

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
SANDRA CHARTON,  
Complainant

v.

DOCKET NO. 09-BEM-02132

JULIAN SUSO,  
Respondent

Appearances: Timothy M. Burke, Esq. for Complainant  
Leonard H. Kesten, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On August 6, 2009, Complainant, Sandra Charton, filed a complaint against her former employer, the Town of Framingham<sup>1</sup>, and Respondent Julian Suso, who was then the Town Manager, alleging that they had unlawfully retaliated against her by terminating her employment in violation of G.L. c. 151B § 4, ¶¶ 4, 4(A), and 5. Complainant alleged that Suso terminated her employment in retaliation for her asserted protected activity of opposing Respondent's implementation of lay-offs which she believed to be discriminatory. The Investigating Commissioner found probable cause to credit the allegations of the complaint and a hearing was held before the undersigned hearing officer on December 3, 4, 5, 6, 2012 and January 3, 2013. The parties submitted post-hearing briefs and supplemental briefs. Having

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<sup>1</sup> The Complainant subsequently dismissed the Town of Framingham as a Respondent and the Hearing proceeded against Respondent Suso only.

reviewed the record of the proceedings and the submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

## II. FINDINGS OF FACT

1. Complainant, Sandra Charton began her employment with the Town of Framingham as Director of Human Resources, in September of 2007. (Tr. I, 28-29) Pursuant to the Town's By-laws she was appointed to her position for a three-year term and could be removed from her position "for cause." (Tr. I, 28, 108) Complainant is an attorney with a background in labor relations and experience in employment and discrimination law.<sup>2</sup> (Tr. I, 27, 155-56) In her role as Director of Human Resources, she reported to then Town Manager, Julian Suso. (Tr. I, 28-29) Her responsibilities included employee relations, assuming a leading role in negotiating collective bargaining agreements with the Town's various unions, and dealing with issues related to discrimination and affirmative action. (Tr. Vol. I, 30, 31)

2. Complainant supervised five individuals in the Human Resources Department, including the Payroll Coordinator, Benefits Coordinator, two Human Resource Analysts, and an Administrative Assistant. (Tr. Vol. I, 80-81) She also oversaw the Veterans' Services Director and a part-time Administrative Assistant. (Tr. Vol. I, 29) The Human Resources Administrative Assistant performed a number of administrative and clerical duties for the HR Department. (Ex. R-4; Tr. Vol. II, 173; Vol. III, 50)

3. In the Fall of 2008, the Commonwealth faced an impending fiscal crisis which would result in reductions in state spending and cuts in local aid to municipalities. The Town of Framingham also faced impending reductions in its local sources of revenue. (Tr. Vol. II, 206; Tr. III, 7,8; Tr. Vol. IV, 47-49)

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<sup>2</sup> Complainant had sued a previous employer for gender and age discrimination in the 1990's and the matter was resolved through settlement.

4. Town Manager Suso addressed the looming fiscal crisis in an email dated October 2, 2008, to all Town division and department heads, Chief Financial Officer, Mary Ellen Kelley, and Assistant Town Manager, Timothy Goddard. He asked that all division heads and department heads “indefinitely postpone all discretionary, budgeted spending” within their areas of responsibility. (Ex. R-1) Suso explained that adjustments made currently could “potentially avoid much more difficult challenges later in the budget year,” and noted that he would continue to discuss the situation in the weeks to come. (Ex. R-1; Tr. Vol. III, 8,9) A core working group consisting of Suso, CFO Kelley and Assistant Town Manager Goddard was designated to analyze the impact of the financial crisis and to review the Town’s options. (Ex. R-1; Tr. Vol. III, 7, Tr. IV, 50)

5. By a memorandum dated October 6, 2008, CFO Kelley reiterated to all division and department heads that, in accordance with the prior notification of the Town Manager, spending and hiring restrictions were in place. (Ex. R-2; Tr. III, 8) The hiring freeze included back-filling current and future vacancies. (Ex. R-2) No hiring was to take place without a requisition approved by Human Resources, CFO Kelley and Town Manager Suso. (Ex. R-2; Tr. IV, 50) Complainant testified that she understood this memo to refer only to those positions funded by the Town’s General Fund. (Tr. Vol. I, 163,164) The Water & Sewer Divisions of the Town’s Department of Public Works were funded out of separate accounts called the Enterprise Funds which were funded by user fees. (Tr. Vol. I, 86) Goddard and Kelley testified that there were no exceptions to the hiring freeze initially. (Tr. II, 207; Tr. III, 9,10, 40) During the hiring freeze there were some exceptions made on a case by case evaluation of the position’s fundamental necessity to Town services. (Tr. Vol. IV, 51, 52) Town Manager Suso had to ultimately approve

the filling of any position that was determined to be an exception to the hiring freeze. (Tr. IV, 63)

6. In October of 2008, Suso also asked each Town department to submit scenarios assuming departmental budget cuts of three percent, five percent, and seven percent and Complainant submitted the requested scenarios to Suso. (Tr. Vol. I, 72) On December 23, 2008, in anticipation of further State cuts to local aid, Suso sent out a memo to all Division Heads announcing a temporary suspension in the filling of any vacant General Fund positions. The memo stated further that he would continue to review on a case by case basis those areas in which contractual obligations provided for minimum level of manpower for public safety reasons. (Ex . C-6)

7. In early 2009, it became evident that despite its best efforts to control costs, the Town would suffer a budget shortfall at the end of the fiscal year in June. In January and February of 2009, Suso asked Complainant to draft a variety of standardized lay-off letters to unionized employees, those employees governed by Civil Service (e.g. Police and Fire Department employees) and non-unionized employees. Complainant reviewed the collective bargaining agreements for provisions governing lay-offs and drafted the letters which Suso requested. (Tr. Vol. I, 33-34)

8. Suso discussed with Department Heads that all departments would be subjected to the layoff process and that there would have to be shared sacrifice and cooperation. The time frame for layoffs/reductions to begin taking effect was the end of March 2009. (Tr. Vol. IV, 58) Department heads began submitting their proposals for layoffs or reductions in late January and early February of 2009. (Id.) On February 19, 2009, Suso met with Complainant, Kelley and Goddard and informed Complainant that she needed to lay off employees in the Human

Resources Department. Complainant testified that she asked Suso if he would be willing to consider alternatives to lay-offs such as offering full-time employees the option of part-time work but he did not follow-up on her suggestion. (Tr. Vol. I, 32) That evening Complainant sent Suso an email with suggestions for averting or minimizing layoffs, as well as layoffs in the Human Resources Division. (Tr. Vol. I, 185; Ex. R-3) Complainant recommended laying off the part-time administrative assistant in the Veterans' Services Department and assigning those duties to her own Administrative Assistant, Brant Johnson. Complainant proposed some additional cuts to the Human Resources budget and asked about severance packages and the anticipated time line for layoffs.

9. Complainant did not submit a proposal for layoffs in her department. On February 24, 2009 she followed up with an email to Suso pointing out that her department was unique in its staffing needs in that it did not have an Assistant Director, had only one Administrative Assistant, and had previously streamlined its operations and downgraded a position. She indicated her general reluctance to cut any positions from her department. (Ex. R-4) She also stated her concern about losing her Administrative Assistant, Johnson, because of the array of administrative support he provided to the department. (Id.)

10. When it became clear in February of 2009, that layoffs and or reductions were imminent, Suso asked Town Counsel, Christopher Petrini, to assist him with scheduling weekly meetings with an expanded group of individuals to discuss layoffs and their impact. This group included Suso, Petrini, Goddard, Kelley, Complainant, and Linda Lowe, an attorney who worked at Petrini's law firm. (Tr. Vol. IV, 55-57) Attorney Lowe and others testified that at one of these meetings she raised the issue of the Town's need to be cognizant of the discrimination laws in implementing layoffs and reductions in hours. Complainant claims that she first raised the issue

of discrimination to this group, but I credit the testimony of Lowe, Goddard, and Suso that Lowe brought up the issue. (Tr. Vol. II, 212, 221, 228; Tr. Vol. III, 15-16, 19; Tr. Vol. IV, 59)

Complainant also raised concerns that she had about the Town's layoff plans and noted there were statutory protections for disabled veterans, and requirements of collective bargaining agreements that might require pre-layoff bargaining. She felt the latter concern was met with annoyance due to the nature of the fiscal emergency. Both she and Lowe raised the issue of the Town's potential liability if the layoff process was discriminatory and Lowe was asked to research the issues and provide a legal memo with Complainant's assistance. (Tr. Vol. I, 37-39, 43; Tr. Vol. III, 16)

11. Complainant was told by Goddard on March 5, 2009 that each division head would make the decision as to who would be laid off in his/her division. (Tr. Vol. I, 54) On March 10, 2009, Attorney Lowe sent a memo to Suso and Complainant stating that she was preparing a memorandum on the law pertaining to employment discrimination as it relates to layoffs, and seeking some factual information on the individuals selected to be laid off with respect to their age, race, gender, disability, and other protected classes. (Ex. R-5; Tr. Vol. III, 17-18) As of that date, Suso had not yet shared with Complainant the names of the employees the Town was planning to lay off, and she had only anecdotal information about which employees from other divisions were selected for layoff. (Tr. Vol. I, 56) On March 11, 2009, Suso gave her a list of names by phone of full-time employees who were scheduled to be laid off. The list did not include part-time employees who were being laid off or employees whose hours were being reduced. (Tr. Vol. 1, 99) Complainant had informed Suso the day before, in response to a question, that even reducing an employee's work hours could constitute an adverse action under the discrimination laws. (Tr. Vol. I, 47-48; Ex. C-2)

12. By email to Attorneys Lowe and Petrini dated March 11, 2009, Complainant indicated that she would pull the personnel files of the full-time employees that Suso had identified for layoff and prepare a spreadsheet providing the information Lowe requested. (Ex. R-6)

Complainant prepared a spread sheet that did not include individual's names but their protected classes and Lowe reviewed it. Lowe testified that she was not concerned about any potential adverse impact based on age or gender because the demographics demonstrated that a large number of Town employees were female and over the age of 40. (Tr. Vol. III, 18, 19)

13. By March 10, 2009, Suso had received recommendations regarding implementation of layoffs from every department head on a timely basis, except for Complainant. (Tr. Vol. IV, 59) Throughout this time she presented a variety of other options but continued to maintain that her department should not be subject to lay-offs. (Ex. R-3, Tr. Vol. III, 67) Complainant acknowledged that she was attempting to avoid layoffs in her department and to that end she reached out to a member of the Board of Selectmen, regarding cuts to her department and spoke to CFO Kelley about how to avoid layoffs in her department. (Tr. Vol. I, 185, 187, 189; Tr. Vol. III, 47) Kelley acknowledged that Complainant repeatedly asked to meet with her to discuss alternatives to layoffs including a transfer of an HR person to an Enterprise Fund position. Kelley was clearly uncomfortable with Complainant's requests telling her that the layoffs in HR were part of a "group discussion" and needed to be a "group conclusion." (Tr. Vol. III, 47-48)

14. In early March Complainant met with Selectman Jason Smith to discuss layoffs and she discussed the value of Human Resources to the Town. (Tr. Vol. I, 205) She subsequently forwarded him a copy of the February 24, 2009 email she had sent to Suso regarding the various functions that HRD and its staff performed. (Tr. Vol. I, 189; Ex. R-4) Suso testified that he received information that Complainant had spoken to other department heads, including CFO

Kelley, about her belief that the HR department should not be included in the reduction in force and in particular, that Brant Johnson, the HR Administrative Assistant should not be selected for layoff. (Tr. IV, 76; Ex. R-4) This testimony is consistent with the testimony of others, including Kelley, that Complainant was reluctant to lay off anyone from HR, particularly Johnson, and resisted doing so.

15. On or about March 12, 2009, there was a subsequent meeting in Attorney Petrini's office to discuss the layoffs once the names of those selected had been shared. (Tr. Vol. I, 194) It is unclear whether Suso was present at the meeting. (Tr. Vol. I, 49; Vol. II, 220) Goddard testified that Complainant raised specific concerns about discrimination with regard to some of the employees selected because of the protected classes that they were in, and was more vocal and specific in her admonition once she had the names of those selected. (Tr. Vol. II, 229, 230, 233) There was discussion at that meeting that laying off only employees who worked in Town Hall meant that women over forty would be disproportionately impacted. (Tr. Vol. II, 236)

16. On March 13, 2009, Complainant had not yet provided Suso with a final written plan for layoffs in her department, and Suso sent her an email at 9:38 a.m. asking for her recommendation. (Ex. R-12) Rather than respond to Suso's email, at 10:01 a. m. that same day, Complainant forwarded his email to Peter Sellers, Executive Director of the Department of Public Works for the Town and Dianne Conner, the Director of Administration and Finance for the DPW, asking for their assistance. (Ex. R-12) Complainant had become aware of a vacant position at DPW; however the position had not yet been posted. (Tr. Vol. I, 220; Tr. Vol. II, 21) In her March 13<sup>th</sup> email she stated she was "trying to finesse" the transfer of one of her HR Generalists/Analysts [Judy] and she wanted to see what could be done that day. She stated



further that she was “trying to do some stuff ‘under the radar screen’” in order to maintain her staff and to see what could be done with the “revolving fund.” (Ex. R-12) Complainant met with Kelley on March 13, 2009 to briefly discuss the possibility of an HR generalist transferring to a vacant DPW position, if it was posted, and Kelley informed her the position in question did not exist. (Ex. R-34)

17. Complainant had discussed the possibility of layoffs in her department with Sellers and Conner on several occasions and indicated she was very upset at the prospect. (Tr. Vol. IV, 6, 9; Tr. Vol. V, 8, 9) In her discussions about impending layoffs with Sellers, Complainant did not discuss the layoffs in general, but only in terms of her department. She did not express an opinion to Sellers that she believed the anticipated layoffs were discriminatory. (Tr. Vol. IV, 31-32; Tr. Vol. V, 8-12) In one discussion with Conner, Complainant was informed that DPW was laying off an Hispanic woman who was out on Family Medical Leave (FMLA) and Complainant did not disagree with this decision and offered some suggestions to support the rationale for this layoff. (Tr. Vol. IV, 7,8)

18. On March 13, 2009, Complainant sent Suso an email at 5:35p.m. making her recommendation for layoff in her department. (Ex. R-8) Since Complainant’s supervision included Veterans’ Services, she recommended the layoff of a part-time female employee who was over the age of forty who worked in Veterans’ Services and suggested that the HR Administrative Assistant, Brant Johnson, a white male under the age of 40, assume those duties. She also recommended cutting the hours of an HR Analyst/Generalist who was an Hispanic female from five days to three days. (Ex. R-8; Tr. Vol. I, 179-184) As justification for her recommendation, she stated that the HR Generalist was “not well suited” to taking on additional tasks while Johnson could be assigned just about any task that needed to be done. (Ex. R-8) In

another email Complainant indicated she would support reducing the same HR Generalist to 2.5 days which would have entailed a loss of benefits. (Tr. Vol. IV, 72,73) On March 15, 2009 Complainant forwarded the email with her recommendations for her department to Town Selectman Jason Smith, stating, “As you know, I’d really prefer not to cut anybody in my department-we’re a lean operation with a lot of work to do and without any ‘deadwood’ (in my opinion)” She also indicated she understood the Town’s situation and her responsibilities. (Ex. R-8)

19. Suso, Goddard and Kelley discussed Complainant’s recommendations for reductions in the HR department. Kelley expressed her opinion that reducing the HR Generalist’s hours did not make sense because the employee in question handled duties such as unemployment claims, RFP’s and recruiting, duties Kelley considered much more integral to the HR function than those of the Administrative Assistant. (Tr. Vol. III, 48-51)

20. On March 17, 2009, Suso responded to Complainant’s proposal. (R-9; Tr. Vol. I, 212-213) He accepted Complainant’s recommendation to consolidate Veterans’ Services administrative functions within Human Resources and to layoff the part-time Veterans’ Services administrative staff person. Suso also wrote that while he had given full consideration to the Complainant’s recommendation to reduce the hours of an HR Generalist, he decided to reduce the hours of the HR Administrative Assistant, Brant Johnson, from five days to three days, with the expectation that the three experienced colleagues in HR would assume some of the administrative/clerical duties on the two days Johnson was not in the office. (Ex. R-9) He noted that this proposal would allow Johnson to continue to receive the Town’s benefit package.

21. Complainant responded to Suso that she was “deeply disappointed” and that she “deeply regret[ed] the decision.” (Ex. R-27) She indicated to Suso that he had devalued her analysis and

judgment as someone experienced in HR, but that she would comply with his directives as long as she continued to work for the Town. (Id.) Suso replied that he understood her disappointment but that it was “imperative that [she] join [him] in full support of moving forward with this overall Reduction in Forces process.” (Id.) Complainant forwarded Suso’s response to Board of Selectmen member Smith on March 17, 2009. (Ex R-9)

22. On March 18, 2009, Complainant emailed Peter Sellers at the DPW asking him whether there was an M1 position available in the DPW and indicating if there were, she would like to encourage Johnson to apply for it. (Ex. R-10) Sellers responded that there was a data entry position open. (Id.) Complainant suggested to Johnson that he might want to apply for the position. (Tr. Vol. II , 178)

23. Regardless of whether a position was funded from the General Fund or the Enterprise Fund, a department head with a position to fill was required to fill out a Request for Personnel Form (RFP) which was forwarded to HR for approval and sign-off by the HR Director. The Chief Financial Officer would sign off at the next level and from there it would go to the Town Manager for final approval. (Tr. III, 10) After the hiring freeze was implemented, positions funded from the Enterprise Fund such as DPW positions had to be evaluated on a case by case basis. (Id.) An RFP for a DPW position of Program Assistant (an M1 position) and had been signed off on by Conner and Complainant on March 16, 2009, and by CFO Kelley on March 20, 2009, but Suso did not approve the position and did not sign the RFP until July 23, 2009, the next fiscal year. (Ex. R-11)

24. On March 19 and 20, 2009, meetings were held to inform employees who were impacted by the layoffs. Suso met with Brant Johnson on the afternoon of March 20<sup>th</sup> and Complainant was present. Suso gave Johnson the notice informing him of the reduction in his hours and

explained that he would retain full benefits and might be eligible for some unemployment compensation. (Tr. Vol. IV, 70, 71,75) Johnson asked if he could obtain additional hours in another position such as the Selectmen or Town manager's office and Suso responded the he could not consider the request at that time, but would revisit the issue, at the earliest, at the beginning of the new fiscal year. (Tr. Vol. IV, 71) Complainant and Johnson testified that Suso only prohibited Johnson from working in the Selectmen's office but did not specifically restrict him from working elsewhere for the Town, including the DPW. (Tr. Vol. I, 73; Tr. Vol. II, 179) Suso asserted that the prohibition extended to working any additional hours for the Town. (Tr. Vol. IV, 71) Suso testified that notwithstanding Johnson's possible misunderstanding regarding alternative part-time employment, Complainant was fully aware of Suso's position because he had specifically informed her of this one week earlier, when she raised the issue. (Tr. Vol., IV, 157) I credit his testimony regarding this issue.

25. Complainant testified that Suso asked her to remain in his office after meeting with Johnson on March 20<sup>th</sup> and told her that he wanted to move on from the layoffs and asked her if she were a "team player." Complainant testified that during the discussion she told Suso she understood there needed to be RIFs in HR, but asked him why he had overruled her recommendation, selecting Johnson for layoff, despite the detailed criteria supporting her recommendation. She testified that Suso's response was that Johnson is a "white male," and they didn't want to lay off all minorities. (Tr. Vol. I, 76, 77) Complainant testified that she interpreted this to mean that Suso had decided to layoff Johnson based solely on his gender and color, and she was appalled by this. (Tr. Vol. I, 78) Suso testified that Complainant challenged his decision to reduce Johnson's hours claiming that "as a white male," [Johnson ] was in a protected class and that it was improper to lay him off for that reason. (Tr. Vol. IV, 138) He did

not recall telling Complainant that he did not want all the employees targeted for layoff to be minorities. (Tr. Vol. IV, 158) It seems unlikely that Complainant would have raised the issue of Johnson being in a protected class, absent a comment from Suso about not wanting to lay off only minorities, and therefore I credit her testimony that Suso said this.

26. Almost immediately after the meeting, Johnson sent emails to Peter Sellers at DPW and to the Director of the Framingham Library explaining that his hours had been cut and asking about any available part-time positions. (Ex. C-5; C-18; Tr. Vol. II, 180) Both Complainant and Johnson testified that she did not advise Johnson to send these emails, and Johnson did not tell her he was sending them, nor did he copy her on them. (Tr. Vol. I, 74; 232; Vol. II, 203, 204) However, it is clear that the plan for Johnson to pick up additional hours working for the DPW originated with Complainant and she had pursued the opportunity on Johnson's behalf. Complainant had already spoken to Sellers about the possibility of Johnson working for DPW prior to March 20, 2009 (Tr. Vol. I, 238) She had also discussed this possibility with Diane Conner, the Director of Finance and Administration for the DPW prior to March 20<sup>th</sup>. (Tr. Vol. I, 228; Tr. IV, 11,12) Sellers informed Complainant on the evening of March 20<sup>th</sup> that after receiving Johnson's email, he and Johnson had spoken about Johnson working at the DPW part-time in a vacant entry level position that had not yet been posted. (Tr. Vol. I, 234) Johnson testified that Complainant arranged the job at DPW for him, and told him to contact Dianne Conner to coordinate which days he would work there. ( Tr. II, 181) The DPW position was in another location in Framingham, away from the Town Hall.

27. Suso received an email from a Town Selectman on March 23, 2009 questioning why an Ad appeared in the Metrowest Daily News seeking a new employee for the Town at time when layoffs had just been completed. (TR. Vol. II, 120-123) Complainant informed Suso that an

HR employee had placed the ad. (Ex, C-16) Suso lamented the unfortunate timing of this ad calling it “boneheaded” and “insensitive” in his response to the Selectman and sent Complainant an email on March 23, 2009 requesting that any and all posting and advertisements related to any positions, including water and sewer, be removed and put on hold until further discussion with the Board of Selectmen and no earlier than the first week in April. (Ex. C-17; Ex. R-14)

28. Although the reductions in force were not scheduled to take effect until the following week beginning March 30, Complainant allowed Johnson to work his new three-day a week schedule the week of March 23<sup>rd</sup> but paid him for working 5 days. Complainant stated that she believed she was acting in accordance with the Town’s intent by allowing Johnson to receive a prorated “severance” because employees who were laid off had received one week of severance pay. (Tr. Vol. I, 91, 254-255) Suso testified that severance pay was not intended for the two employees who had their hours reduced, but only for those laid off. (Tr. Vol. IV 79, 80)

29. On March 20, 2009, Suso sent an email to all division heads confirming that the difficult layoff process had come to a closure, and thanking everyone for their understanding, support and teamwork. (Ex. R-30) Suso had stressed the need to work collaboratively and for shared sacrifice throughout the process and he attached a summary of the reductions by department to demonstrate that no department had been spared the reductions. (Tr. IV, 78,79) At Complainant’s request, Suso met with the Human Resources staff on March 27<sup>th</sup> to discuss the importance of a team approach. Johnson was not present at that meeting, and Suso asked why he was not present and Complainant told him Johnson was out that day with no further explanation. (Tr. I, 83; Tr. IV, 88, 89,) Suso stated that his relationship with Complainant at that point was cordial and he did not anticipate disciplining her any reason related to the layoffs. (Tr. Vol. IV, 81)

30. On Monday, March 30, Johnson's post RIF three day per week schedule in HR went into effect, and this was when the reductions took effect. He was paid out of the HR department's budget for the three days he worked there. That same day Sellers wrote an email to managers in the DPW instructing them to coordinate with Complainant to have Johnson work in a data entry position there two days per week, only until the position was posted. (Ex. R-25) Suso was not consulted about this and did not approve it. (Tr. Vol. V, 13, 14)

31. On the morning of April 8, 2009, Suso received an email from Johnson in which Johnson remarked that it was nice of the DPW to let him work in their department on Mondays and Fridays. (Ex. R-15) Johnson sent this email assuming that Complainant had cleared this arrangement with the Town Manager. (Tr. Vol. II, 182) Suso, knowing nothing about this, emailed Goddard and Kelley, asking them if they had any information regarding Johnson's work at the DPW. (Ex. R-15) Kelley told Suso that she had heard a rumor about Johnson working at the DPW the previous afternoon. (Ex. R-15; Tr. III, 55) She told Suso that she thought it was unfair that others who were laid off were not offered the same opportunity. (Id.)

32. That same day, in the early afternoon, Suso emailed Johnson thanking him for his email but stating that he did not know what Johnson was talking about. He copied Complainant, Sellers, Conner, Kelley, and Goddard on the email and asked if one of them would enlighten him. (Ex. R-32; Tr. IV, 83) Complainant was angry that Johnson had emailed Suso without consulting her and she was concerned because it was obvious from Suso's email that he was upset. (Tr. II, 47, 48) Johnson testified that Complainant was furious with him and told him that he was not to send any further emails to the Town Manager without her seeing them first. (Tr. II, 183)

33. Complainant responded to Suso that DPW had an M-1 vacancy for a data entry clerk in the water and sewer division that had not been posted, and stated that “DPW has been using Brant on a temporary, part-time basis to fill in.” (Ex. R-16) Suso followed up with an email to Complainant, Sellers, Conner, Kelley and Goddard asking for a meeting to discuss the circumstances of this decision. (Ex. R-16) At 4:58 p.m. that afternoon, Complainant forwarded the email chain about the DPW situation to Johnson, asking him to keep it private and confidential and emailed him shortly thereafter that she was “really upset” and suggesting that he just let her be for now. (Ex. R-17)

34. Complainant wrote to Suso on the evening of April 8, 2009 advising him that Sellers was out until Monday, but that she would speak with Sellers regarding who was involved in the decision. (Tr. IV, 85; Ex. R-32) Suso replied asking Complainant to forward him all of the requisite paperwork involving Johnson’s assignment to the DPW position. (Id.) Complainant replied that she would do so, but she admitted at the hearing she did not know if any paperwork existed. (Ex. R-32; Tr. II, 69, 70) In fact, Complainant had directed the payroll clerk to keep paying Johnson for five days per week, three from Human Resources funds and two from the Water and Sewer Department funds. Kelley testified that the payroll clerk requested the paperwork for this change, but Complainant did not generate the required Action Form which requires the Town Manager’s signature to designate the change in payroll status for Johnson. (Tr. II, 69 Tr. III, 56-58) DPW Director, Sellers, testified that he assumed that Complainant, as Human Resources Director would have informed the Town Manager about the arrangement. (Tr. V, 13-14)

35. Complainant met with Suso and Goddard on April 9, 2009 and Suso raised the Johnson matter. He told Complainant he was concerned that in allowing Johnson to secure employment



in another department she had taken actions contrary to their discussions on the subject and contrary to the whole layoff process. (Tr. IV, 83, 86) Suso told Complainant that she felt her action undermined the entire reduction-in-force process and poisoned the even-handed result that they had all worked on collaboratively for months. (Tr. IV, 86, 87) He felt that Complainant had acted contrary to his directives, had acted outside her authority and stated he had lost confidence in her ability to manage the Town's HR function. (Tr. IV, 87) In what purports to be an email Complainant sent to herself on April 9, 2009 she appears to summarize the meeting with Suso. She confirms Suso's testimony that the issue with Johnson was a major concern for him and that he no longer had confidence in her ability to lead HR and did not consider her a team player. He indicated concern that she did not communicate with him about the matter which made it appear that HR was getting preferential treatment. Complainant states that she did not believe Johnson filling in temporarily would be an issue and she apologized, but felt as if she was being attacked and was not prepared to answer Suso's questions. (Ex. C-13) Complainant was upset during this meeting and cried and left Suso's office distraught. (Tr. Vol. I, 94-95)

36. Subsequent to the April 9, 2009 meeting, Suso also learned that Complainant had paid Johnson for two days he did not work in the week before the layoffs were scheduled to take effect. He stated that he was shocked and dismayed to learn this and that Complainant had no authority to direct the payroll administrator to pay Johnson for those days because he had not authorized severance pay for those employees who merely had their hours reduced. (Tr. IV, 79,80,88, 89) Suso had questioned Johnson's absence in a meeting he held with HR on one of those days and Complainant had merely responded that he was not in work that day. (Id.)

37. On April 13, 2009, Complainant met with Suso, Goddard, Sellers and Conner to discuss the Johnson matter, and Suso asked how Johnson had come to be working at DPW. (Tr. I, 98,

100; Tr. IV, 92) Sellers stated that it was a misunderstanding on his part. He did not know that Suso had declined Johnson's request to work in another department, and had he known that, he would not have allowed it to occur. He agreed to discontinue the arrangement immediately. (Tr. IV, 92, 93) According to Goddard, Complainant also stated that she had misunderstood and was not aware of any "directive" regarding Johnson working at DPW. (Tr. Vol. II, 215)

Immediately thereafter, Suso and Goddard met alone with Complainant and Suso indicated his disappointment with her actions which he felt undermined his authority and the integrity of the layoff process. (Tr. IV, 93) Suso believed that Complainant's response was disingenuous, that she had ignored his directive, undertaken actions in contravention of their conversations, and surreptitiously communicated with others, unbeknownst to him, to spare employees in her department from layoff, thereby undermining his authority. (Tr. 101-103) Suso told Complainant that he found her conduct unbecoming of an HR director and re-iterated his lack of confidence in her ability to manage the HR department. (Tr. IV, 93-94) He asked her about her intentions to remain as the HR director and Complainant stated that she loved her job, considered herself a team player and had no intention of leaving. (Tr. Vol. IV, 94) Complainant testified that she again raised the issue of potential discrimination in Johnson's layoff if he were chosen because he was a white male and that this angered Suso. (Tr. I, 105-106)

38. Complainant testified at the hearing that she did not arrange the DPW job for Johnson, but that Johnson and Sellers had done so. She stated that she communicated about it but did not arrange it and did not see a problem with it. Her recollection of when she learned of the arrangement was hazy, and she testified that she believed Sellers told her about it sometime on March 20<sup>th</sup>. (Tr. Vol. I, 229-232, 235-236) This testimony was not credible and I find that Complainant was responsible for making this arrangement. Complainant later admitted in

further questioning that she had discussed with Sellers that it would be a good idea for him to utilize Johnson on a part-time basis and that this discussion occurred before Johnson sent Sellers an email on March 20<sup>th</sup> and before Sellers discussed this with Johnson. (Tr. II, 89-90, 92) Sellers confirmed that he did not initiate the request for Johnson to work in the DPW, and that it was Complainant and not Johnson who had made the request, but that he implemented the arrangement. (Tr. V, 53, 57-58) Johnson also testified that Complainant got him the DPW job. (Tr. II, 162, 181)

39. On April 16, 2009, Complainant was called into Suso's office and given a Notice of Intent to Remove for Cause and Notice of Administrative Leave with charges that included several allegations surrounding the layoff process and her arranging for Johnson to work at the DPW, conduct which Suso believed constituted cause for removal from her position. The notice stated she had "engaged in a pattern of conduct which has interfered with and undermined the Town of Framingham's layoff/reduction-in-force process..." (Ex. C-8; Tr. I, 106-107; Tr. IV, 99) Suso testified that he relied on the advice of Town Counsel in drafting the notice. (Tr. IV, 95-98) A Hearing on the matter was scheduled for April 29, 2009 and by the Notice Complainant was placed on administrative leave. Complainant was advised she would be on unpaid administrative leave after April 29<sup>th</sup> and on April 28<sup>th</sup> she applied for FMLA leave, which was granted by the Town, once she submitted a second medical opinion. From April 30 to June 3, 2009, Complainant was permitted to exhaust her sick and vacation time and was paid for that period. From June 4, 2009 up until her termination on June 25, 2009, Complainant was on unpaid FMLA leave. (Tr. I, 109, 111-113)

40. A Hearing to determine whether there was just cause for Complainant's termination was held on May 22, 2009. (Tr. I, 117) Suso conducted the Hearing and relied on Town counsel's

advice in doing so. (Tr. IV, 97) Complainant was represented by counsel at that hearing but was not allowed to call other witnesses. (Tr. I, 121; Ex. C-11) Complainant requested a public hearing but Suso denied this request. (Tr. Vol. I, 118) Prior to this hearing, on May 4, 2009 Complainant's counsel had requested a hearing before the Town's Personnel Board purportedly to address allegations that Complainant had been the victim of retaliation in violation of the Commonwealth's Whistleblower statute, G.L. c. 149, s. 185, for voicing concerns about the potential discriminatory impact of layoffs. (Ex. C-9) Although Suso knew about Complainant's request for said hearing, he gave no advice to the Selectmen or Personnel Board regarding her request to meet with them. (Tr. IV, 96-97) That request was denied. (Tr. I, 118-119) Suso did not learn until later that Complainant had been communicating her dissatisfaction with the layoffs to Selectman Smith. (Tr. IV, 97)

41. On June 15, 2009, Complainant by letter from her counsel requested to meet with the Board of Selectmen. The letter noted that she had complained about potential violations of anti-discrimination laws. (Ex. C-11) Town counsel replied to that letter stating that Suso, not the Selectmen, was the decision maker in her termination, but her request would be communicated to the Selectmen to consider for their next meeting. (Ex. R-22)

42. On June 25, 2009, Complainant was notified by Suso of his decision to terminate her employment with the Town, effective immediately. (Tr. I, 121) Suso testified that he relied on the advice of Town Counsel in drafting the decision. (Tr. IV, 98) After Complainant was terminated she asked to retrieve personal items from the Town Hall and was allowed to do so after hours but was accompanied by Kelley and a plain clothes Framingham police officer. At that time, Complainant had filed a discrimination complaint against the Town. (Tr. I, 124, Tr. IV, 100-101) Suso testified that this was a standard precaution. (Tr. IV, 100, 101)

### III. CONCLUSIONS OF LAW

General Laws c. 151B §4(4) prohibits retaliation against any person who has engaged in activity protected by the statute. Complainant contends that Respondent, Suso, retaliated against her because she expressed concerns about the Town's layoffs and reduction in force occurring in March of 2009, as potentially being discriminatory. In addition to resisting lay-offs in her department, Complainant was particularly vocal about the reasons why she believed her HR assistant, a white male, was selected for layoff. G.L. c. 151B §4 4(A) makes it unlawful *inter alia* for any person to coerce, intimidate, threaten or interfere with any person in the exercise of any right granted or protected by the statute.

To establish a prima facie case of retaliation, Complainant must demonstrate that (1) she engaged in protected activity; (2) Respondent was aware that she engaged in protected activity; (3) Respondent subjected Complainant to an adverse employment action; and (4) a causal connection existed between the protected activity and the adverse employment action. *Mole v. University of Massachusetts*, 442 Mass. 582 (2004); *Kelley v. Plymouth County Sheriff's Department*, 22 MDLR 208, 215 (2000). An individual engages in protected activity if he or she opposes any practices forbidden by G.L. c. 151B, or files a complaint, testifies or assists in any proceeding under G.L. c. 151B. Protected activity includes pre-charge and non-charge complaints of discrimination as well as complaints filed with the Commission, and informal voicing of complaints about discrimination. *Auborg v. American Drug Stores*, 21 MDLR 238, 242 (1999); *Proudy v. Trustees of Deerfield Academy*, 19 MDLR 83, 88 (1997) The requisite causal connection may be inferred where the timing of events makes such an inference reasonable. *Mesnick v. General Electric Co.*, 950 F. 2d 816, 828 (1<sup>st</sup> Cir 1991) However, the

mere fact that one event followed another is not sufficient to establish a causal link. *Mole*, 442 Mass. at 592.

I conclude that Complainant has established a prima facie case of retaliation in that she engaged in protected activity. Complainant did raise concerns about the layoffs and reductions stating that the Town needed to be aware of any potential discriminatory impact. She was not the only person to raise this issue and Town counsel's office had been directed to provide a memo regarding the various laws that could be implicated by the layoffs and to advise the Town about proper procedures. Complainant prepared spread sheets noting the protected classes of those selected for layoff. She noted after being provided with the list of those affected that the majority of those being selected for layoff appeared to be women over the age of 40. Moreover, Complainant protested Suso's selection of Johnson to be laid off from the HR department and she articulated to Suso that if he chose to layoff Johnson merely because he was white and male, that this could be discriminatory treatment. Complainant subsequently protested what she believed to be Respondent's discriminatory actions in letters to the Town's Personnel Board in May of 2009 and to the Town's Board of Selectmen in June of 2009. I find that Complainant's voicing of concerns about discrimination was sufficient to be considered protected activity. Since her concerns were articulated to Suso directly, he was aware of her protected activity.

Complainant's protected activity was followed closely by an adverse employment action. She was terminated from her employment as the HR Director by Suso not long after the layoff process was completed. The timing of the termination and the meeting leading up to the termination were sufficiently close in time to raise an inference of causation.

Once the Complainant establishes a prima facie case of retaliation, the burden shifts to Respondent to articulate a non-retaliatory reason for the adverse employment action. If

Respondent articulates a non-discriminatory reason supported by some credible evidence, Complainant has the burden to prove by a preponderance of the evidence that Respondent's non-retaliatory reason is a pretext. *Mole*, 442 Mass at 591. In other words, Complainant must prove that the articulated justification is not the real reason, but a pretext for discrimination.

Ultimately, the Complainant must show that the employer's adverse action was based on a desire to retaliate against her for engaging in protected activity. *Melnychenko v. 84 Lumber Co.*, 424 Mass 285, 293 (1997); *Tate v. Department of Mental Health*, 419 Mass. 356, 364 (1995).

Respondent has articulated legitimate non-retaliatory reasons for Complainant's termination and supported those reasons with credible evidence. Suso obviously harbored concerns over the manner in which Complainant responded to the layoff procedure and her reluctance to include the HR department in the reductions. The evidence is that Complainant resisted naming anyone from her department and suggested to Suso that her department should not be impacted by the layoffs. After Suso informed her that all departments would have to sacrifice equitably in the reductions, she initiated communication with other department heads surreptitiously in attempts to avoid HR employees being impacted by the layoffs. She stated in emails that she was trying to do stuff under the radar screen and finesse the transfer of one of her employees to another department. She did not submit a proposal for layoffs in the HR department in response to Suso's initial request, and did so only at the 11<sup>th</sup> hour under pressure from him to so do. Prior to that, she had contacted a member of the Board of Selectmen to complain about having to layoff HR personnel and sought his intervention. When she did finally submit her proposal it was to layoff an Hispanic female, over the age of 40, a selection that did not appear to comport with her purported concerns about the layoffs adversely impacting older female employees.

Once Suso rejected Complainant's selection of one of her HR analysts to be laid off and chose instead to reduce Johnson's hours, preserving his benefits, she protested this decision and continued to question it. Complainant then took steps to find Johnson additional hours in another department in direct contravention of Suso's directive. She contacted Kelley and Sellers and Connors in an attempt to accomplish this. Kelley avoided responding to Complainant's inquiries and made it clear that she wanted nothing to do with such behind the scenes maneuvering. Complainant's articulated concerns about the potential discriminatory impact of the layoffs on older females was belied by her own actions to ensure that her administrative assistant, who was a young white male, did not suffer any impact. Since Suso was unaware of Complainant's attempts to arrange transfers or additional hours for HR employees while the layoff process was unfolding, he had no intention of disciplining Complainant once the layoffs were completed. This was in spite of her negative and uncooperative attitude, and the fact that she had raised discrimination as a potential issue. Subsequent to the layoffs being completed, he thanked her and others for their cooperation, and he agreed to meet with the HR department to discuss how they could move forward collaboratively with less administrative support.

However, once Suso learned that Complainant had initiated a plan with Sellers at the DPW for Johnson to work part-time in a position that had not been posted, he was infuriated. Complainant undertook this action despite Suso's admonition to Johnson, when she was present, that Johnson would not be allowed to pick up any extra hours at that time, but that Suso would revisit the issue at the start of the new fiscal year. The evidence suggests that Complainant proceeded to flaunt Suso's directive in a manner that undermined his authority as Town Manager and demonstrated she had no compunction about maneuvering to reverse the impact of his decision because she disagreed with it. Suso justifiably believed that her actions constituted



insubordination and he questioned her willingness to abide by his directives going forward and her ability to manage and lead the HR function for the Town. This was particularly true given the fiscal difficulties the Town was facing and the emotional upheaval attendant to job losses. The fact that Complainant attempted to hide her involvement in arranging Johnson's DPW hours and replied to Suso that she would have to look into how that came about was incredibly disingenuous and angered Suso further. He clearly understood this was a pretense. It was apparent from the testimony of other senior managers who reported to Suso that they agreed with his view of Complainant's actions and did not sympathize with her plight. At least one senior manager, Goddard, testified that you can disagree with the Town manager but once the decision has been made, you must abide by the Town Manager's directives. Once Suso became convinced that he could no longer trust Complainant to head up HR in a manner consistent with his directives and to be honest with him, he made the decision to terminate her employment. I conclude that Suso articulated a legitimate non-retaliatory reason for Complainant's termination and that his reason is supported by credible evidence.

If Respondent succeeds in articulating a legitimate reason that is not retaliatory, the burden remains with Complainant to persuade the finder of fact by a preponderance of the evidence, that the articulated reason was not the real reason, but a pretext for discrimination. *See Lipchitz v. Raytheon Co.*, 434 Mass. 493, 501 (2001) In order to prevail on her claim of retaliatory termination, Complainant must prove that Suso acted with intent to retaliate against her because of her protected activity. Complainant has failed to persuade me that this is the case. I do not believe that Suso's actions were motivated by her protected activity. There is no evidence that Suso harbored hostility toward Complainant because of any ideas or concerns she expressed about possible discrimination during their meetings regarding layoffs. The issue of the

potential discriminatory impact of layoffs was a proper subject to be addressed and it was discussed in meetings. Town counsel was authorized to research the issue and prepare a memo for the Town Manager and the working group of department heads dealing with layoffs. Counsel provided advice that satisfied Suso and the group that they were acting appropriately.

Suso may have been unhappy that Complainant protested his selection of Johnson to be laid off, but not because she suggested his decision was potentially discriminatory. Rather, it is clear to me that Suso viewed her protestations as nothing more than a continuation of her intransigence and insistence that her department be spared the impact of layoffs, as demonstrated by her reluctance to provide Suso with a plan for reductions in her department and her outright stone-walling in selecting individuals to be laid off from HR. The fact is that Suso did not intend to take any disciplinary action against Complainant, and in fact did not do so, until after he discovered that she had deliberately disregarded his directive. This discovery was compounded by Complainant's refusal to own up to her involvement in making the arrangement and the pretense that she needed look into how Johnson's working at the DPW had come about. Suso clearly recognized that Complainant was being disingenuous in suggesting that she had not initiated the arrangement. These facts and the timing suggest that Suso was not motivated to retaliate against Complainant for any prior protected activity. Rather he came to the decision to terminate her employment only after discovering that she had deliberately flaunted his directive, and undermined his authority in such a way that he believed he could no longer trust her to manage the HR function for the Town.

Complainant further asserts that Suso's actions of unilaterally converting her administrative leave from paid to unpaid leave and assigning a police officer to escort Complainant in the Town Hall as she packed up her items after she had filed her discrimination

complaint were retaliatory and constituted coercion and interference with her rights in violation of G.L. c. 151B s. 4(4A). While reasonable people might disagree about whether Suso's actions were unduly harsh or even mean-spirited, I cannot conclude that they were motivated by retaliation for protected activity under c. 151B or an intent by Suso to otherwise coerce threaten or interfere with Complainant's c. 151B rights. I conclude that Suso genuinely believed that he could no longer rely on Complainant to be forthright with him and to carry out his directives. His actions were motivated by conduct that he justifiably viewed as flagrant insubordination and lack of honesty on Complainant's part and were not undertaken in violation a G.L. c. 151B.

IV. ORDER

Having concluded that Suso's actions did not violate G.L. c. 151B, I hereby Order the complaint in this matter dismissed. This constitutes the final decision of the Hearing Officer. Any party aggrieved by this decision may pursuant to 804 CMR 1. 23 file a Notice of Appeal to the Full Commission within ten days of receipt of this Order and a Petition for Review with the Full Commission within thirty days of receipt of this Order.

So Ordered this 31<sup>st</sup> day of December, 2013.

Eugenia M. Guastaferrri  
Hearing Officer

