18-P-260 Appeals Court

JEROME HALL-BREWSTER vs. BOSTON POLICE DEPARTMENT & another.[1]

No. 18-P-260.

Suffolk. February 12, 2019. - September 5, 2019.

Present: Rubin, Milkey, & Sullivan, JJ.

Police Officer. Police, Assignment of duties. Administrative Law, Administrative Procedure Act, Hearing, Substantial evidence, Judicial review. Due Process of Law, Taking of property, Administrative hearing. Division of Administrative Law Appeals. Public Employment, Demotion. Practice, Civil, Review of administrative action, Judgment on the pleadings.

Civil action commenced in the Superior Court Department on January 23, 2015.

The case was heard by Edward P. Leibensperger, J., on motions for judgment on the pleadings.

Dan V. Bair, II (Kevin Mullen also present) for the plaintiff.

David J. Fredette (Barbara V.G. Parker also present) for the defendants.

[1] Division of Administrative Law Appeals.

SULLIVAN, J. Jerome Hall-Brewster appeals from a Superior Court judgment affirming a decision of the Division of Administrative Law Appeals (DALA), upholding Hall-Brewster's reassignment from detective to patrol officer. On appeal Hall-Brewster contends that he was entitled to notice and a hearing before the reassignment, and that the DALA decision was not supported by substantial evidence. We conclude that under the unique statutory scheme applicable to detectives in the Boston Police Department (BPD or department), see G. L. c. 7, § 4H, Hall-Brewster was entitled to notice and a predeprivation hearing. We also conclude that the DALA decision was supported by substantial evidence. Because the reassignment was properly sustained after a postdeprivation hearing, Hall-Brewster is not entitled to reinstatement or back pay, but is entitled to nominal damages for the violation of his due process right to a predeprivation hearing.

Background. We summarize the facts found by the DALA magistrate. Hall-Brewster joined the BPD in 1995. He achieved a detective rating in 2007, and was assigned to district B-2, covering the Roxbury and Dorchester areas of Boston. His 2013 reassignment to patrol officer arose out of two cases that he investigated in 2011 and 2012.

1. The Mission Hill assault. On October 9, 2011, a pedestrian was assaulted outside a 7-Eleven convenience store in

the Mission Hill area of Boston. The next morning, Detective Kevin Pumphret interviewed the victim and took pictures of his injuries. After learning that the store had video surveillance cameras, Pumphret told the victim that he would check if there was any video footage of the assault. Approximately a week later, the victim went to the police station and asked about the status of his case. Pumphret told him that the case had been reassigned to Hall-Brewster. The victim called Hall-Brewster, who at the time was working the night shift, and was unaware that he had been assigned the case. The victim again inquired into the status of his case, and told Hall-Brewster that the video footage would only be available at the convenience store for thirty days from the date of the assault.[2]

Hall-Brewster, now "a week or so behind," went to the store and attempted to retrieve the video tape during his evening shift. He spoke with the store clerk, who was unaware of the assault. Hall-Brewster left a message for the store owner to contact him, but the owner did not do so. Hall-Brewster went to the store again, and on October 20, 2011, talked to the store owner by telephone, "who agreed to download the footage and leave it with one of his clerks" for Hall-Brewster to collect.

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[2] Hall-Brewster did not remember if he knew of the thirty-day time limit, but the magistrate credited the victim's statement that he told Hall-Brewster.

On October 22, 2011, Hall-Brewster returned to the store to pick up the video footage. It was not there.

A few days later, the victim called Hall-Brewster's supervisor, Sergeant Detective Thomas O'Leary, complaining that Hall-Brewster had yet to retrieve the video tape. O'Leary assured the victim that the department would obtain the footage by October 31, 2011, which it did not do. The victim called the department again on November 2, 2011, and spoke to O'Leary's supervisor, Lieutenant Detective Patrick Cullity. Two days later, Cullity told Sergeant Detective Timothy Horan, who worked the day shift, to retrieve the video.

Horan went to the store the next day (November 5, 2011), and learned that the owner "did not have the technical skills necessary to transfer [the] footage to a disc." Horan left a message with Detective Timothy Laham, an investigator in the BPD forensics unit, asking him to make the copies at the store. Laham was on vacation when Horan left the message, but went to retrieve the footage on November 8, 2011. When Laham arrived at the store on November 8, 2011, he was unable to obtain the video because the footage had been taped over five hours before his arrival.

The victim filed a formal complaint against Hall-Brewster and Horan after he learned the footage had been erased. On April 29, 2013, after an approximately one-year delay in

investigation, the department's internal affairs (IA) unit sustained the complaint against Hall-Brewster due to his failure to recover the video footage.

2. The Parker Hill incident. Early in the morning on September 28, 2012, a woman was attacked from behind on Parker Hill Avenue in Boston. She was "choked to the point of unconsciousness, and robbed of her handbag." When she regained consciousness she had a wallet in her hand containing an identification belonging to one Edwin Alemany. She gave the wallet to the police. Although she did not get a good look at the perpetrator, she described him as six feet tall and of Hispanic descent. Police officers went to the address listed on Alemany's identification, but did not find him there.

Hall-Brewster arrived at the scene after the victim had been taken to the hospital. He examined the scene and sent a Gatorade bottle (bottle), a baseball hat, the wallet, and blood collected from the wallet to the department's crime lab for deoxyribonucleic acid (DNA) testing. Hall-Brewster also checked Alemany's criminal record and discovered that he had prior felony convictions. This meant his DNA was in the Combined DNA Index System (CODIS) database.

Later the same morning, Cullity told "Hall-Brewster to re-canvass the [crime scene], interview the victim, and look for Mr. Alemany at the address listed on the identification found in

the wallet." Neither Hall-Brewster nor his supervising officers, Sergeant Detective Michael Stratton and Cullity, believed there was probable cause to arrest Alemany at this time; they thought the district attorney would require corroboration, although no one contacted the district attorney's office to verify that opinion. Within the next few days Hall-Brewster reinterviewed the victim, revisited the scene, and looked, unsuccessfully, for video cameras. He also "went by the area" of the address indicated on Alemany's identification, but did not see him.

Hall-Brewster did not interview the witness who found the victim after the assault, follow up with the victim again, investigate whether the perpetrator had tried to use the victim's stolen credit cards, or look for Alemany at the other potential addresses provided to him. Had Hall-Brewster interviewed Alemany immediately after the incident, he could have examined him for injuries, questioned him concerning his whereabouts, and asked him why his wallet was at the scene of the incident.

On October 2, 2012, Cullity told Hall-Brewster to go back to Alemany's listed address and use all available resources needed, including overtime, to find Alemany. Hall-Brewster, however, decided not to speak with Alemany until he gathered the results from the DNA tests "for fear of tipping off how little

proof the police had of the perpetrator's identity and exposing the victim to retaliation if he confirmed that Mr. Alemany was a suspect." Hall-Brewster and his supervisors still assumed that they lacked probable cause to arrest Alemany. No one vetted this assumption with the district attorney.

Emily Ross, the BPD lab criminalist assigned to the case, e-mailed Hall-Brewster on October 5, 2012, asking if the bottle, baseball hat, and wallet belonged to the suspect. Hall-Brewster did not respond because he thought he had been clear that the items were from the suspect.[3] Ross e-mailed Hall-Brewster again on November 9, 2012, and asked him the same question. Hall-Brewster again did not respond, so Ross e-mailed him once more on November 19, 2012, along with his supervisor, Stratton, reiterating her question and this time stating that she could not test the items until she had the information she needed. Stratton responded immediately, acknowledging Ross's e-mail, and later that day, after speaking with Hall-Brewster, e-mailed Ross again, stating that he believed the items were from the suspect. The next morning, Hall-Brewster e-mailed Ross and confirmed that he believed the items were from the suspect and that all three

[3] He did not check the boxes on the evidence form for DNA testing and instead wrote "DNA" under each item. He also did not check the boxes indicating whether the evidence was collected from the victim or suspect, but wrote "suspect" on an attached custody receipt instead.

items should be analyzed. On November 21, 2012, Ross submitted only the bottle for DNA testing.

Due to a backlog in the crime lab, the testing was delayed until June of 2013.[4] The laboratory analysis found DNA on the bottle but could not match it with anyone listed in the CODIS database. Hall-Brewster did not ask about the other items he submitted because he assumed that they had been tested. They were not tested at that time.

3. The murder of Amy Lord. The following month, on July 23, 2013, a Hispanic man choked a woman on a street in South Boston. Later the same morning, Amy Lord was kidnapped and murdered in South Boston. Shortly after Lord's death, another woman was stabbed in South Boston. The perpetrator cut himself during the stabbing and sought treatment at a hospital. While at the hospital, the perpetrator was identified as Edwin Alemany, and was charged with Lord's murder. Alemany was also charged with the Parker Hill robbery and assault and battery after the baseball hat was tested and revealed a DNA match.

4. Reassignment. When the police commissioner learned of Lord's murder and the fact that Alemany's identification had

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[4] Testing was prioritized based on the seriousness of the crime. Homicide and rape cases generally took precedence, and this case was classified as an unarmed robbery and assault and battery.

been found at the scene of the Parker Hill incident, he stated publicly that there had been probable cause to arrest Alemany in 2012 after the Parker Hill incident. Soon after, the commissioner told Deputy Superintendents Kelly Nee and Juan Torres of the department's bureau of investigative services to interview Hall-Brewster and to "determine whether he had a legitimate excuse for not working more diligently to locate Mr. Alemany" after the Parker Hill incident.[5] During that interview, Hall-Brewster stated that he waited for the DNA results to interview Alemany because (1) he believed Alemany could have been another victim, (2) he did not think Alemany actually lived at the address listed on the identification, (3) he had other active, demanding cases that required his attention, (4) he did not recall the e-mails from Ross from the crime lab seeking clarification, (5) he did not believe he had probable cause to arrest Alemany, (6) he wanted to wait for something more "solid," and (7) he did not want to "tip [his] hand" or "expose [the] victim."

The commissioner was not persuaded that Hall-Brewster had reason to ignore Cullity's directive to "find Mr. Alemany."

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[5] This interview was not assigned to the IA unit, nor was it conducted as part of an IA investigation. The IA unit did not investigate until after Hall-Brewster's reassignment to patrol officer.

Hall-Brewster could have found Alemany's whereabouts by talking to Alemany's apartment complex manager, searching the "motor vehicle and gang unit databases," or by "perform[ing] a warrant check." Ultimately, the commissioner believed that it was more important to have interviewed Alemany than wait for the reasons given by Hall-Brewster. While reviewing the Parker Hill investigation, the commissioner also learned of the complaint against Hall-Brewster arising out of the Mission Hill incident.

On July 30, 2013, one week after Lord's murder, the commissioner reassigned Hall-Brewster to patrol officer for neglect of duty and poor judgment.[6] The commissioner's decision was based on his understanding that Hall-Brewster "had failed to actively seek out Mr. Alemany, despite being told to do so by his supervisors, and had failed to respond to Criminalist Emily Ross's emails," and because he did not recover the video tapes from the Mission Hill convenience store. The commissioner

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[6] The commissioner's letter notifying Hall-Brewster of the reassignment stated:

> "You neglected to perform your duties as a Detective and used unreasonable judgment regarding two separate investigations. Specifically, in 2011, you failed to retrieve video footage related to an assault and battery investigation. Additionally, in relation to a September 2012 incident, you failed to properly investigate the matter and move the case forward for potential prosecution. As a result, I have determined that you can no longer perform the duties of a Detective and I am removing your rating."

concluded that the two investigations demonstrated a pattern of investigative mistakes, including a failure to take initiative in the investigations. The commissioner also concluded that Hall-Brewster's handling of the Parker Hill case damaged the trust of the public in the police department.

After Hall-Brewster's reassignment to patrol officer, the IA unit conducted an investigation and sustained two counts of neglect of duty and two counts of failing to follow directives and orders. No additional action was taken against Hall-Brewster as a result of that investigation. However, four of Hall-Brewster's supervisors were reprimanded.

Following Hall-Brewster's reassignment, the commissioner received additional information regarding the Parker Hill and Mission Hill investigations. With regard to the Parker Hill investigation, the commissioner originally thought that Hall-Brewster had failed to respond to Ross entirely. He later learned that Hall-Brewster had responded to Ross's last e-mail, albeit after a substantial delay; had planned on interviewing Alemany, but was waiting for the DNA results; and had requested all three items (bottle, baseball hat, and wallet) be tested for DNA. However, the new information did not alter the commissioner's views; he believed that Hall-Brewster should have pursued the lead on Alemany in a more timely manner. With regard to the Mission Hill investigation, the commissioner later

learned that Hall-Brewster had visited the convenience store several times in an effort to obtain the video, but nonetheless considered him responsible for the failure to secure the video tape or a copy of it.

DALA decision. Hall-Brewster appealed the commissioner's decision to reassign him to patrol officer to DALA. See G. L. c. 7, § 4H.[7] After a two-day hearing, the magistrate upheld the reassignment. The magistrate concluded that Hall-Brewster was not entitled to a predeprivation hearing. He further concluded that even though Hall-Brewster took a number of appropriate steps in the Parker Hill and Mission Hill investigations, he "failed to take the obvious additional steps need[ed] to move the investigations along," in contravention of direct orders.

The magistrate found that Hall-Brewster had gotten the "runaround" from the store owner in the Mission Hill case but failed to take appropriate action to get the video tape before it was destroyed. He also found that the commissioner properly rejected the reasons underlying Hall-Brewster's "conscious

[7] General Laws c. 7, § 4H, provides, "Detectives, in a city which employs more than three hundred and fifty police officers and where the detectives employed in the police department of said city are entitled to a hearing, other than one provided under chapter thirty-one, concerning their transfer from the rank of detective, shall be entitled to a hearing before an administrative magistrate of the division of administrative law appeals, to determine whether said transfer is for just cause."

decision" not to interview Alemany. By neglecting to interview Alemany, Hall-Brewster gave up the opportunity to see if Alemany was scratched or bruised, to see if he could provide an alibi, and to see if he claimed to be a robbery victim himself. Waiting several months to talk to Alemany let the trail run cold.

The magistrate also found "nonsensical" Hall-Brewster's claim that he did not want to put the Parker Hill incident victim in danger by letting Alemany know that he was being investigated. Either the perpetrator had discarded the victim's wallet, and no longer had the victim's address, or he still had the wallet, in which case he knew her address, and failing to question him left the victim in ongoing danger. In sum, the magistrate found that "[f]ailing to question Mr. Alemany did not help the victim, and it left the investigation at a standstill unnecessarily." The magistrate also found that the commissioner would have made the same decision even if he had fully understood all the facts at the outset, and rejected Hall-Brewster's contention that the commissioner "scapegoat[ed]" him for political reasons.

Chapter 30A review. A judge of the Superior Court affirmed DALA's decision, concluding that Hall-Brewster was not entitled to a predeprivation hearing, that his interview with the two deputy superintendents provided him with sufficient due process,

and that the DALA decision was supported by substantial evidence.

Discussion. 1. Standard of review. "We may set aside the [agency's] decision only if 'the substantial rights of any party may have been prejudiced' [because the agency decision] is based on an error of law, unsupported by substantial evidence, or otherwise not in accordance with the law." Spencer v. Civil Serv. Comm'n, 479 Mass. 210, 215 (2018), quoting Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 689 (2012). See G. L. c. 30A, § 14 (7).[8] Questions of law are reviewed de novo. Camara v. Attorney Gen., 458 Mass. 756, 759 (2011).

2. Due process. a. Property interest. Under both the United States Constitution and the Massachusetts Declaration of Rights, "[t]he threshold issue in a procedural due process action is whether the plaintiff had a constitutionally protected property interest at stake." Perullo v. Advisory Comm. on Personnel Standards, 476 Mass. 829, 840 (2017), citing Mard v. Amherst, 350 F.3d 184, 188 (1st Cir. 2003). Property interests "may derive from existing rules or independent sources, such as

[8] We understand our review to encompass whether the department's actions were "[i]n violation of constitutional provisions," "[b]ased upon an error of law," "[m]ade upon unlawful procedure," or "[u]nsupported by substantial evidence." G. L. c. 30A, § 14 (7) (a), (c), (d), & (e).

State law." Perullo, supra. Hall-Brewster contends that he has a property interest in his detective rating.

A "just cause" standard creates a property interest in continued employment in cases where a public employee has been discharged. See Harris v. Board of Trustees of State Colleges, 405 Mass. 515, 520 (1989). See also Perullo, 476 Mass. at 840. Here, the Legislature chose to expand just cause protection to reassignment from detective to patrol officer in certain police departments. See G. L. c. 7, § 4H; Police Dep't of Boston v. Fedorchuk, 48 Mass. App. Ct. 543, 547 (2000) (Fedorchuk).[9] The just cause standard in G. L. c. 7, § 4H, therefore creates a property interest in Hall-Brewster's detective rating. See Perullo, supra; Harris, supra.[10]

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[9] The BPD detective bureau was established by special statute in 1950, and BPD detectives were originally granted limited rights to a hearing under that legislation. See St. 1950, c. 735, § 2; Murphy v. Police Comm'r of Boston, 369 Mass. 469, 471 (1976) (detailing legislative history). In 1989, G. L. c. 7, § 4H, was amended to provide a right of appeal to detectives in other cities, who were otherwise entitled to a noncivil service hearing, and inserted the just cause standard. See St. 1989, c. 192. Previous amendments to § 4H had inserted provisions regarding administrative appeals and judicial review. See, e.g., St. 1973, c. 1229, § 3.

[10] There is no dispute that Hall-Brewster otherwise meets "the requirements of § 4H, namely: (1) the detective served in a city which employs more than 350 police officers; (2) the detective was entitled to a hearing on his transfer from the rank of detective; and (3) the hearing must be one which is not provided by the civil service law." Fedorchuk, 48 Mass. App. Ct. at 546 n.5.

b. Predeprivation hearing. The question remains whether the property interest in the detective rating created by the just cause provision of G. L. c. 7, § 4H, warrants a predeprivation hearing.[11] The "opportunity for a hearing before [a person] is deprived of any significant property interest" is "'the root requirement' of the Due Process Clause." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (Loudermill). We balance three factors in determining what predeprivation process is due: "[f]irst, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest." Gilbert v. Homar, 520 U.S. 924, 931 (1997), quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The property interest in a detective rating is a significant interest that the Legislature has taken care to shield from arbitrary adverse action. This legislative determination guides our analysis. A detective's "interest in retaining his rank is not as compelling as the interest of an

[11] At oral argument the department agreed that G. L. c. 7, § 4H, created a property interest, but maintained that it was not the type of interest that warranted a predeprivation hearing.

employee who is actually fired, as in Loudermill. It is not, however, an insignificant interest. Loss of rank entails a reduction in pay and benefits. As to the risk of an erroneous personnel action, . . . the opportunity for the employee to present his side of the story prior to termination may significantly reduce the risk of . . . erroneous action, . . . [a] risk . . . no more or less serious than it was in Loudermill" (citations omitted). DelSignore v. DiCenzo, 767 F. Supp. 423, 427-428 (D.R.I. 1991) (sergeant had property interest in retaining his rank under town charter and ordinances, and was entitled to predeprivation hearing). See Williams v. Seattle, 607 F. Supp. 714, 720 (W.D. Wash. 1985) (sergeant had property interest in his rank by virtue of city code, and was entitled to predeprivation hearing).

The BPD maintains that Hall-Brewster was not entitled to a predeprivation hearing because (1) the statute does not provide for it, and (2) the government's interest in public safety outweighed Hall-Brewster's interest in remaining a detective while his appeal was heard. The former statement is true as a matter of statute and internal BPD rule, but fails to address the constitutional dimension of the property interest created by the just cause provision in § 4H. "The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a

property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" Loudermill, 470 U.S. at 541, quoting Arnett v. Kennedy, 416 U.S. 134, 167 (1974) (rejecting "bitter with the sweet" theory that State Legislature may create property interest but simultaneously limit procedural protections). See Williams, 607 F. Supp. at 720.

The BPD's public safety concerns were addressed directly in Loudermill, 470 U.S. at 542-545, which held that a public employee's interest in a predeprivation hearing as a check against an erroneous discharge took precedence over "the governmental interest in the expeditious removal of unsatisfactory employees." In the event "the employer perceives a significant hazard in keeping the employee on the job [pending a predeprivation hearing], it can avoid the problem by

suspending [the employee] with pay" (footnote omitted). Id. at 544-545.[12,13]

We therefore hold that Hall-Brewster had a constitutionally protected interest in his detective rating created by the just cause provision of G. L. c. 7, § 4H, and that he was entitled to a predeprivation hearing.[14]

c. Sufficiency of predeprivation hearings. Hall-Brewster contends that he did not receive a constitutionally adequate

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[12] As a matter of Federal constitutional law, an employer may temporarily suspend a police officer who has been charged with a felony without pay and without a predeprivation hearing. In that circumstance the deprivation is not final, and the basis of the temporary suspension -- the arrest or grand jury indictment -- is readily verifiable and provides adequate assurance that the suspension is justified because it is the product of a determination by an independent third party that a serious crime has been committed. See Gilbert, 520 U.S. at 931, 933-934. Similar circumstances are not presented here, where the reassignment to patrol officer is not temporary, and the factual basis for the reassignment was based on disputed facts, susceptible to differing interpretations, and discretionary decision-making.

[13] On the facts presented, we do not reach the question whether the commissioner could also have reassigned Hall-Brewster to desk duty without loss of pay without a predeprivation hearing. Cf. Framingham v. Framingham Police Officers Union, 93 Mass. App. Ct. 537, 545 (2018).

[14] We reach this conclusion as a matter of Federal constitutional law under Loudermill, 470 U.S. at 541. We also reach this conclusion independently under art. 10 of the Massachusetts Declaration of Rights. See generally Matter of Powers, 465 Mass. 63, 80 n.18 (2013) (treating procedural due process analysis under State and Federal Constitutions identically).

predeprivation hearing because he was not given notice of the charges against him, provided an explanation of the evidence against him, or given an opportunity to respond to the charges. The BPD claims that Hall-Brewster's interview with Superintendent Deputies Kelly Nee and Juan Torres provided him with notice and evidence of his misconduct, and satisfied all the requisites of due process.

The predeprivation proceeding is "an initial check against mistaken decisions . . . , a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Loudermill, 470 U.S. at 545-546. "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." Id. at 545, quoting Boddie v. Connecticut, 401 U.S. 371, 378 (1971). The employee must receive, however, "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Loudermill, supra at 546. See Williams, 617 F. Supp. at 721 (police sergeant "was constitutionally entitled . . . to notice of the charge, an explanation of the evidence against him, and an opportunity to respond prior to the Chief's disciplinary decision").

As to notice, Hall-Brewster was given an opportunity to clarify his role in the Parker Hill investigation, but he was told that he was being interviewed as part of an internal inquiry at the request of the commissioner. Moreover, he was not told that he could lose his rating as detective. Nor was he told that his conduct in the Mission Hill case was also under scrutiny. Thus, Hall-Brewster was not given notice of all the charges against him and the possible consequences of the charges. See Cotnoir v. University of Me. Sys., 35 F.3d 6, 11 (1st Cir. 1994) (officials must provide notice of both charges and proposed action, in order to provide "meaningful opportunity to invoke the discretion of the decisionmaker" [citation omitted]).[15]

Nor was Hall-Brewster informed of the evidence against him. As a result, he was not fully able to respond to the charges. See Cotnoir, 35 F.3d at 12. An internal investigatory interview is not a hearing. See Worcester v. Civil Service Comm'n, 87

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[15] During this interview, Nee told Hall-Brewster:

> "The reason we are here is to discuss Internal Affairs case number 2013-0291 [Parker Hill investigation]. I was asked to do this interview with you, Jerome, at the behest of the Police Commissioner because he really wants to hear your side of the story about what happened with regard to the case in question."

Nee's statement is markedly similar to that found deficient in Cotnoir, 35 F.3d at 8.

Mass. App. Ct. 120, 125 (2015). In fact, the commissioner made his initial decision to reassign Hall-Brewster to patrol officer based in part on a faulty understanding of what had occurred in both the Mission Hill and Parker Hill investigations. Although the misconceptions were not outcome-determinative, see infra, the factual errors underscore the critical role a predeprivation hearing plays in avoiding erroneous decision-making. Hall-Brewster did not receive a constitutionally adequate predeprivation hearing. See Loudermill, 470 U.S. at 541. Contrast Perullo, 476 Mass. at 841 (employee was not deprived of due process rights because she had notice of disciplinary hearing, knew alleged grounds for discipline imposed, and had ability to appear at hearing prior to termination).[16]

[16] The BPD also argues that any deficiency in predeprivation due process was cured by the fact that Hall-Brewster received a full postdeprivation hearing. As a matter of Federal law, "the state normally cannot satisfy due process solely through post-termination process." Jones v. Boston, 752 F.3d 38, 57 (1st Cir. 2014). See Vitek v. Jones, 445 U.S. 480, 491 (1980) (since "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action"). A limited exception exists under 42 U.S.C. § 1983, where the State provides adequate postdeprivation remedies, and the "random and unauthorized conduct by state officials" in violation of an established State procedure deprived a plaintiff of predeprivation due process. Lowe v. Scott, 959 F.2d 323, 340 (1st Cir. 1992), discussing Hudson v. Palmer, 468 U.S. 517, 533 (1983), and Parratt v. Taylor, 451 U.S. 527, 537 (1981). The rationale underlying these cases (upon which the BPD relies) is that the State should not be asked to do the impossible when an official has acted in a random and unauthorized manner. Lowe,

3. Just cause. Hall-Brewster contends that the DALA magistrate's decision upholding the BPD decision to reassign him to patrol officer for just cause was unsupported by substantial evidence because he did not engage in misconduct in either the Parker Hill or Mission Hill investigations, and his reassignment to patrol officer was politically motivated. The BPD argues that DALA's decision was supported by substantial evidence because Hall-Brewster violated a direct order and showed poor judgment and a lack of initiative by failing to locate Alemany and to retrieve video footage from the Mission Hill convenience store.

Just cause under § 4H means "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service" (quotation and citation omitted). Fedorchuk, 48 Mass. App. Ct. at 548-549. "'Substantial evidence' means such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). There was substantial evidence to support the removal of Hall-Brewster's detective rating for just cause. Although Hall-Brewster took a number of steps in both the Parker

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supra. Here, the decision was not random or unauthorized. See Zinermon v. Burch, 494 U.S. 113, 136–139 (1990). The decision was authorized by the commissioner, the final decision maker. See Dwyer v. Regan, 777 F.2d 825, 831–833 (2d Cir. 1985). The limited exception does not apply as a matter of Federal law.

Hill and Mission Hill investigations, he failed to take additional steps to expedite the investigations, with negative consequences.

The DALA magistrate found that these omissions demonstrated a lack of initiative and a pattern of neglect. Even though Hall-Brewster was on notice that the video tape in the Mission Hill investigation was scheduled for destruction, he failed to secure it. See note 2, supra. The magistrate found that Hall-Brewster disobeyed a direct order to interview Alemany in the Parker Hill case.[17] The commissioner concluded, and the magistrate found, that Hall-Brewster's reasons for failing to fully investigate the Parker Hill incident demonstrated poor judgment, and that the failure to promptly follow up with the crime lab delayed receipt of the DNA results by several weeks. Nor can we say that the commissioner's opinion or the magistrate's finding that Hall-Brewster's actions harmed the public perception of the department lacked support in the record. Hall-Brewster told the deputy superintendents who

[17] At the interview conducted by the deputy superintendents before the reassignment, Hall-Brewster denied receiving an order to interview Alemany. The magistrate found that the order had been given. Hall-Brewster also acknowledged during that interview that he could not find his file on the Parker Hill case, and had "to recreate it."

conducted his initial interview that people recognized him in district B-2 and asked him about the Lord case.

Hall-Brewster further contends that he was "scapegoat[ed]" for Lord's murder, and that the commissioner reassigned him for political reasons. The DALA magistrate explicitly rejected this claim, finding that the commissioner's decision was not politically motivated. It is not for us "to make different credibility choices, or to draw different inferences from the facts found by the [agency]." Houde v. Contributory Retirement Appeal Bd., 57 Mass. App. Ct. 842, 851 (2003), quoting Retirement Bd. of Brookline v. Contributory Retirement Appeal Bd., 33 Mass. App. Ct. 478, 480 (1992). "[W]e 'seek[] to uphold the findings of fact made by a hearing officer or examiner based upon the demeanor and credibility of the witnesses whose oral testimony he [or she] has personally observed and evaluated.'" McGuiness v. Department of Correction, 465 Mass. 660, 669 (2013), quoting A.J. Cella, Administrative Law and Practice § 352, at 660 (1986). The decision to remove Hall-Brewster's detective rating was supported by substantial evidence. For the same reason, the magistrate's ultimate conclusions were not arbitrary or capricious.

4. Remedy. Hall-Brewster seeks reinstatement and back wages and benefits. Given our conclusion with respect to the DALA magistrate's just cause determination, Hall-Brewster is not

entitled to reinstatement. The reassignment to patrol officer itself is not an injury caused by the due process violation because Hall-Brewster would nonetheless have been reassigned.

The question remains whether Hall-Brewster is entitled to back pay for the violation of his right to a predeprivation hearing. See, e.g., DelSignore, 767 F. Supp. at 429 (awarding back pay for period of time from transfer to patrol officer to postdeprivation hearing, which had not yet occurred). In Carey v. Piphus, 435 U.S. 247, 260 (1978), the United States Supreme Court held that students who were suspended without a predeprivation hearing were not entitled to compensatory damages for injuries caused by their suspensions unless they could prove that they would not have suffered injury if they had been afforded a predeprivation hearing. A similar rule has been applied in public sector employment cases by every United States Court of Appeals to have considered the question of damages due to an adverse job action undertaken without a constitutionally required predeprivation hearing.[18] Where a public employee's

[18] See Whalen v. Massachusetts Trial Court, 397 F.3d 19, 29 (1st Cir.), cert. denied, 546 U.S. 872 (2005) ("A plaintiff's entitlement to more than nominal damages in a procedural due process case turns on whether the constitutional violation -- the failure to provide a pre-termination opportunity to contest termination -- did in fact cause the harm asserted -- the loss of the job and related benefits"); Patterson v. Utica, 370 F.3d 322, 337 (2d Cir. 2004) (plaintiff "is entitled to nominal damages based on the deprivation itself and may . . . be entitled to collect compensatory damages, if he can prove that

termination is justified, the employee is entitled only to nominal damages because the employee would have been terminated even if the required hearing had been held. See, e.g., Whalen v. Massachusetts Trial Court, 397 F.3d 19, 29 (1st Cir.), cert. denied, 546 U.S. 872 (2005) ("A plaintiff's entitlement to more than nominal damages in a procedural due process case turns on whether the constitutional violation -- the failure to provide a

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he suffered actual injury as a result of the denial of due process" [citation omitted]); Savarese v. Agriss, 883 F.2d 1194, 1206 n.19 (3d Cir. 1989) ("A back pay award should make whole the injured party by placing that individual in the position he would have been in but for the defendants' wrongful conduct"); D'Iorio v. County of Delaware, 592 F.2d 681, 690 n.16 (3d Cir. 1978) ("[plaintiff's] claim to back pay would appear to be undermined seriously by proof that the County Council would have discharged him using proper procedures"); Burt v. Abel, 585 F.2d 613, 616 (4th Cir. 1978) ("In order for a plaintiff who has suffered a deprivation of procedural due process to recover more than nominal damages, he must also prove that the procedural deprivation caused some independent compensable harm"); Wilson v. Taylor, 658 F.2d 1021, 1035 (5th Cir. 1981); Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1352 (6th Cir. 1992) ("The denial of procedural due process is actionable for nominal damages without proof of actual injury"); Dargis v. Sheahan, 526 F.3d 981, 989 (7th Cir. 2008) ("where a plaintiff would have suffered the same fate had the required hearing been held, he is not entitled to recover damages caused by the suspension"); Hopkins v. Saunders, 199 F.3d 968, 979 (8th Cir. 1999), cert. denied, 531 U.S. 873 (2000) ("where an employee would have been discharged even if he had received due process, i.e. was discharged for cause, his sole injury is the lack of process and only nominal damages are proper"); Brady v. Gebbie, 859 F.2d 1543, 1557 (9th Cir. 1988), cert. denied, 489 U.S. 1100 (1989); County of Monroe v. United States Dep't of Labor, 690 F.2d 1359, 1363 (11th Cir. 1982) ("For a party to recover more than nominal damages for a deprivation of procedural due process, he must show actual compensable injury. The injury caused by justified termination is not compensable in the form of back pay").

pre-termination opportunity to contest termination -- did in fact cause the harm asserted -- the loss of job and related benefits").[19] With the exception of Alaska, State appellate courts also follow Carey's rationale in public sector employment cases. See Carey, supra.[20]

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[19] Hall-Brewster has not sought, and we do not address, other forms of compensatory damages, such as damages for mental and emotional distress, for the failure to afford a predeprivation hearing. See Carey, 435 U.S. at 262-263 (discussing availability of mental and emotional distress damages caused by denial of predeprivation procedural due process in cases where adverse action has been upheld, but plaintiff "actually suffered distress because of the denial of due process itself"). We note that Carey was brought under 42 U.S.C. § 1983. This case was brought solely under G. L. c. 30A and G. L. c. 7, § 4H. Hall-Brewster has not sought relief on any other basis.

[20] See Hutchinson v. South Montgomery Academy, 535 So. 2d 189, 191 (Ala. Civ. App. 1988) ("in the case at bar, [the plaintiff], to receive compensatory damages, must show that his loss flowed from the imperfect termination procedure -- not the termination"); Metropolitan Dade County v. Caputi, 466 So. 2d 1087, 1088-1089 (Fla. Dist. Ct. App. 1985) ("if an aggrieved party is unable to prove actual damages from the deprivation of procedural due process he is entitled to nominal damages. Generally, nominal damages do not exceed one dollar"); Oliver v. Lee County Sch. Dist., 270 Ga. App. 61, 64 (2004) ("Absent reinstatement, violation of [the employee's] right to procedural due process by denial of counsel at the hearing did not entitle him to continued payment of his salary"); Bowler v. Board of Trustees, 101 Idaho 537, 545 (1980) ("It is now well established that where the deprivation of a protected liberty or property interest is substantively justified, but procedurally defective, the plaintiff is entitled to recover only nominal damages"); Kaiser v. Dixon, 127 Ill. App. 3d 251, 267 (1984) ("plaintiff would only be entitled to back pay and reinstatement if it were determined that there was no cause for her discharge"); Board of Educ. v. Crawford, 284 Md. 245, 259 (1979) ("To award [the employee] pay for the period in question . . . because of the initial failure of due process would constitute a windfall,

Historically, the Supreme Judicial Court has "treated the procedural due process protections of the Massachusetts and United States Constitutions identically." Matter of Powers, 465 Mass. 63, 80 n.18 (2013), quoting Hoffer v. Board of Registration in Med., 461 Mass. 451, 454 n.5 (2012). It is for the Supreme Judicial Court to determine whether a departure is warranted in this case. Treating State and Federal due process protections identically here, Hall-Brewster is entitled to nominal damages only, not to exceed one dollar. See Carey, 435 U.S. at 266-267.

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rather than compensation, to [the employee]" [quotation omitted]); Emanuel v. Columbus Recreation & Parks Dep't, 115 Ohio App. 3d 592, 601 (1996) ("If on remand the court finds that plaintiff would have been terminated from his position even if procedural due process had been observed, then he is not entitled to an award of back or front pay; however, he may be entitled to an award of nominal damages for the deprivation of his due process rights"); County of Dallas v. Wiland, 216 S.W.3d 344, 357 (Tex. 2007) ("If there was just cause to dismiss [the employees], [the employees] can recover only damages directly resulting from the denial of a hearing, if any can be proved, or, absent such proof, nominal damages"); White v. Barill, 210 W. Va. 320, 324 (2001) (employee "entitled only to nominal damages for the denial of due process, unless the [employee] demonstrates actual injury attributable to the denial of due process rather than to the deprivation"). See Hough v. Dane County, 157 Wis. 2d 32, 43-44 & n.4 (Ct. App. 1990). Contrast North Slope Borough v. Barraza, 906 P.2d 1377, 1381 (Alaska 1995) ("when a constitutionally unlawful dismissal is cured by a post-termination hearing, the appropriate relief is back pay up to the time of the curative hearing").

Conclusion. The judgment of the Superior Court is vacated, and the case is remanded for further proceedings consistent with this opinion.

So ordered.