

**COMMONWEALTH OF MASSACHUSETTS  
COMMISSION AGAINST DISCRIMINATION**

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MASSACHUSETTS COMMISSION  
AGAINST DISCRIMINATION and  
EMILE MONT-LOUIS,  
Complainants

DOCKET NO. 11-BEM-00510

v.

CITY OF CAMBRIDGE,  
Respondent

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**DECISION OF THE FULL COMMISSION**

This matter comes before us following a decision of Hearing Officer Eugenia M. Guastaferrri in favor of Respondent, City of Cambridge (“the City”). Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for discrimination based on age in violation of M.G.L. Chapter 151B §4(1C), or retaliation in violation of M.G.L. Chapter 151B §4(4). 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 Guinn 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 has appealed the decision on the grounds that 1) the Hearing Officer’s finding that Complaint failed to perform his assigned duties and falsified timesheets was in error; 2) the Hearing Officer’s finding that Complaint violated attendance rules was in error; 3) the Hearing Officer failed to consider that Complainant’s termination occurred under circumstances that would raise a reasonable inference of discrimination; 4) the Hearing Officer’s finding that Complainant did not perform his job adequately was in error; and 5) the Hearing Officer’s finding that there was no evidence of pre-textual discrimination was in error. 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). We address each of Complainant's grounds for appeal in turn.

**1. Assigned Work and Timesheets**

Complainant, a former Cross-Connection Inspector for Cambridge, appeals the decision on the grounds that the Hearing Officer erred in finding that Complainant failed to perform his assigned work and falsified timesheets. This argument distorts the Hearing Officer's findings.

The Hearing Officer did not make a finding that Complainant "failed to perform his assigned work and falsified timesheets." She did find that he failed "to follow instructions that he return to the office for additional assignments rather than sit in his vehicle" and that Complainant's "refusal to comply with the Water Department's directives regarding performance of cross-connection functions had a negative impact on the effectiveness of the cross-connection program." She also found that "Complainant was observed taking off more than two hours a day for non-work activities." She also found that Respondent concluded that "Complainant made matters worse by not being truthful about his time when confronted..." These findings are not equivalent to a determination that Complainant falsified time sheets, but are supported by substantial evidence.

Complainant argues that prior to August of 2010 Complainant had never been reprimanded and had completed all the tests that he was assigned; however, Complainant fails to acknowledge the Hearing Officer's finding that Respondent set performance

expectations at a higher level in November of 2009 than had applied since Complainant's hire in 2002. Cambridge was issued a Notice of Non-Compliance ("NON") by the Massachusetts Department of Environmental Protection in August of 2009. In response to the NON, in November of 2009, Respondent notified all the Cross-Connection Inspectors that the City was going to increase supervision and structure to improve the entire program. This written notice confirmed work assignments starting at 7:00 a.m. each day. Prior to these changes the Cross-Connection Inspectors were assigned work in six month blocks and there was little to no oversight. Following a verbal warning to Complainant for unsatisfactory work and insubordination documented on August 17, 2010, Respondent placed all Cross-Connection Inspectors under surveillance. The private investigation company reported that in September and October of 2010, Complainant was observed in violation of his required work hours, taking extended lunches and breaks, doing personal shopping during work hours, and not arriving at his work site at his designated start time. Based on the report, the City reached the conclusion that Complainant was sometimes working less than 75% of the hours for which he was being paid.

It is well established that the Hearing Officer is in the best position to judge the credibility of witnesses and to make determinations regarding the weight to give such evidence. Ramsdell v. W. Massachusetts Bus Lines, Inc., 415 Mass. 673, 676 (1993) (recognizing that credibility is an issue for the Hearing Officer and that fact-finder's determination had substantial support in the evidence). Complainant's disagreement with the Hearing Officer's determinations does not mean that the Hearing Officer misinterpreted or misconstrued the evidence presented, even if there is some evidentiary support for that disagreement. Id. (review requires deferral to administrative agency's fact-finding role). The

Full Commission defers to the determinations of the Hearing Officer. See Guinn 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). This standard of review does not permit us to substitute our judgment for that of the Hearing Officer in considering conflicting evidence and deciding disputed issues of fact. We will not disturb the Hearing Officer's findings of fact, where, as here, they are fully supported by the record.

The Hearing Officer found that the City reached the conclusion that the Complainant was not working all the hours for which he was being paid to work. In making this determination, the Hearing Officer credited the testimony of the City's Personnel Director, who conducted the disciplinary hearing concerning Complainant's behavior on dates when Complainant was observed during work hours apparently failing to perform services for the City. A Hearing Officer is in the best position to credit or not credit witnesses and weigh the significance of evidence presented at the hearing, including the "right to draw reasonable inferences from the facts found." Ramsdell, 415 Mass. at 676. The Hearing Officer credited the testimony of the City's Personnel Director that he knew Complainant was being paid for a forty hour work week even though he did not review any specific timesheets. The report of the disciplinary hearing indicates that despite evidence from the private investigators' report, Complainant denied any wrongdoing, and gave conflicting explanations for his failure to be at a work site at 7:00 a.m. and for his extended lunches. The determination that Complainant was observed working less than a full work day while paid for working forty hours in that same week was one of the legitimate non-discriminatory reasons for Respondent's adverse action was a reasonable inference that the Hearing Officer reached

from the evidence. Thus, we will not disturb the Hearing Officer's factual findings where, as here, they are supported by credible testimony in the record.

## **2. Attendance Rules**

Complainant appeals the decision on the grounds that the Hearing Officer erred in finding that “[t]he City’s attendance rules require employees to be at the work sites and ready to work at the beginning of their regularly assigned work hours and to remain on the job until the end of their assigned work hours, unless a supervisor has been consulted[,]” because there is insufficient evidence to support this conclusion. The Complainant argues that the Hearing Officer cited to the Employee Manual and the testimony of the City’s Personnel Director and disregarded the testimony of the Managing Director of the Water Department.<sup>1</sup> Where there is conflicting evidence, the Hearing Officer is charged with the responsibility of weighing the conflicting evidence and credibility of witnesses to make determinations and findings of fact they are in the best position to make these determinations. School Committee of Chicopee, 361 Mass. at 354.

The Complainant further argues that the schedule sent out by the Managing Director of the Water Department in the November of 2009 Memorandum superseded the Employee Manual that delineated work hours and a half hour lunch, stating that the new schedule did not carve out specific time or limitations regarding lunch and only called for Complainant to complete tests between 7:00 a.m. and 12:00p.m..<sup>2</sup> We find that the Hearing Officer’s finding that City employees were to be at their work site and ready to work at the beginning of their

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<sup>1</sup> Although the Managing Director of the Water Department testified that he did not believe that the policy requiring an employee to be at his job site, which in the case of the Cross Connection Inspectors was a test site, by 7:00 a.m. was in writing anywhere, he stated that Complainant was verbally advised of this requirement dozens of times. (Public Hearing, April 13, 2015 Transcript. pp. 114-115).

<sup>2</sup> This argument is unsupported by the record as the memorandum did not state that it superseded the Employee Manual; there was nothing in the memorandum which contradicts the hours and rules set forth in the Employee Manual; and this argument leaves out the requirement that Complainant was supposed to be conducting surveys from 12:00 p.m. to 2:30 p.m. then return to the office.

regularly assigned work hours and that employees were allotted a half-hour lunch break was supported by substantial evidence in the record. Complainant's disagreement with the Hearing Officer's determinations does not mean that the Hearing Officer ignored contradictory evidence or that her determinations were faulty. We will not disturb the Hearing Officer's findings as they are supported by substantial evidence in the record.

### **3. Reasonable Inference of Discrimination**

Complainant appeals the decision on the grounds that the Hearing Officer's ruling that Complainant did not demonstrate that Respondent hired someone significantly younger to replace him was in error. Complainant argues that the Hearing Officer did not consider whether Complainant was terminated under circumstances that lead to a reasonable inference of discrimination. The Hearing Officer recognized that to establish a prima facie case of unlawful termination based on age discrimination the Complainant must "demonstrate that he was terminated under circumstances that give rise to a reasonable inference that his age was the cause of his termination, **or** that he was replaced by an individual who is at least five years younger than he was at the time." Sullivan v. Liberty Mutual Insurance, Co., 444 Mass. 34 (2005) (emphasis added); Knight v. Avon Products, Inc., 438 Mass. 413 (2003). The Hearing Officer did conclude that Respondent contracted with a private company to perform the Cross-Connection Inspectors' roles, and that Complainant was not replaced.

However, the Hearing Officer's decision also establishes that she did not find that the circumstances surrounding Complainant's termination gave rise to a reasonable inference that his age was the cause of his termination. For example, the Hearing Officer states that, "Complainant's allegations of age discrimination also conveniently ignore the fact that he was 58 years old at the time he was hired by the City and that those who participated in the

decision to terminate his employment were over the age of 60 and in the protected age category.” She cited to case law recognizing that “it is improbable that the same persons who hire or promote someone already in an older age bracket will suddenly develop an aversion to older people.” See Dziamba v. Warner & Stackpole, LLP, 56 Mass. App. Ct. 397, 406 (2002). The fact that the Hearing Officer’s discussion of the prima facie case states that Complainant did not demonstrate that Respondent hired someone significantly younger to replace him, while true, does not constitute an error as her decision also considered whether reasonable inferences that age was a determinative factor could be drawn from the evidence.

#### **4. Satisfactory Job Performance**

Complainant appeals the decision on the grounds that the Hearing Officer’s ruling that Complainant did not perform his job adequately was in error. The Hearing Officer’s determination that the Complainant was not performing his job at an acceptable level was supported by substantial evidence. Complainant misconstrues the Hearing Officer’s findings when he states that the basis for the Hearing Officer’s ruling was simply that Complainant failed to meet performance expectations set forth in the November 2009 Memorandum by completing significantly fewer tests that he was assigned. In determining that Complainant was not performing his job at an acceptable level the Hearing Officer found that the significantly fewer tests completed by Complainant “gave Respondent good reason to suspect he was not working at a full capacity nor working his required hours.” She further discusses Complainant’s “uncooperative attitude when confronted with not performing up to expectations and not following department directives.” She also considered evidence of Complainant’s inappropriate response to his superiors when approached regarding the “precipitous drop in the number of tests he performed”; and the surveillance report that



“contained irrefutable evidence that Complainant was not working the required hours, was not on the job-site at the beginning of the work day, took extended and excessive lunch breaks, and sometimes did not perform tests in the afternoon.” Her decision relied upon more than Complainant failing to meet the November 2009 performance expectations.

Complainant cites to Igartua v. City of Newton, et al., 11 Mass. L. Rptr. 188 (Mass.Super. 2000) as “precedent” that when an employer does not have a system of performance appraisal they cannot demonstrate that an employee failed to perform at an acceptable level. However, even if a Superior Court case considering a summary judgment motion could be considered “precedent,” Complainant misconstrues the holding in Igartua. The Superior Court held that where the City of Newton had no system of performance appraisal and failed to terminate the employee, whether she was performing her job at an acceptable level remained a genuine issue of material fact to be determined by a trier of facts, precluding summary judgment. In contrast, in this case the Complainant was terminated and the Hearing Officer made the determination that Complainant could not establish that he was performing his job at an acceptable level. The City of Cambridge provided evidence through its Employee Manual of unacceptable activities which may result in dismissal, as well as evidence of such unacceptable activities. The Hearing Officer, the trier of facts, weighed the evidence presented at the hearing and determined that Respondent presented persuasive evidence that Complainant was not performing his job at an acceptable level. We do not disturb this finding.

##### **5. Pre-Textual Discrimination**

Complainant appeals the decision on the grounds that the Hearing Officer’s ruling that there was no evidence of pre-textual discrimination is in error and ignores overwhelming

evidence of pre-text. In support of this argument Complainant asserts that pre-textual discrimination was shown as Respondent fabricated violations of non-existent rules; Respondent lied about the timing of their decision to terminate Complainant; and Complainant abided by the requirements imposed by the Massachusetts Department of Environmental Protection's NON.

When a Complainant has established a prima facie case of unlawful discrimination, once a respondent has articulated legitimate, non-discriminatory reasons for their conduct, in an indirect evidence case a complainant must show that the respondent's reasons are a pre-text for unlawful discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The complainant must prove "by a preponderance of the evidence that Respondent's facially proper reasons given for its actions...were not the real reasons, but that Respondent acted with discriminatory intent, motive or state of mind." Lipchitz v. Raytheon, 434 Mass. 493, 504 (2001)(internal citation omitted). This is a burden of persuasion. See Blare v. Husky Injection Molding Sys. Boston, Inc., 419 Mass. 437, 446 (1995)("[T]he plaintiff may, and more often than not must, carry his burden of persuasion with circumstantial evidence that convinces the fact finder that the proffered explanation is not credible."); Lipchitz v. Raytheon Company, 434 Mass. 493, 500-501 (2001)("[I]f the fact finder is persuaded that one or more of the employer's reasons is false, it may (but need not) infer that the employer is covering up a discriminatory intent, motive or state of mind"). In this case the Hearing Officer was not persuaded.

The Hearing Officer found that Complainant was in violation of the rules of his employment, a finding which was supported by substantial evidence. The Hearing Officer credited the testimony of the Managing Director of the Water Department that Complainant

was told on dozens of occasions that he was required to be at his job, which was a test site, by 7:00 a.m.; the Employee Manual that states employees are required to be at their work sites and ready to work at the beginning of their regularly assigned work hours and to remain on the job until the end of their assigned work hours except for approved breaks and lunch; Complainant's own testimony that he was allowed a half hour for lunch; and the surveillance evidence that documented Complainant's violations of these policies. As previously noted a Hearing Officer is tasked with weighing the significance of the evidence presented. Where there is conflicting evidence, the Hearing Officer is charged with the responsibility of weighing the conflicting evidence and credibility of witnesses to make determinations and findings of fact, as they are in the best position to make these determinations. School Committee of Chicopee, 361 Mass. at 354.

The Hearing Officer was also unpersuaded by Complainant's argument that Respondent lied about the timing of the decision to terminate Complainant. The Hearing Officer found the testimony of the City's Personnel Director, Michael Gardner, to be credible. Mr. Gardner testified that at the end of the disciplinary hearing on December 16, 2010, he determined that Complainant could no longer perform services for the City. Public Hearing April 14, 2015 Transcript, pages 75 -76. Following the disciplinary hearing, Complainant was offered the opportunity to resign in lieu of termination. Complainant did not avail himself of that opportunity. Respondent then completed a report on the disciplinary hearing, and Complainant was terminated on February 2, 2011. Complainant's disagreement with the Hearing Officer's determinations does not mean that the Hearing Officer ignored evidence or that her determination was not supported by sufficient evidence.

We have carefully reviewed Complainant's grounds for appeal and the record in this

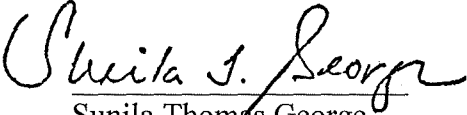
matter and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings of fact and conclusions of law. We find the Hearing Officer's conclusions that Respondent did not discriminate against Complainant due to his age and did not retaliate against him for engaging in protected activity was supported by substantial evidence and we defer to the Hearing Officer's conclusions.


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<sup>3</sup> this 19<sup>th</sup> day of December, 2019

  
Sunila Thomas George  
Chairwoman

  
Monserrate Quiñones  
Commissioner

<sup>3</sup> Commissioner Neldy Jean-Francois did not participate in the Full Commission deliberations concerning this matter. The Investigating Commissioner, Chairwoman Sunila Thomas George, participated in this matter in order to create a quorum. See 804 CMR 1.23(1)(c).