

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
COLLEEN HEATH,
Complainants

v.

DOCKET NO. 08-BEM-03076

MASSACHUSETTS PAROLE BOARD,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferrri in favor of Respondent, Massachusetts Parole Board, on Complainant's claim of failure to promote on the basis of gender in violation of M.G.L. c. 151B, § 4(1). Following an evidentiary hearing, the Hearing Officer dismissed the complaint finding that Respondent articulated legitimate, non-discriminatory reasons for bypassing Complainant for a promotion to Field Parole Officer. Complainant has appealed the decision 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 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.

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). 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.

BASIS OF THE APPEAL

Complainant’s appeal to the Full Commission asserts that the Hearing Officer erred by: (1) failing to consider evidence of disparate treatment of male and female applicants during Respondent’s selection process; (2) finding that Respondent’s Executive Director and Chair, Maureen Walsh, made the ultimate decision to bypass the Complainant; (3) failing to consider historical data showing that the Field Parole Officer position has been overwhelmingly held by men; and (4) failing to address the disparate impact on female applicants that Respondent created by intermingling the internal promotional list with the open competitive list during the selection process. 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. Quinn v. Response Electric Services, Inc.,

27 MDLR 42 (2005). The key to substantial evidence is whether a “reasonable mind” would accept the evidence as adequate to form a conclusion. M.G.L. c. 30A, s. 1(6); see Gnerre v. MCAD, 402 Mass. 502, 509 (1988). The 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). We have considered Complainant’s appeal in accordance with the standard of review summarized above, and conclude that there is substantial evidence in the record to support the findings of fact and conclusions of law made by the Hearing Officer, as discussed below.

Complainant has appealed the decision on the grounds that the Hearing Officer erred in failing to consider evidence of the treatment of male candidates more favorably than female candidates. This argument is unpersuasive and ignores the Hearing Officer’s discussion of this issue in her decision. Indeed, the Hearing Officer did consider the treatment of male candidates compared to female candidates, noting that “the panel initially chose no female candidates for the eight positions This fact alone might render the selection process suspect.” However, the Hearing Officer then went on to credit Respondent’s witnesses’ testimony that they were committed to promoting females to the job and were champions of females in law enforcement. The Hearing Officer further credited Respondent’s witnesses’ testimony that Complainant did not do well in her interview and that they genuinely believed Complainant failed to demonstrate an understanding of the importance of the position and she lacked energy and enthusiasm for the job. It is the Hearing Officer’s responsibility to evaluate the credibility of witnesses and to weigh conflicting 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. Massachusetts Comm’n Against Discrimination, 361 Mass. 352 (1972); Bowen v. Colonnade

Hotel, 4 MDLR 1007, 1011 (1982).

Complainant argues that the Hearing Officer erred in finding that Executive Director and Chair of the Parole Board, Maureen Walsh, made the ultimate decision to bypass Complainant, as this finding was unsupported by the evidence and was arbitrary and capricious. The Hearing Officer credited Walsh's testimony that as Respondent's Executive Director and Chair she was the appointing authority and all hiring decisions were ultimately sanctioned and approved by her. The Hearing Officer also noted that Walsh reviewed the hiring recommendations and was familiar with many of the candidates, including the Complainant. The Full Commission defers to the credibility determinations of the Hearing Officer. Thus, we will not disturb the Hearing Officer's findings as they are supported by credible testimony and substantial evidence in the record.

Complainant also argues that the Hearing Officer erred by failing to consider historical data showing that the Field Parole Officer position has been overwhelmingly held by men. Contrary to Complainant's assertion, the Hearing Officer did acknowledge that the position of Field Parole Officer has largely been filled by men, but stated that this "is not surprising given the nature of the work, and it is likely attributable to long-existing barriers to females in the criminal justice field." The Hearing Officer ultimately concluded that "while probative in some situations" these statistics did not cause her to conclude that Complainant's non-selection for the promotion was inherently biased or suspect. Based on the testimony of Respondent's witnesses as to their perception of the Complainant's performance during her interview, the Hearing Officer found that Respondent determined in good faith that Complainant did not demonstrate that she possessed the qualities required for the promotion to a Field Parole Officer position.

Complainant finally asserts that the Hearing Officer erred in discounting the disparate

impact that Respondent's intermingling of the internal and open promotional lists had on female candidates. The Hearing Officer found that Respondent merged the lists in error due to its unfamiliarity with the Civil Service rules and lack of Human Resources support. The Hearing Officer found no evidence of bad faith or discriminatory animus on Respondent's part in making this mistake. The Hearing Officer noted that there was a remedy available to Complainant and other applicants disadvantaged by Respondent's mistake—to file a bypass appeal with the Civil Service Commission.¹ Further, the Hearing Officer recognized that all internal candidates, male and female, were disadvantaged by Respondent's mistake in failing to abide by Civil Service Rules and intermingling the internal and external hiring lists of applicants. The Hearing Officer weighed the evidence, and determined that Respondent's error did not establish a discriminatory intent in Complainant's non-selection. We defer to this finding of the Hearing Officer. .

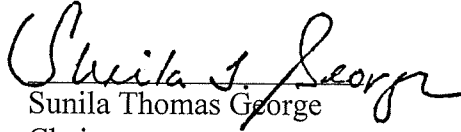
ORDER

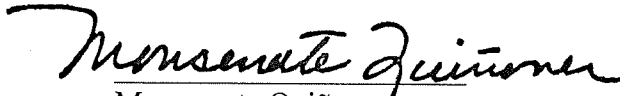
For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may contest the Commission's decision by filing a complaint in superior court 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

¹ Complainant filed a bypass appeal with the Civil Service Commission; in a decision dated September 11, 2008, it ruled that Respondent did not have a reasonable justification for the bypass and that Respondent violated the Civil Service Rules by comingling the internal promotional list with the external hiring list. The Human Resources Division was ordered to place Complainant's name at the top of the existing or next certification list for consideration and to adjust her seniority date retroactive to the date of bypass should she be promoted in the future. Complainant was promoted to the position of Field Parole Officer in October of 2011.

aggrieved party's right to appeal pursuant to M.G.L. c. 151B, §6.

SO ORDERED² this 4th day of March, 2019


Sunila Thomas George
Chairwoman


Monserrate Quiñones
Commissioner

² Commissioner Hubbard recused herself from consideration of the Full Commission appeal. However, for purposes of Full Commission Review, a quorum of the Commission consists of two of its members. See, 804 CMR 1.03(2), Further, although Chairwoman Thomas George was assigned as the Investigating Commission in the matter, she may participate in the deliberations in order to create a quorum. See, 804 CMR 1.23(c).