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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

BRIAN SWEET *vs.* CIVIL SERVICE COMMISSION & another. [FN1]

11-P-1638

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, State Trooper Brian Sweet, appeals from the imposition of a disciplinary suspension of fifteen days without pay. A trial board (board) of the Department of State Police (department) found Sweet guilty of 'unbecoming conduct' causing 'disrepute' to the department and 'discredit [to] himself,' in violation of art. 5.2 of the rules and regulations of the department. The board recommended the sanction. The Colonel/Superintendent of the department imposed it.

Pursuant to G. L. c. 22C, § 13, and G. L. c. 31, § 43, Sweet appealed to the Civil Service Commission (commission). A hearing commissioner conducted a de novo evidentiary hearing, made detailed findings of subsidiary facts, reached the same conclusion as the board and Colonel/Superintendent, and maintained the fifteen-day suspension without pay. Pursuant to G. L. c. 31, § 44, and G. L. c. 30A, § 14, Sweet appealed in turn to the Superior Court. By a comprehensive written memorandum of decision, a judge found the decision of the commission to be free of legal error, supported by substantial evidence, and neither arbitrary, capricious, nor abusive of discretion. G. L. c. 30A, § 14(7)(*c*), (*e*), (*g*). The judge entered judgment on the pleadings in favor of the commission and the department, in accordance with Mass.R.Civ.P. 12(c), 365 Mass. 754 (1974). For the following reasons, we now affirm. *Background.* The evidence presented at the hearing permitted the hearing commissioner to find the following facts by a reasonable preponderance. On March 10, 2007, Sweet was performing a night patrol shift. At approximately 11:30 *P. M.,* he responded to a radio call for assistance from Trooper Justin Peledge and traveled to a supermarket parking lot in Chelsea. At least thirty 'low-rider' vehicles occupied the lot, an indication of a probable drag race. Sweet positioned his cruiser so as to block the exit of the low-rider vehicles from the lot to the adjacent roadway. That maneuver prevented approximately fifteen vehicles from leaving. Sweet and Peledge got out of their cruisers and approached the vehicles. Peledge drew his firearm, and Sweet and he ordered the drivers to turn off their vehicles and throw their keys from their windows. At some point during this action, Sweet kicked the car door of the complainant, Joel Santana. At the commission hearing, testimony differed over the question whether, when Sweet kicked the door of the vehicle, Santana had stopped and disengaged it or he was continuing to drive the car in reverse. The kick damaged the car and prompted Santana's formal complaint.

On May 29, 2008, in accordance with G. L. c. 22C, § 13, and art. 6.7 of the department's rules and regulations, a board convened to hear the complaint. Santana failed to appear. The board then granted Sweet's motion (through counsel) to dismiss the complaint. The board did so 'with prejudice.' On June 2, 2008, the Colonel/Superintendent ordered the board to reconvene. On August 26, 2008, the reinstated hearing of the board resulted in the fifteen-day suspension. The

subsequent proceedings have generated a timely appeal to this court.

Analysis. Sweet has appealed from the decision of the commission to the Superior Court and now to this court upon three grounds: (1) that, as a matter of law, the Colonel/Superintendent lacked authority to reinstate a hearing under the governing rules and regulations of the department and under the principles of issue preclusion; (2) that the finding of 'unbecoming conduct' lacked the support of substantial evidence; and (3) that the findings resulted from bias and prejudice on the part of the original investigating officer.

Like the Superior Court judge, we review these contentions from the face of the administrative record and under the standards of the Administrative Procedure Act, G. L. c. 30A, § 14(7).

1. *Authority of the Colonel/Superintendent to reinstate the disciplinary process.* We review this contention of law de novo under G. L. c. 30A, § 14(7)(*c*). It fails for several reasons. First, no provision of the rules and regulations prohibits the Colonel/Superintendent from reinstating a disciplinary hearing. To the contrary, art. 6.9 of the rules and regulations confers broad authority upon the Colonel/Superintendent to administer the board's process. That article characterizes all board results as 'recommended discipline' before final decision by the Colonel/Superintendent, with one notable exception. The Colonel/Superintendent may not alter a board finding of not guilty; 'such finding shall be final, conclusive and binding on all parties.' Art 6.9.6. Otherwise, '[a]ll judgments of guilt entered or, discipline recommended by [a board] . . . shall be subject to the approval of the Colonel/Superintendent and, when so approved, shall be final and conclusive except as otherwise provided by law.' Art. 6.9.5. The initial board's proposed dismissal with prejudice for failure of a complaining witness to appear did not constitute a finding of not guilty. The disciplinary process remained subject to the expansive authority of the Colonel/Superintendent.

Second, the doctrine of issue preclusion in administrative adjudications requires the presence of three elements: '(1) the identity or privity of the parties to the present and the prior actions, (2) identity of the cause of action, and (3) prior final judgment *on the merits*' (emphasis added). *Kobrin v. Board of Registration in Med.,* 444 Mass. 837, 843 (2005), quoting from *DaLuz v. Department of Correction,* 434 Mass. 40, 45 (2001). See *Almeida v. Travelers Ins. Co.,* 383 Mass. 226, 229-230 (1981) (precluded issue received actual adjudication). Preclusion requires disposition on the merits, not off the merits (as occurred here by reason of the absence from the original hearing of the complainant). The Colonel/Superintendent possessed authority to reinstate a proceeding designed to determine the facts.

Third, the Colonel/Superintendent obviously construed the rules and regulations to authorize his reinstatement action. As a general guideline of administrative law, the courts will defer to an agency's interpretation of its own rules so long as it does not apply them in an arbitrary, irrational, or inconsistent manner. See *Springfield v. Department of Telecommunications & Cable,* 457 Mass. 562, 572 (2010); *Fioravanti v. State Racing Commn.,* 6 Mass. App. Ct. 299, 302 (1978); *Forman v. Director of the Office of Medicaid,* 79 Mass. App. Ct. 218, 221 (2011). We respect the Colonel/Superintendent's reasonable interpretation and application of the rules and regulations in this instance.

2. *Substantial evidence.* Evidence submitted to the hearing commissioner in support of his findings was substantial. G. L. c. 30A, § 14(7)(*e*). Two corollaries of the substantial evidence doctrine are especially applicable here. First, a reviewing court may not 'displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.' *Southern Worcester County Regional Vocational Sch. Dist.* v. *Labor Relations Commn.,* 386 Mass. 414, 420 (1982). Second, in the circumstances of contradictory testimony, the determination of the credibility of witnesses naturally belongs to the administrative hearing officer able to observe their demeanor under the pressures of direct and cross-examination. See *Fisch v. Board of Registration in Med.,* 437 Mass. 128, 138 (2002); *Duggan v. Board of Registration in Nursing,* 456 Mass. 666, 674 (2010).

Here, the hearing commissioner assessed Sweet's position that he kicked Santana's car only to gain compliance with his command to shut off the vehicle and to prevent Santana from backing his

automobile into Peledge. The hearing commissioner observed that Peledge testified that he had not heard or seen Santana's car start up or back toward him. He weighed also Santana's testimony that he had already removed his keys from the ignition so as to shut his car off before the kicking incident. The hearing commissioner found 'that [Sweet] has fabricated almost every detail related to his encounter with [Santana].'

3. *Claimed bias of the original investigating officer.* Sweet contends that a remark by the officer originally assigned to investigate Santana's complaint, i.e., that Sweet was not an individual whom the department 'protects,' indicates bias in the prosecution of the complaint against him by the department. The hearing commissioner specifically credited the report of that comment, but concluded that it 'does not change my conclusion regarding the appropriateness of the discipline imposed here.' Article 6.7.3 of the department's rules and regulations provides that '[n]o member of a [board] shall sit in a hearing in which his . . . personal or official relations to either party or to counsel might properly raise a question of impartiality.' Our main concern is the impartiality of the decision maker, rather than the investigator. The investigating officer here was not a member of the board. More importantly, the effective fact finder and decision maker was the hearing commissioner from a position independent of any influence or culture of the department. Sweet's counsel had the opportunity to confront and cross-examine all witnesses against his client in the presence of that hearing commissioner. Finally, that hearing commissioner was aware of the investigator's comment and expressly nullified it as a factor in his findings and disposition. No bias infected the final decision. As a matter of substantial evidence or as a claim of action arbitrary, capricious, or abusive of discretion, this argument has no merit.

Judgment affirmed.

By the Court (Cypher, Grasso & Sikora, JJ.),

Entered: August 24, 2012.

FN1. DEPARTMENT OF STATE POLICE.

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