

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
THEOPHILUS DRIGO,

Complainants

v.

DOCKET NO. 14-BEM-00261

CITY OF BOSTON,

Respondent

Appearances: Michael L. Mahoney, Esq. for Complainant
Matthew M. McGarry, Esq. and Andrea M. Milyko, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On February 4, 2014, the Complainant, Theophilus Drigo, filed a complaint with this Commission, alleging that he was subjected to race and color discrimination by the Respondent, City of Boston during the course of his employment as a mechanic within the City's Public Works Department, Central Fleet Management division. Complainant also asserted that he was subjected to retaliation by Respondent after he filed an internal complaint alleging race discrimination in his workplace with the City's personnel department.

The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. The matter was certified for a public hearing and a hearing was held before me on November 14-16, 2017. At the hearing, seven

witnesses were called and forty-seven exhibits were introduced. In early February 2018, the parties submitted post-hearing briefs. Having reviewed the record of the proceedings and the post-hearing submissions, I make the following Findings of Fact, Conclusions of Law and Order.

II. FINDINGS OF FACT

1. Complainant is a black man who was born and raised in St. Croix, U.S. Virgin Islands. He graduated from high school there in 1985. He moved to Massachusetts in the late 1980's. Complainant attended school for auto-mechanics in Massachusetts and prior to working for the City of Boston was employed at private auto dealerships. He holds a Massachusetts Class A driver's license which permits him to drive tractor trailers and is certified as a General Motors and Ford technician. He holds three Automotive Service Excellence (ASE) certifications in brakes, electrical, and air conditioning and ventilation, and is currently an HMER Class II, Grade 16. (Tr. I, pp.14-17; Tr. II, p. 109)

2. The City of Boston Public Works Department, Central Fleet Management division (CFM) is responsible for the repair and maintenance of some 1200 City owned vehicles and heavy equipment. There are three shops within CFM: the Light Maintenance Shop, the Heavy Maintenance Shop, and the Communications Shop, also known as the Radio Shop. (Tr. II, 98-100) The shops are all within the same building. (Tr. I, 19, 21; Tr. II, 100) Scott Alther became the Superintendent of Central Fleet Management on or around 2011 or early 2012.¹ (Tr. II, p. 52) Prior to holding that position he was the General Foreman of Central Fleet Management. (Tr. II, 49-50) He had previously worked alongside Complainant as an HMER grade 15 in the Heavy shop. (Tr. II, p. 108) Alther reported to Jim McGonagle in 2013 and subsequently to William Coughlin. (Tr. II, p. 82; Jt. Ex. 31)

¹ Jim McGonagle was his predecessor in that position.

3. Complainant began his employment with the City of Boston Public Works Department in Central Fleet Management in 2002 as a Heavy Motor Equipment Repair Person (HMER). He has been employed in that capacity for some 15 years. (Tr. I, 19-20) At the time of hearing, Complainant was working in the Heavy Maintenance Shop, where he has worked primarily; however he has frequently been a "floater," working in all three shops. His current supervisors in the Heavy Maintenance shop are General Foreman Paul Musto and Foreman Victor Montero. (Tr. I, 21) Complainant has always worked the 7:00 a.m. to 3:30 p.m. shift. (Tr. I, pp. 22-23) He testified that throughout his employment with the City he has taken advantage of training opportunities offered. (Tr. I, 20) In 2011, Complainant was rated by Alther as a "seasoned tech with good mechanical understanding...willing to help his peers without being asked." In 2012, he was rated as exceeding expectations in "job knowledge, productivity, and communication skills and was referred to as one of the "top techs" with "good trouble-shooting skills." Both evaluations noted that Complainant had some issues with tardiness and punctuality. (Jt. Ex. 23 & 24; Tr. II, pp. 173 -176)

4. In late 2011 or early 2012, Tom Rowlings was hired into the Communications Shop with the title of Senior Radio Technician. (Tr. II, p. 114) After Rowlings became supervisor of the Communications shop, an Hispanic employee transferred out of the shop in frustration that he was not chosen for the position. (Tr. II, p. 42; Tr. II, pp. 117,118) Sometime in 2012, Complainant volunteered to work in the Communications shop at the request of Jim McGonagle², who was then the Director of Fleet Maintenance. (Tr. I, pp. 24-25; Tr. II, pp. 109, 116, 118). Complainant worked in the Communications shop for approximately two years. The work involved installation and repair of radios, two-way radios, lights, strobes, and performing decal laminating. (Tr. I, pp.24-26) During some of that time when there was no foreman in the

² McGonagle is no longer employed by the City.

Communications shop, Lawrence Pennucci oversaw the functions of the shop. Pennucci has been Respondent's Fleet Inventory Manager since 2010, overseeing the repair and maintenance of the fleet vehicles. (Tr. I, 30; III, 42, 43) Pennucci reported to McGonagle in 2013 and subsequently to William Coughlin. (Tr. II, p. 82; Jt. Ex. 31)

5. Complainant testified that mechanic assignments generally are routinely handed out daily in the morning from a board on which they are noted. The assignments are generated by a repair order (RO) completed by a service writer who documents the needed work on a vehicle and enters information into a computer regarding the make and model of the vehicle, the mileage, the plate, the asset number and any other relevant information. (Tr. I, pp.26-30) Complainant stated there was no service writer in the Communications Shop, but in the absence of a service writer, a manager would be responsible for this task. (Tr. I, pp. 30-31) Once a repair is completed, the mechanic performing the work verifies completion in writing on the repair order, notes it on a computer, and turns it in to the manager of the shop. Complainant testified that he did not have responsibility for entering vehicle mileage on repair order forms, and that prior to 2013, he was not instructed to do so by McGonagle or Pennucci. (Tr. 31-34) I credit his testimony on this issue.

6. Within a year of Rowlings coming to the Communications shop, two additional HMER's, Seamus Sullivan and Robbie Pardo,³ both Caucasian, came to work in the shop. Pardo had worked for Central Fleet since 2010 and had worked with Complainant for two years in the Light shop before Complainant transferred to Communications. (Tr. III, pp. 204, 207) Pardo testified that he was brought into the shop to work on FleetHub work and Sullivan was brought in to work on Surplus. (Tr. III, pp. 214-216) According to Complainant, the two

³ Pardo was an HMER I and Sullivan was an HMER III. (Tr. II, 119-120) According to Respondent, an HMER I is an ASE-certified Master Technician and HMER III's were entry level technicians. (Tr. II, 103-105; 120) Complainant was an HMER II. (Jt. Ex. 4)

employees new to the Communications shop were given many of his former duties and Rowlings assigned him more difficult tasks on older vehicles. Complainant stated that the older vehicles are more difficult to work on, and are often corroded from salt and snow, while new vehicles more often require just the installation of new equipment or lettering. (Tr. 43-45, 136) Complainant claimed that after he spoke to Rowlings about the adverse changes in his work assignments, Rowlings' behavior toward him became more aggressive and hostile. (Tr. I, 46-47) Rowlings responded that he was the boss, the assignments were his decisions, and told Complainant he was acting like a spoiled child. (Tr. I, 46-47) Rowlings also commented that he resented the fact that Complainant made more money than he did, since Rowlings was the boss of the shop. (Tr. I, 46) Complainant asserted that he was denied opportunities to learn new duties and to advance. (Tr. 48-51)

7. On March 7, 2013 Complainant was called to a meeting with Scott Alther, Larry Pennucci and Tom Rowlings to discuss his cell phone usage on the job and the City's cell phone policy. Rowlings noted in a writing to himself that he had observed Complainant using his personal cell phone for an extended period of time on that day while Complainant had not finished a job assigned to him, claiming he would do so only if given overtime.⁴ (Jt. Ex. 34) At the March 7, 2013 meeting, Complainant received a written warning for abuse of the City's cell phone policy on work time in violation of acceptable department standards. (Jt. Ex. 14) Pennucci had no memory of that complaint or meeting but acknowledged he was present because he signed the warning to Complainant. (Tr. III p. 128) Alther testified that Rowlings reported that Complainant's phone use was excessive and interfered with his work. Rowlings had recently rated Complainant as successfully meeting or exceeding expectations with very positive

⁴ Rowlings did not testify at the hearing.

comments about his quality of work, teamwork, professionalism, and punctuality and attendance in an evaluation dated January 15, 2013. (Jt. Ex. 25)

8. Complainant did not deny using his cell phone at work for personal phone calls but testified that he had placed the City on notice previously that he might have to use his cell phone at work due to medical emergencies arising with his sister who is an epileptic and for whom he is the contact person. (Tr. I, 39-40, 192) Alther acknowledged that McGonagle had informed him that Complainant had a family medical issue that might necessitate him using his personal cell phone during work hours. (Tr. II, pp. 94-95) Alther also testified that Complainant did not follow the policy of informing supervisors about emergency calls and that he had witnessed McGonagle tell Complainant to get off the phone. (Tr. II, 147-149, 150-151) Pennucci testified that he had observed Complainant take calls on his personal phone at work without informing Pennucci the calls were of an urgent nature. (Tr. III., pp. 129-130, 132) William Coughlin, who is currently the Director of Fleet Maintenance, and who previously had supervised Complainant when foreman in the Heavy maintenance shop, testified credibly that Complainant was not on his cell phone more or less than any other City employee in Fleet Management. He also stated that, other than Complainant, he was not aware of any other employee who was disciplined for cell phone use. (Tr. III, 121, 123, 125-126)

9. Complainant testified that he lodged complaints with Larry Pennucci about the atmosphere in the Communications shop and told Pennucci he felt like he was being forced out of the shop. According to Complainant, Pennucci responded if he didn't like what was going on, he could pack his tools and leave. (Tr. 51-52) Pennucci had no recollection of this discussion and denied the latter statement. (Tr. III, 45-46) I credit Complainant's testimony over Pennucci's that this discussion occurred. Complainant also had a meeting in June 2013 with

Pennucci, Scott Alther and Jim McGonagle, the then Director of Fleet Maintenance. (Tr. I, 52, 55; Jt. Ex. 31) Complainant informed them at the meeting that his difficulties in the Communications shop began when the new guys came on board, and because he was the only black employee in the shop, he attributed the adverse treatment he was experiencing to his race. Complainant testified that everything changed, including Rowlings' attitude toward him, when the two new white employees came into the shop. (Tr. I, pp. 54-55; Jt. Ex. 2; Tr. II, pp. 23-24)

10. Complainant testified that when conditions in the Communications shop did not improve over the summer, on September 18, 2013, he filed a written complaint alleging race discrimination with the City's Human Resources Department. (Tr. I, 59; Jt. Ex. 1) In addition to referencing different terms and conditions of employment, Complainant testified that he was denied opportunities to advance. He specifically asked for training on how to program radios, and despite Rowlings' response that only the Senior Radio tech was allowed to program, Complainant observed Rowlings showing his white co-worker Pardo how to do this. (Tr. I, 59-60) Complainant claimed he was also denied computer training on how to issue Fleet Hub rental vehicles and how to upload computer information for surplus vehicles that were being taken out of service. (Tr. I, pp. 156-157, 181, 184) Alther acknowledged being aware of Complainant's dissatisfaction with his work and requests for training in more areas. He stated that management offered Complainant surplus work which involved decommissioning a vehicle and putting it on a website to be sold, but Complainant rejected it. However, Alther also acknowledged that Complainant refused the offer because he was not trained in how to do surplus work. (Tr. II, pp. 124-126). Alther stated there was no formal training program for doing surplus or FleetHub work, both of which Complainant expressed an interest in doing, and that others in the shop were self-taught. (Tr. II, pp. 126-128, 132) However I credit

Complainant's allegation that Rowlings would not assist him in learning these systems, even on an informal basis, but that Complainant observed him assisting others. Alther stated there was a training session for the Communications shop in programming radio, but he believed Complainant did not remain for the entire session. (Tr. II, p. 131)

11. Complainant testified that many of his functions were taken over by the two new white employees who were hired into the Communications shop. (Tr. I, pp. 155-156) He stated that when these two employees were hired, he knew they were trying to get him out of the shop. (Tr. I, pp. 163-164) Thereafter, he was never at ease in the shop and always felt tension. Complainant testified that the tensions at work caused him to suffer sleepless nights, depression, anxiety and stress which he noted in his complaint to Human Resources. (Tr. I, 60-62; 159-160; Jt. Ex. 1)

12. Pennucci testified that he could not recall being interviewed by Human Resources in connection with Complainant's charges or telling HR that he thought Complainant was a good worker, despite the fact that his comments were documented in HR's report of its investigation. He stated that his recollection of the meeting was not refreshed by reading the report. (Tr. III, 46-49; Jt. Ex. 2) He claimed to have no knowledge of Rowlings indicating that he wanted Complainant out of the Communications shop. (Tr. III, pp. 50-51) I find his testimony in this regard to be less than credible.

13. On October 4, 2013, the Office of Human Resources issued its findings on Complainant's charge.⁵ (Jt. Ex. 2) The Investigation section referenced a staff meeting conducted by Rowlings on June 28, 2013, ostensibly to review work expectations of all three employees in the Communications shop and to discuss cell phone use and extended breaks. The report states that "the discussion became personalized and somewhat contentious," because

⁵ The author of the report did not testify at the hearing.

Complainant had been disciplined for these issues in March. The Investigation noted that Rowlings' many criticisms of Complainant's performance, including that he was "lazy," had a "different work ethic," and "didn't care," were in stark contrast to other supervisors' opinions of Complainant's work and attitude. The criticisms also contradicted Complainant's then most recent performance reviews documenting that he consistently met or exceeded expectations in most areas. Rowlings' claim that Complainant was "making the shop look bad and he wanted to get him out of the shop," was also in direct contrast to his comments in a 2013 review attesting that Complainant exceeded expectations in Attendance and Punctuality, Customer Service, Job Knowledge, and Teamwork & Relating to Others.

14. The Investigation gave rise to questions about Rowlings' approach to supervision and his ability to effectively manage the Communications Shop. The report noted that in lieu of counseling or disciplining Complainant for purported performance deficiencies, Rowlings instead sought to transfer him. The investigation also raised concerns that some of Rowlings' characterizations of Complainant could be perceived as "racial stereotyping," and surmised that this, in addition to Rowlings' approach to supervision, "may have contributed to [Complainant's] feelings of being targeted." (Jt. Ex. 2) Notwithstanding, the report ultimately concluded that race was not the "reason for what [Complainant] perceived as unfair treatment." The report did not substantiate Complainant's claim of violations of the City Policy on Discrimination, Harassment and Retaliation. (Jt. Ex. 2)

15. Since Rowlings submitted his resignation prior to issuance of the Report,⁶ recommendations for improving his supervisory skills were rendered moot. The report did recommend regular shop meetings, maintaining open lines of communication, and that the successor supervisor utilize staff meetings to "share information among staff," and recognize

⁶ Rowlings reportedly left his employment with the City for a better job.

“one-on-one coaching and counseling sessions” as the more appropriate “place to discuss specific employee performance concerns.” The report also recommended that management continue to support, coach, and encourage staff, including Complainant, to take additional ASE tests and seek out training. (Jt. Ex. 2)

16. When Rowlings resigned, Larry Pennucci, who had been the Fleet inventory manager since 2010, was appointed on an interim basis to oversee the Communications Shop. (Tr. I, 65; Tr. III, 42, 51) Pennucci testified that his oversight of the Communications shop was to check that repair orders were accurately filled out and to make sure vehicles were repaired in a timely fashion and that the labor was charged correctly. (Tr. III, pp. 52-53; 132-133) He testified that he made frequent visits to the shop and noted deficiencies. (Tr. III, 133) Pennucci authored a number of documents that were not on City letterhead and were unsigned that he referred to as notes to himself to keep track of meetings or other things that transpired in the Communications shop. (Tr. III, pp. 54-55) Some of these memos referred to communications with employees of the shop and some concerned Complainant only. (Jt. Ex. 3, 5, 8, 10, 11)

17. Complainant claimed that after he filed his internal complaint of race discrimination with Human Resources he began to experience retaliation almost immediately, specifically from Pennucci. He cited the following, among other things: (1) a meeting Pennucci held on October 21, 2013 to go over rules regarding cell phone use and clocking in and out of jobs; and (2) an October 31, 2013 memo issued by Pennucci regarding expectations of the employees in the Communications Shop which Complainant was required to sign. (Jt. Ex. 3; Jt. Ex. 5; Tr. I, 117-118) One memo referenced a meeting where Pennucci discussed cell phone usage and computer entries. (Jt. Ex. 3) Pennucci claimed he held this meeting because of deficiencies he had noted in the radio shop particularly with respect to use of cell phones and blue tooth devices. (Tr. III,

134) He also instructed technicians not to go to the service writer in the Heavy shop to make adjustments to repair orders generated in the Communications shop and stated that Rob Pardo was the point person in the Communications shop for such adjustments. (Jt. Ex. 3, Tr. III, pp. 135-136). Alther testified that Complainant frequently went to the service writer in the Heavy shop for assistance with these issues and that this made it difficult for Pennucci to manage the shop and keep track of repair work for the employees he was overseeing. (Tr. II, pp. 162-164) Complainant, who also did work in the Heavy shop, felt strongly that the memo articulating the expectations for employees in the Communications shop was directed at him and meant to single out the Communications shop. (Tr. I, 118) Pennucci stated the memo was directed at the Communications shop because he was overseeing that shop and it was given to all the shop employees, but admitted that a number of the expectations were addressed to Complainant's issues. (Tr. III, pp. 138-139; 187) He also stated that cell phone usage was a safety issue and that Complainant had a recurring problem with cell phone usage but that he did not observe this with the other employees of the shop. (Tr. III, p. 139) Pennucci claimed that Complainant did not meet expectations for arriving on time, abiding by break times, signing in and out of the shop, and clocking in and out of assignments, but cited only one specific example. He stated the others had similar issues with breaks and signing in and out of the shop on occasion. (Tr. III, pp. 141-143)

18. On November 19, 2013, Pennucci wrote a memo to himself regarding an incident where Complainant was logged in to work on an assignment in the Communications shop but was instead operating a floor cleaning machine in the Heavy shop. Pennucci spoke to the foremen in the Heavy shop because a department should not charge for labor time that didn't occur in that shop. Having determined that the Heavy shop foreman had asked Complainant to

do the job, he did not discipline Complainant for this event. (Jt. Ex. 33; Tr. III, pp.145-148) On November 20, 2013, Pennucci documented that Complainant had logged 7.8 hours for a job that took only 3 hours and that he needed to correct his time. Complainant informed him that the Heavy shop foreman would be adjusting his time to reflect that he had worked on job in the Heavy shop for the remainder of the day. (Jt. Ex. 41; Tr. III, 149-151)

19. On November 22, 2013, Complainant was suspended for one day for insubordination purportedly for using his personal cell phone during work hours in an unsafe manner on November 18, 2013. (Tr. I, 119; Jt. Ex. 6) The notice of suspension referenced the October meeting and memo from Pennucci regarding employee expectations and cell phone use. (Jt. Ex. 5) The suspension ensued after Complainant's white co-worker, Rob Pardo, took a photo of him answering his cell phone while climbing the side of a trash collection vehicle. Pardo forwarded an email and the photo to Pennucci telling Pennucci he was concerned about safe work practices and suggesting there be a meeting to address safety in the shop. (Jt. Ex. 35; Tr. III, p. 74) Pardo testified that Pennucci instructed him to take the photo. (Tr. III, pp. 248-249) The email was made available to Human Resources. Pennucci testified that if an issue involved workplace safety, HR would get involved but he did not know who forwarded it to HR. (Tr. III, p. 73-74) According to Respondent, Complainant's action created a potential safety issue. (Tr. I, 122-123; Jt. Ex. 15) Pennucci could not recall any other time that an employee provided him with a photo of an unsafe work practice. (Tr. III, pp. 77-78) An unsigned document authored by Pennucci dated 11/18/13 states that Complainant was observed using his cell phone during work hours in an unsafe manner, and that this was an ongoing issue for which Complainant had been counseled on numerous occasions, and for which he had received a prior written warning. (Jt. Ex. 8) This statement was quoted verbatim in Complainant's suspension letter. Pennucci claimed he did not

make the decision to suspend Complainant following this event, and had no involvement other than to be present for questioning by HR. However, he gave the memos that he authored about the incident to HR and they were referenced in detail in the suspension letter from the Commissioner of Public Works. (Tr. III, p. 82, 86-88, 154; Jt. Ex. 6) Complainant was unaware of any other employee being suspended for cell phone use and both Alther and Pennucci testified that they were not aware of any suspensions for cell phone use. (Tr. I, 124; Tr. II, 84; Tr. III, pp. 85-86) This testimony comports with that of William Coughlin current Director of Fleet Maintenance who previously was a foreman in the heavy maintenance shop. (Tr. III, 121, 123, 125-126) Complainant grieved his suspension through his union, but the suspension was upheld after a hearing. (Tr. II, p. 166-167)

20. On November 20, 2013, Complainant received an email from Pennucci, copied to Mary O'Neil, the Director of HR for the City, directing Complainant to enter the mileage of vehicles he worked on into the computer system to update all repair orders. (Jt. Ex. 7) Alther did not know why such a memo would be copied to Human Resources. (Tr. III, pp. 9-10) Pennucci stated that he sent a copy to HR because Complainant's deficiencies with record keeping were an on-going issue and he was seeking guidance from HR. (Tr. III, p. 89-90) I do not find this assertion credible. Pennucci had never copied HR on memos to other employees and had never sent a memo regarding deficient repair orders to any other employee. (Tr. III, p. 90-91, 94-95, 97-98)

21. According to Complainant, his job was to enter notes in the computer regarding the repairs that he made to a vehicle, but that he had never been required to update mileage on the computer system. He testified that the driver who brings the vehicle in for repairs, must complete a complaint sheet and repair order with this information. (Tr. I, pp. 31- 34, 186-190)

Alther confirmed and Pennucci agreed that information about the vehicle, including mileage, is transferred from the driver to the service writer whose job it is to enter the information into the computer. (Tr. II, pp. 63-64; Tr. III, p. 61) Both Alther and Pennucci testified that, in the Communications shop, generating repair orders was a function of the Senior Communications Technician and was done by Rowlings and later by Pardo for a while. (Tr. II, p. 136-137; Tr. III, p. 60).

22. Respondent introduced records of repair orders worked on by Complainant that were purportedly deficient because they were missing mileage or serial numbers. (Jt. Exs. 36-38) One of the repair orders accompanying the memo from Pennucci to Complainant on 11/20/13 was dated a year earlier on 10/16/2012, and was created by Sean Hayes, service writer in the Heavy shop and Coughlin is listed as the mechanic in the Heavy shop. The other repair order dated 11/15/13 was created by Pardo, and Complainant is listed as the mechanic in the radio shop, but it is unclear who noted the incorrect mileage on the second document. There is no evidence that Pardo was counseled by Pennucci for failure to input information properly. (Jt. Ex. 37; Tr. III, pp. 11-20, 94, 97) Alther testified that no service writers have ever been written up for failure to record mileage on a repair order. (Tr. III, pp. 17-18, 22) On the other repair orders attached to Complainant's warning and dated 11/21/13 and 11/11/13, Complainant is listed as the mechanic. According to Alther, it is unclear who generated those repair orders, but it was likely the service writer or foreman in the Heavy shop, since mechanics don't generate repair orders. (Jt. Ex. 37; Tr. III, pp. 20-22) A number of other purportedly incomplete repair orders offered by Respondent as evidence of Complainant's dereliction of duty to record vehicle mileage or serial numbers were dated from June 2013 to September 2103, when Rowlings was the Senior Radio tech in the Communications Shop and it was his responsibility to accurately complete repair

orders. (Tr. III, pp 25-26; 32) The repair orders were pulled and printed in September of 2013 during the time the Human Resources Department was conducting an investigation of Complainant's internal discrimination charges, but Alther could not say by whom. (Tr. III, p. 28; Jt. Ex. 36)

23. Alther and Pennucci testified that record keeping and data entry, including inputting vehicle mileage and serial numbers on repair orders, is considered "other related work" required by HMERs during the relevant time period per the job description. (Tr. II, pp. 113-114, 137-138; Tr. III, pp. 159-162) Respondent proffered a document dated 11/3/17, some four years after the events at issue, sent to all Central Fleet Management Technicians outlining the duties of technicians and stating that among other duties, technicians are responsible for updating vehicle mileage and hours on every repair order. The document noted that as of November 2017, technicians were officially put on notice that they were responsible for these duties. (Jt. Ex. 29) Prior to the issuance of this memo by Coughlin in 2017, some 12 days before the hearing in this matter, the duty of mechanics to record mileage was not memorialized in writing, but according to Alther and Pennucci, that duty was conveyed orally to the HMERs by the foreman in meetings. (Tr. II, 66-67, 137; Tr. III pp. 96-97) The memo lends support to Complainant's testimony that this duty did not previously fall to technicians or that the failure to perform it was largely disregarded by superiors prior to November 2013, when Pennucci wrote to Complainant that his repair orders were incomplete and copied Human Resources.

24. On January 24, 2014, Pennucci documented an incident in which Complainant was purportedly insubordinate when he was directed to install radios in two cars and replied that he would not jump-start the cars if they didn't start. (Jt. Ex. 10; (Tr. III, pp. 169-170) Complainant could not recall this incident, except to state that if he wasn't in his work area at 7:05 a.m. it was

because had worked overtime the night before or was in the Heavy maintenance shop. (Tr. I, 139-140) On January 27, 2014, Pennucci documented an incident wherein Complainant arrived late to the Communications shop and failed to complete an assignment. (Jt. Ex. 11, Tr. III, 170-172) He was informed by Pardo and Sullivan that Complainant worked in the Heavy Shop all day. (Tr. III, p. 197) Complainant testified that he usually arrives at work at 6:00 a.m., one hour before his start time and opens up the shop. He stated if he was not in the Communications shop area he could have been working overtime in the Heavy maintenance shop or gone to the bathroom or to the canteen truck that comes to the Heavy shop. (Tr. I, p. 141) Complainant denied that he ever refused a directive or assignment from Pennucci. (Tr. I, p. 140)

25. In January of 2014, after some three months of supervising Complainant, Pennucci presented Complainant with a written performance review that Complainant characterized as "very negative" and not reflecting his performance at all. (Tr. I, p. 128, 134 ; Jt. Ex. 9) Complainant testified that he had worked in Central Fleet Management for fifteen years and had never received such a bad review. (Tr. I, p. 129) Pennucci rated Complainant as not meeting expectations in the category of "Initiative and Responsibility," stating the he "doesn't volunteer for new tasks," "typically avoids additional work," "requires constant supervision," and does not "pay attention to detail." Complainant refused to sign his performance evaluation and shortly thereafter Pennucci issued the two memos cited above documenting purported performance issues involving Complainant. (Tr. I, p. 141)

26. In the first week of February 2014, Complainant was notified by Pennucci and Alther that he was being transferred to the light maintenance department and that the reason for the transfer was departmental needs. (Tr. I, p. 141-142; Tr. II, 87-88) Complainant believed this reason to be spurious, since the need in Light maintenance was for preventative work which was

done on the night shift and he worked the day shift. (Tr. 142-143) At the time of his transfer, Pardo, as a Class I technician in Communications, was helping with the day to day operation, overseeing FleetHub, helping with administrative duties, and acting as foreman on occasion. (Tr. II, pp. 184-185) Complainant worked in Light maintenance for only two days and then was transferred at his request to Heavy maintenance where he preferred to work. (Tr. I, pp.143-144) Alther testified that McGonagle, who was then the Director of Central Fleet Maintenance, made that decision and that he had no input. (Tr. II, p. 185)

27. Complainant's supervisors in Heavy maintenance were William Coughlin initially and later Paul Musto. (Tr. I, pp. 145-146) Complainant's annual review in January of 2015 approximately one year after he transferred to the Heavy shop was conducted by Coughlin and signed by Alther and was positive. It described Complainant as a "very capable technician," whose "work is very consistent." It also noted that he is a "self-starter," who "used his time well." (Jt. Ex. 12) With regards to attendance and punctuality the review stated that "You can set a clock by him." Complainant was further rated as a "good team player," who "interacts well with all customers. The review also noted that Complainant was proficient with the current technology and his work was completed in a timely manner.

(Id.)

28. Complainant filed his MCAD complaint after he was transferred to Light maintenance. He testified that prior to filing his complaint with MCAD he had followed all of the proper protocols for airing his grievances with Respondent by speaking first to his manager, and then the Director of Fleet Maintenance, and then addressing his concerns to the Human Resources Department at City Hall, all to no avail. The treatment he was experiencing made him feel very bad and he felt like his "back was against the wall," and the only way to make any progress was

to take his complaint outside of the City. (Tr. I, 157-158) Complainant testified that after he was transferred to work in the heavy maintenance shop, when Coughlin was his foreman, Coughlin offered him a position at a higher grade level if he would drop the complaint, but that he rejected this suggestion because his complaint was not about money. (Tr. I, 146-149; Tr. II, p. 36-37) Coughlin denied that he never made such an offer to Complainant. Coughlin testified that he never discussed Complainant's MCAD complaint with him. (Tr. II, p. 112) At the time of the hearing Coughlin had been the director of Fleet Maintenance and overseeing the entire operation for approximately two and half years. (Tr. II, p. 80) I credit Complainant's testimony because his memory of the event was very specific regarding time and place and who was present, and I find it unlikely that he would have fabricated this discussion.

29. The position of Senior Communications Technician, which was held by Rowlings, became open after Rowlings left Respondent's employ and the position was posted three times. The first posting was open on 10/3/13 and closed on 10/18/13, just weeks after Complainant filed a complaint with Human Resources. (Jt. Ex. 30; Tr. II, p. 75) Complainant applied for the position all three times. (Tr. I, p.153) Alther testified that he, Pennucci, and two others conducted the interviews for the third posting and that he, Pennucci, and possibly McGonagle had conducted the interviews for the first and second postings. (Jt. Ex. 39; Tr. I, 153; Tr. II pp. 187-189) Complainant's understanding was that the essential ability required for the job is proficiency in electronics and he holds an ASE certification in electronics. (Tr. I, p. 154) Complainant testified that he performed all of the work in the Communications shop prior to Rowlings being hired, and believed that he was qualified for the position. (Tr. pp. 153-155; Tr. II, p. 7) Alther testified that an ASE certification in electronics was not required for the Senior Communications Tech position and that Complainant had knowledge of electronics. (Tr. II, p.

96) He also testified that none of the candidates met the five-year equivalent of work experience in electronic communication equipment. (Tr. II, p. 190; Jt. Ex. 39) The position was not filled after the first two postings. The third time the position was posted, in March of 2015, Alther devised an exam using an ASE publication to be given on-the-spot to applicants to test their knowledge of automotive electronics. (Ex. R-1; Tr. II, p. 43, 52-53) This was the only test that Alther had ever administered to any candidates for a job. (Tr. II, p. 211) According to Alther, Pardo scored the highest on the exam and on the interview criteria. (Tr. II, p. 195; Ex. R-3) Both Complainant and Pardo were rated equivalent by Alther on "performance experience" and "job knowledge." Alther rated Pardo higher on "Job Skills Required" because of his education and higher on "Interpersonal Skills" stating Complainant was sometimes unwilling to work with or assist some customers." (Tr. II, pp. 206-207). Some of the scoring was seemingly subjective, particularly on the latter issues. The other interviewers did not testify and Pennucci was not asked about his scoring of the candidates. Complainant was not chosen for the position, and he, along with two other rejected candidates, grieved the failure to promote them. The Union decided to pursue the grievance only on behalf of the applicant with the most seniority and withdrew Complainant's grievance. (Jt. Ex. 27; Tr. II, pp. 11-13; 15-16; Ex. R-2) The Senior Communications Technician position was filled in April of 2015, when Rob Pardo, was offered the position and made supervisor of that shop. (Ex. R-14; Tr. II, p. 60) At that time Pardo was a HMER class I Grade 18 technician. He has a college degree in automotive science, 15 ASE certifications and is considered a "double master." (Tr. II, p. 119, 122) He had been acting as the Senior Radio Technician prior to officially holding the position, which Pardo described as "filling in" and was responsible for some of the Senior Radio Tech duties. (Tr. III, p. 159; 173-

174, 176) He took on the FleetHub duties when he arrived at the Communications Shop. (Tr. III, pp. 214-215)

30. After Complainant filed his MCAD complaint, two employees of color were advanced to the position of foremen of the Light and Heavy maintenance shops, although one has no ASE certifications and does not meet the requirements set forth in the collective bargaining agreement but has been working temporarily out of grade for over one year. (Tr. II, p. 57-59; 116-117) Complainant's replacement in the Communications Shop was Manuel Valera. Alther claimed not to know whether Valera is Hispanic and described his skin color in deposition testimony as "having a good tan." (Tr. II, p. 62) Alther's statement that he has no knowledge of whether Valera is Hispanic or a person of color is not entirely credible.

31. Complainant testified that as a result of his complaints he "always [had] to be walking on pins and needles on the job," and "be cautious" about what he said, what he did, and how he did it. He felt he was constantly under attack. From the spring of 2013 until early 2014, he was always concerned about being reprimanded and found this very stressful. (Tr. I, p. 160) He stated that his anxiety subsided after he was granted a transfer to the heavy equipment shop, and does not believe that he is the victim of discrimination any longer. He has had no difficulties with his superiors or co-workers since that transfer. (Tr. I, p. 161-163; 167)

III. CONCLUSIONS OF LAW

A. Discrimination

Massachusetts General Laws c. 151B s. 4(1) makes it an unlawful practice to discriminate in the terms and conditions of employment based upon an employee's race. Discrimination may include subjecting an employee to adverse actions that constitute disparate

treatment based on race and/or creating a hostile work environment. Claims of unlawful discrimination in employment generally rely on the three-stage analysis articulated in McDonnell-Douglas Corp. v. Green, 411 U.S. 972 (1973) adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). Complainant must first establish a prima facie case of discrimination which Respondent may rebut with a legitimate non-discriminatory reason. Complainant must then demonstrate that the reason articulated by Respondent is a pretext for discrimination, i.e. that discriminatory animus was the reason for the action. Lipchitz v. Raytheon Co., 434 Mass. 493, 502-504 (2001).

To establish a prima facie case of disparate treatment, Complainant must establish that he is (1) a member of a protected class; (2) that he was performing his job adequately; (3) that he suffered an adverse employment action, and (4) that similarly situated individuals not of his protected class were not treated in a like manner, giving rise to an inference of discrimination. Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000); Blare v. Husky Molding Systems, 419 Mass. 437 (1995).

Complainant was a long term employee of the City's Central Fleet Management operation having worked there for more than 15 years. He had worked at some point in all three of the shops comprising Central Fleet Management with a positive work experience, encountering no major issues with his supervisors or management. Except for some occasional issues related to his time, Complainant's performance evaluations were good and he was respected as a competent and knowledgeable mechanic. Complainant testified that his tardiness issues in earlier years involved only minute fractions of time related to his having to wait in the early morning hours with his young daughter, who was in the Metco program, to catch her school bus. Over the years, this issue had largely resolved.

Complainant alleges that beginning in 2013, he was subjected to disparate treatment by his then supervisor in the Communications Shop, Tom Rowlings, particularly after two white employees joined the shop. He complained that he was repeatedly assigned more difficult work on older vehicles and was denied training opportunities in certain programs---Surplus, Fleet Hub, and radio programming---all requiring knowledge of computer programs. Complainant asserted that he was denied training in these programs while he observed his co-workers being shown how these programs operated. He also testified that Rowlings' attitude toward him changed after two white employees joined the shop and that Rowlings expressed resentment of Complainant's higher salary and called him a spoiled child.⁷ I found Complainant's testimony about how Rowling's treated him to be credible. The problems clearly began when the two new white employees arrived in the shop and, as Complainant testified, everything changed.

Complainant asserted that he complained about Rowling's adverse treatment first to Pennucci, who responded if he didn't like it he could leave, and later to others in management. When he received no adequate response and noted no change in his treatment by Rowlings, Complainant filed a formal internal complaint of discrimination with the City's Human Resources Department. I conclude that Complainant satisfied his burden to establish a prima facie case of race discrimination.

Respondent has the burden at stage two to articulate a legitimate non-discriminatory reason for Complainant's treatment and to produce credible evidence that the reason advanced was the real reason. Wheelock College, supra, at 138. Respondent denies that Complainant was subjected to disparate treatment by Rowlings, claiming that his co-workers' skills were different

⁷ Since Rowlings no longer works for the City and did not testify at the hearing, certain of Complainant's allegations about their interactions are unrebutted.

from his and that each was assigned work appropriate to his skill level and experience. Respondent asserts that certain work was assigned to Pardo, because he was a more experienced technician and that Sullivan was less experienced mechanic than Complainant. Respondent also asserts there was no formal training programs for the computer work Complainant expressed an interest in learning and that the others were self-taught. Respondent introduced evidence that Complainant was spoken to about excessive cell phone use by Rowlings, resulting in a warning in March of 2013, and that the issue was brought to the attention of management. Respondent thus articulated legitimate non-discriminatory reasons for Rowlings' treatment of Complainant.

At stage three, Complainant must prove that Respondent's articulated reasons were a pretext for discrimination. Lipchitz, supra. at 504. I conclude that he has met this burden. The investigation conducted by Human Resources concluded that Complainant did not establish racial discrimination, but revealed that there were problems with Rowlings' management style which may have contributed to Complainant's perception that he was being targeted. However, it also noted that Rowlings singled out Complainant when discussing expectations in the Communications shop and his criticisms of Complainant were largely in stark contrast to other supervisor's opinions of Complainant's work and attitude. The report noted that Rowlings' criticism of Complainant included language that could be perceived as "racial stereotyping." The report also noted that Rowlings indicated he wanted Complainant out of the shop. Given Complainant's largely unblemished employment history with Central Fleet, the stated views of Alther and Pennucci to Human Resources that he was a good and competent employee, and that the difficulties did not arise until two new white employees arrived in the Communications shop, I conclude that Complainant was the victim of disparate treatment motivated by discriminatory intent. The disparate treatment he has alleged was discrimination in violation of G.L. c. 151B.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B. 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). Complainant asserts that after he filed his formal complaint with Human Resources, Respondent began to strictly monitor his activities and performance, looking for any reason, regardless of how inconsequential, to criticize his performance. He alleges he was unfairly scrutinized and received unwarranted warnings and a suspension and was rejected for promotion to the position of Senior Radio Technician on three occasions.

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth above. Complainant must first establish a prima facie case of retaliation by demonstrating that: (1) he engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected him 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, 442 Mass. 82 (2004). Protected activity may consist of internal complaints as well as formal charges of discrimination but regardless of the type of complaint, the charges must constitute a reasonable belief that unlawful discrimination has occurred. See Guazzaloca v. C. F. Motorfreight, 25 MDLR 200 (2003) *citing* Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526 (9th Cir. 1994); Kelley, supra.

Complainant engaged in protected activity when he voiced his informal complaints to Pennucci, Alther, and McGonagle, and when he filed a formal complaint of discrimination with the City's Human Resources Department in September 2013. Thereafter, he was subjected to a number of adverse employment actions and was denied a promotion. I conclude that he has established a prima facie case of unlawful retaliation.

Starting in October 2013, some one month after Complainant filed his formal complaint of race discrimination with the City, until he was transferred to the Heavy shop in February of 2014, a period of about 6 months, he received some seven or more notices from Pennucci regarding expectations, deficiencies or warnings about his performance. A number of these related to cell phone use on the job. His suspension for cell phone use in November of 2013 began with a co-worker reporting to Pennucci that he witnessed Complainant engage in unsafe conduct and Pennucci instructing the co-worker to take a photo. Some of the warning notices were copied to Human Resources. Complainant received a very negative performance review from Pennucci after only three months under Pennucci's supervision. He was transferred out of the Communications shop in February of 2014 shortly after filing his MCAD complaint. His tenure in the Heavy shop thereafter was without incident, he received a positive review the following year, and he enjoys working with his current supervisors.

Respondent asserted that the notices and warnings Complainant received were warranted because he abused the City's personal cell phone use policy, caused a potential safety issue, disappeared from the Communications shop for periods of time without notifying Pennucci that he was working elsewhere, and did not accurately record mileage and his time for certain assignments in the Communications shop. At first blush Respondent's articulated reasons appear to be a legitimate justification for the notices and warnings Complainant received. Pennucci and

Alther claimed the actions against Complainant were performance related and not tied to any motive to retaliate against him for his protected activity.

The final hurdle for Complainant is to disprove this assertion and to prove causation. Proximity in time from the employee's protected activity to the employer's adverse action can clearly be a factor in establishing an inference of a causal connection. Mole v. Univ. of Mass, supra, at 592. Complainant has demonstrated that Pennucci's conduct began very soon after Complainant filed his internal charges and Pennucci began overseeing the Communications shop. I conclude that Pennucci's persistent notices and warnings constituted retaliation for Complainant having lodged charges of discrimination. The timing of the seemingly constant monitoring and scrutiny of Complainant's activities is suspect. While some of Respondent's alleged infractions likely had a kernel of truth to them and Complainant may not have been a model employee in every instance, the evidence suggests that many of the cited infractions were largely exaggerated. Particularly, as regards one of the primary complaints of excessive cell phone use, there was credible testimony from Coughlin rebutting the assertion that Complainant was guilty of more numerous infractions than others. Coughlin, who had supervised Complainant for years, before, during, and after the events in question, testified quite credibly that Complainant was not on his personal cell phone any more or less than any other employee on the job. I found his testimony to be the most credible on this issue.

Complainant also received a number of notices about his being delinquent in recording mileage of vehicles he worked on and entering serial numbers of equipment. Complainant testified credibly this was not a duty that had ever been required of him as a mechanic. In other shops this was the job of the service writer and in the Communications shop, first Rowlings and then Pardo were responsible for this task. Respondent asserted this had always been a

responsibility of mechanics as a related duty, but the notice officially recognizing this duty was not issued until 2017. As regards Complainant's work in the Heavy shop he testified that he had rotated between the shops for some time and frequently did work there. This was not something new or different that Pennucci was unaware of. Ultimately, it fell to the foreman of the Heavy shop to inform Pennucci that he was utilizing Complainant.

It is clear from the evidence that Pennucci, possibly in consort with Human Resources, was deliberately building a record on Complainant and monitoring his activities more closely after he lodged his internal charges of discrimination. When asked why he was copying Human Resources on some of the notices, Pennucci testified that he was seeking guidance from HR because this was an ongoing issue. I do not credit this testimony. The fact that Complainant had not been subjected to complaints of this nature or frequency prior to his charges of discrimination, and that he received a very good review from Coughlin after transferring back to the Heavy shop is also evidence of pretext.

Finally as to the decision to promote Pardo and not Complainant to the position of Senior Radio Technician, Respondent has articulated legitimate reasons for choosing Pardo. The first two times Respondent posted the position they did not fill it, because they were not satisfied with the candidates' experience. On the third occasion Respondent decided to devise a brief test to examine the applicants' technical knowledge of electronics and Pardo scored the highest on the test. Although the interview questions were somewhat subjective and the scoring open to interpretation, Respondents have articulated that Pardo was the most qualified candidate who demonstrated significant initiative in training and advancement. He had a college degree in automotive sciences, had achieved 15 ASE certifications, as opposed to Complainant's 3 ASE's, and was a double master. His position was two grade levels higher than Complainant's. He also

had been performing a number of the duties of the Senior Radio Technician prior to being officially promoted to the position.

Complainant would argue that Pardo had a leg up and was being groomed for the Senior Radio Technician job because Rowlings mentored him and showed him things he refused to teach Complainant, and that this is evidence of pretext. He also argues that the surprise test administered for the third posting for the job is evidence of pretext, because the questions were taken from books that Pardo had used to study for his ASE's and had donated to the shop for other's use. Even though Complainant argues that his and Pardo's skills in electronics were relatively equivalent, given Pardo's background, qualifications, record of achievement, and experience with the Senior Tech duties, I find there is insufficient evidence of pretext to support a finding that Complainant was not chosen for retaliatory reasons. Therefore, I conclude that the failure to promote was not an unlawful action in violation of G.L. c. 151B.

IV. REMEDY

Upon a finding that Respondents have committed an unlawful act prohibited by the statute, the Commission is authorized to award damages to make the victim whole. See G.L. c. 151B §5. This includes damages for emotional distress. Stonehill College v. MCAD, 441 Mass 549 (2004). Having found that the failure to promote Complainant was not retaliatory, he is not entitled to a wage differential from a Grade 16 to a Grade 18.

However, having concluded that Complainant was subjected to disparate treatment that was discriminatory and retaliatory, including persistent notices, warnings, and a ultimately a suspension, he is entitled to damages for emotional distress and expungement of unwarranted disciplinary proceedings from his record from the time period of March 2013 to February 2014.

Awards for emotional distress “should be fair and reasonable, and proportionate to the distress suffered.” Stonehill, supra. at 576. Some of the factors to be considered are: “(1) the nature and character of the alleged harm; (2) the severity of the harm; (3) the length of time the Complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm...” Id. The Complainant “must show a sufficient causal connection between the respondent’s unlawful act and the complainant’s emotional distress.” Id.

I conclude that Rowlings’ and then Pennucci’s treatment of Complainant caused him to suffer considerable emotional distress, humiliation and embarrassment. Complainant offered compelling testimony that during the period of time from March of 2013 to February of 2014 he was never at ease at work and always felt tension. He felt strongly that he was being targeted and that the others wanted him out of the shop. He “always [had] to be walking on pins and needles on the job,” and “be cautious” about what he said, what he did, and how he did it. He felt he was constantly under attack. From, at the very least, the spring of 2013 until early 2014, he was always concerned about being reprimanded and found this very stressful. He experienced great discomfort with his co-workers in the Communications shop given the adverse treatment he was subjected to and felt betrayed by one of his co-workers who reported him to management. The tension and anxiety he experienced at work caused him great stress outside of work and he suffered sleepless nights and depression, which he noted in his complaint to Human Resources. After he filed his internal complaint, Pennucci’s persistent hounding of him for relatively minor infractions and the receipt of a very negative performance review made Complainant feel further persecuted. He refused to sign the performance review believing the criticisms to be unwarranted and felt that his “back was against the wall” and that he had no option but to file a complaint outside the City.

Once Complainant filed his MCAD complaint he was transferred to the Light shop but worked there only two days, and upon his request, was transferred again to the Heavy shop. He testified that he has not experienced any difficulties since the latter transfer and has enjoyed working with his supervisors in that shop. Given Complainant's credible testimony regarding the significant distress he suffered for a period of at least a year and that his distress was directly related to Respondent's unlawful conduct, I conclude that he is entitled to damages in the amount of \$50,000.00.

V. ORDER


Based on the forgoing Findings of Fact and Conclusions of Law, Respondent is hereby Ordered:

- 1) To cease and desist from any acts of discrimination based upon race and retaliation.
- 2) To expunge from Complainant's personnel records any notices or disciplinary actions from March 2013 to February 2014 resulting from the events at issue in this matter.
- 3) To pay to Complainant, Theophilus Drigo, the sum of \$50,000 in damages for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

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. Pursuant to § 5 of c. 151B, Complainant may file a Petition for attorney's fees.

So Ordered this 30th day of March, 2018.

A handwritten signature in cursive script, reading "Eugenia M. Guastaferrri".

Eugenia M. Guastaferrri
Hearing Officer