AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR
Tammy Brynie, Esq., Arbitrator

In the matter of the
arbitration between:

NEPBA, Local 550

and Case No. 01-15-0003-1160
(J. Gaudreau)

Worcester County
Sheriff's Department

Decision and Award

For the Employer

[redacted]

For the Union

Gary G. Nolan, Esq.

Background

This hearing was held on March 17, 2016 and April 8, 2016. At arbitration, the parties submitted the following stipulated issue:

> Did the Employer discriminate against the Grievant, Joseph Gaudreau based on his Union activity, in violation of Article 11, or any other relevant section of the collective bargaining agreement, during the 2014-2015 sergeants' promotional process?
>
> If so, what shall be the remedy?[1]

The Grievant, Joseph Gaudreau, has worked for the Employer, as a Correctional Officer, for at least 22 years. Prior to his work with the Employer, the Grievant served in the Air Force, in an active duty capacity, for 11 years. During his military service, the Grievant received a variety of decorations and awards, See Union Exhibit #16, and was honorably discharged.

The Employer operates a correctional facility that provides for the care and custody of both inmates who have been convicted of crimes (ranging from misdemeanors to felonies), and individuals who have been charged with crimes and whose court appearances are pending. The Union represents the majority of the Employer's workforce -- Correctional Officers and Sergeant Correctional Officers.[2]

For the majority (about 18 out of 22 years) of the Grievant's correctional employment, his primary work assignment has been at Central Control. That post, in a glassed-in area, is a main hub of the jail. Central Control, in effect, regulates travel and traffic within the facility, including staff and inmate movement. Central Control serves, in effect, like the traffic

[1] At hearing, the parties further agreed that the received exhibits and the prepared transcript would be the proceeding's record.

[2] Superior Correctional Officers are represented by a different collective bargaining agent.

coordinator for the correctional facility, "by opening gates so the flow of the jail runs." Tr. Vol. I. p. 168. In addition, Central control regulates the passage of civilians coming in and out of the facility, including, amongst others, lawyers, DCF workers and/or other Commonwealth employees. Due to its critical security functions, access to Central Control is restricted and, during its day-to-day operations, correctional officers, assigned within the "booth" have circumscribed interactions with inmates. The Senior Shift Officer (who is usually a Lieutenant) generally makes the Central Control officer assignment. It is undisputed that the Grievant exhibited fine performance in the central control role and, through supervisors' choices, he was retained in that position for almost two decades.

In addition to his regular shifts within Central Control, it is uncontroverted that the Grievant, over time, performed a lot of overtime shifts. Indeed, the Grievant testified, without contradiction, that he averaged anywhere from about 80 to 100 overtime shifts a year. Generally, on overtime, the Grievant worked in the "Annex" -- a dormitory style housing area, lined with bunk beds (and not cells), where on-duty correctional officers walk through the area and address any issues that arise.

Apparently, the "Annex" is a special needs unit, housing inmates that, for various reasons (including, for example, their crimes or their age), can not live within the general prison population.

Over the years, the Grievant has received fine performance evaluations. For example, in a January 2008 evaluation prepared by then-Lieutenant Scott McMillan, the Grievant received an overall rating of 4.075 out of 5.0. In the evaluated category of "Relations with Inmates," the Grievant received a 4.0 mark. In the comments section of the evaluation, McMillan wrote:

> Joe is an excellent asset to the 7-3 shift. Joe can always be counted on to perform at a high level. Joes reacts cool and calm during stressful situations. And has a great understanding of corrections. Joe has a great attitude and is always professional when dealing with the public and co-workers. It is in this officers opinion that Joe would be a perfect selection for the next rank of sergeant. Union Exhibit #9, p. 3.

More recently, in 2014, the Grievant was evaluated by Lieutenant Steven Foulkrod. In the performance review, the Grievant received 4.0 out of 5.0 marks with respect to "Relations with Inmates," while receiving an overall 4.18 out of a 5.0 possible rating. In the "Addition comments" section, Foulkrod wrote:

> Officer Gaudreau is an experienced employee who knows and performs his job well. He is always willing to give guidance to less experienced officers and takes the time to explain procedures to

> them. He is certainly an asset to the daily running of this shift.

Then, in the "Goals set by evaluator" portion of the document, Foulkrod indicated:

> Officer Gaudreau should continue to perform his duties in the professional manner in which he always has. He should continue to test for promotion as his willingness to assist less experienced officers would serve the department well as a supervisor. Union Exhibit #14.

In addition to his fine evaluations, the Grievant has been recognized for excellent attendance. Evidently, sick leave use, and monitoring sick leave for potential abuse, has been an Employer concern. The Grievant's sick leave record, for example, was appended to his 2014 evaluation, noting that he used only 11.50 hours during the course of the year. Union Exhibit #14. In addition, the Employer implemented a Sick Leave Cash Incentive Benefit for employees with fine attendance records. The Grievant, by letter dated January 30, 2015, was notified that he was eligible due to his calendar year 2014 attendance. In addition, Sheriff Evangelidis' communication stated:

> As you know, since taking office, I have consistently stressed the importance of attendance. When evaluating candidates for personnel appointments, one of the first things reviewed is since time use. I am committed to rewarding those employees who are committed to being dependable members of the Worcester County Sheriff's Office and show up for work.
> Union Exhibit #15.

Scott McMillan reviewed the Grievant's 2014 evaluation. He signed-off on the document, affixing his handwriting in the "Reviewer's" signature block on December 17, 2014.[3] Union Exhibit #14.

The Grievant had taken a written promotional exam for sergeant on or around September 15, 2014. Amongst the approximately 82 marked results, he achieved the 5th highest score. Union Exhibit #3. Pursuant to a recent Memorandum of Agreement between the Union and Employer, the parties agreed to modify Article 5 of the collective bargaining agreement, Sections 3 and 4, as follows:

> There shall be an oral interview of the top 25 candidates by a panel which shall consistent of two members selected by the Sheriff and one member (must be a sergeant) selected by the NEPA, Local 500. Any recommendation of the panel shall be advisory only. Union Exhibit #1 and Joint Exhibit #1.

The Employer had a Policy and Procedure, 914.13, with respect to promotions, indicating that the promotional process would consist of an independent written test and an oral examination. The Policy and procedure further

[3] This performance evaluation was finalized in the midst of the promotional process challenged here. The Grievant's promotional interview took place on November 4, 2014, Union Exhibit #5, with the promotions effective in January of 2015. As detailed, below, McMillan participated in the promotional "roundtable" that discussed, evaluated and selected promotional candidates. McMillan testified that he recommended that the Grievant not be promoted and that one of his criticisms of the Grievant during the roundtable discussion was that he was "timid" around inmates, Tr. Vol. I, p. 244.

detailed the expectations of panel members conducting the oral examination -- namely, that "[e]ach panel member will grade each candidate independently from the other two panel members." Union Exhibit #2.[4]

In addition to his role as a Correctional Officer, the Grievant was also an active Union official. For about nine years, the Grievant held positions within the Union's local executive, with the majority of his Union involvement being as its Chief Steward. In that role, the Grievant participated in labor-management meetings and took part in contract negotiation sessions. In addition, the Grievant was responsible for the filing and processing of grievances -- a role that led him to interact, as an advocate and, at times, in a resulting adversarial capacity, with Employer supervisors and managers. Indeed, the Grievant testified, without contradiction, to the effect that Assistant Superintendent James Trainor would assume, when they met, that the Grievant was coming to deliver grievances -- and that their interactions took on a "Now what?" tenor. Tr., Vol. II, p. 63.

It is undisputed that there have been turbulent

[4] In August of 2015, after the filing and processing of the instant grievance, the Employer issued Attachment 4 to 914.03. The newly promulgated provision indicated that "Evaluations shall be a major component to all promotions, transfers and demotions." Union Exhibit #17, p.17. Yet, here the Employer provided arbitral testimony to the effect that evaluations were not factored into the promotional process as they were not accurate tools due to the prevailing culture of supervisors' giving employees praise and failing to be critical. Employer Brief at p. 5

relations between the Employer and the Union during stretches of time when the Grievant was a Union official. As the individual filing and prosecuting grievances on the Union's behalf, the Grievant was on the front-line of many disputes.[5] By all accounts, more recently, the parties have achieved a much improved relationship.

The Employer conducted interviews for top-scoring individuals on the promotional exam for sergeant. Due to a three-way for 25th place on the exam, the Employer interviewed 28, rather than 25, candidates. Interviews were scheduled over four days, with the panel of interviewers changing each day. For example, on the first few days, the interview panel consisted of four people -- with three Employer representatives, and one bargaining unit member, then-Sergeant Stephen Hart. Union President Justin O'Toole testified that he called Special Sheriff Rebecca Pellegrino to say, in effect, that the contract provided for only a three person panel. O'Toole testified, without rebuttal, that Pellegrino was "less than happy with me" but that the number of interviewing panel members decreased to three for the remaining two days of interviews. Tr. Vol. II, p. 8. Thus, during the

[5] The Grievant's sole disciplinary scrap occurred in conjunction with his Union activity. Evidently, a dispute arose with respect to the propriety of Union fund-raising activities and the Grievant was issued a Letter of Reprimand. As a result of later global resolutions/settlements of pending grievances and disputes, the Grievant's reprimand was expunged from his record.

four days of interviews, the number of panelists varied, as did the identity of the panel members. The questions posed by each panel were not uniform, nor was there necessarily any consistency to the questions posed to individual candidates by the same panel.[6] Whether, and how, candidates were graded and/or ranked varied from panel to panel. And, how and when panelists discussed candidates and/or made promotional recommendations was also variable.

It appears that panelists received little guidance or instructions with respect to the interview process. I find no indication that panel members were given any criteria for evaluating or ranking candidates. Nor were model responses to interview questions, or any rating or grading sheets, provided. To the extent that panel members took notes during the interview process, or recorded candidates' rankings, all such notes or documents have been destroyed.

The Grievant was interviewed by a four person panel, consisting of Assistant Superintendent James Trainor, Assistant Deputy Superintendent Michael Temple, Lieutenant Dennis Dowd and then-Sergeant Stephen Hart.[7] Testimony elicited from the panelists did not provide a clear indication of interview events. Indeed contradictory

[6] See Tr. Vol. I, pp. 171-172.
[7] Hart, in the interim between the challenged promotional process and the present arbitration was promoted to Lieutenant and, as a result, is no longer within the bargaining unit represented by the Union.

testimony about critical matters, including whether or not the panelists discussed the questions prior to the interview; whether the interviewed candidates were individually scored or graded and/or whether the interviewed candidates were ranked; and, to the extent that any ranking was developed, where the Grievant ranked, was elicited at hearing.[8]

One aspect of his interview particularly struck the Grievant. The Grievant testified that, as his interview was winding up, Trainor said, in effect: One more thing, you're a big Union guy, right? The Grievant did not recall anyone saying anything else. Tr. Vol. II, p. 57.

After the interviews, a roundtable discussion about promotions was convened, and it was attended, in the main, by individuals holding the rank of Deputy and above. According to Superintendent Special Sheriff David Tuttle, he had decided on a roundtable discussion, as he wanted to ensure that the Employer's career personnel had a say in the promotional process.[9] Thus, supervisors who were not on a candidate's interview panel could, during the roundtable discussion, provide opinions and recommendations concerning candidates' suitability for

[8] A reliable summary of the inconsistencies and discrepancies exhibited by panelists' testimony, reproduced in chart form by the Union in its Brief, at p. 10, is instructive.

[9] Evidently, there was a perception, in the past, that promotions had been contingent upon political considerations. A credible aspect of Tuttle's testimony concerned recent attempts and desires to move beyond such influences and to reframe and remake the Employer's workplace culture.

promotion. The Grievant, following the roundtable discussion process, was not promoted to sergeant.[10]

The Grievant was one of three Union officials who sought promotion to sergeant in 2014. Union President O'Toole, who ranked 7th on the exam list, participated in the promotional process, as did Steward Matthew Roesch, whose exam's score put him in the 8th spot, out of about 82 exam participants. Union Exhibit #3. Twenty eight promotional candidates were interviewed (due to the three-way tie for 25th place on the list) and it appears that 18 promotional offers were tendered. Not one of the three Union officials, all of whom had scored well on the written exam, were promoted. The Grievant, at the time of the promotional process, was: one of the most senior candidates; a decorated veteran, at a time when the Employer favored veterans in hiring situations; an individual with an unblemished disciplinary record;[11] the recipient of fine evaluations; and, an officer with an excellent attendance record.

The Grievant filed a January 2015 grievance, asserting that the Employer had violated Article 11 of the collective bargaining agreement during the promotional

[10] The expressed rationale for the challenged promotional decision is examined in the Opinion, below.
[11]The sole Letter of Reprimand (relating to Union fundraising activity) was removed from the Grievant's file as part of a global resolution settlement.

process. In part, the filed grievance provides:

> During my interview a high-ranking management official made to the comment to me "you're a big union official right?" I feel the question during my promotional interview was completely inappropriate and confirms my union affiliation was a major concern for management. On Jan. 4, 2015 the Worcester Sheriff promoted 18 Officers to the rank of Sergeant. I was not included in the promotions. Union Exhibit #6.

An Employer grievance response explained the basis for its decision to not promote the Grievant. The January 29th response states, in part:

> When the interview process was complete, all members of the administration (Assistant Deputy Superintendent and above) were asked to provide feedback on each interview candidate during a roundtable discussion. During the initial round of discussions, Officer Gaudreau was unanimously eliminated from further discussion.
>
> While it is undisputed that Officer Gaudreau has a lengthy career at WCSO without any discipline and his overall work performance is satisfactory, this does not automatically make him a top candidate for Sergeant. When evaluating candidates for promotion, the administration not only focuses on prior performance, but gauges whether the individual will be a leader who can supervise others, develop the skills of younger officers and effectively manage a housing unit. The consensus of the group, comprised on individuals with over 100 years of combined experience in the field of corrections was that notwithstanding his lengthy career as an Officer and test performance, Officer Gaudreau was a poor candidate for Sergeant.
>
> The deputies that participated in Officer Gaudreau's interview panel commented that of the seven (7) interviews they conducted, his performance was amongst the weakest.[12] Union Exhibit #7.

[12] In contrast, Hart testified, in effect, that, with respect to the multiple panels that he sat on, the Grievant's interview performance was about average. Tr. Vol. I, p. 153-154.

Evidently, Union President O'Toole filed a grievance challenging his lack of promotion. Then, as he testified, he elected to withdraw the grievance, because, in effect, things were getting better in the Union/Employer relationship. He realized that he'd still have to work with them as President, and he didn't think it was in the best interest of the Union for him to pursue the matter. Tr. Vol., II, p. 7.[13]

Ultimately, the instant grievance was processed, without resolution, throughout the contractual grievance procedure to arbitration. Both parties then filed comprehensive post-arbitration written submissions.

Relevant Contract Provisions

ARTICLE 5
PROBATIONARY PERIODS, PERMANENT APPOINTMENT, ETC.

* * *

> Section 3. To become eligible to be promoted to the rank of sergeant, a corrections officer must successfully pass a written examination administered by the Sheriff's Office. Notwithstanding the Sheriff's Office promotional policy, the promotion to sergeant by the Sheriff shall be from the list as

[13] Evidently Union Steward Roesch (who, according to the Grievant's unrebutted testimony, had only been employed "a short number of years," (Tr. Vol. II. p. 60), decided to not file a grievance with respect to the promotional process.

established based upon the written examination. The Sheriff shall promote each sergeant among the top twenty-five (25) candidates on the list; provided, however, that in the aggregate of every seven promotions made by the Sheriff, the Sheriff may promote one (1) candidate not on the list of top twenty-five candidates to one of the 7 promotional sergeant positions. The Sheriff may exercise this discretion on a rolling basis for every 7 openings.

Section 4. There shall be an oral interview of the top twenty five (25) candidates by a panel which shall consist of two members selected by the Sheriff and one member (must be a sergeant) selected by NEPBA, Local 550. Any recommendation of the panel shall be advisory only.
Joint Exhibit #1 and Union Exhibit #1.

ARTICLE 11
NON-DISCRIMINATION

The Sheriff's Office or Union shall not discriminate against any officer in connection with their employment with the Sheriff's Office because of race, color, sex, age, as defined by law, religion, handicap, sexual orientation as defined by law, genetic information or Union activity or non-Union activity.
Joint Exhibit #1.

Contentions of the Parties

The Union asserts that the Employer unlawfully discriminated against the Grievant, a 22 year employee, universally regarded as excellent, when it passed him over for promotion. Article 11 of the collective bargaining agreement prohibits discrimination "as defined by law."

In the public sector, it is unlawful to retaliate against an employee for engaging in union conduct. M.G.L. c. 150E, Sec. 10(a)(3). Unlawful employer motivation may be proven by circumstantial evidence and reasonable inferences drawn from that evidence. Town of Carver, 35 MLC 29 (2008). Factors that may suggest unlawful motivation may include the triviality of reasons given by the employer or an employer's derivation from past practice. It is insufficient for an employer to simply state lawful reasons for its adverse action -- it must produce supporting facts that show that this reason was actually a motive in the decision. Forbes Library, 384 Mass. 559 (1981).

Here, the record reflects that the Grievant was one of the top five candidates on the written exam; among the most senior officers on the list, with excellent attendance and fine annual evaluations. Despite all of this, the Grievant was not promoted. Indeed, he was one of three Union official candidates-- and not one was promoted. Moreover, in the process of selecting candidates for promotion, the Employer overlooked its contractual obligation with respect to the interviewing panel and its own policy calling for evaluations to be a major component in all promotions.

A major rationale for the Grievant's non-promotion is a typical justification -- he did not interview well. No notes, lists or documents, however, were preserved that could substantiate an assertion of poor interview performance. In addition, irregularities with respect to the interview process -- including panels comprised of different people, no set questions or model responses, no grading or ranking system and no process to compare results were present.

The reasons proffered by the Employer are untrue or pretextual. For example, although witnesses testified that employee evaluations were not considered, as they were unreliable, other Employer witnesses indicated that, to the contrary, evaluations are regularly relied upon and are an important consideration for supervisors. Likewise, a supervisor's testimony that the Grievant was not qualified to be a sergeant was inconsistent with the same supervisor's fine evaluations of the Grievant, including comments that the Grievant, in effect, would be a fine promotional selection.

Here, the Grievant was not selected for promotion, after an uncontrolled, open interview and a roundtable review of candidates. The evidence substantiates that, more likely than not, the Grievant was not promoted because of his Union activity.

As remedy, the Grievant should be made whole, with interest. In addition, the Arbitrator should retain jurisdiction with respect to any remedial dispute.

* * *

The Employer contends that the Union has failed to meet its burden of establishing a case of retaliation or discrimination. There is no indication that the Grievant was not promoted as a result of any desire to penalize or punish him for any Union activity. The Union's case rests on the premise that the Grievant should have been promoted and, therefore, discrimination must be inferred because he was a Union official.

Superintendent Tuttle's testimony establishes that interview performance and supervisor recommendations decided who was to be promoted. Here, the Grievant had a weak interview performance. Further, he was not recommended for promotion by supervisors. As Tuttle testified, annual evaluations were not a factor, because they were not accurate tools due to the long-standing culture within the facility.

The Union failed to admit any evidence that the Grievant was not promoted due to the Employer's desire to discourage Union activity. The sole allegation of

discriminatory motivation came from the inference to be drawn from one question the Grievant was asked during his interview by Trainor. The true import of the question, however, was whether the Grievant could separate himself from his role as a Union official and discipline officers under his command, if necessary. The question was not substantively discriminatory -- instead, it sought to determine whether the Grievant could be a fair and impartial supervisor.

Legitimate, non-discriminatory reasons for the decision to not promote the Grievant have been established. Undisputed evidence indicates that the Grievant was not promoted because he did poorly in his interview and because his supervisor of ten years, ADS McMillan believed that the Grievant lacked experience both in supervising inmates in housing units and in supervising correctional staff.

Members of the Grievant's interview panel testified that the Grievant did poorly during his interview. ADS Temple, for example, testified that, during the roundtable discussion, he described the Grievant's interview as "painful." Another panel member, Lt. Dowd, indicated that he had ranked the Grievant's interview as the worst.

During the roundtable discussion, ADS McMillan

testified that he recommended that the Grievant not be promoted. McMillan testified that although the Grievant does an excellent job inside of the Central Control booth, he lacked experience in supervising the inmate population and in supervising correctional staff. Thus, direct evidence established that the Grievant's supervisor recommended that he not be promoted for legitimate nondiscriminatory reasons. As a result, any presumption of discrimination has been dispelled. Trustee of Forbes, 384 Mass. 559, 566 (1981). Accordingly, the grievance should be denied as legitimate nondiscriminatory reasons for not promoting the Grievance, with supporting evidence, have been produced.

Finally, the Union failed to prove that the asserted reasons for the non-promotion were a pretext and not the real reasons. The Union has failed to admit any evidence proving that the Grievant was not promoted due to his poor interview performance as well as due to McMillan's recommendation. As a result, the grievance must be dismissed.

Opinion

The crux of the Union's contention is that the Employer denied the Grievant a promotion to Sergeant due to hostility with respect to his Union activities. The Union's assertion implicates a violation of Section 10(a)(3) and, derivatively, 10(a)(1) of M.G.L. c. 150E and Article 11 of the parties' collective bargaining agreement -- a provision that prohibits discrimination "as defined by law." Thus, my review begins with an analysis pursuant to the Commonwealth's public employee collective bargaining law, M.G.L.c. 150E.

First, to establish a prima facie violation of Section 10(a)(3), the Union must establish: 1) that the Grievant engaged in protected activity, 2) that the Employer knew of his protected activity, 3) that the Employer took adverse action against the Grievant, and 4) that the adverse actions was motivated by a desire to penalize or discourage protected activity. Fowler v. Labor Relations Commission, 56 Mass. App. Ct. 96, 97-98 (2002); Town of Clinton, 12 MLC 1361, 1364 (1985).

Here, I am readily convinced that the Union has met the first three components of its initial evidentiary burden. It is undisputed that the Grievant was a visible Union official, who filed and processed the grievances that were pending during a relatively acrimonious period in labor-

management relations. It is likewise undisputed that the Employer knew of the Grievant's protected activity, as he was often the 'point person' with respect to filed grievances or pending disputes. It is also clear that the failure to promote the Grievant constituted adverse actions. Thus, an initial critical question is whether that adverse action -- the failure to promote the Grievant -- was motivated by a desire to penalize or discourage protected Union activity.

Unlawful motivation may be established by direct or indirect evidence of discrimination. Lawrence School Committee, 33 MLC 90, 97 (2006). Here, the inquiry to the Grievant during the interview process, to confirm that he was 'a big Union guy' results in a highly probable inference that a bias, or unwarranted concern with respect to protected activity, was present and verbalized during the interview process. In its initial grievance response, the Employer asserted that, if made, the statement simply states a fact that was known to everyone with the facility -- namely, that the Grievant was a member of the Union's Executive Board. Union Exhibit #7.[14] I am not persuaded, however, that an alleged reference to the Grievant as 'a

[14] It appears that, for the first time at arbitration, it was asserted that the inquiry was, in essence, meant to be a means to address the Grievant's ability to be a fair and impartial supervisor. Tr., Vol. I, pp. 177-178.

big Union guy' during the interview constituted a benign statement -- rather, in the context of a promotional interview, it could lead to an inference that at least one panel members was expressing a bias about or concern with respect to the Grievant's protected Union activity during the promotional interview process.

Whether or not the cited statement constitutes sufficient direct evidence of unlawful motivation, I am convinced that substantial circumstantial evidence also exists. The uncontroverted fact that all three of the Union officials who applied for promotion, were rejected, seems highly suspicious. Only twenty eight employees were interviewed and eighteen promotional opportunities were offered. Yet, not one of the three Union official candidates were selected. And, the lowest ranking Union official, based on test scores, was Number 8 -- with the result that all of the Union official candidates were, based on their test scores, within the top third of the promotional candidate pool. Suspiciously, not one was promoted.

Turning to the Grievant in particular, he was a promotional candidate with longevity with the Employer. Over time, he had fine evaluations, a discipline-free record, excellent attendance and a background as a

veteran, at a time when the Employer was actively promoting veteran hiring and employment opportunities. Based on these circumstances, I draw the reasonable inference that bias was present in the promotional process.

The Employer, however, contends that its decision to not promote the Grievant was motivated by legitimate reasons. The reasons for the decision to not promote the Grievant, the Employer now asserts are that he did poorly during the interview and that his supervisor, McMillan, recommended that the Grievant not be promoted due to his lack of experience supervising inmates in housing unit and his lack of supervising correctional staff. Employer Brief, at p. 9. It is, however, insufficient for an employer to simply state lawful reasons for its adverse action -- it must produce supporting facts that show that the proffered reason was actually a motive in the decision. Trustee of Forbes Library, 384 Mass. 559, 566 (1981).

In this regard, in the Employer is hampered by the lack of any contemporaneous interview notes or grading sheets, and any materials, whatsoever, from the roundtable discussion that led to the promotional decisions. There is no contemporaneous, verifiable documentation to

provides support for its asserted basis for the decision to not promote the Grievant.

Moreover an initial asserted basis for the decision to not promote the Grievant -- that he had a bad interview -- is not fully supported by the facts adduced at arbitration. For example, panel members who interviewed the Grievant offered varying testimony with respect to the Grievant's interview performance. For example, Deputy Temple opined that the Grievant was the worst candidate, while Lieutenant Dowd indicated that he was on the lower end of the rankings, placing about 6 out of 7. Hart, on the other hand, recalled, in essence, that as a result of his participation on the Grievant's panel, and (evidently) based on comparisons with his other panel's candidates, he considered the Grievant's performance to be about average, and in the middle of the pack. Thus, the arbitration record shows no agreement amongst panel members that the Grievant's interview precluded him from promotion.[15]

Moreover, the lack of any consistency of questioning and rating of candidates, both within and between interview panels, undercuts any argument that interview performance was fair or otherwise served as a legitimate

[15] Indeed, candidates were promoted, despite having a terrible interview. For example Chris Carlin was promoted, despite an interviewer conceding that he had the worst interview amongst the panel's assessed candidates. Tr. Vol. I, p. 257-258.

basis for making any promotional determinations. There were a myriad of deficiencies in the instant interview process. Briefly, there was not a consistent interview protocol for all candidates -- the candidates were not asked the same questions. Nor were all of the candidates interviewed by the same panel members, a fact that inhibits any fair or reasonable comparisons between candidates who interviewed on different dates, with different panel members. Nor were the members of the varying interview panels provided with minimally-acceptable answers to any set questions prior to the interviews.

Nor am I persuaded that supervisors provided legitimate, non-discriminatory reasons for not promoting the Grievant beyond their interview concerns. At arbitration, ADS McMillan testified that, at the roundtable discussion, he spoke against the Grievant's promotion for several reasons.[16] Yet, the reasons asserted at arbitration are not supported by verifiable facts. McMillan's arbitration assertion that the Grievant lacked experience in supervising the inmate population is flawed. It is clear that, as his primary assignment, the Grievant

[16] The lack of any contemporaneous notes or records preclude verifying either McMillan's arbitration testimony about his asserted recommendation that the Grievant not be promoted or the underlying rationale that he offered in support of his recommendation.

was selected by superior officers to work at Central Control. In addition, however, the Grievant testified, without rebuttal or contradiction, that he typically worked about 80-100 overtime shifts a year -- often in the Annex, a dormitory-like setting with significant inmate contact. The assertion that the Grievant, a long-time employee who routinely worked overtime shifts with direct inmate contact, lacked experience working within the inmate population, appears to be pretextual.[17] Moreover, although the Employer witnesses, at arbitration, discounted the reliability of its annual performance review of employees, I note that in December of 2014 McMillan reviewed and sign-off an evaluation of the Grievant indicating both that he had above average (4.0) relations with inmates and that the Grievant "was always willing to give guidance to less experienced officers and takes the time to explain procedures to them." Union Exhibit #14. Thus, McMillan's affirmation of the Grievant's contemporaneous performance within the annual evaluation substantially undermines the non-promotion rationale and testimony that McMillan offered at arbitration -- namely, that the Grievant lacked sufficient experience or expertise with respect to dealing with inmates and that he failed to or lacked experience supervising other correctional officers.

I determine that the Employer has not produced

[17] Moreover, certain correctional officers who do not work in housing units, or routinely supervise inmates, were promoted, including an officer who worked, primarily, within the Employer's transportation service.

sufficient, reliable evidence to show that it had a lawful reason for its decision to not promote the Grievant. The contention that the Grievant's interview performance precluded his promotion -- when that process was inconsistent and flawed, and when at least one other correctional officer was promoted despite a terrible interview -- cannot be sustained. Nor are there verifiable facts in the record to support McMillan's assertion that the Grievant lacked experience supervising inmates or other correctional officers. Unrebutted arbitration testimony established that, over time, the Grievant averaged between 80 and 100 overtime shifts per year, with those shift often performed in the Annex, a special housing unit that entails substantial inmate contact. Moreover, in the general timeframe of the promotional process, McMillan reviewed and signed the Grievant's fine performance evaluation -- an action that appears to be at odds with his asserted criticisms and non-promotion recommendation at the promotional roundtable discussion.

In conclusion, I have determined that the Union has established a prima facie case of discrimination, based on Union activity, with respect to his non-promotion. On the other hand, I am not persuaded that the Employer has

provided facts and evidence demonstrating, establishing, verifying or substantiating its purported reasons for the decision to not promote the Grievant. Overall, I am convinced that unsubstantiated, pretextual reasons were offered to justify the non-promotion decision. Because I conclude, applying a Chapter 150E, Section 10(a)(3) analysis, that the Employer discriminated against the Grievant in its promotional process, I find a corresponding violation of Article 11 of the collective bargaining agreement.

As remedy, I determine the Grievant shall be promoted to Sergeant, and that he shall be deemed in terms of seniority, benefits and all rights and privileges to have held that rank since January 4, 2015. In addition, the Grievant shall be made whole for loss of earnings suffered as a result of his denial of promotion to Sergeant as of January 4, 2015. I decline, however, to award interest.

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AWARD

The Employer discriminated against the Grievant, Joseph Gaudreau, based on his Union activity, in violation of Article 11of the collective bargaining

agreement, during the 2014-2015 sergeants' promotional process.

As remedy, the Grievant shall be promoted to Sergeant, and he shall be deemed in terms of seniority, benefits and all rights and privileges to have held that rank since January 4, 2015. In addition, the Grievant shall be made whole for loss of earnings suffered as a result of his denial of promotion to Sergeant as of January 4, 2015.

I will retain jurisdiction of this matter, solely to resolve remedial issues, if any, for a period of 90 days, subject to extension at the request of either party.

/s/ Tammy Brynie
Tammy Brynie
Arbitrator
August 29, 2016