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COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 13-4382-D

NOTICE SENT

06.22.15

MASS. A.G.

R.L.Q.T.R.

C.L. & P.

S.M.M.

T.D.N.

L.C.C. & P.

J.A.P.

RICHARD EVERTON,
Plaintiff,

vs.

TOWN OF FALMOUTH & another¹,
Defendants.

(LAT)
MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS AND
DEFENDANTS' MOTION TO STRIKE

INTRODUCTION

The Plaintiff, Richard Everton, was discharged from his position as a police officer with the Falmouth Police Department ("FPD") for engaging in conduct unbecoming a police officer. Everton appealed his discharge to the Civil Service Commission (the "Commission"), which was upheld. Pursuant to G. L. c. 31, § 44, Everton seeks judicial review in the Superior Court of the Commission's findings and conclusions by way of his Motion for Judgment on the Pleadings.² For the reasons that follow, Everton's motion is DENIED.

BACKGROUND³

Everton was employed as a police officer with the FPD beginning in 2008 until his discharge on February 16, 2012. During his tenure with the FPD, Everton was disciplined on three occasions: (1) in the winter of 2007-2008, Everton lost his driving privileges as a result of

¹ Civil Service Commission, as Co-Defendant.

² The Defendants have filed a motion to strike from the record Everton's separate Statement of Facts in support of his Motion for Judgment on the Pleadings, arguing that this court's review is confined to the administrative record. Because Everton's statement includes only facts with corresponding references to the administrative record, the Defendants' Motion to Strike is DENIED.

³ The facts herein are taken from the administrative record.

driving his police cruiser with excessive speed in icy conditions; (2) while in training at the Police Academy, Everton received a written warning for disrespecting a citizen during a traffic stop; and (3) on September 8, 2010, Everton was required to forfeit one day of vacation time for rude and discourteous behavior toward a motorist, saying to her, "don't threaten me with that shit lady, you don't support us anyway." Despite his prior discipline, Everton received four positive written letters from the FPD, commending him on his outstanding performance as a police officer.

Everton's Insubordination in September 2011

On September 8, 2011, the FPD received a tip that two individuals had planned to rob an electronics store that night by breaking and entering through its roof. Everton and FPD Officer DeVito were the only officers on duty that night with prior tactical experience for such an operation. Officer DeVito was dispatched and promptly notified Everton that he was on the roof. He asked Everton to ensure that there was no unnecessary chatter on the police radio and that no unmarked cruisers would be in the area to alert the subjects.

At 12:20 a.m. on September 9, 2011, Everton sent the following text message through the FPD's internal text messaging program to all on-duty FPD officers:

Please be advised ****ALL UNITS**** Secret Squirrel, is in effect. DeVito is on the roof of Radio Shack. He is attempting to watch the Friendly's lot too. If subjects show. We take down the "look out" car first. Then cover the subjects inside the store. Rule one: DO NOT broadcast any activity in this area beforehand, as to not tip off the subjects. Please call the recorded line if a report worthy event occurs. DeVito's radio is on low, let's not compromise his position by broadcasting radio traffic. Thank you 372 Out.

Everton did not discuss the contents of his message with his shift supervisors, Sergeants John Doyle and Brian Loewen, prior to sending it over the system. Shortly thereafter, Sergeant Doyle issued the following text message:

10-22 [meaning, disregard] on the last. Identify a crime prior to taking any enforcement action against occupants of any vehicle. DeVito is the man on the scene and he will advise when he has and what the circumstances are to determine what actions will be taken. Officer safety will come before anything else.

Everton replied privately to Sergeant Doyle's message, stating:

I wish you would have come talked to me first before putting that out and making me look like a fool . . . I have been talking to DeVito on cell. I put it out that way because these guys have little tactical experience and may have to be walked through it.

Upon receiving Everton's message, Sergeant Doyle asked Everton to report to his office.

Everton told the dispatcher, Diana Lanahan, "I'll be right back. I'm going to get into a fight."

Sergeants Doyle and Loewen explained to Everton that they believed he had exceeded his authority by issuing the initial message without their prior approval and that they disagreed with the instructions he had provided. Everton conceded that he should have ran the message by Doyle and Loewen first, but reiterated that he had acted at the express request of Officer DeVito. Although the conversation remained calm, Everton seemed visibly agitated and proceeded to leave the room. Doyle called Everton back into his office, but Everton did not respond. After returning to work, Everton responded over the intercom, "Negative, I'll talk to you in the morning after I cool off." Everton admits that his conduct constituted a public refusal to obey a direct order.

Doyle suggested that Everton be sent home for the remainder of his shift. Loewen contacted FPD Captain, Edward Dunne, who suggested they continue to discuss Everton's conduct before sending him home. Loewen then remarked to Everton that it would be "in his best interest" to continue discussing Everton's conduct. Doyle interjected, saying "we are offering you an opportunity here," to which Everton responded, "[o]h, you think so, huh?"

Everton asked whether their request was an order; when told it was an order, Everton abruptly ascended from his seat, and, while visibly agitated, proceeded to the detail room as ordered.

Doyle and Loewen construed his demeanor as a sign that the situation was about to escalate. Doyle saw no point in further discussion and yelled to Everton, "Rick go home!" Everton collected his belongings and departed from the police station.

FPD Chief, Anthony Riello, sent a letter to Everton on September 9, 2011, informing Everton that he had been placed on paid administrative leave while an internal investigation was pending. On October 6, 2011, Everton received a letter from the Falmouth town manager informing him of a disciplinary hearing concerning the September 9, 2011 incident. The first hearing was held on October 19, 2011.

Everton's October 26, 2011 Motorcycle Accident

On October 26, 2011, one week following his October 19, 2011 hearing, Everton was found speeding while operating a privately-owned motorcycle. Everton was off duty. His motorcycle was equipped with two rear-view mirrors. While in operation, the rear-view of the motorcycle is obstructed by the operator's elbows, rendering it difficult to see what is directly behind the motorcycle without moving one's arms.

FPD Officer, Norman Adamson, was on traffic duty in the morning on October 26, 2011. His cruiser was positioned along the side of Route 28's northbound lanes about a half-mile south of the Thomas B. Landers Road overpass. His vehicle was in plain view. The posted speed on Route 28 is fifty-five miles per hour. The speed limit is reduced to forty miles per hour one-half mile before the Otis Rotary in Bourne, Massachusetts, and is further reduced to twenty-five miles per hour in the rotary.

On October 26, 2011, Adamson clocked Everton's motorcycle traveling northbound at eighty miles per hour. After traffic passed, Adamson pulled into the northbound lane and began to give chase. Observing that Everton's motorcycle was pulling away, Adamson activated his blue lights. Adamson accelerated to a speed of 110 to 115 miles per hour. He continued to see Everton's motorcycle ahead weaving in and out of traffic. Everton admitted to passing four to five vehicles while using the breakdown lane. Everton's motorcycle crossed the town line into Bourne, at which point Adamson slowed down, deactivated his lights and turned back to Falmouth.

Everton proceeded on Route 28. When he reached the Otis Rotary, Everton lost control of his motorcycle, which skidded 140 feet before landing on its left side. Everton was thrown off the motorcycle and was treated at the scene before transported to a medical center. His motorcycle incurred significant damage as well.

Bourne Police Officer, Christopher Wrighter, responded to the scene of the accident. Officers Wrighter and Adamson both prepared police reports based on their observations and statements taken from several eyewitnesses. Based on their reports, Wrighter and Adamson concluded that excessive speed was a significant contributing factor to the accident. One witness, David Fitzsimmons, stated to police that he observed Everton's motorcycle traveling at ninety miles per hour and later saw the same motorcycle involved in the accident in the Otis Rotary. Another witness, Kenneth Fisk, observed Everton traveling at roughly 100 miles per hour while passing his vehicle. Everton was ultimately cited for operating to endanger, failure to stop for a police officer and speeding.⁴

⁴ Everton faced criminal charges for the events stemming from his October 26, 2011 accident in Bourne. A District Court judge found Everton guilty on two counts of Negligent Operation of a Motor Vehicle in violation of G. L. c. 90, § 24 and one count of Failing to Stop for a Police Officer in violation of G. L. c. 90, § 25. He was not found

Everton's Discharge from FPD

On December 12, 2011, Falmouth Town Manager, Julian Suso, sent a letter to Everton, informing him that the pending disciplinary proceedings against him would be reopened in order to consider additional charges stemming from the motorcycle accident on October 26, 2011. Chief Riello also contacted Everton, requesting his response to several questions concerning the accident. Everton replied:

- Q1: Why you failed to stop for a Falmouth police officer pursuing you?
A1: During this time in question, I never observed or heard a Falmouth police officer behind me. Note: I wear a full face helmet.
Q2: Why your speed exceeded 100 miles per hour?
A2: My speed never approached or exceeded 100 miles per hour.
Q3: The cause of your accident at the Bourne Rotary?
A3: Patches of sand and/or loose gravel caused a fishtail.

On December 21, 2011, a second hearing was held to determine whether Everton should be discharged for insubordination, discourtesy, conduct unbecoming a police officer based on the September and October 2011 events, and misconduct while on paid administrative leave. The hearing officer issued her decision on February 16, 2012, finding that Everton had a history of discourteous behavior, erratic driving and misconduct unbecoming a police officer, and such history was proper grounds for discharge.

DISCUSSION

I. Standard of Review

The Civil Service Commission's final orders and decisions are subject to judicial review in the Superior Court; this court's review is guided by the provisions of G. L. c. 30A, § 14. See G. L. c. 31, § 44 (2013). Therefore, the court will uphold the Commission's findings "unless it is

guilty of Speeding in Violation of a Special Regulation in violation of G. L. c. 90, § 18. Everton received six months of administrative probation, and was fined an assessment of \$250.00.

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.” McGuiness v. Department of Corr., 465 Mass. 660, 668 (2013) (internal citations and quotations omitted).

In conducting its review, the court is bound by the Commission’s factual findings if supported by substantial evidence. City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). Taking the facts found, the court’s ultimate consideration is whether the commission’s action was legally tenable. Id. Upon a motion for judgment on the pleadings to reverse a decision of the Commission, a petitioner’s burden is heavy for the court gives due weight to the Commission’s expertise and its ability to determine the credibility of witnesses that come before the hearing officer. See Cosby v. Police Comm’r, No. 00-P-1258, slip op. at 1 (Mass. App. Ct. Aug. 26, 2002). See also Stratton, 58 Mass. App. Ct. at 731 (“because so much of the [hearing officer’s] decision hangs on questions of credibility we are bound . . . to defer”).

II. Just Cause to Discharge Everton

General Laws c. 31, § 41 provides that “[e]xcept for just cause and except in accordance with the provisions of [§ 41], a tenured [civil service] employee shall not be discharged.” For the purposes of G. L. c. 31, § 41, “just cause” is defined as “substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.” Police Comm’r v. Civil Serv. Comm’n, 39 Mass. App. Ct. 594, 599 (1995), quoting Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). Before the Commission, Everton bore the burden of proving by a preponderance of the evidence that the FPD lacked just cause to discharge him. See Stratton, 58 Mass. App. Ct. at 727.

Everton attacks the Commission's proceedings and findings and conclusions of law on several grounds. First, Everton asserts that the Commission acted arbitrarily and capriciously and committed errors of law by disregarding the notion of "progressive discipline" and evidence of disparate treatment; admitting double-hearsay evidence where the police reports relied on third-party eyewitness testimony; and admitting evidence of Everton's convictions arising from the October 26, 2011 accident. Second, Everton claims that the Commission's decision is unsupported by substantial evidence. The court addresses each argument in turn.

A. *Progressive Discipline*

Everton argues that the FPD did not exhaust progressive discipline before discharging Everton for his conduct. Progressive discipline a term of art describing a sequence of discipline used by employers. Such policies typically include the following levels of discipline, in this order: "verbal warning, written warning, written reprimand, suspension, and ultimately, discharge." See Essex Cnty. Sheriff's Dep't v. Essex Cnty. Corr. Officers Ass'n, 2010 Mass. Super. LEXIS 310 at *19 (Mass. Super. Ct. 2010). The court first notes that Everton has not proffered any case law, statutes or regulations that suggest that progressive discipline is required to be followed by FPD or any other civil service employer. The only evidence of FPD's use of progressive discipline comes from Chief Riello, who indicated during Everton's evidentiary hearings that the FPD uses progressive discipline to address officer misconduct.

Furthermore, there is substantial evidence in the record to suggest that FPD did follow the ordinary course of progressive discipline as to Everton's ultimate discharge. The Commission made clear in its findings and conclusions that discharge would not have been proper if based solely on Everton's discourteous behavior and insubordination in September

2011. However, the Commission and the hearing officer both made significant findings as to the history of discourteous behavior and misconduct by Everton.

The Commission and the hearing officer credited evidence presented of Everton's past misconduct, including: (1) losing driving privileges for driving too fast during icy conditions; (2) receiving a written warning for disrespecting a citizen during a traffic stop while in police academy; and (3) forfeiting one day of vacation time for rude and discourteous behavior toward a motorist on a different occasion, when he said, "don't threaten me with that shit lady, you don't support us anyway." It is clear that he had received warnings from the FPD for his past conduct. In September 2011, Everton was placed on paid administrative leave and suspended from FPD until the insubordination incident was investigated. While on paid administrative leave, Everton negligently drove his motorcycle in violation of several traffic laws, which led to his ultimate discharge. The evidence before the Commission clearly shows that Everton's penalties for his past conduct exactly aligns with the course of progressive discipline.

B. *Evidence of Disparate Treatment*

The Commission credited the evidence provided by Everton regarding misconduct by other police officers and corresponding punishments. The Commission made findings as to an incident in 2011 where an officer exchanged derogatory words and acts with fellow officers; a 2009 motor vehicle accident where one officer rear-ended another officer who ultimately struck a civilian while responding to a report of domestic violence; and an incident where a third officer received a 180-day suspension for use of excessive force against a youth during arrest.⁵

⁵ The Commission cites additional examples proffered by Everton of misconduct by officers and their corresponding punishments. The Commission correctly did not consider those events and corresponding punishments as disparate treatment although the officers were not discharged because these incidents took place prior to Chief Riello's assumption of leadership at the FPD.

The Commission determined that Everton's assertion of disparate treatment was unfounded. While the Commission noted that the discharge would have constituted disparate treatment had it been solely based upon Everton's insubordination during the September 2011 shift, Everton's conduct while operating his motorcycle in October 2011 was a more serious offense. The Commission noted that only the other motor vehicle accident was comparable in egregiousness, but that the FPD was warranted in treating the two situations differently because the officer-involved accident involved officers responding to a complaint of domestic violence. Here, however, Everton was driving his motorcycle in excess of 100 miles per hour while he was on paid administrative leave from the FPD during an ongoing investigation into prior acts of insubordination.

The Commission's consideration of Everton's evidence of disparate treatment coupled with its own analysis as to why the proffered examples of misconduct did not rise to the kind of misconduct present in Everton's case is entitled to deference. Even if the court would have come to a different conclusion, the court is not permitted to retry the case; rather, the court is bound by the Commission's decision. Stratton, 58 Mass. App. Ct. at 731.

C. *Admission of Eyewitness Testimony*

Everton contends that the Commission and the hearing officer erred by considering police reports and eyewitness statements therein testifying to the perceived speed of Everton's motorcycle during the October 2011 incident. Specifically, Everton contests the Commission's consideration of testimony from both Kenneth Fisk and David Fitzsimmons, who identified Everton's motorcycle as having passed them at speeds of 100 and ninety miles per hour, respectively. This, Everton argues, is double hearsay and should not have been considered. The court disagrees.

Proceedings governed by the provisions of G. L. c. 30A “need not observe the rules of evidence observed by courts, so long as the evidence admitted is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs.” Wardell v. Director of the Div. of Emp’t Sec., 397 Mass. 433, 437 n.5 (1986) (internal citations and quotations omitted). See also G. L. c. 30A, § 11(2) (2013) (“agencies need not observe the rules of evidence observed by courts”). Although police reports containing eyewitness testimony and accounts can be considered double hearsay if admitted to prove the contents alleged, they “bear sufficient indicia of reliability.” Boston Police Dep’t v. Suppa, 2011 Mass. App. Unpub. LEXIS 716 at *5 (Mass. App. Ct. 2011).

The hearing officer specifically expressed that she credited the testimony of Sargent Locwen, Officer Adamson and Officer Wrighter because they gave consistent accounts of the October 26, 2011 incident that mirrored their earlier accounts and exhibits proffered. Officer Wrighter proffered a police report taken at the scene that contained testimony from both David Fitzsimmons and Kenneth Fisk. The hearing officer did not err by considering the reliable testimony and police report of Officer Wrighter, which included the eyewitness accounts of Fitzsimmons and Fisk. Consequently, the Commission did not commit any error of law.

D. *Admission of Everton’s Subsequent Convictions*

Everton asserts that the Commission erred by permitting admission of Everton’s subsequent convictions stemming from the October 26, 2011 accident. Everton’s basis is unfounded. The Commission specifically articulated that it had reached its conclusion entirely “independent of the fact of the convictions themselves.” The Commission notes that it does not rely on Everton’s conviction of refusing to stop for a police officer; rather, the Commission found that “Officer Everton’s cruiser was in plain view and he should have seen Officer

Adamson's cruiser as he passed him and later gave pursuit, but for his neglect in observing the road, *all of which is supported by independent evidence presented at the Commission hearing.*"

See Civil Service Commission Decision, dated November 14, 2013, at 24.

Further, the inadmissibility of the convictions, if improper, does not undermine the Commission's findings or ability to find substantial evidence to support Everton's discharge. The just-cause requirement for the discharge of civil service employees encompasses conduct well beyond that which is prohibited by criminal law. Faria v. Third Bristol Div of the Dist. Ct. Dep't, 14 Mass. App. Ct. 985, 986 (1982). The Commission's decision is supported by substantial evidence beyond the mere fact that Everton was convicted for his misconduct on October 26, 2011.

E. Substantial Evidence

Everton further asserts that the Commission's decision is not valid because it does not rely upon substantial evidence. The court disagrees.

An agency decision is supported by substantial evidence where it relies upon "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (2013). The Town of Falmouth proffered sufficient evidence to support the conclusion that Everton had a history of discourteous conduct and insubordination with the FPD. His prior temperament compounded with his willful violation of traffic laws, which put himself, his department, and the public in danger, are sufficient to support his discharge for "just cause."

It is axiomatic that police officers have a duty to comport with the very laws they are charged to enforce. The Appeals Court has emphatically expounded on the special status and duties of a police officer:

Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that

brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct. Police officers are not drafted into public service; rather, they compete for their positions. In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.

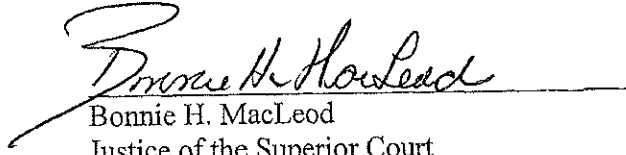
Police Comm'r v. Civil Serv. Comm'n, 22 Mass. App. Ct. 364, 371 (1986). This special status must be taken into account whether a police officer engages in misconduct on or off duty. Police Comm'r, 39 Mass. App. Ct. at 601.

The hearing officer and Commission's decisions are sound, especially in light of the heightened expectation attributed to police officers to behave themselves in accordance with the law and the public interest. Everton severely understates his history of discourteous behavior and prior discipline. In addition to his discourteous behavior towards civilians, he openly and repeatedly refused to obey orders of his superiors and exhibited a "pattern of gross insubordination and conduct unbecoming a police officer." Decision of Hearing Officer Heather Harper, dated Feb. 16, 2012, at 13.

Everton's final straw was his willful disobedience of the traffic laws, failure to stop for his fellow officer, and eventual motorcycle accident on October 26, 2011. The Commission correctly found that his conduct not only endangered himself and other FPD officers, but the public as well. His defiance of the law, which he is charged with enforcing, and negligent driving posed serious risks to the public interest. Consequently, the Commission reasonably could determine that the FPD had just cause to discharge Everton.

ORDER

For the reasons stated herein, the Plaintiff's Motion for Judgment on the Pleadings is **DENIED**. Judgment shall enter for the Defendants, the Town of Falmouth and the Civil Service Commission.


Bonnie H. MacLeod
Justice of the Superior Court

Dated: June 22, 2015