

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SHIRLEY J. ESLINGER,

Complainants

v.

DOCKET NO. 10-BEM-02076

MASSACHUSETTS DEPARTMENT
OF TRANSPORTATION,

Respondent

Appearances: Caitlin A. Sheehan, Esq., Commission Counsel for Complainant
Maria C. Rota, Esq. and Peter M. Mimmo, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On August 12, 2010, Complainant, Shirley J. Eslinger, filed a complaint with this Commission charging Respondent, Massachusetts Department of Transportation (MassDOT) with discrimination in employment on the basis of her gender in violation of M.G.L. c. 151B, s. 4(1) and Title VII. The Investigating Commissioner issued a Finding of Probable Cause to credit the allegations of the complaint. Conciliation efforts were unsuccessful and the case was certified for a public hearing. A hearing was held before me on May 9, 10, and 11, 2016. Complainant, who was one of three Deputy Chief Engineers at MassHighway, alleged that her employment was terminated after she refused to accept a different position in the newly created Massachusetts Department of Transportation, a position she characterized as a demotion.

Respondent asserts that Complainant's reassignment was the result of a consolidation and reorganization in 2009 of the Commonwealth's transportation agencies into the agency known as MassDOT. Respondent denies the allegations of gender discrimination and states that the new position Complainant was offered at MassDOT was not a demotion and that Complainant's position at MassHighway was eliminated. It also asserts that it had legitimate non-discriminatory reasons for offering a male colleague of Complainant's a newly created position at MassDOT that encompassed Complainant's prior duties.

Complainant testified on her behalf and Respondent called four witnesses to testify. The parties submitted 79 joint exhibits, Complainant offered an additional 11 exhibits, and Respondent an additional 7 exhibits. Administrative notice was taken of two documents, consisting of the legislation authorizing the Accelerated Bridge Program and the 2009 Transportation Reform Act. A transcript of the digital recording of the Hearing was generated by a vendor contacted by Respondent subsequent to the Hearing and copies were provided to Complainant and the Commission. In the absence of any objections, this transcript is deemed to be the official record of the proceedings. The parties submitted post-hearing briefs in September of 2016. Having reviewed the record and post-hearing submissions of the parties, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Shirley Eslinger, is a female who has a Bachelor of Science degree in Engineering from Southern Illinois University. She has received a wide variety of training on engineering, management and technical subjects and is a Registered Professional Engineer (P.E.) in Massachusetts, Missouri and Colorado. Complainant is also a Registered Structural Engineer

in Illinois. (Tr. 1, pp. 5-14; Jt. Exs. 1, 45, 48, 51) Complainant has over 30 years of experience working as an engineer, in both the private and public sectors, including the Missouri Department of Transportation. (Tr. 1, pp. 14-18; Jt. Ex. 1, 52) In 1994 she received an award for outstanding achievement from the National Society of Professional Engineers. (Tr. 1, p.10; Jt. Ex. 52)

2. Respondent, MassDOT, is a state agency within the executive branch of state government that is responsible for the oversight, operations, and management of the Commonwealth's highways, transit systems, motor vehicle registry, and aeronautics. It is an employer within the meaning of G.L. c. 151B. MassDOT was created following the passage of the Transportation Reform Act of 2009, in which several state transportation agencies, including the former MassHighway and the Massachusetts Turnpike Authority (MTA), were merged and reorganized into a single entity. The merger was effective on November 1, 2009. (Administrative Notice, Tab1)

3. At all times relevant to this matter, Luisa Paiewonsky was the Commissioner of MassHighway. Following MassHighway's consolidation into MassDOT, Paiewonsky was named Administrator of the Highway Division within MassDOT. In both positions, she was head of the agency. (Jt. Ex. 32, 33) Paiewonsky began her career at MassHighway in 1989 as an intern, was promoted through the organization several times, and was named Deputy Commissioner in 2002 and Commissioner of MassHighway in 2005. (Tr. 3, pp.6- 7) Since the 1990's, Paiewonsky has been an active member of the Women's Transportation Seminar (WTS), an international organization whose mission is to advance women in transportation related careers, and which provides training, networking opportunities, and mentoring. (Tr. 3, pp. 4-6) She also serves on an Advisory Board at the University of Massachusetts-Lowell Center for

Women and Work, which conducts research and seeks to end gender inequality for women in the workplace. (Tr. 3, p. 60) Paiewonsky testified that she undertook efforts to expand the reach of personnel postings to places like WTS Boston to increase diversity in the industry and to enhance awareness of job opportunities for qualified women and minorities at MassHighway. (Tr. 3, p. 114; Jt. Ex. 62 p.2)

4. At all times relevant to Complainant's employment, Frank Tramontozzi was the Chief Engineer at MassHighway and was Complainant's direct supervisor. He later became the Chief Engineer at MassDOT. Tramontozzi was hired by Paiewonsky to be Chief Engineer at MassHighway in 2008 and he reported to her. (Tr. 2, p. 21; Jt. Exs. 14, 32, 33) Complainant had applied for the Chief Engineer job at MassHighway when Tramontozzi was selected as the successful candidate. She was interviewed by Paiewonsky, who was impressed with her experience and credentials. (Tr. 3, pp. 8, 16)

5. As a result of their prior interaction, Paiewonsky had Complainant in mind when she sought approval for creation of a new Deputy Chief position at MassHighway to oversee the agency's bridge and asset management staff. After securing approval and consulting with Tramontozzi, she recruited Complainant for the position. The position was not posted and no other candidates were considered. Paiewonsky testified that she was seeking a fresh perspective and new leadership in the MassHighway organization. (Tr. 3, pp. 9-11, 16)

6. In or about April of 2008, Complainant was hired by MassHighway as Deputy Chief Engineer of Bridges and Asset Management. (Tr. 1, pp. 20-22; Jt. Ex. 5) Registration as a Professional Engineer in Massachusetts was a "preferred qualification" for the position. (Tr. 1, p. 30; Tr. 2, p. 38) Complainant began working in the position on or about May 5, 2008. (Jt. Ex. 5) She was the first female Deputy Chief Engineer in MassHighway's history. (Tr. 2, p. 9; Ex.

R-6) Paiewonsky testified credibly that she was proud of having recruited the first female Deputy Chief Engineer and was invested in Complainant's success. (Tr. 3, p. 48) She reached out to the two male Deputy Chief Engineers who were both long-term employees of the agency, asking them to be a support and a resource for Complainant. She testified that both had excellent interpersonal skills and had been very welcoming to her. (Tr. 3, pp. 14-15)

7. At all times during her employment, Complainant earned \$114,718.08 per year, the same compensation as the two male Deputy Chief Engineers. (Tr. 3, p. 13; Jt. Exs. 1, 35) Complainant's duties were focused on developing and implementing "a long term strategy for preserving and maintaining critical elements of the state's infrastructure." (Jt. Ex. 5) The position holder was responsible for "ensuring that the agency" would continue to improve its "Asset Management system," by evaluating and identifying "the most cost effective ways to replace, rehabilitate, or maintain" the state's "infrastructure," and by identifying potential savings." Priority was to be given to the oversight of design, construction, inspection and preservation of MassHighway system bridges which were considered the most critical asset. (See Jt. Ex. 3, Management Questionnaire; Tr. 3, 9-10)

8. In her sole written performance review from MassHighway, dated May 19, 2009, Complainant received a rating of "Successful Performer," a level above "Satisfactory." (Tr. 1, pp. 26-27; Jt. Ex. 1) Complainant did not receive any negative feedback with regard to her employment and received positive verbal feedback from Tramontozzi. (Tr. 1, pp. 27-28) Paiewonsky testified that she received feedback from the two male Deputy Chief Engineers that they had each reached out to Complainant, but she was disinterested in their help or support. (Tr. 3, pp. 14-15) Paiewonsky characterized Complainant's performance as a "mixed review." Paiewonsky testified that she sought to create a collaborative work environment since the

creation and design of highway and bridges is multi-disciplinary and “it is not possible to work solo.” (Tr. 3, p. 46-47) To that end, she encouraged Complainant to view her colleagues as resources but testified that Complainant was oftentimes not communicative or “silent” during staff meetings and did not interact or accept assistance from her colleagues. (Id.) Paiewonsky believed Complainant had the technical skills to do the job, but thought her communication skills and ability to work with colleagues were a drawback. (Id; Tr. 80-82) Tramontozzi also received reports from some of Complainant’s peers that they had difficulty communicating with her. (Tr. 2, p. 104-105) Paiewonsky testified that Complainant also relied on Tramontozzi more than was expected to resolve conflicts. (Tr. 80-82)

9. As part of her duties, Complainant was expected to bring about changes to increase efficiencies and streamline processes. (Tr. 3, p. 160) These efforts were met by some resistance from the staff, but both Paiewonsky and Tramontozzi supported Complainant’s efforts to implement changes. (Tr. 3, p. 16; Jt. Ex. 57; Tr. 2, pp. 30, 31; Jt. Ex. 55) They convened a meeting of the Bridge staff to convey support for Complainant’s authority and to support her efforts to implement changes to processes and to increase efficiencies. (Tr. 3, p. 16)

Paiewonsky proposed the Complainant be the “point person” for MassHighway on Bridge Project Development.¹ (Tr. 3, pp. 25- 27; Jt. Ex. 8) As such, Complainant had a “key role” in assisting MassHighway to identify which projects would be part of a new Accelerated Bridge Program. (Tr. 3, pp. 27-28)

¹ Complainant contended that she was made the temporary director of this project, but Paiewonsky stated that this was not her intent, and that she inadvertently referred to Complainant in an email as “Project Director (temp.)” (Tr. 3, pp. 25- 26; Jt. Ex. 8) Secretary of Transportation Bernard Cohen also testified that he did not publicly introduce Complainant as the Acting Director of the ABP program. (Tr. 2, pp. 6-7; Ex. R-6)

10. The Accelerated Bridge program came about as the result of an infusion of Federal funds in the amount of approximately \$3 billion over eight years designated for the rapid improvement of bridges in the Commonwealth. (Tr. 3, p. 17) By June of 2008, the planning process for what would be the Accelerated Bridge Program (ABP) had begun in earnest. This included identifying bridges to be targeted by the program, determining the highest priorities, setting goals for the program, and determining appropriate staffing. (Tr. 3, p. 19) There were discussions about the whether the program would be run separately or as part of the state-wide bridge program. (Tr. 3, pp. 19-20)

11. The then Secretary of Transportation, Bernard Cohen, wanted the Accelerated Bridge Program to be a “stand-alone” entity, separate from the state-wide bridge program. He was concerned that the current bridge section structure could not handle the demands of the ABP and he wanted the ABP staff to be focused 100% on the program projects. Paiewonsky and Tramontozzi preferred to keep the ABP within the existing state-wide bridge program. Secretary Cohen’s view prevailed and the ABP was structured as a stand-alone entity with its own staff and management separate from the bridge section. (Tr. 2, pp. 6-7; Tr. 3, pp.19-21)

12. In July of 2008, sometime after the legislation creating the ABP program was signed, Stephen O’Donnell was appointed as the interim director of the ABP program. (Tr. 3, p. 21; Jt. Ex. 58) In an email discussing his appointment, Complainant was identified as “Director of Bridge Project Development.” (Jt. Ex. 58; Tr. 3, pp. 23-25) O’Donnell had previously served as the District Highway Director for MassHighway’s District 4, which was then the largest and most complex District within MassHighway. He was also the Director of Maintenance and, according to Paiewonsky, was someone who could “hit the ground running,” and pull resources together quickly. (Tr. 3, pp. 23-25) Paiewonsky testified that Complainant was not chosen as

Interim Director of ABP because she was a relatively new employee who had been on the job only a few months and already had a huge job dealing with the state-wide bridge program. (Tr. 3, p. 25) According to Paiewonsky, there was some misunderstanding or confusion in communications with other agencies about whether Complainant was the interim director of the ABP, because she was the “point person for MassHighway, but that Complainant’s position was always the Deputy Chief engineer of the state-wide bridge program, and not the interim director of the ABP. (Tr. 3, pp. 26-30; Jt. Ex. 59)

13. Paiewonsky officially announced O’Donnell’s appointment as Interim Director of the ABP on August 18, 2008 in an agency-wide email. Paiewonsky wrote that O’Donnell was “responsible for overseeing all aspects of the Accelerated Bridge Program, working closely with District Directors and Deputy Chief Engineers, Shirley Eslinger,” and her two peers. (Jt. Ex. 61) Respondent posted the position for a permanent ABP Director as an M10 Manager position on August 15, 2008 and recruited nationwide for the position. (Tr. 3, pp. 30-31; Jt. Exs. 34, 64) The job posting outlined the duties, the minimum requirements for the position and the preferred qualifications. A Professional Engineering (P.E.) license was listed as a preferred qualification, but not a requirement of the job. (Jt. Ex. 34; Tr. 3, pp.33-34)

14. Complainant did not apply for the ABP Director position and did not express any interest in the position. (Tr. 3, p. 32; Tr. 2, p. 62) She participated in the first round of interviews on a panel that was responsible for narrowing the field of twelve candidates down to three finalists. (Tr. 1, pp. 41-42; Tr. 3, p. 32; Jt. Ex. 66) One of the three finalists, Shoukry A. Elnahal, was the successful candidate for the position. (Jt. Ex. 2) Complainant testified that she had some reservations about Elnahal, but she did not communicate them to Paiewonsky. (Tr. 1, pp. 42, 125-126, Tr. 3, p. 33) Elnahal was then employed by the Federal Highway

Administration Resource Center, had more than 30 years of experience in the engineering field, and had led major national Federal Highway Administration Engineering Programs. He had experience in structural design, construction, accelerated bridge construction and Pre-fabricated Bridge Systems. (See Jt. Ex. 12) Paiewonsky and Tramontozzi gave due consideration to his experience with federally funded projects and his extensive work with the Federal Highway Administration, particularly with bridges and structures, because half the ABP was federally funded.

15. Elnahal, who was not a registered professional engineer (P.E.) in Massachusetts, was hired at a salary of \$120,000, some \$18,000 less than he was earning at the Federal Highway Administration, and approximately \$5000 more than Complainant and the other two male Deputy Chief Engineers. Elnahal reported to Chief Engineer, Tramontozzi. (See Jt. Exs. 2, 14; Tr. 3, p. 33; Tr. 2, pp. 62-63) He successfully managed the ABP and advanced innovative ideas for bridge rehabilitation and replacement. Highlights of his initiatives included the “Fast 14” (the rapid bridge replacement project on I-93) and the rehabilitation of several other major bridges, employing innovative replacement techniques such as using pre-casted decks and “bridge in a backpack.” During his tenure, the program received national recognition and awards. (Jt. Ex. 78, pp. 32-34; Tr. 3, p. 43) Elnahal continued to manage the ABP when he was appointed Deputy Chief of Bridges and Tunnels at MassDOT in March of 2010 until his resignation in April of 2013.

16. Pursuant to the Transportation Reform Act which became effective on November 1, 2009, MassHighway, the Mass Turnpike Authority (MTA) and elements of the Department of Conservation and Recreation (DCR) were abolished and their operations merged into the Highway Division of the newly formed Massachusetts Department of Transportation known as

MassDOT. (Administrative Notice, Tab #2) The new agency grew in size and scope both in terms of assets and projects to be managed and increased personnel. (Tr. 3, pp. 49-51) Jeffrey Mullen, who had been the Chairperson of the Turnpike Authority, was named as the Secretary of Transportation responsible for MassDOT. Paiewonsky was named as the Chief Administrator of the Highway Division within MassDOT. Paiewonsky was given a clear directive by the Secretary of Transportation to form a management team that encompassed staff from both MTA and MassHighway, that built on and emphasized the strengths of the former organizations, and that avoided duplication or redundancy in management. (Tr. 3, pp. 50-51) To comply with these directives, Paiewonsky had to confront the challenges of duplication of management positions in the predecessor agencies and she was required to restructure and to eliminate some management positions. She testified that this was a very turbulent time with great anxiety among employees about the possible loss of their jobs. (Tr. 3, pp. 48-49, 52-53)

17. Paiewonsky selected Jerry Allen to be MassDOT's Deputy Chief Engineer for Operations and Maintenance. Allen had been the Chief Maintenance Engineer for the MTA, which had the reputation for being successful in the areas of operations and maintenance. This decision required Paiewonsky to eliminate the counterpart position at MassHighway held by Tom Laughlin. Prior to the reorganization, Laughlin was the head of Highway Operations at MassHighway and he and Paiewonsky shared a close working relationship. (Tr. 3, pp. 52-54) It was apparent Paiewonsky's testimony that eliminating Laughlin's position was a very difficult decision for her. Paiewonsky appointed Michael McGrath, who had been Director of Construction at MassHighway, to fill a new position of Deputy Chief Engineer for Construction at MassDOT, reflecting an increase in his role and responsibilities occasioned by the increase in the scope and size of the new agency. (Jt. Ex. 14, Tr. 3, pp. 54-55)

18. Paiewonsky made the decision to retain Tramontozzi as the Chief Engineer for MassDOT. As a consequence of consolidation, the position of Chief Engineer at MTA, held by Helmut Ernst was eliminated. (Tr. 3, pp.77-78) Ernst was notified by Secretary of Transportation on a Friday in November 2009 that he was being assigned to a new role at MassDOT the following Monday as the District Head of a new District 6, reporting to Tramontozzi. (Tr. 2, pp. 116-117, 130; Jt. Ex 27) District 6 was a new highway district comprised of 20 municipalities within the metropolitan Boston area which included the “metropolitan highway system.” (MHS) The MHS is the I-90 system of tunnels and bridges, which includes the Big Dig tunnels, consisting of the Ted Williams Tunnel, the O’Neil Tunnel and the Zakim Bridge. It is the most complicated roadway and bridge network in the state. (Tr. 2, pp. 68-69) Ernst was given no other options for continued employment with MassDOT and he suffered an annual pay cut of some \$20,000 to \$23,000, which he viewed as a demotion. Paiewonsky decided to cut the salary for the position because it did not conform to the pay scale for Ernst’s counterparts at MassHighway. She testified that this was also a very difficult decision. (Tr. 3, pp. 77-78; Tr. 2, p. 117) Ernst was one of several managers at the Turnpike Authority whose positions were re-purposed, re-deployed or even eliminated as a result of the merger. (Tr. 2, pp. 114, 121-122)

19. The merger also required Paiewonsky to address how the State-wide Bridge Programs from MTA and DCR would be consolidated under the new MassDOT. At least two male managers from the former agencies were reassigned from state-wide bridge programs to positions in the newly formed District 6. (Tr. 3, pp. 60-62) Paiewonsky decided to combine the Accelerated Bridge Program Director position held by Elnahal and the Deputy Chief Engineer for Bridges and Asset Management, held by Complainant. Paiewonsky testified that

the decision to merge two state-wide bridge programs resulted from the Secretary's directive in the wake of the merger, to consolidate functions and avoid duplication of positions. (Tr. 3, pp. 59-60)

20. Paiewonsky chose Elnahal to fill this new position because she believed his technical skills and skills as a manager made him the right person for the job. In addition to excellent technical skills, the qualifications she sought for the position included good communication skills, a willingness to take "managed risks," the ability to work well with others, particularly those at different professional levels, and to interface with various other government entities including the Governor's Office, the Secretary of Transportation and the Legislature. She favored a candidate who recognized the necessity of collaboration in managing such a large program to deliver results in a short time period, and one who could communicate well at all levels, motivate individuals to work for a common purpose, and who had demonstrated the ability to get projects done. (Tr. 3, pp. 80-81) Paiewonsky testified that Elnahal possessed these characteristics as demonstrated by his organizing, developing, and executing the "very high profile" Accelerated Bridge Program; interfacing with the Governor's office on that program; demonstrating strategic thinking with respect to reforms and innovations to the bridge program; and taking the initiative in spreading reforms throughout MassHighway. She provided several concrete examples of his innovative approaches to programs. (Tr. 3, pp. 79-80)

21. Paiewonsky testified that Complainant's strengths did not lie in these areas but rather in her technical and engineering skills. Paiewonsky had observed that Complainant did not demonstrate qualities of innovation, leadership, communication and effective collaboration. According to Paiewonsky, Complainant did not play an active role in conflict resolution, problem solving or inspiring staff to think creatively. (Tr. 3, pp. 81-82) Notwithstanding,

Paiewonsky sought to retain Complainant because of her significant engineering skills. (Tr. 81) Paiewonsky and Tramontozzi met with Complainant on December 7, 2009 and Paiewonsky discussed the new organization and changes that were coming. She informed Complainant that she had a new position for her as “head of structures” for the newly formed District 6. Complainant testified that Paiewonsky asked her if she would be interested in being the “director of tunnels.”² Complainant also testified that when she asked about her current position, Paiewonsky informed her it would remain vacant and would have to be posted. Complainant did not respond positively to the information about a new position. (Tr. 3, p. 64-65; Tr. 1, p. 55) After the meeting Complainant sent an email to Paiewonsky indicating that she was not interested in assuming the new position that Paiewonsky had described to her that morning and that she wished to remain in her then current position of Deputy Chief of Bridges and Asset Management. (Jt. Ex. 15) Paiewonsky denied telling Complainant that her then current position would remain vacant and stated that she said nothing to indicate to Complainant that remaining in that position would be an option. (Tr. 3, p. 66) I credit Paiewonsky’s testimony that the new assignment was not presented to Complainant as a choice.

22. On December 10, 2009, Paiewonsky sent an agency-wide email announcing five new appointments to the MassDOT Highway Division management team that included two former MTA employees and three Deputy Chief Engineers. Neither Complainant nor Elnahal were listed in the announcement. Paiewonsky testified that her intent in sending this email was to announce the new management team to date, and to note that it would include managers from both the former MassHighway and MTA, but that her team was not yet finalized. (Jt. Ex. 17; Tr. 69-70) Paiewonsky testified that she was unable to immediately address the concerns that

² There is a dispute about what Respondent called this position. Paiewonsky testified that there was not a firm title for the position at that point, but that it would be managing the structural assets in District 6, including bridges and tunnels. (Tr. 3, p.65)

Complainant had raised in emails or to meet with her due to a serious illness in her immediate family that kept her out of the office for a period of time in late December and early January.

(Tr. 3, p. 68)

23. On January 4 and 5, 2010, Complainant sent an email to Paiewonsky requesting a job title and job description and other details of the new position Paiewonsky had discussed in December. She also indicated that she was not qualified to perform the assignment because she did not have expertise dealing with tunnels and believed that accepting the assignment would put her in violation of her professional license. (Jt. Exs 17& 18) Complainant also asked for clarification about what her position within the new MassDOT would be, and referenced Paiewonsky's email of December 10, 2009 announcing that the two male Deputy Chiefs at MassHighway would become Deputy Chiefs for MassDOT. Complainant also noted that she had not received any further communication about her position within MassDOT. (Jt. Exs. 16 & 17) Respondent noted Complainant had previously been directed by Tramontozzi to develop more structural expertise with respect to tunnels, as they needed to expand their capabilities in that area because the new District 6 would encompass the tunnel system in Boston. Complainant responded that she had already begun to increase her knowledge about the tunnel system in anticipation that the MassHighway tunnels would become her responsibility. (Jt. Ex. 71, Tr.1, pp. 118-119)

24. On January 5, 2010 when Paiewonsky returned to work, she and Tramontozzi met with Complainant to discuss her new assignment to District 6. Paiewonsky clarified that the position was not "Director of Tunnels" but "Director of MHS Infrastructure," within District 6, which included bridges, tunnels, and the systems that supported them. Paiewonsky discussed that there was a need for a very high level engineer with structural expertise to assist with the

management of this very high profile and heavily traveled highway system. In response to Complainant's concerns about her P.E. license, Tramontozzi stressed that Complainant's job would not be designing and constructing tunnels, but ensuring that the maintenance and preservation protocols were developed and implemented by staff. They discussed that everyone in transportation management was experiencing changes due to the MassDOT integration. Paiewonsky's notes of this meeting indicate that Complainant did not refuse to accept the assignment but was very resistant to the change and insisted she would be required to report it to the state licensing authorities. Complainant was informed that she would be reporting to Helmut Ernst and was encouraged to speak with him about the position. Complainant was also informed that she was not being demoted to the position of "District Bridge Engineer," but would be performing significant and complex work and would retain her salary level. (Tr. 3 p. 63; Tr. 2, p. 74, 78; Jt. Ex. 19)

25. Subsequent to the January 5, 2010 meeting, Complainant sent an email to Paiewonsky and Tramontozzi reiterating her claim that they had referred to the position as "Director of Tunnels," requesting a written job description and reporting structure, and reiterating her belief that she had to report the assignment to the Board of Registration, that she was not qualified to perform the assignment, and that to accept it would violate her professional license. (Jt. Ex. 20) Paiewonsky responded that she and Tramontozzi had given the assignment careful consideration and believed Complainant was fully qualified to carry out the assignment, that the changes occurring with the formation of MassDOT had affected all of them, and that senior managers needed to approach the new environment with flexibility and professionalism. (Jt. Ex. 22) Complainant subsequently sought an opinion from the Board of Registration as to whether MassDOT was violating regulations governing her Professional Engineer License in

Massachusetts, but was advised on January 11, 2010, that the Board did “not have a specific answer” to her question. (Ex. R-7) Complainant continued to rely on the regulation at 250 CMR 4.03 which states in relevant part: “registrants shall undertake assignments only when qualified by education or experience in the specific technical field of engineering or land surveying involved.” (Jt. Ex. 7; Tr. 1, pp. 57-60) Respondent maintained that a Massachusetts P.E. license was not a requirement of the job and that Massachusetts Law exempts from registration requirements those engineers who work for a registered professional engineer. Both Tramontozzi and Ernst had Mass P.E. licenses. (Jt. Ex. 36; Admin. Notice 2 (G.L. c. 112, s. 81R); Tr. 1, pp. 148-149; Tr. 2, pp. 40, 111)

26. Tramontozzi contacted Ernst to discuss Complainant’s anticipated assignment to District 6, and he characterized Complainant’s qualifications and experience in a positive light. (Tr. 2, p. 123) They discussed Complainant’s role as being that of the level of a Deputy Chief at the former MassHighway, a high level management position, involving overseeing engineers, who in turn would be managing teams of employees. (Tr. 2, p. 124) Ernst was not told that Complainant was difficult to get along with or that she had difficulty relating to her peers. (Tr. 2, p. 133) Ernst testified that he envisioned Complainant as a “Director of Bridges and Tunnels” and responsible for managing teams of inspectional units, but not responsible for sealing design plans or designing tunnels. He welcomed the prospect of Complainant being assigned to the District, as he was in need of an engineer to manage its complex structures. (Tr. 2, pp. 124-12, 129-130) On January 6, 2010, Ernst called Complainant to discuss the new position, after being encouraged by Paiewonsky and Tramontozzi to contact her. He sought to discuss the position with Complainant and to settle on a start date, but testified that she refused to discuss anything about the position until she received a written job description and noted her concerns about her

P.E. Ernst described her demeanor during that conversation to Tramontozzi as “extremely difficult,” and “adversarial.” (Tr. 2, pp. 125-127; Jt. Ex. 21) Complainant testified that Ernst told her she would not get anything in writing, not to expect “special treatment,” and to think about the position and call him if she wanted to discuss. (Tr. 1, pp. 62-63; Jt. Ex. 21) I credit both accounts of this conversation and that it did not go well. Given Complainant’s reticence to accept the position, I do not doubt that she appeared to be intransigent and that Ernst, who had also been involuntarily reassigned to a new position at MassDOT, reacted somewhat negatively. Complainant memorialized this conversation in an email to Paiewonsky and Tramontozzi. (Jt. Ex. 21)

27. On January 7, 2010, Complainant informed Paiewonsky and Tramontozzi that she was “not interested in a position that [she] was not qualified to do,” and repeated her request that the new position be “put into writing and more importantly [explain] expectations.” (Joint Ex. 33) On January 11, 2010, Respondent’s Attorney Robert Horacek met with Complainant to “elicit as much information as possible regarding the proposed reassignment of [Complainant] to the new District 6 position, and to help resolve what appeared to be an “impasse,” regarding her resistance to accepting the position. Complainant continued to express to Horacek and others her interest in remaining in her current position as Deputy Chief of the State-wide Bridge program, and re-iterated her belief that her reassignment was a demotion, and that she lacked tunnel engineering expertise. (Tr. 1, 67, 143-144)

28. On January 25, 2010, Tramontozzi sent Complainant an email regarding the position entitled “District Six Manager Structures and Asset Management,” which was developed by Ernst and Tramontozzi and included a job description and the reporting structure. (Tr. 1, 63-64; Tr. 2, pp.74-78, 130; Jt. Ex. 27) The position description included supervising technical and

non-technical staff in the managing of billions of dollars of infrastructure, managing sensitive issues including administration, personnel matters, resolving disputes, and overseeing the safety of the District's infrastructure. (Tr. 2. p. 93; Jt. Ex. 27) Complainant contended that she could not perform any duty that referenced "tunnels" and responded with an email to Tramontozzi she would not be able to accept the position because of the concerns she had raised and the response she received from the Board of Registration. (Jt. Ex. 28, Tr. 1, p. 144) Complainant testified that she also viewed the job as a demotion because she was in a lower position in the organizational structure and would no longer report to the Chief Engineer and because the responsibilities and the level and number of people reporting to her were diminished. Despite the fact that Complainant's grade and salary would remain the same, she declined to accept a position she regarded as a demotion. (Tr. 1, pp. 60-61; 65-66)

29. Complainant did not communicate further with Paiewonsky or Tramontozzi about the position. Complainant was never informed outright that if she did not accept the District 6 Director position, she would be terminated, but I find that this was clearly the implication of the many discussions Respondent had with her about the new position. Additionally, Paiewonsky informed Complainant that there were lay-offs and furloughs occurring and she really wanted to keep Complainant within the organization. Paiewonsky stated that she had more conversations with Complainant than with any other employee before terminating her position, because she had recruited Complainant and was committed to retaining her at MassDOT. (Tr. 3, pp. 98-99) I credit her testimony. On March 1, 2010, Complainant was informed that her employment was terminated. The termination letter she received that same day stated that (her position was eliminated "due to a reorganization and consolidation of various management positions." (Tr. 1, 68-70; Jt. Ex. 31)

30. El Nahal was ultimately appointed to the new position of Deputy Chief of Bridges and Tunnels at MassDOT. Paiewonsky testified that she made the decision and Tramontozzi concurred with her recommendation to remove Complainant from her Deputy Chief position and to assign Elnahal to the new position at MassDOT that consolidated Complainant's former duties and El Nahal's duties as Director of the Accelerated Bridge Program. (Tr. 3, pp. 78, 83-84; Tr. 2, pp. 81-82, 97) The five remaining Deputy Chiefs at MassDOT were all male and reported to Tramontozzi. (Tr. 3, p. 102, Tr. 2, p. 99; Jt. Ex. 32, 33) Paiewonsky testified that in choosing El Nahal for the statewide Deputy Chief position she considered the importance of superior communication, collaboration and leadership skills, which she determined El Nahal possessed. (Tr. 3, pp. 181-182) Paiewonsky asserted that Complainant had some short-comings with these essential management and communication skills, despite her excellent technical abilities. (Tr. 3, pp.15; 46-47)

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B s. 4(1) prohibits discrimination on the basis of sex. Complainant alleges that she was the victim of sex discrimination when she was reassigned to a position at MassDOT that she believed was inferior to her current position at Mass Highway and which she viewed as a demotion. She also alleges that her non-selection for a Deputy Chief position at MassDOT was based on her gender.

Respondent asserts that there is no direct evidence that Complainant was discriminated against based on her gender. In the absence of direct evidence, discrimination claims are analyzed using the three stage burden-shifting model of proof set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and adopted by the SJC in Wheelock College v. MCAD, 371 Mass. 130 (1976). In order to establish a prima facie case of gender

discrimination, Complainant must show that (1) she is a member of a protected class; (2) she was adequately performing the duties of the job at issue; (3) she was subjected to adverse treatment; and (4) she was treated differently from individuals outside of her protected class. Blare v. Husky Molding Systems, 219 Mass. 437, 441 (1995). The elements of a prima facie case may vary depending on the specific facts of the case. Wheelock College, supra at 135; Abramian v. President & Fellows of Harvard College, 432 Mass. 107 (2000). Complainant has established a prima facie case of gender discrimination following the inferential model of proof.

Complainant belongs to a protected class by virtue of her gender. There is evidence that she was adequately performing her duties at MassHighway as the Deputy Chief Engineer for Bridges and Asset Management. Her sole performance review indicates she was a “successful performer.” Respondent asserts that Complainant does not satisfy the third element of the prima facie case, because she cannot demonstrate that she suffered from an adverse employment action, in that she could not show a “change in working conditions which materially disadvantaged” her. McCormack v. Boston Edison, 423 Mass. 652, 662 (1996)

Respondent argues that Complainant’s reassignment to MassDOT was not a demotion in grade or salary. Had she accepted the position she would have experienced no diminution in pay, benefits, or management classification. Complainant would have been a member of the senior management team of District 6. However, the new position would have placed Complainant one level lower on the reporting structure, since she was scheduled to report to Ernst, who was no longer a Chief Engineer, and who in turn reported to Tramontozzi. Complainant asserts that the position she was offered at MassDOT was inferior to her

position at MassHighway, because she would have fewer direct reports, the breadth of her duties was diminished and she was lower on the organizational chart. Respondent disputes that Complainant's duties were diminished, noting that District 6 was comprised of billions of dollars of significant infrastructure that was highly traveled and essential to the region's highway system. Complainant was to have management oversight of all the major structures in District 6, not just bridges. Paiewonsky believed that the new assignment emphasized Complainant's strengths and expertise in structural engineering. Complainant asserted she had no expertise in tunnel engineering. She believed serving in the position would violate her State PE license and require her to gain expertise in a new area, which she considered adverse consequences. Given the change in reporting, loss of the title Deputy Chief, different duties that no longer encompassed state wide structures, and the assignment of new responsibilities outside Complainant's area of expertise, the new position at MassDOT could reasonably be viewed as adverse to Complainant. While reasonable persons could disagree about whether she was materially disadvantaged, I conclude that for purposes of a prima facie case, Complainant has demonstrated that certain aspects of the reassignment could be characterized as an adverse job action, even if not technically a demotion.

Finally, Complainant asserts that she was treated differently than similarly situated male employees, because the remaining two Deputy Chief Engineers at MassHighway retained their titles and positions at MassDOT while Elnahal became the Deputy Chief for Bridges State-wide. For purposes of establishing a prima facie case, Complainant has demonstrated the four required elements.

Once a prima facie case is established, Respondent must articulate a lawful reason for its action, supported by some credible evidence that the reason advanced was the real reason.

Blare, supra at 442 quoting Wheelock College, supra at 138. This burden of production is not onerous. Blare at 442.

Respondent has asserted that Complainant was reassigned to the position overseeing major structures in District 6 as a result of a reorganization and consolidation required by the Transportation Reform Act and the establishment of MassDOT. As head of MassDOT, Paiewonsky was charged with facilitating the reorganization. She had to make a number of difficult decisions to eliminate positions that were redundant and that compelled the reassignment or termination of staff. These decisions impacted a number of highly placed male managers in both MassHighway and the MTA, as well as Complainant. I conclude that the high level managers Paiewonsky referenced as being subject to layoff or reassignment were comparators for purposes of this case and that the group of comparators is broader than just the Deputy Chief Engineers from MassHighway. A comparator's circumstances need not be identical, but should be substantially similar to Complainant's. Trustees of Health and Hospitals v. MCAD, 449 Mass. 675, 682 (2007)

Paiewonsky testified that she chose Complainant for the District 6 position because of her technical and engineering expertise and because Paiewonsky sought to retain her talent in these areas. Respondent asserts that while Complainant's geographic focus as the District 6 manager would have shifted from a statewide perspective to the Boston metropolitan area, her duties would have been commensurate with her duties at MassHighway, requiring similar technical skill and expertise. While Complainant's new assignment was one step lower in the new organizational structure, she would have remained at an M10 level of management and her salary was unchanged. In the new position, Complainant would have been responsible for monitoring and maintaining the integrity of very important, highly traveled

structures in the Massachusetts Highway system that connect the City of Boston and the surrounding region.

Complainant chose not to accept the offer of reassignment to District 6 in MassDOT and informed Paiewonsky and others that she preferred to remain in her position as Deputy Chief Engineer overseeing the state-wide bridge program. Complainant failed to grasp that the offer of reassignment was not a choice and she claims not to have been informed of the consequences of failing to accept the reassignment. This is difficult to fathom given the persistent measures undertaken by Respondent to encourage her to accept the MassDOT position. Paiewonsky was extremely disappointed that Complainant did not accept and embrace the new position and was surprised that Complainant considered the reassignment as optional, given the warnings that jobs were being eliminated. Given Complainant's refusal to accept reassignment, Paiewonsky ultimately was compelled to inform Complainant that her position at MassHighway was eliminated.

Complainant asserts that she was justified in declining assignment to the MassDOT District 6 position because she believed it would have placed her in violation of her Massachusetts Professional Engineering license. She asserted this because she did not have structural expertise with respect to tunnels. However, Respondent argued convincingly that there would have been no such violation because Complainant was not responsible for design and construction matters, but was to oversee compliance with maintenance protocols by technical teams that had the requisite expertise and knowledge. Respondent also noted that the Board of Registration declined to issue an advisory that the new assignment would place Complainant in violation of her PE license.

Subsequently, Elnahal was appointed to a MassDOT position that was broader in scope than Complainant's former position and that included overseeing the former state-wide bridge and ABP programs at MassHighway and other structures. Paiewonsky asserted that she chose him for this position because of his demonstrated leadership and vision, communication skills, and innovative approaches as Director of the Accelerated Bridge Program. She gave very specific examples of how he excelled in these areas as the Director of the ABP. I conclude that Respondent asserted legitimate non-discriminatory reasons for its reassignment of Complainant, eliminating her former position, and choosing Elnahal for a new position that consolidated their former duties and encompassed other structures.

At the third stage, the employee must prove that the employer's decision was motivated by unlawful discrimination. Blare at 442-443, 446; Abramian at 118. The fact-finder may draw an inference of discriminatory animus "from proof that the employer offered a false reason for the employment decision." Lipchitz v. Raytheon Co., 434 Mass. 493, 502 (2001). Complainant challenges Respondent's assertion that her position was eliminated as false, because Elnahal was appointed as a Deputy Chief and assumed her prior duties. She asserts that the purported elimination of her job due to reorganization and consolidation is a pretext for gender discrimination because her former duties were assumed by a male engineer who was less qualified.

The evidence demonstrates that Complainant's former position at MassDOT was eliminated and that Elnahal's new assignment at MassDOT was broader in scope than Complainant's former job, and was a consolidation of their two former positions. The MassHighway Bridge programs were an area where there was significant duplication of

efforts and overlap of responsibility, a redundancy Paiewonsky was charged with eliminating as part of the re-organization. The new position consolidated the state-wide bridge and ABP programs under Elnahal with additional responsibilities. There is no evidence that the elimination and consolidation of positions was a pretext for gender discrimination.

Complainant next asserts that she was a better candidate for the consolidated Deputy Chief position because she had an additional engineering license (structural engineer) and was a licensed PE in Massachusetts. However, these licenses were not required for the job, and Paiewonsky determined in good faith that the District 6 position was a better fit for Complainant precisely because of her technical and engineering strengths. More importantly, in appointing Elnahal to the new position at MassDOT, Paiewonsky considered other factors beyond technical skills that she viewed as important to leadership. She discussed Elnahal's demonstrated innovative solutions, communication skills, and successful collaboration with stake-holders at all levels, and particularly noted his impressive leadership initiatives as the director of the Accelerated Bridge Program. Paiewonsky addressed some of the challenges Complainant had in these areas, including that she was uncommunicative and that she relied excessively on Tramontozzi to resolve conflicts in her department.

Ultimately, Complainant must prove that Respondent "acted with discriminatory intent, motive or state of mind." Lipchitz, supra at 504. In my view, she has not met this burden. Paiewonsky testified that she had authority to designate management positions at MassDOT and was the decision maker with respect to these assignments. If she were influenced by others in choosing her new team at MassDOT, it is not apparent from the record. Paiewonsky was a very credible witness and I take her at her word that the decisions rested with her, subject to approval by the Secretary of Transportation.

As a woman leader in a male-dominated industry, Paiewonsky recognized the importance of recruiting and retaining talented women. She has engaged in efforts throughout her career to support and recruit women to the industry. Having recruited Complainant to a high level management position at MassHighway, Paiewonsky was invested in her success. She engaged in efforts to ensure Complainant felt welcome and supported by her peers and bolstered Complainant's authority with subordinates when they resisted change. Paiewonsky greatly respected Complainant's technical and engineering capabilities and sought to retain Complainant in a high level management position at MassDOT. Complainant, herself, acknowledged that Paiewonsky "fought for her," but did not prevail. However, the evidence does not suggest that Paiewonsky's hiring decisions or her efforts on Complainant's behalf were countermanded in any way. As one who undertook significant efforts to enhance diversity in the industry and to promote women's careers, Paiewonsky appreciated the significance of having a female engineer in a high level management position. She considered Complainant's reassignment to District 6 as reflecting her efforts in this regard.

Finally, Complainant's was only one of many positions that underwent elimination or reassignment due to the reorganization and creation of MassDOT. Paiewonsky testified that the transportation reform act caused a great deal of angst, the times were turbulent, and many employees were very anxious about how the reorganization would affect their jobs. The consolidation of state-wide transportation agencies required Paiewonsky to make difficult decisions to eliminate a number of the high level management positions held by male employees at MassHighway and the Turnpike Authority. She also had to facilitate reassignments of some male managers to lower grade positions with significant salary cuts, which were clearly demotions. She testified that she made these decisions based on the

incumbents' strengths and record of successes in their prior respective positions. Her credible testimony was that these decisions were based on objective criteria, were not easy, and resulted in some long-term valued employees being disappointed and unhappy.

Even if Complainant had been justified in her view that she was not qualified to perform the duties of the new position, this does not advance her claim of gender discrimination. The evidence does not support an inference that Paiewonsky made the reassignment in bad faith or that she intended to drive Complainant out of the organization by assigning her to a job she could not do. Indeed the evidence supports the very opposite conclusion that Paiewonsky sought to retain Complainant in a high level position within the new organization that played to her strengths and skillset. Complainant nonetheless prejudged the assignment as a demotion, rejected it out of hand, and refused to even discuss the position and the possibility of her changing role with Ernst.

All of these circumstances lead me to conclude that Complainant's reassignment and the elimination of her former position were not motivated by considerations of gender but based on objective considerations of Complainant's strengths and challenges. There is no evidence to what extent, if any, considerations of local politics, or long-standing alliances, played a role in the MassDOT assignments. However, Elnahal's appointment to a high level MassDOT position as a relative new-comer, and Paiewonsky's credible testimony, suggest such considerations were not major factors in her decision making process. Even if political considerations were at play, this does not prove gender discrimination.

Given all of the above considerations, I conclude that Complainant's reassignment and the ultimate elimination of her former position after she declined the new assignment at MassDOT were not based on her gender and were not in violation of G.L. c. 151B.

IV. ORDER

The Complaint is hereby dismissed. This decision represents the final order of the Hearing Officer. Pursuant to 804 CMR 1.23, any party aggrieved by this Order may appeal this decision to the Full Commission. To do so, a party must file a Notice of Appeal of this decision with the Clerk of the Commission within ten (10) days after the receipt of this Order and a Petition for Review within thirty (30) days of receipt of this Order.

So Ordered this ^{24th} day of February, 2017.


Eugenia M. Guastaferrri
Hearing Officer