COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. SUCV 2016-3751-D

Notice sent
11/29/2017
J. A. P.
L.,C.,C. & P.
N. A. M.
R. M. B.
C. M. C.
H. B. P.
R. L. Q.,JR.

DANIEL OTERO,
Plaintiff,

vs.

THE CITY OF LOWELL and CIVIL SERVICE COMMISSION,
Defendants.

(sc) **AMENDED[1] MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

The City of Lowell ("City") disciplined plaintiff, Daniel Otero ("Mr. Otero") by suspending him for five-days for conduct unbecoming an officer. Otero has filed this appeal under G. L. c. 30A, § 14 from a final decision, dated October 27, 2016 ("Decision") of the Civil Service Commission ("Commission") upholding the City's decision to impose the five-day suspension. Pursuant to Standing Order 1-96, Mr. Otero has filed a Motion for Judgment on the Pleadings ("Motion"), which the Commission has opposed. After review of the administrative record, motion and memorandum and upon consideration of oral arguments, the Motion is **DENIED**.

BACKGROUND

Otero is employed as a Lowell Police Officer. He had a prior disciplinary record. On April 25, 2013, during an investigation of alleged harassment by a fellow officer against his ex-wife, "Ms. M" -- now Otero's wife – Otero told Lieutenant Buckley that Officer Golden had sent a video of their child was holding a laser pointer, with the light

[1] The Court amends its November 2, 2017 Memorandum to address the typographical errors on page 1, identified in the Attorney General's letter to the Clerk, dated November 21, 2017.

going on and off and that the child was penetrating herself in the vaginal area with the laser. Lt. Buckley determined that this description departed significantly from a description of the video that Otero provided at an earlier interview on December 12, 2012. He filed a report of possible child abuse against Officer Golden pursuant to G.L. c. 119, § 51A. Otero never filed such a report. During the DCH investigation, he gave a different account of the video than he gave on April 25, 2013. DCF found no substantiation for the 51A report, and the Middlesex District Attorney's Office closed its investigation into the matter. Otero and Ms. M. told investigators that the video had been lost.

Ms. M. then made a complaint against Officer Golden for domestic violence. Lt. Laferriere of the Internal Affairs department investigated the complaint and concluded that Officer Golden had exercised poor judgment in taking and sending the video, but did not violate police department rules and regulations in doing so. He concluded that Otero had provided differing reports of the video, had made a serious allegation against another officer which turned out to be unfounded. On February 12, 2014, Lt. Laferriere found that Officer Otero had violated rules and regulations by engaging in conduct unbecoming an officer. He delayed disseminating his report until August 12, 2014, because the District Attorney's investigation of Officer Golden was still pending.

Officer Otero received the findings of the internal affairs investigation, dated September 9, 2014, on September 11, 2014. Superintendent Taylor testified that, because he desires to protect confidentiality and privacy, he does not release the full findings of an Internal Affairs Investigation to interested parties until a decision has been finalized about the action the Department will take as a result of the investigation. On November

13, 2014, the Superintendent issued a Notice of Five Day Suspension to Officer Otero, based upon Lt. Laferriere's finding that Officer Otero had engaged in conduct unbecoming a police officer. Superintendent Taylor endorsed Lt. Laferriere's finding and increased the discipline because of Otero's past infractions, pursuant to the Department's policy of progressive discipline. That prior disciplinary history includes two official reprimands and one incident which result in counselling.

The City manager upheld the discipline based on a recommendation of an independent hearing officer who presided at Officer Otero's Appointing Authority hearing.

Officer Otero appealed the City's decision to the Commission on December 23, 2014. After an evidentiary hearing, the Hearing Officer issued the Decision, upholding the 5-day suspension. Otero timely appealed to this Court.

DISCUSSION

A. Standard of Review

Under G. L. c. 30A, § 14(7), this Court has limited power to set aside or modify the Decision. It may do so if his substantial rights may have been prejudiced because the agency decision is based on an error of law or on unlawful procedure, is arbitrary and capricious or unwarranted by facts found by the agency, or is unsupported by substantial evidence. G. L. c. 30A, § 14(7)(c)-(g). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1(6). The court must consider the entire record, including whatever "fairly detracts" from the agency's finding, but the Court has no power to substitute its judgment for that of the agency if the record contains substantial evidence to support conflicting propositions; nor

may it second guess the agency's judgment regarding credibility of witnesses and the weight to be given to particular evidence. See Doherty v. Retirement Commission of Medford, 425 Mass. 130, 135 (1997). When reviewing an agency decision, the court 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." G. L. c. 30A, § 14(7).

The appealing party bears the burden of demonstrating the invalidity of the agency decision. See Bagley v. Contributory Ret. Appeal Bd., 397 Mass. 255, 258 (1986). The Supreme Judicial Court has noted that the appellant's "'burden is heavy.'" Springfield v. Dep't of Telecomms. & Cable, 457 Mass. 562, 568 (2010) (citation omitted).

B. Imposition of Discipline

Officer Otero's principal argument is that the Commission lacked substantial evidence to accept Lt. Buckley's account as true. He cites several key aspects of Lt. Buckley's reporting. First, Lt. Buckley's 51 A report, made the same day as his police report, states that Ms. M. – not Officer Otero -- made the penetration allegations. Second, his December 12, 2012 police report did not mention the video. Third, his April 25, 2012 police report does not mention Ms. M putting her head in her hands and acquiescing to Officer Otero's statement. He also alleges that the Commission failed to make findings on numerous aspects of his favoritism/bias argument.

Lt. Buckley testified from personal knowledge about the April 25, 2013 meeting. The Commission found his testimony to be credible, even though there is little doubt that his reporting contained inconsistencies. Not only did the Hearing Officer have the

opportunity to see Lt. Buckley's testimony, but there were a number of accrediting facts. The Hearing Officer could reasonably view Lt. Buckley's contemporaneous police report of April 25, 2013 as the most persuasive evidence of the facts that Lt. Buckley observed. Moreover, Officer Otero knew that Lt. Buckley intended to file a 51A Report against Officer Golden and had the chance to set the record straight, but did not. The Commission could view that fact as corroborating Lt. Buckley's testimony that he had received a report of child abuse, not just a vague statement about a small and unclear video.

It was for the Commission to assess the extent, if any, to which the inconsistencies in Lt. Buckley's various accounts caused it to disbelieve Lt. Buckley's testimony at the hearing. The Decision (at 18, A.R. 180) explicitly resolved that question: "[a] lthough there were two discrepancies involving Lt. Buckley's reports and the DCF report about the accusations, Lt. Buckley credibly explained each of them." It is for the fact-finder to decide the significance, if any, of inconsistencies between a witness's testimony and his prior inconsistent statements. See Doe No. 10800 v. Sex Offender Registry Board, 459 Mass. 603, 639 (2011) ("To the extent that there were any inconsistencies among the statements made by M.L., it was the province of the hearing examiner to evaluate their reliability."); Massachusetts Superior Court Civil Practice Jury Instructions (MCLE 3d ed. 2014), § 1.2(b) ("It is for you to say how significant any difference is."). The inconsistencies in Lt. Buckley's accounts, which he explained at least to a degree, do not preclude a reasonable person from accepting his testimony regarding Officer Otero's misconduct. That is particularly true where there were reasons

(including claimed loss of memory, destruction of the video and animosity between Otero and Golden at the time) for the Hearing Officer to discredit Otero's account.

There is also no question that honesty is crucial to Otero's employment because "[p]olice work frequently calls upon officers to speak the truth when doing so might put into question a search or embarrass a fellow officer." Falmouth v. Civil Service Comm'n, 447 Mass. at 801, citing Cambridge, 43 Mass. App. Ct. at 303. The Commission had sufficient evidentiary support for upholding the City's decision to impose discipline because there was "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.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303 (1997).

C. Bias and Favoritism.

Officer Otero also asserts that the Commission failed to address issues of bias and favoritism. This argument relies upon the same type of deficiencies in Lt. Buckley's account discussed above. The evidence did not establish any link those deficiencies and any favoritism. Indeed, it appears that Lt. Buckley and Lt. Laferriere had very little prior interaction with Officer Otero and therefore little reason to be biased against him. Moreover, Lt. Buckley did file a § 51A report against Officer Golden.

The fact that Lt. Buckley and Lt. Laferriere did not conduct the investigation in the manner that Officer Otero contends was correct, or that they did not credit his account or interpretation of the evidence, does not show bias. Here, as in a large number of factually-contested cases, unfavorable action does not suffice to warrant an inference of

Notice sent
11/29/2017

(sc)

bias. There is no evidence suggesting that any of the police witnesses against Officer Otero had any personal animosity or ulterior motive. The fact that the imposition of discipline occurred when Officer Otero was first in line for promotion to Sergeant is not strong evidence, if any, for an inference of favoritism – any conscientious appointing authority would want to know the resolution of pending disciplinary charges before making a decision about promotion.

The Hearing Officer stated: ". . . I sensed no bias or other inappropriate motive against the Appellant on the part of Lt. Buckley, Lt. Laferriere or Supt. Taylor." While the use of the word "sensed" may be unfortunate in an agency's findings of fact, there is no ambiguity about the Hearing Officer's conclusion that she found no bias or favoritism on the part of the two lieutenants or the superintendent. Indeed, the Decision states (at 12, A.R. 174), among other things: "[p]rior to the child abuse allegations asserted by the Appellant, Lt. Laferriere had no particular view of the Appellant's professionalism and he had no problems with the Appellant." The Commission's findings on favoritism, and the evidentiary support for them, are rational and supported by the evidence.

CONCLUSION

For the above reasons:

1. The plaintiff's Motion for Judgment on the Pleadings is DENIED.
2. The defendants' Cross-Motion for Judgment on the Pleadings is GRANTED.
3. FINAL JUDGMENT SHALL ENTER AFFIRMING the Final Decision of the Civil Service Commission, dated October 27, 2016.

Douglas H. Wilkins
Justice of the Superior Court

Dated: November 28, 2017