

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

STEPHEN HURLEY and
LEONARD FORD,
Complainants

v.

DOCKETS NO. 98-BEM-3304
98-BEM-3305

CITY OF MELROSE and
MELROSE POLICE DEPARTMENT,
Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman in favor of Complainants, Stephen Hurley and Leonard Ford. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for discrimination on the basis of age in violation of c. 151B, § 4(1B) of the Massachusetts General Laws, when they refused to promote complainants, who were police officers of long standing in the department, to the position of sergeant from an active civil service list, on which they were the next in line for promotion. The Hearing Officer found that the Chief of Police informed the Complainants in July of 1998 that he was not promoting from the 1995 civil service list, in order to give the “newer and younger officers” a chance at the promotions. He subsequently allowed the list to expire thereby requiring Complainants to re-take subsequent civil service exams and re-qualify for the position. The Hearing Officer specifically found that but for the Chief’s discriminatory animus in not promoting Complainants, they would have been promoted.

RESPONDENT'S APPEAL

Respondents appealed to the Full Commission and Complainants have filed a cross-appeal seeking modification of the Hearing Officer's award. The Complainants are seeking pre-judgment interest on the award, and an order compelling Respondents to promote them retroactively to sergeants positions within the police department with back pay to be assessed retroactively to the date of promotion.

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 and 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 otherwise not in accordance with the law. See 804 CMR 1.23.

Respondents have appealed the decision of the Hearing Officer on grounds that it is based on errors of law and not supported by substantial evidence. They also argue that the Hearing Officer's award of damages for emotional distress is not justified by the evidence.

We have carefully reviewed Respondents' Petition and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review articulated therein. As a result of our review, we find no material errors of fact or law and conclude that there is substantial evidence in the record to support the findings of fact made by the Hearing Officer. We therefore deny the Respondents appeal and modify the decision of the Hearing Officer as noted below.

COMPLAINANTS' CROSS-APPEAL

Complainants' cross-appeal seeks an amendment of the Hearing Officer's decision to include prejudgment interest. We concur that an award of pre-judgment interest is warranted in this matter. At the time of the Hearing Officer's decision, the Commission relied on the Appeals Court decision in City of Boston v. MCAD, 39 Mass. App. Ct. 234 (1995) with respect to the issue of awarding prejudgment interest against a municipality. In that case, the Appeals Court had held that the Commission was precluded from imposing interest on damage awards against public employers by principles of sovereign immunity. The Appeals Court has since reversed itself on this issue. Trustees of Health and Hospitals of the City of Boston, Inc. v. MCAD, 65 Mass. App. Ct. 329 (2005), holding that the Supreme Judicial Court has made it clear that prejudgment interest is authorized by Chapter 151B and that this broad authorization is sufficient to constitute a waiver of sovereign immunity. More recently, the Supreme Judicial Court settled this issue when it upheld an award of interest by the Superior Court against a municipality on an award of back pay to a plaintiff. DeRoche v. MCAD, 447 Mass. 1 (2006). The Court affirmed its prior position that the broad remedial language of

Chapter 151B permits awards of interest even against public employers, stating that by "a natural and ordinary reading of the statute," the Legislature has expressed its intention "that sovereign immunity with respect to the imposition of interest on a G.L. c. 151B damage award has been waived."

The Commission has awarded pre-judgment interest in a number of other cases where the Hearing Officer did not assess interest because of the previous limitations of City of Boston, and where the parties subsequently sought pre-judgment interest because of the change in the law. See Morse v. Massasoit Community College, 29 MDLR 134 (2007); Sabella v. Boston Public Schools, 28 MDLR 93(2006); McTernan v. Boston Public Schools, 28 MDLR 88 (2006). Therefore, interest is properly assessed against Respondents in this case and the Hearing Officer's award should be modified to include an assessment of pre-judgment interest on the award of damages for back pay and emotional distress from the date the Complaint was filed up to and including the date of payment.

Complainants also argue that the Hearing Officer could and should have ordered Complainants promoted to the position of Sergeant and awarded Complainants back pay retroactively to the date of those appointments. We conclude that it is within the authority of the Commission to order any affirmative relief necessary to make the Complainants whole. Chapter 151B §5 specifically authorizes the Commission "to take such affirmative action, including but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay..." Given the circumstances of this case, where the Hearing Officer specifically found that the Complainants would have been promoted to sergeant in 1998 but for the discrimination of Respondent, the Complainants are entitled

to this relief. Had they been promoted from the 1995 Civil Service eligibility list, as they would have been, in the absence of discriminatory animus, the Complainants would not have been required to take any subsequent tests to qualify as Sergeants. Because Complainants would have been promoted to Sergeant but for discrimination based on their age, this case is distinguishable from Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597 (1987) wherein the expiration of eligibility lists were due to administrative delay. Thus, we conclude that the Hearing Officer's findings as to Complainants' failure to mitigate their damages by failing to take the subsequent civil service tests is moot.

The Complainants are therefore entitled to a back pay award that is the differential from the amount they earned as officers and the rate of pay they would have earned as sergeants from July of 1998, when the Chief made the decision not to appoint them from the 1995 Civil Service eligibility list, up to the present time.

COMPLAINANTS' PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of the Complainants we conclude that Complainants have prevailed in this matter and are entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5.

The determination of what constitutes a reasonable fee is one that the Commission approaches utilizing its discretion and its understanding of the litigation and of the time and resources required to litigate a claim of discrimination in the administrative forum. In reaching a determination of what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School

Committee, 14 MDLR 1097 (1992). This method requires the Commission to undertake a two-step analysis. First, the Commission will calculate the number of hours reasonably expended to litigate the claim and then multiply that number by an hourly rate considered to be reasonable. Second, the Commission will then examine the resulting figure, known as the “lodestar”, and adjust it either upward or downward or not at all depending on various factors.

The Commission’s efforts to determine the number of hours reasonably expended will involve more than simply adding all hours expended by all personnel. The Commission carefully reviews the Complainant’s submission and will not simply accept the proffered number of hours as “reasonable.” See, e.g., Baird v. Bellotti, 616 F. Supp. 6 (D. Mass. 1984). Hours that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel’s Den v. Larkin, 749 F.2d 945 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours that are reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved.

Complainants’ counsel has filed a petition seeking attorney fees in the amount of \$61,931.00 and costs in the amount of \$1,360.15. Complainants’ counsel has also requested additional fees of \$13,710.00 in a Supplemental Petition.

Having reviewed the contemporaneous time records that support the attorney fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by

Complainants is reasonable. The records do not reveal that compensation is sought for work that is duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We further conclude that Complainants' attorney hourly rates are consistent with rates customarily charged by attorneys with comparable expertise in such cases and are within the range of rates charged by attorneys in the area with similar experience. We find that the costs requested by Complainants are adequately documented and reasonable.

We therefore award attorney fees totaling \$75,641.00 and costs in the amount of \$1,360.15 to Complainants.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer and modify the Order of the Hearing Officer as follows:

(1) Respondents shall promote Complainants Ford and Hurley to the position of Sergeant in the Melrose Police Department retro-actively to July of 1998.

(2) Respondents shall pay to both Complainants, Ford and Hurley back pay damages, in an amount to be calculated by the parties, based on the differential between the applicable rate of pay for Sergeants from July of 1998 to the present time, and the rate of pay Complainants received as officers, with interest thereon at the rate of 12% per annum from the date the Complaints were filed, until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

(3) Respondents shall pay Complainants damages for emotional distress as set forth in the Hearing Officer's decision, with interest thereon at the rate of 12% per annum

from the date the Complaints were filed, until such time as payment is made or this order is reduced to a court judgment and post-judgment interest begins to accrue.

(4) Respondents shall pay Complainants attorney fees in the amount of \$75,641.00 and costs in the amount of \$1,360.15.

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. Such action must be filed within 30 days of receipt of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, § 6, and the 1996 Superior Court Standing Order on Judicial Review of Agency Actions. 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 28th day of October, 2008.

Malcolm Medley
Chairman

Martin S. Ebel
Commissioner

Sunila Thomas-George
Commissioner