Massachusetts Commission Against Discrimination

ANDREW HARRIS AND SPENCER TATUM, COMPLAINANTS
v.
CITY OF WORCESTER POLICE DEPARTMENT, RESPONDENT

Docket No. 94-SEM-0589
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ORDER OF THE FULL COMMISSION UPON REMAND FROM SUPERIOR COURT

This matter comes before us on remand from the Worcester Superior Court following a decision ordering the Commission to weigh and find the "determinative cause" of the City of Worcester's ("City") decision to forego the use of Massachusetts Personnel Administration Rule.10 ("PAR.10") to promote Andrew Harris and Spencer Tatum, two qualified minority candidates, to the position of sergeant in 1993, 1994 and 1995.[1] During this time frame, the City of Worcester promoted no minority officers to the position of sergeant while promoting thirty white officers. Minority officers comprised at least 10 percent of the Worcester Police Department's non-superior officer staff and the minority population of the City of Worcester exceeded 14 percent in each of those years.

Standard of Review

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law or whether the decision was arbitrary or capricious, an abuse of discretion, unsupported by substantial evidence or otherwise not in accordance with the law. See 804 CMR 1.23.

[1] Throughout this decision the term "minority" refers to black and Hispanic individuals unless the context conveys otherwise.

In assessing whether substantial evidence supports the Hearing decision, we look to the underlying evidence. Katz v. Massachusetts Com'n Against Discrimination, 365 Mass. 357, 365 (1974); M.G.L. c. 30A, § 14(7). Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion. Id. If, upon review, we determine that the cumulative weight of the record evidence tends substantially toward an opposite finding of fact or inference, we may reverse the hearing officer's decision. See Fitchburg Gas & Elec. Light Co. v. Department of Telecommunications & Energy, 440 Mass. 625, 632 (2004). See M.G.L. c. 151B, § 3; 804 CMR 1.23.

It is within the province of the fact-finder to make determinations regarding the truth and veracity of witnesses, the reliability of evidence and the weight afforded to such evidence. See Starks v. Director of Div. of Employment Sec., 391 Mass. 640, 643-644 (1984). Credibility determinations concerning witnesses, however, cannot render conjectural and speculative evidence, reliable and probative. See School Committee of Brockton v. Massachusetts Com'n Against Discrimination, 423 Mass. 7, 15 (1996). Moreover, when a decision is based on one or more legally erroneous factors, the Full Commission can reconsider the weight of the evidence for purposes of its substantial evidence review, Katz, 365 Mass. at 365, and take into account whatever other evidence in the record detracts from the evidence relied on by the hearing officer. Lycurgus v. Director of Division of Employment Security, 391 Mass. 623, 627-628 (1984).

As instructed by the Superior Court, we have reviewed the evidence from both public hearings held in this matter and further "weigh[ed]" the articulated "causes" for the City's decision not to invoke PAR.10 to promote Complainants Andrew Harris and Spencer Tatum, or any other qualified minority officer to sergeant based on the 1992 and 1994 civil service examination results, and "find" the "determinative cause" was impermissible racial

considerations. We conclude that Harris and Tatum have sustained their burden of proving disparate treatment, and that the City of Worcester engaged in a pattern and practice of discrimination where the interests of white officers were consistently favored over those of minority officers.[2]

Summary of Facts and Procedural History[3]

On September 15, 1994, Andrew Harris and Spencer Tatum filed almost identical complaints with the Commission claiming that the City of Worcester engaged in unlawful discrimination based on race and color in violation of G.L. c. 151B, § 4(1), when its appointing authority, the City Manager, failed to promote them to the position of sergeant after they took and passed the competitive civil service examination, both in 1992 and 1994, administered by the Department of Personnel Administration ("DPA")[4]. Following investigation, the Investigating

[2] In the first Hearing Decision, the Hearing Officer concluded that Harris and Tatum failed to prove their disparate impact claim. Both Harris and Tatum appealed to the Full Commission. Without "review of the Decision of the Hearing Officer for purposes of evaluating the sufficiency of the evidence in the record upon which the factual and legal conclusions were drawn," the Full Commission remanded the matter to the Hearing Officer to take additional evidence and to determine whether Harris and Tatum could prevail under a disparate treatment theory. Upon review of the Hearing Officer's decision following remand, the Full Commission did not address the original appeals presented by the parties of the Hearing Officer's original dismissal of the matter under the disparate impact theory. For reasons that are unclear, and arguably without proper jurisdiction, the Superior Court on judicial review under Chapter 30A, reviewed and affirmed the Hearing Officer's finding against Harris and Tatum on the disparate impact claim. As a result of this unusual procedural history, the Full Commission has been denied an opportunity to properly review the Hearing Officer's decision on the disparate impact claim. Given the opportunity, and based on the analysis contained *infra*, the Full Commission would be inclined to find that the Hearing Officer applied incorrect law in his analysis of the original decision.

[3] The "Findings of Fact, Conclusions of Law and Order of the Hearing Officer" issued April 26, 2002, and August 13, 2004, will be cited throughout as "Hearing I" and "Hearing II", respectively. Similarly, the "Decision of the Full Commission" issued August 4, 2003, and March 8, 2006, will be cited throughout as "Full Commission I" and "Full Commission II", respectively.

[4] The Department of Personnel Administration is now the Human Resources Division ("HRD").

Commissioner issued a probable cause determination in both cases. When conciliation failed, the Commission held the first of two public hearings on July 10, 2001. ("Hearing I"). At this hearing, Harris and Tatum presented their case under a disparate (or adverse) impact theory of discrimination, alleging that the City's exclusive use of the Civil Service examination rankings for promotion ("Promotion Policy" or "Policy") resulted in unjustified discriminatory impact on black and Hispanic officers as reflected in the absence of minority police officers serving in the rank of sergeant in the Department.[5] The Hearing Officer found in favor of the City and Harris and Tatum appealed to the Full Commission. The Full Commission remanded the case for a second hearing on the issue of whether the City acted with discriminatory animus or engaged in a

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[5] A disparate (or adverse) impact case is a challenge to an employment practice(s) that is neutral on its face but in practice falls more harshly on members of a particular group(s). To establish a prima facie case of disparate impact the plaintiff must demonstrate that a neutral policy detrimentally affects a protected group in a way that is disproportionate to their representation in the relevant population. Disparate impact can be determined by applying a statistical analysis like the Equal Employment Opportunity Commission's ("EEOC") four-fifths rule to a set of comparison figures to determine whether a public employer's employment practices have or have had a "racially disproportionate impact." Castro v. Beecher, 459 F.2d 725, 732-34 (1st Cir. 1972). See 29 CFR §1607.4(D). Proof of a violation of the four-fifths rule is "generally regarded" as "evidence of adverse impact", Massachusetts Association of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 258 (2001) citing Boston Police Superior Officers Fed'n v. Boston, 147 F.3d 13, 21 (1st Cir. 1998), and may "signify" that a test or other employment practice is discriminatory, Cotter v. Boston, 323 F.3d 160, 164 (1st Cir. 2003), and raises an inference that the employment practice or policy identified as the cause was (or is) discriminatory under Chapter 151B or Title VII. The burden of production and persuasion shifts to the party whose "use of a means of selection [is] shown to have a racially disproportionate impact" who "must . . . justify" the selection method by "demonstrate[ing] that [it] is in fact substantially related to job performance." Castro v. Beecher, 459 F.2d at 733-34 (emphasis added). See School Committee of Brockton v. Massachusetts Com'n Against Discrimination, 377 Mass. 392, 402 n,14 (1979) (noting that in an employment case involving disparate impact, the "touchstone" of the "business necessity" defense case is "whether the discriminatory employment practice is vital to safe and efficient job performance"). The Hearing Officer in Hearing I applied a considerably diluted standard in his determination that Harris and Tatum had not proved their claim under a disparate impact theory of liability.

pattern and practice of discrimination when it failed to apply for a PAR.10 alternative list in 1993, 1994 or 1995. Full Commission I.

The City of Worcester is a municipal corporation and subdivision of the Commonwealth of Massachusetts subject to the terms of the Civil Service Law, G.L. c. 31, et seq., when promoting candidates within the police department. Hearing I at 1, 2. During the relevant times of these complaints, any person employed as a police officer in a Massachusetts municipality, who had completed three years of service and desired to be promoted to the next rank of sergeant, was required to take and pass a competitive promotional examination written, administered and graded by the Commonwealth of Massachusetts Division of Human Resources ("HRD"). Id. at 2.

In compliance with Civil Service law, the City of Worcester required all candidates for promotion to take HRD's competitive promotional examination for sergeant. Hearing I at 2. The final civil service exam score is comprised of several components. Id. at 3. The main component, the written test, comprises 80% of a candidate's final score. Id. at 3. A candidate could also receive credit for training and experience of up to 20% of the final grade; and a candidate with over 25 years of service (or who was a qualified veteran) could have two additional points added to his or her final exam score. Id. HRD established the passing score at 70% for both the 1992 and 1994 examinations -- a score characterized as "typical" for a civil service promotional examination. Id. at 3. After taking the civil service test, HRD calculates a candidate's final score and places the names of all candidates who passed the examination on an "eligibility" list from the highest to lowest score. G.L. c. 31, § 25. A public employer seeking to fill civil service positions in its Agency or Department submits a requisition to the Personnel Administrator, who in turn certifies a number of officers from the "eligibility" list according to

formula. G.L. c. 31, § 27; Hearing I at 4. If an appointing authority decides not to pick the highest ranked candidate on the eligible list, (s)he is required to provide HRD with a written reason for the "bypass". G.L. c. 31, § 27; Hearing I at 4.

Andrew Harris joined the Worcester Police Department in 1980, graduating from the Police Academy in 1981. Hearing I at 2. Harris testified that in 1981, there were no minority officers in the superior ranks of the Department. Id. He further testified that he began taking the civil service examination in the mid-1980s and had taken the exam every year it was offered once he became eligible for promotion to sergeant after completing three years of service as an officer in the WPD, including in 1988, 1992 and 1994. Id. Spencer Tatum was hired in 1987, became eligible for promotion to sergeant in 1990, and took the 1992 and 1994 examinations. Id. Both Harris and Tatum passed the examinations held in 1992 and 1994, but were not ranked high enough to be selected for promotion in 1993, 1994 or 1995 under the City's Policy of promoting in strict rank order from the certified eligibility list.[6] Id. at 4-5. During the time that the 1992 and 1994 eligibility lists were in effect, the Worcester Police Department had no minority officers serving as sergeant and only one minority officer serving as a superior officer in the Department. Id. at 2. The City employed between sixty (60) and sixty-five (65) sergeants in this period. Id. at 2.

Based on the results of the 1992 and 1994 civil service examination, the City made a total of thirty (30) promotions based on three (3) requisitions, each time following its rank order Promotion Policy. Id. at 4. In 1993, the City promoted fourteen (14) white officers from the

[6] The Hearing Officer found, based on the sworn testimony of City officials and the submissions of the City's attorneys, that the City had a "policy of simply selecting the highest ranked candidates when making police department promotions without regard to any other consideration." Hearing I at 4.

1992 examination. Id. At that time, 10.2 percent (or 28 out of 274) non-superior officers in the Department were black or Latino. Id. In 1994, the City promoted an additional four (4) officers from the 1992 examination, again all white, for a total of eighteen promotions. Id. Following the 1994 examination, the City promoted twelve more officers, also all white, from the ranked eligibility list created by HRD in response to a requisition request by the City in 1995. Id. at 5. By 1996, the number of non-superior minority officers had increased to 11.3 percent of the force (or 43 out of a total of 381 non-superior officers). Id. at 2. According to the 1990 census the City of Worcester's minority population was 14.1% of the city's general population – 4.5 percent black and 9.6 percent Hispanic. Id. at 2. Based on this workforce data, the Hearing Officer found the City's rank order Promotion Policy had such a substantial adverse impact on the promotion opportunities of minority officers that the "need for a detailed statistical analysis" was "obviate[d]" and he found "pervasive evidence" of disparate impact discrimination in the Worcester Police Department.[7] Id. at 8, 9. He concluded however, that the City met its burden, demonstrating that the Policy was a "lawful business necessity" because it was required under the civil service law, specifically stating that the City "must comply with the statutory mandate of adhering to 'basic merit principles' when making appointments and promotions in order to assure the 'fair treatment of all applicants and employees in all aspects of personnel administration'" by ensuring against "political considerations, favoritism, and bias." Id. at 10.

[7] Specifically, the Hearing Officer stated that, "[b]ased on this evidence, I believe a gross disparity exists between the racial composition of the officers who were eligible for promotion to sergeant and the racial composition of the officers who actually worked as sergeants in the department." Hearing I at 8. And further, "[o]ne need not be a statistician to conclude that the relevant percentages from 1993 to 2000 - 0.00% of minority sergeants in the department, 10.2-12.4% minority members in the department, and 14.1% minority population in the City of Worcester - constitutes persuasive evidence by which I may reasonably infer a prima facie case of unlawful discrimination in the promotion of minority officers." Hearing I at 8.

He opined further that had Harris and Tatum or any other minority candidates been promoted ahead of the higher scoring non-minority candidates, the civil service law would have been violated and the City exposed to legal liability. Id at 10.

The Hearing Officer stated while it was true that in certain instances an appointing authority could "deviate" from basic merit principles and promote minorities candidates out of rank order to "rectify racial imbalance," it could only do so if a consent decree, affirmative action plan, or legal agreement was in place to justify the race-conscious decision-making, a situation not present here.[8] Hearing I at 10. Finally, the Hearing Officer concluded that Harris and Tatum failed to prove that a less restrictive alternative existed that the City could have used which did not have had the same adverse impact on minority officers,[9] and dismissed their complaints of discrimination based on disparate impact for failure to establish that the City's promotional policy violated M.G.L. c. 151B, § 4(1) or Title VII of the Civil Rights Act of 1964. Id. at 11. Harris and Tatum appealed to the Full Commission. See Full Commission I.

On appeal, and without "review of the Decision of the Hearing Officer for purposes of evaluating the sufficiency of the evidence in the record upon which the factual and legal conclusions were drawn," the Full Commission remanded the matter to the Hearing Officer for further consideration of whether the City acted with discriminatory animus or engaged in a pattern and practice of discrimination when it failed to apply for a PAR.10 alternative list in 1993, 1994 or 1995. Full Commission I at 1. The Full Commission instructed the Hearing

[8] The Hearing Officer stated that "[a]bsent the existence of a consent decree, the City's policy of not considering the race or color of the candidate when making promotions to sergeant is a necessary part of the City's obligations under the Civil Service Law." Hearing I at 11.

[9] Specifically, the Hearing Officer concluded that Harris and Tatum failed to introduce any evidence that the City would have qualified for an alternative list for promoting minority officers under PAR.10, an evidentiary lacuna was cured at the second hearing based on an erroneous interpretation of the relevant law. Id.

Officer to take evidence on a number of questions "central" to the discrimination analysis, including why the City of Worcester had failed to comply with the terms of the "Agreement" "Relative to Equal Opportunity and Affirmative Action" ("1988 EEO Agreement"), a three year binding contract between the Commission and the City of Worcester that required the City to engage in "positive, aggressive measures to ensure equal opportunity in the areas of . . . promotion" including amongst those "measures", the development of an affirmative action plan and use of PAR.10. Full Commission I at 2 (emphasis added). The Full Commission asked the Hearing Officer to address the question: "Is there sufficient evidence to establish that the City's failure (following the expiration of the Consent Decree in 1991) to create an affirmative action plan and apply for a PAR.10 special certification for its promotions in 1993, 1994 and 1995 amounts to discriminatory animus against the hiring and promotion of racial and ethnic minorities," and if so, were the Complainants in this matter "harmed by the City's conduct?" Id. at 3.

As directed, the Hearing Officer held a second Public Hearing on January 6, 2004, and took additional evidence on the history of the non-implementation of the 1988 Agreement, the reasons for the City's adherence to its policy of promoting in strict rank order from the eligibility list, and its concomitant failure to apply for a certified alternative list under PAR.10 during the relevant years. See Hearing II. Applying the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and followed by the Commission in disparate treatment cases where there is no direct evidence of discrimination, Bingham v. Lynn Sand & Stone Co., 25 MDLR 123, 129 (2003); Jones v. Glowacki, 23 MDLR 296, 297 (2001), the Hearing Officer once again concluded that Harris and Tatum had established a prima facie case of disparate treatment and that the City met its burden of articulating a legitimate non-

discriminatory reason for its failure to promote Harris and Tatum. Hearing II at 9. The Hearing Officer found that the same rationale offered as the City's "business justification" in Hearing I on the disparate impact claim also established a "legitimate non-discriminatory reason" for the City's actions under the disparate treatment analysis -- i.e. that the City had no choice but to adhere to its strict rank order Promotion Policy, and failure to do so would have violated the civil service law and invite legal action as a result. Id.[10]

The Hearing Officer also observed, however, that appointing authorities have "deviated from basic merit principles to promote minorities to rectify racial imbalance" when a consent decree, affirmative action plan or some other enforceable agreement was in existence that would justify racial considerations when making promotions.[11] Id.at 9. He recognized further that PAR.10 specifically authorizes "Special Certifications in the Civil Service" and that an appointing authority may further its affirmative action goal to appoint members of protected groups through this process. Id. Moreover, he determined that the City could have "pursued" a PAR.10 certification list with HRD which would "likely" have been granted.[12] Hearing II at 11. Applying the formula used by HRD, the Hearing Officer concluded that the City would "likely"

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[10] Specifically, the Hearing Officer stated that the City "strictly adhered to the practice of promoting candidates by order of rank on the civil service eligibility list in order to comply with fundamental goal of the civil service process, which is to ensure the exclusion of political considerations, favoritism, and bias in the promotional process." Hearing II at 9. The City articulated that if it had promoted Complainants or any other minority candidates ahead of the higher scoring non-minority candidates, without the existence of a consent decree, affirmative action plan or binding agreement, then the City would have violated civil service laws and faced possible legal action. Id.

[11] The Hearing Officer cited Massachusetts Association of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001) ("MAMLEO"). See discussion *infra*.

[12] The City stipulated that it never submitted an affirmative action plan to HRD, never applied for a PAR.10 certification nor did it seek to use PAR.10 to make any promotions in the Police Department. Hearing II at 2.

have been authorized to promote at least six black officers who passed the sergeant's examination from the PAR.10 alternative certification list,[13] and Tatum and Harris would likely have been among the eighteen (18) officers in 1993 and 1994 or the twelve (12) officers in 1995 promoted to sergeant. Id. at 7-8.[14] Nonetheless, the Hearing Officer concluded that the City met its evidentiary burden of articulating a legitimate non-discriminatory reason for its actions by crediting testimony from City officials that the City had a good faith belief that PAR.10 could not be used for promotions and had received "inconsistent and conflicting information from HRD" in this regard. Id. at 9. The Hearing Officer also credited the City's concern that the union would oppose its use of PAR.10 and file a lawsuit challenging any promotions made under a PAR.10 certification. Id. at 11. Finally, the Hearing Officer credited the City's testimony indicating that it was concerned that using PAR 10 to make promotions would negatively affect the morale of bypassed white officers as a non-discriminatory reason for its actions that was credited by the Hearing Officer. Id. at 4.

In response, Harris and Tatum argued that the City's reasons were false and a pretext for discrimination, relying on, among other indicia of discriminatory motive, the fact that when the City was contractually required under an Agreement between the City and the Commission to

[13] Sally McNeely, the Director of the Organizational Development Group for HRD, submitted an affidavit describing the formula used by the administrator to determine whether a City would qualify for a PAR.10 promotional list. The formula compares the number of minority sergeants to the number of tenured (three or more years on the job) police officers to the number of minority individuals employed in the protective services EEO category in Worcester's Standard Metropolitan Statistical Area ("SMSA"). According to McNeely, if the formula produces a ratio that is less than .800 (using the four-fifths rule of thumb guideline set forth in the EEOC's Uniform Guidelines on Employee Selection Procedures), HRD "will allow a municipality to make a sufficient number of minority promotions from an alternative list to achieve a ratio that meets the .800 guideline."

[14] In addition to Tatum and Harris, one other minority officer who passed the 1992 examination and three other minority officers who passed the 1994 exam would likely have been promoted as well. Hearing II at *7.

use PAR.10 to promote minority officers it failed to do so. Id. at 10. The Hearing Officer found that the City was "clearly obligated" under the 1988 EEO Agreement to use PAR.10 to promote officers and that it breached the Agreement by its failure to do so. Id. In addition, he found that the City promoted ten (10) white officers in the three years the Agreement was in effect. Id. He "decline[d] to give this evidence significant weight" concluding that the breach was not "indicative of the City's discriminatory animus" when other factors were considered that showed the City's good faith equal employment opportunity efforts.[15] Id.

Harris and Tatum once again appealed the Hearing Officer's decision to the Full Commission. For reasons that are unclear, the Full Commission did not consider the issue of disparate impact reserved by the Full Commission, in Full Commission I, pending the remand to the Hearing Officer. Instead the Full Commission focused exclusively on the issue of disparate treatment. After thoughtful and spirited deliberation, there was a split amongst the Commissioners.[16] See Full Commission II. One Commissioner concluded that there was sufficient evidence in the record to support the Hearing Officer's decision. Full Commission II at 4. The other Commissioner found little support in the hearing record for crediting the City's "good faith" belief that a PAR.10 alternative list would have been turned down by the Administrator, especially in light of the "extreme circumstances" of the case. Id. She also concluded that the third articulated reason for the City's failure to end its strict rank order

[15]The Hearing Officer further concluded that neither of the parties had submitted any credible evidence that minority officers had taken and passed the relevant promotional examination during the terms of the Agreement and would have been eligible for placement on a PAR 10 certification list had the City complied with the Agreement or that such a promotional appointment would have increased Harris and Tatum's chances for promotion from the 1992 and 1994 lists. Hearing II at 2, 6-7.

[16] At the time the Full Commission decision was issued, there were only two Commissioners appointed to the Commission.

promotion policy, namely, its concern that use of PAR.10 would have affected the morale of white officers, itself, constituted direct evidence of discriminatory bias which warranted a decision in favor of Harris and Tatum. Id. [17] Because the Full Commission was unable to reach consensus on whether to affirm or reverse the decision, Hearing II became the Commission's final decision for purposes of G.L. c. 151B, § 6 and G.L. c. 30A, § 14.[18] Id. at 4. Harris and Tatum sought judicial review in accordance with G.L. c. 30A, appealing the Commission's decision dismissing the disparate treatment claim and ostensibly the dismissal of the adverse impact claim.[19] See Tatum and Harris v. City of Worcester and Mass. Com'n Against Discrimination, Civil No. 06-00739-A (Suffolk Super. Ct.).

The Superior Court, by Memorandum of Decision and Order on the Parties' Motions for Judgment on the Pleadings, affirmed the Commission's finding against Harris and Tatum on the adverse impact claim and rejected their arguments that (1) the Commission had applied the wrong law to their disparate impact discrimination claim and (2) had the correct standard been applied, the City would have failed to meet its burden of proving that the promotion examinations were "job-related." Tatum and Harris v. City of Worcester and Mass. Com'n Against Discrimination, Civil No. 06-00739-A (Suffolk Super. Ct., March 15, 2007)(Fecteau, J.)

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[17] We believe that the last two articulated reasons are evidence of the City's greater concern with the effects of its decisions on white officers than minority officers and are evidence of impermissible racial considerations.

[18] The Full Commission, however, was sufficiently concerned about the City's record of promoting minorities that it "strongly urge[d]" it to "exercise its PAR. 10 option to determine if the promotion of minority officers, including [Harris and Tatum], [was] appropriate at this time". Full Commission II at 4. Furthermore, after noting the City's "problematic record" in promoting minorities over a significant period of time, the Full Commission authorized the Investigating Commissioner for the region to initiate a Commission complaint, at her discretion, to investigate the current promotional practices of Respondent. Id.

[19] See FN 2 *supra*.

Harris and Tatum also argued on judicial review that the Hearing Officer erred in finding that the City articulated a legitimate non-discriminatory reason for not applying for a PAR.10 alternative certification and that they should have prevailed on their disparate treatment theory of liability. Memorandum at 4. The Superior Court concluded that because the Hearing record contained "at least some evidence" that the City's failure to use PAR.10 may have been the product of impermissible racial animus[20] and that one of the Commissioner's had concluded that Harris and Tatum had proven their claim, that the evidence warranted further examination as to the "legitimacy" of the City's articulated reasons. Id. at 8. The Superior Court judge remanded the case with an order directing the Full Commission to "weigh the causes" and to find the "determinative cause" of the City's decision "to forgo use or application for usage of the PAR.10 protocol," which we do today. Id. at 8.

Analysis

We have examined the record evidence as directed by the Superior Court on remand to determine the "legitimacy" of the City's articulated reasons for adhering to its strict rank order Promotion Policy and conclude that the "determinative" cause of the City's decision to "forgo use or application for usage of the PAR.10 protocol" in 1993, 1994 or 1995 to promote Harris and Tatum was impermissible racial bias. As directed by the Superior Court, in coming to this decision, we have "further examine[d] the City's justification for its actions," made "further findings" regarding the "legitimacy" of the City's articulated reasons, and determined the weight to "afford[] the reasons expressed by the City."

[20] Specifically, the Superior Court pointed to the City's articulated concern about "reverse discrimination" suits, the "morale" of white officers and the City's failure to use PAR.10 "even when it was under contract to do so, and knew that . . . [it] would likely result in the promotion of minority officers." Id. at 7.

In evaluating Harris and Tatum's disparate treatment claim, the Hearing Officer applied the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973)which has been followed by the Commission in disparate treatment cases where there is no direct evidence of discrimination. Lipchitz v. Raytheon Co., 434 Mass. 493, 503 (2001); Bingham v. Lynn Sand & Stone Co., 25 MDLR 123, 129 (2003); Jones v. Glowacki, 23 MDLR 296, 297 (2001). Under this standard, once a complainant has established a prima facie case of disparate treatment,[21] the burden shifts to the employer to articulate a legitimate non-discriminatory reason for its failure to promote the complainant and "produce not only evidence of the reason for its action, but also underlying facts in support of that reason." Abramian, 432 Mass. at 116-117; Wheelock College, 371 Mass. at 136. The employer must also "produce credible evidence that the reason or reasons advanced were the real reasons." Wheelock College, 371 Mass. at 138. If the employer meets its burden of production, the burden shifts back to the complainant to show by a preponderance of the evidence that the employer's decision was the product of discrimination. Abramian, 432 Mass. at 116-118. Because proof of unlawful discrimination can rarely be established by direct evidence, Complainants may prove that an employer's discriminatory animus was the determinative cause by establishing that one or more of its stated non-discriminatory reasons were false, or not the real reasons for its action. Lipchitz, 434 Mass. at 499, 504-505; see, Abramian, 432 Mass. at 118 (finding by jury that at least one of the reasons advanced by defendant was false, in addition to proof of prima facie case, sufficient to permit inference that real reason for defendant's action was discrimination).

[21] In order to prove a prima facie case, Complainants must show that (1) they are members of a protected class; (2) they were qualified to perform the duties of the job at issue; (3) they were subjected to an adverse employment action; and (4) they were treated differently from other similarly situated persons not of their protected class. Lipchitz, 434 Mass. at 503; Abramian, 432 Mass. at 104; Bingham, 25 MDLR at 129; Jones, 23 MDLR at 297.

The complainant, however, retains the ultimate burden of proving that an adverse employment decision was the result of discriminatory animus. Lipchitz, 434 Mass at 504; Abramian, 432 Mass at 117.

We conclude that the City has failed to produce insufficient evidence of the reason for its failure to apply for and use PAR.10, a long-standing affirmative action tool under the civil service law, to promote Harris and Tatum, two qualified minority officers, during a three year period when over half of all sergeant positions - thirty in total - were vacant and filled in strict rank order exclusively by white officers. The City failed to present evidence from the appointing authority, the legally designated person for making the promotions at issue, about the City's reasons for refusing to invoke PAR.10.[22] Mass. Personnel Admin. R. 10; G.L. c. 31, § 27. Instead the Hearing Officer relied on vague and imprecise hearsay evidence from two City employees to conclude that the reason the City eschewed PAR.10 was because it believed the alternative certification was not available for affirmative action promotions – a position directly at odds with the purpose of the rule. We conclude that the reasons advanced by the City were not credible reasons for its conduct, but a pretext for discrimination.

The Hearing Officer first credited as a legitimate non-discriminatory reason(s) for the City's failure to use the PAR.10 process to promote Harris and Tatum, its claim that the Promotion Policy was required by the civil service law and it's underlying "basic merit principles." G.L. c. 31, § 1 et. seq. The Hearing Officer concluded that the City was required to adhere to its Promotion Policy "in order to comply with [the] fundamental goal of the civil service process, which is to ensure the exclusion of political considerations, favoritism and bias

[22] The Appointing Authority prior to January 1994 was City Manager William Mulford and after that date, City Manager Thomas Hoover.

in the promotional process".[23] Hearing I at 19. He also credited the City's related concern that if it promoted Harris and Tatum or any other minority officer ahead of higher scoring non-minority officers without the existence of a consent decree or binding agreement justifying race-conscious decision-making, the City would have violated civil service laws and faced possible legal action.[24] The Hearing Officer went on to recognize that "appointing authorities have deviated

[23] "[B]asic merit principles" under the civil service law operate to prevent political favoritism and bias by emphasizing "merit," as the Hearing Officer found. Hearing I at 10. However, "basic merit principles" serve the additional purpose of "assur[ing] fair treatment . . . in all aspects of personnel administration without regard to the…, race, color . . . national origin …" of "all applicants and employees." G.L. c. 31, § 1. This part of the definition reflects a policy of equal employment opportunity. The statutory bypass and PAR.10 procedures are tools under the civil service law that can be used to implement the policy when a public employer's employment practices result in unequal job opportunities for members of a protected class (or classes),. It is important to note that the Commission has a vested interest in ensuring that this aspect of the civil service laws' "basic merit principles" is properly enforced. The Commission has been given broad responsibility by the Legislature to investigate, conciliate, adjudicate and enforce Chapter 151B which includes the right to equal treatment in employment by state and municipal actors. See Charland v. Muzi Motors, Inc., 417 Mass. at 582, 585 (1994) ("`the clear purpose of G.L. c. 151B is to implement the right to equal treatment guaranteed all citizens by the constitutions of the United States and the Commonwealth'"). The Supreme Judicial Court has recognized that Chapter 151B sets forth an "overriding governmental policy proscribing various types of discrimination". Massachusetts Bay Transp. Auth. v. Boston Carmen's Union, Local 589, 454 Mass. 19, 26, 29, (2009). We believe that "basic merit principles" is consistent with this policy.

[24] The Hearing Officer Court cited Massachusetts Association of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001) ("MAMLEO") for this proposition. In MAMLEO, non-minority officers filed an appeal to the Civil Service Commission ("CSC") against the City of Boston after the Boston Police Departments' ("BPD") appointing authority promoted minority officers to the superior officer rank in order to achieve affirmative action goals by bypassing the nonminority candidates with higher civil service examination scores. The Supreme Judicial Court affirmed the CSC's conclusion that the City's appointing authority had improperly exercised the bypass option because it could not sustain its burden of proving a "reasonable justification" for the bypasses within the narrow standard of review applicable to such appeals. Id. The Court stated, however, that even in the absence of a consent decree, the civil service law allows consideration of race in promotion decisions under PAR.10, a process that requires an appointing authority to file an affirmative action plan with the Personnel Administrator. Id. at 264, 261 n. 12. The Court also noted that the provisions of the civil service law do not preclude an aggrieved individual from bringing a discrimination action under state or federal anti-discrimination law.

from basic merit principles to promote minorities to rectify racial imbalance" but concluded that the City had articulated another legitimate non-discriminatory reasons for not using PAR.10, namely, that it had "received conflicting and contradictory information" from HRD as to whether the City could have used the PAR.10 process for promotions. He also credited testimony that the City considered the police officers union's opposition to the use of PAR 10 and possible legal challenge.

Neither of the City's legal arguments are correct statements of the law. There is "no prohibition on … out-of-rank decisions" and "no valid policies [are] disturbed" by promoting out-of-rank order under the civil service law. Brackett et.al. v. Civil Service Com'n et.al., 447 Mass. 233, 244-45, 253, 255 (2006) (emphasis added), quoting Cotter v. Boston, 323 F.3d 160, 170, 171-172 (1st Cir. 2003). In fact, the civil service law itself provides alternative methods for selecting persons for promotions through the statutory bypass process[25] and under duly promulgated Rule PAR.10. See MAMLEO, 434 Mass. at 261 n. 12. The City is incorrect in its contention that it could not promote Harris and Tatum over higher scoring white candidates without a pre-existing consent decree or settlement agreement showing past discrimination in the promotion ranks to justify race-conscious decision-making. See Stuart v. Roache, 951 F.2d 446, 450 (1st Cir.1991) (a government entity can take remedial steps and make race-conscious

[25] Section 27, the relevant provision of Chapter 31, requires that the Administrator "certify" names on the eligibility list to an appointing authority in descending order from the highest scorer but does not set forth a mandate requiring an appointing authority to make hiring selections or promotions in that manner. G.L. c. 31, § 27. Instead, the statute provides that an appointing authority "may appoint from among such candidates" on the certification list so long as (s)he "immediately" files with the administrator a written statement of his or her "reasons for appointing the person whose name was not highest." Id. This bypass statement becomes valid when received by the Administrator and can be appealed by the person who is bypassed to the civil service commission. Id. The City bypassed white officers to promote a lower scoring qualified black officer to sergeant in the early 1980s, which we discuss later in this decision.

promotions where there has been a contemporaneous or antecedent finding of past discrimination by a court or other competent body or evidence approaching a prima facie case of a constitutional or statutory violation). The State Human Resources Division through its predecessor, the DPA, long specifically enacted rule PAR.10 for public employers to invoke in the civil service context to remedy past and present discrimination arising from disparate impact due to discriminatory employment practices. The procedure requires the Personnel Administrator to make a finding of past discrimination before race and sex-based conscious decision-making is authorized, thereby obviating the argument that a prior finding of discrimination as evidenced by a pre-existing consent decree or settlement agreement is required. We will first discuss the Hearing Officer's legal conclusions and the PAR.10 process before turning to the City's other reasons for adhering to its Promotion Policy and foregoing PAR.10, including the claim that HRD staff provided "conflicting and contradictory information" to the City's staff on whether PAR.10 was available for promotions.

PAR.10

The City Manager in this case promoted officers from the "eligible" lists compiled by HRD after the civil service examinations in 1992 and 1994. These lists contained the names of all candidates who passed the examination from highest to lowest score. G.L. c. 31, § 25. When the City sought to fill a specified number of vacant sergeant positions in 1993, 1994 and 1995, it submitted requisitions to the Personnel Administrator who in turn "certified" a number of officers from the "eligible" list for each examination under the formula 2(N) + 1.[26] G.L. c. 31, §

[26] The actual number of candidates submitted in response to a requisition to fill positions from an appointing authority is determined by the "2n +1" formula. For example, if an appointing authority seeks to promote five persons, it may consider the top eleven candidates on the eligibility list for promotion. This number is determined by multiplying the number 5 by 2 and adding 1 i.e. (2(5) + 1 = 11. Hearing I at 4. If individuals share the same score, the number of

27. The City then promoted according to its Policy in rank order from the "certified eligible" list with the result that thirty white officers and no minority officers were promoted in those three years.[27] At all relevant times, the City could have applied for a "certification" of qualified minority candidates under PAR.10, a rule that was specifically enacted as an alternative to selection procedures such as the one used by the City and that have resulted in substantial disparate impact and under-representation of member(s) of protected class(es) when applied at the promotion level. See e.g. Brackett, 447 Mass. at 256-57 (PAR.10 certification properly sought by public employer and granted by HRD where strict rank order promotions would have resulted in disparate impact on female and minority MBTA officers seeking promotion to sergeant and lieutenant positions).

The predecessor to PAR.10 was adopted in 1972 "as a result of growing evidence that the Commonwealth's policies and procedures, as formulated, implemented, and practiced in the past, may have included discriminatory employment practices that were illegal under State and Federal law." See Hearing Exhibit 1: Department of Personnel Administration Memorandum to

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candidates on the eligibility list will exceed the formula. This formula was derived from G.L. c. 31, § 25 which directs the administrator to "certif[y] from an eligible list the names of three persons who are qualified for and willing to accept appointment."

[27] The Hearing Officer found that the City "strictly adhered to the practice of promoting candidates by order of rank on the civil service eligibility list in order to comply with fundamental goal of the civil service process, which is to ensure the exclusion of political considerations, favoritism, and bias in the promotional process." Hearing II at 7 (citing Hearing Decision I). The City's Appointing Authority, however, bypassed a female candidate who had taken the September 1992 civil service examination. She was at the top of the list for promotion to sergeant when the Appointing Authority filled four vacant positions with lower scoring candidates. Hearing Decision I at 8 n. 5. Also, in the mid-1980s, the City promoted a black officer to sergeant and bypassed higher scoring white candidates. See City of Worcester v. Local 378, Intern'l Brotherhood of Police Officers, et al, 2007 WL 1977725, *4 ("Worcester v. Local 373").

Municipal Appointing Authorities dated October 9, 1984 re: Implementation of Personnel Administration Rule .10(1) and Rule .09(4), IS-006 ("PAR.10 Implementation Standard"). Originally adopted as Rule 14, the Rule was reissued as Rule 10 on July 9, 1984, along with a Memorandum and Implementation Standard on PAR.10 and the Rule itself. Id. The Personnel Administrator in the "PURPOSE" section of the Memorandum advised municipal appointing authorities that PAR.10 was explicitly intended to be used for affirmative action: "[t]his alternative certification rule was designed to provide an affirmative action tool for appointing authorities to appoint members of protected groups from Civil Service eligible lists" and applied to "any" Civil Service Classification in a municipality (except for entry level positions subject to Federal Court Decrees in Castro v. Beecher or NAACP v. Beecher).[28] Id. (Emphasis added). PAR.10 was created as a tool that an appointing authority could proactively invoke when the public employer's selection procedures or employment practices resulted in actionable disparate impact and if allowed, authorized remedial decision-making based on race, sex and/or other protected class distinctions. Id.

The process for PAR.10, from application to the Administrator's determination, is set out for municipal appointing authorities in a detailed Implementations Standard (IS-006) and the PAR.10 rule itself. Under IS-006, appointing authorities are instructed that PAR.10 can be used in "instances of substantiated underutilization of protected groups, minority or female," and that

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[28] The Hearing Officer found that the City of Worcester is a municipal corporation and subdivision of the Commonwealth of Massachusetts subject to the terms of the Civil Service Law, G.L. c. 31, et seq., when promoting candidates within the police department. Hearing I at *1-2. A "[c]ivil service appointment" is "an original appointment or a promotional appointment made pursuant to the provisions of the civil service law and rules." A "[c]ivil service employee" is a person holding a civil service appointment." A "[c] ivil service position" is an office or position, appointment to which is subject to the requirements of the civil service law and rules." See G.L. c. 31, § 1.

the administrator determines evidence of underutilization through a statistical analysis of the municipality's civil workforce.[29] Id. The appointing authority must submit municipal workforce data that is confirmed by the Personnel Administrator and used for a statistical analysis of need.[30] Id. If the administrator makes a written determination "substantiating" that "previous practices" of a department and/or appointing authority with respect to filling positions have discriminated against members of a protected group on the basis of race, color, sex, or national origin in violation of the law, the administrator certifies names from the protected class who have passed the test (are on the eligible list) in order of test score, as an "alternative certification." [31] PAR.10(b). At the relevant time, the appointing authority must also submit an

[29] In making this finding the Personnel Administrator applies a statistical formula to determine if a disparity ratio is produced for members of a particular group, using the four-fifths rule of thumb guideline set forth in the Equal Employment Opportunity Commission's Uniform Guidelines on Employee Selection Procedures ("EEOC Guidelines"), 29 CFR § 1607.4(D). The four-fifths benchmark raises an inference of discrimination and triggers an appointing authority's obligation under federal law to prove that a test is valid for its purposes and to consider using other alternative selection procedures that would not have the same discriminatory impact. Id. It also puts the employer on notice of possible liability under Title VII and Chapter 151B. See Boston Police Superior Officers Federation, 147 F.3d at 21, quoting Local 28, Sheet Metal Workers' Int'l Association v. EEOC, 478 U.S. 421, 478 (1986) (plurality opinion) (four-fifths benchmark is a gauge for employer's efforts to remedy effects of past discrimination).

[30] The "statistical technique" for "examine[ing] … numerical evidence of past discrimination in the personnel system." is set forth in IS-006 under "Evaluation of Numerical Evidence of Need." Hearing Exhibit 1. The numerical determinations are "based on the composition of a relevant and logically coherent segment of the Civil Service workforce, in comparison with the composition of the workforce with similar job skills in the recruitment area i.e. the standard metropolitan statistical area in which the municipality is a member." Id. The appointing authorities were advised that "these evaluations would detect any sizable and statistically significant deviations from reasonable expectations of the composition of the Civil Service workforce." Id.

[31] PAR.10(b) provides that the administrator must make a written determination "substantiating that previous practices of the department and/or of said appointing authority with respect to the filling of [] position or positions have discriminated against members of a [protected] group on the basis of race, color, sex, or national origin in contravention of any provision" of state or Federal constitutions or state or federal antidiscrimination laws. If the written determination is made, the "administrator may then certify, in addition to names certified in accordance with

affirmative action plan "relating to numerical goals for hiring and promotions" that has been approved by the MCAD. Id. If approved, the PAR.10 alternative certification can be "implemented [by an appointing authority] to provide increased opportunities to members of protected groups to be reached on the Civil Service eligibility list." Id. The PAR.10 process is voluntary – it was enacted in response to court enforced remedies following civil actions filed by minority police officers and fire fighters as a way for an appointing authority to address discrimination before litigation. There is no mechanism, however, by which the Administrator can compel an appointing authority to apply for and use the procedure; rather, an appointing authority must take the initiative of applying for an "alternative" certification under PAR.10.[32]

The Hearing Officer found that the City could have applied for PAR.10 and that if it had, the Administrator would "likely" have allowed the alternative certification under the HRD's statistical formula in 1993, 1994 or 1995, and Harris and Tatum would "likely" have been promoted in any of those years. The Hearing Officer, however, credited testimony from Janice Silverman and Lawrence Raymond and concluded instead that City officials were led astray by "inconsistent and conflicting information" they received from HRD on whether the City could use PAR.10 for promotions (despite HRD's official position in IS-006 and Rule PAR.10 itself which makes no such distinction). The Hearing Officer also credited the City's concern that the police union would oppose the use of PAR.10 and possibly file a lawsuit under the civil service laws. Finally, he credited but did not give weight to the City's argument that white officer's

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PAR.09 [the eligibility list], the names of a like number of individuals who are members of the protected group and are on an eligible list for such position in order of their standing."

[32] The City argues that there was no requirement that it apply for and use the PAR.10 process in 1993, 1994 or 1995. While this may be so, the City is not insulated from liability for discrimination under state or federal anti-discrimination law.

morale would suffer if lower scoring qualified minority officers were promoted ahead of higher scoring white officers.

"Inconsistent and Conflicting Information"

Two City employees, Human Resources Director Janice Silverman and Assistant Human Resources Director and Affirmative Action Officer Lawrence Raymond, testified on behalf of the City. Both acknowledged the under-representation of minority officers in the supervisory ranks of the WPD and professed their desire to address the problem.[33] The Hearing Officer found, based on their testimony, that the City "received inconsistent and conflicting information from HRD as to whether the City could have used" the PAR.10 process and that this was the reason for the City's forbearance from applying for and using PAR.10. We conclude that Silverman and Raymond's testimony is vague and imprecise and lacks indicia of reliability and along with other factors we discuss within, should not have been credited by the Hearing Officer as a legitimate non-discriminatory reason for the City's failure to apply for a PAR.10

[33] For example, the Hearing Officer found that Raymond testified credibly "that the City has considered the benefit of having a racially-diverse police force including a police force with racial diversity among the superior officers." Hearing II at 5. Raymond also testified that a more diverse workforce at the supervisory level of the WPD would provide "role-modeling" for the "on-line officer." Tr., p. 114**.** Silverman testified that "the makeup of the police department in the promotional ranks does not reflect the makeup of the population of the City of Worcester" and agreed that the minority representation in the lower rank doesn't "relate well" to representation in the supervisory rank. Tr., p. 210. Chief Gardella testified that under-representation of minority officers in the superior rank was a "problem long before I became Chief." Chief Gardella served as the WPD's Affirmative Action Officer when he was a captain in (at least) August 1984 under an Affirmative Action Program developed as a result of a 1983 Equal Employment Opportunity Memorandum of Agreement with the MCAD ("1983 EEO Agreement"). See Hearing Exhibit 24: List of City's AAO Officers, Appendix A of the Affirmative Action Program for Employment for the City of Worcester.

certification.[34] We note that the City has a tough road to hoe on proving the "legitimacy" of this non-discriminatory reason in light of the preceding discussion about PAR.10 and its express purpose of increasing hiring and promotion opportunities to members of protected groups.

At the initial Public Hearing, Silverman testified that "[t]here is some sentiment at HRD that you may not be able to use PAR 10 for promotions unless there has been a prior showing of past discrimination in the promotional ranks. And while we entered into the consent decree for hiring, there has never been a prior showing of discrimination in the promotional public safety ranks in Worcester. So there was an issue raised of whether we were even eligible to use the PAR.10 process." Tr. at 202-03.[35] We do not believe that Silverman's testimony is properly characterized as "conflicting and contradictory" on the availability of PAR.10. At most it suggests uncertainty about the scope of PAR.10, and that could easily have been resolved had the City simply filed a request with the Administrator for an alternative list. Silverman could not say when she spoke with HRD personnel and testified that she was unable to say whether in the time period of 1992 to 1994 she had "personally considered using PAR.10" for police promotions, (although she considered PAR.10 after this time period and discussed the matter with the City manager.)[36] Tr. at 200-01. Silverman further testified that she "made decisions regarding whether we should utilize PAR.10 or not" but could not "remember whether it was a direct result of my discussions with Ms. Dennis [at HRD] or not, or with her, Marie Gregg [at HRD] and

[34] The Commission may admit evidence excludable before a court when equities and pragmatism demand its admission. See Brockton Educ. Association v. Brockton Sch. Comm., 12 MDLR 1461, 1478 (1990). In so doing, "the considerations underlying the hearsay rule still apply." Sutherland v. Suffolk County Sheriff's Dep't., 14 MDLR 1331, 1343 (1992).

[35] Tr. as used herein shall refer to the Transcript of the Public Hearing held April 26, 2002.

[36] Silverman could not remember, however, "if I specifically told him we should do it or not." Tr., p. 201.

other people in the City." Tr. at 202. As of the date of the Hearing, July 2001, the City had never submitted a written request for a PAR.10 certification for promotions within the Police Department. Id. We conclude that Silverman's testimonial evidence is too vague and unspecific as to when and to whom she spoke with at HRD to be credited, Sutherland v. Suffolk County Sheriff's Dep't., 14 MDLR 1331, 1343 (1992), and that its content simply does not support the Hearing Officer's conclusion that HRD staff communications were the reason for the City's failure to apply for PAR.10.[37]

Raymond testified that in the "mid-1990s" when he became the Assistant Director of Human Resources, the "City" discussed using PAR.10 to increase the number of promotions for minority officers, but "ultimately decided against it" because of a "belief that the rule could not be used to promote African-American officers to supervisory positions." Hearing II at 3. Raymond testified that his source for this belief was Janice Silverman who he said had been told by HRD that PAR.10 "could not be utilized for affirmative action purposes." Id. Silverman's testimony, which we have just discussed, is considerably less definitive than Raymond's recitation.[38] As double hearsay, Raymond's testimony is highly unreliable for reasons that are demonstrated here and should not have been credited by the Hearing Officer.

Raymond testified that he "questioned" Silverman's information and remembered speaking with either Marie Gregg or Elizabeth ("Betty") Dennis of HRD in the "mid-1990s" as a result. Hearing II at 3-4. Although he had no specific recollection of his conversation and could

[37] Silverman testified to other reasons, including a discussion with HRD about whether the City could use PAR.10 and run the process itself rather than lose control to "the state". The City was told that HRD would be responsible for administering the process. Tr. at 203.

[38] The Hearing Officer concluded that the testimony of Silverman and Raymond, about the conversation, was "consistent" and credited Raymond's testimony, a conclusion to which we disagree.

not recall specifically with whom he spoke, he remembered being "informed [that] PAR.10 could not be used to reach minority candidates." Id. at 4. This hearsay evidence also lacks indicia of reliability. Sutherland, 14 MDLR at 1343. Raymond could not specifically identify the person with whom he spoke. If Dennis was indeed the HRD employee at issue we would have expected the City to produce her as a corroborating witness in this case.[39] Also unclear is when the alleged conversation took place. The "mid-1990s" is too imprecise a time-frame to establish that Raymond's conversation with HRD employees took place before the City Manager made some or all of the promotions in this case starting in 1993.

Moreover, even if the City's conversations with HRD personnel had not been so vague, imprecise and lacking in indicia of reliability and instead met the substantial evidence standard, we would still reach the same conclusion. The testimony regarding the communications between the City and HRD employees begs the question of why the City did not simply submit a request to the Personnel Administrator for a PAR.10 alternative list and end any confusion or speculation that may have existed about whether PAR.10 applied to promotions. The failure of the City to take this step is perplexing, especially because the Hearing Officer found that if the City had sought a PAR.10 certification in 1993, 1994 and 1995, the Personnel Administrator would "likely" have granted it and Harris and Tatum would "likely" have been promoted. Hearing II at 7. Informal conversations with HRD staff are not official decisions of the Personnel

[39] We note that Betty Dennis provided written stipulated testimony in this case, but that testimony did not address whether she was the person Raymond spoke with or whether she told him PAR.10 could not be used. Far from confirming a belief or "sentiment" that PAR.10 could not be used for promotions, she stated precisely the opposite: "[o]ne of the Personnel Administration Rules with which I am familiar with [sic] is PAR.10. This rule allows a municipality to request the certification of an alternate promotional list for minorities as an affirmative action tool… HRD uses a statistical formula to review the need for a PAR.10 list. The formula has been the same for as long as I have been working at HRD…". See Exhibit 26, Stipulation of Testimony of Betty Dennis (*emphasis added*).

Administrator. We are not convinced that any of the alleged communications between HRD and City staff established a non-discriminatory reason for the City's refusal to apply for PAR.10. [40]

There are a number of other important factors that also affect the "legitimacy" of the City's claim that have been given weight.

No Testimony from Appointing Authority

Even if we were to accept the Hearing Officer's conclusion that informal conversations between HRD and City staff resulted in the City's receipt of "contradictory and conflicting" information about the availability of PAR.10 for promotions (which we do not), there is a fundamental flaw in this finding. The Hearing Officer concluded that "the City" had articulated a "legitimate non-discriminatory" reason for adhering to its Promotion Policy and eschewing the PAR.10 certification process based on the testimony of Silverman, Raymond and Chief Gardella where in fact the decision was made by the City Manager as the legal appointing authority. Only the City Manager can make promotions and he made the decisions in 1993, 1994 and 1995 to promote thirty white officers and no minority officers. [41] Similarly, only the City Manager could lawfully apply for an alternative certification under PAR.10, as a means to voluntarily address the effect of past (and current) discriminatory employment practices on minority officers in the Department. G.L. c. 31, § 27. Our review of the record reveals that the City Manager never

[40] Even if substantial evidence has supported the Hearing Officer's conclusion that the City had a nondiscriminatory reason for believing that PAR.10 was unavailable for promotions based on "conflicting and contradictory" statements from HRD employees, this would not explain why the City failed to use other selection procedures – particularly the statutory bypass process - to address the severe disparity in the Department. The City had already made an EEOC-driven out-of-rank order promotion of a black officer to sergeant in the early 1980's "presumably" using this statutory bypass process. See City of Worcester v. Local 378, 2007 WL 1977725, 4.

[41] Willam J. Mulford was City Manager from until 1986 until 1994. Thomas Hoover was appointed City Manager in 1994 and served until 2004. Police Chief, Gardella, recommends candidates for promotion to the City Manager, who makes the final decision.

testified or provided any evidence so the Hearing Officer was unable to determine the reason for his promotion of only white officers and his refusal to apply for and use PAR.10. As the City's Appointing Authority for civil service hires and promotions, knowledge of civil service laws and rules are imputed to the City Manager. As a municipal appointing authority, the City Manager received or had access to information from the Personnel Administrator about PAR.10 including DPA's (now HRD) detailed Implementation Standard (IS-006) for PAR.10 discussed earlier, which stated that PAR.10 was "designed to provide an affirmative action tool for an appointing authority to appoint members of protected groups from Civil Service eligible lists" and could be applied to "any" Civil Service Classification in a municipality (except for entry level positions subject to Federal Court Decrees in Castro v. Beecher or NAACP v. Beecher). See PAR.10 Implementation Standard. (emphasis added). Moreover, the record contains a copy of DPA's standard Public Safety Requisition form dated June 1993, that requires the City Manager's signature for any request to fill vacant positions for police and fire-fighters job as "the Officer authorized by law to make Appointments" and specifically asks about "Alternative Certification data", reminding the appointing authority as follows: "Please note that PAR.10 certification may not be utilized for entry level appointments in departments subject to the NAACP or Castro consent decree. PAR.10 may be requested for promotional titles in all communities". See Hearing Exhibit 1 (emphasis added).

There is nothing in the record to suggest that either City Manager was unavailable to testify at the hearings. In other similar cases the appointing authority has provided written or oral testimony for his or her personnel decisions. See e.g. Mayor of Revere v. Civil Service Com'n, 31 Mass. App. Ct. 315, 319 (1991) (mayor provided testimony about reasons for not promoting lieutenant to chief of police); Riffelmacher v. Bd. of Police Comm'rs of Springfield,

27 Mass. App. Ct. 159, 162 (1989) (testimony given by board of police commissioners as to why female auxiliary officers were not promoted to permanent officer positions); Cotter v. City of Boston, 323 F.3d at 169 and n. 18 (referring to appointing authority Commissioner Evans' deposition testimony regarding reasons for his affirmative action promotions). Both City Managers responsible for the decision in 1993, 1994 and 1995 are material witnesses who were legally responsible for the decisions at issue in this case. The record provides no explanation for the City's failure to call them.[42]

City's Past Practice of Deviating from its Promotion Policy.

The weight of the City's evidence is further undermined by incomplete and inaccurate testimony by the City's witnesses Gardella, Raymond and Silverman, when asked the critical question of whether the City ever deviated from its strict rank order Promotion Policy. Each witness testified that a promotion bypass occurred rarely and when it did, it was because of the disciplinary history of a particular candidate.[43] None of the City's witnesses testified that the City had deviated from its strict rank order Policy to make an "affirmative action" promotion of a black officer to sergeant in the 1980s. See City of Worcester v. Local 378, 2007 WL 1977725 at

[42] Our review of the record evidence demonstrates (un-rebutted) testimony from Raymond that in 1998, at a City Council, meeting he announced that he was prepared to recommend to the City Manager that PAR.10 be used for affirmative action in the police department "no matter what the political and other realities might be". He testified further that the "papers" published his comments, that there was a reaction and that the City did not apply for PAR.10 after all.

[43] Raymond, the City's Affirmative Action Officer and Silverman, the City's Human Resources Director, both testified that the City deviated from its Promotion Policy only in the rare circumstance when a candidate's disciplinary history justified bypassing the higher scoring officer for a lower scoring one. Chief Gardella testified that he made a recommendation to the City Manager that he bypass a female officer and appoint lower scoring (male) candidates who were "better qualified" than she was (which contradicted his testimony in the arbitration proceeding that she was bypassed because of her disciplinary history). City of Worcester v. Local 378, 2007 WL 1977725, 4.

4.[44] The City has made at least one promotion of a lower scoring candidate in order to meet equal employment opportunity goals as a result of the disparate impact of its employment practices on minority officers. See City of Worcester v. Local 378, 2007 WL 1977725 at 4 (in a review of an arbitration decision on the City's Motion to Vacate an award, the Superior Court discusses the "presumed" bypass). While the instant case was pending, the City asserted in an arbitration forum that it had a "past practice" of deviating from its strict rank order Promotion Policy for equal employment opportunity reasons.[45] Id. The promotion of the black officer was "in order to achieve goals established" by our sister agency, the Equal Employment Opportunity Commission ("EEOC"), which means the City was aware that its employment practices related to promotions had an actionable discriminatory impact on minority officers. Id. This information (which the City failed to bring to the Commission or Superior Court's attention) was presented by the City at an arbitration proceeding that challenged the City Manager's decision to bypass a female officer who was next on the 1992 sergeants' eligibility list. The City lost after the arbitrator concluded that the City had a past practice of promoting police officers "based on their rank on the Civil Service eligibility list," and that the one exception "that was made to address anti-discrimination claims did not negate the finding of a long-standing practice by the

[44] At that time, in 1983, Chief Gardella was the Police Department's Affirmative Action Officer under the City's Affirmative Action Plan and would have been aware of the EEOC-driven promotion in the Department. Chief Gardella provided testimony in the arbitration proceeding about the affirmative action promotion. City of Worcester v. Local 378, 2007 WL 1977725, *4.

[45] Contrast, Silverman's testimony in this case that if the City used PAR.10 to make promotions the Union might sue and argue that the City violated its past practice of promoting in in rank order. Tr., at 196-97.

City of not engaging in a bypass." Id. The Superior Court denied the City's Motion to Vacate the Arbitration Award.[46]

We believe that had the Hearing Officer taken notice, at the time, of City of Worcester v. Local 378 it would have affected the credibility of the testimony of the City's various witnesses and the outcome of the case. We have taken notice of the holding in City of Worcester v. Local 378, and the underlying arbitration, Worcester v. Clarkson, 2007 WL 1977725, as we weigh the "legitimacy" of the City's reasons to "forgo use or application for usage of the PAR.10 protocol" in 1993, 1994 and/or 1995.

Violation of 1988 EEO Agreement.

Before any of the conversations purportedly took place between HRD and City employees, City Manager William J. Mulford failed to apply for a PAR.10 alternative certification for promotions when the City was under a binding Agreement with the Commission to do so from 1988 to 1991. In March 1988, the City entered into the 1988 Equal Opportunity and Affirmative Action Agreement which was signed by City Manager William J. Mulford. See Hearing Exhibit 2. The 1988 Agreement required that all executive officers serving under the City Manager, including the Chief of Police, "shall rigorously take affirmative action steps to ensure equality of opportunity" and defined "affirmative action" to "require[] positive aggressive measures to ensure equal opportunity in the areas of hiring [and] promotion . . . ." Id. at Art.3.2. (Emphasis added). The affirmative action provisions provided that the City's affirmative action "shall include efforts required to remedy the effects of present or past discriminatory patterns and

[46] The female candidate was next on the eligibility list compiled from the 1992 civil service examination for promotion to sergeant when she was bypassed in favor of lower scoring male candidates. An arbitration proceeding was held in May 2002 and a decision issued in August 2003. The City sought to vacate the award and the City's motion was denied in February 2007. Worcester v. Local 378, 2007 WL 1977725, 4.

practices, and any actions necessary to guarantee equal employment… for all people in accordance with the law". Id. In the "Fair Employment" section, the City agreed to "forthwith adopt and keep in place" [d]departmental goals for "minorities and women on all hiring and promotion until such time as parity" is reached. Id. at Art. 4.1. (Emphasis added). Finally, the Agreement required that the City "immediately process the filling of Civil service vacancies where an eligible list is in existence and appointments to be made therefrom as provided by Article 4.2…" which in turn required that the City specifically use DPA's Rule PAR.10, and "any other option reasonably designed to meet the goal of this Agreement as provided by law." Id.

We credit the Hearing Officer's conclusion that the City of Worcester was "clearly obligated" to use PAR.10 for promotions based on the language of the Agreement. We also credit his finding that the City breached the Agreement by failing to submit an affirmative action plan to HRD (a prerequisite to applying for PAR.10), apply for PAR.10 and/or use PAR.10 to make promotions, which resulted in the City Manager's promotion of ten white officers to sergeant and no minority officers during the 1988 to 1991 period.[47] Hearing II at 2. The record does not disclose why the City completely disregarded these obligations and as we have already noted, the conversations with HRD employees offered as a rationale with respect to the

[47] The Hearing Officer concluded that neither Harris or Tatum had submitted any credible evidence that minority officers had taken and passed the relevant promotional examination in 1988 and would have been eligible for placement on a PAR.10 certification list had the City complied with the 1988 Agreement or that such a promotional appointment would have increased their chances for promotion from the 1992 and 1994 lists. Hearing II at 2, 6-7. However, un-rebutted record evidence shows that Harris started taking the examination after competing three years of service in the "mid-eighties" and that he passed the examination every time except in the case of the last examination prior to the May 2001 MCAD Hearing in this case, which he failed. Tr., pp. 69-70, 73.

promotions at issue in this case did not occur until the mid-1990s or later. Moreover, the City Manager at the time was not produced as a witness to testify on this issue.

The Hearing Officer "decline[d] to give this evidence [of non-compliance] significant weight" and concluded that the non-compliance was not "indicative" of "discriminatory animus" when other factors (discussed below) were considered that showed the City's good faith equal employment opportunity efforts. Hearing II, at 10.

We disagree with the Hearing Officer's conclusion that the City's breach of the EEO Agreement was insignificant and find instead that the City's failure to take "aggressive" efforts to address disparity at promotional levels in the WPD in the three years commencing in March, 1988, by using PAR.10 or "any other option reasonably designed to meet the goal of this Agreement as provided by law" is evidence of discriminatory intent. Following close on the heels of the EEOC-driven promotion, the City Manager's decision to ignore the affirmative action components of the EEO Agreement (full title -- "Affirmative Action and Equal Employment Opportunity Agreement") that specifically applied to promotions and to promote ten white officers at a time when a single minority officer served in the WPD's superior ranks, raises an inference of discriminatory intent. It is "well established" that under both state and federal law that events occurring prior to the applicable limitation period of a seasonable claim are admissible and potentially probative as "background evidence of discriminatory animus or motive" even though time-barred for purposes of recovery for damages. See Sabree v. United Bd of Carpenters & Joiners, Local No. 33, 921 F.2d 396, 400 n.9 (1st Cir. 1990), as cited in Cuddyer vs. The Stop & Shop Supermarket Co., 434 Mass. 521 (2001). Full Commission Decision I at 3. We consider the City's breach of the affirmative action aspects of the three-year 1988 EEO Agreement pertaining to promotions to be significant and strong evidence of

discriminatory animus on the part of the City. Additionally, we firmly reject the notion that an Agreement entered into between the Commission and a governmental entity can be cavalierly ignored and as a matter of policy we reject the de minimus effect accorded the City's non-compliance.

History of Discrimination – Worcester Police Department

Entry-Level Discrimination: In declining to give "significant weight" to the City's non-compliance with the 1988 EEO Agreement, the Hearing Officer considered and gave weight to other factors including the City's "un-rebutted" testimony of its good faith compliance with an entry-level consent decree applicable to hiring of minority police officers and the absence of a history of racial discrimination that would suggest the City's promotional decisions were motivated by racial animus. Hearing II at 10. The City of Worcester, however, along with other municipalities in the Commonwealth, have a history of entry-level discrimination against minority applicants as a result of past hiring practices pertaining to Massachusetts police officers that were declared unlawful in Castro v. Beecher. 459 F.2d 725, 728, 735-36 (1st Cir. 1972) ("Castro I) (First Circuit holding that HRD-developed civil service examinations used before 1970 had a racially discriminatory impact on minority applicants who applied for jobs at Massachusetts municipalities and agencies). See Sullivan v. City of Springfield, 561 F. 3d 7 (1st Cir. 2009) ("Sullivan") (setting forth the history of the Castro consent decree).

As a result of the Castro decision, the City of Worcester, like other municipalities and agencies, was required to meet hiring goals to remediate the disparate impact on minority officers that had resulted from its previous use of discriminatory employment practices for entry-level positions. See e.g. Sullivan, 561 F.3d at 10-11(Castro applied to Springfield Police Department); Brackett v. Civil Service Commission, 447 Mass. 233, 245 (2006) ("Brackett")

(applying Castro to Massachusetts Bay Transportation Agency ("MBTA")), Stuart v. Roach, (applying Castro to Boston Police Department). The decree was "intended to 'counteract the unconscious lopsidedness of the recruitment of the past' by 'giv[ing] a priority to [minority candidates] who have shown themselves qualified" Sullivan 561 F.3d at 10 citing Castro v. Beecher, 365 F.Supp. 655, 660 (D.Mass. 1973). At the time of the first Hearing in this case in 2001, however, almost thirty years after Castro was decided, the City had not yet remedied the disparate impact of its earlier entry level discrimination or been released from the consent decree.[48] Raymond testified that under the consent decree the City was still required to increase the number of minority police officers hired and to make efforts to attract minority candidates to take the entrance-level examination and to attend the police academy. In 2000, the last year for which there are statistics in the record, the percentage of entry level minority officers in the Department had actually declined from 12.4 percent in 1997, to 11.9 percent in 2001, for a net loss of three minority officers.[49] At the same time, the minority population of the City increased according to Raymond, based on the 2000 Census, to 15 to 18 percent of "work-age" minority adults.[50] Contrast Brackett (by May 1996, 27.6 percent of all patrol officers employed by the MBTA were black or Hispanic, i.e. 50 out of a total of 181 patrol officers showing the MBTA's "significant progress in remedying discriminatory hiring practices"). In short, the City's

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[48] Silverman testified that the City has been bound by the entry level consent decree since the late 1970s. Tr., at 205.

[49] The City may have had difficulty meeting the Castro goal of "rough parity" because of reluctance of minority officers to take a job with a police department with little or no prospect of promotion based on the City's track record from the early 1980s forward. The City may also have experienced trouble retaining minority officers for the same reason.

[50] Raymond testified that "so I certainly know that one [minority sergeant promoted two months earlier] out of whatever the number is not even close to the count of 15 to 18 percent [minority work-age adults]" Tr. at 126.

performance under the entry-level consent decree has been slow and lackluster at best and should not have been given weight as a positive factor in the City's favor when considering the City's failure to comply with the 1988 EEO Agreement.

Even had the City shown stellar efforts in achieving the "rough parity" required of Castro, we still would not accept the proposition that the City's compliance with the terms of a consent decree targeted at entry-level positions is demonstrative of across-the-board good faith in all equal employment efforts or that an inference of an absence of discriminatory bias is reasonable. We note that promotions are fundamentally different than entry level positions because established interests -- here, the virtually all-white superior officers union – can influence policies or practices that perpetuate (intentionally or unintentionally) discriminatory effects.[51] We find instead that compliance with a consent decree demonstrates nothing more than a party's recognition that failing to do so could lead to sanctions, including contempt, and we reject the Hearing Officer's reliance on this factor in his decision in favor of the City.

*Promotion-Level Discrimination***:** The City also has a past history of discrimination in promotions. See Worcester v. Clarkson, 2007 WL 1977725. The City was on notice in the early 1980s that its employment practices has an unlawful discriminatory impact on black officers and as a result the EEOC required that a black officer be promoted to sergeant bypassing higher scoring white officers. Despite this departure from past practice for affirmative action (that was unchallenged by the Union), the City returned to promoting only in rank order of test scores with the result that discriminatory impact increased side by side with the increasing number of tenured minority officers. The City Manager's failure to comply with the 1988 EEO Agreement and use

[51] An example of this is the requirement that examination scores be calculated to the 100th percent so that the City Manager can promote the highest scorer among candidates with a tie score. Tr. at 193.

PAR.10 to make promotions is a continuation of the history of discrimination especially since it resulted in the promotion of ten white officers and no minority officers.

Other Commonwealth Cities and Agencies were actively taking steps to mitigate the effects of past discriminatory practices during the relevant times of this case or earlier, including for the legally recognized "lingering effect" of past entry-level discrimination on the promotional opportunities of minority officers and disparate impact arising from employment practices like the City's promotion policy. In 1991, the First Circuit held in Stuart v. Roche that discriminatory hiring practices such as those found in Castro v. Beecher, had a "lingering effect" on the number of minority officers in the supervisory ranks. The Supreme Judicial Court similarly recognized that entry-level discrimination has a "significant impact beyond the entry level, affecting the number of minority officers who ultimately reach the supervisory level". Brackett, 447 Mass. at 244-45 ("[r]emedial action takes time, and discrimination may linger for many years in an organization that had excluded blacks from its ranks" quoting Stuart v. Roache, 951 F.2 at 452). See also Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13, 20 (1st Cir.1998) (finding that past-entry level discrimination had a "lingering" effect on promotion opportunities at the rank of lieutenant, justifying the BPD's affirmative action promotion), United States v. Paradise, 480 U.S. 149, 168-169 (1987) (plurality opinion).[52]

In Brackett, 447 Mass. at 246, the Supreme Judicial Court upheld the MBTA's use of PAR.10 to make race- and sex-based promotions of patrol officers to sergeant, from the 1994 promotion examination, despite arguments from bypassed white officers that the MBTA had

[52] In United States v. Paradise, 480 U.S. 149, 168-169 (1987) (plurality opinion) the United States Supreme Court found that entry level discrimination "necessarily precluded" blacks from competing for promotions, and "resulted in a departmental hierarchy dominated exclusively by non-minorities [,] . . . [the department cannot] segregate the results achieved by its hiring practices and those achieved by its promotional practices…"

been successful in addressing entry-level discrimination and there was no longer any disparity for minority and female positions. The Court observed that even when a department or agency has made significant progress in remedying discriminatory hiring practices by increasing the number of minority patrol officers, "the effects of such [entry-level] discrimination lingers at the supervisory level". Brackett, 447 Mass. at 246. See Cotter v. Boston, 323 F.3d at 170-71 ("[p]ast discrimination in the hiring of minorities has limited the opportunities for minorities to move up through the ranks, and recent statistics show that the effects remain"). In Brackett, the Supreme Judicial Court held that if the MBTA "based its promotion decisions on strict rank order, as determined by scores on a [1996] competitive examination, the statistical disparity between minority and non-minority officers would have been even more pronounced" at the supervisory ranks, thereby exacerbating the "lingering" effect of the MBTA's past discrimination. As a result, the MBTA's use of PAR.10 to make affirmative action promotions based on race and sex was affirmed.

Similarly, in Stuart, the First Circuit upheld the Boston Police Department's "race-conscious employment program" of promoting black officers to the position of sergeant ahead of higher scoring white officers contained in a revised consent decree. Stuart, 951 F.2d at 455. The original consent decree arose out of a 1978 lawsuit filed by the Massachusetts Association of African American Police, Inc. ("MAAAP") against the BPD for discrimination on behalf of black officers who took the civil service examination for sergeant but failed to score high enough to be promoted and who claimed that the department's discriminatory employment practices had resulted in a "virtually all-white cadre of sergeants".[53] Stuart, 951 F. 2d at 448. Over the first ten

[53] MAAAP claimed inter alia that the testing procedures of the pre-1978 promotion examinations for sergeant that were developed and administered by the DPA (later HRD) were

years of the consent decree (1980 to 1990) the BPD made some progress in increasing the number of black sergeants but fell short of the goals set forth in the decree. Id. at 448.[54] The BPD and MAAAP requested that the decree be extended until after the City of Boston gave an alternative promotion examination (not the HRD-developed examination) which was "specially validated" as anti-discriminatory and fair.[55] The revisions also increased BPD's affirmative action promotion goals to more closely reflect the higher number of promotion-eligible black officers in the Department in 1990.[56] Id. at 449. Upon the District Court's approval of the revisions, thirty-four (34) white officers with higher test scores who but for the revised consent decree would have been promoted filed an appeal arguing that the race-conscious promotions of lower scoring black officers to sergeant anticipated by the Decree were unconstitutional and violated the Equal Protection Clause. Id. The First Circuit issued a decision in 1991 that upheld the constitutionality of the BPD's "race-conscious employment program" in an analysis that established clear guidance (and notice) to appointing authorities in the various Cities in Massachusetts about when they could engage in affirmative action decision-making consistent

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biased. Stuart, 951 F. 2d 446. The City of Worcester required its officers to take the same civil service examination developed by HRD.

[54] The BPD was required under the consent decree to use only promotional tests that were "specially validated as anti-discriminatory and fair" and the appointing authority was required to make promotions that addressed the "underutilization" of black officers as sergeants according to specific yearly numerical goals. From 1980 to 1990 the BPD gave one "validated-as-fair" promotional examination. Stuart, 951 F. 2d at 448.

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[55] The City of Boston developed its own promotional examination for sergeants under authority of G.L. c. 31, §§ 7, 10 and 11 in order to meet the terms of the Decree when HRD was unable write an examination that could be "specially validated as anti-discriminatory and fair". The City of Worcester however continued to use the HRD developed promotional examinations.

[56] The BPD expected that by 1991 nearly 20 percent of promotion-eligible officers would be black and the revised consent decree increased the numerical goal for promoting black sergeants to a total of 40 or 15.5 percent of the Department's sergeants, which would put the City in compliance with the EEOC's four-fifths rule. Stuart, 951 F.2d at 448.

with strict scrutiny standards under the Equal Protection Clause. The Stuart Court stated that a public employer establishes a compelling state interest for affirmative action efforts when it can demonstrate a "strong basis in evidence" of past or current discrimination by a "contemporaneous or antecedent finding of past discrimination by a court" or other competent body, or evidence approaching a prima facie case of a constitutional or statutory violation. Stuart, 951 F.2d at 450-51 (emphasis added). See Boston Police Superior Officers Federation v. City of Boston, 147 F.3d 13, 20 (1st Cir.1998). Both types of underlying evidence of discrimination were present in this case -- past entry level discrimination based on Castro and, as the Hearing Officer found, prima facie evidence of a violation of Chapter 151B based on the "gross disparities" in the WPD between the promotion rate of white officers (100%) and that of minorities officers (0%) in each year promotions were made.

Unlike in Worcester, the Boston Police Commissioner worked to reduce the disparities and under-utilization rates in order to reach the goals set forth in the revised Stuart consent decree of eliminating adverse impact in the sergeant rank under the EEOC's four fifths rule. By 1996, the BPD had forty-six (46) black sergeants comprising 17 percent of the department's overall number of officers of that rank.[57] Stuart v. Roache. In stark contrast, in 1996 the WPD had no minority officer serving in the rank of sergeant despite ample opportunity to use PAR.10 for affirmative action promotions. Over a period of seven years the City Manager promoted a total of forty (40) white officers to sergeant from the 1988, 1992 and 1994 civil service examinations, filling 75 percent of the fifty-five (55) to sixty (60) sergeant positions in 1996. During this period, a single black officer served in the WPD's supervisory ranks and his promotion to sergeant in the early 1980s was as a result of the EEOC's intervention. From at

[57] The Stuart case was brought on behalf of black officers so there is no information on the number Latino officers similarly promoted.

least 1981 until 2001 this single black officer was the only minority officer promoted in the WPD. No Hispanic officers served in a supervisory capacity during this time frame (1981 to 2001).[58] The next time a minority officer was promoted to sergeant was in 2001 when, two months before the first Hearing in this case, a black officer was promoted.

The City of Worcester did nothing of substance over the years to address the substantial discriminatory impact of its employment practices on minority officers. We do not believe that any positive weight should be accorded the minimal efforts testified to by the Chief of Police, [59] the Human Resources Director,[60] and the Assistant Human Resources Director,[61] to increase the number of minority officers promoted especially where the solution was clearly set forth in the Personnel Administration Rules i.e. PAR.10. The City Manager's stubborn adherence to the policy of promoting officers by order on the eligible list and refusal to apply for and use PAR.10 for affirmative action promotions demonstrates a pattern and practice of discrimination by the Appointing Authority against its minority officers who took and passed the promotional examination for sergeants from (at least) 1988 through (at least) 2000 and a disservice to the

[58] We do not know when the first Hispanic Officer was promoted since our statistics do not go beyond 2001.

[59] Police Chief Gardella testified that he advocated "study groups".

[60] When asked what steps she had taken as the Director of Human Resources "to promote the hiring and promotion of minorities" within the City, Silverman testified that she "[had] done a lot of research over the years to try to figure out how we could, within the bounds of Civil Service, get better representation of minorities in the promotional ranks of the police and fire. I have found myself stymied at just about every opportunity for a variety of reasons" including the "civil service law which makes it very difficult to do anything creative" and the "adamant[] oppos[ition] of the public safety unions "to doing anything that departs from past practice."

[61] The Hearing Officer found, based on Raymond's testimony that rather than use PAR 10, the City "attempted" to develop a mechanism to get police officers better prepared for the promotional exams. Hearing II at *5

City's significant minority population.[62] See Trustees of Health and Hosps. of the City of Boston, Inc. v. Mass. Com'n Against Discrimination, 449 Mass. 675, 686-687 (2007); Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001).

Police Union Opposition**.**

The Hearing Officer also credited Raymond and Silverman's testimony that when the City made the decision to forgo the application or use of PAR.10, it considered the police union's opposition to PAR.10 and the prospect that the Union would file a reverse discrimination case in court or a bypass challenge under the civil service law should the City seek an alternative certification.[63] First, we note a certain inconsistency with the City's position that its officials believed PAR.10 was unavailable for promotions because of "conflicting and contradictory" statements of HRD staff on the one hand and its position that it did not invoke the procedure because of anticipated union opposition (and morale issues), on the other. If PAR.10 was inapplicable to promotions it begs the question of why the City would even be concerned about union opposition or, for that matter, why, as Silverman testified, PAR.10 was a topic of

[62] It is reasonable to conclude that minority officers were discouraged from taking the promotional examination given the situation just described. Officer Harris, who took and passed the examination every time it was offered (except one) after becoming eligible for promotion to sergeant, testified about the discouraging effect of being repeatedly passed by and the absence of black role models for himself and others in the supervisory rank. We cannot help but wonder whether discouragement and depression affected his preparation and performance on the last examination he took prior to the May 2001.

[63] Raymond could not recall ever seeing or hearing any statement by a Union official that expressed any opposition to using PAR 10. Silverman testified that "every time [the City] broach[ed] the subject with the public safety unions they have been adamantly opposed to us doing anything that departs from past practice. They want the first individual on the list promoted in each and every instance. They have been opposed to PAR 10's as recently as the current round of collective bargaining, where we raised it as an issue again." We note that the Union did not oppose the affirmative action promotion of a black officer in the early 1980's, "presumably" by statutory bypass. City of Worcester v. Local 378.

discussion during union negotiations. This inconsistency is yet another reason why we have refused to accord conclusive weight to Silverman and Raymond's testimony about their conversations with HRD staff.

Moreover, the Hearing Officer's decision to credit the City's belief that the City would be legally vulnerable if it used PAR.10 (after approval from the Administrator) in the absence of a pre-existing consent decree or binding agreement establishing a finding of past discrimination is, as we have already discussed, incorrect as a matter of law. See *supra*. The City Manager could have applied for and used PAR.10 (or the statutory bypass process as it did in City of Worcester v. Local 378) at any time before making promotions from the certified eligibility lists requisitioned in 1993, 1994 or 1995, and promoted Harris and Tatum and other qualified minority candidates without running afoul of the civil service law or any other. See e.g. Brackett, *supra* (affirming appropriateness of the MBTA's use of PAR.10 and the Personnel Administrator's grant of such request to use sex and race in 1996 promotion decisions.) Had the City applied for PAR.10 and the Personnel Administrator allowed an alternative list of qualified minority candidates (as was "likely" according to the Hearing Officer) from which the appointing authority promoted Harris and Tatum, the City would have been able to defend its voluntary actions as consistent with the civil service law. See Brackett. The City would also have been able to defend itself from a reverse discrimination suit filed by bypassed white officers under the Equal Protection Clause, since a PAR.10 request is approved only when the Administrator has made a written determination substantiating that previous discriminatory practices have adversely impacted members of a protected class. The process undertaken for evaluating and acting upon a PAR.10 request is functionally equivalent to strict scrutiny under the Equal Protection Clause and the affirmative action goals are limited in scope and tailored to

the needs established in the Administrator's analysis.[64] Brackett, 447 Mass. at 256-57 (PAR.10 held to be a proper exercise of the rule-making authority of the Personnel Administrator and to give full effect to the equal protection concerns that arise with race-based decision-making) There are no actions the City could have taken that would have prevented a lawsuit by the union, although it is interesting to note that by making the decision in 1993, 1994 and 1995 to promote in rank order, the City placed the burden and expense of challenging its decision-making on the minority candidates rather than the white officers supported by the union.

Finally, fear of litigation by the union is not a valid reason for the City's decision to forego use of PAR.10 and instead, continue to promote in rank order only white officers year after year. See Cotter, 323 F.3d at 172, n.10 (Court is "skeptical" that avoiding litigation is a valid reason for the BPD Commissioners' decision to depart from strict rank order in 1997 to promote three African-American officers, especially where a reverse discrimination action by bypassed white officers was filed anyway). See also Ricci v. Stefano, __ U.S.___, 129 S.Ct. 2658 (2009) (City of New Haven could not toss out a promotion examination that had an adverse impact on minority officers to the detriment of white exam-takers who had passed it because of a fear of litigation where the evidence showed the test was valid for its purposes and there was insufficient evidence that an alternative selection procedure existed).[65] The only challenge the City cannot defend is the one it faces today.

[64] The Hearing Officer applied the HRD's formula for the PAR.10 analysis and concluded that the City's General Manager would have been able to promote up to six black officers from a certified alternative list. See Hearing II at 7.

[65] In Ricci v. DeStefano, *supra*, the City of New Haven had developed the promotion test with an outside vendor and the testimony established that efforts had been made to render it non-discriminatory and valid.

Morale.

The City articulated a third reason for not using PAR.10, namely, that it had considered the fact that promoting minority officers from a PAR 10 alternative list, instead of promoting officers with the highest scores on the examination, would have an adverse effect on the morale of the Department. Specifically, Raymond testified that if the City bypassed many white officers with higher scores in order to appoint minorities, the bypassed white officers would "experience tremendous resentment that would dilute the authority of the minority candidates and create a rift between the minority and nonminority officers".[66] The Hearing Officer found that the City never conducted a study to analyze this potential problem and that the City's impression that the Department would experience morale problems was based on hearsay and anecdotal information. Although he found Raymond and Gardella testified credibly regarding this matter, he concluded that the potential for morale problems did not constitute a legitimate reason for not using a PAR.10 appointment to promote minorities.

We find it difficult to understand why the City apparently gave little thought to the effect of its Promotion Policy, which repeatedly excluded minority officers from the superior ranks, on the morale of minority officers and how divisive this longstanding state of affairs might be on the functioning of the Department.[67] . While the Hearing Officer credited the City's testimony that it

[66] Police Chief Gardella likewise testified that promoting someone who scored much lower would raise a question of "fairness" and cause a morale problem in the Department.

[67] In Cotter, 323 F.3d at 170-71, the BPD's Commissioner testified (by affidavit) that one of the reasons he promote three African-American officers to sergeant (in 1997) and none of the seven white officers who shared the same test score, was his "aware[ness] of racial tensions within the Department" from conversations with African-American officers about disparate treatment and racial incidents. The First Circuit held that racial tensions along with disparity in the promotion of officers to sergeant and the documented history of past discrimination in the BPD (i.e.Castro entry-level discrimination and "lingering effects" at the supervisory level) established the strong

considered the morale of white officers but did not give it any weight, we conclude that this "non-discriminatory" reason supports an inference of discriminatory bias against minority officers.

Conclusion

We have examined the record evidence as directed by the Superior Court on remand to determine the "legitimacy" of the City's articulated reasons for the City Manager's adherence to the strict rank order Promotion Policy and decision to "forgo use or application for usage of the PAR.10 protocol" in 1993, 1994 or 1995, that "likely" would have led to the promotion of Harris and Tatum. We have "further examined the City's justification for its actions", made "further findings" regarding the "legitimacy" of the City's articulated reasons and determined the weight to "afford[] the reasons expressed by the City". We conclude that the City's articulated reasons for these actions are either unsupported by substantial record evidence, an error of law, or outweighed by other factors, and leads us to conclude that the City's reasons for not promoting Harris and Tatum by using the PAR.10 process were not the real reasons, but a pretext for discrimination. We also consider the City's concern with union opposition where PAR.10 is a valid tool under the civil service law for promoting Harris and Tatum, the City's willingness to place litigation costs on minority employees and its concern with the hypothetical morale of white officers where the actual morale of minority officers over many years has been ignored, as support for our conclusion that the Appointing Authority's conduct was motivated by impermissible racial bias. The appointing authority consistently favored the Department's white officers over its minority officers when it failed to apply for PAR.10 in 1993, 1994 or 1995, and

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basis in evidence required under the strict scrutiny standard for the Commissioners' conclusion that race-based action was necessary. Id. The Court dismissed the reverse discrimination suit brought by the seven white officers.

when it violated an Agreement with the Commission and failed to use PAR.10 from 1988 to 1991. The fact that the alternative list would "likely" have been allowed and led to the promotion of Harris, Tatum and other eligible and qualified minority officers in 1993, 1994 and 1995, is a situation we believe City officials sought to avoid.

Remedy

Upon a finding of discrimination, the Commission is authorized to award remedies to make Complainants whole, and to ensure compliance with the antidiscrimination statute. G.L.c. 151B s. 5; Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). The Commission may award monetary damages for, among other things, lost compensation and benefits, lost future earnings, and emotional distress suffered as a direct and probable consequence of the unlawful discrimination. In addition the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent. The Commission has broad discretion to fashion remedies best to effectuate the goals of G.L. c. 151B. Conway v. Electro Switch Corp., 825 F. 2d 593, 601 (1st cir. 1987).

Affirmative Relief. Pursuant to G.L.c.151B, sec. 5, the Commission has the authority to issue orders for affirmative relief, including the promotion of employees. The Full Commission concludes that the findings of fact, set forth herein, merit such action in this case. Accordingly, Complainants Harris and Tatum shall be promoted to the position of Sergeant, in the Worcester Police Department, retro-active to November 23, 1993, the date on which the alternative list would "likely" have been allowed and led to the promotion of Harris and Tatum..

Lost Wages: City of Worcester Police Department shall pay to Complainants, Harris and Tatum, back pay damages, in an amount to be calculated by the parties, based on the differential between the applicable rate of pay for Sergeants and the rate of pay Harris and Tatum received as officers from November 23, 1993 to the time they are promoted to the position of Sergeant.,. Any pay received for details and overtime shall not be used to offset the lost wage calculation. .

Damages for Emotional Distress: Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the extent of Complainant's suffering are the nature, character and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. Stonehill College v. MCAD, 441 Mass. at 549.

Andrew Harris:

Harris testified that after not being promoted, his feelings about the police department changed. Despite the fact that he loved his job, the department had changed for him and was no longer a "happy place." Harris further testified that after filing his complaint he was subjected to retaliatory acts by his co-workers. Harris testified that other officers interfered with his radio communications, which threatened his ability to request assistance during an emergency and had the potential to endanger his life. He also testified about derogatory statements being written on this paycheck. Harris stated that he complained of the retaliation, but no remedial action was taken.

To be compensable, emotional distress must be causally connected to the discriminatory conduct alleged – in this case the failure to promote. To the extent that Harris complains of distress associated with the retaliatory acts, such distress is not compensable. In light of the foregoing, however, Andrew Harris is awarded $25,000.00 in emotional distress damages.

Spencer Tatum:

Tatum testified that after not being promoted to sergeant he was frustrated and depressed. He stated that his education, background and life experiences made him a better candidate then some of the promoted individuals. He also stated that knew he would make a good sergeant but was held back by a system that does not consider competence. Tatum testified that he was unable to leave the frustrations and depression at the job. Instead Tatum brought home his job frustrations, which ultimately contributed to the dissolution of his marriage. In light of the foregoing Spencer Tatum is awarded $25,000.00 in emotional distress damages.

Training. City of Worcester Police Department is directed to conduct anti-discrimination training, within six (6) months of the Commission's final decision with mandatory attendance by the City of Worcester Manager, all members of its human resource staff and command officers with responsibility for promotions. The anti-discrimination training shall include Personnel Administration Rule PAR 10 information and training. The training may be conducted by the MCAD or a trainer and training proposal approved by the MCAD. *Monitoring:* Respondent City of Worcester Police Department shall, within ninety (90) days of the Commission's final decision, provide the MCAD with a list of all promotions made under PAR.10 from 2001 until present time.

Monitoring. Respondent City of Worcester Police Department shall, within ninety (90) days of the Commission's final decision, provide the MCAD with a list, by gender, race and rank of all superior officers employed by the Department at any time from 2001 to the present including

the date of promotion and whether the individual was promoted in rank order from the eligibility list, PAR.10 list, pursuant to a consent decree or for any other reason.

Respondent City of Worcester Police Department shall, within ninety (90) days of the Commission's final decision, provide the MCAD with a listing of each and Officer who sat for the promotional examination for any superior officer position from 2001 to present. The listing shall identify the individual's race and gender, the results of such examination, and whether the individual was promoted to a superior rank.

Respondent City of Worcester Police Department shall, every year for the next three (3) years, submit a report which lists each officer who sat for a civil service promotion examination by race and gender.

Respondent City of Worcester Police Department shall, within ninety (90) days of the Commission's final decision, provide the MCAD with a listing of all consent decrees, affirmative action orders, or other agreements which mandate or suggest that race and/or gender be considered when making promotions, which were in effect at any time from 2001 to the present, and from the present, every year for the next three (3) years.

ORDER

Based upon the aforementioned findings and conclusions, and pursuant to the authority granted to the Commission under M. G. L. c. 151B, section 5, we reverse the decision of the Hearing Officer and it is hereby ordered that:

1. Respondent City of Worcester Police Department shall immediately cease and desist from engaging in the discriminatory practices set forth herein.

2. Respondent City of Worcester Police Department shall promote Complainants Andrew Harris and Spencer Tatum to the position of Sergeant in the Worcester Police Department, effective retroactive to November 23, 1993, and shall make them whole for all lost wages and other benefits, including but not limited to seniority, up to the date of promotion.

3. Respondent City of Worcester Police Department shall pay to both Complainants, Harris and Tatum back pay damages, in an amount to be calculated by the parties, based on the differential between the applicable rate of pay for Sergeants from November 23, 1993 to the present time, and the rate of pay Complainants received as officers, with interest thereon at the rate of 12% per annum from the date the Complaints were filed, until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue, and front pay from the present time up to and until Complainants are promoted. Such calculation shall not be offset by pay received for details and overtime.

4. Respondent City of Worcester Police Department shall pay to Andrew Harris the sum of $25,000.00 in damages for emotional distress with interest thereon at the statutory 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. Payment shall be made within 60 days of receipt of this order.

5. Respondent City of Worcester Police Department shall pay to Spencer Tatum the sum of $25,000.00 in damages for emotional distress with interest thereon at the statutory 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. Payment shall be made within 60 days of receipt of this order.

6. Respondent City of Worcester Police Department shall conduct training in accordance with the provisions set for herein.

7. Respondent City of Worcester Police Department shall, within ninety (90) days of the Commission's final decision, provide the MCAD with a list of all documents as required under the Monitoring section of this Full Commission Decision.

This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review within 30 days of receipt of this decision in accordance with M.G.L. c. 30A, c. 151B, §6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. The filing of a petition pursuant to M.G.L. c. 30A does not automatically stay enforcement of this Order. Failure to file a petition in court within 30 days of receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L.c. 151B, §6.

SO ORDERED this 9th day of November , 2011.

_____
Julian T. Tynes
Chairman

_____
Sunila Thomas-George
Commissioner

_____
Jamie Williamson
Commissioner