COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and RICHARD PIMENTAL
Complainants

Docket Nos. 10 NEM 00241

v.

BRISTOL COUNTY SHERIFF'S OFFICE
Respondent

Appearances: Robert Ward Jr., Esq. for Complainant
Bruce Assad Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On February 1, 2010, Complainant Richard Pimental filed a charge of retaliation against the Respondent Bristol County Sheriff's Office alleging that after filing race, national origin, and disability complaints,[1] he was removed from the position of affirmative action officer. A probable cause finding was issued on October 26, 2012. The case was certified to public hearing on June 27, 2013.

A public hearing was held on November 6, 9, and 12, 2015. Complainant submitted eleven (11) exhibits.[2] Respondent submitted fourteen (14) exhibits. The following individuals testified: Complainant, James Barnes, Romaine Payant, Gregory

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[1] Complainant filed complaints internally and with the Commission. The Commission, in docket number 10 NEM 00169, determined that there was no probable cause for the claims of race, national origin, and disability discrimination.

[2] Complainant also attempts to submit evidence by attaching documents to his post-hearing brief, claiming that the documents are part of the Commission's "own file." To the extent that these documents were submitted during the investigatory phase of the Commission's inquiry but not proffered as evidence at the public hearing, they are not part of the official record of the administrative hearing and will not be accorded evidentiary weight. See 804 CMR section 1:21(9) (record shall consist of transcript of public hearing and exhibits in evidence including certification, complaint, answer, stipulations, motions, and dispositions thereof.

Centeio, Lorraine Rousseau, Steve Souza, Lori Ponte, John Daignault, Ph.D., and Robert Novack, Esq.[3]

Based on all the credible evidence that I find to be relevant to the issues in dispute and based on the reasonable inferences drawn therefrom, I make the following findings and conclusions.

II. FINDINGS OF FACT

1. Complainant Richard Pimental began work at the Bristol County Sheriff's Office in 1990 as a correction officer. In 1995, he was promoted to lieutenant by then-Sheriff David Nelson.
2. In 1999, Sheriff Thomas Hodgson asked Complainant to serve as affirmative action officer in addition to his regular duties. The affirmative action officer assignment involved the investigation of race discrimination claims. On June 23, 1999, Complainant completed a five-hour training session in Medfield, MA concerning affirmative action officer duties at the Sheriff's Office. Complainant's Exhibit 5. Complainant never received training in sexual harassment.
3. In 2001, Complainant was promoted to captain by Sheriff Hodgson.
4. During the approximately seven years that Complainant served as affirmative action officer, he investigated five to seven complaints of discrimination. Complainant's Exhibit 1; Transcript I at 59; III at 103. Complainant did not investigate sexual harassment complaints.

[3] Attorney Novack participated in various pre-trial matters on behalf of the Sheriff's Office and sat at counsel table throughout the proceedings as Respondent's representative, but he is not listed in the parties' pre-hearing memorandum as a trial counsel and he did not conduct any direct or cross-examinations of witnesses.

5. Complainant received no additional pay for being an affirmative action officer nor was he relieved of his regular duties as a captain. He received overtime on one or two occasions for investigations which required that he work outside of his normal schedule.

6. After 2007, Complainant did not perform any duties as affirmative action officer.

7. Complainant contemplated resigning as affirmative action officer in 2008, but he changed his mind.

8. In 2009, Assistant Superintendent Romain Payant and staff attorney Lorraine Rousseau were assigned to investigate sexual harassment matters. Their handling of a complex investigation involving employee "TK" lasted from February to July of 2009. In July of 2009, Assistant Superintendent Payant retired. Following his retirement, the Bristol County Sheriff's Office received a new sexual harassment complaint brought by employee "CD."

9. Lt. Colonel Gregory Centeio was asked to be the male member of the sexual investigation team with Rousseau. Centeio was a trained investigator assigned to the special investigation unit which handles criminal investigations involving inmates. Centeio performed sexual harassment investigations in the past.

10. The regular work assignments of Centeio and Rousseau became back-logged as a result of the "CD" investigation. In order to relieve their back-log, Respondent, in August of 2009, took steps to reorganize the investigation of all discrimination claims. Meetings involving Attorney Robert Novack, Special Sheriff Bruce Assad, and then-Assistant Superintendent Steven Souza resulted in decisions to: 1) increase the number of investigators handling discrimination claims from two to four; 2) create two

investigatory teams each consisting of a male and female investigator; 3) eliminate the former designations of affirmative action officer and sexual harassment investigator and have the teams investigate all types of discrimination claims including sexual harassment and race; 4) limit team members to non-union, managerial personnel; and 5) ensure that at least one member of each team was a trained investigator.

11. The decision to select only management-level investigators was due to concerns that union members would be reluctant to investigate or testify against fellow union members and would not have flexibility to interview witnesses outside their 8:00 a.m. to 4:00 p.m. shifts. Whereas managers are able to "flex" their hours, union employees, per their collective bargaining agreement, must obtain permission to work (and be paid for) overtime in order to interview individuals on other shifts.

12. By the end of December, 2009, Sheriff Hodgson approved the selection of the following managerial-level staff as investigators: Lorraine Rousseau, who had prior experience as a sexual harassment investigator; Esther Hickok, who was an auditor; Ronald Manzone, who was a workers' compensation and fraud investigator; and Gregory Centeio, who was a special investigation unit investigator and had prior experience as a sexual harassment investigator.

13. Complainant was not a manager and had no training as a sexual harassment investigator.

14. On January 12, 2010, Complainant received notice that he was being disciplined for making phone calls to his significant other while on duty, for failing to report that his significant other was the mother of a current inmate, for lying about his failure to report his relationship with the inmate's mother, and for showing favoritism to the

inmate. Respondent's Exhibit 14. Complainant's discipline consisted of demotion to lieutenant and two twenty-five day suspensions. Of the proposed discipline, a ten-day portion of one, twenty-five day suspension was to be served immediately and the other twenty-five day suspension was to be held in abeyance for a year. Id.

15. Complainant filed a claim of discrimination with the MCAD on January 21, 2010. He alleged that his discipline constituted disparate treatment based on race, color, national origin, and disability.

16. Complainant did not file an internal discrimination complaint until on or about January 25, 2010, even though the internal complaint is dated January 13, 2010. See MCAD Complaint 10-NEM-00241, para. 3 stating that, "On or about January 25, 2010, I filed an internal discrimination complaint with Steve Souza, Assistant Superintendent who forwarded it to the legal department."[4]

17. On January 27, 2010, Sheriff Hodgson announced that claims of sexual harassment and affirmative action (i.e., race discrimination) were going to be handled by two new teams of investigators consisting of Lt. Col. Gregory Centeio, Senior Auditor Esther Hicox, Investigator Ronald Manzone, and Attorney Lorraine Rousseau. Respondent's Exhibit 13.

18. According to Complainant, after distribution of the January 27, 2010 announcement, Asst. Supt. Souza said that he "couldn't believe that they had removed him (Complainant) as AAO." Complainant's testimony was refuted by Souza who credibly denied making the statement.

[4] Complainant asserts in his post-hearing brief that Assistant Superintendent Souza acknowledged receipt of the internal complaint in a January 15, 2010 memorandum thereby establishing that the internal complaint was submitted prior to that date. I reject Complainant's argument for two reasons. First, the January 15th memorandum was not submitted into evidence. Second, the January 15th memorandum acknowledges receipt of a labor grievance not receipt of an internal discrimination complaint.

19. On February 4, 2010, Respondent received a copy of Complainant's first MCAD Complaint No. 10 NEM 00169 which was mailed to it by the MCAD on February 1, 2010. Respondent's Exhibit 1-A.

20. In July of 2010, Complainant fractured his elbow as a result of participating in the extraction of a detainee from a van. He received workers' compensation and never returned to work.

21. Complainant retired from the Bristol County Sheriff's Office on September 30, 2010 after accumulating twenty years of service. Complainant's Exhibit 4. As a twenty-year employee, Complainant retired with a pension consisting of 50% of his then-salary.

22. On August 24, 2011, an arbitration decision was issued which found that the Employer had just cause to discipline Complainant in January of 2010 by imposing two twenty-five day suspensions but did not have just cause to demote Complainant. Respondent's Exhibit 3.

23. On October 25, 2012, Complainant's MCAD charges of race, national origin, and disability discrimination were dismissed by the Commission for lack of probable cause. Respondent's Exhibit 1-B.

III CONCLUSIONS OF LAW

Chapter 151B, sec. 4 (4) prohibits retaliation against persons who have opposed practices forbidden under Chapter 151B. Retaliation is a separate claim from discrimination, "motivated, at least in part, by a distinct intent to punish or to rid a workplace of someone who complains of unlawful practices." Kelley v. Plymouth

County Sheriff's Department, 22 MDLR 208, 215 (2000) *quoting* Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1040 (D. Mass. 1995).

In the absence of direct evidence of a retaliatory motive, the MCAD follows the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 Mass. 972 (1973) and adopted by the Supreme Judicial Court in Wheelock College v. MCAD, 371 Mass. 130 (1976). The first part of the framework requires that Complainant establish a prima facie case of retaliation by demonstrating that: (1) he engaged in a protected activity; (2) Respondent was aware that he had engaged in protected activity; (3) Respondent subjected him to an adverse employment action; and (4) a causal connection exists between the protected activity and the adverse employment action. See Mole v. University of Massachusetts, 442 Mass. 82 (2004); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208, 215 (2000). While proximity in time is a factor in establishing a causal connection, it is not sufficient on its own to make out a causal link. See MacCormack v. Boston Edison Co., 423 Mass. 652 n.11 (1996) *citing* Prader v. Leading Edge Prods., Inc., 39 Mass. App. Ct. 616, 617 (1996).

Protected activity may consist of internal complaints as well as formal charges of discrimination but regardless of the type of complaint, the charges must constitute a reasonable and good faith belief that unlawful discrimination has occurred. See Guazzaloca v. C. F. Motorfreight, 25 MDLR 200 (2003) *citing* Trent v. Valley Electric Assn. Inc., 41 F.3d 524, 526 (9th Cir. 1994); Kelley v. Plymouth County Sheriff's Department, 22 MDLR 208 (2000). Complainant argues in his post-hearing brief that he engaged in protected activity on two occasions: first, when he filed an internal complaint of discrimination with the Sheriff's Office on January 13, 2010 and second, when he filed

his first claim of discrimination with the MCAD on January 21, 2010 asserting that his discipline constituted disparate treatment based on race, color, national origin, and disability.

Complainant correctly identifies two episodes of protected activity but incorrectly identifies the date on which he first gave the Sheriff's Office notice of these matters. According to Complainant, he submitted an internal complaint of discrimination on January 13, 2010. Credible evidence establishes, however, that Complainant did not file an internal complaint with the Sheriff's Office until January 25, 2010, well after the decision to terminate Complainant's assignment as affirmative action officer. The January 25th date is not only stamped on the face of the document, it is the date on which Complainant swore in the instant MCAD charge of retaliation, signed under the pains and penalties of perjury, that he submitted the internal complaint to the Sheriff's Office. See MCAD Charge No. 10-NEM-00241, stating in paragraph 3 that, "On or about January 25, 2010, I filed an internal discrimination complaint with Steve Souza, Assistant Superintendent who forwarded it to the legal department." In an attempt to back away from this assertion, Complainant attempts to rely on a memorandum in which Assistant Superintendent Souza acknowledges receipt of an internal complaint on January 15, 2010. Such reliance is misplaced. The Souza memorandum refers to the receipt of a labor grievance, not Complainant's internal discrimination complaint. In any event, the Souza memo is not in evidence.

The other instance of protected activity took place when Complainant filed a charge of disparate treatment discrimination with the MCAD on January 21, 2010. See MCAD Charge No. 10 NEM 00169 (alleging discrimination based on race, color,

national origin, and disability). As with the internal complaint of discrimination, notice of this claim was received by Respondent after it eliminated Complainant's assignment as affirmative action officer. Credible evidence establishes that Respondent did not receive a copy of the MCAD complaint until February 4, 2010. Based on the foregoing, it was not until January 25, 2010 at the earliest that Respondent first became aware of Complainant's protected activity.

Well before the two instances of protected activity came to its attention, the Sheriff's Office commenced the process of re-organizing the investigation of discrimination claims. Managerial meetings took place in August of 2009 which led to the elimination of investigators who handled only affirmative action (i.e., race) or sexual harassment complaints, the creation of two teams of generic discrimination investigators, the restriction of team members to managers, and the requirement that at least one member of each team be a trained investigator. By the end of December, 2009, Sheriff Hodgson had approved the selection of four managerial-level staff as discrimination investigators. Thus, the matters deemed by Complainant to be "adverse" to his interests were all decided prior to Respondent learning about Complainant's protected activity, albeit not yet announced or implemented.

In light of the above sequence of events, there can be no causal connection between Complainant's protected activity and the loss of his affirmative action assignment. When Respondent decided to replace Complainant as affirmative action officer, the Sheriff's Office was not yet aware that Complainant had engaged in protected activity. See Clark County Sch. Dist. v. Breeden, 532 U. S. 268, 272 (2001) (no inference of retaliation where employer contemplated transferring employee prior to

learning of employee's Title VII claim although actual transfer did not occur until after learning of the claim); Mole v. University of Massachusetts, 442 Mass. 582, 592-3 (2004) (where adverse action predates Respondent's knowledge of protected activity, no inference of retaliation can be made). As the Supreme Court noted in Clark County Sch. Dist. v. Breeden, where an employer contemplates adverse action prior to learning of protected activity, the fact that the employer thereafter proceeds with the contemplated action is not evidence of causality. See, 532 U. S. at 272.

There was, moreover, no significant penalty inflicted upon Complainant which rises to the level of adverse action by virtue of his affirmative action officer assignment. During the approximately seven years that Complainant was assigned to the role of affirmative action officer, he received no additional pay for the assignment nor was he relieved of his regular duties in order to perform the role. Complainant only received overtime on one or two occasions for performing investigatory chores. Throughout his tenure as an affirmative action officer, Complainant only investigated five to seven complaints of discrimination. He was never assigned to investigate sexual harassment complaints nor was he trained to do so. After 2007, Complainant did not perform any duties as affirmative action officer and he subsequently contemplated resigning the role. Under such circumstances, the loss of Complainant's assignment as affirmative action officer cannot be deemed "adverse." See Bain v. City of Springfield, 424 Mass. 758, 765-766 (1997) (defining adverse employment action as a change in objective terms and conditions of employment which materially disadvantage or threaten to disadvantage the complaining individual); MacCormack v. Boston Edison, 423 Mass. 652, 663 (1996)

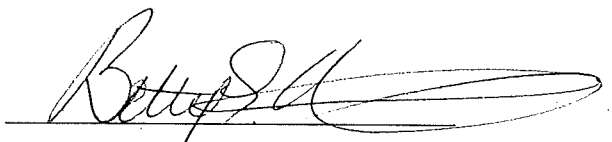
(same); Ruffino v. State Street Bank and Trust Co., 908 F. Supp. 1019, 1046 (D. Mass. 1995) (defining adverse action as denial of a term or condition of employment).

In light of the foregoing, Complainant fails to satisfy the standards of a prima facie case of retaliation. Even if he had prevailed at stage one, however, Respondent satisfies its stage-two burden by articulating legitimate, non-retaliatory reasons for its action supported by credible evidence. See Blare v. Huskey Injection Molding Systems Boston Inc., 419 Mass. 437, 441-442 (1995) *citing* McDonnell Douglas Corp v. Green, 411 U.S. 792 (1973). Respondent credibly asserts that it replaced Complainant as affirmative action officer with two teams of management-level personnel because the latter are able to flex their time when conducting investigations as opposed to union members such as Complainant whose employment contract does not permit flex-time arrangements. Respondent also justifies its decision on the basis that union members might be reluctant to investigate or testify against fellow union members. Complainant, at stage three, is unable to rebut these rationales by showing that the articulated justifications are not real reasons, but a pretext for retaliation. See Lipchitz v. Raytheon Co., 434 Mass. 493, 501 (2001).

IV. ORDER

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

So ordered this 6th day of July, 2016.



Betty E. Waxman, Esq.,
Hearing Officer