

**STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS**

Commission on Human Rights and
Opportunities ex rel. Donald J. Rajtar,
Complainant
v.

CHRO No. 0510115
Fed No. 16aa402033

Town of Bloomfield,
Respondent

October 3, 2007

FINAL DECISION

I.

PROCEDURAL BACKGROUND

On September 16, 2004, the complainant, Officer Donald J. Rajtar, filed a complaint with the Connecticut Commission on Human Rights and Opportunities (commission) alleging that the respondent, Town of Bloomfield, terminated the complainant from his employment as a Bloomfield Police Officer on May 18, 2004, on the basis of his age in violation of General Statutes § 46a-60(a) (i) (CFEPA), and the Age Discrimination in Employment Act, of 1967, 29 U.S. C. 621-634 (ADEA).

The commission investigated the charges in the complaint, found reasonable cause to believe a discriminatory practice had been committed, and attempted to eliminate the unfair practice by conference, conciliation and persuasion. After failing to so eliminate the practice, the commission certified the case to public hearing on July 26, 2006, in accordance with General Statutes § 46a-84(a) and § 46a-54-79a of the Regulations of Connecticut State Agencies. On January 11, 2007, I, the undersigned, J. Allen Kerr, Jr., Human Rights Referee, was assigned as presiding referee, in substitution of David S.

Knishkowsky. I conducted a duly noticed public hearing at commission headquarters, 21 Grand Street, Hartford, Connecticut, on March 6, 7, 8, 9, 14 and 16, 2007. Pursuant to the Post Hearing Scheduling Order dated March 20, 2007, post hearing briefs were due by June 1, 2007 and reply briefs were due by July 6, 2007 (all timely filed) at which time the record closed.

II.

FINDINGS OF FACT

Transcripts referenced are herewith identified by "TR pp." followed by the page number(s). Exhibits are herewith referenced by "C" or "R" followed by the applicable number. The following exhibits are duplicates (or one is contained entirely within the other) and as a matter of discretion and/or convenience I reserve the right to refer to only one to the exclusion of the other: (R-1 and C-8), (R-2 and C-4), (R-3 and C-2), (R-4 and C-2), (R-5 and C-5), (R-6 and C-6), (R-7 and C-9), (R-8 and C-12), (R-9 and C-13), (R-10 and C-7), (R-23 and C-16) and (R-24 and C-17).

1. The complainant was born on April 8, 1954. TR p. 10.
2. The complainant was hired as a police officer by the respondent on August 13, 1998, to be a member of its police department (department). TR p. 10.
3. At the time of his termination (May 18, 2004) the complainant was a patrol officer (the rank at which he had been hired). TR p. 10.
4. At the time of termination the complainant was the oldest patrol officer in the department. TR p. 10.

5. Prior to the complainant's termination, he had never been disciplined by the respondent. TR p. 12.
6. Chief Betsy Hard (Chief Hard) was recruited from California to become respondent's chief of police on January 15, 2003. TR p. 923.
7. Chief Hard testified that she was not aware of a maximum age limit for new police hires, but that she had sent a couple of thirty-four year old new hires to the police academy. TR p. 986.
8. The complainant's job evaluations were all satisfactory or better. TR p. 12, C-15.
9. The complainant had been counseled on the thoroughness of his investigations on several occasions. TR p. 6, R-1, R-11.
10. Chief Hard believed that sergeants must be empowered to truly perform their jobs, by doing more than managing paperwork, and by leading their people. TR p. 924.
11. Chief Hard believed that prior to her assuming the duties of chief, the sergeants had been second-guessed and their directives dismissed. TR p. 925.
12. Chief Hard believed that as first line supervisors, sergeants were the most critical department level for imparting the direction, policies and philosophies of the department. TR p. 925.
13. Louis Chapman (Chapman) has been the respondent's town manager since 1993. TR p. 1147.

14. In matters of police officer termination Chief Hard is the principal decision maker but Chapman has the power to ratify her decision or not. TR p. 1160.
15. The complainant had worked in security at a nuclear plant prior to joining the department. TR p. 790.
16. Sergeant Michael Driscoll (Sergeant Driscoll) was the complainant's supervisor in February of 2004, and he was born on June 13, 1965. TR p. 788, 796.
17. Sergeant Driscoll's supervisor, Lieutenant Mark Samsel (Lieutenant Samsel), had noticed that the relationship between Sergeant Driscoll and the complainant was beginning to "divide." TR p. 635.
18. Sergeant Daniel Mathena (Sergeant Mathena) was also a supervisor of the complainant and was born in 1952. TR p. 552, C-29.
19. Sergeant Mathena and Sergeant Driscoll were friendly and socialized outside of work. TR p. 752.
20. On February 10, 2004 or February 11, 2004 Sergeant Driscoll and Sergeant Mathena counseled the complainant on a case he had handled concerning a mother who wanted to report that her son had been struck at school. She wanted only to report it to make a record, but was content to let the school handle it. Sergeant Driscoll and Sergeant Mathena believed the complainant should have investigated the matter further and sought an arrest if warranted. The complainant disagreed and did not want to "browbeat" people into making complaints. TR pp. 533-537.

21. Sergeant Driscoll mistakenly believed the complainant was accusing him (Sergeant Driscoll) of “browbeating” him (the complainant). TR p. 804.
22. On February 11, 2004 the complainant received a call that had been stacked (delayed) nine or ten minutes about a breach of peace with a firearm at Lee’s Famous Recipe Chicken Restaurant (Lee’s). TR p. 13.
23. The incident was already over when the call came in so it was not a “lights and siren” response. TR p. 13.
24. Upon arriving at Lee’s, the complainant met with the proprietor, Marlon Hutchinson (Marlon) and they sat in a booth in the restaurant where Marlon gave a statement, which the complainant transcribed and Marlon signed. TR pp. 14, 15.
25. The statement briefly described an incident involving Marlon being threatened by a former employee with a firearm, which individual entered into a verbal altercation with Marlon and pulled a phone from the wall before leaving. C-1.
26. The complainant asked Marlon about witnesses and has claimed he does not remember the exact wording but that Marlon indicated there were not, and that there were two employees, Roshana Hinkson (Roshana) and Mark Caines (Caines), that one was in the front and one was in the back. TR p. 17.
27. The complainant was unable to fully confirm the identity of the suspect, initially identified by Marlon as Joel Williams and later determined to be Joel

Williamson (Joel), and returned to headquarters to try to identify him further.
TR p. 17.

28. The complainant did not speak to Caines or Roshana before returning to headquarters. TR p. 18.
29. The complainant was not able to further identify the suspect at headquarters that day. TR p. 19.
30. The complainant had obtained a cursory description (young black male) of Joel and wrote it down in his notebook but did not put it in his report. TR p. 20, C-1, C-14.
31. The complainant had not issued a "BOLO" ("Be on the lookout for...") because the description he had of Joel would have matched most young males in the area. TR pp. 24, 25.
32. The complainant returned to Lee's approximately two hours after his first visit to determine if Marlon had dropped off additional information on Joel's identity. TR p. 25.
33. Marlon was not there and the complainant spoke briefly with Roshana who told him Marlon had not dropped off any additional information. TR p. 26.
34. The complainant maintains that he asked Roshana if she or the other employee had witnessed the incident and she responded in the negative. TR p. 26.
35. The complainant discussed the incident briefly with Sergeant Driscoll, showed him Marlon's statement, finished his incident report and put it in

Sergeant Driscoll's basket at the end of his shift on February 11. TR p. 29, C-1.

36. The complainant was off duty on February 12, 13 and 14. TR p. 35.
37. On February 12, 2004, Sergeant Driscoll saw the complainant's report and realized he had "problems" with it. TR p. 515.
38. Sergeant Driscoll signed off on the report, however, and did not send it back to the complainant although he could have. TR p. 845.
39. On February 12 Sergeant Driscoll was given some additional information about Joel and he called Marlon as a result. TR pp. 816, 817.
40. Sergeant Driscoll decided to pick up the investigation himself because the complainant was off for several days. TR p. 817.
41. Some sergeants would not have taken over the investigation under the circumstances, but Sergeant Driscoll didn't have any problems with doing so. TR p. 817.
42. Sergeant Driscoll went to Lee's and spoke with Marlon who told him there were two other employees who had witnessed "some of" the incident. TR p. 818, C-2.
43. While at Lee's, Sergeant Driscoll knew that it was possible Marlon may have spoken to Roshana or Caines after Marlon's statement to the complainant, but he did not ask about that. TR pp. 846-848.
44. Sergeant Driscoll took Caines statement which statement evidences that he had in fact seen and heard some of the incident. C-1, C-2.

45. Later that day (February 12) Sergeant Driscoll called Roshana on the telephone (she had not been at Lee's during his visit). TR p. 819, C-2.
46. Roshana told Sergeant Driscoll she had seen and heard some of the incident, but had not seen the gun. TR pp. 818-820, C-2.
47. Sergeant Driscoll prepared a supplemental incident report (C-2) and left it in the complainant's box. TR pp. 35, 820.
48. The complainant and Sergeant Driscoll spoke on the complainant's return to duty, and Sergeant Driscoll was agitated and asked the complainant about the other witnesses and other details missing from his report. TR p. 37.
49. Sergeant Driscoll told the complainant that Roshana had told him she had witnessed some of the incident. TR pp. 36, 37.
50. The complainant told Sergeant Driscoll that Roshana told him the opposite – that she had not seen anything. TR pp. 37, 822.
51. The complainant's focus had been on finding Joel because he believed he had already established probable cause for an arrest. TR p. 221.
52. The complainant had never been counseled to take a statement from a witness who said he had seen nothing, and had never been disciplined for not doing so. TR p. 223.
53. Although agitated, Sergeant Driscoll did not attempt to reconcile the discrepancy with the complainant. TR p. 37.
54. Sergeant Driscoll called Roshana again on February 16 and maintains that she told him that the complainant did not "interview or speak to her." TR pp. 823, 898.

55. Sergeant Driscoll discussed his findings and concerns about the complainant's report with Sergeant Mathena. TR pp. 824, 825.
56. The two sergeants were of the same mind that there were problems with the report and Sergeant Driscoll prepared a request for a disciplinary investigation of the complainant (IA request). TR p. 825, R-1.
57. The IA request was prepared February 17, 2004 and delivered up the chain of command on February 18, 2004. TR p. 876, R-1.
58. The IA request cited the inadequacy of the complainant's investigation (failure to interview witnesses, document same, get statement). TR pp. 825, 826, R-1.
59. The IA request stated that the complainant maintained that he did speak to Roshana on February 11. R-1.
60. Sergeant Driscoll was "unclear" about whether the complainant had lied because Roshana had not yet given a written statement. TR p. 826, R-1.
61. The IA request prepared by Sergeant Driscoll confirmed that he asked Roshana if she had been "interviewed" by the complainant, and that she had responded in the negative. R-1.
62. Sergeant Driscoll concedes that there is a significant difference between an interview and just asking someone a question. TR pp. 899, 900.
63. The complainant next prepared an unsigned, unsworn, undated arrest warrant application and draft affidavit (affidavit) and submitted it to Sergeant Driscoll on February 18, 2004. TR pp. 39, 831, C-4.

64. In paragraph 4 of the draft affidavit, the complainant stated that Roshana had stated to him on the date of the incident that "...no one had witnessed the incident." C-4.
65. It was standard practice for subordinates to submit such draft affidavits for consideration by supervisors and the department's general order 5.3.1, section A3 directs that if a warrant application is denied by a supervisor it is to be sent back for modifications. TR pp 41-44, C-39.
66. Sergeant Driscoll, without further inquiry, concluded that paragraph 4 constituted an intentional misstatement and was not covered by the general order. TR p. 836.
67. Upon receiving the draft affidavit (probably on February 18, 2004) Sergeant Driscoll went to Sergeant Mathena convinced that the complainant had lied in paragraph 4 and shared this belief with him, despite the fact that Roshana had yet to give a written statement and had only been spoken with on the telephone. TR pp. 859, 861.
68. Sergeant Driscoll then shared his beliefs about the affidavit with Chief Hard, before a written statement had been taken from Roshana. TR p. 896.
69. The complainant maintains that he included paragraph 4, knowing it conflicted with Sergeant Driscoll's account of what Roshana had told him, because he considered it exculpatory information (inconsistent statements by a witness). TR p. 47.
70. The complainant had been trained to include exculpatory information in an affidavit. TR p. 48.

71. Chief Hard concluded that a written statement from Roshana would be required and put out a directive that she did not want Sergeant Driscoll taking it. TR p. 961.
72. Sergeant Driscoll and Sergeant Mathena both concluded the complainant had lied and Sergeant Driscoll had told Sergeant Mathena that Roshana told him she had never been spoken to by the complainant. TR p. 545.
73. It was unusual for a sergeant to have taken over the investigation and a supervisor would normally assist the investigating officer. TR pp. 545, 593.
74. Sergeant Mathena took Roshana's first written statement on February 20, 2004. TR p. 592, C-5.
75. Roshana's sworn statement confirmed that on a first officer's visit, that officer did not speak to her at all, but also disclosed for the first time the arrival of "another officer" two hours later who did ask her "...about information on Joel...." C-5.
76. Roshana's statement does not expand on (and hence she could not reasonably have been asked by Sergeant Mathena so to do) the identity of the second officer and the precise nature of the "information on Joel" he had asked about. C-5.
77. As a result of Roshana's statement of February 20, 2004, Sergeant Mathena and Sergeant Driscoll had notice that a second visit was made by a police officer on February 11, 2004 and that he had at least spoken to Roshana about Joel. C-5.

78. It is undisputed that the second officer was the complainant and there is no evidence in the record to even suggest that it could have been anyone else.
79. Sergeant Driscoll did not know when he had talked to Roshana for the second time on February 16 that when she said she hadn't been interviewed by the complainant (the first officer to arrive who had interviewed Marlon), that she had in fact talked with the complainant when he returned a second time, but had not disclosed it because she was unaware that it was him. TR pp. 857, 858.
80. Despite the reconciliation of the then principal inconsistency that Roshana's statement provided, the statement did not change Sergeant Driscoll's initial assessment that the complainant had lied and that Roshana had not spoken to the complainant, inasmuch as he could ascribe (as he testified) no motive for her to lie. TR p. 837.
81. Sergeant Driscoll then met with Chief Hard to discuss what to do next. TR p. 838.
82. Chief Hard told Sergeant Driscoll to amend his write-up of the complainant and draft a new warrant application himself. TR p. 839.
83. Sergeant Driscoll (despite Chief Hard's directive that he not take Roshana's statement) took an additional written statement from Marlon on February 25, 2004 and issued a February 26 supplement to his IA request. C-6, C-9.
84. Sergeant Driscoll went to see Marlon on February 25, 2004 to "document" (Driscoll's term) that the complainant had not interviewed Roshana or Caines, despite the fact that the complainant had never claimed he had

interviewed Roshana or even that he had spoken to her during his first visit to Lee's, which is the only visit during which Marlon was present and hence the only visit he could have witnessed. TR p. 840.

85. Sergeant Driscoll's narrative in C-9 recounting Marlon's statement of February 25 and Roshana's statement of February 20 states that the complainant did not talk to Roshana at all in his initial response to Lee's. It makes no mention of Roshana's further disclosure in her February 20 statement that she and the complainant did speak on his second visit. C-9.
86. Sergeant Mathena was still unclear in his testimony before the commission in March of 2007 whether the complainant was the second officer to appear at Lee's on February 11, 2004. TR pp. 594-597.
87. Before filing his C-9 supplement Sergeant Driscoll never approached the complainant to discuss differences between his version of the facts and Roshana's, particularly with respect to exploring reconciliation of her denial that she had been "interviewed" and his claim (and hers) that he had questioned her. TR p. 900.
88. There was no follow up by Sergeant Mathena or Sergeant Driscoll to Roshana's disclosure in her February 20, 2004 affidavit that she had spoken to the second officer to arrive on February 11 (who could not have been anyone other than the complainant), as there is no evidence that this was pursued until a second statement was given to Lieutenant Matthew Willauer (Lieutenant Willauer) on March 8, 2004 in his role as Rajtar IA investigator.

C-7. Note: Lieutenant Willauer held the rank of sergeant during the time period covered by some of these findings.

89. Sergeant Driscoll never talked to the complainant about the differences between “talking” with a witness and “interviewing” a witness despite knowing that Roshana had said she had not been “interviewed” and that the complainant had never claimed to have “interviewed” her, before filing his February 26 C-9 supplement to his IA request. TR p. 900.
90. Prior to submitting C-9 Sergeant Driscoll did not do a background check on Marlon, never asked Marlon if he was satisfied with the complainant’s response and never personally interviewed Roshana. TR p. 907.
91. Chief Hard forwarded Sergeant Driscoll’s IA request (R-!) to the department’s professional standards unit on February 24, 2004. TR p. 927.
92. Lieutenant Willauer received a written directive from Chief Hard to conduct an internal affairs investigation (the Rajtar IA) on February 26, 2004. TR p. 356.
93. Chief Hard forwarded Sergeant Driscoll’s supplement (C-9) to Lieutenant Willauer after she received it from Sergeant Driscoll. TR p. 933.
94. The supplement (C-9) focused on the complainant’s statement in the draft affidavit he prepared that Roshana stated to him there were no witnesses, juxtaposed with Sergeant Driscoll’s conclusion that the complainant did not “interview” Roshana, and his use of Roshana’s statement of February 20 and Marlon’s statement of February 25 to establish that the complainant

never talked to Roshana, while ignoring her disclosure in the statement that she did talk with a second officer. C-9.

95. Chief Hard did not consider Sergeant Driscoll's request for an IA of the complainant to be that serious. It was for an inadequate investigation, which was a competency issue that could have been dealt with in different ways, such as a performance plan (remedial training). TR pp. 963-965.
96. It was Sergeant Driscoll's February 26 C-9 supplement that alleged that the complainant had been dishonest in his draft affidavit for a warrant that was deemed serious. C-9.
97. On February 26, 2004, Lieutenant Willauer issued written notice of the Rajtar IA to the complainant and CIPU Local 14 President, Steve Tonkin. The allegations therein were that the complainant had failed to complete several core investigative tasks, had falsely attributed statements to Marlon and Roshana and had provided false information in a draft arrest warrant affidavit relative to Roshana's statements to him. R-11.
98. The complainant's unsworn interview with Lieutenant Willauer was taped and transcribed and the complainant was interviewed twice, on March 3, 2004 and March 8, 2004. R-8, R-9.
99. The complainant told Lieutenant Willauer that upon arriving at Lee's on February 11, 2004 he asked Marlon (after Marlon had described the gun incident with Joel) if anyone else was involved. The complainant replied that Marlon said, "No, other employees were in the store, one was in the front and one was in the back." R-8 lines 70, 71.

100. The complainant also stated to Lieutenant Willauer that he had forgotten the exact words Marlon had used. R-8 lines 237, 238.
101. The complainant told Lieutenant Willauer that on his second trip to Lee's, Roshana replied "no" to his question whether she or Caines had seen anything during the "event" and she stated that she was in the front and the other employee was in the back. R-8 lines 266-272.
102. The complainant told Lieutenant Willauer that after reading Sergeant Driscoll's supplemental incident report (C-2) he saw Sergeant Driscoll four times on February 16, that Sergeant Driscoll was irate when he tried to explain what he had found and that in the final exchange with Sergeant Driscoll was told, "...tell it to Willauer...I already put you in for discipline." R-8 lines 345-353.
103. During the March 3 interview the complainant suggested that the Lee's employees talk and gossip among themselves and suggested that Roshana and Caines may have discussed what had happened between themselves in an effort to lash out at Joel. R-8 lines 538, 539.
104. During the March 3 interview the complainant also speculated that Roshana and Caines may have discussed their accounts of what happened and not really remembered what happened, but had stories in their head, which is why the complainant concluded Roshana was not aware that he was the officer who had responded a second time on the day of the incident. R-8 lines 537-541.

105. The complainant confirmed to Lieutenant Willauer in the March 3 interview that he stood behind his statement in paragraph 4 of the draft affidavit concerning Roshana's statement to him. R-8 line 562.
106. Lieutenant Willauer interviewed Roshana after the complainant's first interview on March 3 but did not take her statement at that time. TR p. 380.
107. Lieutenant Willauer asked Roshana if the second officer had questioned her about witnessing the "incident" and she replied in the negative. R-11.
108. In the complainant's March 8, 2004 interview Lieutenant Willauer again asked about the complainant's account of what Marlon had told him and asked if he could quote exactly what Marlon had told him. The complainant responded that he could not and again gave his general account of what Marlon had said. R-9 lines 127-136.
109. The complainant was also asked in the March 8 interview if he could remember exactly what he had asked Roshana and exactly what she had said in reply during his second visit to Lee's and he responded that he could not and again gave his basic account. R-9 lines 138-146.
110. After the complainant's second interview on March 8 Lieutenant Willauer returned to Lee's again and took an additional written statement (C-7) from Roshana wherein she stated that the second officer did not ask her whether she had witnessed the incident. He also interviewed Marlon who denied he had said there were no witnesses. Both Roshana and Marlon were informed that they were being interviewed regarding officer performance. R-11.

111. Lieutenant Willauer's report concluded that the complainant's investigation of the incident at Lee's was inadequate in a number of respects and highlighted the inconsistencies between the complainant's testimony about what Marlon and Roshana told him and their accounts to Sergeant Driscoll and to him. He concluded that he could not "surmise" any motivation for Roshana or Marlon to lie and that the complainant was the only party questioned with any motivation to be dishonest. R-11.
112. Lieutenant Willauer conceded that civilians at a crime scene don't always tell the truth. TR p. 386.
113. Lieutenant Willauer never questioned Roshana about her relationship to Joel or whether she had a problem with police officers. TR p. 391.
114. Lieutenant Willauer did not investigate whether Marlon had a criminal record, although it came to his attention that he did prior to his issuing his report, but he did not include it. TR p. 392.
115. Lieutenant Willauer conceded that at no time had Roshana stated that she had seen a gun. TR pp. 396, 397.
116. Lieutenant Willauer conceded that if the complainant's draft affidavit were true, that paragraph 4 would be properly included as exculpatory evidence. TR p. 482.
117. Lieutenant Willauer was not aware of any effort by Sergeant Driscoll to contact the complainant about the discrepancy between the complainant's draft affidavit and Sergeant Driscoll's account of Roshana's story from the time Sergeant Driscoll became aware of the conflict until the time he

submitted his February 26, 2004 C-9, although he did send Sergeant Mathena out to take a statement from Roshana. TR pp. 482-484.

118. Lieutenant Willauer did not seriously consider whether there might have been a misunderstanding between the complainant and Marlon. R-11.
119. Lieutenant Willauer concluded the complainant had lied, and Marlon and Roshana had not, because of his belief that only the complainant had a motive to lie. TR p. 389, R-11.
120. Lieutenant Willauer's testimony as to whether the complainant was inconsistent (changed his position) during the Rajtar IA interviews was itself inconsistent and utterly inconclusive. TR pp. 411, 412, 442, 443, 495, 496.
121. On March 19, 2004, ten days after Lieutenant Willauer completed his investigation, Chief Hard placed the complainant on paid administrative leave. R-15.
122. On said date (March 19) Chief Hard also issued a notice to terminate the complainant's employment for having failed to perform a complete and thorough preliminary investigation, fabricating a false witness utterance in an affidavit and making false statements during an IA investigation. R-15.
123. Chief Hard made note in her recommendation that the issue of truthfulness had arisen during the investigation and that the original issue had involved only an incomplete investigation. R-15.
124. The truthfulness issues, triggered by Sergeant Driscoll's C-9 supplement, brought the incident to a much greater level. R-15.

125. On March 15, 2004, four days before issuing her recommendation, Chief Hard secured a memorandum from Deputy Chief Weisher detailing the problems an officer could cause to his department after having been found to have been untruthful in the performance of his duties. R-13.
126. Actual decertification of an officer by the State of Connecticut would require, however, clear and convincing proof of a lie under oath and there is no claim that the complainant ever lied under oath or in a sworn affidavit. TR pp. 991, 992.
127. In her recommendation, Chief Hard relied on Lieutenant Willauer's findings and the supporting documents he included and she did not conduct an investigation of her own. TR p. 104.
128. Chief Hard never spoke to Marlon, Roshana or Caines. TR p. 998.
129. Chief Hard did not discuss Lieutenant Willauer's investigative findings with the complainant. TR p. 938.
130. If the complainant had been found only to have conducted an inadequate investigation he would likely have received a sanction less severe than termination. TR p. 999.
131. During her employment with the department, Chief Hard had never recommended suspension for an officer found to have conducted an incomplete investigation with no prior disciplinary record. TR p. 1000.
132. Chief Hard had recommended a suspension of approximately one week for an officer found to have conducted an incomplete investigation where the officer had a prior history of discipline. TR pp. 1000, 1001.

133. The complainant had no prior history of discipline. TR p. 1000.
134. Chief Hard met with the complainant on March 19, 2004 to tell him personally of her recommendation. TR p. 938.
135. Earlier that day (March 19), the complainant had completed an interview with Captain Jeffrey Blatter (Captain Blatter) wherein with reference to an IA investigation he had initiated against Sergeant Driscoll (Driscoll IA), the complainant disclosed specifically for the first time that his complaint was predicated on age discrimination. TR p. 959. Note: Captain Blatter held the rank of lieutenant during the time period covered by some of these findings.
136. Captain Blatter told Chief Hard that the Driscoll IA contained an age discrimination claim by the complainant after the March 19 interview. TR p. 959.
137. The complainant's interview with Captain Blatter came about as a result of a chain of events that began with the complainant preparing a grievance to be filed against Sergeant Driscoll on March 3, 2004. R-22, R-22a.
138. On March 4, 2004 a narrative authored by the complainant outlining the events of the Lee's incident and claiming discrimination in violation of the union contract and state and federal law was received by Lieutenant Samsel. R-22, R-22b, R-22e.
139. On March 8, 2004 Lieutenant Samsel was presented with the actual grievance. R-22, R-22b, R-22e.

140. The complainant had presented his concerns initially to Sergeant Michael Gerrish (Sergeant Gerrish) and was surprised to learn that Sergeant Gerrish had informed Lieutenant Samsel. TR p. 195.
141. Lieutenant Samsel met with the complainant on March 8, 2004 at which time the complainant stated he believed Sergeant Driscoll was discriminating against him, was holding him to a higher standard than others, had been disrespectful to him and wanted him (complainant) terminated. R-22, R-22e.
142. During the March 8 interview the complainant stated that Sergeant Driscoll wanted him to fail in his tasks, expected more of him than others, talked to him disrespectfully and required of him things he had not required of other officers he had supervised. R-22, R-22e.
143. On dates in March uncertain Lieutenant Samsel obtained written statements from Sergeant Mathena and Sergeant Driscoll contesting the complainant's claim. R-22, R-22d, R-22f.
144. Lieutenant Samsel was division commander and was aware that the relationship between Sergeant Driscoll and the complainant was beginning to "divide". TR p. 635.
145. Lieutenant Samsel filed a memorandum with Chief Hard on March 8, 2004 summarizing his findings to date and containing his interview with the complainant and statements from Sergeant Mathena and Sergeant Driscoll. R-22, R-22e.

146. On or about March 10, 2004 Lieutenant Samsel put in a request for a disciplinary investigation against Sergeant Driscoll and Chief Hard ordered an IA (Driscoll IA) on that date. R-22g.
147. Lieutenant Samsel had no involvement with the Driscoll IA thereafter. TR p. 657.
148. Captain Blatter was asked by Chief Hard to take over the Driscoll IA. TR pp. 675, 676.
149. Captain Blatter received the grievance results Lieutenant Samsel had acquired. TR pp. 679, 680.
150. The complainant came in for an interview on March 19, 2004 (the day he was to be suspended and recommended for termination by Chief Hard in the Rajtar IA) and brought a five page typewritten narrative, detailing the complainant's claims of discrimination against Sergeant Driscoll, all subsequent to Lieutenant Samsel having obtained a statement from Sergeant Driscoll. TR pp. 683, 684, R-22, R-22c.
151. Prior to his interview of the complainant on March 19, Captain Blatter interviewed a number of officers who consistently portrayed Sergeant Driscoll as hands on, detail orientated and approachable. One officer, Officer Medina, stated that on a couple of occasions he believed Sergeant Driscoll treated the complainant differently than others. R-22, R-22h.
152. During the complainant's interview on March 19 Captain Blatter became aware for the first time that the complainant was claiming age discrimination. TR p. 692.

153. Captain Blatter never met with Sergeant Driscoll during his investigation (the Driscoll IA). TR p. 692.
154. Captain Blatter had been Sergeant Driscoll's supervisor. TR p. 697.
155. Captain Blatter never asked Sergeant Driscoll about the complainant's age discrimination claim. TR pp. 724, 725.
156. Sergeant Driscoll's written statement does not address age discrimination. TR p. 727, R-22.
157. Captain Blatter did not ask any of the witnesses about possible age discrimination. TR p. 728.
158. Captain Blatter did not interview any witnesses at all after learning for the first time that the complainant's claim (Driscoll IA) was age based. TR p. 740.
159. The "pyramid of power" was the complainant to Sergeant Driscoll to Lieutenant Samsel with Lieutenant Samsel supervising both. TR p. 746.
160. Captain Blatter stated Lieutenant Samsel had not disclosed any problems between Sergeant Driscoll and the complainant, despite Lieutenant Samsel's testimony being to the contrary. TR p. 747.
161. Captain Blatter's interview of Lieutenant Samsel was not thorough or comprehensive. TR pp. 748, 749.
162. Captain Blatter did a "Google" inquiry on the complainant on his computer as a result of a tip off, but not on anyone else. TR p. 753.
163. Captain Blatter relied on Sergeant Driscoll's statement, which was given before age was an issue in the investigation. TR p. 763.

164. Officers may be reluctant to give testimony against a sergeant and Captain Blatter attempted to allow for that. TR p. 780.
165. The Driscoll IA concluded that the complainant's allegations were not supported and recommended Sergeant Driscoll's exoneration on April 9, 2004. R-22, R-22-h.
166. Chief Hard became aware of the fact that the Driscoll IA being conducted by Captain Blatter was predicated on the complainant's age discrimination claims on the same day she recommended the complainant's termination, but she did not await the completion of the Driscoll IA or reconsider the issuance of her written recommendation. R-15, R-16.
167. Chief Hard was satisfied with Captain Blatter's handling of the Driscoll IA. TR p. 1054.
168. There is no evidence of any significant activity in the Rajtar IA or the Driscoll IA from the time of the complainant's suspension on March 19, 2004 and Captain Blatter's recommendation that Sergeant Driscoll be exonerated on April 9, 2004 until late April when both IA's culminated with quite different results.
169. While Chapman as town manager made the final decision on whether to discipline the complainant, Chief Hard was the principal decision maker in his mind. TR p. 1166.
170. A hearing was held regarding Chief Hard's recommendation to terminate the complainant on April 19, 2004 in the town hall. C-42.

171. None of the witnesses to the Lee's incident (Roshana, Marlon or Caines) testified at the hearing before Chapman. TR p. 1160.
172. Age discrimination was not dealt with in the hearing before Chapman. TR p. 1185.
173. Chief Hard did not disclose to Chapman prior to his decision that the complainant had made an age discrimination complaint (Driscoll IA) against Sergeant Driscoll. TR pp 1184-1186.
174. Chief Hard "could not find any motive" why the witnesses would lie (although the record is silent as to any efforts by her or her investigators to identify any possible motivation or bias). TR p. 949.
175. Chapman decided to uphold Chief Hard's recommendation to terminate the complainant after the hearing. TR p. 1167.
176. Chapman took the action he did because he believed the complainant had lied and because he refused to acknowledge it. TR p. 1174.
177. Chapman relied on Lieutenant Willauer's investigation. TR p. 1167.
178. At the time of Chapman's decision he had no knowledge of the Driscoll IA. TR pp. 1184, 1185.
179. Through negotiations with the union – and after the hearing before Chapman but before rendering his decision – Chapman offered the complainant a suspension, which required a public apology and acceptance of wrongdoing, but the offer was rejected. TR pp. 1162-1164.
180. On April 20, 2004, one day after Chapman had ratified Chief Hard's recommendation to terminate the complainant, she issued a written

exoneration of Sergeant Driscoll clearing him of all the complainant's discrimination charges against him in the Driscoll IA. R-22.

181. Officer Robert Spellman (Officer Spellman) has been a patrol officer with the department since 1996. TR p. 306.

182. Officer Spellman was born on June 22, 1956. TR p. 307.

183. Prior to the commission hearing the respondent produced a number of interdepartmental emails containing "ageist" humor, particularly regarding Officer Spellman. C-20.

184. Of the emails contained within C-20, one dated July 27, 2002 purportedly from Officer Spellman and directed to the entire department (necessarily including the complainant) makes reference to his (Spellman's) 4 pm bedtime, prune juice, fig juice, being as old as dirt, civil war service, drooling, adult diapers and being decrepit and feeble. C-20.

185. The email dated July 25, 2003 purportedly from Officer Spellman to numerous department members (including the complainant – who was approximately two years older than Officer Spellman) makes reference to his (Spellman's) being forgetful, mindless, unable to bathe, moving to a retirement center and being a wrinkly skinned guy who drools on himself and wears oversized diapers. C-20.

186. An email dated September 13, 2005, purportedly from Officer Spellman to various department members (the complainant had already been terminated), makes reference to Sergeant Mathena "blowing me up during

roll call” and Sergeant Mathena generally teasing him about his age, handicap permits and limp arms. C-20.

187. An email dated October 31, 2005 purportedly from Officer Spellman to the entire department makes reference to his (Spellman’s) “old ticker’ and prune juice. C-20.

188. The four emails contained in C-20 were not actually sent by Officer Spellman but by someone unknown who had access to his computer and used it on occasions when he had failed to log off. TR p. 310.

189. Officer Spellman found the emails derogatory to an older person but did not complain. TR p. 311.

190. The July 27, 2002 email was addressed to everyone including Chief Hard. TR p. 273.

191. By way of a November 1, 2004 email Captain Blatter addressed the email situation generally. C-21.

192. Blatter’s November 1 email was addressed to certain supervisors, including Lieutenants Willauer and Samsel. C-21.

193. Captain Blatter’s November 1 email states that while the ageist emails are harmless, requiring only a “gentle cautionary reminder,” those who are unscrupulous might “twist” them and they could be used in a frivolous complaint. C-21.

194. Chief Hard remained unwilling at the hearing before the commission to characterize the C-20 emails as inappropriate, although she testified that they reflected less than the best of judgment. TR p. 1118.

195. Multiple copies of a pamphlet entitled "Law Enforcement Response to the Needs of Elderly Persons" compiled by the Southwestern Connecticut Agency on Aging, were "humorously" directed only to Officer Spellman. Officer Spellman complained to a supervisor. TR pp. 324, 325, C-24.
196. Officer Spellman responded to this event with a May 11, 2006 email to the presumed pamphlet perpetrator, and this email contained his own ageist humor and references to an internal affairs investigation, a CHRO complaint, the EEOC and suing the department for a "gazillion dollars." C-23.
197. Chief Hard responded on May 11 by email to the Spellman email (copied to the entire department) addressing the complainant's complaint before the commission and instructing Officer Spellman to stop such responses because they served to feed into "this whole climate." TR p. 320, C-23.
198. Chief Hard further addressed the email situation in her May 11 email by stating that while such emails (the Spellman email) were "humorous", a complaint was pending before the commission. C-23.
199. Sergeant Gerrish would sometimes address Officer Spellman and the complainant at morning roll call in a louder voice than others as if to imply that they could not hear, sometimes in front of supervisors, and was not admonished for it. TR pp. 270, 308, 309.
200. On one occasion Deputy Chief Weisher laughed at Sergeant Gerrish's "humor". TR p. 271.

201. Age related jokes and derogatory comments about Geritol, prune juice and wheelchairs were made around the department. TR pp. 271, 272.
202. Sergeant Mathena, who took Roshana's first written statement, referred to Officer Spellman as "old Bob" and joked with him about not being able to hear. TR pp. 603, 604.
203. Lieutenant Willauer would sometimes refer to the complainant and Officer Spellman as "young man" (despite their being older than him), but could not identify anyone else he addressed by this term. TR pp. 267, 268, 397, 398
204. The complainant found being called "young man" offensive. TR p.181.
205. Lieutenant Willauer made mention that the complainant wore collared civilian shirts when reporting for duty. TR p. 398.
206. Lieutenant Willauer found it "entertaining" that the complainant always wore a collared shirt to work – always dressed nice – "whereas the rest of us dress like bums." TR p. 399.
207. Lieutenant Willauer would make fun of the complainant about his collared shirts. TR p. 399.
208. Lieutenant Willauer knew about Sergeant Gerrish talking loud at roll call and did nothing about it. TR p. 426.
209. Sergeant Driscoll had referred to older drivers as "Q-tips" and told the complainant that he fit a certain criminal profile because of his age. TR p. 51.
210. On November 1, 2005, Captain Blatter (who headed the Driscoll IA) emailed Lieutenant Willauer (who headed the Rajtar IA) and Lieutenant Samsel (who

handled the complainant's grievance against Sergeant Driscoll) and offered a "gentle cautionary reminder" that ageist emails such as Officer Spellman's email of October 31, 2005 could be used by a person who is unscrupulous to support a frivolous claim. Captain Blatter made specific reference in the email to the age discrimination case pending before the CHRO. TR p. 426, C-21.

211. In an incident, which occurred closely in time to the complainant's dismissal and Sergeant Driscoll's absolution, four Bloomfield policemen were disciplined as a result of an incident, which occurred on April 14, 2004 on town property. C-18, C-29.

212. Probationary Officer David Provender (DOB July, 1976), Officer Sean Cecchini (DOB May, 1968) Joseph Babkiewicz (DOB July, 1977) and Sergeant Michael Sergeant Gerrish (DOB January, 1970) were disciplined for various levels of misconduct involving off duty drinking and ramming a portable toilet ("porto potty") with their vehicles, which event was termed "choir practice." Damages to public property were assessed at \$3,400. C-18, C-29.

213. Investigations were conducted by Captain Blatter and Lieutenant Willauer. All officers were charged with offenses and Sergeant Gerrish was charged administratively (not criminally) with driving under the influence of alcohol, a charge later sustained by Chief Hard when she issued her findings on May 24, 2004. C-18, C-29.

214. The charges were sustained against all, but no one was terminated and suspensions were measured in weeks. Chief Hard noted her hope that each of the officers would “mature.” C-18, C-29.
215. The four police officers ranged from approximately fourteen to twenty three years younger than the complainant. C-18, C-29.
216. On July 22, 2004 Lieutenant Willauer opened a disciplinary investigation against Officer Isaac Medina (Officer Medina) (DOB October 1970) for his handling of a threatening complaint. C-17, C-29.
217. The investigation occurred only a couple of months after the complainant’s termination and was again conducted by the same lieutenant (Willauer) who had conducted the Rajtar IA. C-17, C-29.
218. Officer Medina is approximately sixteen years younger than the complainant. C-17, C-29.
219. The thrust of the charges was that Officer Medina attributed statements to witnesses, which they disputed. C-17, C-29.
220. Officer Medina was interviewed by Sergeant Willauer. C-17, C-29.
221. Lieutenant Willauer’s report found Officer Medina to have been dishonest in his interviews and notes that he had received disciplinary counseling on two previous occasions. C-17, C-29.
222. Officer Medina also received counseling from Lieutenant Willauer himself and Captain Blatter. C-17, C-29.

223. Lieutenant Willauer concluded that he found it “unfathomable” that Officer Medina could not remember in his interview whether he had obtained the permission of one of the witnesses to seize his firearm. C-17, C-29.
224. On November 3, 2004 Chief Hard sustained all the charges against Officer Medina, but made no mention of his lack of veracity and placed him on a performance plan with no suspension. C-17, C-29.
225. Lieutenant Willauer continues to maintain, despite Chief Hard’s apparent disregard for his findings that Officer Medina was dishonest in his IA interview and that in fact he was not truthful on multiple points. TR p. 408, C-17.
226. Chief Hard conceded that the complainant’s report of the Lee’s incident was more thorough than Officer Medina’s report of the gun seizure incident. TR p. 1064.
227. Chief Hard was aware when she made her decision to offer Officer Medina a performance plan that Lieutenant Willauer had found Officer Medina to be untruthful. TR p. 1085.
228. Chief Hard acknowledged that between Officer Medina’s account of the gun seizure event and the witnesses’ account that there were “...point by point things that were inconsistent. I took the whole thing globally.” TR p. 1085.
229. After attempting to explain that Officer Medina’s apparent inconsistencies in his investigation were attributable to his lack of knowledge about search and seizure laws, Chief Hard ultimately concluded in her commission testimony that that had nothing to do with a credibility determination. TR p. 1091.

230. The Medina matter and the “choir practice” matters never came before Chapman and were resolved at Chief Hard’s level. TR p. 1168.
231. In February of 2003 Captain Blatter had been assigned to criminally investigate Officer Charley Simmons (Officer Simmons) who was accused of stealing a sports drink from the Bloomfield Mobil station. C-16.
232. Commensurate thereto, Lieutenant Willauer began an internal affairs investigation (Simmons IA) against him. C-16.
233. The Simmons IA revealed that he had taken the drink without permission, attempted to conceal the evidence and was deceptive and dishonest in the interview with Lieutenant Willauer. C-16.
234. In her written recommendation dated April 2, 2003, Chief Hard notified Officer Simmons that he had been found guilty of wrongdoing in the theft, his attempt to cover it up and conceal the evidence and in being untruthful in the criminal interview with Captain Blatter and the IA interview with Lieutenant Willauer. She recommended termination. C-16.
235. Officer Simmons had a bad record and had been disciplined on multiple occasions. TR p. 1171.
236. Chapman decided to offer Officer Simmons a suspension in lieu of termination, in part because he believed a shift change would offer him better supervision. TR p. 1151.
237. The complainant had once requested a change in supervisors and had his request denied. R-22.

238. By arbitration award dated December 28, 2005, the complainant was ordered reinstated to his prior position and his termination reduced to a suspension of two hundred workdays. R-7.
239. The complainant returned to work on Monday, January 9, 2006. C-22.
240. After his termination and prior to his reinstatement the complainant was unable to afford the full medical coverage he had previously been provided by the respondent. TR pp. 112, 113.
241. During the period of non-coverage the complainant was hospitalized and incurred charges from Middlesex Hospital of \$18, 852, which he was unable to pay and which resulted in a suit against him in the superior court. C-36.
242. The complainant also incurred related medical expenses. TR pp. 114, 115, C-37.
243. The complainant and respondent have introduced their respective computations of the complainant's damages (should he prevail) and are in agreement as to the computation for wages and benefits. The hospital bill, related medical charges and pre judgment interest are in dispute. C-38, R-26.

III.

DISCUSSION AND CONCLUSION

A.

Overview

The ADEA and the CFEPA prohibit discrimination based on a person's age. 29 U.S.C. § 623(a) (1), General Statutes § 46a-60(a) (1). Access to federal protections is provided through General Statutes § 46a-58(a). The complainant has made no claim under this statute and hence consideration under the ADEA is not available. Additionally, since “age” is not protected under § 46a-58(a) any such claim would have been likewise unavailing. Courts use the same framework to analyze claims under both statutes and Connecticut courts employ federal precedent. *Levy v. Commission on Human Rights and Opportunities*, 236 Conn. 96 (1996). Therefore state and federal (ADEA) cases may be considered in evaluating the complainant’s CFEPA age claims, properly presented through § 46a-60 (a) (1). Because this is a disparate treatment case in which the complainant alleges that the defendant acted with discriminatory intent or motive, the case is governed by the burden shifting analysis set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 466 (2d Cir.2001) ADEA disparate treatment claims analyzed under same burden shifting framework as Title VII claims.

The framework for presenting an employment discrimination case under the *McDonnell-Douglas* paradigm is well recognized in the Connecticut courts. To do so, the

complainant must show that: (1) he is a member of a protected class; (2) he was qualified for the position; (3) he experienced an adverse employment action; and (4) the adverse action occurred under circumstances giving rise to an inference of discrimination. *Jacobs v. General Electric Company*, 275 Conn. 395, 400 (2005). The complainant's burden is one of production and involves no credibility assessment by the fact finder. The requisite level of proof is minimal. *Craine v. Trinity College*, 259 Conn. 625, 638 (2002). After the complainant establishes a prima facie case, the respondent must produce legitimate non-discriminatory reasons for its adverse employment actions. *Texas Department of County Affairs v. Burdine*, 450 US 248, 254 (1981).

Once a defendant offers a legitimate, non-discriminatory reason for its actions, the presumption of discrimination which arose with the establishment of the prima facie case drops out. The complainant must then come forward with evidence to fulfill his ultimate burden of proving that the defendant intentionally discriminated against him. *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133, 142 (2000).

In order to satisfy this burden of persuasion, the complainant may attempt to prove that the legitimate, non-discriminatory reason offered by the respondent was not the employer's true reason but was a pretext for discrimination. *Id.*, 143. The Supreme Court stated as follows: "Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is

dissembling to cover up a discriminatory purpose.... Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision." (citations omitted), *Id.*, 147.

Evidence that an employer's reason is false, combined with the evidence presented to establish a prima facie case, in some cases, can be enough to sustain a complainant's burden, and a complainant need not have independent evidence of discrimination. *Id.*; see also *Zimmermann v. Associates First Capital Corp.*, 251 F.3d 376 (2nd Cir. 2001). The Second Circuit has, following *Reeves*, advocated a case-specific approach to determining whether evidence of the falsity of a defendant's reason and a prima facie case are enough to support a finding of discrimination. A finder of fact may consider the strength of the prima facie case, the probative value of the proof that the defendant's reason is pretextual and any other evidence presented in the case when determining if the complainant has sustained his burden. *Id.*

Connecticut courts have held under CFEPA that the complainant must have the opportunity to demonstrate that the defendant's proffered reason was not the true reason for the adverse employment action. This burden now merges with ultimate burden of persuading the court by a preponderance of the evidence that the complainant has been the victim of intentional discrimination. The complainant may succeed in this either directly by persuading the court that a discriminatory animus more likely motivated the employer or indirectly by showing that the employer's proffered

explanation is pretextual, and unworthy of belief. *Jacobs v. General Electric Company*, supra 275 Conn. 400,401.

Reeves was exhaustively considered in *Board of Education of the City of Norwalk v. Commission on Human Rights and Opportunities*, 266 Conn. 492, 510 (2003), wherein the Connecticut Supreme Court clarified that establishing that an employer was motivated in its actions by an impermissible discriminatory animus is not the only way for a complainant to prevail (or a necessary component in all cases). It was found that *Reeves* stood for the proposition that evidence demonstrating (by a fair predominance) that the proffered legitimate non-discriminatory reasons advanced by the respondent are false may in itself be enough to demonstrate intentional discrimination in conjunction with a level of evidence of intentional discrimination sufficient to satisfy a prima facie case.

The complainant has established a prima facie case. He was a male over the age of 40 at the time of his termination. Having served as a patrol officer for six years, without any disciplinary record and with all satisfactory or better evaluations, he established that he was qualified for the position. He suffered an adverse employment action when he was terminated. Lastly, the adverse action occurred under circumstances giving rise to an inference of discrimination, which circumstances included discriminatory and disparate conduct more fully set forth in this decision.

The respondent countered with its proffered legitimate non-discriminatory reason, best summarized in Chief Hard's recommendation that he be terminated for having failed to perform a complete and thorough preliminary investigation, for fabricating a false witness utterance in an affidavit he submitted and "intended" to swear to and in making false statements during an IA investigation. The complainant has responded by asserting and rebutting alternatively that a discriminatory motive more likely motivated the respondent and by claiming that the respondent's proffered reason is unworthy of credence. This he has attempted to do with "broad brush" marshalling of testimony and evidence indicating age animus on the part of various of the respondent's "decision makers". These include a spiritless patently inadequate investigation of the complainant's internal age discrimination claim, a unquestioning willingness to jump to conclusions damaging to the complainant in the initiation of a disciplinary proceeding against the complainant and a failure to pursue a reasonable explanation for the inconsistent statements between officers and civilians. They also include a willingness to accept--and not question—an assumed lack of motive for any of the complainant's accusers (in or out of uniform) to be less than fully forthcoming in any of their statements and a willingness to parse words to achieve an unsettling result--the complainant's termination--which itself appeared disproportionate and disparate when compared to that endured by younger officers who had faced similar disciplinary initiatives.

Prior to embarking on a more precise exploration of how successfully the evidence fleshes out the burden the law places on the complainant to satisfy the ultimate burden

of persuasion placed upon him by *Reeves*, two preliminary legal issues must be addressed.

B.

The Arbitration Hearing

As set forth in my ruling of even date on the respondent's motion to dismiss, I have determined not to give preclusive effect to the superior court decision, *Town of Bloomfield v. United Electric Radio & Machine Workers of America*, 2006 WL 3491719 (Sup. Ct. 2006), in such manner so as to preclude me from making factual and legal conclusions in the instant matter.

It is not seriously contested that as to the weight to be accorded the decision of the arbitration panel, it is only so much as may be deemed appropriate by the commission's presiding officer. The written arbitration award has been admitted as evidence (R-17), and some limited testimony was allowed about that proceeding. Upon careful review, I have decided to bestow no significant weight to that proceeding. I do so because of the following:

- There is no transcript.
- Some of the witnesses who appeared before the panel did not appear before me, and some of the witnesses who appeared before me did not appear before the panel.
- The issues before the panel were considerably more restricted, tailored to the collective bargaining agreement, and did not include claims of age discrimination.

- The panel considered the credibility of the witnesses without ever considering that the complainant's accusers might have been motivated by an ageist animus or the need to protect those who were so motivated.
- If the respondent's proffered reason for terminating the complainant was pretextual, and the termination was actually effectuated primarily because of age discrimination, the events properly under review by me effectively culminated with Chapman's ratification of Chief Hard's recommendation, and in most respects would remain unchanged by testimony presented to and action taken by the arbitration panel, by which time the decision was beyond the respondent's control and alleged animus.

C.

The identity of the decision makers

The complainant's termination was the result of a complex chain of events, commencing with a relatively routine preliminary investigation and culminating with a hearing before the town manager. At various point along the way the chain of events might have taken a different tack and resulted in something short of termination of employment. In that respect there were decision makers all along the way. Some of them--and some of the decisions they made--were as follows. Sergeants Driscoll and Mathena decided to seek a disciplinary investigation of the complainant rather than try to rectify possibly innocent inconsistencies in statements and recollections, or to explore the possibility that the civilian witnesses might have been less than fully cooperative when first questioned by

the complainant. Lieutenant Willauer decided not to question the civilian witnesses about their backgrounds and their coordination with one another, and their relationships with Joel. Captain Blatter decided there was no need to interview any witnesses after learning that the Driscoll IA was predicated on the complainant's claim against him of age discrimination and Chief Hard decided not to disclose to Chapman that the complainant's chief accuser (Sergeant Driscoll) was himself the subject of the Driscoll IA, which was not closed until after Chapman's decision to ratify the complainant's proposed termination.

As such, individual decision makers controlled the complainant's ultimate fate in two ways; unilaterally, in that their decisions and inactions allowed the complainant's disciplinary inquiry and investigation to advance to increasingly serious levels, and also in the sense of a "Cat's Paw" analysis, wherein their preliminary comments, actions, inactions and decisions (in conjunction sometimes with those of non-decision makers) may have influenced the actions and decisions of the ultimate decision makers (Chief Hard and Chapman). *EEOC v. BIC Coca-Cola Bottling Co.*, 450 F.3d 476 (10th Cir. 2006). In establishing pretext, non-decision maker's discriminatory comments will be considered if they influenced final decision makers. *Azar v. TGI Friday's Inc.*, 945 F.Supp. 485, 499 (E.D.N.Y. 1996). Comments by non-decision makers can be construed as evidence of discrimination when a trier of fact could reasonably believe that the comments reflect company policy. *Malarkey v. Texaco, Inc.*, 983 F.2d 1204, 1210 (2nd Cir. 1993). Discriminatory comments by a superior, who did not have termination authority, but who had "enormous influence" in the process, could constitute direct

evidence of discrimination. *Rose v. New York City Board of Education*, 257 F.3d 156, 162 (2nd Cir. 2001). Remarks by those without independent termination authority, but who play a meaningful role in the decision to terminate, are relevant as to termination. *Ercegorich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 354 (6th Cir. 1998). A less than impartial investigation may be evidence of pretext. *United Technologies v. Commission on Human Rights and Opportunities*, 72 Conn. App. 212 (2002).

D.

Analysis

Upon a review of the entire record, including the transcripts of the hearing and careful consideration of the fine legal briefs filed on behalf of the complainant, respondent and the commission, I have concluded that but for the complainant's age, the Lee's incident would not otherwise have led to his termination. More specifically, I find he has met his burden of persuasion on two counts. He provided credible evidence of ageist animus and he also provided credible evidence that the respondent's proffered legitimate reason for his termination was pretextual, not fairly established and not the true reason for his termination. I do not dispute that his investigation of the Lee's incident was flawed, that there may have been some philosophical differences in the definition of good policing tactics between the complainant and some of his supervisors, and that some level of discipline would have been meted out by the respondent as the result of what transpired at Lee's irrespective of his age. Chief Hard made it clear, however, that but for her belief that the complainant had lied, termination would not have been her

recommendation. I do not find that the complainant's dishonesty was ever fairly established. I conclude that the one-sided nature of the manner in which the respondent initiated, investigated and evaluated the complainant's alleged transgressions produced a result that was—if not overtly preordained—at least disquietingly accommodating to the virtually inevitable, in that it allowed for the removal of a “square peg from a round hole”, or stated otherwise, the removal of a fifty year old officer from patrol ranks customarily staffed by much younger officers. The claims that the complainant had lied in his preliminary investigation, draft warrant and during his IA were promulgated and evaluated in such a manner as to lead me to conclude that they were in significant part allowed to play out so as not to impede what may have been an unnecessarily harsh outcome. The charge that the complainant had lied was never pursued with sufficient objectivity so as to allow it to be fairly established.

It is important that I acknowledge that there are matters I am specifically excluding from my consideration:

- The public policy issue of reinstating an officer found to have lied, which is presently under appeal. My concern is with whether the investigation and punishment, on their own or in comparison to that afforded younger officers similarly situated, constitute evidence of pretext sufficient to lead me to conclude that the conclusion that the complainant had lied was accepted without sufficient substantiation, not because the respondent was simply wrong (which it is allowed to be), but because its being wrong was a result of an impermissible discriminatory animus.

- I am not concerned with the quality of the complainant's criminal investigation at Lee's and his follow-up thereto. There is ample evidence that some form of discipline, up to and including a possible suspension, would have been warranted. But termination was allegedly predicated on his having lied, and my concern is with whether the respondent's pursuit and evaluation of this particular claim was tainted with animus sufficient to render it pretextual.

That being said, I am led to conclude that the complainant has satisfied his ultimate burden because of the following:

- There was no serious consideration of or inquiry into the possibility that the witnesses to the incident at Lee's had not been fully honest in their initial statements to the complainant, and may have had a reason to be less than forthcoming. Marlon might have led the complainant to believe that there were no additional witnesses because he didn't want them involved in a time consuming legal proceeding, because he feared they might be in danger if pitted against Joel, or that they might resent his involving them in the matter. Roshana might have indicated to the complainant that she and Caines had not witnessed the incident because she didn't want the bother, because she was friendly with Joel, or perhaps feared him. Later after Caines' written statement, Marlon and Roshana may have felt the need to correct and coordinate their statements.
- There was no serious consideration of or inquiry about the possibility that a failure to define terms may have led to a wrongful conclusion. Just what was the "incident" the witnesses were or were not witness to? Was it Joel storming into

Lee's having words with Marlon and ripping the phone from the wall (Roshana saw some of that) or Joel actually holding a gun on Marlon and threatening him with it (Roshana saw none of that)? Did Marlon initially lead the complainant to believe there were no other witnesses, referring only to the gun, later to correct himself when he learned Roshana and Caines acknowledged witnessing other aspects of the incident? The same lack of consideration applies the terms "spoken to" and "interviewed", with the complainant employing the former and Roshana the latter and no serious effort being made by the respondent to consider the significance of the difference in meaning.

- Sergeant Driscoll had reached the conclusion that the complainant lied when he sent Sergeant Mathena out to take Roshana's sworn statement, and shared his opinion with Mathena. At that time "the lie" was the complainant's claim that he had spoken to Roshana on the day of the incident. When Roshana revealed in her statement that she had spoken with a second officer that day "about Joel" it is inexplicable that neither sergeant expressed any apparent interest in this then explosive disclosure by presenting follow-up questions to Roshana or by updating Chief Hard that the assumption that the complainant had lied about having spoken to Roshana was now in serious question.
- When Sergeant Driscoll went to Lee's to take Marlon's written statement (his second), the sergeant said it was to "document" that the complainant had not spoken to Roshana. "Document" is a term which denotes that there is no longer any possibility that one's initial conclusion could possibly be wrong.

- When Roshana and Marlon gave their last statements to Lieutenant Willauer, they were informed that the statements were being used to evaluate an officer. Their prior statements were given under the presumed understanding that they were to further a criminal prosecution of Joel.
- Captain Blatter's investigation of the Driscoll IA seemed to end before it began. On the day the complainant disclosed to him that he was a victim of age discrimination at the hands of Sergeant Driscoll, and just hours before that he was placed on administrative leave, the Driscoll IA seemingly shut down. Neither Sergeant Driscoll nor any other witness was interviewed from that point forward. Chief Hard seemingly paid no attention to this disclosure and allowed the Rajtar IA to proceed through conclusion.
- There was obvious disparity in the three disciplinary situations regarding younger officers cited by the complainant when compared to that which he endured. While Chief Hard took a firm position in the Simmons matter, particularly regarding his apparent dishonesty, he was an officer with a poor record who was allowed to survive in part because Chapman believed that a change in supervision—something the complainant had sought and was denied—might still salvage his career. The “choir practice” incident, particularly with regard to the conduct of Sergeant Gerrish, while not centered on dishonesty, was very serious, and one can reasonably conclude that the complainant's career would not have survived an administrative finding of his driving a vehicle while intoxicated into a porto potty after a night of drinking in a public place with his subordinates. One can also be skeptical that the

complainant would have been given another chance in the hope that he would “mature.” The Medina matter was the most egregious. His investigation was less thorough than the complainant’s and his attempts to deceive Lieutenant Willauer blatant. Chief Hard’s leniency coupled with her attempts to characterize his deliberate obfuscation as no more than ignorance of search and seizure law, are clearly evidence of disparate treatment with age playing a significant role.

- The presence of older officers among the ranks of the respondents patrol officers was an awkward fit at best. As previously characterized, the complainant (as well as Officer Spellman) was truly a square peg in the round hole that was the respondent’s department.
 - By all accounts Sergeant Driscoll was a “hands on” sergeant who appears to have micro-managed the work of his subordinates. While his alleged use of the term “Q-Tips” and his alleged reference to the complainant fitting a criminal profile because of his age (which use I find credible) are innocuous enough, they indicated an awareness of age in his discussions with the complainant. His disputes with the complainant about the thoroughness and aggressiveness of the complainant’s investigations, and his holding him to a higher standard (which I also find credible) are consistent with a possible stereotype of the complainant to the effect that he was set in his ways. It is not difficult to envision that Sergeant Driscoll found it increasingly difficult to employ his “hands on” style of supervision with the complainant, and that this was in part attributable to the complainant’s age.

- Sergeant Mathena and Sergeant Driscoll were friends, and Mathena referred to Officer Spellman as “old Bob.” There is no evidence that he referred to Captain Blatter as “old Jeff” or Chief Hard as “old Betsy.” Clearly there was something about older patrol officers that made them fair game for derision. It is true that they were subordinates and as such could be engaged safely, but they appear to have been more than subordinates – more like oddities, or at the very least outsiders. The same mindset emerges with another sergeant (Gerrish) addressing the complainant and Officer Spellman at morning roll call in a loud voice so as to imply that they could no longer hear. These patrolmen were oddities and it was fair game to point this out to their peers and superiors, even in a public setting.
- Lieutenant Willauer – who was the investigator upon whose narrative Chief Hard relied in the Rajtar IA – effectively admits to calling the complainant and Officer Spellman “young man” despite being considerably younger than both. Why? To remind them that they are different? He admitted in his testimony to commenting on the complainant’s collared shirts and testified that he found the complainant’s wearing of such shirts “amusing.” Again, why? Lieutenant Willauer’s response was to the effect that the other officers dressed in sweats. He stated the “rest of us” looked like “bums.” This too may appear innocuous, but indicates that even to his eventual inquisitor, he was perceived as an outsider.

- The emails certainly qualify as the complainant's most attention grabbing evidence. They may have been intended as humorous, but of course they were demeaning in the extreme. More importantly, they evidenced a tolerated strain of "humor" within the department to the effect that there was something really humorous (in a demeaning way) about ridiculing an older officer (in this case Spellman) trying to perform the duties of a patrol officer. When Chief Hard addressed the email problem with her email, directing that such ageist emails were to cease, she stated specifically that they served to feed into, "this whole climate." One can only speculate as to what she meant by "whole climate" but I found it most certainly must have included her recognition of a department wide discomfort with and objection to older individuals serving as patrol officers. One way to calm the climate would certainly have been to allow the removal of the source of the disturbance.
- While there was no direct evidence that Chief Hard harbored an age-based animus against the complainant, she testified to the effect that in her view the sergeants were the department's guiding force. It is understandable that she would be inclined to accommodate the initiatives and agenda of her sergeants, several of whom exhibited a bias against older patrol officers, when set against the fate of the oldest patrolman in the department. While there were no ageist comments attributable to Chief Hard it could be concluded that she must have considered the complainant's circumstances (age fifty with only six years on the force) at

least curious. When asked if there were an age maximum for new police hires to attend the academy, she indicated there were not and that she had sent a couple of thirty four year olds to the academy. Assuming the complainant had been sent to the academy at the time of his hire by the respondent, he would have been a full decade older than that. Additionally, in choosing not to terminate Sergeant Gerrish and the three other “choir practice” officers (all substantially younger than the complainant), she wrote in her findings of her hope that they would “mature”, which was certainly an acknowledgment of their youth being a factor in her leniency.

E.

Summary

I had occasion to observe department members during the hearing in Hartford from patrolmen to chief and also the town manager. I have no reason to believe these are not good people, that they do not have a fine department and the town is not well led. I am not so naïve as not to realize that the interjection of a newly recruited older patrolman with previous private sector experience to take his place in a department where he is supervised by younger sergeants and lieutenants can be a challenge to the accepted norm, not unlike the challenge to previous norms that occurred when women and racial minorities entered the ranks. It is a challenge that must be met, however, and the respondent was therefor obligated to deal with it in a manner consistent with what the law requires. While Officer Spellman was the target of the most virulent mockery,

he clearly had resigned himself to make no waves. The complainant was unwilling to do so, and became more of a challenge as a result. What began (the Lee's incident) as a relatively minor, possibly innocent disparity in recollection or understanding, which could have led to the complainant's first discipline for his inadequate preliminary investigation, and a possible clearing of the air between him and the younger sergeants, was allowed to escalate in an unchecked, carelessly monitored fashion, which I have concluded was intended to allow the complainant to be terminated more for his age than his transgressions. A review of Chief Hard's detailed written explanation of why she ultimately concluded the complainant had lied (R-15) reveals a "house of cards", which could easily (although admittedly not with certainty) have been toppled if the complainant had been extended the degree of animus free evenhandedness the law requires. Lieutenant Willauer, in surmising (his term) that none of the witnesses (save the complainant) had a motivation to lie, effectively sealed the complainant's fate with a standard of "proof", which according to my desktop dictionary (2nd College Edition, The American Heritage Dictionary) means: "To infer...without sufficiently conclusive evidence; guess..." The complainant was entitled to more than a career ending "surmise". Without the extension of animus free even handedness, I cannot conclude either that the complainant lied or that the respondent had established to its own reasonable satisfaction that he had lied, in anything other than a tortured pretextual sense.

Age discrimination is in many ways the most complex form of discrimination to evaluate. As was pointed out by complainant's counsel, if even the uncontroverted evidence in

this case had been predicated on the complainant being black, hispanic or female, the matter would have had taken on a far more grave veneer. The law, however, does not generally distinguish between protected classes and each one is entitled to the same degree of protection.

Finally, and in recognition that the complainant has returned to the department, it should be noted that the complainant has requested only to be made whole--to be in the same financial position as if not wrongfully terminated--and not the “gazillion dollars” one of the offending emails had suggested.

IV.

DAMAGES AND OTHER RELIEF

1. Based upon a review of R-26, C-36 and C-37, and the parties' representations as to areas of agreement in their post hearing briefs, I find wages owed to the complainant and to be paid by the respondent to be \$80,369.34. In addition thereto the respondent shall credit to the complainant, aggregate accrued time in the amount of 687.97 hours.
2. I am authorized to award relief to make the complainant whole. General Statutes §§ 46a-83 (i), 46a-86. Termination caused the complainant to lose his medical benefit and he testified that he was unable to afford the premium

for COBRA coverage and allowed his insurance to lapse. Subsequently he was hospitalized and incurred a hospital bill (unpaid to date) in the amount of \$18,852 and related medical expenses in the amount of \$940, which I award to make the complainant whole.

3. The respondent shall pay prejudgment interest on the above ordered amounts (as per the exercise of my discretion) from the date of the complainant's reinstatement as a patrol officer on January 9, 2006 at the rate of 10% per annum. *Silhouette Optical Ltd. V. Commission on Human Rights and Opportunities*, (Conn. Super.), 10 Conn. Rptr. 599, January 27, 1994 (Maloney, J.).
4. The respondent shall pay to the commission the amount of \$11,154, which is the amount of unemployment compensation paid to the complainant and which the commission shall transmit to the appropriate state agency.
5. The respondent shall pay post judgment interest on all awards, from the date of his judgment until paid at the rate of 10% per annum, compounded annually, pursuant to General Statutes § 37a-3a.
6. The respondent shall expunge from any and all records any information detrimental to the complainant resulting from the conduct complained of in this case, except as may otherwise be prohibited by law.
7. The respondent shall not engage in, or allow any of its employees to engage in, any conduct against the complainant or any party to participant in these proceedings in violation of General Statutes § 46a-60 (a) (4).

It is so ordered this 3rd day of October 2007.

J. Allen Kerr, Jr.
Presiding Human Rights Referee

cc.

Donald Rajtar
David Kent, Esq.
David S. Monastersky, Esq.
Stephen F. McEleney, Esq.