COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
EMILE MONT-LOUIS,

Complainants

v. DOCKET NO. 11-BEM-00510

CITY OF CAMBRIDGE,

Respondent

Appearances: Michael L. Mason, Esq. for Complainant
Keplin K. U. Allwaters, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 4, 2011, Complainant Emile Mont-Louis filed a complaint with this Commission against Respondents City of Cambridge and Stephen S. Corda alleging that he was discriminated against on the basis of age and retaliated against for engaging in protected activity in violation of G.L. c. 151B §4 ¶¶1C and 4, when he was terminated from his position as a Cross-Connection Inspector with the City of Cambridge Water Department. Respondents denied the allegations of the Complaint, asserting that Complainant was terminated for violating work rules, specifically failing to work the required hours. The Investigating Commissioner found probable cause to credit Complainant's allegations against the City of Cambridge only and dismissed the complaint against Stephen Corda. Efforts at conciliation were unsuccessful and the matter was certified for

a hearing. The hearing was held before the undersigned hearing officer on April 13 and 14, 2015. The parties filed post-hearing briefs. Having considered the post-hearing submissions of the parties and the record evidence before me, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant was hired by Respondent City of Cambridge Water Department as a Cross-Connection Inspector in April 2002. At the time he was 58 years of age. (Tr. I, p. 19) His complaint alleges that he was over the age of 64 in 2011 at the time of his termination from the City. At the time he was hired by the City, Complainant also worked a second full-time job at Analogic in Peabody, MA and testified that he worked both jobs for approximately six or seven years.

2. Respondent, City of Cambridge is an employer within the meaning of G.L. c. 151B. At all times relevant to this complaint, the Cambridge City Manager was Robert Healy and the Managing Director of the Cambridge Water Department was Stephen "Sam" Corda. Michael Gardner was the City's Personnel Director. Fred Centanni was the Cross-Connection Manager within the Cambridge Water Department.

3. Massachusetts law prohibits the existence of cross-connections between potable or domestic water and non-potable, or industrial water; the device for preventing a cross-connection is a "backflow prevention cross-connection device." G.L. c. 111, § 160A. The risk that back flow prevention devices are designed to prevent is the leaking of chemicals or other contaminants into the City's water supply. (Tr. I, p. 23) The chief duty of the Cross-Connection Inspector position is testing backflow prevention devices at non-residential sites throughout the City. Inspectors drive their own vehicles and schedule testing appointments with the customers.

During Complainant's employment there were two other Cross-Connection Inspectors, both of whom were well over the age of 40. (Tr. I, p. 144) They were supervised by John Blouin, the Cross Connection Supervisor. (Tr. I, pp. 35-36) All of the cross-connection inspectors were brought up on disciplinary charges in December of 2010. Complainant's co-workers chose to retire. (Tr. I, p. 146)

4. On August 14, 2009, the State Department of Environmental Protection (DEP) issued a "Notice of Non-Compliance" (NON) to the Cambridge Water Department concerning, in part, its cross-connection program. (Ex. 1) The NON was issued because of the Department's failure to provide DEP with a schedule to (1) identify all of the industrial and commercial premises served by the municipal water system, (2) identify those premises for which Cambridge did not have written documentation that a full cross connection survey has been performed, and (3) complete all necessary surveys. The NON mandated that Cambridge provide the lists of premises and a schedule for completing the required cross-connection surveys by June 30, 2010.

5. Under the laws and regulations governing public water supplies, DEP has the authority to issue fines of up to $25,000 against public water supply entities for lack of compliance. (310 CMR 5.21, 5.22; TR. I, pp. 155-156) The City Manager Robert Healy testified that the NON was a "very serious matter," that the Water Department's cross-connection function is a public health function, and he instructed Corda to take the necessary steps to bring the City into compliance. (Tr. II, pp. 8, 23) Corda testified that the potential for DEP fines influenced his decision to restructure the Water Department's cross-connection program. (Tr. I, p. 176) The Water Department's concern over receiving the NON was clearly demonstrated in Corda's November 16, 2009 memo to the cross-connection inspectors wherein

Corda stated that "...if we don't improve the program in the areas that have been stated above today we may not have a program tomorrow." (Ex. 2)

6. Water Department Manager Sam Corda testified that there are approximately 3000 cross-connection/backflow prevention devices in the City and most need to be inspected once in the first six months of the year and once in the second six months of the year and that it might take from three to ten minutes to inspect a particular device. (Tr. I, p. 170) Prior to November of 2009, the Water Department assigned tests to cross-connection inspectors by giving each inspector a list of devices to test within a six-month period. (Tr. I, p. 90) In an effort to better manage the functions of the cross-connection inspectors, in November of 2009, Corda issued a memorandum to them announcing a "pilot program" to "clear the DEP NON." Among the goals of the project were better documentation and increased productivity. (Ex. 2; Tr. I, p.176)

7. The pilot program schedule that Corda set out for Complainant in his November 16, 2009 memo stated that he would perform inspections between 7:00 a.m. and noon, (approximately 15 tests), do remedial surveying from noon to 2:30 p.m. (approximately 3 surveys), and then return to the Water Department offices for the remainder of the day to do paperwork. Lunch and break times were to be taken "as appropriate." (Ex. 2) Respondent asserted that as part of a restructuring of the cross-connection program in response to the NON, it had implemented a daily monitoring of tests conducted by the inspectors. The restructuring process was to ensure that the cross-connection program be kept in-house in the future. (Ex. 23)

8. On August 10, 2010, Complainant received an email from Fred Centanni, the Cross Connection Manager. (Ex. 22) Centanni informed Complainant in this email that there was a "drop off" in the number of tests performed by Complainant over the prior two days. (Tr.

I, p. 72) The email stated Complainant had been given a schedule of some 53 potential tests to be performed within a matter of several days, and that, in two days, he had completed only 10 tests, and had done only 4 tests on 8/11/10, which was a very low number. Complainant testified that this was the first time he had ever been informed that the number of tests he performed was inadequate. Centanni acknowledged that Respondent had not up until that time designated in writing a minimum number of tests required, and Centanni hoped it would not come to that. Complainant was instructed to complete some 55 tests by the following Monday and to meet with Centanni to discuss the scheduling process the following Monday. (Ex. 22)

9. On August 15, 2010, Complainant met with Centanni and Sam Corda to discuss the email of August 10th and Complainant's performance. Complainant testified that he attempted to explain that he could not complete all of the assigned tests on those days because some of the customers were not able to make the facilities available on short notice. (Tr. I, pp. 37, 39) He stated that he had made arrangements to complete the tests. After that meeting, Centanni issued a warning to Complainant on August 17, 2010. The warning noted that Complainant had admitted that when he did not have any tests to perform, he would sit in his car instead of returning to the office to be assigned additional tests. (Ex. 23; Tr. I p. 73-74) Complainant testified that when he was sitting in his car, he was attempting to schedule more tests and/or otherwise addressing discrepancies in the information he had. (Tr. I, p. 39) In its August 12, 2010 memo to Complainant, Respondent had advised him that if he had difficulty scheduling tests or had lack of walk-in response, he was to return to the office to be assigned additional tests. (Ex. 23) Complainant stated that he became angry because Centanni was aggressive in that meeting and did not allow him to explain himself. Complainant was clearly unhappy with this directive.

10. When Complainant was counseled that this behavior was grounds for a warning, he responded by challenging Respondent to "go ahead and write me up." (Id.) Corda testified that Complainant's attitude in the August 17th meeting was of great concern to Respondent and that he was disciplined more for his poor attitude and negative response to the directive to return to the office for additional assignments, than for his failure to complete a requisite number of tests. Corda testified that Complainant behaved in an angry manner toward his superiors at this meeting and his response signaled an attitude that he would continue to operate in his usual manner rather than heed his superiors' directives. (Tr. I, pp. 107-108, 177-179) This was of concern to Respondent at time when they were under a directive and a deadline to accurately update cross-connection device information and to complete a large number of tests within a given time period. (Tr. I, 177-180)

11. Following the warning to Complainant, the City placed all three of the cross-connection inspectors under surveillance. Corda testified that the City decided to conduct surveillance of the cross-connection inspectors because of a suspicion about their daily routines; that they were not getting to the first site by 7:00 a.m., were taking excessive lunch breaks, and not performing an adequate number of tests. (Tr. I, pp. 111-112) After the August 17, 2010 written warning to Complainant he was observed on three occasions in September and October 2010 by a private investigator hired by the Water Department. He was found to violate work rules related to time keeping and failing to work the requisite number of hours for his position. (Ex. 17, 20, Ex. 31-33; Tr. II p. 137, 140-169)

12. The report from the company hired to conduct surveillance on Water Department employees indicated that on September 24, 2010, Complainant was observed taking a lunch break well in excess of the half-hour allotted. On that occasion he remained at his residence for

approximately one hour and thirty six minutes before returning to the Water Department. (Tr. II, 141) On September 27, 2010, Complainant was observed at his residence from 12:06 p.m. to 1:39 p.m., a duration of one hour and thirty-three minutes. On October 8, 2010, Complainant was observed at this residence during work hours for one hour and 37 minutes. (Tr. II, pp. 141, 156) Complainant was also observed on two occasions, September 27, 2010 and October 8, 2010 dropping off a passenger at McLean Hospital in Belmont, MA at or around 7:00 a.m., the time he was required to commence working and be at his first inspection site. (Ex. 31; Tr. II, p. 141, 155) Complainant completed time sheets untruthfully indicating that he had worked forty hours on the three occasions that he was observed working less than a full work day. (Tr. II, pp. 92-93: 96-97)

13. Michael Gardner, the former Director of Personnel on labor relations for the City of Cambridge, testified that his responsibilities were to oversee the human resources function for the City including hiring, firing, promotions, benefits, wages and compensation and employee discipline. (Tr. II, pp. 34-35) He testified that the City would utilize surveillance of employees in instances where they had concerns about employee behavior under circumstances where it was not easy or practicable to obtain information any other way. (Tr. II, pp. 54-55) Gardner asserted that Complainant was ultimately terminated from his employment for working less than his required seven and one-half hours per day and then lying about it. (Tr. II. pp. 35-36)

14. Complainant was observed taking off more than two hours a day for non-work activities including an extended lunch. (Ex. 31) Gardner testified that when confronted with this information, the Complainant claimed untruthfully that he worked a full day and that he was at the worksite at 7:00 a.m., and that he took only a half an hour for lunch time extended by a 15

minute break. (Tr. II, p. 36) On at least three occasions, Complainant was observed conducting no inspections at all in the afternoon, ending inspection activity between 10:45 and 11:15 a.m., and proceeding to his home for extended lunches, lasting sometimes more than an hour and a half, prior to returning to the Water Department facility as required for the last hour of his work day. (Tr. II, p. 38; Ex. 31) He was also observed driving another and himself to work in the morning after the beginning of his shift, driving to his home for excessive lunch breaks, and taking extended breaks in the morning, essentially cheating the City out of approximately two hours of work a day, which Respondent calculated to be 25% of his work time. (Tr. II, p. 97)

15. The City's attendance rules require employees to be at the work sites and ready to work at the beginning of their regularly assigned work hours and to remain on the job until the end of their assigned work hours, unless a supervisor has been consulted. (Ex. 19, p. 8: Tr. II p. 93) Gardner testified that the personnel manual requires employees to be at their work-site at the beginning of each day, which for Complainant would be his first inspection site. (Tr. II, 93-94) Based on the report from the private investigators, the City ultimately reached the conclusion that Complainant was essentially working sometimes less than 75% of the work hours for which he was being paid. Gardner testified that Respondent had concerns that Complainant was not performing all the tests he was assigned and could not be performing the assigned number in the hours he actually worked. (Tr. II, 92) I found Gardner to be a very credible witness.

16. On November 1, 2010, Complainant was questioned by Water Department managers, including the department head, regarding the report of the investigators who conducted surveillance on him. (Ex. 24; Tr. 48-49, 52) When confronted about not working full days in accordance with his designated hours, Complainant responded by insisting that he had done nothing wrong and claimed that as long as he was in his car driving to a work site at seven

a.m., he was in compliance with the work rules, and that he could not recall taking one and one half hour lunches, and that the time he took to drive from work to his home was work time. (Ex. 25; Tr. II, p. 46 -48) Prior to making these statements, Complainant was advised that lying in response to questions about his time and attendance would be an additional ground for discipline. (Tr. II, p. 36) According to Respondent, Complainant made matters worse by not being truthful about his time when confronted with the investigator's findings.

17. In a letter to Complainant from City Manager Robert Healy dated December 8, 2010, Respondent notified Complainant of the facts found by the private investigators and the allegations against him that the City considered violations of the Standards of Conduct for City employees. The letter advised him that Respondent was considering imposing discipline against him up to and including termination and had scheduled a hearing to consider the charges for December 16, 2010. Complainant was suspended without pay pending the hearing, but permitted to use leave time if available to him. (Ex. 24)

18. A hearing was conducted on December 16, 2010, at which Gardner presided as the Hearing Officer. (Tr. II, p. 44) He also questioned Complainant on behalf of the City. Complainant was represented by counsel from his Union. Subsequent to the hearing Complainant was offered the opportunity to resign in lieu of termination. (Tr. II, p. 76) In January of 2011, Complainant retained private counsel who wrote to Respondent asserting allegations of age discrimination against Complainant by the City. (Ex. 27) After receiving the letter Gardner assumed the proposed offer to resign was rejected by Complainant. (Tr. 77-78) On February 2, 2011 Gardner wrote a 14 page Memorandum to City Manager Healy titled the Hearing Officer's Report on Emile Mont-Louis Disciplinary Matter, in which he recommended Complainant's employment with the City be terminated. (Ex. 26) Complainant was terminated

by letter from Healy dated that same day. He was advised to consult his union contract regarding any right of appeal. (Ex. 25) Complainant did not grieve his termination. He filed his age discrimination and retaliation complaint at the Commission approximately one month later. He did not seek other employment after his termination from the City. (Tr. I, pp.87-88)

19. The City brought similar disciplinary charges against the other two cross-connection inspectors, both of whom chose to retire. (Tr. I, p.146) Subsequently the City's cross-connection inspection and surveying functions were outsourced to a private company. (Tr. I, p. 161) The employees who perform the cross connection testing are employees of the private company and the City has no role in selecting them for the job. (Tr. I, 162-163)

III. CONCLUSIONS OF LAW

General Laws c. 151B § 4(1C) prohibits employment discrimination by a public employer on the basis of age. In order to establish a claim of age discrimination based on disparate treatment a Complainant must satisfy the three-stage burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973) and adopted by the Supreme Judicial Court in *Wheelock College v. MCAD*, 371 Mass. 130 (1976). In the first stage of this test, the burden is on the Complainant to establish a prima facie case of discrimination by a preponderance of the evidence.

To establish a prima facie case of unlawful termination based on age discrimination Complainant must demonstrate that 1) he is a member of the protected class, i.e. over the age of 40; 2) that he was performing his job at an acceptable level; and 3) that he was terminated under circumstances that give rise to a reasonable inference that his age was the cause of his termination, or that he was replaced by an individual who is at least five years younger than he

was at the time. *Sullivan v. Liberty Mutual Insurance, Co.* 444 Mass. 34 (2005); *Knight v. Avon Products, Inc.* 438 Mass. 413 (2003).

In the second stage of the burden shifting test, if the complainant has established a prima facie case of unlawful discrimination, the employer can rebut the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the employment action, and producing credible evidence to show that the reason or reasons advanced were the real reasons. *Blare v. Huskey Injection Molding Systems Boston, Inc.*, 419 Mass. 437,442 (1995) *citing Wheelock, supra.* at 138.

In third and final stage, if the employer meets its burden of producing evidence of a non-discriminatory reason, the Complainant must prove that the employer's reason is a pretext for discrimination, i.e. that the employer acted with a discriminatory intent, motive or state of mind. *Lipchitz v. Raytheon*, 433 Mass. 493, 504 (2001).

Complainant in this case has not established a prima facie case of discrimination. While he belonged to a protected class in that he was over the age of 40 and was terminated from his position, Complainant has not demonstrated that he was performing his job at an acceptable level at the time of his termination or that his employer sought to fill the position with a substantially younger person. Complainant argues that his performance was adequate because there is no evidence that he failed to complete any particular inspection and that he had good reasons for not being able to complete certain inspections. However, the evidence is clear that Respondent had set performance expectations at a higher level in November of 2009 and changed the manner in which inspections were assigned after receiving the Notice of Non-Compliance from the State Department of Environmental Protection. Respondent produced evidence that when Complainant failed to meet those expectations and completed significantly fewer inspections

than he was assigned, this gave Respondent good reason to suspect he was not working at full capacity nor working his required hours.

In August of 2010, Respondent notified Complainant that he was not meeting performance expectations when he completed only 10 inspections in two days, having been assigned to complete over 50 inspections in that time period. In response to this admonition Complainant gave reasons for his inability to complete an assignment, such as having inaccurate information about a particular site, and stated that he sat in his car if he could not complete assignments rather than return to the Water Department for additional assignments. He became angry that his work record was being questioned and challenged Respondent to discipline him.

Complainant disputes the assertion that his performance was inadequate and argues there is no evidence that he did not perform the inspections assigned to him. Even if I were to accept Complainant's argument that his performance was acceptable because he was never counseled before August of 2010 regarding the number of tests he completed, he has not demonstrated that Respondent hired someone significantly younger to replace him. The evidence is that Respondent contracted with a private company to perform cross-connection and surveying functions after Complainant was terminated and his two co-workers retired. Respondent played no role in recruiting or selecting what individuals replaced Complainant thereafter. Notwithstanding this, Respondent asserts that one of the first inspectors engaged by the contractor was actually older than Complainant. Therefore, I conclude that Complainant has not established a prima facie case of age discrimination.

Even if a fact-finder could reasonably conclude otherwise, finding that Complainant had established a prima facie case, Respondent has articulated legitimate non-discriminatory reasons for disciplining, undertaking surveillance of, and terminating Complainant. The first is the

precipitous drop in the number of inspections completed in August 2010 and Complainant's uncooperative attitude when confronted with not performing up to expectations and not following department directives. Complainant's inappropriate response to counseling about the precipitous drop in the number of tests he performed over a two day period in August 2010 was troubling to Respondent and in part motivated its decision to hire a private investigator to undertake surveillance of him during his work day. There was credible testimony that the City has undertaken surveillance of employees in all age groups including those in their 20's and 30's, particularly to prevent abuse of workers compensation benefits. Complainant cannot establish that he was targeted for surveillance because of his age.

The evidence resulting from surveillance by a private investigator demonstrated that Complainant was not adhering to the hours set for his position and routinely not working a full day. The surveillance report submitted to Respondent contained irrefutable evidence that Complainant was not working the required hours, was not on the job-site at the beginning of the day, took extended and excessive lunch breaks, and sometimes did not perform inspections in the afternoon. When confronted with this evidence, Complainant claimed he was working a full day, insisted he had done nothing wrong, or otherwise attempted to justify his lax compliance with work rules.

Respondent reasonably concluded that Complainant's lax adherence to work rules, while denying he had committed any infractions, or alternatively insisting that they did not matter, were an indication that he was unwilling to change. It determined that his refusal to comply with the Water Department's directives regarding performance of cross-connection functions had a negative impact on the effectiveness of the cross-connection program. Complainant's failure to abide by the hours for his position set by the City' Employee Manual and the collective

bargaining agreement; failure to accurately report the hours he worked; failure to follow instructions that he return to the office for additional assignments rather than sit in his vehicle; and his lack of truthfulness when confronted about his time are legitimate non-discriminatory reasons for his termination. Thus, Respondent thus met its burden of production at stage two of the *McDonell Douglas/ Wheelock* analysis.

If Respondent succeeds in articulating a legitimate non-discriminatory reason for the adverse action, Complainant must prove that the reasons are a pretext for discrimination and must prove the existence of discriminatory animus. Complainant argues that the fact that he and the other two cross-connection inspectors were over the age of sixty, and that they were all investigated and either terminated or resigned, suggests the existence of discriminatory animus on the part of Respondent's decision makers. This assertion ignores the fact that all three inspectors were suspected of being derelict in their adherence to established work rules at a time when Respondent was seeking to make significant changes to improve efficiencies in the cross-connection functions. The evidence strongly suggests that Respondent came to believe that the unwillingness of the cross-connection inspectors to alter their work ethic and their resistance to new standards and directives left Respondent with no choice but to shutter the cross-connection department and outsource the function to a contractor. There is no evidence that this decision was based on the inspectors' age.

Complainant's allegations of age discrimination also conveniently ignore the fact that he was 58 years old at the time he was hired by the City and that those who participated in the decision to terminate his employment were over the age of 60 and in the protected age category. See *Dziamba v. Werner & Stackpole, LLP*, 56 Mass. App. Ct. 397, 406 (2002) citing *Grossmann v. Dillard Department Stores, Inc.*, 109 F. 3d 457, 459 (8th Cir. 1997) and *Chiaramonte v.*

Fashion BED Group, Inc. 129 F. 3d 391, 399 (7th Cir. 1997) (noting that "it is improbable that the same persons who hire or promote someone already in an older age bracket will suddenly develop an aversion to older people.")

Complainant also argues the fact that no supervisor or manager was terminated for failure to properly manage the cross-connection inspection functions is unfair and evidence of pretext. However, the City's determination to discipline the individuals who committed the infractions while not holding supervisors similarly responsible for purported mismanagement of their subordinates is not evidence of age discrimination, even if seemingly unfair.

Even if Complainant's termination for violation of time and attendance issues might seem precipitous or draconian, there is no evidence that it was a pretext for age discrimination. Respondent demonstrated that it had grave concerns about the Department's failure to comply with the requirements of the DEP's Notice of Noncompliance and about completing the essential work to avoid costly fines. Respondent came to believe neither Complainant, nor for that matter his co-workers, were fully engaged in the work or willing to accelerate their performance to abide by new directives necessary to achieve compliance. Considering all of the above, I conclude that Complainant has not established pretext and has not proved that his termination was motivated by age discrimination.

Similarly, I conclude that Complainant has failed to prove that his termination was in retaliation for raising the issue of age discrimination in a letter to Respondent from his counsel in January of 2011. This letter was sent to the City Manager after the disciplinary hearing on Complainant's infractions had been held, but before Hearing Officer Gardner made his recommendation that Complainant's employment be terminated.

In order to establish a claim of retaliation, Complainant must show that he engaged in protected conduct, that he suffered an adverse employment action, and that there is a causal connection between his protected conduct and the adverse employment action. *Mole v. University of Massachusetts*, 442 Mass. 582, 591-592 (2004). The mere fact that one event followed another is not sufficient to make out a causal connection. *Id.* citing, *MacCormack v. Boston Edison Co.*, 423 Mass. 653, 662 n. 11 (1996).

I conclude that the adverse actions leading to discipline and termination of Complainant's employment were already in motion and predated his protected activity of alleging age discrimination. The protected activity occurred long after Complainant both received warnings and was subject to a disciplinary hearing for violating work rules. Where adverse employment actions predate any knowledge that the employee has engaged in protected activity, it may not be permissible to draw an inference that subsequent adverse actions, taken after the employer acquires knowledge of the protected activity, are motivated by retaliation. *Mole, supra.* at 592. In *Mole*, the SJC stated that … "were the rule otherwise, then a disgruntled employee, no matter how poor his performance or how contemptuous his attitude toward his supervisors could effectively inhibit a well-deserved discharge by merely filing, or threatening to file a discrimination complaint." I decline to draw an inference that the Complainant's termination was caused by his protected activity, despite the timing, because the adverse actions pre-dating the January 2011 letter clearly presaged his termination. Ultimately, I am not persuaded that Gardner's recommendation or Healy's decision were motivated by retaliatory animus.

In light of the above, I conclude that Complainant has not met his burden to prove that Respondent's actions in disciplining him and terminating his employment violated G.L. c. 151B.

IV. ORDER

The complaint in this matter is hereby dismissed. This decision represents the final Order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission, pursuant to 804 CMR 1.23 (1). A party must file a Notice of Appeal with the Clerk of the Commission within ten (10) days after receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 23rd day of September, 2015

Eugenia M. Guastaferri
Hearing Officer