

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2011-2405

MICHAEL KELLEY,
Plaintiff

vs.

MASSACHUSETTS DEPARTMENT OF CORRECTION
and CIVIL SERVICE COMMISSION,
Defendants

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WORCESTER

**MEMORANDUM AND DECISION ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

The plaintiff Michael Kelley has brought the present civil action pursuant to M.G.L. c. 30A, § 14 and M.G.L. c. 31, § 44. This is an administrative appeal wherein the plaintiff is asking that the court reverse the holding of the Civil Service Commission wherein the Civil Service Commission upheld the termination of the plaintiff from employment as a correction officer which termination took effect on July 20, 2010. The defendants filed appropriate answers to the plaintiff's complaint and subsequent to the answers, the administrative record was also filed by the defendants. This administrative record is extensive and consists of three bound volumes.

Thereafter the plaintiff filed a motion for judgment on the pleadings and after some motion practice and procedural issues the defendant, Massachusetts Department of Correction filed a memorandum in opposition to the plaintiff's motion for judgment on the pleadings and its own

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motion for judgment on the pleadings seeking that the plaintiff's complaint be dismissed.¹ The court held a hearing on this matter on August 28, 2012.

The plaintiff, Michael Kelley, began employment as a corrections officer in 1982 and retained that position until terminated on July 20, 2010. The decision that is the subject of this administrative appeal is the decision of Administrative Magistrate Maria Imperato which decision is dated August 24, 2011 and was mailed to the Civil Service Commission on November 7, 2011. See, Administrative Record Volume I at pages 425 through 444.²

Magistrate Imperato in her report found that the Department of Correction had reasonable justification to terminate Mr. Kelley and set forth the specific legal and factual grounds for her determination and further recited that her decision was based on a hearing which went forward on July 20, 2010. At the hearing the magistrate accepted into evidence Exhibits 1 through 29 and received testimony from Mr. Kelley, Steven O'Brien, an individual identified as BS, a Correction Program Officer, Christine Dodd, Mark McCaw and James Saba. The magistrate kept the hearing open with the record closing on June 3, 2011 so that the parties could file post-hearing briefs. In addition, the administrative record filed with the court contained a copy of the transcript of that administrative law hearing which transcript is contained within volumes II and III of the administrative record.³

¹The Civil Service Commission took no position on the subject motions and filed a pleading to that effect with no written position being advanced for or against the motions.

²This citation to the Administrative Record includes the decision of the Civil Service Commission wherein the report and decision of the magistrate was accepted and the appeal of Mr. Kelley to the magistrate report was dismissed.

³The court has reviewed in its entirety Volumes I, II and III of the administrative record.

It is clear from a review of the hearing transcript that the factual issues presented to the magistrate were aggressively contested by Mr. Kelley through counsel and that this was an active and robust adversarial proceeding. The administrative hearing presented to the magistrate clear and distinct issues of fact which required her to make factual determinations in large part based on credibility determinations. These determinations were made by the magistrate at the hearing in real time as the witnesses presented their testimony. Mr. Kelley through counsel provided aggressive cross examination that contested the evidence presented by the Department of Correction in support of their positions allegedly justifying termination. The magistrate subsequent to the hearing in a detailed seventeen page decision found that "the Department of Corrections had reasonable justification to terminate the appellant for his violations of the Professional Boundaries Policy in Rules 6(b) and 8(b) of the Blue Book when he disseminated information about a coworker's medical leave and for his violations of general policy I and Rules 1, 6(a) and 8(c) of the Blue Book when he failed to promptly report telephone contact with former inmates to the superintendent, DOC, department head or Commissioner, and when he wrote a confidential report and letters to the superintendent and commissioner containing disparaging remarks about co-workers and superiors in light of his last chance warning issued in December 2008". Administrative Record Volume I, p. 428. Ultimately Magistrate Imparato found "in view of the fact that the appellant had received a final warning in December 2008, and in view of his violation of the DOC Rules enumerated above, I recommend that the Civil Service Commission affirm the action of the appointing authority". Administrative Record Volume I, page 444.

Essentially Magistrate Imparato upheld the decision of the Department of Correction in terminating Mr. Kelley as of July 20, 2010 and the Civil Service Commission, upon receiving

Magistrate Imparato's decision in November of 2011, by a vote of 3 to 1, adopted her decision and dismissed Mr. Kelley's appeal thereby upholding his termination from employment with the Department of Correction.

DISCUSSION

Pursuant to M.G.L. c. 30A, § 14(7), this court may 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 on unlawful procedure, arbitrary and capricious or unwarranted by facts found by the agency and unsupported by substantial evidence. Mr. Kelley bears the burden of demonstrating the invalidity of the department's decision. Merisme v. Board of Appeals on Motor Vehicle Liability Policies and Bonds; 27 Mass. Appeals Ct. 470, 474 (1989). In reviewing an agency decision, the court is required to "give due weight to the experience, technical competency, 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) (1997); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988). The reviewing court may not substitute its judgment for that of the agency. Southern Worcester County Regional Vocational School v. Labor Relations Commission, 386 Mass. 414, 420-421 (1982), citing Old Town Liquor Store, Inc. v. Alcoholic Beverages Control Commission, 372 Mass. 152, 154 (1977). Nor may a court reject an administrative agency's choice between two conflicting views even though the court justifiably would have made a different choice had the matter been presented de novo. Zoning Board of Appeals v. Housing Appeals Commission, 385 Mass. 651, 657 (1982). Finally, the standard of

determination of the lack of substantial evidence in support of an agency finding is demanding. The court must conclude that “the evidence points to no felt or appreciable probability of [the finding] or points to an overwhelming probability of the contrary.” M & T Charters, Inc. v. Commissioner of Rev., 404 Mass. 137, 140 (1989), quoting from New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981). The test is “whether a contrary conclusion is not merely a possible but a necessary inference from the findings.” Kennametal, Inc. v. Commissioner of Rev., 426 Mass. 39, 43 (1997), cert. denied, 523 U.S. 1059 (1998), quoting from Commissioner of Rev. v. Houghton Mifflin Co., 423 Mass. 42, 43 (1996).

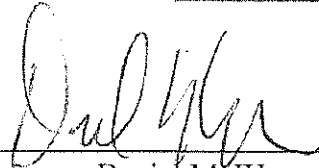
This court having reviewed the administrative record in its entirety, including the hearing transcript as well as the seventeen page decision of Magistrate Maria Imparato, finds that the hearing decision in question is not based on an error of law or unlawful procedure was not arbitrary or capricious and the facts found by the magistrate were warranted by the evidence presented and were supported by substantial evidence. The plaintiff through counsel, both at the administrative hearing and at the hearing on the motion for judgment on the pleadings, offered a passionate argument which in large part urged the magistrate and this court to make credibility determinations that were favorable to Mr. Kelley. It is clear from a review of Magistrate Imparato’s decision that she made substantially different credibility determinations than those urged by plaintiff’s counsel. Her factual findings, however, are supported by the evidence presented at the hearing and this court as the reviewing court may not displace an administrative board’s choice between two fairly conflicting views even if this court would justifiably have made a different choice had the matter been before it de novo. Southern Worcester County Regional Vocational School District v. Labor Relations

Commission, at 420. In addition, in the circumstances where contradictory testimony is presented to the administrative magistrate, the determination of the credibility of witnesses naturally belongs to the administrative hearing officer, in this case Magistrate Imparato, due to her ability to observe the demeanor of the witnesses under the pressures of direct and cross examination. See, Fisher v. Board of Registration and Medicine, 437 Mass. 128, 138 (2002); Duggan v. Board of Registration and Nursing, 456 Mass. 666, 674 (2010). As noted above, the magistrate at the administrative hearing was presented with clear factual disputes and was required to make credibility determinations after full, fair and aggressive direct and cross examination by counsel. The hearing officer made those credibility determinations based on her role as a fact finder and this court does not have authority to revisit those decisions in a de novo fashion.

CONCLUSION

Based on the above court finding and analysis the plaintiff, Michael Kelley's Motion for Judgment on the Pleadings is herewith **DENIED** and the defendant, Massachusetts Department of Corrections' Motion for Judgment on the Pleadings is **ALLOWED**.

The plaintiff's complaint for Administrative Appeal is herewith **DISMISSED**.



Daniel M. Wrenn

Justice of the Superior Court

DATED: August 30, 2012