

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

SCOTT FERRY,
Complainant

v.

DOCKET NO. 89-NEM-0052

FALL RIVER POLICE DEPT.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith Kaplan on remand from our Full Commission decision dated November 25, 2002. Hearing Officer Kaplan's decision on remand assessed damages against Respondent as a result of the Full Commission's order reversing her original decision and finding that Respondent had engaged in unlawful discrimination in violation of M.G.L. c.151B. Complainant filed a timely appeal 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, Section 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 and/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. Colonnade 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(1)(h).

COMPLAINANT'S PETITION FOR REVIEW

Complainant's appeal is based on his contention that the Hearing Officer erred in her award of back pay, her failure to award front pay, her exclusion of certain contractual benefits from the award and her award of emotional distress damages. Complainant further contends that the Hearing Officer's failure to reopen the hearing for additional evidence was error.

With respect to back pay and front pay, we find that the Hearing Officer's findings and conclusions are well supported in the record and by the law. The Hearing Officer's finding that Complainant's back pay was cut off when he removed his name from the civil service list and elected to change careers by enrolling in nursing school was supported by the record and not an error of law. See Nikolsky v. Summit Services Group, Inc., 20 MDLR 126, 130 (1998). Such a finding necessarily renders the decision to eschew front pay proper. We further note that the Commission and the courts have long held that given the speculative nature of front pay, such an award will be made only in very limited instances, such as where the discriminatory act occurs near an individual's retirement date, Fitzpatrick v. Boston Police Department, 18 MDLR 29, 30 (1996), or where comparable positions would be difficult to find. Kealy v. City of Lowell, Dept. of

Public Schools, 21 MDLR 19, 24 (1999); Madden v. Town of Falmouth Harbormaster Waterway Dept., 15 MDLR 1949, 1967-68 (1993). The evidence presented in the record did not indicate that front pay was an appropriate remedy and, thus, the Hearing Officer's decision not to award it was proper.

With respect to Complainant's request to reopen the record, we find that the Hearing Officer properly refused to reopen the record as Complainant was required to offer all evidence of damages at the time of the public hearing. Complainant cannot now complain simply because he failed to submit damages evidence at the hearing. Only in the event that the Hearing Officer had found that damages continued beyond the date of the public hearing would it be appropriate to reopen the record at this time.

Finally, with respect to exclusion of certain contractual benefits, we agree with Complainant that the Hearing Officer improperly excluded these in her damages award. At the public hearing it was uncontested that Complainant would have been a member of a collective bargaining unit and, as such, would have received the following payments from March 15, 1989 through August 31, 1990 under the applicable collective bargaining agreement: holiday pay (\$1,100), a uniform allowance (\$1,300), a cleaning allowance (\$500) and a weapons differential (\$637.50). Consequently, we believe Complainant is entitled to an additional \$3,537.50 in benefits pay. The other compensatory damages sought by Complainant such as payment for lost pension, life insurance, health insurance and overtime were not supported in the record. We therefore decline to award them as speculative. Thus, the Hearing Officer's award of lost wages (\$32,727.01) must be increased by \$3,537.50 for a final award of \$36,264.51.

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant has filed a petition seeking attorneys' fees in the amount of \$14,030.00 and costs in the amount of \$218.90. Respondent has filed an Opposition thereto.

Massachusetts General Laws Chapter 151B allows a prevailing complainant to recover reasonable attorneys' fees. The determination of whether attorneys' fees are reasonable is subject to the discretion of this Commission. In rendering a determination of reasonable attorneys' fees, we will use the "lodestar" methodology adopted by the Commission for the computation of attorneys' fees. See generally Samuelson v. Sunguard Financial Systems, 23 MDLR 121 (2001); Baker v. Winchester School Committee, 14 MDLR 1097 (1992); Brown v. City of Salem, 14 MDLR 1365 (1992). By this methodology, we will first calculate the number of hours reasonably expended to litigate the underlying claim(s) and multiply that number by a reasonable hourly rate. We will then examine the resulting base figure, known as the "lodestar," and may adjust it depending on various factors.

Our calculation of hours reasonably expended includes eliminating time beyond that consistent with a standard of reasonable efficiency and productivity; subtracting hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of Complainant's successful claim; and eliminating hours insufficiently documented. See Harley v. Costco Wholesale Corporation, 23 MDLR 140 (2001); Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir. 1984). In determining whether the requested hours are reasonable, we will consider contemporaneous time records maintained by counsel and will review both the hours expended and the tasks involved.

Complainant seeks reimbursement for \$14,030 in fees charged by Gerald Johnson, Esq., which are supported by contemporaneous time records. Having reviewed the record presented of time expended in the preparation and litigation of this claim, we

conclude that it is reasonable. We find no evidence that the hours spent were duplicative, unproductive, excessive or otherwise unnecessary to successful prosecution of the claim. Attorney Johnson charged an hourly rate of \$200 per hour. We conclude that this rate is consistent with rates customarily charged by attorneys with comparable experience and expertise in such cases and is well within the range of rates charged by attorneys in the area with similar experience. We therefore award attorneys' fees in the amount of \$14,030.

Complainant's counsel also seeks reimbursement for costs in the amount of \$218.90. We find that this sum represents a reasonable figure of costs incident to litigation in this matter.

ORDER

For the reasons set forth above, we hereby affirm, with the modifications set forth herein, the findings of fact and conclusions of law of the decision of the Hearing Officer on remand and issue the following ORDER of the Full Commission:

- (1) Within forty-five (45) days of receipt of this Order, Respondent shall pay the Complainant \$5,000.00 in damages for emotional distress;
- (2) Within forty-five (45) days of receipt of this Order, Respondent shall pay Complainant \$36,264.51 as damages for lost wages and benefits;
- (3) Within forty-five (45) days of receipt of this Order, Respondent shall pay Complainant's attorneys' fees in the amount of \$14,030 and costs in the amount of \$218.90;
- (4) The parties shall notify the Clerk of the Commission as soon as the ordered payments have been made.

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 seeking judicial review, together with a copy of the transcript of proceedings before the Hearing Officer or Commissioner (See M.G.L. c. 151B, s.6) in the Superior Court within thirty (30) days of receipt of this decision.

Failure to file a petition in court within 30 days of the receipt of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, section 6. The filing of a petition pursuant to M.G.L. c. 30A does not automatically stay enforcement of this Order. Failure to comply with this Order will result in the Commission's initiation of enforcement proceedings, pursuant to 804 CMR 1.25, which may subject the noncomplying party to both civil and criminal penalties as provided in M.G.L. c. 151B, section 8.

If the Respondent fails to comply with the terms of this Order within the time period allotted, please notify the Clerk of the Commission.

SO ORDERED this 19th day of March, 2003.

Walter J. Sullivan, Jr.
Commissioner

Cynthia A. Tucker
Commissioner