13

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 16-1033-H

KEVIN FARRELL,
Plaintiff,

vs.

CIVIL SERVICE COMMISSION and TOWN OF DANVERS,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR LEAVE TO PRESENT ADDITIONAL EVIDENCE

The plaintiff in this proceeding under G. L. c. 30A, § 14, Kevin Farrell ("Farrell"), moved for leave to present testimony of alleged procedural irregularities during the Civil Service Commission ("Commission") proceeding that led to this appeal. Farrell also asks the Court to allow additional evidence on his claim that he was wrongly terminated from his position as Fire Chief of the Town of Danvers ("Town"). The Court heard oral argument on February 6, 2017. For the below reasons, Farrrell's motion is **DENIED**.

BACKGROUND

The Town employed Farrell from 1985 until 2015. Farrell was hired as a firefighter in 1985, and later promoted to Lieutenant, Deputy Fire Chief, and provisional Fire Chief. Farrell was appointed as the Town's permanent Fire Chief in March 2011. (AR 423).[1]

[1] "AR __" refers to the Administrative Record.

On August 7, 2015, the Town terminated Farrell. (AR 442). The Town's decision was motivated in part by events that occurred on June 12, 2015, at a time when Farrell and his former spouse were moving their belongings out of a house located in Groveland. (AR 431). One of the findings leading to Farrell's termination was that, on that day, Farrell had requested license plate information -- about a pick-up truck belonging to his former wife's boyfriend -- for personal reasons not related to his official duties. (AR 433).

Farrell appealed his termination to the Commission. (AR 445). The Commission held a hearing, which took place over the course of two days, with Farrrell's former wife and six other witnesses testifying on October 30, 2015, and Farrell testifying on November 2, 2015. (AR 21-22, 420-422). Immediately after Farrell testified on November 2, 2015, the following exchange occurred:

> MR. BOWMAN:[2] Anything else?
>
> MR. WERMUTH:[3] No.
>
> MR. BOWMAN: Okay. Thank you for your testimony, sir. I appreciate it. You rest?
>
> MR. COLLINS:[4] I do.
>
> MR. WERMUTH: Yes.
>
> MR. BOWMAN: You're done? Okay. Okay. Why don't I just talk to the two of you about getting proposed decisions in and things like that, okay?
>
> MR. WERMUTH: Go ahead. (Nov. 2, 2015 Hearing Transcript pp. 159-160).

---

[2] Mr. Bowman was the hearing officer.

[3] Mr. Wermuth is the Town's attorney.

[4] Mr. Collins was Farrell's attorney during the Commission proceeding.

Farrell alleges that, during the ensuing conversation, the hearing officer told his attorney that he believed Farrell's version of the events of June 12, 2015, and that his former wife was probably confused about the date. (AR 472-473). Farrell further alleges that, based on these comments, his lawyer was dissuaded from presenting additional evidence. (AR 470).

On March 4, 2016, the Commission issued a decision upholding Farrell's termination. (AR 418, 464-465). According to the Commission, "[t]he crux of th[e] case centers on what occurred on Friday, June 12, 2015." (AR 454). The Commission noted that Farrell and his former wife provided "starkly different version[s]" of what happened that day. Noting that he had "carefully listened (and re-listened) to the testimony of both Mr. Farrell and his former spouse," and that he had "reviewed all relevant exhibits, including the prior statements made by both individuals" (AR 455), the Commission hearing officer credited the testimony of Farrell's former spouse, including that Farrell had arrived at the Groveland house in the morning and observed that she was using the black pick-up truck. (AR 455-456). The Commission, therefore, concluded that Farrell's termination was justified because, among other conduct, he had engaged in substantial misconduct when he requested the license plate information for personal reasons. (AR 462-465). The Commission further found that, far from being an aberration, Farrell had "for several years, while serving as the Town's Fire Chief...engaged in a pattern of egregious misconduct." (AR 464).

After receiving the unfavorable decision, Farrell moved for reconsideration, arguing that the Commission's hearing officer had made off-the-record statements after he testified that discouraged him from presenting additional corroborating evidence. (AR

470-485). Farrell attached to his motion numerous affidavits and other materials that he asserted would have corroborated his claim that he did not arrive at the Groveland house until the afternoon of June 12, 2015. (AR 488-517). The Town filed an opposition. (AR 521-536). On March 31, 2016, the Commission denied Farrell's motion for reconsideration for the reasons stated in the Town's opposition. (AR 539).

Thereafter, Farrell filed this action seeking review of the Commission's decision to uphold his termination. Farrell has moved, pursuant to G. L. c. 30A, § 14(5), to present testimony of the hearing officer's off-the-record statements, and, pursuant to G. L. c. 30A, § 14(6), to present the corroborating evidence that he asserts he was discouraged from presenting to the Commission.

DISCUSSION

Farrell asks this Court to hear testimony on alleged procedural irregularities before the Commission, and to admit the evidence that Farrell says that he would have presented to the Commission but for those irregularities. In the alternative, Farrell asks this Court to remand the matter so that this additional evidence can be presented to the Commission. None of these actions is warranted.

A. No Hearing Is Warranted Based on Alleged Procedural Irregularities

Review of an administrative agency's decision is confined to the administrative record, unless a party alleges that "procedural irregularities" occurred during the administrative proceeding. G. L. c. 30A, § 14(5);[5] see LeMaine v. Boston, 27 Mass. App.

[5] General Laws c. 30A, § 14(5) provides, in full:

> "The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court."

Ct. 1173, 1175 (1989) (rescript) ("Judicial review of administrative proceedings is confined to the record, unless procedural irregularities before the agency is alleged."). Where a party "allege[s] irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court." G. L. c. 30A, § 14(5).

There are two separate reasons not to conduct a hearing before this Court on alleged procedural irregularities. First, the alleged irregularities are fully set forth in the administrative record.[6] As such, there are no "irregularities in procedure before the agency, *not shown in the record*...." G. L. c. 30A, § 14(5) (emphasis added). Because the alleged procedural irregularities are disclosed in the administrative record, the Court need not hold an evidentiary hearing on the matter. See West Boylston Nursing Home, Inc. v. Dougherty, 2011 Mass. Super. LEXIS 242 at *4 (Mass. Super. 2011) (procedural irregularities "exception applies very rarely, since most procedural irregularities are shown in the record").

The second reason not to hear testimony pursuant to G. L. c. 30A, § 14(5) is that, as discussed below, Farrell's decision not to present additional evidence was a litigation decision, not the result of any procedural irregularity.

B. Neither This Court Nor the Commission Should Hear Additional Substantive Evidence

1. This court should not hear the additional evidence.

"Section 14(6) [of G. L. c. 30A] does not authorize a reviewing judge to consider extra-record evidence and make findings," rather "[i]t authorizes a judge . . . to 'order

[6] Under Code Mass. Regs. § 1.01(10)(k)(1), the administrative record consists of, among other materials, "all motions, pleadings, briefs, memoranda, petitions, objections, requests and rulings . . . [and] all findings, decisions and orders presented whether recommended or final."

that the additional evidence be taken before the agency,' which 'may modify its findings and decision by reason of such additional evidence.'" She Enterprises, Inc. v. State Bldg. Code Appeals Bd., 20 Mass. App. Ct. 271, 273 (1985), quoting G. L. c. 30A, § 14(6).[7] The only exception to this rule is for testimony about procedural irregularities, see *supra* at 4-5, and for the reasons discussed herein such a hearing is not warranted in this case.

2. The Commission should not hear the additional evidence.

Under G. L. c. 30A, § 14(6), a party may request that the court grant it leave to present additional evidence to an administrative agency. "A motion for leave to present supplemental evidence pursuant to G. L. c. 30A, § 14 (6), is addressed to the sound discretion of the judge." Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 265-266 (2001). The party seeking to supplement an administrative record must demonstrate that the additional evidence is "material" and that "there was good reason for failure to present it in the proceeding before the agency." G.L. c. 30A, § 14(6).

Here, Farrell cannot meet either requirement. The additional evidence would not be material, and there was no good reason for Farrell's failure to present the evidence at the Commission hearing.

---

[7] General Laws c. 30A, § 14(6) provides, in full:

> "If application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material to the issues in the case, and that there was good reason for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of such additional evidence and shall file with the reviewing court, to become part of the record, the additional evidence, together with any modified or new findings or decision."

On the issue of materiality, Farrell provided a minute-by-minute account of his whereabouts at the hearing, which the Commission specifically found was not credible.[8] (AR 456-459). The Commission did not credit Farrell's detailed description because it found the testimony of his former spouse to be credible[9] and because he had not included any of those details in his rebuttal to the police chief's report of the June 12th incident. (AR 458). According to the Commission, Farrell's "detailed [two]-page and one paragraph August 5th rebuttal does not specifically dispute the former spouse's statement that both she and [Farrell] were at the house in Groveland during the morning of Friday, June 12th—and the written rebuttal certainly does not offer any of the detailed itinerary put forth by [Farrell] at the conclusion of the Commission hearing." (AR 459). Thus, the Commission discredited Farrell because of his inconsistent explanations regarding his whereabouts and not because he failed to further corroborate certain details of his account. The additional evidence, therefore, would have added nothing to the Commission's determination that Farrell's version of events was not credible. See, e.g., Doe, Sex Offender Registry Bd. No. 15606 v. Sex Offender Registry Bd., 452 Mass. 784, 795 (2008) (plaintiff's motion to present additional evidence was properly denied where hearing examiner considered plaintiff's position and the plaintiff did not demonstrate that further evidence on the matter "would have added anything to the hearing examiner's conclusion.") Farrell also ignores that the Commission made its credibility findings against a broader finding that Farrell had "for several years, while serving as the Town's Fire Chief...engaged in a pattern of egregious misconduct." (AR 464)

---

[8] The Commission also noted that it considered Farrell's corroborating receipts. (AR 458).

[9] Farrell's counsel chose not to cross-examine Farrell's former spouse. (See Oct. 30, 2015 Hearing Transcript p. 48).

Moreover, the Commission has already considered in substance the additional evidence that Farrell would present at a re-opened hearing, having reviewed his motion for reconsideration, including all of the attached affidavits, and having denied the motion. (AR 539). See Commonwealth v. Roxbury Charter High Pub. Sch., 69 Mass. App. Ct. 49, 54-55 (2007) (proposed evidence not material where evidence, in some form, was before the agency during the hearing and was again pressed on a motion for reconsideration).

As for the second requirement to re-open the Commission hearing, Farrell has not demonstrated that there was a good reason for not initially presenting the evidence. In his motion for reconsideration, Farrell asserted that "[a]fter listening to widely different versions from [Farrell] and his former wife, the Hearing Officer met with counsel for both parties to discuss upcoming witnesses and to make plans for the rest of the hearing. At that time the Hearing Officer informed counsel for both parties that he believed [Farrell's] version and that while the former wife seemed sincere, she was mistaken about the date." (AR 472-473). Farrell repeated this assertion in his affidavit attached to the motion. (AR 500). The Commission directly addressed the assertion in its decision on Farrell's motion for reconsideration, stating that it "concur[ed] with the statement in the [Town's opposition] that counsel for [Farrell] misremembered the post-hearing off-the-record colloquy that occurred after both parties had rested in this matter." (AR 539). Farrell's assertion that the purpose of the colloquy was "to discuss upcoming witnesses and to make plans for the rest of the hearing" (AR 472) is highly dubious, given that the parties had both rested their cases immediately before the colloquy. See *supra* at 2.

There is no evidence, or even any assertion, that Farrell had other witnesses at the hearing whom he wanted to call and who were precluded from testifying. See She Enterprises, Inc., 20 Mass. App. Ct. at 275-276 (plaintiff failed to show that he had good reason for not presenting additional evidence where he did not request that agency hear evidence on the matter and "[t]here [wa]s no suggestion that [the plaintiff] had witnesses who were prepared to testify...") In essence, Farrell's request to reopen the Commission is nothing more than an attempt to retry the appeal of his termination. See, e.g., Fanion v. Director of Div. of Employment Sec., 391 Mass. 848, 850-851 (1984). This is not "good reason" to re-open the hearing under G. L. c. 30A, § 14(6).

ORDER

For the foregoing reasons, Plaintiff Kevin Farrell's Motion for Leave to Present Testimony of Procedural Irregularities and Additional Evidence (Docket # 10) is **DENIED**.

Dated: March 20, 2017

Robert L. Ullmann
Justice of the Superior Court