

COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
RIGAUBERT AIME,  
Complainants

v.

DOCKET NO. 11-BEM-02854

MASSACHUSETTS DEPARTMENT  
OF CORRECTION,  
Respondent

Appearances: Susan K. Howards, Esq. and Philip Weber, Esq. for Complainant Aime  
James F. Kavanaugh for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On October 31, 2011, Complainant, Rigaubert Aime, filed the instant complaint with the Commission alleging numerous acts of retaliation by Respondent, Department of Correction, for his having filed an earlier complaint of discrimination against Respondent with this Commission on March 1, 2011.<sup>1</sup> Complainant, who was employed as a Correction Officer at Respondent's Lemuel Shattuck Hospital Correction Unit in Boston, alleged the following acts of retaliation: (1) Respondent's delay in investigating an incident that occurred in June of 2010, for which Complainant was ultimately disciplined; (2) two incidents that occurred on March 8, 2011, when Complainant believed he was being forced to attend an investigative interview of the June 2010 incident without benefit of union representation, and the subsequent receipt of discipline for

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<sup>1</sup> The March 11, 2011 Complainant was dismissed by the Investigating Commissioner on November 27, 2013 for Lack of Probable Cause.

being insubordinate to the Deputy Superintendent of the facility on that same day; (3) an incident that occurred on May 29, 2011 regarding forced overtime in which Complainant asserts he was treated adversely by a Lieutenant; (4) a two-day suspension served on October 18 and 19, 2011, for failing to timely report his observation of two fellow correction officers who were allegedly sleeping while on duty; and (5) his involuntary transfer by the Superintendent to another Department of Correction facility on July 27, 2011. Respondent denies that its actions surrounding any of the above incidents were motivated by retaliation for Complainant's charge of discrimination.

The Investigating Commissioner found probable cause to credit the allegations of the complaint and efforts at conciliation were unsuccessful. The matter was certified for a Hearing and the matter was heard by the undersigned hearing officer over the course of seven days in January, February, March and April of 2016.<sup>2</sup> Complainant testified on his behalf and called two additional witnesses. The Respondent called twelve witnesses on its behalf. The parties filed post-hearing briefs on August 29, 2016. Having considered the record in this matter and the post-hearing submissions of the parties, I make the following Findings of Fact, Conclusions of Law and Order.

## II. FINDINGS OF FACT

1. Complainant, Rigaubert Aime, is an African American male who has been employed by Respondent as a Correction Officer I for over twenty years. At the time of the hearing he worked at a Department Facility in Roslindale, MA known as the Boston Pre-Release Center.

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<sup>2</sup> A portion of certain testimony on two of the hearing dates was re-constructed from the notes of the Hearing Officer due to problems with the digital recorder. A summary of the testimony in narrative form was reviewed and approved by both parties as an accurate account of the testimony.

Prior to July 27, 2011, Complainant worked at the Lemuel Shattuck Hospital Correctional Unit (LSHCU) in Boston. (Testimony of Complainant)

2. Respondent, Department of Correction, is an agency of the Commonwealth of Massachusetts, responsible for the care and custody of individuals sentenced to any of the facilities within the Commonwealth's correctional system. Respondent controls and manages a distinct unit within the Lemuel Shattuck Hospital in Boston known as the Lemuel Shattuck Hospital Correctional Unit. (LSHCU). The two specific areas of LSHCU where inmates receive medical care are identified as 8 North and the Outpatient Department (OPD). (Testimony of Driscoll)

3. The Superintendent of LSHCU at all times relevant to the instant charges was Raymond Marchilli. Directly below the Superintendent was Deputy Superintendent, Anne Manning. Below the Deputy Superintendent in the chain of command was Administrative Captain, Donna Driscoll, who began her employment with the Department in 1986 and was made Captain in 2007. The facility also employed several Correction Officer III's who serve as Lieutenants, Correction Officer II's who serve as sergeants and Correction Officer I's. (Testimony of Marchilli, Manning, Driscoll)

4. Respondent is a paramilitary organization that operates with a "chain of command" structure. Each employee is assigned a rank within the organizational structure and all matters are to be addressed within the chain of command through one's immediate supervisor. (Testimony of Complainant, Driscoll, Jeghers) Any time a Correction Officer is given an order or instruction by an individual who is superior in rank, the Officer is obligated to comply with that order, except in limited circumstances. Failure to abide by an order from a superior officer is a violation of Department policy and such failure may result in discipline of the subordinate

officer. (Testimony of Adams and Jeghers) There was ample credible testimony that when a Correction Officer of a subordinate rank fails to comply with an order or directive of a superior officer, the entire operation and structure of the organization is undermined, creating circumstances that may lead to dissension and a chaotic and undisciplined work environment. (Testimony of Manning, Driscoll, Jeghers)

5. Respondent has a rule book distributed to all employees, entitled Rules and Regulations Governing All Employees of the Massachusetts Department of Correction, also referred to as the "Blue Book." Any employee who fails to comply with the Department rules and regulations is subject to discipline. (Jt. Ex. 1; Ex. C-20) Respondent has a practice of progressive discipline, meaning that with each subsequent disciplinary event, the Respondent imposes more severe discipline. The progression of discipline typically goes from a warning, to suspension, and ultimately termination. (Joint Ex. 1; Testimony of Marchilli, Driscoll)

6. Respondent has an Internal Affairs Unit policy which sets out the procedure for investigating workplace incidents or allegations of misconduct. (Ex. R-12) Matters may be investigated within a Department facility by employees assigned to that facility, who are trained to conduct investigations, or by Respondent's Internal Affairs Unit (IAU), also known as the Office of Investigative Services. IAU is a separate investigative unit not affiliated with any Department facility. (Testimony of Marchilli, Driscoll, Adams; Ex. R-12) Investigations are categorized as Category I or Category II depending upon the severity of the allegations of misconduct. The IAU conducts only Category II investigations which involve more severe conduct. (Testimony of Marchilli, Driscoll, Adams) An internal investigation is typically initiated by a Confidential Incident Report submitted to the facility superintendent or division head who refers the matter to IAU. IAU reviews the allegations and determines whether the

investigation will be a Category I or II and whether the facility will investigate the matter in-house. (Marchilli, Driscoll, Adams, testimony; Ex. R-12)

7. Complainant was involved in a dispute on June 25, 2010 with LSHCU Shift Commander, Lt. Michael Jeghers. The circumstances of the underlying dispute are not the subject of this complaint and were not addressed at the Hearing. Complainant's sole allegation surrounding this incident is the inordinate amount of time the Department took to investigate and reach a resolution of the matter. He claims this delay was deliberate and was retaliation for his having filed an MCAD complaint in March of 2011. After IAU determined the investigation was to be a Category I, handled internally at the facility, LSHCU Superintendent Marchilli assigned the matter to Lieutenant Douglas Adams to investigate. One of the job titles Lt. Adams held at the LSHCU facility in 2010 and 2011 was Superintendent's Special Investigator. At the time he was assigned to investigate the matter, Lt. Adams had handled hundreds of investigations for Respondent. Complainant claims that Supt. Marchilli and Lt. Adams intentionally delayed the investigation to retaliate against him. (Ex. R-2; Complainant and Adams testimony)

8. Lt. Adams was assigned the investigation of the June 2010 incident on July 1, 2010. Handling investigations was just one of Adams' many duties at LSHCU as he held several job titles. He testified that LSHCU staffing was at a "bare bones" level during this time period. (Adams testimony) Adams also testified that scheduling investigative interviews with employees was difficult because of varying schedules particularly during the summer months when employees typically took vacations. Complainant had various sick and vacation days from August through December of 2010. Complainant's first interview was scheduled to occur on December 21, 2010, but Complainant did not report to work on that day, stating that he was sick. Thereafter, Complainant was absent for the months of January and February 2011 due to sick

leave, presumably due to stress and other mental health issues. (Complainant testimony)

Complainant was scheduled to be interviewed on March 8, 2011 shortly after his return from leave, but that interview did not occur for reasons discussed below.

9. Lt. Adams provided Complainant one week advance verbal notice of the scheduled March 8, 2011 interview. By law, as a member of the Massachusetts Correction Officers Federated Union (MCOFU), Complainant was entitled to have union representative present with him at any investigative interview that might result in disciplinary action. (Adams testimony, Mograss testimony) It is the responsibility of the employee to secure union representation and it is the Union's responsibility to represent its members. Union stewards are obligated to protect their members' interests, including representing MCOFU members, even if that means representing an employee on their own time. (Mograss, Henderson, Marchilli & Wells testimony)

10. Complainant requested Correction Officer Robert Henderson, who was a union steward, accompany him to the interview, which was scheduled for 6:00 a.m., during Complainant's 11:00 p.m. to 7:00 a.m. shift. Henderson advised Lt. Adams that he would not attend that interview because it was not during Henderson's regularly scheduled shift which was 9:00 a.m. to 5:00 p.m. Henderson requested that Supt. Marchilli pay him overtime to attend the interview during his off-duty hours, but Marchilli denied his request.<sup>3</sup> Henderson did not advise Complainant that he would not attend the interview. (Adams, Henderson testimony) When Complainant was summoned to attend his interview he asked for permission to contact CO Henderson but was unsuccessful. Lt. Adams gave Complainant the option to request a different

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<sup>3</sup> There was testimony by MCOFU President, Jon Mograss, that as a matter of past practice, overtime had been paid to union representatives who appeared outside their regularly scheduled shift, but there is no evidence that Marchilli denied representation to Complainant for retaliatory reasons, particularly where Complainant had yet to file his first MCAD discrimination complaint.

CO to serve as his representative, but Complainant rejected this option, whereupon Adams informed Complainant that he was going to proceed with the interview. Complainant refused to answer any questions or to otherwise participate in the interview. As a result, Adams became angry and raised his voice and the interview was terminated by Deputy Superintendent Manning whose office was nearby. Complainant testified that Adams yelled at him in an abusive manner. I credit Complainant's testimony that Adams raised his voice to him. (Complainant, Henderson, Marchilli & Adams testimony)

11. Deputy Superintendent Ann Manning was aware of the investigative interview Adams had scheduled with Complainant for March 8, 2011, and determined that this would be a convenient time to speak to Complainant concerning two other matters. She intended to give Complainant a copy of a letter of reprimand for conduct that had occurred in December of 2009, which had been issued in January 2011 while Complainant was on leave. Deputy Superintendent Manning had informed Complainant of the reprimand via telephone while he was out on leave and advised him a copy would be mailed to him. When Complainant returned from his extended sick leave, he asserted he had never received the letter of reprimand. Manning also intended to discuss with Complainant a Confidential Incident Report filed by the Shift Commander Lt. Hawkins on February 28, 2011, alleging that Complainant had hung up the phone on Hawkins, had questioned his direction and had ignored him several times when Hawkins asked how things were going on his post.<sup>4</sup> Manning intended only to remind Complainant that Hawkins was the shift commander, that his directives must be followed and that Complainant could not ignore his

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<sup>4</sup> Complainant had a history of conflict with Lt. Hawkins, who was the principal subject of Complainant's allegations in his initial MCAD complaint filed on March 1, 2011. By most accounts, Hawkins was a difficult and unpleasant person who was disliked by many CO's. (Heeks testimony, Driscoll testimony) Complainant asserted that he refused to respond to Hawkins' question of "how are you doing?" because he believed it was a personal question that did not require a response, as opposed to a question about how the shift was going. I do not find this assertion credible.

inquiries. (Manning testimony; Jt. Exs. 20, 29; Ex. R-7) Manning testified that this meeting was not disciplinary in nature and she did not intend to impose any discipline. I credit her testimony.

12. Deputy Manning's office was located near Lt. Adams' office and on the morning of March 8<sup>th</sup>, she heard Adams raise his voice and ask Complainant several times if he was refusing to be interviewed. She proceeded to Adams' office and informed them both that the interview would not proceed and that Complainant need not participate. She then informed Complainant that she needed to speak to him about another matter and directed him to her office. Complainant did not respond to Manning and walked past her shaking his head to indicate "no." Manning twice more directed Complainant to proceed to her office but he continued to walk away from her and did not respond verbally. This conduct occurred in the presence of Lt. Adams and Capt. Donna Driscoll. (Manning, Driscoll, Adams testimony) Manning again advised Complainant that she was responsible for managing LSHCU and that she needed to speak with him. He responded that he did not have a union representative. Manning told him that the meeting did not concern discipline and he therefore did not need, and was not entitled to, union representation. Capt. Driscoll repeated that the meeting was not disciplinary in nature. (Manning, Driscoll testimony; Jt. Ex. 28, Exs. R-10, R-13) Both Manning and Driscoll testified that an employee is not entitled to union representation in every meeting with supervisory personnel. Their practice when conducting meetings with correctional staff is to inform the employee before the meeting begins that the employee should seek to have a union representative present during the meeting if discipline is contemplated or likely to result. Notwithstanding that no discipline was contemplated, Manning allowed Complainant to contact a union steward and Correction Officer Kenny Beers, appeared as a union representative for him. (Manning, Driscoll testimony; Jt. Ex. 7; Ex. R-13)

13. The meeting then proceeded with the Deputy Superintendent, Captain Driscoll, Complainant, and his union representative. Manning began the meeting by informing Complainant that his failure to respond to her repeated requests to speak with him in her office was insubordinate and would be reported to Supt. Marchilli. Complainant became angry, denied any insubordinate behavior, and challenged Deputy Manning by stating, "It will be your word against mine." At that point, CO Beers requested a break in the meeting, which was granted. Complainant and CO Beers returned whereupon Complainant apologized to Manning for his earlier conduct, stating that he did not mean any disrespect, that he always found Manning to be "very nice," and that she treated him fairly. (Manning, Driscoll testimony; Jt. Ex. 7, Ex. R-13) Manning then gave Complainant a copy of the Letter of Reprimand issued some two months earlier, of which he already was aware. She then discussed Lt. Hawkins February 28, 2011 Confidential Incident Report. She told Complainant he could not refuse to respond to operational inquiries from the Shift Commander, that such conduct raised serious security concerns, and that treating a fellow officer with civility and respect was required by Blue Book Rules 6(a) and 6(b). (Manning testimony; Jt. Exs. 1, 7, 20, 28, 29)

14. Deputy Manning reported Complainant's insubordinate behavior to Superintendent Marchilli on March 8, 2011 in a Confidential Incident Report. Manning testified that she was "flabbergasted" by Complainant's conduct on March 8<sup>th</sup> and stated that prior to the incident, she had never had a similar experience with any other Correction Officer. She explained that Respondent is a paramilitary organization and emphasized that authority must be respected. She added that ignoring directives from a superior officer could jeopardize a Correction Officer's own safety and that of his fellow employees. (Manning testimony) Manning testified that she had no knowledge of Complainant's discrimination complaint at that time and denied that her

actions in reporting the March 8, 2011 incident were intended to retaliate against Complainant for his protected activity of filing such complaint. On March 29, 2011, Supt. Marchilli issued a one-day suspension to the Complainant for his insubordinate conduct in failing to respond and to acknowledge Deputy Manning's directives on March 8, 2011.<sup>5</sup> (Jt. Ex. 16)

15. Following the March 8, 2011 incidents, Complainant took sick days on March 9<sup>th</sup> and 10<sup>th</sup>, and a personal day on March 13<sup>th</sup>, 2011, purportedly for stress resulting from events of March 8<sup>th</sup>. The interview with Adams was rescheduled for March 15, 2011, and again did not occur. Complainant was ultimately interviewed by Adams in connection with the June 2010 incident on March 29, 2011. Adams conducted seven interviews in connection with the June 2010 matter beginning on September 23, 2010 and ending on April 22, 2011. (Adams testimony, Jt. Ex.-27; Exs. R-2, R-3, R-7, R-9)

16. Once the interviews were complete, Adams reviewed the documentation he had compiled, listened to audio tapes of the interviews, drafted the investigative packet and submitted his report to Supt. Marchilli for his review on August 4, 2011. Adams testified that based on his experience, the time from assignment of the investigation to submission of his final investigative report was average. (Adams testimony; Ex. R-2) Adams also testified that during the investigation, he was not aware of the fact that Complainant had filed a claim of discrimination at MCAD and he denied that he intentionally delayed the completion of the investigation. I credit his testimony that he did not intentionally delay his investigation and find that his efforts were hampered in large part by Complainant's extended absence from work from late December 2010 until early March 2011.

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<sup>5</sup> The Complainant appealed this suspension to the Civil Service Commission, which vacated the one-day suspension based on a finding that Deputy Manning's meeting with Complainant was disciplinary, because she intended to give him a copy of the previously issued disciplinary letter, a position the Department disagrees with. The Civil Service Commission decision does not address retaliation for protected activity and has no bearing on the issue before me. (See Jt. Ex. 19)

17. Supt. Marchilli reviewed the investigative packet and issued a recommendation on September 19, 2011, requesting that a disciplinary hearing be held to address Complainant's conduct in June 2010.<sup>6</sup> (Ex. R-20) Marchilli testified that given his many pressing duties and obligations as Superintendent of LSHCU, six weeks was not a lengthy period of time for him to have completed the review. (Marchilli testimony) Supt. Marchilli denied that he intentionally delayed completion of the investigation into the June 2010 incident and I credit this testimony.

18. On September 28, 2011, Complainant received a two-day suspension, that he also alleges is evidence of retaliation. The two-day suspension was in connection with conduct that occurred in February and March of 2011 that was unrelated to the Adams investigation. It arose out of a separate investigation of Complainant's allegations of disparate treatment by his Shift Commander, Lt. Hawkins detailed in two Confidential Incident Reports filed by Complainant on March 15, 2011, after he had been spoken to by Manning for his refusal to respond to Lt Hawkins.<sup>7</sup> In those reports Complainant alleged disparate treatment by Lt. Hawkins. He stated that while Lt. Hawkins "wrote [Complainant] up" for not acknowledging him on February 28, 2011, Hawkins failed to report that on March 8<sup>th</sup> he had observed two Correction Officers sleeping on their shift on 8 North and that he had shaken them awake. Complainant also alleged that Hawkins failed to "write up" these two officers for violation of the Department's rules. (Complainant testimony; Jt. Exs. 4 and 5).

19. Respondent maintains security cameras throughout LSHCU, including cameras of the 8 North corridor. Videos of the footage captured on security cameras remains on the hard drive for approximately fourteen days. (Testimony of Manning, Driscoll, Marchilli) Upon receipt of Complainant's March 15, 2011 Confidential Incident Report, Deputy Manning

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<sup>6</sup> A Hearing was held on the December 22, 2011 to determine the appropriate level of discipline and on February 12, 2012, a three-day suspension was imposed on Complainant. (Jt. Ex. 17)

<sup>7</sup> Complainant was not disciplined for his refusal to respond to a superior officer.

reviewed the March 8, 2011 video footage of 8 North, since Complainant's allegation of officers sleeping at their post was a serious violation of Department rules and she needed to confirm if this had indeed occurred. Manning testified that in her review of the video footage, she did not observe any Correction Officers sleeping, but did observe Hawkins pat an officer on the back, in what appeared to be an "atta boy."<sup>8</sup> Despite Manning's belief that Complainant's allegations were false, after reviewing the video, she took no further action in the matter. She did not take steps to preserve the video footage because she did not know that further investigation of this matter would ensue as a result of Complainant's allegations.<sup>9</sup> (Manning testimony) I found Manning to be a very credible witness and I credit her testimony surrounding this incident.

20. Upon receipt of Complainant's March 15, 2011 Incident Reports, Supt. Marchilli determined that the allegations of two Correction Officers sleeping at their posts was serious, and referred the matter to IAU by submitting an Investigative Services Intake Form. Captain Harold Wilkes, then a Lieutenant and an IAU investigator was assigned to investigate Complainant's allegations. Captain Wilkes testified that he had been employed by Respondent for 28 years, the majority of that time as an investigator. Wilkes, who is African American, had no affiliation with LSHCU, but had handled other investigations at the facility wherein allegations of discrimination had been raised. He conducted several interviews, including with Complainant, Lt. Hawkins, the two CO's who were alleged to have been sleeping, and then Sgt. now Lt. William Heeks. (See Ex. R-6)

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<sup>8</sup> Complainant had alleged that the CO's were sleeping so deeply that Hawkins had to physically shake them to wake them up.

<sup>9</sup> Manning did not participate in the Wilkes investigation and did not know who initiated it. She did not believe she ever read the Wilkes' report.

21. Complainant expanded his allegations during the investigative interview to include a claim that Hawkins had questioned him about why he had not voted for Hawkins as union steward. Complainant asserted that he had previously raised this issue with Capt. Driscoll. Capt. Driscoll recalled complaints by some CO's that Hawkins had assigned them to a "punishment post" on 8 North when he learned they didn't vote for him for steward.<sup>10</sup> Despite the fact that no CO ever filed a formal incident report about this, Driscoll spoke to Hawkins about it, and essentially determined that the allegations had little merit, since union elections for steward are by secret ballot and there is no post on 8 North that is considered a "punishment post." Driscoll recalled that Complainant had other issues with Hawkins regarding telephone usage and television viewing while on shift, but never filed any incident reports as he was directed to do or filed reports with vague allegations.<sup>11</sup> Driscoll nonetheless addressed these issues with Hawkins and heard no further complaints from Complainant. (Driscoll testimony; Ex. R-6)

22. Lt. Hawkins' assertion that Complainant had failed to respond to his question regarding how things were going was corroborated by Correction Officer Craven who was present during the exchange. Craven testified that Complainant's refusal to respond was uncomfortable and that he found it "weird," that Complainant would ignore a question from a supervising officer even if he believed it not to be directly related to work. Complainant admitted that he refused to answer Hawkins until Hawkins specifically asked about the shift because Complainant did not believe he was required to answer a personal inquiry, such as

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<sup>10</sup> As noted earlier, Hawkins was generally disliked by a number of CO's for reasons related to a prior incident unrelated to this matter. He was not generally viewed as congenial. Driscoll testified he did not engage in social pleasantries and did not appear to be a happy person.

<sup>11</sup> Complainant stated he feared further harassment and retaliation from Hawkins if he filed a report. He claimed his three-month leave was caused by emotional stress from Hawkins mistreatment of him and that Driscoll and Marchilli were aware of the antagonistic relationship with Hawkins. These allegations were the subject of the earlier complaint dismissed by MCAD after investigation and are not the subject of the instant retaliation complaint.

“how’s it going?” Hawkins informed Capt. Wilkes that Complainant had been on medical leave from November 19, 2010 until February 25, 2011, and that the night of this incident was the first time the two had worked together since November, 2010.<sup>12</sup> (Exs. R-6, R-7, R-22) Hawkins also reported to Wilkes that he was concerned about Complainant’s mental state as Complainant appeared to be under a great deal of stress and Hawkins believed he was experiencing personal/family problems.<sup>13</sup> (R-6) Given that Complainant had been out of work for some time, it is not unusual that Hawkins might have greeted Complainant with a question about how he was doing.

23. During the investigation of Complainant’s charges, both correction officers allegedly involved in the sleeping incident denied to Capt. Wilkes that they were asleep at their posts or that Hawkins had awakened them and spoken to them about sleeping. Both these officers also denied Complainant’s allegations at the Hearing. Contrary to Complainant’s report and his testimony, Lt. Heeks also denied that he had been sent by Hawkins shortly afterward to talk to the two officers about sleeping on their posts. In addition to denying that this occurred, Lt. Heeks stated that this would not have made sense, since Hawkins had allegedly already spoken to the officers and would have dispatched him to deal with the situation only if Hawkins were unable to leave the control room. Lt. Heeks was not particularly fond of Lt. Hawkins and told Capt. Wilkes he was a micro-manager and very difficult to work with. Heeks also reported to Wilkes that Hawkins treated all staff in an unprofessional manner, including him, and made it clear when he was unhappy with someone. Lt. Heeks testified that he had a good relationship

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<sup>12</sup> Hawkins did not testify at the public hearing. He retired from the Department in September 2011 and is believed to be living out of state. The audio tape of his interview with Capt. Wilkes was offered into evidence. (Ex. R-22) Hawkins told Wilkes that he believed Complainant was unhappy with the assignment Hawkins gave him upon his return from leave and because he had been denied a Worker’s Compensation claim for stress he was experiencing on the job. (Ex. R-6)

<sup>13</sup> Complainant later apologized to a fellow CO for his conduct while at LSHCU indicating that he was not in the right state of mind and had a lot of things going on when he was assigned there. (Conroy testimony)

with Complainant and was sympathetic to his issues, and stated that he had never observed Hawkins specifically target Complainant for unfair treatment. Contrary to Complainant's assertion, he denied telling Complainant that Hawkins was trying to break him and to sabotage his performance. I found Lt. Heeks to be a very credible witness who shed significant light on the issues. (Complainant, Craven, Conroy, Heeks, testimony; Exs. R-6, R-22)

24. Ultimately, Capt. Wilkes determined that the Complainant's allegations about officers sleeping on their shift and Hawkins' failure to report this were unfounded. He also concluded that there was no support for Complainant's claim that Lt. Hawkins had targeted him or subjected him to disparate treatment. Wilkes did not find that Complainant's allegations were false, but merely unable to be substantiated. Complainant was not disciplined for filing a false report. However, Complainant was disciplined for his failure to file a timely report about CO's sleeping at their post, since he did not file his report until a week after the alleged incident. (Ex. R-6) Wilkes found that his failure to report the alleged misconduct in a timely fashion violated Department Policy and Rules.<sup>14</sup> (Wilkes testimony, Jt. Ex. 1, Ex. R-6) Capt. Wilkes had no knowledge of Complainant's MCAD discrimination complaint, but more importantly stated that in his role as an independent investigator who was unaffiliated with LSHCU, he was a neutral party who had no interest in finding for or against Complainant. He did not discuss the matter or seek input from LSHCU management. I found Wilkes to be a credible witness. (Wilkes' & Marchilli testimony)

25. The Department's rules and regulations require correctional staff to report employees sleeping at their posts as soon as possible and not later than the end of a Correction Officer's shift. Complainant did not report his purported March 8, 2011 observation until a week later on

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<sup>14</sup> While it might seem odd that Complainant was disciplined for not promptly reporting an incident that the Department ultimately concluded did not occur, the latter conclusion does not negate the failure to follow stringent reporting requirements about observed violations of the rules.

March 15, 2011. (Marchilli, Wilkes testimony; Jt. Ex. 1 [rule 10(b)], Jt. Ex. 5) Complainant told Capt. Wilkes that he did not report the “sleeping” incident sooner because he was not at work between March 8<sup>th</sup> and March 15<sup>th</sup>, and did not have time to report the incident on March 8<sup>th</sup> because he was being interviewed by Lt. Adams. However, Complainant had ample opportunity to, but did not mention the sleeping incident, in his meeting with Deputy Manning that same day, when he learned of Hawkins’ complaint of his being non-responsive. I draw the inference that it is more likely that in the days after Manning reproached Complainant for his inappropriate behavior towards Hawkins, Complainant grew more agitated and responded to this charge by filing a report against Hawkins for unfair treatment when he returned to work.

26. Capt. Wilkes’ investigative report was issued on April 27, 2011. Prior to final review and decision by the Department’s Deputy Commissioner, the report was reviewed and commented on by the Department’s Director of Diversity, Monserrate Quinones. Ms. Quinones played no active role in the investigation, but reviewed the investigative packet and the findings of Capt. Wilkes. Based on her review of interview summaries with Captain Driscoll and Lt. Heeks, Ms. Quinones raised concerns about Lt. Hawkins management style, specifically that he exhibited unprofessional and bullying conduct. She testified that she did not mean to suggest that Lt. Hawkins was targeting Complainant or treating him unfairly because of his race or because of an intent to retaliate. In her review comments, Quinones noted Lt. Heeks’ comments about how Hawkins behavior generally caused animosity at the facility. She expressed concern that even if all staff were equally subjected to Hawkins’ unprofessional and bullying conduct, it should not be allowed to continue and she recommended further review of his conduct. (Ex. R-6; Quinones testimony)

27. Assistant Deputy Commissioner Karen Hetherson conducted the final review of the Wilkes investigation and supported his findings of no disparate treatment of Complainant. She referred the matter to Superintendent Marchilli on August 1, 2011, to determine any appropriate action against Complainant for his violation of the rules in failing to timely report the purported sleeping incident. She also requested that Marchilli meet with Complainant and Hawkins to discuss their job responsibilities and workplace conduct. (Ex. R-6) Pursuant to Respondent's progressive discipline policy, a three-day suspension of Complainant would have been justified since Complainant had recently received a one-day suspension for his insubordinate conduct to Deputy Manning. Three days was generally the next step in the standard progression of discipline; however, upon reviewing the findings, Marchilli decided to impose only a two-day suspension. Complainant was notified of the decision on September 28, 2011.<sup>15</sup> (Jt. Ex. 22, Marchilli testimony) Supt. Marchilli was unable to meet with Complainant and Hawkins to discuss their workplace conduct, because Hawkins was out of work on an extended medical leave and then retired unbeknownst to Marchilli. (Ex. R-17; Marchilli testimony)

28. Some two months after the March 2011 incidents, on May 19, 2011, Complainant was involved in an incident surrounding forced overtime that resulted in an unpleasant exchange with Lt. Jeghers, the 8 North Shift Commander for the 7:00 a.m. to 3 p.m. shift. Complainant claimed that this incident was additional evidence of retaliation against him by Respondent. He asserted that Lt. Jeghers harassed him when he informed Jeghers that he was unable to work forced overtime due to a medical issue. He testified that Jeghers twice hung up the phone on him, yelled at him, and directed him to remain at his post.

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<sup>15</sup> Complainant appealed this two-day suspension to the Civil Service Commission, which in August of 2012 upheld the finding of prohibited conduct but reduced the suspension to one-day, since Complainant's previous one-day suspension for the events of March 8, 2011 had been vacated. (Jt. Ex. 24)

29. Each shift at LSHCU must have adequate staffing to ensure effective operations and the safety and security of the facility. Department policy demands that correctional staff remain at their post until properly relieved. As a result, correctional staff can be required to work beyond their regular eight-hour shift for all or part of next shift, until relief is secured. (Complainant, Driscoll, Jeghers, Wells testimony) In situations where overtime is required, Respondent first seeks volunteers, but if there is still insufficient staff to operate a shift, management may have to resort to forced overtime of an officer on the prior shift. (Id.) Correction officers are “forced” based on inverse seniority, but at LSHCU there is a rotation to avoid the least senior Correction Officer always having to work forced overtime. An officer cannot be “forced,” if he has a scheduled day off the following day and an officer cannot work more than two consecutive shifts in a row. [Wells, Jeghers testimony; Ex. R-11; Jt. Ex. 3,0 Article 7, s. 3(H)(iii)] Senior Officers testified that they have been forced to work overtime on many occasions. (Jeghers, Wells, Heeks testimony) Complainant acknowledged the forced overtime is part of a correction officer’s duties and responsibilities.

30. On May 18, 2011, there were fifteen correctional staff members assigned to the 11-7 Shift. Lt. Wells determined that he needed five additional Correction Officers for the upcoming 7-3 shift on May 19<sup>th</sup>. The 7-3 shift was expected to be very busy because there were multiple inmate surgeries scheduled for that day which required correctional staff to escort inmates. (Jeghers, Driscoll, Wells testimony) Lt. Wells was able to secure four volunteers to work overtime, but needed a fifth candidate. (Wells testimony; Jt. Exs. 31, 32) For reasons related to the rules stated above Complainant was the only candidate eligible to remain on the 7-3 shift. Wells instructed Lt. Heeks to inform Complainant that he was being “forced” to work overtime. Heeks testified that Complainant was not happy about this but did not inform him that

he could not work overtime and did not state he had a medical appointment. Later, when Lt. Wells also informed Complainant that he would be required to work forced overtime for a period of time, but no later than 9:00 a.m., Complainant told Wells he had to attend a medical procedure and could not stay. (Wells testimony; Ex. R-8) Since forced overtime is a directive to remain on duty, Wells reasserted that Complainant was being “forced” but told Complainant if he needed to use sick-time, he would have to speak to the 7-3 Shift Commander, Lt. Jeghers, and would be required to produce a medical note. (Wells testimony; Ex. R-8)

31. The Shift Commander is responsible for the overall safety and security of Department employees, the inmates housed on 8 North, and the medical staff assigned to that shift. The position of Shift Commander on the 7-3 shift was a stressful one because of the various trips and medical procedures frequently scheduled for inmates. Inmate medical appointments typically occur during regular business hours and the Shift Commander was responsible for coordinating those appointments with LSH medical staff at other Boston hospitals. (Jeghers, Driscoll testimony) In addition, the period of shift change is frequently a hectic period of time for the oncoming Shift Commander.

32. When Lt. Jeghers, who was Shift Commander, arrived for his 7-3 shift on May 19, 2011, he was briefed by Lt. Wells who informed him that several officers, including Complainant would be working overtime on the 7-3 shift. (Jeghers testimony) Lt. Jeghers was preparing his roster for the 7-3 shift when he received a phone call from Complainant at approximately 6:50 a.m. Complainant told Jeghers he had a medical appointment and needed to be relieved. Jeghers informed Complainant that he was aware of Complainant’s situation and was doing what he could to get him relieved. Complainant placed another call to Jeghers seconds later repeating his request and yelling in an angry tone. Jeghers informed Complainant

that he was completing the shift roster for the 7-3 shift and was unable to discuss the matter at that time and directed Complainant to stop calling the Control Room. Shortly thereafter, Complainant called Jeghers a third time. Jeghers reiterated that he could not speak with Complainant as he was completing the shift roster and trying to figure out how to handle the situation. He ordered Complainant to stop calling him. Jeghers testified that these three phone calls occurred in the first five minutes of the shift, which was a very busy time. Complainant called the Control Room a fourth time and asked to speak to Lt. Adams. This fourth call also occurred before 7:00 a.m. Jeghers then ordered Sgt. Simpson, who was in the Control Room, to direct Complainant to stop calling the Control Room. Jeghers testified that he became frustrated and angry that he had to order Complainant twice to stop calling the Control Room since he was doing his best to resolve the situation and get Complainant relieved. He described his tone of voice when giving these directives as stern. (Jeghers testimony; Jt. Ex. 14, 26) By all accounts, Lt. Jeghers acted professionally and his directives were justified given the circumstances. Lt. Jeghers and Complainant worked different shifts and usually had no regular interaction. Jeghers testified that during the ten years he was assigned to LSHCU, he probably had less than ten minutes of total interaction with Complainant. (Jeghers testimony)

33. At approximately 7:00 a.m. on May 19, 2011, Captain Driscoll entered 8 North and was informed by Lt. Jeghers that Complainant had been “forced” but was protesting the assignment, stating that he was sick. Captain Driscoll told Jeghers that Complainant needed to remain at his post until relief arrived and that she would notify Supt. Marchilli of the situation. (Driscoll, Jeghers testimony; Jt. Ex. 14; Ex. R-14) Shortly thereafter, Capt. Driscoll held a meeting with Complainant where Lt. Wells served as his union representative. Driscoll

instructed Complainant, per Supt. Marchilli's directive, to draft a letter explaining why he was unable to remain for forced overtime. Complainant wrote that he had a medical appointment at 9:45 a.m. (Driscoll, Wells testimony; Ex. R-15) Supt. Marchilli released Complainant at approximately 7:45 a.m. to allow him to attend his 9:45 a.m. medical appointment. (Marchilli testimony) On May 23, 2011, Supt. Marchilli issued what is known as an "Attachment D" to Complainant. Pursuant to the Collective Bargaining Agreement with MCOFU and the Respondent's sick leave policy, an "Attachment D" may be issued if Respondent has probable cause to believe that sick leave is being abused. It requires a Correction Officer within 7 days of receipt to produce medical documentation to substantiate a sick leave absence. (Jt. Ex. 30, Article 8K; Ex. R-18) Marchilli testified that he was concerned that Complainant was abusing his sick leave time when he claimed to be ill only after being assigned to work forced overtime. Lt. Wells and Lt. Heeks agreed that the manner in which Complainant raised the issue was somewhat suspicious. When Complainant submitted documentation to substantiate his medical appointment, the matter ended. (Marchilli testimony; Jt. Exs. 11, 12)

34. On July 20, 2011, Complainant had a conversation with Capt. Driscoll wherein he sought to discuss his alleged mistreatment by Lt. Jeghers during the May 19, 2011 overtime incident some two months earlier. They agreed to meet the next day. In that meeting, Complainant raised the issue of Lt. Jeghers' treatment of him during the May incident, claiming it was the second time Jeghers had "accosted" him by addressing him in a hostile and derogatory fashion when directing him to remain at his post. Capt. Driscoll explained that it was standard procedure to require a correction officer to work overtime if staffing required, and noted that Complainant had disobeyed Jeghers' directive to stop calling the Control Room and continued to demand he be relieved. Capt. Driscoll was somewhat surprised that Complainant was raising an

issue from two months earlier, particularly since he had minimal contact with Jeghers and there were no on-going issues. She asked Complainant if there had been any incidents with Jeghers since the May 19<sup>th</sup> overtime matter and he stated there had been no additional incidents.

Complainant sought an explanation for why Respondent had not spoken to Jeghers about his conduct on May 19<sup>th</sup>. When Driscoll asked for clarification, he responded that Lt. Jeghers treated him like a “nigger.” (Driscoll testimony; Jt. Ex. 25) Complainant told Driscoll he was stressed out, losing weight, and couldn’t even work out because of hostility in the workplace. Driscoll testified that she was shocked by Complainant’s use of the “n-word.” She advised him that the June 25, 2010 incident with Jeghers was still under investigation and that Jeghers’ actions on May 19, 2011 were appropriate given the circumstances. (Driscoll testimony, Jt. Ex. 25) Driscoll told Complainant that if he was unhappy with LSHCU, he should consider a transfer to another facility, telling him that she had sought a transfer early in her career when she was unhappy with the environment at a facility. Complainant responded that if anyone was going to leave LSHCU, it would be Lt. Jeghers. Driscoll responded that this was unlikely given that transferring a supervisor, such as Lt. Jeghers, would result in far greater operational impact than transferring a Correction Officer I. This was because there were only two supervising correctional staff per shift but far more Correction Officer I’s. Driscoll also told Complainant that she would relay his views to Supt. Marchilli and Depty. Supt. Manning. Driscoll testified that Complainant’s conduct and repeated conflicts with superior officers were adversely impacting LSHCU operations. (Driscoll testimony, Jt. Ex. 25) Complainant testified that at the time of his July 2011 meeting with Driscoll, he was feeling animosity towards not only Lt. Hawkins and Lt. Jeghers, but also towards Capt. Driscoll and the entire command staff.

(Complainant testimony)

35. Supt. Marchilli testified that since he had become Superintendent at LSHCU in 2010, Complainant had been involved in increasingly more frequent conflicts with LSHCU correctional and supervisory staff. On March 24, 2011, Supt. Marchilli drafted an email to Asst. Deputy Commissioner Hetherson seeking authorization to reassign Complainant pending the results of Lt. Adams' investigation into the June 2010 incident, and the investigation by Capt. Wilkes concerning the alleging unfair treatment by Lt. Hawkins. He stated that conflicts involving Complainant were becoming increasingly disruptive to the facility and that he thought it best to separate Lt. Hawkins from Complainant while the matters were being investigated. Marchilli also noted that Lt. Hawkins had requested in a confidential incident report that either he or Complainant be transferred from LHSCU. Marchilli wrote that due to staffing patterns, it was not practical to transfer Lt. Hawkins, as that would disproportionately impact the ranks of Lieutenant at the facility, since he already had one vacant Lt. position, and the transfer of a superior officer would result in significant increased overtime for Shift Commander coverage. At the Hearing, Marchilli referenced the conflicts Complainant was involved in, citing the June 2010 incident with Jeghers; the February 2011 incident when Complainant refused to respond to Lt. Hawkins; Complainant's refusal to participate in the March 8, 2011 interview with Adams; his March 8<sup>th</sup> insubordinate conduct toward Deputy Manning; and the allegations raised in Complainant's March 15, 2011 reports of mistreatment by Hawkins. Marchilli also referenced in his March 24<sup>th</sup> email to the Deputy Assistant Commissioner that Complainant had filed a claim of discrimination against Respondent with MCAD and a Worker's Compensation Industrial Accident claim alleging stress and an unsatisfactory work environment. Marchilli noted that he was making no judgment about the validity of either claims, and was not proposing a transfer as punishment or retaliation but in an attempt to resolve on-going and escalating conflict.

(Marchilli testimony, Ex. R-19) On May 25, 2011, Marchilli drafted a second email to ADC Hetherson as a follow-up to his March 24<sup>th</sup> request notifying her of the May 19, 2011 incident with Jeghers regarding “forced” overtime.

36. Ultimately, ADC Hetherson approved Supt. Marchilli’s request to transfer Complainant. By letter dated July 27, 2011, Complainant was administratively reassigned from LSHCU to the Boston Pre-Release Correctional Center facility (BPRCC) which was located approximately one mile from LSHCU. At BPRCC Complainant’s shift and days off remained the same and the transfer had no impact on his compensation, his benefits, and did not otherwise impact his employment status with Respondent. (Marchilli testimony, Jt. Ex.3) There was testimony that administrative reassignments within the Department are not uncommon and that employees are frequently transferred due to some type of workplace conflict that impacts institutional operations. In such cases the Department’s goal is to transfer an employee to a DOC facility physically near his current institution and to maintain the employee’s shift and days off. (Testimony of Asst. Deputy Commissioner Kelley Correira) Complainant admitted that his transfer to BPRCC did not pose any hardship to him, but stated he felt it caused damage to his reputation because administrative transfers are often viewed as a negative or a punitive measure. (Complainant testimony)

### III. CONCLUSIONS OF LAW

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B, or who have filed a complaint, testified or assisted in any proceeding brought pursuant to sec. 5 of the statute. See Ritchie v. Department of State Police, 60 Mass. App. Ct. 655, 663-664 (2004). Retaliation is a separate claim from discrimination,

“motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices.” Kelley v. Plymouth County Sheriff’s Department, 22 MDLR 208, 215 (2000) quoting Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995). In order to establish a prima facie case of retaliation, an employee must prove that (1) he engaged in protected activity, (2) he subsequently suffered an adverse employment action, and (3) the adverse employment action was causally linked to the protected activity. Mole v. University of Massachusetts, 442 Mass 582, 591 (2004). As part of the third prong, Complainant must demonstrate that the employer both knew of the employee’s protected activity and that a retaliatory motive prompted the alleged adverse action. Id. at 592; MacCormack v. Boston Edison Co., 423 Mass. 652, 662 (1996) (employee must show that but for the filing of the discrimination claim, the alleged adverse action would not have occurred).

If an employee establishes a prima facie case of retaliation, the burden then shifts to the employee to proffer legitimate, non-retaliatory reasons for its actions. See Mole, 442 Mass. at 591. Finally, if the employer provides a legitimate, non-discriminatory reason for the alleged adverse actions taken against the employee, the employee retains the ultimate burden of proving that the employer’s actions were motivated by retaliatory intent, motive or state of mind. Lipschitz v. Raytheon Co., 434 Mass. 493, 504 (2001); Abramian v. President and Fellows of Harvard College, 432 Mass. 107, 117 (2000)

Complainant engaged in protected activity when he filed a discrimination complaint at the MCAD on March 1, 2011, and when he subsequently filed internal complaints in March and July of 2011 alleging unfair treatment by Lt. Hawkins and Lt. Jeghers based on his race. Complainant may prevail on a claim of retaliation despite dismissal of his underlying claim of discrimination. Bain v. City of Springfield, 424 Mass. 758, 765 (1997); Abramian v. President

& Fellows of Harvard College, 432 Mass. 107, 121-122 (2000); See Ritchie, supra. at 664.

Complainant need only “prove that [he] reasonably and in good faith believed that the [employer] was engaged in wrongful discrimination,” not that the employer actually engaged in wrongful discrimination. Abramian, supra. at 121, quoting from Tate v. Department of Mental Health, 419 Mass. 356, 364 (1995). In this case, Complainant has alleged facts that sufficiently meet the requirement that he “reasonably and in good faith” believed the Department engaged in conduct that violated c. 151B given the adverse actions that occurred subsequent to his protected activity. I also conclude that Complainant had a good faith belief that Respondent acted with intent to punish him and remove him from LSHCU based on his complaints of racial discrimination.

Complainant alleges that he was subjected to a number of adverse actions after he filed his MCAD complaint. These include (1) delay in investigating a June 2010 incident; (2) being harassed about attending an investigative interview without benefit of union representation on March 8, 2011, and being disciplined for insubordination on March 8, 2011; (3) being treated adversely surrounding a forced overtime situation in May of 2011; (4) being suspended for two days for failing to timely report officers sleeping; and (5) being involuntarily transferred to another DOC facility.

An adverse action requires proof that Complainant suffered a change in his working conditions that materially disadvantaged him. Adverse employment actions generally involve changes to one’s “salary, grade or other objective terms and conditions of employment.” MacCormack v. Boston Edison Co., 423 Mass. 652, 663 (1996). Complainant was subjected to discipline that resulted in his being suspended from employment on at least two occasions. Since the suspensions caused Complainant to lose pay for those days, and because Respondent’s

progressive discipline policy renders an employee one step closer to termination with each infraction, I conclude that these disciplinary measures constituted adverse actions that materially disadvantaged Complainant. Both suspensions occurred subsequent to his filing a complaint of discrimination.

Complainant first asserts the delay in investigating and resolving the June 2010 incident was retaliatory. However, the facts in evidence support a contrary finding that the delay was not intentional, was not an adverse action, and was not motivated by retaliatory animus. First, there is no evidence that the delay in completing this investigation materially disadvantaged Complainant in any way. Respondent asserts that the delay in concluding the investigation was related to difficulty in scheduling interviews and other pressing work at LSHCU. In fact, there is ample evidence that much of the delay was occasioned by Complainant. Lt. Adams was unable to interview Complainant from December 2010 until early March 2011 because Complainant failed to report to work on December 21, 2010, the day his first interview was scheduled, calling out sick, and subsequently going out of work on an extended medical leave from late December until early March 2011. At least two other interviews with Complainant did not occur because Complainant was absent from work on those days. Adams was unable to interview Complainant until March 29, 2011. Indeed, the evidence seems to suggest that Complainant intentionally avoided being interviewed in connection with that incident. There is also evidence that further delays were occasioned by the difficulties in coordinating interviewee's schedules, particularly during the summer months, and due to other matters of priority that Lt. Adams was responsible for at LSHCU. Even if a reasonable fact finder could conclude that the delay of the investigation was an adverse action that materially disadvantaged Complainant, there is no evidence that it was motivated by retaliatory animus on the part of Lt. Adams, Supt. Marchilli, or any other

employee of Respondent. Adams denied that he had any knowledge of Complainant's discrimination complaint during the investigation. His denial is supported by the fact that Adams had scheduled Complainant's March 8, 2011 interview one week prior, suggesting that Complainant's MCAD filing on March 1, 2011, may have been a reaction to the receipt of Adam's notice. Moreover, the investigation had already been delayed by some nine months prior to Complainant filing his MCAD complaint, demonstrating that the much of the early delay could not have been occasioned by the filing of his complaint.

Complainant next asserts that Adams compelling him to attend the investigative interview on March 8, 2011, without benefit of union representation, was evidence of retaliation. Adams was not responsible for the failure of Complainant's chosen representative to attend the meeting. Indeed there was ample testimony that CO Henderson did not serve Complainant well and neglected his obligations as a union steward by refusing to attend the meeting because Respondent refused to pay him overtime. Adams gave Complainant the option of having another representative present prior to commencing the meeting, but Complainant refused. While Adams insisted the interview proceed and the situation became heated when Complainant refused to answer any questions, Deputy Manning intervened and cancelled the interview. It is clear that Manning did her best to diffuse a tense situation and Complainant was not disciplined for refusing to participate in the interview. I believe Complainant's testimony that Adams raised his voice to him, but conclude that Adams did so out of frustration that his investigation was once again being stymied after several months delay resulting from Complainant's extended leave. Adams's frustration and anger are understandable given the circumstances, but the evidence does

not suggest his treatment of Complainant was motivated by retaliation,<sup>16</sup> particularly since Adams denied any knowledge of Complainant's MCAD charge.

Complainant asserts that his subsequent interaction with Deputy Manning which resulted in discipline for insubordination was also evidence of Respondent's retaliation against him. I conclude that Complainant's suspension was an adverse action. Respondent asserts that Manning was justified in imposing a one-day suspension because Complainant was blatantly insubordinate to her in the presence of other officers by violating a direct order to enter her office and speak with her. Complainant's refusal to obey Manning's directive was a violation of Respondent's rules and regulations, which are of utmost importance in a paramilitary organization. There was ample testimony that compliance with a superior officer's order is paramount to the safe and efficient operation of correctional institution. The fact that Complainant was upset because his union representative had failed to appear for the Adams interview and failed to notify Complainant that he was not coming is understandable. When Adams yelled at Complainant and sought to compel the interview, this heightened Complainant's distress which likely caused his negative response to Manning. However, the fact that Complainant was upset does not justify his utter disregard of Manning's directives. Manning made it clear to Complainant that she did not seek to meet with him to impose discipline, but merely sought to discuss a matter that had recently come to her attention, and that he did not require union representation.<sup>17</sup> I found Manning to be a very credible witness and conclude that her intent in meeting with Complainant to discuss a concern raised by Lt. Hawkins and to deliver

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<sup>16</sup> To the extent Complainant alleges that Respondent's refusal to pay CO Henderson overtime to attend the investigative interview in violation of past practice, there is no evidence to suggest the denial was retaliation for Complainant's protected activity.

<sup>17</sup> The fact that the Civil Service Commission rescinded the discipline, ruling that the meeting with Manning was disciplinary in nature because Manning intended to give Complainant a copy of a disciplinary letter that had been issued to him months earlier while he was on leave, and of which he was already notified, does not negate his insubordination; nor does it prove that Manning's subsequent discipline for his actions was retaliatory.

the letter previously mailed to Complainant was not to impose discipline. Manning merely sought to diffuse some of the hostility between Complainant and Hawkins by reminding Complainant of the appropriate response to a superior officer. As second in command at LSHCU, Manning clearly had to mediate conflicts caused by difficult personalities and she demonstrated through her credible testimony that she attempted to do so with the utmost professionalism and respect for employees. Complainant admitted that Manning had always treated him fairly which was supported by her intervention to stop the Adams' interview, and to de-escalate the conflict when she heard Adams raise his voice to Complainant. I also conclude that Manning's imposition of discipline for Complainant's insubordination was justified and was a legitimate, non-retaliatory reason, related solely to his conduct of that morning.<sup>18</sup> There was ample evidence that insubordinate conduct is a serious offense for which offending correction officers are regularly disciplined, and that Complainant's discipline was consistent with Respondent's practices. The fact that the two events of March 8, 2011, closely followed Complainant's protected activity, the filing of an MCAD complaint on March 1, 2011<sup>19</sup>, is insufficient, under the circumstances, to demonstrate the cause of his discipline was retaliation. See Mole, 442 Mass. At 592.

Complainant alleges retaliation motivated his two-day suspension for failing to timely report officers sleeping, a violation of Respondent's rule that any incidents in the workplace must be reported no later than the end of an employee's shift. This suspension arose out of Wilkes's investigation of Complainant's charges of unfair treatment by Lt. Hawkins in an incident report Complainant filed on March 15, 2011. Complainant filed this report after Manning spoke to him on March 8, 2011 for his failure to respond to Lt. Hawkins questions,

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<sup>18</sup> Manning also claimed that she did not have notice of Complainant's discrimination complaint and I believe that this was likely.

<sup>19</sup> There was no evidence that Respondent had yet received the MCAD complaint.

after which Complainant called in sick for two days and then took a personal day. Complainant stated that Hawkins reported him for failing to answer questions, but did not report that two other officers were sleeping at their posts on March 8<sup>th</sup>. After Wilkes determined that the allegations about Hawkins failure to report officers sleeping could not be substantiated, Complainant was disciplined for not reporting the incident until a week after it purportedly occurred. While Respondent did not address the issue of the timing of Complainant's report of unfair treatment by Hawkins, the timing is somewhat suspect, coming on the heels of Hawkins complaint about Complainant's refusal to answer his questions.<sup>20</sup> Notwithstanding, there is no evidence that the discipline Complainant received for his late reporting of this alleged incident was retaliation. There is no question but that Complainant violated Respondent's rule requiring prompt reporting of incidents, including sleeping at one's post, which is considered a serious infraction by Respondent. This is a legitimate non-discriminatory reason for the discipline.

Complainant asserts the fact that Respondent did not preserve the March 8<sup>th</sup> video tape of the officers sleeping on the 11-7 shift on 8 North is evidence of pretext. However, Manning testified credibly that after she viewed the video tape and saw no evidence of officer's sleeping or being shaken awake, she considered the matter closed, and there was no reason to preserve the video.<sup>21</sup> There is no evidence to suggest that the video was deliberately erased to harm Complainant. Moreover, even if the video had shown officers sleeping, that would not have altered the fact that Complainant did not report his observation of this infraction until a week

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<sup>20</sup> Hawkins reported that Complainant was also upset about the assignment Hawkins gave him upon his return to work after an extended leave. Hawkins told Wilkes he was limited in the assignments he could give Complainant because Complainant was unable to qualify with a firearm. As a result, he was instructed to assign Complainant to an unarmed post. (Ex. R-6)

<sup>21</sup> Manning was unaware at that time that Complainant would later be disciplined for untimely reporting of the incident and she did not participate in the Wilkes investigation. Notwithstanding, whatever the video would have shown is irrelevant to the violation of late reporting.

after it occurred. Therefore, I do not find that the failure to preserve the video is evidence of pretext for retaliation.

Complainant also asserts that his treatment by Lt. Jeghers and Superintendent Marchilli during the May 2011, incident where he was forced to work overtime for two hours and to provide a written request for relief, was evidence of retaliation. Complainant claims that being yelled at by Lt. Jeghers, and being required to remain at his post and to provide a written reason for his request to leave, despite his assertion that he was sick, was disparate treatment. Respondent asserts that overtime was required on that day due to very short-staffing and the busy schedule of inmates with medical appointments. Complainant was the only officer on the 11-7 shift who was eligible under the Department's rules to remain on duty that day. He was compelled to stay due to legitimate staffing reasons. When he was first informed that he was being "forced," to work overtime, he did not inform Lt. Wells that he was sick or that he had a scheduled medical appointment. Complainant raised this issue later with Lt. Wells and then contacted Lt. Jeghers in the Control Room three times during shift change to state he could not stay, in defiance of Jeghers orders to cease calling the Control Room. Jeghers was working on the roster for the 7-3 shift during shift change which is a very hectic time and he advised Complainant several times that he was doing everything he could to get Complainant released as soon as possible. That Jeghers became angry and yelled at Complainant to stop calling him is understandable given Complainant's wholly inappropriate behavior and his refusal to comply with his superior's directive. Jeghers admitted that he was extremely frustrated with Complainant and spoke to him sternly. Capt. Driscoll believed that the incident was sufficiently serious that it merited a report to the Superintendent, who required that Complainant state in writing why he could not work overtime. There were legitimate non-retaliatory reasons for

Respondent's actions and no evidence to suggest that Jeghers' and Marchilli's directives or that their treatment of Complainant was a pretext for retaliation against him for his protected activity. In fact, although Complainant could have been disciplined for violating Lt. Jeghers direct orders, Respondent did not impose discipline for this incident.

Finally, Complainant alleges his involuntary transfer was retaliation for his complaining about race discrimination. Complainant was notified on July 27, 2011, that he was being administratively reassigned to another DOC facility shortly after meeting with Capt. Driscoll and complaining that Lt. Jeghers had treated him unfairly because of his race during the forced overtime incident two months earlier. During that meeting, Capt. Driscoll suggested to Complainant that he consider transferring to another facility if he was unhappy at LSHCU. In fact, Supt. Marchilli had already requested on March 24, 2011, that Complainant be reassigned, only a few weeks after Complainant filed his charge of discrimination at MCAD. While proximity in time to the filing of Complainant's charge might suggest that his transfer was retaliation for his protected activity, Marchilli testified the repeated conflicts Complainant was having with superior officers, that were becoming increasingly disruptive to the facility, are what prompted his request. If problems with the employee predate the employee's protected activity, the inference cannot be drawn that the subsequent adverse actions were motivated by retaliation. Mole v. UMass, 442 Mass. at 594. Also a showing merely that the employer knew of a discrimination claim and thereafter took some adverse action is insufficient to establish causation. If this were the case, a disgruntled employee could thwart an employer's legitimate adverse action by filing a discrimination claim. Mole, 442 at 592 *citing* Mesnick v. General Elec. Co., 950 F.2d 816, 828 (1<sup>st</sup> Cir. 1991) At the time of Marchilli's request, there were already pending investigations regarding Complainant's disputes with superior officers and

Complainant had just come off an extended medical leave purportedly for reasons related to stress at work, when the conflicts re-ignited. As early as his first week back to work he experienced difficulties with Lt. Adams and Lt. Hawkins. Marchilli testified that he had concerns about the smooth operation of the facility, sought to de-escalate the conflicts and believed that separating Complainant from Lt. Hawkins would serve this end.<sup>22</sup> In fact, Hawkins had requested a transfer because of the conflict with Complainant, but given the insufficient number of Lieutenants in the LSHCU ranks, and the need for superior officers to serve as Shift Commanders, Marchilli determined it would be detrimental to the facility's efficient operation to transfer Hawkins. Marchilli made it clear that he was very frustrated and confounded by the ongoing issues involving Complainant and felt the need to resolve the matter and bring some renewed semblance of order to LSHCU's operations. He decided, therefore, that it was in the best interest of the facility to transfer Complainant. Courts have long held that prison administrators are entitled to wide-ranging deference in the adoption of policies and practices that in their judgment are necessary to preserve institutional order and discipline. See Bell v. Wolfish, 441 U.S. 520 (1979) The Supreme Judicial Court has also recognized that the difficulties inherent in the operation of a correctional institution warrant broad discretion by prison officials in the adoption of policies and the administration of prison affairs. See Langton v. Comm'r of Correction, 404 Mass. 165, 167 (1989). Given that Marchilli articulated a legitimate non-retaliatory reason for the transfer, other than the timing, there is no evidence to suggest the reason for the transfer was Complainant's protected activity.

Ultimately, I am not persuaded that Complainant has established a prima facie case of retaliation with respect to his transfer given the circumstances. For a transfer to constitute an

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<sup>22</sup> There is some evidence to suggest that Marchilli had instructed Hawkins to communicate to Complainant through Lt. Heeks as a means of alleviating the strained relationship. (See R-6)

adverse employment action it must materially disadvantage the employee. Kraft v. Boston Police Dept., 28 MDLR 1, 21, 2006, *citing* Bain v. Springfield, 424 Mass at.765-766.

“Subjective feelings of disappointment and disillusionment,” without “objective evidence” of a disadvantage in tangible working conditions, are insufficient to establish that an “adverse employment action” has occurred. MacCormack v. Boston Edison Co., 423 Mass. at 663. Other than Complainant’s view that administrative transfers were often viewed as negative or punitive, there was no evidence that his transfer to BPRCC caused Complainant to suffer any tangible economic loss or a change in any other job related benefits. The transfer to BPRCC did not involve a material change in Complainant’s shift, days off, or any other terms and conditions of his employment, including his commuting time. He claims to have had no problems working at BPRCC. Given the above, I conclude that Complainant’s transfer was not an adverse action sufficient to support a claim of retaliation. However, even if the transfer could be considered an adverse action, Complainant has not proved that the reasons given for the transfer were a pretext for retaliation. I conclude that Respondent’s actions were not motivated by retaliation in violation of G.L. c. 151B § 4(4).

#### IV. ORDER

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

So Ordered this 30<sup>th</sup> day of December, 2016.

A handwritten signature in cursive script, reading "Eugenia M. Guastaferrri".

Eugenia M. Guastaferrri  
Hearing Officer