

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

16-P-269

EDWARD MCCORMACK

vs.

DEPARTMENT OF STATE POLICE & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

The plaintiff, Edward McCormack, and the defendant, the Department of State Police (department), cross-appeal from a judgment entered on the pleadings. A Superior Court judge affirmed the decision of the Civil Service Commission (commission) finding that the department had established just cause to terminate McCormack from his position as a State trooper, but that he was nonetheless entitled to forty days of back pay (representing a portion of the time that he had been suspended without pay). McCormack argues that the department lacked just cause to terminate him, and the department challenges the back pay order. We affirm.

1. Procedural history. McCormack graduated from the State Police Academy and became a State trooper in 2002. Based on

¹ Civil Service Commission.

allegations that McCormack had engaged in prescription drug abuse and "doctor shopping," the department held a duty status hearing on April 3, 2008, and subsequently suspended him without pay. On January 7, 2009, McCormack was indicted on eighteen counts of obtaining a false prescription through fraud and one count of uttering a false prescription.² During the course of the criminal proceedings, a Superior Court judge suppressed certain prescription drug records which the State police had seized without a warrant. As a result, the Commonwealth filed a nolle prosequi on seventeen counts of the indictment; after a trial before a jury, McCormack was acquitted of the remaining charges.³

Once McCormack's criminal case was disposed of, and as a result of four separate investigations into his conduct before and after his suspension, a State police trial board (board) held a hearing at which McCormack was found to have committed fifty-six violations of departmental rules. The board submitted its findings and recommendations on December 7, 2011, to Colonel Timothy Alben, who approved the findings and ordered that McCormack's employment be terminated on November 6, 2012.

² The department held another duty status hearing on January 12, 2009, after which McCormack remained suspended.

³ In an unpublished decision pursuant to our rule 1:28, McCormack v. Department of State Police, 86 Mass. App. Ct. 1113 (2014), we upheld a Superior Court judge's decision dismissing McCormack's claim for lost wages pursuant to G. L. c. 30, § 59, during the pendency of his criminal case.

McCormack appealed the board's decision to the commission pursuant to G. L. c. 31, §§ 41-45, and G. L. c. 22C, § 13; a de novo evidentiary hearing was conducted before a single commissioner.

The commissioner heard testimony over the course of three days from sixteen witnesses presented by the department and one witness presented by McCormack. For the most part, the commissioner credited the testimony of all the witnesses, but expressed reservations as to the testimony of McCormack's former girl friend, finding her testimony only "relatively reliable." The commissioner also drew a negative inference against McCormack based on his failure to testify.

The commissioner determined that the department had shown just cause to discipline McCormack based upon some, but not all, of the fifty-six rule violations found by the board. She further determined that the department had established just cause for the termination, but that it owed McCormack forty days of back pay.⁴ The commission adopted the commissioner's findings. McCormack then appealed to the Superior Court, where

⁴ The commissioner found that the board lacked just cause to impose (1) two concurrent ten-day unpaid suspensions based on allegations that McCormack took his former girl friend out of State, in violation of her probation, and (2) two concurrent thirty-day unpaid suspensions based on allegations that "McCormack fraudulently obtained thousands of controlled substances" which resulted in his addiction and in criminal proceedings against him.

a judge affirmed the commission's decision. This appeal followed.

2. Background. The department conducted four investigations into McCormack's conduct, and the commissioner found the following facts.

a. First investigation. The first investigation involved McCormack's conduct during traffic stops conducted on January 7 and January 28, 2010, when McCormack was suspended from his position.

On January 7, McCormack was pulled over for speeding by State Trooper John Kiley. McCormack showed Kiley what appeared to be a State police badge and said, "I'm one of you guys." Kiley permitted McCormack to leave without citing him, but later learned that McCormack was suspended and that the badge may have been a replica.

On January 28, McCormack was stopped three times during the early morning hours. Yarmouth police Officer Scott Lundegren conducted the first stop for a traffic violation. McCormack showed Officer Lundegren what appeared to be a State police badge. He explained that he worked from "H-1" in Boston, that he was going to "help someone out," and was "just trying to save a life," suggesting that he was responding to an emergency. McCormack was let go.

Shortly thereafter, McCormack was stopped by State Trooper Thomas Fitzpatrick, who was investigating the theft of a badge from a retired State trooper (Fitzpatrick had been contacted by Officer Lundegren after the prior stop); Fitzpatrick suspected that McCormack might possess the badge. McCormack showed Fitzpatrick what appeared to be a State police badge, and said he did not have his police identification with him.⁵ Fitzpatrick was then joined by Lundegren. McCormack denied being suspended, but told the two officers that he was on medical leave for a back injury.

The third traffic stop of the morning was conducted by Mary Gibney, another Yarmouth police officer. She stopped McCormack for failing to yield at a stop sign.⁶ McCormack told Officer Gibney that he was a State trooper, but omitted saying that he had been suspended.⁷ Gibney was soon joined by Fitzpatrick and Lundegren. The three of them concluded that McCormack's badge was a replica, and Fitzpatrick seized it.

⁵ During the second stop, McCormack called someone who identified himself as McCormack's brother, who was also a State trooper. This person told Fitzpatrick that McCormack was suspended.

⁶ Officer Gibney testified that she was unaware that McCormack was the subject of an investigation into the stolen badge until after she had stopped him.

⁷ Officer Gibney issued McCormack citations for failure to yield at a stop sign and failure to change his address with the Registry of Motor Vehicles. He appealed the citations and was found not responsible.

Based upon the testimony of these three police officers, which the commissioner credited, the commissioner found that the department had demonstrated that McCormack "acted in a manner as to bring the State [p]olice in disrepute and received a complaint regarding his conduct," failed to conform to State and Federal laws, and made untrue statements. The commissioner concluded that the department had just cause to terminate McCormack.

b. Second investigation. The second investigation involved McCormack's relationship with his former girl friend (identified as "Ms. A." in the commissioner's decision) and his conduct with various officials at the Barnstable District Court. Ms. A. used heroin; during her relationship with McCormack she had been arrested and charged with six counts of breaking and entering into a property with the intent to commit a felony.⁸ She pleaded guilty to the charges and was placed on probation. While Ms. A. was on probation and McCormack was suspended, McCormack met with her probation officer,⁹ the probation officer's supervisor, and two community corrections coordinators who were supervising Ms. A. McCormack identified himself as a State trooper in order to gain information and obtain favorable

⁸ State police rules prohibit associating with persons involved in criminal activity.

⁹ McCormack also shouted at the probation officer, "You got your wish," after she requested that he not attend his girl friend's probation meetings.

influence over Ms. A.'s probation. McCormack also allowed Ms. A. to be photographed wearing his State police badge.¹⁰ At some point Ms. A. broke up with McCormack, after which he threatened her with criminal prosecution and the loss of custody of her child.¹¹

The commissioner found that the department had just cause for disciplining McCormack based on violations of several department rules, including one that provides that "[s]uspended members shall be deprived of all . . . State [p]olice powers and privileges and must not represent themselves as members of the . . . State [p]olice." The commissioner found that this was just cause for the department to terminate McCormack.

c. Third investigation. The third investigation involved McCormack's conduct toward another motorist during a motor vehicle accident that took place while McCormack was suspended. The commissioner heard and credited testimony from Barnstable police Officers Jennifer Ellis and Justin Waskiewicz, who responded to the accident, as well as State police Detective Dana Pagley, who spoke with the other driver and with McCormack's insurance company. McCormack had identified himself

¹⁰ From the record it appears that this incident occurred before McCormack was suspended, and thus that Ms. A. was wearing his real badge, not a replica.

¹¹ Because there was contradictory evidence, the commissioner determined that the department lacked just cause to discipline McCormack for allegedly taking Ms. A. to New Hampshire, in violation of the terms of her probation.

as a State trooper to both the other motorist and the responding officers. He attempted to intimidate the other driver by using his position as a State trooper, withheld details of the accident in order to hinder or delay the investigation, and made untrue statements. The commissioner found that the department had just cause to discipline McCormack by imposing suspension without pay.

d. Fourth investigation. The fourth investigation involved McCormack's use of prescription drugs and misrepresentations about his medical condition. The department alleged that McCormack provided false information when he was applying to the State police in 2001 and 2002 regarding the seriousness of certain back injuries that he had sustained in 1998 and 1999. The department also alleged that McCormack unlawfully used and possessed controlled substances between 2007 and 2011. Ms. A. testified that she and McCormack took oxycodone together, that she sold oxycontin to McCormack, that she gave McCormack suboxone that had been prescribed to her, and that McCormack gave her money to purchase heroin and wanted her "to shoot him up," but that she did not do so because she believed that what she had purchased was "no good."

McCormack also obtained hydrocodone from his dentist without revealing that he was already on prescription pain medications. The dentist testified that, had he known that

McCormack was already on prescription pain medication, he would not have prescribed additional pain medication. However, because the majority of McCormack's pharmacy records were suppressed in the criminal case, the commissioner did not consider this information,¹² and found that the department had just cause to terminate McCormack only on the allegation of his misstating his medical condition.

3. Substantial evidence. McCormack contends that the commission's findings were not supported by substantial evidence, as required by G. L. c. 30A, § 14(7)(e). We disagree. "A court reviewing a decision made by the commission is 'bound to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence.'" Beverly v. Civil Serv. Commn., 78 Mass. App. Ct. 182, 188 (2010), quoting from Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). "Substantial evidence" is defined in G. L. c. 30A, § 1(6), as "such evidence as a reasonable mind might accept as adequate to support a conclusion." "In order to be supported by substantial evidence, an agency conclusion need not be based upon the 'clear weight' of the evidence or even a preponderance of the evidence, but rather only upon 'reasonable evidence,' . . . after taking

¹² McCormack contends that he lacked notice that he was being charged with being untruthful about his medical condition and had insufficient opportunity to prepare. Because he neither made such a claim in his complaint nor argued it to the Superior Court judge, we decline to consider this argument.

into consideration opposing evidence in the record." Lisbon v. Contributory Retirement Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996) (citations omitted). "Under the substantial evidence test, a reviewing court is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts found by the [commission]." Medi-Cab of Mass. Bay, Inc. v. Rate Setting Commn., 401 Mass. 357, 369 (1987).

The commissioner issued a comprehensive and detailed decision, with 126 factual findings and a lengthy legal analysis. "[I]t is for the agency, not the courts, to weigh the credibility of witnesses and resolve factual disputes." School Comm. of Wellesley v. Labor Relations Commn., 376 Mass. 112, 120 (1978). Contrary to McCormack's assertions, even though he was acquitted of criminal charges and found not responsible on the traffic violations, the department could still discipline him for conduct related to those matters. "Police officers must comport themselves in accordance with the laws that they are sworn to enforce and behave in a manner that brings honor and respect for rather than public distrust of law enforcement personnel. They are required to do more than refrain from indictable conduct." Police Commr. of Boston v. Civil Service Commn., 22 Mass. App. Ct. 364, 371 (1986). McCormack's more specific challenges to the evidence are also unpersuasive.

a. Harassment. McCormack argues that because the evidence demonstrates that he was "harassed and targeted" by law enforcement officials who had concocted a "plan to seize McCormack's badge," the department has failed to show that he was legitimately stopped for traffic violations on January 28, 2010. He challenges the finding that he violated traffic laws and the rules pertaining to a trooper's truthfulness. This assertion lacks merit.

"The reviewing court may not make new determinations of facts or make different credibility choices." Leominster v. Stratton, supra at 733, citing Pyramid Co. v. Architectural Barriers Bd., 403 Mass. 126, 130 (1988). Even assuming that there are "two fairly conflicting views" of the evidence, the commission is entitled to choose how to interpret the evidence before it. Labor Relations Commn. v. University Hosp., Inc., 359 Mass. 516, 521 (1971). Two local police officers and one State trooper testified as to McCormack's traffic violations and untruths, and the commissioner credited their testimony.

b. Hearsay evidence. McCormack asserts that several findings pertaining to the incident involving a motor vehicle accident are not supported by substantial evidence because the department failed to present the testimony of the other motorist. This argument is also unavailing. "In administrative proceedings, hearsay evidence can be received and may constitute

substantial evidence if it contains sufficient indicia of reliability and probative value." School Comm. of Brockton v. Massachusetts Commn. Against Discrimination, 423 Mass. 7, 15 (1996). The department presented the other motorist's statements through reliable hearsay. The police officer who spoke to the motorist immediately after the accident testified to the motorist's statement, and this testimony was consistent with other evidence.¹³ We will not overturn the commission's findings where, as here, the its reliance on the evidence was not unreasonable.¹⁴ Ibid.

4. Back pay. The department asserts that the commission exceeded its authority when it ordered the department to compensate McCormack for forty days of back pay because the commission may only authorize back pay if an individual is returned to his or her position. In support of this proposition, the department cites to G. L. c. 31, § 43, which states that "[i]f the commission by a preponderance of the evidence determines that there was just cause for an action taken against

¹³ McCormack also contends that the department's failure to subpoena the other motorist violated departmental rules which provide him the right to cross-examine adverse witnesses. See Fisher v. Lint, 69 Mass. App. Ct. 360, 368 (2007). McCormack's bare assertion is unaccompanied by citation to legal authority, and we have found none that suggest the department was compelled to subpoena the other driver.

¹⁴ To the extent that we have not addressed the defendant's other contentions, they "have not been overlooked. We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

[an aggrieved] person it shall affirm the action of the appointing authority. . . ." However, the statute continues by stating that the commission "may also modify any penalty imposed by the appointing authority." It is true that "[t]he commission is not free to modify the penalty imposed by the [department] on the basis of essentially similar fact finding without an adequate explanation." Falmouth v. Civil Serv. Commn., 447 Mass. 814, 824 (2006) (citation omitted). However, here the commission made dissimilar findings and did not find just cause for several of the fifty-six violations found by the department. Accordingly, we discern no error.

Judgment affirmed.

By the Court (Vuono, Meade & Maldonado, JJ.¹⁵),

Joseph F. Stanton

Clerk

Entered: August 14, 2017.

¹⁵ The panelists are listed in order of seniority.