COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION,
ANDREW HARRIS and SPENCER TATUM
Complainants,

v. DOCKET NO. 94-SEM-0589
94-SEM-0590

CITY OF WORCESTER POLICE DEPARTMENT,
Respondent.

DECISION OF THE FULL COMMISSION ON REMAND

This matter comes before us on remand from the Worcester Superior Court directing the Full Commission to review, pursuant to G.L. c. 151B, § 5 and 804 C.M.R. 1.23, the Findings of Fact, Conclusions of Law and Order of the Hearing Officer issued April 26, 2002. In that decision, the Hearing Officer dismissed the complaints of Andrew Harris and Spencer Tatum, who were alleging disparate impact discrimination. After completing such review, for the reasons stated below, the Full Commission reverses the Hearing Officer's decision and concludes that the City of Worcester Police Department violated G.L. c. 151B's proscription against disparate impact discrimination.

RELEVANT PROCEDURAL HISTORY

On September 15, 1994, Complainants Tatum and Harris each filed nearly identical complaints with the Commission, claiming that the City of Worcester Police Department violated Massachusetts General Laws Chapter 151B when it failed to promote them to the position of sergeant based on their race and color. After efforts at conciliation failed, the matter was Certified

and set for public hearing before Hearing Officer, Edward Mitnick ("Hearing Officer").

On July 10, 2001, the first of two Public Hearings was held. At this hearing, Tatum and Harris pled their case under a disparate impact theory of discrimination. Tatum and Harris alleged that the City's practice of promoting in strict order, based only on an individual's rank on the Civil Service eligibility list, following a promotional examination, had a discriminatory impact on African-American officers. In the ensuing decision, which is the subject of this Full Commission Order, the Hearing Officer dismissed Tatum's and Harris' complaints. The Hearing Officer concluded that while Tatum and Harris had established a prima facie case of disparate impact discrimination, the City had met its burden of establishing that its practice of promoting by strict rank order constituted a lawful business necessity and therefore did not violate G.L. c. 151B. The Hearing Officer further found that Tatum and Harris failed to identify less discriminatory alternatives which would not have had the same discriminatory impact on African-American officers. Pursuant to 804 C.M.R. 1.23, Tatum, and Harris appealed the Hearing Officer's decision to the Full Commission.

After review of the Hearing Officer's decision, the Full Commission on August 4, 2003 remanded the matter to the Hearing Officer to take additional evidence on the issue of disparate treatment and pretext. The Full Commission expressly noted that the Order remanding the case did not "constitute a final review of the Decision of the Hearing Officer for purposes of . . . [judicial review]."

Following the remand hearing, on August 13, 2004 the Hearing Officer issued a decision dismissing Tatum's and Harris' claims of disparate treatment. Tatum and Harris once again appealed the Hearing Officer's decision to the Full Commission. For reasons unknown, the Full Commission did not substantively address Tatum's and Harris' original appeal of the dismissal of

the disparate impact claim. Instead, the Full Commission focused exclusively on the issue of disparate treatment. The Full Commission, however, was unable to reach consensus on the appeal of the disparate treatment claim. As a result, the Hearing Officer's second decision, dated August 13, 2004, became the Commission's final decision, for purposes of judicial review pursuant to G.L. c. 151B, § 6 and G.L. c. 30A, § 14.

Tatum and Harris sought judicial review, in the Superior Court, of the Full Commission decision dismissing the disparate treatment claim. Despite the documented lack of administrative finality, Harris and Tatum also sought judicial review of their disparate impact claim. After review, the Superior Court affirmed the dismissal of the disparate impact claim, and remanded the disparate treatment claim to the Commission for further review.

As directed by the Superior Court, the Full Commission on November 9, 2011 issued an Order addressing its review of Tatum's and Harris's claims of disparate treatment discrimination. In a reversal of the Hearing Officer's Decision, the Full Commission concluded that the City's failure to promote Tatum and Harris violated G.L. c. 151B. The Full Commission further noted that "[a]s a result of th[e] unusual procedural history [it] has been denied an opportunity to properly review the Hearing Officer's decision on the disparate impact claim."

In accordance with G.L. c. 30A, the City filed a complaint in Superior Court requesting judicial review of Full Commission order pertaining to disparate treatment. Tatum and Harris filed a complaint seeking limited review, and requesting that the case be remanded to the Commission for a final determination on Tatum's and Harris's disparate impact claims. On August 21, 2013, the Superior Court allowed the request to remand the matter. The case was sent back to the MCAD for a final administrative review of the Hearing Officer's decision on the disparate impact claim. It is upon the Superior Court's second remand order that the following Full Commission Order is issued.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. G.L. c. 151B, § 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "....such evidence as a reasonable mind might accept as adequate to support a finding..." *Katz v. MCAD*, 365 Mass. 357, 365 (1974); G.L. c. 30A. It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission's role is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. *See* 804 CMR 1.23.

ANALYSIS

G.L. c. 151B and Title VII, prohibit employers from using "'employment practices that [create] a disparate impact on the basis of race' unless those practices are justified by business necessity." *Jones v. City of Boston*, 752 F.3d 38, 46 (1st Cir. 2014) (quoting 42 U.S.C. § 2000e–2(k)). Disparate impact discrimination "involve[s] employment practices that are facially neutral in their treatment of different groups, but that in fact fall more harshly on one group than another." *Lopez v. Commonwealth*, 463 Mass. 696, 709-710 (2012) (internal citation omitted).[1] Unlike disparate treatment claims, "discriminatory motive is not a required element of proof" in disparate impact cases. *Id.*

[1] "Because there is relatively little case law on disparate impact claims in Massachusetts [the courts] look to Title VII for guidance, mindful that Federal interpretations are not binding on [the courts] when construing a State statute." *Lopez,* 463 Mass. at 710 (citations omitted).

Disparate impact claims follow a three-part analysis involving shifting evidentiary burdens. 42 U.S.C. § 2000e–2(k)(1)(A)(i). "To make a prima facie showing of disparate impact, a [complainant] starts by 'isolating and identifying' the employment practice being challenged." *Jones*, 752 F.3d at 46 (quoting *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994 (1988), (plurality)). A complainant must then demonstrate that the challenged practice "causes a disparate impact on the basis of race, color, religion, sex, or national origin." In doing so, the complainant may rely on statistical data. *Bresnahan v. Route 114 Liquors*, 17 MDLR 1129, 1134 (1995). *See International Broth. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (recognizing the use of statistics in proving employment discrimination). The precise impact of the identified policy need not be proved to a mathematical certainty. *Id.* "[A] prima facie showing of disparate impact [is] "essentially a threshold showing of a significant statistical disparity ... and nothing more." *Jones*, 752 F.3d at 46 (quoting *Ricci v. DeStefano,* 557 U.S. 557, 587 (2009)).

Once a complainant has established a prima facie case of disparate impact discrimination, "a respondent has two avenues of rebuttal." *Gulino v. New York State Educ. Dept.*, 460 F.3d 361, 382 (2nd Cir. 2006) (citations omitted). First, the respondent may "directly attack [complainant's] statistical proof by pointing out deficiencies in data or fallacies in the analysis." *Id.* Second, the respondent may rebut a prima facie showing by "demonstrat[ing] that the challenged practice is job related for the position in question and consistent with business necessity." *Id.* (quoting 42 U.S.C. § 2000e–2(k)(1)(A)(i)). "In all events, however, a defendants' good faith is not a defense to a disparate impact claim." *E.E.O.C. v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 602 (1st Cir. 1995) (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971)).

"If the defendant fails in its efforts to counter the plaintiff's prima facie case, then the

factfinder is entitled—though not necessarily compelled to enter judgment for the plaintiff, *Steamship Clerks Union*, 48 F.3d at 602 (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 509-10 (1971)). Even if the respondent establishes that the challenged practice is a business necessity, the complainant may still prevail if he is able to establish that the professed rationale is pretextual. *Bradley v. Lynn*, 443 F. Supp. 2d 145, 157 (D. Mass. 2006) (citing *Steamship Clerks*, 48 F.3d at 601-02). "The [complainant] might demonstrate, for example, that some other practice, without a similarly undesirable side effect, was available and would have served the defendant's legitimate interest equally well. Such an exhibition constitutes competent evidence that the defendant was using the interdicted practice 'merely as a 'pretext' for discrimination.' " *Id.* (citing *Donnelly v. R.I. Bd. of Governors for Higher Educ.,* 110 F.3d 2, 4 (1st Cir.1997) (noting that although *Steamship Clerks* addressed the legal framework as it existed prior to the 1991 amendments to the Civil Rights Act, the First Circuit continues to apply the same framework)).

The Prima Facie Case.

In this matter, Tatum and Harris alleged the City of Worcester's practice of strictly promoting candidates, as ranked on the Civil Service eligibility list, generated from the results of the civil service promotional exam, had a discriminatory impact on African-American police officers. The principle that facially neutral employment practices may violate statutory anti-discrimination provisions has frequently been applied where "standardized criteria have had an adverse impact on hiring and promotion of minority candidates." *Lopez v. Com*, 463 Mass. 696, 710 (2012)(citing *Watson*, 487 U.S. at 988 (citations omitted)).

In evaluating statistical evidence, "[t]he Supreme Court has said that no single test controls in measuring disparate impact." *Bradley v. Lynn*, 443 F. Supp. 2d 145, 160 (D. Mass. 2006) (quoting *Langlois v. Abington Hous. Auth.,* 207 F.3d 43, 50 (1st Cir. 2000) (citing *Watson,* 487 U.S.

at 995–96 n. 3 ("[W]e believe that such a case-by-case approach properly reflects our recognition that statistics 'come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances' ")(citation omitted)). While "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group . . . [o]ur formulations ... have never been framed in terms of any rigid mathematical formula . . . " *Id.* at 157 (citing *Watson,* 487 U.S. at 994–95). Statistical disparities must "be sufficiently substantial . . . [to] raise . . . an inference of causation." *Id.*

Recently, however, decisions from the United States District Court of Massachusetts and the First Circuit Court of Appeals have placed increasing significance on the statistical methodology used to demonstrate disparate impact. *See Jones v. City of Boston*, 752 F.3d 28 (2014); *Lopez v. City of Lawrence*, No. 07-11693-GAO (D.Mass. Sept. 5, 2014) *appeal filed*, Docket #:14-1952 (1st Cir. Apr. 8, 2015). Preferring "analytic rigor" these federal decisions suggest that in order for a complainant to prevail in demonstrating a statistically significant disparity, a large sample size is required. *Lopez,* No. 07-11693-GAO @ 5. The danger of applying such analytic rigor is the total exclusion of a class of cases in which an employment practice has a discriminatory impact, but the employment data set is too small to establish a prima facie case.

Although the issue has not been directly addressed by the Supreme Judicial Court, the Court intimated in *Lopez v. Commonwealth*, 463 Mass. 696 (2012) that it may adopt a less stringent approach to its assessment of statistical disparities in considering a claim of disparate impact discrimination under G.L. c. 151B. In *Lopez*, a group of African-American and Hispanic police officers alleged that the Commonwealth's Human Resource Department engaged in racial discrimination through the preparation and administration of examinations used by candidates

seeking promotion to the rank of sergeant. *Id.* at 697. The group further alleged that as a result, "in the municipalities that employed them, 'few, if any, minorities had been promoted to the position of sergeant.' " The Court, citing *Commonwealth v. Arriaga,* 438 Mass. 556, 565–567 (2003), indicated that in evaluating the statistical evidence proffered in support of a prima facie case it would apply "the absolute disparity test to determine whether underrepresentation of a group is substantial." *Lopez, supra* at 700 n. 6. The Court went on to suggest that a successful claim, under the facts alleged, would include evidence of "a significant disparity . . . between the percentage ratio of African-American and Hispanic police sergeants and their numbers in entry-level police officer ranks, on the one hand, and the corresponding percentage ratio of similarly situated non-minority police officers on the other." *Id.* In applying the absolute disparity test, courts have "held that a disparity below ten percent is generally not substantial." *Arriaga*, 438 Mass. at 565 (citing *Commonwealth v. Fryar*, 425 Mass. 237, 243, cert. denied, 522 U.S. 1033 (1997) (citations omitted).[2]

In this case, after analyzing the statistical evidence proffered, the Hearing Officer concluded that Tatum and Harris successfully stated a prima facie case of disparate impact discrimination. In reaching this conclusion, the Hearing Officer examined the racial demographics of both the City of Worcester and the Worcester Police Department. Relying on 1990 census data for the City of Worcester, the Hearing Officer found Worcester's minority population was 14.1% of the general population. The census indicated that Black residents comprised 4.5% of the general population, while Hispanics comprised 9.6%. Comparing the general population data with the demographics of the Worcester Police Department, the facts revealed that for the years 1993 to 2000, the percentage of minorities serving as sworn police officers ranged from a low of 10.2% in 1993 to a high of

[2] Additionally, the SJC indicated that in a disparate impact challenge to a Statewide test, data aggregation across municipalities may be appropriate in certain situations to establish a prima facie case; an approach rejected by the U.S. District Court in *Lopez v. City of Lawrence*, No. 07-11693-GAO. See *Lopez v. Com., 463 Mass.* at 712-13.

12.4% in 1997. By 2000, the percentage of minorities serving in the Worcester Police Department had fallen to 11.9%.

During this same period, the City employed between 55-65 sergeants. None (0.00%) of those who held the rank of sergeant was minority. Moreover, prior to the May 2001 promotion of one minority to the rank of sergeant, the City had not promoted a minority to sergeant in more than a decade. During the thirteen-year period of 1987 to 2000, the City had promoted only one minority to a superior officer's position.[3]

In surveying promotions to the rank of sergeant, the Hearing Officer found that in 1993, the City promoted 18 white officers from the eligibility list established after the 1992 promotional exam. Using the eligibility list established after the 1994 promotional exam, in 1995, the City promoted 12 white officers to sergeant. In 1992, in addition to Tatum and Harris, one other minority police officer passed the exam. In 1994, three other minority police officers passed the exam. Although they received passing scores, none of the successful minority police officers ranked high enough to be considered for promotion under the City's policy of selecting candidates in strict order of rank on the eligibility list.

Based on this evidence, the Hearing Officer properly concluded, "a gross disparity exists between the racial composition of the officers who were eligible for promotion to sergeant and the racial composition of the officers who actually worked as sergeants in the department." The Hearing Officer went on to note "[o]ne need not be a statistician to conclude that the relevant percentages [over a seven year period] from 1993 to 2000 - 0.00% of minority sergeants in the department, 10.2-12.4% minority members in the department, and 14.1% minority population in the City of Worcester - constitutes persuasive evidence by which [it] may reasonably [be] inferred

[3] In the November 9, 2011 Order of the Full Commission, the Full Commission took judicial notice of the fact that the lone minority promoted to the position of sergeant, prior to 2001, received the promotion based on the City's effort to meet equal employment opportunity goals set by the EEOC.

[that] a prima facie case of unlawful discrimination in the promotion of minority officers[exists]."

Even if the absolute disparity test noted by the SJC in *Lopez*, had been substituted for the Hearing Officer's "intuitive judicial judgment," *Fudge v. City of Providence*, 766 F.2d 650, 657-58 (1st Cir. 1985), the results would have been the same. Comparing the percentage ratio of minority Worcester "police sergeants and their numbers in the entry-level police officer ranks, on the one hand, and the corresponding percentage ratio of similarly situated nonminority [Worcester] police officer on the other," *Lopez*, 463 Mass. at 700, we find that between 1993 and 2000 the percentage difference in Caucasian sergeants and minority sergeants range between 18% to 26% - percentages sufficient to pass the absolute disparity test. After review, the Full Commission finds no error in the Hearing Officer's assessment of the statistical disparities and concludes that that Tatum and Harris set forth a prima facie case.[4]

Business Necessity.

Once a plaintiff has established a prima facie case of disparate impact, the employer may defend by demonstrating that its policy or practice is "job related for the position in question and consistent with business necessity." *Ricci v. DeStefano*, 557 U.S. 557, 557 (2009). "The proper standard for determining whether 'business necessity' justifies a practice which has a racially discriminatory result is not whether it is justified by routine business considerations but whether

[4] In rebuttal to the prima facie showing, the City attempted to point out deficiencies with the methodology of the analysis. The City began by attacking the statistical "proof head-on" arguing that the data relied upon was not numerically relevant for its purpose. Relying on *Boston Police Superior Officers Fed'n v. City of Boston*, 147 F.3d. 13 (1st Cir.1988) the Hearing Officer disagreed. Next, the City attempted to rebut the prima facie case by conjecturing that test preparation time and techniques negatively impacted Tatum's and Harris' test scores. The Hearing Officer correctly rejected the City's arguments as unpersuasive for two reasons. First, neither party presented evidence regarding the correlation of study and success on the promotional examination. Nor was evidence presented on the study habits of the higher scoring candidates versus the lower scoring. Second, the Hearing Officer noted that a complainant who "presents a statistical analysis of some challenged practice in a disparate impact case need not rule out all other variables" to establish a prima facie case. *USA v. City of Warren*, 138 F.3d 1083, 1094 (6th Cir. 1998) (citations omitted). The Full Commission finds that the Hearing Officer's conclusions are supported by substantial evidence and free from error of law.

there is a *compelling* need for the employer to maintain that practice and whether the employer can prove there is *no* alternative to the challenged practice." *Id.* at 623 (2009) (quoting *Kirby v. Colony Furniture Co.*, 613 F.2d 696, 705, n. 6 (8th Cir. 1980)(emphasis in original)). "That a practice served legitimate management functions does not "suffice to establish business necessity." *Id.* at 622-623 (quoting *Williams v. Colorado Springs, Colo., School Dist.*, 641 F.2d 835, 840–841 (10th Cir. 1981)(internal quotation marks omitted).

It is here that the Full Commission and Hearing Officer part ways. Relying primarily on an interpretation of the language contained in the Commonwealth's Civil Service statute, G.L. c. 31, the Hearing Officer concluded that the City's practice of strictly promoting candidates by order of rank on the civil service eligibility list was a business necessity. Citing G.L. c. 31, § 1(e), the Hearing Officer noted that the City must adhere to "basic merit principles" when making appointments and promotions. Such adherence is necessary to assure the "fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap or religion . . . " *Id.* Thus, the Hearing Officer continued, it is by necessity that the City comply with civil service rules and procedures which ensure exclusion of political consideration, favoritism and bias in the promotional process and not deviate from the practice of strict rank order promotions. In arriving at this conclusion, the Full Commission finds that the Hearing Officer erred as a matter of law.

While the City must admittedly comply with the statutory mandate of adhering to "basic merit principles," there is no statutory prohibition against promotions made outside of strict rank order. *Brackett v. Civil Service Comm'n*, 447 Mass. 233, 253(2006) (citing *Cotter v. City of Boston*, 323 F.3d 160, 171-72 (1st Cir. 2003)). When making appointments and promotions, G.L. c. 31 provides municipalities with the option to create and administer an alternative promotional

examination, and to rest promotional decisions on factors other than the examination. *Lopez*, 463 Mass. at 705; G.L. c. 31 §§ 11 and 3(e). Although promotional appointments must generally be made "on the basis of merit as determined by examination, it need not be the only criterion to evaluate merit." *Lopez*, 462 Mass. at 706 n.13 (citing *Lopez*, 588 F.3d 69, 77-78 (2009)). Pursuant to G.L. c. 31 § 3(e), merit may also be assessed through "performance evaluation[s], seniority of service or any combination of factors which fairly test the applicant's ability to perform the duties of the position as determined by the administrator." *Id.*

As further evidence that strict rank order promotion is not mandated, "the civil service law allow[s] police departments to bypass the candidates at the top of the list, so long as the department, as the appointing authority, then provide[s] HRD with a written statement of reasons." G.L. c. 31, § 27. *Lopez*, 588 F.3d at 79 (citing *Brackett*, 447 Mass. at 253.). Reasons for bypass may include "a history of domestic violence, past criminal charges, or any other grounds pertaining to the candidate's ability to effectively perform in the job." *Id.* at 79 (citing *Crete v. City of Lowell*, 418 F.3d 54, 59 (1st Cir. 2005)).

Additionally, G.L. c. 31 allows appointing authorities to promote individuals with "special qualifications," such as specific language proficiencies. PAR.08(6).[5] "Upon the request of a municipality, HRD issues a "selective certification" comprised of the names of eligible candidates possessing both the general qualifications and the required fluency in the specific language sought. *Id.*

Finally, "municipalities that wish[ ] to hire more minority candidates could do so pursuant to . . . PAR.10." Rule PAR.10 allows police departments to make a requisition to fill positions based on race, color, national origin, or sex. Special certifications under PAR.10 require substantiation

[5] PAR refers to the Personnel Administration Rules originally promulgated by the Commonwealth's Department of Personnel Administration - the predecessor to the Human Resources Division ("HRD").

that the previous practices of the department, with respect to filling the identified positions, have discriminated against members of a protected class in contravention of any Constitutional provision or in violation of state or federal law. *Id.*

"In short, even for police departments that chose to rely upon HRD-administered written examinations to evaluate candidates for promotion to police sergeant, these examinations were never wholly determinative of promotion decisions. These departments had a number of ways they could consider other factors beyond examination scores and look beyond the top-ranked candidates on an eligibility list." *Lopez*, 588 F.3d at 80.

Pretext/Less Discriminatory Alternative:

In attributing error to the Hearing Officer's conclusion that the City of Worcester had rebutted the prima facie case, the Commission is entitled to enter judgment for Tatum and Harris. *Abramian v. President & Fellows of Harvard Coll.*, 432 Mass. 107, 117-18 (2000). *See Steamship Clerks Union*, 48 F.3d at 602 (citing *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 509-10 (1971)). We conclude that sufficient evidence exists to support a finding of disparate impact discrimination. Additional evidence proffered at hearing further supports our conclusion that the City's practice of making strict rank promotions was discriminatory.

In this case, as in the companion disparate treatment case, the City of Worcester cannot escape the fact that prior to its decision to strictly adhere to its policy of strict rank order promotions, it had actual notice that its practice had resulted in discrimination. The City's notice was provided in the form of an EEO Agreement executed between the City and the Commission some five years prior to promotions in question. The Agreement required the City to take affirmative action to remediate the gross disparities that signaled a history of discrimination, including making promotions outside the confines of strict rank order. Armed with both the

knowledge of past (and present) discrimination and the ability to remedy the procedures which "operate as 'built-in headwinds' for minority groups," the City chose to take no action. *Griggs,* 401 U.S. 424, 432 (1971). Given the City's refusal to act where it was on notice of past practices evidencing a history of discrimination, and its ability to remedy the situation, the Commission concludes that the City's failure to act was pretext for discrimination.[6]

ORDER

For the reasons set forth above and pursuant to the authority granted to the Commission under G. L. c. 151B, section 5, we reverse the decision of the Hearing Officer and find the City of Worcester Police Department violated G.L. c. 151B's proscription against disparate impact discrimination. This Order incorporates all of the damages, affirmative relief, and monitoring requirements set forth by the Full Commission in its Order of November 9, 2011, addressing Tatum's and Harris' claim of disparate treatment.

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

[6] Had the City "stalemated the prima facie case," the burden would have shifted to Tatum and Harris to establish that the professed rationale was pretextual. *Bradley v. Lynn*, 443 F. Supp. 2d 145, 157 (D. Mass. 2006) (citing *Steamship Clerks*, 48 F.3d at 601-02). Tatum and Harris, nonetheless, may have carried this burden by demonstrating that "some other practice, without a similarly undesirable side effect, was available and would have served the defendant's legitimate interest equally well." *Id.* "Such an exhibition" is one example of "competent evidence" available to demonstrate that the "defendant was using the interdicted practice merely as a pretext for discrimination." *Id.* (internal quotations and citations omitted). *Cf.* 42 U.S.C.A. § 2000e-2(k)(1)(A)(ii).

automatically stay enforcement of this Order. Failure to file a petition in court within 30 days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to G.L. c. 151B, §6.

SO ORDERED this 30th day of June, 2015

Jamie R. Williamson
Chairperson

Sunila Thomas-George
Commissioner

Charlotte Golar Richie
Commissioner