

STATE OF MAINE  
CUMBERLAND, ss.

SUPERIOR COURT  
CIVIL ACTION  
Docket No. AP-12-53  
TDW-CUM-3/15/2013

NICHOLAS STEIN,

Plaintiff

v.

ORDER

CRIMINAL JUSTICE ACADEMY BOARD  
OF TRUSTEES,

Defendant

RECEIVED

Before the court is plaintiff Nicholas Stein's motion for the taking of additional evidence pursuant to M.R.Civ.P. 80C(e).

Specifically, the additional evidence that Stein seeks to have the court consider in connection with his appeal involves evidence as to the actions of the Criminal Justice Academy Board of Trustees with respect to suspension or revocation of certificates of eligibility of other corrections officers.<sup>1</sup>

Stein's initial motion outlined the general subject matter of the additional evidence he sought but did not contain an offer of proof that set forth what he expected to prove. In his reply memorandum, however, Stein asserted that there were four similarly situated corrections officers who had also been alleged to have assaulted inmates and that those individuals had received "much shorter, if any, suspensions of their certificates of eligibility." Reply Memorandum dated December 24, 2012 at 2-3. In

---

<sup>1</sup> In his original motion Stein stated that he was seeking additional evidence relating to the entire decision-making process of the Board in the other cases. Motion to Take Additional Evidence filed December 3, 2012 ¶ 9. However, he thereafter clarified that he is not seeking evidence as to the mental processes of the Board members but only the record of Board actions in those other cases. Id. ¶ 12; Reply Memorandum dated December 24, 2012 at 3.

essence, therefore, Stein seeks additional evidence to prove that he was subjected to a longer suspension than similarly situated individuals.

This is a very general offer of proof, especially since Stein admits that he does not have more detailed information with respect to the four officers who he alleges are similarly situated. Reply Memorandum dated December 24, 2012 at 3. Whether the circumstances of the alleged assaults in the other cases bear any resemblance to the circumstances involving Stein, therefore, is not known and in that respect Stein appears to be engaged in a fishing expedition.

Even assuming that Stein's offer of proof is sufficient and that his request does not constitute a fishing expedition, Stein's motion to take additional evidence is denied for three reasons:

1. Plaintiff did not seek to offer the additional evidence he now seeks – records relating to suspensions or revocations of certificates of eligibility of other corrections officers – at the administrative level. Issues not raised at the administrative level are not preserved for appellate review. New England Whitewater Center v. Department of Inland Fisheries and Wildlife, 550 A.2d 56, 58 (Me. 1998).<sup>2</sup>

2. Under 5 M.R.S. § 11006(1)(B) a court may order the taking of additional evidence before the agency if the evidence “could not have been presented or was erroneously disallowed in the proceedings before the agency.” Assuming that evidence relating to proceedings involving other corrections officers would have been available and would have been material to the proceedings involving Stein, Stein has not demonstrated that he could not have presented such evidence before the agency.

---

<sup>2</sup> Although this issue is only mentioned obliquely by the Board, evidence relating to other correction officers – except for written decisions at the conclusion of adjudicatory proceedings – appears to be subject to statutory confidentiality pursuant to 25 M.R.S. § 2806(8) and it is not necessarily clear that Stein would have the right to access such evidence.

3. To allow Stein to convert this administrative appeal into an exercise comparing and contrasting his case to the cases of other corrections officers would go far beyond the role of the court in judicially reviewing administrative actions under Rule 80C. See Hall v. Board of Environmental Protection, 498 A.2d 260, 266 (Me. 1985).<sup>3</sup> Moreover, even assuming that the Board imposed a more severe sanction on Stein in this case than it imposed on other corrections officers in past cases, that would not be a basis to reverse the decision here. The Board is entitled to conclude either than Stein's behavior was more egregious than that of other corrections officers or that its prior sanctions had been too lenient. If the Board were required to be lenient in this case because it had previously been lenient, it would never be able to conclude that it had been too lenient in the past and that repeated instances of assaults on inmates required a change in policy to more severe discipline.

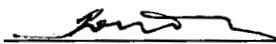
The entry shall be:

Plaintiff's motion to take additional evidence is denied.

Plaintiff's brief is due within 40 days from the date of this order. The Board's brief is due 30 days after service of plaintiff's brief. Plaintiff shall have 14 days after service of the Board's brief in which to file a reply brief.

The Clerk is directed to incorporate this order in the docket by reference pursuant to Rule 79(a).

Dated: March 15, 2013

  
\_\_\_\_\_  
Thomas D. Warren  
Justice, Superior Court

---

<sup>3</sup> To the extent that Stein were to argue that the Board's actions in this case constituted selective prosecution in violation of equal protection, he would have to show at a minimum that the Board was motivated by a discriminatory purpose, Polk v. Town of Lubec, 2000 ME 152 ¶ 14, 756 A.2d 510, and he has made no offer of proof to that effect.

Date Filed 10-25-12

CUMBERLAND

County

Docket No. AP-12-53

Action 80C APPEAL

NICHOLAS STEIN

BOARD OF TRUSTEES, MAINE CRIMINAL  
JUSTICE ACADEMY

vs.

Plaintiff's Attorney

KRISTINE HANLY ESQ  
VINCENT KANTZ PITTMAN & THOMPSON  
44 EXCHANGE ST  
SUITE 301  
PORTLAND ME 04101

Defendant's Attorney

DENNIS SMITH, ESQ.  
ASSISTANT ATTORNEY GENERAL  
6 STATE HOUSE STATION  
AUGUSTA, ME 04333-0006

Date of  
Entry