COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
CATHERINE WASH,
Complainants

v. DOCKET NO. 07-BPR-02155

FIRST REALTY ASSOCIATES,
CHRIS STINES and TRACY CLEMENT,
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Betty Waxman in favor of Respondents, First Realty Associates ("First Realty"); Chris Stines ("Stines"), an employee of First Realty; and Tracy Clement ("Clement"), the owner of property at 8 Leslie Street in Dorchester, MA. Complainant Catherine Wash filed a charge alleging that Respondents discriminated against her by denying her the opportunity to rent an apartment because she was pregnant and the apartment was not de-leaded, in violation of G.L. c. 151B, § 4(11)[1] and G.L. c 111, § 199A.[2] The Complainant claims that the Hearing Officer erred when she (1) allowed

[1] It is an unlawful practice under G.L. c. 151B, § 4(11), "[f]or the owner, [] real estate broker … of... other covered housing accommodations, or other person having the right of ownership or possession or right to rent or lease or sell such accommodations… to refuse to rent or lease or sell or otherwise to deny to or withhold from any person such accommodations because such person has a child or children who shall occupy the premises with such person…"

[2] G.L. c. 111, § 199A (a) states that "[i]t shall be an unlawful practice for purposes of chapter one hundred and fifty-one B for the owner, [ ] real estate broker. . . of any premises to refuse to [] rent, lease or otherwise deny to or withhold from any person or to discriminate against any

testimony regarding an alleged statement made by Wash during Conciliation, in violation of the Commission's regulation, 804 CMR § 1.18(1)(e) and (2) in determining that Respondents did not discriminate against Complaint on the basis of children and lead. We agree on both accounts and reverse the decision of the Hearing Officer.

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 § 1(6).

It is the Hearing Officer's responsibility to evaluate the credibility of witnesses and to weigh the evidence when deciding disputed issues of fact. The Full Commission defers to these determinations of the Hearing Officer. See, e.g., School Committee of Chicopee v. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine, inter alia, whether the decision under appeal was rendered on

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person in the terms, conditions or privileges of the [] rental or lease of such premises, because such premises do or may contain paint, plaster or accessible structural materials containing dangerous levels of lead, or because the sale, rental or lease would trigger duties under [the Lead Paint law]. Any person claiming to be aggrieved by an alleged unlawful practice as herein defined may file a complaint pursuant to section five of chapter one hundred and fifty-one B and all provisions of said chapter shall be applicable to such complaints". The statute also states that "[r]efusing to rent to families with children in violation of paragraph eleven of section four of chapter one hundred and fifty-one B shall not constitute compliance with the lead law and regulations." G.L. c 111, § 199A (b).

unlawful procedure, based on an error of law, unsupported by substantial evidence, or whether it was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23(1)(h).

BASIS OF THE APPEAL

The Hearing Officer found that Complainant was seven months pregnant when she saw a newspaper advertisement for an apartment in Dorchester listed at between $800 and $850 per month. Complainant called the first of two telephone numbers in the advertisement, which had been placed by Richard Ihenetu, owner of First Realty Associates, on behalf of the property owner, Tracy Clement. Ihenetu answered the call and instructed her to call the other telephone number on the advertisement, which was the number for Chris Stines, a scheduler that Ihenetu had hired to record the telephone numbers of people calling in response to advertisements and to advise them that a realtor would call them back. Complainant called Stines and testified that he asked her about the number of people who would be occupying the apartment to which she responded that it would be two people and the child she was expecting. The Complainant testified that Stines then told her the owner of the property did not want anyone with children under the age of six moving into the apartment because it was not de-leaded. Stines testified, however, that he told the Complainant she could see the apartment but would have to wait for a realtor to contact her. The Hearing Officer credited Stine's testimony over that of the Complainant.

Stines also testified that Complainant called his cell phone a number of times while he was at home that evening but that he declined to answer the call until his wife made him do so because she believed that Complainant was a "girl-on-the-side" that Stines was hiding from her. According to Stine, when his wife realized the call was from a potential renter, she took the

phone from him and told Complainant that "she would have to wait for the 'owner' to call her back" and hung up the phone.[3] Complainant testified, however, that Stines told her that the owner of the apartment was present and that a woman came on the line who identified herself as the owner and informed Complainant that she did not want a tenant with children under the age of six renting the apartment because it was not de-leaded. Stines testified that he never put the owner on the line and Clement (the owner of the unit) similarly testified at the Hearing and denied that she ever spoke to Complainant on the phone. Stines' wife did not testify at the Hearing.

In order to aid her in choosing between conflicting accounts, the Hearing Officer allowed testimony from Clement and Ihenetu, about a conversation that took place at the Conciliation conference held pursuant to G.L. c. 151B, § 5,[4] at which the Complainant allegedly retracted her claim that she had spoken on the phone with Clement. Specifically, Ihenetu testified that at the Conciliation, the Complainant said that she didn't speak with Clement.[5] Over Commission counsel's objection, the Hearing Officer allowed the testimony for the limited purpose of showing that Clement was not the person Complainant had spoken to over the phone, and in her decision stated that Complainant's alleged statement while "not dispositive of the discrimination

[3] As discussed within, the evidence is undisputed that no one from First Realty ever contacted Complainant to set up an appointment with her so that she could see the apartment.

[4] The Conciliation process is mandated by G.L. c. 151B, § 5, and provides that after the Investigating Commissioner had determined that "probable cause exists for crediting the allegations of any complaint and no complainant or respondent has elected judicial determination of the matter, he shall immediately endeavor to eliminate the unlawful practice complained of… by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has occurred in the course of such endeavors, provided that the commission may publish the facts in the case of any complaint which has been dismissed, and the terms of conciliation when the complaint has been so disposed of".

[5] Ihenetu testified that "Ms. Clement said, 'I have never spoken to you, You never spoke with

claim" did "serve to undermine Complainant's credibility as a witness." In finding for the respondent, the Hearing Officer rejected Complainant's testimony that both Stines earlier in the day, and the female he passed the phone to that evening, had told her the owner didn't want to lease to someone with a child under the age of six because of lead.

The Complainant argues that the admission and use of the statement from the Conciliation violated the Commission's regulation which provides that "nothing that is said or done in the course of conciliation may be made public or used as evidence in a subsequent Public Hearing". 804 CMR § 1.18(1)(e). The Hearing Officer was aware of this prohibition but stated that she was making an exception for the sole purpose of making a credibility determination among witnesses – a determination that ultimately was decided against the Complainant. We recognize that there may be times when an exception to the prohibition on disclosure of information obtained during the Conciliation process might be necessary. Rule 408 of the Massachusetts Rules of Evidence ("Mass. R. Evid."), which prohibits "[e]vidence of conduct or statements" made in settlement negotiations from admission during trial, contains limited exceptions to the blanket prohibition, including for such things as proving bias, prejudice, or state of mind of a witness.[6] Mass. R. Evid. 408 The circumstances here, however, where the Hearing Officer admitted the evidence to help her in making a credibility determination amongst witnesses, does not justify an exception, especially when balanced against the important policy

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me. Did you hear my voice?' and that Ms. Wash responded, "I am sorry. I never spoke to her".

[6] Under Rule 408 of the Massachusetts Rules of Evidence, compromise statements are not completely excluded and may be admissible when "offered for another purpose, such as proving bias, prejudice, or state of mind of a witness; rebutting a contention of undue delay; or proving an effort to obstruct a criminal investigation or prosecution". See also Uforma/Shelby Business Forms Inc. v. National Labor Relations Board, 111 F.3d 1284 (6th Cir. 1997) (applying exception to Rule 408 of the Federal Rules of Evidence which prohibits admission of compromise statements and conduct during settlement negotiations where a party has threatened retaliation or fraud or other unlawful conduct).

goal of the Commission's regulation, 804 CMR § 1.18(1)(e), which (like its state and federal court Rules 408 counterparts) is to encourage amicable settlement of disputes by facilitating communications between complainants and respondents without fear of prejudice should the matter not resolve and instead proceed to a hearing. See Zucco v. Kane, 439 Mass. 503, 510 (2003) ("[t]he primary argument in favor of excluding statements made during settlement negotiations is that the probative value of admitting them is outweighed by the public policy repercussions of discouraging compromise by penalizing candor between bargaining parties"). We believe that the Hearing Officer could have and should have made her credibility determinations based on the testimony and demeanor of the witnesses at the Hearing without resort to the Complainant's alleged statement made during Conciliation. Where the testimonial evidence in a case is conflicting, the Hearing Officer is charged with the responsibility of resolving the conflicts by evaluating the demeanor of witnesses and making credibility judgments so that she can make the requisite findings of fact. School Committee of Chicopee v. MCAD, 361 Mass. 352, 354 (1972). We are confident that credibility issues can be resolved and the fact-finding function performed without admission of what is "said" in the "course of conciliation".

We are also hard-pressed to find a material discrepancy between the Conciliation statement and the Complainant's testimony at trial. During the conversation at issue, it is undisputed that Stines did in fact hand over the phone to a female speaker. Our review of the Hearing transcript shows that the Complainant testified that the reason she believed she was speaking with the owner was because Stines told her so when he put the female speaker on the line. On cross examination, she maintained that she had always claimed that she spoke with the

"owner" and had never said she spoke with "Clement". Therefore, even if Complainant stated at the Conciliation that she did not speak with Clement, we find little discrepancy between the statement and her testimony at trial and are skeptical as to the relevance of the latter on Complainant's credibility. Both statements could be true and do not justify ignoring the important public policy behind the evidentiary prohibition on what is "said and done" at Conciliation. This is not to say, however, that the statement did not impact the Hearing Officer's decision or prejudice the Complainant. We believe that the Hearing Officer's decision to carve out an exception to the Commission's blanket prohibition on such evidence must have been motivated by her strong belief that the evidence was necessary to make the credibility determinations.[7] The Hearing Officer mostly credited Respondents' version of events over Complainant's version, and considered the evidence from the Conciliation to be probative of Complainant's lack of credibility. The Admission of the statement from the Conciliation violated 804 CMR § 1.18(1)(e), was contrary to the law, and prejudicial to the Complainant.[8]

The Complainant next argues that the Hearing Officer erred in entering judgment in favor of the Respondents where Respondents had failed to carry their burden of rebutting her prima facie case of housing discrimination. The Hearing Officer found that Complainant carried her initial burden of proof by presenting evidence showing that she was a member of a protected class (housing seeker with children), that First Realty was seeking applicants on the owner's behalf through an advertisement in the newspaper; that Complainant contacted First Realty and that First Realty failed to return her calls, depriving her of a potential housing opportunity. The Hearing Officer also found credible evidence that both First Realty and Tracy Clement were

[7] The Hearing Officer stated, "I think [the testimony] is very relevant as to who's telling the truth and who is not telling the truth".

aware of the "potential" presence of lead paint in the apartment at issue. Specifically, the Hearing Officer noted the absence of any residents with children under age six living in the three units of the building and that no lead abatement certificate existed for the apartment. She also found that Complainant had identified herself as being pregnant when she responded to the advertisement, that First Realty had promised that Complainant would receive a call from a realtor, and that no one ever returned her calls. We agree with the Hearing Officer that these "circumstances" support a prima facie case of housing discrimination, and by dint of law give rise to an "inference" of discrimination i.e. that Respondents failed to contact Complainant because she was about to give birth to a child under the age of six who would reside with her in the 8 Leslie Street apartment and the apartment contained or may have contained lead. The burden therefore shifted to Respondents to articulate a legitimate, non-discriminatory reason for failing to show or to rent the apartment to Complainant. It is here that we part ways with the Hearing Officer.

The Hearing Officer found and our review of the record confirms that the Respondents offered no explanation for why they did not contact Complainant to show her the apartment after promising to do so, thereby precluding her from consideration as a prospective tenant. In the absence of any articulated reasons from Respondents, the Hearing Officer nonetheless sua sponte drew the inference that Respondent's failure to return Complainant's phone calls was primarily due to Complainant's multiple calls and "overbearing and impatient manner in dealing with Stines and his wife over the phone," which was "mirrored" in her demeanor at the Public Hearing, and not to the presence of lead paint.[9] The Hearing Officer should not have stepped in

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[8] See 804 CMR 1.23(1)(h); and Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982).

[9] The Hearing Officer stated in her decision, "I infer that Respondents did not wish to deal with

to provide the Respondents with a reason for their actions based on her personal reaction to the Complainant's demeanor. While Stines testified that the Complainant's calls were "annoying, anxious and harassing" neither he nor Ihenetu articulated them or Complainant's personality as the reason a broker from First Realty failed to contact Complainant. Moreover, our review of the record shows that while the Complainant called Stine's number more than twice, only two conversations actually took place and the second conversation was prompted by circumstances which provided an alternative reason for why Stines' might have found the calls "annoy[ing], anxious or harass[ing]", namely, his wife's suspicions of infidelity.

We conclude that by relying on a reason that was not articulated by Respondents, the Hearing Officer prejudiced the Complainant because she was deprived of the opportunity to present evidence in rebuttal or to show that the reason Respondents failed to return her call (her temperament) was a pretext for discrimination. While Complainant has the burden of persuasion on the issue of whether the employer's articulated reason was the real reason, she was deprived at stage three of her right to respond to any reasons, because none were articulated at public hearing. Complainant cannot be expected to respond to a reason that is not put in evidence by Respondents. Wheelock College v. MCAD, 371 Mass. 130, 136-137 (1976). It is Respondents' burden to produce credible evidence of the reason for its actions as well as the underlying facts to support that reason. Wheelock College v. MCAD, 371 Mass. 130, 136 (1976); Lewis v. Area II Home Care 397 Mass. 761 (1986). Absent any explanation from Respondents, the Hearing Officer's decision to infer a legitimate reason, i.e., that Respondents did not wish to deal with

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an individual of Complainant's demonstrable temperament as a prospective tenant. Complainant's demeanor at trial mirrored the impatient manner with which Complainant conducted herself over the phone and lent credence to Respondent's allegations that Complainant repeatedly called Stines even though he told her that she would have to wait for a return call from a realtor".

Complainant because she was a nuisance and overbearing, constitutes an error of law and an abuse of discretion. Because there is no record evidence rebutting Complainant's prima facie case, Respondents failed to meet their burden of production and the prima facie case of discrimination is left unrebutted.

Finally, in our view, there is ample evidence of discrimination that goes beyond the inference created by the *prima facie* case supporting a conclusion that Respondents discriminated against the Complainant based on children and the existence or possible existence of lead in the apartment in question, in violation of G.L. c. 151B, § 4(11) and G.L. c 111, § 199A. As we have already noted, the Hearing Officer found credible evidence that First Realty and Clement were aware of Complainant's pregnancy and the potential presence of lead in the apartment. Specifically, she found that there were no residents with children under the age of six living in the three unit building and no lead certificate for the apartment showing it was de-leaded. Additionally, Ihenetu (the owner of First Realty) testified that the apartment "probably" had lead paint because it was built before 1978 and lead paint was "commonly" used before that date. While he refused to say that the apartment definitely had lead he put the likelihood at "80%". This combined with the Hearing Officer's finding that the apartment had not been rented and was still being shown approximately six weeks after Complainant first responded to the advertisement, supports a conclusion that the presence of lead and Complainant's pregnancy were the reason the Respondents never contacted Complainant to arrange to see the apartment, thus preventing her from applying for and renting the apartment. Accordingly, we reverse the decision of the Hearing Officer and enter judgment in the Complainant's favor and remand the case for issuance of a cease and desist order and a determination of (1) the appropriate award of

damages to Complainant; (2) whether an anti-discrimination training order for First Realty and its employees should issue and (3) any other relief appropriate and consistent with the purposes of G.L. c. 151B.

ORDER

For the reasons set forth above, this matter is reversed and remanded to the Hearing Officer.

SO ORDERED this 18th day of September, 2012

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Julian T. Tynes
Chairman

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Sunila Thomas George
Commissioner

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Jamie R. Williamson
Commissioner