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COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
SUPERIOR COURT DEPARTMENT

BRISTOL, ss.

BRISTOL, SS SUPERIOR COURT
FILED

SEP 25 2017

MARC J. SANTOS, ESQ.
CLERK/MAGISTRATE

Civil Action No. 1473CV00836

FRANK CONDEZ,
Plaintiff

v.

TOWN OF DARTMOUTH and
LEONARD H. KESTEN,
Defendants

CONSOLIDATED WITH

Civil Action No. 1673CV00796

FRANK CONDEZ,
Plaintiff

v.

CIVIL SERVICE COMMISSION and
TOWN OF DARTMOUTH
Defendants

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS
CONCERNING DECISION OF THE CIVIL SERVICE COMMISSION**

The plaintiff, Frank Condez, brought civil action # 1673CV00796 pursuant to G.L. c. 31, § 44 and G.L. c. 30A, § 14, seeking judicial review of a decision of the Civil Service Commission terminating his employment as a police sergeant for the town of Dartmouth. The parties have filed cross-motions for judgment on the pleadings pursuant to rule 12 (c) of the Massachusetts Rules of Civil Procedure and Superior Court Standing Order 1-96.

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FACTS

In reviewing a decision of an administrative agency, the court's review of the issues "shall be confined to the record...." G.L. c.30A, § 14(5). "The reviewing court is, therefore, bound to accept the findings of fact of the [civil service] commission's hearing officer, if supported by substantial evidence." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003). *City of Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 188 (2010).

The record shows that the town of Dartmouth accused Sgt. Condez of four incidents of misconduct relating to: (1) an upgrade of the police department's computers in 2010; (2) a disruption of the police department's computers in 2013; (3) a polygraph examination of Sgt. Condez in 2013 concerning an investigation of a missing firearm; and (4) accusations of child abuse against Police Chief Timothy Lee.

By agreement of the parties, a commissioner of the Civil Service Commission (rather than the appointing authority) held a hearing on the charges pursuant to G.L. c. 31, § 41A. The commissioner made extensive findings of fact, which the Commission adopted on October 15, 2015. The following is a summary of the facts adopted by the Commission that are pertinent to this appeal.

In 2012, Condez was employed as a police sergeant in the town of Dartmouth. He also operated a side business repairing computers. The chief of police, Timothy Lee, brought his wife's laptop computer to Condez for repair. Condez repaired and returned the computer but kept a copy of the data that was on Chief Lee's computer.

On October 1, 2013, Sgt. Condez was placed on paid administrative leave due to an investigation involving unlicensed software on the police department's computers. Charges of misconduct were brought against Sgt. Condez and a hearing was scheduled before his appointing

authority. After an initial continuance, a hearing was scheduled for June 9, 2014. On June 4, 2015, Sgt. Condez' attorney sought a second continuance to a date after July 1, 2014. The town's attorney responded that the hearing would not be continued beyond June 17, 2014. However, the hearing never took place due to subsequent developments.

On June 6, 2014, Sgt. Condez hand delivered the following letter to the town administrator.

Frank Condez
543 High Hill Road
North Dartmouth, MA 02747

Town of Dartmouth Selectboard
C/O David Cressman, Town Administrator
400 Slocum Road
Dartmouth, MA 02747

June 5, 2014

Dear Mr. Cressman,

Attached are the photos which were recently discovered when initially recovered from Timothy Lee's personal laptop which was given to me by him to be serviced for a failing hard drive. The metadata encoded in these photos tie them to the same brand and model of digital camera used to take numerous other family photos. These are only two of multiple photos of this nature. There is also a possibility that some of the photos were taken out of state. The photos can, at best, be described as disturbing. They are more accurately, possible evidence of abuse or sexual exploitation of a child by him and could be indicative of serious liability for the Town should other victims be discovered. This is being shared with the Select Board in their role as Police Commissioners and based on their duty to supervise the Chief of Police.

These photos have been provided to the Select Board in a redacted form so they are aware of this serious issue prior to it coming to them from an outside source. It is particularly disturbing to me and I'm sure it will be to the public as a whole that someone in a position of public trust would be involved and or condone this type of conduct. I'm sure I don't have to explain the severity of something such as this and the duty of the Select Board to investigate something as serious as this. I will be happy to provide all of the original evidence to whatever entity or outside police agency the Select Board decides to have investigate this matter. Given the serious nature of the issues here I don't have to go into great detail as to

the consequences for the Town should other victims be discovered given that the Town now has knowledge of the situation. Thank you for your prompt attention to this matter.

Very Truly Yours,

s/ Frank Condez
Frank Condez

Administrative Record, Vol II, p. 646.

Sgt. Condez included with the letter two photographs of Chief Lee's infant son naked in a bathtub. Sgt. Condez redacted the photographs to cover the child's genital area but not his face.

On learning of the letter, Chief Lee contacted the Bristol District Attorney's Office and demanded that the District Attorney investigate him. The District Attorney assigned two State Police troopers to investigate Chief Lee. The town hired Attorney Robert Pomeroy, a former Chief of Police in Plymouth, to conduct its own investigation of Chief Lee.

On July 1, 2014, Sgt. Condez and his attorney met with Attorney Pomeroy but Sgt. Condez refused to speak to him about the matter.

On July 3, 2014, Sgt. Condez filed a report with the Department of Children and Families in which he stated that Chief Lee had "neglect[ed]" his four year old son. Sgt. Condez submitted copies of the photographs of the child taken from Chief Lee's computer. The Department concluded that the report was not worthy of investigation and closed the case a few days later.

On July 18, 2014, the internal affairs officer for the police department notified Sgt. Condez by letter that Sgt. Condez was the subject of an internal affairs investigation. The letter also advised Sgt. Condez that Attorney Pomeroy was conducting an investigation into the allegations Sgt. Condez made in his letter to the Select Board. The internal affairs officer directed Sgt. Condez to meet with Attorney Pomeroy and provide him with "all original evidence" as Sgt. Condez offered to do in his letter.

On July 24th, Sgt. Condez and his attorney again met with Attorney Pomeroy and Sgt. Condez again refused to speak to him. On advice of counsel, Sgt. Condez refused to provide Attorney Pomeroy with the “original evidence” on grounds that Attorney Pomeroy was not an appropriate person to receive the evidence. Sgt. Condez said that he would turn the evidence over to the State Police.

That same day, Sgt. Condez made a DVD copy of the data he had copied from Chief Lee’s computer. He then “forensically wiped” the data from his own hard drive, where the data had been stored. This eliminated important metadata that had not been copied onto the DVD, such as the dates files were created and accessed.

On July 28, 2014 the Select Board issued a letter to Sgt. Condez advising him, pursuant to G.L. c. 31, § 41, of a disciplinary hearing scheduled for August 12th to consider numerous charges of misconduct against him. Charge 9 alleged a violation of a police department order prohibiting “Conduct Unbecoming an Officer,” defined as “[t]he commission of any specific act or acts of immoral, improper, disorderly or intemperate personal conduct, which reflects discredit upon the officer himself, upon his fellow officers or upon the police department.” The letter included the following “[s]pecification” of the charge:

In his June 5, 2014 submission to the Town of Dartmouth Select Board, Sergeant Frank Condez made baseless accusations of a scurrilous nature against the Chief of Police Timothy Lee, claiming that Chief Lee engaged in deviant sexual criminal behavior with his own child and suggesting there were other “victims,” with the additional insinuation that the matter could become public. Condez did so with the motive to embarrass the Chief of Police and impede Condez’ own disciplinary hearing. These actions involved immoral, improper and intemperate conduct, constituting Conduct Unbecoming an Officer in violation of the Dartmouth Police Rules and Regulations.

Administrative Record, Vol. II, pp. 643-644.

On July 30, 2014, Sgt. Condez met with, and was interviewed by, State Police troopers about the allegations against Chief Lee. Sgt. Condez provided the State Police with the DVD copy of the data copied from Chief Lee's computer.

The commissioner who acted as hearing officer found that the town proved that Sgt. Condez falsely accused Chief Lee of committing child abuse; that he acted knowingly or recklessly; and that he concealed evidence. The commissioner found that Sgt. Condez' actions "were taken with an ulterior motive to impede the investigation of the original pending charges being pursued against him." Decision, p. 39. Although the commissioner found that the town had not proven any of the other charges against Sgt. Condez, the commissioner recommended that the Civil Service Commission terminate Sgt. Condez' employment as a police officer.

On October 15, 2014, the Commission voted to adopt the recommendations and to terminate Sgt. Condez' employment.

ANALYSIS

"Judicial review of a final decision of the [civil service] commission is governed by G.L. c. 30A, § 14. ... '[The court] may set aside or modify the commission's decision if [it] conclude[s] 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.' ... [The court] generally defer[s] 'to the [commission] on questions of fact and reasonable inferences drawn therefrom.'" *Sherman v. Town of Randolph*, 472 Mass. 802, 810 (2015), quoting *Police Department of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012).

Sgt. Condez contends that the Commission's decision must be vacated because it was based on three errors of law; two of its key findings of fact were not supported by substantial evidence; and termination was too harsh a remedy for his misconduct.

I. Errors of Law

The plaintiff contends that the Commission committed errors of law in ordering his termination from employment because: (A) his letter to the Dartmouth Select Board was protected speech under the First Amendment to the United States Constitution; (B) as a mandated reporter, his report of child abuse was privileged under G.L. c. 119, § 51A (h); and (C) the Commission improperly based its decision on uncharged misconduct.

A. First Amendment

Sgt. Condez argues that his letter to the Dartmouth Select Board concerning Chief Lee was protected speech under the First and Fourteenth Amendments to the United States Constitution.

“[P]ublic employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.” *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

“In *Pickering v. Board of Education*, 391 U.S. 563 (1968), [the Supreme Court] stated that a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment. [The Court] also recognized that the State’s interests as an employer in regulating the speech of its employees ‘differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.’ *Id.*, at 568. The problem, [is] arriving ‘at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.’” *Connick v. Myers*, 461 U.S. 138, 140 (1983).

“*Pickering* and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. ... If the answer is no, the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. ... If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. ... This consideration reflects the importance of the relationship between the speaker’s expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity’s operations.” *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

The court “must determine first, based on ‘the content, form, and context of [the] given statement, as revealed by the whole record,’ ... whether the public employee was speaking ‘as a citizen upon matters of public concern.’” *Pereira v. Commissioner of Social Services*, 432 Mass. 251, 256 (2000), quoting *Connick v. Myers*, 461 U.S. 138, 147-148 (1983).

Sgt. Condez argues that he was speaking as a citizen, rather than a police officer, when he wrote the letter to the Select Board. The court agrees. Condez obtained the photographs, not in the course of police work, but as part of his computer-repair business. His letter did not contain any reference to his status as a police officer; nor did it request any criminal prosecution or other law enforcement action, such as reporting the matter to the Department of Children and Families. Instead, he wrote that he was sharing the photographs “with the Select Board in their role as Police Commissioners and based on their duty to supervise the Chief of Police.” He warned of “serious liability for the Town” and adverse public reaction. These concerns are civil and

administrative matters. They are not peculiarly related to Sgt. Condez' employment as a police officer. They are the kind of concerns that any citizen – police officer or not – might articulate to the town's governing body if allegations of child abuse were made against the police chief.

“To be protected, the speech must [also] be on a matter of public concern....” *Waters v. Churchill*, 511 U.S. 661, 668 (1994). *Pereira v. Commissioner of Social Services*, 432 Mass. 251, 259 (2000) (“the First Amendment’s protection against adverse personnel decisions extends only to speech on matters of public concern.”) “Speech involves matters of public concern ‘when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.” ... The inquiry turns on the ‘content, form, and context’ of the speech.” *Lane v. Franks*, ___ U.S. ___, ___, 134 S.Ct. 2369, 2380 (2014).

If the photographs taken from Chief Lee's laptop actually constituted “evidence of abuse or sexual exploitation of a child,” as suggested in Sgt. Condez' letter, the topic would undoubtedly be a matter of public concern; but they did not. The photographs merely show Chief Lee's infant son playing in the bath. That is a private matter; not a public concern. Accordingly, Sgt. Condez' letter is not protected speech under the First Amendment.

B. G.L. c. 119, § 51A (h)

Sgt. Condez also argues that he is protected from discipline by the privilege created by the Legislature for mandated reports of child abuse. The statute provides as follows:

No employer shall discharge, discriminate or retaliate against a mandated reporter who, in good faith, files a report under this section, testifies or is about to testify in any proceeding involving child abuse or neglect. Any employer who discharges, discriminates or retaliates against that mandated reporter shall be liable to the mandated reporter for treble damages, costs and attorney's fees.

G.L. c. 119, § 51A (h).

This argument must be rejected for two reasons.

First, the Commission found that Sgt. Condez did not make his report “in good faith,” as required by the statute.¹ The phrase, “good faith,” has not been construed by our appellate courts in the context of this statute. In general, however, a person is acting in good faith where he is “[b]ehaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage.” Black’s Law Dictionary, “Acting in Good Faith” (10th ed. 2014).

The Commission found that Sgt. Condez made “false accusations amounting to charges that Chief Lee had committed a felony, i.e. child abuse, either knowing them to be false or with reckless disregard and, in addition, made an effort to conceal his actions, all of which were taken with an ulterior motive to impede the investigation of the original pending charges being pursued against him.” Decision, p.39. The Commission described Sgt. Condez’ letter to the Select Board as containing “willful, intemperate and wholly unsubstantiated accusations” that “were retaliatory.” Decision, p. 46. These findings of fact make it clear that Sgt. Condez did not deliver his letter to the Select Board “in good faith.”

Second, the report was not made to the Department of Children and Families. The statutory privilege applies to a mandated reporter who files a report under Section 51A. Under that section, under applicable circumstances, a mandated reporter must “file a written report with the department [of children and families.]” Although he later filed a report of “neglect” with the Department, Sgt. Condez’ letter alleging abuse was filed with the town’s Select Board.

¹ The Commission also ruled that the statutory privilege does not apply because Sgt. Condez did not, in fact, have “reasonable cause to believe” that the child was abused. That is the standard that triggers the requirement that a mandated reporter report abuse to the Department of Children and Families. G.L. c. 119 § 51A (a). The standard under § 51A (h), which establishes the privilege, is broader. That subsection merely requires that the report be made “in good faith.” A person who acts in a good faith but mistaken belief that the facts constitute “reasonable cause” to believe a child is being abused would be covered by the privilege. The fact that Sgt. Condez lacked “reasonable cause to believe” that the child was abused does not necessarily preclude application of the privilege.

Sgt. Condez argues that his letter to the Select Board qualifies as a report to the Department under the following provision:

If a mandated reporter is a member of the staff of a medical or other public or private institution, school or facility, the mandated reporter may instead notify the person or designated agent in charge of such institution, school or facility who shall become responsible for notifying the department in the manner required by this section.

G.L. c. 119, § 51A (a).

Whether Sgt. Condez' letter to the Select Board qualifies as a report of abuse by a mandated reporter under this provision is a mixed question of law and fact. The legal question is whether the Select Board qualifies as a "person ... in charge of [a public or private] institution, school or facility ... responsible for notifying the department...." *Id.* The factual question is whether Sgt. Condez sent his letter in lieu of a direct report to the Department.

The terms "institution" and "facility" are not defined in the statute or Department regulations. Still, their meaning can be adduced by the Legislature's use of those terms in other parts of the statute and in the Department's use of the terms in its regulations. The statutory definition of "mandated reporter" uses the term, "facility," to mean a place where children are cared for or receive services, i.e. "mandated reporter" includes a "person paid to care for or work with a child in any public or private facility...." G.L. c. 119, § 21. The Department's regulations use the terms, "institution" and "facility interchangeably and in the sense of an organization that provides care or services to children. For example, "institutional abuse" is defined as "abuse or neglect which occurs in any facility for children, including but not limited to group homes, residential or public or private schools, hospitals, detention and treatment facilities, family foster care homes, group day care centers, and family day care homes." 110 CMR 2.00. Police departments are not primarily engaged in taking care of children, although

that is an incidental part of police activities. The court therefore concludes that a municipal police department is not an “institution” or “facility” as those terms are used in G.L. c. 119, § 51A (a).

Likewise, the Commission was warranted in concluding that the purpose of the letter was not to serve as a mandated report of child abuse under Section 51A but rather as an attempt to “throw sand in the gears of the pending investigation of Sgt. Condez’ own alleged misconduct.” Decision, p. 50. The conclusion that the letter did not serve as a substitute for a report of child abuse directly to the Department is supported by the fact that the letter never mentions the Department and does not indicate in any way that Sgt. Condez expected the Select Board to forward the letter to the Department. Further, the argument that Sgt. Condez used the letter to the Select Board as a substitute for a direct report to the Department is contradicted by the fact that Sgt. Condez filed a direct report with the Department about the photographs less than thirty days after his letter to the Select Board. If Sgt. Condez sent the letter as a report in fulfillment of his duty under the statute, there would be no need to make a second, direct report to the Department.

Accordingly, Sgt. Condez was not privileged to send the letter to the Select Board under G.L. c. 119, § 51A (h).

C. Uncharged Misconduct

Sgt. Condez argues that the Commission erred because it decided to terminate his employment based on uncharged misconduct.

“Chapter 31, § 41, restricts the ability of an appointing authority to remove a tenured civil service employee. An employee cannot be laid off except for ‘just cause.’ The commission’s task is to determine, after a hearing, whether the appointing authority has sustained its burden of

proving by a fair preponderance of the evidence that there was just cause for the action it took.

... In attempting to show just cause, the appointing authority can rely only on those reasons for layoff that it gave to the employee in writing,” *Gloucester v. Civil Service Commission*, 408 Mass. 292, 298 (1990).

Sgt. Condez argues that Charge 9 in the notice given to him “solely asserts” misconduct in sending the letter to the Select Board; whereas the Commission terminated his employment for “destroying evidence and/or making the subsequent 51A report to DCF.” *Plaintiff’s Memorandum*, pp. 17-18.

Sgt. Condez is correct that the notice alleged misconduct only in sending the letter to the Select Board, not in destroying evidence or filing a later report of abuse with the Department of Children and Families. The notice includes the following “specification” for Charge 9:

In his June 5, 2014 submission to the Town of Dartmouth Select Board, Sergeant Frank Condez made baseless accusations of a scurrilous nature against the Chief of Police Timothy Lee, claiming that Chief Lee engaged in deviant sexual criminal behavior with his own child and suggesting there were other “victims,” with the additional insinuation that the matter could become public. Condez did so with the motive to embarrass the Chief of Police and impede Condez’ own disciplinary hearing. These actions involved immoral, improper and intemperate conduct, constituting Conduct Unbecoming an Officer in violation of the Dartmouth Police Rules and Regulations.

Administrative Record, Vol. II, pp. 643-644.

The written decision adopted by the Commission mischaracterizes the charge as including both the letter to the Select Board and subsequent conduct:

Dartmouth charged that Sgt. Condez’s June 5, 2014 letter to the Dartmouth Select Board, *and his subsequent actions in furtherance of the assertions made in that letter*, also violated General Order 670.00, prohibiting “Conduct Unbecoming an Officer.” Here, Dartmouth is on solid ground. It is hard to imagine behavior that comes any closer to the intent of General Order 670.00 than does Sgt. Condez’s willful, intemperate and wholly unsubstantiated accusations against Chief Lee of

felonious conduct by alleging, in what amounts to a public accusation of child neglect and sexual exploitation by Chief Lee of his only, wholly innocent son. I conclude that Sgt. Condez's accusations amount to conduct unbecoming an officer. I also find that his accusations were retaliatory. *Finally, I conclude that Sgt. Condez repeatedly lied, misled, concealed and destroyed evidence in order to further his unbecoming and retaliatory behavior.*

Decision, p. 46 (emphasis supplied).

The Commission essentially decided that the town had proven both the charge specified in the notice and also a cover-up of that misconduct. Since the charge alleged in the notice was proved, just cause existed for discipline. The finding of additional violations of General Order 670.00 is unnecessary but does not invalidate the finding of just cause.

II. Substantial Evidence

Sgt. Condez also contends that two of the Commission's findings were not supported by substantial evidence: (A) Sgt. Condez was motivated by his desire to "throw sand in the gears of the pending investigation" against him; and (B) Sgt. Condez engaged in conduct unbecoming a police officer.

A decision of a state agency must be supported by "substantial evidence." G.L. c. 30A, § 14(7)(e). "Substantial evidence" is defined as "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6).

"Judicial 'review under the substantial evidence standard is circumscribed.' ... It is a standard of review 'highly deferential to the agency' In order to be supported by substantial evidence, an agency conclusion need not be based upon the 'clear weight' of the evidence ... or even a preponderance of the evidence, but rather only upon 'reasonable evidence' ... i.e., 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' after taking

into consideration opposing evidence in the record. G.L. c.30A, §§1(6), 14(8).” *Lisbon v. Contributory Retirement Appeal Board*, 41 Mass. App. Ct. 246, 257 (1996) (citations omitted.)

“Under the substantial evidence test, a reviewing court is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts found by the [agency].” *Pyramid Co. v. Architectural Barriers Bd.*, 403 Mass. 126, 130 (1988) (citations omitted).

A. Sgt. Condez’ Motive

Sgt. Condez contends that the Commission’s finding that his motive in sending the letter to the Select Board was to delay the pending disciplinary hearing was not supported by substantial evidence.

The Commission adopted the following finding:

The timing of Sgt. Condez’s actions also illustrates an ulterior motive, coming the day after he learned that all efforts to keep postponing his disciplinary hearing had been exhausted. By his own admission, Sgt. Condez had known of the “disturbing” photographs and the allegedly potential liability they posed for some time, claiming he first saw them when he started to “wipe” his stack of “scratch drives” in May 2014. Yet he chose to take no action and did not report the “disturbing” discovery for another month. I heard no credible explanation for the unusual coincidence in timing other than the logical inference that it was meant to throw sand in the gears of the pending investigation of Sgt. Condez’s own alleged misconduct and I conclude that was the primary, and probably sole, motive for his decision to send the June 5, 2014 letter.

Decision, pp. 49-50.

The Commission inferred Sgt. Condez’ motive based on the circumstances that existed at the time the letter was sent, including the timing of the letter. Since the inference was based on facts in evidence, it was a permissible inference. “A fact may be inferred even though the relationship between the basic fact and the inferred fact is not necessary or inescapable, so long as it is reasonable and possible” Mass. G. Evid, § 301 (b) (2017 ed.)

Sgt. Condez also argues that the Commission's finding as to his motive is arbitrary and capricious. "A decision that does not contain ... a factual source [for the agency's conclusion], along with a reasoned explanation, is 'arbitrary within the meaning of G. L. c. 30A, § 14(7)(g).'" *Eady's Case*, 72 Mass. App. Ct. 724726 (2008), quoting *Dalbec's Case*, 69 Mass. App. Ct. 306, 316 (2007). A decision is arbitrary and capricious if "there is no ground which 'reasonable [persons] might deem proper' to support it." *FHC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*, 41 Mass. App. Ct. 681, 685 (1996).

As the Commission stated in the passage quoted above, its finding concerning Sgt. Condez' motive was based on the factual circumstances in which he sent the letter, including the timing in relation to the pending disciplinary hearing. The finding was based on facts in evidence and was reasonable. Therefore, it was not arbitrary or capricious.

B. Conduct Unbecoming a Police Officer

Sgt. Condez also challenges the following findings of the Commission:

Dartmouth has proved the charges of conduct unbecoming an officer for Sgt. Condez's wholly false accusations that Chief Lee was guilty of a felony, namely, criminal abuse of his only child. Sgt. Condez showed extreme lapse of judgment, untruthfulness and unconscionable retaliatory behavior motivated [*sic*] by an unfounded personal animus against Chief Lee and others, all of which is utterly intolerable in a police officer. Accordingly, Dartmouth proved just cause for his termination on those charges against him.

Decision, p. 34.

In particular, he contends that the following findings were not supported by substantial evidence: (1) the statements in his letter were "wholly false;" (2) he engaged in "unconscionable retaliatory behavior;" and (3) he was motivated "by an unfounded personal animus against Chief Lee and others."

Sgt. Condez sent a letter to the Select Board with two photographs of an infant boy naked in the bathtub. In one of the photographs, the boy has an indistinct object on his penis. Sgt. Condez asserted that the photographs were "possible evidence of abuse or sexual exploitation of a child by [Chief Lee]." Sgt. Condez wrote that it was "disturbing ... that someone in a position of public trust would be involved and or condone this type of conduct." He described the situation as "serious" four times. He twice suggested that there were additional "victims." He warned of liability of the town and called for an investigation by an "outside police agency." Adm. Record, Vol. II, p. 646. Based on the letter and the photographs, the Commission could permissibly find that the serious accusations in the letter were "wholly false" in the sense that they were unsubstantiated.

The Commission could also permissibly find that Sgt. Condez' actions were "retaliatory" based on the fact that he only sent his letter after being denied an additional continuance of pending disciplinary proceedings. Likewise, the Commission could permissibly find that Sgt. Condez was motivated by personal animus against Chief Lee based on the facts that Chief Lee was in charge of the police department bringing the charges and the personal nature of the scandalous and unwarranted attack on Chief Lee.

III. Severity of the Remedy

Finally, Sgt. Condez contends that his report of child abuse did not warrant the severe sanction of termination of employment.

The severity of the punishment is a matter committed to the sound discretion of the appointing authority and the Commission. See, *Police Commissioner of Boston v. Civil Service Commission*, 39 Mass. App. Ct. 595, 600 (1996). The court may not disturb the choice made by the agency unless the choice is arbitrary or capricious. As noted above, a decision is arbitrary

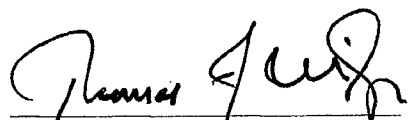
and capricious if “there is no ground which ‘reasonable [persons] might deem proper’ to support it.” *FHC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*, 41 Mass. App. Ct. 681, 685 (1996).

In determining the appropriate disciplinary action, the Commission took into account the fact that Sgt. Condez “has performed on many occasions with distinction.” Decision, p. 56. However, the Commission also determined that Sgt. Condez had caused “irreparable damage” to his own credibility and to the reputation of the police department. *Id.* Weighing both factors, the Commission concluded that termination was the appropriate discipline. Because that decision was based on a rational view of the evidence, it was neither arbitrary nor capricious and the court is required to defer to the Commission’s conclusion.

ORDER

In Civil Action No. 1673CV00796, the plaintiff’s motion for judgment on the pleadings (Paper # 14) is **DENIED** and the defendants’ cross-motion for judgment on the pleadings (Paper #15) is **ALLOWED**. Judgment shall enter **AFFIRMING** the decision of the Civil Service Commission.

September 23, 2017


Thomas F. McGuire, Jr.
Justice of the Superior Court