Commonwealth of Massachusetts
County of Suffolk
The Superior Court

16

CIVIL DOCKET# SUCV2008-01794

Jovan J Lacet
vs
Civil Service Commission,
Boston Police Department (As Amended)

JUDGMENT

This action came on before the Court, Carol S. Ball, Justice, presiding, and upon consideration thereof,

It is **ORDERED and ADJUDGED:**

THE COMMISSION'S FINAL ADMINISTRATIVE DECISION IS AFFIRMED. (See Memorandum of decision dated 9/29/09 Ball,J)

Dated at Boston, Massachusetts this 29th day of September, 2009.

NOTICE SENT
10/1/09
DZL
DRM
NTT

Michael Joseph Donovan,
Clerk of the Courts

By: Judith Trokiju
Assistant Clerk

ENTERED: 09/29/09

TRUE COPY OF JUDGMENT DULY ENTERED ON 10/1/09

cvdjudgen_1.wpd 3322063 complain trockiju

JUDGMENT ENTERED ON DOCKET 10/1 20 09
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 58(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

15

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 08-1794-G

JOVAN J. LACET

vs.

CIVIL SERVICE COMMISSION & another[1]

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

INTRODUCTION

Jovan J. Lacet ("the plaintiff") brought this action against the defendants the Civil Service Commission ("Commission") and the Boston Police Department ("BPD") pursuant to G. L. c. 30A, § 14, seeking judicial review of the Commission's final decision affirming the BPD's decision to terminate the plaintiff. The plaintiff claims that (1) the basis for his dismissal violated a grant of immunity he had received and that (2) he had not been given adequate notice of the disciplinary action when it began. This case is before the court on the plaintiff's Motion for Judgment on the Pleadings, pursuant to Mass. R. Civ. P. 12(c). The Commission and the BPD oppose the plaintiff's motion and ask that this court affirm the Commission's administrative decision. For the following reasons, the plaintiff's motion is **DENIED** and the Commission's administrative decision is **AFFIRMED**.

BACKGROUND

The facts as set forth in the administrative record are as follows. The plaintiff worked at the Boston Police Department at "all relevant times." On March 1, 1999, the plaintiff testified under oath before a Suffolk County Grand Jury regarding the involvement of his brother, Besher

[1] Boston Police Department

Lacet, in the homicide of Moses Landais. The plaintiff testified before the Grand Jury that his brother was present at the scene of the murder. Besher Lacet's trial took place in November 2002 in Suffolk Superior Court. On November 18, 2002, plaintiff notified the Court that if he were to be called as a witness during his brother's trial, he would assert his Fifth Amendment rights. On November 12, 2002, the court, Donovan, J., granted the plaintiff judicial immunity pursuant to G. L. c. 233, §§ 20C-20E. On November 25, 2002, the plaintiff testified at his brother's trial. At that time the plaintiff testified that his brother was not at the scene of the murder. This testimony was materially inconsistent with his prior statements before the Suffolk County Grand Jury on March 1, 1999. The plaintiff stated that he had been coerced when he originally made the statements to the Grand Jury. Additionally, it was learned that plaintiff had earlier failed to notify law enforcement officials that he had contact with his then fugitive brother for whom an arrest warrant was outstanding.

On March 16, 2004, the plaintiff received a notice of the BPD's contemplated action setting forth eight specifications against him. On March 11, 2004, the BPD had made a formal complaint against him for violations of various Rules and Procedures of the Boston Police Department including Rule 102, § 3 (Conduct, three counts), Rule 102, § 8 (Directives and Orders), Rule 102, § 23 (Truthfulness), Rule 102, § 25 (Reporting Law Violations), Rule 102, § 35 (Conformance to Laws), Rule 113, § 5 (Public Integrity Canons 1 and 10). These specifications alleged perjury; failure to notify the BPD that he had contact with his fugitive brother; and failure to submit a report, as ordered by the BPD's Internal Affairs Division ("IAD"), regarding his failure to appear for an IAD interview. On March 25, 2004, the plaintiff submitted a Request to Withdraw charges. On April 15, 2004, the BPD rejected the plaintiff's

Request to Withdraw and revised the specifications asserted.[2] On the same day, the BPD included an additional specification. On May 12, 2004, a Departmental Disciplinary Hearing was held before a hearing officer, Superintendent William M. Casey. Only one witness was called during the hearing, Sergeant Detective William Chinetti. The plaintiff did not testify and 16 exhibits were entered into the record.

The BPD informed the plaintiff in a letter dated December 30, 2004, that the charges against the plaintiff had been sustained and the plaintiff would be terminated from the Boston Police Department effective that day. The original March 11, 2004 specifications were included as reasons for the plaintiff's termination. The plaintiff then filed an appeal with the Civil Service Commission on January 6, 2005. He admitted that he lied under oath at the Suffolk County Grand Jury proceedings but stated that he had been immunized with regard to that perjury. The BPD filed a Motion for Summary Decision to which the plaintiff submitted his opposition. On March 27, 2008, the Commission found that the plaintiff failed to demonstrate that the reasons listed for his termination were inaccurate and that the BPD had just cause to terminate the plaintiff for the act of testifying untruthfully while under oath.

DISCUSSION

I. Standard of Review

General Laws c. 30A, § 14 provides that "any person . . .aggrieved by a final decision of any agency in an adjudicatory proceeding . . . shall be entitled to a judicial review thereof." A court reviewing an administrative decision may set it aside only if the court finds that the

[2] The revision affected specifications III, IV and V by replacing "committed perjury before the Grand Jury in connection with Commonwealth v. Besher Lacet" with "committed perjury in connection with Commonwealth v. Besher Lacet."

substantial rights of a party have been prejudiced because the decision is defective under G. L. c. 30A, § 14(7). The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bds., 27 Mass.App.Ct. 470, 474 (1989). General Laws c. 30A, § 14(7), provides the following:

> "The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is (a) In violation of constitutional provisions; or (b) In excess of the statutory authority or jurisdiction of the agency; or (c) Based upon an error of law; or (d) Made upon unlawful procedure; or (e) Unsupported by substantial evidence; or (f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or (g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law."

The court's review of an agency's decision is confined to the administrative record. G. L. c. 30A, § 14(5). The reviewing court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. Hingham v. Department of Telecomm & Energy, 433 Mass. 198, 201 (2001); 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. Flemings v. Contributory Ret. Appeal Bd., 431 Mass. 374, 375 (2000). The plaintiff alleges that the Commission's decision denying the plaintiff's claim should be reversed because it was based upon an error of law. See G. L. c. 30A, § 17(7)(c).

II. Statutory Immunity

General Laws c. 233, § 20G specifies the scope of immunity that is granted during a trial.

The statute provides:

> "A witness who has been granted immunity as provided in section 20E shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction(,) matter, or thing concerning which he is so compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal or civil proceeding against him in any court of the commonwealth, except in a prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion, pursuant to section 20C or 20E."

G. L. c. 233, § 20G.

The plaintiff argues that because he was granted statutory immunity, he cannot be subjected to any penalty or forfeiture. The plaintiff asserts that his firing by the BPD was a penalty within the meaning of G. L. c. 233, § 20G and that it was used against him in a civil proceeding in a court within the commonwealth.

A. Plaintiff's dismissal was not a penalty or forfeiture within the meaning of G. L. c. 233, § 20G.

The use of immunized testimony must result in a penalty or forfeiture to be prohibited. G. L. c. 233, § 20G. Massachusetts recognizes that there is a difference between a penalty or forfeiture and a remedial measure. A penalty or forfeiture is punitive in nature and aims to punish, where a remedial measure is not focused on the offender but is instead taken in order to protect the public safety or the integrity of a public institution. Luk v. Commonwealth, 421 Mass. 415, 426-27 (1995) (revocation of a driver's licence is not a punishment; it is nonpunitive, its purpose to prevent future public harm); Kvitka v. Board of Registration In Medicine, 407 Mass. 140, 146 n.4 (1990) (revocation of a physician's license is considered to be remedial).

Essential to the policing profession is maintenance of the public trust. There is a

"public policy against requiring the reinstatement of police officers who have committed felonious misconduct" because the criminal justice system depends upon the public's trust of the police. Boston v. Boston Police Patrolmen's Ass'n, 443 Mass. 813, 823 (2005). The public must be confident that police officers will honestly uphold the law; if not, police officers will not be trusted on the street or in court. Id. Here, it is undisputed that the plaintiff committed perjury, a felony under Massachusetts law. G. L. c. 268, § 1.

A police officer can be dismissed for refusing to disclose whether he had invoked his Fifth Amendment rights while testifying before a Grand Jury. Silverio v. Municipal Court of City of Boston, 355 Mass. 623, 630 (1969). This is because "a police officer who has claimed or claims the privilege as to a matter under current investigation could be deemed unfit to work in any aspect of his job related to that or to a similar investigation." Id. A public "employee knows that if he fails to divulge information pertinent to the issue of his use or abuse of his public trust he may lose his job." Silverio. 355 Mass. at 629. Public officials must stay faithful to the performance of their offices and divulge appropriate information, and if they do not they may be discharged. Id.; see also, Attorney General v. Colleton, 387 Mass. 790, 798 (1982) (a public employee may be removed if self-incriminating statements affect the official's ability to perform acts, be fit for service or serve generally in governmental service). Here, while the plaintiff did not refuse to divulge information, he perjured himself and therefore abused the public trust.

Additionally, the court has upheld as remedial, disciplinary actions in other professions held in the public trust, such as the practice of law. In In the Matter of Joel M. Pressman, 421 Mass. 514 (1995), the court held that even though Pressman had been

granted federal immunity, the Board of Bar Overseers was not prevented from disciplining him. The court stated that, "[i]t would be a strange rule that forbad the use of a lawyer's testimony under oath to determine the lawyer's qualifications to continue as a member of the bar." Pressman, 421 Mass. at 518. An attorney owes a fiduciary duty to clients, and allowing him to continue in the practice of law would impact the integrity of the bar in the eyes of the public. Id. The use of immunized testimony in this context is not to punish the lawyer in the criminal sense, or as in this case the civil sense, "but rather to preserve the integrity of the bar." Id. Moreover, as one of his official duties, a police officer occasionally must give testimony in court. The integrity of the police department demands that the public trust that such testimony is truthful.

B. Plaintiff was not subject to a criminal or civil proceeding in any court of the commonwealth.

Immunized testimony may not be used in a "civil proceeding" against a person "in any court of the commonwealth." G. L. c. 233, § 20G. The Civil Service Commission is an administrative agency created under G. L. c. 31 to hear and decide appeals of public employees under the protection of the civil service laws. The court has stated that boards of this sort "are essentially administrative tribunals and in no sense are courts although they exercise quasi judicial functions in hearing witnesses and in determining questions of fact." Collins v. Selectmen of Brookline, 325 Mass. 562, 566 (1950). Additionally, the power to remove a public officer is executive in nature. Collins, 325 Mass. at 565. When the duties of such an officer are not connected with the courts, the removal is of an executive or administrative nature and not of a judicial nature. Collins, 325 Mass. at 566.

The Supreme Judicial Court has suggested that a disciplinary proceeding before an agency is not a civil proceeding within the purview of G. L. c. 233, § 20G. Pressman, 421 Mass. at 516-17. Specifically, the court stated that,

> "It may be (but we need not decide) that a bar disciplinary proceeding is not a 'civil proceeding' within the meaning of those words in § 20G. Moreover, because bar discipline is an administrative process under the authority of the justices of the Supreme Judicial Court, it may also be that [this form of] testimony is not being used as evidence 'in any court of the commonwealth.'"

Id. In this case, the plaintiff's dismissal by the BPD and the Commission's affirmation of that dismissal did not occur in the context of a civil proceeding in a court of the commonwealth. Therefore, the prohibition contained in G. L. c. 233, § 20G had no application here.

III. Notice

Before a civil service employee may be removed from their position, the employee must be given adequate notice. General Laws c. 31, § 41 requires that, "[the] employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action ... and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority."

Here, the plaintiff received written notice on March 16, 2004. This written notice stated that disciplinary action had commenced and attached a list of specifications which had been filed against the plaintiff. Each specification stated a rule the plaintiff was alleged to have violated, and detailed the plaintiff's conduct that constituted a violation.

The notice identified the date and time of the hearing. The notice received by the plaintiff clearly satisfied the requirements of G. L. c. 31, § 41.

ORDER

For all of these reasons, the plaintiff's Motion for Judgment on the Pleadings is **DENIED** and the Commission's final administrative decision is **AFFIRMED**.

Carol S. Ball
Associate Justice of the Superior Court

Dated: September 29, 2009