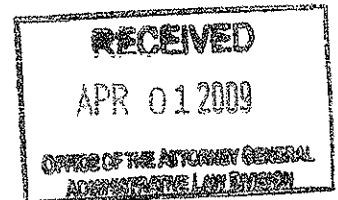


3-31
COMMONWEALTH OF MASSACHUSETTS



SUFFOLK, ss.

NOTICE OF
03/31/09
S.G.S. H. & D.
B.C.D.
R.E.H.
R.L.O.S.
D.A.J.

SUPERIOR COURT
CIVIL ACTION
NO. 07-4839-F

TYRONE SMITH

VS.

MASSACHUSETTS CIVIL SERVICE COMMISSION and another

(LAT)
**MEMORANDUM OF DECISION AND ORDER ON CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

Pursuant to G.L. c. 30A, § 14, the plaintiff, Tyrone Smith ("Smith"), brings this action for judicial review of a Massachusetts Civil Service Commission ("Commission") decision upholding the determination of the Boston Police Department ("Department") suspending Smith for ten days based on alleged violations of Department rules. This matter is before the court on the parties' cross-motions for judgment on the pleadings. For the reasons set forth below, Smith's motion for judgment on the pleadings is denied and the Commission's cross-motion for judgment on the pleadings is allowed.

BACKGROUND

The following pertinent facts are taken from the administrative record. On the evening of June 14, 2000, at approximately 8:00 p.m., Smith visited the Suffolk County House of Correction with the intention of leaving twenty dollars for his brother, an inmate at that facility. Upon arriving at the House of Correction, Smith parked illegally in a fire lane marked "No Parking." Smith was off-duty and not in uniform at the time. Deputy Sheriff Gary Henry ("Henry") was

¹ The Boston Police Department

working in the lobby of the House of Correction on that day. He approached Smith and told him he could not park his vehicle in that area and that he needed to move his car. Smith responded that he would only be two minutes. When Henry again told him he could not park there, Smith responded that he was merely dropping off some money and continued to walk through the lobby toward the visitor's desk. When Smith arrived at the visitor's desk, Henry told the officer working at the desk not to accept his money. Smith responded with a statement to the effect of "if it makes you feel like a big shot, I'll move my vehicle." The Commission found that this was Smith's first display of disrespect toward the House of Correction staff. Henry also testified that he informed Smith that, because of his disrespect, he would not be welcome back into the facility that day. Smith then exited the House of Correction to move his vehicle.

After moving his vehicle, Smith returned to the House of Correction. Smith approached the vestibule and attempted to enter the lobby. Lieutenant Charles Bailey ("Bailey"), who had arrived in the area and spoke with Henry, stopped Smith. Bailey raised his hand in a "stop" gesture and informed Smith that he would not be permitted to re-enter the building but could do so the following day. During this interaction, Smith pushed Bailey's hand down, stating "don't put your hands on me." The Commission found that this was Smith's second display of disrespect toward House of Correction staff.

The Sheriff's Department protocol authorized an officer to ask a disrespectful visitor to leave the facility. At some point after Smith pushed Bailey's hand down, a Sheriff's Emergency Response Team ("SERT"), a mobile security force, arrived on the scene. When the SERT arrived in the lobby area, Smith stated something along the lines of "you got your boys here." The Commission found that this was Smith's third display of disrespect toward the House of

Correction staff. There was evidence that when the SERT arrived, Bailey allowed them to handle the situation and that Deputy Melvin Reed ("Reed"), a SERT officer, ordered Smith to leave the facility. The administrative record also includes evidence that, in response to Reed's order, Smith moved toward Reed and bumped him in the chest with his hands and body. The Commissioner found that at this point, Smith instigated a confrontation.

Smith's account of this portion of the events differs. Smith testified that when the SERT officers arrived in the lobby, he identified himself to Reed as a Boston Police Officer, and Reed informed him he could not come inside the House of Correction. Smith further testified that Reed told him he needed to leave the House of Correction property. In response, Smith demanded that Reed get out of his face. At this point, Smith turned to exit the vestibule. Smith testified that the SERT officers then jumped him from behind, began kicking and punching him, and dragged him to the floor.

The administrative record also conflicts with Smith's account because it reflects that at some point thereafter, Smith identified himself as a Boston Police Officer, in contrast to Smith's assertion that he identified himself when the SERT arrived. Reed testified that Smith did not inform the SERT officers that he was a Boston Police Officer until he was being handcuffed. SERT escorted Smith to a training area because he complained of shortness of breath, leg pain, and wrist pain. EMS transported Smith to Brigham and Women's Hospital where he was treated for injuries and released.

Subsequently, Stephen Jacobs ("Jacobs"), the Deputy Superintendent of Operations for the Sheriff's Department, conducted an investigation of the incident. Jacobs collected fifteen incident reports and four Use of Force reports from the officers involved in the incident. Jacobs

never contacted any of the other persons who had witnessed the altercation despite the availability of the names of visitors present at the House of Correction that evening. On June 22, 2000, Jacobs submitted an investigation report to the Suffolk County Sheriff's Department.

On April 17, 2001, the Boston Police Department Internal Affairs Division ("IAD") issued a complaint against Smith for alleged violations of Rule 102, § 3 (Conduct Unbecoming)², and Rule 102, § 9 (Respectful Treatment)³. On November 16, 2001, the IAD held a hearing regarding the complaint against Smith. On February 28, 2002, the Boston Police Department suspended Smith for ten working days, effective March 1, 2002, for violation of Rule 102, §§ 3 and 9. The Department imposed the suspension based upon "Smith's disrespectful conduct, offensive language, and inappropriate behavior when, off-duty, Officer Smith visited the Suffolk County House of Correction and instigated a verbal and physical confrontation with members of the Suffolk County Sheriff's Department."

Smith appealed the Department's suspension to the Civil Service Commission. On May 15, 2007, the Commission conducted a hearing on Smith's appeal. The Commission determined that the Department had proven by a preponderance of the evidence that there was just cause to

² Rule 102, § 3 provides:

"Employees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming an employee shall include that which tends to indicate that the employee is unable or unfit to continue as a member of the Department, or tends to impair the operation of the Department or its employees."

³ Rule 102, § 9 provides:

"Employees shall, on all occasions, be civil and respectful, courteous and considerate toward their supervisors, their subordinates and all other members of the Department and the general public. No employee shall use epithets or terms that tend to denigrate any person(s) due to their race, color, creed or sexual orientation except when necessary in police reports or in testimony."

suspend Smith and dismissed the appeal. Smith now seeks judicial review of the Commission's dismissal of his appeal.

Smith advances several theories as to why the Commission's dismissal of his appeal was unlawful. He asserts that the Commission's decision is unsupported by substantial evidence, arguing that the weight of the evidence does not support a finding that Smith instigated a physical confrontation or acted as the physical aggressor. Smith also argues the decision is based on an error of law because the Commission improperly substituted its judgment for that of the Department. Finally, Smith asserts that the Commission's decision was based on unlawful procedure because it made erroneous credibility determinations and failed to resolve credibility disputes.

DISCUSSION

I. Standard of Review

General Laws c. 31, § 2(b) requires the Civil Service Commission to determine, on the basis of the evidence before it, whether the Department sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for the action it took.

Mass. Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 260 (2001).

Reasonable justification 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." Selectmen of Wakefield v. Judge of First District Court of East Middlesex, 262 Mass. 477, 482 (1928).

A judge exercising judicial review of a commission decision is limited to determining whether the commission's decision was supported by substantial evidence. See McIsaac v. Civil

Serv. Comm'n, 38 Mass. App. Ct. 473, 476 (1995). Moreover, a judge is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." Iodice v. Architectural Access Bd., 424 Mass. 370, 375-376 (1997), quoting G.L. c. 30A, § 14(7). Pursuant to G.L. c. 31, § 44, the court reviews the commission's decision to determine if it violates any of the standards set forth in G.L. c. 30A, § 14(7). Plymouth v. Civil Serv. Comm'n, 426 Mass. 1, 5 (1997). The court must overturn those commission decisions that are inconsistent with the applicable law. Id. The party appealing a commission decision has the burden of proving that the decision is invalid. Coggin v. Mass. Parole Bd., 42 Mass. App. Ct. 584, 587 (1997).

Pursuant to G.L. c. 30A, § 14, the court may affirm, reverse or set aside, or remand an agency's decision. G.L. c. 30A, § 14; Howard Johnson Co. v. Alcoholic Beverages Comm'n, 401 Mass. 347, 351 (1987); South. Worcester Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 420-421 (1982). In particular, a court may set aside an administrative agency's final decision only where the court determines a plaintiff's substantial rights have been prejudiced, because the decision was based upon an error of law, was unsupported by substantial evidence, or was arbitrary and capricious or an abuse of discretion. G.L. c. 30A, § 14(7); Connolly v. Suffolk County Sheriff's Dep't, 62 Mass. App. Ct. 197, 191-193 (2004).

" 'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6). When applying the substantial evidence standard, a court "may not displace. . . [the Commission's] choice. . . even though the court would justifiably have made a different choice had the matter been before it de novo." Labor Relations Comm'n v. Univ. Hosp., Inc., 359 Mass. 516, 521 (1971). A decision is based upon an

error of law if the state administrative agency has misinterpreted or misapplied an applicable rule or statutory provision. See Zavaglia v. Contributory Retirement Appeal Bd., 345 Mass. 483, 487 (1963). A decision is made upon an unlawful procedure if that administrative agency has issued its decision by utilizing or relying upon procedures not authorized by statute, agency rule or regulation, judicial decision, or Constitutional provision. See Fortier v. Dep't of Pub. Utilities, 342 Mass. 728 (1961).

II. Validity of the Commission's Decision

A. Substantial Evidence

The Commission's decision is supported by substantial evidence. The Commission properly concluded that the Department sustained its burden of proving, by a preponderance of the evidence, that there was reasonable justification for its action. The Department suspended Smith based on his disrespectful conduct, offensive language, and inappropriate behavior when he visited the House of Correction and instigated a verbal and physical confrontation with members of the Sheriff's Department. Smith's own testimony reflects that in response to Henry's instruction that he move his car, he stated "if it makes you feel like a big shot, I'll move my vehicle." In addition, Smith admits that when he attempted to re-enter the House of Correction he physically pushed Bailey's hand down, stating "don't put your hands on me." Smith also admitted that when the SERT team arrived at the lobby, he stated "you got your boys here."

The Commission properly found that the Department had reasonable justification for its action in suspending Smith, because it found the action was "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.” Specifically, Smith’s own testimony confirms the basis of three acts of disrespect: the “big shot” statement, the act of pushing Bailey’s hand down, and the “you got your boys here” statement. Accordingly, the Commission’s decision with regard to the acts of disrespect is supported by substantial evidence.

Smith asserts that the Commission’s determination that Smith instigated the confrontation by moving aggressively toward Deputy Reed and bumping his chest is unsupported by substantial evidence. The record includes Bailey’s testimony that as the SERT team arrived, Smith began to directly confront the SERT team. The record also includes, through the testimony of Henry, that after Smith stated “you’ve got your boys here,” he directly confronted the SERT team, would not leave, and put his hands on Reed. Reed testified that after the SERT team entered the vestibule, Smith was agitated, entered Reed’s space, and pushed him on his right side. The record also includes Smith’s testimony that after exchanging words with Reed, he (Smith) turned to leave the House of Correction, that he never touched Reed, and he was jumped from behind by the House of Correction officers and taken to the ground. While Smith’s testimony may have conflicted with the testimony of the other officers, the Commission’s determination that Smith instigated a verbal and physical confrontation with Reed is nonetheless supported by substantial evidence.

B. Error of Law

Smith argues that the Commission’s decision is based upon an error of law. Smith asserts that the facts found by the Commission do not establish a reasonable justification for the Department’s actions, because the Commission improperly substituted its judgment for that of the Department. Smith argues that while the Department suspended him for “disrespectful

conduct, offensive language, and inappropriate behavior. . . and [that he] instigated a verbal and physical confrontation with members of the Suffolk County Sheriff's Department," the Commission merely found that Smith's conduct was "unprofessional and disrespectful conduct," not finding that Smith used any offensive language.

The Commission's decision was not based upon an error of law. The facts, as found by the Commission, included Smith's statements to Sheriff's Department officials which were not only disrespectful, but would also certainly qualify as offensive under the applicable Department rules. Rule 102, § 3 covers violations for conduct unbecoming of an officer, and § 9 covers violations for disrespectful conduct. Smith violated Department rules by making the statements "if it makes you feel like a big shot, I'll move my vehicle" "don't put your hands on me," and "you got your boys here." Moreover, neither Rule 102, § 3 nor § 9 requires the use of an epithet or vulgar word in order for an officer to violate the rules. On the facts found by the Commission, the Commission properly concluded that the Department had a reasonable justification for suspending Smith.

Moreover, the Commission properly found that Smith "instigated a verbal and physical confrontation" based on its finding that, after being told to leave the House of Correction, Smith told Reed to "get out of [his] face", moved toward him aggressively, and pushed Reed. Finally, Smith argues that the Commission erroneously found Smith's parking in a "No Parking" zone an instance of disrespectful conduct under the Department rules. Smith's argument is without merit. The Commission specifically found that Smith's parking in an illegal area in addition to his "big shot" statement to Henry constituted his initial display of disrespectful conduct. Accordingly, on

the facts found by the Commission, the Department's ten-day suspension of Smith was reasonably justified.

C. Unlawful Procedure

Smith also contends that the Commission's decision was based upon unlawful procedure. First, Smith asserts that because the Commission noted that Smith appeared "agitated" in Reed's presence at the hearing, that the Commission therefore improperly considered Smith's demeanor during the hearing as evidence of Smith's behavior at the time of the June 14, 2000 incident.⁴ This argument is without merit. The Commission did not rely on Smith's conduct at the hearing in reaching its decision. Rather, it appears that the Commission was simply trying to note the concern raised by Smith's counsel; namely, that while at the hearing, Reed had made an inappropriate gesture toward Smith.

Next, Smith argues that because the Commission found Smith to be "hot-tempered" during the incident, that this finding was improperly based upon its notation that Smith was "agitated" in Reed's presence. This argument is likewise without merit. Smith mischaracterizes the Commission's findings. The portion of the findings of fact to which Smith refers describes the Commission's findings as to the credibility of Smith's testimony, based upon Smith's version of the events when contrasted to the testimony of several others, who characterized Smith's demeanor at the time of the incident as hot-tempered. The Commission's finding in no way


⁴ In its findings of fact, the Commission noted Smith's demeanor in the context of Smith's counsel's allegation that Reed made an improper hand gesture and wink towards Smith during the hearing. Smith's counsel raised the issue and requested that he be able to call his co-counsel to testify to Reed's alleged conduct. The Commissioner stated that, as he did not see it, the hearing should move forward, but also stated that the Commission noted counsel's concern.

relied on or mentioned its observation that Smith was "agitated" in Reed's presence at the hearing.

Finally, Smith argues that the Commission's decision was based upon unlawful procedure because the Commission failed to make a credibility determination regarding Reed. This argument is likewise without merit. Smith's testimony with regard to whether he instigated the verbal and physical confrontation largely differed from that of Reed and the other officers. The Commissioner found that Smith's "testimony was largely crafted to place him in the best light possible rather than to offer a completely honest assessment of his actions." Consequently, it is clear that the Commission determined the testimony of Reed and the other officers to be credible. Accordingly, Smith's motion for judgment on the pleadings is denied and the Commission's cross-motion for judgment on the pleadings is allowed.

ORDER

For the foregoing reasons, it is hereby **ORDERED** that the plaintiff's motion for judgment on the pleadings be **DENIED** and the defendants' cross-motion for judgment on the pleadings be **ALLOWED**.


Geraldine S. Hines
Justice of the Superior Court

DATED: March 9, 2009