

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
DOCKET NO. 2179CV00318

REBECCA BOUTIN

vs.

WESTFIELD FIRE COMMISSION & another¹

CONSOLIDATED WITH

DOCKET NO. 2179CV00673

HAMPDEN COUNTY
SUPERIOR COURT
FILED

DEC 27 2022

Heather J. Jacob
CLERK OF COURTS

WESTFIELD FIRE COMMISSION

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & others²

**CORRECTED³ MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

I. Introduction

The Westfield Fire Commission (WFC)⁴ terminated the plaintiff, Rebecca Boutin, from her position as a captain in the Westfield Fire Department (WFD) based on her comments about sexual assault allegations against then-deputy chief Patrick Egloff (Egloff). The WFC also terminated two other WFD firefighters, Kyle Miltimore and David Kennedy, for similar reasons.

Boutin, Miltimore, and Kennedy appealed their terminations to the Massachusetts Civil Service Commission (CSC or Commission). After a seven-day evidentiary hearing, the CSC

¹ Massachusetts Civil Service Commission.

² Rebecca Boutin, David Kennedy, and Kyle Miltimore.

³ The court, having allowed the joint motion to correct a scrivener's error, issues this corrected decision nunc pro tunc to the date of the original decision.

⁴ The WFC is the appointing authority for the fire department meaning it has authority to hire, fire, and otherwise discipline department employees.

issued a 66-page decision overturning the three terminations and modifying Boutin's discipline to a 30-day suspension.

Boutin filed this action challenging the CSC's decision and asking that her 30-day suspension be set aside or reduced. She argues that the CSC decision is unsupported by substantial evidence, violates her First Amendment rights, and that the 30-day suspension is too severe. The WFC challenges the CSC's decision as to all three officers in a separate lawsuit, Docket No. 2179CV00673. The cases have been consolidated and are before the court on motions for judgment on the pleadings by Boutin, the WFC, and the CSC⁵.

II. Background

The following facts are taken from the administrative record, with some matters reserved for the legal analysis. The allegations of sexual assault against Egloff that are central to this lawsuit surfaced in 2016 when Egloff and members of the WFD socialized at a bar with Noble Hospital employees following the Holyoke St. Patrick's Day parade. At that time, a Noble Hospital nurse, "Ms. N," told Westfield Firefighter Niles Lavalley that Egloff had inappropriately touch her on her breast and between her legs. Shortly after that event, Westfield firefighter Chrissy Humason told Boutin that Egloff had "cupped" Ms. N after the parade. Humason also told Boutin that Egloff had touched her "on the ass" on the day of the parade.⁶

These allegations surfaced again in January 2018 when WFD firefighter Lee Kozikowski (Kozikowski) ran into Ms. N and "Ms. S" while on an ambulance run at Noble Hospital. Ms. S is also a hospital employee. In the course of discussing a comment by President Trump about "grabbing women by the pussy," Kozikowski referred to the 2016 incident where Egloff touched

⁵ The CSC did not file a separate motion but incorporated its request for judgment in its favor in its opposition to Boutin's motion.

⁶ Although Humason later denied any inappropriate touching by Egloff, substantial evidence supports the CSC's determination that Humason told Boutin about the touch on her "ass."

Ms. N on the breast and between her legs. Ms. S then revealed that Egloff "went down her pants and touched her vagina." Ms. S recounted that she pushed Egloff away but he "went up her shirt and attempted to touch her breasts." Kozikowski later shared his conversations with Ms. N and Ms. S with other members of the WFD, including his captain, Keith Supinski (Supinski), Miltimore, and Kennedy. Boutin heard about Ms. S's allegations from Kozikowski or Miltimore. Soon it was disclosed that another firefighter, Jennifer Daley, had reported Ms. S being groped by Egloff after the parade.

After hearing about the allegations involving Ms. S from Kozikowski, Kennedy spoke directly with Ms. S while on an ambulance run to Noble Hospital. Ms. S relayed essentially the same description of the incident Kennedy heard from Kozikowski. Miltimore communicated with Ms. S by text message and invited her to a planned meeting at Miltimore's house. Although Ms. S said she was unable to attend, she expressed hope that "you guys come up with a plan."

Kennedy, Miltimore, Kozikowski, and a fourth firefighter met at Miltimore's house to discuss the allegations Ms. N and Ms. S as well as their own concerns about Egloff. Sometime after the meeting, Miltimore sought advice from a friend, who was a trooper with the Massachusetts State Police. The trooper told Miltimore that he had a duty to act.

Soon thereafter, the Massachusetts State Police launched a criminal investigation. As part of that investigation, Troopers Michael McNally and Jeffrey Burke conducted separate video-taped interviews of Miltimore and Boutin. Miltimore, who was interviewed first, told the troopers what he knew about the allegations. The state police told Miltimore that they needed to gather more information before deciding whether to pursue criminal charges.

The troopers then interviewed Boutin. She also told them what she had heard about the St. Patrick's day incidents. According to Boutin, the troopers told her that Egloff faced serious

charges and would have to go to court. At the troopers' request, Boutin later called Humason, Ms. N, and Ms. S. Ms. N and Ms. S told Boutin they would speak with the troopers.

A few days after meeting with the troopers, Boutin told Supinski and Captain Charles Warren that Egloff would be arrested that Friday for rape.⁷ However, unbeknownst to Boutin, Humason, Ms. N, and Ms. S declined to cooperate in the investigation, and Egloff was not arrested. McNally closed the investigation on February 28, 2018.

Thereafter, the WFC hired an outside investigator, Dawn McDonald, to investigate, *inter alia*, whether there was merit to the allegations of Egloff's misconduct and whether such allegations (including similar allegations made in a February 22, 2018, anonymous letter sent to the Westfield Personnel Director) were aimed at derailing Egloff's promotion to the rank of fire chief. McDonald was also asked to recommend appropriate discipline for those involved in derailing Egloff's promotion if the sexual assault allegations were determined not credible. McDonald conducted approximately 90 interviews of WFD employees. In either her notes or her final report, she characterized Boutin, Miltimore and Kennedy disparagingly, including by describing one of them as a "lying sack of shit." During McDonald's interview of Egloff, Egloff admitted that he had "grabbed [Ms. N] by the vagina" and later apologized to her. McDonald concluded that Ms. S fabricated her story that Egloff had put his hand down her pants and touched her vagina. McDonald did not credit accounts of Kennedy and Kozikowski who, unlike McDonald, heard directly from Ms. S about Egloff touching her vagina.

⁷ The CSC credited the testimony of Supinski and Warren regarding what Boutin said. Boutin admitted to speaking with both Supinski and Warren, but claims that she told them that Egloff was "facing serious charges," not that he would be arrested for rape. Boutin concedes, however, that the testimony of Supinski and Warren is sufficient to support the CSC's conclusion that Boutin told Supinski and Warren that Egloff would be arrested for rape.

In June of 2018, McDonald submitted her report to the City Solicitor. McDonald recommended that Boutin, Miltimore and Kennedy be terminated, reasoning that they had engaged in a conspiracy to undermine Egloff and to have him arrested for rape.

On August 7, 2018, Boutin, Miltimore, and Kennedy were notified that the WFC was considering their terminations. On December 18, 2019, the WFC, after a hearing, voted to fire Boutin, Miltimore, and Kennedy.

The three firefighters appealed their terminations to the CSC, which conducted a seven-day evidentiary hearing between May and September of 2020. In those proceedings, Boutin testified that the troopers told her that Egloff was facing serious charges. McNally testified that he did not tell Boutin that Egloff was going to be arrested. Boutin concedes this, but testified that in her mind, facing charges and going to court were interchangeable. The CSC found that the troopers told Boutin that the allegations could result in serious charges and, if so, victims and witnesses would go to court.⁸ On May 21, 2021, the CSC issued a thorough, 66-page decision.

The CSC sharply criticized the investigation conducted by the WFC's investigator, McDonald. The CSC explained in detail how McDonald's report was biased and evinced a personal animus against Boutin, Miltimore, and Kennedy. As found by the CSC, McDonald's report was riddled with unsubstantiated beliefs and not supported by a preponderance of the evidence. The CSC's decision noted a stark difference between its findings and those of McDonald, who did not interview the troopers or hear their recorded interviews with Miltimore

⁸ Boutin complains that was no evidence before the CSC that the troopers used those exact words, as the CSC heard only Boutin's account because McNally testified that he could not recall what he said to Boutin in the February 2018 interview. Boutin has not shown that the CSC's finding is unsupported, however. The CSC did not have to credit Boutin's account and could reasonably infer that both McNally and Boutin would have understood that, at the time of McNally's interview of Boutin, the investigation had just begun and the troopers had not yet interviewed women identified in the allegations against Egloff. The CSC could have reasonably found, therefore, that McNally told Boutin that the allegations against Egloff could result in serious charges.

and Boutin. Moreover, the CSC concluded that "bias affected the overall investigation," that McDonald acknowledged that "certain officials were guiding her to a pre-determined outcome," and that the then-chief of the WFD "absolutely attempted to direct the course of the investigation from the beginning."

The CSC concluded that the evidence it found credible did not support firing Boutin, Kennedy, and Miltimore. Therefore, it overturned the three terminations. However, the CSC found that Boutin engaged in substantial misconduct by falsely reporting to two other captains that Egloff was about to be arrested. As a result, it found some discipline was warranted and imposed a 30-day suspension.

The CSC also made some pointed remarks about WFC, which it found had ignored Egloff's sexual misconduct. The CSC expressed surprise that the WFC had not disciplined Egloff but instead promoted him to the rank of chief. In these circumstances, the CSC found

"overwhelming evidence that the decision to terminate Captain Boutin was not consistent with the principle of uniformity and the need to ensure the equitable treatment of similarly situated individuals. The decision to terminate Captain Boutin, while almost simultaneously *promoting* Patrick Egloff to Fire Chief, is one of the more egregious examples of disparate treatment that I have encountered during my decade and a half tenure on the Civil Service Commission. . . . [T]here is simply no rational explanation for the Fire Commission's decision to terminate Captain Boutin, while taking no disciplinary action, and actually promoting, Patrick Egloff to Fire Chief."

The CSC mandated that WFC (a) discipline Egloff appropriately for his admitted misconduct; (b) conduct a fair, objective, independent investigation into the allegations of disputed misconduct by Egloff; (c) impose discipline for any proven misconduct by Egloff; and (d) develop and implement a program to prevent and address sexual harassment in the WFD.

III. Discussion

A. CSC's Decision to Reverse the Terminations Was Supported by Substantial Evidence and Legally Sound

Any party aggrieved by a decision of the CSC may obtain judicial review in this court. "The reviewing court is . . . therefore, bound to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence." *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003). The court may not make new factual determinations or different credibility choices. *Id.* at 733. The question on judicial review is whether, on the facts found by the CSC, the action of the CSC was legally tenable. *Id.*

An appointing authority cannot discharge an employee without just cause, which "exists where the employee has committed 'substantial misconduct which adversely affects the public interest by impairing the efficacy of the public service.'" *Brookline v. Alston*, 487 Mass. 278, 292 (2021), quoting *Doherty v. Civil Service Comm'n*, 486 Mass. 487, 493 (2020). An appointing authority's decision to discipline must be consistent with basic merit principles, which include assuring fair treatment of all employees. *Brookline*, 487 Mass. at 293.

In reviewing the WFC's termination of the three firefighters, the CSC was required to determine, by a preponderance of the evidence, whether there was just cause or reasonable justification for the termination "in the circumstances found by the commission to have existed when the appointing authority made its decision." See *Leominster*, 58 Mass. App. Ct. at 727; *Falmouth v. Civil Service Comm'n*, 61 Mass. App. Ct. 796, 800 (2004). The CSC's role has been described as reviewing the legitimacy and reasonableness of the appointing authority's action. *Beverly v. Civil Service Comm'n*, 78 Mass. App. Ct. 182, 187 (2010). The CSC makes de novo findings of fact and passes judgment on the penalty. See *Falmouth v. Civil Service Comm'n*, 447 Mass. 814, 823 (2006).

Here, the administrative record contains the requisite substantial evidence to support the CSC's decision. WFC argues, in essence, that it was entitled to rely on McDonald's report recommending the terminations because the report was the product of a "fair and unbiased investigation." The fatal flaw in that argument is that the CSC's role is to evaluate any penalty (here termination) in light of its own findings of fact made following a de novo hearing. See *id.* Moreover, contrary to the WFC's argument, the substantial evidence "need not amount to preponderance evidence." *Dotson v. Commissioner of Revenue*, 82 Mass. App. Ct. 378, 385 (2012).

Here, the record provides ample support for the CSC's findings of facts set forth in its thorough decision. In light of those facts, the CSC's determination that the town lacked a "reasonable justification" for the terminations was legally sound.

B. CSC's Modification of Boutin's Discipline from Discharge to a Suspension

Both the WFC and Boutin contest the CSC's modification of the discipline imposed by the WFC. The WFC contends that the CSC lacked authority to do so. Boutin claims that the 30-day suspension is too severe a punishment, and that consideration of Egloff's inappropriate, reprehensible conduct toward her warrants a far shorter or no suspension. For this argument, Boutin cites the reasoning in a concurring opinion of CSC Commissioner Ittleman, urging a more lenient suspension.⁹

⁹Boutin also asserts that she had a First Amendment right to tell Supinski and Warren that Egloff would be arrested for rape. This argument fails because Boutin did not raise it during the proceedings before the CSC. "The general rule is that it is too late to raise a claim before a reviewing court if the point had not been raised before the administrative agency. . . . Except for jurisdictional claims based upon constitutional challenges to an agency's enabling legislation, litigants involved in adjudicatory proceedings should raise all claims before the agency, including those which are constitutionally based." *Gurry v. Bd. of Pub. Accountancy*, 394 Mass. 118, 125-126 (1985) (citations and quotations omitted). As Boutin waived her First Amendment argument, this court declines to consider it. See *id.*

The CSC may, in some circumstances and with an adequate explanation, modify the penalty imposed by the appointing authority. See G. L. c. 31, § 43; *Police Comm'r of Boston v. Civil Service Comm'n*, 39 Mass. App. Ct. 594, 600 (1996) (vacating decision of CSC which failed to explain its modification of the penalty from discharge to 18-month suspension). Unless the CSC's findings of fact differ significantly from those reported by the appointing authority, or the CSC interprets the relevant law in a substantially different way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. *Falmouth*, 447 Mass. at 824. The CSC's power to modify penalties imposed by the appointing authority

"permits the furtherance of uniformity and the equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., 'to protect efficient public employees from partisan political control.'"

Police Comm'r of Boston, 39 Mass. App. Ct. at 600, quoting *Debnam v. Belmont*, 388 Mass. 632, 635 (1983).

"In making that analysis, the commission must focus on the fundamental purposes of the civil service system--to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control. Where there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority."

Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 304 (1997) (citations omitted). See *Boston Police Dept. v. Collins*, 48 Mass. App. Ct. 408, 412-413 (2000) (where CSC did not find that discipline was based on bias or tainted by singling out police officer for unusually harsh punishment, and nothing indicated that discipline was anything other than valid exercise of discretion based on merit or policy considerations, commission could not modify discipline).

Where, as here, the CSC's findings of fact differ substantially from those of the

appointing authority, the WFC, the CSC has broad discretion to modify the penalty. See *Faria v. Third Bristol Div. of the Dist. Ct. Dept.*, 14 Mass. App. Ct. 985, 986 (1982). As explained above, the CSC's findings were supported by substantial credible evidence. Moreover, the CSC's modification of Boutin's discipline is grounded in core reasons for the civil service system: to assure the fair treatment of all employees and guard against personnel decisions which are blatantly biased and devoid of indicia of a neutrally applied policy. See *Brookline*, 487 Mass. at 293. The CSC thoroughly and meticulously explained how the WFC's decision to terminate Boutin was tainted by "objectives unrelated to merit standards or neutrally applied public policy," and instead imposed extremely harsh treatment on Boutin. The CSC's decision advances equitable treatment and the protection of efficient public employees from partisan political control. See *Police Comm'r of Boston*, 39 Mass. App. Ct. at 600. The CSC provided an eminently rational explanation for its decision to reduce Boutin's discipline from termination to a 30-day suspension. See *Faria*, 14 Mass. App. Ct. at 986. Because the CSC's decision to modify Boutin's decision to a 30 day suspension was made on adequate reasons sufficiently supported by substantial credible evidence, this court's review is limited to the narrow question of whether it is legally tenable. See *Leominster*, 58 Mass. App. Ct. at 728. The decision easily satisfies that standard.

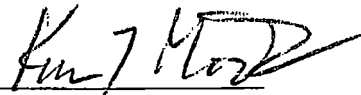
Equally unavailing is Boutin's assertion that the 30-day suspension is too severe because the CSC should have taken into account Egloff's behavior and the harassing environment in which Boutin worked. The CSC did take those facts into account and, as a result, has mandated investigative and disciplinary procedures applicable to Egloff's admitted misconduct and alleged misconduct. Boutin has not shown, however, that her misconduct was caused by Egloff's misconduct or the WFC's tolerance of it. Contrast *Brookline*, 487 Mass. at 303 (affirming CSC's

decision that town lacked just cause to discipline firefighter for misconduct--inability to work-- which town caused). In sum, the CSC's decision to reduce Boutin's discipline from termination to a 30- day suspension was supported by substantial evidence in the record. Therefore, it is precisely "the type of difficult, fact-specific determination that requires deference" to the CSC. See *id.* Consequently, the court affirms the CSC's decision. See *id.*

ORDER

For the foregoing reasons, it is hereby **ORDERED** that:

- (1) the Civil Service Commission's Motion for Judgment on the Pleadings is **ALLOWED**;
- (2) Rebecca Boutin's Motion for Judgment on the Pleadings is **DENIED**;
- (3) the Westfield Fire Commission's Motion for Judgment on the Pleadings¹⁰ is **DENIED**; and
- (4) the Civil Service Commission's decision is **AFFIRMED**.



Karen L. Goodwin
Justice of the Superior Court

Dated: December 27, 2022

¹⁰ As noted, the WFC did not file a separate motion captioned as one seeking judgment on the pleadings but requested in its opposition to Boutin's motion for judgment on the pleadings (# 19) that the court grant the WFC's motion for judgment on the pleadings.