COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CLEVELAND COATS,
Complainants

v. DOCKET NO. 14-BEM-00729

MASSACHUSETTS STATE POLICE,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty Waxman in favor of Complainant Cleveland Coats, Jr. ("Complainant") and against Respondent Massachusetts State Police ("Respondent"). Following an evidentiary hearing, the Hearing Officer found Respondent discriminated against Complainant on the basis of age and race in violation of M.G.L. c. 151B §§4(1) and (1B) when Respondent removed Complainant from his position in the Executive Protection Unit ("EPU"). The Hearing Officer awarded Complainant damages for emotional distress and lost overtime wages and ordered Respondent to participate in training focused on discrimination based on race and age within 120 days of the decision. Respondent appealed the Hearing Officer's decision and Complainant intervened in the appeal. Respondent also appeals from the Hearing Officer's award of attorney's fees and costs. For the reasons discussed below, we affirm the Hearing Officer's decision in full and the Hearing Officer's order on Complainant's Petition for Attorneys' Fees.

STANDARD OF REVIEW

The responsibilities of the Full Commission are outlined by statute, the Commission's Rules of Procedure (804 CMR 1.00 (2020)), 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, §§ 3 (6), 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, § 1 (6).

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). It is nevertheless the Full Commission's role to determine whether the decision under appeal was supported by substantial evidence, among other considerations, including whether the decision was arbitrary or capricious or an abuse of discretion. 804 CMR 1.23(10) (2020).

LEGAL DISCUSSION

Respondent appealed on the grounds that: (1) the Hearing Officer's calculation of emotional distress damages was disproportionate to Complainant's alleged injuries; (2) the Hearing Officer's award of lost overtime damages was based on (a) an improper comparator and (b) improperly admitted evidence; and (3) the Hearing Officer improperly denied, in part, Respondent's Motion for Protective Order relating to some content in the hearing decision.

Respondent challenges the Hearing Officer's award of emotional distress damages on the grounds it is excessive and disproportionate to Complainant's claimed injuries. We disagree. The Hearing Officer based her award for emotional distress damages on credible testimony from the Complainant, which she found compelling. "Emotional distress damage awards, when made, should be fair and reasonable, and proportionate to the distress suffered." Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Furthermore, awards for emotional distress are not one-size-fits-all and are determined on a case-by-case basis rather than a strict formulation. Id. The SJC has articulated some of the criteria to be considered in rendering damage awards for emotional distress. These include the nature, character and severity of the harm, the duration of the suffering, and any steps taken to mitigate the harm. Id.

Respondent maintains that Complainant's testimony concerning his emotional distress was "limited" and "vague." It is the Hearing Officer's responsibility to assess the demeanor and credibility of witnesses. Here, the Hearing Officer explicitly noted that the description of Complainant's emotional distress "appear[ed] to only scratch the surface of what Complainant experienced" - an observation that contradicts Respondent's characterization of the testimony. The Hearing Officer credited the testimony of the Complainant that his removal from the EPU was emotionally damaging to him and his reassignment to the Joint Terrorism Task Force ("JTTF") was also distressing. Complainant testified concerning his stress in his assignment to the JTTF, his loss of interest in his hobbies, and withdrawing from social and sporting events, and its impact on his relationships with his friends and family. As such, the Hearing Officer found the nature, character, and severity of the emotional distress caused Complainant sincere, deep emotional pain.

Respondent also argues that Complainant failed to mitigate damages by failing to see a doctor, speak with a pastor, or take medication for his emotional distress. Evidence of a physical

manifestation of emotional distress, or expert testimony is beneficial *but not necessary* to justify an award of damages for emotional distress. Id. Though the Stonehill criteria consider the concept of mitigation in determining an emotional distress award, it is not mandatory. Emotional distress and how a person chooses to manage it is inherently personal. Some may find counseling or medication helpful, whereas others do not. It is not uncommon for an award of emotional distress damages to be based on witness testimony alone. See, e.g., Dalrymple v. Town of Winthrop, 50 Mass. App. Ct. 611 (2000) (upholding $200,000 award for emotional distress based on Complainant's testimony of emotional suffering stemming from Respondent's unlawful conduct); see also City of Lowell v. MCAD, 70 Mass. App. Ct. 1111 (2007) (unpublished decision issued pursuant to M.A.C. Rule 23.0) (upholding $200,000 emotional distress damage award to complainant who suffered severe emotional distress, but did not mitigate damages by taking medication or seeking counseling). The damage award is supported by sufficient evidence in the record and we find no reason to disturb the Hearing Officer's discretionary award of damages in the amount of $250,000.

Next, Respondent's argument that the Hearing Officer considered an improper comparator and improperly admitted evidence to determine lost overtime wages is unpersuasive. Respondent implies that the chalks used during public hearing were not supported by underlying evidence, testimonial or documentary, yet fails to identify the allegedly inaccurate content. Chalks submitted by Complainant's counsel included summaries of payroll records, which were separately admitted into evidence, and were used to assist Complainant's testimony concerning lost overtime wages. Respondent specifically contends the Hearing Officer improperly admitted into evidence a chalk prepared by the Complainant concerning pay records and improperly relied on said chalk in calculating lost overtime wages. Respondent contends that while chalks may be used to assist in

the presentation of evidence, they should not be admitted as evidence. The Commission is not bound by the rules of evidence observed by the courts, except for the rules of privilege. See 804 CMR 1.12 (13) (2020). However, even under the rules of evidence, summaries, charts, and similar documents can be used to prove the content of voluminous records that cannot be easily examined. See, MA R. Evid. § 1006; Commonwealth v. Carnes, 457 Mass. 812, 825 (2010) ("summaries of testimony are admissible, provided that the underlying records have been admitted in evidence and that the summaries accurately reflect the records"). The chalks were admitted over Respondents objection in addition to the underlying payroll records, and the Hearing Officer expressly noted that if there were discrepancies between the material in the chalks and the underlying records, the underlying records would prevail. Respondent had ample opportunity to identify any discrepancies between the chalks and the underlying pay records but has not done so to show a substantial error. In this context, it was not improper for the Hearing Officer to consider the chalks.

Respondent alleges that the comparator used to calculate Complainant's lost overtime wages, Sergeant Stephen Flaherty, was improper because Sergeant Flaherty worked significantly more overtime than Complainant. However, when the Hearing Officer invited Respondent to speak on the use of the chalks discussed above, Respondent acknowledged that Sergeant Flaherty and another sergeant in the EPU would be comparators. Further, Complainant did not argue that he was entitled to the exact amount of overtime that Sergeant Flaherty worked between June 2013, when Complainant was transferred out of the EPU, and October 2015, when Complainant retired. The evidence concerning Sergeant Flaherty's overtime was presented to illustrate the fluctuations in available overtime opportunities in the EPU because their overtime income changed in a similar

manner. Here, the use of the chalks illustrated that the fluctuations in Sergeant Flaherty's overtime were proportional to fluctuations in Complainant's overtime and were considered appropriately.

Respondent's next argument on appeal is that the Hearing Officer improperly denied its Motion for a Protective Order. This issue has been rendered moot by the two orders issued by the Full Commission in response to Respondent's Emergency Motion for Protective Order/Impoundment Order and Stay of Publication of the Hearing Officer's Decision Pending Full Commission Review (Emergency Motion for Protective Order). Respondent was ordered to specifically identify testimony and exhibits to allow the Full Commission to analyze whether it is in the public interest to prevent disclosure. Though the orders permitted some additional exhibits and transcript testimony to be subject to a protective order, Respondent failed to provide sufficient, specific, supporting rationale to provide a basis for imposing a blanket protective order upon particular exhibits, specific testimony in the public hearing, and to justify the impoundment of the hearing decision. For these reasons, we deny the Respondent's appeal and affirm the Hearing Officer's decision in its entirety.

ATTORNEY'S FEES & COSTS

Complainant's counsel filed a Petition seeking attorney's fees in the amount of $596,855 and costs in the amount of $12,379.22. Respondent opposed the Petition, and the Hearing Officer issued an order granting Complainant reduced attorney's fees in the amount of $497,963 and costs of $12,379.22. Respondent primarily appeals on the grounds that the hourly rates requested by Complainant's counsel were unreasonable, although it raises a general objection with respect to excessive fees requested. Respondent specifically requests that we reduce lead counsel's awarded hourly rate from $575 to $350, and associate counsel's awarded hourly rate from $350 to $175.[1]

[1] The Hearing Officer declined to award fees of $575/hour for work billed by a third attorney during the post-hearing phase.

Chapter 151B, § 5 allows prevailing complainants to recover reasonable attorney's fees. The determination of whether a fee sought is reasonable is subject to the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). The Commission has adopted the lodestar methodology for fee computation. Id. By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by an hourly rate it deems reasonable. The Commission then examines the resulting figure, known as the "lodestar," and adjusts it either upward or downward or determines that no adjustment is warranted depending on various factors, including complexity of the matter. Id. 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. Id. at 1099. Compensation is not awarded for work that appears to be duplicative, unproductive, excessive, or otherwise unnecessary to the prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Grendel's Den v. Larkin, 749 F.2d 945, 952 (1st Cir. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992). The party seeking fees has a duty to submit detailed and contemporaneous time records to document the hours spent on the case. Denton v. Boilermakers Local 29, 673 F. Supp. 37, 53 (D. Mass. 1987); Baker, 14 MDLR 1097.

"A determination of a reasonable hourly rate begins with the 'average rates in the attorney's community for similar work done by attorneys of the same years' experience.'" Haddad v. Wal–Mart Stores. Inc. (No. 2), 455 Mass. 1024, 1025 (2010), quoting Stratos v. Dept. of Pub. Welfare, 387 Mass. 312, 323 (1982). Respondent argues that counsel's hourly rates should be comparable

to those of Springfield or Worcester because Attorney Brodeur-McGan's office is in Springfield and a portion of the public hearing took place in Worcester. However, we agree with the Hearing Officer's conclusion that hourly rates sought for attorney's fees in this case should be compared with attorneys with comparable experience in the Boston area where the case was filed and managed. The underlying issues in this case challenge the practices of the Massachusetts State Police EPU, which operates primarily out of Boston but has implications throughout the Commonwealth. Moreover, this case was complex and was tried enthusiastically by experienced counsel for both parties. Attorney Brodeur-McGan is an attorney with 30 years of experience. She has extensive litigation experience, including in the areas of employment and civil rights law. Her requested hourly rate of $575 is reasonable.

As for the amount of fees requested, the Hearing Officer painstakingly reviewed the time records submitted, and reduced the requested fee amount by $98,892. Respondent did not offer specific objections to the Hearing Officer's analysis resulting in the deduction of $98,892, only that Complainant's counsels' hourly rates were excessive in light of the size and location of their practice. Solo practitioners and small firms may be awarded attorney's fees commensurate with their experience, regardless of whether they could have received a higher fee by practicing in a large firm. See, e.g., Neal v. City of Boston, No. CV 16-2848-H, 2022 WL 303492 (Mass. Super. Jan. 18, 2022) (awarding solo practitioners, one with 40 years of experience $525/hour and an one with ten years of experience a rate of $400/hour, where both had extensive experience in civil litigation and employment law); Riley v. Massachusetts Dept. of State Police, No. CV 15-14137, 2019 WL 4973956 (D. Mass. Oct. 8, 2019) (award of $600/hour and $525/hour to senior partners and $350/hour to an associate and contract attorneys in a Title VII case was appropriate). We find that counsel's requested rates of $575/hour for Attorney Brodeur-McGan and $350/hour for

Attorney Montagna are reasonable. At the time of the Petition for Attorneys Fees & Costs was filed, Attorney Brodeur-McGan had 30 years of experience, and Attorney Montagna had 10 years of experience. Both played an important role in the prosecution of the matter and zealously met Respondents challenges throughout. Any duplicative or unreasonable hours that were charged by Complainant's counsel were appropriately identified and reduced by the Hearing Officer. As averred in Attorney Brodeur-McGan's affidavit in support of the Petition for Attorney's Fees, as a small firm, Complainant's counsel had to forego other work to devote the time and resources to this matter for several years. The Hearing Officer's analysis comported with the methodology for computing and awarding attorney's fees, and we see no error.

Accordingly, we affirm the Hearing Officer's Order awarding reduced attorney's fees of $497,963 and costs of $12,379.22.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety and issue the following Order directing Respondent to:

1) Cease and desist from all acts of discrimination;

2) Pay Complainant $148,000 in lost income with interest at the rate of 12 per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post judgment interest begins to accrue;

3) Pay Complainant the sum of $250,000 in emotional distress damages with interest at the rate of 12 per cent per annum. Said interest shall commence on the date that the complaint was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

4) Pay to Complainant's Counsel attorney's fees in the amount of $497,963 and costs in the amount of $12,379.22;

5) Conduct, within 120 days of the receipt of this decision, a training of Respondent's senior managers and supervisors who make decisions related to assignments and promotions including the Colonel, Lt. Colonels, etc., down to the rank of Lieutenant. Such training shall focus on discrimination based on race and age. Respondent's chosen trainer shall submit a draft training agenda to the Commission's Director of Training at least one month prior to the training date, along with notice of the training date and location. The Commission retains the right to send a representative to observe the training session. Following the training session, Respondent shall provide to the Commission the names of persons who attended the training.

In accordance with 804 CMR 1.24(1) (2020) and 804 CMR 1.23(12)(e) (2020), the within Order is not a final decision or order for the purpose of judicial review by the Superior Court in accordance with M.G.L. c. 151B, § 6 and M.G.L. c. 30A. Pursuant to 804 CMR 1.23(12)(c) and (d) (2020), Complainant has 15 days from receipt of this Order to file a petition for supplemental attorney's fees and costs incurred as a result of litigating the appeal to the Full Commission, and Respondent has 15 days from receipt of the petition to file an opposition.

The Commission will issue a Notice of Entry of Final Decision and Order when either the time for filing a petition for attorney's fees and costs has passed without a filing, or a decision on the petition is rendered. The Commission's Notice of Entry of Final Decision and Order will represent the final action of the Commission for purposes of M.G.L. c. 151B, § 6 and M.G.L. c. 30A § 14(1). The thirty (30) day time period for filing a complaint challenging the Commission's Final Decision and Order commences upon service of such Notice.

SO ORDERED this 28th day of December 2023.

Sunila Thomas George
Chairwoman

Monserrate Rodríguez Colón
Commissioner