

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and NANCY DALRYMPLE,
Complainants

v.

Docket Nos.: 02-BEM-03751
05-BEM-01174
05-BEM-02944

TOWN OF WINTHROP,¹
Respondent

Appearances: Jonathan J. Margolis and Beth R. Meyers, Esqs. For Complainant
Michelle Randazzo and Peter E. Montgomery, Esqs. For Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On November 7, 2002, Nancy Dalrymple (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) charging that the Town of Winthrop discriminated against her on the basis of gender and retaliated against her for filing prior complaints alleging discrimination.² On April 28, 2005, Complainant filed additional charges of gender discrimination and retaliation against the Town of Winthrop and individually-named respondents.³ On November 4, 2005, Complainant filed a third charge of gender discrimination and retaliation against the Town of Winthrop and individually-named respondents.⁴ A lack of probable cause finding was issued in the first complaint on March 11, 2004 but was reversed after appeal on September 30, 2005.

¹ At the commencement of the public hearing, the parties agreed to release the individual respondents from the case.

² MCAD Docket No. 02-BEM-03751.

³ MCAD Docket No. 02-BEM-01174.

⁴ MCAD Docket No. 05-BEM-02944

On December 21, 2007, a preliminary disposition was issued in the second complaint in which the claims against individuals David Goldstein, Richard DiMento and Virginia Wilder were found to lack probable cause but the claims against the Town were found to have probable cause. A probable cause finding was issued by the Investigating Commissioner in the third complaint on September 2, 2010.

The cases were certified for a public hearing on January 28, 2008, February 10, 2009, and August 23, 2011, respectively. It was determined that the matters would be consolidated and heard together. The public hearing commenced on July 8, 2013 and continued on July 9, 11 and 15, 2013. On the first day of hearing, Complainant moved to dismiss claims against individually-named Respondents Virginia Wilder, Martin O'Brien, Brian Perrin, and Susan Bolster. The motion was granted.

The following witnesses testified at the public hearing: Complainant, Michael McManus, Virginia Wilder, Stephen Rogers, Paul DeLeo, Susan Bolster, Frank Scarpa, and Ronald Vecchia. The parties submitted Joint Stipulations of Fact and forty-nine (49) agreed-upon exhibits. In addition, Complainant submitted five (5) additional exhibits and Respondent submitted three (3) additional exhibits. Two (2) chinks pertaining to Paul DeLeo's promotion to lieutenant were also submitted.

Based on all the relevant, credible evidence and the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant became a permanent police officer in the Town of Winthrop in 1982. Transcript I at 27. For a number of years she was the only woman on the force. Transcript II at 42. Complainant has a Bachelor of Arts degree and a

Master of Science degree in the fields of political science and criminal justice administration. She attended the police academy and holds certificates of completion in areas of first aid, fingerprinting, breathalyzer operation, and investigation of sex offenses. At various times during her tenure with the Winthrop Police Department, she was the police union vice president and member of the police union executive board. At the time of public hearing she was the second most senior member of the Department. Only Lieutenant Frank Scarpa had more seniority. Joint Exhibit 11.

2. Prior to January 1, 2006, the Winthrop police chief reported to the Winthrop Board of Selectmen which functioned as the Appointing Authority for the Winthrop Police Department. The chief could not hire or promote without the Board's approval. Transcript II at 94. Although the Board of Selectmen was technically the Appointing Authority, it deferred to the Chief's recommendations regarding the appointment and promotion of police personnel. The Board of Selectmen was a part-time entity administered by an executive secretary. Virginia Wilder served as the Board's executive secretary from 1989 to January 1, 2006. Wilder was the conduit between department heads and the Board of Selectmen. She knew about litigation brought by Complainant against the Town, attended Complainant's jury trial against the Town, and testified at the MCAD in regard to previous claims brought by Complainant. Transcript II at 162-167. On January 1, 2006, the Town changed to a town council form of government and abolished the Board of Selectmen. Transcript II at 93.

3. The Winthrop Police Department operates under the provisions of Massachusetts civil service law. Joint Stipulation 35. In 1987, Complainant took, but did not pass, a civil service examination for promotion to police sergeant. Transcript I at 36.
4. In 1989, Complainant filed an MCAD complaint alleging that she was treated differently from other members of the Winthrop Police Department in regard to such matters as executing arrest warrants and participating in drug raids. The charge went to public hearing and resulted in an award of \$25,000.00 in damages and an additional award for attorney's fees. See Dalrymple v. Town of Winthrop, 15 MDLR 1473 (1993). The award was upheld on appeal. See Town of Winthrop v. MCAD and Dalrymple (Suffolk, ss, CA 965667C, November 1998, Cratsley, J), *affirmed* Town of Winthrop v. Dalrymple and another, Memorandum and Order pursuant to Appeals Court Rule 1:28 (Doc. No. 99-P-280, December 28, 2000).
5. Between 1990 and 1991, Complainant brought several additional charges to the MCAD pertaining to a shift reassignment, the omission of her name in regard to firearm recertification, and the refusal to reassign her to the station during her second pregnancy.
6. In August of 1992, Complainant was terminated from her position as police officer for "conduct unbecoming" in regard to her alleged refusal to return to work after a leave of absence following her second pregnancy and her efforts to extend the leave based on a doctor's note addressing problems with her hands (a work-related injury to one hand and pregnancy-related tendonitis in the other).

- Chief Angelo LaMonica initiated the termination. Complainant appealed to the Civil Service Commission and, after being out of work for almost three years, the Civil Service Commission in 1995 ordered Complainant reinstated with back pay upon a medical determination that she was fit to return to duty. Transcript I at 27-28.
7. In 1995, Complainant filed a complaint with the MCAD for gender discrimination and retaliation arising out of her dismissal from the police force. The case was removed to Suffolk Superior Court (Docket No. 95-4248B). Following trial, a jury awarded Complainant damages in the amount of \$575,000.00 for compensatory and punitive damages against the Town of Winthrop and individually against former Police Chief LaMonica. The verdict was upheld on appeal. See Dalrymple v. Town of Winthrop, 50 Mass. App. Ct. 611 (2000). The Supreme Judicial Court subsequently denied further appellate review. Joint Stipulation 58. The judgment was common knowledge within the Town of Winthrop and its police department. Transcript III at 115, IV at 11, 28-29.
 8. In 1995, Complainant took a civil service examination for sergeant and placed third on the list for promotion to sergeant. Transcript I at 36. The Town promoted the top two patrol officers to sergeant off the eligible list. Respondent's Exhibit 2 (arbitration decision at p. 2); Transcript I at 37.
 9. On October 23, 1999, Complainant again took a civil service examination for sergeant. Complainant placed first on the March 23, 2000 eligible list. Complainant's Exhibit 1; Transcript I at 37; Respondent's Exhibit 2 (arbitration decision at 2). It is customary in the Town of Winthrop Police Department to

select the first candidate on the eligible list to fill a vacancy unless there is a valid reason for bypass in which case the Chief must provide a written justification for the bypass. Goldstein Deposition at 45.⁵

10. In December of 2000, Michael McManus became chief of the Winthrop Police Department. Transcript II at 92. He had previously been a lieutenant. Transcript II at 51. Prior to his appointment as chief, there were four lieutenants and five sergeants. Transcript II at 103. There had been five sergeants in the Department since at least 1995. Transcript III at 49. After his appointment, there were three lieutenants (Perrin, Scarpa, and Lessard) and five sergeants (DeLeo, Femino, Hickey, Scholwin, and Diaz). Chalk A; Transcript I at 176; Transcript II at 69, 104.⁶

11. In 2001, the Town paid Complainant \$784,633.96 in compensatory and punitive damages and interest in fulfillment of the 1995 jury award, the MCAD award(s), and possibly other judgments that Complainant held against the Town. Joint Stipulation 59; Transcript II at 169. Around the time that the judgment was paid, Ronald Vecchia and Marie Turner were re-elected to the Winthrop Board of Selectmen after a period of time when they were off the Board. Transcript IV at 76; Turner Deposition at 11, 64. They both denied any recollection of discussions about the Appeals Court verdict for Complainant even though it represented

⁵ David Goldstein was the Winthrop Police Chief from 2004 to 2009. He does not live in Massachusetts and, thus, could not be served with a subpoena to command his testimony at the public hearing. In lieu of live testimony, I accepted portions of his November, 2006 deposition into evidence.

⁶ According to Joint Stipulation of Facts #22, the 2001 Annual Town Report lists Paul Deleo as a lieutenant. I discredit this information since it conflicts with the credible evidence cited herein as well as Joint Stipulation 41 which states that Sergeant DeLeo was promoted to lieutenant on March 1, 2002.

almost half of the police personnel budget. Id. at 77, 79; Deposition at 28. I do not credit their testimony.

12. Chief McManus testified in at least one prior action brought by Complainant before the MCAD and in the jury trial. Transcript I at 34, II at 43.
13. In March of 2002, the Town promoted Sergeant Paul DeLeo to lieutenant. Respondent's Exhibit 2 (arbitration decision at p. 2); Chalks A & B; Joint Stipulation 41. DeLeo was first on the civil service eligible list for lieutenant. Transcript II at 115. During McManus's tenure as chief, he never recommended an officer for promotion who was lower than first on a promotion list. Transcript II at 68.
14. After DeLeo's promotion, there were four lieutenants and four sergeants. Transcript I at 49; Chalk B. One of the existing lieutenants, Lt. Perrin, was moved out of the day shift and put in charge of detectives. Transcript II at 113. After DeLeo's promotion and Lt. Perrin's transfer, some shifts lacked supervisory coverage which made it more likely that a supervisory officer would have to be hired on an overtime basis to ensure the presence of a superior officer on all shifts. Transcript II at 152-153; III at 116.
15. Chief McManus did not request funding for an additional sergeant's position in his proposed budgets for fiscal years 2002 (7/01-6/02) and 2003 (7/02-6/03). Transcript II at 105-107. He testified that he did not do so because even without a fifth sergeant's position, there were still two superior officers on each shift. Transcript II at 109, 120. Chief McManus testified that he did not believe another sergeant would significantly reduce supervisory overtime because: 1) the fifth

- position would be assigned to a particular shift; 2) overtime costs on the other shifts would be unaffected; and 3) the Department always spends whatever overtime is allocated. Transcript II at 126-127. I do not credit his testimony.
16. Then-Board of Selectman Marie Turner testified at deposition⁷ that the Board didn't requisition a promotional list for sergeant after Deleo's promotion to lieutenant because the Police Department was operating well with four lieutenants and four sergeants and because of extreme cutbacks on overtime. Deposition at 38. However, she also stated that she didn't know about overtime usage following DeLeo's promotion and never requested to see supervisory overtime data. Deposition at 47, 74. According to Turner, Complainant should not have won "close to a million dollars" in damages because she was not subjected to discrimination. Deposition at 36-37, 62-63, 66. Nonetheless, Turner denied having any conversations about Complainant's litigation and denied that there was any discussion about Complainant winning a lawsuit against the Town. Deposition at 62-64. I do not credit Turner's testimony.
17. Sergeant Stephen Rogers, police union president from 2003 to 2004, testified in contradiction to Chief McManus that four sergeants was an insufficient number to achieve the cost-effective goal of having two supervisors on every shift. Transcript III at 55; Complainant's Exhibit 5 ("Promotion Versus Overtime Expenditure"). Rogers testified that he provided McManus with Complainant's Exhibit 5 while McManus was chief. The document purports to show the cost savings of promoting supervisors versus spending on supervisory overtime.

⁷ Marie Turner was a member of the Winthrop Board of Selectman in 2000 to 2003 when Michael McManus was the chief of police. The parties agreed to submit portions of Turner's deposition in lieu of her live testimony.

Transcript III at 57-58. According to Sergeant Rogers, prior to a shift configuration in 2006, it was necessary to have a total of nine or ten supervisors (sergeants and/or lieutenants) in order to maintain supervisory coverage on each shift. Transcript III at 62. In March of 2002, there were only seven supervisors in the Department aside from the Chief, who supervised the whole department and Lt. Perrin, who supervised detectives. Chalk B; Transcript III at 62-63.

18. Chief McManus asserted that he did not know how many times Complainant had taken the sergeant's promotional exam or where she stood on the promotional list for sergeant as of March, 2002. Transcript II at 123-124. I do not credit this testimony.
19. Former Executive Secretary Virginia Wilder testified that she was approached by Complainant multiple times in 2002 about whether the Board planned to call for the sergeant's list on which she was the top candidate. Transcript II at 176. Wilder said that she informed Complainant that fiscal constraints prevented the appointment of a fifth sergeant. Transcript II at 180-181. Although I credit that this is what Wilder told Complainant, I do not credit the substance of what she said. I found Wilder to be an evasive witness who testified unconvincingly that she couldn't recall "talk" about Complainant's prior lawsuit, that she didn't object to the jury's verdict of \$575,000.00 for Complainant, and that she considered the jury as having done "what they had to do." Transcript II at 165, 171. These assertions are contradicted by the deposition testimony of Police Chief Goldstein who stated that "it may very well have been" Wilder who told him that she didn't

agree with the court decision in favor of Complainant and that Wilder was “not reticent about the decision.” Deposition at 82.

20. The eligible list from the 1999 sergeant’s exam expired in October of 2002.

During the life of the eligible list -- on which Complainant was the top-scoring candidate -- the Town did not use it to make any promotions to sergeant.

Transcript II at 63.

21. Prior to the expiration of the eligible list for sergeant in October of 2002,

Complainant filed a grievance on September 13, 2002 stating that the Town’s failure to make a promotion from the list constituted discrimination and retaliation against her. Respondent’s Exhibit 2. The grievance, denied by Chief McManus, proceeded to arbitration and resulted in an arbitration decision denying the grievance on the basis that the Town of Winthrop’s Board of Selectmen (the Appointing Authority) was not obligated to fill a sergeant’s position whenever a vacancy occurred. Respondent’s Exhibit 2 (arbitration decision); Transcript I at 174.

22. Complainant testified that filling a fifth sergeant’s position from the eligible list

on which she was the top candidate would have reduced the need for supervisory overtime. Transcript I at 66. She acknowledged, however, that a fifth sergeant would not eliminate supervisory overtime on all shifts. Transcript I at 163, 168.

23. According to Chief McManus, the money to cover the cost of promoting a patrol

officer to sergeant in 2002 would have been approximately \$5,000.00 to \$6,000.00 and could have been found in the police department budget. Transcript II at 81.

24. Complainant volunteered for and began serving as school resource officer in the fall of 2002. Prior to taking the school resource assignment, she worked the 4:00 p.m. to midnight shift, for which she received an eight percent pay differential. During the time that Complainant served as school resource officer, she continued to receive the eight percent night-shift pay differential even though she worked an “administrative schedule” which consisted of working Mondays through a half-day on Fridays. Transcript II at 12. While she served as school resource officer, Complainant took time off during school vacations without counting it as vacation time until Chief Goldstein prohibited her from doing so. Transcript I at 80-82; II at 10-11; Goldstein Deposition at 61.
25. On October 19, 2002 Complainant took another civil service exam for police sergeant. Transcript I at 40, 148; Joint Stipulation 43.
26. On November 7, 2002, Complainant filed the first of the three complaints at issue in this decision: MCAD complaint 02 BEM 03751. Complainant charged that the Town of Winthrop engaged in gender discrimination and retaliation against her by allowing the eligible list for sergeant to expire in October of 2002 so that she would not be promoted because of her previously-filed sex discrimination claims.
27. On March 31, 2003, a new eligible list for sergeant was established by the state Human Resource Division from the 2002 sergeant’s exam. Terence Delehanty was first on the eligible list with a score 80; Complainant and Stephen Rogers were tied at second place on the eligible list with scores of 74. Joint Stipulation 44.

28. On April 28, 2003, the Board of Selectmen appointed two male patrol officers -- Terence Delehanty and Stephen Rogers -- as acting sergeant sergeants. Joint Exhibit 5; Transcript I at 72. Rogers was selected to fill a vacancy created by Sergeant Diaz who was deployed on a military assignment for approximately eight weeks. Transcript II at 13, 131; III at 68; Joint Stipulation 45. Delehanty was selected to fill in for Sergeant Scholwin who was preparing to retire. Transcript I at 73, 127. At the time the acting promotions were made, Rogers and Diaz worked the same 4:00 p.m. to midnight shift whereas Complainant worked days as school resource officer. Transcript II at 14; 133-134. Delehanty was then a permanent patrol officer for seven years, Rogers was then a permanent patrol officer for eight years, and Complainant was then a permanent officer twenty-one years. Transcript III at 68.
29. Chief McManus testified that when he recommended Delehanty and Rogers as acting sergeants, he hadn't yet seen the May 2, 2003 certification of candidates from the October 19, 2002 civil service exam for sergeant. Transcript II at 130, 142. While Chief McManus may not have seen the actual certification (Joint Exhibit 1; Transcript II at 13), I do not believe that he was unaware of the candidates' relative standings on the eligible list from which the certification derived.
30. According to Chief McManus, while Delehanty and Rogers were serving as acting sergeants, they asked permission to attend command school. Transcript I at 20; II at 134-135. Because too few people enrolled in the summer command school program, Rogers went to the next scheduled session which occurred after

- he returned to patrol officer from his acting sergeant assignment. The command school serves as a training school for recently-promoted sergeants. Transcript III at 71. Chief McManus was not credible when he testified that he would have approved Complainant's request to go to command school if she had asked. In permitting Rogers to attend command school, Chief McManus evinced an intent to promote him to the permanent rank of sergeant.
31. On May 2, 2003, three candidates were certified to the Town of Winthrop off the eligible list from the October, 2002 exam for sergeant: Terence Delehanty, the top-ranked candidate and the next two candidates -- Complainant and Stephen Rogers -- who were tied. Joint Stipulation 44.
32. On May 19, 2003, Terence Delehanty was promoted to permanent sergeant to fill the vacancy caused by Sergeant Scholwin's retirement. Transcript I at 74; Joint Stipulation 46.
33. In January of 2004, Chief McManus retired and in the following month, David Goldstein became the Winthrop police chief. Transcript II at 40; II at 192; Goldstein Deposition at 17. After being hired, Police Chief Goldstein had conversations with the Board of Selectmen's Executive Secretary Virginia Wilder about Complainant's litigation against the Town. Goldstein Deposition at 38. Chief Goldstein testified at deposition that "it may very well have been" Wilder who told him that she didn't agree with the court decision in favor of Complainant and that Wilder was "not reticent about the decision." Deposition at 82. Chief Goldstein also requested that the Town allow him to promote a fifth sergeant on

the basis that it was more cost effective than hiring sergeants on supervisory overtime. Goldstein Deposition at 23, 70. I credit this testimony.

34. Shortly after Chief Goldstein was hired in January of 2004, he “commissioned” Sergeant Stephen Rogers to perform a financial analysis of police department personnel costs entitled “Supervisor Budget Expenditure Analysis.” Deposition at 70-72. Based on the analysis, Chief Goldstein concluded that it would be better to hire another sergeant rather than pay for supervisory overtime. Complainant’s Exhibit 6; Goldstein Deposition at 70, 105. Chief Goldstein estimated that the difference in pay between a police officer and a sergeant was approximately \$100.00 per week and that this expenditure would result in a “substantial savings” in supervisory overtime. Goldstein Deposition at 70, 93, 105, 113. The study states that the Department spent \$30,250.21 in overtime costs to fill vacant supervisor spots on shifts in FY 2004 (July 1, 2003 to June 30, 2004) whereas the total cost of adding two supervisors would have been \$13,180.29. Complainant’s Exhibit 6.

35. According to Sergeant Rogers, the addition of two supervisors would have permitted lieutenants or sergeants to be assigned to each of the three groups within the police department’s day, evening and overnight shifts. Transcript III at 104-106. Rogers testified that such an arrangement would have ensured that two supervisors were assigned to work each shift since shifts were, at all times, staffed by two out of a shift’s three groups. Id. The plan also called for one supervisor to work an outside beat in situations where there were two supervisors on the same shift. Transcript III at 102. Sergeant Rogers testified that having two supervisors

- assigned to work the same shift meant that there would be supervisory coverage even if one of the supervisors took time off for sickness, vacation, personal time, training, etc. Sergeant Rogers asserted that such an approach would substantially reduce, albeit not eliminate, supervisory overtime but that without promoting another sergeant it wasn't possible. Transcript III at 55, 94.
36. Chief Goldstein communicated his support for increasing the number of sergeants to the Town Manager and to the Board of Selectmen via Executive Secretary Wilder. Deposition at 89-91. On July 20, 2004, Chief Goldstein requested that the Board of Selectmen call for the sergeant's list in order to add one or more supervisory officers as a way of reducing the costs for supervisory overtime, but the Board did not act favorably on his request. Transcript II at 195; Joint Exhibit 13.
37. Chief Goldstein testified credibly that prior to becoming chief he was told by the Board of Selectmen that there were five sergeant positions, but that after becoming chief, he was told by the Board that there were "not" five positions. Deposition at 22. The reduction in sergeant positions was not negotiated with the police union nor was it brought before Town Meeting.
38. In the summer of 2004, Complainant voluntarily returned to the 4:00 p.m. to midnight shift after serving two academic years as school resource officer. Transcript I at 78-80, 92.
39. In August of 2004, Chief Goldstein requested a certification of names from the October 19, 2002 examination in order to fill a sergeant's vacancy created by the retirement of Sergeant Diaz which had occurred approximately six months earlier.

- Joint Exhibit 19; Transcript I at 93; II at 136. Two names were certified: Complainant and Rogers, who both had scores of 74. Id.; Joint Exhibit 1.
40. In order to assist in selecting between the tied candidates, Chief Goldstein designated a “promotion board” consisting of two internal officers -- Lieutenant Frank Scarpa and Sergeant Salvator Femino -- and two external officers. Sergeant Femino had previously testified as a Town witness at one of Complainant’s earlier MCAD hearings. Transcript I at 101. The promotion board conducted an oral review of the two candidates on September 23, 2004. Transcript I at 94; II at 3. Board members filled out forms on which they graded answers to questions to six hypothetical questions, three informational questions, the candidates’ oral presentations, and the candidates’ appearance and communication skills. Joint Exhibit 43. The form did not contain a place for members of the board to take account of the candidates’ length or breadth of experience. Id.; Transcript I at 102.
41. Complainant had approximately three weeks to prepare for the review process. Transcript I at 96. The candidates received instructions to submit an outline and prepare an oral presentation addressing “The Winthrop Police Department Through the Next Five (5) Years” and prepare for an oral examination regarding relevant laws, regulations, bylaws, and requirements for search warrants and eyewitness identifications. Joint Exhibit 45. Complainant testified that she believed Rogers received notice of the review process sooner than she did. Transcript II at 15. I do not credit this testimony.

42. Sergeant Rogers testified that the training he had received at command school helped him prepare for the presentation. Transcript III at 78. He made a PowerPoint presentation using a projector belonging to the Town. Id.
43. Complainant testified that she thought about using an overhead projector or slides for her presentation and contacted the Chief about the availability of projection equipment but she was told it wasn't available so she used an easel with flip pages on which she wrote handwritten material. Transcript I at 99-100. At the end of her presentation, Complainant was asked whether she believed that the screening process had been fair and she answered yes. Transcript I at 102.
44. The promotion board recommended Rogers for the sergeant's position even though Complainant had fifteen years more seniority on the police force and there were no female superior officers on the Winthrop Police Department. Transcript I at 103; Joint Exhibit 8. Frank Scarpa participated in the promotion board as the chairperson. Transcript IV at 34; Goldstein Deposition at 88.
45. The Town of Winthrop promoted Rogers to sergeant, effective September 27, 2004. Joint Stipulation 47. The promotion of Rogers left Complainant as the only individual remaining on the sergeant's list.
46. Chief Goldstein characterized Complainant as having strong and weak points as a police officer. Deposition at 41. He described her strengths as dealing with the public, handling desk duties in the dispatch area, handling walk-in issues, and being respectful to her supervisors. Deposition at 42. He described Complainant as honest, intelligent, and "for the most part" a team player, but noted that she could be "overly critical," was at times "very insecure" in regard to decision-

making, required coaching, and “oftentimes” asked too many questions.

Deposition at 42-43.

47. On April 19, 2005, Chief Goldstein emailed Secretary Wilder to again express his view that adding an acting supervisor would be a “good idea” in terms of “supervisory overtime. Joint Exhibit 14.

48. On April 28, 2005, Complainant filed MCAD charge 02-BEM-01174 alleging gender discrimination and retaliation against the Town of Winthrop and individually-named Respondents in regard to the Town promoting Rogers to sergeant in September of 2004.

49. In the summer of 2005, the Town of Winthrop Board of Selectmen called for a new exam for police sergeant. Transcript I at 112-114. The new test was given in October of 2005, around the same time that the previous eligible list for sergeant expired. Transcript I at 118; Complainant’s Exhibit 2. Complainant took the exam and scored at the top of the list. Id.

50. The eligible list from the October 19, 2002 sergeant’s exam expired on October 1, 2005 without being used by the Town.

51. Chief Goldstein again wrote the Board of Selectmen in October of 2005 about ways of decreasing overtime costs. Joint Exhibit 3. The Chief’s letter noted that an “inordinate” amount of overtime funds were devoted to supervisory overtime,⁸ that one of the active lieutenants was unable to supervise members of the patrol force because he was on light duty, and that the Department’s supervisory staff (consisting of four sergeants and four lieutenants) were the most senior members

⁸ The letter asserts that between July 1, 2005 to October 1, 2005, supervisory overtime costs amounted to \$25,966.88. Joint Exhibit 4 at p.2.

of the force with the largest share of accumulated leave such as vacation days and the highest rates of compensation when working overtime. Joint Exhibit 3, p.4; Transcript III at 91. To address these matters, one of the Chief Goldstein's twelve proposals was to increase the existing number of lieutenants and sergeants by two positions. Joint Exhibit 3, p. 5. The proposal was rejected by the Board of Selectmen -- Brian Perrin,⁹ Sue Bolster, and Martin O'Brien -- who were concerned that the Police Department was top heavy with supervisors. Transcript II at 19.

52. On November 4, 2005, Complainant filed MCAD charge 05-BEM-02944 alleging gender discrimination and retaliation against the Town of Winthrop and individually-named respondents in regard to the Town declining to promote her to sergeant off the civil service list that expired on October 1, 2005.

53. In 2006, an eligible list was established from the October 22, 2005 sergeant's exam. Complainant's name was at the top of the list. Complainant's Exhibit 2. She was not promoted to sergeant off the list.

54. At some point in 2006, Chief Goldstein altered the shift configuration in order to reduce supervisory overtime problems. Transcript III at 85-86, 98. Under the revised shift configuration, a lieutenant was put in charge of all groups within a shift whether or not the lieutenant was not on duty. Goldstein Deposition at 28-29. The Chief entered into an agreement with the union to run shifts with only four individuals, to designate the senior patrol officer as the "Officer in Charge" and to give that officer a stipend. Deposition at 36. As of the date of deposition,

⁹ Brian Perrin was a lieutenant on the Winthrop Police Department as well as a member of the Board of Selectmen.

- Chief Goldstein had only given the Officer in Charge designation to one female officer, Judy Racow, on a single occasion. Deposition at 48. Chief Goldstein stated that in addition to Complainant, Officer Racow had filed a charge of discrimination against the Police Department. Deposition at 57.
55. Complainant was out of work from January of 2008 to December of 2010 for reasons unrelated to this litigation. Transcript I at 139. The parties have stipulated that the period from January 8, 2008 up to and including October 19, 2010 should be excluded from any calculation or award of damages.
56. Chief Goldstein left the Winthrop Police Department in early 2009. He was succeeded by Terence Delehanty who was appointed Chief in September of 2009.
57. In the fall of 2011, Complainant took a promotional exam for sergeant but did not pass. Transcript II at 30.
58. In September of 2012, the Town of Winthrop made Mary Crisafi its first female sergeant. Transcript I at 103, 129. The Town had not made any sergeant promotions since that of Stephen Rogers in 2004. Transcript I at 168. There was a special ceremony to mark the promotion. Transcript IV at 42. Complainant was emotionally disturbed by the promotion. Transcript IV at 43.
59. Complainant testified that her attempts to be promoted have “taken over [her] life and that she experiences pain whenever she works under a less senior male officer. According to Complainant she let go of her anger from earlier disputes with the Town because she was “vindicated” in 2000 and 2001, but that after being denied promotion, she felt herself as becoming “invisible” on the force. Transcript II at 28. Complainant testified that due to holding in her feelings, she

has had stomach problems, lost hair, had chest pains, had sporadically high blood pressure experienced chronic hives, and has experienced insomnia. Complainant testified to feelings of anger, rage, despair, hopelessness and frustration.

Transcript I at 134. Complainant stated that her symptoms caused her to seek medical care from her primary care physician, a gastroenterologist, a cardiologist and a pulmonologist, but not any mental health professionals. Transcript I at 134; II at 26. She was prescribed stomach medication for acid reflux and Xanax for a period of time but only took the latter medication “occasionally” because she didn’t want to be on it.” Transcript I at 136. Complainant did not place any medical records into evidence and had no health care professionals testify on her behalf. Complainant acknowledged that she had abdominal pain prior to 2002 and distress also caused by the illness and death of her mother in 2003 and her house burning down in November of 2005, an event which resulted in a four-plus year absence from her home and the loss of all the contents of her house.

Transcript II at 26, 29-30. Complainant testified that she did not seek treatment with any mental health care professionals and did not introduce medical records into evidence.

60. Lt. Frank Scarpa is a thirty-seven year member of the Winthrop Police Department, former union president, and Complainant’s shift commander for approximately eight years. Transcript IV at 28-29. He testified that Complainant’s lack of success at being promoted has emotionally affected her over the years. Transcript IV at 40. According to Lt. Scarpa, Complainant would frequently remark on her status. He described it as “weighing” on her mind. Id.

at 41. He assessed her as a very good patrol officer, an officer who “knows her stuff,” and someone he can rely on. Transcript IV at 41. Lt. Scarpa asserted that she would be a very good sergeant. Id.

61. Complainant testified that the amount of overtime she worked has varied over the years. She worked less overtime prior to 2006 and more thereafter because her children were older. Transcript I at 124-125. Starting in 2006, she also earned several thousand dollars per years covering shifts as a senior patrol officer.

Transcript I at 125. Complainant testified that had she been promoted to sergeant in 2002 or thereafter, her base pay would have been larger, her “Quinn bill” percentage would have been larger, her longevity pay would have increased, and her pension would have been higher. Transcript II at 21.

62. The parties stipulated that Complainant earned \$728.040 per week as a step 6 patrol officer in FY 03; \$749.880 per week as a step 6 patrol officer in FY 04 and \$779.878 per week as a step 6 patrol officer in FY 05. Joint Stipulations 49-51.

During those same years sergeants in the Winthrop Police Department earned the following: \$826.62 per week; \$851.434 per week and \$885.486 per week. Joint Stipulations 52-54. From 2002, Complainant had received a 25% Quinn bill salary increase which is calculated using her base salary rate.

III. CONCLUSIONS OF LAW

A. Gender Discrimination

Complainant does not proffer direct evidence of forbidden bias and therefore, in order to establish a prima facie case of disparate treatment discrimination, she must show that she: (1) is a member of a protected class; (2) was performing satisfactorily; (3)

suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s) not in her protected class. See Lipchitz v. Raytheon Company, 434 Mass. 493 (2001); Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000) (elements of *prima facie* case vary depending on facts).

The first two elements are satisfied in that there were no female supervisors in the positions of sergeants or lieutenant during the years when Complainant sought promotion, and that Complainant was a member in good standing of the Winthrop Police Department who scored at or near the top of multiple promotional exams. Regarding the third element of a *prima facie* case, Complainant alleges that the Town subjected her to the following adverse actions: it failed to make any promotions to sergeant from the 1999 sergeant's exam which Complainant topped (02-BEM-03751);¹⁰ it promoted Rogers to sergeant in September of 2004 even though Complainant had the same exam score and greater seniority (05-BEM-01174); and it failed to promote Complainant from the eligible list for sergeant which was established in October of 2002 and expired in October of 2005 (05-BEM-02944). Complainant's allegations are supported by credible evidence that the Town failed to make any promotions to sergeant between 1999 and 2005 whenever she topped civil service eligible lists for the position; overlooked Complainant for elevation to acting sergeant in 2003 in favor of less senior male patrol officers who were thereby given a leg up in the permanent promotion process, and declined to

¹⁰ Respondent argues that since no one was promoted, there was no adverse action resulting from Complainant's failure to attain sergeant status as a result of the 1999 exam results. Such an argument overlooks the fact that the Town promoted individuals to sergeant from civil service exams in 1995 and 2002 when Complainant was *not* the top-scoring candidate but declined to do so from the 1999 civil service exam when Complainant *was* the top-scoring candidate. Since the Town traditionally promotes candidates in the order of their standing on civil service eligible lists, the failure to make any sergeant promotions from the 1999 exam was tantamount to a refusal to promote Complainant. Compare Wheelock College v MCAD, 371 Mass. 130, n.6 (1976) (suggesting that there would be no *prima facie* case where college declined to rehire an academically-qualified woman due to teaching position being abolished).

permanently promote Complainant to sergeant in 2004 in favor of a male candidate with the same score by using a screening process of dubious neutrality. In all of these situations, Complainant was on the losing end of circumstances that favored similarly-situated male patrol officers.

Respondent asserts that the Town's failure to make sergeant promotions at various times when Complainant topped eligible lists for the position is not an adverse action, but such a contention is without merit. See Hurley v City of Melrose Police Department, 27 MDLR 7 (2005) (where police chief declined to use eligible list and delayed sergeant promotions in order to open the field to younger candidates, such inaction deemed an adverse action evidencing age discrimination). Whether alone or in concert with other conduct favoring male competitors, such inaction is evidence of discriminatory animus.

Having established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support legitimate, nondiscriminatory reasons for not promoting Complainant. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000). Respondent focuses on fiscal constraints to justify the lack of any permanent sergeant promotions off the eligible list which remained in effect for a three-year period following the 1999 sergeant exam. According to Chief McManus, he did not request funding to make such a promotion in fiscal years 2002 and 2003 even though the number of sergeants decreased from five to four because he did not believe another sergeant would significantly reduce supervisory overtime. His testimony is supported by the assertion of former Executive Secretary Wilder that fiscal constraints prevented the appointment of a fifth sergeant and by the

assertion of then-Selectman Marie Turner that the Police Department operated well with only four sergeants.

In regard to acting sergeant promotions in April of 2003, the selection of Terrance Delehanty reflects his status as the top candidate on the 2003 eligible list for sergeant¹¹ in combination with the Town's practice of selecting the top candidate for permanent promotion absent a compelling reason for bypass. Since Delehanty was the presumed favorite for the next permanent promotion, it stands to reason that the Town gave him the acting position. The selection of Stephen Rogers was justified on the basis that he worked the same four-to-midnight shift as the sergeant whose place he temporarily filled, in contrast to Complainant who worked days as a school resource officer.

When Respondent finally made a permanent promotion to sergeant in 2003, it selected Delehanty in conformity to his rank on the eligible list and, in the following year, selected Rogers, with whom Complainant was tied, to fill a second sergeant's vacancy. In order to justify the latter promotion, Respondent administered an ostensibly-neutral selection process. The selection board consisted of internal and external panelists. The board entertained oral presentations from candidates Rogers and Dalrymple and evaluated their responses to a uniform set of interview questions. The foregoing circumstances are sufficient to satisfy Respondent's burden at stage two.

Complainant, at stage three, must show by a preponderance of evidence that Respondent's articulated reasons were not the real ones but a cover-up for a discriminatory motive. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). Complainant retains the

¹¹ Chief McManus claimed not to have seen a certification of candidates for permanent promotion to sergeant prior to selecting Delehanty for acting promotion, but I believe that Chief McManus was aware of Delehanty's position as the top candidate on the eligible list.

ultimate burden of proving that Respondent's adverse actions were the result of discriminatory animus. See id.; Abramian, 432 Mass. at 117. I conclude that Complainant has satisfied her burden at stage three for the following reasons.

Following Complainant's appointment to the Winthrop Police Department, there were numerous years when she stood at the top of civil service lists for promotion to sergeant without any positive result. Her name first rose to the top of such a list from a 1995 civil service exam after two males were promoted to sergeant. Several years later she once again stood at the top of civil service list for promotion when she scored highest on the 1999 civil service exam for sergeant. In neither case, did Respondent make use of the lists as long as Complainant topped them.

After the promotion of Paul DeLeo to lieutenant in March of 2002, the number of sergeants on the force decreased from five to four. At that time, it would have been cost-effective to fill a fifth sergeant's position. I base my conclusion on the fact that DeLeo's promotion caused additional supervisory officers to be hired on an overtime basis in order to ensure the presence of a superior officer at all times. Then-Chief McManus conceded that the cost of adding a sergeant would have been only five to six thousand dollars yearly and could have been found in the police department budget. His successor, Chief Goldstein, also acknowledged that it would have been more cost-effective to hire another sergeant rather than to pay for supervisory overtime and, for this reason, sought (albeit unsuccessfully) to fill a fifth sergeant's position. Sergeant Rogers likewise testified that the existing number of sergeants was insufficient to achieve the cost-effective goal of having two supervisors on every shift which, according to Sergeant

Rogers, required a total of nine or ten supervisors rather than the seven who were available to supervise patrol officers in March of 2002.¹²

Notwithstanding the cost-effectiveness of filling the fifth sergeant's position, Respondent refrained from back-filling DeLeo's sergeant slot for as long as Complainant was the top candidate on the eligible list for sergeant from the 1999 exam. I conclude that it did so in order to avoid having to promote Complainant in conformity to its practice of selecting the top candidate off an eligible list unless compelling reasons justified a bypass. Since Complainant stood at the top of the eligible list between March of 2000 and October of 2002 and since there were no compelling reasons to bypass her for promotion, adherence to the practice would have resulted in awarding Complainant the fifth sergeant's position if it were filled during the life of the eligible list.

After the eligible list expired in October of 2002, Complainant took yet another civil service exam for sergeant in October of 2002. She received an exam score that was lower than that of Terrance Delehanty but was the same as that of Stephen Rogers. Six months later, Respondent made acting promotions of Patrol Officers Delehanty and Rogers. These acting promotions paved the way for the subsequent permanent promotions of the male candidates by giving them experience as sergeants and by allowing them to attend command school. The acting promotions were followed in May, 2003 by the permanent promotion of Delehanty and in September, 2004 by the permanent promotion of Rogers. While neither of these actions resulted in the bypass of Complainant on the eligible list from the October of 2002 exam, they nonetheless had the

¹² A 2004 arbitration decision about the staffing of superior officers on the Winthrop Police Department opined that the Appointing Authority was not obligated to fill a sergeant's position whenever a vacancy occurred, but that decision analyzes the parties' collective bargaining obligations and not whether the refusal to fill the position violated Chapter 151B. Respondent's Exhibit 2.

effect of favoring male employees with seven and eight years' experience, respectively, over Complainant who was a female candidate with twenty-one years of experience.

The allegedly-neutral screening process for permanent promotion was, moreover, tainted by Stephen Rogers receiving access to Town equipment for his presentation to the promotion board whereas Complainant was denied such access. Although the Town sought to portray male candidate Stephen Rogers as superior to Complainant in 2004, then-Chief Goldstein testified that Complainant was a strong candidate in terms of dealing with the public, handling desk duties in the dispatch area, handling "walk-ins," and being respectful to her supervisors. He described Complainant as honest, intelligent, and generally a team player, although sometimes overly critical, insecure in making decisions and prone to asking too many questions. Lt. Frank Scarpa, a thirty-seven year member of the Winthrop Police Department, former union president, and Complainant's shift commander for approximately eight years, described Complainant as a very good patrol officer, one who "knows her stuff," someone he can rely on, and someone who would be a very good sergeant.

The promotion of Rogers resulted in the continued lack of any female superior officers on the Winthrop Police Department for another nine years. Complainant subsequently took another civil service exam in 2005 for sergeant and again scored at the top of the list but never became a sergeant. I infer from the above circumstances that Complainant's gender played a "material and important ingredient" role in the selection process. See Chief Justice for Administration and Management of the Trial Court v. MCAD, 439 Mass. 729 (2003) *citing* Lipchitz v. Raytheon Co., 434 Mass, 493, 506, n. 19 (2003) (jury could infer that female candidate was not promoted because of

discriminatory intent where reasons for promoting a male candidate over a female candidate could be considered false). Gender discrimination has been demonstrated by the pretextual reasons given for failing to fill a fifth sergeant's position, by the staffing of open sergeant slots (acting and permanent) with male candidates in preference to Complainant, and by the failure to fill sergeant positions during times when Complainant stood as the top candidate on eligible lists. The financial rationales provided by Respondent do not stand up to factual scrutiny, as evidenced by contrary data compiled by Chief Goldstein and Sergeant Rogers. Respondent attempts to address each and every circumstance that resulted in Complainant's non-promotion, but does not adequately explain why Complainant, unlike her male comparators, failed to secure a supervisory position after decades on the Department and why there were no female supervisors until 2012. Based on the foregoing, Complainant has proven by a preponderance of the evidence that Respondent discriminated against her based on her gender.

Even if nondiscriminatory reasons played some part in the decisions to promote Delehanty and Roger, the evidence establishes that a combination of gender-based and retaliatory animus played a motivating role in depriving Complainant of any promotions throughout her decades-long employment by the Winthrop Police Department. I conclude that Respondent's gender and retaliatory animus (see below) are inextricably intertwined as determinative factors in this case.

B. Retaliation

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B or who have filed a complaint of discrimination. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a

distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000), *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In the absence of direct evidence of a retaliatory motive, the MCAD must follow the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). *See also* Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000); Wynn & Wynn v. MCAD, 431 Mass. 655 (2000).

To prove a prima facie case of retaliation, Complainant must demonstrate that: (1) he engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. *See* Mole v. University of Massachusetts, 58 Mass. App. Ct. 29, 41 (2003); Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. *See* MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996), *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Once a prima facie case is established, the burden shifts to Respondents at the second stage of proof to articulate a legitimate, non-retaliatory reason for their action(s) supported by credible evidence. *See* Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). If Respondents succeed in doing so, the burden then shifts back to

Complainant at stage three to persuade the fact finder, by a preponderance of evidence, that the articulated justification is not the real reason, but a pretext for retaliation. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001). Complainant may carry this burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not true and that Respondents are covering up a retaliatory motive which is a motivating cause of the adverse employment action. Id.

Applying the aforementioned elements to the matter at hand, there can be no doubt that Complainant participated in protected activity when she filed MCAD complaints in 1989, 1990, 1993, 1995, 2002, and 2005. Following the adjudication of the matters brought in 1990s, Complainant collected \$784,633.96 in damages from the Town in 2001 to redress discriminatory acts by Respondent. Various Town witnesses seek to downplay the impact of the award, but I do not credit their testimony. More accurate expressions of the Town's views were communicated in the deposition testimony of former Board of Selectman Marie Turner and Chief Goldstein. Turner asserted that Complainant should not have won the award because she was not the subject of discrimination. Executive Secretary Virginia Wilder was described as "not reticent" in stating that she didn't agree with the court's decision in favor of Complainant. Various town officials were compelled to testify in the legal proceedings brought by Complainant.

I conclude that Complainant's lawsuits against the Town fostered a deep resentment against Complainant which caused her to be denied an acting promotion to sergeant in 2003¹³ and permanent promotions from the 1999 sergeant's exam which she

¹³ Respondent argues that any claims based on the April, 2003 acting sergeant promotions are untimely because the acting promotions took place after Complainant filed her November, 2002 MCAD complaint and more than six months prior to Complainant filing her April and November, 2005 MCAD complaints. I do not accept this rationale because the full impact of the acting promotions did not become apparent until

topped¹⁴; the 2002 sergeant's exam on which she stood in a second-place tie;¹⁵ and the 2005 sergeant's exam which she topped.¹⁶ Rather than maintain a staff of five permanent sergeants as it had previously done, Respondent spent more money throughout the 2002 to 2006 period to fill sergeant positions on an overtime basis. The evidence indicates that it did so in order to avoid promoting Complainant, despite the testimony of Chief McManus that additional supervisors were not needed to cover shifts. In arriving at this conclusion, I find it noteworthy that Chief McManus came up through the ranks of the Winthrop Police Department, was on the force during Complainant's litigation against the Town, testified in at least one prior action brought by Complainant, and was unconvincing in claiming ignorance about where Complainant stood on the promotional list for sergeant in 2002.

Respondent attempts to downplay the link between Complainant's damage award of \$784,633.96 in 2001 and the promotion of Officer Rogers to sergeant in 2004, but proximity in dates is not the only criterion in making out a causal link. The sizable nature of the award ensured that it would not soon be forgotten. In any event, a three-year span between protected activity and adverse action mischaracterizes the sequence of events since Complainant filed an MCAD complaint in November of 2002 in which she accused

Complainant failed to obtain a permanent sergeant promotion in September of 2004 (when it went to Officer Rogers). Complainant thereafter filed a timely retaliation complaint with the MCAD eight months later.

¹⁴ In regard to the 1999 sergeant's exam, the relevant period is the last seven months of the life of the exam's eligible list -- March of 2002 to October of 2002. During this period, the roster of sergeants on the Winthrop Police Force dropped from five to four following Sergeant DeLeo's promotion to lieutenant. The drop in the number of sergeants presented an opportunity to fill the empty fifth sergeant's position from the eligible list on which Complainant stood as the top candidate but Respondent declined to do so.

¹⁵ In regard to the 2002 sergeant's exam, Respondent made two promotions to sergeant from the eligible list to fill positions vacated by Sergeants Scholwin and Diaz. Although Complainant was tied as the second candidate on the eligible list and had substantially greater seniority than the candidate with whom she was tied, she was not promoted.

¹⁶ In regard to the 2005 sergeant's exam, the relevant period extends from the establishment of the eligible list, which Complainant topped, and the reconfiguration of shifts in 2006 which eliminated at least some need for supervisory overtime to augment the four permanent sergeants on the Department's roster.

the Town of gender discrimination and retaliation. Respondent's attempt to downplay the relationship between Complainant's protected activity and her failure to be promoted also ignores the fact that one of the members of the promotion board testified against Complainant in a prior proceeding she brought against the Town. For all of these reasons, Complainant's allegations against Respondent do not constitute a past conflict long forgotten but, rather, a decades-long struggle between Complainant and the Town of Winthrop over allegations of gender discrimination. I do not credit the Town's contention that it has long ago forgotten any such disputes and that Complainant, alone, harbors continuing animus. On the basis of my credibility findings, I conclude that Complainant has made out a prima facie case of retaliation.

Once a prima facie case is established, the burden shifts to Respondent at the second stage of proof to articulate a legitimate, non-retaliatory reason for its action, supported by credible evidence. In attempting to carry this burden, Chief McManus claimed at the public hearing that a fifth sergeant's position was unduly costly, that supervisory overtime was necessary regardless of the number of permanent sergeants, and that Officer Rogers made a more effective presentation to the promotion board in 2004 and, thus, fairly won the vacant sergeant's position. Such rationales are sufficient to satisfy Respondent's burden at stage two.

At stage three, Complainant asserts that the Town's financial rationale for refusing to fill the fifth sergeant's position between 2002 and 2006 and its explanation for promoting Officer Rogers rather than Complainant in 2004 are false and that the motivating cause for these actions was retaliation. I concur. The credible evidence in the record establishes that it would have been less expensive to fund an additional sergeant's

position during 2002-2006 rather than maintain supervisory coverage through the hiring of sergeants on an overtime basis and that the promotion board favored Rogers over Complainant as a result of retaliatory animus against Complainant. In arriving at this conclusion I am not influenced by a contrary finding in an arbitration matter between Complainant's Union and the Town concluding that the Town was not obligated contractually to fill a vacant sergeant's position. The arbitrator arrived at this conclusion pursuant to the parties' collective bargaining agreement whereas I arrive at the conclusions set forth herein pursuant to Chapter 151B.

IV. REMEDIES AND DAMAGES

A. Affirmative Relief

Pursuant to G.L.c.151B, sec. 5, the Commission has the authority to issue orders for affirmative relief. I conclude that the findings of fact set forth in this decision merit such action and that Complainant is entitled to promotion to sergeant, retroactive to March of 2002, when the number of sergeants on the Department decreased from five to four. See Hurley and Ford v City of Melrose, MDLR (2008) (Full Commission Decision concluding that MCAD's powers to award affirmative relief allow for promotion of Complainant to police sergeant with retroactive pay where hearing officer determined that Complainant would have been promoted but for age discrimination).

B. Lost Wages and Benefits

Chapter 151B provides for monetary restitution to make a victim whole, including the same types of compensatory remedies that a plaintiff could obtain in court. See Stonehill College, 441 Mass at 586-587 (Sossman, J. concurring) *citing* Bournewood Hosp., Inc. MCAD, 371 Mass. 303, 315-316 (1976). In appropriate circumstances, the

MCAD is also authorized to award front pay as well as back pay as part of a compensatory damage award. See Beaupre v. Smith & Associates, 50 Mass. App. Ct. 480 (2000) *citing* Conway v. Electro Switch Corp., 402 Mass. 385, 387-388 (1988); Madden v. Town of Falmouth Harbormaster Waterway Dept., 15 MDLR 1949 (1993). Front pay is appropriate where the discriminatory act occurs near an individual's retirement date and/or where comparable positions would be difficult to find. See Haddad v. Wal-Mart Stores, Inc., SJC 10261 (October 5, 2009) (nineteen-year front pay award appropriate where plaintiff planned to work for defendant until retirement, where few comparable employment opportunities existed, and where plaintiff's ability to obtain employment undermined by defendant's harm to her reputation); Fitzpatrick v. Boston Police Department, 18 MDLR 29, 30 (1996); Madden, 15 MDLR at 1967-68.

As lost wages, Complainant is entitled to the difference between the salary, overtime, retirement benefits, Quinn Bill benefits, longevity benefits, and any other income or benefits she earned as a patrol officer and that which she would have earned as a sergeant commencing in March of 2002 but excluding the period from January 8, 2008 to October 19, 2010. The parties are directed to confer and together determine the differential.

C. Emotional Distress Damages

Upon a finding of unlawful discrimination, the Commission is authorized, where appropriate, to award damages for the emotional distress suffered as a direct result of discrimination. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). An award of emotional distress damages must rest on substantial evidence that is causally-connected

to the unlawful act of discrimination and take into consideration the nature and character of the alleged harm, the severity of the harm, the length of time the Complainant has or expects to suffer, and whether Complainant has attempted to mitigate the harm. See Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Complainant's entitlement to an award of monetary damages for emotional distress can be based on expert testimony and/or Complainant's own testimony regarding the cause of the distress. See Stonehill College v. MCAD, 441 Mass. 549 (2004); Buckley Nursing Home v. MCAD, 20 Mass. App. Ct. 172, 182-183 (1988). Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill, 441 at 576.

Complainant testified convincingly that she experiences distress whenever she works under a less senior male officer. According to Complainant, she let go of her anger from earlier disputes with the Town because she was "vindicated" in 2000 and 2001, but that after being denied promotion, she felt herself becoming "invisible" on the force. Complainant testified that due to internalizing her feelings, she has had stomach problems, hair loss, chest pains, sporadically high blood pressure, chronic hives, and insomnia. Complainant testified to feelings of anger, rage, despair, hopelessness and frustration. Lt. Frank Scarpa, Complainant's shift commander for approximately eight years, testified that Complainant's lack of success at being promoted has emotionally affected her over the years. According to Lt. Scarpa, Complainant would frequently remark on her status. He described it as "weighing" on her mind.

Complainant stated that her symptoms caused her to seek medical care from her primary care physician, a gastroenterologist, a cardiologist, and a pulmonologist. She was prescribed Xanax for a period of time and stomach medication for acid reflux.

Notwithstanding the foregoing stressors, Complainant did not seek treatment with any mental health care professional, only took Xanax “occasionally,” did not place any medical records into evidence, and had no health care professionals testify on her behalf. Complainant acknowledged that she had abdominal pain prior to 2002 and suffered distress due to her mother’s illness and death in 2003. Complainant’s emotional state was also impacted by her house burning down in November of 2005, which caused a four-plus year absence from her home and the loss of all the contents of her house. In addition to these factors, some of Complainant’s emotional distress must be attributed to other employment-related litigation that is separate and distinct from these proceedings. As the Supreme Judicial Court has noted, there must be substantial evidence of a causal link between the claimed emotional distress and the alleged discriminatory conduct. See DeRoache v. MCAD, 447 Mass.1, 8 (2006) (where the Court determined that there was no causal connection between the discriminatory act of retaliation and the employee’s emotional distress); Stonehill College v. MCAD, 441 Mass. at 576.

After considering all the factors contributing to Complainant’s emotional distress, I conclude that only a portion of Complainant’s emotional distress can be attributed to her failure to be promoted to sergeant. Complainant is entitled to \$50,000.00 in emotional distress caused by the gender animus and retaliatory actions established in this case.

V. CIVIL PENALTY

Pursuant to G.L. c. 151B, section 5, the Commission may, in addition to any other action which it takes under the section, assess a civil penalty against the Respondent in an amount not to exceed fifty thousand (\$50,000.00) dollars if Respondent is “adjudged to have committed two or more discriminatory practices during the seven year period ending on the date of the filing of the complaint.” Within the seven-year period prior to the initial filing date in these consolidated matters, Respondent was adjudged by this Commission to have committed gender discrimination against Complainant for which \$25,000.00 in damages and attorney’s fees was awarded. See Dalrymple V. Town of Winthrop, 15 MDLR 1473 (1993), *affirmed* Town of Winthrop v. MCAD and Dalrymple (Suffolk, ss, CA 965667C, November 1998, Cratsley, J), *affirmed* Town of Winthrop v. Dalrymple and another, Memorandum and Order pursuant to Appeals Court Rule 1:28 (Doc. No. 99-P-280, December 28, 2000). Within the same seven-year period, Respondent was also adjudged by a Suffolk Superior Court jury to have committed gender discrimination and retaliation against Complainant for which \$575,000.00 in compensatory and punitive damages was awarded. Suffolk Superior Court (Docket No. 95-4248B), *affirmed* Dalrymple v. Town of Winthrop, 50 Mass. App. Ct. 611 (2000). The sum total of the litigation between Complainant and Respondent convinces me that the Town’s conduct towards Complainant over her thirty-year career has been egregious and intransigent. Complainant, alone, has failed to achieve promotion through the ranks of an organization in which male officers, as a matter of course, achieve higher rank. Such failure has been degrading, demoralizing and financially detrimental. Based on the foregoing, the Town merits the maximum civil penalty available, to wit \$50,000.00.

VI. ORDER

Based on the foregoing findings of fact and conclusions of law and pursuant to the authority granted to the Commission under G. L. c. 151B, sec. 5, Respondent is ordered to:

- (1) Cease and desist from all acts of gender discrimination and retaliation;
- (2) Promote Complainant to sergeant retroactive to March 1, 2002;
- (3) Pay Complainant the differential between what she would have earned as a sergeant commencing on March 1, 2002 and what she earned as a patrol officer, plus all benefits incidental thereto and interest on the back pay award at the rate of twelve per cent per annum starting on the date that Complainant filed her November 7, 2002 retaliation complaint through such time as payment is made or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (4) Pay Complainant the sum of \$50,000.00 in emotional distress damages with interest at the rate of twelve per cent per annum. Said interest shall be apportioned equally among the three complaints with the interest obligations commencing on the date that each of the three complaints was filed and continuing until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;
- (5) Pay to the Commonwealth of Massachusetts a civil penalty in the sum of \$50,000.00.
- (6) Conduct, within one hundred twenty (120) days of the receipt of this decision, a training of the Winthrop Police Department's managers and

supervisors. Such training shall focus on gender discrimination and retaliation. Respondent shall use a trainer provided by the Massachusetts Commission Against Discrimination or a graduate of the MCAD's certified "Train the Trainer" course who shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date and location. The Commission has the right to send a representative to observe the training session.

Following the training session, Respondent shall send to the Commission the names of persons who attended the training.

This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So ordered this 22nd day of January, 2014.

Betty E. Waxman, Esq.,
Hearing Officer

