

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

ANDREW HARRIS and SPENCE TATUM,

Complainants

v.

NO. 94-SEM-0589
94-SEM-0590

CITY OF WORCESTER POLICE DEPARTMENT

Respondent

DECISION OF THE FULL COMMISSION

This matter is before us following a remand decision of Hearing Officer Edward Mitnick, in favor of Respondent. In his decision of August 13, 2004, the Hearing Officer concluded that the Complainants had failed to establish that the City of Worcester had engaged in unlawful discrimination on the basis of race and color when it did not promote them to the position of sergeant in the police department during the period from 1993 to 1995.¹ Specifically, the Hearing Officer determined that the City had produced

¹ The Decision of **August 13, 2004**, was based on a remand ordered by the full commission in an order dated August 4, 2003. In his earlier decision dated **April 6, 2002**, the Hearing Officer had concluded that despite the Complainants having proved a prima facie case of disparate impact discrimination, the City had nonetheless established that its practice of strictly promoting candidates by order of rank on the civil service eligibility list constituted a lawful business necessity. 24 MDLR 122, 126-128 (2002).

Complainants appealed to the Full Commission. On August 14, 2003, the Full Commission remanded the case to the Hearing Officer to consider and review the claims under a disparate treatment analysis. 25 MDLR 261, 263 (2003). In accordance with the decision of the Full Commission, another Public Hearing was held before the Hearing Officer on January 6, 2004, in Springfield, MA, at which time the parties offered supplemental testimony and exhibits in evidence.

sufficient credible evidence that its conduct was not motivated by discriminatory racial animus. The primary question on remand for which additional evidence was presented was: “Is there sufficient evidence to establish that the City’s failure (following the expiration of the Consent Decree in 1991) to create an affirmative action plan and apply for a PAR 10 special certification for its promotions in 1993, 1994 and 1995 amounts to discriminatory animus against the hiring and promotion of racial and ethnic minorities,” and if so, were the Complainants in this matter harmed by the City’s conduct. 25 MDLR 261, 263 (2003).

I. The Hearing Officer’s Findings of Fact and Conclusions of Law

Central to the original complaint was an agreement “Relative to Equal Opportunity and Affirmative Action” entered into by the Respondent and this Commission in 1998 and which expired in 1991. In his second decision, the Hearing Officer reviewed the history of events of significant relevance to the non-implementation of that agreement and its relevance to the instant case.

Section 4.1 of the 1988 Agreement states:

[The City agrees to] forthwith adopt and keep in place departmental hiring goals, consistent with applicable affirmative action/equal opportunity regulations, for minorities until such time as parity is reached.

Section 4.2 of the Agreement states:

In order to achieve hiring goals set forth in the City's Affirmative Action Plan, the City agrees to the Division of Personnel Administration Rules PAR 10, the Selective Certification option, and any other option reasonably designed to meet the goal of this Agreement as provided by law.

Section 5.4 of the Agreement states:

The city shall immediately process the filing of Civil Service vacancies where an eligible list is in existence and appointments are to be made therefrom as provided in Article 4.2 above.

It is undisputed that Massachusetts Personnel Administration Rule ("PAR") 10, entitled, "Special Certifications in the Civil Service", is designed as an affirmative action tool for appointing authorities to appoint members of protected groups, including African-Americans, from civil service eligibility lists. PAR 10 provides, in pertinent part:

(1) Pre-requisites for special certifications based on race, color, national origin or sex shall be made whenever:

(a) an appointing authority shall make requisition to fill one or more positions included in said appointing authority's affirmative action plan on file with the administrator, and;

(b) the administrator has made a written determination substantiating that previous practices of the department and/or of said appointing authority with respect to the filling of such position or positions have discriminated against members of a group, hereinafter referred to as a protected group, on the basis of race, color, sex, or national origin in contravention of any provision of the Constitution of the United States or the Constitution of the Commonwealth, Title VII of the federal Civil Rights Act of 1964 (42 U.S.C. 2000e) or any other federal or state statute the administrator may then certify, in addition to names certified in accordance with PAR.09, the names of a like number of individuals who are members of the protected group and are on an eligible list for such position, in order of their standing.

Significantly, The City stipulated that it had not used PAR 10 to make any promotions in the police department. The City also admitted that it never submitted a request to the Massachusetts Division of Human Resources ("HRD") to use a PAR 10 certification. Moreover, despite promoting ten (10) officers to sergeant during the term of the Agreement (1988 to 1991), the City did not promote any minority officers to a

supervisory position during this period.² However, the hearing officer went on to find that there was no credible evidence in the record that any minority officers had taken and passed the civil service promotional exam for the position of sergeant and would otherwise have been eligible for placement on a PAR 10 certification list. There was also a finding that the City had met its affirmative action goals with respect to hiring.

The Hearing Officer found the following additional evidence as support for the City not having a discriminatory animus. First, the testimony of Larry Raymond who testified that in the mid-1990's, when he became the Assistant Director of Human Resources, the City discussed using PAR 10 to increase minority promotional appointments, but it ultimately decided against it. According to Raymond, one reason the City did not use PAR 10 was its belief that the rule could not be used to promote African-American officers to supervisory positions. He claimed that Janice Silverman, the City's Human Resources Director, initially received information from HRD that it could not utilize PAR 10 for affirmative action purposes.

Additionally, the Hearing Officer credited Raymond's testimony that;

“City also considered the likelihood that if the City used PAR 10, then the police officer's union would oppose the process and possibly file a reverse discrimination action against the City. Raymond could not recall ever seeing or hearing any statement by a Union official that expressed any opposition to using PAR 10. But Silverman testified at the initial Public Hearing that "every time [the

² The Hearing Officer specifically found that “the City promoted twelve (12) officers from the 1994 promotional exam and all were white males. Consistent with the City's practice of selecting candidates by rank, the persons selected ranked 1 to 12, respectively, on the eligibility list and had scores ranging from 95.00 to 84.00. The five minority officers that had passed the 1994 exam again scored significantly lower than the selected candidates: Tatum (score 78.00, rank 29), Rosario (score 76.00, rank 39), Maddox (score, 76.00, rank 40), Logan (score 75.00, rank 42), and Harris (score 74.00, rank 49). Considering the City promoted 12 officers to sergeant from the 1994 promotional exam, I find that the City would have likely been able to promote Tatum and Harris from a PAR 10 certification had it used such a list instead of strictly promoting officers with the highest rank and score.” Harris and Tatum v. City of Worcester Police Department, 26 MDLR 203, 207 (2004).

City] broach[ed] the subject with the public safety unions they have been adamantly opposed to us doing anything that departs from past practice. They want the first individual on the list promoted in each and every instance. They have been opposed to PAR 10's as recently as the current round of collective bargaining, where we raised it as an issue again." I credit Raymond and Silverman's testimony."

Raymond claimed that the City also discussed the possibility that the promotion of African-American officers from a PAR 10 list - instead of promoting officers with the highest ranks and scores on the exams - would have an adverse effect on the morale of the department. Specifically, Raymond testified that if the City bypassed many white officers with higher scores in order to appoint minorities, the bypassed white officers would experience tremendous resentment that would dilute the authority of the minority candidates and create a rift between the minority and non-minority officers.³ We are unable to reach accord on the issue of whether this evidence, when viewed in the light of other reasons offered, constitutes direct evidence of a discriminatory motive.

II. Standard of Review

It is axiomatic that it is the duty of the Full Commission to review the record of proceedings before the hearing officer. M.G.L. c. 151B, s. 5. The hearing officer's findings of fact must be supported by substantial evidence, which is defined as "...such evidence as a reasonable mind might accept as adequate to support a finding ..." Katz v. MCAD, 365 Mass. 357, 365 (1974); M.G.L. c. 30A. This includes taking into account whatever in the record detracts from the evidence relied on by the hearing officer.

Lycurgus v. Director of Division of Employment Security, 391 Mass. 623, 627-628

³ While reasonable persons might disagree about whether morale of non-minority officers is a legitimate non-discriminatory reason for not promoting minority officers who scored lower on the exam, the Hearing Officer accepted Raymond's testimony on this issue.

(1984). It is the responsibility of the hearing officer to evaluate the credibility of witnesses and/or to weigh the evidence when deciding disputed questions of fact, and the Full Commission defers to these determinations. See e.g. School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission is to determine whether the decision under appeal was rendered in accordance with the law, or whether the decision was arbitrary or capricious, an abuse of discretion, or was otherwise not in accordance with the law. See 804 CMR 1.16(8)(f).⁴

Based on our review, the undersigned Commissioners cannot reach agreement in this matter. Our individual analyses of the record and the facts as found by the Hearing Officer have caused us to reach different conclusions on the question of whether the Hearing Officer's conclusions of no racial animus, essentially a determination based on the credibility of witnesses, is supported by substantial evidence in the record.

The standard used in by the Full Commission in reviewing the facts found by the Hearing Officer, including determinations of credibility, is to defer to those facts so long as they are supported by substantial evidence in the record. Under the substantial evidence test, the reviewer on appeal is not permitted to make de novo determinations of the facts, to make different credibility choices, or to draw different inferences from the facts found by the agency. Pyramid Co. of Hadley v. Architectural Barriers Bd., 403 Mass. 126, 130 (1988). If a fact-finder has made a "choice between two fairly conflicting views" and his determination is based on reasonable evidence, a reviewer on appeal may not displace the fact-finders choice ...even though it would have justifiably made a

⁴ The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 et seq.) and relevant case law.

different choice had the matter been before it de novo. Lisbon v. Contributory Retirement Appeals Board, 41 Mass. App. Ct. 246, 259 (1996). Thus, while the reviewer on appeal may disagree with the outcome and might have made a different determination based on those same facts, this is not a basis for reversal so long as the facts are supported by the evidence

Relying on this standard, Commissioner Sullivan concludes that there is sufficient evidence in the record to support the credibility determinations made by the fact-finder on the issue of racial animus. That basic standard requires deference to the facts found by the hearing officer which are carefully laid out in this case. Commissioner Sullivan accepts the Hearing Officer's finding that Raymond's testimony was credible and that the morale of the white officers as one of a number of reasons for failing to exercise PAR 10, was insufficient evidence of discriminatory motive, particularly where the employer has articulated other legitimate non-discriminatory reasons for its action.

Based on her review of the very same set of facts, Commission Tucker concludes that the Hearing Officer's finding of no racial animus is unsupported by the evidence. She finds little to no support in the record upon which to credit the testimony of Respondent's agents on the issue of their good faith belief that a PAR 10 exception was not appropriate, given the extreme circumstances. Other than the self-serving testimony of both Silverman and Raymond supporting each others' testimony in this regard, no corroborating evidence was introduced by the City establishing any basis for not administering and advancing the provisions of PAR 10.

In addition, Commissioner Tucker finds that that the city's concern that implementation of PAR 10 type affirmative action efforts would have affected the morale of (white) officers constitutes direct evidence of racial animus. Given this she concludes that Complainants have established evidence of pretext sufficient to warrant a decision in their favor. Commissioner Tucker thus finds the Decision of the Hearing Officer to be erroneous as not based on the substantial evidence in the record and, therefore, subject to reversal.

As a general principal, the inability to reach a consensus on whether to affirm or reverse the decision below, results in the decision below standing, when, as here, there is a tie vote. Therefore, the Decision of the Hearing Officer stands. Notwithstanding, the Full Commission has sufficient concerns regarding the Respondent's record of promoting minorities that it strongly urges the Respondent to exercise its PAR. 10 option to determine if the promotion of minority officers, including Complainants, is appropriate at this time. In addition, given Respondent's problematic record in promoting minorities over a significant period of time, the Full Commission hereby authorizes the Investigating Commissioner for the region to initiate a Commission complaint, at her discretion, to investigate the current promotional practices of Respondent.

SO ORDERED this 8th day of March, 2006.

Cynthia A. Tucker, Commissioner

Walter W. Sullivan, Commissioner