

NOTIFY

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2019-1370-G

MASSACHUSETTS DEPARTMENT OF STATE POLICE and COLONEL KERRY A. GILPIN, in her official capacity as Colonel and Superintendent

v.

CIVIL SERVICE COMMISSION, JEFFREY K. REGER, DANIEL CRESPI, JOHN F. ADAMS, and JEFFREY J. RUSSELL

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

NOTICE SENT
06.02.20
LAW/D.J.M.
E.S.B.
D.J.M., JR.
R.F.K.
L.G.
J.P.K.
MASS.A.G.
R.L.Q., JR.
M.S.P.
M.B.H.

This case arises out of allegations that the defendants, Jeffrey K. Reger, Daniel Crespi, John F. Adams, and Jeffrey J. Russell (collectively, "Troopers"), collected overtime pay for shifts, or portions of shifts, that they did not work. Their employer, the Massachusetts Department of State Police ("Department"), suspended each defendant trooper without pay after a "Duty Status" hearing. The Troopers appealed to the Civil Service Commission ("Commission"), which determined that the Department had violated the Troopers' procedural rights to a hearing and ordered the Troopers be reinstated to their positions. The Department appealed the Commission's decision to the Superior Court. The matter is now before the court on the parties' cross-motions for judgment on the pleadings. For the reasons discussed below, the Department's Motion is ALLOWED, the Commission's Motion is DENIED, and the Troopers' Motion is DENIED.

(ms)

BACKGROUND

During 2018, the Department conducted an audit of overtime in Troop E. On August 13, 2018, the Department placed the Troopers on administrative leave with pay pending a Duty

Status hearing and informed each trooper that he was officially the subject of an internal investigation. On August 15, 2018, the Department held Duty Status hearings for each trooper. After the hearings, each trooper was suspended without pay. Each trooper appealed their suspension to the Colonel pursuant to G. L. c. 22C, § 43.¹

In addition to appealing to the Colonel, each trooper appealed to the Commission. The Department moved to dismiss, asserting that the Commission lacks jurisdiction over appeals of Duty Status Board decisions. The Commission denied the motions to dismiss.

On November 29, 2018, the Commission held an evidentiary hearing. Because of its position that the Commission lacked jurisdiction, the Department did not introduce any evidence at the hearing. Stating that the burden of proof at the hearing was on the Department, the Troopers also did not introduce any evidence.

On March 28, 2019, the Commission decided that it had jurisdiction and that the Troopers were entitled to relief. The Commission concluded that the Department had violated the Troopers' due process rights to a hearing and ordered the Troopers be reinstated to their positions.

The Department then filed this action seeking judicial review of the Commission's decision under G. L. c. 30A, § 14 and G. L. c. 31, § 44. The Department argues that the Commission lacks jurisdiction over appeals of Duty Status Board decisions.

DISCUSSION

General Laws c. 22C, § 2 creates the department of state police subject to the supervision and control of the Colonel. The Colonel is charged with the administration and organization of

¹ The parties dispute the reasons why the Colonel has not yet heard and/or decided the Troopers' appeals.

the Department, with the authority to "organize such divisions, bureaus, sections, and units as he deems necessary." G. L. c. 22C, § 3. The Colonel's appointment of officers to the Department is by enlistment and "such appointees shall be exempt from the requirements of chapter thirty-one." G. L. c. 22C, § 10. The Colonel directs all investigations and makes the necessary rules and regulations for the Department. G. L. c. 22C, § 3.

Any person affected by an order of the Department can appeal to the Colonel "who shall thereupon grant a hearing, and after such hearing the colonel may amend, suspend or revoke such order." G. L. c. 22C, § 43. Further,

[a]ny person aggrieved by an order approved by the colonel may appeal to the superior court; provided, that such appeal is taken within fifteen days from the date when such order is approved or made. The superior court shall have jurisdiction in equity upon such appeal to annul such order if found to exceed the authority of the department or upon petition of the colonel to enforce all valid orders issued by the department. Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy.

G. L. c. 22C, § 43.

Pursuant to the Colonel's authority under G. L. c. 22C, § 3, the Department has promulgated Rules and Regulations to which its members are expected to adhere. At issue in this case is Article 6, titled "Regulations Establishing Disciplinary Procedures and Temporary Relief from Duty." Article 6 sets forth two different hearings processes:

First, Section 6.2 provides for "Duty Status" hearings, which occur when (1) a member: (a) is the subject of a criminal investigation, is arrested or indicted or, if a criminal complaint or warrant is issued against the member; (b) is the subject of an internal investigation; (c) engages in a strike or prohibited job action; (d) has failed to attend and successfully complete compulsory training; or (e) is the subject of a court order directing the member to refrain from abusing, threatening to abuse, or endangering the health, safety or welfare of a family or household

member; or (2) exceptional circumstances exist. See Section 6.2.1. A Duty Status hearing is conducted by a Board consisting of three staff and/or commissioned officers appointed by the Colonel. See Section 6.2.2. After the hearing, the Duty Status Board makes findings and recommends to the Colonel what should happen with the member's duty status, that is, whether the member should be continued on full duty, placed on restricted duty, suspended with pay, or suspended without pay. See Section 6.2.4. All Duty Status recommendations are subject to the Colonel's approval. See Section 6.2.5.

Article 6 also provides for "Trial Board" hearings. See Section 6.7. The convening of a Trial Board happens after a commanding officer recommends to the Division of Standards and Training that disciplinary action be brought against an officer for violation of the law and/or the State Police Rules, Regulations, Policies, Procedures, Orders, and Directives. See Section 6.4. The Division of Standards and Training then recommends whether "charges be preferred" against the officer. See Section 6.4.1. If the Colonel approves the charges, the Colonel recommends corrective or disciplinary action. See Section 6.4.3. The accused officer is then given notice of the charges and an opportunity to be heard. See Sections 6.4.3, 6.4.6, and 6.5.1 ("A member who has served for one year or more and has been formally charged in accordance with Departmental Rules and Regulations shall be tried by a State Police Trial Board appointed by the Colonel/Superintendent. Alternatively, the member may request that s/he be tried by a Board consisting of the Colonel."); see also G. L. c. 22C, § 13 ("Any uniformed member of the state police who has served for 1 year or more and against whom charges have been preferred shall be tried by a board to be appointed by the colonel or, at the request of the officer, may be tried by a board consisting of the colonel.")²

² The accused officer can also waive his/her right to a hearing. See Section 6.4.5.

A Trial Board consists of three staff and/or commissioned officers appointed by the Colonel. See Section 6.7.2. At the hearing, the accused officer has the right to counsel, and to present evidence, call witnesses, and cross-examine witnesses. See Section 6.7.6. The Trial Board makes findings of fact, enters “guilty” or “not guilty” for each charge, and recommends disciplinary action. See Section 6.7.8 and 6.9.1.³ All disciplinary recommendations are subject to the Colonel’s approval. See Section 6.9.5. The accused officer has the right to appeal the Trial Board’s decision to the Commission. See G. L. c. 22C, § 13 (“Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45, inclusive of chapter 31.”); see also Section 6.7.1 (Trial Board hearing is “a formal administrative proceeding”); *Fisher v. Lint*, 69 Mass. App. Ct. 360, 367 (2007), quoting *Burns v. Commonwealth*, 430 Mass. 444, 448 n.6 (1999) (trial board hearing “appears analogous to a military court martial board”).

In its decision, the Commission determined that: (1) the Troopers were deprived of their right to a hearing before they were suspended without pay, “as intended by the provisions of G. L. c. 22C, § 13, G. L. c. 31, § 41 through 45, Department Rules 6.4 through 6.9, and, to the extent applicable, the provisions of the collective bargaining agreement governing their employment with the Department”; and (2) the Troopers may contest their suspensions to the Commission which has jurisdiction to rectify procedural irregularities pursuant to G. L. c. 31, § 42 as well as require the Department provide just cause for their suspensions pursuant to G. L. c. 31, § 43. Administrative Record, pages 391-392.

³ The Trial Board can recommend discharge, suspension, loss of accrued vacation, personal, or holiday time, reprimands, and other discipline as it deems appropriate, including but not limited to alternative duty, transfer, limiting paid details or overtime, and reduction in title or rank. See Sections 6.9.2 and 6.9.3.

Deference is due when an agency interprets a statute it is charged with administering. *Commerce Ins. Co. v. Commissioner of Ins.*, 447 Mass. 478, 481 (2006); see *Alliance to Protect Nantucket Sound, Inc. v. Energy Facilities Siting Bd.*, 448 Mass. 45, 50 n.6 (2006) (court owes substantial deference to agency's interpretation of statute it is charged to enforce, which includes approving interpretation of statutory language that may be read in two ways). Here, it is the Department, not the Commission, that is charged with administering G. L. c. 22C, a statute governing the Department. Accordingly, the Commission's interpretation of G. L. c. 22C, while relevant, is not one to which the court pays special deference. *Springfield v. Civil Service Comm'n*, 469 Mass. 370, 380 (2014). Furthermore, ultimately, "the duty of statutory interpretation rests in the courts." *Commerce Ins. Co.*, 447 Mass. at 481. A court's primary duty in interpreting a statute is "to effectuate the intent of the Legislature in enacting it." *Water Dep't of Fairhaven v. Department of Env'tl. Protection*, 455 Mass. 740, 744 (2010). "Ordinarily, if the language of a statute is plain and unambiguous it is conclusive as to legislative intent." *Sterilite Corp. v. Continental Cas. Co.*, 397 Mass. 837, 839 (1986). Where "the language of the statute is clear, it is the function of the judiciary to apply it, not amend it." *Commissioner of Rev. v. Cargill, Inc.*, 429 Mass. 79, 82 (1999).

General Laws c. 22C, § 10 is unambiguous. It specifically exempts Department appointees from the requirements of the civil service laws contained in G. L. c. 31. Thus, members of the Department are not "civil service employees," to which G. L. c. 31, §§ 41-45 apply. See G. L. c. 22C, § 1 (defining "uniformed member" as "member of the state police who has been appointed under the provisions of section ten"); see also G. L. c. 31, § 1 (defining "civil service employee" as "person holding a civil service appointment," "civil service appointment" as "an original appointment or a promotional appointment made pursuant to the provisions of the

civil service law and rules,” and “civil service position” as “an office or position, appointment to which is subject to the requirements of the civil service law and rules”).

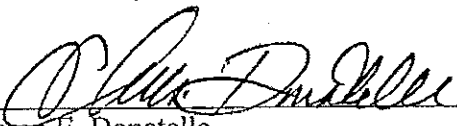
The Legislature has specifically authorized Commission review of decisions of Trial Boards, but not decisions of Duty Status Boards. See G. L. c. 22C, § 13.⁴ Duty Status Boards and Trial Boards are separate proceedings as set forth in the Regulation and the Department’s determination to treat them as such is entitled to deference. See *Carey v. Commissioner of Corr.*, 479 Mass. 367, 369 (2018) (quotations and citations omitted) (unless agency’s interpretation of its own regulation is “arbitrary, unreasonable, or inconsistent with the plain terms of the rule,” such interpretation is entitled to deference). As the statute itself provides for Commission review only of Trial Board decisions, the Commission’s determination that “[t]he Legislature clearly intended for uniformed members of the State Police to be entitled to access the Commission for all adverse employment actions that fall within the scope of G. L. c. 31, § 41,” is contrary to the

⁴ Before 2002, G. L. c. 22C, § 13 allowed for review by the District Court. See G. L. c. 22C, § 13 (1992 ed.) (“Any person aggrieved by the finding of [the] trial board may within sixty days after being notified thereof, bring a petition in the district court within the judicial district of which he resides, or in the municipal court of the city of Boston ... asking that the action of the department trial board be reviewed by the court ...”). In 2002, the Legislature amended the law to allow for review by the Commission instead of the District Court. See *Lint*, 69 Mass. App. Ct. at 369 n.13 (“Effective May 13, 2002, G. L. c. 22C, § 13, was amended by St. 2002, c. 43, to provide that any person aggrieved by the finding of a trial board may appeal pursuant to G. L. c. 31, §§ 41 to 45, rather than by means of a petition filed in the District Court.”). The Commission argues that this change indicates that the Legislature “clearly intended for uniformed members of the State Police to be entitled to access the Commission for all adverse employment actions that fall within the scope of G. L. c. 31, § 41, and that includes removal from the payroll, i.e., suspensions without pay.” Administrative Record, page 387. The court disagrees. The Legislature changed which entity reviewed Trial Board hearings; it did not make any change affecting Duty Status hearing review. Cf. *General Elec. Co. v. Department of Envtl. Protection*, 429 Mass. 798, 803 (1999) (court does not read into statute language which Legislature did not see fit to put there, whether omission came from inadvertence or of set purpose).

plain language of G. L. c. 22C, § 13. The Commission does not have jurisdiction to hear appeals of Duty Status Board decisions.⁵

ORDER

For the foregoing reasons, it is hereby **ORDERED** that Department of State Police's Motion for Judgment on the Pleadings is **ALLOWED**, the Civil Service Commission's Motion for Judgment on the Pleadings is **DENIED**, and the Troopers' Motion for Judgment on the Pleadings is **DENIED**. The Commission's decision is **VACATED**.


Sharon E. Donatelle
Associate Justice of the Superior Court

DATED: May 28, 2020

⁵ The court acknowledges the due process arguments made by the Commission and the Troopers. More specifically, the Commission argues that because the Troopers have a constitutionally protected property interest in remaining on the Department payroll unless separated or suspended for just cause, they were entitled to due process which they failed to receive. This appeal, however, is about the Commission's jurisdiction; even if the Troopers were not provided with adequate process, that does not, by itself, give the Commission jurisdiction. Any due process issues can be addressed upon Superior Court review of the Colonel's decision pursuant to G. L. c. 22C, § 43. See e.g., Memorandum of Decision and Order on Plaintiff's Motion for Judgment on the Pleadings in *Cutone v. Massachusetts Dep't of State Police*, Hampden Superior Court Civil Action No. 2016-570.(McDonough, J.) (Sept. 11, 2017), attached to the Commission's Memorandum as Exhibit 5.