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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 2020-2800**

NOTICE SENT (4)
07.29.22

REC'D CIV. SERVICE COMM
AUG 1 2022 4:03:37

CITY OF SOMERVILLE

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION and another¹

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

On December 8, 2017, Defendant Theresa Hussey-Rogers, an employee of Plaintiff City of Somerville, entered her superior John DeLuca's office. During the meeting that followed, Ms. Hussey-Rogers made disparaging remarks, including expletives, about Mr. DeLuca's managerial ability and his standing among his colleagues. Because of this conduct, the City of Somerville issued Ms. Hussey-Rogers a 30-day suspension. Ms. Hussey-Rogers then appealed the decision to the Defendant Civil Service Commission. After a three-day evidentiary hearing, the Commission issued a 24-page decision on November 5, 2020 (the "Decision") which, by a 3-2 vote, instructed the City to reduce Ms. Hussey-Rogers' suspension from 30 days to 10 days. The Commission denied the City's motion for reconsideration on March 11, 2021.

This lawsuit is the City's appeal under M.G.L. c. 30A, § 14 and c. 31, § 44 of the Commission's Decision. The City and Ms. Hussey-Rogers have cross-moved for judgment on the pleadings. I heard oral argument on June 10, 2022. For the reasons set out below, I will deny

¹ Theresa Hussey-Rogers

the City's motion for judgment on the pleadings, allow Ms. Hussey-Rogers' motion, and order that judgment enter affirming the Decision of the Commission.

Background

When the Commission issued its Decision on November 5, 2020, Ms. Hussey-Rogers had been a tenured civil service employee in the Somerville Water and Sewer Department ("WSD") for more than 28 years. For the past 11 years, she had held the position of Foreman.

Due to a performance-related incident (the "Mondamin Court Incident") that took place on May 30, 2017 — which is not the subject of this lawsuit — the City's Personnel Director Candace Cooper placed Ms. Hussey-Rogers on paid administrative leave for 14 weeks, later issuing a 2-day suspension. Decision at 4. Ms. Hussey-Rogers complained about this discipline in writing to the Board of Alderman on two occasions, and on one such occasion referred to the Mondamin Court Incident as a "serious miscarriage of justice" and a "sham and a witch hunt to cover up their wrongdoings." Decision at 6.

After Ms. Hussey-Rogers returned to work, she began experiencing a lack of cooperation, along with "insubordination" and "disrespect," from the WSD crew she supervised. She twice brought this to the attention of WSD's Director, Mr. DeLuca, via email, on December 4 and 7, 2017. Decision at 7. Accordingly, on December 5 and 8, 2017, Mr. DeLuca spoke with Ms. Hussey-Rogers' crew to ameliorate the alleged difficulties.

On December 8, 2017, after speaking with the crew for the second time, Mr. DeLuca invited Ms. Hussey-Rogers to his office for a meeting. At one point during the meeting, Ms. Hussey-Rogers asked Mr. DeLuca "why he 'put her out' over the Mondamin Court Incident." Decision at 9. Mr. DeLuca explained that he could not discuss the incident but asked Ms. Hussey-Rogers what she thought of him as a boss. Ms. Hussey-Rogers then told him, as she has

admitted, that “he was a terrible boss, that nobody in the WSD liked him and she heard nobody liked him in Framingham, where he came from.” Decision at 9. The remainder of the meeting was spent on operational issues.

After the meeting, Ms. Hussey-Rogers shared the details of the encounter with Mark Lawhorne, WSD Field Operations Manager, and Matthew Gagnon, a WSD engineer, both of whom had been close by outside of Mr. DeLuca’s office. According to a statement prepared by Mr. Lawhorne and credited by the Commission, Ms. Hussey-Rogers told him that she had called Mr. DeLuca a “f****g a*****e” during the meeting, and that she also told Ms. DeLuca he was a “terrible boss,” that “everyone hated him,” and that she had heard that nobody had liked him in Framingham, either. Decision at 10. Mr. Lawhorne told the Commission that Ms. Hussey-Rogers had raised her voice during her meeting with Mr. DeLuca. The Commission found that neither he nor Mr. Gagnon were able to make out what was discussed. Decision at 10.

After an investigation was conducted and a “show cause” hearing was held, Ms. Cooper imposed a preliminary 5-day suspension on Ms. Hussey-Rogers — the maximum discipline that can be issued without a more formal hearing — pending a second hearing before the appointing authority (the Mayor). Decision at 12. On April 20, 2018, at the conclusion of the second hearing, a hearing officer designated by the Mayor found that Ms. Hussey-Rogers had “acted in an unprofessional, inappropriate, threatening, retaliatory and hostile manner toward Mr. DeLuca on December 8, 2017,” and that there was, accordingly, just cause for both the existing 5-day suspension imposed by Ms. Cooper and an additional 25-day suspension. Decision at 12. On May 21, 2018, the Mayor adopted the hearing officer’s factual findings and legal conclusions, upheld the 5-day suspension, and issued an additional 25-day suspension.

Analysis

1. The Decision

In its Decision, the Commission found that the City had shown that Ms. Hussey-Rogers had engaged in “inappropriate, unprofessional, and insubordinate behavior toward Mr. DeLuca that properly warranted remedial action.” Decision at 15. In essence, therefore, the Commission affirmed three of the five findings of the Mayor’s hearing officer: that Ms. Hussey-Rogers’ behavior had been inappropriate, unprofessional, and hostile, although the Commission substituted the word “insubordinate” for “hostile.”

However, the Commission parted ways with the City as to the Mayor’s hearing officer’s other two findings, concerning threatening and retaliatory behavior. The Commission found “the conflicting evidence presented at the Commission hearing about what actually transpired . . . too inconclusive to establish by a preponderance of the evidence the more serious charges of ‘threatening’ or ‘retaliatory’ workplace conduct.” Decision at 16.

In reaching its conclusions, the Commission found that Ms. Hussey-Rogers not only made professionally and personally disparaging remarks to Mr. DeLuca during their meeting, as admitted to by Ms. Hussey-Rogers, but also found that she had admitted to co-workers that she had called him a “f*****g a*****e.” Decision at 19. The Commission also found problematic that Ms. Hussey-Rogers relayed the details of her encounter with Mr. DeLuca to WSD employees Lawhorne and Gagnon.

Nonetheless, the Commission found that although the evidence established Ms. Hussey-Rogers’ inappropriate, unprofessional and insubordinate behavior, it could not conclude that this behavior was threatening, retaliatory, or “put Mr. DeLuca in any reasonable fear for his safety, as he and Somerville claimed.” Decision at 20. Accordingly, the Commission concluded that a

“ten-day suspension [was] sufficient remedial discipline consistent with basic merit principles for the misconduct that was proved” and ordered the 30-day suspension issued by the City to be so modified. Decision at 21.

2. The Legal Standard

a. On Appeal to the Commission

When a civil servant appeals a disciplinary action issued by an appointing authority, “[i]f the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action . . . The commission may also modify any penalty imposed by the appointing authority.” M.G.L. c. 31, § 43.

The role of the Commission is not to decide “whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority . . .” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). In other words, the Commission cannot “substitute its judgment about a valid exercise of discretion based on merit or policy considerations.” *Falmouth v. Civil Service Com'n*, 61 Mass. App. Ct. 796, 800 (2004).

The Commission may conclude that the appointing authority had no “reasonable justification” for the penalty it imposed if the facts, as determined by the Commission, do not support the “charges for which discipline had been imposed.” See *id.* However, “the commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” *Falmouth v. Civil Service Com'n*, 447 Mass. 814, 824 (2006).

b. On Further Appeal to the Superior Court

Under M.G.L. c. 30A, §14, this Court may reverse, remand, or modify an agency decision if the decision is in violation of constitutional provisions, in excess of its statutory authority, based upon an error of law, unsupported by substantial evidence, arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. It is not this Court's role to "determine the facts anew or judge credibility," which is the domain of the Commission. *Allen of Michigan, Inc. v. Deputy Director of Div. of Employment & Training*, 64 Mass. App. Ct. 370, 377 (2005), citing *Fisch v. Board of Registration in Medicine*, 437 Mass. 128, 138 (2002).

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" by statute. M.G.L. c. 30A, § 14(7). The Court also "accords due weight and deference to an agency's reasonable interpretation of a statute within its charge." *Police Comm'r of Boston v. Cecil*, 431 Mass. 410, 413 (2000), citing *Massachusetts Med. Soc'y v. Comm'r of Ins.*, 402 Mass. 44, 62 (1988).

3. Application of the Law to the Decision

The City argues two points in its brief. In its first argument heading, the City contends that "[T]he [Commission's] Decision to Modify the Suspension is WHOLLY Unsupported by Substantial Evidence and Improper" – but only because "The Commission Inexplicably Did Not Address the Mountains of Evidence Discrediting the Plaintiff Ms. Hussey-Rogers' Version of Events." Mem. in Supp. of Pl.'s Motion for J. on the Pleadings at 14th unnumbered page (emphasis in original). In its second argument heading, the City suggests that "The Downward Modification from 30-Days to 10-Days Was Unwarranted, Arbitrary and Capricious and Went

beyond the Statutory Authority of the Civil Service Commission.” *Id.* at 16th unnumbered page.

I will consider these two arguments in that order.

a. The City’s Substantial Evidence Argument Fails

The City first asserts that the Commission’s decision to modify the suspension is wholly unsupported by substantial evidence. The usual “substantial evidence” argument in a Chapter 30A appeal is that the defendant agency reached a conclusion that has too little support in the factual record before that agency. Here, however, the City’s argument departs from this usual formula, in two important ways.

First, the City is complaining not about unsupported factual findings *made* by the Commission; it is complaining that the Commission *failed to make* factual findings that it could have made on the evidence before it, namely that Ms. Hussey-Rogers acted in a threatening and retaliatory manner. Second, and more fundamentally, the City is not even asking me to find that substantial evidence was *lacking* in the record before the Commission. Instead, it is arguing exactly the opposite, contending that the record before the Commission actually did contain “mountains of evidence” of retaliatory and threatening conduct by Ms. Hussey-Rogers that the Commission “inexplicably” chose to ignore. Mem. in Supp. of Pl.’s Motion for J. on the Pleadings at 14th unnumbered page. As the City itself puts it, the City is arguing that the Commission “overlooked very significant accounts . . . [of] evidence . . . which discredit Ms. Hussey’s version of events . . .” *Id.* That is very different, of course, from complaining about a *lack* of substantial evidence before the Commission.

Based on the evidence before it, the Commission found that Ms. Hussey-Rogers made certain coarse statements to Mr. Deluca: that “he was a terrible boss, that nobody in the WSD liked him and [that Ms. Hussey-Rogers] heard nobody liked him in Framingham, where he came

from.” Decision at 9. The Commission went even further, finding that Ms. Hussey-Rogers admitted to Mr. Lawhorne that she had just called Mr. DeLuca “a f*****g a*****e” to his face. Decision at 19. The Commission then concluded that Ms. Hussey-Rogers thereby “crossed the line of what is acceptable workplace conduct for a supervisor when interacting with her Department Head and other WSD employees.” Decision at 19.

In this and other regards, the Commission was weighing evidence and making credibility determinations as it found facts. For example, the Commission explicitly stated that it disbelieved Mr. DeLuca’s testimony about the details of his dealings with Ms. Hussey-Rogers on the morning in question because “[t]he phone logs and his calendar are inconsistent with his shifting memory.” Decision at 17. See also Decision at 11 n.10 (the Commission “do[es] not credit this testimony” of Mr. DeLuca that he took notes of his encounter with Ms. Hussey-Rogers); Decision at 12 (again mentioning apparent discrepancies between Mr. DeLuca’s account of his dealings with Ms. Hussey-Rogers on the morning in question and the City’s telephone logs about those dealings). Indeed, the Commission devoted more than a page of the Decision to a bullet-point listing of “[o]ther material discrepancies in [Mr. DeLuca’s] testimony.” Decision at 18-19.

The Commission’s weighing of all the evidence caused it to conclude, bluntly, that it “cannot credit Mr. DeLuca’s uncorroborated testimony about the details of the encounter in his office.” Decision at 17. The Commission further explained its rationale as follows:

It defies common sense to believe that Ms. Hussey-Rogers showed up unannounced, not for the purpose of getting a report on the meeting with her crew and discussing the operational details of the day, but solely to rant against Mr. DeLuca. Nor does it make sense that, after she had behaved so badly that he was put in fear of physical harm, he would then ask her to sit down and tell him what she thought of him. It does also not make sense that he was truly in fear of harm when the meeting turned back into a cordial exchange and ended with discussion about routine matters, the documented follow-up

later in the day was business as usual, and he waited until late afternoon to put Ms. Cooper on notice of an alleged imminent threat.

Decision at 18-19.

In sum, the Commission was doing what it is empowered, and indeed required, to do: it was deciding whom to believe, and then weighing all of the credible evidence in the record before it, and then finding the facts. See *Allen of Michigan, Inc.*, 64 Mass. App. Ct. at 377. Therefore, there is no merit to the City's argument that the Commission's Decision was unsupported by substantial evidence.

b. The Commission Did Not Substitute its Own Judgment for That of the City

The City next contends that because the Commission's findings of fact did not differ substantially from those of the City, the Commission was not legally permitted to exercise its statutory right to "modify any penalty imposed by the appointing authority." M.G.L. c. 31, § 43. See *Falmouth v. Civil Service Com'n*, 447 Mass. 814, 824 (2006).

However, the Commission's findings of fact did differ substantially from those of the City. Most notably, while the Commission agreed with the City "that the preponderance of the evidence established that Ms. Hussey-Rogers was insubordinate and did act inappropriately and unprofessionally," in contrast to the City's findings the Commission "cannot conclude, however, that her behavior rose to the level of 'threats', and 'retaliation' or put Mr. DeLuca in any reasonable fear for his safety, as he and [the City] claimed." Decision at 20.

The City suggests that the Commission's decision not to find threatening or retaliatory conduct was a legal conclusion rather than a factual finding, and that there was no substantial difference between the Commission's and the City's subsidiary factual findings — e.g., what was said during and after the meeting. The City is incorrect. There are substantial differences between the facts found by the Commission and those found by the City, primarily resulting

from the Commission's decision not to credit the testimony of Mr. DeLuca on many key points. I have described some of the relevant evidence before the Commission, and the Commission's subsidiary factual findings based on that evidence, above. Quite simply, the City's decision to suspend Ms. Hussey-Rogers for 30 days rested heavily on its acceptance of Mr. DeLuca's description of his meeting with her, while the Commission made quite different factual findings about that meeting. The Commission's decision, taken as a whole, provided an "adequate explanation," as *Falmouth* puts it, 447 Mass. at 824, of why it found that the City had failed to prove threatening or retaliatory conduct by Ms. Hussey-Rogers.

The City further contends that because the City did not apportion a specific number of days from the 30-day suspension to the charges of threatening or retaliatory workplace conduct, the remaining charges of inappropriate, unprofessional, and insubordinate behavior, confirmed by the Commission, justify the full 30-day penalty. In support of this position, the City states that it indicated to the Commission that the 30-day suspension was for the "entirety of the conduct during the incident." Mem. in Supp. of Pl.'s Motion for J. on the Pleadings at 16th unnumbered page.

However, the law is clear. If the "charges for which discipline had been imposed" are unsupported by the subsidiary facts as determined by the Commission, the Commission can modify the penalty for lack of reasonable justification. *Falmouth*, 61 Mass. App. Ct. at 800. Therefore, the Commission acted well within its legal authority when it found that the two most serious charges had not been proven on the facts presented to the Commission and, accordingly, reduced the 30-day suspension to 10 days to reflect this.

Moreover, if the penalty, as the City says, was for the entirety of Ms. Hussey-Rogers' conduct, rather than for specific conduct, it is not clear why the City levied numerous distinct

charges instead of a single garden-variety charge, such as unprofessional conduct. The City's 30-day suspension must have been substantially premised upon the most serious charges, threatening and retaliatory conduct, which the Commission found unproven as a matter of fact. It would be unfair not to not allow the Commission to modify the penalty to comport with its narrower findings of fact.

Accordingly, the Commission's Decision was neither arbitrary nor capricious, did not exceed its statutory authority, and did not constitute substitution of its own judgment for that of the City.

Conclusion and Order

For the reasons stated above, the Commission did not overstep its statutory role, did not issue an arbitrary or capricious decision, did not substitute its judgment for that of the City, and heard and cited substantial evidence justifying its modification of the penalty imposed by the City.

Plaintiff City of Somerville's Motion for Judgment on the Pleadings is **DENIED**.
Defendant Theresa Hussey-Rogers Cross-Motion for Judgment on the Pleadings is **ALLOWED**.
The decision of Defendant Civil Service Commission is **AFFIRMED**. The clerk will **ENTER JUDGMENT** in favor of the Defendants.



Paul D. Wilson
Justice of the Superior Court

July 21, 2022