

NOTED

SUFFOLK, ss.

COMMONWEALTH OF MASSACHUSETTS

SUPERIOR COURT
CIVIL ACTION
NO. 07-3766-A

MASSACHUSETTS DEPARTMENT OF
STATE POLICE & another¹

vs.

CIVIL SERVICE COMMISSION & another²

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

INTRODUCTION

The plaintiffs, Massachusetts Department of State Police ("the Department"), and Mark F. Delaney in his capacity as Colonel and Superintendent ("Colonel Delaney"), filed this action pursuant to G.L. c. 31, §44 & G.L. c. 30A, §14 for review of a decision made by the Civil Service Commission ("the Commission"), which vacated a disciplinary ruling against Massachusetts State Police Trooper Rosemarie Hicks ("Trooper Hicks") by the State Police Trial Board ("Trial Board") and Colonel Delaney. The plaintiffs also seek declaratory relief pursuant to G.L. c. 231A. The case is before the Court on the plaintiffs' motion for judgment on the pleadings. The Commission has opposed the motion. Trooper Hicks also opposed the motion and has filed a cross-motion for judgment on the pleadings. For the following reasons, the plaintiffs' motion is **DENIED** and the defendant Trooper Hicks' cross-motion is **ALLOWED**.

BACKGROUND

The record discloses the following facts. On September 13, 2000, Trooper Hicks was

¹ Mark F. Delaney in his capacity as Colonel and Superintendent

² Rosemarie Hicks

Noted
sent
7/29/08
M.B.H.
L.A.-aa.H.
D.H.-aa.H.
S.W.D.
a.H.M. W.H.
(mb)

charged with interference with a police officer and assault and battery on a police officer for an off-duty incident that occurred in her Brockton home. As a result of the alleged misconduct, Trooper Hicks was brought before the Trial Board on September 12, 2002 to face formal disciplinary charges. Although she had testified previously in the criminal proceedings, she invoked her right against self-incrimination in the disciplinary proceedings. On or about September 18, 2002, having received testimony from all of the percipient witnesses but Trooper Hicks, the Trial Board found Trooper Hicks guilty of the disciplinary violations and recommended that she lose thirty days of accrued time as a penalty. On September 26, State Police Colonel Thomas J. Foley ("Colonel Foley") affirmed the Trial Board's findings but reduced the penalty to a loss of twenty days because Trooper Hicks only possessed twenty-two days of accrued time. The penalty was subsequently implemented.

On or about October 2, 2002, Trooper Hicks appealed the decision to the Commission. On January 24, 2007, a hearing was held before a Division of Administrative Law Appeals Magistrate. Unlike the in proceedings before the Trial Board, Trooper Hicks testified on her own behalf at the appeal. The Department did not call any witnesses and instead chose to rely on the written accounts of those witnesses from the proceedings back in 2002. The magistrate reviewed the case *de novo* and concluded that Trooper Hicks presented a credible and reliable account of the September 13, 2000 events and that the hearsay evidence of adverse witnesses was insufficient to overcome her testimony. As such, the magistrate recommended that the Commission allow Trooper Hicks' appeal and vacate the disciplinary action. The Commission accepted the magistrate's recommendations. Trooper Hicks' accrued time has not been

reinstated.³

DISCUSSION

The plaintiffs challenge the Commission's decision on three grounds. First, they argue that, although the Commission has authority to review decisions made by the Trial Board, it has no authority to review subsequent disciplinary action taken by the Colonel. Second, they argue that the Commission has no authority to review disciplinary penalties that are not specifically enumerated in G.L. c. 31, §41-45 and that loss of accrued time is not specifically enumerated. Finally, they argue that the Commission improperly relied on Trooper Hicks' testimony at the appeal without acknowledging that she had previously refused to testify in front of the Trial Board.

Review of Colonel Daley's Decision

G.L. c. 22C, §13 provides that any uniformed trooper aggrieved by a finding of the Trial Board may appeal the decision to the Commission under G.L. c. 31, §41-45. The plaintiffs argue, however, that this statute does not authorize review of subsequent decisions by the Colonel of the State Police. The crux of the plaintiffs' argument is that the Colonel's disciplinary authority is independent of the Trial Board's findings. As such, the Colonel's disciplinary authority is not addressed in the statute and thereby not subject to review by the Commission.

This argument has already been rejected in Comm. of Mass. Dep't of State Police v. Reilly, Superior Court C.A. No. 06-2349, May 8, 2008 (Macdonald, J.). In Reilly, the court characterized the plaintiffs' position as follows: "The [Department] acknowledge[s] that [the

³ It appears Colonel Delaney replaced Colonel Foley at some point during this case.

statute] entitles a trooper to a hearing before the Commission, but . . . the appellate remedy is limited to the hearing itself, i.e., that it provides no authority in the Commission to alter the Colonel's discipline." Id. at 3. The court concluded that such an outcome is "inherent[ly] illogic[al]." Id. Further, the court explained that the statute was enacted "to obtain what was perceived as the greater protection for Troopers and Sergeants of review by the Commission" and that, contrary to this intent, the plaintiffs' interpretation "would result in the troopers having substantially less protection." Id. The court thus concluded that the Commission had the authority to review the Colonel's decision under G.L. c. 22C, §13. Id. at 7.

This Court agrees with the reasoning and analysis of the court in Reilly and holds that the Commission properly exercised its authority to review Colonel Daley's disciplinary decision.

Review of Accrued Time

G.L. c. 31, §41 & §43 provide that any uniformed trooper "discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent . . . lowered in rank or compensation without his written consent [or if] his position be abolished" shall "be given a hearing before a member of the [C]ommission or some disinterested person designated by the chairman of the [C]ommission." The plaintiffs argue that this provision does not apply to the current case because "forfeiture of accrued time" is not listed in the statute as an appealable penalty. The defendants contend, however, that forfeiture of accrued time is the functional equivalent of a suspension and, thus, the statute applies to a forfeiture of accrued time.

The Department Disciplinary Guidelines explain that "[t]he Trial Board may recommend loss of accrued time . . . as an alternative to suspension. Such recommendation shall not be

considered a departure from the Guideline provided the number of days so recommended is consistent with the Guideline.” In other words, where a disciplinary violation calls for suspension, loss of accrued time is an interchangeable penalty under the Guidelines. The interchangeable nature of the two penalties suggests that the loss of one is equivalent to the loss of the other.

The purpose of the statute in affording appellate rights would be defeated if that purpose could be subverted merely by the meting out of an equivalent penalty under a different name. See Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court, 448 Mass. 15, 24 (2006) (“[i]f a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat that purpose”). Even though the loss of accrued time is not specifically enumerated in the statute, the Court holds that such a penalty is equivalent to a suspension under the Guidelines and is therefore properly appealable to the Commission.

Hicks’ Testimony

Finally, the plaintiffs argue that the Commission erred in failing “to account for the negative inference that the [Trial Board] was permitted to draw from the refusal of [Trooper Hicks] to testify” at the first hearing. See Falmouth v. Civ. Serv. Comm’n, 447 Mass. 814, 826 (2006). The plaintiffs’ argument relies heavily on Falmouth, in which the Commission had reduced the disciplinary penalty from 180 days suspension to 60 days suspension because the Commission found that the violations were “less egregious” than found by the “appointing authority.” Id. at 824-825. The Court held that the Commission improperly reduced the disciplinary sanction because “there was reasonable justification for the action taken by the

appointing authority in the circumstances found by the [C]ommission to have existed when the appointing authority made its decision.” Id. at 826. The Court explained that the difference in circumstances found by the Commission were “too inconsequential to justify the reduction of the penalty *especially* where [the defendant] testified before the commission but not before the [appointing authority].” Id. at 824-825 (emphasis added).

In this case, the differences between the Trial Board’s findings and the Commission’s findings were not “too inconsequential to justify the reduction of the penalty.” See Falmouth, 447 Mass. at 824-825. The evidence before the Trial Board was different from the evidence before the Commission. Both the Trial Board and the Commission appear to have considered the evidence carefully yet each came up with different conclusions of fact. This is not a situation, like in Falmouth, where the Commission found the violations were merely “less egregious” and needed only to consider whether there was “reasonable justification” for the penalty. See id. On the basis of a *de novo* review of the facts, the Commission found that Trooper Hicks was not guilty. The Falmouth case is therefore inapposite, see id., and the plaintiffs’ argument must fail.

ORDER

For the foregoing reasons, the Plaintiff Massachusetts Department of State Police’s Motion for Judgment on the Pleadings is **DENIED** and Trooper Hicks’ Cross-Motion for Judgment on the Pleadings is **ALLOWED**. Therefore, the Civil Service Commission’s decision vacating Trooper Hicks’ disciplinary penalty is hereby **AFFIRMED**.

By the court (Quinlan, J.)


Assistant Clerk

Date: July 25, 2008