

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
STEVEN ST. MARIE,
Complainants

v.

DOCKET NO. 04-SEM-01589

ISO NEW ENGLAND, INC.,
Respondent.

ORDER OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman on remand from the Full Commission. The Full Commission's Remand Order followed a decision by the Massachusetts Appeals Court identifying an error of law in the underlying decision and ordering the Commission to conduct a de novo review, consistent with the Court's memorandum and order. Specifically, the Appeals Court determined that the Full Commission erred when it concluded that the Hearing Officer's exclusion of certain evidence, based on a misinterpretation of law, was harmless error. Consistent with the order of the Appeals Court, the Hearing Officer convened a one-day public hearing to take the previously excluded evidence. On May 16, 2017, the Hearing Officer issued a decision reversing her prior decision¹ and concluding that upon consideration of the totality of the evidence, the actions of the Respondent were not the result of an unlawful animus. Upon review of the entire record, including the parties' non-conforming

¹ On March 12, 2008, as a result of a bifurcated hearing, Hearing Officer Betty Waxman issued a decision addressing liability only. The decision on damages was issued on August 14, 2009.

reply and sur-reply briefs to the Full Commission², we conclude the Hearing Officer’s decision on remand is supported by substantial evidence and free from error or law.

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. Massachusetts Comm’n Against Discrimination, 365 Mass. 357, 365 (1974).

It is within the province of the Hearing Officer to make determinations regarding the truth and veracity of witnesses, the reliability of evidence, and the weight afforded to such evidence, when deciding disputed issues of fact. See Starks v. Director of Div. of Sec., 391 Mass. 640, 643-644 (1984). If, upon review, the Full Commission determines that the cumulative weight of the record evidence does not support the Hearing Officer’s decision, and instead substantially supports an opposite finding of fact or inference, the Hearing Officer’s decision may be reversed. See Fitchburg Gas & Elec. Light Co. v. Department of Telecommunications & Energy, 440 Mass. 625, 632 (2004). 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. 804 CMR 1.23 (2020).

SUMMARY OF RELEVANT FACTS AND PROCEDURAL HISTORY

On June 15, 2004, Stephen St. Marie (“St. Marie”) filed a complaint with the Commission alleging that ISO-NE (“ISO”) terminated his employment in retaliation for engaging in activities

² 804 CMR 1.23 (1999) does not provide for the filing of reply and sur-reply briefs.

protected by M.G.L. c. 151B. After efforts at conciliation failed, the matter was Certified and set for public hearing before Hearing Officer Betty E. Waxman (“Hearing Officer”). Prior to the commencement of the public hearing, and after “examin[ing] the terms of the parties’ Settlement Agreement” the Hearing Officer issued an order precluding ISO from relying on certain employment events occurring prior to the execution of the agreement as partial justification for St. Marie’s termination. The settlement agreement provided for, among other things, the release of “any and all differences, disputes, claims, and disagreements” between ISO and St. Marie “regarding [St. Marie’s] employment and the alleged discrimination and retaliation against him.” Relying on Schuster v. Baskin, 354 Mass. 137 (1968), the Hearing Officer ruled that the language of the agreement was sufficiently broad as to release all disputes involving St. Marie’s alleged past performance deficiencies. The specific events precluded by the Hearing Officer’s order involved St. Marie leaving the Control Room despite an approaching snowstorm, and displaying an effigy of his supervisor in a noose.

On June 11, 2007, an evidentiary hearing on liability commenced. At the hearing, ISO’s chief operating officer, Stephen Whitley, testified that he made the decision to terminate St. Marie following a December 2003 power outage, which lasted two hours and affected approximately 300,000 homes on Cape Cod and Southeastern Massachusetts.³ At the time of the outage, St. Marie was the Control Room Shift Supervisor. Also working in the Control Room at the time of the outage was Senior System Operator, Dennis McGroarty (“McGroarty”) and Security Operator, David Cyr (“Cyr”). Because of their involvement in the power outage, McGroarty and Cyr both received a one-day suspension.

³ St. Marie's employment was terminated on January 27, 2004.

In explanation of his rationale for terminating St. Marie, Whitley testified that he made the decision based on St. Marie's alleged failure to exercise leadership in the Control Room during the day of the outage; leaving the Control Room before the outage occurred to attend to routine matters, and; insisting that blame for the outage resided with the lack of specific documentation and technical instruction contained in the published guidance. As an additional basis for St. Marie's termination, Whitley testified that he also relied on two prior performance issues that he believed took place between 2000 and 2001.⁴ The first involved St. Marie leaving the Control Room during an approaching snowstorm for which St. Marie was admonished by his supervisor, Seamus McGovern. The second was the displaying of an effigy of McGovern, with his head in a noose, and left in McGovern's office. St. Marie's second transgression resulted in, a "Code of Conduct" violation and a one-day suspension.

In 2008, the Hearing Officer issued her decision concluding that St. Marie's termination was the result of a retaliatory animus [hereinafter "2008 liability decision"]. Consistent with her pre-hearing ruling, the Hearing Officer excluded evidence of the 2001 incidents for their independent probative value. The Hearing Officer did allow Whitley to testify, however, that the incidents "influenced his state of mind when making the termination decision."

One significant basis for the Hearing Officer's finding of retaliation was the disparate discipline meted out as a result of the power outage in December of 2003. The Hearing Officer explicitly found that ISO's decision to terminate St. Marie's employment, when compared with the one-day suspensions received by McGroarty and Cyr, "was so unduly harsh as to render it suspect and therefore discriminatory."

⁴ In his testimony Whitley was unable to provide the exact dates of the two incidents, placing them sometime between 2000 and 2001. The record indicates that both incidents occurred in 2001. Specifically, the snowstorm incident occurred in March 2001 and the effigy incident occurred in November 2001.

While the Full Commission concluded that the Hearing Officer's exclusion of the pre-settlement incidents was harmless error, the Massachusetts Appeals Court disagreed. Upon order of the Appeals Court, the case was ultimately remanded to the Hearing Officer for both review and the receipt of additional evidence regarding the excluded incidents.

In review of the 2001 snowstorm incident, the Hearing Office found that St. Marie left his duties to secure hotel rooms that could have been secured over the phone. St Marie also unnecessarily visited a satellite location in contravention of a directive of his supervisor and never reported the visit despite receiving concerning information while at the location. In considering the 2001 effigy incident, the Hearing Officer opined that the incident which St. Marie portrayed in the original public hearing as a joke, was actually a matter of grave concern to his supervisor and ISO. Rather than terminating St. Marie's employment, ISO issued him a one-day suspension. Moreover, because ISO considered the effigy incident a Code of Conduct violation, ISO planned to withhold a substantial bonus otherwise payable to St. Marie.

The Hearing Officer also found that in 2002, St. Marie received a performance evaluation for calendar year 2001, that was graded as "needs improvement" in one out of four general categories. The Hearing Officer also noted that St. Marie was "taken to task" for a number of supervisory shortcomings, including those associated with the snowstorm and effigy incident.

Finally, the Hearing Officer also considered the actions taken by Whitley in 2002 to petition the ISO board for an exception to the rule rendering St. Marie ineligible for a substantial bonus. In a letter, originally excluded during the 2008 liability hearing, Whitley wrote that while St. Marie's performance "had been decidedly inadequate" and "termination from employment [had been] a serious option" in response to the effigy incident, the "hope" was that the bonus would incentivize St. Marie's performance.

On May 16, 2017, the Hearing Officer issued her decision on remand [hereinafter “2017 remand decision”] and determined that credible evidence supports the conclusion that the prior excluded incidents “highlight a history of [ISO’s] dissatisfaction with certain shortcomings” it attributed to St. Marie’s performance. “When viewed in the context of [St. Marie’s] disciplinary history . . . the evidence makes clear that [St Marie’s] discharge was not solely for the power outage but was the culmination of a series of professional missteps.” Reversing the 2008 finding on liability, the Hearing Officer concluded that a retaliatory animus was not the determinative basis for St. Marie’s termination.

BASIS FOR APPEAL AND DISCUSSION

St. Marie presents three separate challenges to the Hearing Officer’s Decision on Remand. First, St. Marie argues that the Hearing Officer’s decision to dismiss the complaint is not based on substantial evidence because the testimony and documents presented in the 2017 hearing were duplicative of that offered in the 2007 liability hearing and thus reversal is not warranted. Second, St. Marie argues that the Hearing Officer’s failure to evaluate the scope of the 2003 settlement agreement, prior to concluding that St. Marie’s disciplinary history should have been admitted, was an error of law. Lastly, St. Marie argues that the Hearing Officer erred by considering the one-day suspension imposed by ISO for the “effigy” incident, as justification for the termination, because the incident was a “Code of Conduct” violation which was expressly waived by the 2003 settlement agreement. The Commission examines each basis for appeal in turn.

St. Marie first argues that the limited testimony and documents presented on remand were patently insufficient to support the reversal of the 2008 liability decision. Specifically, St. Marie contends that the evidence presented on remand was narrow in scope and duplicative of that presented in the initial liability hearing. St. Marie continues, arguing that based on the limited evidence presented, the Hearing Officer made “about face” determinations on key findings

contained in the original decision. The findings identified are the impact of the St. Marie's litigation and settlement on the decision to terminate his employment, ISO's recognition that St. Marie's 2002 performance had improved over 2001 thus undercutting the importance of the snowstorm and effigy evidence, and the significance of Whitley's request to the Board that St. Marie receive a lucrative bonus.

St. Marie's alleged infirmities with the Hearing Officer's decision, however, do not hold up under scrutiny. First, St. Marie's argument loses sight of the procedural posture of this matter. The Appeals Court remanded this matter for review based on its finding that the Hearing Officer failed to thoroughly consider the evidence of St. Marie's pre-settlement transgressions in determining liability. In rendering its decision, the Appeals Court directly cited the Hearing Officer's statement, contained in the opinion, explicitly discounting the evidentiary value of the pre-settlement events. In conformity with the Appeals Court's remand order the Hearing Officer took additional evidence, including St. Marie's testimony addressing the events in question. While some of the evidence may have been duplicative, the weight afforded that evidence changed upon remand. Most importantly, previously discounted testimony regarding the ultimate question of the decision-maker's state of mind, at the time the decision to terminate was made, was given full probative value. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 439 (1995) (noting that the ultimate factual question in an employment discrimination case is motive, intent, or state of mind). Here, after fully considering the previously excluded evidence and the additional testimony proffered at hearing, the Hearing Officer made factual findings and drew reasonable inferences different from those contained in her original decision.⁵

⁵ Had the Hearing Officer disagreed with the Appeals Court's conclusion that she discounted the probative weight of St Marie's disciplinary history and Whitley's testimony regarding his state of mind at the time the decision to terminate St. Marie's employment was made, the Hearing Officer could have simply declined to modify her original decision. See Stephan v. SPS New England, Inc., 32 MDLR 223 (2010). (Upon remand from the Superior Court to

Second, in considering the “about face” determinations identified by St. Marie, the Hearing Officer squarely addressed her change in position when she acknowledged that “[a] different picture emerges when the events . . . are considered in light of St. Marie’s full employment history.” Following the 2017 hearing, and based on a totality of the evidence, the seriousness of St. Marie’s prior performance deficiencies came into focus. The Hearing Officer found that while St. Marie’s conduct in connection with the snowstorm was deemed problematic, more concerning was the effigy incident. The Hearing Officer found the incident that St. Marie self-described as a humorous gesture to lighten tension between himself and McGovern was anything but to both McGovern and ISO. The Hearing Officer further found that not only was McGovern not amused by the effigy, he questioned whether the incident was a “threat.” In an email addressed to his staff McGovern stated that his “office was targeted.” When St. Marie was reprimanded for the effigy incident, Operation Manager Donald Gates characterized the conduct as a “serious matter,” that was “unprofessional, immature and displayed a total lack of judgment and leadership skill.” As a result of the incident, not only did St. Marie receive a one-day suspension, but he became ineligible for a substantial bonus. When St. Marie asked, on multiple occasions, that the reprimand be removed from his personnel file, his requests were denied.

Against this backdrop, the Hearing Officer re-examined St. Marie’s 2001 and 2002 performance evaluations. The Hearing Officer noted that St. Marie was “taken to task” in his 2001 evaluation and graded “needs improvement” in one out of four general categories. Performance deficiencies noted in the appraisal included a “lack of respect for operations management authority” and being “slow to act during emergencies, reliant on inexperienced subordinates, not proactive in stressful situations and not consistent in demonstrating professional

accept additional evidence in accord with G.L. c. 30A, § 14(6), Hearing Officer Betty Waxman accepted the additional evidence but declined to modify the decision based on her original analysis.)

conduct.” The Hearing Officer concluded that St. Marie’s “personnel record caused [ISO] to harbor serious misgivings about his supervisory performance prior to the ... power outage” which led to his termination. While St. Marie’s performance improved, as evidenced by his 2002 performance evaluation, the improvement does not negate the seriousness of his prior deficiencies.

Moreover, the Hearing Officer noted that St. Marie ultimately received the bonus he was initially denied because of his misconduct. The person who advocated for St. Marie’s receipt of the bonus was Whitley, the same person who made the decision to terminate St. Marie’s employment. In a letter, which was erroneously excluded from the 2007 liability hearing, Whitley noted that while St. Marie’s performance had been “decidedly inadequate” and that ISO had considered termination as a possible consequence for the effigy incident, ISO had decided to pay St. Marie the withheld bonus in “hope” that it would “serve as an incentive to [St. Marie] to improve [his] performance.” Importantly, ISO’s payment of the bonus occurred during the pendency of St. Marie’s age discrimination complaint and after he refused to join his co-workers in settling the claims with ISO. Based on an assessment of the full evidence presented, the Hearing Officer reasonably inferred that such actions are inconsistent with a retaliatory animus.

Finally, based on the totality of evidence, the Hearing Officer reassessed whether St. Marie’s settlement of the age discrimination claim was the determinative cause of his termination and concluded in the negative. While reaffirming her earlier finding that St. Marie’s settlement of his discrimination claim was a protected activity, the Hearing Officer now reasoned that “[r]ather than exacerbate tensions” the settlement “likely had the effect of promoting good will.” We conclude this was a reasonable inference based on both Whitley’s willingness to advocate for St. Marie’s receipt of the lucrative bonus, during the pendency of his age discrimination case, and ISO’s minimal payment of \$5,000 in resolution of “all age-related litigation between the parties.”

We find the Hearing Officer's decision, on these issues, based on substantial evidence and free from error of law.

Next, St. Marie argues that the failure of any adjudicative body to evaluate the scope of the 2003 settlement agreement, prior to admitting the previously excluded evidence of his disciplinary history, was an error of law. In addressing this argument, the Full Commission points to the Hearing Officer's Order, of February 13, 2007, which makes clear that she evaluated the scope of the settlement agreement prior to her pre-hearing determination excluding certain evidence.⁶ In that Order, the Hearing Officer unambiguously states that in making her ruling, she not only read the submissions of the parties, but "examined the terms of the parties' settlement agreement." Although the Hearing Officer's initial reliance on Schuster, *supra*, to exclude certain evidence may have been misplaced, it does not negate the Hearing Officer's prior evaluation of the scope of the agreement. Contrary to St. Marie's argument there is no error of law.

St. Marie also challenges the Hearing Officer's consideration of the one-day suspension imposed by ISO for the effigy incident as justification for the termination. St. Marie contends that because the effigy incident was a Code of Conduct violation, which was expressly waived by the 2003 settlement agreement, the Hearing Officer's consideration of the resulting discipline was an error of law. St. Marie further argues that the Hearing Officer's error was compounded when she relied on the resulting discipline and concluded that the one-day suspension imposed on Cyr and McGroarty for their involvement in the power outage, was functionally equivalent to St. Marie's one-day suspension for the Code of Conduct violation. St. Marie argues that the Hearing Officer's reliance on this false equivalency resulted in the erroneous finding that it was appropriate to

⁶ The Hearing Officer's February 13, 2017 Order, which is the genesis of the remand in this case, addressed St. Marie's "Motion to Preclude Respondent from Relying on Pre-Settlement Conduct to Justify the Complainant's Termination."

terminate St. Marie for his part in the power outage. St. Marie's argument is not supported by either the facts or the law.

To begin, as discussed *supra*, the Hearing Officer completed an evaluation of the settlement terms prior to her original evidentiary ruling. Regardless, even if the Hearing Officer never assessed the scope of the agreement, there still is no error as a review of the private settlement agreement is not required by M.G.L. c. 151B, § 5. The MCAD is charged by the Legislature with the eradication of discrimination in the workplace and has broad statutory authority to investigate and remediate instances of discrimination in the Commonwealth. M.G.L. c. 151B, § 5. The main object of a proceeding under Section 5 "is to vindicate the public's interest in reducing discrimination in the workplace by deterring and punishing, instances of discrimination by employers against employees" Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549, 563 (2004). An MCAD adjudication is not a vehicle for litigation on behalf of private parties, but an action by an agency with independent authority to vindicate the public interest. As such, the MCAD owes no independent duty directly to a complainant's private interests, but instead, has a broader obligation to the citizens of the Commonwealth. To that end, a private agreement made between the parties, does not preclude the Commission from considering all relevant evidence associated with a claim of discrimination. See 804 CMR 1.05(6) (2020) ("[n]o waiver or other agreement signed by any individual shall affect the Commission's right to investigate any complaint filed before it or to initiate a complaint to enforce the Commonwealth's anti-discrimination statutes). Any other result, would unreasonably restrict the Commission in its ability to serve the public interest by shielding relevant evidence necessary for the fact-finder to determine if any unlawful discriminatory practice occurred.⁷ Cf.

⁷ Nothing precludes a Hearing Officer from affording some weight to the fact an employer acted contrary to the terms of a settlement agreement. While such evidence may have probative value, the evidence is not necessarily dispositive

Joule, Inc. v. Simmons, 459 Mass. 88, 95 (2011) (discussing the effect of arbitration agreements on Commission proceedings and concluding that “even a clear and unmistakable provision in an employment agreement . . . would not affect the MCAD's authority under G.L. c. 151B, § 5.”); In re Mohawk Greenfield Motel Corp., 239 B.R. 1 (Bankr. D. Mass. 1999)(concluding that to protect the public interest in preventing employment discrimination the MCAD’s police powers exempts it from inclusion in mandatory stays during bankruptcy proceedings); Massachusetts Commission Against Discrimination, Eric Grzych & Joseph E. Collins, Esq., Trustee For In Re: Eric Grzych v. American Reclamation Corp. & Vincent Iuliano, 41 MDLR 79 (2019), aff’d 39 MDLR 49 (2017)(discussing the state centric nature of Commission proceedings and the discretionary nature of its authority in the exercise of the public interest as it applies to judicial estoppel).

Turning to the false equivalency argument, St. Marie maintains that it was incumbent on the Hearing Officer to consider the “nature, character, quality, and impact of the disciplinary events” including the culpability of all involved in the power outage before concluding that the discipline meted Cyr and McGroarty mirrored the severity of St. Marie’s discipline for the effigy incident. A reading of the Hearing Officer’s 2008 liability decision and the 2017 remand decision indicates, however, that the Hearing Officer thoroughly considered all necessary facts prior to making her determination. The 2008 liability decision painstakingly sets forth all of the facts relating to the power outage, the responsibility of each individual involved, and the discipline received.⁸ Likewise, the 2017 remand decision sets forth the facts supporting the Hearing

on the issue of discrimination. Cf. Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 687 (2016) (noting that a failure to follow established procedures or criteria **may** support a reasonable inference of intentional discrimination).(emphasis added). The weight afforded is dependent of the specific facts of the case.

⁸ Any contention by St. Marie that the outage was attributable only to Cyr and McGroarty is belied by the findings of the Hearing Officer in the 2008 liability decision. Specifically, the Hearing Officer found that St. Marie “was not blameless. The Hearing Officer further found that “[i]t is, no doubt, true that [St. Marie] should have worked more closely with his team . . ., should have anticipated contingencies . . ., should have anticipated ways of reconfiguring the system. . ., and should not have left the Control Room during an emergency.”

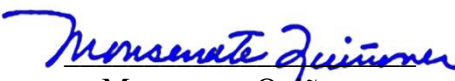
Officer's conclusion that the effigy incident was of grave concern to ISO and the conclusion that the discipline meted was reflective of that concern. Based on the substantial evidence the Hearing Officer properly concluded that when considered in their totality, it was the culmination of St. Marie's professional missteps and not a retaliatory animus that resulted in St. Marie's termination.⁹ The Hearing Officer's decision on remand is supported by substantial evidence and free from error of law.


ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer on Remand from the Appeals Court. 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 the 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 Superior Court Standing Order 1-96. 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 21st day of January, 2021


Sunila Thomas George
Commissioner


Monserrate Quiñones
Commissioner


Nedy Jean-Francois
Commissioner

⁹ To the extent that St. Marie argues that in order to consider the equivalency of the meted discipline, the Hearing Officer was required to evaluate the soundness of ISO's internal disciplinary policy, St. Marie's argument fails. As noted by the Supreme Judicial Court in Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34, 45 (2005), in assessing discrimination cases, the task is not to evaluate the soundness of the decision-making but to ensure it does not mask discriminatory animus.