

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MCAD and PAUL MCMANUS,
Complainants

v.

DOCKET NO.99-BEM-0681

MASSACHUSETTS DEPARTMENT
OF CORRECTION,
Respondent

Appearances:

Brian P. Fitzsimmons, Esquire for the Complainant
Daryl F. Glazer, Esquire for the Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 8, 1999 Complainant Paul McManus filed a complaint with this Commission charging Respondent Department of Corrections with unlawful discrimination and retaliation in violation of M.G.L.c.151B. The Investigating Commissioner issued a lack of probable cause finding as to all claims. On appeal, the Investigating Commissioner reversed the lack of probable cause finding and issued a probable cause finding in part as to the retaliation claim. Attempts to conciliate the matter failed and the case was certified for public hearing. A

public hearing was held before me on November 12-15, 2002. At the public hearing, Respondent moved to exclude from consideration several of the incidents alleged in Complainant's charge because the Commission considered these incidents in a prior case filed by the Complainant (95-BEM-0845) that was dismissed for lack of probable cause in February 2001. I ruled that evidence regarding the incidents that occurred on August 27, 1998 and October 11, 1998 would be admitted solely as background information to clarify or explain later actions and would not be admitted to establish Respondent's liability for those earlier actions. After careful consideration of the record in this matter and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Paul McManus resides in Acushnet, Massachusetts. Complainant, who is of Cape Verdean ancestry, was employed as a Correction Officer by the Respondent Department of Correction for 11 years until November 19, 1998. Throughout his employment with Respondent, Complainant was assigned to the Southeastern

Correctional Center (SECC) at Respondent's Bridgewater Complex.

2. In 1998, Complainant worked the 7:00 a.m. to 3:00 p.m. shift and reported to various shift commanders, including Captain Michael Breault.

3. Throughout the course of his employment, Complainant filed various complaints alleging race discrimination, including an internal affirmative action complaint in 1994, an MCAD complaint in April 1995 and an MCAD complaint in March 1999, which is the subject of this public hearing. In his previous complaints, Complainant alleged that Breault had discriminated against him because of his race and retaliated against him for complaining of discriminatory treatment.

4. Complainant was active in the Massachusetts Correction Officers Federated Union (MCOFU) and from 1996-1998 he was a union steward.

5. In November 1997, James Walsh was appointed superintendent of SECC. Walsh's responsibilities included command of the complete operation of SECC, including

security, care and custody of inmates, budgetary requirements and personnel matters. Walsh also enforced the "Blue Book", Respondent's policies and the Collective Bargaining Agreement.

6. In April 1998, Duane MacEachern became the Director of Security at SECC. His responsibilities were the overall supervision of the correction officers and the operations and functions of all security at SECC.

7. During 1998, a written policy dictated the appropriate uniform for correction officers. The uniform policy included a winter uniform that went into effect the third week of October each year. The winter uniform included a long-sleeved shirt and a tie. Walsh testified that he enforced the uniform policy at SECC from the beginning of his superintendence and that he directed MacEachern to enforce the policy. I credit this testimony.

8. Sergeant Stephen Hocking testified that until 1998, it had been the practice for correction officers to wear short-sleeved shirts in the winter, until Walsh began enforcing the uniform policy. I credit this testimony.

9. Captain James Gentile enforced the uniform policy at SECC. He testified that whenever he saw an officer out of uniform, he would instruct the officer regarding the proper uniform. I credit this testimony.

10. In addition to the uniforms issued by the Department of Correction, Correction Officers sometimes wore unofficial clothing such as sweatshirts, sweaters and hats that they had purchased at the SECC print shop. Such clothing was not considered part of the appropriate uniform.

11. Complainant testified that on August 27, 1998, after reporting to his assigned post, he was approached by Warren Cummings, the Headquarters Lieutenant, who informed Complainant that Captain Breault had ordered him to reduce Complainant's pay by one minute for that day because of tardiness. Complainant then confronted Breault, stating that he had arrived on time, however, Breault refused to rescind the order. Immediately thereafter, another union steward, Anthony Pistole, intervened and Breault agreed to rescind the order. Complainant's pay was never docked for that day.

12. On or about October 11, 1998, Complainant wore a navy blue sweatshirt embroidered with the Massachusetts state seal and the words "Massachusetts Department of Correction." Complainant testified that he had frequently worn this sweatshirt while on duty. Although sold at the SECC, the sweatshirt was not part of the Correction Officer's official uniform. When Breault saw Complainant wearing the sweatshirt, he ordered him to remove it.

13. On November 19, 1998 Complainant wore a department issued short-sleeved shirt and tie while assigned to in-service training, although the uniform policy required a long-sleeved shirt at this time of year. As Complainant watched a training video along with several other officers in the operations area of the institution, Director of Security Duane MacEachern entered the training room and yelled to Complainant and the trainer Lt. Robert Eklund to come into his office.

14. In MacEachern's office, he told Complainant that he was out of uniform and that he should be wearing a long-sleeved shirt. Complainant and MacEachern argued about the matter, and then Complainant returned to the training session. Eklund returned to the training room

shortly thereafter, and instructed Complainant to put on his uniform winter jacket in order to cover the short-sleeved shirt. Complainant looked around the room and observed other officers out of uniform and told Ecklund that he was going home.

15. Complainant then called Headquarters Lt. Cummings and requested to use personal time. Cummings approved his request.

16. As Complainant attempted to go through the set of trap doors leading out of the prison, Lieutenant Griswald, who was posted at the trap, told him that Captain Breault had "frozen" the trap; meaning that the institution was locked down and he could not leave.

17. Complainant went back into the institution and was approached by Captain Gentile, who met with him and officer Alfredo Silva, whose presence Complainant requested. Gentile testified that he and Brault were instructed by MacEachern to tell Complainant that if he went home sick following their argument, he would have to provide medical documentation to prove his illness. Gentile told Complainant that if he left the prison, his

pay would be docked and, because of his confrontation with MacEachern, he would be subject to a "Commissioner's Hearing", an appeal reserved only when a suspension of more than five days was possible.

18. Complainant returned to the training room wearing his winter coat. Complainant was feeling ill, and at the next break, went to the Health Services Unit where a nurse found his blood pressure elevated and advised him to leave by ambulance. Instead Complainant returned to the training, but after two more visits to the Health Services Unit, he was taken by ambulance to Brockton Hospital where he remained for several hours.

19. After following up with his own physician, Complainant remained out of work for anxiety, depression and low back pain and has not returned to his position at Respondent since. He applied for and received workers' compensation benefits and is now receiving disability retirement benefits.

20. Officer Michaud testified that Correction Officers often wore short-sleeved shirts in November 1998 because of the excessive heat in the building. He

testified that he was sitting next to Complainant on the day that MacEachern confronted Complainant and Ecklund, and that he wore a non-department issued v-neck sweater. He stated that Sgt. Beth Boardman also wore a non-department issued sweater that day, but after MacEachern spoke to Complainant, Boardman put on a DOC-issued jacket. I credit this testimony.

21. Lt. Robert Ecklund testified the November 19 incident was not the first time he had been admonished by MacEachern about officers under his command being out of uniform. On a previous occasion, MacEachern had witnessed another officer, Carol Belcher, wearing a non-department issued sweater while attending a training session. At the time, MacEachern told Ecklund that as the ranking officer in the training classroom, he was responsible for ensuring that officers wore the proper uniforms. On that previous occasion, Ecklund instructed Belcher to remove the sweater and she complied. I credit this testimony.

22. Complainant testified that the trap was ordinarily frozen only during emergencies such as fights, riots, and fires and had never before been used to prevent an employee from leaving the institution. However,

Lieutenant Griswald testified that the trap was also frozen on occasion to prevent officers from leaving the institution at the end of a shift when staffing shortages required forced overtime.

23. Griswald testified that he has worn non-Department of Correction issued clothing to work.

24. Alfredo Silva testified that a few weeks after the incident with Complainant, he observed MacEachern instruct Correction Officer Richie Cotton not to wear a short-sleeved shirt. I credit this testimony.

25. Joe Freitas testified that he has observed Correction Officers wearing non-Department of Correction issued clothing in the fall of 1998. In such instances, the Shift Commander usually talked to the officer during roll call about what constituted the proper uniform. I credit this testimony.

26. Steven Hocking testified that Breault told him that he did not get along with Complainant and did not like to talk to him. Hocking testified that SECC had steam heat that could not be controlled by thermostat and that there

were many areas of the prison that reached up to 90 degrees in the winter. He stated that up until 1998, the practice at SECC was to allow officers to wear short-sleeved shirts with ties in the winter and to wear non-department issued sweatshirts, as long as they appeared neat and professional. I credit this testimony.

27. Timothy Harrington testified that on October 12, 1998, he wore a non-department issued blue sweatshirt with a state seal that he had purchased at the prison and had worn to work "countless" times. When Breault saw him, he instructed Harrington to take off the sweatshirt. He testified that on subsequent occasions he was told not to wear the sweatshirt, but was not disciplined nor threatened with discipline. On another occasion, Director of Security MacEachern instructed Harrington to take off a non-DOC issued hat displaying a shamrock and state seal that he had purchased at the prison. I credit this testimony.

28. James Walsh was appointed the superintendent of SECC in November 1997. Walsh testified that he observed several instances when the uniform policy wasn't enforced, for example when officers did not polish their boots, did

not wear ties or had stains on their uniforms, which he considered to be a total disregard for the policy. I credit this testimony.

29. Walsh testified that he directed MacEachern to insure that all officers conformed to both the winter and summer uniform policies. Walsh testified that even when in training, and not assigned to the custody and care of inmates, correction officers must be in uniform in case of an emergency response when all available manpower was needed. I credit this testimony.

30. Walsh testified that it was not unusual to freeze the trap in order to speak with a staff member before he left work. In the instance involving Complainant, Walsh testified that Breault and Gentile had ordered the trap frozen in order to advise Complainant that if he went home sick he would have to provide medical documentation. He stated that if Complainant went out the door they may never had been able to contact him.

31. MacEachern testified that he had had no interaction with Complainant before coming to SECC in April 1998 and that in November 1998, he was unaware that

Complainant had filed previous complaints with the MCAD. I credit this testimony.

32. On September 24, 1998, MacEachern sent a memorandum to all correction officers explaining that the winter uniform policy would be enforced as of October 18, 1998. (Exh.R-1). He stated that he got clear direction from Walsh to enforce the policy and he ensured that the Captains he supervised were enforcing the policy. MacEachern denied that officers were allowed to wear short sleeves in the winter. I credit this testimony.

33. MacEachern testified that in his experience at various facilities, whenever a Correction Officer left work early after having a dispute with a supervisor, he was subject to being asked for medical evidence.

34. James Gentile was the 7-3 shift commander at SECC in 1998. He stated that in November 1998 he was not aware that Complainant had filed an MCAD complaint in 1995. He stated that when he was shift commander, the Headquarters Lieutenant could not approve a request for time off without checking with him. I credit this testimony.

35. Gentile testified that whenever he observed an officer out of uniform, he would address the matter with the officer at the time. I credit this testimony.

36. Gentile testified that he told Complainant that his pay would be docked and he would face a commissioner's hearing if he left work following his confrontation with MacEachern.

37. Brault testified that he once sent officer Anthony Pistels home when he arrived at work wearing yellow work boots that were not part of the uniform. He testified that once when Lieutenant Cummings wore lime green colored shoelaces on his black boots and he ordered him to remove the laces and replace them with black laces. I credit this testimony.

38. Warren Cummings testified that as headquarters lieutenant he was responsible for approving personal time for officers, but that a shift commander would have to approve sick time. When an officer requested personal time, he would determine whether the officer was entitled to the time off by considering his seniority as well as the staffing needs of the institution on that particular day.

39. Cummings testified that he always wore a short-sleeved shirt to work in the wintertime because the area of the institution where he worked became very hot. Cummings was never disciplined for wearing a short-sleeved shirt. I credit this testimony.

40. Complainant testified that within a few days after the incident on November 19, he completed an application for workers' compensation. A co-worker, Matthew Michaud, submitted the application at Complainant's request. The application referred back to a previous back injury incurred in July 1998. Shortly thereafter, Michaud called and told him the application had been returned to him. Complainant then received a telephone call from Kathy Lovell, the Respondent's Industrial Accident Coordinator, who told him to fax certain documents to her.

41. Thereafter, on December 16, 1998, Complainant received an agreement to pay workers' compensation, but around January 2, 1999, he received a letter that his claim was denied.

42. Thereafter, Complainant testified that he received another call from Lovell telling him that his

agreement was not going to be honored because Superintendent Walsh would not honor the agreement. I do not credit this testimony. It was inconsistent with Lovell's credible testimony regarding the circumstances surrounding Complainant's workers' compensation claims. Complainant eventually received workers' compensation benefits retroactively on January 28, 1999.

43. Kathy Lovell has worked in Respondent's Industrial Accident division since 1998. She testified that she did not know that Complainant had filed an MCAD complaint until the time of the public hearing in this matter. I credit this testimony.

44. Lovell testified that Complainant's November 1998 application for workers' compensation benefits was submitted to her office, processed through the Human Resources Division, a separate state agency, where it was denied.

45. Lovell testified that after the denial a conciliation meeting was scheduled regarding Complainant's previous claim of July 27, 1998 and at that conciliation

both the July and November claims were discussed, and later denied.

46. Lovell testified that following the denial of both claims, the parties eventually settled both claims and Complainant received benefits for the July 1998 claim. The parties treated the November 19, 1998 injury as a continuation of the July 1998 injury. I credit this testimony.

47. Lovell testified that although Superintendent Walsh initially disapproved the claim of November 1998, he could not, and did not try to interfere with the claim, once the agreement was signed. She testified that Complainant's claim for November 19, 1998 was initially denied because of a lack of documentation regarding whether Complainant injured his back when he got onto the stretcher. I credit this testimony.

III. CONCLUSIONS OF LAW

M.G.L. c. 151B, section 4(4) makes it unlawful to retaliate against an employee for exercising his rights under this chapter. Complainant charges that Respondent

unlawfully retaliated against him for having filed internal complaints of discrimination, as well as complaints of discrimination with this Commission. In order to establish a prima facie case of retaliation, Complainant must show that he engaged in a protected activity, that Respondent was aware of that activity, and that he was subsequently subjected to an adverse employment action and, absent other evidence establishing retaliatory intent, the adverse action followed the protected activity within such time that retaliatory intent can be inferred. Cimino v. BUT Electronics, 18 MDLR 197 (1996). I conclude that Complainant has failed to establish a prima facie case of unlawful retaliation. Complainant engaged in a protected activity when he filed an internal affirmative action complaint in 1994 and an MCAD complaint in April 1995. While Captain Brault was the subject of Complainant's previous complaints, he did not make the decision to freeze the trap on November 19, 1998. That order was given by Director of Security MacEachern, who did not come to the SECC until April 1998, and who denied that he was even aware of Complainant's prior complaints. Further, even assuming that MacEachern was aware of Complainant's prior complaints, there was no evidence that Complainant was treated any differently from other officers who were out of

uniform. Although there were random incidences of officers who were out of uniform during the fall of 1998, the uniform policy was nonetheless enforced against numerous officers who had not filed complaints with the MCAD. Complainant was yelled at by his superiors about his uniform, temporarily prohibited from leaving the prison and threatened with discipline after having an argument with his superior about the uniform policy. The evidence showed that the threat of discipline was related to Complainant's argument with MacEachern and not to his having been out of uniform. There is simply no evidence that the confrontation with MacEachern was retaliatory in nature.

Finally, Complainant alleges that Superintendent Walsh and Kathy Lovell interfered with his application for workers' compensation benefits arising out of the November 19, 1998 injury in retaliation for his having filed a 1995 MCAD complaint against Respondent. I find that Complainant has failed to establish a prima facie case of retaliation with respect to this claim. While Walsh disputed the workers' compensation claim, there was no evidence that his motive was retaliation, as there was no evidence that Walsh, who became the Superintendent of SECC in November 1997, was aware of Complainant's prior MCAD complaint at the time he applied for workers' compensation. Further,

Kathy Lovell testified that she first became aware of Complainant's previous MCAD complaint on the first day of public hearing in this matter, and her credible testimony established that Complainant's claim was processed in the normal course of events and that it was eventually resolved in Complainant's favor in conjunction with an earlier claim. There was no evidence that Complainant's workers' compensation claim was improperly interfered with in any way by Respondent. For the reasons stated above, I conclude that Respondent did not engage in unlawful retaliation in violation of M.G.L.c. 151B.

V. ORDER

For the reasons stated above, this matter is hereby dismissed.

This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal within ten days of receipt of this order and a Petition for Review within 30 days of receipt of this order.

SO ORDERED, this 3rd day of September, 2003.

JUDITH E. KAPLAN
Hearing Officer