

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
RIGAUBERT AIME,
Complainants,

v.

DOCKET NO. 11-BEM-02854

MASSACHUSETTS
DEPARTMENT OF CORRECTION,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri dismissing Complainant, Rigaubert Aime’s complaint charging Respondent, Massachusetts Department of Correction (“DOC”) with retaliation. Following an evidentiary hearing, the Hearing Officer found that Respondent was not liable under M.G.L. Chapter 151B § 4(4) for retaliation. Complainant appealed to the Full Commission. For the reasons stated below, we affirm the Hearing Officer’s decision.

STANDARD OF REVIEW

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 the 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. When determining if a decision is supported by substantial evidence “we must consider the entire record, and must take into account whatever in the records detracts from the weight” of the Hearing Officer’s determinations. Duggan v. Board of Registration in Nursing, 456 Mass. 666, 673-674 (2010).

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). Fact finding determinations are within the sole province of the Hearing Officer who is in the best position to judge the credibility of witnesses. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); Garrison v. Lahey Clinic Medical Center, 39 MDLR 12, 14 (2017) (because the Hearing Officer sees and hears witnesses, her findings are entitled to deference). The role of the Full Commission is to determine whether the decision under appeal was based on an error of 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(10) (2020).

BASIS OF THE APPEAL

Complainant has appealed the decision on the grounds that the Hearing Officer’s findings were arbitrary and capricious, and not supported by substantial evidence. Complainant contends that 1) the Hearing Officer erred in allowing testimony of Lieutenant Hawkins via sources other than his direct testimony in violation of Complainant’s Sixth Amendment right to confront witnesses against him; 2) the Hearing Officer abused her discretion by crediting Respondent’s witnesses and disregarding evidence presented by the Complainant; and 3) the Hearing Officer

erred in finding that the transfer of Complainant to another facility was not an adverse action. After careful review we find no material errors with respect to the Hearing Officer's findings of fact and conclusions of law. We properly defer to the Hearing Officer's findings that are supported by substantial evidence in the record. See Quinn v. Response Electric Services, Inc., 27 MDLR at 42. This standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support a contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984). We address each argument in turn.

Complainant contends that the Hearing Officer erred in allowing in “testimony” of Shift Commander Lieutenant Hawkins via sources other than his direct testimony where Lieutenant (“Lt.”) Hawkins did not testify at the Public Hearing, as this was a violation of Complainant’s Constitutional right to confront witnesses against him under the Sixth Amendment of the United States Constitution. The Hearing Officer permitted an audio recording of an interview by Captain Wilkes of Lt. Hawkins¹ to be offered into evidence. Hearing Exhibit (“Ex.”) R-22. This argument misapplies the Sixth Amendment, which is applicable to defendants in criminal prosecutions. U.S. Const. amend. VI (“In all **criminal** prosecutions, the **accused** shall enjoy the right ... to be confronted with the witnesses against him...” (emphasis added)). Complainant cites Crawford v. Washington, 541 U.S. 36 (2004) in support of this argument; however, this case specifically recognizes that the Confrontation Clause was created to protect accused individuals in criminal matters. See, U.S. v. Rondeau, 430 F.3d 44, 47 (1st Cir. 2005) (“Nothing in *Crawford* indicates that the Supreme Court intended to extend the Confrontation Clause’s reach beyond the

¹ The Hearing Officer noted that Lt. Hawkins retired from the DOC in September of 2011 and was believed to be living out of state. This notation suggests that the Hearing Officer recognized that Lt. Hawkins was unavailable for the Public Hearing.

criminal prosecution context.”) A Public Hearing at the Commission is not a criminal prosecution with a threatened loss of liberty. Nor was Complainant’s liberty at stake as a result of the Public Hearing.

To the extent the audio recording might be considered hearsay evidence, it is well established that the Commission is not “bound by the strict rules of evidence prevailing in courts of law or equity.” M.G.L. Chapter 151B § 5. A Hearing Officer may consider relevant hearsay evidence. See School Committee of Brockton v. MCAD, 423 Mass. 7, 15 (1996) (In administrative proceedings, hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value.) The DOC’s Investigation Report of Aime’s employee misconduct report of March 15, 2011 contained Captain (“Capt.”) Wilkes’ summary of his recorded interview with Lt. Hawkins, and was also submitted into evidence. Ex. R-6. Capt. Wilkes testified at the Public Hearing, and was available for cross-examination. The Hearing Officer found that Capt. Wilkes was “a credible witness.” Hearing Decision, ¶24. Further, the audiotape of the interview was only one of the pieces of evidence considered by the Hearing Officer regarding topics covered in the recorded interview. The Hearing Officer also considered testimony of other witnesses, including two Correction Officers who had first-hand information about the reported employee misconduct and denied Complainant’s allegations at the Public Hearing. We find no abuse of the Hearing Officer’s discretion in permitting the audio recording to be offered into evidence.

Complainant argues that the Hearing Officer erred by making certain findings of fact that are not supported by substantial evidence and by crediting the testimony of Respondent’s witnesses while disregarding evidence presented by the Complainant. Specifically, Complainant contends that the Hearing Officer’s findings in regards to 1) the denial of accommodations to

have a Union Representative at his interview with a superior officer; 2) the failure to retain a copy of the security footage of March 8, 2011; and 3) the weight given to Complainant's prior performance record were an abuse of discretion. It is well established that the Hearing Officer is in the best position to judge the credibility of witnesses and to make determinations regarding the weight to give such evidence. Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (recognizing that credibility is an issue for the hearing officer and not for the reviewing court, and that fact-finder's determination had substantial support in the evidence). In this case, the Hearing Officer documented in her decision evidence that she found significant, and when she made a finding where there was contradictory evidence in the record, she addressed the contradictory evidence in her decision. Complainant's disagreement with the Hearing Officer's determinations does not mean that the Hearing Officer misinterpreted or misconstrued the evidence presented, even if there is some evidentiary support for that disagreement. Id. (review requires deferral to administrative agency's fact-finding role, including its credibility determinations). The Full Commission defers to the determinations of the Hearing Officer. "While we must consider the entire record, and must take into account whatever in the records detracts from the weight of the [Hearing Officer's decision]...as long as there is substantial evidence to support the findings...we will not substitute our view of the facts." Duggan v. Board of Registration in Nursing, 456 Mass. 666, 673-674 (2010) (citations omitted). After review of the entire record, including contradictory evidence, we find that the Hearing Officer's findings of fact are fully supported by the record; therefore, we will not disturb the Hearing Officer's findings.

Complainant also contends that the Hearing Officer erred as a matter of law in finding that his administrative transfer in July 2011 was not an adverse action. An adverse employment

action requires a showing that the employer made a change in the terms and conditions of employment that materially disadvantages an employee. Yee v. Massachusetts State Police, 481 Mass. 290, 296-7 (2019). A complainant must present “objective evidence that he had been disadvantaged in respect to salary, grade, or other objective terms and conditions of employment.” MacCormack v. Bos. Edison Co., 423 Mass. 652, 663 (1996). "Subjective feelings of disappointment and disillusionment," without "objective evidence" of a disadvantage in tangible working conditions, are insufficient to establish that an "adverse employment action" has occurred. Id. Determining whether an action is materially adverse requires a case-by-case inquiry. Yee, 481 Mass. at 297.

Complainant admitted that his transfer did not pose any hardship to him, but “felt” it caused damage to his reputation. The Hearing Officer found that where the transfer did not cause Complainant “to suffer any tangible economic loss or a change in any other job related benefits,”² his transfer did not constitute an adverse action despite Complainant’s subjective view that “administrative transfers were often viewed as negative or punitive.” On appeal, Complainant does not point to any evidence of economic loss or loss of benefits resulting from his transfer, but instead insists that the transfer was retaliatory and intended to deter Complainant from further exercising his rights. In any event, even if the transfer was considered an adverse action, the Hearing Officer determined that there was no evidence, other than its timing, to suggest that the Superintendent’s transfer request was motivated by Complainant’s protected activity. There was testimony that administrative transfers were not uncommon at the DOC, and employees were frequently transferred due to workplace conflicts impacting institutional operations. The Superintendent testified that since he became Superintendent of the facility,

² The Hearing Officer found that the transfer did not involve any change in Complainant's shift, days off, or any other terms and conditions of his employment, including his commuting time.

Complainant had been involved in increasingly more conflicts with correctional and supervisory staff. We will not disturb the Hearing Officer's findings of fact, where, as here, they are supported by the record.

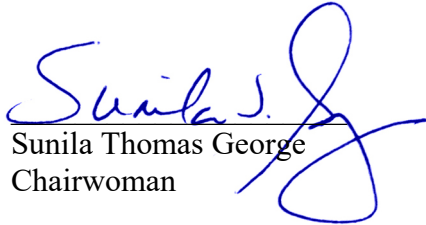
We have carefully reviewed Complainant's grounds for appeal and the full record in this matter and have weighed all the objections to the decision in accordance with the standard of review as stated herein. On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

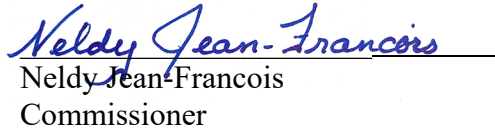
ORDER

We hereby affirm the decision of the Hearing Officer dismissing the case. This Order represents the final action of the Commission for purposes of M.G.L. c.151B, §6 and M.G.L. c. 30A, §14(1). Any party aggrieved by Order may challenge it by filing a complaint in Superior Court seeking judicial review, together with a copy of the transcript of proceedings. Failure to provide a copy of the transcript may preclude the aggrieved party from alleging that the Commission's decision is not supported by substantial evidence, or is arbitrary or capricious, or is an abuse of discretion. Such action must be filed within thirty (30) days of service of this Order and must be filed in

accordance with M.G.L. c. 30A, M.G.L. c. 151B, §6, and Superior Court Standing Order 96-1. Failure to file a complaint in court within thirty (30) days of service of this Order will constitute a waiver of the aggrieved party's right to appeal pursuant to M.G.L. c. 151B, §6 and M.G.L. c.30A.

SO ORDERED³ this 4th day of January, 2021


Sunila Thomas George
Chairwoman


Neldy Jean-Francois
Commissioner

³ Commissioner Monserrate Quiñones previously worked at the Department of Corrections as the Director of Diversity and in that capacity reviewed Respondent's investigations regarding the incidents of November 12, 2008 (Joint Exhibit 5) and March 9, 2009 (Joint Exhibit 6). Accordingly, she did not take part in the Full Commission Decision. The Investigating Commissioner, Sunila Thomas George, participated in the deliberations to create a quorum. See 804 CMR 1.23(6) (2020).