COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 10-0781-D

Notice sent
9/24/2013
J. M. B.
S. G.
R. L. Q., JR.
C. A. W.
G.,W. & W.
A. L. L.

ROBERT GRIFFIN

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another[1]

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS (sc)

This is an action for judicial review pursuant to G. L. c. 30A, § 14, whereby the plaintiff, Robert Griffin ("Griffin") challenges a decision by the Massachusetts Civil Service Commission ("the Commission") upholding a one-day suspension for violating the Chelsea Police Department's ("the Department") internal affairs policy ("IA Policy"). Griffin now moves for judgment on the pleadings pursuant to Mass. R. Civ. P. 12 (c). For the following reasons, Griffin's Motion for Judgment on the Pleadings is **DENIED**.

BACKGROUND

The administrative record reveals the following facts:

Griffin has been a member of the Chelsea Police Department since 1987. He became a member of the United States Navy Reserve in 1999. Early on in Griffin's career as a Department officer, he became aware of rumors surrounding the misconduct of a certain Department employee who will be referred to as "Sgt. X." Specifically, the rumors suggested that Sgt. X habitually used illegal narcotics, occasionally reported for duty while under the influence of narcotics, and was involved in other illegal drug activity operating out of a local bar ("Dick's

[1] City of Chelsea.

Cafe"). As far as Griffin knew, no formal disciplinary action had been taken against Sgt. X, notwithstanding the Department's knowledge of his alleged misconduct.

In March 2003, Griffin was ordered to active duty as a member of the United States Navy. At that time, he reported to United States Central Command at McDill Air Force Base in Tampa, Florida. Notwithstanding his military leave, Griffin continued to receive partial pay from the Department. During the summer of 2003, Griffin learned of a United States Drug Enforcement Agency ("DEA") investigation of the Department regarding allegations of illegal drug activity, which included the rumors concerning Sgt. X. Griffin also learned that the Department had opened its own investigation of Sgt. X and was collaborating with the DEA.

In August of 2003, as Griffin was preparing for military deployment, he decided to independently contact DEA Agent Brady ("Agent Brady") in order to assist in the investigation by disclosing his knowledge regarding the rumors he had heard about Sgt. X during his early years at the Department. This contact was in violation of the chain of command policy required by General Order 00-12. Under the Department's General Order 00-12, policy # 200 § VII, the Department monitors its internal investigations by requiring all officers to follow a "chain of command policy" in order to maintain an investigation's integrity and uniformity.

Upon learning of Griffin's disclosure to the DEA, the Department opened an internal affairs investigation of Griffin himself, headed by Lieutenant Dunn ("Lt. Dunn"). Griffin was notified of this investigation via email. Attached to the email was a notification document informing Griffin that he was bound by the Department's IA Policy and that he was not to speak to any other parties regarding the matter, except for his union representative or an attorney. Despite this warning, which Griffin alleges he did not initially read, Griffin again contacted Agent Brady regarding the investigation, and the Department learned of this contact.

At the conclusion of the Department's investigation of Griffin, Lt. Dunn issued a summary report, which he forwarded to the Chief of Police. Lt. Dunn's report detailed four violations, including insubordination and the IA Policy, and included a recommendation for disciplinary action. The Chief of Police issued Griffin a one-day suspension without pay pursuant to G. L. c. 31, § 41. Dissatisfied with this decision, Griffin requested a hearing.[2] A hearing was held, and the appointing authority upheld the one-day suspension for violating the Department's IA Policy. The appointing authority, however, did not uphold any of the other three violations levied against Griffin.

Griffin appealed the appointing authority's decision to the Commission pursuant to G. L. c. 31, § 43. Griffin's primary contention before the Commission was that the Massachusetts "whistleblower" statute protected his actions involving the DEA, and thus he did not violate the Department's IA Policy. The Commission upheld the appointing authority's decision supporting the Department's one-day suspension. Griffin has filed this complaint for judicial review of the Commission's decision pursuant to G. L. c. 30A, § 14.

DISCUSSION

I. Standard of Review

Griffin, as the party seeking review under G. L. c. 30A, § 14, bears the burden of demonstrating the invalidity of the agency decision. Andrews v. Division of Med. Assistance, 68 Mass. App. Ct. 228, 229 (2007). 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.'" Springfield v. Department of

[2] Pursuant to G. L. c. 31, § 41, a civil service employee, "may be suspended for just cause for a period of five days or less without a hearing prior to such suspension." G. L. c. 31, § 41. However, the employee may then "file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension." Id.

Telecomm. & Cable, 457 Mass. 562, 567 (2010), quoting G. L. c. 30A, § 14 (7). A court must also defer to the agency's determinations of fact and the reasonable inferences drawn from the record. See Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992). "Thus, a court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Gauthier v. Director of the Office of Medicaid, 80 Mass. App. Ct. 777, 783 (2011) (quotations omitted). A court may, however, reverse, remand, or modify an agency decision if the "substantial rights of any party may have been prejudiced because the agency decision is based on an error of law or unlawful procedure; is arbitrary and capricious or unwarranted by facts found by the agency; or is unsupported by substantial evidence." G. L. c. 30A, § 14 (7).

In reviewing the Commission's decision pursuant to G. L. c. 30A, it is necessary to understand the Commission's role in the appeals process. The Commission's duty is to determine whether "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the [C]omission to have existed when the appointing authority made its decision." Town of Falmouth v. Civ. Serv. Comm'n., 447 Mass. 814, 824 (2006) (quotations omitted). The Commission must affirm the appointing authority's decision if it determines by a preponderance of the evidence "that there was just cause for an action taken against such person . . . ." G. L. c. 31, § 43. "Just cause" is defined as "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray v. Second Dist. Court of E. Middlesex, 389 Mass. 508, 514 (1983).

II. Analysis

Griffin argues that the Commission's decision was error and not based upon substantial evidence because there was no just cause for affirming Griffin's suspension. Specifically, he

reiterates his argument that the Massachusetts "whistleblower" statute protects him from retaliatory action by the Department for circumventing the IA Policy. Griffin further argues that, even if the whistleblower statute does not apply, his conduct should not result in punishment because it would have been futile to report the information through the proper channels. In response, the Department argues that Griffin violated Department policy and the whistleblower statute is not applicable to this situation.

A. The Department's IA Policy and "Just Cause"

Regarding internal affairs investigations, the Department's General Order 00-12, policy # 200 § VII requires that "[a]ny contact with regard to criminal charges will be made through the IA Investigator who will act as a liaison to any outside agency." A. R. at 314. Griffin violated this policy when he contacted Agent Brady.[3] The Commission concluded that Griffin's violation of the Department's policy gave the Department just cause to order a one-day suspension.

As previously stated, "just cause" is defined as "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Murray, 389 Mass. at 514. Here, the Commission gave a significant amount of credence to Lt. Dunn's testimony regarding the Department's IA Policy, especially regarding the importance of adhering to the chain of command. Following the chain of command allows an internal investigation to maintain its integrity, as well as facilitate a coordinated Department approach to the issue at hand. Similarly, breaching the Department's IA Policy would amount to substantial misconduct because it would hinder the appearance of integrity and solidarity, which are core components of any public service department. Therefore, because Griffin intentionally circumvented the IA policy, the Commission reasonably concluded that the Department had just cause to discipline

[3] Although Griffin suggests that he was not technically a Department employee at the time he violated the IA Policy, this argument is without merit primarily because Griffin was still receiving partial compensation from the Department while on military leave. As such, he was bound by the terms of the Department's IA Policy.

him, so long as Griffin is not exempt from following the IA policy due to the whistleblower statute or otherwise.

B. The Whistle Blower Statute, G. L. c. 149, ¬ 185

A Department employee is not required to follow the IA Policy, meaning that he may directly contact an outside party instead of contacting the IA Investigator, if specifically permitted by the Whistle Blower Statute, G. L. c. 149, § 185. In order to be protected by G. L. c. 149 ¬ 185, an employee must fall into one of the categories listed in subsection (b) and, if applicable, comply with the notice requirements of subsection (c).

Subsection (b) specifies that "[a]n employer shall not take any retaliatory action against an employee" in certain situations, including where the employee:

> "(1) Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer . . . that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law, or which the employee reasonably believes poses a risk to public health, safety or the environment;
> (2) Provides information to . . . any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law . . . which the employee reasonably believes poses a risk to public health, safety or the environment by the employer."[4]

G. L. c. 149 ¬ 185 (b)(1) and (2). If an employee falls into one of the categories in subsection (b), then it must be determined whether the employee satisfied the notice provisions of subsection (c).[5]

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[4] G. L. c. 149 § 185 (b) specifies a third situation, which is not relevant here and not referenced by the parties.

[5] Subsection (c) (1) provides notice requirements for subsection (b)(1) only and specifies that:

> "the protection against retaliatory action provided by subsection (b) (1) shall not apply to an employee who makes a disclosure to a public body unless the employee has brought the activity, policy or practice . . . to the attention of a supervisor of the employee by written notice and has afforded the employer a reasonable opportunity to correct the activity, policy or practice."

However, pursuant to subsection (c)(2), an employee is not required to comply with the notice requirements of (c)(1) if he:

> "(A) is reasonably certain that the activity, policy or practice is known to one or more supervisors of the employer and the situation is emergency in nature; (B) reasonably fears physical harm as a result of the disclosure provided; or (C) makes the disclosure to a public body as defined in clause (B) or (D) of the

Here, in evaluating whether subsection (b)(1) or (2) is satisfied, the primary issue is whether Griffin "reasonably believe[d]" that the information regarding Sgt. X's alleged drug use "pose[d] a risk to public health, safety or the environment." On this point, Griffin argues that Sgt. X's alleged drug use and involvement with other drug activities posed a risk to public safety because he was a police officer entrusted with the responsibility to protect the public.

The Commission rejected this argument for two reasons. First, Griffin could not reasonably consider the information to be pertinent to public safety because the evidence was of questionable value and he knew at the time of disclosure that Sgt. X was under investigation by two independent agencies and had been placed on administrative leave. The Commission noted that Griffin's report to the DEA referenced only "rumors of misconduct dating back to the late 80's or 90's" and Griffin had "no current information that Sgt. X might be violating the law." Furthermore, Sgt. X was placed on leave and would not be interacting with the public. The Magistrate additionally noted that Griffin admitted that any allegations connecting Sgt. X to Dick's Cafe had already been investigated and resolved with the closing of the establishment.[6]

Second, the Commission concluded that Griffin did not subjectively believe the information to be related to public safety. The Magistrate reasoned that Griffin's extreme delay in reporting the allegations, coupled with his "admitted interested in being promoted," calls into question his motivations in reporting the rumors of Sgt. X's misconduct at the exact time that both he and Sgt. X were trying to get promoted to the same position. The Commission reasoned

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definition for 'public body' in subsection (a) for the purpose of providing evidence of what the employee reasonably believes to be a crime."

[6] On a similar vein, Griffin briefly asserts that the Department had notice of Sgt. X's misconduct and, accordingly, the Department also committed misconduct by apparently deciding to not discipline Sgt. X. The inference from this assertion is that the police force improperly employed an unqualified and unethical police officer, thereby placing the public in harm's way. However, the risk flowing to the public from the Department's retention of Sgt. X, if any, was vitiated when Sgt. X was placed on administrative leave. There is no evidence or allegations that the Department unlawfully retained anyone other than Sgt. X.

that, if public safety were Sgt. X's concern, he would have reported the matter sometime during the more than ten years that he was aware of the allegations.

Because Griffin did not reasonably believe that his report was related to public safety or health, the Commission concluded that Griffin did not satisfy G. L. c. 149 7 185 (b). This decision was reasonable and will be upheld. Moreover, credibility determinations regarding Griffin's intent in disclosing the information are left to the discretion of the agency. See, e.g., Flint, 412 Mass. at 420.

C. Futility of Complying with the Department Policy

Griffin argues that he acted reasonably in bypassing the Chelsea Internal affairs because, given that Sgt. X's alleged misconduct was widely known throughout the Department for years and Sgt. X had never been disciplined as a result, Griffin had a valid concern that any information given to the IA Investigator would not have been relayed to the DEA. In response, the Committee points to the Magistrate's conclusion that "given the fact that the investigation was underway and the offending officer on leave" she did not credit Griffin's assertion "that following the chain of command would have been futile." A.R. at 320. Although not referenced in the Committee's decision, the Department's hearing officer also stated that Griffin would need to first attempt to use the proper channels before claiming that using such channels would be futile. The hearing officer stated:

> "If Sgt Griffin's intention was to report the apparent wrongful behavior of [Sgt. X] to insure that a careful investigation was conducted and to see that [Sgt. X] was appropriately disciplined, Sgt. Griffin must first address these issues through the chain of command. There was no evidence presented that Sgt. Griffin made this effort."

A.R. at 6. The court agrees with the Department's hearing officer on this point. Griffin was required to first report any information to the IA Investigator before he could claim that doing so

would be futile. Therefore, the Commission had reasonable grounds to reject Griffin's assertion that his circumstances permitted him to violate the Department's policy. (sc)

D. Conclusion

The Commission's decision to affirm the one-day suspension must be upheld, because it was based on substantial evidence and is not "based on an error of law" or "arbitrary and capricious." See G. L. c. 30A, § 14 (7).

ORDER

For the foregoing reasons, the Plaintiff's Motion for Judgment on the Pleadings pursuant to Mass. R. Civ. P. 12 (c) is **DENIED**. Judgment shall enter **AFFIRMING** the Commission's decision supporting Griffin's one-day suspension for violating the Department's IA Policy.

Date: September 20, 2013

Bonnie H. MacLeod
Justice of the Superior Court