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NOTIFY

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COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-4497-B

NOTICE SENT
11-23-12.
A.E.W.
B.M.A.N.
E.J.M.
MAES, A.G.
R.L.Q. JR.

BOSTON POLICE DEPARTMENT

v.

**ROBERT TINKER and the
MASSACHUSETTS CIVIL SERVICE COMMISSION**

(LAT)

**MEMORANDUM OF DECISION AND ORDER
ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to G.L. c. 30A, § 14 and G.L. c. 31, § 44, plaintiff, Boston Police Department, ("Department") seeks judicial review of a disciplinary decision and order rendered by the Massachusetts Civil Service Commission ("Commission"), granting, in part, the appeal of the defendant, Sergeant Detective Robert Tinker, ("Defendant"). For the reasons set forth below, the plaintiff's motion is **ALLOWED**, the Commission's decision is vacated, and the Department's decision is reinstated.

FACTUAL BACKGROUND

The facts as found by the Commission are summarized, supplemented where necessary by undisputed aspects of the record. New Bedford v. Massachusetts Comm'n Against Discrimination, 440 Mass. 450, 452 (2003).

The Defendant has served as a tenured sergeant detective at the Department for over thirty years. Admin. Record Vol. 2, pp. 51-59. On January 25, 2010, the Defendant was assigned to work on the Ballistics Audit at the Evidence Management warehouse with Officer Gary Lewis

("Officer Lewis"). Admin. Record Vol. 1, pg. 151. The purpose of the audit was to take inventory of the Ballistics Unit. Id. at 52. This was accomplished by matching and confirming the contents of examined cases with an Evidence Tracker system. Admin. Record Vol. 2, pg. 30.

Officer Lewis assisted the Defendant throughout the day in removing crates from shelves and scanning each case into the Evidence Tracker system. Id. at 31. The boxes contained evidence from cases that were between thirteen and twenty years old, Id. at 52, but the Defendant was not aware whether the audited cases had been resolved. Id. at 70. The Defendant would open the box of evidence and read off the contents to Officer Lewis, who would, in turn, confirm the accuracy of the Evidence Tracker based on that content. Id. at 31-32. In the event of any discrepancy, Officer Lewis would make any corrections in the Evidence Tracker, and the Defendant would fill out certain forms to document the occurrence. Id. at 32.

At some point before the lunch break, the Defendant opened a case in which the contents did not match the inventory listed in the Evidence Tracker. Id. at 33. The Evidence Tracker on that particular case listed a firearm, four shell casings, and one live round (bullet) Id., but the bullet was missing from the box. Id. Officer Lewis noted the discrepancy in the Evidence Tracker. Id. Upon returning from lunch, Officer Lewis found a bullet on the floor near the Defendant's work area, and picked it up. Id. at 35. He then brought it to the attention of the Defendant and asked him what he wanted to do with said bullet. Id. The Defendant placed the bullet on the table in front of him, and continued to work on other cases. Id. Later that day, the Defendant leaned toward Officer Lewis, said, "you didn't see this" and threw the bullet into a blue tote bag used for trash. Id.

At the end of the workday, Officer Lewis returned to Boston Police Headquarters and reported the incident to his Superintendent. Id. at 36. The next day, January 26, 2010, Lieutenant Detective John Fedorchuk (“Lt. Det. Fedorchuk”) went to the Evidence Management warehouse, located the bullet in the blue tote, and delivered it to the Anti-Corruption Division. Id. 43.

On May 27, 2010, the Department issued the Defendant a five-day suspension for improperly disposing the found bullet and for encouraging a subordinate to ignore his actions.¹ Admin. Record Vol. 1, pg. 82. The Defendant requested a hearing to appeal his suspension. Admin. Record Vol. 2, pg. 68. That hearing was held on June 4, 2010 before Superintendent Norman Hill. Id. Superintendent Hill retired prior to issuing his recommendation, so a rehearing was held on December 7, 2010 before Deputy Superintendent Colm Lydon, who, after reviewing all presented evidence, found that there was just cause to uphold the Defendant’s suspension. Admin. Record Vol. 1, pp. 77-99. The Defendant was accordingly served with a Notice of Decision, informing him of the charges and the decision. Id. at 79-80.

The Defendant filed an appeal to the Commission, which held a hearing on April 25, 2011 to determine whether the Department had just cause to suspend the Defendant for violating the Department’s Rules and Procedures. Admin. Record Vol. 1, pg. 150. The Defendant admitted to the general facts and allegations. Id.

On November 7, 2011 the Commission issued a decision that the Department did have just cause to impose “some discipline” on the Defendant, but that his conduct did not warrant a five-day suspension. Id. at 176-177. The Commissioner then vacated the Department’s

¹ In violation of Boston Police Department Rules and Procedures: 102 §4(Judgment); 102 §3 (Conduct); and 309 (Procedures for Handling Physical Evidence and other Property Coming into Police Custody).

suspension and replaced it with a written reprimand, and an order to return to work in his position without loss of pay or benefits Id. at 176-177. The Commission allegedly based its decision on witness testimony from the Defendant's superiors in the Department and disciplinary cases in which similarly situated civil service employees received lesser discipline than what the Department had imposed. Id. at 175-178.

The Department filed a Motion for Reconsideration of the Commission's Decision on November 18, 2011, which the Commission denied on December 5, 2011.

DISCUSSION

Standards of Review

Standard of Review for the Commission's Review of Police Discipline Cases

In police discipline cases, the Civil Service Commission must determine "whether, on the basis of the evidence before it, the appointing authority had sustained its burden of proving that there was a reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303 (1997). "The question before the Commission is not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the Commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the Commission to have existed when the appointing authority made its decision." Police Department of Boston v. Collins, 48 Mass. App. Ct. 408, 411, n. 5 (2000), Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). In determining the propriety of discipline, the Commission must be guided by the principle of "uniformity and the equitable treatment of similarly situated individuals", as well as the "underlying purpose of the civil service system: "to guard against political considerations,

favoritism, and bias in governmental employment decisions.” Town of Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823 (2006).

The Role of the Court in Reviewing The Commission’s Decision

Because it is the Department that appealed from the Commission's decision, the Department bears the burden of establishing that the Commission’s decision is invalid. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 242 (2006). This is a "heavy burden," (Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001)), since the Court gives "due weight to the experience, technical competence, and specialized knowledge" of the Commission in deciding these matters. G.L. c. 30A, § 14(7). "This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." Brackett 447 Mass. at 241, quoting Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992). The Court may not make new determinations of facts or make different credibility choices. Zoning Bd. of Appeals v. Housing Appeals Comm'n, 385 Mass. 651, 657 (1982).

Accordingly, under G.L. c. 31, § 44, and the assimilated standards of G.L. c. 30A, § 14(7), the Superior Court (a) must typically accept the findings of fact of the Civil Service Commission hearing officer if supported by substantial evidence; and (b) will, upon the facts so supported, determine whether the action of the Commission was “legally tenable.” Boston Police Dept. v. Tolland, Civ.A. 03-2734-A, 2005 WL 1309076 (Mass. Super. May 18, 2005) aff'd sub nom. Police Dept. of Boston v. Tolland, 67 Mass. App. Ct. 1107 (2006), quoting City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, (2003); School Comm. of Brockton v. Civil Serv. Comm’n, 43 Mass.App.Ct. 486, 490 (1997). A Commission's decision is justified if it is supported by substantial evidence. “Substantial evidence is such evidence as a reasonable mind

might accept as adequate to support a conclusion.” Singer Sewing Machine Co. v. Assessors of Boston, 341 Mass. 513, 517 (1960). Pursuant to G.L. c. 31, § 44, the Court must review the Commission's decision to determine whether it was in conformity with the standards set forth in G.L. c. 30A, § 14(7). Police Dept. of Boston v. Jill Kavaleski, Supreme Judicial Court, No.10972 Slip Op. (November 6,2012), quoting Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. at 260-262.

Massachusetts courts, however acknowledge the special importance of police disciplinary decisions for purposes of morale and order. Police rules of conduct and their enforcement are policy matters which, in the absence of political interference or deviation from merit standards, “are beyond the [Civil Service] Commission's reach.” Police Dept. of Boston v. Collins, 48 Mass. App. Ct. at 413. The Court may thus set aside or modify the Commission's decision if it concludes that “the substantial rights of any party may have been prejudiced” by a decision that is based on an error of law, unsupported by substantial evidence, or otherwise not in accordance with the law. G.L. c. 30A, § 14(7).

It is undisputed that the Department was justified in disciplining the Defendant. The Defendant openly admits to his conduct, and all parties agree that such conduct warrants discipline. Therefore, the central question before the Court is whether the Commission justifiably modified the Department’s level of discipline imposed on the Defendant.

The Commission maintains that although it was proper for the Department to discipline the Defendant, the particular discipline amounted to disparate treatment because it was significantly harsher on the Defendant than that historically imposed on similarly-situated employees. Admin. Record Vol. 2, pg. 175.

In reaching that decision, the Commission cites, in relevant part, the following standard:

Unless the Commission's findings of fact differ materially and significantly from those of the appointing authority or interpret relevant law in a substantially different way, the Commission may not substitute its judgment for that of the Department, and "cannot modify a penalty on the basis of essentially similar fact finding without an adequate explanation. "E.g. Falmouth v. Civil Serv. Comm'n, 447 Mass 814, 823 (2006) and cases cited [...]"

Based on the above-quoted standard and applicable Massachusetts law, this Court finds that the Commission's findings of fact with respect to its modification of the Defendant's discipline do not differ materially and significantly from those found by the Department except insofar as the Commission's findings are based on misrepresentations of the administrative record and irrelevant evidence. Misrepresentations and irrelevant evidence do not constitute substantial evidence. Because such findings are not based on substantial relevant evidence, they are not legally tenable. Tolland, Civ.A. 03-2734-A, 2005 WL 1309076. Accordingly, this Court must set aside the Commission's legally untenable decision as it prejudices the Department's substantial rights in violation of G.L. c. 30A, § 14(7) and controlling case law. To that end, this Court turns to the Commission's justification for modifying the Department's level of discipline.

The Commission's explanation for modifying the Department's decision based on disparate treatment is inadequate and troubling for two main reasons. First, it misrepresents the administrative record by ignoring evidence that contradicts its own findings and conclusions. Second, the decision improperly focuses on irrelevant facts regarding the Defendant's motives and intent. As such, the Commission inappropriately and without adequate explanation modified the Department's five-day suspension. The Court addresses each issue in turn.

The Commission's Decision Misrepresents the Record

The Commission's primary reason for modifying the Department's decision is based on the Commission's finding that the Department imposed a disparate level of discipline on the Defendant. The Department argues, and this Court agrees, that the Commission arrived at this conclusion by relying on incomplete testimony, misinterpretations of the record, and irrelevant circumstances.

The Commission's decision misrepresents the record. The Commission summarily arrives at its conclusion by stating that "the [Department's] own witness² on the issue relayed that two supervisors, both Sergeants, charged with similar offenses received only 'written reprimands', and at worst a one-day suspension as discipline," and that, "Chief Linskey, who participated in the [Department's] 'green folder' meeting to determine the appropriate discipline, specifically sent out for the files on those two supervisor cases because he believed they [were more comparable]."

The Commission's conclusion as to Chief Linskey's request is inaccurate. Chief Linskey requested those two additional cases because, unlike the previous cases that involved subordinate officer discipline, the two requested cases involved supervisor discipline. Contrary to the Commission's suggestion, his request simply concerned treating similarly-situated roles in a similar fashion. In addressing the difference between the Defendant's discipline and the discipline imposed on the defendants in the other two cases, Chief Linskey thoroughly explained that although prior disciplinary cases resembling the Defendant's case resulted in, at most, one-

² It is worth noting that the Department's "witness" on the issue was a Department officer who was asked by the Department to simply compile disciplinary reports. Said Officer is unfamiliar with this case or the Defendant.

day suspensions, the Defendant's case stood out. It stood out, according to the Department, because: (a) the Defendant was a supervisor, and not an ordinary officer; (b) he was performing an evidence audit, work of a highly sensitive nature; (c) he intentionally threw away evidence instead of following protocol; and (d) he attempted to influence a subordinate officer³.

The Commission's decision ignores Chief Linksey's undisputed testimony. Rather than addressing said testimony, the Commission focused its attention on wholly irrelevant matters, such as the "messy" state of the Audit Warehouse and the perceived shortcomings in the auditing process. Such observations do not constitute substantial evidence that bears on whether the Department imposed disparate discipline on the Defendant.

The Commission Improperly Focuses on Irrelevant Facts and Unfounded Conclusions

Instead of adequately explaining its reasons for modifying the Department's decision, the Commission digresses into an irrelevant explanation of the Defendant's intent and motivation: ostensibly a point-by-point exculpatory narrative on behalf of the Defendant. The Commission somehow suggests that the severity of the Defendant's misconduct should be mitigated by the Commission's perception of Chief Linskey's allegedly erroneous belief that the audit should have been complete and thorough; by Chief Linskey's allegedly mistaken belief that the

³ See Admin Record, Vol. 1 pp. 123-125: "[...][What] set this apart is the nature of the assignment and the mission [...], along with [*sic*] interaction of the subordinate involved[...]. [W]e had a process where we were doing an audit and review of all of our ballistics items to determine if every firearm, every piece of ammunition was where it was supposed to be[...]. It could be a weapon that was turned in with ammunition that isn't linked to a crime and will have no repercussions if its not properly recorded. It could be a homicide case where that bullet could indict somebody or could exculpate somebody [...]. [...] [T]o have an audit function that was undermined that was a serious—serious concern. ... [The Defendant] made a decision to take that piece of evidence and throw it away as opposed to determining what should happen to it or counting it...and [...] when you then look at a police officer who's assigned to work for you and you direct that police officer to advocate [*sic*] his duty, that you didn't see that, and you put that police officer in a position where he has to now [violate] Rules and Regulations, advocate [*sic*] his duty to do his job...and cover up a potential misdeed, that's what made this case stand out from others[...]."

defendant was trying to encourage his subordinate to abdicate his duty (evidently because the Defendant “honestly believed” his “you didn’t see this” statement was a “joke”, and the Department failed to demonstrate otherwise⁴); because the audit process (in the Commission’s view) was already full of shortcomings and inaccuracies; because Lt. Fedorchuk testified that it might not be possible to identify the tossed bullet, the origin of which had not been identified; and because of the Defendant’s otherwise thirty-one-year, discipline-free tenure⁵. Based on that line of reasoning, the Commission concludes that “the [Department] failed to show by a preponderance of the credible evidence in the record that the [Department], under the totality of the circumstances found, proved that the [Defendant] violated the BPD rules and policies[...]”. According to the Commission, [The Defendant] admitted his simple act from the beginning...and it cannot be said that by this single act, [that the Defendant] is guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” The Commission’s line of reasoning is illogical and wholly untenable as justification for modifying the Department’s disciplinary action.

Although police officers are, indeed, required to adhere to a high standard of conduct, Police Commr. of Boston v. Civil Serv. Commn., 22 Mass.App.Ct. 364, 371 (1986); McIsaac v. Civil Serv. Commn., 38 Mass.App.Ct. 473, 476, 648 N.E.2d 1312 (1995), the Commission must, when reasonable justification is provided, respect the Department’s action in enforcing such a

⁴ The Defendant’s testimony was that he “[...] said it jokingly because [he] did not think what [he] was doing was significant[...] [and] had [he] thought [so], [he] wouldn’t have done it.” Admin. Record, Vol. 2, at 54-55. However, the Commission somehow arbitrarily concludes that the “[Defendant] was open, jocular, and obvious” and that he “honestly believed” it “was a joke, after he just blatantly committed a single act, which he later realized was bad judgment or thoughtless.” Admin. Record, Vol. 1, at 174.

⁵ But see, Watertown v. Arria, 16 Mass.App.Ct. 331, 335 (1983) (“[T]he police department has substantial and very practical reasons for penalizing an officer in certain cases,[...] even a twenty-seven year veteran”).

code of conduct for its police officers⁶. Police Dept. of Boston v. Collins, 48 Mass.App.Ct. 408, 412 (2000); See generally Police Dept. of Boston v. Dean, 56 Mass. App. Ct. 1111, 779 N.E.2d 165 (2002). Thus, even if the Commission could cite the aforementioned mitigating factors as tenable reasons for modifying the Department's disciplinary action, the Commission would still be acting beyond its authority. Police Dept. of Boston v. Collins, 48 Mass.App.Ct. at 412-413⁷ (vacating the civil commission's decision and reinstating the police department's five-day suspension of a police officer that engaged in a heated conversation with and cursed at superior officer).

Given the circumstances of the instant case, this Court finds that the Commission, in excess of its statutory authority, impermissibly substituted its own judgment for that of the appointing authority. There is nothing in the administrative record that suggests that the five-day suspension was anything other than a valid exercise of the Department's discretion based upon proper policy considerations. Accordingly, under the facts found by the Commission, it was an abuse of discretion, in excess of statutory authority, and not in accordance with Massachusetts law to conclude that the Department imposed disparate discipline on this Defendant.

Accordingly, the Commission's decision must be vacated.

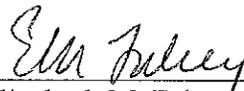
⁶ Massachusetts courts have previously noted the high standard of conduct required of police officers and the need for the Civil Service Commission to respect that standard. See Police Commr. of Boston v. Civil Serv. Commn., 22 Mass.App.Ct. 364, 370-371 (1986).

⁷ By engaging in a heated conversation with and cursing at a superior officer, Collins violated departmental rules of conduct by engaging in "substantial misconduct that adversely affect[ed] the public interest by impairing the efficiency of the public service." Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983). The decision to impose discipline for violating those rules, even where the gravity of the offense appears mitigated by its occurring out of earshot of others and under trying circumstances involving stress, lack of sleep, and personal ill feeling, is a matter of policy for the appointing authority.

ORDER

The Commission's order is thus VACATED, and the Department's decision and order suspending the Defendant for five days, without pay or benefits, is REINSTATED.

By the Court,



Elizabeth M. Fahey
Justice of the Superior Court

DATED: 11/21/12