

NOTED

SUFFOLK SUPERIOR COURT

BENJAMIN MCGUINNESS AND RICHARD MULLEN  
V.  
DEPARTMENT OF CORRECTION AND CIVIL SERVICE COMMISSION

*Ruling of the Court*

Case: 06-02915 Pleading: Plaintiffs' Motion for Judgment on the Pleadings  
Date: 11/18/09

Notice sent  
11/19/09

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Plaintiffs' Motion for Judgment on the Pleadings is **denied**.

In 2005, plaintiffs were terminated by the Department of Correction (DOC) from their positions due to allegations of excessive force against an inmate. Plaintiffs appealed the DOC decision to the Civil Service Commission (CSC); a commissioner overturned their terminations. CSC appealed to the Superior Court which reversed the decision of the commissioner, sending it back to the CSC. On remand, CSC was instructed that the rehearing should not take place before the same commissioner. Hence, this matter was heard by the Division of Administrative Law Appeals (DALA), who stands in as the hearing officer on this case.<sup>1</sup>

The DALA judge found just cause for the plaintiff's termination, and recommended affirmance of the DOC's decision to terminate. Plaintiffs appealed again to the CSC. The full commission (minus one member) deliberated the matter with the result of a split 2-2 vote. I start with the effect of this vote.

Under the Civil Service statutory scheme, the CSC may hear and decide appeals of certain decisions of administrators, as here, a DOC termination by a terminated employee. G.L. c. 31A:8. The CSC may not reverse the decision of the administrator "except by an affirmative vote of at least three members of the commission." G.L. c. 31 s.2(b). In this case, where an order of this court (Troy, J.) precluded one commissioner<sup>2</sup> from participating in this decision, only four commissioners were available.

Notwithstanding that circumstance, there is no reason not to respect the literal

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<sup>1</sup> "...[H]e shall be given a hearing before a member of the commission or some disinterested person designated by the commission." G.L. c. 31 s. 43.

<sup>2</sup> Commissioner Henderson

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reading of the statute and I conclude it controls. Where only two commissioners favored reversal, the DOC's termination decision stands, as mandated by the statute. This had the effect of dismissing the appeals, and the CSC so ruled.

Without a majority vote, the CSC did not adopt the recommended decision of the DALA judge. Close examination of the text of the decision reveals that the vote is reported but the recommendation is not adopted. Rather than adopting the recommended decision, the CSC decreed that plaintiffs' appeals were dismissed and the original DOC decision of termination remained standing.<sup>3</sup> This was procedurally correct under G.L. c. 31 s. 2(b).

This interpretation is consistent with analogous circumstances where on an evenly split vote, appeal was denied. See Wells v. Zoning Board of Appeals of Billerica, 68 Mass. App. Ct. 726, 727 (2007) Consequently, the Standard Adjudicatory Rules, 801 CMR 1.01, were not violated here.<sup>4</sup> Those rules provide that a majority of the members constituting the panel "shall make direct Agency decisions." 801 CMR 1.01(11)(d). Here, with no majority, the CSR did not make a direct agency decision to reverse. By default then, the DOC decision was unaffected.

This Court concludes that the CSC split vote dismissed the plaintiffs' appeals, and that the DOC decision stands. Importantly, the CSC did *not* adopt the DALA decision. But whether the appeal was dismissed *or* the DALA recommendation adopted thus dismissing the appeal, plaintiffs are at the same place.

In the interests of equity and in the event that a higher court disagrees with the analysis above and determines that the Commission by a 2-2 vote and consequent inability to reverse necessarily adopted the DALA recommendation, I will consider whether the DALA decision is consistent with the requirements of G.L. c. 30A s. 14.

Pursuant to the Massachusetts Administrative Procedure Act, judicial review under G.L. c. 30A is limited to the administrative record. G. L. c. 30A, § 14(4), 14(5); *Cohen v. Bd. of Registration in Pharmacy*, 350 Mass. 246, 253 (1966). The party appealing an administrative decision bears the burden of demonstrating that the decision is invalid.

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<sup>3</sup> Plaintiffs misinterpret the decision of the defendant commission, arguing that the procedural defect was the adoption of the DALA decision without a majority vote. This does not accurately describe the commission's decision which was to dismiss the appeal of the DOC decision as mandated by the failure of a majority vote. This misinterpretation runs through plaintiffs' entire Memorandum.

<sup>4</sup> There is a substantial question as to whether these Rules would apply to the CSC which is explicitly deemed not to be an "agency." G.L. 30(A) s.1(2).

*Merisme v. Bd. of Appeals on Motor Vehicle Liab. Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989).

The Commission would have been obligated, not to substitute its own judgment for the DOC, but based on the *de novo* determination of facts found by the DALA judge, to determine if there was "just cause" for the actions of the department, G.L. c. 31 s. 43. The Commission is to guard against political considerations, favoritism, and bias in government employment decisions. *Town of Falmouth v. Civil Service Commission*, 61 Mass. App. Ct. 796 (2004).

It would not be open to this Court to reconsider, *de novo*, the correctness of the termination decision, or whether this Court might have reached a different judgment than DALA did in these individual cases. "The reviewing court is bound...to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence." *City of Leominster v. Stratton*, 58 Mass. App. Ct. 726 (2003). This Court will examine whether there was substantial evidence to support the DALA recommended decision.

The primary objection that the plaintiffs have to the DALA decision is that the credibility judgments are not well founded. This requires a brief factual description.

Plaintiffs Benjamin McGuinness and Richard Mullen were corrections officers at the Massachusetts Alcohol and Substance Abuse Unit (MASAC), ranked as commanding officer and a sergeant, respectively. They were alleged to use excessive force on an inmate, who had previously been violent. Mullen was alleged to use excessive force during the transfer of the inmate to the Treatment Center. During the initial scuffle, another officer named Sgt. Nedley responded to the inmate's calls for help. Nedley made troubling observations—or observations which troubled him—and he disclosed them in due course. The DALA judge found Nedley to be highly credible. She did not believe the plaintiffs' versions of the event.

The DALA judge was permitted to resolve any inconsistencies in accordance with her observation of the witness and his demeanor. The inconsistencies, if any, were apparently not troubling to her or were adequately explained by Nedley.

Such appears reasonable to this court where Nedley was second in command on the evening of this event to plaintiff McGuinness, who was shift commander. Additionally, Nedley discovered both plaintiffs in a struggle with an inmate. He was unsure of what had provoked the struggle or why the officers were within the cell with the prisoner. These factors, joined with the subsequent conversation with Mullen which Nedley interpreted as a threat, all could justify the delayed reporting.

Nedley assisted in getting the inmate to the floor. He heard thuds behind him, and heard plaintiff Mullen make a remark about getting hit in the kidneys. Nedley said he never saw Mullen or McGuinness punch the inmate. However, he heard blows to the

prisoner landing behind his own body and out of his range of vision. Because the events were heard and not seen, plaintiffs argue that such testimony is inherently unreliable and not credible. I reject that argument.

The inability to visualize events goes only to the weight of the evidence and not necessarily to its credibility. Plus, "assessing the credibility of witnesses is a preserve of the finder of fact upon which a court conducting judicial review treads with great reluctance." *Stratton*, id. at 729.

Whether the stepping on the legs of the prisoner by McGuinness was excessive use of force was a question of fact for the DALA judge. She heard that the prisoner was down on the floor and being restrained, and she believed that testimony, as she was entitled to do..

Mullen's argument that Nedley mis-read his twisting of the prisoner's wrists as excessive was rejected by the DALA judge. Nedley described the maneuver he saw, its permitted usage, its effect on the prisoner, and the commentary by Mullen while he was walking the prisoner to the van. This Court is satisfied that the DALA judge's reading of this situation was well-grounded.

The DALA judge did not credit plaintiffs' testimony. I find this have to be rational and reasonable choice; both plaintiffs had failing memories and McGuinness appear to have been argumentative and evasive. Their versions were contradicted by other facts.

In this Court's view, having fully examined the transcript of the 2007 hearing,<sup>5</sup> there was substantial evidence to support the DALA judge's factual findings as well as her recommended decision. The facts and circumstances of this case warrant the conclusion of "just cause" for the actions of the department, G.L. c. 31 s. 43. Termination from employment by the DOC in this case was not a product of political considerations, favoritism, or bias in government employment decisions, and the Civil Service Commission was fully warranted in so concluding.

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<sup>5</sup> This transcript was missing from the Administrative Record. It was provided upon request of the clerk.

### CONCLUSION

On both analyses: that the Civil Service Commission dismissed the appeal by failure of a majority vote, or that the Civil Service Commission adopted the DALA recommended decision, the termination decision of the Department of Correction stands as fully supported and warranted by the facts of this case.

Plaintiffs' Motion for Judgment on the Pleading is **DENIED**. Judgment is to enter for the Civil Service Commission and the Department of Correction.

So ordered:

  
Frances A. McIntyre  
Justice, Superior Court

dated: November 18, 2009