

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

CITY OF WORCESTER

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION and LEON DYKAS

SUPERIOR COURT
CIVIL ACTION
NO. SUCV2010-04182

Notice sent
7/19/2012
M. C. L.
S. & S.
T. V. D.
B. LAW OFFS.
J. J. B.

(sc)

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

INTRODUCTION

Pursuant to G. L. c. 30A, § 14, the City of Worcester brought this action challenging the reinstatement of patrol officer Leon Dykas by the Civil Service Commission. The plaintiff asks this court to vacate the Commission's decision and affirm Worcester's termination of Dykas, because the Commission's decision was based upon an error of law and was arbitrary and capricious. The action is now before this court on the parties' Cross Motions for Judgment on the Pleadings. For the following reasons, the plaintiff's motion is DENIED, the defendant Dykas' motion is ALLOWED, and the Commission's decision to return Dykas to his position as a Worcester Police Department patrol officer is AFFIRMED.

BACKGROUND

The administrative record ("AR") establishes the following undisputed facts. Leon Dykas was a tenured patrol officer employed by the Worcester Police Department

which has Rules and Regulations that apply to all police officers. (AR 326.) On March 14, 2009, Dykas complied with an order to attend an investigatory interview at the Worcester Police Department Bureau of Professional Standards ("BOPS"). (AR 329.) On March 17, 2009, Worcester Police Chief Gary Gemme placed Dykas on administrative leave with pay because of the pending investigation into whether he had engaged in misconduct. *Id.* On July 2, 2009, Dykas was served with a Notice of Hearing and Contemplated Dismissal, dated July 2, 2009 from City Manager Michael V. O'Brien, Worcester's Appointing Authority for police officers. *Id.* Paragraph 2 of the Notice read as follows:

You are directed to attend and testify truthfully. If you fail to obey this directive in any respect, it could result in discipline, up to and including dismissal, separate and apart from any discipline imposed as a result of the substantiation of the underlying charge. A copy of sections 41-45 of Chapter 31 is attached.

Id. at ¶ 9.

The disciplinary process for Worcester police officers usually begins with a Department investigation, which can include written reports and interviews of the officer and other witnesses. Unless the matter has criminal implications and the officer invokes his constitutional right against self-incrimination, the officer is obligated to cooperate fully. (AR 329.) In matters where discipline of more than a five (5) day suspension without pay is contemplated, the Department investigation is followed by a hearing pursuant to G. L. c. 31 § 41. (AR 329-330.) The Section 41 hearing is a formal proceeding, conducted by a city attorney as hearing officer. (AR 330.) The City's labor

counsel prosecutes the case and the officer is represented by counsel and/or the Union. *Id.* All witnesses are required to testify under oath and are subject to cross-examination, except where the matter involves criminal implications and the officer invokes a constitutional right against self-incrimination. The officer who is the subject of the allegations and who does not assert a privilege must testify under oath and is subject to cross-examination. *Id.* Generally, a stenographic transcript of the Section 41 hearing is prepared. *Id.*

In some instances, one of the charges at a Section 41 hearing is whether the officer, during the Department investigation, violated the Department Rules and Regulations, Policies and Procedures, including those requiring full and truthful cooperation with the investigation. *Id.* After the Section 41 hearing, the hearing officer prepares a report and a recommendation for the City Manager, who then decides whether or not to adopt the report and recommendation and whether to impose or uphold discipline. *Id.*

The July 2, 2009 notice stated that Dykas' Section 41 hearing was scheduled for July 21, 2009. Through counsel, Dykas requested and was granted a rescheduled date of August 14, 2009. (AR 331.) Prior to the August 14, 2009 hearing, Dykas' attorney, Kevin Buck, asked the City's attorney for certain documents and a list of witnesses who the City expected to call. *Id.* On August 12, 2009, the City's attorney, Leo Peloquin, sent the documents and a letter that included the following statement, "I anticipate calling Gina Genatossio and Toby Lauder and, possibly Sgt. Andrew Avedian as witnesses." *Id.*

On August 14, 2009, the hearing on the charges set forth in the July 2, 2009 notice began before Attorney John O'Day, the hearing officer designated by the City

Manager. On the second day of the hearing, August 20, 2009, Hearing Officer O'Day granted a break during the hearing in which Attorney Buck, Dykas, and the President of NEPBA Local 9111 left the hearing room. (AR 332.) When Attorney Buck returned a few minutes later, Dykas did not return with him. Attorney Peloquin asked about Dykas' whereabouts and Attorney Buck responded with words to the effect that Dykas had left. *Id.* Attorney Peloquin requested that Dykas return to the hearing to testify. Attorney Buck responded that Dykas would not be returning and he was not going to testify. *Id.* Attorney Peloquin responded that, in the July 2, 2009 notice, the City Manager had directed him to attend and testify truthfully. *Id.* Attorney Buck responded that Dykas was not going to testify. *Id.*

Hearing Officer O'Day resumed the hearing and determined that Dykas had been properly notified of the hearing and the continuation date. He stated that he would not decide the legality of the City Manager's order to Dykas to attend and testify truthfully. (AR 333.) However, he stated that, in deciding the charges set forth in the July 2, 2009 notice, he would draw an adverse inference against Dykas for his failure to testify and concluded the hearing. *Id.*

In a letter dated August 24, 2009, Chief Gemme notified Dykas in writing that, pursuant to G. L. c. 31, § 41, he was suspended for five (5) tours of duty without pay for failing to obey the order to testify at the hearing. *Id.* The reason given for the suspension was that "[y]ou disobeyed the City Manager's written directive in a July 2, 2009 notice when you failed to remain at a disciplinary hearing to consider the charges against you and testify." *Id.* On the same date, City Manager Michael V. O'Brien notified Dykas that a hearing pursuant to G. L. c. 31 § 41 would be taking place on August 28, 2009 and that

the “hearing could result in disciplinary action against you, up to and including dismissal.” (AR 333-334.) The City Manager’s correspondence stated that, “[y]ou disobeyed my written directive in a July 2, 2009 notice when you failed to remain at a disciplinary hearing to consider the charges against you and testify.” (AR 334.) At no time did Dykas challenge the City Manager’s order to testify nor did he claim a right to not testify at the hearing on August 20, 2009 based on a privilege of self-incrimination. *Id.*

On August 28, 2009, there was a hearing pursuant to G. L. c. 31 § 41 on Dykas’ appeal of the five (5) day suspension for failing to obey the order to testify and to determine whether he should be dismissed for failing to obey the order to testify. *Id.* The hearing officer was Attorney Karen Meyer, who was appointed by the City Manager. *Id.* At the hearing, the parties reached an agreement on pertinent facts, which the hearing officer incorporated into her final report. *Id.* On September 18, 2009, Hearing Officer Meyer submitted a Hearing Officer Report and Recommended Disposition to the City Manager in which she found that there was just cause to uphold the five (5) day suspension and dismiss Dykas for failing to obey the order to testify. *Id.* On September 22, 2009, the City Manager issued a decision in which he adopted the hearing officer’s report in its entirety, denied Dykas’ appeal of the suspension, and dismissed him. (AR 334-335). Dykas appealed the suspension and the dismissal to the Civil Service Commission. The Commission concluded that the City did not have just cause to suspend or terminate Dykas for his failure to testify at his Section 41 hearing and ordered the City to return Dykas to his position. The City appealed the Commission’s decision pursuant to G. L. c. 30A and the appeal is now pending before the Superior Court.

DISCUSSION

I. Standard of Review

Pursuant to G. L. c. 30A, a reviewing court may affirm, reverse, remand or modify an agency's decision if it determines that the substantial rights of any party have been prejudiced because the agency's decision violated constitutional provisions, was not supported by substantial evidence, was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. G. L. c. 30A, § 14(7). The court is to determine "whether, within the record developed before the administrative agency, there is such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988), citing Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 521 (1971).

In reviewing the agency's decision, the court must give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it. G. L. c. 30A, § 14(7); Thomas v. Civil Serv. Comm'n, 48 Mass. App. Ct. 446, 451 (2000). Similarly, judicial review is confined to the administrative record and the court "must apply all rational presumptions in favor of the validity of the administrative action." G. L. c. 30A, § 14(5); Consolidated Cigar Corp. v. Dept. of Pub. Health, 372 Mass. 844, 855 (1977). This deference to an agency's decision extends to an agency's interpretation of the statutes which govern it. Falmouth v. Civil Service Commission, 447 Mass. 814, 821 (2006). However, the court may overrule an agency's interpretation of a statute it is charged with enforcing if the interpretation is "patently wrong, unreasonable, arbitrary, whimsical, or capricious." TBL

Inc. v. Board of Health of N. Andover, 431 Mass. 9, 17 (2000), quoting Brookline v. Commissioner of the Dep't of Envtl. Quality Eng'g, 398 Mass. 404, 414 (1986).

II. Analysis

The City argues that the Civil Service Commission committed an error of law in interpreting G. L. c. 31, § 41 to, in effect, provide a police officer charged with (non-criminal) misconduct a privilege not to testify in a Section 41 hearing. The City contends that the Civil Service Commission's ruling overrules a well-established Police Department regulation requiring officers to cooperate truthfully in all phases of investigations, hearings, trials and proceedings, as well as contradicting an express Appointing Authority order directed at the defendant, Leon Dykas, to testify.

The administrative record and the case law supports the Civil Service Commission's conclusion that Dykas may choose to testify, or not, and that he can not be required to testify at his own hearing. "[A]n important purpose of the civil service system is *assuring that all employees are protected against coercion for political purposes and are protected from arbitrary and capricious actions.*" Callahan v. Personnel Adm'r for Comm., 400 Mass. 597, 600 (1987), citing G. L. c. 31, §1(f) (emphasis added). Furthermore, it is the duty of the Civil Service Commission to guard against political considerations and bias in governmental employment decisions. Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 304 (1997).

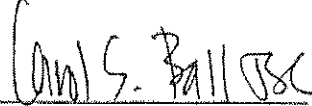
The court agrees with the Civil Service Commission that the Section 41 hearing is held in order to protect the due process rights of the employee rather than to provide an opportunity for the city's Appointing Authority to conduct a further inquiry as to whether the charges are supported by evidence and whether there is just cause to discipline an

employee. The City is not prejudiced by an officer's refusal to testify at the Section 41 hearing. Unlike the defendant in Massachusetts Parole Board v. Civil Service Commission, 47 Mass. App. Ct. 760, 766 (1999), who failed to appear at an investigatory interview, Dykas attended and answered questions with the BOPS regarding his alleged misconduct. As the Civil Service Commission noted in its decision, the city could have extended the BOPS investigation and required further testimony from Dykas in that connection. (AR 343.) Additionally, the city was not left without recourse by Dykas' refusal to testify. Hearing Officer O'Day drew a negative inference from the fact that Dykas left the hearing and refused to testify. As the Commission noted, "if the Appellant is willing to risk that such an inference will be made, which could lead to a negative outcome for himself, then he must be permitted to do so [not testify] as the hearing is being held in order to protect his rights." (AR 345.)

Given two equally plausible interpretations of the statutory language of G. L. c. 31, § 41, which is silent on the issue of required employee testimony, this court must defer to the Civil Service Commission's reasonable interpretation that the employee is not required to testify. "We are guided by the familiar principle that '[a] state administrative agency in Massachusetts has considerable leeway in interpreting a statute it is charged with enforcing.'" Falmouth v. Civil Service Commission, *supra* at 821, quoting Nuclear Metals, Inc. v. Low-Level Radioactive Waste Mgt. Bd., 421 Mass. 196, 211 (1995). In light of the evidence presented in the administrative record and the deference the court must give to the agency's interpretation of the statute it enforces, the Commission's decision can not be considered arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

ORDER

Based on the foregoing, the plaintiff's Motion for Judgment on the Pleadings is DENIED, the defendant's Cross Motion for Judgment on the Pleadings is ALLOWED, and the Civil Service Commission's decision to return Dykas to his position as a Worcester Police Department patrol officer without any loss of pay or other benefits to which he is entitled is AFFIRMED.



Carol S. Ball
Justice of the Superior Court

DATED: July 19, 2012