COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION and JOSUE AND CLARA GARCIA, et al.,
Complainants

v.

DOCKET NOS. 11-BPR-01091, 01092, 01093, 01094, 01096, 01099, 01100, 01101, 01102, 01105, 01108, 01110, 01112, 01114, 01115, 01116, and 01117

DAVID ZAK, ZAK LAW OFFICES, P.C., AND LOAN MODIFICATION GROUP INC, d/b/a LOAN MODIFICATION GROUP OF MASSACHUSETTS,
Respondents.

DECISION OF THE FULL COMMISSION

This matter comes before us following a decision of Hearing Officer Betty E. Waxman, Esq. in favor of Complainants. Following an evidentiary hearing, the Hearing Officer concluded that Respondents were liable for discrimination based on national origin (Latino) in violation of M.G.L. Chapter 151B §§4(3B) and (4A). Respondents appealed 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. 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 was otherwise not in accordance with the law. See 804 CMR 1.23.

BASIS OF THE APPEAL

Respondents have appealed the decision on the grounds that the Hearing Officer erred as a matter of law by finding that Respondents engaged in "residential real estate-related transactions" under M.G.L. c. 151B, §4(3B) so as to render them liable for discrimination under that section.[1] Respondents argue that the loan modification services they provided to Complainants do not comprise "residential real estate-related transactions" under the statute.

We have carefully reviewed Respondents' grounds for appeal and the record in this matter and have weighed all the objections to the decision in accordance with the standard of review herein. As a result of that review, we find no material errors of fact or law with respect to the Hearing Officer's findings and conclusions of law. We find the Hearing Officer's conclusions were supported by substantial evidence in the record and we defer to them.

[1] Respondents assert, see Respondents' Petition for Full Commission Review at p. 2, fn. 1, that "…G.L. c. 151B, §4(3B) is the ***only*** statutory provision that provided a basis for finding the Respondents liable to the Complainants for discrimination." This assertion is incorrect. The Hearing Officer expressly found Respondents liable for violations of both G.L. c. 151B, §4(3B) and §4(4A) (providing that no person may coerce, intimidate, threaten, or interfere with the exercise or enjoyment of rights pursuant to c. 151B). See Decision of the Hearing Officer at p. 34. Respondents do not contest the Hearing Officer's determination of liability pursuant to G.L. c. 151B, §4(4A).

Complainants are seventeen (17) homeowners who alleged that David Zak and his companies deliberately targeted them for mortgage modification services because they were Latinos and homeowners who were experiencing difficulty in making mortgage payments. Respondents advertised their services in Spanish and Portuguese on radio and TV ads, in Spanish and Portuguese publications, and through fliers. Respondents' advertising included false statements about Zak's experience and success in obtaining loan modifications from banks. By way of example, the Hearing Officer found that the Respondents' ads falsely stated that Zak was "the only lawyer in Massachusetts who has saved 'hundreds of Latinos from foreclosure and cut their mortgage payments in half…'"[2] Many of Respondents' clients did not speak English fluently, had little formal education, did not know how to navigate the judicial system, and had financial problems. Direct evidence in the form of witness testimony showed that Zak focused on the Latino community because he believed Latinos were "stupid people," "easy targets," and gullible, in contrast to Caucasian clients who "knew too much" and black clients who "would sue him." Zak's fees were excessive and his provision of services misleading. As a result of Zak's falsehoods, misrepresentations, inflated fees, lack of concern for his Latino clients, and his ineffectiveness in obtaining mortgage modifications, Complainants suffered harm in the form of foreclosures, bankruptcy, evictions, short sales, additional fees paid to other attorneys, other loss of property, and emotional distress.

In their appeal, Respondents contend that the phrase "residential real estate-related transaction" is not defined in M.G.L. c. 151B, §4(3B) and that the Commission should adopt the definition in the statute's federal analogue, 42 U.S.C. §3605(b), which defines the term as "the making or purchasing of loans or providing other financial assistance for purchasing,

[2] Hearing Officer's Decision, Findings of Fact, ¶4.

constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or the selling, brokering, or appraising of residential real estate." Respondents argue that this statute exists for the sole purpose of prohibiting the denial of financial services to residents of certain areas, especially inner-city neighborhoods, a practice called "redlining," and that Respondents did not purchase, sell, or broker real estate or mortgages or provide financial assistance to enable people to maintain their homes. Respondents also contend that analyzing a mortgage and negotiating with a lender for a mortgage loan modification is not a "transaction" as that word is understood and used in §4(3B).

M.G.L. c. 151B, §4(3B) specifically prohibits discrimination on the basis of national origin by individuals who engage in residential real estate-related transactions to make mortgage loans available in order to maintain a dwelling. The statute in pertinent part provides that "[s] uch transactions shall include, but not be limited to: (1) the making or purchasing of loans or the provision of other financial assistance for purchasing, constructing, improving, repairing, or maintaining a dwelling; or the making or purchasing of loans or the provision of other financial assistance secured by residential real estate; or the selling, brokering, or appraising of residential real estate." Respondents advertised and secured clients in order to provide assistance in obtaining mortgage loan modifications on residential real estate mortgages. Complainants paid Respondents money in exchange for these services that would purportedly lower their mortgage payments and allow them to maintain their homes. Respondents' services fall within the clear language of the statue and their actions are the type of discriminatory practices §4(3B) seeks to prohibit. The statute also expressly allows for the inclusion of other types of real estate-related transactions that would result in discrimination with the words, "but not be limited to."

The purpose of §4(3B) is to provide recourse for those who are discriminated against in obtaining mortgages or financial assistance to purchase, construct, improve, repair or maintain residential real-estate. M.G.L. c. 151B, §9 proscribes a liberal construction of the statute for the accomplishment of its purpose to eradicate discrimination. A fair reading of §4(3B) includes individuals who assist others to obtain a mortgage or financial assistance. Respondents' contention that 42 U.S.C. §3605(b) [and thus §4(3B)] solely prohibits redlining or reverse redlining-practices that are not involved in this case misconstrues the meaning of that section and overlooks the clear intent of the statute as a whole in prohibiting discrimination in residential real estate-related transactions. We find that the evidence supports a conclusion that Respondents subjected Complainants to adverse treatment on the basis of national origin in the provision of mortgage loan modification services and that such transactions constitute residential real estate-related transactions under M.G.L. c. 151B, §4(3B).

Federal law is not binding on the Commission; however, the Commission may look to federal law for guidance where appropriate. Even if the Commission were to accept Respondents' narrow reading of 42 U.S.C. §3605(b) as limited to redlining, which it does not, the Commission's interpretation of section 4(3B) stands.[3] The statutory language of 42 U.S.C. §3605(b), while similar to that in M.G.L. c. 151B, §4(3B), is not identical. Section 3605(b) provides that "…the term residential "residential real estate-related transaction" means any of the following: (1) The making or purchasing of loans or providing other financial assistance (A) for purchasing, constructing, improving, repairing, or maintaining a dwelling; or (B) secured by residential real estate" (emphasis added). Id. By contrast, as noted above, the definition in G.L.

[3] The Fair Housing Act also provides that "[n]othing in this subchapter shall be constructed to invalidate or limit any law of a state…that grants, guarantees, or protects the same rights as are granted by this subchapter…" (emphasis added) 42 U.S.C. §3615.

c. 151B, §4(3B) expressly states that "residential real estate-related transaction[s]…shall include, but not be limited to" the transactions listed in the statute (emphasis added).

On the above grounds, we deny the appeal and affirm the Hearing Officer's decision.

PETITION FOR ATTORNEYS' FEES and COSTS

Complainants filed a Petition for Attorneys' Fees and Costs on June 30, 2015 to which Respondents have filed no opposition.[4] For the reasons stated below, Complainants' Petition for Attorneys' Fees and Costs is granted in the amount of $457,205.57.

Complainants' Memorandum of Law in Support of their Petition seeks attorneys' fees in the amount of $481,749.38. The petition is supported by affidavits of counsel and detailed contemporaneous time records for each attorney, intern and fellow who worked on the case, noting the amount of time spent on specific tasks, and reducing time which was not supported by such records. M.G.L. c. 151B allows prevailing complainants to recover attorneys' fees for the claims on which Complainants prevail. The determination of whether a fee sought is reasonable is subject to the Commission's discretion and includes such factors as the time and resources required to litigate a claim of discrimination in the administrative forum. The Commission has adopted the lodestar methodology for fee computation. Baker v. Winchester School Committee, 14 MDLR 1097 (1992). By this method, the Commission will first calculate the number of hours reasonably expended to litigate the claim and multiply that number by an hourly rate 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 complexity of the matter.

[4] The Petition for Attorneys' Fees and Costs seeks fees in the amount of $544,115.57, which appears to be a typographical error and is unsupported by the submitted time records. Accordingly, we address the amount identified in the Memorandum of Law in Support of the Petition.

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. Compensation is not awarded for work that appears to be duplicative, unproductive, excessive or otherwise unnecessary to prosecution of the claim. Hours that are insufficiently documented may also be subtracted from the total. Brown v. City of Salem, 14 MDLR 1365 (1992).

Counsel for Complainants seeks reimbursement for work performed by a legal team comprised of three attorneys, legal interns and fellows. The contemporaneous time records filed in support of that request have been carefully reviewed. We conclude that the tasks performed are adequately documented and that the amount of time spent on preparation and litigation of this claim is well within reason given the breadth and complexity of this case. We also recognize that the Complainants voluntarily reduced by 25% the hours sought for reimbursement associated with one of the attorney-fellow's time records. The Complainants also do not seek recovery for time where law fellows failed to keep adequate time records. With the exception of a duplicate entry by one attorney on one of the days of public hearing amounting to six hours and one hour of unsupported work in the billing records submitted by Attorney Zabin, the records supporting the Petition for Fees do not indicate that the remaining hours for which the Complainants seek recovery were duplicative, unproductive, excessive or otherwise unnecessary to successful completion of the individual task or the overall prosecution of the claims. The duplicate entry on the day of public hearing warrants a reduction in the hours to be compensated for Attorney Zabin's time in the amount of six hours. Attorney Zabin's time records also include one hour for an unidentified timekeeper "KL Lally" concerning Rhode Island Superior Court

dockets. Since there is no explanation for this person's research relative to the MCAD complaint, nor is any rationale for an hourly rate identified, we reduce the hours to be compensated for Attorney Zabin's time by an additional one hour.

Counsel seeks reimbursement at the hourly rates of $550 for Attorney Albert Zabin, $450 for Attorney Nadine Cohen and $350 for Attorney Todd Kaplan, $150 for first-year attorney fellows and $75 for student interns. The rates for Attorneys Cohen and Kaplan, the first-year attorney fellows and student interns are consistent with the rates identified in the Greater Boston Legal Services (GBLS) Attorneys' Fee Scale. These rates are also consistent with those customarily charged by attorneys and other professionals with comparable experience and expertise in such cases and are well within the range of rates charged by attorneys practicing employment law and providing professional support within the area. Attorney Cohen was the primary attorney for the Complainants, developed the case, led the legal team, examined the majority of witnesses at public hearing, and has substantial civil rights legal experience. Attorney Kaplan is an experienced housing discrimination attorney, who interviewed potential complainants, prepared witnesses and exhibits for the public hearing, examined witnesses and assisted other attorneys. Attorney Zabin's affidavit demonstrates his substantial litigation and trial experience, and indicates that his usual hourly billing rate is $775. In this case, he provided general litigation and strategy advice to GBLS attorneys, assisted in interviewing potential complainants, preparing witnesses and exhibits, and examining witnesses. Indicating that this was a "pro bono" case, he reduced his rate and seeks compensation of $550 per hour. However, given Attorney Zabin's role in prosecution of the claim relative to lead Attorney Cohen and his comparable work in the case to Attorney Kaplan, we assign an hourly rate of $350 to his work. Accordingly, after reduction of the duplicate entry of six hours, reduction of the unexplained one

hour for "KL Lally" and application of the reduced rate of $350, we award $40,355 for attorneys' fees associated with Attorney Zabin's work on this case.[5] This amount, combined with the time value requested for Attorneys Cohen and Kaplan and other GBLS professionals in the amount of $414,484.38, results in a total fee award of $454,839.38.

We hereby award fees in the amount of $454,839.38.

COSTS

Complainant seeks costs in the amount of $2,366.19 for deposition transcripts. This request is supported by documentation in the form of vendor detail information. We find that this request is reasonable and hereby award costs to Complainants in the amount sought.

ORDER

For the reasons set forth above, we hereby affirm the Decision of the Hearing Officer in its entirety and issue the following order:

(1) Respondents shall cease and desist from any further acts of discrimination on the basis of national origin;

(2) Respondents shall pay Complainants damages in the amounts set forth in the Decision of the Hearing Officer, with interest thereon at the rate of twelve percent (12%) per annum from the date of the filing of each complaint, until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(3) Respondents shall pay Complainants the sums set forth in the Decision of the Hearing Officer in emotional distress damages with interest at the rate of twelve percent (12%)

[5] The time records for Attonrey Zabin seek 122.30 hours. With the deductions, this amounts to an award for 115.30 hours at $350 for a total of $40,355.

per annum. The interest obligations on each award shall commence on the date that each of the complaints was filed and continue until paid or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(4) Respondents shall pay Complainants' attorneys' fees in the amount of $454,839.38 and costs in the amount of $2,366.19 with interest thereon at the rate of twelve percent (12%) per annum from the date the petition for attorney's fees and costs was filed until paid, or until this order is reduced to a court judgment and post-judgment interest begins to accrue;

(5) Respondents shall pay the Commonwealth a civil penalty in the amount of $10,000.

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 service of this decision and must be filed in accordance with M.G.L. c. 30A, c. 151B, §6, and Superior Court Standing Order 96-1. Failure to file a petition in court within thirty (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 ORDERED[6] this 24th day of May, 2018

Sheila A. Hubbard
Commissioner

Monserrate Quiñones
Commissioner

[6] Chairwoman 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(1)(c).