

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and RAYMOND
PERRY,
Complainants

v.

DOCKET NO. 01-BEM-0523

MASSACHUSETTS CORRECTION OFFICERS
FEDERATED UNION and PAUL BOUDREAU
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Respondents Massachusetts Correction Officers Federated Union (MCOFU) and Paul Boudreau. Following an evidentiary hearing, the Hearing Officer concluded that the evidence failed to show that Respondents discriminated against Complainant on the basis of handicap or retaliated against him in violation of M.G.L. c. 151B §§ 4(2) and (4). Complainant has appealed to the Full Commission.

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. It is the duty of the Full Commission to review the record of proceedings before the Hearing Officer. M.G.L. c. 151B, § 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.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses or to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role 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 1.23.

We have carefully reviewed the Complainant's appeal and the record in this matter and find no material errors of fact or law regarding the finding that Complainant did not establish the elements of either handicap discrimination or retaliation under M.G.L. c. 151B.

Handicap Discrimination

In order to establish a prima facie case of handicap discrimination by Respondent MCOFU, Complainant was required to show that 1) he was a member of a protected class; 2) he was eligible to receive the services he sought from the Respondent; 3) the Respondent union subjected him to adverse treatment and 4) he was treated differently from similarly situated persons not in the protected class. Cheeks v. MCOFU, 27 MDLR 30 (2005); Wheelock College v. MCAD, 371 Mass. 130, 136 (1976). In this case the Hearing Officer found that the Complainant failed to establish the third and fourth elements of his prima facie case: that he was subjected to adverse treatment or that he was subjected to treatment different from persons not in the protected class. These findings are supported by substantial evidence. The Union's initial considerations of who was qualified to run for office addressed members whose dues were in arrears in addition to those on IA leave; the possibility of disqualifying people on those grounds was quickly rejected once the

union consulted with counsel; the union never did disqualify complainant and at no time did Respondent tell Complainant he could not campaign; and there is no evidence that any of these events that occurred in late December and early January had any impact on the elections in March. Moreover, there was substantial evidence supporting the Hearing Officer's conclusion that the Respondent MCOFU's conduct during this time had nothing to do with Complainant's perceived handicap, but rather was motivated by Complainant's past disputes with Respondent MCOFU.

Retaliation

The Hearing Officer's finding that the Complainant's protected activity was not the reason for Respondent Boudreau's filing of judicial charges is likewise supported by substantial evidence and is in accordance with the law. Complainant argued the judicial charges were motivated by Complainant's MCAD complaint and the charges he filed within the union challenging the Union's decision to preclude members on IA leave from running for union office. Respondent Boudreau, on the other hand, testified that he filed charges against Perry and Poh because of their actions in undermining the union and its membership.

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). When a fact-finder makes a "choice between two fairly conflicting views" and her determination is based on reasonable evidence, the Full Commission "may not displace the fact-finders choice ... even though it would have justifiably made a different choice had the matter been before it de novo." Lisbon v. Contributory Retirement Appeals Board, 41 Mass. App. Ct. 246, 259 (1996).

There is evidence that the Complainant's MCAD complaint and judicial charges on the IA issue played a role in Respondent Boudreau's decision to file charges against Complainant. Boudreau filed his charges shortly after learning about the MCAD complaint, and witness Langlois testified that Boudreau told him he filed charges in part because of "the IA issue." However, even in the face of strong evidence that a respondent's adverse employment action was based on an unlawful consideration, liability can be avoided if Respondent shows that it would have taken the same action without the unlawful consideration. Wynn & Wynn, PC. v. Massachusetts Comm'n Against Discrimination, 431 Mass. 655, 669-670 (2000). In this case, the Hearing Officer, after viewing all of the circumstantial evidence and assessing the credibility of the witnesses, found that the reason for Boudreau's actions was the long history of animosity and mutual antagonism between the parties over union issues. See Lipchitz v. Raytheon Co., 434 Mass. 493, 499 (2001) citing, Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 445 (1995).

Moreover, the Hearing Officer concluded that Respondent Boudreau would have pursued the charges against Complainant "notwithstanding Complainant's filing of an MCAD claim."¹

¹ At one point in her decision, the Hearing Officer included Complainant's January 8 judicial charges among the factors motivating Respondent Boudreau's actions. Complainant correctly points out that those charges were based in part on the Respondent's questioning of the eligibility of members on IA leave to run for union office, and argues that the Complainant's judicial charges were protected activity under M.G.L., Ch. 151B, §4(4). It is clear from reading the decision as a whole, however, that including mention of the judicial charges in this context was not dispositive on the issue of causation. The remainder of the decision makes amply clear that the long running disputes between the parties was the overriding and determinative cause for Respondent Boudreau's action ("the mutual antagonism between Complainant and the Respondents *began long before he filed his complaint [and his judicial charges] in 2001*" (emphasis added); "the ongoing disputes were the primary factors motivating Boudreau's action;" Boudreau's charges "were but one of many instances of internecine fighting among union members over a period of years;" "the ongoing dispute went back years" It is clear from the decision is that the history of animosity was the primary factor motivating Respondent Boudreau.

The Hearing Officer's findings are supported by substantial evidence. Thus even if Complainant's filing of judicial charges against Respondent were protected activity within the meaning of M.G.L. c. 151B §4(4), the Hearing Officer's finding in this case should stand as neither the MCAD complaint nor the judicial charges were found to be the determinative cause for Boudreau's conduct.

We have carefully reviewed Respondent's contentions on appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings and conclusions of law. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them.

ORDER

The decision of the Hearing Officer is affirmed. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court seeking judicial review within 30 days of receipt of this decision in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. The filing of a petition pursuant to M.G.L. c. 30A does not automatically stay enforcement of this Order. Failure to file a petition in court within 30 days of receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, § 6.

SO ORDERED this 2nd day of May, 2008.

Malcolm S. Medley
Chairman

Martin S. Ebel
Commissioner

Sunila Thomas George
Commissioner