

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
ISMAEL RAMIREZ-SOTO,
Complainant

v.

DOCKET NO. 04-BEM-01916

UNIVERSITY OF MASSACHUSETTS BOSTON,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Judith E. Kaplan in favor of Respondent University of Massachusetts Boston (UMB) and dismissing Complainant's charges of unequal terms and conditions of employment based on race and color (Latino) and national origin (Puerto Rican). The complaint arose from the parties' failure to come to terms on a new employment contract for Complainant as Dean of the College of Public and Community Service (CPCS)¹ in 2003, after he had served as the Dean for a number of years.² Complainant alleged that UMB discriminated against him by treating him differently with respect to salary and tenure as compared to similarly situated white administrators, by failing to negotiate in good

¹ CPCS is a non-traditional program serving urban adults beyond college age who are engaged in public and community service and it seeks out non-traditional students and particularly, people of color.

² Complainant filed a complaint on June 23, 2004, against Respondents UMB, Jo Ann Gora (Chancellor) and Paul Fonteyn (Provost) alleging discrimination in the terms and conditions of employment and hostile work environment based on his race, color and national origin. The Investigating Commissioner found probable cause on the claim of unequal terms and conditions against UMB only, and dismissed all other claims against UMB and the individually named Respondents. The hearing proceeded on the claim of unequal terms and conditions against UMB only.

faith to renew his employment contract and by failing to honor a “return to faculty” clause in his contract at the time. After an evidentiary hearing, the Hearing Officer concluded that Respondent articulated legitimate non-discriminatory reasons for its conduct and dismissed Complainant’s claim. Complainant has appealed to the Full Commission.

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); 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. Massachusetts Comm’n Against Discrimination, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The role of the Full Commission is to determine, *inter alia*, 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. See 804 CMR 1.23.

BASIS OF THE APPEAL

Complainant has appealed the decision on the grounds that the Hearing Officer’s findings were not supported by substantial evidence, were arbitrary and capricious, an abuse of discretion

and otherwise not in accordance with the law. Complainant asserts that the Hearing Officer failed to properly consider ample evidence that the reasons Respondent articulated in support of its actions were, actually, pretexts for discrimination. He cites specific examples of testimony that the Hearing Officer failed to consider or discuss.

We have carefully reviewed Complainant's grounds for appeal and the full record in this matter and have weighed all of the objections to the decision in accordance with the standard of review stated herein. 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 which are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). The key to substantial evidence is whether a "reasonable mind" would accept the evidence as adequate to form a conclusion. M.G.L. c. 30A, s. 1(6). See also, Gnerre v. MCAD, 402 Mass. 502, 509 (1988) . The standard does not permit us to substitute our judgment for that of the Hearing Officer even if there is evidence to support the contrary point of view. See O'Brien v. Director of Employment Security, 393 Mass. 482, 486 (1984)

Viewed in this light, we conclude that there is substantial evidentiary support for the Hearing Officer's determination that Respondent's articulated reasons for its actions relative to Complainant's contract and teaching position were non-discriminatory. Specifically, the Hearing Officer credited testimony by Paul Fonteyn, UMB's Provost at the time, that the contract terms Complainant sought were "highly unorthodox" and "unusually favorable," would have required a "million dollar financial commitment" by UMB at a time of declining enrollments at CPCS and severe budget cuts throughout the entire UMB campus. In addition the contract's terms would have allowed Complainant eleven years to compete for tenure when the typical period of time to do so was six years. The Hearing Officer credited Fonteyn's testimony

that in all his years as a college administrator, he had never encountered such a favorable tenure clause and would never countenance such tenure terms in any contract he was negotiating.³

Fonteyn's testimony that it was not fiscally prudent to create an additional tenured professorship given UMB's financial situation, declining enrollments, and an already high professor to student ratio⁴, was also credited. There was testimony that the entire university was undergoing severe budget cuts and that the most dramatic decline in enrollments had been at CPCS.⁵

The Hearing Officer found no evidence of pretext for discrimination in the fact that Fonteyn did negotiate one multi-year dean's contract, when he first started working at UMB but that this was before he received word from Chancellor Gora that it was not her practice to negotiate multi-year contracts. He subsequently made offers to six other deans during the period from 2003 to 2006 and they were all for one-year appointments. Fonteyn's testimony was corroborated by Gora who explained she had a long-standing policy of offering one-year-only renewable contracts to deans, a practice she carried over from her previous job. Gora testified that she had worked in very traditional academic settings and that when she came to UMB, she encountered, in her words, a number of unusual, "unprofessional," and "anything goes," employment arrangements for faculty and administrators, and that some of these arrangements were the result of patronage. Because she did not wish to be tied into such unorthodox deals, she chose not to commit to multi-year contracts with faculty and administrators. Gora also

³ Complainant sought to negotiate as part of his 2003 contract a "return to faculty" clause similar to the one in his 1998 contract, which offered him a five-year, non-tenure track appointment at a salary commensurate with that of senior professors at CPCS, should he return to faculty status at, or prior to, the end of the contract. It also allowed Complainant to convert to a tenure-track appointment at his discretion. Under these terms, Complainant would have had five years to declare his intent to seek tenure and six more years to achieve tenure. Fonteyn became Provost in 2002 and he subsequently rejected these terms as highly unorthodox and unusually favorable.

⁴ It was costing UMB \$7000 per student at CPCS as compared to liberal arts where the cost was \$4000 per student.

⁵ During the relevant time period CPCS enrollments had fallen from a high of about 1,000 students to 600 students in 2003, and perhaps even as low as the low 400's.

implied that certain individuals did not have the necessary credentials or qualifications to be on the staff, and the Hearing Officer credited her testimony that she sought to strengthen the qualifications of faculty and administrators at UMB. We note that attempting organizational change on this level requires challenging the status quo and the politics of an organization. There is always a shift in those who are favored or disfavored given the circumstances of a new administration with a different vision and that this is implied in the Hearing Officer's decision.

We find that the Hearing Officer properly determined that Respondent articulated a legitimate non-discriminatory for not granting Complainant a multi-year contract in 2003, even though Fonteyn had done so previously for a similarly-situated white, non-Hispanic employee. As to determinations of credibility, the Hearing Officer is in the distinct position to hear the testimony and to observe the demeanor of the witnesses, and is best situated to evaluate their testimony and to determine its reliability and trustworthiness. We are not in the position to substitute our judgment for hers, so long as her determinations are supported by the evidence.

In reaching her conclusion that the decision to deny Complainant a tenure track position on the terms he sought when he stepped down as Dean of CPCS was not discriminatory, the Hearing Officer carefully reviewed the situations of comparators proffered by Complainant. She credited evidence showing that the other individuals offered dean's positions at UMB had already achieved tenure in their previous positions at other universities and therefore tenure would be an expectation in any subsequent job. These individuals would not have accepted a position at UMB had an offer of tenure not been included. By contrast, the Hearing Officer found that Complainant was not a tenured professor at the time he was hired, nor did his initial contract include an offer of tenure.⁶ There was one other dean at UMB who, similar to

⁶ Gora testified that Complainant had been hired for his skills as an administrator, he had no traditional academic background and he had not taught or published for many years.

Complainant, lacked traditional academic credentials and his contract did not contain an offer of tenure or a return to faculty clause.

The Hearing Officer carefully considered each of Complainant's allegations of pretext and made several collateral findings based on her thorough review and analysis of the evidence. These findings support her decision that there was insufficient evidence of pretext and that Respondent's actions were not motivated by discriminatory animus. These include her findings: (1) that Complainant's concerns of bias by a certain faculty member appointed as chair of the committee conducting his evaluation were unfounded as evidenced by the committee's favorable report; (2) that Fonteyn did not deliberately delay contract negotiations as a means to pressure Complainant to agree to less favorable terms, where Complainant actually sought more time to consider the proposal and delayed a meeting until after his month-long vacation; (3) that Chancellor Gora was displeased with Complainant's failure to communicate UMB's fiscal restraints to the CPCS faculty, who were unhappy that some faculty positions had not been filled and had begun a letter-writing campaign urging her not to close down CPCS, but that this had nothing to do with Complainant's race, color or national origin; and (4) that Chancellor Gora's not shaking hands with Complainant at her interview and the fact that he was the only dean not seated on the stage at her inauguration were unintentional, and that her failure to acknowledge Complainant at an event with the Latino Coalition from UMass was colored by her displeasure that she was not warned in advance of the grievances the community sought to air at the meeting, causing her to feel ambushed, and was not motivated by discriminatory animus against Complainant. The Hearing Officer also found that UMB's interpretation of a contract term regarding Complainant's salary upon return to faculty status was reasonable and financially prudent; that Fonteyn's decision to assign Complainant the title of "lecturer" instead of

“professor” upon his return to faculty arose out of Fonteyn’s own university experience of what these titles mean⁷ and not a discriminatory motive; that Fonteyn’s denial of a sabbatical to Complainant was based on the fact that his contract did not contain sabbatical provisions; and that Fonteyn’s statement to Boston Globe columnist Adrian Walker that Complainant was not qualified to seek tenure was accurate because, at the time, he was deficient in two major criteria required for tenure: he had minimal teaching experience and had not published any peer-reviewed articles.

The Hearing Officer rejected Complainant’s assertion that a number of instances where he felt slighted or disparaged by UMB administrators established a pretext for a pattern of discrimination. She found that the actions of UMB administrators were either unintentional or attributable to legitimate concerns unrelated to Complainant’s race or ethnicity. The Hearing Officer concluded that Complainant’s belief that he was not being treated fairly by the administration, caused him to any view any unfavorable interactions with Fonteyn and Gora that did not advance his career as discrimination based on his race and national origin.

Ultimately, the Hearing Officer was not persuaded that Complainant would have been offered more favorable contract terms but for his race, color and national origin. She concluded that some of the admitted irreconcilable differences that arose were attributable to personality conflicts and differences in viewpoints and philosophy, but not discrimination. She stated this clearly in her decision.⁸ She also noted that Gora and Complainant held differing views of

⁷ Fonteyn testified that he comes out of a traditional academic background where the title “professor” applies only to tenure-track positions and all other teachers are deemed “lecturers.” Complainant’s only prior teaching position was as a lecturer at the University of Puerto Rico for three years. While in two prior contracts with UMB he had held the titles of Assistant and Associate Professor, during his tenure at CPCS he only co-taught a single course and did no research, and had published no peer-reviewed articles.

⁸ “[N]ot every personality conflict, dispute about contract terms, or adverse decision is evidence of discriminatory motive. The record in this matter does not support Complainant’s interpretation of events. While Complainant sought to offer evidence of pretext, there is insufficient credible evidence to support a conclusion that the reasons Respondent articulated for its actions were not the real reasons for the failed negotiations, or that Respondent was

leadership and of the relative importance of CPCS at UMB.

We conclude that the Hearing Officer's decision was rendered in accordance with the law and that there is substantial evidence in the record to support her findings of fact. We therefore deny the appeal and affirm the decision of the Hearing Officer in its entirety.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer. Complainant's appeal to the Full Commission is hereby dismissed. This Order represents the final action of the Commission for purposes of M.G.L. c. 30A.

Any party aggrieved by this Decision may file 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 receipt 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 3rd day of August , 2011

Julian Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie Williamson
Commissioner