

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and WAYNE SYLVESTER;
MCAD and DENNIS A. DAMATA
Complainants

v.

Docket No.: 10 NEM 01426
10 NEM 01423

TOWN OF WAREHAM
POLICE DEPARTMENT,
Respondent

Appearances: Patricia A. McArdle, Esq. for Complainants Sylvester and Damata
Leonard Kesten and Peter Montgomery, Esqs. for Respondents

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 11, 2010, Wayne Sylvester and Dennis Damata (“Complainants”) filed charges of employment discrimination with the Massachusetts Commission Against Discrimination (“MCAD”). Complainant Sylvester alleged that the Town of Wareham Police Department discriminated against him based on: 1) race (Black) when it removed him from a Detective assignment and assigned three Caucasian Patrol Officers to Detective positions and 2) retaliated against him after his attorney submitted a demand letter in regard to alleged race discrimination by denying Complainant Sylvester injured on duty leave, suspending his license to carry a firearm, and denying him sick bank benefits. Complainant Damata alleged that the Town of Wareham Police Department: 1) discriminated against him based on race (Caucasian) by removing him from a Detective assignment along with the removals of two Black Detectives in order to deflect charges

of race discrimination and 2) retaliated against him after he complained about being grouped in a race-based demotion by giving him less paid detail work than other officers following his retirement and denying him a portable radio. Probable cause findings were issued on November 23, 2009,¹ and the cases were certified to public hearing on October 19, 2012.

A public hearing was held on October 21, 22, 24 and 25, 2013 and on November 5, 2013. The parties submitted thirty-nine (39) joint exhibits.

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

II. FINDINGS OF FACT

Complainant Wayne Sylvester

1. Complainant Wayne Sylvester is a resident of Wareham, MA who identifies racially as Black Cape Verdean. Transcript I at 13. He became a full-time Wareham Patrol Officer in 1986. Transcript I at 14, 17. According to Complainant Sylvester, he has a good rapport with young people on the street, is well-respected by people in the community, and has been active in civic causes. Transcript I at 51-55.
2. Complainant Sylvester testified that Chief Thomas Joyce appointed him a Detective in 2001 after he unsuccessfully applied for the position on three prior occasions. According to his personnel file, however, he was made a Detective on December 29, 1999. Transcript I at 17, 24, 112. At the time of his

¹ Complainant Sylvester charged Town Administrator Mark Andrews with discrimination but the Commission found no probable cause in regard to Andrews.

appointment, the Detective Division was led by Detective-Sergeant Donald Bliss with whom Sylvester was a close friend.²

3. Complainant Sylvester testified that he succeeded in obtaining a Detective position after being advised to improve his sick time usage on the midnight to 8:00 a.m. shift and to improve his grammar and spelling. Transcript I at 25. Retired-Chief Thomas Joyce concurred, stating that he had advised then-Patrol Officer Sylvester to improve his report-writing skills and that, in response, Sylvester obtained tutoring. Transcript IV at 89. In response to Chief Joyce's advice, Complainant Sylvester also stopped taking sick days, sought remedial education, and arranged to have his reports proofread or dictated. Transcript I at 26-29.
4. Becoming a Detective is a de facto promotion even though Detectives are classified under civil service law as Patrol Officers.³ Detectives work seventeen more days per year than Patrol Officers and do not generally earn overtime, but they receive an increase in base pay (with a corresponding increase in retirement pay), work a regular five day-a-week shift (7 to 3 or 3-11) with most weekends off rather than the "four and two" schedule of Patrol Officers, earn compensatory time, drive unmarked cruisers that they can take home, wear plainclothes rather than a uniform, and carry a gold badge rather than a silver one. Transcript I at 19-22, II at 12, 134-135; V at 21.

² According to retired-Sergeant Preston Urquhart, Donald Bliss and Wayne Sylvester "are pretty much best friends." Transcript III at 58. Bliss acknowledged that being friends with Complainant Sylvester and his family. Transcript IV at 38.

³ Although Sergeant Douglas Jacinto testified that an assignment to the Detective Division was not a promotion, his assertion was persuasively contradicted by Complainants Sylvester and Damata, Sergeant Walter Correia, retired-Lt. Arthur Brightman, retired Chief Robert Hammond, and retired Chief Thomas Joyce. Transcript II at 14, 126; III at 16, 64-66, 82; IV at 74, 92; V at 48.

5. As a Detective, Complainant Sylvester initially reported to Detective-Sergeant Bliss until 2006, then reported to the following supervisors in the Detective Division: Detective-Sergeant Bradford Bulgar, Detective-Sergeant Preston Urquhart,⁴ Lt. Arthur Brightman, and Patrol Officer Christopher Park.⁵ Transcript I at 31, 35, 40, 44-47, 122-123; II at 22-28.
6. As a member of the Detective Division, Complainant Sylvester specialized in cataloging evidence. Transcript II at 87, 142. Complainant Sylvester was, at times, the “point person” in the Detective Division under Urquhart and Brightman, i.e., he performed administrative duties such as cataloging evidence, filling out time sheets, and assigning cases to other Detectives. Transcript I at 41-43, 113-114; II at 27-28, 142; III at 68-69; IV at 84. While serving as point person, Complainant Sylvester continued to handle investigations but carried a reduced caseload.
7. Retired-Sergeant Urquhart was Detective-Sergeant between 1996 and 1999. Transcript III at 54; IV at 77. While he served as Detective-Sergeant, the following Detectives reported to him: Walter Correia, Wayne Sylvester, Dennis Damata, Bill DeSilva, and Peter Flannery. Transcript III at 36. Urquhart described Complainant Sylvester as “a great guy” and a great administrative assistant who performed duties such as cataloging evidence, taking care of court

⁴ According to Sergeant Jacinto and Chief Stanley, Urquhart was removed as Sergeant-Detective after he criticized Sylvester for only performing clerical functions and Correia for failing to complete reports. Transcript V at 92-93, 97, 142.

⁵In July of 2008, Patrol Officer Park, who was on the eligibility list for promotion to Sergeant, was appointed by Chief Joyce as acting Detective-Sergeant. Transcript I II at 74; V at 23; V at 23. Several weeks later, the Board of Selectmen declined to approve Park’s promotion to Detective-Sergeant. Transcript V at 24. Park continued to function as acting supervisor of the Detective Division, but he did not receive promotional pay. Transcript V at 24-25, 28. Park was removed from his supervisory assignment in the Detective Division by Chief Stanley in late summer or fall of 2009 in order to receive a promotion to Patrol-Sergeant in October of 2009. Transcript I at 71; II at 24-25, V at 25, 30, 144.

assignments, making drug lab runs, performing tedious office tasks, and handling “stupid” calls but not as good at performing the investigatory part of the job such as fingerprinting and writing reports. Transcript III at 38, 46-47, 51. Urquhart testified that Complainant Sylvester improved his report-writing skills to the satisfaction of Chief Joyce but that he (Urquhart) considered Sylvester’s reports to be a continuing problem because they were drafted outside of the station. Transcript III at 48-50.

8. Lt. Brightman testified that Complainant Sylvester “ran” the Detective Division after the departure of Sergeant Urquhart and described Sylvester as “absolutely” qualified. Lt. Brightman said that Sylvester’s investigative skills were fine, that he received no complaints about Sylvester’s report writing, and that while he supervised the Detective Division, Sylvester handled a couple of major cases and didn’t need any help. Transcript III at 68-70, 72, 8-841.
9. Retired Lt. Bliss⁶ testified that when he supervised Complainant Sylvester in the Detective Division, Sylvester had “very good” investigatory skills, thought “outside the box,” and was able to strategize and execute plans. Bliss acknowledged that Sylvester had “issues” with spelling and grammar which he had taken steps to overcome. Transcript IV at 14-15, 18.
10. Retired Detective-Sergeant Bradford Bulgar, who described his ancestry as American Indian and Cape Verdean, testified that Complainant Sylvester did a good job as a Detective. Transcript II at 102, 110.

⁶ Bliss testified that the Town “destroyed [his] life” in regard to the termination of his police career and that he is in litigation against the Town and former Chief Richard Stanley. Transcript IV at 48, 52, 60-61. He testified that the Board of Selectmen ordered the Town Administrator to fire him. Transcript IV at 51.

11. Sergeant Christopher Park (Caucasian) testified that during the time he supervised the Detective Division, he usually assigned larceny cases to Complainant Sylvester because they were the easiest cases and involved minimal report writing. Transcript V at 29, 33. According to Park, Sylvester had a very difficult time writing reports and could not explain why he was charging someone with a crime. Transcript V at 29.
12. Retired-Chief Thomas Joyce, a good friend of Complainant Sylvester and close friend of the Sylvester family, testified that Sylvester was a very thorough and good Detective, very effective in his case management, very committed to the job, good at interviewing, and naturally organized. Transcript II at 79; IV at 93-94, 108-109. Joyce attributed the Department's up-to-date drug inventory to Sylvester's organizational skills and to his ability to handle evidence. Id. at 108-109. According to Joyce, the Town of Wareham has a sizeable minority population making it beneficial to have minority officers in the Detective Division. Transcript IV at 131. Joyce described Sylvester as having his finger on the pulse of the Cape Verdean community more than the Department's other Cape Verdean officers. Transcript IV at 148. According to Joyce, Complainant Sylvester's report-writing issues did not interfere with his ability to be an effective Detective. Joyce stated that by the time Sylvester became a Detective, his report-writing capabilities improved. Transcript IV at 107, 142.
13. In 2009, the Detective Division consisted of Complainant Dennis Damata (Caucasian), Complainant Wayne Sylvester (Black Cape Verdean), Walter Correia (Black Cape Verdean), and Patrol Officer Christopher Park (Caucasian).

Park served as acting supervisor of the Detective Division. Transcript I at 56; IV at 153.

14. In the summer of 2009, Chief Joyce retired and was replaced by Chief Richard Stanley. Transcript I at 56-57; V at 137. Chief Stanley initially served as a part-time Chief while continuing to function as Chief of the North Andover Police Department. Transcript II at 85; V at 135. Chief Stanley met with Wareham's Acting Town Administrator John Sanguinet who told him that the Wareham Police Department had lost touch with the community and had issues with race relations. Transcript V at 135. Chief Stanley also met with Christopher Park, Dennis Damata, and Walter Correia. Transcript VI at 25. Chief Stanley testified that he drove around the Town of Wareham and observed pawn shops, drug activity, people hanging around street corners, and a lack of police presence. Transcript V at 136. Chief Stanley testified that at the beginning of his tenure with the Wareham Police Department, it had no filing system, no records for gun permits, a records division that was in disarray, a departmental website that was not interactive, a police force that lacked training and was demoralized, and poor community relations. Transcript V at 138. Chief Stanley testified that the Department's then-Detectives did not properly catalogue evidence, did not write up reports, and did not follow up on cases. Id. at 140.

15. Chief Stanley had "lengthy conversations" with members of the force. Id. at 137. According to Chief Stanley, Sergeant Urquhart encouraged him to make a "clean sweep" in the Detective Division because: 1) Damata would "backstab

anyone;” 2) Correia would not finish projects; and 3) Sylvester could not handle reports. Transcript V at 141.

16. Retired-Sergeant Urquhart testified that he met with Chief Stanley at the Cranberry Cottage Diner prior to Stanley taking over as Wareham Police Chief and that Stanley asked him about areas of concern within the Detective Division. Transcript III at 56. Urquhart testified that he told Chief Stanley that DeSilva, Flannery, and Damata were good but that Sylvester “as a Detective . . . I just didn’t see it.” Transcript III at 56.
17. Complainant Sylvester testified that he was offended by Chief Stanley who, upon their initial introduction, asked him about a Cape Verdean shooting in Boston. Transcript I at 57, 117.
18. According to Chief Stanley, he spoke to Patrol Officer Chris Park, Lt. Wallace, “possibly” Complainant Damata, and Complainant Sylvester about a stabbing within the Cape Verdean community in Boston because of its potential impact on a Cape Verdean Festival in Onset, MA. Stanley testified that he was concerned about the “spill-over effect.” Transcript V at 145-146.
19. Complainant Sylvester testified that he hosted a retirement party for Chief Joyce which Chief Stanley attended. According to Sylvester, Stanley had to leave early and said, “Hey brother, can you serve my table?” Transcript I at 58. Chief Stanley testified that he uses the term “brother” all the time in regard to other police officers. Transcript V at 146.
20. Sergeant Douglas Jacinto describes his ancestry as “full blooded Portuguese from Azores.” Transcript V at 36. In early October of 2009, Chief Stanley

asked Sergeant Jacinto if he was interested in becoming Sergeant-Detective for the Department. Transcript V at 38. Chief Stanley offered Jacinto the position because other officers and community members gave him “high grades.”

Transcript V at 145, 146. After hesitating, Jacinto accepted the assignment in mid-October of 2009. Id.; V at 75.

21. According to Sergeant Jacinto, Chief Stanley expressed dissatisfaction with the Detective Division and a desire to go in a “whole different direction” consisting of Detectives issuing search warrants “for everything,” engaging in aggressive investigations, following up on cases, and handling pawn shops, narcotics, and problems at motels. Transcript V at 39, 42, 66, & 147-148.
22. Sergeant Jacinto testified that he, too, believed that the pre-November 1, 2009 Detective Division had not functioned in an aggressive manner because he had forwarded cases in his capacity as Patrol Sergeant which did not get investigated. Transcript V at 42. Jacinto had worked with Complainant Sylvester in the Patrol Division prior to Sylvester becoming a Detective in 2001. He characterized Sylvester’s writing ability as “not that good” and stated that Sylvester’s reports had to be corrected before they could be turned in. Transcript V at 120. Sergeant Jacinto testified that despite having been “really close” with Complainant Sylvester’s uncle and despite having been a pall bearer at the funeral of Complainant Sylvester’s father, he believed in 2009 that a change was needed in the Detective Division. Transcript V at 36-37.
23. Chief Stanley gave Sergeant-Detective Jacinto a free hand to keep or replace Detectives Sylvester, Damata, and Correia. Jacinto decided to replace all three

members of the Detective Division because of their lack of case follow-up⁷ and because the other supervisors whom he consulted -- Urquhart, Park (acting supervisor), Walcek, Walsh, Gifford, and Bulgar – favored replacing them with Officers DeSilva, Courchesne, and Smith. Transcript V at 43-45, 84.

24. On or around October 19, 2009, newly-appointed Detective-Sergeant Jacinto approached Complainant Sylvester on his day off and informed him that he was being re-assigned back to the Patrol Division. Jacinto testified that telling Sylvester about his re-assignment was very difficult because of their friendship. Transcript V at 47.
25. A personnel memo dated October 20, 2009 was posted for the position of Detective which informed Patrol Officers with a minimum of five years patrol experience that they could apply for the position of full-time Detective by submitting a cover letter no later than October 27, 2009. Joint Exhibit 2. The posting stated that the position would be a five-year rotating position and would be subject to annual evaluations. Id. Sergeant Jacinto testified that he imposed the five-year rotating requirement because he didn't want to appear critical of the Detectives who were being replaced. Transcript V at 48-49, 103.
26. Sergeant Jacinto stated that he was personally familiar with the qualifications of all the Detective candidates, having worked with them previously. Id. at 67-68; V at 120. Because of his familiarity with the candidates, he did not review their

⁷ In 2008-2009, Detective Sylvester was assigned 45 cases and wrote up 7; Detective Damata was assigned 55 cases and wrote up 37; Detective Correia was assigned 41 cases and wrote up 15. Transcript V at 59-60. During the year after they were replaced, Detective DeSilva was assigned 157 cases and wrote up 145; Detective Courchesne was assigned 113 cases and wrote up 101; Detective Smith was assigned 112 cases and completed 105. Transcript V at 60-61. Sergeant Jacinto testified that as a Patrol Sergeant, he knew that day shift reports went to the Detective Division for follow up but that “nothing was ever written.” Transcript V at 62.

resumes or their personnel files, nor did he conduct interviews in order to discuss their qualifications, although he informed each candidate over the phone that he received their applications as a show of “respect.” Id. at 67-68, 98, 110-115.

27. Sixteen candidates applied for the Detective positions. Joint Exhibits 8-23. Sergeant Jacinto spoke to eleven of the candidates over the phone and five in person. Joint Exhibit 24. According to Sergeant Jacinto, the discussions were limited to reviewing the candidates’ cover letters and informing candidates when a decision would be made. Joint Exhibit 24.
28. On October 21, 2009, Chief Stanley posted a personnel memo which stated that Detectives Sylvester, Damata, and Correia would be reassigned to the Patrol Division effective November 1, 2009. Joint Exhibit 3.
29. On October 29, 2009, another personnel memo was posted which announced that Patrol Officers William DeSilva, Al Courchesne, and Mike Smith were going to be assigned to the Detective Division, effective November 1, 2009. Joint Exhibit 7; Transcript I at 67.
30. On October 30, 2009, Complainant Sylvester met with Chief Stanley and Sergeant Jacinto. Joint Exhibit 5; Transcript I at 76. The meeting did not result in the reversal of Sylvester’s re-assignment back to the Patrol Division.
31. According to Walter Correia, he heard from Complainant Damata that Sergeant Jacinto said he had to “get rid of all of you guys . . . because it would give them something to say.” Transcript II at 156. Correia testified that he didn’t attach importance to the statement until he subsequently overheard Detective-Sergeant

Jacinto say over the phone to Caucasian Patrol Officer Peter Flannery, “I couldn’t give it to you because it would give them – them something to say.” Correia believed that Jacinto was referring to the Department’s Black Detectives (Sylvester and himself) when mentioning “them.” Transcript II at 159.

32. Sergeant Jacinto testified that he told Flannery that it wouldn’t be fair to consider him for a Detective assignment because the job posting for Detective stated that there was going to be a five-year rotation and Flannery, along with Sylvester, Damata, and Correia, had already worked as a Detective for five years. Transcript V at 50, 101.
33. Detective Allan Courchesne (Caucasian) was one of the replacement Detectives in November of 2009. He testified that at the time of his appointment, he had less police training than Sylvester and after his appointment had to undergo extensive training. Transcript III at 110-112. He was not interviewed for the position except for a telephone conversation with Douglas Jacinto. Transcript III at 112. According to Courchesne, he is personal friends with Jacinto, they socialize outside of work, and they have vacationed together. Transcript III at 113-114. Courchesne testified that Jacinto told him and the other newly-appointed Detectives in November of 2009 that they were to be “very aggressive” and to “hit the crime hard.” Transcript III at 115. He said that he and the other newly- appointed Detectives issued a lot of search warrants which required an understanding of the elements of the crime. Id. Courchesne

testified that the new group of Detectives focused on stolen property and drugs and “stepped it up” on pawn shops. Transcript III at 117.

34. Michael Smith (Caucasian) was another of the replacement Detectives. After his appointment as Detective, Smith had to undergo extensive training. Transcript III at 128. He testified that Sergeant Jacinto told him that as a Detective, he was expected to be very active and to work in unison with Patrol Officers. Transcript III at 132.
35. William DeSilva was the third replacement Detective. When asked if he was interviewed by Sergeant Jacinto prior to being assigned a Detective on November 1, 2009, he said they “spoke” for approximately one-half hour. Transcript V at 18. DeSilva had previously been a Detective for about a year in 2007 but returned to a Patrol Officer assignment because of a conflict over work hours. Transcript V at 15, 20. According to DeSilva, the Detectives selected to work under Detective-Sergeant Jacinto in November of 2009 were expected to write up reports on every case. Transcript V at 17.
36. John Gerard worked as a narcotics investigator in 2009. Transcript V at 6-7, 9. He testified that after the Detective staff changed in November of 2009, he was able to increase his productivity because the new Detectives were more available to assist him. Transcript V at 8-11.
37. Complainant Sylvester testified that going back to a patrol position was “very, very difficult” and that he was “embarrassed.” Transcript I at 75. He said that a lot of people in the community asked him what he did wrong. Id.

38. After Complainant returned to the position of Patrol Officer, he responded as a back-up cruiser to a 911 “hang-up” call originating out of the north sector in Wareham on December 18, 2009. Transcript I at 78. According to Complainant Sylvester, Patrol Officer Richard Robidoux was assigned to the north sector but did not show up at the scene because Chief Stanley told him not to respond. Transcript I at 78-81.
39. In January of 2010, Complainant Sylvester met with Chief Stanley to say that he was thinking of leaving the Department as a result of the emotional toll of being returned to a Patrol Officer position. Transcript I at 82. He mentioned that he was seeing a therapist for depression. Complainant Sylvester stopped going to work sometime in January of 2010, using vacation time, personal days, and sick time to continue his salary through July 1, 2010. Joint Exhibit 28; Transcript I at 85, 130.
40. Licensed Clinical Social Worker Andrea DiFilippo testified that Complainant Sylvester presented for therapy with her in January of 2010 and that she continues to see him weekly or every other week for depression and anxiety marked by a lack of motivation and drive, sadness, a failure to engage with family and community, altered sleep and appetite, and a “completely different” lifestyle than the one he had prior to his removal as a Detective. Joint Exhibit 27; Transcript III at 136-139. According to DiFilippo, Sylvester suffers from anxiety and rage but does not exhibit signs of being a threat to himself or others. Transcript III at 140-143.

41. On May 10, 2010, Complainant Sylvester's attorney requested that he be placed on paid leave pursuant to M.G.L., chapter 41, Sec. 111F (injured-on-duty leave) resulting from the circumstances surrounding his demotion. Joint Exhibit 28; Transcript I at 87, 129.
42. Retired-Lieutenant Wallace testified that in 2010 he was the issuing authority for firearms permits within the Wareham Police Department in 2010. In this capacity, he was responsible for the suspension and revocation of firearms licenses. Transcript III at 91. On May 17, 2010, Lt. Wallace sought to determine from Complainant Sylvester's treating therapist, Andrea DeFilippo, whether she had concerns about Sylvester's ability to possess and carry firearms. Joint Exhibit 30. He attempted to communicate with DeFilippo about her description of Sylvester's "intense feelings of anger and rage," a description which she used in regard to Sylvester's application for Chapter 111F benefits based on anxiety and depression. Transcript III at 93, 95. When Lt. Wallace did not receive a response from DiFilippo, he and Chief Stanley decided to suspend Complainant's license to carry a Departmental weapon, effective May 24, 2010. Joint Exhibit 33; Transcript III at 100. Retired-Lt. Wallace testified that he went to Complainant Sylvester's home on May 24, 2010, served him with a notice of suspension of license to carry a firearm, and took Sylvester's department-issued gun but not his personal gun. Transcript I at 88-89.⁸ Wallace testified that he left Sylvester in possession of his personal firearm but told him to turn it over to his brother. Transcript 100-102.

⁸ According to retired-Lt. Wallace, Complainant Sylvester appealed the loss of his Department-issued firearms license to the district court which ruled in favor of the Department. Transcript III at 104-105.

43. On June 3, 2010, Sylvester's attorney made a request for sick bank benefits for Sylvester which were denied. Joint Exhibit 34; Transcript I at 91-92. Police Chief Stanley and the Town Administrator voted to approve the sick bank benefits but Complainant's union voted against granting the benefits. Transcript V at 160-161.
44. On July 7, 2010, the Town of Wareham informed Complainant Sylvester's attorney that the Town was denying Sylvester's application for benefits under G. L. c.41, section 111F because, *inter alia*, his medical documentation was insufficient to establish that he was unable to perform the essential functions of a police officer. Joint Exhibit 35.
45. Patrol Officer Walter Correia was promoted to Patrol Sergeant In July of 2010 based on the results of a civil service exam he took prior to his removal from the Detective Division.⁹ Transcript II at 164, 177, 179-180. Sergeant Correia now serves on a strategic planning team instituted by Chief Stanley. Transcript II at 181.
46. On October 25, 2010, the Town of Wareham wrote to Complainant Sylvester accusing him of unauthorized absence from work, but Town Administrator Mark Andrews conducted a hearing and determined that Sylvester had not abandoned his job. Joint Exhibit 46; Transcript I at 93. Complainant Sylvester's last paycheck from the Town was in late-June, 2010.

⁹ Sergeant Correia was number two on the eligible list for Sergeant in 2010. He was selected over the highest candidate, Peter Flannery, who is Caucasian. Transcript II at 180-181. Sergeant Correia testified that he believed that he was selected over Flannery because of an "ongoing investigation" involving Flannery. Transcript II at 184.

47. Complainant retired from the Town of Wareham Police Department at the beginning of 2013 and began receiving approximately \$2,000.00 in monthly retirement benefits. Transcript I at 98. Around the same time, he commenced work as a maintenance supervisor at a mobile home park earning \$45,000.00 per year. The job provides no vacation time or benefits. Id.
48. Complainant Sylvester testified that losing his Detective position made him feel like he let down his family. He testified that the loss caused him bad nights and tears. Transcript I at 99. As a result of losing his Detective position and leaving the employ of the Wareham Police Department, Complainant was forced to limit his daughter's educational opportunities and to borrow money from relatives. He has seen multiple therapists for mental health issues.

Complainant Dennis Damata

49. Complainant Dennis Damata (Caucasian) worked for the Town of Wareham Police Department for twenty-eight years. He served as an acting sergeant for approximately one year, as an investigator for another year, and then became a Detective in 2003, handling major crimes. Transcript II at 12-15, 87. At the time, the Detective division consisted of himself, Walter Correia, Complainant Wayne Sylvester, and Peter Flannery. Transcript II at 69.
50. According to retired-Sergeant Urquhart, Complainant Damata performed his Detective work well and quickly and was "very good." Transcript III at 37, 52. Retired-Sergeant Bradford Bulgar described Damata as a hard worker who performed his duties as required. Transcript II at 103. Retired-Lt. Arthur Brightman described Damata as a good investigator, who was "more than

capable,” and who had no deficiencies in his work as an investigator. Transcript III at 74-75. Retired-Lt. Donald Bliss said that Damata “could do anything” and had “very good, very detailed” investigative skills. Transcript IV at 27.

Retired- Chief Thomas Joyce described Damata as a “self-starter,” “always busy,” and a Detective who did great investigative work. Transcript IV at 119.

51. In late-October, 2009, Douglas Jacinto, after becoming Detective- Sergeant, told Complainant Damata that he was being removed from the Detective Division because the Chief wanted “to go in a different direction” and was going to remove all the Detectives. Transcript II at 35. Complainant Damata asked to remain as a Detective for three or four months until he retired but his request was not allowed. Transcript II at 36.

52. According to Complainant Damata, Jacinto told him, “[I]f I leave you in there, he [Chief Stanley] says I’m gonna start getting trouble from them” “They’re gonna start their racial shit.” Id.; Transcript II at 89. Damata testified that Jacinto was referring to Wayne Sylvester and Walter Correia, the Department’s two Black Detectives. Id. Complainant Damata asked for the decision to be reconsidered, citing its adverse impact on his retirement pay, but his request was denied. Transcript II at 38.

53. Sergeant Jacinto testified that he decided to remove Complainant Damata along with then-Detectives Sylvester and Correia based on his opinion that he couldn’t remove two Detectives and allow the third one to stay. Transcript V at 45-46, 105, 107. Jacinto testified that he “needed to do a clean sweep to get things done the way the Chief wanted.” Transcript V at 47-48, 105, 107. According to

Jacinto, if he was being held responsible, he had to replace everybody in order to make sure that the Detective Division would operate his way. Transcript V at 46, 105. Jacinto refused to allow Damata to remain as a Detective until his retirement because he felt that it “would be unfair” to reassign Sylvester and Correia back to Patrol Officers and allow Damata to stay as a Detective, even for a few months, since they were all his friends. *Id.* at 48, 107. When pressed about his opinion of Complainant Damata’s capabilities as a Detective, Sergeant Jacinto commented that Damata wasn’t doing the Detective job the way that Chief Stanley wanted it done and commented that half of Damata’s investigatory reports were not finished, but Jacinto acknowledged that he had minimal dealings with Damata in the Detective Division and could not state when he became aware of Damata’s failure to complete his reports. Transcript V at 120-121, 124.

54. Complainant Damata returned to being a Patrol Officer on or around November 1, 2009. Transcript II at 47. He subsequently worked on an accreditation project. Transcript II at 47-49.

55. Complainant Damata retired, effective February 4, 2010. Transcript II at 51. After his retirement, Complainant Damata was appointed as a special police officer, a designation which allowed him to perform road details not filled by regular rank and file officers. According to Complainant Damata, he was initially bypassed for details by Sergeant Park. Damata brought his bypasses to the attention of Lieutenant Walsh. Transcript II at 56, 58. Lt. Walsh issued a memorandum on September 27, 2010 stating that retired officers would be

called for detail work after full-time officers decline the work and that a list of retired officers in the order of their years of service to the Department would be posted. Joint Exhibit 43. A second memo was issued by Lt. Walsh on January 5, 2011 reminding all personnel that retired officers were to be called for detail work in the order that their names appear on a call list. Joint Exhibit 43.

Following the issuance of Lt. Walsh's memos, Complainant Damata began to be called for detail work. Transcript II at 56, 58.

56. Sergeant Park acknowledged that he initially declined to call Damata for details because he believed that Damata had "backstabbed" people in the Department, was "negative," and had been difficult to supervise. Transcript V at 33.

57. Complainant Damata testified that he was not allowed to keep a portable police radio at his house for use in performing detail work but that other retired officers were allowed to do so. Damata had to obtain a portable radio from the Department at the beginning of each detail he worked as a retired officer. Transcript II at 59-60. Retired-Lt. Wallace testified that he and retired-Sergeant Delaney were allowed to keep police radios at their houses for use in details. Transcript III at 102. According to Wareham Communications Officer Edward Johnson, however, retirees are not issued police portable radios to keep at their houses. Johnson testified that he spoke to Chief Stanley after Damata asked for a radio and the Chief said that none of the retirees were to be issued portable radios. Transcript II at 121. Chief Stanley testified that due to a shortage of police radios, he decided to take them away from retired officers. Transcript V at 157.

III. CONCLUSIONS OF LAW

A. Complainant Sylvester's Racial Discrimination claim

In order to prevail on a charge of discrimination in employment based on race and/or color under M.G.L. c. 151B, s. 4(1), Complainant may establish a prima facie case of circumstantial evidence¹⁰ by showing that he: (1) is a member of a protected class; (2) was performing his position in a satisfactory manner; (3) suffered an adverse employment action; and (4) was treated differently from similarly-situated, qualified person(s). See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (elements of *prima facie* case vary depending on facts); Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665-666 n.22 (2000) (prima case established where protected class member applies for position, is not selected and employer seeks or fills position with similarly-qualified individual); Blare v. Husky, 419 Mass. 437, 441 (1995). The Supreme Court characterizes the burden of establishing a prima facie case of disparate treatment as “not onerous,” requiring only that a qualified individual establish circumstances “which give rise to an inference of unlawful discrimination.” Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Blare v. Husky, 419 Mass. 437 (1995). Sufficient circumstances to support a prima facie case exist in this case insofar as the Complainant, a Black Detective, who adequately performed his job, was removed from his assignment, and along with two other Detectives were replaced by Caucasian Police Officers.

¹⁰ Complainant Sylvester did not proffer sufficient direct evidence of discrimination to merit a direct evidence analysis. See Wynn & Wynn, P.C. v MCAD, 431Mass. 655, 665 (2000) *quoting Johansen v. NCR Comten, Inc.*, 30 Mass. App. Ct. 294, 300 (1991) (defining direct evidence as resulting in the “inescapable, or at least highly probable” inference of discrimination).

Once Complainant has established a prima facie case of discrimination, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its action. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Wheelock College v. MCAD, 371 Mass 130, 238 (1976). If Respondent does so, Complainant, at stage three, must persuade the fact-finder by a preponderance of evidence that Respondent's articulated reason was not the real one but a cover-up for discrimination. See Wynn & Wynn v. MCAD, 431 Mass. at 666 *citing* Abramian, 432 Mass. at 117-118; Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 504 (2001). The determination that a proffered reason is false permits, but does not require, the trier of fact to infer discriminatory animus. See Wynn & Wynn v. MCAD, 431 Mass. 655, 666 (2000); Abramian v. President & Fellows of Harvard College, 402 Mass. 107 (2000) (third step of circumstantial method of proof may be satisfied by proof that one or more of the reasons advanced by the employer is false leading to inference of discriminatory animus).

The record contains ample, albeit contradicted, evidence of nondiscriminatory reasons for replacing Complainant Sylvester. Retired-Sergeant Urquhart described Complainant Sylvester as "a great guy" and a great administrative assistant but not adept at performing the investigatory part of the job such as fingerprinting and writing reports. Urquhart testified that Complainant Sylvester improved his report-writing skills to the satisfaction of Chief Joyce but that he (Urquhart) considered Sylvester's reports to be a continuing problem because they were drafted outside of the station. Before Chief Stanley began working in Wareham, Urquhart told him that Sylvester could not handle

reports and that Urquhart “just didn’t see” Sylvester functioning successfully as a Detective. Sergeant Christopher Park testified that during the time he supervised the Detective Division, he usually assigned larceny cases to Complainant Sylvester because they were the easiest cases and involved minimal report writing. According to Park, Sylvester had a very difficult time writing reports and could not explain why he was charging someone with a crime. Sergeant Jacinto testified that he, too, had concerns about Sylvester’s competence based on having worked with Complainant Sylvester in the Patrol Division prior to Sylvester becoming a Detective in 2001. He characterized Sylvester’s writing ability as “not that good” and stated that Sylvester’s reports had to be corrected before they could be turned in. Jacinto consulted with supervisors Urquhart, Park, Walcek, Walsh, Gifford, and Bulgar who all favored replacing the pre-November 2009 complement of Detectives, including Sylvester. Documentary evidence also supports the removal of Complainant Sylvester from the Detective Division. In the year prior to his re-assignment back to Patrol Officer, Detective Sylvester was assigned 45 cases but only wrote up seven.

Notwithstanding the above concerns, opinions were divided about whether Complainant Sylvester was an effective Detective. Lt. Brightman described Sylvester as “absolutely” qualified with investigative skills that were “fine.” Retired-Lt. Bliss testified that Sylvester had “very good” investigatory skills as a Detective, thought “outside the box,” and was able to strategize and execute plans. Retired-Detective-Sergeant Bradford Bulgar claimed that Complainant Sylvester did a good job as a Detective and retired-Chief Thomas Joyce characterized Complainant Sylvester as a very thorough and good Detective, very effective in his case management, very committed to

the job, good at interviewing, naturally organized, and did not have report-writing issues which interfered with his ability to be an effective Detective.

I have carefully considered the above statements but am mindful that some of the most complimentary come from close personal friends of Complainant Sylvester such as retired-Lt. Bliss and retired-Chief Joyce. It also bears noting that Lt. Bliss has strong animosity for the Town and Chief Stanley against whom he is currently engaged in litigation. No such conflicting motives appear to exist on the part of those who expressed concern about Complainant Sylvester's abilities. To the contrary, Sergeant Urquhart and Jacinto harbor warm personal feelings for Complainant Sylvester but nonetheless expressed concerns about his effectiveness as a Detective.

I conclude that the concerns expressed about Complainant Sylvester's investigatory and writing skills are sufficient to satisfy Respondent's stage two burden of articulating and producing credible evidence to support legitimate, nondiscriminatory reasons for removing Complainant Sylvester from his Detective assignment. At stage three, Sylvester attempts to rebut Respondent's concerns about his abilities by casting doubt on the Town's professed goal of "moving in a new direction." He does so by pointing to the Town's failure to articulate what the new direction was, its failure to explain why he could not be part of the new direction, and its failure to meet with him before announcing the replacement Detectives. In my judgment, these matters do not indicate racial animus but rather the Town's struggle to find the least confrontational and least critical way to replace him.

Complainant Sylvester also cites two stray remarks to supports his claim of discriminatory animus on the part of Chief Stanley but I do not agree with the

significance that he attaches to the statements. First, Complainant Sylvester took offense when Chief Stanley, upon their initial introduction, asked him about a Cape Verdean incident in Boston. Sylvester presumed that the Chief asked him about the incident because of his Cape Verdean ancestry but, according to Chief Stanley's credible testimony, he also spoke to Chris Park, Lt. Wallace, and "possibly" Dennis Damata, about the potential spill-over effect of the incident on a Cape Verdean Festival scheduled to be held in neighboring Onset, MA. Second, Complainant Sylvester took offense when Chief Stanley called him "brother" at the retirement dinner for retired-Chief Joyce. Although Complainant Sylvester was offended, Chief Stanley testified credibly that he uses the term "brother" all the time in speaking to fellow police officers.

Based on the foregoing, Complainant Sylvester, at stage three, has failed to come forward with persuasive evidence that Respondent's reasons for re-assigning him back to the Patrol Division were a cover-up for discrimination. A preponderance of credible evidence establishes that Chief Stanley and Sergeant Jacinto had racially-neutral reasons for being dissatisfied with Complainant Sylvester's performance as a Detective and sought to improve the Detective Division by changing the officers who staffed it.

B. Complainant Sylvester's Retaliation Claim

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 Respondent at the second stage of proof to articulate a legitimate, non-retaliatory reason for the action 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 Respondent succeeds 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 Respondent is covering up a retaliatory motive which is a motivating cause of the adverse employment action. Id.¹¹

Applying the aforementioned elements to the matter at hand, Complainant Sylvester asserts in his charge of discrimination that he engaged in protected activity when his attorney submitted a “demand letter” on his behalf to Respondent on or about March 24, 2010 for lost pay on the basis of race discrimination. He claims that following the demand letter, Respondent declined to act on his request for injured-on-duty leave pursuant to M.G.L., chapter 41, Sec. 111F, suspended his license to carry a firearm, confiscated his duty weapon, and denied him sick bank benefits. While these adverse employment actions took place, I do not infer a causal connection between prior protected activity and these matters.¹²

As far as Complainant Sylvester’s firearms permit is concerned, retired-Lieutenant Wallace testified that in 2010 he was responsible for the suspension and revocation of firearms licenses. On May 17, 2010, Lt. Wallace sought to determine from Complainant Sylvester’s treating therapist, Andrea DeFilippo, whether she had concerns about Sylvester’s ability to possess and carry firearms based on her description of Sylvester’s “intense feelings of anger and rage.” When Lt. Wallace did not receive a response from DiFilippo, he and Chief Stanley decided to suspend Complainant’s license to carry a Departmental weapon, effective May 24, 2010. This decision appears

¹¹ In using a “motivating cause” standard, Massachusetts interprets Chapter 151B retaliation claims more differently than does the Supreme Court which interprets Title VII retaliation claims to require proof that the desire to retaliate is the “but-for cause” of a challenged employment action. See University of Texas Southwestern Medical Center v. Nassar, 570 U.S. ___, 133 S. Ct. 978 (2013).

¹² I decline to address the 911 call incident because it took place prior to, not after the alleged protected activity.

reasonable rather than retaliatory.

As far as the denial of sick bank benefits are concerned, the evidence establishes that Police Chief Stanley and the Town Administrator voted to *approve* the sick bank benefits not to deny them. It was Complainant's union rather than Respondent which voted which against granting the benefits.

Complainant Sylvester's request for injured-on-duty leave was likewise denied based on a lack of medical documentation sufficient to establish that he was unable to perform the essential functions of a police officer. Complainant Sylvester cited no physical reason why he could not perform his job, merely stating that he was too upset to work as a result of being re-assigned. Respondent concluded that no precedent permitted it to award Complainant Sylvester Chapter 11F benefits on such a basis. Its response is sufficient to refute a claim of retaliation

C. Complainant Damata's Racial Discrimination claim

An individual may satisfy the initial burden of producing evidence of unlawful discrimination through an inferential method and/or by direct evidence. See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000). Complainant Damata, a Caucasian officer, is hampered in regard to the inferential method by the fact that he was removed from the Detective Division in November of 2009 along with two Black officers and all three were replaced by Caucasian Detectives. Thus, individuals outside his protected class suffered the same adverse action that he suffered and the beneficiaries of the adverse actions were all members of Damata's own protected class. Such circumstances, do not lend themselves to a circumstantial case of race discrimination. See Abramian v. President & Fellows of Harvard College, 432 Mass. 107, 116 (2000) (noting that the

elements of prima facie case vary depending on facts).

Where a circumstantial case of race discrimination is foreclosed, Complainant Damata may still present direct evidence of discrimination. See Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 665 (2000), *quoting Johansen v. NCR Comten, Inc.* 30 Mass. App. Ct 294, 300 (1991) (defining direct evidence as that “which if believed results in an inescapable, or at least highly probable, inference that a forbidden bias was present in the workplace.”). Direct evidence is analyzed in a mixed-motive framework whereby a plaintiff must first prove that a proscribed factor played a motivating part in the challenged action followed by defendant having to prove that it would have made the same decision without the illegitimate motive. See Wynn & Wynn, P.C. v MCAD, 431 Mass. 655, 670 *citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-245 (1987). Although an illegitimate motive may co-exist with one or more legitimate motives, Complainant can only prevail in a direct evidence case by demonstrating that the employer’s illegitimate motive was a “motivating part” in an employment decision. Wynn & Wynn, 431 Mass at 665 *citing Price Waterhouse v. Hopkins*, 490 U.S. at 244.

Complainant Damata attempts to meet his burden under a mixed-motive analysis by proffering direct evidence of an illegitimate reason for removing him as Detective, i.e., to camouflage the racial-based removals of Sylvester and Correira. He alleges that Sergeant Jacinto told him there would be “trouble” if he were allowed to remain as a Detective because Sylvester and Correira would “start their racial shit.” Complainant Damata also claims that he overheard a telephone conversation wherein Jacinto said he couldn’t appoint Flannery as a Detective because “it would give them ... something to say.” Damata maintains that these statements evidence an intention to demote him – a

Caucasian Detective -- in order to dilute the negative impact of demoting the Department's two Black Detectives.

Direct evidence is distinguishable from stray remarks in that the former establishes a strong presumption of forbidden bias whereas the latter does not. See Wynn & Wynn, P.C. v. MCAD, 431 Mass. at 667 (defining stray remarks as those made by those without power to make employment decisions or statements unrelated to the decisional process). Although the remarks at issue here were allegedly made by decision-maker Sergeant Jacinto and concerned the decisional process, I reject these remarks as constituting direct evidence of discrimination for the following reasons.

Sergeant Jacinto's alleged reference to "racial shit," would, if believed, support a claim of discrimination, but I am not convinced that he uttered those words. Sergeant Jacinto testified candidly that he "needed to do a clean sweep to get things done the way the Chief wanted" but denied that the "clean sweep" was based on race. There is, to be sure, a fine line between implementing a fresh start with a clean slate and attempting to deflect concern about the removal of two Black Detectives by also removing a Caucasian Detective, but I conclude that Sergeant Jacinto's motives lie on the acceptable side of this equation. When Sergeant Jacinto testified that he couldn't remove two Detectives and allow the third one to stay, he was referring to the need to impose new standards by using new personnel. Complainant Damata claims to have heard a more pointed statement, but I credit Sergeant Jacinto's version of why he replaced Detective Damata along with Detectives Sylvester and Correira.

Sergeant Jacinto's views about making a fresh start with a new Detective Division coincided with Chief Stanley's opinion that the Detective Division needed to go in a

“whole new direction.” Sergeant Jacinto testified that he, along with Chief Stanley, believed that the pre-November 1, 2009 Detective Division had not functioned in an aggressive manner – a situation which he observed from the vantage point of a Patrol Sergeant forwarding cases to the Detective Division for investigation. A preponderance of the evidence supports Sergeant Jacinto’s assertion that he was given a free hand to staff the Detective Division and decided to replace all three members of the Detective Division because of their lack of case follow-up and because the other supervisors whom he consulted -- Urquhart, Park, Walcek, Walsh, Gifford, and Bulgar – all favored replacing them with Officers DeSilva, Courchesne, and Smith. The witnesses at the public hearing generally gave Complainant Damata good reviews as a Detective, but Damata’s completion rate for cases in 2008-2009 was 37 cases out of 55. This completion rate exceeds those of Detectives Sylvester and Correira, but it is less than the completion rate of replacement Detectives DeSilva, Courchesne, and Smith during the following year, to wit: 145 out of 157; 101 out of 113; and 105 out of 112.

Because of his familiarity with the candidates, Sergeant Jacinto did not review resumes, personnel files, or conduct interviews prior to selecting new Detectives in November of 2009. He testified credibly that he informed each candidate over the phone that he received their applications as a show of “respect” but did not delve into their credentials. Given his long familiarity with the candidates, I draw no adverse conclusion from the fact that Sergeant Jacinto did not hold formal interviews prior to selecting new Detectives.

Turning to the other statement relied on by Complainant Damata as direct evidence of race discrimination, I likewise reject it as establishing an inescapable, or

highly probable, inference that a forbidden bias was present in the workplace. Sergeant Correia purportedly overheard Detective Sergeant Jacinto say to then-Patrol Officer Peter Flannery, “I couldn’t give it to you because it would give them – them something to say.” A preponderance of the evidence convinces me that the statement refers to Officer Flannery being disqualified for a Detective assignment because he had already served five years in the position as had Complainants Damata and Sylvester. Such an interpretation is more reasonable than an inference that Sergeant Jacinto was referring to Flannery’s race. Had Sergeant Jacinto been referring to race, he would not have replaced Complainants with three other Caucasian officers.

D. Complainant Damata’s Retaliation Claim

Complainant Damata maintains that he protested his removal as Detective, claiming it was a smokescreen behind which Respondent sought to avoid accusations of racial animus in regard to its restructuring of the Detective Division. According to Damata, after this protest and his ensuing retirement, he was given fewer off-duty details than other similarly-situated individuals and not given a portable radio to keep at his home for use in connection with off-duty details. Based on the foregoing, Damata asserts that he engaged in protected activity of which Respondent was aware, was subjected to adverse employment actions, and that a causal connection exists between the two. 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). Damata’s allegations and the evidence submitted in support thereof are sufficient to establish a prima facie case of discrimination.

At the second stage of proof, Respondent notes that Complainant Damata was appointed as a special police officer following his retirement, a designation which allowed him to perform any road job details not accepted by regular rank and file officers. Although he was bypassed for some detail work by Sergeant Park, he began to receive detail calls after his bypasses were brought to the attention of Lieutenant Walsh. Sergeant Park acknowledged that he initially declined to call Damata for details but explained that he did so because he believed that Damata had “backstabbed” people in the Department, was “negative,” and had been difficult to supervise. Sergeant Park’s state of mind might have contained some degree of retaliatory animus, but it appears that he was influenced predominately by personal dislike. In any event, Park’s denials of detail work to Damata were de minimus and in contravention to Departmental policy. Park’s actions were reversed by Lt. Walsh as soon as the situation was brought to his attention.

Damata’s assertion that he was denied a portable radio is likewise unconvincing as a basis for a retaliation claim. Several retired officers may have kept such equipment at their homes for use in performing detail work, but Chief Stanley instituted a policy that, for the most part, put a stop to the practice. Damata, along with other retired officers, had access to portable radios for detail work by going to the station and picking them up.

Weighing the Department’s handling of Complainant Damata’s post-retirement detail work and his access to Departmental radios, I conclude that Respondent has articulated legitimate, non-retaliatory reasons for its actions supported by credible evidence and that Complainant has failed to establish that retaliation was a motivating

cause of Respondent's actions. Thus, Complainant Damata fails to present a persuasive case of retaliation.

IV. ORDER

The case is hereby dismissed. This decision represents the final order of the Hearing Officer. Any party aggrieved by this Order may appeal this decision to the Full Commission. 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 14th day of August, 2014.

Betty E. Waxman, Esq.,
Hearing Officer

