

THE COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

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M.C.A.D. & JOHN P. FOLEY, JR.,  
Complainants

v.

DOCKET NO. 09-BEM-02839

TOWN OF MILTON & BOARD OF  
SELECTMEN FOR THE  
TOWN OF MILTON, JOHN M. SHIELDS,  
Chair, MARION V. McETTRICK, Secretary  
and KATHRYN A. FAGAN,<sup>1</sup>  
Respondents

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Appearances:

John R. Hitt, Esq. for the Complainant  
Jeremy I. Silverfine, Esq. for the Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 22, 2009, John P. Foley filed a complaint charging Respondents with discrimination on the basis of age, in violation of M.G.L. c.151B ¶(4)(1C) for failing to hire him for the position of Milton fire chief. The Investigating Commissioner issued a probable cause finding. Attempts to conciliate the matter failed, and the case was certified for public hearing. A public hearing was held before me on April 9-11, 2013. 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.

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<sup>1</sup> The selectmen are Respondents only in their official capacity. They were dismissed from the case as individuals by the Investigating Commissioner.

## II. FINDINGS OF FACT

1. Complainant John Foley resides in Boston, MA. He was born in 1949 and was 60 years old at the time of the events at issue. Complainant has worked for the Town of Milton fire department since 1972, first as a firefighter, and then a Lieutenant. Since 1985 he has been a Deputy Chief. At the time of the events in question he had been a Deputy Chief for some 24 years. Complainant has an Associate's Degree in Fire Science from Massasoit Community College and a Bachelor's Degree in Fire Science Administration from Salem State College. He is also the long-time Director of the Milton Fire Department Auxiliary.

2. Firefighters, including chiefs, are required by Massachusetts law to retire at age 65, although municipalities can file a home-rule petition to extend a firefighter's employment beyond age 65, which must be approved by the state legislature.

3. The town of Milton has a three-member Board of Selectmen that is responsible for hiring the town's fire chief. In 2009, the selectmen were Chairman John M. Shields, Secretary Marion McEttrick and Kathryn Fagan.

4. Kevin Mearn was Town Administrator from 2007-2012. Prior to serving as town administrator, Mearn was the Milton police chief and a long-time member of the police force. (Tr. 3, p.5)

5. In 2008, then Fire Chief Malcolm Larson informed the Town of his intention to retire on June 30, 2009. (Tr. 2, p.6)

6. In anticipation of his retirement, Larson recommended that the selectmen create an "assessment center"<sup>2</sup> to interview qualified candidates to be his successor. Larson advised the selectmen that the assessment center model, which would consist of fire chiefs from surrounding areas, as well as citizens of Milton, was designed to ensure an objective hiring process. Larson

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<sup>2</sup> Also referred to as a "selection committee" or "blue ribbon panel."

proposed several well-respected fire chiefs who had experience with assessment centers.

Beyond recommending the assessment center to the selectmen, Larson had no further role in the selection process. (Tr. 2, p. 9-12)

7. The Board of Selectmen adopted Larson's recommendation and selected three fire chiefs, William Scobie of Westwood, Kenny Galligan of Brockton and Kevin Robinson of Marshfield; and two citizen volunteers, one from the town Personnel Board and another from the Warrant Committee, to serve on the assessment center. (Tr. 2, p. 114-115)

8. Chief William Scobie, who has participated in approximately 50 similar procedures, was made chair of the assessment center. (Tr. 2, p. 41- 43) He testified that the members met and determined that candidates for the Fire Chief position would be selected from within the Milton Fire Department and were required to have obtained the rank of Lieutenant for at least one year. There were six members of the Fire Department who met the criteria, including three Lieutenants and three Deputy Chiefs: Complainant, Brian Linehan and John Grant. The six candidates were invited to apply for the position. The assessment center was to select three finalists from among the candidates, whose names would be passed on to the selectmen for final determination. Kevin Mearn's role in the hiring process was to inform applicants of the process and to keep the Board of Selectmen informed about the process. (Tr. 3, pp. 5-21)

9. The qualifications for the Fire Chief's position included: an understanding of federal, state and local fire laws and building codes; a minimum of an Associate's Degree in Fire Science or equivalent; minimum rank of lieutenant in Milton for at least one year; basic understanding of the collective bargaining process, the Town's governing process and Massachusetts Civil Service Laws; demonstrated ability to deal with fire suppression, fire prevention, fire investigation and hazardous materials incidents; demonstrated leadership, planning, management, organization,

communication, and supervisory skills; demonstrated ability to interact positively with elected and appointed officials and the general public. Residency within the Town of Milton was strongly preferred but not required. (Ex. C-3)

10. In response to the invitation, in January 2009, Complainant submitted a letter of interest and his resume, as did the two other Deputies. At the time, Deputy Brian Linehan was 51 years old and Deputy John Grant was 49 years old. (Tr.1, p. 17-18)

11. Brian Linehan has been employed by the Milton Fire Department since 1983 and has been Deputy Fire Chief for 17 years. He has an Associate's Degree in fire science from Massasoit Community College and a Bachelor's Degree in Fire Science from Salem State College. At the time of his application, Linehan was working on a Master's Degree in Public Administration from Framingham State College and was taking courses in budgeting.

12. John Grant has been employed by the Milton Fire Department for 22 years and was a Deputy Chief for 14 months at the time of the events in question. He graduated from the Massachusetts Maritime Academy and was appointed to the Milton Fire Department in 1986. He held the positions of President and Vice President of the firefighters union until his appointment to Deputy Chief. (Ex. C-11)

13. On Tuesday, March 24, 2009, the selection committee interviewed the six candidates including Complainant, Brian Linehan and John Grant. Each candidate was asked the same questions and the interviews were equal in time. The panel asked one question about fire ground command, and 10 questions regarding areas of expertise, thought process and vision. Chief Scobie testified that each candidate had strengths and weaknesses. (Tr. 2, p.50-51) He praised all three candidates to the selectmen and did not recommend one candidate over the

others. (Tr. 2, p. 84) The interviews were broadcast on local cable and were video-recorded. (Ex. 1)

14. Each assessment center member scored the candidates individually. Only after scoring the candidates did the members discuss their reasoning with the others.<sup>3</sup> Each member, who was identified only by a number, gave his score sheet to Scobie, who added up the scores and calculated the average score for each candidate. (Tr.2, p.46-50; Ex. C-8)

15. The three highest scorers were selected as finalists. They were Linehan, with a score of 78.2; Grant with a score of 74.2 and Complainant with a score of 74.1. Scobie testified that all three finalists were qualified for the position of Chief and he did not recommend any one of the three finalists. Scobie emailed the raw scores to Kevin Mearn who provided them to the selectmen. (Tr.2, p.53-55)

16. On April 23, 2009, the three finalists were interviewed by the selectmen. Prior to the interviews, the selectmen watched the earlier recorded interviews of the three finalists conducted by the assessment center and saw their scores. (Tr. 2, p. 79-80). The interviews before the selectmen were scheduled from 6:00 p.m. to 9:00 p.m. The order of interviews was determined by lottery and Complainant was selected to be interviewed last. Complainant's interview did not begin until approximately 9:15 p.m. Each selectman prepared his or her own questions and each candidate was asked the same questions and was allowed an hour for the interview. (Ex. R-6) Also present at the interviews, but not participating, were Kevin Mearn, and Personnel Administrator Annemarie Fagan, who is not related to selectwoman Fagan. The interviews were broadcast on local cable television. (Tr. 2, p.80-82; Ex. R- 6)

17. Complainant testified that he was "not at his best" during the interview and had difficulty hearing some of the questions due to a then undiagnosed condition of tinnitus.

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<sup>3</sup> Any notes of that discussion as well as notes taken during the interviews were destroyed.

Notwithstanding this assertion, Complainant never asked the panel to repeat a question and acknowledged that he heard all of their questions. (Tr. 1, p. 27-29) The interview lasted for one hour. (Tr. 1, p. 32-33)

18. At the end of the interviews, the selectmen stated publicly that they were glad to have three very well qualified candidates. (Ex. R- 6)

19. The selectmen testified that the assessment center's scores were an important part of the selection process but were not the only consideration. The Board of Selectmen chose Brian Linehan for the chief's position. (Ex. R-7)

20. At the April 30, 2009, selectmen's meeting, McEttrick announced Linehan's selection and stated that any one of the three candidates would "perform with distinction as chief, which made it a difficult choice" and that the "differences among them were slight" (Uncontested Facts 8, 9) but that Linehan stood out as the preferred candidate because he was taking classes in budgeting and knowledge of how to prepare and implement a budget was an important part of the chief's job. Shields testified that the decision was very close, but Linehan and Grant stood out, and he chose Grant. (Uncontested Facts 10; Ex. R-7)

21. In early May, 2009, Linehan withdrew his name from consideration for the Chief's position when he and the Town could reach an agreement on his contract once Linehan determined that he would make more money as a Deputy Chief than as Chief. (Uncontested Facts 11)

22. On May 10 or 11, 2009, Complainant wrote to Mearn and the selectmen, expressing his continued interest in the position and reiterating his education, background and experience. (Ex. C-4; Uncontested Facts 11)

23. Chief Larson emailed the Board of Selectmen, praising Complainant and encouraging the board to re-interview Complainant and Grant before making a final decision. (Ex.C-5) The board did not conduct further interviews.

24. On May 14, 2009, at an open meeting, the selectmen voted unanimously to select Grant for the position of fire chief. (Tr. 1, p. 51; Ex. R-8) They made their decision based on the assessment center interviews and scores and their own interviews with the three finalists. After appointing Grant, Fagan stated, "Hopefully he'll be with us for a long time." She noted at the time that Grant was very interested in community outreach, exploring grants and fund-raising in general. She also testified that Grant appeared confident in public and she sensed he cared deeply about the Town. McEttrick stated at the time that Grant was full of ideas, very well spoken and eager. Although he had fewer years as Deputy than Complainant, he had many years of seniority with the fire department. Shields stated that Grant was most exuberant about renovating the fire houses. (Uncontested Fact 14; Ex. R-8)

25. Captain John Fleming of the Milton Fire Department Auxiliary, who has served under Complainant in that position since the 1980s, testified that during a conversation with selectwoman Fagan at a town event in either March or May of 2009, she told him that the Town did not want to go through the hiring process again in three or four years, so the selectmen were seeking someone for the long term, "maybe ten years." (Tr. 1, p. 154-56) I do not credit his testimony. Fagan did not recall making such a statement to Fleming and doubted that she would have made such a statement. (Tr. 2, p. 90-91) I credit her testimony.

26. Selectwoman Fagan testified that after Linehan withdrew from consideration, she selected Grant for Chief because his interview responses were more thorough and clearer than Complainant's. She testified that public speaking skills and the ability to provide clear responses

to questions from town officials and the public were important qualities in a fire chief. She viewed such skills as particularly important during town meeting where members regularly questioned the Town's budget decisions and other matters and the atmosphere sometimes became contentious. I credit her testimony. (Tr. 2, p. 83-87)

27. Fagan testified that she praised all the candidates in the public selectmen's meeting because it was important to emphasize the positive attributes of the candidates and out of the sincere belief that the Town was fortunate to have three great candidates. She testified that she admired Complainant and hoped that all the candidates would continue to work for the fire department. I credit her testimony. (Tr. 2, 87-88)

28. At the time of Grant's appointment, Fagan remarked that she hoped he would remain in the position for a long time. Fagan testified that she made the remark with a sense of relief that the extended hiring process was finally completed, and would have made the statement regardless of who was chosen. I credit her testimony. (Tr. 2, p. 89-90)

29. John Shields<sup>4</sup> was Chairman of the Board of Selectmen in 2009. (Tr. 2, p. 112-113) He stated that it was a "big leap" from Deputy to Chief and the selectmen wanted to choose the right candidate. (Tr.2, p. 130) Shields stated that given that Complainant and Grant had virtually identical qualifications, he determined that their interview skills became a significant factor in choosing the best candidate. (Tr. 2, p.123)

30. Shields stated that management, budgeting and public speaking ability were more important qualities in a chief than education and credentials in firefighting science because the chief had to work cooperatively with the Town Administrator, other department heads, the warrant committee and selectmen on budget and purchasing equipment. (Tr. 2, p. 125-127) Shields stated that Complainant was a "distant third" behind Linehan and Grant in his interview

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<sup>4</sup> Shields was unavailable at the time of the public hearing and portions of his deposition were read into the record.

with the assessment center and the selectmen. Complainant gave several one-word answers during the selectmen's interview and appeared to have given little thought to issues important to the fire department, such as renovation of the stations. (Tr. 2, p. 131,135-6)

31. Shields stated that he was aware that Linehan and Grant were younger than 54, Shields' age at the time of the interviews, because he had known their families growing up. Shields believed that Complainant was about the same age as he was. (Tr. 2, p. 132-133) Shields was unaware of the mandatory retirement age for fire chief and the stated the issue was not discussed by the selectmen. (Tr.2, p.136-137)

32. Selectwoman McEttrick testified that the interview was an important element of the selection process because it demonstrated to the selectmen how the candidates would perform in a setting where they would have to respond to questions. (Tr. 2, p.148-149) She testified that she was disappointed in Complainant's poor performance at his interview, while Linehan and Grant had performed well. (Tr. 2, 176) McEttrick noted that Complainant's answers to her questions were often so brief that she felt compelled to ask follow-up questions in order to elicit more complete responses from him. (Tr. 2, p. 146) McEttrick stated that she had no sense of Complainant's understanding of the chief's role in the budget process, or his strategy for going before the warrant committee, the selectmen or communicating with the general public. McEttrick was unaware of the candidates' ages at the time and testified that age played no role in the decision-making process. McEttrick was not aware of the mandatory retirement age of 65. (Tr. 2, p. 147-148,178) She praised all the candidates at the public selectmen's meeting because it was her policy to publically state positive things about all job candidates, even those who were not selected, because they would continue to serve the Town. (Tr. 2, p. 147) I credit her testimony.

### III. CONCLUSIONS OF LAW

M.G.L. c.151B§4(1C) prohibits the Commonwealth or any of its political subdivisions by itself or its agent, from discriminating against an employee on the basis of age. As a municipality, the Town of Milton is a political subdivision of the Commonwealth. The statute protects persons age forty and over. M.G.L. c. 151B, §1(8). Complainant alleges that Respondents discriminated against him the basis of age by not selecting him for promotion to the position of Fire Chief. In order to establish a prima facie case of age discrimination, Complainant must produce evidence that he is over the age of forty and, in the absence of other evidence of unlawful age discrimination, that the successful candidate was at least five years younger than he was. Knight v. Avon Products, Inc., 438 Mass. 413, 424-5 (2003). Complainant has established a prima facie case. He was 60 years of age at the time of his rejection for the fire chief's position, he was qualified for the position and a similarly situated individual, Deputy Chief Grant, who was 11 years younger than Complainant, was promoted to the Chief's position.<sup>5</sup>

Once Complainant had established a prima facie case of age discrimination, the burden of production shifts to Respondents to articulate legitimate, non-discriminatory reasons for their decision. Abramian v. President and Fellows of Harvard College, 432 Mass. 107 (2000) Respondents' articulated reason for selecting Grant over Complainant was that Grant demonstrated superior interviewing skills and that Complainant's interview skills were poor and his responses to interview questions were inadequate. There was testimony from the Selectmen who interviewed the candidates that, while Grant demonstrated exemplary public speaking skills

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<sup>5</sup> Complainant did not take issue with Respondents' first choice, Linehan, whom he perceived to be as qualified as Complainant for the position, despite their age difference.

and was “exuberant” in his responses, Complainant’s answers to the selectmen’s questions were short, sometimes one-word answers, and he failed to demonstrate an understanding of the Chief’s role as an advocate for the Fire Department before the Board of Selectman, various other town boards and in public meetings. Respondents did not consider Grant’s lack of education in fire science and his shorter time as a Deputy Chief to be as important to the position of chief as the ability to effectively communicate with the public and at town meetings. They viewed Complainant’s poor interview skills as an indication that he lacked the necessary communication skills and ability to effectively address and persuade the members of town meeting, the warrant committee and the general public in matters pertaining to department’s needs with respect to funding, resources and initiatives. I conclude that Respondents have met their burden to articulate legitimate, non-discriminatory reasons for not selecting Complainant for promotion to the position of Fire Chief.

If Respondent meets this burden, Complainant must prove by a preponderance of the evidence that these reasons are a pretext and that Respondents “acted with discriminatory intent, motive or state of mind.” Lipchitz v. Raytheon Company, 434 Mass. 493,501 (2001); see, Abramian, 432 Mass 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, supra. at p.501. Complainant retains the ultimate burden of proving that Respondents’ adverse action was the result of discriminatory animus. Id.; Abramian, 432 Mass at 117.

Complainant contends that public remarks by Selectmen that “all of the candidates were well qualified,” and that “any one of them would make a good chief,” are evidence of pretext. He argues that these remarks belie their stated reason for choosing Grant over him, i.e., that

Grant demonstrated superior interviewing and public speaking skills. Respondents credibly countered this allegation. The Selectmen justified their comments by stating they believed it was important to publicly praise all candidates for the position and they did so particularly when the unsuccessful candidates would continue to work for the town. I conclude that the public remarks of the selectmen stating that all the candidates were qualified are not evidence of pretext, but merely demonstrate the intent to be kind and considerate in a public forum by showing respect for those candidates who made the final cut.

As further evidence of age discrimination, Complainant has proffered statements by Selectwoman Fagan that she hoped Grant would be around for a long time, and by Selectman Shields that Grant was the “most exuberant” about renovating the town’s fire stations, a project needing attention within the next five to ten years, and one that requires the Chief’s leadership. Complainant contends that these statements evidence age animus because his tenure as Chief would have been cut short due to mandatory retirement at age 65, thus rendering him less able to address long-term projects. However, I am not convinced that the Selectmen’s statements evidence age animus. Fagan testified credibly that her statement referred only to her relief that the protracted hiring process was over. Shields testified that he believed the renovation of the fire stations was important and he was impressed that Grant addressed the issue and was enthusiastic about it. In addition, the Selectmen asserted that they did not know Complainant’s age, testified credibly that they were unaware of the mandatory retirement age and were unequivocal that the candidates’ age was not a factor in their decision-making process.

Complainant asserts that the selectmen initially cited fire-related education and experience as one of the criteria for selecting the new chief and in selecting Linehan as their first choice, noted that they positively considered his pursuit of a Master’s Degree. Complainant

contends that these statements conflict with Respondent's cited reasons. He argues the cited reasons are a pretext for age animus because he had more fire-related experience and more relevant education than Grant, facts the Selectmen duly failed to consider in choosing Grant over him. I note, however, that selectwoman Fagan praised Linehan, not for his general level of education, but for pursuing courses in budgeting, which the Selectmen viewed as an important skill for the chief to have. The job description for Chief that the Selectmen ultimately adopted included not only education and fire experience, but the ability to interact positively with elected and appointed officials as well as the general public. The Selectmen testified credibly that they felt the Chief's job required a set of skills that included public speaking and the ability to field questions from town meeting and other committee members as well as the general public, and that this skill had more relevance to the Chief's many administrative duties than fire-related educational credentials. Respondents have credibly established that they believed Complainant and Grant to be otherwise equally qualified for the position of Chief, and that their respective abilities to speak persuasively in public and address issues of significance to the department, was in essence, the tie-breaker. Videos of the finalists' interviews with the assessment center and the Selectmen were admitted into evidence. While not presuming to substitute my judgment for that of the Selectmen, my personal observations of the selectmen's interviews comport with the Selectmen's view of Complainant's performance as lackluster and I find their assessment of the Complainant's interview to be reasonable. Complainant gave much shorter answers, was less animated and overall exhibited less enthusiasm for the position than did Grant.

While the Selectmen's assessment of Complainant's interview performance was by nature subjective, "hiring decisions are necessarily subject to some degree of subjective impressions and absent evidence of unlawful bias, those impressions are entitled to some degree

of deference.” M.C.A.D. and Heath v. Massachusetts Parole Board, 35 MDLR 99,103 (2013). I am not persuaded that in this case the selectmen were motivated by unlawful considerations of age. The credible testimony suggests instead that their hiring decision was based on a sincere belief that while Grant and Complainant had very similar qualifications and scored a virtual tie by the assessment center, Grant performed better at the interview, possessed superior communication skills and demonstrated enthusiasm and vision for the fire department. Respondent deemed these qualities important to the Chief’s duties which required making public addresses and requests for resources and facing tough questions from the public and various town bodies.

Given the evidence before me, I am not persuaded that Respondent acted out of unlawful motives and conclude that Respondent’s non-selection of Complainant for promotion to Chief was not based on his age and did not violate M.G.L. c.151B ¶(4)(1C)

#### 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 20th day of February, 2014

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JUDITH E. KAPLAN  
Hearing Officer