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COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, ss.

SUPERIOR COURT
CIV. NO. 15-0118

JAMES FOLEY
Plaintiff

v.

CITY OF NORTH ADAMS and
CIVIL SERVICE COMMISSION
Defendants

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FEB 29 2016

WESTERN MASSACHUSETTS REGIONAL OFFICE
OFFICE OF THE ATTORNEY GENERAL

**MEMORANDUM OF DECISION ON THE PARTIES' CROSS-MOTIONS
FOR JUDGEMENT ON THE PLEADINGS**

The plaintiff, *pro se*, seeks judicial review of a decision by the Civil Service Commission ("Commission"), which upheld a decision by the City of North Adams ("City" or "North Adams") that terminated plaintiff's employment as a police officer. The plaintiff argues that the Commission's decision was not supported by substantial evidence, unwarranted by the facts, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law.¹ He requests that the court set aside the decision and reinstate his employment as a police officer. The matter is now before the court on the parties' cross-motions for Judgment on the Pleadings. For the following reasons, the plaintiff's motion is DENIED and the Commission's decision is AFFIRMED.

NATURE OF THE DISPUTE

The facts as found by the Commission are as follows. James Foley was a member of the North Adams Police Department from 1994 until his termination in 2013. He started his service as a reserve police officer that evolved into a full time position in 1998. He was promoted to sergeant in 2008 and served as a patrol supervisor on the second shift. From 1997 to 2003, Foley was a narcotics investigator and served with the Berkshire County Drug Task Force.

In March 2012, there were breaks into student residences at the Massachusetts College of Liberal Arts in North Adams and Williams College in Williamstown.

¹ The plaintiff was initially represented by Attorney Terence E. Coles during March and April 2014. Attorney Michael Aleo took over the case and represented the plaintiff until July 2014.

Electronic items, including computers were reported stolen. The Williamstown police arrested an individual identified as RJ for these crimes. Given the similarities to the crimes in North Adams, the police departments coordinated their investigations and jointly interviewed RJ. Of significant to this case, RJ informed the police that he was involved in the thefts and that Joe Pini “was the leader and came up with [the] idea.” Specifically, RJ would steal the electronics from the apartments and put them in Pini’s motor vehicle so that Pini could sell the items. Pini would pay him \$50 for every night he worked and stole items.

After developing other evidence, Pini was arrested on May 7, 2012 and held in the Berkshire County House of Correction. Pini was subsequently indicted by a Berkshire County Grand Jury and the prosecution of the cases against him was assigned to assistant district attorney Marianne Shelvey.

As noted in the Commission’s findings based on the testimony of Foley, the relationship between Pini and Foley went back to 1998 when Foley was a foot patrol officer and Pini was an informant for Foley and other members of the Department.²

Although Foley was not assigned to the Pini investigation, he took an interest in Pini and had a number of conversations with him. On July 14, 2012, Foley, Pini and Pini’s girlfriend were part of a three way conversation when Pini was incarcerated in the House of Correction.³ In the communication, Pini was concerned about receiving a long prison sentence and the effectiveness of his attorney. Foley offered him general support and recommend another attorney. Foley advised Pini that he could not talk with the district attorney’s office on his behalf because Foley had a criminal case pending against him, however, indicated that he believed that Pini did not commit the crimes alleged in the indictments. Pini then asked Foley, if there were “any B & Es out there” as he “need[s] the kid RJ to start up again.” Foley responded that there had not been any recent breaking and entering reports and that RJ “may not” start-up again. The conversation ended when Foley indicated that if Pini needed something to have the girlfriend give him a call.

Pini made calls to at least one other member of the North Adams police department seeking assistance and was rebuffed by, at least, one member who indicated that he could not talk with him without his attorney present.

In the fall of 2012, Foley had additional communications that included a meeting at the House of Correction on December 7, 2012. Foley signed in on the “Visitor Register” for the purpose of an “interview.” The visit lasted 90 minutes with Foley and Pini reviewing documents that Pini had received during the criminal discovery process. They concluded that one of the witnesses (KA) had provided inconsistent evidence. Pini also provided Foley with information regarding unrelated crimes in North Adams that Foley wrote down on an envelope.

² Most, if not all, of the evidence of the plaintiff’s involvement with Pini came from Foley, himself.

³ Given that the House of Correction only allowed inmate to talk with identified persons, a three way conversation would often be used to circumvent that rule. However, the call was recorded by the jail.

Within a few weeks of this “interview,” Foley met with the witness KA at KA’s home and informed him that Pini believed that his statements were not accurate. At this time, Foley’s involvement in the Pini case was unknown to anyone in the North Adams Police Department, including the detective leading the investigation.

On January 2, 2013, Foley met with Michael Cozzaglio, Director of the North Adams Police Department. Foley indicated that he had concerns about the case involving Pini and Cozzaglio was surprised that Foley had such detailed information about the matter. When asked why he was so interested in the case, Foley replied that an “innocent party shouldn’t be jailed.” Cozzaglio told Foley to bring his concerns to Detective Mark Bailey, the primary officer of the case.

In discussing the matter with Detective Bailey, Foley indicated that RJ was the master mind and that Pini usually admitted to his crimes. He then stated that there were inconsistencies in the statement given by KA and that Bailey may have violated the “safe harbor rule” in interviewing him.⁴ Foley further indicated that RJ and not Pini had sold the computer to KA. Foley did not tell Bailey that he (Foley) had interview KA a few days before, however, he did say that he would provide him with a written supplemental narrative. This document was never provided.

On January 8, 2013, Foley sent an email to Director Cozzaglio summarizing his conversation with Detective Bailey. After this point in time, neither Director Cozzaglio nor Detective Bailey received any information or communication from Foley.

In March 22, 2013, Detective Bailey re-interviewed KA and was advised that his earlier testimony was wrong and that he handed the money to RJ and not Pini and that it was RJ who brought the computer to his apartment and not Pini. This information was given to the District Attorney’s Office.

In March or April 2013, Foley had another three-way telephone conversation with Pini and his girlfriend. There was a discussion related to the request that KA be re-interviewed. Pini was released from jail on May 1, 2013.

Pini’s criminal trial was scheduled to begin on May 8, 2013 in the Berkshire Superior Court. The day before, on May 7, at 10:00 p.m., Pini called Foley while he was on duty at the North Adams police station and expressed concern over going to trial. Foley left the police station and drove to Pini’s home in a police cruiser, picked up Pini and drove to the “Fish Pond” area in North Adams. Pini had in his possession discovery documents in had received from his attorney and together they reviewed the documents and conversed regarding inconsistencies. After 30-45 minutes, Foley drove Pini home

⁴ “An otherwise admissible statement is not to be excluded on the ground of unreasonable delay in arraignment, if the statement is made within six hours of the arrest (day or night), or if (at any time) the defendant made an informed and voluntary written or recorded waiver of his right to be arraigned without unreasonable delay.” *Commonwealth v. Rosario*, 422 Mass. 48, 56-57 (1996)

and then drove back to the police station with the discovery materials. While at the station, Foley used a department computer to type-up notes from his examination of the discovery materials consisting of 3 pages. During this process, Sergeant Baker was seeking Foley's assistance concerning police-related matters but Foley was preoccupied with the analysis of the discovery materials.

At approximately 12:30 a.m., Foley brought a copy of the notes to Pini's home and returned the discovery materials. Pini made written comments on the third page of the notes.

Later that morning, in Superior Court on the date the trial was to commence, Pini's counsel initially attempted to resolve the case by plea but was unsuccessful. Then Pini attempted to remove his attorney, unsuccessfully. Finally, Pini began to waive around a document saying that it was a police report from officer Foley that showed that he did not commit the crimes. ADA Shelvey was stunned to hear that Foley was involved in this case as he was not identified as a witness.

Given this stunning event, the trial judge continued the case until 2:00 p.m. that day. Shelvey contacted Director Cozzaglio and sought the report prepared by Foley. Director Cozzaglio indicated that Foley had taken a "keen interest" in the case but he was unaware of any report he authored. Also that morning, Pini sent a text message to Foley essentially stating that, "I fucked up; I didn't know I shouldn't have given the document to anyone."

Adding to this chaos, Director Cozzaglio had a subpoena issued against Foley to appear at the Berkshire Superior Court at 2:30 that day and personally served Foley with the subpoena. At the afternoon hearing, defense counsel clarified that his client had a friend who is a North Adams police officer and this officer assisted Pini in identifying areas of cross-examination. The judge removed the case from the May trial list and scheduled the case for trial in July.

When Foley arrived at the courthouse, he informed ADA Shelvey that the document was his own personal notes and that he was concerned about how the investigation was handled. He further stated that he did his own investigation and his notes must have been "inadvertently picked up by Pini when he gave him the discovery back." Being skeptical about this information, ADA Shelvey told Foley to prepare a report documenting any contact that he had with anyone regarding the Pini criminal matter.

That same day, Director Cozzaglio sent a letter to Foley ordering him to provide a written report that included,

"Any and all correspondence you had with Joseph Pini-Campbell or his attorney since the beginning of this investigation that led to the charges he is currently on trial for." This investigation began on or around March 2012. This will include, but not limited to, any information you provided or received in written form,

computer generated, copied, spoken in word, whether in person, via telephone, text message, any type of digital communication or thru a third party to include but no limited to [Pini's girlfriend].”

Foley asked Cozzaglio for clarification regarding the order and was told to simply follow the order. In a letter dated the same day, Foley indicated that he did not “recall having any correspondence” with Joe Pini, [the girlfriend] or the attorney as requested in the letter.

Director Cozzaglio considered the response by Foley to be untruthful and Foley was placed on administrative leave on May 24, 2013. An investigation was undertaken by the police department and Foley also spoke with Pini, his girlfriends and various police officers to obtain information.

Based on the above conduct, Foley was cited with the following violations: conduct unbecoming an officer; improper associations; undue influence; interfering with the course of justice; public criticism of department; truthfulness; use of department records and communications; order and insubordination. A hearing was scheduled before the Mayor of North Adams on January 31, 2014. Foley did not testify at the hearing. On the same day, the Mayor issued a written decision terminating Foley from the North Adams police department.

On February 3, 2014, Foley filed an appeal with the Civil Service Commission, pursuant to G.L. c. 31, § 43, seeking to overturn the decision to terminate him from his position. The appeal was dismissed on July 11, 2014 after the parties represented that they had reached a settlement agreement. Shortly thereafter, the plaintiff, *pro se*, filed a motion to reopen the appeal that was allowed in September 2014. After some preliminary motions, a hearing was held on November 12-14, 2014, in North Adams. The Commission, consisting of four Commissioners, held a *de novo* hearing and received testimony from 9 witnesses and received 88 exhibits.

After receiving submissions by the parties, on March 19, 2014, the Civil Service Commission issued a lengthy decision (34 pages) finding that, based on the preponderance of the evidence, there was “just cause” to terminating Foley from the police force. Specifically, the Commission found that Foley had been untruthful, insubordinate and engaged in conduct unbecoming a police officer.

On April 30, plaintiff's motion for Reconsideration was denied by the Commission.

On April 21, 2015, the plaintiff, *pro se*, filed a Complaint for Judicial Review, pursuant to G. L. c. 30A, § 14, seeking to vacate the decision of the Commission and reinstate him to the position as sergeant in the North Adams police department. He is also seeking an order compensating him for back pay, benefits, overtime and interest.

DISCUSSION

In reviewing an agency's decision, this court must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14 (7); *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992), quoting G. L. c. 30A, § 14 (7). Unless the decision of the hearing examiner violated constitutional provisions, exceeded the authority of the Board, was founded upon an error of law or unlawful procedure, was unsupported by substantial evidence, was unwarranted by the facts on the record, "arbitrary or capricious, an abuse of discretion[,] or otherwise not in accordance with law," this court may not set aside or modify the Board's decision. G. L. c. 30A, § 14 (7). The party appealing an administrative decision under G. L. c. 30A bears the burden of demonstrating its invalidity. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989).

Judicial review of an agency's decision is confined to the administrative record, and a court may not substitute its judgment on questions of fact for that of the agency. G. L. c. 30A, § 14(5); *Southern Worcester County Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n.*, 386 Mass. 414, 420-21 (1982).

The plaintiff asserts numerous issues for review by the Superior Court under Section 14. He raises procedural issues, evidentiary issues, constitutional issues and asserts that the decisions was arbitrary and capricious, an abuse of discretion and that the Commission exceeded its authority.

A. Procedural Defects

Foley contends that the investigation was "poorly conducted...not supported by reliable evidence and selected evidence gathered deprived plaintiff of favorable evidence that is forever lost..." Specifically, Foley argues that "Cozzaglio relied on speculation, conjecture and the uncorroborated word of Pini." As a result of the defects, Foley argues that he was deprived of due process and that the hearing lacked fundamental fairness.

Frankly, most of the evidence regarding the conduct of Foley came from his own testimony, particularly the nature and extent of his meetings and collaboration with Pini. The Commission, specifically, did not credit the testimony of Pini and relied on the evidence provided by Foley, with background information from ADA Shelvey, Cozazaglio and Bailey. The Commission found the testimony of Cozazaglio, Bailey and Shelvey to be credible and I am bound by that determination. Cf. *Guarino v. Director of the Div. Of Employment Sec.*, 393 Mass. 89, 92 (1984).

In addition, Foley does not identify the "favorable evidence" that was lost. He had the opportunity to present evidence and witnesses to the Commission. In fact, he presented numerous exhibits and three witnesses for consideration. Foley failed to show how any missing information would have changed the outcome of the hearing. He bears a heavy burden in this appeal and failed to meet that burden.

Foley also asserts that the City concealed a deal for reward for Pini's testimony depriving him of fundamental fairness and due process. However, he cites nothing in the record to support this claim. More importantly, the Commission discounted Pini's testimony so his evidence played no role in the decision. Finally, the Commission was free to accept Cozzaglio's testimony that there was no agreement.⁵

Foley asserted that the Commission inappropriately shifted the burden of proof to the plaintiff. In this section of his memorandum Foley states that the "burden of proof was on the City and evidence must be viewed in alight most favorable to Plaintiff." This is simply incorrect. The Commission repeatedly identifies that the City bears the burden of proof by the preponderance of the evidence. This is the correct standard and the Commission applied that standard.

Foley also argues that that the Commission and City "failed to apply the objective reasonable person standard when drawing inferences, presumptions and conclusions." He does not identify any specific inferences drawn by Commission that failed to be reasonable. As will be discussed later, the inference that the Commission drew that Foley had lied to Cozzaglio when he responded to his request of May 8, 2013, was reasonable, if not compelling.

B. Trial Issues

The plaintiff raises a number of trial issues regarding credibility, particularly as it relates to assistant district attorney Marianne Shelvey. The plaintiff takes testimony or evidence that was submitted to the Commission but not included in the findings and argues about its inaccuracy. Whether the Commission rejected the evidence because of its veracity or its significance to the case is irrelevant. Such evidence was not part of the findings and immaterial to this appeal.

In the Commission's findings, ADA Shelvey's testimony was limited and essentially provided background information. For example, Foley disagrees with Shelvey that the trial was continued as a result of Foley's memorandum. Instead, he claims that the trial was continued as a "result of the Commonwealth's failure to provide discovery." The transcript that was before the Commission reflects that Judge Kinder continued the trial by allowing a joint motion to continue because of the Foley's memorandum and the fact that the defense need to explore additional material. Like many issues raised by the plaintiff, this disagreement is irrelevant to the undisputed conduct of Foley and his unseemly relationship with Pini.

In any event, Foley has admitted that he authored the memorandum, with the only caveat that the documents "inadvertently" end up in the hands of Pini. The fact that the document first appeared at the commencement of the trial and was a cause of delay for the trial is clear from the transcript.

⁵ Foley, in his memorandum, confuses the criminal standard that required prosecutors to reveal deals and agreement with witnesses with this administrative appeal which does not.

Foley makes similar claims about Cozzaglio and his testimony. Again, his issues relate to facts that were not in the Commission's decision and unrelated to the reasons that he was terminated.

C. Arbitrary and Capricious, Abuse of Discretion and Contrary to Law

The major thrust of the plaintiff's appeal is that the Commission was arbitrary and capricious and abused its discretion in accepting certain evidence and rejection other evidence. The plaintiff's criticism is general and can best be understood by the following section of his memorandum.

“[The Commission's decision] gives the appearance [of] carefully selected facts to offer an explanation for Commission's decision that runs counter to the evidence presented at [the hearing] and City's supporting facts and testimony of allegation. Commission's arbitrary discrediting of testimony or ignoring substantive, probative, evidence favoring Plaintiff.”

First, the Commission is empowered to hold a hearing and resolve the facts. It is free to accept or reject testimony and evidence. The bottom line is that evidence was introduced that established that the plaintiff acted in a way that was inconsistent with a police officer's duties and contrary to the rules and regulations of the North Adams Police Department Police Manual.

Foley's own testimony that he repeatedly communicated with a criminal defendant (Pini) without the knowledge of the defendant's attorney, his superiors in the police department and the district attorney's office is sufficient to establish that he acted unprofessionally and displayed conduct unbecoming an officer. He certainly interfered with the trial of the case when the memorandum he drafted to assist the defendant suddenly appeared at the trial, causing an uproar and a continuance. The Commission was free to reject his explanation which was described as “illogical.” The Commission was hardly espousing a position devoid of reason when it decided not to accept Foley's justification for such actions.

The Commission found, also based on the testimony of Foley, that he “interfere[ed] with the course of justice.” Again, the Commission was free to draw its conclusions based on the testimony and evidence that the conduct of Foley in surreptitiously meeting with a criminal defendant during the pre-trial period and on the eve of trial, providing support and assistance, meeting with witnesses and withholding details about his interactions with Pini from his superiors. It was not an unreasonable conclusion to draw that Foley was interfering with a criminal prosecution. In fact, it is hard to find an innocent explanation for all of these events.

The conclusion reached by the Commission that Foley was “untruthful” is also supported by the testimony of Foley and the record. The request from Director Cozzaglio on May 8, 2013 was clear and unequivocal; any correspondence with Pini or his attorney

regarding the investigation. Cozzaglio further defined correspondence to include, "any information you provided or received in written form, computer generated, copied, spoken in word, whether in person, via telephone, text message, any type of digital communication or thru a third party to include but no limited to [Pini's girlfriend]." Foley response was, "I do not recall having any correspondence with" the above parties.

The Commission was well within its authority to concluded that Foley, an experienced sergeant in the North Adams police department, knew exactly what the Director was requesting and was feinting confusion to avoid providing inculpatory information. Accordingly, the Commission's finding that Foley's response was blatantly false, and insubordinate is neither arbitrary nor capricious.

Finally, the use of department computers and resources to assist Pini, as admitted to by Foley, also violated the department's rules.

In summary, the Commission had sufficient evidence to find that the plaintiff violated a number of rules and regulations that applied to North Adams police officers, particularly James Foley. The Commission did not act arbitrarily or capriciously in reaching its conclusions. Foley's claim of bias or conflict based on the failure of the Commission to accept his version of events is without merit. There was substantial, if not overwhelming, evidence that the plaintiff's relationship and activities with and on behalf of Joseph Pini were inconsistent with his duties and responsibilities as a police officer for North Adams.

Further, the Commission's finding that the plaintiff "was untruthful on multiple occasions and violated numerous other rules of the City's Police Department," and that such actions justified the decision to terminate him from employment as a North Adams police officer was consistent with the evidence and appropriate.

Accordingly, the plaintiff's motion for Judgment on the Pleadings is DENIED, and the defendants' motion for Judgment on the Pleadings is ALLOWED.

SO ORDERED

2/26/16
Date

J. R. A. [Signature]
Associate Justice, Superior Court

