COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
THEOPHILUS DRIGO,
Complainant

v. DOCKET NO. 14-BEM-00261

CITY OF BOSTON,
Respondent.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferri in favor of Complainant, Theophilus Drigo. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was liable for discrimination based on race and retaliation in violation of M.G.L. c. 151B, §§ 4(1) and (4). Respondent appealed to the Full Commission. For the reasons discussed 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 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, § 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); MCAD and 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).

BASIS OF THE APPEAL

Respondent has appealed the decision on the grounds that: (1) the decision did not establish any adverse action to support a finding of discrimination or an adverse action to support a finding of retaliation; (2) the Hearing Officer erred in finding a causal connection between any adverse action and the Complainant's protected activity; (3) the Hearing Officer's decision is unsupported by substantial evidence (4) the Hearing Officer erred in crediting the testimony of Complainant; and (5) the Hearing Officer's award of emotional distress damages were unsupported by substantial evidence. 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 the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984).

Respondent argues that the Hearing Officer's decision did not establish any adverse action to support the findings of discrimination and retaliation. The Hearing Officer included findings demonstrating that Complainant was subject to adverse employment actions. To establish adverse action requires a showing that the employer made a change in the objective terms and conditions of employment that materially disadvantages or threatens to disadvantage Complainant. Yee v. Mass. State Police, 481 Mass. 290, 297 (2019); Bain v. City of Springfield, 424 Mass. 758, 765 (1997); Psy–Ed Corp. v. Klein, 459 Mass. 697, 707–708 (2011). Whether an employee has suffered an adverse employment action is determined on case-by-case basis. Yee, 481 Mass. at 297. There was sufficient evidence for the Hearing Officer to find that the actions taken by the Respondent were substantial enough to have materially disadvantaged Complainant.

The evidence supports the determination that objective aspects of Complainant's work environment were affected by discrimination and retaliation. The Hearing Officer described evidence that Complainant was assigned more difficult work than his Caucasian coworkers; he was denied training opportunities in certain programs (Surplus, Fleet Hub, and radio programming) and his supervisor's attitude towards him changed after two Caucasian employees were transferred to the unit, as the supervisor then expressed resentment of Complainant's salary. She also recognized that Respondent's own internal investigation noted that the supervisor's many criticisms of Complainant's performance "were in stark contrast to other supervisors' opinions of Complainant's work and attitude." Amended Decision, Finding of Fact, ¶ 13. It is well established that adverse employment actions include disadvantageous transfers or

assignments and unwarranted negative job evaluations, both of which the Hearing Officer identified in this matter. See Hernandez-Torres v. Intercontinental Trading, Inc., 158 F.3d 43, 47 (1st Cir. 1998); Wyatt v. City of Bos., 35 F.3d 13, 16 (1st Cir. 1994).

Respondent argues that the Hearing Officer's decision did not establish a causal connection between the protected activity and the adverse employment action to support the retaliation determination. The Hearing Officer found that Complainant was retaliated against after filing an internal complaint of race discrimination with Respondent's Human Resources Division in September of 2013. She considered the seven or more notices Complainant received in the seven months after he filed his internal complaint regarding expectations, deficiencies or warnings about his performance. She found that the "timing of the seemingly constant monitoring and scrutiny of Complainant's activities … suspect." She recognized that Complainant was suspended for cell phone use in November of 2013, yet there was credible testimony from one of Complainant's supervisors that Complainant was not on his cell phone "more or less than any other City employee in Fleet Management." This supervisor also testified that he was not aware of any other employee who was disciplined for cell phone use. The Hearing Officer further finds that "While some of Respondent's alleged infractions likely had a kernel of truth to them and Complainant may not have been a model employee in every instance, the evidence suggests that many of the cited infractions were largely exaggerated." Based on the foregoing, the Hearing Officer concluded that the ensuing excessive monitoring and numerous reprimands that followed Complainant's protected activity were not valid, job-related responses to legitimate performance issues but, rather, were the result of retaliatory animus. We find that the Hearing Officer's determination was supported by substantial evidence in the record, thus, we will not disturb the Hearing Officer's findings.

Respondent further argues that the Hearing Officer's findings of fact were erroneous and not supported by substantial evidence or were contrary to the evidence presented. Within this argument Respondent claims that the Hearing Officer erred in crediting Complainant; made impermissible inferences; ignored evidence; and misconstrued evidence. We disagree. In this case, the Hearing Officer documented in her decision evidence that she found significant, she noted the testimony that she found credible, she noted when she did not credit contradictory testimony, and she cited to specific evidence in the record when explaining why these determinations were made. Respondent'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. Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (review requires deferral to administrative agency's fact-finding role, including its credibility determinations). The Hearing Officer remains in the best position to assess credibility because she hears the testimony of witnesses and observes their demeanor firsthand. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). The Full Commission defers to the Hearing Officer's credibility determinations and findings of fact, absent an error of law or abuse of discretion School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982). This review standard does not permit us to substitute our judgment for that of the Hearing Officer in considering conflicting evidence and testimony, as it is the Hearing Officer's responsibility to weigh the evidence and decide disputed issues of fact. We will not disturb the Hearing Officer's findings of fact, where, as here, they are fully supported by substantial evidence in the record.

Respondent also contends that the emotional distress damages award of $50,000 is not

supported by sufficient evidence and was excessive. Respondent further contends that the Hearing Officer erred in crediting Complainant regarding his emotional distress. We disagree. Awards for emotional distress must rest on substantial evidence of the emotional suffering that occurred and be causally-connected to the unlawful act of discrimination. DeRoche v. MCAD, 447 Mass 1, 7 (2006); Stonehill College v. MCAD, 441 Mass. 549, 576 (2004). Factors to consider in awarding emotional distress damages include "the nature and character of the alleged harm, the severity of the harm, the length of time the complainant has suffered and reasonably expects to suffer, and whether the complainant has attempted to mitigate the harm." DeRoche, at 7. Also, an award of damages may be based on a complainant's own credible testimony. Stonehill College, at 576. The Hearing Officer awarded Complainant damages for emotional distress, basing her decision on the credible, "compelling testimony" of Complainant. The Hearing Officer concluded, that during the period from at least March of 2013 to February of 2014, Complainant never felt at ease at work, always felt tension, and felt like he always had to be cautious because he was targeted, and others wanted him out of the shop. The Hearing Officer found that the Complainant testified credibly regarding the stress, tension, and anxiety Complainant suffered due to the treatment he received from Respondent. The Hearing Officer also credited the Complainant's testimony that the stress he experienced at work adversely impacted his ability to relax outside of work and that for a period of approximately one year he suffered sleepless nights, depression, and feelings of persecution. We find substantial evidence in the record to support the Hearing Officer's award of emotional distress damages and decline to alter the emotional distress award.

On the above grounds, we deny Respondent's appeal and affirm the Hearing Officer's decision.

ATTORNEYS' FEES AND COSTS

Complainant filed a Petition for Attorney's Fees and Costs on April 17, 2018, along with an affidavit and invoices.[1] The petition is supported by detailed contemporaneous time records noting the amount of time spent on specific tasks and an affidavit of counsel. Complainant seeks to recover fees in the amount of $37,050 for 156.4 hours of work performed at a rate of $250 per hour, and costs in the amount of $2051.40.[2] On May 17, 2018, Respondent filed an Opposition to Complainant's Petition for Attorney's Fees and Costs arguing that Complainant's fee request should be reduced by 1/6 or approximately 0.17% because he did not prevail on the failure to promote claim. Respondent also argues that Complainant's fee request should be reduced for specific time entries for work that was unnecessary or excessive and for time entries which included travel time.

M.G.L. c. 151B allows prevailing complainants to recover reasonable attorneys' fees for the claims on which Complainant prevailed. 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. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). 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

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[1] Since the Petition for Attorneys' Fees and Costs was filed pursuant to 804 CMR 1.00 (1999) et seq., the Full Commission determined the award.

[2] The Full Commission recognizes that 156.40 hours of work at a rate of $250 results in $39,100, and that Complainant's attorney's billing time records equal $39,101.40. However, the Complainant has requested fees in the amount of $37,050 in his Petition for Attorneys'Fees.

warranted depending on various factors, including complexity of the matter. Baker v. Winchester School Committee, 14 MDLR 1097 (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. 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).

We address Respondent's arguments. First, Respondent contends that Counsel's itemized invoice includes 6.3 hours of time billed on various days in October 2017 for drafting an Emergency Motion that should be reduced for being unnecessary. We disagree. The Motion was filed in furtherance of Complainant's case. Since the entry for these 6.3 hours is sufficiently related to the prosecution of this case, is adequately detailed, and is not duplicative we decline to reduce these entries. Second, Respondent avers that the time billed for drafting and re-drafting the notices of his Rule 30(b)(6) deposition of the City was excessive. We decline to reduce these fees in their entirety as we find that the entries are sufficiently related to the prosecution of this case, are adequately detailed, and are not excessive.

Third, Respondent asserts that entries which include "travel and attendance" should be reduced as travel time and be discounted at half the rate of core legal work. Respondent argues that "[t]ravel time is considered to be non-core work that is routinely discounted at half the rate of core legal work." Ellicott v. Am. Capital Energy, Inc., 2017 WL 1224537, at *3 (D. Mass. Apr. 3, 2017)(unreported); see also Norkunas v. HPT Cambridge, LLC, 969 F. Supp. 2d 184,

196 (D. Mass. 2013)(court concluded that travel time should only be charged at fifty percent rate). However, Massachusetts has not established any explicit rules regarding attorney's travel time or any requirement that these this time be discounted. The decision to discount travel time is left to the discretion of the governing body. The First Circuit found that "an attorney's travel time may be reimbursed in a fee award." Hutchinson ex rel. Julien v. Patrick, 636 F.3d 1, 15 (1st Cir. 2011). The court found that although travel time is ordinarily calculated at a lower hourly rate, "there is no hard-and-fast rule establishing what percentage of an attorney's standard billing rate is appropriate for travel time." Id.; see also Cent. Pension Fund of the Int'l Union of Operating Engineers & Participating Employers v. Ray Haluch Gravel Co., 745 F.3d 1, 8 (1st Cir. 2014) (finding that there is no hard-and-fast rule requiring a discount for attorney travel time). We have considered the number of hours documented in each entry which included travel time and have determined that it does not appear excessive. We decline to discount these entries given the requested hourly rate of $250.

Finally, Respondent argues that Complainant's fee petition should be reduced to reflect the fact that Complainant did not prevail upon one of the factual bases for his claims of discrimination and retaliation – the denial of promotion. Respondent argues that because Complainant put forth six bases for his claims of discrimination and retaliation and the Hearing Officer's determined that the failure to promote was not discriminatory, the attorney's fees should be reduced by 1/6. We disagree.

A complainant may request attorney's fees for claims in which they prevailed. Complainant was successful in establishing his claims of discrimination and retaliation. The Hearing Officer found that there was insufficient evidence of pretext to support a finding that Complainant was not chosen for promotion for retaliatory reasons. The fact that Complainant

was not successful on one of the grounds for his claims for which he was successful does not require a reduction in fees. When a complainant does not prevail on all claims charged the "Commission may exercise its discretion to reduce the overall fees requested by some amount that may reasonably be said to have been expended in pursuit of Complainant's unsuccessful claim. In making such a determination, we may examine the "degree of interconnectedness" between the two claims. Blue v. Aramark Corp., 27 MDLR 73 (2005). We find that Complainant's claims were interconnected and decline to reduce Complainant's fee petition because Complainant failed to establish one of the six bases of his claim, where he has prevailed overall on his claims of discrimination and retaliation.

The contemporaneous time records and affidavit filed in support of this request have been carefully reviewed. Attorney Mahoney seeks reimbursement at the hourly rate of $250. This rate is fully consistent with the rates customarily charged by attorneys with comparable experience and expertise in such cases and is well within the range of rates charged by attorneys practicing employment law within the area. We conclude that the tasks performed are adequately documented and that the amount of time spent on preparation and litigation of this claim is well within reason. We also note that Complainant did not seek attorneys' fees associated with preparation of the fee petition nor his Notice of Intervention in the Full Commission Review.

We conclude that the total amount of attorneys' fees sought by Complainant is appropriate and hereby award fees in the amount of $37,050. Complainant seeks costs in the amount of $2,051.40 for deposition transcripts and subpoena service. We find that this request is reasonable, the documentation is sufficient and hereby award costs to Complainant in the amount sought.

ORDER

For the reasons set forth above, we hereby affirm the Decision of the Hearing Officer in its entirety and issue the following order:

1. Respondent shall cease and desist from any further acts of discrimination based upon race and retaliation;
2. Respondent shall expunge from Complainant's personnel records any notices or disciplinary actions from March of 2013 to February of 2014 resulting from the events at issue in this matter;
3. Respondent shall pay Complainant, Theophilus Drigo, the sum of $50,000 in damages for emotional distress with interest thereon at the statutory rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.
4. Respondent shall pay to Complainant, Theophilus Drigo, the sum of $39,101.40 in attorney's fees and costs with interest thereon at the rate of 12% per annum from the date on which the petition for fees was filed until such time as payment is made, or until this Order is reduced to a Court judgment and post-judgment interest begins to accrue.

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 in superior court seeking judicial review, together with a copy of the transcript of proceedings. Such action must be filed within thirty (30) days of service of this decision and

must be filed in accordance with M.G.L. c.30A, c. 151B, § 6, and the 1996 Standing Order on Judicial Review of Agency Actions, Superior Court Standing Order 96-1. Failure to file a petition 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.

SO ORDERED[3] this 8th day of June, 2020

Monserrate Quiñones
Commissioner

Neldy Jean-Francois
Commissioner

[3] Chairwoman 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(6)(2020).