

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
COLLEEN HEATH,
Complainant

v.

DOCKET NO. 08-BEM-03076

MASSACHUSETTS PAROLE BOARD,
Respondent

Appearances: Sol J. Cohen, Esq. for Complainant
Timothy V. Dooling, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. INTRODUCTION

On October 24, 2008, Complainant, Colleen Heath, filed a complaint of discrimination against the Respondent, Massachusetts Parole Board alleging that Respondent discriminated against her on the basis of her gender in violation of G.L. c. 151B § 4(1) when it did not promote her to the position of Field Parole Officer in 2006. The Investigating Commissioner found probable cause to credit that allegations of the complaint and efforts at conciliation were unsuccessful. The case was certified for hearing and a hearing was held before the undersigned hearing officer on June 6 and 7, 2012. The Complainant testified on her own behalf and Respondent called as witnesses, two members of the 2006 interview panel: Deputy Chief of Field Services, Lila Carver, and former Chief of Field Services, Michael Brown; as well as the Honorable Maureen Walsh, Regional Administrative Justice for Western Massachusetts and

former Chairperson of the Parole Board; and Parole Board CFO, Pamela Minchoff. The parties introduced over 30 exhibits including a decision of the Massachusetts Civil Service Commission relating to Complainant's Civil Service appeal of her non-promotion. The parties submitted post-hearing briefs in October of 2012. Having reviewed the record of the proceedings and the post-hearing submissions of the parties, I make the following Findings of Fact and Conclusions of Law.

II. FINDINGS OF FACT

1. Complainant, Colleen Heath, is a female employee of the Respondent, Massachusetts Parole Board. Complainant has been an employee of Respondent since 1997 when she began her employment as a Transitional Parole Officer. (TPO) Complainant initially worked full time as a TPO, but after the birth of her first child in 2002 she requested and was granted a part time schedule of approximately 20 hours per week. She continued on that part time schedule, had a second child in 2005 and remained a part-time employee by choice until 2011 when she became a Field Parole Officer (FPO). Complainant did request a number of times to increase her hours by 10 to 12 hours per week, but never sought to work full time.¹ Her requests were denied for budgetary reasons. (Ex. 5; Testimony of Complainant)

2. The Respondent, Massachusetts Parole Board, is an agency within the Massachusetts Executive Office of Public Safety. The Parole Board hierarchy consists of a seven member board that is appointed by the Governor with the advice and consent of the Governor's Counsel. Members of the Board serve for five year staggered terms and are responsible for making decisions about granting parole for incarcerated criminal offenders who have sentences ranging from 60 days in a house of correction, up to and including life sentences for felony convictions

¹ Complainant testified that one of the reasons she sought an FPO position was because it allowed for more flexible hours.

such as murder in the second degree. The Board is headed by a Chairperson, appointed by the Governor who is one of the seven members. Prior to her appointment to the judiciary, Judge Maureen Walsh was a Parole Board member from 1998 until 2003. She was appointed Chair of the Board in August of 2003. (Testimony of Judge Walsh) As the Chair of the Board and Executive Director, Judge Walsh was the “appointing authority” who made final decisions as to hiring. (Carver & Walsh testimony) Judge Walsh stated that during her tenure as Chair of the Parole Board, hiring and promoting female candidates was a priority of hers and female candidates comprised 80% of her management hires. Judge Walsh also discussed her personal views and philosophy regarding the importance of women in the criminal justice system, the importance of family friendly policies, and noted that she has a sister who was one of the first female state troopers in Massachusetts.

3. A Transitional Parole Officer is an institutional officer who works within a correctional facility.² The duties of the position include meeting with inmates, working with inmates to prepare for parole, reviewing records, criminal case files, police and probation records and other reports, determining an inmate’s criminal and institutional history and preparing reports and packets of information on each offender who is eligible for parole in advance of a parole hearing, for review by the Parole Board members. The TPO duties also include making recommendations regarding parole to the Board. TPO’s work closely with Parole Board members, attend Board hearings to provide information and answer questions, and make recommendations to the Board regarding granting or denying parole. They also communicate the reasons for denial of parole to an inmate and research for outstanding warrants if parole is

² The terms Transitional Parole Officer and institutional parole officer will be used interchangeably throughout this decision.

granted. TPO's also ensure that suitable conditions for parole, such as a residence, are in place outside the institution, prior to release. (Ex. 8; Testimony of Complainant & Judge Walsh)

4. During her fifteen year tenure as a Transitional Parole Officer, Complainant received excellent performance evaluations and received very positive feedback from her supervisors. She had no record of disciplinary action nor did she ever receive negative feedback from a supervisor. (Ex. 16; Testimony of Complainant) Complainant was interested in, and applied for an FPO position in 2001 or 2002, but was not selected.

5. In the Spring of 2006, Respondent had eight openings for the position of Field Parole Officer. In contrast to the role of TPO, FPO's work outside correctional facilities and are responsible for ensuring public safety and facilitating a parolee's successful reintegration into the community by conducting visits to parolees' homes, administering drug and alcohol tests, conducting arrests, and writing reports regarding parole violations. FPO's are issued firearms and pepper spray and are required to carry their firearm and pepper spray in the performance of their duties. (Ex. 9; Ex. 7; Testimony of Brown, Carver, Walsh)

6. Complainant applied for the position of FPO in 2006. She was one of seven internal promotional candidates who signed the Civil Service promotional certification list indicating a willingness to accept a full time position. Based on her Civil Service test scores, Complainant held the highest position on the certification list of internal promotional candidates. (Ex. 3) Complainant provided Respondent with a comprehensive application package prior to her interview. Respondent also received an open competitive list of external candidates from the Civil Service Commission and interviewed candidates from that list. (Ex. 2)

7. Chairperson Walsh appointed an interview panel to conduct interviews of all eligible candidates. The panel members were then Chief of Field Services, Michael Brown, and the

Deputy Chiefs of Field Services Leila Carver and George Valentgas. The interview panel interviewed seventeen candidates and asked each one the same series of eight questions. Each candidate was given a numerical score of one through four, with 1 being below average and 4 being excellent, across four categories: Education/Work Experience, Problem Solving Skills/Judgment, Interpersonal Skills, and Initiative/ Related Experience. The candidates' responses were recorded in the panel members' notes, but the panel members did not necessarily note their subjective impressions of the responses or comment on them in their notes. Ultimately, the panel evaluated not only a candidate's response to a question, but their overall performance in the interview, including the applicant's poise, confidence, understanding of the position, and desire to work in the field of criminal justice as a Field Parole Officer. The panelists compiled their individual ratings of the candidates at the conclusion of the interviews by averaging their individual scores for each sub-category and adding them to get a final overall interview evaluation score for each candidate. Complainant was one of three candidates to receive the lowest interview evaluation score of thirty-three.

8. Leila Carver had served as both a Transitional Parole Officer and a Field Parole Officer prior to being promoted to Deputy Chief. She testified that in her view, the FPO position is very challenging and potentially dangerous. The most important qualities for the job are self-confidence, excellent communication skills, an authoritative presence and the judgment to assess and respond to some difficult and unpredictable situations. She discussed her challenges as a female FPO and her view that there was a need for female FPO's in the field because of the different perspective they bring to the table and because of their ability to meet some of the unique needs of female parolees such as caring for children and dealing with domestic abuse.

9. Carver knew none of the candidates personally and stated that she was hoping to see some strong female candidates. She recalled Complainant's interview and stated that Complainant did not present in a professional, prepared or confident manner. Carver testified that given Complainant's nine years of experience as a parole officer she expected Complainant to articulate much more well-formulated responses regarding the role of an FPO, the goals of the position, and her reasons for wanting to work as an FPO. She stated that she rated Complainant's responses to questions as average, and that Complainant seemed not to comprehend the importance of the position and gave the impression that she deserved the job. I credit Carver's testimony as to her impressions of Complainant's performance in the interview.

10. Michael Brown served as a Field Parole Officer for 11 years prior to being promoted to Chief of Field Services in 2005 by then Chairman Walsh. He had been promoted to Deputy Chief of Field Services by Respondent in 2001. Brown testified that he worked closely with Chairman Walsh and has great respect and admiration for her leadership and management abilities, her work ethic, and her innate sense of fairness to all employees regardless of their race or gender. Brown also believed it was important to promote females in the criminal justice field. As Chief, he promoted Leila Carver to be the first female Deputy in Field Services.

11. Brown testified that Field Parole Officers work 7 days a week but have flexible hours. They are expected to work nights and weekends making random unannounced home investigations and meeting with parolees' families and friends. FPOs meet with parolees to ensure compliance with work requirements, substance abuse and or sex offender counseling, and other conditions of parole. FPOs are special police officers who have department issued weapons, have full police powers and are authorized to make arrests. Brown stated that it is a dangerous job that sometimes requires visits to unsafe neighborhoods and that an FPO may

encounter unexpected circumstances while conducting home visits, including potential criminal activity. FPOs must remain poised in high pressure situations, have the ability to think on their feet and respond swiftly to situations that impact their own and the public safety and must maintain an acute awareness of the surroundings. They must also be familiar with the communities to which they are assigned.

12. Brown also did not know Complainant prior to her interview. He had little independent recollection of Complainant's specific responses to the questions asked in her interview but had some recollection of his impression of Complainant and relied on his notes of her responses to comment on his impression of their adequacy. (Ex. 12) He did recall that Complainant's interview stood out for him because she seemed ill prepared, was hesitant and uncertain in her responses and did not sell herself as other candidates did. His notes about why she wanted the job reflect that she stated it would be "nice to see the other side of the institution and how inmates react on the outside," an answer which he felt was weak because it demonstrated a fundamental lack of understanding and enthusiasm for the position,³ despite Complainant's ability to list the duties of the position. All panel members stated that they were dissatisfied with Complainant's response as to how she might intervene in a situation where physical violence was threatened by a parolee. There was also some concern that Complainant had not come to the interview dressed in a professional manner, another indication that she did not take the position seriously. Complainant states that her attire was consistent with Respondent's dress requirements for parole officers and disputes that she was not dressed

³Complainant testified that one of the reasons she preferred the FPO job was because of its flexible hours, a statement that supports Respondent's view of her tepid commitment to the position and suggests that for her the position was less about a career move and more about flexible hours.

professionally. Complainant's law enforcement work experience was her five years as an Transitional Parole Officer.

13. After the interviews, Brown wrote a memo to Judge Walsh in which the panel recommended seven male candidates for hire. Two male candidates from within the agency were chosen both of whom ranked below Complainant on the Civil Service test score. Six external candidates were chosen, one of whom ranked lower than Complainant. The memo stated in general terms the reasons the recommended candidates were chosen. (Ex. 7) Of the eight candidates initially recommended by the interview panel none was female. However, a female candidate was ultimately recommended as the eighth candidate in Brown's memo. The memo also listed the names of the candidates not selected and the reasons for their non-selection. Judge Walsh did not participate in the interview process and made her decisions based on her review and consideration of the panel's recommendations. Judge Walsh testified that she accepted the panel's recommendations without reservation and did not question their commitment to equality and fairness. She was not surprised by the recommendations but felt very comfortable with them based on her prior knowledge of and experience working with certain applicants.

14. Complainant was one of three applicants to receive the lowest score of 33 for her interview. The highest candidate received a score of 55. (Ex. 4) The stated reasons in Brown's memo for Complainant's non-selection were that she was rated fifteenth out of the eighteen candidates interviewed, she was not prepared for the interview and was not familiar with the essential functions of a Field Parole Officer. (Ex. 7) As stated above, both Brown and Carver expounded on the reasons they were disappointed with Complainant's interview. Despite her ability to recite a number of the duties of an FPO as listed in the job description, they were left

with the impression that she did not fully comprehend the significance of the position nor did she understand fundamentally why the job was important. She also seemed unable to convincingly articulate the reasons she wanted the job. Judge Walsh testified that panel's reasons for not selecting Complainant were consistent with her view of Complainant as an employee. She had worked closely with Complainant for several years and stated that she liked Complainant personally and found her to be essentially competent. However, she did not consider Complainant to be an exceptional employee and did not consider her to be a "go to" person, stating she was not always proactive and responsive, but more reactive. She stated that Complainant did not always take the initiative and was less prepared for her parole hearings than others in her position. Judge Walsh expressed clearly her reservations about Complainant and her view that Complainant was a "middle of the road" employee. Judge Walsh had worked closely with the two internal male candidates whose scores were lower than Complainant's but who were nonetheless selected to be hired as FPO's. Judge Walsh stated that they were proactive, energetic, "go to" employees who were considered the best TPO's in the agency at the time. (Walsh testimony)

15. Walsh, Carver, and Brown all testified that in 2006, the Parole Board did not have its own Human Resources department and had to rely on the Department of Correction for advice and information on HR matters. The Board relied on DOC for correct information and direction in the Civil Service hiring process, the compilation of hiring lists and the process for selecting and notifying candidates. As a result, the Respondent improperly comingled the internal promotional and the open competitive certification lists in contravention of the Civil Service rules thereby requiring internal promotional candidates to compete with outside candidates. Judge Walsh had little familiarity with Civil Service and admitted that the Parole Board made

some mistakes regarding its implementation of the sometimes cumbersome and confusing Civil Service rules and protocols, due to lack of information, but she ascribed no ill motive to those errors and I credit her testimony.

16. Complainant did not initially question that her by-pass was motivated by gender discrimination and she did not believe this to be the case. She did suspect that the Civil Service protocols and rules had not been properly followed, and as a result of her understanding, she filed a by-pass appeal with the Civil Service Commission alleging that the stated reasons for her by-pass were inadequate under Personnel Administration Rule (PAR) 8(3). She did not allege discrimination in her complaint to the Civil Service Commission. A Hearing was held on Complainant's by-pass appeal at which Complainant and interview panel members Carver and Valentgas testified. The Civil Service Commission ruled in a decision dated September 11, 2008 that Respondent did not have reasonable justification for Complainant's by-pass and that Respondent had violated Personnel Administration Regulation PAR .07 by intermingling the internal promotional list with the open competitive list. As a result, rather than being first on the promotional list, Complainant ranked ninth on the intermingled list. (Ex. A) The Civil Service decision also found that the evidence presented established "a bias in the interviewing process that is not the result of an 'unprejudiced mind.'" The decision concluded that "the rankings of the candidates was arbitrary and presented a bias against women." As a remedy, the Human Resources Division of the Commonwealth was ordered to place Complainant's name at the top of the existing or next certification list requested by the Parole Board for such a time that she shall receive at least one opportunity for consideration and to adjust her seniority date retroactive to the date of the by-pass should she be promoted in the future. Based on the Civil Service

Commission decision, Complainant filed the instant gender discrimination complaint with the MCAD. Complainant was promoted to the position of Field Parole Officer in October of 2011.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B § 4(1) prohibits discrimination in employment based on gender. The statute's proscriptions include discrimination in the terms and conditions of employment which includes promotion. To establish a prima facie case of gender discrimination Complainant must demonstrate that, as a member of a protected class, she applied for a promotion, she satisfied the minimum qualifications for being promoted, that she was denied promotion, and that a male candidate with similar qualifications was promoted.

Patterson v. Mass DOC, 18 MDLR 76 (1996); *Sanmartino v. Clark University*, 17 MDLR 1121 (1995). In the absence of direct evidence of unlawful discrimination based on gender, the Commission follows the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 972 (1973) and adopted by the SJC in *Wheelock v. MCAD*, 371 Mass. 130 (1976). See also *Weber v. Community Teamwork, Inc.*, 434 Mass. 761 (2001); *Lipchitz v. Raytheon Company*, 433 Mass 493 (2001) (G.L. c.151B sets out four elements: membership in a protected class, harm, discriminatory animus and causation); *Abramian v. President & Fellows of Harvard College*, 432 Mass. 104 (2000).

Complainant has established a prima facie case of discrimination based on failure to promote. Complainant met the requirements for the position in the she had related experience working for Respondent as an institutional parole officer for a number of years. Complainant took the required Civil Service Exam and passed with a score that placed her above a number of

other applicants on the internal promotional Civil Service list. Complainant was not selected for the position of FPO while a number of male candidates were recommended and selected.

If the Complainant satisfies her initial burden, the burden of production shifts to Respondent to articulate a legitimate non-discriminatory reason for the adverse job action, supported by “credible evidence to show that the reason or reasons advanced were the real reasons.” *Blare v. Huskey Injection Molding Systems*, 419 Mass 437, 441-442 (1995) quoting *Wheelock College*, 371 Mass at 138. If Respondent succeeds in producing credible evidence at the second stage the burden shifts back to Complainant to prove “by a preponderance of the evidence that Respondent’s facially proper reasons given for its actions...were not the real reasons, *Wheelock, supra.* at 139, but that Respondent acted with discriminatory intent, motive or state of mind. *Lipchitz v. Raytheon*, 434 Mass. 493, 504 (2001). More often than not, a Complainant “must carry her burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not credible.” *Blare*, 419 Mass. at 445.

Respondent has articulated a legitimate non-discriminatory reason for not selecting Complainant for the position of FPO, that she received one of the lowest evaluation scores on her interview with the selection panel. Based on her performance in the interview, which the panel members determined was decidedly poor, the panel concluded that Complainant did not evidence a sufficient understanding of the significance of the position, did not articulate a compelling reason for wanting the position, did not express enthusiasm or energy for the job and did not possess the self-assurance that they believed was required for the job. Both Carver and Brown testified that Complainant lacked authority and ability to think on her feet, qualities important to a Field Parole Officer, particularly in unpredictable and potentially dangerous situations. Both Brown and Carver had held FPO positions for a number of years and had first-hand knowledge

of the essential qualities and skills that render one effective as an FPO, as well as the type of experiences an FPO was likely to encounter in the field. I found their testimony to be persuasive and credible and conclude that they determined in good faith that Complainant did not demonstrate that she possessed those qualities. They also testified that the candidates they chose demonstrated to a much greater degree the qualities and characteristics they believed would serve them well as FPO's. Respondent has satisfied burden of articulating a legitimate non-discriminatory reason for not selecting Complainant.

Once Respondent meets its burden at stage two, Complainant must show that the articulated reasons are a pretext (i.e. they have no reasonable support in the evidence or are wholly disbelieved) *Blare*, 419 Mass. at 443. If Complainant is able to persuade the fact-finder that one or more of Respondents articulated reasons is false, the fact-finder may draw the inference that the employer is covering up a discriminatory intent, motive or state of mind. *Lipchitz*, 434 Mass. at 501. Complainant retains the ultimate burden of proving by a preponderance of the evidence that Respondent was motivated by discriminatory intent based on her gender and that discrimination was the determinative cause of the adverse employment decision. *Abramian*, 432 Mass. at 117; *Lipchitz*, 434 Mass. at 501.

Complainant points to a number of factors that suggest pretext in her non-selection, including the selection panel's evaluation of her responses to the interview questions. She disagrees that she was unable to articulate the essential functions of Field Parole Officer because she listed seven of the duties of the position and the panel scored her "above average" for her understanding of the job responsibilities. She also notes that the panel rated her a 3 out of 5 for self-confidence. Complainant argues that her answers as recorded were not substantially different from those of a number of the chosen male candidates. She also disputes the assertion

that she did not appear professional and lacked poise. Moreover, she asserts that because her performance evaluations and other materials she submitted were not considered by the panel, she was not given due consideration for the position.

As to the assertion that Complainant's interview scores did not properly reflect her responses to the questions posed, the interviewer may properly distinguish recorded responses to questions that are based on objective criteria such as written job descriptions or rote memorization of rules or protocols, from a candidate's fundamental understanding of the significance of a job and how he or she presents in an interview. There is a legitimate difference between one's intellectual understanding of the duties of a job and one's emotional commitment to its goals and the employer's mission. Equally significant are considerations of qualities such as presence and the ability to communicate persuasively and effectively. I conclude that the interviewers genuinely believed that Complainant failed to demonstrate an understanding of the importance of the FPO position or her motivation for seeking it. These were the areas in which Complainant's performance was deemed most weak. Complainant also gave the impression that she lacked enthusiasm and energy for the job and that she was entitled to the position because of her years working as an institutional parole officer. The panel voiced an expectation of much stronger and committed responses from an internal candidate as to a fundamental understanding of the importance of the position and the desire to undertake new challenges.

The panel was also dissatisfied with Complainant's response as to how she would react in a potentially violent situation, believing that her manner of response did not demonstrate that she had the experience or judgment to handle such a scenario. Even though Complainant claims her answer to the situational question regarding how to handle a volatile and potentially violent scenario was virtually identical in substance to the responses of two of the male candidates

selected, I cannot second guess the judgment of the panel as to the authority and certainty she projected in responding. While based on subject impressions, I found the panel member's views in this regard to be genuine and worthy of credence. Hiring decisions are necessarily subject to some degree of subjective impression and, absent evidence of unlawful bias, those impressions are entitled to some degree of deference. As to Complainant's dress, while reasonable people might disagree about whether Complainant's attire was sufficiently professional, it is apparent that the low score she received for appearance included not only her attire, but more likely her overall presentation.

In addition to Complainant's by-pass in favor of two male candidates with lower scores, the panel initially chose no female candidates for the eight positions, and according to Brown's selection memorandum, none of the five female candidates had an understanding of the essential functions of the FPO position. This fact alone might render the selection process suspect. However, Judge Walsh, Brown, and Carver expressed credible views of the importance of women in the position and their eagerness to support female candidates they deemed qualified. Carver and Judge Walsh discussed being a champion of females in law enforcement. I credit their testimony that they were committed to fairness in the process, open to promoting females to the job, and not tainted by gender bias. While subjective impressions are subject to greater scrutiny, particularly for unconscious bias, I detected no animus based on gender, unconscious or otherwise, on the part of the selection committee members who testified or Judge Walsh, the ultimate decision maker. In fact, despite the use of such words as "strong" and displaying "authority" to describe the qualities panel members sought, it was apparent that they genuinely viewed these qualities as essential to the role of an effective FPO and not merely male attributes. I do not believe that this view suggests an inherent bias against female candidates. The fact that

some of the candidates selected had law enforcement backgrounds was not surprising given the panel members' experience doing the job and their understanding of its challenges. For these reasons, I conclude that the interview process and scoring of responses was not tainted by gender bias, but by genuinely held views of whether the candidates demonstrated the qualities, skills and experience that best serve an FPO.

The panel members' failure to consider Complainant's employment evaluations and educational background was discounted by Judge Walsh who stated that the two types of parole jobs were significantly different, and that functioning ably as an institutional parole officer would not predict one's ability to function effectively as a Field Parole Officer. It was clear that the two jobs presented very distinct challenges. The TPO position was administrative and document intensive and required good organizational skills; the FPO position involved a much more hands-on presence in the field. An FPO position is more akin to a law enforcement position, involves carrying a weapon, and requires the ability to intervene and take charge of potentially dangerous situations and to assert authority over individuals in volatile and sometimes dangerous and unpredictable circumstances. FPO's are sometimes called upon to defuse potentially dangerous situations. These are legitimate reasons for seeking strong individuals who demonstrate a sense of authority and composure under pressure. The fact that 60% of the Parole Board's workforce is female, but the FPO positions have been largely filled by men is not surprising given the nature of the work, and is likely attributable to long-existing barriers to females in the criminal justice field. While probative in some situations, I cannot conclude that these statistics suggest Complainant's non-selection was inherently biased or suspect. Consideration of the personal experiences, work histories and motives of the decision

makers is paramount in this case, and I conclude that the decision makers acted in good faith and free of gender bias.

Complainant argues further that the improper co-mingling of the internal and outside competitive hiring lists materially disadvantaged her in that she was forced to compete with external candidates. The improper co-mingling of the internal and external hiring lists was admittedly an error and was explained by the fact that Respondent had no HR department at the time and was utterly unfamiliar with arcane and often confusing Civil Service Rules regarding hiring. While one could reasonably argue that Respondent was obliged to know and properly implement these rules and to ensure the hiring process was in compliance, there was no evidence of bad faith on Respondent's part and there existed a remedy for this transgression. Complainant had the right to file a by-pass appeal with the Civil Service Commission and her appeal was granted. The remedy was to place her at the top of the next hiring lists, to remain in such position as to guarantee her fair consideration in the future. She was ultimately hired as an FPO. More importantly, the failure to properly implement the Civil Service rules was not shown to be related to Complainant's gender and all internal candidates, male and female, were disadvantaged by Respondent's the failure to abide by these rules.

Complainant asserts that Judge Walsh's opinion of her performance should be discounted, because Walsh did not participate in the selection process, but merely accepted the recommendations of the interview panel. Complainant also argues that Judge Walsh's stated view of her performance is contradicted by her "excellent" employee evaluations as a TPO. The latter argument was addressed to my satisfaction, as noted above. I am not persuaded by the argument that Judge Walsh was not the decision maker, because I credit her testimony that as the Executive Director and Chair of the Parole and Board, she was the appointing authority, and all

hiring decisions were ultimately sanctioned and approved by her.⁴ She reviewed the hiring recommendations and displayed more than a passing familiarity with a number of the candidates chosen and their professional backgrounds. Based on that knowledge and on her own experiences working with some of the candidates, including Complainant, Judge Walsh approved the selections. She stated that she was satisfied with the selections, comfortable that the process was fair, and that she was not surprised by Complainant's non-selection. Judge Walsh reached this conclusion relying in part on her own interactions and observations of Complainant. Given Judge Walsh's background in criminal justice, her stated commitment to advancing women in the field, and her familiarity with Complainant, I conclude that she would not have hesitated to challenge Complainant's by-pass had she believed her to be a superior candidate or if she had any inclination that gender bias was at play in the decision making process.

Complainant also relies on the decision of the Civil Service Commission as proof that there was bias in the interview process and some inherent prejudice in the selection process. At the outset, I note that the MCAD is not necessarily bound by the decisions of other administrative bodies or arbitration decisions, and need not give preclusive effect to their findings and conclusions, but should review those decisions and give them due consideration. *Porio v. Dept. of Revenue*, 80 Mass. App. Ct. 57 (2011) (decision rendered in Civil Service appeal did not have preclusive effect on subsequent discrimination claim); *City of Boston v. MCAD*, 39 Mass. App. Ct. 234 (arbitrator's decision need not be given deference or special weight by MCAD, but may be accorded weight the MCAD deems appropriate) The primary

⁴ Judge Walsh also had approved Complainant's request to work part-time for a number of years, accommodating her need as a young mother to work fewer hours. The judge testified to her commitment to family friendly policies particularly for mothers.

issue before the Civil Service Commission was whether Complainant's by-pass violated Civil Service rules. The Civil Service decision concluded that Complainant's by-pass was in contravention of Civil Service rules and provided a remedy. The portion of the decision discussing bias relies heavily on some apparent contradictions in the selection process based on the recorded responses of the candidates. Much was made in the Civil Service decision and at the hearing before this Commission about contradictions in the recorded responses of the candidates and the scoring for those responses in comparison to other successful candidates. As stated earlier, candidates may recite canned responses to such questions as the duties of a particular position or written rules and protocols. However, the substantive responses may not convey intangible factors such as how the candidate presented, whether she made eye contact with the interviewers, demonstrated confidence in her responses, gave a hearty handshake, or seemed eager and enthusiastic. In my view, the panel's consideration of these factors was not inappropriate, and does not suggest gender bias. Therefore, I decline to be bound by the conclusions of the prior decision maker that the contradictions relating to interview notes and failure to comply with Civil Service rules are dispositive of gender bias.

Given the evidence before me I am not persuaded that Respondents acted out of unlawful motives and conclude that Respondent did not violate G.L. c. 151B when it declined to promote Complainant to the FPO position. I hereby Order the complaint dismissed.

This decision represents the final order of the Hearing Officer. Any party aggrieved by the 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 receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this 11th day of June, 2013.

Eugenia M. Guastaferr
Hearing Officer