

**COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION**

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
SYREETA D. FRAZER,
Complainants

v.

DOCKET NO. 97-SEM-01663

BAY STATE GAS COMPANY,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision by Hearing Officer Judith E. Kaplan in favor of Respondent Bay State Gas Company and dismissal of the complaint. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for gender discrimination in violation of M.G.L. c. 151B, §4(1) when it required Complainant to take a test for promotion to the position of Utility Worker General, as called for in its posting. Complainant alleged that similarly situated male candidates for promotion to the same position were not required to take the test or were promoted without having taken the test. Specifically, the Hearing Officer determined that Respondent did not discriminate against Complainant and did not subject her to disparate treatment based on her gender. Complainant has appealed the decision to the Full Commission.¹

¹ The Commission previously exercised its discretion to grant Complainant's motion to file her Petition for Review to the Full Commission late. See, 804 C.M.R. 1.07(2).

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. The Full Commission's role is to review the record of proceedings before the Hearing Officer to determine if the findings of fact are supported by substantial evidence. M.G.L. c. 151B, §5. Substantial evidence 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 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 must determine, *inter alia*, whether the decision under appeal was rendered on 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.

BASIS OF THE APPEAL

Complainant contends that the Hearing Officer erred as a matter of law in determining that she did not establish a *prima facie* case of gender discrimination or pretext to support her claim. 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 of fact or law 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).

SUMMARY OF THE FACTS

Complainant applied for one of three openings for the position of Utility Worker General or “UWG” on October 30, 2006. Complainant was among the most senior applicants and the only female of five applicants. As stated in the posting for the position, applicants were required to pass a mechanical comprehension test (“MCT”) because they would be working with live gas. When Respondent notified Complainant that she was required to take the MCT, she responded that previous applicants were not required to take the test and that she was being treated differently because she was a woman. Complainant took the test along with other male applicants with seniority for the position. She failed the test and was not promoted to the UWG position at that time.

While Complainant established that other employees were promoted to the UWG position without having taken the MCT prior to and subsequent to her application in October of 2006, Respondent articulated legitimate non-discriminatory reasons for what it claimed was error or oversight on the part of its Human Resources (“HR”) personnel. Further, at least one of those individuals promoted prior to Complainant’s application without having taken the test was a female. Respondent produced evidence that it was unaware that one of its HR personnel had ceased administering the test for a period of time and when it uncovered this oversight, it immediately corrected the problem and re-instated the test in July of 2006. According to Respondent, the promotion of a male employee who had not taken the MCT to UWG in May of 2007 was an oversight, resulting from the HR’s incorrect assumption that he had already taken

the test when hired from the outside in 2006. Complainant did not apply to the UWG position in May of 2007. After discovering that HR had made the incorrect assumption about the male employee promoted in May of 2007, the male employee took and passed the MCT in July of 2007.

A UWG position was posted in March of 2008. Complainant applied for the position, took and passed the MCT, and was hired for the UWG position. At the time of the hearing Complainant continued to work as a UWG.

DISCUSSION

The Hearing Officer found that Complainant did not establish a *prima facie* case of gender discrimination because Respondent required all similarly situated male applicants to take and pass the MCT in October of 2006, when Complainant applied. This fact undermined her claim that she was the victim of disparate treatment based on her gender at the time she applied for the position. Moreover, Complainant's failure to pass the MCT, which was a requirement of the job, arguably meant that she did not possess the stated qualifications for the position. We concur with the Hearing Officer's conclusion that Complainant did not establish a *prima facie* case of gender discrimination and that she properly dismissed the Complaint. Blare v. Huskey Injection Molding Sys. Boston, Inc., 419 Mass. 437, 441 (1995).

However the Hearing Officer did not end her analysis there. She concluded that even if Complainant had established a *prima facie* case of gender discrimination by demonstrating that some male applicants were promoted to the position prior and subsequent to October of 2006 without having taken the test, that there were legitimate, non-discriminatory reasons that this occurred that were unrelated to the candidates' gender. She credited testimony from

Respondent's HR director that this was due to oversight and miscommunication discovered only when there was a personnel change in HR which administered the MCT, as well as poor communication generally among managers regarding the UWG position.

Complainant asserts that these discrepancies are evidence of a general atmosphere of discrimination in the workplace. However where Respondent had a legitimate explanation for selection of each of the applicants selected to fill the UWG position, there is no evidence of a pattern or practice of discrimination or a discriminatory work environment. The Hearing Officer considered the circumstances surrounding each applicant cited by Complainant and properly determined there was no evidence that Respondent's actions amounted to discrimination or were evidence of pretext.

The Hearing Officer credited testimony that Respondent reinstated the MCT in July 2006 after the HR manager in charge of the UWG position left her employment and it was discovered that she had not been administering the test in accordance with posted requirements for the position. This decision was made some three months before Complainant applied for the UWG position in October 2006 and not, as Complainant avers, only after she complained about disparate treatment. The Hearing Officer credited the legitimate explanation as to why two male applicants selected to fill UWG positions in January and April 2006 were not required to take the MCT. She also found credible Respondent's explanation that a male applicant was not administered the MCT when he applied for the position in May 2007, because of a mistaken assumption that he had taken the MCT when he was hired from the outside in 2006. When the newly-hired HR manager discovered that this employee had not taken the MCT, the test was administered to him within one week. The Hearing Officer also noted that a female employee was promoted to the UWG position in January 2006 prior to Complainant application without

having taken the MCT because of a grandfather provision in a prior collective bargaining agreement. Complainant herself was promoted to a UWG position in March 2008 after passing the MCT and held that position at the time of the hearing. While the promotion of a few applicants who had not taken the test may have appeared, on its face, unfair or discriminatory, the Hearing Officer properly concluded that in each instance there was a credible explanation that was supported by the evidence. We see no reason to disturb the Hearing Officer's findings with respect to credibility where they are supported by the evidence. See Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005) (holding Hearing Officer remains in best position to observe testimony and demeanor and to assess credibility). It is not the Hearing Officer's role to second guess Respondent's seemingly unsound business decisions absent any evidence of discriminatory animus. Mesnick v. General Electric Co., 950 F.2d 816, 825 (1st Cir. 1991). Based on the foregoing, we hereby reject Complainant's appeal.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer dismissing the complaint. 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 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 10th day of October , 2013

Julian T. Tynes
Chairman

Sunila Thomas George
Commissioner

Jamie R. Williamson
Commissioner