COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
MARY JANE MCSWEENEY,

Complainants,

v. DOCKET NO. 07-BEM-01947

THE TRIAL COURT OF MASSACHUSETTS,

Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Judith E. Kaplan in favor of Complainant Mary Jane McSweeney against Respondent Trial Court of Massachusetts ("Trial Court") for gender discrimination in violation of M.G.L. c. 151B, §4 (4). Complainant alleged that the Trial Court discriminated against her when Judge Robert A. Mulligan, in his role as Chief Justice for Administration and Management of the Trial Court, selected an outside male candidate over her for the position of Operations and Maintenance Supervisor of the Plymouth Courthouse, despite the hiring panel's unanimous choice that she be promoted to the position. The Hearing Officer found Respondent liable for gender discrimination, determining that Respondent's articulated reasons for failing to promote Complainant were pretextual. The Hearing Officer concluded that unconscious discriminatory gender bias was an important ingredient in Respondent's hiring decision as evidenced by the disparate treatment of male

comparators. The Hearing Officer awarded Complainant damages for back pay in the amount of $30,058.29, for front pay in the amount of $126,469.07 and for emotional distress in the amount of $50,000. Respondent has filed a Petition for Review to the Full Commission appealing the decision below.

SUMMARY OF FACTS

Complainant began working for the Trial Court in 1989 as Senior Administrative Assistant/Environmental Services Manager in the Court Facilities Bureau ("CFB"). In 1993, Complainant was promoted to Facilities Manager, a position that was reclassified in 2002 to Regional Facilities Manager. In this position, Complainant oversaw seven courthouses in Suffolk County. Among other duties, her responsibilities included management of custodians, technicians, buildings supervisors and facilities managers. She also supervised painters, carpenters, electricians, plumbers and security personnel and interacted with the judges. Complainant was a Regional Facilities Manager when she applied for the newly-created senior management position of Operations and Maintenance Supervisor ("O&M") of the Plymouth Courthouse. The Plymouth Courthouse was a new state-of-the art facility nearing completion in 2006. Complainant had knowledge of the technical aspects of facilities and was trained in operating a computer based HVAC system. While she had no hands-on experience with technical work, there was a Building Systems Manager responsible for the technical work in each region.

Respondent was scheduled to open two new state-of-the art courthouses in 2006, one in Worcester and one in Plymouth. As early as 2001, Complainant provided input and written memoranda describing requirements for facilities management at the Plymouth Courthouse. She attended numerous construction meetings regarding the Plymouth Courthouse. In October of

2006, she interviewed and recommended for hire a Building Systems Manager (Joe Renzi) and Assistant Building Systems Manager (Mark Ronan) for the new Plymouth Courthouse. In January of 2007, she provided a staffing plan recommendation for positions to be hired by Respondent to serve under the O&M for the Plymouth Courthouse.

Both the Worcester and Plymouth Courthouses included sophisticated operational systems and Respondent sought individuals for both courthouses to serve as O&Ms who could provide senior management skills for the operation and management of the new buildings. As part of the vetting process of applicants, Chief Justice Mulligan instructed his Chief of Staff, Robert Panneton, to ensure that a representative of the Division of Capital Asset Management ("DCAM") was involved in the hiring process. Panneton instructed Stephen Carroll, the CFB's Director, to include a DCAM representative on both interview panels.

In February 2006, CFB posted the position of O&M for the Worcester Courthouse. Carroll selected a panel of three people to review applications, interview candidates and make a recommendation for the position: himself, DCAM employee Tom Tagan and Statewide Building Systems Manager Tony Granger. The panel recommended Joseph Indrisano, an internal candidate, who had worked for the Trial Court since 1980 and was a Regional Facilities Manager for several courthouses in Worcester. Indrisano came to the Trial Court with experience in general construction, painting and general repairs. He had served in the Marine Corps. as a telephone lineman and took technical courses over the years to become an industrial arts teacher, but did not obtain his degree. He held no technical licenses or certifications in HVAC or other highly technical areas. Judge Mulligan testified he had reservations about the Worcester hiring process, but he did not conduct a review of the Worcester O&M hiring process. Instead, after conferring with Panneton, Judge Mulligan accepted the recommendation of the

hiring panel and selected the male, internal candidate - Indrisano. Licensed electricians, plumbers and carpenters for the courthouse report to Indrisano in his role as the O & M.

Respondent posted the O&M position for the Plymouth courthouse in October 2006. Carroll selected a three-person hiring panel consisting of Ellen Bransfield, a long-time Land Court administrator, Robert LaRocca, the CFB's Operations Manager to whom the new O&M would report and Statewide Building Systems Manager Tony Granger (who had been part of the Worcester O&M panel) for his technical experience. There was no representative from DCAM on the panel.[1] Complainant was the only internal candidate and the only female candidate for the position. Complainant scored the highest during interviews, with Ronald DePesa, the candidate who was ultimately selected by Judge Mulligan, scoring third. The panel submitted the names and ranking of the top three candidates to Carroll, who referred the names to Panneton to pass on to Judge Mulligan. The recommendation was accompanied by a memorandum explaining that Complainant had scored the highest and was the panel's unanimous choice for the position.

Upon receiving Carroll's memorandum and recommendation, Panneton expressed some concern that no representative from DCAM was on the panel, and that Complainant knew all the hiring panel members well. Panneton reported this to Judge Mulligan, who stated he was skeptical about the fairness and objectivity of the process. Judge Mulligan then asked DCAM Deputy Commissioner Michael McKimmey to review and evaluate the qualifications of the top five candidates. McKimmey and Panneton met and reviewed the applications of the five candidates. McKimmey told Panneton that Complainant was a highly qualified career employee of the trial court, who had impressed colleagues in view of the letters of recommendation[2]

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[1] Carroll had no recollection of Panneton instructing him to include a DCAM representative on the panel. (Decision of the Hearing Officer, Finding of Fact, ¶46).

[2] One of the recommendations was from Judge Coffey who wrote, Complainant's "admirable traits including a superior work ethic, personal integrity, strong leadership abilities...have earned her the respect and support of the

attached to her application. However, McKimmey ranked DePesa first because of his credentials and educational background and he ranked Complainant second, noting that she had the requisite experience and was a "known quantity" as an internal candidate. Mulligan then interviewed the top five candidates himself and selected DePesa, citing his technical experience and educational background. Mulligan testified that Complainant did not have a relevant degree or the technical experience to handle the position and to deal with hands-on problems. DePesa and Carroll's testimony, however, identified the presence of specialized staff which alleviated the need for technical certifications. DePesa testified that when he commenced the O&M job, a Building Systems Manager had been hired who was a master plumber, a master pipe fitter, a pipe welder and who was state certified as a refrigeration technician and in the operation of fire sprinklers. In addition, the Assistant Building Systems Manager had been hired.[3] Carroll testified that an electrician and an HVAC technician had also been hired for the Plymouth courthouse and an engineer from a nearby courthouse was available as needed.

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. 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); G.L. c. 30A.

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to

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people she supervises and the many judges she interacts with on a daily basis..."

[3] The Building Systems Manager and Assistant Building Systems Manager had been interviewed and recommended by Complainant for hire.

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). The Full Commission's role is to determine, inter alia, whether the decision under appeal was rendered on unlawful procedure, based on an error of law, is supported by substantial evidence, or is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

Respondent challenges the Hearing Officer's conclusion that Complainant proved Respondent's reasons for failing to hire her were a pretext for discrimination and that unconscious gender bias motivated Respondent's hiring decision. Respondent frames three issues on appeal: that the Hearing Officer erred in finding (1) that Indrisano was similarly-situated to Complainant for purposes of establishing pretext, (2) that Judge Mulligan was involved in the hiring process for the Plymouth O&M position in a disparate fashion and (3) that the Hearing Officer's finding of unconscious bias is supported by substantial evidence.

Absent direct evidence of discrimination, Complainant's case is analyzed under the *McDonnell-Douglas* burden-shifting framework. We focus on the final stage of pretext in this appeal. Respondent's articulated reasons for failing to hire Complainant were that Judge Mulligan did not believe she was the most qualified candidate and because he had concerns that the selection process in Plymouth might appear to be rigged in favor of Complainant because she was known to the hiring panel. He claims to have added two additional levels of review to the process, including his own interviews, because he disapproved of Carroll convening a hiring panel without a DCAM representative and was concerned about promoting an insider. The

Hearing Officer found that Complainant was highly qualified for the job, was the top choice of the hiring panel, and that the Judge approved the internal male candidate for promotion to the Worcester O & M position without any additional review. Further, the Hearing Officer determined that Judge Mulligan's disparate treatment of the internal male candidate with experience nearly identical to Complainant was likely colored by unconscious gender bias, which affected the Judge's perception of Complainant's ability to perform a managerial job that is traditionally held by men.

There is no requirement that Complainant produce direct evidence that Respondent acted with discriminatory intent, motive or state of mind. To prove pretext, Complainant need only show disparity in treatment between herself and a similarly-situated peer absent a credible reason for the disparate treatment. Unlawful discrimination may result from actions by employers that are based on unconscious bias or stereotypes about members of protected classes. See Thomas v. Eastman Kodak Company, 183 F.3d 38, 61 (1st Cir. 1999), Bulwer v. Mount Auburn Hospital, 6 N.E.3d 24, 2015WL10376073 (2016). There was sufficient evidence for the Hearing Officer to conclude that the Respondent's articulated reasons for not promoting her were pretextual and that the denial of Complainant's promotion was unlawful gender discrimination.

Respondent argues that the Hearing Officer erred in concluding that Indrisano was similarly-situated to Complainant for purposes of establishing pretext. We reject the argument that Indrisano is not an appropriate comparator. With respect to similarly situated individuals outside the protected class, the comparator's circumstances need not be identical to those of Complainant; they only need to be substantially similar in all relevant aspects concerning the adverse employment decision. Trustees of Health & Hospitals of the City of Boston v. MCAD 449 Mass. 675, 682 (2007); Matthew v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 129

(1997) *quoting* Dartmouth Review v. Dartmouth College, 889 F. 2nd 13, 19 (1st Cir. 1989) The comparators must be roughly equivalent and the "cases fair congeners." Id.

Respondent contends that Indrisano's qualifications were significantly different from Complainant's, that he and Complainant were not in the same applicant pool and that .Indrisano's interview panel included a DCAM representative. We do not believe that these facts outweigh other evidence establishing the similarity of the promotion circumstances for the O&M positions in Worcester and Plymouth.

We conclude that there is substantial evidence to support a finding that Indrisano was a fair comparator. He and Complainant were applying for the same job (O&M), both in new state of the art courthouses, both were internal candidates, both were qualified for the job and neither had specialized technical credentials in the areas required to operate a building with sophisticated systems. Indrisano and Complainant had similar on the job experience as Regional Facilities Managers within the Trial Court system responsible for the oversight and operation of a number of courthouses, and had general knowledge of the technical aspects of facilities management. Both would have licensed electricians, plumbers and carpenters working under them at their respective courthouses.

Respondent also argues that Judge Mulligan did not insert himself in the Plymouth hiring process in a disparate fashion. The Hearing Officer found that the hiring process for both positions was similar with Carroll assembling three-person panels consisting of one person from outside the chain of command to review applications, interview candidates and make recommendations for Carroll to review and to refer to the Judge for his ultimate approval. Statewide Building Systems Manager Granger sat on both panels, lending his technical experience and also his experience from the Worcester hiring process. The only distinction in

the process was the absence of a DCAM representative on the panel that interviewed Complainant, a difference that was cured by having a DCAM person, McKimmey, review the top choices of the panel and report his findings to the judge. Upon review, McKimmey indicated that Complainant was a highly qualified career employee of the trial court with "great experience" and a "known quantity."

The fact that Judge Mulligan did not conduct a review of the hiring process in Worcester despite his stated reservations with the panel's choice of an internal candidate without technical credentials (the purported reason for rejecting Complainant as O&M), supports the Hearing Officer's conclusion that he treated the Plymouth process differently. Judge Mulligan claimed to have been concerned about the perception of patronage because the Plymouth interview panel knew and liked Complainant; however there was never a suggestion that Complainant was not qualified for the position and she was highly respected for her abilities within the court system. Moreover, Judge Mulligan did not undertake a review of the selection process in Worcester, even though the successful candidate was also an internal candidate.

Rather than accept the hiring panel's recommendation of Complainant as its top choice and McKimmey's validation of Complainant as qualified, Judge Mulligan went on to interview the finalists himself, and appointed a male external candidate to the position. The fact that the Judge did not conduct any additional review of the hiring for the Worcester O&M position despite his stated reservations with the process supports the Hearing Officer's conclusion that he treated the process differently when a female was the preferred candidate. The fact that the Judge inserted himself in the Plymouth process in a disparate fashion is supported by substantial evidence in the record, which supports the Hearing Officer's finding of pretext and the operation of unconscious gender bias. The Hearing Officer had sufficient

evidence to conclude that the female candidate was held to more rigorous standards than her male counterpart.

The fact that Complainant was one of only two females (of seven) who served as Regional Facilities Managers for the Trial Court and was the only female candidate for the Plymouth O&M position also suggests that gender bias was at play. (See, Decision of the Hearing Officer, Findings of Fact, ¶ 11; Joint Exhibits 17, 18). There were also no female candidates for the Worcester O&M position. Courts have found this fact, where an individual is the only woman in a pool of candidates, significant in findings of discrimination. See Price Waterhouse v. Hopkins, 490 U.S. 228, 236 (1989); see also Thomas v. Eastman Kodak, 183 F.3d 38, 65 (1st Cir. 1999) (fact that plaintiff was the only black Customer Service Representative in office may have increased likelihood that she would be treated more harshly). This phenomenon suggests that where there is only one female in the pool of applicants, this increases the likelihood that the decision maker's subjective analysis was motivated by unconscious gender bias. In this case, Complainant's candidacy for the O&M position was supported by unequivocal recommendations from several individuals within the Trial Court. Carroll testified that the position would be a natural career move for her and that he had no reservations about her qualifications or ability to perform the job. Complainant submitted letters of recommendation from three judges and two clerk magistrates, all of whom had worked with her in her role as Regional Facilities Manager, and all of which were discounted by Judge Mulligan. His skepticism of recommendations does not negate the probative value of this evidence. The fact that Judge Mulligan downplayed Complainant's management strengths and experience with the court systems without personal knowledge of her abilities or work[4] despite glowing

[4] Judge Mulligan specifically recognized Complainant's mentoring and training skills at an employee excellence award ceremony in 2006, where Complainant was one of 16 employees selected for awards from among 7,000 trial

recommendations of her abilities, while elevating the male outsider's technical credentials, supports the Hearing Officer's determination that unconscious gender stereotyping was a factor in the decision making process. We conclude that all of these factors are sufficient to support the conclusion of the Hearing Officer that the reason proffered by Judge Mulligan for the decision was actually a pretext. We thus find no error in the Hearing Officer's determination and affirm her decision on liability.

With respect to damages, however, the Hearing Officer failed to discount the front pay damage award of $126,469.07 to the present discounted value of the income stream. Although Respondent did not challenge the award of damages or affirmative relief ordered by the Hearing Officer, it is the Full Commission's obligation to review the Hearing Officer's decision to determine whether the rights of the parties have been prejudiced due to an error of law. An award of damages for front pay must be reduced to present value. Conway v. Electro Switch Corp., 402 Mass. 385, 388 n.3 (1988). The Hearing Officer should have applied a discount rate to the front pay award to reflect present value. See, Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 104 (2009) (approving jury instructions on front pay award where award was properly discounted to present value); Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983) (remanding case for consideration as to discount rate to reduce award for loss of future earnings to present value under Longshoremen's and Harbor Worker's Compensation Act). Since neither party provided testimony on the appropriate discount rate, we take notice of and apply the discount rate of 5.7% which was determined after the review of substantial testimony in another Commission proceeding. St. Marie v. ISO New England, Inc., 31 MDLR 123 (Aug. 14, 2009).

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court employees. (Decision of the Hearing Officer, Findings of Fact ¶29).

The application of this discount rate reduces Complainant's front pay award to $97,886.28.[5]

ATTORNEYS' FEES AND COSTS

Having affirmed the Hearing Officer's liability decision in favor of Complainant, we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorney fees and costs. See M.G.L. c. 151B, § 5. Complainant seeks attorneys' fees in the amount of $54,600.00 and costs of $5,307.35. Respondent filed an Opposition to Complainant's Petition for Attorney's Fees enumerating several reasons why Complainant's attorney's fees should be reduced.

First, Respondent asserts that 17 hours for preparation of the joint prehearing memo is excessive because Respondent's counsel drafted most of the relevant portions of the memo, including the Stipulated Facts, Contested Issues of Fact and Law and Proposed Joint Exhibits. Second, Respondent asserts that the time Complainant's attorney billed for attendance at the deposition of Stephen Carroll on May 19, 2009 is excessive because he was defending the deposition only. Third, Respondent argues that 3.10 hours on August 11, 2010 to review the deposition of McKimmey is excessive because the deposition's duration was 1 hour and 15 minutes and the length of the transcript is only 41 pages. Fourth, Respondent contends that

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[5] $PV=FV/(1+i)^n$. FV (future damages = 126,469.07) is the amount due over *n* years (August 15, 2010 until March 30, 2015 = 4.67 duration of front pay award) and *i* is the market interest rate (5.7%). Using the method outlined in Jones & Laughlin Steel Corp., at 537, n. 21 and the Hearing Officer's findings, the calculation is:

$PV=126,469.07/(1+.057)^{4.625}$

$PV=126,469.07/(1.057)^{4.625}$

$PV=126,469.07/1.292$

$PV=97,886.28$

charging for the preparation and service of subpoenas for 10 trial witnesses is duplicative and excessive because preparing subpoenas does not require legal expertise and the charge for service of the subpoenas is included in Complainant's costs. Fifth, Respondent argues that 70 hours to review the CD's from public hearing and to prepare Requests for Findings is excessive because it does not reflect legal work commensurate with the time billed. Lastly, Respondent asserts that Complainant should not recover fees for drafting an opposition to Respondent's Motion in Limine because the motion was straightforward and was allowed.

The determination of what constitutes a reasonable fee is within the Commission's discretion and relies upon consideration of such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. In determining what constitutes a reasonable fee, the Commission has adopted the lodestar method for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). This method requires a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by an hourly rate which 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 warranted depending on various factors, including the complexity of the matter.

The Commission carefully reviews the Complainant's petition for fees and does not merely accept the number of hours submitted as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass. 1984). Compensation is not awarded for work that appears to be duplicative, unproductive, excessive or otherwise unnecessary to 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 (1st Cir. 1984). Only those hours that the Commission determines were expended

reasonably will be compensated. In determining whether hours are compensable, the Commission considers contemporaneous time records maintained by counsel and reviews both the hours expended and the tasks involved.

At the outset, the expertise of Attorney Gregory Howard is supported by his affidavit and his hourly rate of $175 is well within the rates customarily charged by attorneys with comparable experience and expertise in such cases. Attorney Howard's time records are sufficiently detailed to support the number of hours of legal work performed. He seeks $54,600 for 312 hours of legal work performed. However, we concur that the fee award should be reduced for one item, that being preparation of the pre-hearing memorandum. We conclude that 17 hours to prepare this memorandum, particularly where Respondent's attorney asserts that she prepared the majority of the relevant portions, is excessive. We determine that a deduction of ten hours is appropriate and reimburse Complainant for seven hours of work on this memo.

Attorney Howard's billing records indicate that he spent two hours "preparing and serving" ten subpoenas at a cost of $397 for service. Respondent's objection that these functions are duplicative is without merit because it confuses costs of service with the time allotted for attorney work on the task. While preparing subpoenas could more properly be defined as administrative/clerical work, rather than legal work, since Complainant's attorney's hourly fee of $175 is quite low, we determine that the reimbursement for his time is justified. We conclude that all of the other objections are without merit. Attending the deposition of a major witness for Respondent was appropriate and we see no reason why Complainant's counsel should bill at a lower rate for his attendance because he was not conducting the deposition. Responding to Motions is also a necessary legal function and appropriate advocacy. Finally we conclude that the amount of time spent on reviewing the record and preparing the post hearing brief is justified

since the hearing lasted for eight days and there were multiple witnesses. We do not find 70 hours excessive for this task given the length of the hearing and breadth of the issues.

Attorney Howard also submitted a detailed statement of expenses incurred in this case in the amount of $5,307.35. We grant these costs as they are reasonable and adequately documented. Thus we award Complainant $52,850.00 for attorney's fees, which includes the aforementioned deduction, and costs in the amount of $5,307.55. The award for attorney's fees and costs shall include interest at the rate of 12% per annum from the date the fee petition was filed until such time as payment is made.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer in its entirety except with respect to the front pay award, which is reduced to $97,886.28. We also award attorney's fees and costs with interest as detailed above. 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.

Failure to file a petition in court within thirty (30) days of receipt 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 31st day of March, 2016.

Jamie R. Williamson
Chairwoman

Sunila Thomas George
Commissioner

Charlotte Golar Richie
Commissioner