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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 09-4334-B

notice sent 6/30/10
M.F.M.
H.L.G.

(mm)

NANCY DALRYMPLE

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION and TOWN OF WINTHROP

MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

Pursuant to G. L. c. 31, § 44 and G. L. c. 30A, § 14, plaintiff Nancy Dalrymple brought this action challenging the decision of the Massachusetts Civil Service Commission upholding the Town of Winthrop's actions in suspending her from her position as a police officer due to her refusal to comply with an order to undergo a fitness for duty evaluation. Claiming that it was based upon an error of law, unsupported by substantial evidence, and arbitrary and capricious, the plaintiff asks this court to reverse the Commission's decision. The action is now before this court on the parties' cross Motions for Judgment on the Pleadings. For the following reasons, the plaintiff's motion is **DENIED**, the Town of Winthrop's motion is **ALLOWED**, and the Civil Service Commission's decision is **AFFIRMED**.

BACKGROUND

The record reveals the following facts. Plaintiff is a police officer with the Town of Winthrop and was injured in the line of duty on or about September 25, 2006, when she tripped and hit her chest, suffering a chest contusion that prevented her from working. She subsequently received benefits under G. L. c. 41, § 111F through January 2007. A day or two after being

injured, the plaintiff claims that the Town ordered her to be examined and treated for her injuries at Concentra Medical Center. The town disputes this and claims that while they request that employees who are injured in the line of duty have an initial examination with Concentra, employees always have the option of being examined and treated by their own physician.

In November 2006, the plaintiff was evaluated by Dr. Alan Rodgers of Concentra. According to the Town, the plaintiff was then ordered, pursuant to the provisions of the Collective Bargaining Agreement in place at the time and the provisions of G. L. c. 41, § 111F, to be examined by Dr. Smiley, an independent medical examiner. The plaintiff denies being informed that Dr. Smiley's examination by Dr. Smiley was to serve as an independent medical examination. In December 2006, plaintiff was denied permission to return to light duty.

Based on observations from Dr. Smiley and Dr. Rodgers, plaintiff was allowed to return to light duty work on January 29, 2007, and began performing dispatch duties. She was not issued a firearm.

In a hand-written note on the bottom of a "Physician Activity Status Report" from Concentra, is written: "Dr. Rodgers: Please call Mike Bertino". Mike Bertino, the Finance Director for the Town of Winthrop, testified before the Civil Service Commission that his responsibilities include review of medical documentation concerning employees out on leave and interacting with the Town's insurance companies regarding employee insurance claims. He also testified that he safeguards all such medical information in locked cabinets in his office and that security pass codes are required to enter his office.

On March 22, 2007, the plaintiff was examined by Dr. Eric J. Ewald. Based on Dr. Ewald's subsequent recommendation, the Chief of Police ordered the plaintiff to return to full duty on April 27, 2007. The plaintiff's union filed a grievance on her behalf regarding the Chief's order for her to return to full duty. An arbitrator, after conducting a full hearing on this issue, determined on December 27, 2008 that the Town did not violate the Collective Bargaining Agreement by ordering the plaintiff to return to full duty and accordingly denied the grievance.

The plaintiff reported for full duty at the Winthrop Police Station at 4:00 P.M. on April 27, 2007. When she entered the control room at the station, she expected to be issued a firearm. However, she was not issued one and was assigned to "inside" duties by the command sergeant on duty at the time. On April 28, 2007, she once again reported for full duty and was this time handed one of the Chief's personal weapons by a lieutenant. Sometime shortly after April 29, 2007, plaintiff received e-mail correspondence from the Chief informing her that she needed to qualify, with the assistance of Lieutenant Terrance Delahanty, on a newly-issued weapon, a "Smith and Wesson 40 caliber", that was being issued to all officers. Prior to her leave, plaintiff had been issued a 9mm Beretta Short Stack firearm that was purchased specifically for her because it was a smaller handgun and she has a small hand.

During May 2007, plaintiff trained on the new weapon with Lt. Delahanty. On May 21, 2007, the Chief approached plaintiff and ordered her to "go down and qualify" on the new firearm. The plaintiff told the Chief that she had been training with Lt. Delahanty and that the process of qualifying was going to take "some time." The Chief instructed plaintiff to come into

his office along with Lt. Delahanty, where he asked her if she was disobeying an order. She responded that she was not, and was working with Lt. Delahanty to qualify on the new firearm.

During this meeting, plaintiff began to have trouble breathing and so informed the Chief and Lt. Delahanty. She declined an offer by the Chief and Delahanty to call an ambulance or a relative for her and informed them she would be going home sick. The plaintiff left the police station and had her blood pressure checked at the fire station. The fire personnel informed her that her blood pressure was "very high." Plaintiff then drove home.

Plaintiff did not report to work after May 21, 2007, and began using accrued sick time. Sometime on or around June 7, 2007, she received a letter from the Police Chief asking her to provide medical documentation justifying her sick leave. Plaintiff hand-delivered to the Police Chief a note from Dr. Kumar, a cardiologist that she had begun seeing in April 2007, which stated that she was "under the care" of his office. Plaintiff continued to use her accrued sick time after June 2007.

The Police Chief sent the plaintiff a letter on September 10, 2007, claiming that plaintiff had missed two scheduled medical exams on July 27 and August 15, which were required to help the Town manage her work related injury claim. He ordered the plaintiff to be examined by Dr. Pulde on September 17, 2007. The plaintiff testified that she had not been informed of those appointments in a timely manner and also that she did not have a work-related injury claim pending but was rather using accrued sick time. During cross-examination, plaintiff

acknowledged that as part of the then-ongoing grievance procedure, she was seeking to be paid 111F benefits for sick days.

On October 15, 2007, plaintiff received a letter from the Chief of Police stating in relevant part: "Pursuant to the sick leave provisions of the Collective Bargaining Agreement, I am ordering you to undergo a physical examination with Dr. Stefano Kale, Medical Director of Cambridge Health Alliance on October 25, 2007 at 11:00 A.M." Under the Collective Bargaining Agreement, absences that exceed three days will be paid for "only on submission of a doctor's certificate" satisfactory to the Chief. Article XIV, Section 4 of the Collective Bargaining Agreement states: "If the Chief or his/her designee determines it to be in the best interest of the Town, it shall have an independent doctor make an examination and report."

Lt. Delahanty testified before the Civil Service Commission that other officers have been required to undergo fitness for duty examinations after being out on leave. According to Delahanty's review of personnel records, four officers have been required to undergo independent medical examinations before returning from leave in which they were receiving 111F benefits.

On December 6, 2007, plaintiff was interviewed and examined by Dr. Kale. Plaintiff initially agreed to have her medical information released to the Police Chief, but withdrew her consent following the examination. Dr. Kale wrote a letter to the Police Chief noting this. To comply with the plaintiff's wishes, Dr. Kale never prepared a report.

On December 11, 2007, Town Manager Richard White sent a letter to the plaintiff stating that, "pursuant to G.L. Chapter 31 Section 41 please be advised that I intend to dismiss you from your position as a police officer for the Town of Winthrop. The reasons for contemplated action is your insubordination in failing to cooperate with a fitness for duty evaluation conducted by Dr. Stefano Kales..." A hearing regarding the matter was held on December 28, 2007.

On January 7, 2008, the Town Manager sent a letter to the Appellant stating in relevant part: "As a result of your failure to allow Dr. Kales to release a medical report to the Town of Winthrop, I find that you are insubordinate in your refusal to cooperate and consent to the release of the appropriate information and report from Dr. Kales to the Town. Due to your insubordination I have decided to suspend you for 5 days effective Thursday, January 10, 2008 and ending at the end of your 5th day of duty scheduled for Friday, January 18, 2008. Please be advised that if you fail to provide an appropriate release to allow Dr. Kales to issue his report to the Town of Winthrop you will be placed on administrative leave without pay when your suspension ends which will continue until a release is provided to the Town."

On January 18, 2008, the plaintiff filed an appeal of her suspension with the Civil Service Commission pursuant to G. L. c. 31, § 43. The plaintiff testified before the Commission that she believes she is fit for duty, that she is willing to provide medical documentation from her own physician stating that she is fit for duty, and she is willing to cooperate with a Town-designated physician on the question for fitness for duty without providing the Town with any information regarding her personal medical history. When asked by the Commissioner if there was specific medical information she did not want released to the Town or whether this was an

issue of principle, she responded, "both." The plaintiff stated that there was information in her medical records that related to a heart condition that could result in the Town trying to "retire her out". She also stated that any information included in a report by Dr. Kale could impact an application for life insurance.

On September 11, 2009, the Commission issued a decision denying the appeal. Pursuant to G. L. c. 31, § 44 and G. L. c. 30A, § 14, plaintiff Nancy Dalrymple is now bringing this action challenging the decision.

DISCUSSION

Pursuant to G. L. c. 30A, a court may reverse, remand, or modify an agency decision if the substantial rights of any party have been prejudiced because the agency's decision violated constitutional provisions or was not supported by substantial evidence. G. L. c. 30A, § 14(7) (2005). Under the substantial evidence test, the court determines "whether, within the record developed before the administrative agency, there is such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988), citing Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 521 (1971) (discussing substantial evidence test); see also G. L. c. 30A, §1(6) (defining substantial evidence). If there is substantial evidence, the court must affirm the agency's decision "even though [it] might have reached a different result if placed in the position of the agency." Seagram Distillers Co., 401 Mass. at 721, citing School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978). Judicial review is confined to the administrative record. G. L. c. 30A, § 14(5).

In reviewing an agency decision, the court must give due weight to the experience, technical competence, and specialized knowledge of the agency, and may not substitute its own judgment for that of the agency. G. L. c. 30A, § 14(7); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992); Southern Worcester County Reg'l Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 420-21 (1982). The court "must apply all rational presumptions in favor of the validity of the administrative action," Consolidated Cigar Corp. v. Department of Pub. Health, 372 Mass. 844, 855 (1977), and may not engage in a de novo determination of the facts. Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n, 401 Mass. 347, 351 (1987). The party appealing an administrative decision under G. L. c. 30A bears the burden of demonstrating its invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

The plaintiff contends that the Commission's decision was based upon an error of law, unsupported by substantial evidence, and arbitrary and capricious. Specifically, the plaintiff argues that (1) the Town of Winthrop singled her out in ordering her to undergo a sick leave examination (an order she claims is without precedent) and (2) the Town ordered her to disclose to them her personal medical information beyond what is necessary for the announced purpose of the exam (to determine fitness for duty).

The administrative record shows that substantial evidence supported the Commission's conclusions that the Town was within its lawful power to order Dalrymple to undergo an independent medical examination and that the plaintiff can not unilaterally determine which portions of a doctor's fitness for duty evaluation should be conveyed to the Town. The

administrative record contains within it "such evidence as a reasonable mind might accept as adequate to support the agency's conclusion." See Seagram Distillers Co., 401 Mass. at 721.

Specifically, with regards to plaintiff's claim that the Town of Winthrop singled her out in ordering her to undergo a sick leave examination, the plain language of the Collective Bargaining Agreement ("CBA") in effect at the time allows for such an examination. The CBA states that "absences that exceed three days will be paid for...only on submission of a doctor's certificate" satisfactory to the Chief. Article XIV, Section 4 of the Collective Bargaining Agreement states: "If the Chief or his/her designee determines it to be in the best interest of the Town, it shall have an independent doctor make an examination and report." The Commission found that "after personally witnessing one of his police officers complain of breathing problems while on duty and after several weeks of that employee taking extended sick leave, it was reasonable and appropriate for the Police Chief to require such an independent examination." Record at 290. The Commission found that the Town's actions were reasonable and that it should not be in the position of second-guessing such a decision. Id. Likewise, this court is not in a position to second-guess the findings of the Commission. This court can only review whether its findings were based upon substantial evidence, were arbitrary or capricious, or were made based on an error of law. Given the substantial evidence supporting the Town's position that was presented before the Commission, this court cannot find that the Commission's findings were unreasonable, arbitrary or capricious.

The Commission also found that the plaintiff can not unilaterally determine which portions of the doctor's fitness for duty evaluation should be conveyed to the Town and

dismissed any allegation on the plaintiff's part that her confidential medical information would not be properly safeguarded by the Town. These findings are also based on substantial evidence that a reasonable mind might accept as adequate. The Commission found that the plaintiff's position that she should be able to determine what portions of the fitness for duty evaluation should be conveyed to the Town is "unreasonable and would be in contravention of the statute." Record at 291. The Commission cites the case of Nolan v. Police Commissioner of Boston, 383 Mass. 625 (1981), in which the Supreme Judicial Court interpreted the powers of the Boston Police Commissioner to include determination of a police officer's "fitness to perform his duties or to return to full working status." The Commission reasonably concluded that that duty cannot be carried out if it is left to the police officer being examined to determine what portions of the fitness for duty evaluation will be transmitted to the Town. Record at 292. Furthermore, the Commission found that the plaintiff has failed to show that the Town violated its duty to keep her medical information confidential. Id. at 291. It found that Michael Bertino, the Town's Finance Director who testified before the Commission, was the appropriate person to receive and safeguard such information. Id.

This court may not engage in a de novo determination of the facts and must give due weight to the specialized knowledge of the Commission. G. L. c. 30A, § 14(7); Flint, 412 Mass. at 416, 420; Vaspourakan, 401 Mass. at 351; Southern Worcester County Reg'l Vocational Sch. Dist, 386 Mass. at 420-21. This court must only determine whether the Commission's conclusions were based upon evidence that a reasonable mind might accept as adequate. Seagram Distillers Co., 401 Mass. at 721. In the present case, all of the Commission's findings challenged by the plaintiff were based upon credible evidence that a reasonable mind might

accept as adequate, and the plaintiff has failed to meet the burden of demonstrating their invalidity. See Merisme, 27 Mass. App. Ct. at 474.

ORDER

Based on the foregoing, Dalrymple's Motion for Judgment on the Pleadings is **DENIED** and the Town of Winthrop's Cross-Motion for Judgment of Affirmance is **ALLOWED**. The decision of the Massachusetts Civil Service Commission is **AFFIRMED**.

Elizabeth M. Fahey
Associate Justice of the Superior Court

DATED: June 29, 2010