

Notice sent 11/11/17 (PM)
TBGG AG
TB JHRQ
DG

NOTIFY

911

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 1784CV0037

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

2017 SEP 22 PM 3 35

RECEIVED

RECEIVED

DANIEL DESMOND

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹
MA Off. of Attorney General

Administrative Law Division **DECISION AND ORDER ON CROSS MOTIONS FOR
JUDGMENT ON THE PLEADINGS**

Plaintiff seeks judicial review under G.L. c. 30A, § 14, of an adverse decision issued by the Massachusetts Civil Service Commission (the "Commission"). On December 11, 2014, the Commission issued a decision (the "First Decision") upholding the Town of West Bridgewater's (the "Town") termination of plaintiff Daniel Desmond ("Plaintiff" or "Desmond") from his position as a police officer for the West Bridgewater Police Department (the "Department"). Desmond appealed the First Decision to the Superior Court and the court (Wilkins, J.) issued a decision on April 21, 2016, remanding the case back to the Commission for further findings regarding allegations of disparate treatment and favoritism. The Commission reopened the hearing, heard additional testimony and argument, and reviewed additional exhibits. Following the hearing, the Commission issued its decision on December 8, 2016, again upholding the Town's decision to terminate Desmond (the "Second Decision").

Plaintiff sought judicial review of the Commission's Second Decision. The Town subsequently submitted a certified copy of the administrative record. Plaintiff filed a motion for judgment on the pleadings and the Town filed a cross motion for judgment on the pleadings. A

¹ Town of West Bridgewater

hearing on the motions was held in this court on August 31, 2017. Upon consideration of the parties' written submissions and the oral arguments of counsel, the Town's motion is

ALLOWED and Plaintiff's motion is **DENIED**.

The court's power to set aside or modify the Second Decision is limited. The question presented on judicial review under G.L. c. 30A is whether the Second Decision to uphold the Town's termination of Desmond is based on an error of law, is unsupported by substantial evidence, or is arbitrary or capricious. G.L. c. 30A, § 14(7)(c), (e) and (g). Desmond bears the burden of showing that the Second Decision is invalid. *See Springfield v. Dep't of Telecommunications and Cable*, 457 Mass. 562, 567-68 (2010); *Merisme v. Bd. of Appeals on Motor Vehicle Liab. Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989). In reviewing an agency decision, 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" by statute. G.L. 30A, § 14(7) (1997); *Flint v. Comm'r of Pub. Welfare*, 412 Mass. 416, 420 (1992); *Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n*, 401 Mass. 713, 721 (1988). This court may not substitute its judgment on questions of fact for that of the Commission. *See S. Worcester Cnty. Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n*, 386 Mass. 414, 420-21 (1982) (citing *Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n*, 372 Mass. 152, 154 (1977)). Nor may this court reject the Commission's choice between two conflicting views, even if the court might have made a different choice had the matter been presented de novo. *See Zoning Bd. of Appeals of Wellesley v. Hous. Appeals Comm.*, 385 Mass. 651, 657 (1982).

There is no dispute that Desmond made multiple untruthful statements, including several under oath in court, and that he misused the CGIS system. Likewise it is not disputed that this

conduct warrants discipline. The issue is the severity of the punishment. Judge Wilkins ordered the Commission to make findings as to whether the fact that the Department treated Desmond differently from Officer Michael Kominsky, another officer who was found to have lied under oath in a court proceeding years earlier, was a result of favoritism.² Judge Wilkins noted that Desmond had advanced the theory that Lieutenant Victor Flaherty, who conducted the investigation into Desmond's conduct, was biased due to an encounter that Desmond alleges he had with Lt. Flaherty in connection with the suicide of another officer, and that the Commission had failed to explore this as a possible motivation for disparate treatment.

Several witnesses testified at the reopened hearing and the parties introduced additional exhibits. In the Second Decision, the Commission found that Desmond and Kominsky were not treated uniformly. Kominsky's matter occurred in 2002, when he testified falsely at the criminal trial of Marcel Henderson in the United States District Court for the District of Massachusetts. At the time, Kominsky's father, Robert Kominsky, was the Department's Chief of Police. In 2006, the First Circuit Court of Appeals issued a decision reversing Mr. Henderson's conviction, and remarking that Kominsky's testimony had been false in a number of respects. *See United States v. Henderson*, 463 F.3d 27, 47 (1st Cir. 2006). The Commission found that Donald Clark, who was the Department's Chief of Police in 2006, was made aware of Kominsky's conduct soon after the *Henderson* decision issued, despite Chief Clark's inability to remember when he became aware of it. It also noted that Chief Clark was close friends with his predecessor, Kominsky's father. Based on all of the evidence, the Commission concluded that Kominsky's

² Desmond also contends that the Department treated him differently from Chief Donald Clark, whose testimony at an MCAD hearing was not credited in-part by the MCAD Hearing Officer. The Commission correctly found that Chief Clark's situation was not similar to Desmond's, and therefore, does not constitute a basis for a finding of unequal treatment.

conduct was not properly investigated, Kominsky had not been properly disciplined, and favoritism played a role in those failures.

Desmond claims that the disparate treatment was a result of Lt. Flaherty's bias against him because of an angry encounter Desmond had with Lt. Flaherty. Specifically it was Desmond's contention that when Lt. Flaherty told a group of officers that a fellow officer had committed suicide, Desmond said to Flaherty, "You fucking killed him; I hope you're happy." The Commission found Desmond's story was not credible because several other witnesses testified that they did not hear Desmond make that remark to Lt. Flaherty. Accordingly, the Commission concluded that the interaction never happened, and there was no evidence that Lt. Flaherty was biased against Desmond.

In sum, the Commission found that there was no evidence of bias against Desmond, that Desmond's conduct warranted termination, and the fact that Kominsky was treated differently was a result of inappropriate favoritism towards Kominsky. The Commission concluded that the favoritism toward Kominsky many years earlier did not justify vacating or modifying the Town's decision to terminate Desmond, which was a justifiable punishment for his conduct.³

Desmond made false statements and testified falsely under oath. Public policy dictates that police officers must be truthful and obey the law in the performance of their duties. Since there is no evidence of any bias towards Desmond, and his punishment was reasonable in light of

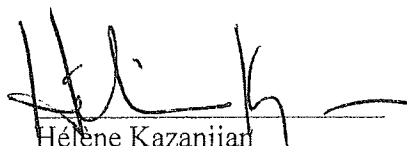
³ The court does not agree with the Commission that Judge Wilkins held that "[i]f the Town does not take steps to terminate Officer Kominsky, it may not terminate Desmond." Judge Wilkins found that the Commission's First Decision lacked factual findings regarding the issues of disparate treatment and favoritism, and any ruling had to include an assessment of those facts. *See Desmond v. West Bridgewater*, No. SUCV20150074D, 2016 WL 3145954, at *5-6 (Mass. Super. Apr. 22, 2016). He left open the possibility that Desmond might be treated differently pursuant to new policy. *See id.* at *5 ("By retaining Officer Kominsky, the Town set its own, exceedingly high threshold for discipline, namely that its policies tolerate continued employment of a police officer who has committed such conduct. If the Town now intends to announce a new policy to raise that threshold (as to past conduct) for Mr. Desmond, it must do so in a fair and uniform manner that does not violate Civil Service principles.").

his misconduct, the court cannot find that the Commission's decision was based on an error of law, unsupported by substantial evidence or arbitrary and capricious. *See City of Boston v.*

Boston Police Patrolmen's Ass'n, 443 Mass. 813, 822 n.9 (2005):

That other police officers may have received lesser sanctions for their serious misconduct avails nothing here. Each case must be judged on its own facts, and the factual record in those cases is not before us. In any event, there is no suggestion that the reasons for [the officer's] termination were pretexts or motivated by improper considerations. Nor do we credit the association's argument that the prior dispositions worked an estoppel of the department's termination in this case. Leniency toward egregious police misconduct in the past (assuming such leniency occurred) cannot lead a police officer to commit reprehensible actions in the expectation that he will receive a light punishment.

For the foregoing reasons, it is hereby **ORDERED** that judgment enter for the Town in this action.


Helene Kazanjian
Justice of the Superior Court

DATE: September 19, 2017