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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 19-00684

Notice sent
1/10/2020
J. E. O-J.
S. J. A.

(sc)

STEVEN J. ADAMS

vs.

CIVIL SERVICE COMMISSION & another[1]

MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff Steven J. Adams ("plaintiff" or "Adams") brings this action *pro se* pursuant to G. L. c. 31, § 44 and G. L. c. 30A, § 14, seeking judicial review of the decision of the defendant the Civil Service Commission ("Commission") to affirm his termination by his former employer, the defendant the Department of the Correction ("DOC"). Presently before the court are the parties' cross-motions for judgment on the pleadings. For the following reasons, the defendants' motion is **ALLOWED**, and the plaintiff's motion is **DENIED**.

BACKGROUND

The following facts are taken from the administrative record. The court reserves further recitation of the facts for its discussion below.

The plaintiff was employed by DOC from 1998 until his termination in 2016. He was initially hired as a Correction Officer I ("CO I"), and assigned to the Massachusetts Correctional Institution ("MCI") Concord, which is a medium secured facility. In 2010, the plaintiff was appointed to the Special Operations Response Unit, Special Reaction Team. In 2011, the plaintiff was promoted to a CO II, the equivalent of the rank of Sergeant, and reassigned to MCI

[1] Commonwealth of Massachusetts Department of Correction

Cedar Junction in Walpole. At the time, MCI Cedar Junction was a maximum secured facility, and the plaintiff worked in the Department Discipline Unit ("DDU"). This was a challenging assignment. The plaintiff was assaulted many times during the course of his work on the DDU.

During his eighteen years of service with DOC, the plaintiff received favorable employee performance reviews ("EPRs"), including a number of "exceeds" ratings in recent years. On two occasions, his EPRs reflect that he was an "exemplary correctional professional." The plaintiff also received specialized training and recognition for his performance throughout his employment with DOC.

On August 26, 2015, police responded to the plaintiff's home and arrested him on charges of assault and battery on a family or household member ("A&B on a family member"), assault and battery ("A&B"), and malicious destruction of property over $250. An abuse prevention order ("ABO") was issued against the plaintiff the same day pursuant to G. L. c. 209A. The ABO was later dismissed at the request of the plaintiff's wife. The charges of A&B on a family member and A&B ultimately were dismissed after the plaintiff's wife and his mother refused to testify. The plaintiff pled sufficient facts to support the wanton destruction of property over $250 charge, but the matter was continued without a finding.[2]

On September 1, 2015, the Superintendent of MCI-Cedar Junction sent the plaintiff a letter indicating that he had been notified of the plaintiff's arrest, pending charges, and the ABO. In the letter, the Superintendent explained: "Given the extreme gravity with which the Department views such crimes of violence in domestic circumstances, after proper notice and hearing, you will be subject to discipline up to and including termination from the Department of Correction." A.R. at 821.

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[2] This charge was amended from "malicious" to "wanton" destruction of property.

In May 2016, following an investigation and hearing pursuant to G. L. c. 31, § 41, a DOC hearing officer found, among other things, that: in connection with the charges stemming his August 26, 2015 arrest, the plaintiff did, in fact, wantonly destroy property over $250, and did, in fact, take physical actions that were threatening and that placed his mother and wife in fear; the plaintiff failed to report the August 26, 2015, incident and related court appearances as well as certain unrelated prior police contact, as required; and the plaintiff was "less than truthful" to a DOC investigator regarding these incidents. A.R. at 819.

As a result of these findings, the hearing officer concluded that the plaintiff's conduct violated the following provisions of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction ("DOC Rules"): General Policy I (DOC employees' "constant obligation to render good judgment and full and prompt obedience to all provisions of the law"); Rule 1 (DOC employees take an oath of office and "should give dignity to their position"); Rule 2(b) (DOC employees must promptly report to Superintendent, Department Head, or designee any involvement with law enforcement pertaining to an investigation, arrest, or court appearance); and Rule 19(c) (DOC employees must "respond fully and promptly to any questions or interrogatories relative" to their conduct during the course of an investigation). A.R. at 809-810, 820. The hearing officer also found that the plaintiff violated the DOC Policy for the Prohibition of Sexual Assault, Domestic Violence, and Harassment (103 DOC 238.01, .03, .04) which provides, in relevant part, that the Commonwealth has a "zero-tolerance" policy for domestic violence occurring within or outside the workplace; defines domestic violence between household or family members to include "[a]ttempting to cause or causing physical harm" and "[p]lacing another in imminent serious physical harm;" and requires DOC employees to refrain from engaging in domestic violence, to cooperate in and provide any information that

they possess during an investigation into domestic violence, and to promptly report to DOC in writing if they are the subject of an ABO. A.R. at 810-811, 820.

In June 2016, DOC Commissioner Thomas Turco III ("Commissioner Turco") affirmed the hearing officer's determination and found just cause to suspend the plaintiff for five days without pay. In his letter notifying the plaintiff of the discipline, Commissioner Turco explained, "I am imposing a **Last Chance Warning** that any violation of *any* Department rule, policy, or regulation may lead to termination of your employment with the Department of Correction." A.R. at 767. Commissioner Turco also informed the plaintiff of his right to appeal the decision to Commission. However, the plaintiff declined to do so.

In July 2016, the plaintiff was arrested and arraigned in Attleboro District Court on the charge of operating under the influence ("OUI"). While the OUI case was open, in the early morning hours of September 15, 2016, State and local police responded to a gas station after the plaintiff's wife placed a 911 call. State Police arrested the plaintiff on the scene on the charges of A&B on a family member, and strangulation or suffocation. The plaintiff was arraigned in Stoughton District Court later that same day. Ultimately, the court ordered that the plaintiff be held without bail because of the conditions of his OUI charge, and transferred the two charges to Attleboro District Court. The Attleboro District Court established bail and conditions that required the plaintiff, should he post bail, to submit to GPS monitoring with exclusion zones for the plaintiff's wife's residence and employment, to stay away from and not abuse his wife, to not possess firearms, and to refrain from alcohol with random testing. The plaintiff posted bail on December 5, 2016, but his bail was revoked for an unspecified violation of the terms of release ten days later. The charges of A&B on a family member, and strangulation or suffocation were

ultimately dismissed on January 26, 2017, after the plaintiff's wife invoked the marital privilege and declined to testify.

On September 16, 2016, DOC initiated an investigation and at its conclusion, the DOC Deputy Commissioner determined that the plaintiff's conduct violated DOC policy as well as its rules and regulations. A hearing was held pursuant to G. L. c. 31, § 41 on September 30, 2016 at the Norfolk County Correction Center ("NCCC") where the plaintiff was being held. The plaintiff was present at the hearing but did not testify under advice of counsel and his Union. On October 3, 2016, the DOC hearing officer issued her decision and found that the plaintiff physically abused his wife on or about September 15, 2016.

As a result of these findings, the hearing officer concluded that the plaintiff's conduct violated the following provisions of the DOC Rules: General Policy I (DOC employees' "constant obligation to render good judgment and full and prompt obedience to all provisions of law"); Rule 1 (DOC employees take an oath of office and "should give dignity to their position"); Rule 2(b) (DOC employees must promptly report to Superintendent, Department Head, or designee any involvement with law enforcement pertaining to an investigation, arrest, or court appearance); and Rule 19(d) (DOC employees have the "duty and responsibility . . . to obey these [DOC] rules and official orders and to ensure they are obeyed by others."). A.R. at 630, 632. The hearing officer also found that the plaintiff violated DOC's "zero-tolerance" Policy for the Prohibition of Sexual Assault, Domestic Violence, and Harassment. See A.R. at 630, 632.

On November 30, 2016, Commissioner Turco affirmed the hearing officer's report. As a result, he terminated the plaintiff's employment effective that day. A.R. at 634.

On December 12, 2016, the plaintiff appealed the DOC's termination decision to the Commission pursuant to G. L. c. 31, § 43. A.R. at 1. The Commission held hearings in this matter on August 4, and 18, 2017. DOC introduced sixteen exhibits into evidence and called as witnesses Investigator Nicholas Green ("CO Green") of the Internal Affairs Unit, who conducted the DOC investigation following the plaintiff's arrest, as well as Officer Jason Wheeler of the Easton Police Department ("Officer Wheeler") and Massachusetts State Trooper Conor Flynn ("Trooper Flynn"), who both responded to the scene following the plaintiff's wife's 911 call. The plaintiff, who was represented by counsel, introduced twenty two exhibits into evidence. The plaintiff testified on his own behalf; however, he did not testify concerning his September 15, 2016, arrest. The plaintiff also called CO Edward Slattery, the Vice President of his Union, to testify.

On January 17, 2019, the Commission issued its decision finding that DOC established by a preponderance of the evidence that it had just cause to terminate the plaintiff in connection with his September 15, 2016, arrest. A.R. at 609, 613-614. The Commission credited the testimony of Officer Wheeler, Trooper Flynn, CO Green, and CO Slattery. The Commission found that the plaintiff's credibility was "limited." A.R. at 606.

Based on the evidence before it, the Commission found the following. While the plaintiff's wife was driving down a state highway early in the morning of September 15, 2016, the plaintiff, who was sitting in the passenger seat, tried to pull the keys out of the ignition and grab the steering wheel to force the car off the road. The plaintiff attempted to throw his wife's cell phone out of the window, but instead injured his elbow because the window was closed. The plaintiff also beat his wife and attempted to choke her. When the car ended up in the break down lane, the plaintiff pulled his wife out of the car, pulled her hair, and again tried to choke

her. He also threw her cell phone and keys into the woods. They returned to the car and drove it to a gas station in Easton using the plaintiff's keys. At the gas station, the plaintiff's wife asked the cashier to borrow her phone and used it call 911. During the call, the plaintiff entered the store and stood next to his wife. His wife then terminated the call. Shortly thereafter, the dispatcher called back and informed the plaintiff's wife that she was sending police to the store.

When he responded to the store, Officer Wheeler observed that the plaintiff's elbow was bleeding, and that his wife had "bruises all over her arms, red marks around her neck, her ears and nose were bleeding, and she looked visibly shaken." A.R. at 610. He also observed a clump of hair "twice the size of a golf ball" fall from the plaintiff's wife's head. A.R. at 610. Trooper Flynn responded thereafter, and spoke with both the plaintiff and his wife. He concluded that the plaintiff was the "primary aggressor" in the incident and placed him under arrest. A.R. at 611. While the plaintiff was in custody, he made calls to his parents and others wherein he alleged that his wife was the aggressor, that she tried to run him down, and that she hit him in the head with a mug. In other conversations, he admitted to pulling his wife's hair, trying to grab the steering wheel, and grabbing his wife by the throat. In a call with a colleague, the colleague noted that this was third (as opposed to second) time that the plaintiff had abused his wife. The plaintiff said that his wife needed to decline to testify against him as she had done in connection with his 2015 arrest, and the colleague said that he and his wife would speak to the plaintiff's wife in that regard. A.R. at 612.

On the day after the decision issued, the plaintiff's counsel withdrew his appearance before the Commission. See A.R. at 616-619. On January 28, 2019, the plaintiff filed a *pro se* motion for reconsideration with the Commission. See A.R. at 622. On February 14, 2019, the Commission issued a written ruling denying the plaintiff's motion. See A.R. at 624-626. On

March 1, 2019, the plaintiff initiated this action seeking judicial review of the Commission's decision pursuant to G. L. c. 31, § 44, and G. L. c. 30A, § 14. The parties then filed the present cross-motions for judgment on the pleadings.

DISCUSSION

I. Standard of Review

The role of the Commission is to determine "on the basis of the evidence before it, whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority." *Brackett* v. *Civil Serv. Comm'n*, 447 Mass. 233, 241 (2006). See G. L. c. 31, § 2(b). For the appointing authority's action to be reasonably justified, it must be based "upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Brackett*, 447 Mass. at 241, quoting *Selectmen of Wakefield* v. *Judge of First Dist. Court of Eastern Middlesex*, 262 Mass. 477, 482 (1928). "In making that analysis, the commission must focus on the fundamental purposes of the civil service system — to guard against political considerations, favoritism, and bias in governmental employment decisions . . . ." *Cambridge* v. *Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 304 (1997). The commission may intervene when there are overtones of political control or objectives unrelated to merit standards or neutrally applied public policy in personnel decisions. *Id.*

In its review, the Commission hears evidence and finds facts anew. *Leominster* v. *Stratton*, 58 Mass. App. Ct. 726, 727 (2003). Thus, the Commission is not limited to examining the evidence that was before the appointing authority. *Id.* The Commission, however, must look at whether 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. *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 823-824 (2006). See *Beverly* v. *Civil Serv. Comm'n*, 78 Mass. App. Ct. 182, 187 (2010) (commission's role is relatively narrow in scope: reviewing legitimacy and reasonableness of appointing authority's actions). The Commission may not "substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *Cambridge*, 43 Mass. App. Ct. at 304. Thus, while the finding of the facts is the province of the Commission, rather than the appointing authority, the Commission owes substantial deference to the appointing authority's exercise of judgment in determining whether there was "reasonable justification" shown. *Beverly*, 78 Mass. App. Ct. at 188. See *Cambridge*, 43 Mass. App. Ct. at 304-305 (appointing authorities are invested with broad discretion in selecting public employees).

A party aggrieved by a final decision of the Commission may seek judicial review under G. L. c. 31, § 44. Pursuant to G. L. c. 31, § 44, the court reviews the Commission's decision to determine if it violates any of the standards set forth in G. L. c. 30A, § 14(7). Specifically, this court must uphold the Commission's decision unless it is unsupported by substantial evidence, based upon on error of law, arbitrary and capricious, or an abuse of discretion. *Boston Police Dep't* v. *Civil Serv. Comm'n*, 483 Mass. 461, 469 (2019), quoting G. L. c. 30A, § 14(7). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Boston Police Dep't*, 483 Mass. at 469, quoting G. L. c. 30A, § 1(6). In conducting its review, the court may not substitute its judgment for that of the Commission. *Massachusetts Ass'n of Minority Law Enf't Officers* v. *Abban*, 434 Mass. 256, 262 (2001). Rather, the court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it."

Boston Police Dep't, 483 Mass. at 474, quoting G. L. c. 30A, § 14(7). The plaintiff bears the "heavy burden" of demonstrating the invalidity of the Commission's decision. *Abban*, 434 Mass. at 263-264.

II. Analysis

The plaintiff's request that this court set aside the Commission's decision and reinstate him to his position as a CO II must be denied for two independent reasons. First, the plaintiff's complaint must be dismissed because it is untimely. General Laws c. 31, § 44 provides that "[a]ny party aggrieved by a final order or decision of the commission following a hearing . . . may institute proceedings for judicial review in the superior court **within thirty days after receipt of such order or decision**." G. L. c. 31, § 44 (emphasis added). Section 44 "impose[s] a strict thirty-day deadline" and "the filing of a motion to reconsider a commission decision does not toll the time for seeking judicial review of that decision." *Cucchi* v. *Newton*, 93 Mass. App. Ct. 750, 751, 756 (2018). The Commission expressly advised the plaintiff of these timing requirements for seeking judicial review at the end of its decision dated January 17, 2019, via email on January 29, 2019, after receiving the plaintiff's motion for reconsideration, and in its ruling on his motion for reconsideration dated February 14, 2019. See A.R. at 615, 620, 625. Even if the court assumes that the plaintiff did not have notice of the Commission's decision until January 28, 2019 (the date he filed his motion for reconsideration), his complaint in this action was filed on March 1, 2019, outside the thirty-day limit. Accordingly, the plaintiff's complaint in this action must be dismissed. See generally *Cucchi*, 93 Mass. App. Ct. 750 (affirming dismissal of request for judicial review of a Commission decision as untimely when complaint was filed outside of the thirty-day time limit of Section 44).

Second, even if the court were to consider the merits of the plaintiff's arguments, he has not presented a basis by which this court is authorized to set aside the Commission's decision.[3] The plaintiff first asserts that he was not present during the hearing because he was detained at the time. However, the record reflects that the plaintiff was present both at the DOC hearing and at the Commission hearing.[4] See, e.g., A.R. at 580, 592-593, 606, 813.

The plaintiff next argues that the Commission failed to consider evidence pertaining to his progress in an alcohol treatment program since the DOC's termination decision.[5] While the court acknowledges this progress, the Commission and, in turn this court, is limited to reviewing the DOC's termination decision in light of the circumstances as they existed at the time that decision was made on November 30, 2016. See *Falmouth*, 447 Mass. at 824, quoting *Watertown* v. *Arria*, 16 Mass. App. Ct. 331, 334 (1983) ("Here the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was

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[3] The defendants correctly point out that the plaintiff waived his arguments that the Commission's decision was not supported by substantial evidence, was arbitrary and capricious, and constituted an abuse of discretion because he did not produce a transcript of the Commission hearing as required pursuant to Superior Court Standing Order 1-96(2). See *Leeman* v. *Haverhill*, 91 Mass. App. Ct. 1129, 2017 WL 2644836, at *2 (2017) (Rule 1:28 decision) ("The judge found, and we agree, that the plaintiffs waived their arguments that the commission decision was not supported by substantial evidence, was arbitrary or capricious, or was an abuse of discretion because they failed to submit a transcript of the commission hearing in the Superior Court."). Thus, any review that could be made by this court is limited to determining whether the Commission's ultimate findings are clearly not supported by its subsidiary findings, and whether the Commission's decision is based on an error of law. See *Connolly* v. *Suffolk Cty. Sheriff's Dep't*, 62 Mass. App. Ct. 187, 193 (2004) (where party waives right to submit transcript, "unless it is clear that the hearing officer's ultimate findings are not supported by her subsidiary findings, our review is limited to determining whether error of law occurred"); *Leeman*, 91 Mass. App. Ct. 1129, 2017 WL 2644836, at *2 (court may consider whether Commission's decision is based on an error of law even where the plaintiff did not produce a transcript of the Commission's hearing). In its decision, the Commission noted the requirement that the plaintiff in any judicial appeal provide the court with a copy of the transcript. See A.R. at 579 n.3.

[4] The Commission previously dismissed the plaintiff's appeal for lack of prosecution after he failed to appear at a prehearing conference and to respond to the subsequent show cause order. However, the Commission reinstated the plaintiff's appeal after receiving a letter from him explaining that he had been detained at the Norfolk House of Corrections at the time of the hearing. See A.R. at 579. To the extent that the plaintiff is referencing his absence at that hearing, it provides no basis to set aside the Commission's decision because his appeal was reinstated and he was provided a full hearing before the Commission.

[5] In its decision, the Commission did note the plaintiff's testimony that he was then attending Alcohol Anonymous meetings, counseling, and a batterers program. A.R. at 593.

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.'"). The record reflects that the plaintiff had been drinking prior to his arrest on September 15, 2016, and that he remained detained through the time that the termination decision was made. See A.R. at 611 (State Trooper on the scene when plaintiff was arrested "detected a 'strong odor of an alcoholic beverage' coming from the [plaintiff's] mouth."); A.R. at 586 (plaintiff was released on bail on December 5, 2016, and bail was revoked 10 days later). Thus, the Commission did not err in failing to overturn the DOC's decision in light of the plaintiff's conduct following that decision.

Finally, the plaintiff argues that he was punished more harshly than other correction officers who were charged with domestic violence-related offenses. In its decision, the Commission concluded that the plaintiff's termination did not constitute disparate treatment after considering the approximately seventy other correction officers who had been disciplined in connection with domestic violence since 2003. A.R. at 596-601, 613. Of those seventy officers, nine were terminated and all but one of those officers was terminated after only one domestic violence incident. A.R. at 597. Here, the Commission concluded that the plaintiff's termination did not constitute disparate treatment where he was terminated as a result of his second incident of domestic violence within a short period of time and in light of his conduct in connection with his 2016 arrest including his efforts to communicate indirectly with his wife that she should invoke marital privilege not to testify. A.R. at 613. Based on these findings, this is not a case where the plaintiff was singled out for more harsh punishment than that imposed in like circumstances, particularly where eight other DOC employees were terminated after a single (as opposed to a second) incident of domestic violence. Cf. *Police Com'r of Bos.* v. *Civil Serv.*

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Comm'n, 39 Mass. App. Ct. 594, 600 (1996) (Commission may modify penalty with reasoned explanation for doing so in furtherance of "uniformity and the equitable treatment of similarly situated individuals."). Accordingly, the court finds no grounds to set aside the Commission's decision.[6]

ORDER

For the foregoing reasons, the plaintiff's Motion for Judgment on the Pleadings (Docket No. 14) is **DENIED**, and the defendants' Cross-Motion for Judgment on the Pleadings (Docket No. 15) is **ALLOWED**.

SO ORDERED.

Joseph F. Leighton, Jr.
Associate Justice of the Superior Court

DATED: December ~~December~~ 1/2/2020, 2019

[6] In his amended complaint, the plaintiff also alleges that the Commission's decision was not supported by substantial evidence because "[a]ll facts not considered bias judgement – possible conflic[t] of interest." Am. Compl. (Docket No. 5). However, he advanced no argument either in his motion or at the hearing concerning the Commission's alleged bias or conflict of interest, and the court discerns none from the record.