

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SHIRLEY J. ESLINGER, PETITIONER

vs.

**MASSCHUSETTS COMMISSION AGAINST
DISCRIMINATION**
and et al,
RESPONDENTS

**ON PETITION FOR WRIT OF CERTIORARI
TO
MASSACHUSETTS APPEALS COURTS**

**BOOKLET 2 OF 3
APPENDIX 1 OF 2 FOR WRIT OF CERTIORARI**

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**United States Court of Appeals
For the First Circuit**

No. 22-8017

SHIRLEY J. ESLINGER,

Petitioner,

v.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION;
MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION
Respondents.

Before
Thompson, Kayatta and Gelpi
Circuit Judges.

JUDGMENT

Entered: August 23, 2022

Having reviewed petitioner's response to the order to show cause entered July 29, 2022, we conclude that the court lacks jurisdiction over this matter. See generally 28 U.S.C. §§ 1291 & 1292; see also U.S. Fid. & Guar. Co. v. Arch Ins. Co., 578 F.3d 45, 55 (1st Cir. 2009) (explaining that the party invoking appellate jurisdiction bears the burden to establish that appellate jurisdiction exists). The matter is dismissed for lack of jurisdiction. See Local Rule 27.0(c).

By the Court:
Maria R. Hamilton, Clerk

cc:
Shirley Eslinger
Richard S. Weitzel
Maura Tracy Healey
Lynn Milinazzo-Gaudet
Laronica King Lightfoot

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Supreme Judicial Court for the Commonwealth
of Massachusetts

FAR 28837 Notice FAR denied
Date Filed: 07/18/2022 Entry ID: 6508607

From: "SJC Full Court Clerk"
<SJCCommClerk@sjc.state.ma.us>
To: stimac4@earthlink.net
Subject: FAR 28837 Notice: FAR denied
Date: Jun 30, 2022 3:45 PM

Supreme Judicial Court for the
Commonwealth of Massachusetts

RE: Docket No. FAR 28837

SHIRLEY J. ESLINGER
vs.
MASSACHUSETTS COMMISSION
AGAINST
DISCRIMINATION & another

Barnstable Superior Court No. 2072CV00282
A.C. No. 2021-P-0653

**NOTICE OF DENIAL OF APPLICATION
FOR FURTHER APPELLATE REVIEW**

Please take note that on June 30, 2022, the
application for
Further appellate review was denied.

Francis V. Kenneally Clerk

Dated: June 30, 2022

To: Shirley J. Eslinger
J. Lynn Milinazzo-Gaudet, Esquire
LaRonica Lightfoot, A.A.G.
Cambrey C. Dent, Esquire

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
21-P-653

SHIRLEY J. ESLINGER
vs.
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION & another.¹

¹The Massachusetts Department of Transportation

**MEMORANDUM AND ORDER PURSUANT
TO RULE 23.0.**

The plaintiff, Shirley J. Eslinger, filed a complaint with the Massachusetts Commission Against Discrimination (MCAD) alleging gender discrimination in violation of G. L. c. 151B, § 4 (1). As we discuss in more detail later, Eslinger was employed as the Deputy Chief Engineer of Bridges and Asset Management in the Massachusetts Highway Department (MassHighway) when the Legislature enacted the Transportation Reform Act, which merged MassHighway and other State agencies into the Massachusetts Department of Transportation (MassDOT). Eslinger claimed that MassDOT discriminated against her when it failed to select her for a new consolidated Deputy Chief position and instead attempted to reassign her to a newly created senior management position, which she viewed as a demotion, and then terminated her employment when she refused to accept the reassignment.

An investigating MCAD commissioner found probable cause to credit Eslinger's allegations, and the case was presented at a public hearing. Thereafter, an MCAD hearing officer determined that MassDOT had not discriminated against Eslinger on the basis

of her gender and dismissed her complaint. Eslinger sought review by the full commission, which affirmed the decision of the hearing officer. Eslinger then commenced this action pursuant to G. L. c. 151B, § 6, and G. L. c. 30A, § 14. On the parties' cross motions for judgment on the pleadings, a judge of the Superior Court rejected Eslinger's claim and entered judgment in favor of MCAD and MassDOT. We affirm.

Background. We summarize the relevant facts found by the MCAD hearing officer as follows. On November 1, 2009, MassDOT was created pursuant to the Transportation Reform Act, which merged the Massachusetts Turnpike Authority (MTA), the Department of Conservation and Recreation, and MassHighway into one new department. Prior to the merger, Luisa Paiewonsky served as Commissioner of MassHighway. Paiewonsky met Eslinger when she applied for the Chief Engineer position at MassHighway in early 2008. Although Eslinger was not selected for the position, Paiewonsky was impressed with Eslinger's credential at the time and recruited her to apply for a position overseeing MassHighway's bridge and asset management staff. Eslinger was hired and assumed the position of Deputy Chief Engineer of Bridges and Asset Management on or about May 5, 2008.

Eslinger was the first female Deputy Chief Engineer in the history of MassHighway. The hearing officer found that Paiewonsky was proud to have recruited Eslinger and was vested in Eslinger's success. Eslinger and two additional deputy chiefs, both of whom were men, reported directly to Chief Engineer Frank Tramontozzi.

Shortly after Eslinger was hired, in June 2008, a new program called the Accelerated Bridge Program was created. In January 2009, M. Shoukry A. Elnahal was hired as Director of that program. Elnahal was paid approximately \$5,000 more than Eslinger and the other two deputy chiefs. Eslinger was involved in the selection of Elnahal for the position and did not express any interest in applying herself. The hearing officer found that by all accounts, Elnahal excelled at his job and earned national recognition for his work.² Elnahal also reported directly to Tramontozzi.

After the merger of the transportation departments, Paiewonsky became Administrator of MassDOT's Highway Division and Tramontozzi became MassDOT's Chief Engineer. The merger created a need for consolidation, and, in

² We note that Elnahal had received some national recognition at the time Eslinger's position was eliminated, but most of that recognition came in the years following Eslinger's termination

her new role as Administrator, Paiewonsky was required to restructure and eliminate several management positions. The hearing officer found that the Secretary of Transportation gave Paiewonsky a clear directive to form a new management team with no redundancy. In carrying out this directive, Paiewonsky was forced to make a number of difficult decisions.

Paiewonsky had to eliminate a number of high-level management positions held by male employees and "facilitate reassessments of some male managers to lower grade positions with significant salary cuts." Paiewonsky testified that these reassessments were based on objective criteria and the salary cuts were necessary to ensure the pay was commensurate with the new role. For example, the position of Chief Engineer at the MTA was eliminated, and the man who had held that job, Helmut Ernst, was subsequently assigned to a lower ranking role as head of District 6.³ His

³ District 6 was a new highway district comprised of twenty municipalities within the metropolitan Boston area, which included the "metropolitan highway system" (MHS). The MHS is the Interstate Highway 90 system of tunnels and bridges including 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. Eslinger would have reported to Ernst if she had accepted the reassignment

compensation was cut by approximately \$20,000.

In addition, Paiewonsky decided to combine Eslinger's and Elnahal's positions to create a new position titled "Deputy Chief of Bridges and Tunnels." This position was given to Elnahal. The hearing officer found that Paiewonsky selected Elnahal over Eslinger because he demonstrated good communication skills, a willingness to take managed risks, and the ability to work well with others. Although Eslinger's sole performance review stated that she was a "successful performer," i.e., a step above "satisfactory," Paiewonsky described Eslinger's performance as a "mixed review." Paiewonsky testified that Eslinger did an "excellent job" at one point meeting with the steel industry, but there were other occasions when she was "silent" during staff meetings and did not interact or accept assistance from her colleagues. Also, Tramontozzi had received reports that Eslinger's peers had difficulty communicating with her. Nevertheless, Paiewonsky sought to retain Eslinger and ultimately offered her a position managing structural assets, including bridges and tunnels, in the newly formed District 6.⁴

On December 7, 2009, Paiewonsky and Tramontozzi met with Eslinger and

⁴Eslinger would have reported to Ernst if she had accepted the reassignment

informed her that she would be given a new position as "head of structures" in District 6. The hearing officer found that the new assignment was not offered to Eslinger as a choice; however, Eslinger viewed it as such and, after the meeting, Eslinger told Paiewonsky that she did not want the new position and preferred to retain the one she had. In addition, Eslinger expressed concern that she was not qualified for the new role as she was not licensed as an engineer for tunnels. Eslinger also maintained that taking on responsibilities for which she was not qualified would jeopardize her current professional engineer (P.E.) license. Eslinger then requested a specific job title and description, which Tramontozzi subsequently provided.⁵

On January 5, 2010, Eslinger met with Paiewonsky and Tramontozzi again to discuss the reassignment to District 6. In response to Eslinger's concern that acceptance of the new position would risk violating her P.E. license, Tramontozzi explained that Eslinger's new role would

⁵There was a dispute regarding the title of the new position, which was purported to be "Director of Tunnels," "Director of MHSInfrastructure," and "Director of Structures and Asset Management in District 6," among others. However, there *is* no question that the position would have involved managing structural assets, including bridges and tunnels

not involve designing and constructing tunnels, but rather ensuring that maintenance and preservation protocols were developed and implemented by staff. Thus, according to Tramontozzi, Eslinger's P.E. license would not be affected by accepting the reassignment.

On January 7, 2010, Eslinger informed Paiewonsky and Tramontozzi that she was "not interested in a position that [she] was not qualified to do," and, although her salary and pay grade would remain the same, Eslinger viewed the reassignment as a demotion because she was in a lower position in the organizational structure, she was no longer reporting to the Chief Engineer, Tramontozzi, and she had less responsibilities and fewer subordinates. Eslinger was never officially informed that she would be terminated if she refused to accept the new position, but the hearing officer concluded that this was "clearly the implication" of the many discussions Eslinger had with Paiewonsky and Tramontozzi. Additionally, the hearing officer specifically credited Paiewonsky's testimony that she informed Eslinger that the merger of the transportation departments would result in layoffs. Ultimately, Eslinger did not accept the new position, and, on March 1, 2010, she was informed that her employment was

terminated. Eslinger received a termination letter that stated her employment was terminated "due to a reorganization and consolidation of various management positions."

Because there was no direct evidence of gender discrimination, the hearing officer analyzed Eslinger's claim using the three-stage burden shifting model set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), and adopted by the Supreme Judicial Court in Wheelock College v. Massachusetts Comm'n Against Discrimination, 371 Mass. 130, 136 (1976). See Trustees of Health & Hasps. of Boston, Inc. v. Massachusetts Comm'n Against Discrimination, 65 Mass. App. Ct. 329, 333 n.4 (2005). Under this paradigm, the plaintiff must first establish a prima facie case of discrimination, the employer must then articulate a legitimate, non-discriminatory reason for its adverse employment action, and the plaintiff must ultimately produce evidence that the employer's articulated justification is not true, but rather a pretext for discrimination. Wheelock College, supra.

The plaintiff establishes a prima facie case by showing (1) she was a member of a protected class, (2) she performed her duties at an acceptable level, (3) she was terminated or otherwise subjected to an

adverse employment action, and (4) she was treated less favorably with respect to that adverse action than similarly situated coworkers who were not members of the protected class. Trustees of Health & Hosps. of Boston, Inc. 65 Mass. App. Ct. at 334. The hearing officer concluded that Eslinger established a prima facie case by demonstrating that she was in a protected class by virtue of her gender and that certain aspects of her reassignment could be characterized as an adverse employment if not a demotion.⁶ However, the hearing officer went on to conclude that MassDOT had successfully met its burden of demonstrating legitimate non-

⁶ Specifically, the hearing officer found that Eslinger established a prima facie case of discrimination by showing: (1) she was a member of a protected class "by virtue of her gender," (2) she was "adequately performing her duties at MassHighway as the Deputy Chief Engineer for Bridges and Asset Management," (3) she suffered an adverse employment action as a result of her reassignment "[g]iven the change in reporting" and the loss of her title as "Deputy Chief," and (4) her layoff occurred in circumstances that raised at least a reasonable inference of unlawful conduct since the two remaining Deputy Chief Engineers at MassHighway were male and "retained their titles and positions while [another male employee] became the Deputy Chief for Bridges State-wide." See Sullivan v. Liberty Mut. Ins. Co. 444 Mass. 34, 41 & 45 (2005).

discriminatory reasons for its actions by showing that the selection of Elnahal over Eslinger as Deputy Chief of Bridges and Tunnels, Eslinger's reassignment to District 6, and the termination of Eslinger's employment after she refused to accept the reassignment, were based on objective considerations of Eslinger's strengths and weaknesses, as well as the "clear directive" impressed upon Paiewonsky in the wake of the merger to consolidate job functions and avoid duplication of positions at MassDOT. In reaching her conclusion, the hearing officer credited Paiewonsky's testimony that the merger impacted many highly placed male managers and that Eslinger's position was one of several that were eliminated. In addition, she credited Paiewonsky's explanation that Elnahal was selected for the Deputy Chief of Bridges and Tunnels position because he had better communication and leadership skills than Eslinger, and that the proposed reassignment would not violate Eslinger's license because Eslinger would not be responsible for the design and construction of tunnels.

Lastly, the hearing officer concluded that Eslinger failed to show that MassDOT's articulated reasons for its actions were pretextual or that MassDOT acted with discriminatory intent. The

hearing officer rejected Eslinger's assertion, that her job had not been eliminated due to the reorganization but instead given to a male (Elnahal) who assumed her prior duties and was less qualified than she was for the position, as contrary to the evidence presented at the hearing. The hearing officer found that Elnahal's new position was broader in scope than Eslinger's former job and was in fact a consolidation of Elnahal's and Eslinger's former two positions. The hearing officer also rejected the assertion that Eslinger was a better candidate for the new Deputy Chief position since she had an engineering license and, unlike Elnahal, was licensed as a P.E. in Massachusetts, because such licenses were not required for the position.

Discussion. 1. MCAD's decision.

Our review of the MCAD's decision is limited. See Trustees of Health & Hosps. of Boston, Inc. v. Massachusetts Comm'n Against Discrimination, 449 Mass. 675, 681 (2007). "We shall affirm a decision and order of the MCAD unless the findings and conclusions are unsupported by substantial evidence or based on an error of law." Ramsdell v. Western Mass. Bus Lines, Inc., 415 Mass. 673, 676 (1993). "[U]nder the substantial evidence standard, the reviewing court must determine whether an agency decision is supported

by such evidence as a reasonable mind might accept as adequate to support a conclusion" (quotation and citation omitted). Sy v. Massachusetts Comm'n Against Discrimination, 79 Mass. App. Ct. 760, 765 (2011). "Deference should be given to the hearing officer's fact-finding role, including her right to draw reasonable inferences from the facts found," and "[c]redibility determinations are solely for the hearing officer to make and will not be disturbed on appeal." Massasoit Indus. Corp. v. Massachusetts Comm'n Against Discrimination, 91 Mass. App. Ct. 208, 210 (2017). In addition, we cannot substitute our judgment for that of the agency even if there is evidence to support the court's point of view Sy, supra.

Eslinger argues that the MCAD's decision is not supported by substantial evidence because (1) her position had not been eliminated, (2) she was never informed that she would be terminated if she failed to accept the reassignment, and (3) Paiewonsky provided false, subjective, and misleading testimony.⁷ The problem

⁷ To the extent that Eslinger argues that Paiewonsky treated her differently than other males similarly situated, she does so in passing and fails to adequately specify what evidence MCAD and the judge ignored in this regard. As a result, we do not consider this argument. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019).

with all three reasons advanced by Eslinger is that they are based on her interpretation of the evidence and do not address the central question of whether the hearing officer's findings are supported by substantial evidence. In effect, Eslinger is asking us to weigh the evidence and make our own credibility determinations rather than rely on those made by the hearing officer. This we cannot do. Here, the hearing officer credited Paiewonsky's testimony that she was under "clear directives to eliminate redundant positions within management." To comply with these directives, Paiewonsky consolidated Elnahal's and Eslinger's positions and created a new role at MassDOT titled "Deputy Chief of Bridges and Tunnels," which was awarded to Elnahal. Thus, there was substantial evidence to support the finding that Eslinger's position had been eliminated. Paiewonsky further testified that she selected Elnahal for the new role because he had technical expertise and demonstrated managerial skills that Eslinger lacked.⁸ The hearing officer also concluded that Eslinger was aware that the reassignment was not

⁸ Paiewonsky testified that she was looking for someone who was able to "communicate really well at all levels to get people moving in the same direction." She went on to say that she "didn't see those as strengths of [Eslinger's]."

offered as a choice and that she, like others, would lose her job as a result of the merger. We will not disturb these findings as they are based on the hearing officer's assessment of the credibility of witnesses.

Next, Eslinger argues that the judge erred in concluding that "Eslinger's licenses were not implicated by the reassignment." However, the judge did not reach this conclusion. Rather, the judge accepted the hearing officer's finding that when Paiewonsky and Tramontozzi offered the reassignment to Eslinger, they believed that it would not affect Eslinger's licensure. As the judge explained, "[e]ven were this court to find that the Hearing Officer incorrectly concluded that Eslinger's licenses were not implicated by the reassignment, an issue this court does not reach, the Hearing Officer concluded that Eslinger's position did not aid her argument with regard to gender discrimination; Eslinger did not offer evidence showing that she was reassigned with the knowledge that she would be unqualified for the purpose of terminating her from MassDOT. Rather, the Hearing Officer found, and the Commission upheld, that Paiewonsky and Tramontozzi believed the reassignment would not affect her licensure."

Eslinger's remaining arguments require little discussion. Eslinger claims

that she was not given a full opportunity to present evidence supporting her claim because MCAD failed to conduct depositions prior to the public hearing and failed to call certain witnesses. We note that there was a significant delay between the finding of probable cause and the scheduling of a public hearing in this case. Given this delay, we believe that depositions of key witnesses would have been prudent, but we are not persuaded that Eslinger was denied the opportunity to present her case. More importantly, as MCAD notes in its brief, Eslinger had the opportunity to pursue a purely private right of action and chose not to do so. The proceedings at issue here were conducted on behalf of the public and not on behalf of Eslinger. See Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 563 (2004) ("[T]he primary purpose of an administrative proceeding before the MCAD is to vindicate the public's interest in reducing discrimination in the workplace by deterring, and punishing, instances of discrimination by employers against employees. The MCAD was established to enforce the Commonwealth's antidiscrimination laws. The complainant, thus, may be a party to a § 5 proceeding and may present testimony at the public hearing, but it is the MCAD, and not the

complainant, that prosecutes the discrimination claim" [citations omitted]). In any event, despite Eslinger's overall dissatisfaction, we discern nothing inappropriate in the prosecution of Eslinger's claim. Eslinger also argues that the MCAD conducted a biased investigation in favor of MassDOT because MassDOT, like MCAD, is an agency of the Commonwealth. We discern no support for this allegation in the record.

2. Denial of motions to present additional evidence. Eslinger challenges an order by a judge of the Superior Court denying her two motions to present additional evidence.⁹ Under G. L. c. 30A, § 14 (6), a judge has the discretion to order an agency to reopen an administrative proceeding for consideration of additional evidence so long as that evidence "is material to the issues in the case, and ...there was good reason for failure to present it in the proceeding before the agency." See Northeast Metro. Regional Vocational Sch. Dist. Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 35 Mass. App. Ct. 813, 817 (1994). Here, we discern no abuse of discretion in the denial of Eslinger's

⁹ The motions were denied without explanation by a different judge.

motions for leave to present additional evidence. The judge could properly have concluded that the proposed evidence, which consisted of (1) an email to Eslinger from MCAD's attorney, William F. Green, explaining, purportedly in jest, the reasons why "men are just happier people," and (2) several emails to Eslinger from MCAD's attorneys, William F. Green and Caitlin Sheehan,¹⁰ discussing discovery issues and litigation strategy, was not relevant to any issue in Eslinger's case. Moreover, the judge also could have concluded that Eslinger's September 3, 2020 motions offered no reason, let alone good reason, to explain why she failed to introduce the emails in evidence at the three-day public hearing held on May 9, 10, and 11, 2016. Thus, the judge did not abuse his discretion in refusing to reopen the evidence.

¹⁰ Attorney Green retired in 2015 and the case was subsequently assigned to Attorney Sheehan.

Judgment affirmed.

By the Court (Vuono, Shin & Singh, JJ.¹¹),

/s/ Joseph Staton, Clerk

Entered: May 6, 2022.

¹¹ The panelists are listed in order of seniority.

COMMONWEALTH OF
MASSACHUSETTS
BARNSTABLE SUPERIOR COURT
CIVIL ACTION NO. 2072CV00282

SHIRLEY J. ESLINGER

vs.

MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION & another¹²

MEMORANDUM OF DECISION AND ORDER
ON THE PARTIES' CROSS-MOTIONS FOR
JUDGMENT ON THE PLEADINGS

INTRODUCTION

Pursuant to G. L. c. 151B, § 6 and G. L. c. 30A, § 14, the plaintiff, Shirley Eslinger ("Eslinger"), seeks judicial review of a June 24, 2020 final decision and order, which the Massachusetts Commission Against Discrimination ("MCAD" or "Commission") issued upholding a Hearing Officer's finding that her termination from the Massachusetts Department of Transportation ("MassDOT") was not the result of gender discrimination. Currently, this matter is before the court on the plaintiff's motion for judgment on the pleadings and the defendants' cross-motions for judgment on the pleadings, pursuant to

¹² Massachusetts Commission Against Discrimination

Mass. R. Civ. P. 12(c). For the reasons discussed below, Eslinger's motion is DENIED and the defendants' motions are ALLOWED, affirming the Commission's decision.

BACKGROUND

In April 2008, Eslinger was hired as a Deputy Chief Engineer of Bridges and Asset Management for the Massachusetts Highway Division ("MassHighway") by Luisa Paiewonsky ("Paiewonsky"), MassHighway Division Commissioner. Eslinger was the first female Deputy Chief Engineer in MassHighway's history. Paiewonsky was proud to have recruited Eslinger for the position and was invested in her success. She reported to the Chief Engineer, Frank Tramontozzi.

Eslinger's only performance review, dated May 18, 2009, indicated she was a "successful performer," a step above "satisfactory." Nevertheless, Paiewonsky noted that Eslinger was often not communicative or "silent" during staff meetings and did not interact and accept assistance from her colleagues. Paiewonsky viewed these issues as drawbacks. Tramontozzi also received reports from Eslinger's peers indicating that they had difficulty communicating with her.

In June 2008, a new program called the Accelerated Bridge Program ("ABP") was formed, for which Shoukry Elnahal ("Elnahal") was hired as Director. Eslinger was involved in

the selection of Elnahal for the position and, although the role paid more than Eslinger's position, she did not express interest in applying. Elnahal also reported to Tramontozzi; he was quite successful in this position, earning national recognition.

In November 2009, the Transportation Reform Act merged Mass Turnpike and MassHighway, creating the MassDOT. Paiewonsky became MassDOT's Highway Division Administrator. In this role, she was directed to form a new MassDOT management team that encompassed staff from both Mass Turnpike and MassHighway; however, she was also charged with eliminating redundancy in management between the two organizations. As a result, certain positions were either eliminated or merged, resulting in a number of layoffs and/or demotions. Elnahal and Eslinger's positions were merged to create a new role titled "Deputy Chief Bridges and Tunnels," which was given to Elnahal. Paiewonsky felt Elnahal's technical expertise and skills as a manager, including his communication skills, made him the right person for the position.

On December 7, 2009, Paiewonsky and Tramontozzi met with Eslinger and told her that she would be given a new position as "head of structures" in District 6.¹³ The job

¹³ District 6 was a new highway district comprised of twenty municipalities within the metropolitan Boston area. It

would involve managing structural assets, including bridges and tunnels. The new assignment was not presented to Eslinger as a choice; nevertheless, after the meeting, Eslinger emailed Paiewonsky to state that she did not want the new position and wanted to remain in her current role.

On January 4 and 5, 2010, Eslinger emailed Paiewonsky and requested an exact job title and description. She expressed concern that she was not qualified for the new role as she was not licensed as an engineer for tunnels. As a result, she was concerned she would be in violation of her professional licensure. Eslinger, however, also acknowledged that she had begun to increase her knowledge about the tunnel system in anticipation that the MassHighway tunnels would become her responsibility.

On January 5, 2010, Eslinger met with Paiewonsky and Tramontozzi to discuss her new assignment. 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 support them. In response to Eslinger's concerns about her licensure, Tramontozzi stressed that Eslinger's role would not be designing and constructing tunnels, but rather ensuring

included the I-90 system of tunnels and bridges: the Big Dig tunnels, Ted Williams Tunnel, O'Neil Tunnel, and Zakim Bridge.

that maintenance and preservation protocols were developed and implemented by staff. She was told the position was not a demotion and that she would retain her salary level. Eslinger would be reporting to Helmut Ernst ("Ernst"), and was encouraged to speak with him regarding the position.

Tramontozzi reached out to Ernst in anticipation of Eslinger's new role. Ernst welcomed the prospect of Eslinger being assigned to the District as he needed an engineer to manage its complex structures. On January 6 2010, Ernst reached out to Eslinger to discuss the position and establish a start date, but Eslinger refused to discuss anything about the position until she received a written job description. Ernst described her demeanor to Tramontozzi as "extremely difficult" and "adversarial."

On January 7, 2010, Eslinger informed Tramontozzi and Paiewonsky that she was "not interested in a position that she was not qualified to do," and again requested a written job description as well as expectations. Attorney Robert Horacek, an attorney for MassDOT, met with Eslinger, on January 11, 2010, to help resolve Eslinger's resistance to accepting her new position. Eslinger continued to express interest in remaining in her current role and her belief that the reassignment was a demotion.

On January 25, 2010, Tramontozzi sent Eslinger an email that included a job

description and the reporting structure. The title of the role was "District Six Manager Structures and Asset Management." Eslinger contended that she could not perform any role associated with "tunnels," and stated that she would not be able to accept the job. Although her salary and pay grade remained the same, Eslinger viewed the position as a demotion because: she was in a lower position in the organizational structure; she would no longer report to the Chief Engineer; and the responsibilities and number of people reporting to her were diminished.

Eslinger had no further communication with Paiewonsky or Tramontozzi. Although she was never informed directly that she would be terminated if she did not accept the new position, the Hearing Officer concluded that this was the clear implication; Paiewonsky informed Eslinger that there were lay-offs and furloughs occurring and that she (Paiewonsky) wanted to keep Eslinger within the organization. Paiewonsky had more conversations with Eslinger than any other employee before terminating her position because Paiewonsky had recruited her and was committed to retaining Eslinger at MassDOT. In a letter dated March 1, 2010, Eslinger was notified that her position as "Deputy Chief Engineer, Bridges and Asset Management" had been eliminated. In the "comments" section of Eslinger's termination sheet, the

reason for her termination was stated as a "staff reduction layoff."

On August 12, 2010, Eslinger filed a complaint with the MCAD alleging gender discrimination in violation of G. L. c. 151B, § 4(1). The investigating commissioner found probable cause existed to support the allegations and, as a result, Eslinger was granted a public hearing. The three-day hearing commenced on May 9, 2016.

On February 24, 2017, the Hearing Officer issued her decision. In her findings, the Officer concluded that Eslinger established a *prima facie* case demonstrating that she was in a protected class and that certain aspects of her reassignment could be characterized as an adverse job action, if not a demotion. In addition, other similarly situated male employees, namely the remaining two Deputy Chief Engineers at MassHighway, retained their titles and positions.

In addition, however, the Hearing Officer found that Paiewonsky was charged with a difficult task in assimilating multiple organizations and eliminating redundancy in management. The result impacted a number of highly placed male managers in both MassHighway and Mass Turnpike; and Eslinger's position was only one of many positions that underwent elimination or reassignment due to the reorganization and creation of MassDOT. Eslinger chose not to accept the new position she was offered, failing to

grasp that the offer of reassignment was not a choice, despite the persistent measures Paiewonsky undertook to encourage her to accept the new MassDOT position. As a result of Eslinger's own refusal to accept reassignment, Paiewonsky was compelled to inform Eslinger that her position had been eliminated.

The Hearing Officer credited Paiewonsky's testimony that there was no violation of Eslinger's professional licensure in the reassignment because she would not have been responsible for design and construction matters. Instead, she would have been in charge of overseeing compliance with maintenance protocols by technical teams who possessed the requisite expertise and knowledge. The Hearing Officer concluded that, even if Eslinger was justified in her view that she was not qualified to perform the duties of the new position, such a view did not advance her claim of gender discrimination. The evidence did not support an inference that Paiewonsky made the reassignment in bad faith or that she intended to drive Eslinger out of the organization through the assignment. Therefore, the Hearing Officer concluded that MassDOT had successfully met its burden to demonstrate legitimate, non-discriminatory reasons for reassigning Eslinger.

Eslinger argued that MassDOT's reassignment was a pretext for discrimination

because Elnahal, a male, was appointed Deputy Chief and assumed her prior duties. The Hearing Officer found, however, that Eslinger's former position was eliminated and that Elnahal's new assignment at MassDOT was broader in scope than Eslinger's former job, as it was the compilation of their two roles. In addition, in appointing Elnahal to the new position at MassDOT, Paiewonsky considered his communication and leadership skills, which were areas where Eslinger struggled. For this reason, the Hearing Officer concluded Eslinger did not meet her burden to show that MassDOT "acted with discriminatory intent, motive or state of mind" and thus, dismissed her complaint.

Eslinger appealed the Hearing Officer's decision to the Full Commission. The Commission reviewed the Hearing Officer's decision to determine if the Hearing Officer's findings of fact were supported by substantial evidence. On June 24, 2020, the Commission affirmed the Hearing Officer's decision in full. Specifically, the Commission found that the Hearing Officer's decision was neither arbitrary and capricious nor unsupported by substantial evidence because, overall, Eslinger's argument simply attempted to re-weigh the evidence and second-guess the Hearing Officer's credibility determinations.

DISCUSSION

I. The Standard of Review

Relief in the nature of certiorari "is to correct substantial errors of law apparent on the record adversely affecting material rights." *Cambridge Haus. Auth. v. Civil Sen. Comm'n*, 1 Mass. App. Ct 586, 587 (1979) (internal quotation and citation omitted). In its review, the court is not authorized to weigh evidence, find facts, exercise discretion, or substitute its own judgment, and it must give due weight to the overall judgment of the commission. *Tracht v. County Comm'r's of Worcester*, 318 Mass. 681, 686 (1945); *Dubuqus v. Conservation Comm'n of Barnstable*, 58 Mass. App. Ct. 824, 828 (2003) (quotations omitted).

II. Analysis

The plaintiff argues that the Commission and Hearing Officer's findings were arbitrary and capricious because the record does not contain substantial evidence to support their findings. A court will find that a commission's decision was based on "substantial evidence" where the administrative record contains "such evidence as a reasonable mind might accept as adequate to support a conclusion." *New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981). Where a decision is based on substantial evidence, it is

not arbitrary or capricious. *Massachusetts Electric Co. v. Department of Public Utilities*, 376 Mass. 294, 312 (1978). Furthermore, when presented with two conflicting views, it is for the commission to decide which view to credit. *Conservation Comm'n of Falmouth v. Pacheco*, 49 Mass. App. Ct. 737, 739 n.3 (2000). A court is required to uphold a commission's decision even if the court would have decided the matter differently. *Seagram Distillers Co. v. Alcoholic Beverage Control Comm'n*. 401 Mass. 713, 721 (1988).

In an employment discrimination case, pursuant to G. L. c. 151B, a three-step burden shifting analysis is required: first, the plaintiff must establish a prima facie case of discrimination; second, the defendant may rebut the prima facie case by articulating a legitimate, nondiscriminatory reason for its action; and third, the burden returns to the plaintiff to establish that the defendant's articulated justification is pretextual. *Blare v. Husky Injection Molding Sys. Boston, Inc.*, 419 Mass. 437, 441-443 (1995). The plaintiff establishes a prima facie case by showing: (1) she is a member of a protected class; (2) she performed her job at an acceptable level; (3) she suffered an adverse employment action; and (4) in the case of reduction in force, her layoff occurred in circumstances that would raise at least a reasonable inference of unlawful conduct. *Sullivan v. Liberty Mut. Ins. Co.*, 444 Mass. 34, 45 (2005).

The Hearing Officer found, and the Commission upheld, that Eslinger met her burden to show a *prima facie* case in the first step. However, in light of MassDOT's legitimate, nondiscriminatory reasons for eliminating Eslinger's position, Eslinger failed to establish MassDOT's justification was pretextual. Eslinger argues that the Commission overstated her burden in the third step by requiring her to prove "intent" and "state of mind," of which she offered circumstantial evidence. She argues that this denied her a fair opportunity to show pretext.

The Hearing Officer found, and Commission upheld, that MassDOT met its burden to articulate a legitimate, nondiscriminatory reason for terminating Eslinger. The Hearing Officer credited Paiewonsky's testimony that the Transportation Reform Act, which created the merger between Mass Turnpike and MassHighway, gave clear directives to eliminate redundant positions within management. Further, Paiewonsky identified the importance of retaining a high-level female manager in a male-dominated industry, as demonstrated by her efforts to convince Eslinger to accept the reassignment. The Hearing Officer and Commission concluded that Eslinger refused the position, despite the obvious conclusion that she would be terminated.

Eslinger argued that MassDOT's

explanation was pretextual because her position had not been eliminated; rather, it had been given to Elnahal, a male employee who was less qualified. She also argued that she was unqualified to accept her reassignment because she did not hold the requisite licensure for tunnels. The Hearing Officer and Commission, however, decided that the evidence did not support this conclusion and therefore, she did not meet her burden to show that MassDOT acted with discriminatory intent, motive, or state of mind.

Similar to her argument before the Commission, much of Eslinger's memorandum is dedicated to reiterating her view of the evidence, offering her characterization of the testimony, and identifying what she believes to be false testimony. Specifically, Eslinger attempts to convince this court to draw a different conclusion from the circumstantial evidence presented at the public hearing. It is not the role of this court to weigh evidence. *Tracht*, 318 Mass. at 686. Therefore, this court cannot disturb the Hearing Officer or Commission's findings as they relate to the credibility of witnesses or the evidence before them. *Id.*

Eslinger also claims that the Hearing Officer made several arbitrary conclusions and errors of law. Generally, she argues that the Hearing Officer incorrectly concluded that the reassignment was not in violation of her professional licensure, which

ultimately forced her to refuse the position. Even were this court to find that the Hearing Officer incorrectly concluded that Eslinger's licenses were not implicated by the reassignment, an issue this court does not reach, the Hearing Officer concluded that Eslinger's position did not aid her argument with regard to gender discrimination; Eslinger did not offer evidence showing that she was reassigned with the knowledge that she would be unqualified for the purpose of terminating her from MassDOT. Rather, the Hearing Officer found, and the Commission upheld, that Paiewonsky worked diligently in an attempt to retain Eslinger as a female employee, and that Paiewonsky and Tramontozzi believed the reassignment would not affect her licensure. The Hearing Officer credited the testimony, a determination this court cannot disturb. *Tracht*, 318 Mass. at 686. See *Pacheco*, 49 Mass. App. Cl at 739 n.3 (within Commission's discretion to make a choice between two fairly conflicting views). In sum, the court concludes the Hearing Officer and Commission bad before it "such evidence as a reasonable mind might accept as adequate to support [its] conclusion." *New Boston Garden Corp.*, 383 Mass. at 466.

ORDER

For the reasons articulated above it is hereby **ORDERED** that the plaintiff's motion for judgment on the pleadings is **DENIED**, and the defendants' cross-motions for judgment on the

pleadings are ALLOWED. The Commission's decision, dated June 24, 2020, concluding Eslinger was not terminated from MassDOT as the result of gender discrimination, is AFFIRMED.

SO ORDERED

s/ Elaine M. Buckley
Justice of the Superior Court
DATED: May 10, 2021

s/ Scott Nickerson
Clerk

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION
DOCKET NO. 10 BEM 02076

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SHIRLEY ESLINGER

Complainants

v.

MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION,

Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us on appeal of a decision by Hearing Officer Eugenia Guastaferri following an evidentiary hearing on the question of whether the Massachusetts Department of Transportation ("MassDOT") unlawfully discriminated against its employee, Shirley Eslinger ("Ms. Eslinger"), by terminating her employment on the basis of gender. Upon consideration of the evidence produced over a three-day public hearing, Hearing Officer Guastaferri determined that MassDOT was not liable for unlawful gender discrimination under

M.G.L. c. 151B, § 4(1), and dismissed the case. Ms. Eslinger appealed to the Full Commission *pro se* and filed a lengthy petition for review in support of the appeal.¹⁴ After careful review of the record and consideration of the arguments advanced on appeal, we affirm the Hearing Officer's decision in full.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 (2020)), and relevant case law. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, §§ 3(6), 5. The Hearing Officer's findings of fact must be supported by substantial evidence, which is defined as "such evidence as a reasonable mind might accept as adequate to support a finding...." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. C, 30A, § 1(6).

It is the Hearing Officer's responsibility to evaluate the credibility of

¹⁴ The case against MassDOT for unlawful discrimination on the basis of gender was prosecuted by counsel for the Commission in accordance with 804 CMR I.09(5)(b) (1999) (the regulations in effect at the time of public hearing) and M.G.L. c. 151B, §5. See Stonehill Coll. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 562-563 (2004)

witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). Fact-finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); MCAD and Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23 (10) (2020).

LEGAL DISCUSSION

Ms. Eslinger argues over the course of an 81-page petition for review¹⁵ that the

¹⁵ The Commission has recently promulgated regulations at 804 CMR 1.23(3) (2020) with respect to the length of a petition for review (now limited to 30 pages).

Hearing Officer's decision was arbitrary and capricious and unsupported by substantial evidence. She also sporadically argues that the Commission's investigation of her claim was "improper", that she was denied a fair hearing, and that she received ineffective assistance of counsel. The latter three arguments may be summarily disposed of, respectively, as follows: (1) an administrative appeal to the Full Commission is limited to the record of the adjudicatory proceedings below which do not include the investigation (see 804 CMR 1.23(t) (1999))¹⁶, and, relatedly, there is no judicial review of the Commission's investigation of a claim (see Grandoit v. Massachusetts Comm'n Against Discrimination, 95 Mass. App. Ct. 603, 606-07 (2019)); (2) the Hearing Officer held a public hearing in conformance with M.G.L. c. 151B, §§ 3 and 5 that clearly provided Ms. Eslinger with notice and the opportunity to be heard (see, e.g., Southbridge Water Supply Co. v. Dep't of Pub. Utilities, 368 Mass. 300 309 (1975)); and (3) Commission

¹⁶ Ms. Eslinger's appeal to the Full Commission was filed when the Commission's 1999 regulations were in effect, although the long-standing rule concerning Full Commission review is unchanged (see 804 CMR 1.23(8) (2020)) and in conformance with M.G.L. c. 1518, § 3(6) (see Smith Coll. v. Massachusetts Comm'n Against Discrimination, 376 Mass. 221,225, fn. 7 (1978)) (requests for review by the Full Commission under section 3(6) are confined to the record of proceedings below).

counsel was not Ms. Eslinger's attorney (see Stonehill, 441 Mass. 549 at 563)¹⁷

We also find that the Hearing Officer's decision was neither arbitrary and capricious nor unsupported by substantial evidence because, overall, Ms. Eslinger's arguments do nothing more than urge us to ignore the standard of review by reweighing the evidence and second-guess the Hearing Officer's credibility determinations. In order to prevail on her claim of unlawful discrimination on the basis of gender, Ms. Eslinger was required to prove that the reasons for her termination advanced by MassDOT were a pretext for discrimination in violation of M.G.L. c. 151B, § 4(1). Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 396-97 (2016) (describing three stage burden-shifting paradigm from well-established case law requiring plaintiff to make *prima facie* case of unlawful discrimination, followed by employer's burden to advance a legitimate, non-discriminatory reason for the termination, and plaintiff's ultimate burden to prove employer's actions were motivated by

¹⁷ Moreover, the right to effective assistance of counsel is generally limited to criminal, not civil, cases (see, e.g., Com. v. Patton, 458 Mass. 119, 124 (2010)), and Ms. Eslinger had the right to hire a private attorney to represent her in Commission proceedings or to withdraw her claim to file in court. See 804 CMR 1.09(5) and 1.15(2) (1999).

discriminatory animus). Over MassDOT's objections with respect to the third element, the Hearing Officer determined that Ms. Eslinger indeed made out her *prima facie* case as outlined in Blare v. Husky Molding Systems, 219 Mass. 437, 441 (1995), because she showed that: (1) by virtue of her gender (female), she is a member of a protected class; (2) she was adequately performing the duties of her job; (3) she was subjected to adverse treatment; and (4) she was treated differently than male employees. The Hearing Officer determined, however, that Ms. Eslinger failed to prove MassDOT's reasons for terminating her (after unsuccessfully urging her to accept a reassignment to another job) were pretextual.

To the extent that Ms. Eslinger's arguments may be summarized, she argues that she presented substantial evidence of pretext in the form of: evidence of discriminatory animus from the MassDOT official who terminated her, Luisa Paiewonsky, where Paiewonsky's testimony was fraught with subtle bias against women; evidence that Shoukry Elnahal, the male employee who assumed her duties (by accepting a new position from Paiewonsky that combined Ms. Eslinger's job and Elnahal's former job), was unqualified; evidence that the reassignment she was offered was insincere because she

was unqualified to take the job; and evidence that she was treated differently from two of her male colleagues who held the same position she held (they retained their positions and she did not).

As for the first three arguments, it was the Hearing Officer's sole authority to determine Paiewonsky's credibility and sincerity with respect to her decisional process, and she believed Paiewonsky's testimony that painstakingly outlined why she consolidated Ms. Eslinger and Elnahal's positions, why she chose Elnahal over Ms. Eslinger to fill the newly-created position, and why she believed Ms. Eslinger was a good fit for the reassignment she was offered. The Hearing Officer also believed Paiewonsky's testimony that after recruiting Ms. Eslinger into her job, she was invested in her success, as evidenced by her decision to try and retain Ms. Eslinger in a high-level position not long after Ms. Eslinger's original position was being eliminated. "[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). When the same decision maker both hires and fires an employee

"[c]laims that employer animus exists in termination but not in hiring seem irrational," because "[f]rom the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them once they are on the job." *Id.* (internal quotations omitted). Moreover, nothing in the record demonstrates that Elnahal was unqualified for the newly created position. Last, Ms. Eslinger's argument that she was unqualified for the reassignment Paiewonsky offered her is not supported by the record as a whole, and, as determined by the Hearing Officer, rebutted by Paiewonsky's credited testimony. For all of these reasons, the Hearing Officer did not err in determining Ms. Eslinger failed to prove pretext by virtue of discriminatory intent on behalf of Paiewonsky herself, by virtue of Elnahal's qualifications, or by virtue of an illusory reassignment offer.

As for the remaining argument, while proof that Ms. Eslinger was treated differently from the two males who held her same position was sufficient to prove her *prima facie* case, other comparators' fates in the context of the reorganization creating MassDOT demonstrates a lack of pretext behind Paiewonsky's explanation. Contrary to Ms. Eslinger's arguments on appeal, her comparators did not have to be limited to just the two other Deputy Chiefs at the Highway Department. When

relying on comparator evidence to establish discriminatory animus the complainant must show that the comparators were similarly situated and treated differently, but "a comparator's circumstances need not be identical to those of the complainant." Trustees of Health & Hosps. of Boston, Inc. v. MCAD, 449 Mass. 675, 682-683 (2007) (during layoffs another employee who had a different job title and different responsibilities was a comparator because they were similarly situated in all aspects relevant to the implementation of the layoff procedure). The Hearing Officer found specific examples of high-level male managers who were similarly situated to Ms. Eslinger and treated similarly to her, not differently. She found that Tom Laughlin, who was the head of Highway Operations at MassHighway was terminated, as his position was duplicative. She also found that Helmut Ernst, who was the Chief Engineer at the Massachusetts Transit Authority, was reassigned to a lower ranking position where he suffered an annual pay cut of approximately \$20,000 to \$23,000. These findings are supported by substantial evidence. As a result, the Hearing Officer did not err in recognizing that male comparators outside of Ms. Eslinger's identical peers were treated similarly to her, and therefore she did not err in determining that Ms. Eslinger failed to prove pretext by virtue of comparator evidence.

In large part, Ms. Eslinger simply disagrees with MassDOT's decision to eliminate her position (which resulted in her termination after she would not accept reassignment). However, an employer's reasons for its decision to terminate "may be unsound or even absurd," but if they are not discriminatory a complainant cannot prevail. Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761, 766, (1986). Furthermore, when undertaking a reduction in force and considering several presumably qualified employees for layoff, an employer may consider an employee's particular expertise, whether two candidates for layoff have overlapping expertise, and the employer's ongoing business needs. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 51 (2005). The Hearing Officer properly declined to assess the wisdom of Paiewonsky's business decisions, and instead more narrowly determined that there was no evidence that MassDOT's elimination and consolidation of positions was a pretext for gender discrimination.

We have carefully reviewed grounds for appeal and the record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings of fact and conclusions of law. We find the Hearing

Officer's conclusion that MassDOT did not discriminate against Ms. Eslinger based on her sex was supported by substantial evidence and we defer to the Hearing Officer's determinations.

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of service of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, §6, and the 1996 Standing Order on Judicial Review of Agency Actions, Superior Court Standing Order 96-1. Failure to file a petition in court within thirty (30) days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, §6.

SO ORDERED¹⁸this 24th day of June,
2020.

/s Monserrate Quinones
/s Neldy Jean Francois
Commissioners

/s

¹⁸ Chairwoman Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission Decision. See 804 CMR

COMMONWEALTH OF
MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION

DOCKET NO. 10-BEM-02076

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SHIRLEY J. ESLINGER,
Complainants

v.

MASSACHUSETTS DEPARTMENT
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)

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)¹⁹

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

¹⁹ 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 publically introduce Complainant as the Acting Director of the ABP program. (Tr.2,pp. 6-7 Ex.R-6)

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 8, 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 Prefabricated 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."²⁰ 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

²⁰ 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)

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

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. Bxs. 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 layoffs 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 El Nahal 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 stakeholders 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 reassessments 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 newcomer, 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

/s/ Eugenia M. Guastaferri
Hearing Officer

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SHIRLEY J. ESLINGER, PETITIONER

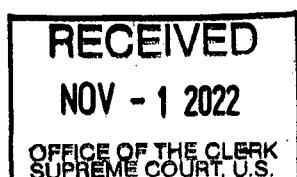
vs.

**MASSACHUSETTS COMMISSION AGAINST
DISCRIMINATION**
and et al,
RESPONDENTS

**ON PETITION FOR WRIT OF CERTIORARI
TO
MASSACHUSETTS APPEALS COURTS**

**BOOKLET 3 OF 3
APPENDIX 2 OF 2 FOR WRIT OF CERTIORARI**

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250 CMR: BOARD OF
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3.05 Professional Practice

(5) The Board file shows the branch of engineering in which the registrant was found to be competent by the Board on the basis of education, experience, and specific examination passed by said registration.

(6) The Board initially registers an applicant for Professional Engineer in one branch of engineering only. A registrant who wishes to change registration to a different branch or to be registered in an additional branch of engineering shall file a new application form including the proper experience record and educational basis for said application. There will be the standard fee for each registration application and for any examinations required. A registrant who wishes to practice engineering in an area of competence other than that in which registered may request a determination of competence by submitting such evidence as may be required by the Board.

(7) A registrant must limit professional practice to areas of personal competence as

demonstrated to and approved by the Board. (The registrant may, however, work in other areas provided it is under the guidance of a Registered Professional Engineer or Land Surveyor qualified in said other areas, or under the guidance of a competent Engineer or Land Surveyor practicing under one of the exceptions listed in M.G.L. c. 112. § 81R as noted in 250 CMR 3.05(8).) A registrant shall not take responsibility for work in areas in which said registrant is not competent even though the area comes within a branch in which said registrant is registered. The burden of proof of competence rests upon the registrant should a question be raised as to that competence. The Board shall make the determination of competence when requested by the registrant or any person or entity.

(8) Engineering work may be performed only by registered Professional Engineers and land surveying work may be performed only by registered Land Surveyors with certain exceptions listed under M.G.L. c. 112, § 81R. These rights granted by specific exception do not include the right to use the title "engineer" or "land surveyor".

(9) Engineering work may be performed only by or under the direct supervision of a registered Professional Engineer qualified by the laws of the Commonwealth of Massachusetts to so practice.

**250 CMR: BOARD OF REGISTRATION
OF PROFESSIONAL ENGINEERS AND
LAND SURVEYORS**

**250 CMR 4.00: PROFESSIONAL
RESPONSIBILITY**

Section

- 4.01 Preamble**
- 4.02 Responsibility**
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- 4.04 Public Statements**
- 4.05 Conflict of Interest**
- 4.06 Solicitation**

4.01 Preamble

In order to safeguard, life, health and property, to promote the public welfare, and to establish and maintain a high standard of integrity and practice, the following Rules of Professional Responsibility shall be binding on every person holding a certificate of registration and on all partnerships or corporations or other legal entities authorized to offer or perform engineering or land surveying services in the Commonwealth of Massachusetts.

The Rules of Professional Responsibility as promulgated herein are an

exercise of the police power vested in the Board by virtue of the following General Laws: M.O.L. c. 13, §§ 45 and 46; c. 112, §§ 81D through 81T; c. 143, § 54A, St. 1970 c. 707, §§ 1 through 12; c. 282; c. 707, §§ 13 through 15, St 1971 c. 1099; St. 1972 c. 684; St. 1975 chs. 545 and 588; St. 1979 c. 897 with particular reference to M.G.L. c. 112. § 81E.

All persons registered under the above stated Massachusetts General Laws are charged with having knowledge of the existence of 250-CMR 4.00: *Professional Responsibility* and shall be deemed to be familiar with their provisions and to understand them.

In these Rules of Professional Responsibility, the word "registrant" shall mean any person holding a license issued by this Board.

4.02 Responsibility

- (1) Registrants shall hold paramount the safety, health and welfare of the public in the performance of their professional duties.
- (2) (a) Registrants shall at all times recognize that their primary obligation is to protect the safety, health, property and welfare of the public. If their professional judgment is overruled under circumstances where the safety, health, property, or welfare of

the public may be endangered, they shall notify their employer or client and such other authority as may be appropriate.

(b) Registrants shall approve and seal only those design documents and surveys, reviewed or prepared by them, which are safe for public health, property and welfare in conformity with accepted engineering and land surveying standards.

(c) Registrants shall not reveal facts, data or information obtained in a professional capacity without the prior consent of the client, or employer except as authorized or required by law.

(d) Registrants shall not permit the use of their name or firm name nor associate in business ventures with any person or firm which they may have reason to believe is engaging in fraudulent or dishonest business or professional practices.

(e) Registrants having knowledge of any alleged violation of 250 CMR. 4.00 shall cooperate with the Board in furnishing such information or assistance as may be required.

4.03 Compctcncv

Registrants shall perform services only in the areas of their competence.

(I) Registrants shall undertake assignments only when qualified by education or experience

in the specific technical field of engineering or land surveying involved.

- (2) Registrants shall not affix their signatures or seals to any plans or documents dealing with subject matter in which they lack competence, nor to any such plan or document not prepared or reviewed under their direct supervisory control.
- (3) Registrants may accept an assignment outside of their fields of competence to the extent that their services are restricted to those phases of the project in which they are qualified, and to the extent that they are satisfied that all other phases of such project will be performed by qualified associates, consultants or employees.
- (4) In the event a question arises as the competence of a registrant in a specific technical field which cannot be otherwise resolved to the Board's satisfaction, the Board either upon request by the registrant or on its own volition, shall admit the registrant to an appropriate examination,

4.04:

Public Statements

Registrants shall issue public statements only in an objective and truthful manner.

- (1) Registrants shall be objective and truthful in professional reports, statements or testimony.
- (2) Registrants may express publicly a professional opinion on technical subjects only when that opinion is founded upon adequate knowledge of the facts and competence in the subject matter.
- (3) Registrants shall issue no statements, criticisms or arguments on technical matters which are inspired or paid for by interested parties unless the registrants have prefaced their comments by explicitly identifying the interested parties on whose behalf they are speaking and by revealing the existence of any interest the registrants may have in the matters.

4.05 Conflict of Interest

Registrants shall act in professional matters for each employer or client as faithful agents or trustees; and shall avoid conflicts of interest.

..

- (1) Registrants shall disclose all known or potential conflicts of interest to their employers or clients by promptly informing them of any business association, interest, or other circumstances which could influence or

give an impression of influencing their judgment or the quality of their services.

(2) Registrants shall not accept compensation, financial or otherwise, from more than one party for concurrent services on the same project, or for concurrent services pertaining to the same project, unless the circumstances are fully disclosed to all interested parties.

(3) Registrants shall not solicit or accept financial or other valuable consideration, directly or indirectly, from contractors, their agents, or other parties in connection with work for employers or clients for which the registrant is responsible.

(4) Registrants in public services as members, advisors, or employees of a governmental body or department shall not participate in decisions with respect to professional policies solicited or provided by them or their organizations.

(5) Registrants shall not solicit or accept a professional contract from a governmental body on which a principal or officer of their organization serves a member, except upon public disclosure of all pertinent facts and circumstances and consent of appropriate public authority.

4.05 Solicitation

Registrants shall avoid improper solicitation of professional employment.

(1) Registrants shall not falsify or permit misrepresentation of their own or their associates' academic or professional qualifications. They shall not misrepresent or exaggerate their degree of responsibility in or for the subject matter of prior assignments. Brochures or other presentations incident to the solicitation of employment shall not misrepresent pertinent facts concerning employers, employees, associates, joint ventures or past accomplishments.

(2)- Registrants shall not offer, give, solicit or receive, either directly or indirectly, any commission, or gift, or other valuable consideration in order to secure work, and shall not make any political contribution intended to influence the award of a contract.

REGULATORY AUTHORITY

250 CMR 4.00: M.G.L. c. 112, §§ 81D through 81T.

**Additional material
from this filing is
available in the
Clerk's Office.**