

*Notary*  
COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
Civil No. 2009-02473

STACEY HIGHTOWER

vs.

THE CIVIL SERVICE COMMISSION & another<sup>1</sup>

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

Introduction

Pursuant to G. L. c. 30A, § 14, and G. L. c. 31, § 44, Stacey Hightower ("plaintiff") brought this action against the Civil Service Commission ("Commission") and the Boston Police Department ("Department"), seeking judicial review of the Commission's final decisions to uphold the plaintiff's one day suspension and to deny plaintiff's request to expunge information from her personnel file. The plaintiff requests that the court reverse the Commission's decisions or, in the alternative, remand the matter to the Commission for a new hearing or for further findings of fact. The action is now before this court on the parties' cross motions for judgment on the pleadings. See Mass. R. Civ. P. 12(c). For the reasons set forth below, the plaintiff's motion is **DENIED**, the Department's motion is **ALLOWED** and the Commission's decision is **AFFIRMED**.

BACKGROUND

The facts set forth in the administrative record are as follows. The plaintiff was employed as a patrol officer with the Department from July 1998 until August 2008. On July 31, 2008, the plaintiff submitted her voluntary resignation from the Department, effective August 15, 2008.

<sup>1</sup> The Boston Police Department.

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In this case, the plaintiff is appealing the Commission's May 14, 2009 unanimous decisions to: 1) uphold a one day suspension served for her conduct during a traffic stop; and 2) decline to expunge her personnel record because the Commission lacked jurisdiction to decide her claim. The Commission issued the decisions in response to the plaintiff's September 5, 2009 appeal alleging violations of her right to a hearing contained in G. L. c. 31, § 42, and for suspension without just cause in violation of G. L. c. 31, § 41, brought pursuant to G. L. c. 31, § 43. The Commission conducted an appeal hearing on February 6, 2009.<sup>2</sup>

### **I. The Suspension**

This case arises in part out of a May 19, 2008 traffic stop, when the plaintiff issued Frank Holbrook ("Holbrook") a citation for failure to yield the right of way. At the time of the stop, the plaintiff was off-duty, wearing a Red Sox jersey over her police uniform and driving her personal vehicle on Tremont Street in Boston. Officer Lakenya Webster ("Webster"), who was on-duty, in uniform, and driving a marked police car, witnessed part of the plaintiff's interaction with Holbrook. Holbrook's partner Maureen Saint-Guillen ("Saint-Guillen") was sitting in the passenger seat of the vehicle and also witnessed the incident.

On May 23, 2008, Holbrook filed a complaint against the plaintiff based on her conduct during the traffic stop. Sergeant Joseph Gallarelli ("Gallarelli") was assigned to investigate the incident. During his investigation, he spoke with Holbrook on the phone and reviewed the plaintiff's and Webster's reports of the incident, which they both filed on a Department Form 26.

According to the plaintiff, the plaintiff got out of her vehicle and flagged down Webster to assist her with stopping Holbrook, whom she claims was driving erratically and had cut her off. The plaintiff contends that she and Webster approached Holbrook's vehicle together and that the plaintiff then knocked on Holbrook's window and requested his license and registration,

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<sup>2</sup> At the hearing, the plaintiff waived her G. L. c. 31, § 42, procedural claim and proceeded de novo.

which he initially refused to provide despite repeated requests. When he did finally produce his license and registration, she issued him a citation for failure to yield.

Holbrook's and Webster's descriptions of the incident differed from the plaintiff's account in several respects. Contrary to the plaintiff's account of the incident, Webster's report indicated that the plaintiff had already stopped the car when Webster arrived and that Webster did not approach the car until the plaintiff had issued the citation. In her report, Webster also described telling Saint-Guillen that she could not tell her why Holbrook was pulled over, since she did not make the stop. In his telephonic interview with Gallarelli, Holbrook also reported that the plaintiff approached his car without Webster. According to Holbrook, the plaintiff banged on his window and yelled at Holbrook, demanding that he present his license and registration. The plaintiff threatened to arrest him if he did not comply with the request. Holbrook claims that he could not see her police uniform or a badge and that she did not immediately identify herself as a police officer. According to Holbrook, after the plaintiff issued the citation, he asked her for her name and badge number. The plaintiff responded quickly and he could not understand what she said. When he asked her to repeat it, she rudely responded "Do you need me to spell Hightower?"

After speaking with Holbrook and reviewing the plaintiff's and Webster's reports of the incident, Gallarelli issued a report indicating that he found it "more believable than not that the incident occurred as Mr. Holbrook described it." Accordingly, Gallarelli recommended that Holbrook's complaint be sustained and that the plaintiff be disciplined for her conduct.

On July 1, 2008, pursuant to G. L. c. 31, § 41, the plaintiff's supervisor Captain Paul Russell ("Russell") suspended the plaintiff for one day for violating Rule 102 § 4 (Judgment)

and Rule 102 § 9 (Respectful Treatment) of the Department's Rules and Procedures.<sup>3</sup> The notice of suspension indicated that the reason for the suspension was because the plaintiff was "off duty and driving [her] personal motor vehicle when [she] conducted a motor vehicle stop for a minor infraction, and then [was] disrespectful to said driver." The plaintiff filed a written request for a hearing to appeal the suspension on the same day. She served the suspension without pay on July 2, 2008. On July 3, 2008, the plaintiff's attorney waived her right to a hearing within five days.

At the September 5, 2009 hearing before the Commission, Russell, the plaintiff, Webster, Saint-Guillen and Holbrook all testified regarding the incident. During their respective testimony, both Holbrook and Saint-Guillen described the incident as Holbrook had originally described it to Gallarelli. Webster, however, changed her account of the incident and testified that she may have been present when the plaintiff approached the vehicle.

On May 15, 2009, the Commission issued a decision on the plaintiff's appeal. The Commission found that Holbrook and Saint-Guillen were credible witnesses and that the plaintiff and Webster were not. Regarding Holbrook and Saint-Guillen, the Commission noted that "[t]heir testimony was consistent with one another on key facts and both of them were careful not to overreach, answering only those questions for which they had a solid memory, regardless of whether the answer would portray the Appellant in a positive or negative light." The Commission found that the plaintiff, on the other hand, was not credible because her testimony directly contradicted Holbrook's and Saint-Guillen's credible testimony. Furthermore, even taking the plaintiff's testimony independently, the Commission found that the testimony was "less than what is expected of a witness testifying under oath before the Commission."

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<sup>3</sup> Rule 102 § 4 prohibits "any conduct or omission which is not in accordance with established and ordinary duties or procedures as to such employees or which constitutes use of unreasonable judgment in exercising of any discretion granted to an employee." Rule 102 § 9 mandates that "employees shall, on all occasions, be civil and respectful, courteous and considerate toward their supervisors, their subordinates and all other members of the Department and the general public. No employee shall use epithets or terms that tend to denigrate any person(s) due to their race, color, creed or sexual orientation except when necessary in police reports or in testimony."

Finding Webster similarly not credible, the Commission noted the discrepancies between Webster's initial report of the incident and her testimony and said "her testimony before the Commission appeared to be geared toward portraying [the plaintiff] in the best light, as opposed to providing an accurate recollection of the events."

Accordingly, the Commission found that the May 19, 2008 incident occurred as described by Holbrook and Saint-Guillen. The Commission found that the plaintiff, "while driving her personal vehicle on May 19, 2008, was annoyed that another motorist did not allow her to merge from a double lane into a single lane before him. As a result, she overreacted and exercised poor judgment by getting out of her car, confronting the motorist, treating him in a discourteous manner and, at one point, even threatening to arrest him." According to the Commission, this conduct violated Department rules and constituted "an abuse of her authority as a police officer" that justified a one day suspension as discipline for the conduct.

## **II. The Plaintiff's Personnel Records**

Upon her resignation from the Department, the plaintiff filed a Department Form 1016 Resignation Form indicating that she had "no charges pending." In accordance with Department protocol, a Department Form B-56 Absence and Termination Notice ("B-56") was drafted and circulated throughout the Department to ensure that all the information was correct on the form. When the form was routed to the Bureau of Professional Standards and Development, the Bureau Chief, Superintendent Kenneth Fong ("Fong"), noted that there was an Internal Affairs charge pending against the plaintiff. According to the Department, the "charges pending" relate to charges brought in 2005 for violations of Rules 102 § 27 (Abuse of Process/Withholding Information), 103A § 28 (Patrol Officers Assigned to Wagons) and 102 § 104 (Neglect of Duty) of the Department's Rules and Procedures. The plaintiff declined to settle the matter with a

written reprimand and resigned before any disciplinary hearing. Based on Fong's notation, Human Resources updated the B-56 and on August 18, 2008, Robin Hunt ("Hunt"), Director of Human Resources, signed a Personnel Order indicating that the plaintiff had resigned with "charges pending."

Prior to her appeal hearing, the plaintiff filed a Motion for Authority to Issue Subpoenas to several members of the Department including Hunt and Fong, which the Commission denied. Although Hunt and Fong did not testify, the Department submitted their affidavits regarding the plaintiff's personnel file. The Commission denied the plaintiff's Motion to Strike Hunt's and Fong's affidavits. The plaintiff also filed a Motion for Summary Decision, which argued that the Commission had jurisdiction to expunge the "with charges" notation in her file and that it should do so. In its May 15, 2009 Decision on the Appellant's Motion for Summary Decision, the Commission found that the issue of pending charges related to charges issued in 2005 and did not relate to the plaintiff's one day suspension connected to the Holbrook incident. The Commission also found that it did not have jurisdiction to order the Department to expunge information from an employee's personnel record.

### **DISCUSSION**

The plaintiff brought a motion for judgment on the pleadings and the defendant brought a cross-motion for judgment on the pleadings. Any party may move for judgment on the pleadings after the pleadings are closed. Mass. R. Civ. P. 12(c). A Rule 12(c) motion is actually a motion to dismiss that "argues that the complaint fails to state a claim upon which relief can be granted." Jarosz v. Palmer, 436 Mass. 526, 529 (2002) (quotations omitted). "In deciding a rule 12(c) motion, all facts pleaded by the nonmoving party must be accepted as true." Jarosz, 436 Mass. at 529-530, citing Minaya v. Mass. Credit Union Share Ins. Corp., 392 Mass. 904, 905 (1984).

Pursuant to G. L. c. 30A, § 14(7), this court may reverse, remand or modify an agency decision if the substantial rights of any party have been prejudiced because the agency's decision: (1) violated constitutional provisions; (2) was in excess of the statutory authority or jurisdiction of the agency; (3) was based upon an error of law; (4) was made upon unlawful procedure; (5) was unsupported by substantial evidence; (6) was unwarranted by facts found by the court on the record; or (7) was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

In reviewing an 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 on it." G. L. c. 30A, § 14(7); see also Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992). The court may not "make a de novo determination of the facts" or substitute its judgment for that of the agency. Vaspourakan, Ltd. v. Alcoholic Beverages Comm'n, 401 Mass. 347, 351 (1987); Southern Worcester Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 420-421 (1982). Absent a request to present additional evidence pursuant to G. L. c. 30A, § 14(6), judicial review is confined to the administrative record in this case. G. L. c. 30A § 14(5).<sup>4</sup> As the party appealing the Commission's administrative decision under G. L. c. 30A, the plaintiff bears the burden of demonstrating its invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

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<sup>4</sup> The plaintiff did not make such a request in this case. Accordingly, to the extent that the exhibits attached to the complaint contain documents not contained in the administrative record, the defendant's motion to strike the additional documents is allowed.

## I. The Suspension

To determine whether the Commission's decision to uphold the one day suspension is supported by substantial evidence, this court will consider "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, 621 (1971); see also G. L. 30A, § 1(6). In reviewing the evidence, the court must defer to the Commission's findings on the credibility of the witnesses. See Silva v. Securities Div., 61 Mass. App. Ct. 350, 358 (2004) ("In deciding whether findings have satisfied [the substantial evidence] standard, we do not decide questions of credibility or weigh conflicting evidentiary versions."); see also Cobble v. Commissioner of Dep't of Social Servs., 430 Mass. 385, 393 n.8 (1999) ("[I]t is for the agency, not the reviewing court, to weigh the credibility of witnesses and resolve factual disputes involving contradictory testimony").

The plaintiff argues that the Commission erred in failing to credit the plaintiff's testimony despite what she characterizes as a history of exemplary service to the Department. In support of her argument, the plaintiff argues that the facts of this case are analogous to the facts of New Boston Garden Corp. v. Board of Assessors, 383 Mass. 456, 469-470 (1981), where the court held that the agency wrongly rejected corroborated testimony that had not been rebutted by any other evidence. In New Boston Garden Corp., the court held that "[i]f the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be credited." Id. at 471.

The court's holding in New Boston Garden Corp. does not apply to this case. Unlike New Boston Garden Corp., in this case, the Commission did give "explicit and objectively adequate



reason[s]” for disbelieving the plaintiff’s testimony. New Boston Garden Corp., 383 Mass. at 470-471. Furthermore, the plaintiff’s testimony was directly contradicted by Holbrook’s and Saint-Guillen’s testimony, which the Commission found to be credible. The plaintiff’s testimony was also inconsistent with Webster’s original account of the incident. Moreover, to the extent that Webster’s testimony before the Commission may have corroborated the plaintiff’s testimony, the Commission discredited Webster’s testimony based on inconsistencies between her testimony and her original report of the incident. These are reasonable grounds for the Commission’s decision not to credit the plaintiff’s testimony regardless of any evidence of the plaintiff’s history of exemplary service. See id.; see also Elwell v. Commissioner of Dep’t of Transitional Assistance, 2009 WL 1577813 at \*2 (Mass. App. Ct. 2009) (New Boston Garden Corp. holding did not apply to credibility determination when the agency found that the party’s testimony was self-serving, at times inconsistent and was outweighed by other information).

Giving due deference to the Commission’s reasonable determination of credibility in this case, the court finds that there is substantial evidence to support the Commission’s decision to uphold the plaintiff’s one day suspension. See Cobble, 430 Mass. at 393 n.8; Silva, 61 Mass. App. Ct. at 358. Furthermore, because this court can find no other basis for overturning or remanding the Commission’s decision under G. L. c. 30A, § 14(7), the Commission’s decision with respect to the one day suspension is upheld.

## **II. The Plaintiff’s Personnel Records**

The court must determine whether the Commission erred as a matter of law in finding that it did not have jurisdiction to expunge the “with charges” designation from the plaintiff’s personnel record. See G. L. c. 30A, § 14(7). In considering whether the Commission’s decision was an error of law, the court recognizes that “[t]he construction of a statute is a matter of law

and although the opinion of [the administrative agency] is entitled to some weight, the courts cannot be bound by an erroneous statutory construction by an administrative body.” McDonough v. Contributory Ret. Appeal Bd., 15 Mass. App. Ct. 14, 15 (1982).

General Laws c. 149, § 52C, governs employee personnel records and provides that “[i]f an employer places in a personnel record any information which such employer knew or should have known to be false, then the employee shall have remedy through the collective bargaining agreement, other personnel procedures or judicial process to have such information expunged.” The statute specifically mentions the Commission only once, in a provision requiring that employers maintain personnel records for matters before the Commission. See G. L. c. 149, § 52C (“In any cause of action brought by an employee against such employer of twenty or more employees in any administrative or judicial proceeding, including but not limited to . . . Massachusetts Civil Service Commission . . . or a court of appropriate jurisdiction, such employer shall retain any personnel record required to be kept under this section which is relevant to such action until the final disposition thereof.”)

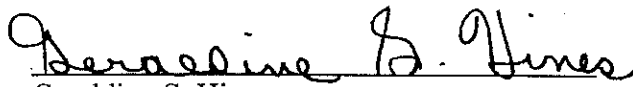
The plaintiff requests that the Commission expunge the “with charges” designation from her personnel file, citing to G. L. 149, § 52C, as the source of the Commission’s authority to do so. In the Commission’s May 19, 2008 Decision on Appellant’s Motion for Summary Decision, the Commission found that it did not have jurisdiction to expunge a personnel record under G. L. c. 149, § 52C.

After reviewing G. L. c. 149, § 52C, the court concludes that the statute does not grant the Commission the authority to expunge the “with charges” notation from the plaintiff’s personnel record. The single provision of the statute referencing the Commission mandates that employers maintain personnel records for an employee that has a cause of action pending before

the Commission. See G. L. c. 149, § 52C. This provision regulates employers and does not, as the plaintiff suggests, grant the Commission the authority to expunge information in an employee's personnel records. Moreover, no other provision of G. L. c. 149, § 52C, specifically mentions the Commission or confers on it the authority to expunge information from an employee's personnel record. In fact, the statute specifically discusses expunging information from a personnel file and does not reference the Commission. See G. L. c. 149, § 52C ("[i]f an employer places in a personnel record any information which such employer knew or should have known to be false, then the employee shall have remedy through the collective bargaining agreement, other personnel procedures or judicial process to have such information expunged.") Accordingly, the court finds that the Commission did not err as a matter of law when it concluded it did not have the authority to expunge a provision in the plaintiff's personnel records under G. L. c. 149, § 52C.

### ORDER

For the foregoing reasons, it is hereby ORDERED that the plaintiff's motion for judgment on the pleadings be DENIED and that the defendant's motion for judgment on the pleadings be ALLOWED.

  
Geraldine S. Hines  
Justice of the Superior Court

DATED: July 22, 2010

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