

COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION and
OSCAR T. BROOKINS,
Complainant

v.

DOCKET NO. 05-BEM-03009

NORTHEASTERN UNIVERSITY,
Respondent

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Malcolm Medley in favor of Respondent Northeastern University. Following an evidentiary hearing, the Hearing Officer concluded that Respondent was not liable for discrimination against Complainant based on race/color and dismissed the complaint.¹ The Hearing Officer found that Complainant did not meet his burden to show that the disparity in pay between Complainant, an African American Associate Professor of economics, and white Associate Professors and Assistant Professors, was due to unlawful discrimination. The Hearing Officer dismissed the matter. Complainant timely appealed to the Full Commission. We affirm the Hearing Officer's decision.

¹ The Investigating Commissioner previously determined that there was a lack of probable cause for the Complainant's charge of age discrimination.

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); 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. 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 based on an error of law, whether the decision was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See 804 CMR 1.23.

SUMMARY OF FINDINGS

Complainant, Professor Brookins, is an Associate Professor in the Economics Department at Respondent, Northeastern University. When he was hired in 1983, his starting salary was roughly \$4,000 higher than the average salaries of the other Associate Professors in the Department. Faculty members in the Department may receive an increase in salary through two processes: the merit increase process and the market adjustment process.

The merit increase procedure involves a review by the Salary Review Committee (“SRC”) using the Department’s Merit Procedures, which meets every year to assess faculty members on their performance in the three areas: teaching, research and service. Complainant served on the SRC periodically at certain times during his employment, and evaluated his colleagues using the Department’s Merit Procedures. Scores in a particular category may be increased by the award of “Chair Points,” namely discretionary points added by the Chair of the Economics Department. The Chair of the Economics Department awarded “Chair Points” to the Complainant on several occasions. The data compiled during the merit review process are subject to a complex weighting system, to arrive at the final amount of each professor’s salary increase.

The market adjustment procedure involves salary enhancements based upon Respondent’s periodic assessment of Northeastern University’s salaries relative to those of professors at comparable colleges and universities. Market adjustments occur when funds are made available to the Department by the university. The process is designed to remunerate faculty members to prevent them from being raided by other institutions. Professor Brookins received market adjustments on four occasions prior to 2005.

In 2005, after discerning that the other Associate and Assistant Professors were earning more than he was, Professor Brookins raised concerns with Northeastern University regarding his salary. Various Northeastern University personnel reviewed the salary history, relative performance of the Associate Professors and SRC scores, and determined that Professor Brookins’ salary position relative to the other Associate Professors was primarily due to lower merit raises. Northeastern University also reviewed Professor Brookins’ claim that the pay disparity was due to discrimination, and

determined that the matter did not rise to the level of discrimination. Professor Brookins filed his charge of discrimination with the Commission on November 15, 2005.

Following a four day public hearing and extensive review of the evidence, the Hearing Officer issued detailed findings and dismissed the Complaint. The Hearing Officer found that Respondent presented ample evidence to show that the disparity in Complainant's pay was the justifiable and cumulative result of Complainant's relatively lower merit scores and merit-based salary increases over a period of over twenty years, which were determined consistent with Northeastern University's established procedures. The Hearing Officer determined that Complainant did not meet his burden to prove that the disparity was the product of impermissible racial bias.

BASIS OF THE APPEAL

Complainant's appeal to the Full Commission asserts that the Hearing Officer erred (1) by failing to recuse himself as the fact-finder because of his relationship with a witness, (2) by finding that there was insufficient evidence of pretext in the matter, and (3) in failing to find that Respondent acted with racial animus. We have carefully reviewed Complainant's Petition and the full record in this matter and have weighed all 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 that are supported by substantial evidence in the record. Quinn v. Response Electric Services, Inc., 27 MDLR 42 (2005). Substantial evidence is such evidence that a "reasonable mind" would accept as adequate to form a conclusion. G.L. c. 30A, s. 1(6); Gnerre v.

Massachusetts Comm'n Against Discrimination, 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 Division of Employment Security, 393 Mass. 482, 486 (1984).

Complainant's first grounds for appeal is that the Hearing Officer erred by failing to recuse himself as the fact-finder because of his relationship to a witness. Complainant argues that the Hearing Officer had a prior "close personal relationship" with Respondent's witness, Dean Donnie J. Perkins, that the Hearing Officer was biased against Complainant due to "strong ties" to Perkins, and that he "uncritically adopted Perkins' conclusions" in deciding this matter.

In June 2005, Complainant had filed an informal grievance with Respondent's Office of Affirmative Action and Diversity ("OAAD"). The Director of the OAAD was Dean Perkins. The grievance charged that Complainant's most recent contractual salary offer reflected disparate treatment on the basis of color, race and age, and requested a salary increase to the range of \$85,000 for the upcoming year. His grievance was denied. Complainant states that it was incumbent upon the Hearing Officer to disclose the relationship with Perkins in the three-month period between submission of the parties' Pre-Hearing Memorandum and the start of the Hearing and that his Decision in favor of Respondent demonstrates that he was "unable" to preside over the hearing "in a neutral manner." We find this argument to be without merit for the following reasons.

First, Complainant overstates the nature of the Hearing Officer's "relationship" with the witness at issue, alleging that it was "personal," "close," and "strong," and that the two individuals "knew one another well" as "brothers" in the same fraternity. The

evidence in the record belies such a claim. The Hearing Officer stated that he was acquainted with the witness when Perkins was called to testify, stating: “For the record, let me disclose that Dean Perkins is someone that I have known outside of the Commission, who I happened to be in the same fraternity with.” The Hearing Officer merely stated that he was acquainted with Perkins not that they had a “relationship” or that he knew Perkins “well.” To imply that the Hearing Officer and Perkins had a personal and close relationship is a misrepresentation of the Hearing Officer’s disclosure.

Second, the record demonstrates that, upon disclosing that he knew Perkins, the Hearing Officer asked the parties to lodge any objection to him hearing Perkins’ testimony. Complainant’s counsel responded, “I would just say, if the Chairman believes he can remain impartial, I have no problem,” and the Hearing Officer responded, “You have my word on that.” The Hearing Officer’s response indicated that he had consulted his own emotions, and determined that he could be impartial. Once a judge has determined that he can be impartial, the question of disqualification is ordinarily left to the discretion of the trial judge. See, Fidelity Management & Research Co. v. Ostrander, 40 Mass.App.Ct. 195, 202 (1996). Complainant did not object at the time, nor did he object after the evidentiary hearing in his post-hearing submissions or correspondence to the Commission prior to receipt of the decision. Complainant was obligated to raise any objection to the Hearing Officer’s impartiality as soon as he acquired knowledge of the relevant facts, prior to the issuance of the final decision. See In re Abijoe Realty Corp., 943 F.2d 121, 126 (1st Cir. 1991) (recusal request must be filed “at the earliest moment” upon gaining knowledge of relevant facts). Complainant did not accuse the Hearing Officer of bias until after receiving a Decision dismissing his claim; only then accusing

the Hearing Officer of being unable to be neutral. “[A] party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives.” Id., at 126 (citations omitted) The timing of the objection speaks more to disappointment with the outcome of the decision as opposed to sounding a legitimate challenge to the Hearing Officer’s impartiality. See also, Demoulas v. Demoulas Super Markets, Inc., 428 Mass. 543, 550 (1998) (“The timing of this motion [for recusal] makes it inherently suspect. The defendants have failed to demonstrate that the filing of this motion was not a last-minute attempt to nullify an adverse judgment.”)

Third, there is no support in the record for Complainant’s assertion that the Hearing Officer was “unable” to preside over the hearing “in a neutral manner” or that he “improperly relied” upon Perkins’ testimony in making his final decision. Perkins stated that upon investigating the allegations of discrimination, he declined to submit the matter to the university’s formal grievance process believing that the allegations “did not appear to rise to a level of discrimination.” Complainant’s counsel moved to strike this testimony, because discrimination is the ultimate issue for the fact-finder to determine. The Hearing Officer indicated that he understood his role was to employ his independent judgment to arrive at his own conclusion pursuant to the standards of G.L. c. 151B. The evidence does not reveal that the Hearing Officer blindly or uncritically adopted Perkins’ view of the matter in assessing the facts and reaching his conclusion. Instead the record reflects that the Hearing Officer engaged in his own detailed and painstaking analysis of Respondent’s salary review procedures and how they were applied to Complainant.

Finally with regard to claims of conflict of interest, that the resulting decision was adverse to the Complainant does not demonstrate “the required ‘bias or prejudice’ to

warrant judicial disqualification.” Smaland Beach Ass’n v. Genova, 461 Mass. 214, 221 (2012). Absent any such evidence in the record, the presumption that the fact-finder acted honestly and fairly is not overcome. See, Erickson v. Com., 462 Mass. 1006, 1007 (2012). Complainant’s allegations of a conflict of interest are not supported by any evidence that the Hearing Officer stood to gain either personally or financially from his decision or that he conducted the proceedings and his deliberations in anything but a fair and unbiased manner.

Complainant next contends that the Hearing Officer erred in finding insufficient evidence of pretext in this matter, by accepting Respondent’s justification that Complainant was paid at a level below that of the comparators due to substandard performance. He argues that because the Hearing Officer found that Complainant met his burden for purposes of the *prima facie* analysis to show that his work entailed substantially equal skills, effort and responsibility as other Associate Professors, finding that Complainant’s performance was “substantially equal to the performance” of the other Associate Professors,” there remains no basis to support Respondent’s position that the pay disparity was due to Complainant’s “substandard” performance. Complainant argues the Respondent’s explanation of the pay disparity must therefore be a pretext for race discrimination. We do not find this assertion persuasive. Complainant is improperly conflating the requirements of the *prima facie* showing, which are minimal, and not onerous, with the ultimate burden of proof that Respondent was motivated by discriminatory intent.

The Hearing Officer discussed at length the parties’ disagreement regarding the third prong of the *prima facie* case, namely that Complainant show that his position

“entailed the same primary functions” and that it required “substantially equal skills, effort and responsibility” as the position of other Associate Professors. Eggert v. Cabot Corp., 21 MDLR 131, 139-41 (1999). The Hearing Officer ultimately determined that Complainant met this burden, finding that Respondent considered all Associate Professors to be of a similar skill level, not expected to progress beyond that rank, and that Complainant’s position required “effort and responsibilities substantially equivalent to the white Associate Professors.” All Associate Professors carried the same course load and were required to perform similar tasks in the areas of teaching, research and service. Accordingly, the Hearing Officer concluded: “For purposes of the *prima facie* analysis, I find that Professor Brookins has met his burden of showing that his performance was substantially equal *to the performance of other Associate Professors and that he has stated a prima facie claim of discrimination.*”

However, finding that Complainant’s position required performance which was “substantially equal” to that of his peers in “skills, effort and responsibility,” is not the same as evaluating Complainant’s relative performance in meeting the requirements of the position and his individual accomplishments. Establishing the elements of *prima facie* case is not tantamount to proving the ultimate claim – it simply creates a rebuttable presumption that permits the analysis to progress to the second and third stages of production and proof. Thus the argument that the Hearing Officer erred by crediting Respondent’s articulated legitimate non-discriminatory reason for the pay disparity, i.e. that Complainant’s “overall performance was consistently and substantially below his peers,” is not persuasive. The Hearing Officer credited the evidence that Respondent conducted salary reviews in an objective and unbiased fashion and that Complainant’s

pay disparity resulted from over two decades of reviews which found Complainant's performance inferior in relation to his peers in three areas, teaching, research and service to the department. This conclusion was supported by the evidence.

There was evidence demonstrating that Complainant's pay level was the cumulative product of his lower relative performance spanning over his employment history at Northeastern University. The Hearing Officer pointed to Complainant's lower relative SRC scores in teaching, research and service, noting especially Complainant's performance drawbacks in teaching and service. He also discussed in detail Complainant's poor teaching scores, both from students and from the SRC, his "limited and questionable Research submissions," and his "relatively low performance in the area of Service," which was underscored by Complainant's own admission that he had not "overdone it" with respect to service. The Hearing Officer noted that each professor in the Economics Department underwent the same merit review process and was rated based on the same numerically-driven merit procedures using objective metrics. The Hearing Officer determined that the merit review process contained "built-in safeguards against bias, including the random selection of SRC members each year, the elimination of high and low scores, a weighted system, and the provision of a right of appeal." Complainant, himself, had served as an occasional member of the SRC, using the same system to evaluate other faculty members, and while having challenged his SRC scores three times during his tenure with Respondent, he had "not otherwise challenged the validity or integrity of the SRC selection and voting process." In a careful analysis of the evidence, the Hearing Officer found that the Respondent met its burden of production that the disparity in pay was based upon the accumulation of lower merit increases due to

relatively lower performance. He further found that the Complainant did not meet his burden to prove that those reasons were a pretext for discrimination. We concur that his conclusions are supported by substantial evidence and should not be disturbed.

Finally, Complainant contends that the Hearing Officer erred in failing to find that Respondent acted with racial animus. Complainant's argument in this respect is premised upon his assertion, discussed and rejected *supra*, that the Hearing Officer found that Complainant's performance was "equivalent" to that of his colleagues and, therefore, Respondent's reason for the pay disparity contradicts this finding of fact, indicating racial animus was at play. Complainant contends that since "the only distinguishing factor" between him and his peers was his race, Respondent's failure to correct the pay disparity, particularly after it was brought to their attention by an internal grievance is sufficient evidence of racial animus. We are not persuaded by this argument. There is ample evidence that Complainant's race was not the only factor that distinguished him from the other Associate Professors. The Hearing Officer found that Complainant's "relatively lower" work performance ratings over a period of over twenty years led to both lower merit scores and merit-based salary raises, which because they were cumulative, resulted in a more noticeable pay disparity. The Hearing Officer dismissed Complainant's argument that the minor disparity in his SRC score relative to others did not justify the broad discrepancy in pay for this reason. The record contains substantial evidence to support the Hearing Officer's findings that the reasons for the pay disparity were legitimate and not animated by any racial bias. The Hearing Officer correctly noted that the Commission's function is not to sit as a "super personnel department, assessing the merits – or even the rationality – of employers' nondiscriminatory business decisions."

Sullivan v. Liberty Mutual Ins. Co., 444 Mass. 34, 56 (2005) (citations omitted).

Moreover, the Hearing Officer found that even if it were appropriate for him to assume such a role, the record in this matter presented him “with no basis for calculating what merit increase should respond to any particular score, or for determining how the appropriate cumulative disparity total should be calculated.” Therefore, any such assessment would be based on speculation. We concur with the Hearing Officer’s conclusion that Complainant failed to prove that Respondent’s actions were the result of race-based animus.

Based on all of the above we conclude that there is substantial evidence in the record to support the Hearing Officer’s findings of fact and conclusions of law, and affirm dismissal of the claim.

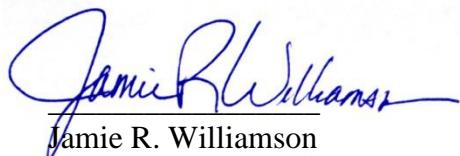
ORDER

Complainant’s appeal to the Full Commission is hereby denied and the Order of dismissal is affirmed.

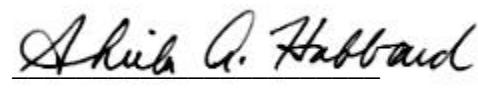
This Order represents the final action of the Commission for purposes of M.G.L. c. 30A. Any party aggrieved by this final determination may appeal the Commission’s decision by filing a complaint seeking judicial review, together with a copy of the transcript of the proceedings.

Such action must be filed within 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 Superior Court Standing Order on Judicial Review of Agency Actions. Failure to file a petition in court within 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 ORDERED² this 28th day of July , 2017.



Jamie R. Williamson
Chairwoman



Sheila A. Hubbard
Commissioner

² Commissioner Sunila Thomas George was the Investigating Commissioner in this matter, so did not take part in the Full Commission decision. See, 804 CMR 1.23