COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
KEVIN DORAN,
Complainants

v. DOCKET NO. 09-BEM-00597

THE R.O.S.E. FUND, Inc.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Respondent The R.O.S.E[1]. Fund, Inc. ("ROSE Fund"). Respondent is a 501(c)(3) non-profit corporation that was formed exclusively for charitable and educational purposes to assist women who are confronted with survival needs that result from sexual assault, molestation, eating disorders, or abuse. On November 4, 2008, Respondent, through its agent, advertised via email that it was offering free facial reconstruction surgery to survivors of domestic violence who met particular conditions. This email was sent to the listserv of the Massachusetts Office of Victim Assistance and stated that recipients were welcome to forward the email to others. A short time after this email was sent, a domestic violence advocate contacted Respondent on behalf of her client, Complainant, Kevin Doran, a male who was seeking facial reconstructive surgery. The advocate was advised by Respondent's agent that the ROSE Fund's mission was to

[1] R.O.S.E. stands for "Regaining One's Self-Esteem."

provide assistance to female survivors of domestic violence. Complainant did not apply for facial reconstructive surgery.

Complainant filed a complaint with the Commission alleging discrimination in a place of public accommodation on the basis of sex and sexual orientation. The charge of discrimination on the basis of sexual orientation was dismissed for lack of probable cause, which finding was upheld upon Complainant's appeal of the dismissal. The charge of sex discrimination was initially dismissed for lack of jurisdiction; however, the Investigating Commissioner ultimately reversed the lack of jurisdiction finding upon Complainant's appeal. Following the submission of a Joint Stipulation of Facts and Exhibits, the Hearing Officer concluded that Respondent was not a place of public accommodation pursuant to G.L. c. 272 §92A and therefore the denial of facial reconstruction services to Complainant did not support a claim of discrimination under the public accommodation statute.

STANDARD OF REVIEW[2]

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. 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); G.L. c. 30A.

[2] Although the parties submitted the case to the Hearing Officer based upon Stipulated Facts and Joint Exhibits, our responsibilities remain the same.

It is the Hearing Officer's responsibility to evaluate the credibility of any 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.

BASIS OF THE APPEAL

I. Public Accommodation Discrimination Claim

A place of public accommodation is defined as "[a] place...which is open to and accepts or solicits the patronage of the general public...." G.L. c. .272 §92A. The public accommodations law prohibits a place of accommodation from discriminating on the basis of sex. Complainant argues that the Hearing Officer, in concluding that Respondent has a limited applicant pool and exercises "genuine selectivity," improperly relied upon cases involving social membership clubs. In order to determine whether a club is a private organization or a public accommodation, courts inquire if the club employs "genuine selectivity" in carrying out its policies with respect to applicants and members. See, e.g., Concord Rod & Gun Club, Inc. v. MCAD, 402 Mass. 716, 720 (1988); Murray v. Framingham Country Club, 2005 WL 2009681, at *5 (Mass. Super. Ct. June 20, 2005); Solyts v. Wellesley Country Club, 2002 WL 31998398, at *6 (Mass. Super. Ct. Oct. 28, 2002); Schkolnick v. The Fly Club, 12 MDLR 1185 (1990). This

inquiry is performed as part of the larger effort to determine whether a club is truly a private entity that limits and restricts its membership or whether it "is open to or solicits the patronage of the general public" within the meaning of G.L. c. 272, § 92A. Complainant asserts that the "genuine selectivity" analysis is applicable to social membership clubs but "legally inappropriate for a service provider like" Respondent. There are three problems with this assertion.

First, there is no language in the case law to indicate that the "genuine selectivity" analysis is solely applicable or must be limited to evaluation of social membership clubs. Second, despite Complainant's assertion that the genuine selectivity standard "has been used exclusively in the context of membership clubs," the standard has in fact been used not only in cases involving social membership clubs, but in other contexts as well. See, Nathanson v. MCAD, 2003 WL 22480688 (Mass. Super. Ct. Sept. 16, 2003) (attorney's private law office place of public accommodation when attorney invited general public, to solicit her services), see also, Haskins v. President and Fellows of Harvard Coll., 2001 WL 1470314, at *3 (Mass. Super. Ct. Sept. 18, 2001) ("In determining whether a facility qualifies as a place of public accommodation, the most important factor is the selectivity of membership...Although Harvard accepts applications for admittance from the general public, it admits only a small fraction of applicants. The unsuccessful majority (like the rest of the public) is then excluded. Thus Harvard is not a place of public accommodation within the meaning of the statute.").

Third, the analysis is employed as part of the larger question concerning whether or not an entity "is open to or solicits the patronage of the general public," and while the concept of "genuine selectivity" was first articulated with respect to the analysis of an

ostensibly private club, it is clearly analogous to and useful in evaluating whether the services are indeed offered to the "general public." As the Hearing Officer noted, Respondent operates under the "genuine selectivity" approach because "it adheres to an array of eligibility criteria involving economic status, type of injury, a period of recovery, and residency restrictions. It does not solicit applications from the general public." Candidate eligibility is determined at the sole discretion of the ROSE Fund and its medical partners. Application of these criteria allows Respondent to determine whether or not someone is an eligible and appropriate recipient of Respondent's services. Respondent screens all of its applicants and will reject an applicant who does not meet these established criteria. This process is akin to that employed by private clubs and other organizations and facilities in admission of members. There is simply no authority suggesting that the Hearing Officer was precluded from relying upon this line of cases in making her determination as to whether or not Respondent is a place of public accommodation under the relevant statute.

Complainant argues that the Hearing Officer erred in concluding that Respondent's limited target audience rendered it a private, rather than public, entity. Specifically, Complainant challenges the Hearing Officer's statement that where Respondent's Medical Network and Reconstructive Surgery Program limits recipients to female survivors of domestic violence who have sustained facial injuries and been free of violence for one year, "[s]uch a cohort does not represent the public at large." Complainant argues that there is no basis in the law for the Hearing Officer's determination that the term "general public" in section 92a is limited to "the public at large," and Complainant presumes that the Hearing Officer, in using "the public at large,"

means to say that "every member of society could take advantage of what the entity has to offer." Complainant protests that no case supports such a proposition. Yet, the Hearing Officer's decision did not conclude that all members of the public must seek to avail themselves of a particular service for an entity to be deemed a place of public accommodation. She explicitly recognized that some organizations are deemed places of public accommodation "notwithstanding the fact that they provide services to a subset of the general population." See, e.g., Currier v. National Bd. of Med. Examiners, 462 Mass. 1, 18 (2012); Concord Rod & Gun Club, Inc. v. MCAD, 402 Mass. 716 (1988); Stropnicky v. Nathanson, 2003 WL 22480688 (Mass. Super. Ct. Sept. 15, 2003). The Hearing Officer also made the distinction that while some organizations may possess "indicia of publicness," in that their initial outreach efforts are generic, others use outreach efforts that are restrictive in nature and are accompanied by pre-screening and methods of genuine selectivity. The Hearing Officer found that Respondent falls into the latter group. Respondent does not promote its services to the public at large but confines its outreach efforts to victims of domestic violence and, further, offers its referral services only to those women who are prescreened on the basis of a number of defined selective criteria. Respondent makes clear at the outset that it serves a small subset of female victims of domestic violence who are in need of facial reconstructive surgery, who have been living in a safe environment for at least a year, and who can demonstrate financial need.

Complainant insists that Respondent solicits the patronage of the general public and therefore falls within the statutory definition of a place of public accommodation. In support of this assertion, Complainant cites Respondent's email of November 4, 2008 to

the listserv of a public agency, the Massachusetts Office of Victim Assistance. This email stated that Respondent was offering free facial reconstruction surgery to survivors of domestic violence, and indicated that recipients should feel free to forward the email to others. Complainant characterizes this email as "a broad solicitation to the domestic violence community and beyond," and an advertisement with no limits to whom it could be forwarded. However, Complainant's characterization is inaccurate. The email cannot fairly be said to "solicit[] the patronage" of the general public where it was transmitted not to the general public but to a discrete group, namely advocates of domestic violence victims and survivors. And the email did not solicit patronage in the sense that an advertisement solicits customers; rather, it sought to enlist the assistance of advocates associated with the Massachusetts Office of Victim Assistance in locating and identifying eligible recipients of its funds. Further, the email was self-limiting, in that it plainly established at the outset the selective eligibility criteria for potential recipients. It specified that qualified domestic violence survivors had to be: (1) free of abuse for at least a year; (2) victims of an injury to the head, face or neck area due to domestic violence; (3) in economic need; and (4) United States legal residents or citizens. Thus even if the email allowed that it could be sent to others, it was still and forever restricted with respect to its target audience and its genuine selectivity no matter how many times it may have been forwarded.

II. G.L. c.151B §4(14) Application to ROSE Fund Services

The Hearing Officer declined to make a decision regarding the G.L. c. 151B §4(14) claim because the Commission had not issued a probable cause determination on

the claim and she viewed discussion of the issue unnecessary. Nevertheless, the claim was certified for public hearing and was therefore properly before the Hearing Officer. The Complainant argues that the Full Commission should make a determination on this claim as it is a pure question of law based on stipulated facts. Respondent argues that Complainant should have addressed the issue at the time of certification for public hearing, however, argues that Subsection 14 in G.L. c.151B §4 only applies to credit-related services and not to all services. Since both parties have briefed the issue, it was considered in the Certification for Public Hearing, and to promote efficiency and avoid delay associated with a remand, we will address it here.

Massachusetts General Law Chapter 151B, section 4(14) states in pertinent part that it shall be an unlawful practice:

> For any person furnishing *credit or services* to deny or terminate such credit or services or to adversely affect an individual's credit standing because of such individual's sex, gender identity, marital status, age or sexual orientation ....

G. L. c. 151B § 4(14) (emphasis added). Complainant argues that the Respondent's Referral Program is a service and therefore falls under the purview of G.L. c. 151B § 4(14). Respondent contends that the term "services" in G.L. c. 151B §4(14) should be interpreted to mean "credit-related services," thus making the statute inapplicable to the ROSE Fund's Referral Program. Using several tools of statutory interpretation, we find that G.L. c. 151B §4(14) applies only to credit-related services, and therefore the Respondent's Referral Program does not fall under the purview of the statute.

First, rather than examining the word "services" in isolation, the word must be interpreted in light of the purpose of the subsection and the entire statute. Kain v. Dept. of Environmental Protection, 474 Mass. 278, 287 (2016); Commonwealth. v. Keefner, 461

Mass. 507, 511 (2012) ("... a statute must be interpreted 'as a whole'; it is improper to confine interpretation to the single section to be construed.") (quoting Wolfe v. Gormally, 440 Mass. 699, 704 (2004)); Section four of G.L. c. 151B prohibits a variety of discriminatory acts in housing, education, employment, and other areas, and subsection fourteen articulates prohibited discriminatory practices in the furnishing of credit. G.L. c. 151B § 4(14). Taking the entirety of the subsection into account, as well as its placement alongside other provisions in section four, the purpose of subsection fourteen is to prohibit discrimination in the furnishing of credit. With that purpose in mind, the word "services" must be interpreted to mean "credit-related services." 2A Sutherland Statutory Construction § 46:5 (7th ed. 2015) ("Courts presume lawmakers have a definite purpose in every enactment and have adapted and formulated subsidiary provisions in harmony with the purpose. That purpose is an implied limitation on the sense of general terms....").

Second, the statute must be read in harmony with other statutes that regulate the same subject matter. See Green v. Wyman-Gordon Co., 422 Mass. 551, 554 (1996) (statutes relating to sexual harassment must be read harmoniously so that the remedial scheme of G.L. c. 151B is not undermined). To read G.L. c. 151B § 4(14) as applying to all service providers without exception would undermine the remedial structure provided by G.L. c. 272 §§ 92A and 98. Id. ("We ordinarily construe statutes to be consistent with one another . . . . Thus, we attempt to interpret statutes addressing the same subject matter harmoniously, 'so that effect is given to every provision in all of them.'") (quoting 2B Singer, Sutherland Statutory Construction § 51.02, at 122 (5th ed. 1992)). In Green, the plaintiff failed to file a timely complaint of sexual harassment with the Commission, a requirement of G.L. c. 151B §§ 4(16A) and 5. She filed a claim in Superior Court under

G.L. c. 214 §1C. Id. The SJC, affirming dismissal of the Superior Court complaint held that the two statutes had to be read harmoniously, and G.L. c. 214 § 1C could not be interpreted as creating an alternative remedial procedure for sexual harassment because to do so would undermine the remedial scheme of G.L. c. 151B. Id.

Similarly, in the present case, to read G.L. c. 151B § 4(14) as applying to any person who furnishes any service would undermine the remedial structure set out in G.L. c. 272 § 96A and 98. The public accommodation statute defines and gives examples of places of public accommodation, clearly intending to only prohibit discrimination in public places, not private ones. The Complainant's interpretation of G.L. c. 151B § 4(14) would render this distinction moot, rendering all service providers, public and private, subject to anti-discrimination legislation. Thus, to read these statutes to be in harmony with one another requires that G.L. c. 151B § 4(14) be given a more narrow interpretation than simply all services of any kind. See G.L. c. 151B § 4(14); G.L. c. 272 § 92A.

Third, "[i]t is not to be lightly supposed that radical changes in the law were intended where not plainly expressed." Keefner, 461 Mass. at 514 (quoting Commonwealth v. Burke, 390 Mass. 480, 486 (1983)) (alteration in original). Massachusetts and other states have long held that discrimination in places of public accommodation is prohibited, but these laws have always relied on the distinction between public accommodations and private entities. See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp of Bos., 515 U.S. 557, 571-73 (1995). To apply anti-discrimination laws to private associations in their provision of services would be a radical change in the law. See id (discussing history of law to ensure access to public accommodations). Without evidence that such a radical change was intended, the statute

should be interpreted to avoid this radical change. See Keefner, 461 Mass. at 514. Based on the three principles of statutory interpretation above, the word "services" in G.L. c.151B § 4(14) should be interpreted to apply only to "credit-related services."

Complainant argues that such an interpretation would render the word "services" meaningless, violating another important tenant of statutory interpretation. See Commonwealth v. Disler, 451 Mass. 216, 227 (2008) (stating that "[e]very word in a statute should be given meaning") (alteration in original). Contrary to Complainant's argument, reading the phrase "credit or services" as "credit and credit-related services" does *not* render the addition of "or services" superfluous. Instead, it makes clear that § 4(14) also may apply to credit insurance, credit monitoring, or a myriad of other services that assist individuals with managing their credit.

Complainant also cites to the Full Commission Decision that preceded the Superior Court decision, Stropnicky v. Nathanson. 21 MDLR 149, 149-50 (1999). [3] In that decision, the Full Commission found that a divorce lawyer could not limit her services to women despite the fact that she wished to advocate on behalf of women who she believed to be disadvantaged by the divorce process. Id. In addition to finding Attorney Nathanson's private law practice a place of public accommodation under G.L. c. 272 §§ 92A and 98 due to her advertisements to the general public, the Full Commission also held the respondent liable under G.L. c. 151B § 4(14). Id. The Full Commission, after a careful analysis, found that the respondent's rights of association and expression would not be unconstitutionally abridged if she were compelled to offer her legal services to men as well as women. Id.

[3] We recognize that this determination overrules the Full Commission's decision in Stropnicky v. Nathanson, 21 MDLR 149 (1999), which held, without discussion or legal analysis, that the "statutory language is clear" that discrimination based on sex in the provision of "services" is prohibited.

Stropnicky[4] can be distinguished from the present case because the Commission found that the provision of legal services to the general public for profit was a place of accommodation and the respondent's First Amendment rights were not violated by the application of anti-discrimination statutes to her provision of legal services. See Stropnicky, 21 MDLR at 149-50. The Full Commission determined that Attorney Nathanson's rejection of a male client was based solely on the basis of sex, not on any particular message to be communicated by the attorney. In contrast, as described above, we affirm the Hearing Officer's conclusion that the ROSE Fund is not a place of public accommodation. Further, the ROSE Fund's rights of expression protected by the First Amendment could be unconstitutionally violated if it were compelled to offer its Referral Program to men.

The ROSE Fund was established as a non-profit corporation for charitable and educational purposes to assist women with needs arising from abuse, sexual assault and eating disorders. Its referral program is a service offered as part of its advocacy work – an expressive activity protected by the First Amendment. See, NAACP v. Button, 371 U.S. 415 (1963); Vill. of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980) (solicitation of funds by charity an activity protected by First Amendment). Compelling the ROSE Fund to offer its referral program to men would require the ROSE Fund "to alter the expressive content" of its activity. See, Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (application of public accommodation law violated nonprofit organization's rights to

[4] On appeal, the Superior Court overturned the Commission's Stropnicky decision regarding the G.L. c. 151B § 4(14) claim. Nathanson, 2003 WL 22480688, at *3 (upholding the Commission's finding of liability under G.L.c. 272 §§ 92A, 98, but overturning the finding of liability under G.L.c. 151B § 4(14)). The court stated, "G.L.c. 151B, § 4, ¶ 14 focuses solely on credit services, which are not in any way involved in this case. . . . [P]ortions of a statute cannot be read out of context." Id.

expressive activity protected by the First Amendment), see also Donaldson v.Farrakhan, 435 Mass. 94, 102 (2002) (holding that "[f]orcing the mosque and its leaders to include women in the meeting would change the message").

The First Amendment protects the rights of an organization to engage in an activity targeted toward particular lawful objectives. In NAACP v. Button, the U.S. Supreme Court found the application of Virginia's statute regulating the legal profession violated freedoms of expression and association protected by the First Amendment. The NAACP affiliate, the Virginia Conference, was engaged in financing litigation to end racial segregation in the public schools of Virginia. The litigation was a means for achieving "the lawful objectives of equality of treatment...for the members of the Negro community..." Button, 371 U.S. at 429. Members of the NAACP would explain to a meeting of parents and children the legal steps necessary to achieve desegregation, and seek authorization for attorneys to represent the litigants in legal proceedings to achieve desegregation. The Conference staff determined whether a litigant was entitled to NAACP assistance. Virginia's Supreme Court of Appeals determined that this activity was a violation of Virginia Code Chapter 33 forbidding solicitation of legal business by a "runner" or "capper." The U.S. Supreme Court, reversing the Virginia Supreme Court decision, determined that the NAACP's constitutionally protected activities which served to vindicate the legal rights of the "American Negro community" were unduly inhibited by the application of Virginia law.

The Massachusetts Supreme Judicial Court (SJC) has also recognized First Amendment rights to engage in protected expressive activities. In Farrakhan, the SJC held that requiring leaders of a mosque to admit women to their men's meeting, though it

was being held in a public theater and men members of the public were permitted to attend, was a violation of the mosque leaders' freedom of expressive association. Farrakhan, 436 Mass. at 102. The court noted that the mosque regularly held separate men's and women's meetings as a part of the religious practice of the Nation of Islam, which had long required the separation of the sexes. Id. at 101. Because the purpose of the meeting was for the religious leader of the Nation of Islam to address the men in the group about the role they should play in addressing certain social ills, the court held that "[f]orcing the mosque and its leaders to include women in the meeting would change the [meeting's] message." Id. at 102 (noting that inclusion of women "would also be in direct contravention of the religious practice of the mosque").

Unlike the defendant's legal services in Nathanson, the ROSE Fund does not offer its Referral Program as a business for profit. Instead, the Respondent's Referral Program is similar to the NAACP's racial desegregation litigation program because Respondent promotes its advocacy on behalf of a subset of women through the Referral Program. Its purpose is to assist women who are confronted with survival needs resulting from sexual assault, molestation, eating disorders, or abuse. Compelling the Respondent to offer the Referral Program to men would be tantamount to "require[ing it] to modify the content of [its] expression." See Hurley, 515 U.S. at 578. Advocating for *women* who have been victims of domestic violence is an essential part of the Respondent's mission, just as the separation of the sexes has been an essential aspect of the religious practices of the Nation of Islam. See Farrakhan, 436 Mass. at 101. Similarly, forcing Respondent to include men in the Referral Program would change the message that the Respondent wishes to send by offering assistance to this particular group of people. Id. at 102. The

U.S. Supreme Court has recognized the venerable history of the public accommodation laws in Massachusetts, [5] but when applied to expressive activity, the laws may not act to compel certain speech in violation of the First Amendment. See Hurley, 515 U.S at 571-72, 578.

While the Commission has a compelling interest in combatting gender discrimination, in these circumstances this interest does not outweigh the rights of freedom of expression held by the ROSE Fund – a non-profit charity formed for the purpose of assisting women who are victims of domestic violence. This case does not pose the question of whether the Respondent should offer its services to men. Instead, the question before the Commission is whether the ROSE Fund is compelled by law to offer the Referral Program to men. Many amici wrote on behalf of the Complainant, expressing the great need of services for men who are survivors of domestic violence, especially in the LGBQ community. They also highlighted that many men suffer additional shame or fear of reporting their abuse because of harmful gender stereotypes that only women can be victims of domestic violence. The truth of these facts, however compelling, cannot determine the Commission's decision. We simply cannot compel truly private organizations to offer their charitable services equally to all. This would be true no matter how just or unjust the cause of the private organization might be.

Although the Commission's mission of combating discrimination is broad, it must be balanced with the interests of protecting the expressive rights of social and political organizations. A private charity set up with the express purpose of serving a narrow community may be allowed to make choices about whom to serve, based on the purpose

[5] The Supreme Court recognized that after the Civil War, the Commonwealth was the first State to enact legislation to ensure access to public accommodations regardless of race. Id.

of the organization and consistent selection criteria. While not every expressive organization expresses a laudable message, the Commission generally does not have the authority to police private charities in their capacities as expressive organizations. To the extent that such organizations have employees or act occasionally as places of public accommodations, they are subject to Massachusetts's anti-discrimination laws and the Commission will enforce them. But, to the extent that charities are founded to express political, cultural, religious, or social messages, without opening themselves up to the public as commercial enterprises, they must be free to serve specific communities. To force any charity that has a particular mission—to help women, people of color, LGBQ individuals, senior citizens, people with disabilities, people of particular national origin —to also use their often scarce resources to offer the same resources to those who do not fall within their mission would undermine the role that such charities often play in supporting underrepresented or disempowered groups.

Based on all of the above we conclude that there is substantial evidence in the record to support the findings of fact and conclusions of law made by the Hearing Officer. Therefore we affirm the dismissal of the claim.

ORDER

Complainant's appeal to the Full Commission is hereby denied and the Order of dismissal is affirmed.

This Order represents the final action of the Commission for purposes of G.L. c. 30A. Any party aggrieved by this final determination may appeal the Commission's decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings. Such action must be filed within 30 days of receipt of this

decision and must be filed in accordance with 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 G.L. c. 151B, § 6.

SO ORDERED[6] this 12th day of September, 2016.

Jamie R. Williamson
Chairwoman

Charlotte Golar Richie
Commissioner

[6] Commissioner Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission decision. See, 804 CMR 1.23