COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
DANIEL STEPHAN,
Complainants

v. DOCKET NO. 98-BEM-0982

SPS NEW ENGLAND, INC.,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a Superior Court judge's order of remand to the Commission upon an application by Respondent SPS New England, Inc. ("SPS") under G.L. c. 30A, § 14(6), for leave to present additional evidence of Complainant Daniel Stephan's ("Stephan") post-termination earnings, in mitigation of damages. Upon remand, Hearing Officer Betty Waxman accepted the additional evidence in the form of a stipulation, based on deposition testimony which Stephan submitted under protest. However, she declined to modify the original award of back pay damages, affirmed by the Full Commission, because SPS had not demonstrated "good reason" for its failure to present mitigating evidence at the administrative hearing, as required by the applicable Commission regulation. 804 CMR § 1.23(1)(g). SPS has appealed to the Full Commission. We begin with a more in depth review of the procedural background.

In March 1998, Daniel Stephan filed a complaint with the Commission for age and

handicap discrimination after SPS laid him off. After a probable cause finding was issued on both claims, a public hearing was held in February 2003. On August 23, 2004, the Hearing Officer issued a decision holding SPS liable for handicap discrimination, but not age discrimination, and Stephan was awarded back pay and emotional distress damages. The award of back pay was mitigated by the amount of unemployment compensation Stephan received from February 10, 1998 to April 20, 1998, as adduced by SPS at the public hearing. The back pay award was not mitigated by Stephan's post-termination earnings because SPS failed to present any evidence of his interim earnings at the hearing, as was its burden.[1] On October 7, 2004, SPS filed a petition for review of the Hearing Officer's decision with the Full Commission and a motion to present additional evidence of Complainant's post-termination earnings, arguing that its failure to do so at the hearing was due to "inadvertent error". On September 19, 2005, the Full Commission denied SPS's request because it failed to show "good reason" for its failure to produce the evidence at the hearing under 804 CMR 1.23(1)(g).[2] The Full Commission also affirmed the Hearing Officer's decision but reduced the back pay award from $483,720 to $371,220, after concluding that the Hearing Officer had calculated the award through the date of the decision instead of the operative date of the hearing.

On October 18, 2005, SPS sought judicial review of the Full Commission's final decision

---

[1] See J.C. Hillary's v. MCAD, 29 Mass. App. Ct. 204, 208 (1989), discussed further within.

[2] The Commission's regulation provides that,"[i]f application is made to the Commission for leave to present additional evidence, and it is shown to the satisfaction of the Commission that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the Hearing Commissioner or Hearing Officer, the Commission may order that the additional evidence be taken before the Hearing Commissioner or Hearing Officer upon such conditions as the Commissioner deems proper. (Emphasis added.) 804 CMR 1.23(1)(g). This standard is the same one applied by the superior court under G.L. c. 30A, § 14(6). See fn. 4.

pursuant to G.L. c. 30A, §14(7), including the Full Commission's refusal to allow its application to present additional evidence of Stephan's post-termination earnings. Four months later, on February 6, 2006, SPS also filed a motion with the Superior Court pursuant to G.L. c. 30A, § 14(6), to supplement the administrative record with evidence of Stephan's post-termination earnings, on the same basis it had argued to the Full Commission, albeit, unsuccessfully.[3] The Commission and Stephan opposed the motion, arguing that SPS failed to meet the legal standard under § 14(6), by showing there was "good reason" for failure to present the evidence at the MCAD hearing.

On May 2, 2006, the Superior Court (Fahey, J.) allowed the motion even though, by the Court's own admission, SPS did not set forth a "good reason" for its failure to present the post-termination evidence before the hearing officer, as required by G.L. c. 32A, § 14(6). See Memorandum of Decision and Order on Plaintiff's Motion for Leave to Present Additional Evidence, dated May 2, 2006. p. 4 ("Memorandum and Order II") ("SPS does not present a 'good reason' why it failed to produce evidence at the proceeding before the agency" (emphasis added)). Instead, the Superior Court concluded that SPS had detrimentally relied on a recently revoked right to a de novo jury trial that would have allowed the company to correct any mistakes it made during the MCAD hearing, in a subsequently filed court action.[4] The Superior

[3] G.L. c. 30A, §14(6) provides, "[i]f application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence and shall file with the reviewing court, to become part of the record, the additional evidence, together with any modified or new findings or decision". (Emphasis added).

[4] This right was revoked on May 4, 2004, in Stonehill College v. Massachusetts Comm'n Against Discrimination, 441 Mass. 549 (2004) (holding that a Respondent has no constitutional right to a jury trial after losing at an MCAD administrative hearing, overruling, in part, Lavelle v.

Court concluded that "principles of fairness" justified its decision to order the Commission to take additional evidence pursuant to § 14(6).

Thereafter, the Commission and Stephan asked the Superior Court to reconsider its ruling, arguing that the decision revoking the de novo jury trial (Stonehill College, see fn. 4) was intended to apply retroactively to cases pending on direct appellate review. As a result, the Superior Court reconsidered its ruling and in a new decision, concluded that it had "essentially, and incorrectly, contradicted" Stonehill College by granting the § 14(6) remand request. See Memorandum of Decision and Order on Defendants' Motion for Reconsideration and Motion to Vacate Judgment of Dismissal dated June 22, 2006 ("Memorandum of Decision II") p. 3. The Court then, however, affirmed the remand order on a different basis, relying on Northeast Met. Reg. Vocational Sch. Comm. v. Massachusetts Comm'n Against Discrimination, 35 Mass. App. Ct. 813, 819 (1994), as authority for granting SPS's motion to supplement the administrative record with evidence of interim earnings under § 14(6), to prevent a "discrimination victim who has suffered no actual loss" from receiving a financial "windfall". Memorandum of Decision II, p. 4.[5] The Superior Court judge, citing Northeast Metropolitan, concluded that it was "within [its] discretion to order an agency to reopen its proceedings and take additional evidence… given the circumstances of this case, and for purposes of fundamental fairness", even though the

---

Massachusetts Comm'n Against Discrimination, 426 Mass. 332 (1997)).

[5] The Superior Court judge was mistaken in its statement that Stephan "suffered no actual loss." The Hearing officer found that Stephan had actual lost wages of $88,080, unlike the complainant in Northeast Metropolitan, who indeed, "suffered no actual loss" and actually earned more at the job she took after being rejected for a position for a reason found to be discriminatory. 35 Mass. App. Ct. at 815. Moreover, the Superior Court judge, here, also mistakenly asserted that Stephan would receive an unfair windfall of $495,917.65. The Full Commission had, however, reduced this amount to $371,220.00, and since Stephan suffered $88,080 in actual lost wages, the "windfall" was reduced to approximately $280,000.00.

statutory requirement of "good reason" was not met. Memorandum and Order II, p. 4.

Stephan appealed the Superior Court's decision and order to the Appeals Court, while the Commission, which initially joined in the appeal, subsequently withdrew and filed a letter with the Appeals Court taking the position that Stephan's appeal was interlocutory. On July 24, 2007, the Appeals Court issued a *rescript* opinion dismissing Stephan's appeal as interlocutory. In its decision, the Appeals Court stated that the issues raised by Stephan (including the Court's misplaced reliance on Northeast Metropolitan) could be decided on an appeal after the MCAD acted.

Upon remand, the Hearing Officer held a pre-hearing conference at which the parties, over Stephan's protest, submitted deposition testimony of Stephan's post-termination earnings which had been taken before the case was certified to public hearing. The Hearing Officer then issued Supplemental Findings Pursuant to Remand Order on April 29, 2008, in which she accepted the deposition testimony as evidence of Stephan's interim earnings, but declined to modify Stephan's back pay award, relying on "clear precedent" which (1) imposed the burden of producing evidence in mitigation of damages on an employer at an MCAD hearing and (2) held that neither inexperience nor mistake constituted "good reason[s]" under 804 CMR 1.23(1)(g). See, J.C. Hillary's v. Massachusetts Comm'n Against Discrimination, 27 Mass. App. Ct. 204 (1989); Buckley Nursing Home, Inc. v. MCAD, 20 Mass. App. Ct. 172 (1985). SPS has appealed this decision 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 Comm. 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 also to determine, *inter alia,* whether the decision of the hearing officer 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

SPS has appealed the Hearing Officer's refusal to modify Stephan's back pay award in accordance with the evidence of his interim earnings, taken pursuant to the Superior Court's order under G.L. c. 30A, § 14(6). Specifically, SPS argues that the Court's order not only required the Hearing Officer to take the mitigating evidence, but also "clearly ruled" that the original back pay award "constituted an impermissible financial windfall to Stephan that could not be sustained," and therefore, requires the Full Commission today, to reduce the award.

We have carefully reviewed SPS'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 abuse of discretion or material error of law with respect to the Hearing Officer's actions upon remand and her decision to leave the award of back pay in place.

In beginning our analysis we note that the Commission, of course, was required to comply with the un-appealed remand Order of the Superior Court allowing SPS's motion for leave to supplement the record with additional evidence. The Hearing Officer, upon remand, did exactly this. We do not agree, however, that the remand Order required the Hearing Officer to modify Stephan's back pay award and we reject SPS's argument that the Superior Court "clearly ruled" that the Full Commission's original final decision on this matter was in error. We reach this conclusion based on the limited nature of the Superior Court's remand authority under § 14(6), and its function within the larger context of the judicial review process set forth in G. L. c. 30A, § 14, of the Administrative Procedures Act ("APA"), as well as the language in the relevant Court orders.

Section 14(7) of the APA, establishes the superior court's initial jurisdiction over an agency's final decision following an adjudicatory proceeding. East Chop Tennis Club v. Mass. Comm'n Against Discrimination, 364 Mass. 444, 447-48 (1973). Any "person" aggrieved by a final decision of an agency can obtain judicial review by filing a civil action in superior court. G.L. c. 30A, § 14(7). A court's review of a decision is confined to the administrative record of the adjudicatory proceeding and the standards set forth within § 14(7). The reviewing court can, inter alia, affirm the agency's decision, or, upon a finding of error of law, absence of substantial evidence, or abuse of discretion, set aside or modify the agency's decision. G. L. c. 30A, § 14(7)(a)-(g).

In contrast to § 14(7), a court has limited authority under § 14(6), and can only "order that [ ] additional evidence be taken before the agency" if, upon a party's application, "it is shown to the satisfaction of the court" that the evidence is "material to the issues in the case" and "there was good reason for the failure to present it in the proceeding before the agency". G.L. c.

30A, § 14(6). (Emphasis added). A court considering a motion under this provision does not "review" the agency's decision for abuse of discretion or any other error. See J.C. Hillary's, 27 Mass. App. Ct. at 107. Instead, § 14(6) establishes a procedure for supplementing the administrative record after a final agency decision has been issued, and the matter is under judicial review pursuant to § 14(7), so long as the statutorily required showing is made. When a Court grants a motion under § 14(6), the statute states that the agency "shall" file any additional evidence it takes with the "reviewing court" so that it "become[s] part of the record." G.L. c. 30A, § 14 (6). It further provides that an agency "may modify its finding and decision by reason of such additional evidence"; and if it does so, "shall" file the "modified or new findings or decisions" with the "reviewing court" to similarly become part of the administrative record. Id. Once the record has been supplemented by the additional evidence and any modified finding or decision of the agency, the aggrieved party can proceed with its civil action for judicial review of the agency's (modified or not) final decision under the standards set forth in § 14(7).

Despite SPS's contention otherwise, both the Appeals Court and Superior Court acted consistently with the limited authority of § 14(6). In its first and second decision, the Superior Court remanded this matter to the Commission "so that it may take evidence of complainant Stephan's earnings". Moreover, in the rescript of the second and operative decision, the Court ordered that SPS's civil action under § 14(7), be dismissed "without prejudice", subject to "reinstate[men]t" after a decision by the Commission.[6] It is clear to us that the Superior Court neither reversed the Full Commission's decision to deny SPS's request under 804 CMR 1.23(1)(g), nor did it order the Commission to modify Stephan's back pay award. Instead, the

[6] See Memorandum and Decision II ("this matter be and hereby is **DISMISSED WITHOUT PREJUDICE** to reinstating the case after decision by the MCAD after remand.")

Court did exactly what it was authorized to do by the Legislature, and ordered the Commission to take additional evidence and supplement the administrative record. G. L. c. 30A, § 14(6).

On Stephan's appeal from the order, the Appeals Court concluded that the Superior Court's allowance of SPS's motion under § 14(6) was an interlocutory order, not a final decision.[7] Furthermore, the Appeals Court stated that whether or not the Superior Court properly relied on Northeast Metropolitan (and correctly interpreted the case to allow a court to dispense with the statutory requirement of "good reason" under § 14(6) in the interest "fundamental fairness"), "can be decided in the course of an appeal after the MCAD has acted after remand".[8] The "appeal" is the judicial review process initiated by SPS under § 14(7), to be "reinstated" to the court docket following a decision by the Commission, on the administrative record, as supplemented by (1) additional evidence taken by the Hearing Officer pursuant to the Superior Court's remand order and (2) any modification to the Commission's findings or final decision. It is incumbent upon us, now, to determine whether the Hearing Officer abused her discretion or committed an error of law, when she refused to modify her original decision "by reason of such additional evidence," following the Superior Court's allowance of SPS's motion, as she was explicitly permitted, but not required, to do under § 14(6). [9] We find no error.

---

[7] An "interlocutory" order, judgment or appeal is defined as "interim or temporary, not constituting a final resolution of the whole controversy." Black's Law Dictionary (8th ed. 2004).

[8] See, Order of Dismissal, p. 2, fn. 3 (further stating "[e]ven assuming [Stephan] is correct, however, any error may be corrected on appeal").

[9] If the Commission were required by the Superior Court to modify its original decision and give effect to the post-hearing evidence by awarding Stephan his "actual earnings", it would lose the right to defend the agency's final decision under the statutory standards set forth by the Legislature in G.L. c. 151B, § 14(7), and any subsequent appeal rights, because SPS would no longer be an "aggrieved party", and the appeal of the § 14(6) issue, would be moot.

The Hearing Officer, in her decision following remand, correctly pointed out that employers have long been on notice of their responsibility to introduce evidence of interim earnings to mitigate an employee's claim for back pay at the MCAD adjudicatory hearing, and to show to the satisfaction of the Commission that the employer had a "good reason" for failing to do so, before the Commission will order that a hearing be reopened and additional evidence taken. 804 CMR 1.23(1)(g); J.C. Hillary's, 27 Mass. App. Ct. at 204. The Hearing Officer, in her original decision and now again following remand, and the Superior Court in both its decisions on SPS's request under § 14(6), concluded that SPS counsel's "inadvertence" did not establish "good reason" for its failure to adduce evidence of Stephan's interim earnings at the MCAD hearing. SPS's counsel learned of Stephan's interim earnings during the discovery process, and admitted in pleadings that he also knew that SPS had the burden of proving the earnings and intended to prove the earnings, "but failed to do so through inadvertence."[10] We agree with the Hearing Officer (as we did in our original decision) that "inadvertence" does not to our satisfaction constitute "good reason" for SPS's failure to present the evidence at the hearing. 804 CMR 1.23(1), see J.C. Hillary's, Mass. App. Ct. at 204 (affirming the Superior Court's conclusion that the Commission had not abused its discretion when it refused J.C. Hillary's request to reopen the MCAD hearing under 804 CMR 1.23(1)(g), to add evidence of interim earnings of two complainants in order to mitigate their back pay award where J.C. Hillary "clearly failed to meet its burden of showing interim earnings" at the hearing and "counsel's unpreparedness and inexperience did not constitute good reason for reopening the hearings").

[10] See SPS's October 7, 2004 Petition for Review.

In reaching this conclusion, we have rejected SPS's argument that the Hearing Officer was obliged, on her own accord, to elicit evidence of interim earnings from Stephan at the original hearing. This claim was raised and soundly rejected in the J.C. Hillary's case, which held that the burden of producing such mitigating evidence rests solely on the employer, and the Hearing Officer has no affirmative duty to raise the issue on her own accord. 27 Mass. App. Ct. at 208-09.[11] We also reject SPS's claim that the Hearing Officer "ignored" the Northeast Metropolitan case, relied on by the Superior Court, and point out that SPS has mischaracterized its holding by stating that the case, "involve[s] an Appeals Court decision remanding a case to the MCAD to take additional evidence of an employee's actual salary, where [s]he had received an erroneous back pay award of $48,507." First, the Appeals Court did not remand the case to the MCAD or order the agency to take additional evidence; it remanded the case to the Superior Court so that it could determine whether Northeast Metropolitan could even make the "substantial showing" required by § 14(6), for granting its motion. Northeast Metropolitan, 35 Mass. App. Ct. at 818-19. Moreover, the Appeals Court did not conclude that the complainant in Northeast Metropolitan, had received an "erroneous back pay" award from the MCAD. In fact, the Appeals Court stated that, on the record before it, it could not say whether the Superior Court, upon remand, should allow or deny Northeast Metropolitan's motion under § 14(6). 35 Mass. App. Ct. at 818-19. The Appeals Court opined that it would neither be an abuse of discretion for the Superior Court to deny Northeast's request under § 14(6), nor to allow it,

---

[11] The Superior Court judge appears to have based her decision, in part, on a belief that the Hearing Officer should have stepped in to elicit the evidence: [t]he record indicates that the hearing officer knew that Stephan was employed after being terminated from his position at SPS, and that he was, after his termination, being paid more than while he was while at [sic] employed at SPS." (Emphasis added). Decision and Order II, p. 4. J.C. Hillary renders the Hearing Officer's knowledge irrelevant.

where "there is an interest on the part of the public in preserving funds earmarked for education, and that interest would be affected adversely by requiring substantial compensation out of those funds to a discrimination victim who has suffered no actual loss." Id. The Appeals Court clearly did not compel any outcome in the Superior Court -- much less the MCAD -- with respect to Northeast's motion under § 14(6), when it remanded the case back to the Court, or conclude that the Commission awarded "erroneous back pay" to the complainant in that case. Id. at 818-19.

Our review of Northeast also leads us to conclude that the Superior Court mischaracterized the Appeals Court decision, wrongly citing it for the proposition that it is "critical" for a Court to allow a remand request on the grounds of "fundamental fairness" to "avoid overcompensate[ing]" a discrimination victim. Memorandum and Order II, p. 4. This description of the holding in Northeast is at odds with the decision itself, which neither used the word "critical" nor expressed any such judgment, and as already noted, specifically stated that it would not be an abuse of discretion for the Superior Court, on remand, to deny Northeast's § 14(6) motion, despite the "windfall" to the complainant which would result. Id. at 818-19. [12]

We believe that the circumstances that led the Appeals Court in Northeast to raise the

---

[12] The Northeast holding was primarily directed at distinguishing a court's "independent" and "review" authority under subsections (6) and (7), respectively, of Chapter 30A, § 14. In Northeast, the superior court judge denied Northeast's motion to supplement the record with additional evidence under § 14(6), believing that it was limited by the Appeal Court's decision in J.C. Hillary's, which held that a superior court judge, reviewing the MCAD's final decision under § 14(7), had no independent authority to order the MCAD to take additional evidence, once it concluding the agency had not abused its discretion in denying J.C. Hillary's motion under 804 CMR § 1.23(1)(g). 27 Mass. App. Ct. at 208. In Northeast, the employer filed its motion for leave to take additional evidence under § 14(6), and the Appeals Court held that because a court exercises "independent authority" when it acts under that subsection, it is not bound or limited by a decision which was issued under the court's more limited "review" authority under § 14(7), as in J.C. Hillary's. The Appeals Court remanded Northeast, as discussed in the text above, to the superior court to decide whether Northeast could make the substantial showing required under § 14(6).

possibility of a departure from the statutory requirements of § 14(6) are unique, based upon the important countervailing policy of whether limited public monies should be sacrificed when a lawyer who represents a public entity fails to elicit mitigating evidence during a hearing that if presented, would have eliminated the back pay award altogether. There is a strong public interest in preventing public funds from being squandered or burdening tax-payers who are far removed from the discriminatory act in question, with the costs of an attorney's "inexperience" or "inadvertence" during an MCAD hearing. We believe these public policy concerns were the focus of the Appeals Court's decision in Northeast, and are absent here, where the interests at stake are purely private, between Stephan and SPS.[13]

We have been unable to find any authority besides Northeast, where a court has suggested that a motion to supplement the record with additional evidence pursuant to §14(6), might or could be granted without the statutory showing of "materiality" and "good reason" set forth in G.L. c. 30A, § 14(6),[14] and instead, have found recent pronouncements to the contrary. The Supreme Judicial Court held in 2001 that the Boston Police Department and MAMLEO had "not provided a 'good reason' for [the Police Department's] 'failure' to present" evidence at the Civil Service Commission hearing, "so the statutory requirements for supplementing the

[13] We have found no case in which the public fiscal rationale of Northeast was adopted by a court as the basis for granting a party's motion under § 14(6). Northeast itself, was settled upon remand, and the Superior Court never had occasion to act upon Northeast's motion under § 14(6).

[14] The Supreme Judicial Court and Appeals Court have cited the Northeast decision favorably for the proposition that judges have discretion to make § 14(6) decisions. Doe v. Sex Offender Registry Bd., 452 Mass. 784, 795 (2008); Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 265 (2001); Wells v. Executive Dir. Div. of Employment and Training, No. 03-P-292, 2004 WL 868385 (Mass. App. Ct. Apr. 22, 2004). None of the authority that cites Northeast Metropolitan, however, does so for the proposition that a court can ignore the statutory requirements set forth in § 14(6).

administrative record [under § 14(6)] are simply not met." Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 266-67 (2001). In Commonwealth v. Roxbury Charter High Public School, following an administrative hearing before the Board of Education that resulted in a final agency decision to revoke a school's charter, the Appeals Court held that a Superior Court judge abused its discretion when it allowed the charter school's motion to supplement the administrative record under § 14(6), because the school failed to show the evidence was "material to the issues" in the case. 69 Mass. App.Ct. 49, 53-54 (2007). The Appeals Court stated that "abuse of discretion [] occurs where judicial action exceeds the legal framework under which the judge is authorized to act." In light of these cases, a court does not appear to be authorized to allow a motion under § 14(6) unless the statutory requirements are met, and therefore, rather than "ignoring" the Superior Court judge's reliance on Northeast in this case, we have thoroughly considered it and conclude that it does not support any modification of the Hearing Officer's decision.[15]

Finally, we note that the standard applied by the Superior Court judge in place of the statutory standard set forth in G.L. c. 30A, § 14(6), threatens the finality and integrity of not just MCAD adjudicatory hearings and final decisions, but all agency hearings and decisions which are subject to Chapter 30A, if a party who has failed to present evidence at an adjudicatory hearing is allowed to supplement the administrative record on the basis of "fundamental fairness." We believe that focusing on a moving party's reason for failing to introduce evidence at an adjudicatory hearing is an important and sound requirement of any effort to re-open an

[15] The dual statutory requirements of "materiality" and "good cause" under G. L. c. 30A, § 14 (6) "are essentially the same as those contained in the commission's regulation," 804 CMR 1.23(1)(g), which "appears to have been drawn directly from G.L. c. 30A, § 14(6)". J.C. Hillary's, 27 Mass. App. Ct. at 208 n. 7.

administrative proceeding under § 14(6), and preserves the integrity of the administrative process and finality of Commission and other agency decision-making.[16]

COMPLAINANT'S PETITION FOR ATTORNEYS' FEES AND COSTS

Complainant has filed two supplemental petitions for attorney's fees and costs. In his May 19, 2008 Petition, Complainant seeks reimbursement for 75.93 hours of work performed in the 30A appeal in Superior Court and for 159.83 hours of work associated performed in the Appeals Court for a total of $58,940. He seeks reimbursement for costs related to the Court appeals in the amount of $7,780.24. This petition also seeks fee for 12. 68 hours of work related to a memo to the Hearing Officer in the amount of $3,166.68 and related costs of $129.85.

On July 21, 2008, Complainant filed a Third Supplemental Petition for Award of Attorneys' Fees and Costs covering the period of time from Respondent's June 2008 Petition for Review of Hearing Officer's April 2008 Decision to July 2008, when it filed its Opposition to the Petition for Review. Complainant seeks an additional $4,187.50 for 16.75 hours of attorney time.

Respondent has filed an opposition to Complainant's request, asserting that Complainant was not a prevailing party entitled to recover attorneys' fees and costs within the meaning of the statute because he did not prevail before the Superior Court or the Appeals Court. Respondent further claims that the Commission does not have authority to award Complainant attorneys' fees incurred in connection with his legal efforts in the higher court proceedings, that Complainant waived his right to recover attorneys' fees and costs because he failed to request them in his appellate brief and that Complainant's fees and costs are excessive and/or unsupported by actual

---

[16] Because there has been no "review" of the Commission's final decision, the doctrines invoked by SPS in its brief, including law of the case, *res judicata* and separation of powers, are inapplicable and we do not address them today.

invoices.

At the outset we note that the Commission has no authority to award fees for work related to the proceedings in the superior and appeals courts, so we must decline the request for work performed in the courts. However, having affirmed the Hearing Officer's decision in favor of Complainant, we conclude that Complainant is entitled to an award of reasonable attorneys' fees and costs for work performed at the Commission only. See M.G.L. c. 151B, §5.

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's efforts to determine the number of hours reasonably expended involves more than simply adding all hours expended by counsel. The Commission carefully reviews the Complainant's submission and does not simply accept the proffered number of hours as "reasonable." See, e.g., Baird v. Belloti, 616 F. Supp. 6 (D. Mass. 1984). Hours for which compensation is sought that appear to be duplicative, unproductive, excessive, or otherwise unnecessary to prosecution of the claim are subtracted, as are hours that are insufficiently documented. Grendel's Den v. Larkin, 749 F.2d 945 (1st Cir.); Miles v. Samson, 675 F. 2d 5 (1st

Cir. 1982); Brown v. City of Salem, 14 MDLR 1365 (1992). 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 tasks involved.

Complainant's counsel's request for work performed at the Commission is supported by detailed time records and affidavits. We conclude that the request is reasonable as is the hourly fee of $250 charged by his attorney. We there award the Complainant additional attorney's fees in the amount of $7354.18 for worked performed at the Commission after the remand from Court. We also award costs in the amount of $129.85 for expenses related to photocopies, postage, courier services, facsimile transmissions and transcripts. We find that these costs are adequately documented and reasonable.

ORDER

For the reasons set forth above, we hereby affirm the decision of the Hearing Officer and Order fees and costs as noted 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 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 15th day of November, 2010

.

____

Julian T. Tynes
Chair

____

Sunila Thomas George
Commissioner

____

Jamie R. Williamson
Commissioner