STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNTIES
OFFICE OF PUBLIC HEARINGS

CHRO ex rel. Dana Peterson, Complainant — CHRO No. 0410049

v.

Hartford Police Department, Respondent — November 14, 2008

Memorandum of Decision

Procedural Background

On August 6, 2003, Dana Peterson (the complainant) filed a complaint with the commission on human rights and opportunities (CHRO or the commission) alleging her employer, the Hartford Police Department (the respondent or HPD) discriminated against her in the selection process for patrol canine handlers and that the basis of the discrimination was her sex (female) and disability (transsexual) in violation of the Connecticut Fair Employment Practices Act (CFEPA), General Statutes §§ 46a-60 (a) (1) and 46a-58 (a).

The complainant on October 15, 2003, amended her pending complaint to further allege that she was again discriminated against in not being selected despite having passed a required physical agility test. The complainant alleges that this denial was discriminatorily based on her sex and disability. Furthermore, it's alleged that this denial was an act of retaliation against her for having previously opposed discriminatory employment practices by filing her complaint with the commission on August 6, 2003, in violation of General Statutes § 46a-60 (a) (4).

On September 18, 2003, the respondent filed its response (answer) to the complainant's affidavit of illegal discrimination. on October 30, 2003 the respondent filed its response to the complainant's amended complaint.

The commission investigated the allegations contained within the complaint and found reasonable cause to believe that an unfair practice was committed and attempted to eliminate the unfair practice by conference, conciliation and persuasion. These efforts having failed, this complaint was certified to public hearing on February 2, 2007 in accordance with § 46a-84 (a).

On February 16, 2007, the Office of Public Hearings sent to all parties of record a Notice of Contested Case Proceedings and Hearing Conference accompanied by the complaint. The respondent filed its answer to this complaint on March 8, 2007.[1]

On December 4, 2007, the matter was assigned to the undersigned referee to conduct the scheduled public hearing.

The public hearing on the above captioned matter was held on various dates between January 15, 2008 and April 2, 2008.

[1] While the respondent did file timely answers, the pertinent regulations for this agency require a respondent after the complaint has been certified to public hearing to again file an answer in writing and under oath. See the Regulations of Connecticut State Agencies, § § 46a-54-79a (a) (5) and 46a-54-56a.

The complainant is Dana Peterson whose business address is 50 Jennings Road, Hartford CT, 06106. The commission is located at 21 Grand Street, Hartford, CT 06106. The respondent, Hartford Police Department address is the City of Hartford, c/o Office of the Corporation Counsel, 550 Main Street, Hartford, Connecticut.

The Parties' Positions

The complainant is a post-surgical male-to-female transsexual who, as a female, applied for and was hired by the HPD. Since complainant's hiring she has experienced numerous instances of mistreatment all related to her gender and being a transsexual. These instances were:

- Continually being referred to as "he" by a HPD Training Academy officer.
- Difficulty in being assigned to a field training officer upon leaving the HPD Academy.
- Posting on a department bulletin board of her yearbook picture when she was a male.
- Pornographic pictures in the bathroom/locker-room labeling a person in the picture as the complainant.[2]

In the summer of 2002 a posting was issued announcing the solicitation of candidates to fill positions open in the HPD canine unit. Being a long held goal of the complainant to become a canine officer, the complainant applied (sought reassignment). Included in her submission was the offer to provide a dog to the department if it was found suitable

[2] While the complainant testified to these unpleasant instances the pending complaint does not include these. It is important to note that the complainant has not made a claim of a hostile work environment which could have made these experiences relevant.

for training. Also included was a detailed list of credentials the complainant held concerning the care and training for dogs. The posting itemized the requirements that would be used in the selection process. The then current canine unit supervisor, Sergeant Brooks (Brooks), chose three candidates for further assessment and training with the Connecticut State Police (CSP). These three candidates failed the CSP physical agility assessment. As a consequence of the three candidates failing, the respondent re-noticed the application process only to add its own physical agility assessment to the list of requirements. The complainant did not apply but did bring to the respondent's attention her belief that she was not chosen because she was a transexual. As a result of her communicating with the respondent, the complainant was invited to participate in the selection process for the canine unit openings. This process started with HPD conducting its own physical agility assessment on January 26, 2003. Throughout the physical agility assessment the complainant was led to believe that if she passed each and every event she would be sent to the CSP Training Academy. The complainant however was informed on February 11, 2003 that she had failed the 300-meter run, one of the five events that made up the assessment. Believing this to be in error, the complainant investigated the standards (minimum scores) needed to pass each event and to determine that the 300-meter run was scored on a "single norm" standard that made no distinction for gender or age, unlike the standards for the four other events. The complainant argues that in using the single norm standard the respondent and/or Brooks purposely increased the difficulty for her to pass. The complainant argues that were the standard accounting for gender and age utilized, her time for the 300-meter run would have resulted in her passing the entire physical

assessment. Furthermore, she argues that had there been a complete review of all the necessary requirements for each candidate to attend the CSP physical agility assessment, which was the initial step required for admission into the CSP Canine Academy, she would have been selected. The complainant proffers the decision to use the single norm standard was a discriminatory act based on her gender and/or her disability of being a transsexual, and implemented to keep her from passing the HPD physical agility assessment and achieving her goal of becoming a canine police officer. The complainant also alleges that in the course of conducting the January 26, 2003 physical agility assessment was overheard by a member of the HPD canine unit making comments referring to the complainant as a he/she/it or that sending her to the CSP would be an embarrassment.

In August 2003 the department, through Brooks, posted a request for applications for canine handlers and again the complainant submitted her request for reassignment. As was provided for in the posting, the HPD conducted its own physical agility assessment on September 6, 2003. Of the candidates who were tested, five passed, including the complainant. The complainant again believed that if a candidate passed the HPD assessment that candidate was then sent to the CSP Training Academy for its physical assessment. In this instance again the complainant was not chosen, and argues that her failure to be chosen despite having passed the HPD physical agility assessment, was an act of retaliation as a consequence of her having filed a complaint of discrimination with this commission on August 6, 2003. Furthermore, it is her position

that the decision not to allow her to attend the CSP physical agility assessment was an act of discrimination based on her sex and her disability (being transsexual).

The complainant also argues that the HPD, in retaliation for her filing a complaint with this commission, has modified its requirements for becoming a canine handler wherein it now prohibits sergeants from becoming canine handlers, or, in the alternative, provides that if an officer is promoted to sergeant he or she must then forfeit that the status to become a canine handler. This, the complainant believes was implemented to keep her from becoming a canine handler.

The respondent takes exception with the complainant and counters that the selection of canine handler candidates was not made with any discriminating animus. The respondent argues that its own physical agility test was implemented to avoid the embarrassment of sending officers to the CSP Canine Training Academy only to find out they could not pass the initial physical agility test. The method of testing and selection of the score that would be required to pass an individual event was in reality not made by the HPD or Brooks but by the CSP Canine Training Academy as they supplied to Brooks the exact physical assessment it employed when testing canine candidates.

In the process of scoring the results for the January 26, 2003 HPD assessment, Brooks, noticing the 300-meter standard differed from the standards used in the four other events, contacted the CSP Canine Training Academy and confirmed that the standard

used for the 300-meter run was the standard employed by the CSP for testing candidates entering the CSP Canine Training Academy.

The respondent's position regarding allegations relating to the September 7, 2003 HPD physical agility assessment is that it employed the same test standards as were used for the January 26, 2003 assessment and that five candidates passed, including the complainant. While five candidates passed, the respondent was only allocated one slot in the upcoming CSP Canine Training Academy. In following the department's long standing policy, it chose two police officers, one designated the selected candidate and the other designated the alternate. The alternate would only be admitted into in the CSP Canine Training Academy were the selected candidate to fail the CSP Canine Training Academy physical assessment.

Finding himself with five available candidates Brooks ranked the candidates according to their physical agility assessment results. This ranking produced a numerically objective order from which the alternate candidate was chosen. The selected candidate was a previously chosen male candidate from the January 26, 2003 HPD assessment who was sent and passed the CSP Training Academy assessment. Shortly after commencing his canine training, he was forced to leave the academy after his assigned dog attacked his daughter and was found unsuitable for training. Brooks, believing that this candidate's departure was due to no fault of his own, promised the candidate that, provided he passed the next (September 7, 2003) HPD assessment he would be sent to CSP for assessment and canine training in the class.

The complainant ranked last in the September 7, 2003 assessment and was not chosen along with three other candidates.

The respondent defends the rationale of not allowing sergeants to become canine handlers by arguing that since the attacks of September 11, 2001, the whole outlook on the police chain of command has changed. Specifically, the respondent wants its commanders (which includes sergeants) to have a broad outlook over their subordinates. This outlook is diminished by having an assigned dog (or "long gun") causing that sergeant to be overly focused on the limited role of a canine handler or marksmen and not sufficiently focused on the situation that the particular sergeant is involved with at the time as a commander. The respondent argues that since employing this new philosophy, several individuals have given up their dogs upon promotion, choosing to give back their sergeant stripes to become a canine handler or deciding not to seek promotion.

The respondent maintains it never improperly considered the complainant's protected class when making its decision.

Findings of Fact[3]

After conducting the public hearing and having reviewed the exhibits introduced into the record and the transcript of the testimony, the following facts relevant to this decision are found:

1. Statutory and procedural prerequisites to the public hearing were satisfied and the complaint as amended is properly before the undersigned human rights referee for decision.

Background

2. Dana Peterson was born a biological male in 1967 (CHRO Ex. 23).
3. The complainant completed high school in 1985 and immediately enlisted in the United States Army and was discharged four years later (TR 27-32).
4. In 1990, the complainant, as a consequence of years of mental turmoil regarding her then anatomical sex and after seeking assistance from mental health professionals and being diagnosed with Gender Identity Disorder, changed his name to Dana Peterson, obtained a replacement birth certificate and drivers license indicating "his" new name, both of which reflected her gender as a female (TR 36-40).
5. On about January 1991, the complainant began living fulltime as a woman (TR 37).

[3] Reference to exhibits are by party designation, number and page. The commission's exhibits are denoted as "CHRO Ex." followed by the exhibit number and page. The complainant's exhibits are denoted as "C" followed by the exhibit number and page. The respondents' exhibits are denoted by "R Ex." followed by the exhibit number and page. References to testimony are to the transcript page (TR) where the testimony is found.

6. In 1993 the complainant applied for a position as a police officer with the HPD (TR 42).

7. The complainant in the fall of 1993 underwent sex reassignment surgery in Canada (TR 40-41).

8. The application process to become a Hartford Police Officer consisted of a written exam and an interview conducted by approximately six individuals consisting of both civilian and sworn officers (TR 50-51).

9. During the interview process in the early part of 1994 the complainant disclosed that she was transgendered (TR 50-51).

10. At the conclusion of the application process the complainant received an offer of employment subject to a background check and a polygraph exam (TR 50-51).

11. After having completed the polygraph exam the complainant was contacted by Detective Bruno, who requested that the complainant meet with him (TR 51).

12. When the complainant met with Detective Bruno, he informed her that she was being rejected for employment as a consequence of having lied on her polygraph exam to a question as to whether she ever sought or received psychological treatment or counseling (TR 53).

13. The complainant responded to the accusation that she lied on the polygraph by stating that she in fact answered the question truthfully and in the affirmative (TR 54).

14. Having contacted several members of the HPD as to its decision to reject her application, a meeting was arranged with then Police Chief Joseph Croughwell that resulted in the department's overturning of its rejection, and offering employment as a police recruit (TR 57).

15. The complainant completed the Hartford Police Academy training, was sworn in as a police officer with the HPD in 1994, and was promoted to the rank of sergeant on July 31, 2004 (TR 25).

16. During training at the HPD Training Academy, the complainant became aware that her being transgendered was known by at least one instructor who would refer to her as a male (TR 60-61).

17. Upon completing her training the complainant had difficulty being assigned a field training officer (FTO). A FTO is an officer with seniority who would guide and teach a brand new officer out of the training academy (TR 61).

18. Shortly after commencing work as a police officer, the complainant found her yearbook picture (as a male) enlarged and posted on a bulletin board outside the records division and internal affairs. The complainant removed the picture and did not report the incident (TR 75-76).

19. The complainant at some point in 1996 was depicted in a picture found in the HPD men's locker room, half of the picture depicted a naked male the other half depicted the same person but with breasts and no male genitalia and labeled "Dana before and after." Next to this same picture was a drawing of a female engaging in oral sex with a male (TR 76-77).

20. In 2002, the complainant discovered on the first floor hallway of the police department a posting regarding co-ed softball where someone had handwritten the comment “where does Dana fit in?” (TR 80).

21. The complainant in 2001 or 2002 found in her HPD mailbox a pornographic magazine with pictures of post-operative transsexuals (TR 82-83).

22. Neville Brooks became a member of the HPD in 1995. In January 2000 he was promoted to the rank of sergeant and then achieved the rank of lieutenant in August of 2007 (TR 1960).

23. On or about April or May 2002, Brooks was appointed the supervisor of the HPD Patrol Canine Unit (TR 1964-65, 1101).

24. At the time of Brooks’ assignment to the canine unit his other duties included being a supervisory investigator in the Internal Affairs Division, and team leader of the Emergency Response Team (TR 1442).

25. As supervisor of the Patrol Canine Unit, Brooks was responsible for the selection of officers to the unit (TR 1101).

26. On May 13, 2002, an inter-departmental memorandum signed by Captain Fallon was posted announcing the department’s intention to fill patrol canine handler positions (TR 1102-03, CHRO Ex. 10).

27. Brooks created the May 13, 2002 memorandum of the department’s intention to fill canine handler positions from prior announcements (TR 1103-04)

28. The memorandum stated that the selection process would require a letter of recommendation from an immediate supervisor; physical agility assessment based on the "Cooper Standards"; lost time and disciplinary review; interview with family members and inspection of residence; and successful completion of a 16-week training class. The announcement further stated that the deadline for requesting this assignment was June 7, 2002 at 1800 hours (6:00 p.m.) (CHRO Ex. 10).

29. Cooper Standards/physical agility fitness norms as defined on November 12, 2007 "are based on a representative sample of approximately 4000 officers that were stratified (by age and gender) and randomly selected from forty municipal, state and federal agencies. 89.7% of the sample was male and 10.3% was female; which reflects the gender characteristics of most agencies. The physical fitness tests were field tests measuring those job related physical fitness areas that have been shown to be the underlying and predictive factors for officer physical abilities to perform essential physical tasks and functions of the job." The 1.5 run in minutes and seconds and the 300-meter run in seconds has been show to be predictive of job performance in over 95% of the studies (C. Ex. 38 pg. 5).

30. Passing a physical agility test administered by the CSP Training Academy has been a requirement for becoming a member of the HPD Canine Unit since at least August 9, 1999 (C Ex. 8; CHRO Ex. 10).

31. At the time of the May 13, 2002 inter-departmental posting, the HPD needed patrol canine handlers on the midnight shift (TR 1127, 1137-38).

32. Those police officers wishing to be considered for patrol canine handlers are required to complete a Request for Reassignment form that requires the following information: name, rank, date submitted, present assignment, division; duration, desired reassignment, reason for reassignment, whether the request is voluntary, supervisor's endorsement, and division/district commander endorsement (R Ex. 2; TR 890-91).

33. The following HPD officers responded to the May 13, 2002, announcement: William Mooney, Earl Baidy, Marcel Washington, Dennis O'Connor, Dana Peterson, Anthony Ragio and Shawn Nichols (R Ex. 2, 3, 4, 5, 6 and 8).

34. The complainant during 2002 and 2003 was assigned to the second shift also referred to as B Squad (TR 577-78).

35. Officer Washington at the time of the May 2002 announcement was assigned to the midnight shift (R Ex. 4).

36. Officer Nichols at the time of the May 2002 announcement was assigned to the midnight shift (R Ex. 8).

37. Shift announcements lasted approximately 86 days and were made strictly on the basis of seniority (TR 576-77).

38. Once an officer receives a shift assignment it is locked in and may not be changed in the middle of a shift cycle (TR 576-77).

39. The custom at the HPD was to send to the CSP Training Academy for its physical agility test one more person than the number of slots allotted to

the department for the class that the agility test was given for (TR 1190-91).

40. Brooks selected Officers Nichols, Washington and O'Connor and did not select the complainant, Mooney, Baidy and Ragio (TR 149).

41. Officers selected to be tested by the CSP for the physical agility test are required to produce an original doctor's certificate attesting to the officers' fitness to perform the physical agility assessment test (CHRO Ex. 22).

42. The HPD does not train canine handlers. Training for the HPD canine handlers is provided by the CSP. Once an officer becomes a canine handler there are once a month training sessions conducted by the HPD (TR 1969).

43. When Brooks took over the supervising of the HPD Canine Unit all individuals involved were trained by the CSP (TR 1969).

44. The required doctor's certificate was to be provided to the CSP training staff conducting the physical assessment testing (CHRO Ex. 22).

45. The CSP based on past experience has found that by selecting canine handlers who are in good physical condition, and conducting exercises to maintain that conditioning has greatly improved performance and reduced the number and severity of injuries to handlers (CHRO Ex. 22).

46. All three officers selected by Brooks who attended the CSP physical agility assessment conducted on December 30, 2002, failed. Brooks was notified of these results at some point after the test (TR 153, 1201).

47. Officer Nichols failed the 1.5 mile run at the December 30, 2002, physical agility test. This event was not the last event tested. The last event test was the simulated canine carry which Officer Nichols passed (TR 1971).

48. The complainant's salary as a member of the HPD would not have changed had she passed the physical agility assessment conducted by the HPD and had of gone to the CSP and passed the requirements of the CSP Training Academy (TR 869).

49. The complainant's time at HPD was mostly on B shift. The term shift and squad refers to the time an officer is assigned to work. There are three squads or shifts: first shift, A squad; second shift, B squad; and third shift, C squad (TR 25-26).

50. The complainant believed that the physical agility assessment conducted by the HPD was a pre-requisite to go forward to the state police test (TR 430).

51. On the morning of January 26, 2003, prior to commencing the physical agility assessment, Brooks addressed the candidates taking the assessment and informed the candidates of what was expected (TR 430).

52. Patrol canine handlers work at their assigned shifts for seven hours and are paid an additional one hour to compensate the officer for the care of his/her assigned dog. Canine officers have a permanent set of days off which always include at least one weekend day. Canine officers are paid for the hour that must be spent maintaining their dog on days off (TR 445-446).

53. Patrol canine handlers are assigned HPD cars which they drive to and from work and any task related to the care of their assigned dog. Expenses related to the assigned vehicle are paid by the HPD (TR 446-447, 480, 1068).

54. P.O.S.T. is and acronym that stands for Police Officer Standards and Training Council (TR 494-495).

55. The complainant included with her request for reassignment a list of certifications she held and conferences and workshops she had attended involving the training of dogs (CHRO Ex. 7).

56. Becoming a patrol canine handler has long been a career goal of the complainant (C Ex. 3; CHRO Ex. 7, 9).

57. The complainant was neither asked by Brooks if she was willing to work the midnight shift nor informed that the openings were on the midnight shift (TR 150).

58. When Brooks contacted the CSP to determine what was the physical agility they employed for canine officers he never mentioned a woman or a trans-gendered woman was taking the test he anticipated giving (TR 2257-8).

59. Brooks was provided with the events and standards (scores) necessary to pass the events that made up the CSP physical agility identified in a memorandum dated December 10, 2002 from Sergeant Rodino of the CSP (CHRO Ex. 22).

60. A canine handler's duties include those of any other police officer along with maintaining his/her assigned dog and using the assigned to: find criminals who have fled, find lost persons, recover evidence, criminal apprehension, building searches, school visits and community relations (TR 390-391).

January 26, 2003

HPD physical agility assessment

61. Brooks did not require any officer to participate in the physical assessment test conducted by CSP to provide him a doctor's certificate of fitness (TR 2005; 1191).

62. Brooks did not request the complainant to provide him with a doctor's certificate of fitness prior to the December 30, 2002 physical agility assessment test (TR 2004-05; 1194; 2059).

63. The physical agility assessment test conducted by the CSP consisted of the following six events: sit and reach; one-minute push-up; one-minute sit-up; 300 meter run; and 1.5 mile run and simulated canine carry. In order to pass a particular event the participant had to score in the 40 percentile based on the "Cooper Standards" (CHRO Ex. 22; TR 2788-89).

64. The Cooper Standard utilized for assessing the 300 meter run did not differentiate between males and females or for the age of the candidate. It provided a single set of scores broken down by time, percentile and category: superior, excellent, good, average, fair and poor (CHRO Ex. 22).

65. As a consequence of Officers Nichols, O'Connor and Washington failing the physical agility assessment on December 30, 2002, Brooks decided to administer a physical agility test to any HPD officers wishing to be considered for an HPD patrol canine officer opening. Brooks implemented a process of the candidates having to take an HPD physical agility test to determine who could pass the agility test conducted by the CSP. This would avoid the embarrassment of officers being unable to pass that assessment along with losing assigned slots to the HPD in the 16-week training class for canine handlers (TR 1203-1209, 1752, 2176-78).

66. Brooks by interdepartmental memorandum dated January 6, 2003 announced the department's intention to fill canine handler positions. This memorandum reflected that the selection process would include two physical agility assessments. One conducted by the HPD and the other by the CSP (R Ex. 10).

67. The following officers responded to the January 6, 2003 memorandum: Earl Baidy, Robert Lawlor, William Mooney and Dennis O'Connor (CHRO Ex. 18, 19, 20, 21).

68. The complainant did not respond to the January 6, 2003 memorandum by requesting a reassignment (TR 224).

69. Brooks utilized the same Cooper Standards to determine whether an event was passed or failed that the CSP utilized for the physical agility assessment referenced in the January 6, 2003 memorandum.

70. The HPD conducted the physical agility assessment that was referenced in the January 6, 2003 memorandum on January 26, 2003 (CHRO Ex. 23).

71. For the HPD physical agility assessment conducted on January 26, 2003, Brooks utilized a Hartford Police Academy form to record the results of the candidates. This form did not anticipate the 300-meter run being given (CHRO Ex. 23; TR 1596-1598).

72. While the form utilized to record the candidates' results for the different events indicated targeted minimum scores, Brooks never intended to use any score identified on the form, rather Brooks intention was to use the scores provided by the CSP (TR 1601-02).

73. The sit-up, sit and reach, and push-up portion of the physical agility assessment given on January 26, 2003, was performed at the Hartford Police Academy at 101 Pearl Street. The remaining events the 300-meter un and the 1.5 mil run were conducted on the truck of St. Joseph's College in West Hartford (TR 166 and CHRO Ex. 23).

74. Brooks never made it a requirement in either the January 20003 or September 2003 HPD assessment that in order to move to the next event a candidate had to pass the prior event (TR 1595-96).

75. The complainant's score (time) for the 300-meter run was one minute thirteen seconds which was higher than the minimum time required of one minute nine and one tenth seconds. (CHRO Ex. 22, 23).

76. At no time during the physical assessment conducted by the HPD on January 26, 2002 did Brooks authorize anyone to inform a particular candidate if an event was passed or failed (TR 2262).

77. Brooks did not prior to nor during the January 26, 2003 physical assessment inform anyone what a passing score for any event would be (TR 1382-1383, 1600).

78. The standard provided to Brooks for the 300-meter run was a single norm standard that made no distinction for gender or age (TR 1718-19; CHRO Ex. 22).

79. Brooks confirmed with Sergeant Kevin Rodino (the commanding officer of the CSP Canine Unit) that the standard utilized for the 300-meter run provided earlier to Brooks was the correct standard to use (TR 1718, 2845).

80. By memorandum dated February 11, 2003, the complainant was notified that she did not successfully complete the physical agility assessment conducted on January 26, 2003. The memorandum stated that she completed the 300-meter run in a time of 73 seconds which did not meet the established minimum time of 69.1 seconds (CHRO Ex. 24).

81. The complainant received the February 11, 2003, memorandum on or about February 13, 2003 (TR 650-51).

82. Of all the candidates who participated in the physical agility assessment conducted by the HPD on January 26, 2003, Officers Lawlor and O'Connor were the only candidates who passed (TR 2036; R Ex. 19, 20).

83. There being only two successful candidates passing the HPD physical agility assessment for two slots in the upcoming CSP Canine Training Academy, Brooks chose not to conduct oral interviews (TR 1724-25).

84. Brooks prior to Officer's Lawlor and O'Connor participating in the CSP physical agility test conducted an inspection of their homes (TR 1721).

85. Officers Lawlor and O'Connor in February 2003 commenced the CSP Canine Training Academy (TR 1760).

86. Lawlor as a result of his assigned dog attacking his daughter and being found unsuitable resigned from the canine training academy (TR 1760, 1798).

87. Brooks promised Lawlor he would get the next training slot given to the HPD at the canine training academy provided he passed the physical agility test assessment (TR 1768-69, 1797-98).

88. Officer O'Connor completed the canine training academy and became a patrol canine handler (TR 1763).

89. Not all officers who start the CSP Canine training program complete the canine training (TR 1760, 2002-03, 2344).

90. Officers Darren Besse, Holly Donahue, Denzil Samuda and Sergeant William Long were present for the physical agility assessment given on January 26, 2003, held at the police training academy and St. Joseph's College (TR 2349, 2492-23, 2494, 2347, 2448).

91. A passing score for any event tested during the physical agility test conducted January 26, 2003 was determined solely by Brooks using the

"Cooper Standards" supplied to him by the CSP (TR 1209, 1410-11, 1475; CHRO Ex. 22).

92. The officers present and in the same proximity as Officer Besse (Besse) to Brooks (at the time Besse claims to have heard Brooks make disparaging comments regarding the complainant) were Holly Donahue, Denzel Samuda and Sergeant William Long (TR 1290), 2457).

93. The first time Besse disclosed to anyone that he overheard Brooks at the St. Joseph College truck on January 26, 2003 refer to the complainant as a he/she/I or that Brooks believed she should be graded as male for the events being tested was when he was interviewed by the CHRO investigator. This took place in the Summer of 2005 (TR 972, 1051; C Ex. 28 pg. 1).

94. Besse remember Brooks addressing the candidates at the HPD Training Academy prior to the start of the January 26, 2003 agility assessment as saying by he didn't want to hear anybody complaining about the process or how this were done and his tone being curt. Brooks also asked the candidates to do the best you can max don't just do the minimums (TR 917, 1053).

95. Besse was approximately 5 or 7 feet from Brooks when he claims to have heard the disparaging comments regarding the complainant from Brooks. (TR 1289).

96. Besse at no time during the physical agility tests conducted by the HPD on January 26, 2003, and September 7, 2003, heard anyone tell the

candidates if you pass the physical agility test you will be sent to the CSP for its physical agility assessment (TR 1382).

97. Brooks demeanor when addressing the candidates at the Hartford Police Academy on January 26, 2003, prior to the physical agility assessment, was authoritative and informative (TR 2349).

98. Brooks purposefully did not discuss minimum scores needed to pass the individual events out of concern that a candidate(s) would rely on that number and stop only to find that several of the push-ups or sit-up were improperly done and not counted (TR 1382-83; 1600).

99. In the course of addressing the candidates at the Hartford Police Academy Brooks told them if they had any problems with the agility test or the way it was run to see him (TR 2369).

100. The January 26, 2003, HPD physical agility assessment was the first Brooks ever conducted (TR 1695).

101. Brooks never directed anyone assisting him in conducting the January 26, 2003, physical agility assessment to report any event for any candidate as being passed or failed TR 1698).

102. CSP informed Brooks that HPD had been allocated two slots in the February 18, 2003 canine training class (TR 1702, 1706).

103. Brooks contacted Sergeant Rodino at the CSP Training Academy days following the January 26, 2003, HDP physical agility assessment and confirmed that the 300-meter event was to be scored by the single norm

standard. Upon getting this confirmation Brooks then determined that the complainant had failed the 300-meter event (TR 1718-19).

104. Brooks prior to sending Officers' Lawlor and O'Connor to the CSP Training Academy for physical agility testing did not review either of these officers' personnel records (TR 1721).

105. Brooks conducted no oral interview as he only had two candidates for the two slots (TR 1725).

106. Brooks first became aware of the Cooper Standard for the 300-meter run that was broken down by gender and age at the hearing on the complainant's grievance (TR 1703).

107. Brooks after becoming aware of the Cooper Standards brought out at the complainant's grievance hearing did not question the use of the single norm standard utilized during the January 26, 2003 HPD physical agility assessment because the single norm standard was what was used by the CSP Canine Training Academy (TR 1732).

108. Brooks had no preference as to what standard was utilized for the 300-meter event other than to use what the CSP used so that the HPD physical assessment "mirrored" exactly what CSP did (TR 1734).

109. Brooks did not want to be embarrassed by HPD officers not being able to meet the criteria (TR 1752).

110. Brooks relied on the supervisors of the applicants for HPD canine officers to verify that each applicant had the minimum of four years as a patrol officer (TR 1785, 1787; CHRO Ex. 10; R Ex. 10).

111. Brooks did not scrutinize the requests for reassignment to confirm that the applicant met all the necessary requirements (TR 1786).

112. The complainant prior to taking the HPD physical agility assessment on January 26, 2003, investigated what would be covered by this test. This investigation included using the internet and going to the CSP, P.O.S.T. website, and HPD websites (TR 128, 138).

113. The complainant after completing the HPD physical assessment on January 26, 2003, was not told officially that she had passed or failed the assessment (TR 183).

114. The complainant believed based on her research of the events tested in the HPD physical agility assessment that she had passed all events including the 300-meter run (TR 182).

115. The complainant was aware after taking the January 26, 2003 HPD physical agility assessment that Officer Nichol's had failed (TR 183).

116. The complainant after learning from her union president, Mike Wood, that she had failed the 300-meter run contacted the HPD police academy and spoke on February 11, 2003, with Officer Dave Dufault a Cooper certified instructor, who provided her with the Cooper Standards that he had for the 300-meter run that was broken down by gender and age (TR 193, 202. CHRO Ex. 1).

117. The complainant while having not sought reassignment per the January 6, 2003 post was allowed to participate in the January 26, 2003 HPD

assessment as a consequence of a conversation between her union representative and one of the HPD chiefs (TR 224).

118. The complainant's assessment score sheet that reflected her scores for the events tested on January 26, 2003 did not indicate whether she passed or failed the 300-meter unit (R Ex. 15).

119. The complainant's union on February 21, 2003, filed a grievance with the HPD regarding the complainant's failing the January 26, 2003, HPD physical agility assessment. (R Ex. 32).

September 7, 2003

HPD physical agility assessment

120. Brooks having requested and was being given one opening in the next state police canine training class and announced by interdepartmental memorandum dated August 28, 2003 that HPD was seeking qualified officers for the position of "patrol k-9 handler" (TR 1763; CHRO Ex. 25).

121. The complainant in response to the August 28, 2003, announcement submitted a request for reassignment dated September 3, 2003 (TR 334-35, 340; C Ex. 23).

122. On September 7, 2003 pursuant to the August 28, 2003 announcement the HPD conducted a physical agility test (TR 1595-96, 2056, 2285-86).

123. Brooks in connection with the August 28, 2003 announcement never stated or represented that passing the HPD physical agility guaranteed a candidate would automatically be sent to the CSP for a physical agility

assessment and to the CSP Training Academy (TR 1382-83, CHRO Ex. 25).

124. The HPD physical agility assessment of September 7, 2003, relating to running took place at Bulkeley High School in Hartford, CT (TR 353).

125. The form utilized to record the scores of the candidates at the September 7, 2003, physical agility assessment differed from that utilized on January 26, 2003. The form used in September did not show a minimum or target score, or any chart relating to gender nor was there any space for the monitor to note pass/fail (CHRO Ex. 27).

126. Brooks requested Officer Dave Dufault (Dufault) to administer the physical agility test given on September 7, 2003. Dufault was “Cooper” certified and was to explain the proper techniques in performing the events. Dufault was not assigned the task of determining who passed and who failed (TR 1477-79, 2259-61).

127. Dufault was certified as a Cooper Standards instructor in 2001 (TR 979).

128. To become a certified instructor Dufault was required to attend a sixty hour course conducted by the Cooper Institute based on biology and kinesiology and to be able to participate in the exercises that are tested (TR 979).

129. After returning from becoming a Cooper certified instructor, Dufault determined that P.O.S.T. (also known as the Municipal Police Training Counsel) was posting on its website an older document identifying times

no longer being used in the Cooper Standard. This inaccuracy was verified by Dufault's Cooper instructor (TR 998-9).

130. Of the candidates who participated in the HPD physical agility assessment on September 7, 2003 the following achieved passing scores in all events: the complainant, Officer Lawlor, Officer Nichols, Officer Rivera and Officer Baidy (R Ex. 30; TR 2039-2052).

131. With the HPD having been given an opening in the upcoming CSP physical agility assessment/canine training Brooks again decided to send one more candidate than the available opening (TR 1794).

132. To determine who would be chosen from the pool of successful candidates Brooks ranked the candidates based on the results of the individual events of the physical agility assessment after throwing out each candidate's lowest score. Of the remaining scores Brooks assessed first, second, third, fourth and fifth place for each event. This resulted in Officer Nichols events showing 1, 2, 2, 2; Officer Rivera 1, 3, 3, 3; Officer Baidy 1, 2, 1, 1; and the complainant receiving 1, 3, 4, 4. After averaging the event scores the complainant placed fifth and Officer Baidy first, Officer Nichols second, Officer Rivera third, and Officer Lawlor, fourth (TR 2039-2052; R Ex. 30).

133. Brooks selected Officers Baidy and Lawlor to attend the CSP physical agility assessment on September 18, 2003 (TR 1870).

134. Lawlor was allowed to go by virtue of a prior commitment to him by Brooks after he withdrew from an earlier canine training class after his dog was found unsuitable due to attacking his daughter. (TR 1763, 1768-69).

135. Officer Baidy attended the CSP physical agility assessment with Lawlor (TR 2651).

136. Officer Baidy did not start the CSP Canine Academy after passing the CSP physical assessment as a consequence of the HPD being allotted one slot which Lawlor took (TR 2651).

137. Officer Baidy was allowed to attend the CSP Canine Academy only after Lawlor dropped out (TR 2657).

138. As a consequence of Lawlor resigning from the CSP Canine Training Academy (due to his assigned dog attacking his daughter), Brooks requested and was given one slot in the canine training academy in September 2003 (TR 1763).

139. Dufault was asked by Brooks to assist with the conducting of the HPD physical agility tests (TR 1776, 1799).

140. The respondent's policy on who could qualify to become a canine handler changed after the September 11, 2001 attacks on this country. The HPD identified key people in its organization and how to respondent and coordinate their work duties and responsibilities at a crime scene. More specifically it identified the role of the sergeant as a supervisor. Their job is to 1) see that the work get done properly and 2) to instruct people how to better perform their duties at a crime scene. As a consequence of this

change in understanding of a sergeant's role canine officers who were supervisors had to relinquish their canines and "long guns" (TR 2153-56).

Retaliation

141. The complainant's grievance was denied on December 1, 2003, after a finding that no violation of the collective bargaining agreement had taken place (C Ex. 11).

142. Officer Denzel Samuda (Samuda) upon being notified of his promotion to sergeant on March 15, 2005 left the CSP Training Academy so as to attend sergeant training at Manchester Community College. Samuda's then dog was never certified and never worked as a police canine (TR 2359).

143. Samuda after having been promoted to sergeant was informed by then Assistant Chief Fallon on or about March or April 2006 that he could no longer be a "k-9" handler (TR 2347, 2366).

144. Samuda upon being promoted to sergeant on March 15, 2005 began working a full eight hour day with no allowance of time being given to care for an assigned HPD dog (TR 2380-81).

145. Samuda was promoted to sergeant on March 15, 2005 (TR 2359).

146. Samuda from the time of his promotion to sergeant to the time of his being informed by Assistant Chief Fallon that he could no longer be a handler would bring his dog (Argo) with him to work when he was assigned to the

North Police Service area. During this period he and his dog were not a certified team and he did not work Argo as a HPD canine (TR 2351-60).

147. Officer Baidy graduated from the CSP canine academy on or about December 2003 or January 2004 (TR 2652).

148. Officer Baidy was promoted to detective on or about November 10, 2006 (TR 2652).

149. Detective Baidy ceased being a HPD patrol canine officer, as he understood that if he became a detective he would have to relinquish his position as a canine officer (TR 2653).

150. Detective Baidy's dog was then turned over to him by Lieutenant Brain Heavren (TR 2653).

151. While Brooks was out on sick leave during 2005-2007 Besse had been authorized to go to Bridgeport, Connecticut as his dog was to inspect cargo ships for drugs, Brooks upon returning form sick leave found no reason for Besse to be going to Bridgeport and found no benefit to the HPD in allowing him to do this. As a consequence Brooks stopped Besse from going (TR 1915-16, 1983, 1995).

152. Brooks put in place a protocol and obtained certification for obtaining narcotics from the state to assist in training dogs to detect and find narcotics (TR 1983-84).

153. As part of being recertified Brooks recalled all drugs distributed to canine handlers to audit the drugs distributed and to confirm the quantities issued previously were still in the possession of the officers who were giving the

drugs earlier. The audit also served the returning by the canine officers state drugs which could not be replaced until prior drugs distributed were accounted for (1983-1992).

154. Besse returned six grams of marijuana after having been issued hundred grams several years earlier (TR 1985-87).

155. Brooks was responsible for commencing an investigation into the ninety-four grams of marijuana not returned by Besse.

156. Sometime in 2007 Brooks encountered Besse in the HPD parking lot displaying a tattoo that had been labeled racist. The HPD had at that time an order issued by the then chief that this type of tattoo had to be covered while an officer is in uniform. To document the event Brooks had Besse submit a report of the occurrence to him (TR 1995-98).

III.

Sex Discrimination under CFEPA and Title VII[4]

The complainant has alleged that the respondent violated General Statutes § 46a-60 (a) (1) which provides in pertinent part that "[i]t shall be a discriminatory practice in violation of this section: (1) [f]or an employer… except in the case of a bona fide occupational requirement or need to… discriminate against him in compensation or in terms, conditions or privileges of employment because of the individuals…sex…or past history of mental disorder…or physical disability… Specifically, the complainant alleges that the respondent treated her differently than other police officers of the HPD who applied for reassignment to the HPD canine unit. The manner by which she alleges that she was treated differently are in the alterative, the first being that despite having passed the HPD physical assessment test she was not chosen to attend the CSP physical

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[4] Both the original complaint filed on August 6, 2003 and the October 15, 2003 amended complaints are silent as to any claim under Title VII. While the complainant has stated in both filings that she is seeking a remedy for her rights being violated under § 46a-60 (a) (1) and § 46a-58 (a) she fails to state as to § 46a-58 (a) what rights she means. For purposes of this decision I will accept that a violation of Title VII as a consequence of her sex is what the complainant was referring to. I find this as § 46a-58 (a) converts a violation of federal law into a violation of state law provided that the discriminatory act is based on religion, national origin, alienage, color, race, sex, blindness or physical disability. *Commission on Human Rights and Opportunties ex. rel Kennedy v. Eastern Connecticut State University,* CHRO No. 0140203 (2004), 2004 WL 5380913. There being no claim in this matter relating to religion, national origin, alienage, color, race or blindness and the Americans with Disabilities Act not covering physical disability as a consequence of being a transsexual coupled with the complainant's admission of limiting her disability claim solely to state law (see complainant's post hearing brief dated June 30, 2008 at page 77) leaves only sex as a basis to consider a § 46a-58 (a) claim.

"Title VII protects a limited class of persons from discrimination. Protection is limited to individuals who are discriminated on the basis of 'race, color, religion, sex or national origin' 42 U.S.C. § 2000e-2 (a) (1), (2)." *Kiley v. American Society for the Prevention of the Cruelty to Animals,* 2008 WL 4442468.

assessment exam which was a precursor to attending the CSP Canine Training Academy. The second being that of the five events tested the 300-meter run was not scored by a standard that took into account both gender and age as were the other four events. The complainant proffers that the standard employed (single norm) by the HPD was more difficult than an existing standard which accounted for gender and age and was known to the HPD Training Academy.

The complainant argues that the treatment she experienced was discriminatory on the basis of her gender and her physical disability (transsexual). "Because the legislature intended the pertinent provisions of the Connecticut statute to mirror those of the federal anti-discrimination laws, Connecticut courts – along with this tribunal – generally follow the analogous federal law when analyzing CFEPA claims. *Board of Education of City of Norwalk v. Commission on Human Rights and Opportunities,* 266 Conn. 492, 505 n. 18 (2003); *Craine v. Trinity College,* 259 Conn. 625, 636-37 (2002)." *Commission on Human Rights and Opportunities ex rel. Szydlo v. EDAC Technologies Corporation,* CHRO# 0510366; 2007 WL 4258347. "The analysis is the same under CFEPA. See *Brittell v. Dep't of Correction,* 247 Conn. 148, 164 (1998)) ("in defining the contours of an employer's duties under our state anti-discrimination statutes we look for guidance to federal case law interpreting Title VII of the Civil Rights of 1964, the federal statutory counterpart to § 46a-60.")" *Byra-Grzegorczyk v. Bristol Myers Squibb Company,* 527 F. Supp. 2d 233 (D. Conn. 2008) (ruling on summary judgment). "[H]ence federal case law may be considered in an analysis of complainant's state claims as well as those

arising under Title VII." *Commission on Human Rights and Opportunities ex rel. Maher v. New Britain Transportation Co.,* CHRO No. 0330303, 2006 WL 2965494.

In the instant matter the complainant argues she suffered as a result of her protected classes (sex and disability) disparate treatment. These types of claims brought under our state or federal anti-discrimination statutes (Title VII) are analyzed for liability under one of two theories, these being the pretext model articulated in *McDonnell-Douglas Corp. v. Green,* 411 U.S. 792 (1973) or the mixed motive theory of *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989).

In the latter of these two models of analysis the complainant has the burden of showing (either with direct or circumstantial evidence) that she was a member of a protected class and that an impermissible factor played a substantial motivating role in the respondents' decision not send the complainant to the CSP Training Academy for a physical agility assessment. *Levy v. Commission on Human Rights and Opportunities,* 236 Conn. 96, 106 (1996).

"Because the [complainant] must show that the evidence is sufficient to allow a fact-finder to infer both permissible and discriminatory motives… The [complainant's] initial burden in a Price Waterhouse mixed-motive case is heavier than the de minimis showing required to establish a prima facie *McDonnell-Douglas case."* (citations omitted) *Raskin v Wyatt Company,* 125 F.3d 55, 60 (1997).

Successfully establishing by direct evidence that the respondents' intention to discriminate was due to a protected status would in most cases utilizing the mixed motive model shift the burden to the respondent to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the discriminatory facts into account. *Price Waterhouse v. Hopkins,* supra, 490 US 247, 258; *Levy v. Commission on Human Rights and Opportunities,* supra 236 Conn. 106. "Both the Second Circuit Court of Appeals and the Federal District Court of Connecticut emphasize that 'to warrant a mixed-motive burden shift, the [complainant] must be able to produce [whether by direct of circumstantial evidence, or both] a 'smoking gun' or at least a 'thick cloud of smoke' to support [her] allegations of discriminatory treatment.'" *Commission on Human Rights and Opportunities ex rel. Szydlo v. EDAC Technologies Corporation,* supra, CHRO No. 0510366, 2009 WL 4258347 quoting *Raskin v. Wyatt Company,* 125 F.3d 55, 60-61. (2nd Cir. 1997).

"Direct evidence of discrimination 'may include evidence of actions or remarks of the employer that reflect a discriminatory attitude … or [c]omments [that] demonstrate a discriminatory animus in the decisional process'… statements or comments that are undisputed constitute direct evidence. See *Price Waterhouse,* supra 490 US 256 (where the statement was admitted); *Milo v. Commission on Human Rights and Opportunities,* 220 Conn. 192, 206 (1991) (where the statement was uncontroverted); *Tyler v. Bethlehem Steel Corp.,* 958 F.2d 1126, 1185 (2nd Cir. 1992) (there was an unequivocal statement of intent constituting direct evidence of discriminatory motive ("I

fired him because he was too old"")," *Commission on Human Rights and Opportunities ex rel. Graves v. Sno-White Avenue Car Wash,* supra 2006 WL 4753456.

Under the *McDonnell-Douglas* model of burden shifting analysis for the complainant to establish a prima facie case of disparate treatment under a facially neutral employment policy she must establish; 1) that she belongs to a protected class; 2) she was qualified for the position sought; 3) she suffered an adverse employment action; and 4) the adverse employment action occurred under circumstances giving rise to an inference of discrimination. *McDonnell-Douglas Corp. v. Green,* supra, 411 US 787; *United Technologies Corporation/Pratt and Whitney Aircraft Division v. Commission on Human Rights and Opportunities,* 72 Conn. App. 212, 225-26, (2002); *Texas Department of Community Affairs v. Burdine,* 450 US 248, 252-56 (1981).

Under the *McDonnell-Douglas* paradigm if a complainant establishes a prima facie case, the burden then shifts to the respondent to produce a legitimate non-discriminating reason for the adverse employment action. *Reeves v. Sanderson Plumbing,* 530 US 133, 142 (2000). Where the respondent produces a legitimate non-discriminatory reason for the adverse employment action, the burden of persuasion then shifts back to the complainant to prove that the proffered reason by the respondent is pretextual. *Ann Howard's apricot Restaurant, Inc. v. Commission on Human Rights and Opportunities,* 220 Conn. 192, 203 (1991) "Although the burden production shifts to the [respondent], the ultimate burden of persuading the trier of fact of intentional discrimination remains at all times with the [complainant]" *Darrell Morris v. Yale*

University School of Medicine, 477 F. Supp. 2d 450, 458 (2007); *Searea v. Rebin,* 117 F. 3d 652, 654 (2d Cir. 1997).

In the instant matter the two methods of analysis are both argued by the parties. The complainant and the commission advance the argument that due to the statements attributed to Brooks by Besse that he would never send the complainant to the CSP for canine training as she would be an embarrassment, along with his referring to the complainant as a he/she/it, and that she (the complainant) should be graded as a male when it came to the physical agility test because she was a male (Besse, TR 922-924) show that Brook's discriminatory animus was the motivating force behind the respondent's decision not to send the complainant to canine training.

For the mixed-motive model to be applied in this case vis a vis complainant's disparate treatment claim I as the trier of fact would have to believe that Brooks in fact made what would be undeniably derogatory comments about the complainant at the track at St. Josephs College on January 26, 2003, and that Brooks when speaking to the candidates prior to commencing the HPD physical assessment at the academy that same date and saying that he would take complaints about the physical assessment into consideration was referring directly to the complainant.

The credibility of witnesses is a determination within the province of the administrative agency *Murphy v. Commissioner of Motor Vehicles,* 254 Conn. 33, 347 n.16 (2003). As

the trier of fact is the final judge of credibility he/she is to give the weight it determines testimony is deserving of *Toffolon v. Avon,* 173 Conn. 525, 530 (1977)

I cannot find that any of the aforementioned statements were made by Brooks. Certainly, were I to have found otherwise the outcome of this matter could and most likely would be different. Discriminatory statements, coming from the decision maker can establish a prima facie case under the mixed-motive analysis; *Denault v. Connecticut General Co.,* 1999 WL 549454, *5.

Having presided over the public hearing I believe that the complainant may have perceived Brooks' comments prior to HPD physical assessment as being directed at her. But I must take into consideration that the complainant's perception may have been skewed as a consequence of her disappointment in not being selected in December coupled with exuberance over the possibility of finally fulfilling a life goal. However, of all the witnesses who testified as to Brooks' demeanor at the HPD Training Academy not one testified that Brooks was anything other than professional, informative or authoritative. Not even Besse, the lynchpin to the complainant's case, offered any testimony to support that of the complainant.

As to the comments allegedly overheard by Besse from Brooks again I find that the weight of the evidence causes me to conclude and find that these clearly bigoted remarks were not said. Of the officers present and within the same vicinity of Besse to Brooks not one person even remotely alluded to that he or she heard what Besse

testified to. Most importantly Officer Samuda, who Brooks (according to Besse) was talking to, testified that he heard nothing of the kind as alleged by Besse uttered by Brooks. The sheer number of officers whose testimony was unchallenged on this issue provides me with enough support to my finding. The fact that Besse waited such a long time before disclosing these comments only strengthens my belief that the comments were never made. Finally, the fact that Besse can remember nothing of the context of the conversation Brooks was having other than the aforementioned comments causes me great concern that he actually heard the statements or may have for some reason heard what he wanted to hear. In either case it has not been sufficiently proven these comments were actually uttered.

Having found that the direct evidence proffered by the complainant and commission not to be credible I find that the proper mode of analysis is the *McDonnell-Douglas* pretext model. "If the [complainant] is unable to produce evidence that directly reflects the use of an illegitimate criterion in the challenged decision, the employee may proceed under the familiar three-step analytical framework described in [*McDonnell Douglas Corp. v. Green*, supra, 411 US 792]" *Commission on Human Rights and Opportunities ex rel. Graves v. Sno-White Avenue Car Wash,* supra. CHRO No. 0330082, 2006 WL 4753456 quoting *Stacks v. Southwestern Bell Yellow Pages,* 996 F.2d 200, 2002 (1993).

For the complainant to succeed she must establish a prima facie case as previously outlined. To this end I find that she is a member of a protected class by virtue of her

gender (female); that she suffered an adverse employment action; and that the decision not to pass the complainant on the January 2003 HPD physical agility test gives rise to an inference of discrimination.

The first component of the *McDonnell-Douglas* analysis requires no further comment as the respondent takes no issue with complainant's gender. My attention must turn to the remaining elements that make up the initial part of the analysis. The respondent does take issue with the claim that the complainant has suffered any adverse employment action. The respondent maintains that if the complainant were to become a canine officer it would simply be a lateral transfer and as a lateral transfer it does not in some manner constitute a demotion and would not be considered an adverse employment action. *Galabya v. New York City Board of Education,* 202 F.3d 636, 641 (2nd Cir. 2000).

The Second Circuit has defined "an adverse employment action as a materially adverse change in the terms and conditions of employment… To be materially adverse, a change in working conditions must be more disruptive than mere inconvenience or alteration of job responsibilities…Examples of such a change include termination of employment, demotion evidenced by a decrease in wage or salary, a less distinguished title, material loss of benefits, significantly diminished material responsibilities or other indices…unique to particular situation (citations omitted)" *Commission on Human Rights and Opportunities ex rel. Maher v. New Britain Transportation, Co.,* 2006 WL 2965494. And while "[a] denial of a transfer may… constitute an adverse employment action, but

we require a plaintiff to proffer objective indicia of material disadvantage; subjective, personal disappointment is not enough (citation, internal quotation marks and brackets omitted)." *Mathirampuzha v. Potter,* DK# 06-4384 CV (2nd Cir. 2008) 2008 WL 4764335. Clearly, the evidence supports a finding that objective indicia of material disadvantage has been produced.

The respondent's view that becoming a canine handler is purely a lateral move is belied by the fact that the canine handler selection process which sought candidates and which appeared to indicate that all who applied would not be chosen does not allow for the specter of discrimination to enter into the decision makers thinking as to who gets chosen and who doesn't. While it is true becoming a canine handler does not increase an officers pay[5], it does offer to selected candidates certain "perks" not enjoyed by the rank and file police officer of the HPD. These perks include, two consecutive days off

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[5] A significant amount of testimony was taken regarding the differences in pay and hours worked by patrol officers and canine handlers. It is the complainant's position that HPD canine handlers work 7 hours a day and were paid for 8 hours. Furthermore, the complainant argued that a HPD car was provided to its canine handlers and not its patrol officers. Finally, the complainant argues that as a consequence of patrol officers working 5-2 – 5-3 schedule and canine handlers working five days a week canine handlers work less hours than patrol officers. These positions taken by the complainant, I cannot ascribe to. While the complainant believes that canine handlers work only 7 hours, per day the reality is that they work eight hours. True 7 hours are related to their duties as police canine officers. However, by virtue of the Collective Bargaining Agreement (CBA) these handlers are compensated for 1 hour each day to cover the care and maintenance of HPD properly better known as their assigned dog. And as these dogs are with them over weekends the 1 hour per day on weekends is also compensated a 1 ½ times their hourly pay. Just because the complainant may feel that caring for a dog owned by the respondent is not compensable time doesn't make it so. And while the complainant argues that canine handlers work fewer hours than patrol officers, this argument is based on the mistaken premise that canine handlers work only 35 hours per week.

per week one of which is a weekend day and holidays off as argued by the respondent *Garber v. New York City Police Department,* supra.

As to the remaining elements of the analysis – inference of discrimination – I find that the fact that the complainant being the only female who took the HPD agility test in both January and September of 2003 coupled with a standard that was used to score the 300-meter run being different than that used for the other events (does not account for gender in age) satisfies the de minimis showing needed to satisfy *McDonnell-Douglas.*

Having found that three elements of the complainant's prima facie case have been met I find that the remaining element of being qualified for the position has not.

The complainant has an enviable record in the area of dog training (see CHRO Ex. 7). However, the most crucial aspect of being sent to the CSP Training Academy was passing the HPD physical assessment, which she did not. The complainant's claim that the wrong standard was used for the 300-meter run boils down to this; Brooks gave the exact test that the CSP Training Academy uses. His rational for using it was to send candidates who could pass the same test, albeit administered by the CSP. By so doing candidates who could not pass the CSP agility test would be exposed as would those who could. The complainant and commission's argument that "[t]here is simply no evidence to suggest that the canine academy required any particular score on the 300-meter run in order to be admitted to the sixteen week canine training,"[6] simply

[6] See complainant's post hearing memorandum of law dated June 30, 2008 page 89.

contradicts the testimony of Trooper Wyler and Brooks and the exhibits put into the record.

While I have found that complainant has failed to establish a prima facie case I do find (were I to assume *arguendo* that a prima facie case had been established) that the burden of producing a legitimate business reason for the decision has been met. *Mario v. P.C. Food Markets, Inc.,* 313 F.3d 758, 767 (2nd Cir. 2002). Here it is abundantly clear that the respondent has produced such a reason. Brooks testified he played no part in determining what events were to be utilized to make up the physical agility test or how the events were to be scored. He wanted only to mirror the assessment given by the CSP Training Academy, so as to avoid the embarrassment of sending officers to the CSP and having them fail.

The complainant and commission appear to argue that Brooks never truly investigated the appropriate standard for the 300-meter run. They claim that Brooks, when faced with four events using gender and age and only one event not doing so, and only calling to the CSP to confirm the appropriateness of the single norm standard, did not do enough and he should have done more. It is argued that Brooks' failure to do more was motivated by his claimed animus toward the complainant based on her gender or disability.

Clearly, it must be remembered that Trooper Wyler testified he wasn't aware of the gender and age standard for the 300-meter run until 2005. While the complainant attempted to challenge that Trooper Wyler did know of the standard by showing some inaccurate results to indicate that the age gender standard model was used, in those same assessments it was shown that there were results also consistent with the single norm standard. This attempt to challenge Wyler I find totally unpersuasive.

Finally, the question remains why Trooper Wyler would have lied. While he may have known Brooks, no relationship with Brooks was ever established to give credence to the claim that Trooper Wyler's testimony was motivated by anything other than to tell the truth.

Contrary to the arguments advance by the complainant it has been "firmly established that '[i]t is not the function of a fact-finder to second-guess a [respondent's] means to achieve a legitimate business goal'" *Commission on Human Rights and Opportunities Szydlo v. EDAC Technologies Corporation,* CHRO No. 0510366 2007 WL 4258347 quoting *Dister v. Continental Group, Inc.,* 859, F.2d 1108, 1116 (2nd Cir. 1988). Having found that the respondent has produced a legitimate business goal and that the complainant has failed to prove it to be a pretext for discrimination, I too will not second guess.

Title VII Sexual Stereotype

The complainant in addition to claiming that she suffered an adverse employment action based on her sex, also has argued that she was a victim of gender stereotyping, a claim now recognized by the federal courts. See *Price Waterhouse v. Hopkins,* supra 490 U.S. 252-52 (1989). This type of claim addresses employees "who face adverse employment actions as a result of their employers' animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender…" *Dawson v. Bumble,* 398 F.3d 211, 218 (2nd Cir. 2005).

By bringing such a claim the employee assumes the burden of presenting a prima facie case under one of the two models discussed above (mixed-motive or pretext). As previously discussed based on having found the alleged statements attributed to Brooks by Besse not established, the pretext mode is the manner of analysis to be utilized.

Prior to entering into the analysis of this claim I am admittedly perplexed by the claim itself as the complainant did not (as has been discussed previously) identify Title VII in her complaint and certainly made no mention of sexual stereotyping either. However, having found that Title VII (sex) is in play via § 46-58 (a), I will find that the complainant's gender stereotyping is viable. While having found that this particular claim may be brought the question remains as to whether it has been proven, or at minimum, whether a prima facie case has at least been presented.

As to the January 26, 2003, HPD assessment I again find that a prima facie case has not been presented. For this finding I rely on my earlier discussion of the application of the *McDonnell-Douglas* model and the complainant's failure to show she was qualified. I would also point out that while gender stereotyping is a recognized claim, it is unclear as to what gender stereotyping the complainant is alleging. Is the complainant arguing that Brooks thought the complainant was too masculine for her female gender or was the complainant too feminine for her biological birth gender? Regrettably the record is devoid of any evidence, however remote, to establish gender stereotyping once the "Besse comments" are rejected. Absent the "Besse comments" I find that the first prong of the *McDonnell-Douglas* analysis - that the complainant is a member of a protected class - has not been established.

Disability

The complainant has argued that she was discriminated against as a consequence of her physical disability (transsexual) and a mental disability (gender dysphoria).

A strict reading of the complainant's complaint could cause one to conclude that she was limiting her claim solely to her claimed physical disability. This conclusion could be drawn from the fact that the face sheet to the affidavit of discrimination offers a complainant the ability to itemize the claims being made. Specifically, this sheet allows the actual type of claim to be checked. In this instance the box for physical disability

was checked noting the disability being transsexual. The box for mental disorder/disability was not checked nor was gender dysphoria noted. However, the actual affidavit merely states that the complainant is claiming a disability (transsexual) but is silent as to whether it is physical or mental. In this matter I find that the complainant's disability claim will include both mental and physical claims. I arrive at this conclusion based on the fact that the affidavit is signed and under oath whereas the face sheet requires no signature at all. I will therefore give the complainant the latitude to bring both claims.

Physical

The complainant's claim that she was discriminated based on her physical disability (transsexual) must first be a cognizable claim under Connecticut law. The only Connecticut case that either party has brought to this tribunal's attention on this point is *Conway v. City of Hartford,* 1997 WL 78585 (memorandum on motion to strike). In this decision the Superior Court found that transexualism is not a physical disability. Admittedly, the *Conway* decision points out that it was relying on two decisions from the other states: *Somers v. Iowa Civil Rights Commission,* 337 N.W. 2nd 470 (Iowa 1983) and *Dobre v. National R. R. Passenger Corp., (Amtrak), 850* F. Supp. 284 (E.D. Pa 1993) (plaintiff a transsexual sought protection under Pennsylvania Human Rights Act). That the plaintiff failed to plead sufficient facts to demonstrate that this condition falls within the Connecticut definition of physical disability.

Connecticut General Statute § 46a-51 (5) defines a physically disabled person as "any individual who has a chronic physical handicap, infirmity or impairment whether congenital or resulting from bodily injury, organic processes or changes from illness, including, but not limited to, epilepsy, deafness or hearing impairment or reliance on a wheelchair or other remedial appliance or device." In this case I find that the paucity of evidence as to her physical condition as a consequence of being a post operative transsexual like in the Conway decision does rise to the level of being a physical disability under Connecticut law.

What was presented at the public hearing in connection with the complainant's physical condition is the following. The complainant since her surgery in Canada has been under a doctor's care and it is expected that this care will be needed for the rest of her life. In addition she takes hormones. That is the entire substance of testimony as to the complainant's condition. In assessing whether the evidence[7] presented by the complainant supports a finding that she is physically disabled, I measure the evidence by the statutory definition. In this instance does the evidence allow me to come to the conclusion that the complainant suffers from a chronic physical handicap infirmity or impairment. "Webster's North New Collegiate Dictionary defines the term as "marked by

[7] I find it only proper to note that while the testimony as to complainant's physical disability came solely from the complainant, her post trial brief identified numerous problems and issues faced by a post-surgical transsexual that do not appear none were in the record (see complainant's post hearing memorandum dated June 30, 2003 at pgs. 73-74). However, I do agree with the comment made by the respondent in its brief dated August 11, 2003 at pg. 44 that had the complainant wished this tribunal to consider these as facts they should have bee properly testified to during the public hearing.

long duration or frequent recurrence; not acute.' Blacks Law Dictionary (6th ed.) similarly defines the term, when referring to diseases to mean" of long duration, or characterized by slowly progressive symptoms; deep-seated and obstinate, or threatening a long continuance; distinguished from acute' *Gilman Brothers Co. v. Commission on Human Rights and Opportunities,* 1997 WL 275578 *4 (Conn. Super.)" *Commission on Human Rights and Opportunities ex rel. Chilly v. Milford Automatics, Inc.,* CHRO No. 9830459 (2000), 2000 WL 35575652.

Applying the aforementioned statute and definitions I cannot find that the complainant has produced sufficient evidence for there to be a finding that satisfies our statutory definition of being physically disabled. Nor was it my perception of the complainant throughout the public hearing that she exhibited any signs of any physical disability. I therefore must conclude like the court in the *Conway* decision that the complainant is not physically disabled under Connecticut law.

Mental Disability

Mental Disability per General Statutes § 46a-51(20) "refers to an individual who had a record of, or is regarded as having one or more mental disorders, as defined in the most recent edition of the American Psychiatric Association's 'Diagnostic and Statistical Manual of Mental Disorders'", (DSM). In this matter the complainant testified that she has been diagnosed with having Gender Identity Disorder. This disorder having been previously found to be a mental disability pursuant to DSM IV I will find the complainant belongs to a protected class by virtue of her mental disability. *Commission on Human*

Rights and Opportunities ex rel. Dwyer v. Yale University, CHRO No. 0130315; 0230323 (2005), 2005 WL 5746424.

Having found that the complainant belongs to a protected class I am still forced to find that she is unable to sustain her burden to establish a prima facie case as previously discussed under the *Mc-Donnell-Douglas*.

I find as I have found before in dealing with other protected classes that the complainant belongs to that in the instance of the January 26, 2003 HPD assessment that she was not qualified and could not establish that prong of the pretext model. Furthermore, even if she could establish the initial burden of producing a prima facie case she has not been able to establish that the legitimate business reason produced was a pretext for discrimination.

September 6, 2003 HPD Assessment

The complainant while claiming that the wrong standard was utilized in scoring the January 2003 300-meter run causing her to fail the event, when retested on September 7, 2003 passed the HPD assessment. As to this assessment it is not completely clear from her complaint whether she is claiming that despite passing the HPD agility assessment and not having sent to the CSP was an act of discrimination or retaliation or both I will assess both claims.

As to her claims of disparate treatment under any of the claimed protected classes and identified above (sex, gender stereotyping and disability), I would again utilize the pretext model in my analysis. The marked difference would be I would find that unlike my previous findings, the complainant was qualified to attend the CSP Training Academy and participate in its agility assessment for participation in the CSP Canine Training Academy.

The question then is has the complainant proven by a preponderance of the evidence that the reason produced as to why the complainant was not chosen was really a pretext for discriminatory animus on the part of Brooks.

In this instance the respondent has proffered that of the five candidates who passed the September 6, 2003 HPD assessment (four were males and one was female), Brooks had already told Lawlor that were he to pass the HPD assessment he was going as the selected candidate for the first slot allotted to the respondent in the next CSP Canine Academy. In keeping with past practice having been given a slot by the CSP, Brooks would send two candidates, one designate selected and the other designated alternate. The alternate knew that were the selected officer to pass the CSP agility assessment he would not participate in the canine academy even if he were to pass the CSP agility assessment.

Brooks faced with four candidates to select from chose to base his decision on what be believed was a clear, understandable and objective standard. Brooks to be fair to all simply used the scores from all five events and rank the candidates. Brooks took all the scores for each event removed the lowest and simply average the scores. This process was performed for all five passing candidates (see R Ex. 30). This gave Brooks a rational result based on the performance of the candidates. The ranking resulted in following order (highest to lowest) 1) Officer Baidy; 2) Officer Nichols; 3) Officer Rivera; 4) Lawlor; and 5) Officer Peterson (complainant).

The complainant has raised several objections to Brook's method for picking the alternate candidate. The first is that using the Cooper Standards score results in other than the pass/fail scenario is improper. The second, is using Lawlor in the rankings was improper or at least questionable as he was according to Brooks already the selected candidate upon passing the HPD agility assessment. In addressing the issues raised by the complainant I could neither find justification, nor was any offered and substantiated, for concluding that using the results of the events to rank the candidates was improper. As to the complainant arguing that "common sense and experience tell that most 24-40 year old healthy males can do more sit-ups than a health 36 year old female,"[8] whether this is true or not the complainant at no point made this inquiry either to Trooper Wyler, Dave Dufault or Brooks and I am not prepared to speculate on the

[8] See complainant's post hearing memorandum pg. 94.

answer. However, in Brooks' ranking of scores in reviewing R Ex. 9 which gives the standards utilized for the events and breaks each score down to a percentage based on age and gender except for the 300-meter run, when applying the ranking system employed by Brooks based on the percentage that the particular score falls into and then excluding the lowest score the complainant's rank still remains last (see R Ex. 24, 25, 26, 27 and 28).

As to the impropriety of using the scores to rank the candidates, I find this argument totally unsupported and is mere conjecture on the part of the complainant. The CSP Canine Training Academy as testified by Trooper Wyler under cross examination uses the Cooper Standard scores in a non pass/fail fashion or as Trooper Wyler testified as a "ranking tool."

Retaliation

The complainant further alleges that as a consequence of her filing a complaint with the commission she was retaliated against by being denied a training opportunity and a position of patrol canine handler in violation of General Statutes § 46a-60 (a) (4). This statute reads in relevant part that "It shall be a discriminatory practice in violation of this section for any …employer… to discharge, expel or otherwise discriminate against any person because such person has opposed any discriminatory employment practice or because such person has filed a complaint or testified or assisted in any proceeding under sections 46a-82, 46a-83 or 46-84." Having found that the complainant has alleged that by virtue of claiming a violation of § 46a-58a that she has claimed that her

rights by virtue of her gender (Title VII) have been violated as well, the analysis relative to § 46a-60 (a) (4) will include retaliation under Title VII.[9]

"CFEPA claims are evaluated using the same framework as an Title VII claims. See *Brittel v. Department of Correction,* 247 Conn. 148, 164 (1998) (Although the language of [Title VII] and that if [CFEPA] differ slightly, it is clear that the intent of the legislature … was to make the Connecticut Statute co-extensive with the federal [statute].')" *Talwar v. State of Connecticut,* 539 F. Supp. 2nd 604 (D. Conn. 2008) (ruling on summary judgment).

The complainant to establish a prima facie case of retaliation must show 1) that she engaged in statutory protected activity; 2) that the respondent was aware of the complainant's activity; 3) that she suffered an adverse employment action; and 4) that causal connections existed between the protected activity and the adverse action. *Galdiere- Ambrosini v. National Realty & Development Corp.,* 136, F.3d 276, 292 (2nd Cir. 1998).

As to the first prong of the prima facie case the complainant is not required to establish that conduct opposed was in fact a violation off law, but only that she possessed a good faith reasonable belief that the conduct opposed was unlawful. Id at 292. The

[9] "Title VII…provides that "[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees … because [the employee] has opposed any practice made an unlawful by' Title VII." *Galdiere-Ambrosini v. National Realty & Development Corp.,* 136, F.3d 276, 292 (2nd Cir. 1998).

complainant having not prevailed on her disparate treatment claims, is not precluded her from bringing and prevailing on her retaliation claim.

To the question of whether the complainant engaged in protected activity, no dispute exists. The respondent has conceded that her filing a complaint with the commission is protected activity.[10] However, the complainant has also claimed that the filing a grievance on February 21, 2003 also constitutes a protected activity, and must be analyzed. The problem in using any complaints surrounding the January HPD assessment including her grievance are that, unlike the issues discussed earlier where the complainant's own pleadings cause a question as to what statute she is proceeding under, the issue of what protected activity forms the basis for her retaliation requires no analysis. In the complainant's amended complaint filed on October 15, 2003 she specifically states her claim of retaliation is based on her August 2003 CHRO filing. The complainant having been so specific in her identification of the protected activity that in expanding what could be protected activity would be prejudicial to the respondent.

The respondent takes issue with the second element that the respondent was aware of the complainant's protected activity. Specifically, it argues that there was no evidence that Brooks was aware of the complainant filing a complaint of discriminatory practice with this commission. Having no knowledge of the commission filing the respondent argues the complainant cannot prove that the decision maker was aware of her

[10] See respondent's post hearing brief dated June 30, 2008 at page 70.

participating in the protected activity. "However, neither the Second Circuit nor any other circuit has held that 'to satisfy the knowledge requirement, anything more is necessary then general corporate knowledge that the plaintiff engaged in protected activity.' *Patene v. Clark,* 508 F.3d 106, 115 (2nd Cir. 2007)" *Byra-Grzegorczyk v. Bristol-Myers- Squibb Co.,* supra 572 F.Supp. 2nd 233 (D. Conn. 2008). The issue of whether the decision maker (Brooks) was aware of the complainant's CHRO filing is relevant to the fourth prong of complainant's prima facie case, which is the existence of a casual connection between the protected conduct and the adverse employment action and whether retaliation played a motivating role. Id.

With regards to the third element that there an adverse employment action I again find that with the complainant having passed all of the events of the September 7, 2003 HPD agility assessment and having not been sent to the CSP, that she has satisfied this element.

The final element for the complainant to establish is, was there a casual connection between her protected activity and the adverse action of not being chosen to go to the CSP Training Academy physical agility assessment. In this instance Brooks testified he was unaware of the complainant's commission filing until after his decision was made to send Lawlor and Baidy to the CSP. However, in this instance while I cannot find the commission filing played any motivating role to retaliate against the complainant, I cannot close my eyes to the fact that Brooks had to have been aware of the complainant's grievance and possibly her letter to Chief Marguis dated April 14, 2003

(see C Ex. 6). I will therefore for purposes of completeness again assume *arguendo* that the complainant did satisfy the four elements of her prima facie case.

Having made this assumption I must determine if the respondent has produced a legitimate business reason for its decision not to choose the complainant to go to the CSP Training Academy. To this I find that a reason has been produced, that being that Brooks having already chosen Lawlor by virtue of his passing the September 7, 2007 HPD assessment, Brooks was left only to select an alternate to send with Lawlor based on past practice of the respondent.

I find it important to note that Lawlor being sent to the CSP Training Academy upon passing the September 7 assessment went virtually unchallenged. Clearly, had the complainant wanted to attack the rationale of sending Lawlor or the promise made to him by Brooks based on his leaving the canine academy through no fault of his own she simply could have called him as a witness.

It is the decision to send Baidy as the alternate that becomes the issue. As to this the respondent states that Brooks was caught in the un-enviable position of four candidates eligible to be sent to the CSP and had to determine who to send. Brooks answer was to rank the candidates by their scores. This process was certainly objective and was in keeping with why the HPD assessment was implemented, that being, to send candidates who could pass the CSP assessment. What Brooks did was simply send the better candidate based on the scores of the candidates who passed.

Having produced a legitimate reason for the decision I find that the complainant has not presented evidence that would cause me to believe or to sustain her burden that the reason given was merely a pretext for retaliation.

Further Acts of Claimed Retaliation

Along with her claims of retaliation relating to the September 7 HPD assessment the complainant raises issues of retaliation against Besse by Brooks occurring on or after 2007. While the complainant is making no claim of damages relating to any actions allegedly taken against Besse, the complainant sites these as further evidence that in fact Brooks harbored a discriminatory animus towards her. And proffers that this evidence tending to show Brooks retaliates when individuals oppose discriminatory practices.

The complainant through the testimony of Besse argues that Brooks retaliated against Besse in the following ways:

- Removed from Officer Besse's control, drugs and equipment used to train his dog for finding illegal drugs.
- Prevented Besse from going to Bridgeport to search for drugs on cargo ships.
- Required Besse to write a report why he exposed a tattoo while in uniform and on HPD property.
- Required Besse to sign a statement that the chain of command must be followed (see R Ex. 34)

Based on the examples above one could wonder whether Besse is being singled out or is being given special attention by Brooks and if so why. However, when the reasons given as to why Brooks took the action he did I can find nothing from the action taken by Brooks vis a vis Besse that cause's me to believe that Brooks took any retaliatory action against Besse for his support of the complainant.

As to the actions taken, Brooks testified that yes he did remove from Besse his drug (marijuana) and training aids. This was done after an inventory of the drugs provided to canine officers was audited and it was found Besse's marijuana was substantially short of the amount assigned to him. As all drugs must be accounted for by both state and federal authorities, Brooks believed that the matter required investigation.

Brooks readily admitted that yes he prevented Besse from going to Bridgeport. This simple explanation was that allowing Besse to travel to Bridgeport was a poor use of HPD resources and he saw no need to send a HPD canine patrol officer to Bridgeport. It is also important to note that Besse offered no rational as to how his time spent in Bridgeport benefited the respondent.

The issue relating to Besse's tattoo resulted from Brooks while in the parking lot of the HPD, witnessing Besse in a short sleeved shirt with a tattoo exposed. The reason Besse had to submit a report was that the tattoo on Besse's arm had previously been identified by the HPD Chief of Police as being required to be covered while an officer was in uniform and on duty.

Brooks as Besse's commander having witnessed a violation of an order of the chief simply had Besse put in writing an explanation of the incident. The interesting point here is that Brooks took no further action on this matter. Clearly if it was Brooks's intent to purposely cause problems for Besse he could have alerted his supervisors of the incident.

Besse testified that he was forced to sign a statement on August 23, 2007 that he must follow the chain of command relating to issues involving the HPD canine unit. Besse was asked to sign such a statement. However he was not alone. All the members of canine unit were asked to sign this memo documenting that the chain of command was to be followed. In all probability the geniuses of this memo may have been that while Brooks was out on sick/disability leave the administrative duties of the canine unit fell on Besse's shoulders and maybe Brooks wanted to make sure everyone realized this. Even if this was not rational it was clear from the testimony Besse was not singled out to sign such a document.

Of the examples given of Brooks' treatment of Besse, I can find nothing that causes me to believe that Brooks retaliated against Besse in 2007 for anything Besse may have done in support of the complainant.

Canine handlers limited to patrol officers

The last possible incident of discrimination experienced by the complainant relative to her being denied the opportunity to become a canine officer was not selecting her as the alternate to Lawlor in September 2003. However, the complainant has suggested that the HPD's current policy of limiting canine handlers to the rank of patrol officer is just another instance where the respondent has based its decision solely to prevent the complainant from becoming a canine handler due to her gender and/or disability. To this claim I find no support in the record. Former HPD Assistant Chief Michael Fallon now Chief of the Capitol State Police testified that the September 11, 2001 attacks on this country caused police department to rethink its use of departmental resources. In particular he testified that sergeants as part of the command structure were needed to have a wider focus of attention as opposed to being singularly focused on using a dog or being assigned a "long gun." As a consequence of this policy change detectives and sergeants were and are now precluded form becoming canine handlers.

From the testimony I find that the complainant (now a sergeant) wishing to become a canine handler that she would have to return to the rank of patrol officer in order to become apart of the canine unit. Examples of this policy were testified to by Samuda who while at the CSP Canine Training Academy was promoted to sergeant. Upon being notified of the promotion, he left the academy and never returned to continue the certification process with his new dog.

The complainant uses the Samuda example of sergeants being permitted to be canine handlers, arguing that at a certain point in time Samuda took his dog to work. True he did take his dog to work however, he never worked the dog nor were he and his dog ever certified as a canine team. Furthermore, upon being promoted, his daily work hours reverted to eight hours and not the seven hours plus one for care and maintenance of his dog.

Conclusion

The complainant and commission having failed to satisfy their burdens of persuasion and for the reasons stated above the complainant's claims are hereby dismissed.

It is so ordered this 14th day of November 2008.

____
Thomas C. Austin, Jr.
Presiding Human Rights Referee

cc.

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