

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ERIC MADONNA,
Complainants

v.

DOCKET NO. 09-NEM-0541

FALL RIVER
POLICE DEPARTMENT,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty Waxman in favor of Respondent Fall River Police Department. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for discriminating against the Complainant based on a disability related to Post-Traumatic Stress Disorder (PTSD) in violation of M.G.L. c. 151B, § 4(16). Complainant has 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. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005); see 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(1)(h).

BASIS OF THE APPEAL

Complainant has appealed the decision on the grounds that the Hearing Officer erred by determining that Respondent did not discriminate against Complainant based on his disability when Respondent did not permit Complainant to work overtime and paid details, and demanded that Complainant turn over his weapons after he left work without permission and did not return the following day due to “stress.” 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).

Complainant argues that the Hearing Officer erred in determining that Respondent did not discriminate against him based on his disability. Specifically, Complainant asserts that Respondent discriminated against him when Respondent did not permit him to work additional paid details and overtime. Complainant argues that the Hearing Officer failed to apply the correct legal standard to the Respondent's refusal to allow him to work overtime and paid details. We disagree with Complainant's assertion.

The Hearing Officer found that Complainant was disabled within the meaning of M.G.L. c. 151B based on his diagnosis of PTSD. The Hearing Officer credited Complainant's testimony that he requested an accommodation to limit his work to the day-shift only in order to maintain a routine sleep schedule, as sleep maintenance problems were symptoms of his disability. Although Chief Souza asserted that Complainant also sought to avoid having contact with the public, the Hearing Officer found that this was not Complainant's requested accommodation. Instead, this was Chief Souza's own belief that it was imprudent for Complainant to work "on the street" with the public based on his PTSD symptoms.¹

Regardless of Chief Souza's understanding of the basis for Complainant's accommodation request, Respondent offered Complainant the opportunity to fill a newly-created evidence custodian position, a position that was designed to permit Complainant to have daytime hours and a weekday schedule.² The Hearing Officer found that Complainant accepted this

¹ Chief Souza had concerns that an accommodation allowing Complainant to remain "on the street" would place Complainant in contact with the public and create potential safety issues. See Carleton v. Commonwealth, 447 Mass. 791, 808 (2006) (providing that an accommodation is not reasonable where it would impose an undue hardship on the conduct of the employer's business due to the dangerous type of work involved and the nature of the risk to public safety).

² By creating this new position for Complainant, Respondent was able to avoid the issue of making Complainant a day-shift only patrol officer, as such an action would have run afoul of the parties' Collective Bargaining Agreement by displacing a more senior officer on the day-shift in order to accommodate Complainant. See U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 403 (2002) (holding that a requested accommodation that conflicts with seniority rules is ordinarily not a reasonable accommodation). The evidence demonstrates that the evidence custodian position allowed Respondent to accommodate Complainant's request to work only day-shifts, while also adhering to the

position, as this position accommodated his request to work the day-shift only and addressed his concerns about maintaining a regular sleep routine with a consistent work schedule. We agree with the Hearing Officer's determination that the evidence custodian position was a reasonable accommodation for Complainant's disability, as it permitted him to work daytime hours.

The Hearing Officer credited Complainant's testimony that he enjoyed performing his job as evidence custodian. However, in January of 2009, Complainant became angry with Respondent after he requested and was denied an honor guard for his father's funeral, because honor guards are only available for police officers, not family members. On or about January 27, 2009, Complainant was also informed that he was unable to work details and overtime while he served as an evidence custodian. The Hearing Officer credited Respondent's testimony that Complainant was serving as an evidence custodian in a "restricted" or "light-duty" capacity. Respondent had a policy that prohibited officers working in a "restricted" or "light-duty" capacity from engaging in extra-duty assignments, including details and overtime.³ The Hearing Officer credited Respondent's witness's testimony that the purpose behind this policy was that a police officer who is restricted from their regular duties should be restricted from working any additional tours of duty.

In addition, Chief Souza also had concerns that paid details and overtime would place Complainant in contact with the public and create potential safety issues. See Dahill v. Police Department of Boston, 434 Mass. 233, 240 (2001) ("The public policies underlying G.L. c. 151B, § 4(16) are clear: to protect handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of employers as avoiding exposing others to significant health and safety risks."); MCAD

seniority requirements of the parties' labor contract.

³ See Joint Exhibit 26, Fall River Police Standard Operating Procedure: Paid Details and Outside Employment.

Guidelines: Employment Discrimination on the Basis of Handicap, 20 MDLR (1998) (providing that the determination of whether there is a risk of substantial harm should be made “on a case-by-case basis”), Gannon v. City of Boston, 476 Mass. 786, 798 (2017) (providing that where an employer defends an adverse employment decision based on the risk to public safety, the employer must make an individualized factual inquiry into the employee’s work and medical history in order to determine whether the employee would pose an unacceptably significant risk of serious injury to himself or others).

The Hearing Officer determined that Chief Souza’s concerns about Complainant working with the public and possessing firearms as a result of his PTSD symptoms were legitimate based upon the evidence in the record. She determined that these concerns were justified by Complainant’s “extreme...reaction” when he was told on January 27, 2009 that he would not be allowed to work details and overtime. Complainant testified that he became “stressed out” and “physically shaken up inside” and left the police station, without clearance from his supervisors, to meet with his licensed clinical social worker. The Hearing Officer credited Complainant’s testimony that he was “suicidal” at the time. Complainant was told that he faced disciplinary action for leaving the station without permission and that he was expected at work the next day. However, Complainant did not return to work the next day, but instead called to say that he would be absent due to “stress.” Based on Complainant’s insubordinate conduct and his demonstrated emotional state during this time, Respondent’s legitimate concerns for the safety of Complainant, and the safety of the public, Complainant was ordered to turn over all of his weapons to Respondent.⁴ The Hearing Officer credited the testimony of Respondent’s witness

⁴ The situation escalated quickly after Complainant was commanded to turn over his weapons, and resulted in a very tense stand-off as Complainant was extremely distraught at being asked to turn over his weapons. Complainant was willing to return Respondent’s firearm, but refused to turn over his Department ID card, access card, license to carry firearms, and his personal weapons. During this stressful situation, Respondent was engaged in conversations with

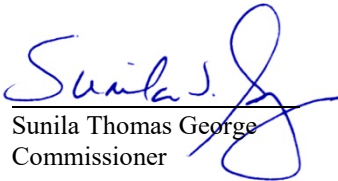
that it was common practice for the Department to take possession of service weapons when officers “go out on stress.” We agree with the Hearing Officer, that given the circumstances, Respondent’s actions were not discriminatory.


In sum, the Hearing Officer did not err in determining that Respondent did not discriminate against Complainant based on his disability.


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 this 2nd day of April, 2019


Sunila Thomas George
Commissioner


Sheila A. Hubbard
Commissioner


Monserrate Quiñones
Commissioner

Complainant’s brother, Complainant’s medical providers, and fellow officers who were friends of Complainant in order to deescalate the situation and encourage Complainant to turn over his weapons. The situation was resolved when a fellow officer and friend of Complainant went to Complainant’s house and obtained his ID card, access card, and license to carry firearms. Complainant also agreed to transfer his personal weapons to a friend. After January 27, 2009, Complainant never returned to work and remained on paid injured-on-duty-leave until his retirement in December 2012.