COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SHIRLEY ESLINGER,

Complainants   DOCKET NO. 10 BEM 02076

v.

MASSACHUSETTS DEPARTMENT OF
TRANSPORTATION,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us on appeal of a decision by Hearing Officer Eugenia Guastaferri following an evidentiary hearing on the question of whether the Massachusetts Department of Transportation ("MassDOT") unlawfully discriminated against its employee, Shirley Eslinger ("Ms. Eslinger"), by terminating her employment on the basis of gender. Upon consideration of the evidence produced over a three-day public hearing, Hearing Officer Guastaferri determined that MassDOT was not liable for unlawful gender discrimination under M.G.L. c. 151B, § 4(1), and dismissed the case. Ms. Eslinger appealed to the Full Commission *pro se* and filed a lengthy petition for review in support of the appeal.[1] After careful review of the record and consideration of the arguments advanced on appeal, we affirm the Hearing Officer's decision in full.

[1] The case against MassDOT for unlawful discrimination on the basis of gender was prosecuted by counsel for the Commission in accordance with 804 CMR 1.09(5)(b) (1999) (the regulations in effect at the time of public hearing) and M.G.L. c. 151B, §5. See Stonehill Coll. v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 562-563 (2004).

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); 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).

LEGAL DISCUSSION

Ms. Eslinger argues over the course of an 81-page petition for review[2] that the Hearing Officer's decision was arbitrary and capricious and unsupported by substantial evidence. She also sporadically argues that the Commission's investigation of her claim was "improper", that she was denied a fair hearing, and that she received ineffective assistance of counsel. The latter three arguments may be summarily disposed of, respectively, as follows: (1) an administrative appeal to the Full Commission is limited to the record of the adjudicatory proceedings below which do not include the investigation (see 804 CMR 1.23(f) (1999))[3], and, relatedly, there is no judicial review of the Commission's investigation of a claim (see Grandoit v. Massachusetts Comm'n Against Discrimination, 95 Mass. App. Ct. 603, 606–07 (2019)); (2) the Hearing Officer held a public hearing in conformance with M.G.L. c. 151B, §§ 3 and 5 that clearly provided Ms. Eslinger with notice and the opportunity to be heard (see, e.g., Southbridge Water Supply Co. v. Dep't of Pub. Utilities, 368 Mass. 300, 309 (1975)); and (3) Commission counsel was not Ms. Eslinger's attorney (see Stonehill, 441 Mass. 549 at 563)[4].

We also find that the Hearing Officer's decision was neither arbitrary and capricious nor unsupported by substantial evidence because, overall, Ms. Eslinger's

[2] The Commission has recently promulgated regulations at 804 CMR 1.23(3) (2020) with respect to the length of a petition for review (now limited to 30 pages).
[3] Ms. Eslinger's appeal to the Full Commission was filed when the Commission's 1999 regulations were in effect, although the long-standing rule concerning Full Commission review is unchanged (see 804 CMR 1.23(8) (2020)) and in conformance with M.G.L. c. 151B, § 3(6) (see Smith Coll. v. Massachusetts Comm'n Against Discrimination, 376 Mass. 221, 225, fn. 7 (1978)) (requests for review by the Full Commission under section 3(6) are confined to the record of proceedings below).
[4] Moreover, the right to effective assistance of counsel is generally limited to criminal, not civil, cases (see, e.g., Com. v. Patton, 458 Mass. 119, 124 (2010)), and Ms. Eslinger had the right to hire a private attorney to represent her in Commission proceedings or to withdraw her claim to file in court. See 804 CMR 1.09(5) and 1.15(2) (1999).

arguments do nothing more than urge us to ignore the standard of review by re-weighing the evidence and second-guess the Hearing Officer's credibility determinations. In order to prevail on her claim of unlawful discrimination on the basis of gender, Ms. Eslinger was required to prove that the reasons for her termination advanced by MassDOT were a pretext for discrimination in violation of M.G.L. c. 151B, § 4(1). Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C., 474 Mass. 382, 396–97 (2016) (describing three-stage burden-shifting paradigm from well-established case law requiring plaintiff to make prima facie case of unlawful discrimination, followed by employer's burden to advance a legitimate, non-discriminatory reason for the termination, and plaintiff's ultimate burden to prove employer's actions were motivated by discriminatory animus). Over MassDOT's objections with respect to the third element, the Hearing Officer determined that Ms. Eslinger indeed made out her prima facie case as outlined in Blare v. Husky Molding Systems, 219 Mass. 437, 441 (1995), because she showed that: (1) by virtue of her gender (female), she is a member of a protected class; (2) she was adequately performing the duties of her job; (3) she was subjected to adverse treatment; and (4) she was treated differently than male employees. The Hearing Officer determined, however, that Ms. Eslinger failed to prove MassDOT's reasons for terminating her (after unsuccessfully urging her to accept a reassignment to another job) were pretextual.

To the extent that Ms. Eslinger's arguments may be summarized, she argues that she presented substantial evidence of pretext in the form of: evidence of discriminatory animus from the MassDOT official who terminated her, Luisa Paiewonsky, where Paiewonsky's testimony was fraught with subtle bias against women; evidence that

Shoukry Elnahal, the male employee who assumed her duties (by accepting a new position from Paiewonsky that combined Ms. Eslinger's job and Elnahal's former job), was unqualified; evidence that the reassignment she was offered was insincere because she was unqualified to take the job; and evidence that she was treated differently from two of her male colleagues who held the same position she held (they retained their positions and she did not).

As for the first three arguments, it was the Hearing Officer's sole authority to determine Paiewonsky's credibility and sincerity with respect to her decisional process, and she believed Paiewonsky's testimony that painstakingly outlined why she consolidated Ms. Eslinger and Elnahal's positions, why she chose Elnahal over Ms. Eslinger to fill the newly-created position, and why she believed Ms. Eslinger was a good fit for the reassignment she was offered. The Hearing Officer also believed Paiewonsky's testimony that after recruiting Ms. Eslinger into her job, she was invested in her success, as evidenced by her decision to try and retain Ms. Eslinger in a high-level position not long after Ms. Eslinger's original position was being eliminated. "[I]n cases where the hirer and the firer are the same individual and the termination of employment occurs within a relatively short time span following the hiring, a strong inference exists that discrimination was not a determining factor for the adverse action taken by the employer." Proud v. Stone, 945 F.2d 796, 797 (4th Cir. 1991). When the same decision maker both hires and fires an employee "[c]laims that employer animus exists in termination but not in hiring seem irrational," because "[f]rom the standpoint of the putative discriminator, it hardly makes sense to hire workers from a group one dislikes (thereby incurring the psychological costs of associating with them), only to fire them

once they are on the job." Id. (internal quotations omitted). Moreover, nothing in the record demonstrates that Elnahal was unqualified for the newly created position. Last, Ms. Eslinger's argument that she was unqualified for the reassignment Paiewonsky offered her is not supported by the record as a whole, and, as determined by the Hearing Officer, rebutted by Paiewonsky's credited testimony. For all of these reasons, the Hearing Officer did not err in determining Ms. Eslinger failed to prove pretext by virtue of discriminatory intent on behalf of Paiewonsky herself, by virtue of Elnahal's qualifications, or by virtue of an illusory reassignment offer.

As for the remaining argument, while proof that Ms. Eslinger was treated differently from the two males who held her same position was sufficient to prove her prima facie case, other comparators' fates in the context of the reorganization creating MassDOT demonstrates a lack of pretext behind Paiewonsky's explanation. Contrary to Ms. Eslinger's arguments on appeal, her comparators did not have to be limited to just the two other Deputy Chiefs at the Highway Department. When relying on comparator evidence to establish discriminatory animus the complainant must show that the comparators were similarly situated and treated differently, but "a comparator's circumstances need not be identical to those of the complainant." Trustees of Health & Hosps. of Boston, Inc. v. MCAD, 449 Mass. 675, 682-683 (2007) (during layoffs another employee who had a different job title and different responsibilities was a comparator because they were similarly situated in all aspects relevant to the implementation of the layoff procedure). The Hearing Officer found specific examples of high-level male managers who were similarly situated to Ms. Eslinger and treated similarly to her, not differently. She found that Tom Laughlin, who was the head of Highway Operations at

MassHighway was terminated, as his position was duplicative. She also found that Helmut Ernst, who was the Chief Engineer at the Massachusetts Transit Authority, was reassigned to a lower ranking position where he suffered an annual pay cut of approximately $20,000 to $23,000. These findings are supported by substantial evidence. As a result, the Hearing Officer did not err in recognizing that male comparators outside of Ms. Eslinger's identical peers were treated similarly to her, and therefore she did not err in determining that Ms. Eslinger failed to prove pretext by virtue of comparator evidence.

In large part, Ms. Eslinger simply disagrees with MassDOT's decision to eliminate her position (which resulted in her termination after she would not accept reassignment). However, an employer's reasons for its decision to terminate "may be unsound or even absurd," but if they are not discriminatory a complainant cannot prevail. Lewis v. Area II Homecare for Senior Citizens, Inc., 397 Mass. 761, 766, (1986). Furthermore, when undertaking a reduction in force and considering several presumably qualified employees for layoff, an employer may consider an employee's particular expertise, whether two candidates for layoff have overlapping expertise, and the employer's ongoing business needs. See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 51 (2005). The Hearing Officer properly declined to assess the wisdom of Paiewonsky's business decisions, and instead more narrowly determined that there was no evidence that MassDOT's elimination and consolidation of positions was a pretext for gender discrimination.

We have carefully reviewed grounds for appeal and the record in this matter and have weighed all the objections to the decision in accordance with the standard of review

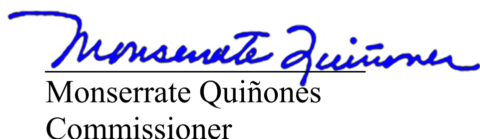
herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings of fact and conclusions of law. We find the Hearing Officer's conclusion that MassDOT did not discriminate against Ms. Eslinger based on her sex was supported by substantial evidence and we defer to the Hearing Officer's determinations.

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

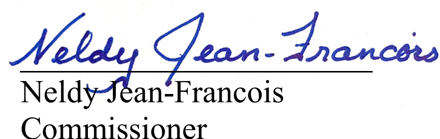
ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. 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[5] this 24th day of June, 2020.



Monserrate Quiñones
Commissioner



Neldy Jean-Francois
Commissioner

[5] 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).