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SJC-12855

DENISE DOHERTY vs. CIVIL SERVICE COMMISSION & another.[1]

Suffolk. September 9, 2020. - December 21, 2020.

Present: Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.[2]

State Police. Jurisdiction, Civil Service Commission. Civil Service, Police, Decision of Civil Service Commission. Police, Suspension. Statute, Construction. Administrative Law, Hearing. Criminal Offender Record Information.

Civil action commenced in the Superior Court Department on July 7, 2016.

The case was heard by Robert L. Ullmann, J., on motions for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Michael B. Halpin, Special Assistant Attorney General, for Department of State Police.
Joseph P. Kittredge for the plaintiff.
Robert L. Quinan, Jr., Assistant Attorney General, for Civil Service Commission.

[1] Department of State Police.

[2] Justice Lenk participated in the deliberation on this case prior to her retirement.

KAFKER, J. This case requires us to consider whether the Civil Service Commission (commission) has jurisdiction under G. L. c. 22C, § 13, and G. L. c. 31, §§ 41-45, to review the discipline of loss of two days of accrued leave time imposed by the colonel of the Department of State Police (department). The department contends that the Superior Court erred in finding that the commission had jurisdiction over the plaintiff's appeal of her disciplinary sanction because loss of accrued leave time does not fall within the scope of appealable matters expressly contemplated by the statutes at issue. The commission disagrees, arguing that it had jurisdiction over the plaintiff's appeal because, even if loss of accrued leave time is not expressly contemplated by the statutes, it is functionally equivalent to a suspension, which is within the commission's jurisdiction to review. The commission also argues it has jurisdiction in light of the statutes' legislative purpose. Finally, the plaintiff, assuming that the commission had jurisdiction, contends that the Superior Court decision must be reversed because the commission denied the plaintiff's request for a public hearing and the commission's decision was not supported by substantial evidence.

We hold that the commission did not have subject matter jurisdiction to review the plaintiff's loss of two days of

accrued leave time under G. L. c. 22C, § 13, and G. L. c. 31, §§ 41-45. We therefore vacate the judgment of the Superior Court and remand for proceedings consistent with this opinion.

Background. We summarize the commission's relevant and undisputed factual findings, as well as the procedural posture of this case.

The plaintiff has been employed by the department for over twenty years. From 2007 to 2012, the plaintiff was assigned to the department's certification unit, which is responsible for providing licensing services for private security (also known as "watch guard") companies. The certification unit will periodically conduct an administrative inspection of a watch guard company to ensure that the licensee company is in compliance with the statutory requirements. Among other things, the certification unit confirms that the company has on file a complete list of current employees, as well as copies of affidavits of all employees affirming they have not been convicted of a felony or crime of moral turpitude, as required by statute.

In October 2011, the plaintiff began an administrative inspection of XYZ Watch Guard Company (XYZ).[3] The plaintiff

[3] Because the actual name of the watch guard company was not relevant to its analysis of the issues, the commission used the pseudonyms "XYZ Watch Guard Company" and "XYZ" throughout its decision. We adopt the same naming convention in this opinion.

reviewed the affidavits of XYZ's employees and conducted board of probation record checks, which led her to determine that ten or eleven XYZ employees had records of felony convictions. The plaintiff subsequently conveyed to XYZ's director of government affairs that these employees jeopardized XYZ's license. The plaintiff then met with XYZ's license holder and director of government affairs and informed them that she would contact the employees herself, and XYZ provided the plaintiff with the employees' contact information to do so.

In March 2013, the department interviewed several XYZ employees who had been contacted by the plaintiff. The employees complained that the plaintiff was "rude" and "unprofessional" in their interactions. Moreover, one employee was incorrectly told by the plaintiff that the employee was unable to return to work at XYZ because of a prior felony conviction that, ultimately, did not exist. As a result of the department's investigation, the plaintiff was charged with violating article 5.8 of the department's rules and regulations concerning unsatisfactory performance, and article 5.27 concerning truthfulness. In December 2015, the department convened a trial board, which heard evidence and ultimately found the plaintiff guilty of five specific violations of

article 5.8.1.[4] The trial board recommended that the plaintiff forfeit a total of two days of accrued leave time as punishment, and both the trial board's findings and disciplinary recommendation were subsequently approved by the department colonel.

The plaintiff then timely appealed the department's decision to the commission pursuant to G. L. c. 22C, § 13. At the outset of an April 2016 evidentiary hearing before the commission, the plaintiff filed a motion requesting a public hearing pursuant to G. L. c. 31, § 43, which provides, "Any hearing pursuant to this section shall be public if either party so requests in writing." Simultaneously, the department moved to impound all testimony and exhibits that were relevant to the appeal. In its motion, the department argued that the bulk of the testimony and exhibits to be presented on appeal concerned the criminal offender record information (CORI) of several XYZ employees previously investigated by the plaintiff. Because such information is "highly sensitive and not subject to dissemination," the department argued that it should not be put

[4] Article 5.8.1 of the department's rules and regulations (effective Jan. 31, 2001) states: "Members shall maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Members shall perform their duties in such a manner as will maintain the highest professionally accepted performance standards in carrying out the functions and objectives of the State police."

in the position of potentially compromising the privacy rights afforded to the XYZ employees in their CORI records in order to defend the disciplinary action it took against the plaintiff.

The presiding commissioner at the hearing noted that there was a conflict between G. L. c. 31, § 43, which affords an appellant before the commission the right to a public hearing upon request, and the CORI statute, which protects the privacy of individuals with respect to the dissemination of their CORI records. After hearing argument from both parties, the presiding commissioner closed the hearing to members of the public. The presiding commissioner permitted the plaintiff's husband to remain for the hearing but advised him to exercise caution with respect to the sensitive information that was to be disclosed at the hearing. Ultimately, the commission issued a decision affirming the department's discipline of the plaintiff, concluding that the department's actions were supported by "just cause" and that the forfeiture of two days of accrued leave time was an appropriate sanction.

The plaintiff then commenced a civil action in the Superior Court, seeking judicial review of the commission's decision. The department, which was named as a codefendant, filed a motion to dismiss the plaintiff's complaint and asserted that the commission did not have subject matter jurisdiction to hear the plaintiff's appeal. Specifically, the department argued that

the commission lacked jurisdiction over the plaintiff's appeal because loss of accrued leave time is not one of the appealable disciplinary sanctions expressly contemplated by civil service law, G. L. c. 31, § 41. The Superior Court judge denied the department's motion to dismiss and concluded that (1) under department regulations, loss of accrued leave time was the equivalent of a suspension; and (2) commission review of the plaintiff's appeal was consistent with the statutory goal of providing appeal rights to State employees across a broad range of disciplinary matters.

Subsequently, the plaintiff moved for judgment on the pleadings. In her motion, the plaintiff argued that the commission's decision to close the April 2016 evidentiary hearing was error requiring reversal and that the commission's decision affirming the department trial board's sanction was not supported by substantial evidence. The department and the commission cross-moved for judgment on the pleadings.

The Superior Court judge entered judgment on the pleadings for the defendants and affirmed the commission's decision in full. Specifically, the Superior Court judge concluded that (1) while it was error for the commission to close the evidentiary hearing to the public, the decision did not prejudice the plaintiff; and (2) the commission's decision was supported by substantial evidence and was not arbitrary or capricious. The

plaintiff then appealed from the judgment on the pleadings, while the department appealed from the Superior Court judge's order denying its motion to dismiss for lack of subject matter jurisdiction. The case is now before this court on sua sponte transfer from the Appeals Court.

Discussion. 1. Subject matter jurisdiction. "[W]henever a problem of subject matter jurisdiction becomes apparent to a court, the court has 'both the power and the obligation' to resolve it." Rental Prop. Mgt. Servs. v. Hatcher, 479 Mass. 542, 547 (2018), quoting HSBC Bank USA, N.A. v. Matt, 464 Mass. 193, 199 (2013). See Mass. R. Civ. P. 12 (h) (3), 365 Mass. 754 (1974) ("Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"). In addition, "[s]ubject matter jurisdiction cannot be conferred by consent, conduct or waiver." Rental Prop. Mgt. Servs., 479 Mass. at 547, quoting Litton Business Sys., Inc. v. Commissioner of Revenue, 383 Mass. 619, 622 (1981). Moreover, "a question of statutory interpretation is a question of law for the court to resolve." Matter of the Valuation of Bell Atl. Mobile of Mass. Corp., 456 Mass. 728, 733 (2010). Accordingly, because "lack of subject matter jurisdiction is fatal to a plaintiff's claims," Everett v. 357 Corp., 453 Mass. 585, 612 (2009), we must first address the threshold issue whether the commission had jurisdiction to

hear the plaintiff's appeal. For the following reasons, we conclude that the commission did not have subject matter jurisdiction under G. L. c. 22C, § 13, and G. L. c. 31, §§ 41-45, to hear the plaintiff's appeal of loss of two days of accrued leave time.

We begin our analysis with text of the relevant statutes. It is a familiar rule that, "[w]here the language of a statute is clear, courts must give effect to its plain and ordinary meaning and . . . need not look beyond the words of the statute itself" (citation omitted). Milford v. Boyd, 434 Mass. 754, 756 (2001). In addition, we have consistently held that when interpreting a statute, "none of its words is to be regarded as superfluous," id. at 757, and we must "avoid a construction which would make statutory language meaningless," Commonwealth v. Super, 431 Mass. 492, 497-498 (2000), quoting Commonwealth v. Maher, 408 Mass. 34, 37 (1990).

General Laws c. 22C, § 13, provides that any uniformed member of the State police who has served for more than one year and who is charged with misconduct shall be tried by a department trial board at the direction of the colonel. The statute further provides: "Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45, inclusive of chapter 31." G. L. c. 22C, § 13. Tracking these cross-references, G. L. c. 31,

§ 41, provides for protection against the imposition of certain enumerated disciplinary actions unless there is "just cause." Finally, G. L. c. 31, § 43, provides that any person who is "aggrieved by a decision of an appointing authority made pursuant to [§ 41]" may appeal that decision to the commission. Taken together, whether a State police trooper may appeal a disciplinary matter to the commission is essentially determined by whether the matter falls within the scope of G. L. c. 31, § 41. This requires a close reading of the specific language of § 41, which provides in relevant part:

> "Except for just cause . . . , a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, . . . lowered in rank or compensation without his written consent, nor his position be abolished."[5]

The statute expressly enumerates specific disciplinary actions that may be appealed to the commission if they are not supported by "just cause." Importantly, "loss of accrued leave time" is not among the list of contemplated disciplinary actions. There is also no language in the statute suggesting that the list includes, but is not limited to, the enumerated disciplinary actions. See, e.g., G. L. c. 112, § 5B ("'Disciplinary action' includes, but is not limited to, revocation, suspension,

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[5] The second paragraph of G. L. c. 31, § 41, also extends "just cause" protection for suspensions of five days or less, although it provides a different process for internal review for these shorter suspensions.

censure, reprimand, restriction, nonrenewal, denial, or restriction of privileges, or resignation"). Nor is there other equivalency or catch-all language in the statute.

We have recognized that "a statutory expression of one thing is an implied exclusion of other things omitted from the statute." Commonwealth v. Russ R., 433 Mass. 515, 521 (2001), quoting Police Comm'r of Boston v. Cecil, 431 Mass. 410, 413 (2000). The listed disciplinary actions are of a common type, involving significant personnel decisions that will be upheld only if there is "just cause" for the disciplinary action. "Just cause," in this context, is defined by "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service" (emphasis added). Police Comm'r of Boston v. Civil Service Comm'n, 39 Mass. App. Ct. 594, 599 (1996), quoting Murray v. Second Dist. Court of E. Middlesex, 389 Mass. 508, 514 (1983). Accordingly, we read G. L. c. 31, § 41, to provide that only the serious disciplinary decisions expressly contemplated by the statute may be appealed to the commission.[6]

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[6] We note the commission itself has previously acknowledged that it does not have jurisdiction over department disciplinary actions that are not enumerated in G. L. c. 31, § 41. See, e.g., Hackett vs. Department of State Police, Civil Serv. Comm'n No. D-06-191, at 16 (Jan. 15, 2009) (acknowledging "the Commission pursuant to [G. L. c. 31 §§ 41-43,] only has jurisdiction over disciplinary actions involving a termination, suspension, involuntary transfer or punishment duty"); Bretta

In the face of a plain language interpretation of the statute, the commission contends that the loss of accrued leave time is the functional equivalent of a suspension. We are not persuaded. While the department trial board is permitted the flexibility to impose loss of accrued leave time as an "alternative" to suspension, the availability of accrual leave time as an alternative indicates that accrual leave time is a lesser sanction to suspension and not an equivalent. In addition, the department's interpretation of its own regulations suggests significant distinctions between the two sanctions. For example, article 5.17.2 of the department's rules and regulations provides that State police troopers who are suspended "shall be deprived of all Massachusetts State Police powers and privileges and must not represent themselves as members of the Massachusetts State Police." That same rule also provides that State police troopers who are suspended for five or more consecutive days must also relinquish their issued badges, identification cards, and weapons to their division commanders for the duration of the suspension. In essence, State police troopers who are "suspended" by the department are temporarily separated from their employment and may not avail

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vs. Department of State Police, Civil Serv. Comm'n No. D-05-1, at 52 (Jul. 31, 2008) (finding commission lacks jurisdiction to address discipline of "reprimand" under provisions of G. L. c. 31, § 41).

themselves of the privileges of being a State police trooper. We note that this interpretation of "suspension" is also consistent with civil service law. See G. L. c. 31, § 1 (defining "suspension" as "temporary, involuntary separation of a person from his civil service employment by the appointing authority"). In contrast, a State police trooper ordered to forfeit accrued leave time is not subject to any of the aforementioned penalties apart from the actual forfeiture of such leave time, and at no point is the trooper separated from his or her employment.[7] Accordingly, we conclude that loss of accrued leave time is not covered by the statutory language referencing suspensions, nor is loss of accrued leave time the functional equivalent of a suspension for purposes of G. L. c. 31, § 41.[8]

The commission also argues that the plain reading of G. L. c. 22C, § 13, should be disregarded based on the Legislature's

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[7] We also recognize that the department has consistently construed suspension and loss of accrued leave time as distinct punishments, with the latter being a less severe sanction attended with far fewer consequences. The record in this case includes numerous instances in which the department has argued that loss of accrued leave time is not equivalent to a suspension.

[8] We reach this conclusion in part based on the fact that only two days of lost accrued leave time were involved here. If the disciplinary sanction imposed had required weeks or months of lost accrued leave time, a more difficult question would have been presented.

intent in promulgating the statute. Specifically, the commission relies on the statute's original 1993 language, which stated:

> "Any person aggrieved by the finding of such trial board may . . . bring a petition in the district court within the judicial district of which he resides . . . [to] review such finding and determine whether or not upon all the evidence such finding and punishment was justified."

St. 1991, c. 412, § 22. The commission contends, based on this pre-2002 amendment language, that the Legislature did not intend to substantively limit the disciplinary matters that a State police trooper could appeal.

We disagree. By amending G. L. c. 22C, § 13, as it did in 2002, see St. 2002, c. 43, the Legislature substantively altered the plain and natural meaning of the statute in two important ways. First, the Legislature redirected appeals of department discipline from the District Court to the commission. Second, and more importantly for our purposes, the Legislature conditioned the commission's jurisdiction to hear such appeals on the express language of G. L. c. 31, §§ 41-45. It is reasonable for the Legislature, when it transferred appeals from the District Court to the commission, to have the commission's subject matter jurisdiction over department discipline track the language of its jurisdiction over other civil service employees.[9]

[9] The legislative history of the 2002 amendment to G. L. c. 22C, § 13, supports this conclusion. In voting to override

In sum, the commission's pre-amendment interpretation of the statute would essentially jettison the amended text's express reference to "sections 41 to 45, inclusive of chapter 31," which we decline to do.

Finally, we emphasize that our decision today does not leave without recourse those State police troopers who have been subject to department level discipline that does not meet the requirements of G. L. c. 31, § 41. General Laws c. 22C, § 43, expressly provides that any person may appeal a department order to the colonel, "who shall thereupon grant a hearing, and after such hearing the colonel may amend, suspend or revoke such order." Such internal appellate rights provide State police troopers protection against less significant forms of discipline.

For the foregoing reasons, we hold the commission does not have subject matter jurisdiction under G. L. c. 22C, § 13, and G. L. c. 31, §§ 41-45, to hear the plaintiff's appeal of loss of two days of accrued leave time.

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the Acting Governor's veto of the amended statute, legislators stated that they wanted to provide "the State Police the same types of access to a review that other police are entitled to," and to provide State police troopers "fairness" by redirecting appeals to the commission. State House News Service (House Sess.), Jan. 16, 2002 (statement of Rep. Timothy J. Toomey, Jr.); State House News Service (Senate Sess.), Feb. 12, 2002 (statement of Sen. Robert S. Creedon, Jr.).

2. Public hearing. Because of the above jurisdictional defect, we need not address the issue whether it was error for the commission to close the evidentiary hearing. Nonetheless, we acknowledge that the presiding commissioner had a difficult task in reconciling the plaintiff's right to a public hearing under G. L. c. 31, § 43, which the plaintiff duly chose to exercise here, with the privacy rights afforded to the witnesses in their CORI records under G. L. c. 6, § 172. Although not necessary for our decision today, we emphasize that in future cases in which a plaintiff requests a public hearing under G. L. c. 31, § 43, we caution the commission against blanket closures of hearings where a less restrictive option is available, such as impoundment or redaction of specific exhibits, or similar limitations on witness testimony.[10]

[10] We also nonetheless agree with the Superior Court judge here that, even if the commission improperly closes proceedings to the public, the appropriate standard of review is not structural error, as argued by the plaintiff. We apply structural error to protect an individual's constitutional right to a public trial in criminal cases. See Commonwealth v. Vargas, 475 Mass. 338, 357 (2016) (affirming that criminal defendants' right to public trial is guaranteed by Sixth Amendment to United States Constitution and that violation of such right is structural error requiring reversal); Commonwealth v. Hampton, 457 Mass. 152, 163 (2010) ("Generally, [structural error] is error that necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence" [quotation and citation omitted]). Such a standard, with its presumption of prejudice, is not applicable to the closure of commission proceedings.

Conclusion. For the foregoing reasons, the judgment of the Superior Court is vacated, and the case is remanded for an order of dismissal of the plaintiff's complaint.

So ordered.