COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION &
RICHARD M. BLAKE,

Complainant

v. DOCKET NO. 08-BPR-03481

BRIGHTON GARDENS APARTMENTS, L.P.,
THE LOMBARDI CORPORATION &
MICHAEL J. LOMBARDI,

Respondents

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Eugenia Guastaferri in favor of Complainant, Richard Blake on his claim of unlawful discrimination in housing based on refusal to accommodate his disability. Following a default hearing where evidence was proffered by the Complainant, the Hearing Officer concluded that Respondents violated G.L. c. 151B when they issued a no pet policy and threatened to evict Complainant, who sought to have an emotional support dog remain in residence with him as an accommodation for his disabilities. The Hearing Officer awarded Complainant $25,000 in damages for emotional distress and ordered Respondents to allow his dog to remain in residence and to establish a policy and procedure for administering requests for reasonable accommodations from disabled tenants. She also assessed a civil penalty of $5000 against Respondents.

Respondents have appealed to the Full Commission, claiming that the public hearing conducted by the Hearing Officer pursuant to the Public Hearing default rules (804 CMR 1.21(8)) violated their due process rights. Respondents also claim that the Hearing Officer erred as a matter of law in concluding that Respondents discriminated against Complainant. Respondents also challenge the Hearing Officer's award of emotional distress damages.

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. MCAD, 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. MCAD, 361 Mass. 352 (1972); Bowen v. Colonnade Hotel, 4 MDLR 1007, 1011 (1982). The Full Commission's role is to determine 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 otherwise not in accordance with the law. See 804 CMR 1.23.

We have reviewed the Respondent's Petition for Review and the Complainant's opposition to the same. All objections raised to the Hearing Officer's Decision were weighed in accordance with the standard of review described above. Having carefully reviewed the record of proceedings, we find no material errors of law or fact. We determine that the application of the Public Hearing Default Rules, including the Hearing Officer's denial of Respondents' Motion to Remove the Default, was not an abuse of discretion nor was it otherwise not in accordance with law. We conclude that there is substantial evidence in the record to support the Hearing Officer's findings. To the extent the findings of the Hearing Officer are supported by substantial evidence in the record, they are accepted and herein incorporated by reference; to the extent they are not supported by the record, they are rejected.

DEFAULT HEARING

As a preliminary matter, Respondents object to the Hearing Officer's decision on denial of due process grounds. Respondents assert that the Commission proceeded with the public hearing even though Respondents were unable to attend due to a conflict that required Respondents' counsel to attend a hearing in another venue, and this was a denial of their due process rights. We are not persuaded that Respondents were denied due process, because the Hearing proceeded without their participation as a result of their own desultory conduct. The Public Hearing was rescheduled by agreement of the parties to occur on September 27 and September 28, 2010. The order rescheduling the public hearing was issued on March 10, 2010, and sent by certified mail to respondents, who received the order on March 11, 2010. The Respondents sought a last minute continuance of the Hearing by facsimile request that was not received by the Hearing

Officer until the morning of the hearing, and not received by Complainant's counsel until later that same afternoon. The handwritten facsimile seeking a continuance attached a purported notice dated August of 2010 from the Suffolk Probate Court concerning a hearing for September 27. Respondents failed to contact the Commission to ascertain if their motion had been received or ruled upon, and they did not respond to the Commission's attempts to contact them by telephone on the morning of the hearing. Respondents simply failed to appear.

The Hearing Officer noted on the record that Respondents had been on notice of the conflict for at least a month prior to the public hearing date and thus had ample time to seek a timely continuance, yet they waited until the eleventh hour to do so. Having not received notice of the late request to continue, the Complainant, his counsel, and his physician appeared and were prepared to proceed on the morning of hearing. Given these circumstances, it was well within the Hearing Officer's discretion to order Respondents defaulted and conduct a Default Hearing pursuant to the Commission's regulations at 804 CMR 1.21. [1] See, Lawless v. Bd. of Registration and Pharmacy, 466 Mass. 1010 (2013) (recognizing that Pharmacy Board did not abuse discretion in entering default where petitioner failed to appear on day of hearing and that petitioner ceded his right to present evidence in his defense due to failure to appear). It was also within the Hearing Officer's discretion to deny the last minute request for a continuance. See, In re Brauer, 452 Mass. 56 (2008) (where motion for continuance filed on eve of disciplinary hearing denial of

[1] The entry of default issued on September 27, 2010. The Respondents filed a Petition to Vacate the Default on October 29, 2010. The Hearing Officer denied the Petition to Vacate the Default finding that the respondents failed to show good cause for their delay in seeking any continuance and failure to appear at the public hearing. Order of November 4, 2010. Notably, as discussed below, the Respondents also failed to demonstrate meritorious defenses to the charge of discrimination. See, Clamp-All Corp. v. Foresta, 53 Mass. App. Ct. 795 (2002)(discussing requirements of both good cause and meritorious defenses for removal of default judgment under Mass. R. Civ. P. 55)

continuance within sound discretion of trial judge). We find no abuse of discretion in the Hearing Officer's decision to go forward with the long-scheduled Public Hearing.

LIABILITY

As to the merits, Respondents challenge the Hearing Officer's determination that Complainant was handicapped within the meaning of the law. They assert that Complainant's submission of a medical diagnosis of an impairment was not sufficient to prove he was disabled. We concur with the Hearing Officer's finding that Complainant made the requisite showing. He produced evidence that he suffers from physical and mental disabilities and has taken medication for associated illnesses for a number of years. His physician of ten years, Dr. Laura Kogelman of Tufts New England Medical Center, testified that Complainant suffers from serious physical ailments and also suffers from depression and anxiety. Complainant's physician also testified to the regimen of drugs and medical appointments that are a routine part of Complainant's life. In addition, the Hearing Officer pointed out that Complainant has been deemed disabled by the Social Security Administration, is unable to work and source of income is Social Security Disability benefits. The law establishes that an individual who receives federal disability benefits generally are considered disabled under both federal and state disability law. See Boston Housing Authority v. Bridgewaters, 452 Mass. 833, 844 (2009) ("A 2004 joint statement of HUD and the United States Department of Justice… informs that '[p]ersons who meet the definition of disability for purposes of receiving Social Security Disability Insurance benefits in most cases meet the definition of disability under the Fair Housing Act.' "). We conclude that the evidence supports the Hearing Officer's finding that Complainant is disabled.

Respondents also challenge the Hearing Officer's finding that Respondents had knowledge of Complainant's handicap. They argue that they had no "specific knowledge" of Complainant's handicap and therefore their actions "must be held to be non-discriminatory." However, the evidence is that Respondents were formally notified of Complainant's disability by the October 2008 letter of Attorney Melissa Champagne to Respondent Michael Lombardi, President of Lombardi Corporation, general partner of Brighton Gardens, which owns and operated the building at issue. The letter informed him that Complainant was handicapped under the Fair Housing Act and requested that Complainant be allowed to keep his support animal as a reasonable accommodation. Indeed, Respondents' own letter of October 7, 2008 specifically acknowledged that Complainant had medical issues, yet deemed them irrelevant, stating: "…Mr. Blake's medical needs are irrelevant to the 2008 policy decision of Brighton Gardens to rid the apartment building of animals…" (Hearing Exhibit C-10).

Also in October of 2008, Complainant's physician wrote a letter to Michael Lombardi providing additional details about his disabilities and noting that Complainant isolated himself as a result of his physical and mental illness, and stating that she had prescribed a support animal as a medical necessity, "in order to alleviate these difficulties, and to enhance his ability to live independently and healthily and to fully use and enjoy the dwelling." Respondents argue that Dr. Kogelman's letter was "vague," and expressed the need for an emotional support animal, but "did not articulate any reason or define any handicap." We find this assertion to be without merit. Dr. Kogelman's letter specifically stated that Complainant was disabled from both physical and mental illness, and that she prescribed an emotional support animal to alleviate the symptoms of those

illnesses. She stated that the support dog's companionship was vital to Complainant's health and well-being and that removing the dog would post a great risk to his emotional health. Contrary to Respondent's assertion that Dr. Kogelman's letter was "vague," and contained merely "vague references to emotional issues," she clearly articulated how and why the companionship of a support dog directly impacted Complainant's health and well-being. Both Dr. Kogelman's and Attorney Champagne's letters are ample evidence supporting the Hearing Officer's finding that Respondents were aware of his disabilities. In response to the information provided by Dr. Kogelman and Attorney Champagne, Respondents denied the relevance of Complainant's medical needs, stating: "Let me be quite clear. My client's position is that Mr. Blake's medical needs are irrelevant as far as the landlord's right to enforce the contractual provisions of its lease with Mr. Blake is concerned." (Hearing Exhibit C-11). To claim that Respondents did not have knowledge of Complainant's disabilities is disingenuous at best.

Respondents next contend that the Hearing Officer erred in finding that they failed to accommodate Complainant's handicap, because Complainant has not yet been evicted and still resides at the Brighton Gardens apartment complex with his dog. They assert they have taken no adverse action against him on account of his dog and have not enforced the no-pet policy. Respondents also assert that "the fact that [they] did not move to formally evict Blake demonstrates extraordinary restraint during a period when Appellant had no knowledge of Blake's true handicap." Respondents' position conveniently ignores the fact of Complainant's pending discrimination claim and that any action to evict Complainant subsequent to his filing this claim, could have been deemed retaliation against Complainant for his having asserted his rights under the law. It also

ignores the fact that prior to his filing this claim, Respondents flatly refused to grant Complainant a waiver from the no-pet policy as evidenced by Michael Lombardi's statements to Complainant's attorney that his medical needs were "irrelevant," and that there would be no exceptions to the policy. Respondents took the position that Complainant was in violation of the new policy and therefore subject to eviction. This conduct was deemed to be discriminatory. That Respondents did not initiate formal eviction proceedings does not negate their discriminatory actions which resulted in Complainant initiating the discrimination complaint and continuing to feel insecure about his housing situation. Complainant has lived in a state of uncertainty and fear that at any moment he could lose his apartment and/or have to give up his dog. Respondent's restraint in not enforcing the no-pet policy or undertaking formal eviction could likely be due to this pending law suit. The Hearing Officer was correct to conclude that Respondents failed to make a reasonable accommodation to Complainant prior to his filing suit and that this constituted unlawful discrimination.

DAMAGES

Respondents also challenge the Hearing Officer's award of emotional distress damages as not supported by substantial evidence. Respondents maintain that Complainant produced no support for an award of emotional damages "beyond the mere allegation that he was stressed out by this matter." This understates the credible testimony presented at the hearing by Complainant and his physician that Respondents' refusal even to consider an accommodation to his disability and their threats of eviction caused Complainant "enormous anxiety and worry." The Hearing Officer credited Complainant's testimony that the dilemma of having to give up his dog or move caused

him great anxiety and that he could not afford, either physically or emotionally, to undertake a move to a new apartment. The Hearing Officer found extremely compelling Complainant's testimony that having a dog had "turned his life around," and that the threat of eviction hanging over his head had been a "nightmare." He talked about the physical manifestations of anxiety including having a constant nervous stomach and the increased urge to smoke. The Hearing Officer found a direct causal relationship between Respondent's actions and Complainant's distress. Respondents argue that the Hearing Officer's reasoning is inconsistent since she found that Complainant's depression and stress had lessened significantly since adopting a dog. We are not persuaded by this argument. Improved emotional health from having the dog prior to being threatened with eviction and suffering subsequent anxiety from Respondents' actions are not mutually exclusive emotions. The evidence demonstrates one of the reasons Complainant was so upset by the no-pet policy and the threat of eviction was *precisely because* he had been assured he could have a pet and her companionship had proved to be such a source of comfort and stability to him. The Hearing Officer was persuaded that Complainant had established a loving and beneficial relationship with his dog and that the prospect of having to give her up "would be enormously painful to him and would jeopardize his physical and emotional health." She considered the factors articulated in Stonehill College v. MCAD, 441 Mass. 549 (2004), and the evidence amply supports her award. We conclude that her award is modest, does not shock the conscience and was not an abuse of discretion. We therefore affirm the award of $25,000 for emotional distress.

In sum, we have carefully reviewed Respondents' Petition for Review and the full record in this matter and have weighed all the objections to the decision in accordance with

the standard of review articulated therein. We conclude that there are no material errors of fact or law and that the Hearing Officer's findings as to liability and damages are supported by substantial evidence in the record. We therefore affirm the decision of the Hearing Officer.

COMPLAINANT'S PETITION FOR ATTORNEY FEES AND COSTS

Having affirmed the Hearing Officer's decision in favor of Complainant we conclude that Complainant has prevailed in this matter and is entitled to an award of reasonable attorneys' fees. See M.G.L. c. 151B, § 5.

The Commission determines whether a fee is reasonable utilizing its discretion and its understanding of the litigation and the time and resources required to litigate a claim of discrimination in the administrative forum. In reaching a determination of 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 the Commission to undertake a two-step analysis. First, the Commission calculates the number of hours reasonably expended to litigate the claim and then multiplies that number by the hourly rate it deems reasonable. Second, the Commission examines the resulting figure, known as the "lodestar", and adjusts it either upward or downward or not at all depending on various factors.

The Commission's assessment of the number of hours reasonably expended involves more than simply adding all hours expended by all personnel who worked on the matter. The Commission carefully reviews the Complainant's submission and will not simply accept the proffered number of hours as "reasonable." See, e.g., Baird v. Bellotti,

616 F. Supp. 6 (D. Mass. 1984). Hours 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. 1984); Brown v. City of Salem, 14 MDLR 1365 (1992). Only those hours that are reasonably expended are subject to compensation under M.G.L. c. 151B. In determining whether hours are compensable, the Commission will consider contemporaneous time records maintained by counsel and will review both the hours expended and tasks involved.

Complainant's counsel filed a petition seeking attorney fees in the amount of $3,487.50 on April 11, 2011. Having reviewed the contemporaneous time records that support the attorney fees request, and based on this and similar matters before the Commission, we conclude that the amount of time spent on preparation, litigation and appeal of this claim by Complainant is reasonable. The records do not reveal that any hours for which compensation is sought are duplicative, excessive, unproductive, or otherwise unnecessary to the prosecution of the claim. We therefore award attorney fees totaling $3,487.50 to Complainant.

ORDER

For the reasons set forth above, we hereby affirm the findings of fact and conclusions of law of the Hearing Officer and issue the following Order of the Full Commission:

(1) Respondents shall cease and desist from taking any action against Complainant on account of his need for a support animal to reside with him in his apartment at Brighton Gardens as a reasonable accommodation to his disability.

(2) Respondent shall immediately grant Complainant, as an exception to any no pet policy it may maintain and enforce, a reasonable accommodation to his disability and allow him to keep his emotional support animal in residence at his apartment at Brighton Gardens.

(3) Respondents shall establish and implement a policy and procedure for administering requests for reasonable accommodations from disabled tenants which shall include the criteria for reviewing said complaints, the medical or other documentation required and protocols for meeting with tenants to discuss and consider the request. Said policy shall be submitted to the Commission for its review and approval.

(4) Respondents shall pay to Complainant, Richard Blake, the sum of $25,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date of the filing of the complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

(5) Respondents shall pay to the Commonwealth of Massachusetts a civil penalty in the amount of $5,000.

(6) Respondents shall pay to Complainant attorneys' fees in the amount of $3,487.50, with interest thereon at the rate of 12% per annum from the date of the filing of the petition for attorneys' fees, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

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 receipt 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 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 28th day of May , 2014.

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Jamie R. Williamson
Chairwoman

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Sunila Thomas-George
Commissioner