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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2013-02245-H

BRIAN SWEET¹

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION² &
DEPARTMENT OF STATE POLICE³

vs.

COLONEL TIMOTHY O. ALBEN⁴, plaintiff in counterclaim/
plaintiff in crossclaim

MEMORANDUM OF DECISION AND ORDER
ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This is an action in which both parties seek judicial review of a decision of the Civil Service Commission ("Commission"). The matter is before me on the Massachusetts Department of State Police's ("MSP") motion for partial summary judgment. After hearing, and for the reasons set forth below, MSP's motion is **DENIED**.

BACKGROUND

The summary judgment record, viewed in the light most favorable to the plaintiff, as the nonmoving party, contains the following facts material to this motion.

¹Defendant in counterclaim

²Defendant in crossclaim

³Plaintiff in counterclaim/Plaintiff in crossclaim

⁴Superintendent of State Police

On October 28, 2010, after a Trial Board hearing, Massachusetts Department of State Police ("MSP") dishonorably discharged Brian Sweet from his position as a State Police trooper. The Trial Board found "just cause" for: 1) unbecoming conduct; 2) insubordination; 3) violation of workplace violence rules; and 4) untruthfulness. On or around the same day, Colonel Marian J. McGovern, acting in her capacity as an authorized Massachusetts firearm licensing authority, revoked Sweet's Massachusetts firearms license. (Although the Colonel stated that she had "independently determined " to revoke his license to carry "based upon a review of [Sweet's] employment history . . . and [Sweet's] unwillingness or inability to correct [his] negative behavior," the facts and circumstances relating to the disciplinary charges Sweet ultimately appealed, were among the reasons provided for the license determination.

At that time, Colonel McGovern notified Sweet in writing of his right to appeal the revocation decision under M.G.L. c. 140, § 131(f). Although Sweet acknowledged receipt of the revocation decision and notification of his right to appeal, he did not appeal the revocation decision in the time frame mandated by the statute. As a result of the revocation, Sweet remains unlicensed to possess a firearm in the Commonwealth of Massachusetts.

Pursuant to M.G.L. c. 31, § 41-43, Sweet appealed his termination to the Civil Service Commission ("Commission"). On May 16, 2013, after a hearing on the issue, the Commission issued a 59-page decision. The Commission determined that MSP lacked just cause on each charge against Sweet except for one charge of untruthfulness. Exercising its authority under M.G.L. c. 31, § 43, the Commission then modified Sweet's penalty from dishonorable discharge to a 60-day suspension. The Commission further ordered that Sweet be reinstated to permanent duty at the end of the suspension, without further loss of compensation or benefits.

The next month, under M.G.L. c. 30A, § 14(7), Sweet filed an action in Middlesex Superior Court appealing the Commission's decision and imposition of a 60-day suspension on the untruthfulness charge. A few days after Sweet filed that appeal, MSP also filed an appeal of the Commission's decision in Suffolk Superior Court. By agreement of the parties, the cases were consolidated and transferred to be heard together in this Court.

After 60 days passed, MSP did not reinstate Sweet. Consequently, on July 31, 2013, Sweet filed a Motion to Compel Compliance with the Commission's Order, during the pendency of the two appeals of the Commission's decision. The court (Wilson, J.) rejected the motion to compel the reinstatement.

MSP then served Sweet with a Motion for Partial Summary Judgment. On April 8, 2014, the court (Gordon, J.) ordered limited discovery on the question of whether the requirement to possess a firearm had been applied universally to a Trooper's eligibility for employment.

On January 4, 2014, Sweet filed an application for a license to carry a firearm. Colonel McGovern denied the application based on her determination that he was not a suitable person to possess a firearms license, pursuant to M.G.L. c. 140, § 131(f). Sweet appealed the Colonel's denial to the Framingham District Court. The court dismissed his appeal and found that he must wait until his license to carry a firearm expired before reapplying. Subsequently, on August 26, 2014, Sweet submitted an application for a license to carry a firearm to Colonel Timothy Alben. Colonel Alben denied the application on September 6, 2014.

Article 5.45 of the Department of State Police Rules & Regulations Rules of Conduct provides:

Members must possess a valid, unrestricted Massachusetts firearms license. Members who know or have reason to believe that their firearms license has expired, or has been suspended, revoked or restricted shall notify their duty assignment supervisor forth with

MSP asserts that the Commission does not have the authority to reinstate Sweet because he does not possess a valid license to carry a firearm, a requisite to police hiring under Article 5.45 of the Massachusetts State Police Departments Rules and Regulations. MSP seeks a declaration to that effect and moves for summary judgment on Count II, Paragraphs (j), (k), (n), and (o) of its Complaint and Count II, Paragraphs (j), (k), (n), and (o) of its Counterclaim. In addition, MSP argues that the Commission's decision violates public policy by requiring the reinstatement of a trooper who cannot meet the essential requirements of the job.

DISCUSSION

"Summary judgment is appropriate where there are no genuine issues of material fact and the record before the court entitles the moving party to judgment as a matter of law." Brown v. F.L. Roberts & Co., Inc., 452 Mass. 674, 678 (2009). See Mass. R. Civ. P. 56(e). An issue of fact is genuine if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. Brooks v. Peabody & Arnold, LLP, 71 Mass. App. Ct. 46, 50 (2008). Material facts are those that might affect the outcome of the suit under governing law. Genesis Tech. & Fin., Inc. v. Cast Navigation, LLC, 74 Mass. App. Ct. 203, 207 (2009), citing Carey v. New England Organ Bank, 446 Mass. 270, 278 (2006).

A party seeking summary judgment may satisfy its burden of demonstrating the absence of a triable issue either by submitting affirmative evidence demonstrating an entitlement to relief (or the opposing party's lack of such an entitlement), or by demonstrating that the opposing party

has no reasonable expectation of proving an essential element of their case. Flesner v. Technical Comm'us Corp., 410 Mass. 805, 809 (1991). In deciding a motion for summary judgment, the motion judge must consider all factual allegations, and draw all reasonable inferences therefrom, in favor of the nonmoving party. Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113, 119 (2010).

The purpose of M.G.L. c. 31, § 43, is to require just cause for the action taken against civil service workers. As a further safeguard, the Commission has the power to modify penalties against workers under M.G.L. c. 31, § 41-43. This power of reinstatement and modification of penalties is clearly defined and well-settled. Cushing v. Fire Comm. of Brookline, 345 Mass. 418 (1963). Generally speaking, administrative agencies are given broad discretion to impose and enforce penalties within their delegated authority, but that discretion is "not without bounds." Faria v. Third Bristol Div. of District Court Dept. of Trial Court, 14 Mass. App. Ct. 985, 986 (1982). Courts have set aside Commission decisions where there was no support in the record for the decision or there were otherwise errors in law. Commissioner of the Metropolitan Dist. Commn. v. Civil Service Commn., 13 Mass. App. Ct. 20 (1982); Superintendent of Belchertown State Sch. v. Civil Serv. Commn., 9 Mass. App. Ct. 756 (1980); Selectmen of Framingham v. Civil Serv. Commn., 366 Mass. 547 (1974). Review of Commission decisions are governed by G.L. c. 30A, § 14. "Review of conclusions of law is *de novo*. The commission's factual determinations must be supported by substantial evidence, meaning 'such evidence as a reasonable mind might accept as adequate to support a conclusion.' A reviewing court must consider the entire administrative record and take into account whatever 'fairly distracts from its

weight.’ We defer, however, to the credibility determinations made by the hearing officer.”

Andrews v. Civil Serv. Commn., 446 Mass. 611, 615-616 (2006).

There is no question that the Colonel of the Massachusetts State Police has both the power and the public responsibility to evaluate the fitness for duty of each trooper under her command, and in particular to assess his or her fitness to carry a gun. See Boston v. Boston Police Patrolmen’s Association, 8 Mass. App. Ct. 220, 226 (1979). Furthermore, it is clear that “[a] license may be revoked or suspended by the licensing authority if it appears that the holder is no longer a suitable person to possess such a license.” G.L. c.140, § 131. The Colonel, as the licensing authority, is vested with “broad discretion” and “considerable latitude” in making the determination as to suitability. See Howard v. Chief of Police of Wakefield, 59 Mass. App. Ct. 901, 902 (2003).

G.L. c. 140, § 131(f), provides a right of appeal of an order denying or revoking a license to carry to the district court. The District Court judge may direct that a license be issued or reinstated if the court finds that the licensing authority had no reasonable grounds for refusing to issue or reinstate a license. To warrant such a finding it must be shown that the refusal was arbitrary, capricious, or abuse of discretion. Chief of Police of the City of Worcester v. Holden, 470 Mass. 845, 861 (2015). Sweet has just such an appeal scheduled for May 1, 2015

However, a material question of fact exists as to whether members of the Massachusetts State Police are required to possess a valid, unrestricted license to carry a firearm. Article 5.45 states that troopers must possess “a valid, unrestricted Massachusetts firearms license.” The very next sentence states that troopers who know or have reason to believe that their license has either “expired, or has been suspended, revoked or restricted shall notify their duty assignment

supervisor forth with.” Clearly, the requirement of a valid, unrestricted license applies to those troopers whose license is expired, suspended or restricted as well as those whose license is revoked. Although the documents are highly redacted, it appears that exceptions to this rule have been made in the past with some regularity. MSP argues that although there may have been exceptions, there have been no exceptions for those with revoked licenses. The court does not find this distinction persuasive. In addition MSP Rules and Regulations do not require termination of the trooper who does not have a valid, unrestricted license to carry a firearm. The Colonel of the State Police has the authority to “make all necessary rules and regulations for the government of the department, for reports to be made by employees of the department and for the performance of the duties of said employees.” G.L. c. 22C, § 3. Under the statute, the Colonel has established disciplinary guidelines applicable when a trooper is found to have violated the Rules and Regulations. Termination is not a form of discipline imposed on a member for violating Rule 5.45.

Furthermore, when viewed in a light most favorable to Sweet, the record does not indicate that the decisions to revoke his license and to deny reinstatement of his license were independent from the termination decision. Indeed, MSP has acknowledged that “the facts and circumstances relating to the disciplinary charges Sweet ultimately appealed were among the reasons provided for the license revocation.” Memorandum of Law in Support of Motion for Partial Summary Judgment, n.1. Notably, the Commission concluded that “[i]t is implausible to believe that the MSP would choose to judge one of its members by such a seriously flawed process unless it was driven, or at least infected by, predisposition for ulterior motive at some level . . .” Therefore, viewing the record favorably for Sweet, it cannot be inferred that the

license revocation decision was unsullied by the allegations underpinning the termination decision.

Sweet will have an opportunity to address whether the Colonel had no reasonable grounds for refusing to reinstate his license to carry a firearm in the District Court. It is illogical to believe that the legislature intended that a licensing authority could do an end run around the requirements of G.L. c.31, § 43, requiring just cause for action against civil service workers, through pretextual actions. The Colonel cannot choose to deny Sweet a license to carry a firearm and then use that voluntary denial as an excuse to violate a legally binding directive. Otherwise, a trooper's contractual right not to be discharged except for just cause is meaningless. See City Manager of Worcester v. New England Benevolent Association, 85 Mass. App. Ct. 119 (2014).

MSP relies heavily upon Kraft, which actually undermines their argument. MSP relies upon Kraft for the "well recognized authority" of law enforcement heads "to determine the fitness of an officer to carry a firearm. Kraft v. Police Comm'r of Boston, 417 Mass. 235, 239 (1994). But what MSP fails to acknowledge is that Kraft also stands for the proposition that such authority is subject to a duty of good faith. In Kraft a police officer, who was ordered reinstated by court order, was required to undergo a psychiatric examination before reissuance of a firearm. New medical records surfaced; the officer failed a new round of psychological testing. The police commissioner refused to recertify his license to carry, but did not refuse to reinstate the officer.

The officer brought an action for civil contempt. The court emphasized that the police commissioner had shown a "good faith exercise of managerial discretion," Id. at 240. The court was unwilling to interfere with the commissioner's authority and found no inconsistency between

the reinstatement order and the commissioner's action. The court was unwilling to find the commissioner in contempt "in the absence of a showing that, . . . the commissioner was engaged in pretext or device motivated by hostility towards the plaintiff rather than by a desire to fulfill his managerial responsibilities."

The Commission did not order The Colonel to reinstate Sweet's license to carry. It ordered his reinstatement, which is within its authority and does not violate public policy or interfere with the Colonel's statutory authority.

ORDER

For the foregoing reasons, MSP's motion for partial summary judgment is **DENIED**.

(Rosalind H. Miller)

Rosalind H. Miller
Justice of the Superior Court

Attest:

Dia S. Roberts-Tyler
Dia S. Roberts-Tyler

Date: April 27, 2015

Entered: 5/4/15