

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

16
SUPERIOR COURT

CIVIL ACTION

NO's. 2001-0752;

2001-0753;

2001-0754

JOHN LEARY & others,¹

Plaintiffs

vs.

CIVIL SERVICE COMMISSION & another,²

Defendants

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COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

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

The plaintiffs, John Leary, ("Leary") David Pender, ("Pender") and Jose Rivera ("Rivera") were disciplined by the City Manager of Lowell for misconduct in connection with a union-sponsored trip to Boston. The plaintiffs were employed as police officers for the City of Lowell at the time. Following a disciplinary hearing, the City Manager concluded that the plaintiffs violated various rules of the Lowell Police Department. As a result, the City Manager terminated Leary from his position as a police officer, suspended Pender for one year without compensation, suspended Rivera for six months without compensation, and required both Pender and Rivera to attend classes in diversity awareness, sexual harassment, or other similar courses at their own expense. The plaintiffs appealed the decision to the Civil Service Commission ("the Commission"). After thirteen

¹ Rivera v. Civil Service Commission, Middlesex Superior Court, Civil No. 01-0753 and Pender v. Civil Service Commission, Middlesex Superior Court, Civil No. 01-0754 are consolidated in this action.

² City Manager, City of Lowell

days of hearings, the Commission issued a forty-page decision in which it affirmed Leary's termination, but reduced the suspensions imposed on Rivera and Pender, respectively, to one month and six months. The plaintiffs brought the present action seeking judicial review of the Commission's decision.

BACKGROUND

The facts as found by the Commission are briefly summarized as follows.

The plaintiffs were disciplined for conduct that occurred during a union-sponsored bus trip to attend a political rally in Boston. The plaintiffs met up with other police officers at the union office in Lowell. Rivera and a fellow officer collected money from the group and purchased three cases of beer. Fifteen officers boarded the bus and departed for Boston at around 4:20 p.m. On the way to Boston, the plaintiffs and a number of other officers drank beer and engaged in what was described as "locker room talk," but none of the passengers objected or appeared offended.

The bus driver, Julie Gagnon ("Gagnon" or "the bus driver") parked in front of the Massachusetts State House, and the group disembarked to attend the rally. During the rally, Pender held the union banner with Officer Vanessa Dixon ("Dixon") and at some point, the two went to the bar for a drink. The rally ended around 7:00 p.m., and the group returned to the bus and proceeded to Anthony's Pier 4. Due to construction in the area, Gagnon had to take several detours to get to Pier 4. During this time, Leary made several rude remarks directed toward Gagnon and generally mocked her driving skills.

Once at Pier 4, the group sat down for dinner and continued to drink. There was an open bar available, and the group took advantage of it. They remained at Pier 4 for roughly four hours, during the course of which they befriended a group of people from California. At around 11:50 p.m., the

officers returned to the bus, and several individuals, including Jason Kumm ("Kumm") were invited to accompany them to J.J. Foley's, a bar located in the South End of Boston. When Gagnon drove in the wrong direction, she was berated by some of the officers on the bus. The group eventually arrived at the bar at approximately 12:15 a.m.

The group continued to consume alcohol. Dixon, the lone female in the group, started ordering shots. She became unsteady, her speech slurred, and the bartender refused to continue serving her. All three plaintiffs were intoxicated by the time they returned to the bus, although Dixon was the only one who had been "shut off" by the bartender.

When Dixon boarded the bus, she was accompanied by Kumm. She directed the bus driver to give Kumm a ride to his hotel, which was about a three minute ride from the bar. As described by Gagnon, "All hell broke loose." A loud argument broke out between Leary and Dixon. Leary strongly objected to giving Kumm a ride back to his hotel. At least one other officer on the bus was concerned that Leary might engage in a physical confrontation with Kumm. As Kumm exited the bus near his hotel, he offered Leary \$20 for the inconvenience. Leary responded, "I don't want your fucking money, I don't need your fucking money, get off the fucking bus." Leary continued to yell at Dixon even after Kumm had left, and other officers in the back of the bus joined in making obscene remarks. In essence, the lewd commentary was suggestive of Dixon's sexual intentions with Kumm. The comments were coming from an area in which Pender, Rivera, and three others were sitting. Aside from Leary, Pender was the only other officer specifically found by the commission to have made "vulgar and unwarranted" comments directed at Dixon or Gagnon. Dixon got up from her seat and asked a fellow officer, Edward McMahon ("McMahon") for help, but Leary continued yelling at her. Leary was very angry, and McMahon was concerned that he might hit Dixon.

Dixon then went to the front of the bus, demanded to be let off, and began kicking the bus door. Gagnon reluctantly stopped the bus and let Dixon out near Boston Common. Several other officers viewed this as an opportunity to exit the bus and urinate against a fence. Rivera and two others attempted to locate Dixon on foot, and the bus circled around Boston Common to find her, but they were unsuccessful.

The troubles continued on the trip back to Lowell. Leary continued to verbally abuse Gagnon, making frequent use of expletives.³ The group arrived back at the union office in Lowell at 3:30 a.m. Before leaving the bus, Leary told Gagnon he wanted a refund for the extra miles they drove in order to drop off Kumm.

Dixon reportedly accepted a ride with a strange man who, while driving, began masturbating and grabbing at her leg. When the man exited the highway and began driving down a dead-end street, Dixon screamed and jumped from the car once it slowed to about five miles-per-hour. She ran to a gas station and called her sister for a ride home. She also called Leary to voice her discontent. Leary expressed his lack of concern and hung up the phone.

The Lowell Police Department conducted an internal investigation regarding the trip. Rivera and Pender were not candid during these interviews.⁴ The City Manager found that Leary was also

³ In a written report, Gagnon described the comments as follows: "I . . . really got beaten on severely. All my flaws of characte[r], driving skills and appearance [were] brought forth, loudly and with great profanity. I was literally on the point of tears but kept my mouth shut and did not add fuel to the fire. . . . If I'm ever offered a charter involving public servants (police; fire; politicians) again I'm afraid I'll have to decline because I will have shot myself in the pedal foot first."

⁴ Some of the evasive and dishonest statements reflected in the internal investigative summary report are as follows: Rivera claimed he was unaware of any argument between Leary and Dixon, or of any vulgarities or obscenities spoken from the back of the bus. Pender described the trip as "a typical Union bus trip, people drunk and swearing, nothing unusual."

dishonest during the investigation, but the Commission neither accepted nor rejected this finding.

DISCUSSION

Any party aggrieved by a decision of the Civil Service Commission may obtain judicial review in the Superior Court. G.L. c. 31, § 44. Unless irregularities in the procedure before the commission are alleged, the court's review is confined to the administrative record. G.L. c. 30A, § 14(5); see also G.L. c. 31, § 44 (judicial review of commission's decision is governed by G.L. c. 30A, § 14). The plaintiffs, as the appealing parties, bear the burden of proving that the commission's decision is invalid. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 242 (2006).

In reviewing the commission's decision, this Court is required to "give due weight to the experience, technical competence, and specialized knowledge of the [Commission], as well as to the discretionary authority conferred upon it." G.L. c. 30A, § 14(7). The decision may be set aside only "if the court determines that the decision is unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or not in accordance with law." Doe v. Sex Offender Registry Bd., 447 Mass. 779, 787 (2006), citing G.L. c. 30A, § 14(7)(e), (g). The court cannot "substitute its judgment for the commission's on questions of fact" or "make different credibility choices." Leominster v. Stratton, 58 Mass. App. Ct. 726, 733 (2003). Rather, the court is "bound to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence." Id. at 728.

unusual." Pender denied making any negative comments about Dixon. With respect to the ride back to Lowell, Pender acknowledged that there was an argument between Dixon and Leary, but claimed he did not pay any attention to what was said and was just trying to get some sleep in the back of the bus. Leary claimed that he was never disrespectful toward the bus driver, and was unaware of any comments that were made to her that would cause concern.

A. Discipline Imposed

A tenured police officer may be suspended or discharged for “‘just cause,’ G.L. c. 31, § 41, a phrase judicially defined as ‘substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service.’” Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 411 (2000), quoting Police Comm’r of Boston v. Civil Serv. Comm’n, 39 Mass. App. Ct. 594, 599 (1996). The plaintiffs’ status as police officers should be taken into consideration when assessing the discipline imposed, even if the misconduct occurred off-duty. Police Comm’r of Boston, 39 Mass. App. Ct. at 601. Police officers are held to a high standard of conduct. They must “behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel.” Police Comm’r of Boston v. Civil Serv. Comm’n, 22 Mass. App. Ct. 364, 371 (1986). “In accepting employment by the public, they implicitly agree that they will not engage in conduct which calls into question their ability and fitness to perform their official responsibilities.” Id.

The court sees no reason to set aside the Commission’s decision. The Commission specifically found that Rivera and Pender lacked candor during their interviews with Internal Affairs. Misconduct of this nature is serious and directly related to their ability to perform their duties as police officers. Courts and juries frequently rely on the testimony of police officers as proof of crimes, which can result in significant penalties and loss of freedom to the accused. A core obligation of the police is to be truthful during all legal proceedings. Dishonesty and failure to disclose material facts during the course of an official investigation is unquestionably a sufficient basis for suspending a police officer. In addition to his dishonesty, Pender was identified as one of the individuals making obscene and abusive comments to either Dixon or Gagnon. The Commission

acted within its discretion in setting the length of Pender and Rivera's suspensions.⁵ Although there may have been past instances where other officers received more lenient sanctions for similar misconduct, the Commission is not charged with a duty to fine-tune employees' suspensions to ensure perfect uniformity. See Boston Police Dep't, 48 Mass. App. Ct. at 412 n.7.

With respect to Leary, the Commission found that he was the instigator of a heated argument on the late-night bus ride back from Boston. Although he did not get physically violent, his anger and inciteful comments led others to be concerned for the safety of Kumm and Dixon. Leary was also found to have verbally abused Gagnon, making frequent use of obscene and offensive language. Gagnon should not have been subjected to the barrage of offensive and belittling comments made by Leary. Creating hostility and disorder is wholly inconsistent with Leary's duties as an officer of the peace. See McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 475 (1995) (noting impropriety of police officer's verbally abusive conduct). The Commission did not err in determining that dismissal was an appropriate sanction under the circumstances.

Pender and Rivera ask the court to take a different view of the evidence. Specifically, they argue that the Lowell Police Department's investigatory report was fabricated and should be disregarded. It is not the proper function of this Court to retry the case, make credibility determinations, or assign particular weight to the evidence. Leominster, 58 Mass. App. Ct. at 728, 733. There was evidence that, contrary to Rivera's assertion during his interview with Internal Affairs that he did not hear any obscenities spoken from the back of the bus, Rivera heard comments made such as, "fuck her, I did, why don't you have her blow you right now, she's done us all." As

⁵ The Commission reduced the length of Pender and Rivera's suspensions based, in part, on its conclusion that some of the alleged misconduct lacked evidentiary support. The defendant City Manager has not challenged the Commission's decision to modify the discipline imposed.

for Pender, who denied making any disparaging remarks about Dixon and claimed that nothing unusual occurred during the trip, there is evidence indicating that Pender was one of the main people "attacking" Dixon. Pender also admitted to making unspecified comments directed toward the front of the bus using crude language. Furthermore, although the Commission largely discredited Dixon's testimony, her relative lack of credibility does not render her statements devoid of evidentiary value, particularly in light of the corroborating evidence of Pender's vulgar commentary. According to Dixon, the majority of the offensive comments made during the ride back from Boston came from Leary and Pender. The administrative record contains evidence to reasonably support the Commission's findings, and therefore passes the substantial evidence test. See *id.* at 733.

B. Due Process

The plaintiffs contend that the Commission's decision was unlawful and in violation of due process due to its failure to address their allegations that: (1) the City Manager had determined the plaintiffs' discipline prior to conducting the disciplinary hearing; and (2) the City Manager imposed disciplinary measures beyond those set forth in its "notice of contemplated action." The first allegation is based on Pender's testimony that he overheard the City Manager inform a city council member, prior to the hearing, what punishment the officers would receive. As a result, the plaintiffs contend that the City Manager should have recused himself and been a witness at the hearing. Regarding the second allegation, Pender and Rivera contend that the City Manager could not lawfully impose discipline beyond what was contemplated in the pre-hearing notice.

Acceptance of the plaintiffs' arguments would present the appointing authority with a legal paradox. Before the appointing authority can discharge or impose a suspension upon a tenured employee in excess of five days, it must first give the employee written notice of the action

contemplated and the reasons therefor, and afford the employee a full hearing on such reasons. G.L.

c. 31, § 41. The City Manager, as the appointing authority, was thus required to contemplate the appropriate disciplinary sanctions in order to satisfy the statutory notification requirements. He did not need to recuse himself under the circumstances. See Dwyer v. Comm'r of Ins., 375 Mass. 227, 236 (1978) (hearing officer did not err in declining to obey a subpoena to give testimony at the hearing concerning unsubstantiated allegations of bias). As for the additional disciplinary measure of taking self-improvement classes, nothing in § 41 precludes the appointing authority from subsequently adjusting the disciplinary measures upon consideration of the evidence presented at the hearing, or otherwise binds the appointing authority to the pre-hearing penalties contemplated.

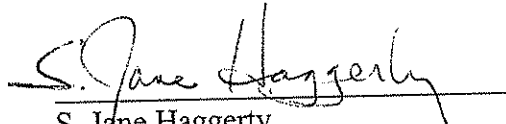
The court acknowledges the various procedural deficiencies during the course of the police department's investigation. The misconduct and failures of the investigating officers were expressly taken into consideration by the Commission when determining the appropriate modification of the discipline imposed on Pender and Rivera. The Commission's decision not to similarly reduce the penalty imposed on Leary was within its discretion. The fact that the plaintiffs were denied legal or union representation during their interviews with Internal Affairs, though unfortunate, does not mean that the Commission's decision was in violation of constitutional provisions for failure to reinstate the officers. The plaintiffs were afforded notice, a hearing, an opportunity to respond, and *de novo* review before the Commission, in full satisfaction of their due process rights. See O'Neill v. Baker, 210 F.3d 41, 47 (1st Cir. 2000) (tenured civil service employees are "entitled to the constitutional minimum of some kind of hearing and some pretermination opportunity to respond" [internal quotation marks and citation omitted]).

C. Free Speech

Pender and Leary's contention that the comments at issue were constitutionally protected expressions of opinion is without merit. Harassing speech finds no shelter under the canopy of our constitutional laws. Commonwealth v. Chou, 433 Mass. 229, 236 (2001). The purpose of such speech "is to cause injury rather than to add to, or to comment on, the public discourse." Id. Furthermore, Pender and Leary were not punished for their ideas or opinions, but rather for their rude, insulting, and obnoxious behavior. The verbally abusive comments attributed to Pender and Leary were an appropriate basis for imposing disciplinary sanctions. See, e.g., Boston Police Dep't, 48 Mass. App. Ct. at 413 (police officer's heated interaction with and rudeness toward superior officer); McIsaac, 38 Mass. App. Ct. at 475 (aggressive verbal abuse of police officer).

ORDER

For the foregoing reasons, it is hereby ORDERED that the plaintiffs' motions for judgment on the pleadings are DENIED. It is further ORDERED that judgment enter AFFIRMING the decision of the Civil Service Commission.


S. Jane Haggerty
Justice of the Superior Court

Dated: March 6, 2009

Entered: March 9, 2009