

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and KATHLEEN STEFANI,
Complainants

v.

Docket No. 03 BEM 01428

DEPARTMENT OF STATE POLICE,
Respondent

For Complainant Kathleen Stefani: Gigi Tierney, Esq.
For Respondent: Sean W. Farrell, Esq.

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On June 2, 2003, Kathleen Stefani (“Complainant”) filed a complaint with the Massachusetts Commission Against Discrimination (“MCAD”) against the Respondent State Police charging that she was subjected to discrimination on the basis of her gender in violation of M. G. L. ch. 151B, section 4(1). Complainant alleges that she was demoted from the rank of Major in March of 2003 because she is female.

On March 31, 2010, the Commission issued a Probable Cause Finding. The case was certified the for public hearing on December 29, 2010.

A public hearing was conducted on September 19, 20, and 21, 2011. The following individuals testified at the public hearing: Kathleen Stefani, Wayne Mackiewicz, John Dunn, Shawn Givhan, Bradley Hibbard, John Flynn, and Thomas Foley. The parties submitted twenty-five (25) joint exhibits. Complainant submitted an

additional seventeen (17) exhibits and Respondent submitted an additional three (3) exhibits.

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. The Complainant was a female officer employed by the Massachusetts State Police from 1978 to 2004. She was promoted to Corporal in 1990, Sergeant in 1992, Lieutenant in 1995, and Captain in 1999. In 1999, then-State Police Colonel John DiFava appointed Complainant to the rank of Major. From June of 2000 until March of 2003, Complainant was assigned as Commander of Troop H (metropolitan Boston and areas south).
2. Respondent is a police organization that is overseen by the State Police Colonel. The Governor appoints the Colonel of the State Police. The selection of candidates for the positions of Trooper, Sergeant, Lieutenant and Captain is determined, in part, by exam scores. Above the rank of Captain, candidates are appointed.
3. The Colonel's command staff consists of a Deputy Superintendent, Lieutenant-Colonels, and Majors. Transcript at 362; 560.
4. The State Police is divided into seven troops: A (northeastern part of state), B (western part of state), C (central part of state), D (southeastern part of state), E (the Turnpike Authority); F (Massport), and H (Boston metropolitan area). Transcript at 561, 579. The Majors in charge of the troops are responsible for managing overtime costs. Transcript at 581.

5. At the time that Complainant was appointed Major in 1999, she was the only female in that rank. Upon her appointment as Major, Complainant was initially assigned to the Division of Investigative Services but in June of 2000, Colonel DeFava assigned her to Troop H. Transcript at 18. Annual events which take place within the jurisdiction of Troop H include: Gillette Stadium football games, Boston's Fourth of July Esplanade celebration, the Caribbean Festival, the Boston Marathon, the Boat Show, the Flower Show, Friday night concerts on the Esplanade, and college graduations. Transcript at 21-22, 51. Complainant describes Troop H as the most urban, dense, and busiest of the troops. Transcript at 20-21. Complainant's duties as Troop H Commander included overseeing its barracks, controlling overtime costs, and handling personnel issues.
6. During the time that Complainant served as Commander of Troop H, she was the "Incident Commander" for the annual July 4th celebration on the Esplanade. Transcript at 201, 590. As Incident Commander, she took charge of the July 4th command post, handled personnel, and addressed issues that came up during the event. Transcript at 591. Complainant's role as Incident Commander included planning the event, overseeing security, and preparing an operations manual for the event. Transcript at 32-33. The operations manual for the July 4, 2002 event did not mention any circumstances under which a threat level would be raised. Transcript at 138.
7. In December of 2001, Colonel DeFava retired. A number of individuals applied for the position of Colonel including Complainant, Tom Foley, and Bradley Hibbard. Transcript at 124, 383, 491. Foley was appointed Colonel by Acting

Governor Jane Swift on December 7, 2001. Transcript at 123, 364, 559.

8. Within several months of his appointment, Colonel Foley removed John Cunningham from his command staff position as Lieutenant-Colonel in charge of Field Services and Glenn Anderson from his command staff position as Deputy Superintendent. Transcript at 125-126, 270, 565. Colonel Foley notified both directly that he was removing them from their command staff positions. Transcript at 565. He notified them personally because they reported directly to him and because he did not have anyone else on his command staff at the time to perform this function. Transcript at 566. Cunningham and Anderson chose to retire rather than returning to their prior ranks. Joint Exhibit 3; Transcript at 649-650. Colonel Foley appointed Bradley Hibbard as his Deputy Superintendent and promoted then-Major John Kelly to Lieutenant-Colonel in charge of Field Services. Transcript at 491, 566. Colonel Foley did not demote any Majors at that time. Transcript at 127, 566.
9. Complainant testified that she had enjoyed a positive relationship with Colonel DiFava but that Colonel Foley consistently rebuffed and ignored her during the eighteen months that she served on his command staff. Transcript at 27, 127.
10. Complainant received a performance appraisal for the period from November 2, 2001 through April 18, 2002 by Lieutenant-Colonel Kelly and co-signed by Deputy Superintendent Hibbard. Joint Exhibit 9. Complainant was graded as “outstanding” in eight categories and as “acceptable” in seven categories. *Id.* She was described as possessing a “great deal of professionalism and efficiency,” as handling “intricate personnel and contractual issues ... with a great deal of

success,” as maintaining a high level of troop morale, as presenting a “very positive image” on behalf of the Department, and as exhibiting excellent decision-making and problem-solving abilities. Id. Complainant’s prior two performance appraisals were equally positive. Id.

11. The Esplanade celebration on July 4, 2002 was the first July 4th event under Colonel Foley’s command and the first such event after the events of 9/11. Prior to July 4, 2002, Colonel Foley and Complainant attended a planning meeting with then-Governor Swift. According to Colonel Foley, he was to be the contact person between the Governor’s office and the command post. Transcript at 590.
12. Colonel Foley and Deputy Superintendent Hibbard arrived at the July 4, 2002 command post at lunchtime and remained at or near the site throughout the day and evening. Transcript at 591. The command post was located at Emerson College, near the Esplanade. Transcript at 157. Colonel Foley met with Complainant after he arrived and told her that if anything happened, he wanted to be informed. Transcript at 143, 408, 592.
13. Just before 11:00 p.m. on the evening of July 4, 2002, Complainant received a radio transmission from the Charles Street MBTA station that a woman had collapsed on the platform and, according to radiation dosimeter instruments, was emitting radiation. Joint Exhibit 22, p.8; Transcript at 34, 39. Complainant issued an order to raise the threat level from a code yellow to a code orange without first talking to Colonel Foley or Deputy Superintendent Hibbard. Transcript at 35, 145. Complainant issued the order over the state police radio system but did not make a public announcement. Transcript at 201. Complainant

dispatched motorcycle officers and the National Guard Civil Support Team to the scene. The Civil Support Team learned that the woman had recently received radiation treatment for cancer. The Team used more specialized equipment to determine that the woman was releasing radioactive material at a sufficiently high level to set off police detection devices. Transcript at 36. Approximately eleven to twelve minutes after receiving the initial call, Complainant reduced the threat level from orange to yellow. Transcript at 36.

14. Colonel Foley and Deputy Superintendent Hibbard heard about the raised threat level over the police radio. Transcript at 143, 146, 411, 594. According to Colonel Foley, he immediately called Complainant and instructed her not to notify the Governor until the Civil Support Team made a determination about the circumstances. Transcript at 597. Foley characterized Complainant's handling of the situation as an "overreaction" and asserted that Complainant lacked authority to raise the threat level. Transcript at 598, 600.
15. Complainant testified that after the incident was resolved, Colonel Foley berated her publicly for raising the threat level to orange by pointing his finger at her chest, saying that she had no authority to raise the code level, and asserting that she should have contacted him. Transcript at 39, 154. Complainant testified that she tried to explain that she did not raise the "state" code level but only the "incident" code level. *Id.* at 39-40, 148. Colonel Foley did not take disciplinary action against Complainant for the July 4, 2002 incident. Transcript at 158, 417.
16. Retired Deputy Superintendent Bradley Hibbard testified that he was "shocked" that Complainant raised the threat level without consulting the Colonel.

Transcript at 412. He testified that upon hearing about the higher threat level, he and Colonel Foley proceeded to the command post where they learned that

Complainant was attempting to contact the Governor. Transcript at 413.

According to Hibbard, Colonel Foley took Complainant “off to one side” and questioned her privately about why the threat level had been raised. Transcript at

413. Hibbard testified that it was Colonel Foley who instructed Complainant to contact the National Guard Civilian Support Team. Transcript at 414-415.

Hibbard stated that he was concerned about Complainant’s actions because of the potential for “mass hysteria” had the information leaked out to the crowd.

Transcript at 416.

17. In general, Troop H incurred overtime expenses in excess of other troops because Troop H was staffed with senior troopers who earned a maximum amount of vacation time, because vacant positions had to be back-filled, because a number of special events took place within the jurisdiction which required extra personnel on an overtime basis, and because Troop H experienced a higher level of activity (arrests, investigations, motorcycle escorts, and court time) than did other troops. Transcript 46-52, 55, 233. Because of these considerations, Troop H was allotted more overtime hours than other troops. Transcript at 324, 575.

18. Around the end of the summer of 2002, Complainant became aware of criticism concerning her handling of overtime from Lieutenant-Colonel Jack Kelly.

Transcript at 45, 53-54.

19. Complainant acknowledged that as a troop commander, it was her responsibility to monitor overtime. Transcript at 175. She testified that it was difficult to do so

because of a practice known as “double dipping” whereby officers took off vacation or personal time and then worked the same shifts on an overtime basis. Transcript at 60-61, 63-64, 166. According to Complainant, she had no discretion to stop this practice. Id. Complainant testified that the collective bargaining agreement covering state police troopers and sergeants specified that officers could take off all time to which they were entitled, regardless of whether it resulted in overtime back-fills. Transcript at 64, 202, 493. However, Complainant also admitted that one of Colonel Foley’s “no-no’s” was to give an officer a personal day and then allow him/her to work that vacancy on an overtime basis. Transcript at 175-176, 333.

20. Retired Lieutenant-Colonel John Dunn asserted that “Administrative Policy 22” allowed an officer to take a day off, go to court on the day off, and be paid overtime for the court appearance, but he also stated that Colonel Foley issued a “superseding order” that prohibited the policy. Joint Exhibit 13; Transcript at 345-346. Colonel Foley testified that he stopped the practice of allowing time-off for court appearances and required officers who were assigned to work on a court day do so on straight time. Transcript at 577-568, 610-611.

21. According to Deputy-Superintendent Hibbard, the practice whereby officers were allowed to take time off in order to work on an overtime basis ended in 2002, except in circumstances where an officer had arranged to take a pre-planned vacation and needed to attend court during that time. Transcript at 471-472. Under the former practice, officers were allowed to collect straight and overtime pay for the same assignment. Hibbard testified that the change in overtime policy

was communicated in both written and verbal form. Transcript at 398, 472.

22. Retired Lieutenant-Colonel John Dunn served under Complainant as Captain/Executive Officer of Troop H between 2001 and 2003. Transcript at 292. Dunn testified that he had been “dismayed” when he was passed over for promotion to Troop H Commander in favor of Complainant, but stated that she was an “outstanding major, probably the most well rounded of all the majors that [he] served under.” Transcript at 319-320.
23. In early September of 2002, Complainant was contacted by Joan Gardner from “Mass-GAP” -- a nonprofit group promoting the advancement of women in government and business in the Commonwealth. Transcript at 64, 158-160. Gardner told Complainant that her organization had received Complainant’s name from “NAWLEE” (National Association of Women in Law Enforcement) and sought her resume. At that time, Complainant did not inform Colonel Foley that she had forwarded an informal copy of her resume to Gardner. Transcript at 158-162. Following the gubernatorial election in the fall of 2002, Gardner, then co-chair of the public safety committee reviewing resumes for Governor-elect Romney’s transition team, sought to recommend Complainant for a number of positions in public safety including Secretary of Public Safety and Colonel of the State Police. Joint Exhibit 18; Transcript at 65-66, 159-160. Complainant testified that she asked for time to “think about it” and to notify her superiors. Transcript at 66. According to Complainant, she discussed the matter with her immediate supervisor, Lieutenant-Colonel Kelly and with her subordinate, Captain John Dunn, who encouraged her to notify Colonel Foley about her

- intentions. Transcript at 164-165; 310-311. Complainant testified that on November 18, 2002, she emailed Colonel Foley to advise him that she was planning to forward an official copy of her resume for consideration by the transition team and that when she did not receive a response from Colonel Foley in twenty-four hours, she proceeded to send her resume to Governor-elect Romney and to communicate that she wanted to be considered for advancement. Complainant's Exhibit 1; Transcript at 67-68. However, according to an email from Complainant to Colonel Foley dated November 18, 2002, Complainant had already forwarded her resume to the transition team by the time she emailed him.
24. Colonel Foley testified that he received an email from Complainant on November 18, 2002 stating that she had applied for the positions of Colonel and for Secretary of Public Safety with the incoming administration. Transcript at 601. According to Foley, he was aware from others that Complainant had done so and thought it was discourteous that she had not informed him sooner. Transcript at 603. Foley testified that his decision to demote Complainant was unrelated to the fact that she applied for his job. Transcript at 660. I do not credit this testimony.
25. According to Complainant's Executive Officer John Dunn, after Complainant applied for the position of Colonel, questions about her use of overtime increased. Transcript at 309.
26. Colonel Foley and Deputy Superintendent Hibbard characterized Complainant's attitude about controlling overtime as "dismissive." Transcript at 423-424, 609. They stated that Complainant was unwilling to work to lower her overtime costs.
27. Lieutenant Walter Keenan was Complainant's third in command in Troop H.

Transcript at 176. In mid- January of 2003, Keenan took a personal day off and then worked the same day attending court on an overtime basis. Transcript at 177. The same situation occurred in February of 2003. Id. Complainant claims that when it was “pointed out” to her, she instructed Keenan and all non-bargaining unit members in her troop to refrain from engaging in this practice. According to Complainant, when Lieutenant Keenan did so again in late February of 2003, she transferred him out of Troop H. Transcript at 105-106; 178-179.

28. According to Deputy Superintendent Hibbard, it was he who noticed that Lieutenant Keenan had put in for time off from a regular shift on January 16, 2003 in order to attend court on an overtime basis. Transcript at 426. Hibbard testified that he brought the matter to Complainant’s attention and informed her that it should not happen again but despite his warning, Lieutenant Keenan continued to “double dip.” Transcript at 430-437.

29. Colonel Foley testified that he did not consider Lieutenant Keenan’s actions to be a good example to send to the rest of the individuals in Troop H. Transcript at 613. Foley testified that he was very upset because he felt that Complainant was not implementing his policy and was disobeying a direct order. Transcript at 616. According to Foley, it was at that time that he decided to remove Complainant from her position as the Commanding Officer of Troop H. Transcript at 618-619.

30. Hibbard testified that for a period of three to five months, three Troop H station commanders came into work on Sundays for an hour or less to review payroll records and were approved for a full shift of compensatory time off (a “day off lost”) for doing so. Transcript at 439-441. According to Hibbard, it was not

necessary for station commanders to perform such work on Sundays. Transcript at 498-499.

31. Wayne Mackiewicz testified that he retired as a Major from the State Police in 2003 after a twenty-seven year career. In July of 1999, Mackiewicz became Troop Commander of Troop D. He served in that capacity for two and one-half years after which he became Deputy Commander of Field Services. Transcript at 224. According to Mackiewicz, in mid-2001 while he was Commander of Troop D, he tried to prevent his troopers from taking vacation or personal time and then working the same days on an overtime basis, but Colonel Foley and Deputy Superintendent Hibbard ordered him to allow the overtime. Transcript at 227-228. On cross-examination, however, Mackiewicz acknowledged Hibbard and Foley did not occupy the positions of Deputy Superintendent and Colonel until the end of 2001. Transcript at 259-262. Mackiewicz also acknowledged that he was upset with Colonel Foley for transferring him out of Troop D. Transcript at 266.
32. Complainant was demoted to the rank of Captain, effective Sunday, March 23, 2003. Joint Exhibit 1; Transcript at 106. Prior to the effective date of her demotion, she received a call from Deputy Superintendent Hibbard on Monday, March 10, 2003 at approximately 5:30 p.m. Transcript at 181, 444-445. According to Complainant, Hibbard said that there were going to be changes in the command staff and that her services would no longer be needed as a Major. Transcript at 107, 181. Complainant testified that she was asked what her options were and he said “none as a Major.” Transcript at 107, 446.

33. When an officer is removed from the command staff, the officer is normally given the option of retiring or returning to a prior rank. Transcript at 620. According to Colonel Foley, there is no established procedure for the manner in which an officer is notified about removal. Transcript at 623.
34. Following Complainant's telephone conversation with Deputy Superintendent Hibbard, Complainant's immediate supervisor, Lieutenant-Colonel Jack Kelly, called her and said that he had not known that she was going to be demoted. Transcript at 109. Complainant told Kelly that she would not be in to work for the rest of the week.
35. During the evening of March 10, 2003, Captain Dunn saw Colonel Foley and Deputy Superintendent Hibbard at a Commissioned Officers' Association meeting and raised the issue of Complainant's demotion. Transcript at 340-341. According to Dunn, he was told by Colonel Foley, "it is all about loyalty." Transcript at 348. According to Foley, it was Dunn who initiated the discussion about Complainant by saying that he (Dunn) knew why she was being removed – that it was because she wasn't being "loyal" to Foley and that he (Dunn) had encouraged her to send an email to Foley in November of 2002 about her application for the Colonel's position. Transcript at 626. Foley testified that he responded by saying that there were a "number of reasons" why Complainant was being removed. Transcript at 626.
36. Complainant testified that during the work week of March 10-14, 2003, she conferred several times with Captain Dunn but did not speak with Colonel Foley or Deputy Superintendent Hibbard. Transcript at 184-185. According to Foley,

he directed Hibbard to communicate with Dunn because Complainant wasn't returning Hibbard's calls and because Dunn was able to reach her. Transcript at 627-628.

37. The personnel order announcing that Complainant was to be demoted to the rank of Captain was issued through the "Doc-U-Share" system on Friday, March 14, 2003, to be effective March 23, 2003. Transcript at 205, 208, 451-452, 516, 629. On the day of the announcement, Complainant left for a pre-scheduled vacation in St. Croix through Sunday, March 23, 2003. Joint Exhibit 23. According to Complainant, she received a message from Captain Dunn while she was in St. Croix that Deputy Superintendent Hibbard wanted to receive a call from her about faxing in retirement papers, but according to Deputy Superintendent Hibbard, it was Captain Dunn who initiated the retirement discussion. Transcript at 187-188, 342, 453-454. Complainant testified that she decided not to call Hibbard because she didn't know what to say and because she hadn't decided whether she wanted to retire. Transcript at 186-190.
38. On or about Monday, March 17, 2003, Captain Dunn received a call from Deputy Superintendent Hibbard. Captain Dunn was asked to advise Complainant that she would be given until Wednesday, March 19, 2003 to retire as Major in lieu of demotion. Transcript at 312, 343. Complainant told Dunn that she would not make a decision until she returned from vacation. Transcript at 314. Deputy Superintendent Hibbard subsequently informed Captain Dunn that Complainant could have until the Monday, March 24, 2003 (after her return from St. Croix) to retire as a Major, even if it required "undoing" the demotion. Transcript at 314,

343, 456-457. Captain Dunn relayed the information to Complainant who responded that she was leaning against retiring as a Major. Transcript at 316-317. Complainant was informed by Captain Dunn on Friday, March 28, 2003 that the Department would rescind the personnel records effectuating her demotion/transfer and allow her to retire as a Major as of that date but that it would be “virtually impossible” for Complainant to retire at the rank of Major after Friday, March 28, 2003 because of changes in the state payroll system. Transcript at 192-194, 458-459, 517-518, 632-633. Complainant did not contact Deputy Superintendent Hibbard or Colonel Foley on that day, either to indicate that she would retire or to seek more time to make a decision. Transcript at 196, 461.

39. Complainant testified that she was “stunned” and “shocked” because other members of the command staff who had been demoted were given “anywhere up to a month or more” to decide whether to stay or go. Transcript at 112-114. She also testified that she thought “the appropriate thing to do” would have been for Deputy Superintendent Hibbard or Colonel Foley to call her rather than relay a message through Captain Dunn that she was to call them. Transcript at 195-197. According to Colonel Foley, however, he had Deputy Superintendent Hibbard contact Captain Dunn because Complainant wasn’t returning Hibbard’s calls and because Dunn was able to reach Complainant. Transcript at 627-628.

40. Dunn testified that in his opinion, Complainant should have been notified of her removal from Troop H by one of her supervisors such as Colonel Foley, Deputy Superintendent Hibbard or the Lieutenant-Colonel in charge of Field Services. Transcript at 315. Dunn acknowledged that Hibbard wanted to receive a

telephone call from Complainant over the weekend of March 22-23, 2003.

Transcript at 344.

41. Following her demotion, Complainant became a Captain in the Department of Standards and Training, a position which she found to be demeaning. Transcript at 116. Complainant was replaced as Commander of Troop H by Major Tom Walsh, who served in the role for approximately two years and then received a promotion to Lieutenant-Colonel in charge of Field Services. Transcript at 117, 317. Dunn was subsequently made Troop H Commander in or around 2007. Transcript at 318.
42. Complainant acknowledged that a majority of Majors choose to retire rather than accept a demotion when confronted with the prospect of being removed from the State Police command staff. They typically do so because an officer's pension is based on his/her last year of salary. Transcript at 191.
43. At or around the same time that Complainant was demoted from Major to Captain, three male Majors -- Harold Ameral, Charles Appelton, and Albert Simon -- were also notified that they were going to be demoted. Transcript at 637-640. They chose to retire instead of accepting demotions. Joint Exhibits 5, 6 & 7; Transcript at 208, 463-464, 468-470. Colonel Foley replaced Major Ameral as Commander of Troop A with Captain Martha Catalano, effective March 16 2003. Joint Exhibit 2; Transcript at 466, 635, 641. Colonel Foley subsequently promoted Marian McGovern to Major in April of 2004. Joint Exhibit 8; Transcript at 471, 642.
44. Following Colonel Foley's retirement, Complainant again applied for the position

of State Police Colonel. Transcript at 198, 207. Complainant made it through the first round of interviews and was invited back for a second round of interviews with the Secretary of Public Safety and his interview committee. During the second round of interviews, Complainant's demotion was raised. Transcript at 207. Complainant was not selected for the position.

45. Complainant retired on September 10, 2004. Transcript at 199.

III. CONCLUSIONS OF LAW

Disparate Treatment

In order to prevail on a charge of discrimination in employment under M.G.L. c. 151B, sections 4(1) and 4 (1B), Complainant must establish a prima facie case by direct evidence or by circumstantial evidence. See Wynn & Wynn P.C. v. Massachusetts Commission Against Discrimination, 431 Mass. 655 (2000). Direct evidence is evidence that, "if believed, results in an inescapable, or at least highly probable, inference that forbidden bias was present in the workplace." Wynn & Wynn, 431 Mass. at 667 citing Johansen v. NCR Comten, Inc., 30 Mass. App. Ct. 294, 300 (1991). In the absence of direct evidence of forbidden bias, Complainant may attempt to establish a prima facie case of employment discrimination on the basis of indirect evidence which shows that Complainant: (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 the protected class(es). 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).

During the 2000-2003 period of time that Complainant held the command staff position of Major, she was the only female officer to do so. Joint Exhibit 24. Accordingly, she was a member of a protected classification based on sex. Complainant's performance appraisals and the credible testimony of her second-in-command at Troop H, attest to her competency as a Troop Commander. Complainant suffered an adverse employment action when, in March of 2003, she was given the choice of accepting a demotion to Captain or retiring at the rank of Major. Thus, the question to be decided is whether Complainant was treated differently from similarly-situated, qualified person(s) not of her protected class. The evidence does not support Complainant's contention that she was treated differently based on her gender.

It is noteworthy that during 2003, Colonel Foley initiated the demotions of more men than women from supervisory positions. Within several months of his appointment, Colonel Foley removed John Cunningham from his command staff position of Lieutenant-Colonel in charge of Field Services and Glenn Anderson from his command staff position of Deputy Superintendent. At or around the same time that Colonel Foley removed Complainant from her position as Major, he removed two male Majors as well - Harold Ameral and Charles Appleton. Prior to making these changes in March of 2003, Foley had already removed Albert Simon from the rank of Major. The fact that the male Majors all chose retirement whereas Complainant chose demotion was a function of each individual's preference. These personnel actions refute a claim of disparate treatment based on gender.

Rather than focus on the above circumstances, Complainant focuses on how the demotions/forced retirements were effectuated rather than the fact that they took place.

Complainant makes much of the short time frame she was given to make her demotion/retirement decision in contrast to her male colleagues who arguably had more time to decide what to do. However, there is no evidence of such disparate treatment aside from a conclusory statement by Complainant that male Majors were given a month or more to decide whether to retire or accept a demotion. This statement alone does not constitute sufficient evidence of disparate treatment. Even if there were a time differential, it may have resulted from Complainant's refusal to contact Deputy Superintendent Hibbard after he informed her of her impending demotion. Complainant chose not to communicate with her superiors about the difficult choice she had to make. Had Complainant chosen to communicate, she might have been able to negotiate more time.

Complainant also makes much about of the fact that between March 10 and 23, 2003, neither Deputy Superintendent Hibbard nor Lieutenant-Colonel Kelly personally contacted her. I do not attach significance to this assertion because the relationship between Complainant and her superior officers was obviously tense. Colonel Foley testified credibly that there was no single protocol for effectuating a demotion. Given that fact, as well as the fact that Complainant was absent from the country, it stands to reason that Deputy Superintendent Hibbard attempted to reach Complainant through Captain Dunn who was Complainant's second-in-command and acting-Troop Commander during her absence. Moreover, I find that the issue of who informed Complainant of her demotion is not a significant consideration in terms of evaluating her employment discrimination claim.

Even if Complainant were able to establish a prima facie case at stage one, the record contains credible evidence of a non-gender-related reason for her demotion, to wit: that Colonel Foley considered Complainant to have been disloyal when she submitted a formal application for his position eleven months after he was appointed. Exculpatory evidence is usually presented at stage two by Respondent. See Abramian, 432 Mass. 116-117; Wynn & Wynn v. MCAD, 431 Mass. 655, 665 (2000) (once complainant establishes a prima facie case, the burden of production shifts to Respondents to articulate and produce credible evidence to support a nondiscriminatory reason). In this case, however, rather than acknowledge disloyalty as the reason for demotion, Respondent focused on Complainant's alleged failure to adhere to overtime procedures and to effectively manage overtime costs as the basis for her demotion. Colonel Foley testified that he made the decision to demote Complainant after she failed to curb Lieutenant Keenan's abuse of overtime.

I do not credit Colonel Foley's stated reasons for demoting Complainant given the myriad legitimate explanations why Troop H had excessively high overtime costs and the praiseworthy nature of Complainant's management skills. There was ample credible evidence to establish that the real reason for demotion was resentment by Colonel Foley at the steps taken by Complainant to advance her career at his expense. My conclusion in this regard is supported by the fact that within months of Foley's appointment as Colonel of the State Police by Acting-Governor Jane Swift, Complainant began to compete for his position. In early September of 2002, Complainant was contacted by a nonprofit group promoting the advancement of women in the Commonwealth and, in response, she forwarded an informal copy of her resume. Following the gubernatorial election in the

fall of 2002, the co-chair of the public safety committee reviewing resumes for Governor-elect Romney's transition team sought to recommend Complainant for a number of positions in public safety, including Colonel of the State Police. In reaction to the solicitation from the transition team, Complainant discussed the matter with her subordinate, Captain John Dunn, who advised her to inform Colonel Foley that she intended to apply for his position. On November 18, 2002, Complainant notified Colonel Foley by email that she was planning to forward an official copy of her resume for consideration by the transition team. According to Colonel Foley, he was already aware from others that Complainant had submitted her application and thought it was discourteous that she had not informed him sooner.

Retired Lieutenant-Colonel Dunn testified credibly that after Complainant applied for the position of Colonel, questions about her use of overtime increased. He also testified credibly that on the evening of March 10, 2003, he raised the issue of Complainant's demotion with Colonel Foley who replied that, "it is all about loyalty." Foley's version of their exchange, while somewhat different, also focuses on the issue of loyalty. Foley testified that it was Dunn who initiated the discussion by saying that he knew why Complainant was being removed – that it was because she wasn't "loyal" to Foley – in response to which Foley said that there were a "number of reasons" for the removal. I conclude that Dunn's version is more believable and supports my conclusion that a perceived lack of loyalty was the primary factor in Complainant's demotion.

The close working relationship between Colonel Foley and Deputy Superintendent Hibbard, who were both competitors for the Colonel's position in 2001, does not detract from the determination that Colonel Foley demoted Complainant

primarily because she applied for his job. Unlike the 2001 circumstances when Foley, Hibbard, and Complainant competed as equal candidates, Complainant's application in 2002 represented an attempt to displace Foley from a position he already occupied. I find that it was this attempt, not gender discrimination, which created friction between Colonel Foley and Complainant. The fact that two other females were promoted to supervisory positions around the same time that Complainant was demoted -- Captain Martha Catalano as Commander of Troop A (effective March 16, 2003) and Marian McGovern as Major (effective April of 2004) -- provides further proof that Colonel Foley was not motivated by gender discrimination.

Notwithstanding my determination at stage two that Complainant's demotion resulted from resentment by Colonel Foley at Complainant's attempt to unseat him as State Police Colonel, Complainant must be given the opportunity at stage three to prove that Respondent acted chiefly out of discriminatory animus based on gender. See Knight v. Avon Products, 438 Mass. 413, 420, n. 4 (2003); Lipchitz v. Raytheon Company, 434 Mass. 493, 501, 504 (2001); Abramian, 432 Mass. at 117. Having evaluated the entire record, I conclude that there is insufficient credible evidence to establish at stage three that Complainant's demotion was motivated by gender bias. Colonel Foley's behavior in relation to Complainant may have been petty or unprofessional, but it was not gender-related. Thus, Complainant has failed to sustain her burden of proving that Respondent's adverse actions were the result of discriminatory animus.

IV. ORDER

For the aforementioned reasons, the complaint is 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 30th day of December, 2011.

Betty E. Waxman, Esq.
Hearing Officer

