

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
REBECCA ANDREWS,

Complainant

v.

DOCKET NO. 08-BEM-00094

MASSACHUSETTS MARITIME
ACADEMY,

Respondent

DECISION OF THE HEARING OFFICER

Appearances: B.J. Krintzman, Esq. for Complainant
James B. Cox, Esq. & Julie M. Marcal, Esq. for Respondents

I. PROCEDURAL HISTORY

Complainant, Rebecca Andrews, filed a claim of discrimination based on race and retaliation against her employer, Respondent, Massachusetts Maritime Academy, on January 17, 2008. Complainant alleged that she was denied a reallocation to the position of Administrative Assistant II (AAII) from her then current position as Administrative Assistant I (AAI), because of her race, in violation of G.L. c. 151B § 4(1), and alleged that she was subjected to retaliation in violation of § 4(4) for filing internal complaints of discrimination with Respondent's Affirmative Action Officer. The Investigating Commissioner found probable cause to credit the allegation of race discrimination but dismissed the charges of retaliation for lack of probable cause. Efforts at conciliation were unsuccessful and the matter was certified for a hearing. A

hearing was held before the undersigned Hearing Officer in April, July and August of 2011. Subsequent to the Hearing, the parties submitted post-hearing briefs. Complainant also submitted a Motion to Admit Claimant's Post-Hearing Exhibit I, which details the difference in salary between an AAI and an AAI for the period of June 2006 to October 2011. It was compiled with the assistance of an HR employee at the Academy. Respondent objected to the admission of this post-hearing exhibit, on the grounds that Complainant failed to introduce the evidence at hearing. Given that the salary for these positions is governed by collective bargaining agreements with AFSCME, and the amounts are not disputed, can be independently verified, and could have been stipulated to, the post-hearing admission is not prejudicial to Respondent and is allowed. Moreover the salary tables for 2006, 2007, and 2008 are in evidence as part of Exhibit R-1, the AFSCME contract in force from July 2005 to June 30, 2008. Having reviewed the record of the proceedings and the parties' post hearing submissions, I make the following findings of fact and conclusions of law.

II. FINDINGS OF FACT

1. Complainant, Rebecca Andrews is a female of Cape Verdean ancestry who identifies as black. Complainant was 57 years old at the time of the hearing in this matter. She has been employed by the Respondent Massachusetts Maritime Academy for 35 years, having commenced her employment in 1977 in an entry level administrative position. (Clerk IV) (Vol. I, p.23) Complainant currently holds the position of Administrative Assistant I in the AFSCME union and her job title is Faculty Secretary. (Vol. I, p.24)

2. Respondent, Massachusetts Maritime Academy, is a public state university that offers bachelor's degrees in a variety of marine and maritime related disciplines. The Academy has eight academic departments organized within the Academic Affairs Division. It employs approximately 74 full time and 40 part-time faculty members. (Vol. 7, pp. 61-63) At the time Complainant began working for Respondent there were approximately 50 faculty members. (Vol. 7 p. 63) Despite the increases in the number of faculty members, Complainant is the only clerical support person for the faculty. (Vol. 7 p. 70) Complainant's workload has increased over the years despite the fact that many of the faculty members do not use her for regular support services. (Tr. Vol. 2 pp. 86-87)

3. Complainant's duties as faculty secretary include typing correspondence and exams, recording grades, and organizing student evaluations. (Vol. 1 p. 61) She also purchases supplies for the faculty and maintains the individual departments supply budgets, and has worked on special projects for the faculty. (Exs. C-21 & C-22) Respondent asserts that Complainant's duties are significantly diminished during the 42 day "sea term" when few faculty members are on campus and few classes are held and during the summer months when most faculty are not required to be on campus. (Vol. 7, pp. 64-65, 73; Vol. 8, pp. 17-18) Respondent also asserts that the nature and complexity of Complainant's duties has not changed significantly over the years.

4. During the period relevant to this matter, Admiral Richard Gurnon was the President of the Academy, Captain Bradley Lima was the Dean and Vice President of Academic Affairs , Captain Allen Hansen was the Vice President of Student Services, Attorney Steve Kearney was the Legal counsel and Dean of Human Resources, and Attorney Anne Folino was the Director of Affirmative Action/EEO. (Vol. 7, pp. 4, 60; Vol. 6, p. 33; Vol. 4, pp. 93-94; Vol. 3 p. 3)

5. The Academy's clerical and technical employees are represented by AFSCME and their employment is governed by a collective bargaining agreement, which provides a grievance and arbitration procedure. (Ex. R-1) Article 23, section 2 of the AFSCME contract specifies a procedure for a unit members' appeal of a position's classification. (Ex. R-1, p.57)

Reclassification is the procedure by which an employee may request an upgrade to his or her position/title based on a change in the employees duties and if the duties the employee is performing do not match those in the employee's current title. (Vol. 7, p. 12) According to Respondent, reclassification appeals are granted only if an employee is performing work of another higher title or job classification, and are not granted for length of service or quality or quantity of work. (Id.; Vol. 5 p. 82; Vol. 6, p.97-98) I do not find this assertion entirely credible because there is evidence that Respondent's application of, and adherence to, the articulated criteria for reallocation was inconsistent and arbitrary, and that it relaxed the rules depending on the individual seeking reclassification.

6. Complainant had applied for a reallocation from Administrator I to Administrator II in 1997 and was denied. At the time she supervised Carol Concannon, who was also a faculty secretary. (Vol. 1, p. 26, 34; C-2) Complainant's request for reallocation was denied at that time because she did not supervise eight people but supervised only one person. (Vol. 1, p. 35) Steve Kearney, who at the time was the Reallocation Appeals Coordinator for Respondent testified that he denied Complainant's reallocation on the basis that she did not supervise eight people. (Vol. 4, p. 120)

7. In early 2003-2004, Respondent concluded that, given its small size, the requirement of supervising eight employees would be nearly impossible for any clerical employee to accomplish, and changed its interpretation of the job specs for an AAI to require supervision of

only one employee. (Vol. 4, p. 118; Vol. 7, pp. 178-179) Respondent asserts that it also looked for a certain level of sophistication of duties to justify the AAI title. (Vol. 6, p. 102-103)

8. From 2004 until 2007 Complainant was supervised by Dee Fearing who held a position within Academic Affairs and reported to Dean Bradley Lima. (Vol. 8, p.8) Fearing testified that because a small percentage of the faculty used Complainant's secretarial services with any frequency, she assigned some Academic Affairs work to Complainant during her slow times. (Vol. 8 p. 11-13) In July of 2007, due to Fearing's impending retirement, Complainant's supervisor became Sue Cornet, Assistant to Dean Lima. (Respondent's Ex. 31) Cornet assigned some Academic Affairs tasks to Complainant such as the SIR II student evaluations of faculty. (Vol.7 p. 67, Vol. 8, p.152) Both Fearing and Cornet testified that Complainant's computer skills were basic, however Complainant was assigned the majority of her work from faculty members and her designated supervisors did not review her work. (Vol. 8, p. 21-22, Vol. 7, p. 149; Vol. I, p. 116-117) Dean Lima testified that Cornet remained Complainant's supervisor for administrative purposes and for evaluation even after Carol Concannon was made Complainant's supervisor for time-keeping in June of 2007. (Vol. 7, p. 68) Cornet testified that at some point Mike Cuff became Complainant's "over-all" supervisor, while Concannon remained her supervisor for time-keeping. (Vol. 8, p. 153, 154)

9. In June of 2006, Complainant again applied for a reallocation of her position to AAI, stating that additional duties had been required of her over the past few years and that her job responsibilities had increased due to more faculty members and additional majors added to the curriculum. (Ex. C-6) Complainant stated her belief that others in the Department had been granted a reallocation based solely on an increase in workload. (Vol. I, p. 110) Respondent disputes that an increase in the volume of work is ever sufficient to justify a reallocation. (Vol.

6, p. 44) According to Complainant, a number of employees in the Academic Department who were Caucasian had been granted title changes, and she was the only employee in the department whose position had not been reclassified. Complainant sought the support of Dean Lima in her reallocation appeal but he declined on the grounds that he might be designated to hear her appeal and because she had identified him as “part of the problem” in previous correspondence. (Ex. R-39) Complainant testified that she believed that Dean Lima harbored discriminatory animus against her because he did not support her reallocation. (Vol. II, pp. 99-100) She stated that a basis for this belief was that “I’m the only person in his department who has not been promoted. And everyone else is Caucasian, and I’m black.” Id.

10. Complainant’s reallocation request went to Human Resources, but was not addressed for some time, ostensibly because the HR and Respondent’s President were working on an across the board upgrade of certain other lowest paid AFSCME employees, which did not impact Complainant. (Vol. 7, pp.7-9; Ex. C-10) In November of 2006, Shirley Gilmetti, the Director of Human Resources who handled the reclassification process, conducted a desk audit at Complainant’s work area. Gilmetti could not recall there being any AAI’s who were persons of color during her tenure at the Academy. (Vol. VI, p. 141) Gilmetti stated that she denied Complainant’s request because nothing had really changed and Complainant did not supervise anyone. (Vol. 6, pp.106-107) In January of 2007, Complainant’s request for reallocation to AAI was formally denied by Steve Kearney on Gilmetti’s counsel and advice. (Ex. C-11) Kearney testified that Gilmetti was handling the reallocation decisions at the time and he reviewed them. (Vol. 4 p. 110-111) Gilmetti testified that she signed the letter of notification for Steve Kearney. Kearney testified that the denial of Complainant’s request for re-allocation was based on the fact that she did not supervise anyone. (Vol. IV, pp. 117, 125) I credit

Kearney's testimony that the key factor in denial of Complainant's reallocation was lack of supervision.

11. On January 31, 2007, Complainant appealed Kearney's decision to Vice President of Student Services, Allen Hansen, the President's designee for reallocation appeals. (Ex. C-13, Vol. 6, p. 36) In May of 2007, Hansen denied Complainant's appeal and upheld Kearney's decision. (Exs. C-15, C-16) Hansen testified that if there was not a significant expansion in the job responsibilities of an applicant for reallocation, he was obligated to deny the request. (Vol. 6, p. 38) However, Hansen went on to state that he based his denial of Complainant's request for reallocation based on her lack of supervisory responsibility. (Vol. 6, p. 42) He further stated that he determined that the responsibilities included in Complainant's job duties were consistent with the description of an Administrative Assistant I responsibilities. (Vol. 6, p. 44) When Complainant sought clarification from Hansen regarding the duties performed by other secretaries who had recently been reclassified to AAI asking what duties they performed that she did not, she received no reply. (C-17; Vol. 1, p. 99) I find that the basis for Hansen's denial was lack of supervision.

12. Complainant appealed the denial of her reallocation to a Department of Higher Education labor/management panel, the final step in the appeals process provided for in the AFSCME contract. (Vol. I, p. 127, Vol. 6, p. 109) A hearing was held on March 25, 2008, and that panel denied Complainant's appeal. (Ex-25)

13. In the summer of 2007, Complainant also filed internal complaints of retaliation and race discrimination with the Director of Affirmative Action, Anne Folino, protesting her recent evaluation and the denial of her reallocation. (Vol. 3, p. 13-14, 32, Ex. 46) Folino ultimately determined the denial of Complainant's reallocation was not based on racial discrimination

because Complainant did not satisfy the supervisory requirements of the AAI position, and this was the primary reason her position had not been reallocated. (Ex. C-33) Folino also testified that she understood the only distinction between an AAI and an AAI was supervision, and that she reached this conclusion after consultation with her supervisor, the Human Resources Dean, Steve Kearney . (Vol. 3, pp. 11, 32-33)

14. The Massachusetts Department of Personnel Administration Classification for AAI and AAI was admitted into evidence. (Ex. C-3) These specifications have not been revised for over 20 years and the distinctions between an AAI and AAI are relatively insignificant, with the major difference being supervisory responsibility. Complainant testified that it was difficult to compare her duties to those of other administrative personnel because she is the only faculty secretary. (Vol. I, p. 87) I find based on the testimony of a number of witnesses involved in reallocations, that supervision is the only objective criteria relied upon in reallocation decisions, and that determinations about the significance of changes in duties is highly subjective.

15. Captain Joseph Murphy, a Professor in the Transportation department at Respondent, testified that an AAI position is considered an entry level position. Murphy is one of the professors for whom Complainant works on a frequent and regular basis. (Vol. IV, p. 6) He testified that the reallocation process at Respondent was “flagrantly abused” and stated that Respondents “make up job descriptions to match requirements of the reallocation.” (Vol. IV, p. 30) Murphy described the entire reallocation process as “capricious,” stated the process was not “uniform” and that the rules change depending on who is seeking a promotion. (Vol. IV, p. 31-32) I found Captain Murphy to be a very credible witness and I ascribe credence to his testimony that the re-allocation process is arbitrary and frequently based upon considerations other than actual job duties.

16. In August of 2005, Carol Concannon, who is white, and whose position at the time was an AAI, also applied for a reclassification to AAI. (Ex. R-16) Her request for reallocation was initially denied by HR Dean Steve Kearney because she did not supervise anyone. (Vol. 4, p. 120) Captain Hansen reviewed Concannon's appeal of the denial of reallocation and denied the appeal in April of 2007 because Concannon had no supervisory experience. (Vol. 6, p. 51; Ex. R-17) In June of 2007, Concannon's request for reallocation to an AAI was reconsidered and granted by Capt. Hansen. (Ex. C-60) This was after Dean Bradley Lima came up with the idea to make Concannon Complainant's supervisor by assigning her the responsibility of signing off on Complainant's time sheet. Dean Lima testified that he was involved in this decision, and that he had a conversation with Hansen in which he discussed assigning Concannon to be Complainant's supervisor because her current supervisor was retiring and he had trust and confidence in Concannon. (Vol. 7, pp. 89-91)

17. Concannon had worked for Hansen as his administrative assistant for at least two years when he was Registrar at Respondent years earlier. (Vol. 6, p. 48) According to Hansen, because Complainant's current supervisor was retiring "it was suggested" that Concannon could be Complainant's supervisor, but since one AFSCME employee could not evaluate the performance of another AFSCME employee, Concannon was to distribute work to Complainant and intervene if there were questions about the work. (Vol. 6, pp. 55-57) I do not find this testimony credible since, as the faculty secretary, Complainant was assigned work directly by faculty members. Moreover, as noted below, Concannon did not assign work to Complainant. Concannon's position was officially reallocated to an AAI by Hansen's decision dated June 29, 2007. (Ex. C-60; Vol. 3, p. 82, Vol. 6, p. 54)

18. Concannon's reallocation was made retroactive with an increase in salary, for a period of two years, a time in which she had no supervisory duties, ostensibly because of the "protracted nature of this process." (Ex. C-60; Vol. 6, p. 59) Hansen's formal notification of the reallocation to Steve Kearny notes that Capt. Bradley Lima agreed to assign Concannon the responsibility of supervision of faculty "secretaries," but noted that Complainant was the only faculty secretary. *Id.* According to Capt. Lima, Concannon was Complainant's supervisor for the purpose of recording her time only. She did not assign Complainant any work, nor did she evaluate her performance. (Vol. 7 p. 107) This is consistent with Complainant's testimony. (Vol. 1, p. 129-131) Complainant's "overall" supervisor was considered to be Sue Cornet. (Vol. 7 p. 107; C-30, p.1)

19. Anne Folino served as the Director of Affirmative Action and EEO at Respondent from July of 2005 until 2009. Folino, who is an attorney, was no longer employed by Respondent at the time of the Hearing. (Vol. 3, pp. 3-4) She testified quite candidly about her observations as the Affirmative Action Officer despite concerns that her husband, who remains employed at the Academy as an athletic trainer, might face retaliation. (Vol. 3, p. 10) She stated that in her view the administration paid lip service to EEO and that she sometimes felt frustrated raising EEO concerns and with the resolution of complaints by the administration. (Vol. 3, pp. 87, 93) She discussed some examples of disparate imposition of discipline by Respondent in situations involving minority employees. (Vol. 3 pp. 93, 94) Folino also voiced concerns about the administration's lax compliance with EEO initiatives in hiring during her tenure, but felt that generally hiring practices were fair. (Vol. 3, p. 101- 102, 109-110; Ex. C-53) On the subject of Carol Concannon's reallocation to AAIL, Folino wrote in a memo to Complainant in February of 2010, that Respondents "make up the rules as they go," and that the decision to make Concannon

Complainant's supervisor was an "after the fact move," to justify the reallocation. Folino was clearly expressing the view that the reallocation process at Respondent was arbitrary and unfair. (Ex. C-54; Vol. 3, p. 67; Vol.5, pp. 56-57) She testified that she discussed the issue with Steve Kearney and this was his conclusion. (Vol. 5, pp. 23, 24, 26) She also stated her observation that "there was a lot of favoritism and preferential treatment," at Respondent. (Vol. 5, p. 57)

20. Stephen Kearney became employed at Mass Maritime in 1993. In 1994 he was promoted to legal counsel and Director of Human Resources and in 1997 his title changed to Dean of Human Resources. He reported to Admiral Gurnon. (Vol. 4, pp.93-94) He left Respondent's employ in January of 2010 and also has a claim for discrimination pending against Respondent. (Vol. 4, p. 94-95) According to Kearney, the job descriptions of an AAI and AAI are "very, very similar" and that the main difference between the two levels in that job classification was supervision. (Vol. 4, pp. 117-118.) He testified that "on this sort of appeal, the test was whether or not the person was supervising another person. There was pretty cut and dry criteria." (Vol. 5, p. 81) I credit Kearney's testimony that the main distinction between the two positions was supervision. Kearney denied Carol Concannon's request for reallocation to AAI for the same reason that he denied Complainant's request, because she did not supervise anyone. His decision to deny Concannon's request was later overruled by Allen Hansen. (Vol. 4, p. 120) As to Concannon's eligibility for reallocation, Kearney testified, that Concannon was not supervising anyone at the time and "they approved the reallocation and assigned the [supervisory] duties at the same time." (Vol. 5 pp. 85-86) When Kearney received an inquiry from Complainant about why Concannon's reallocation was approved, Kearney was unable to respond and sought guidance from Allen Hansen, since he had not made the decision. (Ex. C-56) In an email dated November 25, 2008, Complainant asked Kearney if she could be made to

keep track of another AAI's time in order to qualify for a reallocation, he responded that in his opinion, "supervision requires more than simply recording time and attendance." (Ex. C-58) I credit Kearney's testimony.

21. Complainant's weekly salary would have been greater had she been reallocated to the position of Administrative Assistant II in 2006. According to Complainant, had she been placed in the position of AAI in June of 2006, she would have earned an additional \$30,841.48 as of 10/28/2011. (Complainant's Post-Hearing Exhibit 1) Respondent objected to the submission of this post-hearing exhibit, solely on the grounds that it is untimely, but I find that the salary ranges are governed by collective bargaining agreements in force during the relevant time periods and that the wage differential between an AAI and AAI positions is not disputed. Moreover, the salary tables for 2006, 2007, through June 30, 2008 are in evidence as part of Ex. R-1) The information in provided in Complainant's exhibit was provided by a Human Resources employee of Respondent via email to Complainant and presumably can be independently verified. Based on this information, I find that Complainant is entitled to an award of back pay from the date she applied for reallocation in June of 2006 up to the time of the hearing, the exact amount to be determined by the parties as governed by the existing union pay scales and the salary terms of the AFSCME collective bargaining agreement(s) in effect for the relevant time periods.

22. Complainant testified that she suffered and continues to suffer emotional distress as result of the denial of her request for reallocation, and that she suffered even greater distress when she learned that Concannon's position was being reallocated and that this change was justified by making Concannon Complainant's supervisor, simultaneous with the change in Concannon's position. Complainant testified that she suffers from high blood pressure that is exacerbated by

stress and that she takes anti-anxiety medication. She stated that she feels nauseated when she goes to work every day, was made to feel by the administration that she is “beneath them.” (Vol. 2, pp. 40-42) Other witnesses testified that that they had seen Complainant crying and upset at work. (Vol. 4, p. 34-35; Vol. 7, p. 161) However, there was also evidence that Complainant had suffered from high blood pressure and anxiety and began taking medication for these ailments as far back as the year 2000. (Vol. 2 pp. 104-107) Complainant also testified that she suffered a great deal of stress and anxiety resulting from what she viewed as retaliatory conduct by Concannon and others that occurred subsequent to Concannon being made overseer of her time. Much of this distress resulted from her disputes with Concannon about how she monitored Complainant’s time and requests for time off, which actions were investigated by Respondent and found not to be retaliatory. Complainant filed a number of internal EEO Complaints the third of which was filed on September 12, 2008, alleging that Concannon had engaged in harassing treatment of her. (Ex. C-39) These matters were investigated by Anne Folino, who found no basis for discrimination (Id.) and these claims were not before me. Notwithstanding, I conclude that Complainant did suffer emotional upset as a result of her being denied reallocation and as a result of Concannon’s subsequent reallocation and the assignment of Concannon to oversee her time sheets.

III. CONCLUSIONS OF LAW

Massachusetts General Laws c. 151B prohibits discrimination in the terms and condition of employment on account of race. The failure to promote or advance in employment is included in such prohibition. In the absence of direct evidence of unlawful motive, based on Complainant’s race and color, the Commission utilizes the burden shifting analysis set forth in

McDonnell Douglas Corp. v. Green, 411 US 972 (1973) and adopted by the Supreme Judicial Court in *Wheelock v. Massachusetts Commission Against Discrimination*, 371 Mass. 130 (1976). In order to establish a prima facie case of discrimination based on race, Complainant must demonstrate that she was a member of a protected class, that she was performing her job at an acceptable level, she suffered an adverse employment action and she was treated differently from individuals not in her protected class. See *Abramian v. President & Fellows of Harvard College*, 432 Mass. 107 (2000) (noting that the elements of a prima facie case may vary depending upon the specific facts of a case) Under this evidentiary paradigm, Complainant must demonstrate that she was treated differently from another person, not of her protected class, but otherwise “similarly situated.” *Matthews v. Ocean Spray Cranberries, Inc.*, 426 Mass. 122, 129 (1997) Complainant and her comparator were both Administrative Assistant I’s performing administrative and clerical duties at the time of their requests for reallocation. A comparator’s circumstances need not be identical to Complainant’s. *Id.*

I find that Complainant has established a prima facie case. Complainant is a person of color, a Cape Verdean woman who identifies as black. She is a long term employee of Respondent who by all accounts performed her job acceptably. Complainant’s position was not reclassified from an AAI to an AAI, and she has established that she was treated differently from a white comparator in the process of reallocation and has demonstrated the inconsistent application of the criteria for reallocation.

Respondent has articulated a legitimate non-discriminatory reason for its denial of Complainant’s application for reallocation. Respondent asserts that her duties have not changed significantly over the years and that a mere increase in the amount of one’s work does not justify a reallocation. More importantly, Respondent also asserts that Complainant has never met the

criteria of supervising the requisite number of employees, a number that appears to have been a moving target over the years. However, Respondent's denial of Complainant's application for reallocation cannot be viewed in a vacuum and must be considered in light of the circumstances of her comparator's reallocation. While Respondent's first reason may be worthy of some credence, I do not fully credit either of its articulated reasons as discussed below.

With respect to the issue of changing job duties, no single witness was able to articulate the precise criteria that distinguish the functions of an AAI from an AAI and it is clear that this criteria is subjective and easily susceptible to interpretation or indeed manipulation depending on the decision maker. Since Complainant was the only faculty secretary, her duties varied from other AAI's. Moreover the duties of administrative and clerical staff were sufficiently varied to make exact comparisons of one AAI's duties to another's virtually impossible. Therefore, I do not believe that a change in duties of an AAI, as articulated by Respondent, was necessarily a determining factor in reallocation decisions. At the very least, the extent to which a change in job duties might be considered as part of a reallocation determination, it remained a highly subjective factor. Despite its assertion that Complainant's job performance was lacking in some respects, Respondent admitted that Complainant's job performance was not at issue in this case.

The second articulated reason for the denial, lack of supervision, is seemingly objective, and not subject to interpretation or manipulation. Supervision was the only objective criteria for reallocation from an AAI to and AAI and I credit Kearney's testimony that the main distinction between the two positions was supervision. I find that for this reason it was *the* significant criteria and one that Respondent had to ensure was met in order to effect a reallocation.

However, despite Respondent's articulated adherence to specified criteria in making decisions about reallocation, I find that its adherence to the rules regarding supervision was

inconsistent and arbitrary. It is clear that departure from a prior practice or inconsistent application of neutral criteria can be probative of discriminatory intent. *See Trustees of Health and Hospitals of the City of Boston, Inc., v. MCAD*, 449 Mass. 675 (2007) (In a race and gender discrimination case strong animus of discrimination existed where neutral procedure for lay-offs was fully implemented only against African American employees) The inconsistent application of the criteria for supervision, as more fully discussed below, leads me to doubt the credibility of Respondent's articulated reasons.

However, even if Respondent can be deemed to have articulated legitimate non-discriminatory reasons for its actions, Complainant may demonstrate that its actions are a pretext for discrimination. The evidence is that Respondent manipulated the criteria regarding supervision in granting Concannon a reallocation of her position, while denying Complainant's reallocation on similar grounds. Not long after Respondent denied Complainant's request for reallocation, primarily on grounds that she did not supervise anyone, Respondent upgraded Concannon's position from AAI to AAI.

The testimony of Folino, Kearney, and Murphy which I found to be extremely credible, supports a conclusion that Respondent's actions in making reallocation decisions was arbitrary and inconsistent and that factors other than the articulated criteria may have been at play. Kearney, the Dean of Human Resources, applied the written criteria for reallocation with respect to supervision fairly and consistently, recommending denial of both Complainant's and Concannon's requests because neither of them supervised any other employee. Captain Lima who declined to support Complainant's request for reallocation on the grounds that he might be involved in her appeal, is the individual who proposed that Concannon be made Complainant's supervisor to facilitate Concannon's reallocation. I find that this was an after-fact-justification

because it is clear that Concannon's assignment as Complainant's supervisor was a pretense, as she was not intended in any way to assign, monitor or review Complainant's work, nor would she evaluate her performance. Her only supervisory function was to oversee Complainant's timesheet. This proposal was accepted by Vice President Hansen and approved by President Gurnon. Respondent's decision to reallocate Concannon's position after she was properly denied reallocation for lack of supervisory duties and granting her retroactive pay at the higher grade for a period of two years in which she had no supervisory duties, demonstrates that Respondent had no compunction about bending the rules for a white employee seeking reclassification. Granting exceptions to a policy for individuals not in a protected class, but not for a member of a protected class permits an inference of intentional discrimination. *See Currier v. National Board of Medical Examiners*, Mass. (2012); Slip opinion @ p.10 (interpreting the anti-discrimination provisions of the public accommodations law c. 272, s. 98) I find that Complainant has met her burden of showing pretext by demonstrating Respondent's inconsistent and arbitrary application of the criteria for reallocation, as evidenced by Concannon's advancement to an AAIL. Such an arbitrary application of the rules and lack of transparency in the process allows me to infer a discriminatory motive.

Ultimately, Complainant has proven that she was treated differently from her white counterpart for reasons that have proven to be pretextual. She was repeatedly told that she was not eligible for reallocation because she did not supervise at least six people. When Complainant supervised Concannon years earlier and applied for reallocation, Respondent did not consider her supervision of one person sufficient to permit her reclassification. In contrast, Concannon's reallocation was justified by the pretense that she was to be Complainant's supervisor by being assigned to monitor her time. The ease with which Respondent relaxed the rules to reallocate a

white employee, something it refused to do for Complainant, despite her more than thirty years of service to the Academy and repeated inquiries regarding the criteria for reallocation demonstrates impermissible discriminatory animus. Evidence that the employer made an exception to its articulated criteria for a white employee, in order to facilitate her reallocation, while denying such consideration to Complainant, permits an inference of intentional discrimination. *See Currier, supra.*

Respondent's failure to apply its reallocation criteria consistently and fairly to Complainant and Concannon demonstrates impermissible arbitrariness and lack of transparency in the reallocation process. All candidates for reallocation, but particularly those in protected classes, should be assured of transparency in the process and a guarantee that they start on a level playing field. Respondent's employees deserve fair and equal treatment in consideration of their requests for reallocation, not arbitrary and capricious decision making. I note Folino's credible testimony regarding Respondent's lax compliance with EEO initiatives in recruiting and hiring racial minorities. In light of all the evidence, Respondent's failure to apply its reallocation criteria in a fair, neutral and transparent manner renders its decisions arbitrary. Such arbitrary decisions are particularly suspect when a member of a protected is adversely affected. Personnel decisions that are tainted by favoritism or political influences are suspect where the decisions adversely affect a member of a protected class. *See Chief Justice for Administration and Management of the Trial Court v. MCAD*, 439 Mass. 729 (2003) (Hearing Commissioner's finding that sex was the reason for denial of promotions was upheld by SJC despite some support in the evidence that political support of successful candidates was reason they were selected to be clerks of court)

Finally, Respondent insisted that decisions regarding reallocation are not based on performance criteria, but solely on supervision and whether the duties of one's position have changed significantly to merit an upgrade. Despite this assertion, Respondent focused on issues related to Complainant's performance, whether she was liked by colleagues, and that fact that she had never applied for promotions, and whether she was scrupulous about her time-keeping. I find that these issues were not articulated as criteria that are relevant to reallocation and do not merit consideration. I conclude that the denial of Complainant's request for reallocation is highly suspect when viewed in light of the circumstances surrounding Concannon's reallocation, and that she was the victim of disparate treatment based on her race. Respondent's inconsistent and unfair application of its reallocation process with respect to Complainant constitutes unlawful discrimination in violation of G.L. c. 151B.

IV. REMEDY

Upon a finding of discrimination, the Commission is authorized to award remedies to make the Complainant whole and to ensure compliance with the anti-discrimination statute. G.L. c. 151B, s. 5; *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004) The Commission may award monetary damages for, among other things, lost wages and benefits, lost future earnings, and emotional distress suffered as direct and probable consequence of the unlawful discrimination. In addition, the Commission may issue cease and desist orders, award other affirmative, non-monetary relief and assess civil penalties against a Respondent.

The Complainant seeks back pay from the time she applied for reallocation in June of 2006 up to the time of hearing. Because Concannon was awarded retro-active pay to 2005, at the

higher grade of an AII, a period of two years in which she had no supervisory duties, I conclude that Complainant is entitled to back pay from the date in June of 2006 when she applied for a reallocation, up to the time of the public hearing. The exact amount of back pay shall be determined by the parties utilizing the collective bargaining agreements in force at the time. Complainant is also entitled to front pay from the time of the public hearing until such time as her position is reallocated to an AII in accordance with my Order below, an amount to be determined by the parties, consistent with the collective bargaining agreement currently in force.

The Commission is also authorized to award damages for emotional distress proximately caused by the Respondent's unlawful actions. *Stonehill College v. MCAD*, 441 Mass. 549, 576 (2004) Awards for emotional distress must be fair and reasonable and proportionate to the harm suffered. Factors to consider in determining the extent of Complainant's suffering are the nature, character, and severity of the harm, the duration of the suffering and any steps taken to mitigate the harm. *Id.* The Complainant was clearly frustrated and angry at her inability to achieve an upgrade to her position, and upset at what she perceived as arbitrary decision making and unfair treatment. I believe that she was justified in being upset. Moreover, the denial of Complainant's request for reallocation was made particularly stinging by Concannon's elevation and assignment to be overseer of her time sheets. Since Complainant had once supervised Concannon, it is clear that she found this move to be extremely hurtful and demeaning.

Complainant testified that her high blood pressure was exacerbated by the anxiety and distress of the workplace and her struggle to achieve an upgrade. She testified that she often felt stressed and sick to her stomach at work. Much of Complainant's testimony about emotional distress related to events subsequent to her reallocation being denied and surrounded disputes

with Carol Concannon about her time keeping that Complainant alleged were retaliation for her having complained of discrimination. It is clear that much of her distress arose from her resentment of Concannon being assigned to be her supervisor and their subsequent strained relationship. It is difficult to apportion the amount of distress caused by the denial of reallocation and other subsequent events which were found not to be retaliation both by Respondent's Director of Affirmative Action and the Commission's Investigating Commissioner. However, Complainant is entitled to some damages for emotional distress resulting from Respondent's discriminatory actions and her grave disappointment, frustration, and humiliation resulting from Respondent's actions. I conclude she is entitled to an award of \$20,000 for emotional distress.

V. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, and pursuant to the Commission's authority to grant remedies as articulated in G.L. c. 151B, section 5, it is hereby ordered that the Respondent shall:

- (1) Immediately cease and desist from engaging in unfair and discriminatory reallocation processes.
- (2) Reallocate Complainant's position from AAI to AAI, taking whatever steps necessary relative to any supervision requirements to ensure her reallocation.
- (3) Pay to Complainant an award of back pay from the date of her reallocation application in June of 2006 up to the time of hearing in this matter, commensurate with existing the union pay scales, with interest thereon at the rate of 12% per annum

- from the date the complaint was filed until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.
- (4) Pay to Complainant an award of front pay from the date of the hearing until such time as her position is reallocated, an amount commensurate with the existing union pay scales.
- (5) Pay to the Complainant the amount of \$20,000 for emotional distress with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made or this Order is reduced to a court judgment and post-judgment interest begins to accrue.
- (6) Review its reallocation processes and create a written policy consistent with the Commonwealth's existing written criteria for reallocation, which ensures that the criteria for reallocation is applied fairly and consistently to all candidates and that all reallocation determinations be reviewed by the Respondent's Director of Affirmative Action/EEO.

This constitutes the final Order of the Hearing Officer. Any party aggrieved by this Order may file a Notice of Appeal to the Full Commission within ten days of receipt of this Order and a Petition for Review to the Full Commission with in thirty days of receipt of this Order.

So Ordered this 1st day of May, 2012.

Eugenia M. Guastaferrri
Hearing Officer