N OTTag

3-19c

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 07-1089G

ROBERT McCOY,
Plaintiff

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION
and another,[1]
Defendants

notice sent 3/19/08
J.C.F.
D W B D
N.J.D.
M.E.B.
J.dH R

(mm)

MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Introduction

The plaintiff, Robert McCoy, brought this administrative appeal pursuant to G. L. c. 31, § 44 after the defendant, the Civil Service Commission ("the Commission"), upheld his discharge by the Town of Wayland ("Wayland" or "the town") from his position as a police officer. The matter is before the court pursuant to McCoy's motion for judgment on the pleadings. McCoy's motion is **denied,** the City's cross-motion for judgment on the pleadings is **allowed**, and judgment shall enter affirming the Commission's decision.

Background

The following facts are taken from the Administrative Record, including the Commission's decision.

[1] The Town of Wayland.

The Initial Incident:

McCoy has worked as a full-time Wayland Police officer since June of 2002, having previously worked as a police officer in Lincoln and as an officer for Northeastern University. Prior to the events at issue, McCoy had but one disciplinary matter; it resulted in a two-day suspension for accessing pornography on a department computer in October of 2002.

McCoy's downfall was related to the game of football, which he loved well but not wisely. The New England Patriots were scheduled to play in the Super Bowl in Jacksonville, Florida on February 6, 2005. In anticipation of the big game, the Wayland Police Chief, Robert Irving, had issued a January 28, 2005 e-mail directive to his officers that in order to minimize overtime costs, no vacation leave would be approved over Super Bowl weekend unless the requesting officer arranged for another officer to cover by means of a shift-swap. The Chief also stressed that he did not expect any abuses of sick days.

McCoy, who was scheduled to work on Friday, February 4 and Saturday, February 5, had purchased tickets to see the Patriots play in the Super Bowl. About a week before the game, McCoy spoke to Officer Bradford about swapping shifts for Super Bowl Sunday. Bradford declined, but said that he would not complain if he were "held-over," *i.e.*, required to work overtime.

On January 29, 2005, McCoy sent an e-mail requesting a vacation day for Super Bowl Sunday, and Monday, February 7th, falsely representing that Bradford had agreed to cover his shift. The request was approved.

McCoy's original itinerary had called for him to depart on Independence Airlines on the afternoon of February 5th. However, after a friend accompanying McCoy on the Super Bowl

trip purchased plane tickets for McCoy for February 4th, McCoy cancelled those plans, received a refund for that flight, and instead flew to Jacksonville on AirTran Airlines on Friday, the 4th.

That same day, McCoy called in sick for his scheduled 3:00 p.m. to 11:00 p.m. shift. On Saturday, February 5th, he again called in sick for the same shift.

McCoy Lies About the Incident at an Initial Investigative Meeting

Prompted by an anonymous complaint, Chief Irving initiated an investigation into possible sick-leave abuse by McCoy. At a February 16th meeting, Lt. Bruce Cook told McCoy that there were allegations of his calling in sick on February 4th and 5th when he was really heading to Jacksonville for the Super Bowl scheduled for Sunday, February 6th.

McCoy reacted with anger and vehement denial. He lied to Cook that he had called in sick on February 4th because he was home with stomach pains and diarrhea, and claimed that he left for Florida on Saturday, which he had taken as a vacation day, a claim he said he could document. Pressed, McCoy said he had sent an e-mail requesting vacation days for both Saturday and Sunday. Cook's check showed only a request for Sunday. The dispatcher who took McCoy's February 5th call told Cook that McCoy had asked her to "put me down as sick."

McCoy Lies About the Incident at a Second Investigative Meeting

The Chief and Lt. Cook met with McCoy on February 17th. The Chief told McCoy that he was concerned about perceived inconsistencies in McCoy's account. McCoy again became angry, stating that other officers were trying to "fuck [him] over," and that they could "fuck off."

In response to questions, McCoy reiterated that he had been home sick on Friday. He claimed to have arrived in Jacksonville on Saturday, February 5th at 12:30 p.m., though he professed not to remember the airline he had flown on. Told that a tape recording showed that he had called dispatch at 11:24 a.m. (suggesting he was not "in flight" at that time), McCoy said

he must have been mistaken about his arrival time. McCoy then conceded that he was not sick on Saturday, and attributed his calling in a sick day when he thought he had a vacation day to confusion based on having had too much to drink. Asked about his alleged shift swap agreement with Bradford, McCoy said that he had indeed made such an arrangement, but could point to no specific date when he had agreed to work for Bradford.

McCoy Lies About the Incident at a Third Investigative Meeting

On February 25th, the Chief met with McCoy and a union attorney. McCoy insisted that he had left for Jacksonville on Saturday morning, but reiterated that he did not recall the airline, explaining that a friend had made the travel arrangements, to which he had given little attention. The Chief asked McCoy to contact his friend and obtain the information so that the Chief could verify that McCoy had in fact flown to Jacksonville on Saturday. McCoy agreed to do so.

McCoy Lies About the Incident at a Fourth Investigative Meeting

On March lst, the Chief and Lt. Cook met with McCoy and a union representative. McCoy told the chief that he had flown on Independence Airlines, taking a morning flight to Washington and changing planes to proceed to Jacksonville. McCoy was unable to provide flight numbers or ticket documentation, and professed that he could remember neither the name of the hotel where he had stayed nor the name of the rental car company from whom he rented a car, again explaining that his friend had made all the arrangements. McCoy refused to provide the Chief with telephone numbers for the friends who had accompanied him, attributing his refusal to reluctance to get his friends involved. The Chief ordered McCoy to contact his friends and provide him with written documentation showing he had flown to Jacksonville on the morning of Saturday, February 5th.

The Chief concluded the meeting by warning McCoy that this was his "last chance" to be truthful, and that if he had previously said anything untruthful, that this was the time to clarify the situation. McCoy said nothing, and left the room. That same day, the Chief requested that Independence Airlines provide him with all information concerning any flights taken by McCoy on Friday, February 4th, or Saturday, February 5th.

McCoy Lies About the Incident at a Fifth Investigative Meeting

On March 2nd, the Chief and Lt. Cook met with McCoy, his union attorney Alan MacDonald, and a union representative. McCoy gave the Chief a document from "Travelocity Reservation Information" that set forth an itinerary. It purported to show that McCoy had flown on Independence Air Flight 1130, departing from Boston mid-afternoon on Saturday, February 5th, and connecting at Dulles Airport in Washington, D.C., with a flight arriving in Jacksonville, Florida at 8:33 p.m.

Upset by his review of the itinerary, the Chief asked why McCoy had claimed to have taken a Saturday morning flight when he knew all along that it had left in the afternoon. McCoy apologized, and lied that he had called in sick from his home on Saturday morning and flown to Jacksonville on Saturday afternoon. Attorney MacDonald told the Chief that McCoy had panicked when first answering questions about the sick leave abuse, but was now admitting his mistake.

Based on the written documentation and MacDonald's assurance, the Chief concluded that McCoy was finally telling the truth, that there was no need for further investigation, and all that remained was to decide upon the appropriate level of discipline for McCoy.

Upon Learning of the extent of McCoy's untruthfulness, the Chief decides to fire him

The Chief's confidence that he had uncovered the truth was soon shaken. On March 3rd, Independence Airlines notified the Chief that McCoy's Saturday, February 5th reservation had been cancelled on Friday, February 4th, that it had refunded McCoy's money, and that he was not on the Saturday flight. The Chief confronted McCoy, who refused to answer his questions, stating that he needed an attorney. The following day, the Chief received information from AirTran Airlines showing that McCoy had flown out of Boston to Jacksonville on an AirTran flight on Friday, February 4th. The Chief concluded that McCoy's conduct necessitated his termination from the force.

The Town Fires McCoy

On March 7, 2005, the Chief suspended McCoy for five days and notified him in writing of his right to a hearing before the Wayland Selectmen. He also advised McCoy that the Board of Selectman was "not barred from taking additional disciplinary action against" him. Pursuant to G. L. c. 31, § 41, a hearing officer was appointed who held an evidentiary hearing on April 7th and 15th to consider the suspension and "whether there was just cause for further discipline, up to and including termination." He found that there was. On April 25, 2005, the Selectmen met in executive session, received the hearing officer's report, heard from McCoy and from the Chief, and voted unanimously to uphold the suspension and terminate McCoy.

In their Notice of Termination, the Selectmen noted that McCoy had feigned illness and called in sick when he was not, repeatedly lied during the internal investigation, refused to answer questions during the internal investigation, and provided false written documentation during the investigation. The Selectmen stated that McCoy's conduct violated his oath as a police officer, the Collective Bargaining Agreement, three sections of the Wayland Police

Department's Policy and Procedures Manual, and nine police department rules and regulations. The Selectmen concluded that "[e]ach of the above-cited instances of misconduct, collectively and separately, together with your prior disciplinary record (which includes a two (2) day suspension in November of 2002), constitutes just cause . . . for terminating your employment."

McCoy timely appealed his discharge to the Civil Service Commission.

The Civil Service Commission Upholds McCoy's Discharge

A full hearing was held before Commissioner John J. Guerin, Jr. on June 21, 2006. Chief Irving, Lt. Cook, and McCoy all testified. The Commissioner credited the Chief's testimony, finding that "truthfulness in a police officer's character represents a core value that [t]he [Chief] expects from himself and his charges." The Commissioner also found that neither the Chief nor Lt. Cook was "aware of any member of the Department, other than . . . [McCoy], who has provided untruthful statements or misleading and deceptive documents as part of an internal investigation." When McCoy gave a final statement, he appeared "sincerely contrite in his admissions of wrongdoing." However, the Chief stated that he had heard a similar apology following other incidents of misconduct, and thus, "successfully impugned . . . [McCoy's] attempted sincerity of contrition."

McCoy conceded that the Department had just cause for disciplining him, but argued that the Town had not shown that his conduct justified termination, and that therefore, the sanction should be reduced or vacated as unduly harsh. The Commission found otherwise, and dismissed McCoy's appeal.

Discussion

1. The Standard of Review

General Laws c. 31, § 44, under which a decision of the Civil Service Commission is subject to appeal before the Superior Court, incorporates the standard of review set forth in G. L. c. 30A, § 14. Unless irregularities in the procedure before the agency are alleged, a court's review of an agency decision is confined to the administrative record. G. L. c. 30A, § 14(5). The party appealing an administrative decision pursuant to G. L. c. 30A, § 14 bears the burden of demonstrating its invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

This court may reverse or modify the agency decision only "if it determines that the substantial rights of any party may have been prejudiced" because the decision is "unsupported by substantial evidence," or is "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law." G. L. c. 30A, § 14(7). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Lycurgus v. Director of Div. of Employment Sec., 391 Mass. 623, 627-628 (1984) (citations omitted). See G. L. c. 30A, § 1(6). "When determining whether an agency decision is supported by substantial evidence, the standard of review is 'highly deferential' to the agency." Connolly v. Suffolk County Sheriff's Dep't, 62 Mass. App. Ct. 187, 193 (2004), citing Hotchkiss v. State Racing Comm'n, 45 Mass. App. Ct. 684, 695 (1998).

When reviewing an agency's decision, this 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." G. L. c. 30A, § 14(7). "If [an] agency has, in the

discretionary exercise of its expertise, made a 'choice between two fairly conflicting views,' and its selection reflects reasonable evidence, [a] court may not displace [the agency's] choice . . . even though the court would justifiably have made a different choice had the matter been before it de novo." Lisbon v. Contributory Retirement Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996) (citations omitted).

2. The Commission's Decision to Dismiss McCoy's Appeal and Uphold his Firing

Where an appointing authority—here, the Town of Wayland—dismisses a civil service appointee—here, Officer McCoy—the appointee's appeal to the Commission is governed by G. L. c. 31, §43, which provides in pertinent part that the appointing authority has the burden of proving just cause for its action. If the appointing authority meets its burden, the Commission must affirm, unless the employee proves, by a preponderance of evidence, that the appointing authority's action "was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position." G. L. c. 31, §43, second par..

The Commission accomplishes its function first, by making de novo findings of fact, and second, by "pass[ing] judgment on the penalty imposed by the appointing authority." Falmouth v. Civil Service Commission, 447 Mass. 814, 823 (2006). Here, the Commission found that McCoy had in fact feigned illness and called in sick when he was not, repeatedly lied during the internal investigation, refused to answer questions during the internal investigation, and provided false written documentation during the investigation—the very reasons the town relied upon to justify McCoy's dismissal.

In his testimony before the Commission, McCoy acknowledged that he had lied to the Chief about where he had been on the weekend of Superbowl Sunday, that he had told the Chief "a series of lies" regarding "what [he] had done and where [he] had been and what flight [he] had taken and everything involved in that particular weekend." On cross-examination, he acknowledged, among other things, that he had provided a false document to the Chief to corroborate his lies, that his conduct constituted "conduct unbecoming an officer," that he had violated a regulation prohibiting feigning illness, that he had breached his obligations to "fully cooperate with" the internal investigation and to state the facts truthfully, that he had lied "numerous times." Clearly, the Commission's findings are amply supported by the record.

Having found facts *de novo*, the Commission then had to complete the second half of its statutory duties, to "pass judgment on the penalty imposed by the appointing authority." Falmouth v. Civil Service Commission, 447 Mass. at 823. In contrast to the wide scope the Commission enjoys in its fact-finding function, in the context of considering a penalty the Commission's freedom is quite limited. Its function under G. L. c. 31, §43 is not to determine an appropriate sanction in the first instance, but to review the decision of the appointing authority to determine if "there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission." Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983). Where the appointing authority's decision represents a valid exercise of discretion, the Commission may not substitute its own judgment for the authority's. Boston Police Dept. v. Collins, 48 Mass. App. Ct. 408, 412 (2000), citing Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Where, as here, the facts found by the Commission are essentially similar to those relied upon by the appointing authority, and where the commission

does not "interpret the relevant law in a substantially different way," its discretion to modify the penalty is substantially curtailed. Falmouth v. Civil Service Commission, 447 Mass. at 823.

McCoy raises several arguments to the effect that he was treated inequitably, and punished for much less egregious conduct than that committed by other officers who received lesser sanctions. The credibility of these arguments is immediately suspect in light of McCoy's mischaracterization of his termination as being "for *one instance* of lying and providing false paperwork to his superior officer relative to sick leave." (Plaint. Mem. at 18, emphasis supplied). McCoy accumulated not one, but three instances of lying before any investigation even began: (1) to gain vacation time, he lied that another officer would swap shifts with him; (2) he called in and lied that he was sick on Friday, Feb. 4th; and (3) he did so again on Saturday, Feb. 5th. The Commission found that after the Chief began an investigation, McCoy

> repeatedly lie[d] and submitted deceptive and misleading documents . . . The discipline imposed by the Appointing Authority was subsequent to . . . [McCoy's] being given several opportunities by the Department to correct his mistakes. Rather than taking the opportunity to be truthful, he engaged in further deceitful misconduct.

(R. 257).

McCoy argues that his punishment was excessive when compared to that meted out against Wayland Police Officer David Connolly. See Connolly v. Town of Wayland, 8 MCSR 48 (1995). Connolly had a history of disciplinary actions for four prior incidents, two of which involved his consumption of alcoholic beverages while on duty. When he was again found intoxicated while on duty, the town fired him. On appeal, an administrative magistrate found that there was just cause for discipline, but recommended mitigating the punishment to suspension without pay, with Connolly to be reinstated upon condition he submit verification

that he had successfully completed an approved alcohol education program. The Commission adopted the magistrate's recommendation, with two commissioners dissenting.

McCoy raises several arguments based on the Connolly case, including that the allegedly disparate treatment between his case and Connolly's demonstrates bias by Chief Irving and the town. This argument does not appear to the court to have been raised below. Although Lt. Cook's testimony before the Commission identified Connolly as one of two Wayland officers other than McCoy who had been investigated for sick leave abuse over the last thirty-five years, see Tr. 100-101, McCoy's "Proposed Decision," submitted to the Commission on August 4, 2006, makes no mention of Connolly and requests no finding of bias. Arguments not made to the Commission are not properly before this court. Lincoln v. Personnel Administrator of the Dept. of Personnel Admn., 432 Mass. 208, 213 n.6 (2000); Gordon v. State Building Code Appeals Board, 70 Mass. App. Ct. 12, 16 (2007). Even if the argument were properly before this court, the Commission specifically found that the Chief's articulated reasons for firing McCoy were credible, and thus, effectively found that McCoy's dismissal was not the product of bias. As the town points out, "Irving and Cook testified, and the Commission found, that there was no evidence of any other Wayland police officer who lied during an internal investigation but was nonetheless treated more leniently than was" McCoy. (Def. Mem. at 11). In judging whether there is substantial evidence to support the Commission's decision, this court is not empowered to make credibility evaluations or different choices about how the evidence adds up. Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n., 386 Mass. 414, 420-421 (1982); Pyramid Co. of Hadley v. Architectural Barriers Bd., 403 Mass. 126, 130 (1988).

McCoy also argues that he was denied the benefit of "progressive discipline," unlike Connolly. However, McCoy was given at least some benefit of progressive discipline, since he was not discharged as a result of the prior disciplinary incident involving misuse of departmental computers. The Commission's decision specifically noted that "evidence substantiated . . . [McCoy's] additional misconduct [*i.e.*, his misuse of the computers] during his probationary period." (R. 258).

In any event, while progressive discipline is certainly a hallowed precept of labor law, the court is not persuaded that it is necessarily an indispensable prerequisite for dismissal, particularly where, as here, the violations are serious. Our courts have long "recognized that a 'police department has "substantial and very practical reasons" for penalizing an officer . . . [who lies about his conduct, even his off-duty conduct] . . . namely to enforce the highest norms of decorum in a department that depends on discipline under conditions of stress. " Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 801 (2004), quoting Boston Police Dept. v. Collins, 48 Mass. App. Ct. at 413. Moreover, "'a demonstrated willingness to fudge the truth in exigent circumstances' is a significant problem, because '[p]olice work frequently calls upon officers to speak the truth when doing so might put in question a stop or a search or might embarrass a fellow officer.'" Town of Falmouth, 61 Mass. App. Ct. at 801, quoting Cambridge v. Civil Service Commission., 43 Mass. App. Ct. 300, 303 (1997).[2]

The Commission's decision included no findings of political considerations, other improper bias, or inequitable treatment—indeed, the Commission found the opposite. However,

---

[2] McCoy cites Jason Higgins vs. Plymouth Police Department, 17 MCSR 113 (2004), as an example of "progressive discipline" correctly applied by the Commission in vacating the discharge of a drunken officer who injured two of his colleagues who were attempting to remove him from a bar and place him in protective custody. Interestingly, the hearing officer in Higgins was the same hearing officer who heard McCoy's case, John J. Guerin, Jr. Obviously he was conversant with the concept of progressive discipline and apparently discerned no reason why it should have mitigated McCoy's penalty.

McCoy maintains that this court may reverse the Commission because it "fail[ed] to review the decisions of the many disparate appointing authorities (as well as prior decisions of the town in question)," and that as it "never reviewed or cited cases of similarly situated individuals that had been discharged under the facts contained in the instant record." Therefore, McCoy argues that its decision is "arbitrary and capricious, an abuse of discretion, and not in accordance with the cases" of the Commission which McCoy offers in his memorandum to this court. (Plaint. Mem. at 12).

McCoy brought to the Commission's attention at least three of the cases now he relies upon—Reilly v. Department of State Police, COMMISSION D-05-382, Stots v. Boston Police Department, 14 MCSR 13 (2001), and Dovidio v. Boston Police Department, 16 MSCR 13 (2003). While reference to those cases in the Commission's decision would have been welcome, there is no requirement that the Commission, or any court, specifically discuss any case adduced by a litigant, and this court does not presume that absence of mention is evidence of absence of consideration. The town has rebutted McCoy by citing a number of cases where the Commission has upheld dismissals based on untruthfulness by a police officer. See, *e.g.*, Layne v. Town of Tewksbury, 20 MCSR 372, 375 (2007), citing Meaney v. City of Woburn, 18 MCSR 129, 133 (2005) for the proposition that "[l]ying and filing false reports are just cause for the termination of a police officer." This court is satisfied that the Commission's decision is not inconsistent with prior law, as applied to the facts of this case.

In sifting through the Commission's precedents, it is useful to bear in mind that the Commission, a body with limited discretion, is itself reviewing a discretionary act. Inherent in any exercise of discretion is the possibility that there may be a range of possible decisions, more than one of which may fall short of constituting an abuse of discretion. See Ellis v.United States,

313 F.3d 636, 653 n.10 (1st Cir. 2002) ("This variation [of result] merely serves to illustrate what every lawyer already knows: that two judges can decide discretionary matters differently without either judge abusing his or her discretion"). It is also useful to recall that the result of the Commission's review invariably is either dismissal of the case (affirmation) or modification of the penalty in the direction of lenity. The Commission is not in the business of upping penalties imposed by the Appointing Authority. Given the realities of the Commission's review, the discretion afforded the Appointing Authority and, to a lesser extent, the Commission itself, acts as a useful brake on any tendency to hammer all disciplinary decisions down to the most lenient common denominator to the detriment of public confidence and public safety.

Conclusion and Order

The "heavy burden" of "demonstrating the invalidity of the commission's ruling" was McCoy's. Massachusetts Association of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 263-264 (2001). He has failed to meet that burden. McCoy's undisputed lying and falsification of documents, considered in light of his length of service and prior record as a police officer, sufficed to support his discharge. See Coletti v. Civil Service Commission, 58 Mass. App. Ct. 1106, rev. denied, 440 Mass. 1101 (2003). Substantial evidence supports the Commission's conclusions. Accordingly, the plaintiff Robert McCoy's motion for judgment on the pleadings is **denied**, and the defendant Town of Wayland's cross-motion is **allowed**. Judgment shall enter for the Town and for the Civil Service Commission, whose decision is hereby **affirmed**.

Robert C. Cosgrove
Justice of the Superior Court

March 12, 2008