

12/1/07

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 10-00086-G

NOTICE SENT
GW 12.11
B/HAW
T.M.B.
MASS. A.G.
D.H.
G.T.

BRIAN SWEET

vs.

CIVIL SERVICE COMMISSION & another¹

(ART)

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION
FOR JUDGMENT ON THE PLEADINGS**

Plaintiff Brian Sweet ("Sweet") seeks G. L. c. 30A, § 14(7) review of defendant Civil Service Commission's ("Commission") decision to partially uphold the Massachusetts Department of State Police's ("Department") discipline of Sweet. For the reasons discussed below, Sweet's motion for judgment on the pleadings is **DENIED** and the Commission's order is **AFFIRMED**.

BACKGROUND

The following is taken from the Commission's decision with supplementation from the administrative record:

I. Traffic Stops

A. May 9, 2007 Stop

At 11:00 p.m. on May 9, 2007, Sweet, a Massachusetts state trooper, pulled over a motorcycle driven by Stephen Whalen ("Whalen") on Route 93 South in Medford and cited Whalen for excessively high handlebars, an unlawful helmet, and an exhaust system that was too

¹ Massachusetts Department of State Police

loud. He warned Whalen that he would not "beat" this citation and that he would file for a hearing before the Registry of Motor Vehicles ("RMV") to revoke his registration. Whalen became angry and put his finger in Sweet's face. Sweet repeatedly asked Whalen to put his finger down and Whalen eventually complied.

As this scene unfolded, Massachusetts State Trooper Jodi Gerardi ("Gerardi") drove past on Route 93 North. She noticed a police cruiser stopped on 93 South but did not know it was Sweet's cruiser. Gerardi attempted to contact the trooper involved via radio but received no response. She decided to go check on the trooper but before she could do so Sergeant Derek Outerbridge ("Outerbridge") stated over the radio that he would drive to the scene. Outerbridge pulled behind Sweet just as Sweet cleared the stop.

Following the stop, Whalen drove to a Medford restaurant. While there, he twice saw Sweet drive by in his cruiser at a slow speed. Whalen believed that Sweet was following him. The stop that night was not Whalen's first interaction with Sweet. In April 2006, Sweet cited Whalen for the same violations. In March 2006, Sweet pulled over Whalen's car and cited him for excessive window tint. Whalen had contested both citations and had been found not responsible. Concerned that this latest interaction was a sign that Sweet was purposefully harassing him, Whalen filed a complaint against Sweet on May 10, 2007 with the Department.

On the night of Sweet's most recent stop of Whalen, Sweet wrote a log entry regarding the incident, which stated in part:

Upon being issued citation, operator becomes belligerent with Tpr Sweet. Oper points his finger in Tpr Sweet's face and begins yelling at him. Tpr Sweet advises oper several times to remove his finger out of his face and sit back on the m/c. At this time Sgt Outerbridge and Tpr Gerardi are traveling N/B side and *observe the exchange . . . (emphasis added).*

Sweet asked Gerardi the following day whether she saw his altercation with Whalen the night before. Gerardi said she did not. Despite this conversation, Sweet failed to correct his log entry.

A few days after the stop, Sweet sent an immediate threat form for loss of license to the RMV along with an incident report. Sweet asserts that the RMV instructed him to use the form even though he was seeking to have Whalen's registration revoked. In the incident report, he wrote: "Due to Mr. Whalen's attitude and refusal to comply with M.G.L.'s, I respectfully request the RMV inspect his motorcycle for compliance. I further request the RMV revoke MA registration . . . if Mr. Whalen fails to comply with above MGL's." The signature line on the immediate threat form for "Police Chief or Authorized Person" was left blank.

On June 11, 2007, the RMV held a hearing with Whalen and determined there was no "immediate threat" necessitating revocation of his registration. On June 19, 2007, a clerk magistrate found Whalen "not responsible" for the loud exhaust citation and "responsible" for the handlebar and helmet citations issued on May 9, 2007. Whalen appealed this decision and, a month later, a district court judge held that he was "not responsible" for the handlebar and helmet citations but "responsible" for the loud exhaust citation.

B. Subsequent Stops

In the months following May 9, 2007, Sweet pulled over Whalen twice more. On June 8, 2007, Sweet stopped Whalen, took pictures of his motorcycle, and cited him for a third time for high handlebars, loud exhaust and improper helmet. On August 9, 2007, Sweet cited Whalen for a fourth time for the same violations and again took pictures of his motorcycle. At the time Sweet made the August stop, Sweet was five to eight miles outside his patrol area. The stop prompted Whalen to subsequently amend his complaint against Sweet to reflect what he perceived as further harassment.

II. Department Trial Board's Decision

Following an investigation of Whalen's complaint, the Department Trial Board ("Board") convened and held a full hearing. In a decision dated August 3, 2009, the Trial Board found Sweet violated Massachusetts State Police Rules and Regulations ("MSPRR") Article 5.8.2 because he "demonstrated a lack of knowledge of the application of laws required to be enforced, as well as a lack of proper procedure."² Specifically, the Board determined that Sweet had submitted the immediate threat form inappropriately after Outerbridge both refused to sign the document and suggested there was insufficient evidence that Whalen was an immediate threat.

The Board also found that Sweet exhibited untruthfulness in violation of MSPRR Article 5.27.3 because he: (1) wrote a log entry stating that Outerbridge and Gerardi observed the exchange between him and Whalen even though neither saw their altercation; and (2) falsely stated that the RMV had authorized the use of the immediate threat form.³ Finally, the Board held that Sweet violated MSPRR Article 5.5.3 because he had left his patrol area without permission while executing the stop on August 9, 2007.⁴

As a result of these violations, the Board recommended the following disciplinary action for Sweet: (1) a six-month transfer out of Troop-A; (2) a loss of ten days accrued time; and (3) five days suspension without pay.

² Article 5.8.2 states: "Unsatisfactory performance may be demonstrated by a lack of knowledge of the application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the member's rank, title, or position; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving State Police attention; or absent without leave."

³ Article 5.2.7.3 states: "No member or civilian employee shall, in the course of his/her official duties, execute, file, or publish any false written report, minutes or statements, knowing the same to be false."

⁴ Article 5.5.3 states: "A member assigned to a patrol or post shall not leave the patrol or post except for police necessity or personal necessity. If required to quit such patrol or post, members shall first receive permission to leave from their duty assignment supervisor or proper authority."

III. The Commission's Decision

Unhappy with the Board's ruling, Sweet filed an appeal with the Commission. The Commission conducted a de novo hearing in which several witnesses testified including Whalen, Gerardi, and Sweet. Three months later the Commission issued a decision.

The Commission concluded that Sweet violated MSPRR Article 5.27.3 when he failed to correct his log note after learning that Gerardi had not observed the exchange between him and Whalen. It also found that Sweet violated MSPRR Article 5.8.2 by filing the immediate threat form. The Commission determined that Sweet, believing that Whalen was a member of a Medford motorcycle club, had filed the form in order to retaliate against the club for their harassment of him.

Nevertheless, the Commission held that Sweet did not violate MSPRR Article 5.5.3 on August 9, 2007 because, although he had technically violated the article, such violation was the product of a widely accepted practice for which troopers rarely faced punishment. It also found that the Department's discipline of Sweet was inappropriately harsh, punitive, and perhaps influenced by an ulterior motive. Consequently, it modified the Department's discipline, rescinding the six-month involuntary transfer.

DISCUSSION

A party aggrieved by a final decision of the Commission may seek judicial review under G. L. c. 31, § 44. 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), and cases construing those standards." *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 242 (2006). Pursuant to G. L. c. 30A, § 14(7), the court may overturn a Commission's decision if it is

arbitrary, capricious, an abuse of discretion, based upon error of law, or unsupported by substantial evidence.

Sweet contends that the Commission's decision to uphold his suspension without pay and forfeiture of accrued time off was invalid and improper. A careful review of the administrative record, however, reveal that the decision was supported by substantial evidence.

At the hearing, Sweet did not contest Gerardi's testimony that she told Sweet the day after the May 9, 2007 stop that she had not seen the altercation between him and Whalen. Furthermore, it is undisputed that Sweet never changed the log entry. Consequently, the Commission could properly conclude that Sweet had violated MSPRR Article. 5.27.3 because, absent correction, the log entry contained information Sweet knew to be false...

Evidence also supports a conclusion that the filing of the immediate threat form was retaliatory and so violated MSPRR Article 5.8.2.⁵ Sweet testified that beginning in 2006 he had been repeatedly harassed by a Medford motorcycle club and that he was frustrated because he believed that the Department had failed to adequately support him with respect to this harassment. While Sweet stated at the hearing that he did not know whether Whalen was a member of the club on May 9, 2007, the frequent stops of Whalen is a strong indication that Sweet was singling him out, particularly because Whalen was repeatedly found not responsible for the citations issued. Moreover, in a June 5, 2007 memorandum Sweet stated that, "Whalen is a member of a motorcycle club located in Medford . . . I have been continually harassed by members of this club." All this lends plausibility to the Commission's finding that the filing of

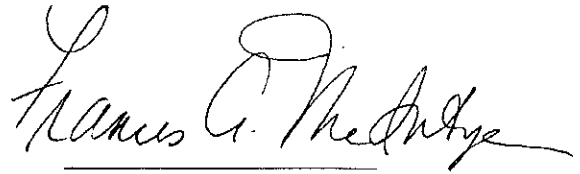
⁵ Sweet suggest that the Commission's finding in this regard was improper because the Board's decision made no mention of retaliation. However, the Commission is required to "conduct a de novo hearing for the purpose of finding the facts anew" and "decides whether there was a reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." (internal quotes omitted) *Falmouth v. Civil. Serv. Comm'n*, 447 Mass. 814, 823 (2006). As discussed below, based on the facts found by the Commission, it could have concluded that retaliation occurred.

the immediate threat form was, at least in part, a retaliatory action related to Sweet's perceived harassment by the motorcycle club.⁶

ORDER

For the foregoing reasons, Sweet's motion for judgment on the pleadings is **DENIED** and the Commission's decision is **AFFIRMED**.

So ordered:

A handwritten signature in black ink, appearing to read "Frances A. McIntyre", written in a cursive style.

Frances A. McIntyre
Justice of the Superior Court

Dated: June 17, 2011

⁶ Sweet makes much of the fact that the Commission found that his discipline may have been influenced by ulterior motives and argues that such a finding required the Commission to vacate the Board's decision. It is certainly the case that the Commission credited a fellow Trooper's statement that, "there are people on the job we protect and [Sweet] is not one of them." However, as the Commission correctly observed, one cannot ignore the evidence indicating that Sweet acted improperly with regards to Whalen. The Commission therefore acted appropriately when it reduced Sweet's discipline to take into account the possibility of bias but refrained from overturning the entirety of the Department's determination.