

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D & JOHN CONNORS,
Complainants

v.

DOCKET NO. 10-SEM-03369

TOWN OF STOW &
MARK TREFRY,
Respondents

Appearances:

Margaret G. Plaza, Esquire for John Connors
Carole Sakowski Lynch, Esquire for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On or about December 7, 2010 Complainant John Connors filed a complaint with this Commission alleging that Respondents discriminated against him on the basis of age, in violation of M.G.L. c. 151B §4¹ by denying him several promotions to the position of full- time police officer and by-passing him for assignments to shifts and details. He also alleges that Respondents retaliated against him for having complained of age discrimination in failing to promote him and not assigning him to shifts and details in violation of M.G.L.c 151B§4¹4. The Investigating Commissioner issued a probable cause determination.¹ Attempts to conciliate the matter failed and the case was certified for Public Hearing. A public hearing was held before me

¹ Complainant filed a subsequent complaint against Respondent on January 26, 2016. (Docket No. 16-33-00127) He charged Respondent with age discrimination for failing to hire him for a full-time police officer position in December 2014. That matter was removed to Superior Court. I ruled that the instant matter would encompass all events up to including an open full-time position in April 2014.

on April 9, 10, 11, 12 and May 1, 2018. After careful consideration of the entire record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant John Connors resides in Clinton, MA. He was born in 1961. He is currently employed as a Special Police Officer for Respondent, Town of Stow. He has held this position since 2002.

2. Stow's police department employs 12 or 13 individuals. The police department does not operate pursuant to the State Civil Service law and regulations, and establishes its own hiring criteria. Respondent employs three categories of employees: full-time police officers who receive benefits and belong to a union, the Massachusetts Coalition of Police; full-time dispatchers who also receive benefits and belong to a separate union; and special police officers, who are part-time, receive no benefits and are assigned to work shifts and details as needed. Special police officers are also assigned to perform details in neighboring towns, by virtue of agreements with those towns. Complainant is the only special police officer not also employed in another unrelated full-time job. (Tr. 4/11/18, p. 16) Respondent's full-time police officers and full-time dispatchers may be assigned to additional shifts and details which allows them to earn extra money. Special police officers prefer to work details because the pay is better than shift work. (Tr. 4/12/18 p. 109-110)

3. Complainant graduated from high school in 1980 and attended Arizona State University for three years where he studied business. He did not complete his degree. (T.

4/9/18, p. 30-31) Complainant completed police academy training in 2000. The town of Clinton, where he resided at all times relevant to this matter, sponsored his academy training. (Tr. 4/9/18, p.34-36)

4. Complainant was 41 years old when he was hired by Respondents as a special police officer in 2002. Three other part-time employees were hired simultaneously. At the time of his hire and until 2004, Complainant worked intermittently as a mechanic. In addition to working for the Town of Stow, Complainant worked details in the Town of Maynard from 2006 to 2016. Complainant also worked full-time for the Town of Rutland Police Department for three or four months in 2006 and 2007. At the time of the public hearing, Complainant was working part-time on details and shifts in the towns of Bolton and Harvard, but spent the majority of his time working for Stow. (Tr. 4/9/18, p.120-135)

5. The vast majority of details are related to road work. The duties include protecting workers at the site, handling the flow of traffic, and reporting to the town any issues, such as car accidents, that might arise. (Tr. 4/12/18, p.110-111) Shift work provides a part-time officer with experience that is more relevant to the duties of a full-time officer. Such experience is more advantageous when applying for a full-time position because the work performed on a shift is identical to that of a full-time officer. (Tr. 4/12/18, p. 111-112)

6. Respondent Mark Trefry, age 60, was employed full-time by the Stow Police Department from 1976 until his retirement in January 2011. He was hired as a full-time police officer, was promoted through the ranks and served as police chief from 2005 until his retirement in 2011. Approximately one year after his retirement, Trefry was appointed as a part-time special police officer. Trefry was involved in the hiring process of full-time police officers in

2005, 2008 and 2010. After his retirement he had no involvement with hiring. (Tr. 4/10/18, p. 82-83)

7. William Bosworth, age 54, has been employed by the Stow Police Department since 1984. He was promoted to sergeant in 1988 or 1989 and became police chief upon Trefry's retirement, in January 2011. During the years Bosworth was a sergeant, he served as the administrative division commander and, in that capacity, was in charge of filling overtime and extra detail slots when on duty. When Bosworth became chief, Sgt. Ralph Marino took over that responsibility. (Tr. 4/11/18, p.116-118)

8. Marino, age 61, was hired by Respondent in 1988. In 1997 he was promoted to sergeant and in 2014 he was promoted to Lieutenant. As a sergeant, Marino was in charge of filling shifts and details, when he was on duty. When he was off duty, the task fell to the next supervisor in line. (Tr. 4/12/18, p. 95-96)

2005

9. In 2005, the Stow Police Department posted a position for full-time police officer. The posting was placed in the building housing the Town's administrative offices and at the police department, but the position was not otherwise advertised. Chief Trefry e-mailed all department employees that anyone who wished to be considered for the position should provide a letter of intent. (Tr. 4/10/18; p. 28; 4/11/18, p.18-19)

10. Four internal candidates, including Complainant and the successful candidate, applied for the position. No hiring panel was created and no candidates were interviewed. (Tr. 4/9/18, p.28-29)

11. Trefry testified credibly that it was his intent to promote the successful candidate, who was approximately 30 years of age, to the position because he had been with the department since 1997 as an auxiliary (volunteer) police officer and had served as a special police officer since 2001. He was also a dispatch supervisor, handled the department's computer operations, had completed the full-time police academy and had a college degree. The successful candidate had also worked as a fire fighter for the town of Stow and as a police officer for the town of Littleton. Trefry considered the successful candidate a valuable employee who had proven his dedication to the department and considered him more qualified than Complainant and the other candidates in every respect. As a result, Trefry did not consider Complainant or the other two applicants. After discussing his choice with the town administrator, Trefry sought approval from the town selectmen, who were the ultimate hiring authority, to appoint the successful candidate to the position. (Tr. 4/12/18, p. 89-91; 4/12/18, p. 88)

2006

12. In 2006, Stow employed three full-time dispatchers who also worked shifts and details as special police officers. Trefry testified that the majority of dispatchers wanted to become police officers, but due to the lack of promotional opportunities, many good dispatchers had left the department over the years. (Tr. 4/10/18, p. 91-92)

13. In order to improve dispatchers' morale and reduce turnover, in March 2006, Trefry decided to make a change in the department's seniority system. (Tr. 4/10/18, p. 91-92) For purposes of seniority, in filling shifts and details, Trefry placed the full-time dispatchers who worked extra shifts and details ahead of special police officers. This change resulted in Complainant and approximately six other part-time special police officers, some of whom were younger than Complainant, losing seniority and being assigned fewer details and shifts from

2006 onward. Trefry testified that he had the authority to make this change in seniority rules. Bosworth, who was the patrol officers' union representative at the time, contacted the union which agreed to the change. (Tr. 4/10/18 p. 93-94; Tr. 4/12/18, p. 119) Complainant objected to the change in seniority and complained to Trefry about losing opportunities to work.

2007

Extra shifts

14. Complainant worked for the Town of Rutland as a full-time police officer from the fall 2006 to January 2007, while continuing to working part-time for Respondent. The Rutland job was the only full-time police officer position that Complainant has ever held. He testified that he left that position because the pay was low and because in February 2007, Trefry offered him the opportunity to cover two shifts per week for an employee who was on sick leave and seeking a medical retirement. According to Complainant, Trefry later reneged on giving him the promised shifts because he had to fill the shifts with recently promoted dispatchers who needed experience working on the road. According to Complainant, the dispatchers were 10 to 15 years younger than he was.

15. According to Complainant, Trefry subsequently gave Complainant a different reason for not assigning him to the shifts: that he received a complaint from the town of Hudson concerning Complainant yelling at a motorist while working a detail in that town. (Tr. 4/9/18, p.43)

16. Trefry testified credibly that full-time officers were covering two of the absent officer's shifts and, since Complainant did not have a full-time job, Trefry asked him if he was interested in covering the remaining two shifts, only if the department was unable to cover them with full-time officers, who had priority over special officers. Trefry testified credibly that he

never promised to assign Complainant to the shifts, but merely told Complainant he would let him know if his assistance was needed at a later time. Ultimately, Sergeant Bosworth was able to fill all four of the absent officer's shifts with full-time police officers, as required by the collective bargaining agreement. (Tr. 4/10/18 pp. 97-98, 101-102)

Complaints about Complainant on details

17. Trefry testified credibly that over time he received several complaints about Complainant from neighboring towns where he worked details. In 2008, the Hudson police chief called Trefry to complain that while working a detail, Complainant screamed at a highway truck driver. Trefry offered to remove Complainant from further details in Hudson but the chief said he would handle the matter himself. Trefry then wrote a memo to all police officers stating that any officers causing a problem in Hudson would no longer be eligible to work in that town. (Tr. 4/10/18, p. 156-157)

18. Trefry testified that another complaint came from the Stow town clerk who observed Complainant screaming at passing motorists while on a detail at a town parade. The clerk called the town several times suggesting that someone come out to speak to Complainant about his demeanor. On another occasion, there was a report that Complainant yelled at a family in a passing car. (Tr. 4/11/18, p. 157-158)

19. Bosworth testified credibly about a complaint from employees of the Stow highway department regarding a construction project detail Complainant was working. Town employees reported that Complainant became so visibly upset about the traffic that he began to throw and kick traffic signs. One town employee was so concerned about Complainant's behavior that he approached and asked him if he was okay. (Tr. 4/11/18, p. 163-164)

Full-time Police Officer position, 2008

20. In 2008, a full-time police officer position became available in Stow when the officer who had been on medical leave officially retired. There were 72 applicants for the position, including Complainant who was age 47 at the time. Trefry appointed a panel composed of Sergeants Bosworth, Marino and Lima to review the applications and they narrowed the list to 12 candidates. Subsequently the three sergeants conducted interviews and narrowed the field to six finalists. Complainant and a full-time dispatcher did not make the cut. (Tr. 4/10/18, p.105-109; Ex. R-7, R-9, C-2) Bosworth testified that none of the three sergeants recommended Complainant. Bosworth testified credibly that he did not believe Complainant met the standards required of a full-time officer and that he had had concerns about Complainant's explosive temper from the time Complainant started at Stow. (Tr. 4/11/18, p. 109-113)

21. The successful candidate was 42 at the time of his promotion. He had previously worked full-time for the town of Pepperell, and for the Boston College police. He had also served as a full-time firefighter for the town of Bedford. After he was not interviewed or selected for the position, Complainant complained to Trefry.

Columbus Day Weekend 2008

22. Columbus Day weekend was often the busiest weekend of the year in Stow, with many people coming to pick apples at the town's orchards. The influx of visitors required extra police officers on patrol and details. In 2008, Respondent was seeking people to work extra details and shifts. (Tr. 4/10/18, p. 111-112) Complainant testified that because he was still angry over being passed over for the position of full-time officer, he decided not to help out the department and to not work that weekend. Complainant testified that Chief Trefry later told him

that because of his failure to inform the department of his plan not to work, Trefry was suspending him from working out-of-town details for 30 days. Tr. 4/9/18, p.65-66)

23. According to Trefry, although Complainant was not required to work Columbus Day weekend, he was asked to notify the department of his plans either way. The department contacted Complainant several times regarding his intent to work, but Complainant never let the department know his plans. Trefry testified credibly that Complainant's irresponsible behavior delayed the department's ability to fill the shifts. Thereafter, Trefry instructed Sergeants Bosworth and Lima not to call Complainant for details and shifts for the remainder of October, a period of approximately two weeks. (Tr. 4/10/18, p. 112-116, Ex. R-10; R-11)

2009

24. Complainant testified that he did not get assigned extra details or shifts for a month and a half during the summer of 2009. He believed the dispatchers were deliberately skipping over him in favor of special officer, Lee Heron (who was *10 years older* than Complainant) because he had gone outside the chain of command by having a state senator recommend him for the full-time officer position. (Tr. 4/9/18, p.58-59)

25. In August 2009, Complainant met with Steven Dungan, the select board chief, regarding his concerns about not being called for shifts and details. According to Complainant, Dungan recommended that Complainant express his concerns in a letter to Chief Trefry. (Tr.4/9/18, p. 54-56)

26. On September 12, 2009 Complainant wrote a letter to Chief Trefry stating that Respondent's failure to call him for details constituted an "unfair labor practice." He did not allege age discrimination or retaliation, but complained that he should be restored to his "actual seniority status" which was greater than the full-time dispatchers.' He stated that "if any

employee violates this by skipping over me they should be held accountable for their actions. I also expect to be given first consideration for the next full time patrolman position that becomes available.” (Ex. C-7) According to Trefry, Complainant never complained that he was being by-passed for shifts because of his age or retaliation and Trefry denied that Complainant was deliberately by-passed for details. (Tr. 4/10/18, p.117)

27. On approximately September 20, 2009, Complainant met with Chief Trefry and Sergeant Bosworth to discuss the issue of his not having been called for details. (Tr. 4/9/2018, p. 57) At the meeting, Complainant told Trefry and Bosworth that employees with less seniority were being assigned shifts and details ahead of him. Trefry explained to Complainant that the full-time dispatchers had been granted higher seniority than special police officers because Trefry wanted to retain them as employees. Complainant also complained that he was not interviewed for the full-time position in 2008. He testified that he told Trefry and Bosworth that younger and less experienced employees were promoted over him. I do not credit Complainant’s testimony that he complained about the age of employees who were interviewed for the position, as in all his communications with Respondent prior to filing his MCAD complaint, Complainant never mentioned his age and consistently framed the issue as one of seniority. I otherwise credit his testimony that he complained about being passed over by others with less seniority. (Tr. 4/9/18, p.57)

28. According to Trefry, Complainant began the September 20, 2009 meeting by screaming and pointing at Trefry, slamming his hand on the table, complaining about Trefry’s hiring process, and about being bypassed for shifts and overtime. Complainant eventually calmed down and they were able to have a discussion. According to Trefry, Complainant never claimed that his age or retaliation were factors. (Tr. 4/10, p. 117-120, 130-131) During the

meeting Trefry reminded Complainant that the department had received complaints about his anger and arriving late or leaving early when working out-of-town details (4/11/18, p. 132-133, Ex. R. 25) The meeting ended with Complainant and Trefry shaking hands and agreeing to work on the issues. I credit Trefry's testimony. (Tr. 4/10/18, p. 119; 4/11/18, p. 133, 134; Ex. R. 25)

29. Bosworth, who took notes at the meeting, wrote that Complainant claimed that an unnamed employee told him there was a "witch hunt" against him. Bosworth explained to Complainant that most of the open shifts and details that summer were taken by full-time officers and that one of the phone numbers provided by Complainant on the overtime sheets was invalid and at times he could not be reached. Complainant was told that new detail worksheets had been created with the special police officers' names listed on the front of the sheets to make them more visible to the dispatcher scheduling the details. Complainant was told that if other part-time officers were getting assigned to details ahead of him it was because the request was given on short notice and the person assigned was easily reached by phone and could get there quickly. (Tr. 4/11/18, p.132; Ex. R-22, R-25) I credit Bosworth's testimony.

30. On September 23, 2009, Bosworth revised the police detail and out-of-town detail worksheets so that all members of the police department, including part-time special officers, were listed on all of the sheets. This change was made in order to avoid any errors in assigning details to the special police officers, since previously their names were on the back of the sheet. The detail sheets were modified to avoid future mistakes and to better answer any questions as to who was called. (Tr. 4/11/18, p. 132-135; Ex. R-13)

31. The detail and shift sheets for July and August 2009 that were admitted into evidence show that Complainant was out of state for two details on July 2, 2009 and July 10, 2009.

Complainant was assigned to details on July 15 and July 16, 2009. On July 23, he turned down a request for an undecipherable reason. Bosworth testified that the vast majority of shifts were filled by full-time police officers, who were higher in seniority than Complainant. (Tr. 4/11/18, p.127-129; Ex. C-26, R-24, R-25) I credit Bosworth's testimony.

32. Bosworth testified credibly that Complainant was never intentionally bypassed for a shift or detail because of his age or retaliation. He testified that each town that Stow worked with had its own rules dictated by the town or collective bargaining agreements, and that such rules are constantly changing. Some towns, such as Concord and Wayland, do not allow part-time officers to work details. Some towns only allow full-time academy graduates to work details and shifts and others don't allow part-time police officers over the age of 65. Stow does not control the rules imposed by surrounding towns to which it assigns its officers. (Tr. 4/11/18, p. 136-137)

33. On November 16, 2009, a dispatcher made a written report to Trefry explaining that she had accidentally by-passed Complainant and another officer and mistakenly assigned a detail to Lee Heron. Complainant came in to the station to start a shift and when he saw the dispatcher posting the detail assignments, he began to yell at her, questioning why she did not call him when he was available and saying that she was "taking \$400 out of his pocket." The dispatcher then bumped Heron from the detail in favor of Complainant. She wrote that she was very upset and embarrassed that Complainant, who was not her supervisor, yelled at her in front of others and that she did not deserve to be publicly lambasted over an honest mistake. (Ex. R-18) Trefry testified that after Sergeant Lima spoke to Complainant and the dispatcher about the matter it was resolved by Complainant apologizing to the dispatcher. (Tr. 4/10/18, p. 142-144)

2010

34. In July 2010, Trefry used surplus funds to create extra shifts for the special police officers on Friday and Saturday nights that would supplement the 3:00 p.m. to 11:00 p.m. shifts of full-time officers. These extra shifts would give special officers experience and training and would assist the full-time officers working busy weekend shifts. These shifts were not based solely on seniority and Trefry instructed Marino to distribute the shifts evenly among special police officers. Complainant was given equal opportunity to sign up for the shifts. (Tr. 4/10/18, p. 103-105, 129; Tr. 4/11/18 p. 106-109)

35. On July 16, 2010, Complainant called Bosworth to complain about being bypassed for such shifts. He stated that Bosworth started yelling that he had always treated Complainant fairly. Complainant responded that he would discuss the matter with the selectmen and that he had had it with "this f---ing place." (Tr. 4/9/18, p.74-76)

36. Bosworth stated that Complainant's July 16, 2010 phone call came during a very busy 3:00 p.m. to 11:00 p.m. shift. Bosworth testified credibly that Complainant angrily accused him of improperly filling a shift. Bosworth told Complainant he did not have time to listen to him, that Complainant had been treated fairly and the department was trying to evenly assign the shifts. Complainant began yelling and swearing and was so out of control and threatening that Bosworth hung up on him. (Tr. 4/9/18, p. 125-126; Tr. 4/11/18, p. 137-142; Tr. 4/12/18, p.84-85) Thereafter, Bosworth sent Trefry a memorandum documenting the phone conversation stating that Complainant was "out of control with anger, disrespectful, insubordinate, and not listening to me but rather just yelling and swearing at me, over my voice." A dispatcher and police officer from a neighboring town who were present told Bosworth that they could hear Complainant

yelling through the phone and could not believe a part-time officer would speak in such a disrespectful manner to a supervisor. Bosworth wrote that Complainant appeared to have “anger issues” and he requested that Complainant be disciplined for his conduct. (Tr.4/12/18, p.54-56; Ex. R-26; Tr. 4/11/18, p. 137-139)

37. Trefry testified credibly that he filed a report with a selectman requesting some disciplinary action against Complainant because of the phone call. The selectman told Trefry to raise the matter when the town manager returned from his vacation. Trefry stated that by the time he met with the town manager, who authorized whatever discipline Trefry recommended, nearly a month had passed and he thought it was too late to impose discipline, and so he took no action against Complainant. (Tr. 4/10/18, p. 125-130; Tr. 4/11/18, p. 142-143; Ex.R-14)

Seniority

38. Complainant testified that after the July 16, 2010 phone call to Bosworth, he was “retaliated against” when Special Officer Lee Heron, who is 10 years older than Complainant, was moved ahead of him in seniority. Complainant asserted that even though hired before he was, Heron has less seniority because he had once been demoted to auxiliary police officer and then promoted back to special officer. Complainant testified that he filed his MCAD complaint in December 2010 because of Heron’s moving ahead of him in seniority. (Tr.4/9/18, p. 58-59)

39. Trefry testified credibly that his secretary informed him that Heron had worked as an auxiliary police officer before becoming a special police officer, had no record of being demoted and therefore had more seniority than Complainant. Based on this information Trefry adjusted the department’s records to reflect the change in seniority. (Tr. 4/10/18, p.133-140; Ex. R-16)

40. On August 18, 2010, Complainant wrote to selectman Dungan to tell him that he continued to be bypassed for shifts despite meeting with Trefry and wrote that he could put it all behind him if he were appointed to a full-time position. (Ex. C-8)

2010 Full-time Police Officer Position

41. In 2010, Respondent had an opening for a full-time police officer. There were 45 applications for the position, including Complainant. Sergeants Bosworth, Marino and Lima² were assigned to review the applications. They did the screening and interviews and then gave Trefry a short list of candidates to advance to the Town Administrator and the Board of Selectmen who were the final appointing authority.

42. Sergeants Lima and Marino did not think that Complainant was qualified to merit an interview. However, Bosworth thought Complainant should have the chance to go through the process in order to diminish the ill will between Complainant and Trefry and the Town. He convinced Lima and Marino to interview Complainant. (Tr. 4/11/18, p. 146) Consequently, Complainant made it to the first round of interviews. Each candidate was given about an hour for the interview and each was asked the same 75 questions.

43. Marino testified credibly that Complainant performed poorly in the interview. He looked at the floor or the ceiling and never made eye contact. His suit was not pressed and his shirt was untucked. His face was beet red and he constantly wrung his hands. (Tr. 4/12/18, p. 138) Bosworth testified that Complainant did not answer the questions asked and seemed nervous and out of place. (Tr. 4/11/18, p.146-147)

² Lima is no longer with the department and did not testify at the public hearing.

44. Marino testified credibly that he was dumbfounded when in response to the question “What is your weakest attribute?” Complainant went on a “tirade” that was completely off topic and unrelated to police work. According to Marino, Complainant spent at least two minutes ranting about how he disliked Democrats and favored Republicans. He told the panel that President Obama and Governor Patrick were ruining the country and the state and had to be replaced. (Tr. 4/12/18, p. 138-141)

45. Bosworth testified credibly that Complainant’s response to the question was “shockingly bad” and had nothing to do with the question and caused him to doubt Complainant’s fitness for the position of full-time police officer. (Tr. 4/11/18, p. 147-149) Bosworth testified that he felt uncomfortable about Complainant’s tirade because he singled out Governor Patrick and President Obama, who are black. Following Complainant’s interview, the sergeants wondered whether he had a mental health problem. (Tr. 4/11/18, p.148-150; Ex. R-36)

46. Another aspect of Complainant’s interview causing the sergeants’ concern was his admission that he had used cocaine in the past and that he had driven a vehicle two or three times under the influence of alcohol. Marino was also concerned that Complainant had worked primarily details and that he had once been removed from detail list for a month for leaving a detail early. (Tr. 4/12/18, p. 142-143; Ex. R-6)

47. Complainant received an overall interview score of 66.0 which fell into the category “hesitate to recommend.” Marino testified that Complainant’s score was at or near the bottom and his application was not advanced. (Tr. 4/11/18, p.149; Ex. R-36; Marino’s Oral Board Questions; 10/29/10)

48. The successful candidate, who was in his mid to late 30s, had been employed as a full-time police officer in Southborough for approximately five years, and had also worked for

the Hopedale police department. He had an associate's degree. His experience, education and his successful responses to interview questions and his appearance made him the best candidate. He was open, frank and concise; he was neat trimmed, and shaved. (Tr. 4/12/18, p. 151)

49. Complainant was notified on November 1, 2010 that he was not selected for that position and on December 7, 2010 he filed his MCAD complaint.

2011 Full Time Police Officer Position

50. In 2011, Respondent again had an opening for a full-time police officer. Complainant applied for the position but was not one of the finalists and was not interviewed for the position.

51. The successful candidate was approximately 19 years younger than Complainant, had approximately eight years full-time police experience for the town of Bolton and had worked full-time for the town of Millville and worked part-time for the town of Petersham for a total of approximately nine years of full-time experience. He graduated from the full-time police academy and had a bachelor's degree in criminal justice. (Tr. 4/11/18, p. 150-151; Ex. R-27)

Complaint from Assisted Living Facility

52. On October 16, 2011, the executive director of the assisted living facility in Worcester where Complainant's father was a resident called the station to lodge a complaint against Complainant. She told the department that a call from Complainant about his desire to transfer his father to another home turned ugly when she told Complainant that it was his responsibility to find his father another home. Complainant called her "an a---hole and an f---ing

immigrant in this country” and “you f---ing immigrants, why don’t you go back where you came from. I am working with my lawyer right now to get all of you immigrants sent back to where you came from.” She told the department that this was the second call of this nature from Complainant and she was concerned that his behavior could escalate to a physical confrontation and she believed Complainant had anger issues. (Ex. R-30) The executive director followed up with a five -page letter to Bosworth regarding Complainant expressing similar offensive beliefs. (Ex. R-31)

53. Bosworth assigned Lt. Marino to conduct an internal affairs investigation of the complaint.

54. Marino interviewed several employees of the assisted living facility, who stated that whenever Complainant visited his father, he was abusive to the nursing staff, he emphasized that he was a police officer, used foul language, made disparaging remarks about immigrants and threatened to report them to the state and to his lawyer. The director of nursing believed Complainant had anger issues and possibly alcohol problems and needed professional help. (Tr. 4/12/18, p.165-180; Exs. R-39, R-40)

55. Marino interviewed Complainant on December 3, 2011 in connection with the complaint. Complainant acknowledged having a heated discussion with the executive director about his father’s care and using foul language and told Marino that he was planning to report her to the state and that his attorney knew of his feelings. (Tr. 4/12/18, p.165-180; Exs. R-39, 40)

56. Marino made a written report of his investigation to Chief Bosworth wherein he concluded that Complainant had violated Stow Police Department’s rules and regulations regarding professional conduct and responsibility, conduct unbecoming an officer, and

disparaging remarks. (Ex. R-38) Marino recommended Complainant be administratively suspended for a period of time to be determined by the chief, although to his knowledge Complainant was not disciplined for the matter. (Tr. 4/12/2018, p. 174-176)

2013

57. In May 2013, Complainant arranged to meet with then select board chair Charlie Kerns at a Dunkin Donuts shop in Stow. At Complainant's request, fellow officer Sean Collins accompanied him to the meeting. At the meeting lasting less than 30 minutes, Complainant discussed his concerns that he had been unfairly rejected for several full-time positions. He stated that Kerns brushed him off and the meeting was a waste of time. (Tr. 4/9/18, p. 107-110) At the meeting, Complainant never said he was being discriminated against or retaliated against.

58. Bosworth testified that the town administrator learned of the meeting and asked Bosworth to find out what Collins knew about the meeting. Collins gave Bosworth a copy of a letter he had written to the town administrator stating his belief that Complainant wanted him at the meeting for support and that he had no new facts about the meeting, which he attended for only a short time while his son was waiting outside in his car. (Tr. 4/11/18; p. 165-173; Ex. R-32; Tr.5/1/18, p.80-85)

Full-time Police Officer Position- 2013

59. In July 2013, Complainant applied for a full-time police officer position with Respondent. He was not interviewed for the position because his status had not changed. (Tr. 4/11/18, p. 156-7)

60. The successful candidate was a graduate of the full-time police academy where she was first in her class. She had a master's degree in criminal justice with a GPA of 4.0. She was a full-time police officer with the Town of Townsend for three to four years and had received very good recommendations. (Tr. 4/11/18, p.152-153)

Full time Police Officer Position 2014

61. In 2014, Respondent had an opening for a full-time police officer. Complainant was not interviewed for the position. The successful candidate had worked as a full-time police officer for the town of Hubbardston for approximately one year. He had a bachelor's and master's degrees in criminal justice, and had special training. He interviewed well and had a positive demeanor and appearance. He had relevant training such as child safety seat certification and active shooter training. (Tr. 4/11/18, p.154-156)

62. Marino testified credibly that Complainant's conduct with respect to the assisted living facility employees called into question Complainant's qualifications for any full-time position for which he applied between December 9, 2011 and June 27, 2014. Marino testified that it was his opinion, having sat on screening panels in 2008, 2010, 2011, 2013 and 2014, that Complainant was not qualified to be a full-time police officer based on his demeanor during the interview, Marino's personal experience working with him, and because Complainant's qualifications did not meet those of the successful candidates. (Tr. 4/12/18, p. 165) Marino testified that the investigation into Complainant's angry outbursts raised concerns about his qualifications from late 2011 onward, because police officers must interact with the public on a daily basis and should not "fly off the handle" when upset. (Tr. 4/12/19, p. 185)

63. Bosworth testified credibly that by observing Complainant over the years on details and patrol shifts, he found that Complainant's ability to multitask and his ability to deal with situations under pressure were poor or below average. In his opinion, Complainant's rating was at or near the bottom of every evaluative process Respondent conducted regarding Complainant's fitness for a full-time position. Tr. 4/12/18, p. 89-93)

III. CONCLUSIONS OF LAW

A. Age Discrimination-Failure to Promote

M.G.L. c.151B §4(1C) prohibits discrimination in employment on the basis of age by the Commonwealth or any of its political subdivisions. Complainant alleges that after hiring him for the position of Special Police officer in 2002 at the age of 51, Respondents failed, on six occasions between 2005 and 2014, to promote him to the position of full-time police officer on the basis of his age, in favor of younger employees. In order to establish a prima facie case of age discrimination in hiring, Complainant must show that he is age 40 or older, was qualified for the position, that he was denied the position and the position was awarded to someone who is five or more years younger than he Knight v. Avon Products, 438 Mass. 413,425 (2003) Alves v. Town of Freetown Police & Board of Selectmen, 18 MDLR 112 (1996); See Puckett v. Commercial Aviation Services, 24 MDLR 77 (2002) (finding evidence of race discrimination when persons outside of the Complainant's protected category were selected for promotional opportunities that were denied to the Complainant, a qualified candidate)

Complainant has satisfied the elements of a prima facie case in that he was over 40 years of age, he was performing his job as special police officer at an acceptable level, he applied for

promotion to the position of full-time police officer on six occasions between the years 2005 and 2014, and was not selected, while younger employees were.

Once Complainant establishes a prima facie case of age discrimination, Respondents must articulate a legitimate, non-discriminatory reason for failing to promote him. Abramian vs. President & Fellows of Harvard College & others, 432 Mass. 107 (2000); Wheelock College v. MCAD, 371 Mass., 130 136 (1976); Blare v. Husky Injection Molding Systems Boston, Inc., 419 Mass 437 (1995). As part of its burden of production, Respondent must "produce credible evidence to show that the reason or reasons advanced were the real reasons." Lewis v. Area II Homecare, 397 Mass 761, 766-67 (1986) Respondents' articulated reasons for not promoting Complainant were, in each case, that the successful candidate had superior qualifications and that Complainant failed to demonstrate that he met the standards of the job, in large part because of his episodes of explosive anger that were disproportionate to the triggering events and inappropriate conduct for a police officer. Complainant's angry outbursts were directed toward co-workers and superiors and were the subject of several complaints about his behavior while on details. During a 2010 job interview for a full-time position, Complainant's response to a question about his "worst attribute," was to rant about his distaste for then President Obama, Governor Patrick and Democrats. His inappropriate response caused the interview panel to be concerned about his mental health and the obliquely racial tenor of his outburst. Furthermore, a complaint from the assisted living facility where Complainant's father resided concerning Complainant's angry anti-immigrant, racially tinged tirades toward employees resulted in an investigation by Respondent that determined Complainant had violated several of its rules of conduct. The record is replete with credible testimony of witnesses and documentary evidence referencing Complaint's disturbing conduct. In addition there is no evidence of any overt or

implicit bias toward Complainant because of his age, he was hired by Respondent at age 41, a number of the officers and commanders referenced were well over the age of 40 and at least one officer who allegedly received more favorable treatment than Complainant was 10 years older than he was. I conclude that Respondents have articulated and produced credible evidence to support the legitimate, nondiscriminatory reasons for its employment decisions.

Once Respondent meets its burden, then Complainant must show by a preponderance of evidence that Respondents' articulated reason was not the real one but a cover-up for a discriminatory motive. Knight at 420, n. 4 (2003) Complainant must show that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001) Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Id at 504. If the Complainant presents such evidence, the trier of fact may, but is not compelled, to infer discrimination. Complainant retains the ultimate burden of proving that Respondents' adverse actions were the result of discriminatory animus. Id. at 117.

As evidence of pretext, Complainant points to his length of service as a part-time employee and asserts that Respondents would not have continued to employ him in any capacity if he were not capable of performing his job and of being promoted. Complainant attempted to deflect blame or minimize his conduct; however, he has failed to persuade me that Respondent's reasons for failing to promote him on numerous occasions were a pretext for age discrimination. While Complainant accused Respondents of unlawful bias against him, the evidence established that the opposite is true. There were several incidents, including his public displays of anger, his misconduct toward the nursing home staff, and his shouting at Bosworth on the telephone, where discipline of Complainant would have been entirely warranted and appropriate, yet Respondents

declined to do so. As a result of the leniency with which his infractions were treated by Respondent, Complainant continued to be employed as a part-time special officer when Respondents likely would have been justified in terminating his employment.

For the reasons stated above, I conclude that there is insufficient evidence that Respondents' articulated reasons for not promoting Complainant were a pretext for unlawful age discrimination or that Respondents were motivated by discriminatory intent, motive or state of mind. Therefore, I conclude that Respondents did not engage in unlawful age discrimination with respect to promotions.

B. Age-Discrimination-disparate treatment in assigning Complainant to details and shifts

Complainant has alleged that he has been passed over for assignment to shifts and details on account of his age. However, Complainant has failed to establish a prima facie case of disparate treatment relative to similarly situated persons not in his protected class with respect to such assignments. With one exception, there was no evidence in the record as to the ages of other special police officers with whom Complainant worked. Much of his dissatisfaction with the assignments resulted from ordinary changes in the seniority system, including moving full-time dispatchers ahead of special police officers in seniority ranking and Respondents' placing special officer Lee Heron, who was ten years older than Complainant and thus in his protected class, ahead of him in seniority.

Assuming that Complainant has established a prima facie case of age discrimination in the assignment of details and shifts, as stated above, Respondents must articulate a legitimate, non-discriminatory reason for failing to promote him and "produce credible evidence to show that the reason or reasons advanced were the real reasons." Abramian, at 116-7; Wheelock College at 136; Blare, at 441-442, Lewis at 766-7. Respondents' articulated reasons for any

discrepancies in assigning details in shifts by strict seniority were that the sign-up sheets listed special police officers on the back of the sheet where they could be missed. Those sheets were ultimately revised to make assignments less prone to error. Respondents' witnesses also testified credibly that assignments were often requested on short notice, requiring the dispatcher doing the scheduling to assign persons who were easily reached. There was evidence that Complainant did not always take the calls and for a period of time, one of Complainant's listed telephone numbers was not working. The evidence supports the Respondents' assertions that the assignment process was imperfect and subject to human error as well as other variables, but free of age bias. Therefore, I conclude that Respondents have articulated and produced credible evidence to support the legitimate, nondiscriminatory reasons for its employment decisions.

As stated above, once Respondent meets its burden, then Complainant must show by a preponderance of evidence that Respondents' articulated reasons were not the real ones but a cover-up for a discriminatory motive and may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Complainant retains the ultimate burden of proving that Respondents' adverse actions were the result of discriminatory animus. See Lipchitz at 504; Abramian at 117.

Complainant has failed to present any credible evidence of discriminatory animus in the assignment of shifts and details. As stated above, much of his dissatisfaction with the assignments resulted from changes in the seniority system, including moving full-time dispatchers ahead of special police officers in seniority, regardless of age, and Respondents' placing special officer Lee Heron, who was ten years older than Complainant and thus in his protected class, ahead of him in seniority.³ For the reasons stated above, I conclude that there is

³ Complainant asserts that seniority serves as a proxy for age discrimination in this matter. I am not persuaded. The cases cited by Complainant in support of this argument are distinguishable from the present case. In Lias v. Sterling

insufficient evidence that Respondents' articulated reasons for bypassing Complainant for shifts and details were a pretext for unlawful age discrimination or that Respondents were motivated by discriminatory intent, motive or state of mind. Lipchitz at 503.

For the reasons stated above, I conclude that Respondents did not engage in unlawful age discrimination.

C. Retaliation

Complainant has alleged that Respondents failed to promote him for his having engaged in protected activity. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in protected activity, that Respondents were aware of the protected activity, that Respondents subjected him to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41 (2003). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian, at 116; Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000). Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, non-retaliatory reason for its actions. Abramian at 116-117 at Wynn & Wynn at 665-666. If Respondent meets this burden,

Corrugated Box Co., 26 MDLR 133 (2004), where the MCAD ruled in favor of a long time employee with a spotless record who was terminated and replaced by a much younger and less qualified worker, there was evidence that Respondent's reason for terminating him was pretextual and that Respondent was concerned about the high cost of Complainant's income and benefits. Here, there was no credible evidence of pretext. In Mulero-Rodriguez v. Ponte, Inc., 98 F.3d, 670, 677(1996), the court, in reversing summary judgment, concluded that a comment that the plaintiff was "too old" combined with a change in the bonus system disfavoring long-term-and therefore often older-employees established enough of a nexus to his termination to send the case to a jury. The instant matter is distinguishable in that after consideration of all the evidence, Respondents' articulated reasons for their conduct were found to be highly credible and there was no evidence that they were a pretext for age discrimination.

then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz, at 504; Abramian, at 117. Complainant may meet this burden through circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. Id.; Abramian, at 117.

Pursuant to M. G. L. c. 151B, s. 4 (4), Complainant has engaged in protected activity if he... "has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." In this case, Complainant made numerous complaints to Respondent and its board members regarding Respondents' failure to promote him and ultimately filed a complaint with this Commission.⁴

With respect full-time jobs that occurred in 2005, 2008, 2009 and 2010, prior to Complainant's filing a complaint with this Commission, I conclude that Complainant has failed to establish that he engaged in protected activity. There was no credible evidence that Complainant ever complained of age discrimination prior to filing his MCAD complaint. Complainant repeatedly framed his internal complaints, written and oral, in terms of length of service or seniority and I did not credit his testimony that he complained in one instance of age discrimination. In fact, Complainant testified that he filed his MCAD complaint because Respondent gave more seniority to a special officer ten years older than he was "in retaliation for" Complainant having a politician support his application for a full time position. However, the act of going outside the chain of command for assistance with a job application is not protected activity. Further, Complainant framed his numerous internal complaints about the

⁴ Complainant's complaints about shifts and details concerned incidents occurring in 2008 and 2009, prior to his filing of his MCAD complaint and therefore he has failed to establish that he engaged in any protected activity with respect to these matters.

being bypassed for assignments as purely based on job seniority and while Complainant complained bitterly about Respondent's failure to promote him, his complaints were based on assignment of seniority and not his age. Complainant consistently based his arguments on his length of service. With respect to the promotions for which Complainant was rejected in the years 2005, 2008, 2009 and 2010 that preceded his filing an MCAD complaint, and the details and shifts that he claimed he was denied, I conclude that Complainant failed to establish that he engaged in protected activity as he never alleged age discrimination during this time period.

Turning to the full-time positions in 2011, 2013 and 2014, following his MCAD complaint, I conclude that while that Complainant has established a prima facie case of retaliation as described above, Respondent has articulated and produced credible evidence to support a legitimate, non-retaliatory reason for its actions. Abramian, at 117.; Wynn & Wynn, at 665-666 however, Complainant has failed to show that Respondents' articulated reasons were not the real ones but a cover-up for a retaliatory motive. Thus I conclude that Respondents did not engage in unlawful retaliation.

IV. ORDER

For the reasons stated above, I hereby order that the complaint in this matter be dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review with the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 11th day of December 2018



JUDITH E. KAPLAN
Hearing Officer