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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2016-02143-H

DENISE DOHERTY,
Plaintiff,
vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION
and DEPARTMENT OF STATE POLICE,
Defendants.

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

The plaintiff, Denise Doherty ("Doherty"), moved for judgment on the pleadings, and the defendants, Massachusetts Department of State Police ("MSP") and Massachusetts Civil Service Commission (the "Commission"), cross-moved for judgment on the pleadings, on Doherty's Complaint for Judicial Review (the "Complaint"). In her Complaint, Doherty appeals, pursuant to G. L. c. 30A, sec. 14 and G. L. c. 31, sec. 44, the Commission's June 9, 2016 decision (the "Decision"), finding that MSP had just cause to discipline her and requiring that she forfeit two days of accrued leave time.[1] A.R. 370-390.[2] The Court heard oral argument on May 23, 2018.

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For the reasons discussed below, the Court concludes that it was error to close the entire hearing after a few preliminary matters, but because there was no resulting prejudice to Doherty she does not have the right to a new hearing. The Court further

[1] This Court previously ruled, over MSP's objection, that the Commission had jurisdiction to review the discipline imposed on Doherty by the Colonel of MSP. See Docket # 11 (Opinion dated May 5, 2017).

[2] "A.R." refers to the Administrative Record, including the Findings of Fact ("FF"), and "Tr." refers to the transcript of the Commission hearing. "CSC Br.," "MSP Br." and "Doherty Br." refer to the parties' briefs on the pending motions.

finds that the Decision is supported by substantial evidence, and is not arbitrary and capricious or contrary to law. Therefore, Judgment on the Pleadings shall enter in favor of MSP and the Commission, and the Commission's decision shall be **AFFIRMED**.

PROCEDURAL HISTORY AND RELEVANT FINDINGS OF THE COMMISSION

In February 2016, an MSP trial board found that Doherty had committed five violations of Massachusetts State Police Rules and Regulations, Article 5.8.1 (Unsatisfactory Performance) by engaging in five instances of unprofessional conduct in or around November 2012. A.R. 3, 383-384. Doherty timely appealed to the Commission, and a hearing was conducted on April 8, 2016 by the Commission's Chairman. See Tr. at 1. The witnesses were Doherty, another MSP employee, and two employees of security company XYZ Watch Guard Company ("XYZ"),[3] identified in the record by their initials F.E. and N.R. See Tr. at 2. The Commission issued its decision on June 9, 2016. A.R. 390.

As found by the Commission, at the time of the hearing Doherty had been employed by MSP for over 20 years and held the rank of sergeant. FF 1. In October 2011, while assigned to MSP's certification unit, Doherty began an administrative inspection of a Boston-area college that included an inspection of XYZ. FF 10. As part of the inspection, Doherty obtained affidavits of XYZ's employees stating that they had never been convicted of a felony or crime of moral turpitude, a condition of employment at security companies. FF 3, 12-13. Based on criminal record checks of XYZ's employees, Doherty determined that 10 or 11 employees had felony convictions. FF 14.

[3] Because the Commission used the pseudonym XYZ Watch Guard Company in its decision, the Court does the same.

Doherty began contacting these employees in late November or early December 2012. FF 15.

Although the MSP trial board found five violations of MSP's professionalism standards by Doherty in the course of her interviews of XYZ employees, and the Commission affirmed the trial board's decision, it is sufficient for purposes of this Opinion to discuss only the most significant violation, which involves XYZ employee F.E..[4] The Decision describes F.E. as "a black female who has been employed as a technician at a large telecommunications company for thirty-seven (37) years... [and] had also been a part-time employee of XYZ for 8 years and worked weekends at a Boston hospital as a security guard." FF 16. Although F.E. had no criminal record, and wound up losing time at work due to Doherty's mistake, Doherty refused to assist F.E. in clearing up the mistake, see FF 22-25, 30, and was "harsh, negative, sarcastic and mean-spirited" in her interactions with F.E., see A.R. 387. As found by the Chairman of the Commission:

> In the case of F.E., [Doherty's] cavalier attitude resulted in a serious injustice. Had Doherty actually *listened* to F.E., and run one additional query that would have taken *seconds*, she would have learned that there was a real question as to whether F.E. had ever been convicted of a felony (which she was not).

A.R. 387 (emphasis in original). The Chairman concluded that, "[g]iven the rather egregious degree of unprofessionalism here, I find the discipline imposed here relatively

[4] The trial board recommended and the Commission affirmed Doherty's forfeiture of two days of accrued time for each offense, but the sanctions were imposed concurrently for a total loss of only two days of accrued time. In contrast to multiple criminal convictions, which have significance even if the sentences on those convictions run concurrently, Doherty in essence received no sanction for four of her five violations, one of which was clearly more serious than the others.

lenient and certainly not worthy of a downward modification by the Commission. A.R. 390. The Commission unanimously supported the Decision. Id.

Doherty filed a timely appeal to this Court.

DISCUSSION

A. The Lack of a Public Hearing, Though Error, Did Not Prejudice Doherty, and Therefore Provides No Basis for a New Hearing

1. The right to a public hearing; Defendants' position on that right

Doherty's hearing before the Commission was held under G. L. c. 31, sec. 43. That section provides in relevant part: "Any hearing pursuant to this section *shall* be public if either party to the hearing files a written request that it be public." G. L. c. 31, sec. 43 (emphasis added). The mandatory nature of this provision is clear. No party disputes that Doherty made a proper request that the hearing be public. Instead, the Commission and MSP argue that the pervasive use of Criminal Offender Record Information ("CORI") evidence during the hearing made it necessary for the Commission to close the hearing. See CSC Br. at 8-12; MSP Br. at 13-17. The Commission also argues that, even if it was error to close the hearing, the Commission's decision must be affirmed because Doherty has not demonstrated that her substantial rights were prejudiced by the closure. See CSC Br.at 13-17. The Court finds that, while it was error to close the entire hearing after a few preliminary matters, there was no resulting prejudice to Doherty, and therefore no grounds for a new hearing.

2. The Commission failed to adequately balance Doherty's right to a public hearing against the need to protect CORI evidence

Although the Commissioner did not cite G. L. c. 6, § 172, he recognized that

G. L. c. 31, § 43 conflicted with the public disclosure of CORI evidence, which is protected under G. L. c. 6, § 172. What the Commissioner failed to do was to harmonize the two statutes. As the Commission acknowledges in its brief, "Where two statutes appear to be in conflict, [courts] do not mechanically determine that the more recent or more specific statute trumps the other. Instead [courts] endeavor to harmonize the two statutes so that the policies underlying both may be honored." George v. Nat'l Water Main Cleaning Co., 477 Mass. 371, 378 (2017) (citations and quotations omitted), See CSC Br. at 10.

Here, instead of attempting to harmonize G. L. c. 31, § 43, and G. L. c. 6, § 172, the Commissioner closed the entire hearing after discussing a few preliminary matters. Closing the entire hearing clearly was not necessary. Indeed, the two most important witnesses - Doherty and F.E. - had no criminal record and could have testified publicly without the disclosure of CORI evidence. It was error for the Commissioner to close the entire hearing under these circumstances.

3. The lack of a public hearing did not prejudice Doherty, and therefore there are no grounds for a new hearing

A reviewing court cannot set aside or modify an agency decision unless it finds that "the substantial rights of any party may have been prejudiced." G. L. c. 30A, § 14. Whether closing all or most of a Commission hearing over a party's objection is *per se* prejudicial to that party appears to be an issue of first impression. This Court holds that Doherty must demonstrate prejudice to get a new hearing and that she has failed to do so.

The parties cite no case law, and this Court is not aware of any case law, holding that the closure of an agency hearing *per se* violates the due process rights or other

substantial rights of a litigant who attended and fully participated in the hearing. This Court declines to create such a right.

Doherty argues in essence that closing a Commission hearing over a party's objection constitutes structural error, i.e., error that is prejudicial *per se*. See Doherty Br., section II. However, as the Commission notes, "Structural error is a particular type of error. Generally, it is error that necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." Commonwealth v. Hampton, 457 Mass. 152, 163 (2010) (additional citations and quotations omitted). In the absence of more specific law, this Court must rely on the general proposition that "due process requires that there be notice and an opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Adoption of Simone, 427 Mass. 34, 39 (1998), quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). Doherty does not point to any prejudice that resulted from closure of the hearing. Doherty had notice of the hearing, attended the entire hearing and testified; she had the right to introduce exhibits, and her attorney cross-examined all of MSPs witnesses. See Tr. at 5, 64-91, 128-151, 186-213, 221-323. Moreover, despite closure of the hearing, Doherty's husband was allowed to attend the hearing. See Tr. at 9-10.[5] When others were asked to leave the hearing Doherty made no showing or even statement as to any resulting harm. See Tr. at 14. Under these circumstances, the Court finds no prejudice to Doherty of her substantial rights, and therefore no grounds for a new hearing.

[5] Although the Commissioner described his decision to let Doherty's husband attend the hearing as "blatantly, probably, inconsistent" with his decision to close the hearing, Tr. at 9, the decision could also be viewed as an attempt to harmonize conflicting statutes.

B. The Commission's Decision Must Be Affirmed

1. The legal standard

Pursuant to G.L. c. 30A, sec. 14(7), this Court may reverse, remand, or modify an agency decision only if the decision is "based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 867-868 (1997). Plaintiff bears the burden of demonstrating the invalidity of the Department's decision. Merisme v. Board of Appeal on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989). Factual disputes and matters of credibility are for the agency, not this Court, to resolve. Greater Media, Inc. v. Department of Public Utilities, 415 Mass. 409, 417 (1993).

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. c. 30A, sec. 14(7) (1997); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988). The reviewing court may not substitute its judgment for that of the agency. Southern Worcester County Regional Vocational Sch. 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).

2. Application of the legal standard

There is no basis for disturbing the Decision, which was the result of a thorough hearing, see Tr. 1-324, and careful analysis, see A.R. 370-390. The Commissioner credited F.E.'s (and N.R.'s) testimony. A.R. at 386-387. Such credibility determinations are the province of any administrative agency. See Greater Media, 415 Mass. at 417.

The Decision is factually and legally supported. The Court agrees with the Commission that, given Doherty's conduct, the discipline imposed was "relatively lenient." A.R. 390. Of course, this Court should not, and will not, substitute its judgment as to the penalty for that of the agency. See Southern Worcester Co. Reg'l Vocational Sch., 386 Mass. at 420-421.

CONCLUSION AND ORDER

For the above reasons, Plaintiff, Denise Doherty's Motion for Judgment on the Pleadings (Docket # 13) is **DENIED**, and the cross-motions for judgment on the pleadings of Massachusetts Civil Service Commission (part of Docket # 14) and Department of State Police (part of Docket # 15) are **ALLOWED**. The Decision of the Commission is **AFFIRMED**. Judgment on the pleadings shall enter in favor of the Defendants, and the case shall be closed.

Robert L. Ullmann
Justice of the Superior Court

Date: June 28, 2018