

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTIONS 09-00445
09-00446
09-00447HAMPDEN COUNTY
SUPERIOR COURT
FILED
JUL 15 2010JOSEPH WILSON
TIMOTHY SKWIRA
SEAN SHATTUCK

vs.

CIVIL SERVICE COMMISSION & another¹MEMORANDUM OF DECISION ON
PLAINTIFFS' MOTIONS FOR JUDGMENT ON THE PLEADINGS
AND DEFENDANT'S CROSS-MOTION
FOR JUDGMENT ON THE PLEADINGS

The plaintiffs in this consolidated action each filed a petition seeking judicial review, pursuant to G.L. c. 31, § 44 and G.L. c. 30A, § 14, of the April 2, 2009 decision of the Civil Service Commission ("the Commission") upholding a fifteen day suspension imposed on each plaintiff by the Mayor of Holyoke as the appointing authority for the Holyoke Police Department. This matter is before the court on the parties's cross-motions for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c) and Superior Court Standing Order 1-96. For the reasons discussed below, the plaintiffs's motions for judgment on the pleadings are **DENIED**, the City's cross-motion is **ALLOWED**, and the Commission's decision is **AFFIRMED**.

BACKGROUND

The facts that follow are taken from the administrative record.

Sean Shattuck ("Shattuck") has been employed as a permanent full-time police officer for

¹City of Holyoke

the City of Holyoke since December 22, 1995. Timothy Skwira ("Skwira") has been employed as a permanent full-time police officer for the City of Holyoke since December 22, 2002. Joseph Wilson ("Wilson") has been employed as a permanent full-time police officer for the City of Holyoke since October 3, 2004.

Around midnight on December 18, 2007, Shattuck, Skwira, and Wilson were off-duty and met at the Pal's Joey Lounge in Holyoke. Around 12:45 a.m., Gilberto Rivera ("Rivera") and Christopher Martinez ("Martinez") entered the bar. They began talking loudly in Spanish and staring and pointing at the police officers. Rivera was known to Shattuck as a gang member and violent offender. Rivera was commenting that police were present and stated something about "guns" in Spanish. A third individual, William Brobovic ("Brobovic"), entered the bar about 15 minutes later and joined Rivera and Martinez. The owner of the bar recognized Shattuck, Skwira, and Wilson as police officers and asked for their assistance in removing Rivera, Brobovic, and Martinez from the premises because he thought they were about to cause trouble. At around 1:40 a.m., when the officers asked the three men to leave, Rivera threw a glass of beer at Shattuck and began cursing at him. As Shattuck grabbed Rivera and ejected him from the bar, Martinez punched the back of Shattuck's head. Skwira and Wilson brought Brobovic and Martinez outside. Martinez began yelling that he was going to kill the officers and their families and then struck Shattuck on the right side of the head, while continuing to yell in a threatening manner. Shattuck and Wilson repeatedly told Martinez to calm down. Skwira was approximately 15 feet away, restraining Rivera from joining in the altercation. At one point, Shattuck swung at Martinez in a defensive manner to prevent a further attack. Wilson brought Martinez to the ground, but Martinez continued to attack the officers, threatening to kill them. Rivera stated that this wasn't over and that he would bring in

his "boys." Shattuck helped hold Martinez down while Brobovic got his car. After Martinez eventually calmed down, Brobovic helped Martinez into his car and drove away. Rivera walked away from the scene.

The officers did not notice any visible injuries to Martinez at that time, other than minor swelling under one eye and redness on his cheek. Shattuck, Skwira, and Wilson got into their vehicles and returned to their homes. They did not report the incident to police headquarters or their supervisor, nor did they document it with a written report. They did not make a report of the incident given that there was no arrest and they considered it only a minor happening because in Holyoke, people threaten and try to punch officers all the time. The officers exercised their discretion not to arrest Martinez because they knew he was very drunk, no one got hurt in the incident, and it was the holiday season. Skwira, who was on leave with an earlier on-duty injury, had no intention of making any report about the incident at that time. Shattuck intended to report it to his supervisor on his next scheduled shift.

Brobovic called 911 around 2:00 a.m. to report that Martinez had been assaulted by police officers at Pal's Joey Lounge. On-duty officers arrived at Pal's Joey Lounge to find the bar closed. The only person present was a snow plow operator who was plowing the parking lot of the K-Mart Plaza. Around 2:15 a.m., Martinez arrived at the Holyoke Hospital Emergency Room, located less than two miles away from Pal's Joey Lounge. His face was badly swollen, and he stated that five unidentified Holyoke Police Officers had beaten and kicked him. Martinez was loud and disruptive, demanding treatment and insisting that he would flip the bed over and destroy the room if a picture of his injuries was not taken. Hospital personnel called 911 for assistance. Lieutenant Donald Whelihan ("Whelihan") arrived at the hospital, spoke to Martinez, and assured him that an

investigation would begin the next morning.

At approximately 6:00 a.m., Whelihan informed the Police Chief of Martinez's allegations and showed him pictures of Martinez's injuries. At that time, the Chief was not sure whether any police officers were actually involved or which ones. The Police Chief requested a criminal investigation and an internal investigation to be conducted simultaneously. The criminal investigation was conducted by Sergeant James Albert ("Albert"). The internal investigation was conducted by Federal Bureau of Investigations ("FBI") Special Agent Ian Smythe, who interviewed numerous witnesses including Rivera, Brobovic, and Martinez, as well as the emergency room staff. Martinez came to the police station to make a statement. While entering the Criminal Investigations Bureau, Martinez observed pictures of all Department employees on the wall and identified his assailants as Shattuck, Skwira, and Wilson. He stated that Shattuck and Wilson had hit and kicked him in the head while he was on the ground.

Shattuck and Skwira knew they were being investigated at approximately 7:00 a.m. that morning when Wilson called to say that the Chief had brought in the FBI. Skwira spoke to counsel, who instructed him not to make a statement about the incident. By the time Shattuck arrived for his next shift, he had been advised by counsel not to make any report or statement regarding the incident. On December 20, Shattuck, Skwira, and Wilson were placed on administrative leave with pay pending the investigation. Albert asked the officers to make statements during the investigation, but they refused upon the advice of counsel.

The Hampden District Attorney declined to convene a grand jury to return criminal charges arising from the incident. However, on January 18, 2008, the Police Chief instructed Albert to take out charges against Shattuck and Wilson of assault and battery, and assault and battery with a

dangerous weapon (shod foot) on Martinez. On May 28, 2008, the Hampden County District Attorney entered a nolle prosequi with respect to the assault and battery with a dangerous weapon charges. On June 2, 2008, a jury acquitted Shattuck and Wilson of the remaining assault and battery charges. The Police Chief then ordered them to submit written statements about the incident. Despite the acquittal, the Chief believed that the officers had beaten Martinez.

Following the conclusion of the internal investigation, on July 9, 2008, the Police Chief suspended Shattuck, Skwira, and Wilson for the maximum authorized five days without pay. The Chief recommended to the appointing authority, the Mayor, that additional discipline be imposed. The Chief recommended an additional 115 days of suspension for Shattuck, an additional 25 days for Skwira, and an additional 55 days for Wilson.

The three appealed their five-day suspensions to the Mayor, who held a hearing on August 4, 2008 on both the officers's appeal and the Police Chief's request for additional discipline. All three officers testified at this hearing. In a written decision, the Mayor concluded that Shattuck, Skwira, and Wilson violated Rule 3.17 of the Holyoke Police Department, Obligation to Report Crimes, which provides in relevant part:

Members of the Department shall communicate promptly to their respective superior officers all crimes, suicides, attempted suicides, fires, accidents, and all important happenings, complaints, and information of which the Department takes [cognizance], that may come to their attention . . .

The Mayor also concluded that Shattuck, Skwira, and Wilson violated Rule 4.5 of the Department, Submission of Reports, which provides in relevant part:

Officers shall submit all necessary reports on time and accordance with established departmental procedure. Reports submitted by officers shall be truthful and complete, and bear the signature of the officer submitting the report. . . .

Finally, the Mayor concluded that Shattuck, Skwira, and Wilson violated Standing Operating

Procedures 8.2.0, Use of Force Reporting, Section IV Procedures, paragraph D Medical Attention, which provides in relevant part:

After any level of force is used, the officer shall immediately evaluate the need for medical attention or treatment for that person upon whom the force was used and arrange for such treatment when:

- a. That person has a visible injury; or
- b. In the case of use of pepper spray, immediately after spraying suspect, officers shall be alert to any indications that the individual needs medical care. This includes, but is not necessarily limited to, breathing difficulties, gagging, profuse sweating and loss of consciousness; or
- c. That person complains of injury or discomfort and requests medical attention.

Based on the officers's violation of these three rules, the Mayor concluded that there was just cause for the five day suspension previously imposed by the Police Chief, and ordered an additional ten day suspension without pay, with no details or overtime permitted during that period, and participation in a mediation training program and alcohol awareness program.²

On August 15, 2008, Shattuck, Skwira, and Wilson filed a timely notice of appeal of the suspensions to the Commission. The Commission held a full public hearing on December 10, 2008. The officers filed a motion to limit the hearing to only the charge of failure to report use of force, on the ground that the officers had a Fifth Amendment right not to report the incident because by the time they arrived to work for their next shift, they were suspects in a criminal investigation. The Commission denied the officers's motion to limit the hearing. Witnesses at the hearing included the three officers, the Union President, the Police Chief, Attorney Aaron Wilson (Officer Wilson's

²The Mayor found that other rule violations alleged by the Chief were unsupported, including rules relating to unbecoming conduct, moral conduct, compliance with law, courtesy towards the public, competency in the performance of duty, and off-duty use of intoxicants.

father), and Sergeant Albert. In addition, Special Agent Smythe testified in order to authenticate the FBI witness summaries he wrote during the internal investigation. Rivera, Martinez, and Brobovic did not testify before the Commission.

On April 2, 2009, the Commission issued its decision upholding the 15 day suspensions imposed by the Mayor. The Commission concluded that the Mayor had met his burden of establishing by a preponderance of the evidence that Shattuck, Skwira, and Wilson violated Holyoke Police Department Rule 3.17 relating to Obligation to Report Crimes, Rule 4.5 relating to Submission of Reports, and SOP 8.2 Use of Force Reporting, Section IV Procedures, paragraph D, Medical Attention. The Commission based this conclusion on the evidence presented by the officers, without consideration of the FBI witness summaries. The Commission found:

Based on the testimony of the Appellants, there is no question that the incident was at a minimum "an important happening." The Officers testified that their lives and the lives of their families were threatened. The officers testified that at least one of the individuals was a dangerous individual. There was a physical altercation where punches were thrown, including by Officer Shattuck. The officers testified that one of the individuals threw a beer glass at one of the officers, knowing him to be a police officer. . . .

At a bare minimum, an incident report should have been filed by the three officers at the conclusion of the altercation. The altercation began sometime after 1:00 A.M. and concluded shortly before 2:00 A.M. At 6:00 A.M. that morning when the Chief first met with Lt. Whelihan, the three officers had still not reported the incident. To suggest that they did not immediately report the incident because they believed that they were suspects in the incident investigation is contrary to the evidence. They were only identified as suspects in the incident sometime after 6:00 A.M. that morning, well after the incident occurred and they chose to go home without notifying anyone at the Holyoke Police Department about the incident. I conclude that by going home without notifying anyone in the Holyoke Police Department the appellants failed to promptly notify the Department as required.

The Commission rejected the officers's assertion that the Police Chief failed to follow proper procedures during the internal investigation, because the cited procedures apply only to

investigations initiated by a citizen, not the Chief himself. Finally, the Commission rejected the officers's argument that the Chief was personally biased against them, and concluded that the discipline imposed was justified.

DISCUSSION

A party aggrieved by a final decision of the Commission may seek judicial review pursuant to G.L. c. 31, § 44, and such review is governed by the provisions of G.L. c. 30A, § 14. Andrews v. Civil Service Comm'n, 446 Mass. 611, 615 (2006). The party appealing an administrative decision bears the burden of demonstrating that the decision is invalid. Fisch v. Board of Registration in Med., 437 Mass. 128, 131 (2002); Bagley v. Contributory Retirement Appeal Bd., 397 Mass. 255, 258 (1986).

Pursuant to G.L. c. 31, § 43, a person aggrieved by a decision of the appointing authority may appeal to the Commission. That section provides: "[i]f the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action The commission may also modify any penalty imposed by the appointing authority." G.L. c. 31, § 43. The Commission reviews whether on the facts found by it de novo, there was reasonable justification for the appointing authority's action. Gloucester v. Civil Serv. Comm'n, 408 Mass. 292, 297 (1990); Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004). Justification in this context means that the action was taken upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law. Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 304, rev. den., 426 Mass. 1102 (1997).

Substantial Evidence

The officers first contend that the Commission's finding of rule violations was unsupported by substantial evidence. 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. G.L. c. 30A, § 1(6); Andrews v. Civil Serv. Comm'n, 446 Mass. at 616. In evaluating substantial evidence, the court must accord due weight to the agency's experience, technical competence, and specialized knowledge, and must defer to the Commission on questions of fact and reasonable inferences drawn from the record. Plymouth v. Civil Serv. Comm'n, 426 Mass. 1, 5 (1997). A court may not displace an agency's choice between two fairly conflicting views, even though the court justifiably would have made a different choice if faced with the same set of facts de novo. Goldberg v. Board of Health of Granby, 444 Mass. 627, 638 (2005). Under the substantial evidence test, an agency's conclusion will fail judicial scrutiny only if the evidence points to no appreciable probability of the conclusion or points to an overwhelming probability of the contrary. Cobble v. Commissioner of the Dept. of Soc. Serv., 430 Mass. 385, 390-391 (1999).

There is ample evidence in the administrative record to support the Commission's finding that Shattuck, Skwira, and Wilson violated Department Rule 3.17, relating to Obligation to Report Crimes, despite the officers's subjective belief that the incident at Pal Joey's Lounge was minor and unworthy of report. As noted by the Commission, the incident involved a known gang member, the possibility of the presence of a weapon, threatened crimes, an assault on a police officer, and the use of physical force by a police officer against a member of the public. Accordingly, the Commission's conclusion that the incident was an "important happening" within the meaning of Rule 3.17 was supported by substantial evidence.

Moreover, the officers's assertion that the Commission's finding of a violation of Rule 4.5, relating to Submission of Reports, was unsupported by substantial evidence because that rule is duplicative of Rule 3.17 is without merit. As explained by the Commission in its decision, Rule 3.17 required the officers to promptly communicate the incident to their superiors, while Rule 4.5 required them to submit all necessary reports on time, to be truthful and complete in such reports, and to sign the reports.

Similarly, there is no merit to the officers's assertion that the Commission's finding of a violation of Standing Operating Procedures 8.2.0, Use of Force Reporting, Section IV Procedures, paragraph D Medical Attention was unsupported by substantial evidence because they all testified that Martinez had no visible injuries and did not require medical attention. The hearing examiner was not required to credit such testimony, and the court must defer to the hearing officer's credibility determinations. Andrews v. Civil Serv. Comm'n, 446 Mass. at 616. The officers's description of Martinez's injuries was contradicted by the photograph taken at the hospital after the incident. Accordingly, the plaintiffs have failed to meet their burden of establishing that the Commission's findings of rule violations were unsupported by substantial evidence.

Shattuck, Skwira, and Wilson also challenge the Commission's decision to uphold the Mayor's imposition of a fifteen-day suspension. The Commission has broad discretion to impose and enforce penalties in matters within its delegated authority. Faria v. Third Bristol Div. of the Dist. Ct., 14 Mass. App. Ct. 985, 986 (1982). The purpose of the Commission's power to modify the penalty imposed by the appointing authority is to further uniformity in the civil service and the equitable treatment of similarly situated individuals. Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 824 (2006); Police Commissioner of Boston v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594,

602 (1996). The Commission recognized that absent political considerations, favoritism or bias, it should not modify the penalty imposed by the appointing authority on the basis of essentially similar fact finding without an adequate explanation. See *id.* The Commission considered but rejected the argument that the penalty was motivated by the bias of the Police Chief, noting that the Mayor imposed the fifteen-day punishment after an independent hearing and after rejecting numerous other rule violations leveled at the officers by the Chief.

Finally, the plaintiffs's argument that in upholding the Mayor's penalty, the Commission was required to allocate the fifteen days among the three rule violations is similarly without merit. Cf. Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. at 802-803. The Commission thus reasonably concluded that there was justification for the Mayor's imposition of a fifteen day suspension. Cf. Murray v. Second Dist. Ct., 389 Mass. 508, 515 (1983) (Commission need not speculate whether less severe discipline would have secured appropriate employee behavior).³

Accordingly, the plaintiffs have failed to meet their burden of establishing that the Commission's decision was unsupported by substantial evidence.

Arbitrary and Capricious

Shattuck, Skwira, and Wilson further contend that the Commission's decision is arbitrary and capricious in light of the officers's undisputed testimony that in their minds, the incident was not an important matter which they were required to report. A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might deem proper to support it.

³The officers have not demonstrated that the fifteen-day suspension upheld by the Commission rises to the level of a substantial error of law, is arbitrary and capricious, or constitutes disproportionate punishment for the offenses at issue. Cf. Police Dept. of Boston v. Collins, 48 Mass. App. Ct. 408, 412 & n. 7, rev. den., 431 Mass. 1102 (2000); Cambridge v. Civil Service Comm'n, 23 Mass. App. Ct. 936, 937 (1986).

Teamsters Joint Council No. 10 v. Director of Dept. Of Labor and Workforce Dev., 447 Mass. 100, 106 (2006); Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. at 303. Conduct is arbitrary and capricious when done without consideration and in disregard of facts and circumstances, or for reasons that are extraneous to the statutory scheme, based on some ad hoc agenda. Fieldstone Meadows Develop. Corp. v. Conservation Comm'n of Andover, 62 Mass. App. Ct. 265, 267 (2004); Long v. Commissioner of Pub. Safety, 26 Mass. App. Ct. 61, 65, rev. den., 403 Mass. 1101 (1988).

Here, the Commission's conclusion that despite their subjective view of the importance of the incident, the officers violated the rules of the Holyoke Police Department is not irrational. There is no evidence that the Commission's decision was based on factors extraneous to the civil service statute. The Commission provided a reasonable and rational explanation for its decision, based on the officers's own testimony. Accordingly, the plaintiffs have failed to meet their burden of establishing that the decision was arbitrary and capricious.

Error of Law

Finally, Shattuck, Skwira, and Wilson contend that the Commission erred in concluding that they violated Rule 3.17 and Rule 4.5, because they had no obligation to make any statement about the incident under Carney v. Springfield, 403 Mass. 604 (1988). Pursuant to G.L. c. 30A, § 14, the court reviews de novo the Commission's conclusions of law. Andrews v. Civil Serv. Comm'n, 446 Mass. at 615. See also Lawrence v. Civil Serv. Comm'n, 66 Mass. App. Ct. 309, 311 (2006) (erroneous legal conclusion not entitled to deference typically afforded the Commission).

The Supreme Judicial Court has stated that absent a valid grant of transactional immunity, where there is a real possibility of criminal prosecution, a public employee has a Fifth Amendment right to refuse to answer questions reasonably related to job performance and cannot be disciplined

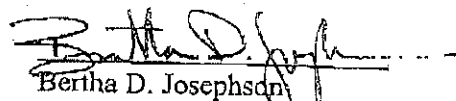
for exercising that right. See Springfield v. Civil Serv. Comm'n, 403 Mass. 612, 615 (1988); Carney v. Springfield, 403 Mass. 604, 609-610 (1988). Here, however, the Commission properly rejected the officers's argument that their Fifth Amendment rights relieved them of the obligation to comply with Departmental Rules, reasoning:

The altercation began sometime after 1:00 A.M. and concluded shortly before 2:00 A.M. At 6:00 A.M. that morning when the Chief first met with Lt. Whelihan, the three officers had still not reported the incident. To suggest that they did not immediately report the incident because they believed that they were suspects in the incident investigation is contrary to the evidence. They were only identified as suspects in the incident sometime after 6:00 A.M. that morning, well after the incident occurred and they chose to go home without notifying anyone at the Holyoke Police Department about the incident.

The Court discerns no legal error in the Commission's analysis. Cf. Massachusetts Parole Bd. v. Civil Serv. Comm'n, 47 Mass. App. Ct. 760, 764, rev. den., 430 Mass. 1111 (1999) (noting that there is a real difference between refusal to answer specific question during investigative proceeding and refusal to answer all questions before the proceeding has advanced to level of specificity in which competing concerns of employee and employer can be addressed in meaningful way). There is no evidence in the record that the officers were disciplined for refusing to make a statement once the internal investigation began. Accordingly, the plaintiffs have failed to meet their burden of establishing that the Commission committed an error of law.

CONCLUSION

Accordingly, for the reasons stated above, the plaintiffs's motions for judgment on the pleadings is **DENIED** and that the City of Holyoke's cross-motion is **ALLOWED**. The decision of the Civil Service Commission on April 2, 2009 is hereby **AFFIRMED**.


Bertha D. Josephson
Justice of the Superior Court

DATED: October 14, 2010