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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 13-01602

TOWN OF MAYNARD

vs.

THE MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹

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

INTRODUCTION

The Plaintiff, Town of Maynard ("Town"), filed this action seeking judicial review of a decision of the Massachusetts Civil Service Commission (the "Commission") modifying discipline imposed by the Town on defendant Tony Rego ("Rego"), a police officer employed by the Town. The Town argues that the Commission exceeded its statutory authority when it reduced the penalty from termination of employment to a lengthy suspension. The Town and Rego have filed motions for judgment on the pleadings pursuant to G. L. c. 30A, §14.² For the reasons set forth below, the Town's motion for judgment on the pleadings is ALLOWED and Rego's motion is DENIED.

ADMINISTRATIVE RECORD

The Maynard Police Department ("the Department") hired Rego as a patrolman on November 2, 2005. Because the Town did not have full-time dispatchers, all patrol officers were required to work up to two hours on "dispatch duty" during their shifts. Exterior security cameras, including two point, tilt and zoom (PTZ) cameras, were located in the front and back of the police station. Images from those cameras were transmitted to monitors in the dispatch area, the technical office, the Lieutenant's office and the office of James Corcoran, the Town's Chief of Police ("Corcoran" or the "Chief"). So-called joysticks in each of these locations controlled the movement of the cameras. The positioning of the cameras could be observed in real time on the monitors in each of the four locations.

¹Tony Rego

² The Town's motion to strike materials attached as "Exhibit 'A'" to Rego's Motion for Judgment on the Pleadings is allowed for the reasons stated in the motion.

In August 2010, while Rego was working in dispatch, he observed one of the PTZ cameras moving on a video monitor in the dispatch area. The joystick located in the dispatch area was not controlling the movements observed by Rego, leading him to conclude that the camera was being controlled from a different location. Rego stated that he observed the camera zoom in on a female's buttocks and concluded that Corcoran was manipulating the camera via the joystick in his office.

In November 2010, Rego stated that, while on duty in the dispatch area, he observed a PTZ camera zoom in on the breasts of a civilian employee. Rego again concluded that Corcoran was controlling the camera. Rego recorded the image displayed on the dispatch monitor with his iPhone. Rego showed the image on his iPhone to his friends, family, and the Town Manager.

In December 2010, Lieutenant James Dawson ("Dawson") sent a Department wide e-mail that stated: "Per Chief Corcoran no one is move [sic] or change the location of the front and rear pan, tilt, zoom (PTZ) cameras from the controls at dispatch." Rego stated that he not believe that this e-mail was a direct order. Rego observed Sergeant Thomas Neufell ("Neufell") move the PTZ cameras after the e-mail was sent. Rego then moved the cameras on thirteen separate occasions.

In February 2011, after he observed movement of the PTZ cameras in violation of his order, Corcoran ordered an investigation. Investigators (Lieutenant Dawson and Inspector Philip Craven) determined that Rego had moved the cameras, and the Department placed him on paid administrative leave as of February 25, 2011. Rego met with investigators on March 22, 2011, and, in the presence of his attorney, Rego admitted that he had moved the cameras after receiving the December 2010 e-mail and that he had recorded the image from the monitor in the dispatch area in November of 2010 on his iPhone and showed it to family and friends.

The investigators determined that Rego had violated several of the Department's Rules & Regulations,³ as

³ The investigators found that Rego violated the following rules and regulations: (1) Rule 7.0: Orders, by moving the camera thirteen times after being ordered not to do so; (2) Rule 7.01: Insubordination, by becoming hostile and combative when he was first informed on February 24, 2011, that he was a subject of the investigation and "[making] unfounded and false accusations that the Chief was inappropriately recording females" to the Town Administrator; (3) Rule 6.9: Truthfulness, by falsely telling the Town Administrator that the female who had been recorded was upset about the recording; (4) Rule 6.7: Dissemination of Official Information, by recording the PTZ camera footage on his phone and showing it to individuals outside of the Department; (5) Rule 6.13: Use of Department Records, Reports and Communications, by showing the Town Administrator the video without first notifying Corcoran as Department Chief; and (6) Rule 6.14: Dealing with Local Officials, by approaching the Town

well as Standard Operating Procedures and a general order prohibiting unauthorized distribution of information regarding the Department's business. A disciplinary hearing was held on May 11, 2011. On June 27, 2011, the Board of Selectmen ("Board") voted unanimously to terminate Rego's employment. In support of their decision, the Board cited the violations found in the 2011 investigation and Rego's prior disciplinary record, which included private reprimands in April of 2008 and July of 2009. On both occasions, the Town had suspended Rego, but after Rego served both suspensions, Rego and the Town agreed that the suspensions would be removed from Rego's file and replaced with letters of reprimand in exchange for Rego's agreement to withdraw pending appeals to the Commission.⁴ Per the agreement, Rego did not receive back pay although he had already served the suspensions.

The investigators found that two other police officers, Sergeant Neufell and Sergeant Michael Noble had also moved the cameras after the order issued. These employees had no prior disciplinary record and received letters of reprimand.

THE COMMISSION'S DECISION

Rego filed an appeal with the Civil Service Commission on June 28, 2011. After a hearing on December 5, 2011, the Commission concluded that the disciplinary action against Rego was warranted, but a majority voted to modify Rego's termination "to a suspension beginning June 28, 2011 and ending April 30, 2013."⁵ Two commissioners dissented.

Administrator without notifying Corcoran "and making groundless accusations" against Corcoran.

⁴ In April 2008, the Department had suspended Rego for three days for failing to follow standard operating procedures while investigating a report for underage drinking. In July 2009, the Department suspended Rego for five days after he was found to have conducted private business while on duty, including entering a private residence without a warrant and failing to inform his supervisor of his actions while on duty.

⁵ Two commissioners dissented as follows:

Mr. Rego disobeyed a lawful and unambiguous order of the Police Chief not to move certain security cameras. He then violated Department rules by recording the video on his own recording device and showing the video to friends and family members. Most disturbingly, it is clear to us that Mr. Rego's purpose in doing so was to make false, unfounded allegations that the Police Chief was engaging in sexual harassment of a private citizen. Mr. Rego then, at best, fudged the truth by making allegations that a female employee was disturbed by a recording of her in the Police Department that Mr. Rego ties to the Police Chief. In fact, the employee had no such concerns. Together, these events paint the picture of a police officer trying to undermine the authority of the Police Chief by disobeying his orders and spreading false, unsubstantiated allegations against him. These actions, coupled with his prior discipline, more than justify Mr. Rego's termination.

With one exception, the Commission found that there was just cause to discipline Rego for violating the applicable rules, regulations and procedures. First, there was just cause for disciplining Rego for moving the cameras thirteen times after the order issued. Second, there was just cause to discipline Rego for sharing the image from the monitor with family and friends. The Commission rejected Rego's testimony that his purpose in showing the recorded images to his family and friends was to obtain their opinions, finding it "more likely that [his purpose was] to suggest to family and friends there was wrong-doing at the Department and to embarrass the Department." Record @ 658. Third, there was just cause for disciplining Rego for showing the image he recorded from the monitor to the Town Administrator and "alleging that the Chief was the person moving the PTZ camera to view her in an appropriate manner" where there was no proof that the Chief was the person who manipulated the camera and the Hearing Officer's review of the recorded image revealed "nothing untoward." (Record at 69). Finally, there was just cause to discipline Rego for being untruthful when he reported to the Town administrator that the civilian employee was "bothered" by reports that the PTZ cameras were focused on her.

The sole basis on which Commission found that the Town did not have just cause to discipline Rego involved the finding that Rego was insubordinate in the course of the investigation in connection with "a loud verbal altercation" during which Rego initially refused to obey order to be seated. The Commission found:

"While Officer Rego was frustrated at the limited time he was given to prepare, that did not entitle him to engage in a loud argument with investigators and disobey their orders."

Record at 660. Nonetheless, the Commission stated that Lt. Dawson "noticed" that Officer Rego was asserting his Weingarten rights⁶ and, *although the Commission has no authority in that regard*, Lt. Dawson should have acknowledged the rights asserted by Officer Rego immediately and ended the interview. *Id.* Record at 660 (emphasis added). On that basis alone, the Commission found that there was insufficient cause to discipline Officer

⁶ In *N.L.R.B. v. Weingarten, Inc.*, 420 U.S. 251, 256-260 (1975), the United States Supreme Court affirmed the holding of the National Labor Relations Board (NLRB) that the denial by an employer of "an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice" under the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 et seq. (1970). The Massachusetts Labor Relations Commission has adopted the Weingarten rule. See *Massachusetts Correction Officers Federated Union v. Labor Relations Commission*, 424 Mass. 191, 193 (1997).

Rego for insubordination.

The Commission also addressed the issue of comparative discipline. The Commission acknowledged that "there is limited evidence of other discipline in analogous matters" with which to compare Rego's termination.⁷ Record at 662. It noted that Neufel had received a reprimand for moving the PTZ camera, but was not disciplined for sending a copy of the December 2010 e-mail to the Town Administrator, but also acknowledged that Neufell did not have any previous discipline. Record at 662.

APPLICABLE LAW

I. Standard of Review

A. Review by the Commission

General Laws c. 31, § 2(b), requires the Commission to determine, on the basis of the evidence before it, whether the appointing authority sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action taken by the appointing authority. *Brackett v. Civil Service Comm'n*, 447 Mass. 233, 241 (2006). See *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 260 (2001); *Cambridge v. Civil Serv. Comm'n*, 43 Mass.App.Ct. 300, 303 (1997). Reasonable justification in this context means "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Brackett, supra*, quoting from *Selectmen of Wakefield v. Judge of First Dist. Court of E. Middlesex*, 262 Mass. 477, 482 (1928).

The concept of "just cause," as that term is used in the disciplinary sections of G.L. c. 31, has been defined as "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service."

⁷ The majority described the longest discipline (other than retirement or resignation) imposed on any police officer as a five (5) day suspension, that included the requirement of a psychiatric evaluation and attendance at anger management. That discipline was imposed on an officer who was observed yelling and screaming at individuals after he responded to a domestic disturbance. While it is appropriate for the Commission to compare the severity of discipline imposed on officers who are similarly situated to promote principles of uniformity and the equitable treatment, see *Police Comm'r of Boston v. Civil Serv. Comm'n*, 39 Mass.App.Ct. 594, 600 (1996), different treatment of individuals who are not similarly situated is not a lawful basis for the Commission to modify a penalty imposed by the appointing authority with reasonable justification. Absent disparate treatment of similarly situated individuals, the fact that no other officer had been terminated in recent memory is irrelevant. The officer in question was disciplined for a single episode of verbal misconduct while responding to a call. Rego engaged in a deliberate and prolonged effort to undermine the Chief's authority during which he violated multiple rules and regulations and was insubordinate to officers charged with investigating his misconduct.

Police Dept. of Boston v. Collins, 48 Mass.App.Ct. 408, 411 (2000), quoting from *Police Commr. of Boston v. Civil Serv. Commn.*, 39 Mass.App.Ct. 594, 599 (1996). In its review, the Commission is to find the facts afresh, and in doing so, the Commission is not limited to examining the evidence that was before the appointing authority. *Leominster v. Stratton*, 58 Mass.App.Ct. 726, 727 (2003). "The Commission's task, however, is not to be accomplished on a wholly blank slate." *Falmouth v. Civil Serv. Commn.*, 447 Mass. 814, 823, 857 (2006). The judgment whether particular behavior on the part of an employee impairs the efficiency of the governmental unit that employs him is one that is assigned by law to the appointing authority. "It is not within the authority of the commission ... to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." *Police Dept. of Boston v. Collins*, supra at 412, quoting from *Cambridge v. Civil Serv. Commn.*, 43 Mass.App.Ct. 300, 304 (1997).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts as found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found to have existed when the appointing authority made its decision." *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). In determining when personnel action of appointing authority is not reasonably justified, and should be reversed or modified by the Commission, it is the role of the Commission to protect the system in light of its fundamental purposes, which are "to guard against political considerations, favoritism, and bias in governmental employment decisions ..., and to protect efficient public employees from political control." *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. at 304. Where these considerations are not present, it is not the function of the Commission to substitute its judgment for that of the appointing authority. *Id.*

The Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions. See *Falmouth*, supra, at 824-826. The judgment whether particular behavior on the part of an employee impairs the efficiency of the governmental unit that employs him is one that is assigned by law to the appointing authority. The "power accorded the commission to modify penalties must not be confused with the power to impose penalties *ab initio*, which is a power accorded the appointing authority." *Police Comm'r of Boston v. Civil Serv. Comm'n*, supra, 39 Mass.App.Ct. at 600. Unless the Commission's findings of

fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty. The Commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation. *Id.* In other words, "[u]nless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty." *Falmouth v. Civil Serv. Comm.*, 447 Mass. at 824.

B. Judicial Review of Commission's Decision

In reviewing a Civil Service Commission decision pursuant to G. L. c. 30A, the Court is confined to the administrative record unless there are allegations of procedural irregularities. G. L. c. 30A, § 14(5). The court "may set aside or modify the commission's decision if [it] conclude[s] that the substantial rights of any party may have been prejudiced by a decision that is based on an error of law, unsupported by substantial evidence, or otherwise not in accordance with the law." *Police Dept. of Boston v. Kavaleski*, 463 Mass. 680, 689 (2012). "[T]he agency's 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, that is, 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Gupta v. Deputy Dir. of Div. Of Employment & Training*, 62 Mass. App. Cl. 579, 582 (2004). In making this determination, the court must examine the record in its entirety and must account for anything that detracts from the weight of the evidence that supports the administrative decision. *Cobble v. Commissioner of Dept. of Soc. Servs.*, 430 Mass. 385, 390 (1999).

Where, as here, the Town is appealing from the Commission's decision, the Town "bears the burden of establishing that the decision is invalid." See *Kavaleski*, 463 Mass. at 689; *Brackett v. Civil Service Comm'n*, 447 Mass. 233, 242 (2006). The burden is a heavy one as this court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred on it" by statute. G. L. c. 30A, § 14(7). See also *Kavaleski*, 463 Mass. at 689. The court may not substitute its own judgment for that of the Commission nor may the court disturb the Commission's findings of fact. *Guarino v. Director of Div. of Employment Sec.*, 393 Mass. 89, 92 (1984). The court's sole function, "is to determine whether

the [Commission] applied correct legal principles in reaching its decision." See *id.*

DISCUSSION

As set forth above, with one exception, a majority of the Commission found, after a full hearing, that the Town had just cause to discipline Rego. The majority found that there was not just cause to discipline Rego for insubordination because Rego was waving a card on which his Weingarten rights were stated and Dawson should have terminated the interview. The record reflects that, upon receiving notification that a hearing would be held, Rego 1) went to the area of the station in which Dawson's office was located; 2) confronted Dawson in a corridor in a loud and argumentative manner; 3) continued to harangue Dawson as Dawson walked to the meeting room; 4) disobeyed orders to be quiet and sit down so that Dawson could formally advise him of the investigation and his rights; and was disrespectful to Inspector Craven. Tr. 134-138. Further, Dawson terminated the interview when Rego said he wished to exercise his Weingarten rights.

The majority's finding is insupportable. Rule 7.01, "Insubordination," provides:

Officers shall not be insubordinate. Insubordination includes:

- a) any failure or deliberate refusal to obey a lawful order . . .
- b) it shall also include any disrespectful, mutinous, insolent or abusive language or action toward a superior whether in or out of the presence of the superior. Record at 424.

After expressly finding that Rego engaged in a loud argument with Dawson and disobeyed orders,⁸ the majority recognized that "it had no authority in this regard," but nonetheless concluded that because Rego was waving his Weingarten card in the air while being insubordinate, Dawson "should have terminated the interview" and there was not just cause to discipline Rego for insubordination. Record at 424. The Commission ignores the fact that Rego himself was preventing Dawson from formally advising Rego of the nature of the investigation and of his rights. Record at 411.

The Commission exceeded its authority when it modified the penalty imposed by the Town. It made no findings suggesting that political considerations or bias played a role in the Town's decision. Although the majority

⁸ The commission could not have found otherwise on this record. Rego testified that Dawson was agitated, that they were speaking over one another, that he was telling Dawson that it was unfair to just give him five minutes notice, that he didn't agree with Officer Craven doing the investigation because Dawson had been assigned to investigate him in the past, that it wasn't fair for one union brother (Craven) to do this to another union brother and that he later apologized to Dawson because "we both had a heated exchange." He acknowledged that when Dawson told him to sit down, he did not sit down, but stated, "I'm all set." Tr. 212-215.

referred to the fact that Neufell received a reprimand because he had also moved the camera and was not disciplined for sending the December 10 e-mail to the Town Administrator, he and Rego were not similarly situated either in terms of the number and seriousness of the disciplinary violations⁹ or in disciplinary history. Rego had two prior reprimands; Neufell had none.

Demonstrating a complete lack of recognition that the power to impose penalties *ab initio* belongs to the Town, the Commission modified the discipline imposed on Rego from termination of his employment to a twenty-two month suspension which it described as "an adequate disciplinary period to address his violations in the absence of analogous conduct and discipline." Record at 663. It appears not to have occurred to the Commission that, as a matter of common sense, if misconduct is sufficiently serious to warrant the suspension of a police officer in a small police department for close to two years, *ipso facto*, it is sufficiently serious to warrant termination.

The extent to which the Commission has ignored the limits on its authority and usurped the powers assigned by law to the appointing authority is graphically illustrated by its attempt to offer guidance to Rego and its threat of a more serious sanction should he require discipline in the future:

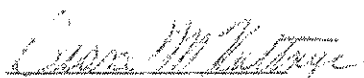
"The Commission earnestly hopes that Officer Rego has duly reconsidered his violations of the Rules and Regulations and SOPs [Standard Operating Procedures], that he understands further violations will not be tolerated and should he continue to violate Rules and Regulations and SOPs, he does so at his own peril."

Record at 664.

⁹ Rego moved the camera thirteen times to monitor his vehicle after he left the dispatch area multiple times (creating a potential delay in response time) to use a remote starter so that his vehicle would be warm when his shift ended. He showed the image to the Town Administrator, family members and friends, alleged without proof that the Chief had manipulated the camera and falsely stated that the female employee was upset in an effort to embarrass the Chief and undermine his authority. As described in the dissent, Rego was engaged in a campaign to undermine the Chief's authority "by disobeying his orders and spreading false, unsubstantiated allegations against him." Neufell moved the camera to check registration plates that he could not read because of glare and sent an e-mail to the Town administrator because he thought the order jeopardized safety.

CONCLUSION AND ORDER

For the reasons stated herein, I find that the Commission exceeded its authority when it reduced the penalty imposed on Rego from termination of his employment to a twenty-two month suspension. Judgment shall issue in favor of the Town of Maynard. The Civil Service Commission is ordered to reinstate the action of the Town of Maynard terminating the employment of Officer Tony Rego.



Diane M. Kottmyer
Justice of the Superior Court

DATED: April 18, 2014