

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ANA CELIA CAPELES,

Complainants

v.

DOCKET NO. 09-BEM-01267

CITY OF BOSTON SCHOOL POLICE
DEPARTMENT and MICHAEL HENNESSEY

Respondents

Appearances: Stephen M. Born, Esq. for Complainant
Michelle K. Hinkley, Esq. and Julie A. Ciollo, Esq. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On May 8, 2008, Complainant, Ana Celia Capeles filed a charge of discrimination against her employer, Respondent City of Boston School Police Department and Assistant Chief of the Department, Michael Hennessey, alleging sexual harassment and retaliation for her having rejected the alleged sexual advances of Hennessey, in violation of G.L. c.151B §4 ¶¶(1)(16A)(4) and (4A). Complainant alleged that from the time of her hire in 2002 up until 2009, Respondent Hennessey subjected her to unwanted advances of a sexual nature and that she was denied promotions and transferred to different schools with a less advantageous schedule because of her rejection of such advances.

The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts to conciliate the matter were unsuccessful. The case was certified for a hearing which was held before the undersigned hearing officer on March 10, 11, 12, 13 and 18, 2014. The parties submitted post-hearing briefs. Having reviewed the record of the proceeding and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Ana Capeles began working for the City of Boston School Police Department as a Patrolwoman in August of 2002. She was assigned to patrol and provide security at English High School in Jamaica Plain. Her starting salary was \$14.95 per hour. At the time she filed the complaint in this matter, she was assigned to the Orchard Gardens Elementary School in Roxbury and earning \$19.33 per hour. (Tr. 19, Complaint)

2. Respondent, Boston School Police Department (BPSD) is a division of the City of Boston and Boston Public Schools. The Department serves as the Boston School Police charged with ensuring the safety of students and faculty at every school within the Boston Public School district. Michael Hennessey was one of two Assistant Chiefs of the BPSD and he was Complainant's supervisor for some of the time relevant to this matter. (Tr. 20, 378, 379; Complaint ¶6) Hennessey is retired from the BPSD.

3. Hennessey interviewed Complainant for the position of patrolwoman. They had met previously when she was an assistant teacher at Hyde Park High School. (Tr. 19-20) Complainant informed Hennessey and others at Respondent that she had some scheduling constraints and could only work from 8:00 a.m. to 4:00 p.m. because she had a school age child. (Tr. 24, 222-223) Complainant's first assignment was to English High School. (Tr. 29)

4. Complainant alleged that she and Hennessey had direct personal contact with each other frequently from 2002 to 2004 and that Hennessey engaged in acts that were unwelcome and made her uncomfortable and that these included: contacting her on her work radio, visiting her at her school site and bringing her coffee on the job, sending her flowers on one occasion, sending her a photo of himself when he was on vacation, and taking her off her assigned school post to accompany him on truancy patrols at the Cambridge Side Galleria Mall. (Tr. 25, 28, 32) Complainant testified that Hennessey would frequently page her on the radio asking that she call him and would ask how her day was going, and if she needed coffee or anything. (Tr. 31-32) Male school officers testified that Hennessey brought them coffee also, or asked them to go on rounds. (Tr. 284, 291)

5. Complainant testified that Hennessey also asked her if she had a boyfriend, and if she was interested in having a relationship with him. She claims he told her she did not have to work as a school police officer, but could move in with him and have a better life. She claims to have responded that she was not interested in him, did not need any favors and wanted to be treated like all the other females in the department. (Tr. 35, 36, 41) She also claimed that Hennessey's behavior was "perverted" because of his "demeanor," "facial expressions," and comments to her that she was beautiful, and that this made her uncomfortable. (Tr. 37-38) While I believe that Hennessey may have complimented Complainant on her appearance, I do not believe that Complainant was made uncomfortable by Hennessey's conduct.

6. Hennessey testified that not long after Complainant began her employment as a police School Officer, she called him once at home to tell him she had not gotten her check and had no money for food. (Tr. 353) She called him at home on another occasion and suggested that they could date. (Tr. 354) She also called him at his office and flirted with him. (Tr. 355) He

admitted that he was flattered by the attention and that in early November 2002, he took Complainant to dinner one time, and she discussed the difficulties in her past and her emotional problems. He testified that he did not pursue a romantic relationship with Complainant, but they remained friends, talked often, and that she would call him for favors. (Tr. 355- 356, 357) He testified about one occasion when Complainant came to the office dressed very provocatively and called him later that night to ask him what he thought about how she looked and that he was shocked by this. (Tr. 354-355) He also testified that he witnessed her being sexually provocative with other officers and that she informed him she had been sexually harassed in the past by other officers, at other jobs, and at the police academy. He advised her to stop talking about sex and to behave in a more professional manner. (Tr. 391-394) I credit this testimony.

7. In late November of 2002, Complainant asked Hennessey for a loan to pay off some fines in the amount of \$1100 or \$1200, so that she could re-instate her driver's license and he lent her the money. (Tr. 357-358) On another occasion when Complainant was in her second year at the Timilty School she had a fire in her apartment and he lent her \$500 for housing so that she could be reunited with her children, who were living apart from her. (Tr. 358) He also drove her to look at apartments because her car was blocked by fire debris, but declined her request for an additional \$1000 loan for a security deposit. (Tr. 358-359) Hennessey also testified that he was kind to Complainant's son and gave him some toys on one occasion. (Tr. 412) I credit his testimony.

8. Hennessey did other favors for Complainant that were work related and she did not hesitate to call him and seek out his assistance when she needed help. He helped her on the job at English High School when there was a violent altercation outside the school and arrests were being made and the Boston Police accused Complainant of letting a student escape. Hennessey

intervened on her behalf so that she would not lose her police powers. Hennessey also helped her with her reports, and he also offered to assist her in reporting a serious sexual harassment issue she encountered at a second job, but she did not follow through on his offer, after he declined to go in full uniform in his police car, stating that it would be inappropriate. He stated that he sometimes got coffee for her when she was on the job. (Tr. 357 -363, 411) Complainant testified that on one occasion when Hennessey was coming to see her and bringing her coffee at English High, she asked another male officer to accompany her to meet him, and when Hennessey saw her with the male officer, he threw the coffee on the ground and left. (Tr. 38-39; 301-302) I credit the testimony that this incident occurred.

9. Hennessey admitted that he sent flowers to Complainant once to cheer her up because she was distraught over a stressful family situation related to her mother's health. (Tr. 410-411) Complainant acknowledged that she had received the flowers and told him no one had ever sent her flowers. He stated that they were for her family also. Complainant's testimony that she threw the flowers away in disgust was not credible and was contradicted by a friend who saw them displayed at her home. (Tr. 499-500) In February of 2003, Hennessey was on vacation and sent Complainant a note and a picture of himself because she called him when he was at the airport and during that conversation, she asked him to send pictures from his vacation. (Jt. Ex. 2; Tr. 25, 408-409) He sent others pictures from the same vacation. (Tr. 410)

10. Hennessey testified that he helped Complainant out because she had a lot of problems and he does what he can to help people. He stated that as a 30 year member of AA, he practices the 12th step of the philosophy, which is to give back. (Tr. 367) In the Spring of 2003, he helped Complainant get a job at the Dorchester Youth Collaborative, because he knew she was looking for a second job. He recommended her because the program was seeking a Spanish speaking

female and he drove her to the interview. (Tr. 365-366) Complainant also expressed an interest in participating in some community outreach programs dealing with young girls and issues of truancy and anti-violence. Hennessey was starting a female intervention unit and looking for female officers to help address those issues and brought Complainant to some presentations. He also selected her to participate in the RAD program which was an anti-violence program, and took her to program related events. (Tr. 366-370) Complainant claimed to have no understanding of the purpose of these outside assignments that Hennessey took her to and stated they had no apparent work related purpose. (Tr. 28, 32-34) I do not find this assertion credible.

11. Hennessey testified that as Assistant Chief, he was aware of personnel issues with school patrol officers. He knew that Complainant had some performance issues. In particular she had problems getting to work on time, returning from assignments on time and accepting supervision. (Tr. 371-373) In August of 2003, Complainant was transferred from English High School to the Timilty Middle School for the 2003-2004 school year, because the principal had requested a female officer and the hours were 8:00 a.m. to 4:00 p.m., which satisfied Complainant's request for a later morning schedule. (Tr. 376-377) Complainant called Hennessey to inform him that she was not happy about the transfer, and accused Hennessey of transferring her because she would not go out with him. (Tr. 377-378) In response to that comment, Hennessey told her he would no longer be involved in her supervision and he testified that he had nothing more to do with her transfers. (Tr. 378-379)

12. On February 4, 2004, Hennessey wrote a memo to Assistant Chief Dave Johnson informing him that Complainant had called him, asked if he was alone and stated she needed to talk to him. According to Hennessey, she told him "there are rumors about us." He stated that he hadn't spoken to her in months, but she informed him that the rumors persisted and told him

“his people[s]” were “out to get her,” and thought she was “a stupid Rican.” She stated that if anything happened to her she would take it to the highest level and the people in his office would regret the day they hired her. Hennessey advised her to get some help for her emotional problems. (Jt. Ex. 37) He testified that Complainant was facing sanctions at the Timilty School at the time. (Tr. 381)

13. Complainant testified that during her time at the Timilty School she complained to Assistant Chief Johnson that Hennessey’s behavior was making her uncomfortable. She claims Johnson said he would address the matter and keep it “discreet” and “under wraps,” and that shortly thereafter Hennessey apologized to her. (Tr. 47-49) Complainant testified in a contradictory fashion about whether Hennessey’s conduct ceased after she complained to Johnson. (Tr. 53-54, 108-113) At her deposition she testified that his conduct ceased after she complained to Johnson, but at the hearing stated his conduct continued for years thereafter. (Tr. 177-178)

14. Complainant testified that after she complained to Assistant Chief Johnson about Hennessey’s behavior sometime late in 2004, she began to have difficulties with her scheduling and she received two negative complaints from school principals. Johnson denied that Complainant or anyone else ever complained to him about sexual harassment by Hennessey, and stated he could not recall meeting with Complainant regarding Hennessey. (Tr. 631, 661-662, 624) Complainant was transferred from the Timilty School and she believed that Hennessey was responsible for the transfer. (Tr. 46-47; 54-55) In her view, Hennessey had instigated the negative complaints from school principals and had contacted them to write complaints against her in order to cover up the harassment. (Tr. 59-60) There is no evidence to substantiate these allegations.

15. In September of 2004, Complainant was assigned to the Burke High School with a secondary assignment to the Marshall Elementary School. In October of 2004 Sgt. Washington spoke to Complainant about her failure to return to the Burke School after reporting to the Dorchester District Court. After a fight broke out at the Burke School and there were only two officers present to handle the situation, Sergeant Washington wrote memos reporting the incident to Assistant Chiefs Johnson and Hennessey and Capt. Bell asking that Complainant be reassigned to a less active school. Sergeant Washington also reported that Complainant had failed to check in to her secondary assignment twice in one week in October of 2004. (Jt. Exs. 9, 19 &20)

16. On November 9, 2004, Complainant had a brief reassignment to the Latin School, but after a meeting with the Head Master in which she informed him of what she would not do and presented her demands, he suggested the Latin School would not be a good match for her. (Jt. Ex. 6)

17. On or about November 15, 2004, Complainant was reassigned to the Curley Middle School. On November 22, 2004 the principal of the Curley School wrote to Police Capt. Dave Bell regarding Complainant's performance problems, including calling in sick and not informing the school. (Jt. Ex. 21) On November 23, 2004 Capt. Bell reported to Assistant Chief Dave Johnson that he had spoken to Complainant about performance issues including the need to be visible and patrol the corridors and not making personal phone calls while on duty. (Jt. Ex. 22) On November 24, 2004, the Principal of the Curley School wrote to Capt. Bell complaining about Complainant's failure to present at the front entrance to the building on time on November 24th and challenging the sign in policy as "childish." When told he would report the incident,

Complainant asked if that was supposed to scare her. (Jt. Ex. 23) These issues did not involve Hennessey or there is no evidence that he was responsible for disciplining Complainant.

18. In December of 2004, the principal of the Curley Middle School sent an email to Hennessey addressing a number of Complainant's performance problems and asking for a meeting to discuss the infractions he had documented, which included her failure to show up at the front of the building for dismissal and calling in sick the following day. (Jt. Ex. 8)

Hennessey testified that he had informed the principal in a prior discussion that he no longer dealt with Complainant and was not her supervisor, and that he should speak to Chief Sisco or Assistant Chief Johnson about her performance issues. (Tr. 384-385)

19. On December 23, 2004, the principal of the Curley School sent an email to School Police Chief John Sisco asking to discuss the current school police assignment stating he did not want the situation to get worse. (Jt. Ex. 24) In late December, Complainant was reassigned to the Edison Middle School in Brighton, because there was an opening there. (Tr. 386) She reported for duty on January 3, 2005. She was informed that she was required to be at work at 7:15 a.m. She told the principal that she did not choose to come to the Edison School and that she had a number of personal issues to attend to on a regular basis and could not be on duty until 7:30 a.m. or later. (Jt. Ex. 7)

20. On December 29, 2004, Assistant Chief David Johnson dispatched a Sergeant to the Curley and Edison Middle Schools, because the officers assigned to those schools had not reported to the schools on the previous day as directed. (Jt. Ex. 25) Complainant who was apparently upset about this and her most recent transfer, called Hennessey and left him a voice mail message accusing him of harassing her and stating that he had stopped cutting her "a lot of slack on certain things," and stating that she was going to come forward with evidence of

harassment. She then called in sick that day. [Jt. Ex. 25 (transcript of phone message)] When confronted with a transcript of the voice mail message she left for Hennessey, Complainant at first denied leaving the message, but after hearing a recording of the message, admitted it was her voice on the message. (Tr. 153-155) On December 30, 2004, Hennessey acknowledged in a memo to Complainant that he had received a voice mail from her alleging harassment and requesting that she submit the details of her complaint in writing so an investigation could commence. He also referred her to the Boston Public Schools Office of Equity. (Jt. Ex. 5)

21. On January 4, 2005, a few days after Hennessey received the threatening voice mail message from Complainant, he wrote a memo to Chief Sisco detailing the complaints made about her performance at the various locations where she recently had been assigned. The memo was a four page narration of Complainant's transgressions and ended with her voicemail complaint to him alleging harassment and threatening to come forward with evidence. (Tr. 556-557; Jt. Ex. 9) This narrative echoed many of the documented complaints from others about Complainant's performance. While Complainant suggests that Hennessey had no good reason for writing this memo other than to smear her reputation, I find that he wrote this in part to protect himself because Complainant told him about the many times she had been sexually harassed by others, and he believed she was threatening him and setting him up. (Tr. 390-394; 518-523)

22. On January 5, 2005, Complainant made contact with Barbara Fields of the Office of Equity and filed a complaint. (Tr. 686; Jt. Ex. 38) Barbara Fields testified that Complainant complained to her that she felt she was being retaliated against in the form of transfers to new schools because of a complaint that she had made earlier regarding harassment by Hennessey. (Tr. 687) According to Fields, Capeles did not ask her to investigate any alleged harassment.

Fields did receive some information about an earlier complaint Complainant had filed with Assistant Chief David Johnson regarding Hennessey's conduct. Fields testified that she understood Complainant's issues with Hennessey to be resolved and she focused her investigation on Complainant's allegations of retaliation in school assignments. (Tr. 688) Fields spoke with Chief Sisco about Complainant's assignments, the reasons for the transfers and her performance generally. (Tr. 693-694) Sisco discussed some of the difficulties Complainant had with various principals, as chronicled in her personnel file, the fact that she was not always a team player and did better at a smaller school. He also informed Fields there were no other vacancies at the time. (Tr. 692-696) Fields concluded that Complainant's allegations that her reassignments were retaliation for her having complained about Hennessey were not substantiated. This was particularly true where the decisions about placement of officers were driven by the school principals and their needs. (Tr. 699)

23. Respondents asserted that Complainant's changes in assignments were not in retaliation for her complainant to Johnson but were in response to her personality conflicts with principals and were also driven by the deployment plan for school police officers and the needs of a particular school for officers and the skills of the officer. All officers are subject to transfer and the decisions are made by the three person management team of the Chief and two Assistant Chiefs. (Tr. 373,-375; 466-467)

24. At some time in 2006 or 2007 Complainant called Hennessey at home and left a voice mail message asking him to intervene in a situation involving her son, who was then in high school, and who had been hit in the face with a water bottle kicked by the assistant coach of the team. She stated to Hennessey that if he didn't do something, she would take action. She

admitted that she was not afraid to call Hennessey at home to demand his help. (Tr. 159-161;389)

25. In October of 2008, Complainant applied for a Sergeant's position. She also applied on two subsequent occasions and did not receive a promotion. (Tr. 100) On one of those occasions, Hennessey sat on the interview panel to fill a vacancy on the panel so that the interviews could be conducted on schedule, but he did know he would be interviewing Complainant until that morning. (Tr. 397-398) Complainant asserted that she did not get the promotion because she had refused to accede to Hennessey's demands and that he sought to retaliate for her complaints against him some four years before the interview. (Tr. 105) In fact, Hennessey gave Complainant the very high score of 93 out of 100 but stated he gave her the high score because he was afraid she would sue him. The other panel members scored her interview at 75 and 63 out of 100. (Tr. 400-401) The final decisions on who was promoted were made by the Chief. (Tr. 178-181; 396-397, 444, 626) Capt. Bell was also on the interview panel and testified that the panel considers factors such as a candidate's attendance record, their personal statement of interest and intent, their experience and whether they have had issues with the principals at the schools they have been assigned to. Bell testified that Complainant did not present with sufficient confidence at her interview for the take charge position of Sergeant. He also stated that the difficulties she had with a number of school principals was a negative factor in evaluating her for a Sergeant's position. (Tr. 441-433) Hennessey discussed at length the qualifications and experience of the two candidates who were promoted to Sergeant in 2008. (Tr. 403-404) Hennessey testified that both his ex-wife and her sister were Boston School Police patrol officers and both were promoted to Sergeant in 2006 and 2008 respectively. He also participated in their interview panels. (Tr. 405-407)

26. Complainant testified that sometime in April of 2009 she received a number of phone calls that she believed were from Hennessey. The caller left voice mail messages with the sounds of people moaning like they were having sex. (Tr. 89-91) Complainant testified that on April 29, 2009, she received another voice mail message where the caller is alleged to have whispered, "you want to make sergeant, let's fuck." (Tr. 91-92) She claimed to be certain it was Hennessey's voice on the messages. (Tr. p. 84) Hennessey denied making any phone calls to Complainant during that time, although Complainant's phone records show an incoming call from Hennessey's phone number. (Tr. 416) His phone records do not show any outgoing calls to Complainant's phone during the time period in question. (Tr. 192, Jt. Ex. 27 & 28) There is no explanation for this discrepancy. I do not credit Complainant's testimony that she recognized Hennessey's voice on her phone and I am not persuaded that Hennessey was responsible for making harassing phone calls to her. Hennessey testified that Complainant called him twice during this time period and her phone number appears twice on Hennessey's phone records on April 10th and April 15th, 2009. (Tr. 418-419) Hennessey claimed that he received a crank call from someone calling him a rat on April 10, 2009 and a few hours later Complainant called him stating he had just called her. He testified that he had not called her. A few days later he received a hang-up call from Complainant's phone number. The calls from Complainant and the crank call he received prompted Hennessey to request a new cell phone number. (Tr. 418, 420) He testified that in July of 2009 after his cell phone number was changed he began receiving many hang-up calls to his home phone and he filed a police report to document the calls and filed a complaint against Capeles with the Attorney General's office. (Tr. 422-423; Jt. Ex. 18)

III. CONCLUSIONS OF LAW

A. Statute of Limitations

Complainant asserts that Hennessey's alleged sexually harassing behavior began as early as 2002 and continued up until 2009. She also testified that the inappropriate conduct occurred primarily in the early years of her employment and essentially ceased after she complained to Assistant Chief Johnson sometime in 2004 at the Timilty School. There is a dispute about whether Complainant did in fact complain to Assistant Chief Johnson about Hennessey's behavior and she did not file an internal complaint of harassment until 2005, some three years after she alleged Hennessey's harassing behavior began. She did not file a charge at the MCAD until 2009, some six years after the harassment is alleged to have begun. It appears that the vast majority of the incidents alleged by Complainant fall outside the statute of limitations for filing a claim at the Commission. *See Cuddy v. Stop & Shop* 434 Mass. 521 (2001). Normally this would preclude Complainant from proceeding on these claims. However, she has alleged a continuing violation or pattern and practice of conduct by Hennessey that continued until 2009 in the form of quid pro quo harassment and retaliation and claims that these later acts anchor the earlier events. I will therefore address her claims of sexual harassment as timely.

B. Sexual Harassment

Massachusetts General Laws c. 151B §4(1) and (16A) prohibit sexual harassment in the workplace.¹ In order to prove a claim of hostile work environment harassment, Complainant must prove that she was: (1) subjected to sexually demeaning conduct; (2) the conduct was unwelcome; (3) the conduct was objectively and subjectively offensive; (4) the conduct was

¹ Sexual harassment is defined as "sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when: (a) submission to or rejection of such advances is made either explicitly or implicitly a term or condition of employment or as a basis for employment decisions and (b) such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's work performance by creating an intimidating, hostile, or sexually offensive work environment. G.L. c. 151B s. 1(18)

sufficiently severe or pervasive as to alter the conditions of employment and create an abusive work environment; and (5) the employer knew or should have known of the harassment and failed to take prompt and effective remedial action. See *College-Town Division of Interco, Inc. v. MCAD*, 400 Mass. 156, 162 (1987); *Ramsdell v. Western Mass Bus Lines, Inc.*, 415 Mass. 673, 678 (1993). A successful claim of quid pro quo harassment requires a showing that Complainant suffered some adverse action as a result of refusing to submit to sexual advances.

As part of her claim of a hostile work environment based on sexual harassment Complainant must demonstrate that she was subjected to a work environment “pervaded by harassment and abuse resulting in “intimidation, humiliation, and stigmatization,” which posed a “formidable barrier” to her “full participation in the workplace.” *Cuddyer v. Stop & Shop Supermarket Co.*, 434 Mass. 521, 532 (2001) quoting from *College-Town, supra.*, 400 Mass. at 162. In short Complainant must demonstrate that the harassing behavior was sufficiently severe and pervasive as to interfere with a reasonable persons’ work performance and that her employer knew or should have known of such behavior, and failed to take adequate measures to remedy the harassment. *Muzzy v. Cahillane Motors, Inc.*, 434 Mass. 409, 411 (2001); *College-Town, supra.* at 167. Complainant must also prove that the conduct was “objectively” and “subjectively offensive.” *Dahms v. Cognex Corp.*, 455 Mass. 190, 205 (2009), quoting *Messian v. Araserve, Inc.*, 906 F. Supp. 34, 36 (1995).

Complainant has alleged that almost from the start of her employment in 2002, Hennessey contacted her frequently at work, came by to see her with coffee and took her away from her regular assignments to go with him to the Galleria Mall or to other programs. She also claims that he sent her pictures of himself on his vacation, sent her flowers, told her she was beautiful, asked her if she had a boyfriend, if she were interested in a relationship with him, and

told her she could move in with him and have a better life. Hennessey admitted to some of this conduct, but denies that he pursued a romantic relationship with Complainant. He stated that he engaged in acts of kindness toward Complainant out of concern for her difficult life circumstances as a single mother with financial problems who seemed to have many problems. He alleges he attempted to assist Complainant in her new job, to introduce her to, and involve her in, related programs in which her skills as a Spanish speaking female officer would be beneficial. He also offered her support personally because of the difficulties she was experiencing in her life, but did not seek or expect sexual favors in return.

Hennessey claimed that Complainant sought him out at work, flirted with him and called him at home. The record supports that this was in fact true. Hennessey was forthright about being flattered by Complainant's attentions and did in fact ask her to dinner on one occasion. He stated that she primarily discussed the many difficulties in her life and that he did not make any romantic overtures to her. He testified that he did not pursue a romantic relationship with Complainant, but that they became friends. He sent her flowers once, when her mother was suffering from a health issue and sent her a photo from his vacation because she asked him to. Hennessey acknowledged bringing Complainant coffee at work, but claims he did this for other officers as well, and that this was not uncommon.

While Hennessey's behavior could be viewed as manifesting a romantic interest in Complainant, his conduct was not overtly sexual, demeaning or offensive. There is no evidence of quid pro quo sexual harassment. Hennessey did not implicitly or explicitly condition Complainant's employment or employment decisions on her acceptance of sexual advances. He did not suggest or require that Complainant provide him sexual favors in return for any of the favors he did for her. The credible evidence does not support a finding that Hennessey ever

suggested to Complainant that she could be promoted to Sergeant in exchange for having sex with him. I did not find credible Complainant's testimony that Hennessey left her a phone message in 2009 stating she could be promoted in exchange for sex. Other than Complainant's transfers which are a routine occurrence at Respondent based on the school department's needs, Complainant suffered no adverse employment action.

There is also no credible evidence that Complainant was subjected to a sexually hostile work environment. I am not persuaded that Complainant felt intimidated, frightened or harassed by Hennessey's conduct or that she found his behavior unwelcome. In short, Complainant has not demonstrated that she found her interactions with Hennessey to be subjectively offensive. As proof that Complainant was not intimidated or frightened by Hennessey's behavior, she frequently initiated contact with him, asked him to lend her money on several occasions, and sought his intervention on her behalf when she had problems both in and out of work. Hennessey lent her significant amounts of money on at least two occasions and assisted her with personal problems. He drove her to look at apartments after a fire in her home. He was kind to her son and brought him some toys on one occasion. Complainant did not hesitate to request favors from him and to ask him for his help if she was in a difficult situation. These are not the actions of an employee who feels intimidated, frightened and abused.

Rather, the credible evidence suggests that Complainant in fact engaged in flirtatious and provocative behavior that invited attention from Hennessey and then took advantage of Hennessey's good will and concern to request favors of him including financial assistance. Hennessey testified credibly that Complainant often ignored the chain of command and came directly to him when she wanted something. She did not hesitate to call him after hours on his mobile phone and to asking for advice, financial help and other favors. Complainant took

advantage of Hennessey's kindness and willingness to help her until she was faced with discipline, criticism or an unfavorable transfer. She was quick to indicate displeasure or threaten him if she was dissatisfied with something at work. While Hennessey made efforts to be a mentor and friend to Complainant, she used this relationship, and then sought to blame him for the consequences of her own poor performance or negative attitude at work. She suggested that her problems with a number of principals and consequent transfers were instigated by him, allegedly because she refused to date him. I do not find this assertion credible and the evidence does not support such a conclusion. Indeed, the evidence demonstrates that Complainant did not raise the issue of Hennessey's alleged harassment until she began experiencing difficulties at her school assignments and was threatened with discipline or transfer to another school. All of this leads me to conclude that Complainant was not subjected to quid pro quo sexual harassment or a sexually hostile work environment and Respondents are not liable for violating chapter 151B §§4(1) or (16A).

C. Retaliation

As part of her claim of quid pro quo sexual harassment but also as a separate claim of retaliation for her complaining about the harassment both internally and at MCAD, Complainant alleges that she was denied a promotion to Sergeant and that she was transferred to schools that were not advantageous placements. Section 4(4) of chapter 151B prohibits retaliation for engaging in protected activity which includes filing complaints of discrimination. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." *Kelley v. Plymouth County Sheriff's Department*, 22 MDLR 208, 215 (2000), quoting *Ruffino v. State Street Bank and Trust Co.*, 908 F. Supp. 1019, 1040 (D. Mass. 1995).

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) she engaged in a protected activity; (2) Respondent was aware that she had engaged in protected activity; (3) Respondent subjected her to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. *See Mole v. University of Massachusetts*, 58 Mass. App. Ct. 29, 41 (2003); *Kelley v. Plymouth County Sheriff's Department*, 22 MDLR 208, 215 (2000).

Complainant has arguably established a prima facie case of retaliation as she did not receive promotions after filing a complaint of harassment and complained of being transferred to assignments that were not optimal for her. Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, non-retaliatory reason for the action supported by credible evidence. *See Blare v. Huskey Injection Molding Systems Boston Inc.*, 419 Mass. 437, 441-442 (1995) *citing McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). If Respondent succeeds in doing so, the burden then shifts back to Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for retaliation. *See Lipchitz v. Raytheon Co.*, 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondent is covering up a retaliatory motive which is a motivating cause of the adverse employment action. *Id.*

Respondents have articulated legitimate non-discriminatory reasons for Complainant's transfers and her failure to achieve promotion to Sergeant. These were the necessities of scheduling for a large school department, the fact that Complainant had difficulties with the principals at a number of schools, and Complainant's performance and attendance problems.

There is no evidence that Complainant's inadequate performance or her difficulty with any given principal was caused by her relationship with Hennessey or that their complaints about her were instigated by him. I am unable to draw such an inference in the face of no evidence suggesting Hennessey's undue influence. Although Hennessey did sit on one of the interview panels when Complainant was a candidate for promotion to Sergeant, he gave her a very high score on the interview and did not influence the others on the panel, who scored her much lower. It is fair to say that Complainant's failure to achieve promotion was the result of her own poor record, and not Hennessey's intervention. Others testified that the types of problems Complainant had would not stand one in good stead for promotion. I conclude that Complainant has failed to prove that Respondents' articulated reasons for their actions were a pretext for discrimination or that they were motivated by retaliatory intent. *See Lipchitz, supra.* at 501. I find that Respondents did not engage in acts of retaliation that violated chapter 151B§§ 4(4) or (4A).

IV. ORDER

In light of the foregoing Findings of Fact and Conclusions of Law, I hereby Order the complaint in this matter dismissed.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission pursuant to 804 CMR 1.23. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 17th day of October, 2014.

Eugenia M. Guastaferrri
Hearing Officer