

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Municipality of Bethel Park, | : |
| | : |
| Appellant | : |
| | : |
| v. | : No. 788 C.D. 2013 |
| | : Argued: November 12, 2013 |
| Bethel Park Civil Service Commission | : |
| and Kenneth Radinick | : |

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
 HONORABLE PATRICIA A. McCULLOUGH, Judge (P)
 HONORABLE JAMES GARDNER COLINS, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
SENIOR JUDGE COLINS**

FILED: January 27, 2014

The Municipality of Bethel Park (Bethel Park) appeals from an order of the Court of Common Pleas of Allegheny County (trial court) affirming the decision of the Municipality of Bethel Park Civil Service Commission (Commission).¹ Following a hearing held on March 26, 2012, the Commission reduced the punishment imposed by Bethel Park Chief of Police John Mackey (Chief Mackey) in disciplinary action against Bethel Park Police Officer Kenneth Radinick (Officer Radinick), from a five-day suspension (reducible to a two-day sentence if he participated in anger management classes) to a letter of reprimand.

¹ The Bethel Park Civil Service Commission is a non-participating party in this appeal.

Bethel Park appealed the Commission's decision and, following the issuance of the trial court's April 12, 2013 order, Bethel Park appealed to this Court.²

I. Background

On October 28, 2011, an auto repair shop owner telephoned the Bethel Park Police Department to report that a heated dispute had arisen between an employee of the shop and an employee of a nearby automotive parts store (herein, the Suspect), and that the Suspect had threatened to retrieve a gun from his residence in order to resolve the dispute. (March 26, 2012 Commission Hearing Transcript (H.T.), Reproduced Record (R.R.) at 189a-190a.) The Police Department Dispatcher relayed information to the shift commander on duty (Sergeant McLain), but neglected to mention the fact that a gun was involved. Patrolman Cristiano was dispatched to handle the dispute, arrived at the repair shop, learned about the gun threat, and heard that the Suspect had left the scene and was travelling home to retrieve a gun. Knowing that Officer Radinick, who has been a police officer for eighteen years, was working in the adjacent zone, Patrolman Cristiano radioed him and requested his assistance.

Officer Radinick arrived at the repair shop scene and, after learning that Sergeant McLain was proceeding to the Suspect's residence, got on the radio and requested back-up for Sergeant McLain. (H.T., R.R. at 271a.) There was no radio response to this request for several minutes, after which another officer responded that he would proceed to the Suspect's residence to back up Sergeant

²This Court's review of the Commission's decision is limited to determining whether the Commission committed an error of law, made findings of fact not supported by substantial evidence or violated the constitution. *City of Philadelphia v. Civil Service Commission (Johnson)*, 967 A.2d 1034, 1038 n.3 (Pa. Cmwlth. 2009); *City of Philadelphia v. City of Philadelphia Civil Service Commission (Carter)*, 895 A.2d 87, 91 n.7 (Pa. Cmwlth. 2006).

McLain. Several minutes later, another officer radioed that he was headed in the direction of the Suspect's residence. Upon hearing from another source that the Suspect was on his way back to the repair shop, Patrolman Cristiano and Officer Radinick positioned themselves in their vehicles at opposite ends of the parking lot, initiated a traffic stop of the Suspect's vehicle at gunpoint, and arrested the Suspect. They found a loaded .380 semi-automatic handgun in the center console of the Suspect's vehicle. (H.T., R.R. at 275a-276a.)

Patrolman Cristiano transported the Suspect to the police station. Officer Radinick followed, and upon arrival, they began the processing procedure. When a detective approached the two officers, Officer Radinick asked the detective if he had heard the radio call, and the detective said he had not heard the call but that he would have been at the scene if he had heard about it. (H.T., R.R. at 277a.) Officer Radinick then questioned another detective, and he also stated that he had not heard the call.

II. Incident Giving Rise to Disciplinary Action

Before the Commission, Officer Radinick testified that while processing the Suspect's arrest, he walked to the front of the station to retrieve a department incident number, walked into Sergeant McLain's office and expressed his anger and frustration with the lack of back-up provided. Sergeant McLain told him that the matter would be looked into and, as Officer Radinick moved to leave the office, Officer Zinsmeister walked in.

Officer Zinsmeister testified that Officer Radinick turned to him and said, in a loud voice, "what about you, you c--k s-----g mother f----r, why is it okay for you to sit in your office after you hear a gun call." (H.T., R.R. 166a.) Officer Zinsmeister stated that he saw the reaction of the people in the lobby, and that they

all turned and were looking. He testified that as he passed Officer Radinick and moved into Sergeant McLain's office, he moved his arm up to close the door, to isolate the situation, but Officer Radinick kicked his foot into the steel wedge that holds the door open and slapped his hand up on the door. (H.T., R.R. at 167a.) He stated that Officer Radinick said "you are no f-----g cop, you're a f-----g coward. You're a do nothing mother f-----g p---y." (*Id.*)

Officer Radinick testified that he asked Officer Zinsmeister if he had been listening to the radio and Officer Zinsmeister replied "yes." (H.T., R.R. at 319a.) Officer Radinick stated that he was angry that Officer Zinsmeister had not provided back-up on the call and admitted that he did call Officer Zinsmeister "a f-----g coward," several times, and that he told Officer Zinsmeister that he did not respect him as an officer, but denied calling him the other profane words. (H.T., R.R. at 320a-321a.) Officer Radinick stated that the argument was heated, and that after Patrolman Cristiano intervened and told him to leave, Officer Zinsmeister walked towards him, stuck his finger in his face, and said "f-k you," and at that point, Patrolman Cristiano grabbed his arm tightly and pulled him away from Officer Zinsmeister. (H.T., R.R. at 322a.)

Sergeant McLain, a witness to the altercation, testified that after Officer Zinsmeister entered the office and Officer Radinick, in a loud, almost screaming voice said, "where the f-k were you," Officer Zinsmeister replied that he had been in his office making phone calls. (H.T., R.R. at 128a.) Sergeant McLain testified that Officer Radinick again said, in a very loud, screaming voice, "you're a mother f-----g coward." So [Officer Zinsmeister] started raising his voice. [Officer Zinsmeister] came closer to [Officer Radinick], they were face to face and they were arguing. Again, very loud, both of them were extremely loud,

about not answering the call and this went back and forth between the two.” (H.T., R.R. at 128a-129a.) He testified that the argument went on for about thirty seconds, and ended when Patrolman Cristiano grabbed Officer Radinick by the arm and elbow and pulled him away. (H.T., R.R. at 152a.)

Officer Zinsmeister filed a complaint against Officer Radinick, and Chief Mackey instructed Lieutenant Rogan to conduct an investigation. Lieutenant Rogan concluded that Officer Radinick initiated the verbal confrontation, and recommended that Officer Radinick be suspended for three to five days, and receive anger management counseling. (Confidential Memorandum from Lieutenant Rogan to Chief Mackey, R.R. at 379a-382a.) Lieutenant Rogan also concluded that Officer Zinsmeister did not initiate the confrontation and that his actions were in self-defense, and recommended a written reprimand to Officer Zinsmeister. (*Id.*)

Chief Mackey suspended Officer Radinick for five days, with the proviso that if Officer Radinick attended anger management counseling, he would reduce the suspension from five days to two days. (11/9/2011 Notice of Disciplinary Action, R.R. at 54a-56a.) The Notice stated: “The behavior you displayed...in full view of your peers, Municipal Staff and the general public, was uncalled for. Your conduct was both unprofessional and embarrassing not only to you, but the entire Bethel Park Police Department.” (*Id.*, R.R. at 56a.) Officer Radinick filed an appeal with the Civil Service Commission.

Officer Zinsmeister received a Letter of Reprimand, which stated “your conduct did not rise to the level of inefficiency, neglect, intemperance, disobedience of orders or conduct unbecoming an officer. Therefore, no additional disciplinary action will be taken against you...I will, however, take this

opportunity to remind you that this type of behavior cannot and will not be tolerated.” (11/2/2011 Letter of Reprimand, R.R. at 373a-374a.)

Before the Commission, Chief Mackey testified at length about the steps he took and the information he considered prior to making a decision with respect to discipline, following the filing of the complaint by Officer Zinsmeister and the completion of the investigation undertaken by Lieutenant Rogan. He stated that he reviewed Lieutenant Rogan’s investigation report as well as written statements from many of the officers involved. (H.T., R.R. at 230a.)

Chief Mackey also testified that he received a written complaint from Officer Radinick regarding the manner in which the incident call was handled, and he instructed Lieutenant Rogan to conduct another investigation. (H.T., R.R. at 222a.) Chief Mackey stated that he reached the conclusion that the Dispatcher had erred in failing to communicate information about a potential weapon (for which the Dispatcher was appropriately disciplined), and determined that the Department was “fundamentally flawed,” in that approximately twelve officers were available at the time the incident call was received, and not enough people (himself included) either had their radios turned on or were listening to them. (H.T., R.R. at 224a.) Consequently, on September 9, 2011, Chief Mackey issued a memo instructing all patrol officers, regardless of unit or job assignment, to be attentive to radio transmissions and the potential for immediate response in case of an emergency. (R.R. at 386a.) However, Chief Mackey testified that there was no serious failure with respect to how the call was handled by the Department in terms of response or number of officers on the scene, and other than the Dispatcher, no officers merited discipline. (H.T., R.R. at 226a-227a.)

III. Commission Findings and Trial Court Order

Following a hearing, the Commission made the following relevant findings of fact:

23. Sergeant McLain testified that Officer Radinick was in the lobby of the Police Department, when Officer Scott Zinsmeister entered the Police lobby area. Officer Radinick asked Officer Zinsmeister, “Where the f-k [were] you?” Sergeant McLain testified that Officer Radinick also called Officer Zinsmeister a “mother f-----g coward”.

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25. Officer Radinick continued yelling at Officer Zinsmeister for about 30 seconds despite being told to “knock it off” by Sergeant McLain.

26. Sergeant McLain testified that this argument was audible and visible to members of the public in the building lobby outside of the Police lobby in front of the District Justice Wyda’s office.

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29. There was no dispute about the testimony from Sergeant McLain that Officer Radinick was “very loud”, which was also confirmed by Communications Officer Warren Roberts.

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31. Officer Zinsmeister testified that Officer Radinick called him a “c--k s-----g mother f----r” and told him “you are no f-----g cop...you’re a f-----g coward” in a voice that was “loud” and “tense”.

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33. When Officer Zinsmeister tried to retreat to the sergeant’s room, Officer Radinick followed him. When Officer Radinick finally began to walk away from Officer Zinsmeister he returned at least three times to re-engage Officer Zinsmeister.

34. All testimony agrees that the aggressive behavior of Officer Radinick was not initiated by Officer Zinsmeister.

35. On the following Monday, October 3, 2011, Officer Zinsmeister attempted to approach Officer Radinick to reduce the tension. Officer Radinick, with fists clenched, told him to stay away from him if he “knows what’s good for him.” He also told him a fight “could be arranged”.

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37. Officer Radinick concedes that he called Officer Zinsmeister a “coward” and a “f-----g coward” in a “loud voice”.

(July 14, 2012 Commission Findings of Fact, Conclusion, and Decision, Factual Findings (F.F.) ¶¶ 23, 25-26, 29, 31, 33-35, 37, R.R. at 72a-73a.)

The Commission also found that Officer Zinsmeister is the School Resource Officer, who is not assigned to patrol duties, and during the time period that began with receipt of the incident call at the police station and ended at the time the Suspect was arrested, Officer Zinsmeister was working on a school-related case. The Commission further found that Officer Zinsmeister admitted that he turned his police radio down while he was making phone calls, and did not even become aware that a gun had been threatened until after Officer Radinick confronted him at the police station. (F.F. ¶ 41, R.R. at 87a.)

The Commission concluded that Officer Radinick’s conduct “showed intemperance,” and that he confronted a fellow officer, lost his temper, and shouted vulgarities and accusations of cowardice in a loud voice, all within hearing of members of the public, as well as other officers and staff. (Conclusions ¶ 6, R.R. at 88a.) The Commission found that all of the witnesses to the altercation agreed that “the aggressive behavior of Officer Radinick was not initiated by Officer Zinsmeister,” although both officers used profane language and raised voices. (F.F. ¶ 34, 40, R.R. at 86a-87a.)

The Commission concluded that the lack of control of emotions exhibited by Officer Radinick would be reprehensible in any adult employee, and were “particularly unacceptable in the case of a police officer, who must keep his emotions and anger in check, because [of] the substantial power he wield[s] and the unusual capacity he has to inflict harm.” (Conclusions ¶ 6, R.R. at 88a.)

The Commission stated that Chief Mackey was within his authority in imposing the discipline on both Officer Radinick and Officer Zinsmeister based on the civil service rules and personnel manual; however, the Commission ruled that “the disparity in the respective disciplines is not supported by the evidence.” (Conclusions ¶ 12, R.R. at 89a.)

The Commission further concluded that “the officer who responded to the call for assistance and helped make the arrest of the gunman – Radinick – despite no prior incidents of misconduct or discipline, received a five day suspension without pay” and “[g]iven Officer’s Radinick’s record, it appears that the punishment imposed was not designed to correct and conform behavior, but was punitive and arguably in retaliation for his request for an investigation.” (Conclusions ¶¶ 14, 16, R.R. at 89a-90a.)

The Commission also concluded that both officers escalated the argument, Officer Radinick with his language and Officer Zinsmeister with his efforts to continue the argument, and fundamental fairness compels that the officers be treated equally. (Conclusions ¶¶ 15, 18, R.R. at 90a.) The Commission determined that the charges brought were supported by the evidence, and the penalty imposed was not prohibited, but decided that “the selection of the penalty vis-à-vis that which was imposed upon Officer Zinsmeister, was arbitrary, discriminatory, and an abuse of discretion,” and therefore modified Officer

Radinick’s penalty to a letter of reprimand, “similar in form and content to that issued Officer Scott Zinsmeister dated November 2, 2011.” (Decision, R.R. at 90a.)

The trial court heard oral argument but took no additional evidence, and in a four-page order, denied Bethel Park’s appeal, finding that the record “amply supports” the Commission’s conclusion that the penalty imposed on Officer Radinick is arbitrary, discriminatory and an abuse of discretion. (April 12, 2013 Order of the trial court, at 3-4.) The trial court noted:

One striking element of this case is that the dereliction of Zinsmeister involved a gun. In view of what has happened in the past and is happening now in our Country over gun use, I, as the evaluator of the evidence, am willing to accord some leeway to Radinick for his severe reaction to potential gun use.

(*Id.* at 2.)

IV. Discussion

Section 1112(B) of the Bethel Park Civil Service Rules and Regulations specifically limits the Commission’s authority to modify discipline, stating:

When the charges brought by municipal officials are found by the Commission to be supported by the evidence and the penalty is not arbitrary, discriminatory, or an abuse of discretion, the Commission may not modify the penalty. *Her[r]man[n] v. Civil Service [C]ommission of Jenkintown*, 478 A.2d 961 (Pa. Cmwlth.1984).

(Section 1112(B) of Municipality of Bethel Park Civil Service Rules and Regulations, R.R. at 46a.) The written statement of charges provided to Officer

Radinick sets forth with specificity the violations of police department policy and procedures that resulted in his five-day suspension.³

Here, the Commission found that the charges brought were supported by the evidence, and the imposition of a five-day suspension was not prohibited; however, they found the penalty vis-à-vis that which was imposed on Officer Zinsmeister to be arbitrary, discriminatory, and an abuse of discretion.

Before this Court, Bethel Park asserts that Officer Radinick's conduct was more severe than Officer Zinsmeister's conduct, and notes that the Commission highlighted the difference in conduct, finding that Officer Radinick engaged in "intemperance" and "conduct unbecoming an officer," with no such finding with regard to Officer Zinsmeister's behavior. Bethel Park states that the Commission cannot substitute its judgment for that of Chief Mackey merely because it disagrees with the severity of punishment, and both the Commission and the trial court erred in giving "leeway" to Officer Radinick because the selection of discipline was within Chief Mackey's exclusive discretion and responsibility.

Section 1103 of the Bethel Park Police Civil Service Rules and Regulations authorizes the Chief of Police to suspend a police officer for a period not to exceed thirty (30) days. (R.R. at 44a.) This Court has consistently held that municipal officials have the primary responsibility and discretion to determine whether and how a police officer should be disciplined. In *Borough of Jenkintown*

³ Officer Radinick's charges include the violation of: (1) Civil Service Rules and Regulations, Article XI, "Disciplinary Actions" Section 1101, Subsection E (inefficiency, neglect, intemperance, disobedience of orders or conduct unbecoming an officer and (2) Subsection I (violation of rules, regulations or procedures of the Bethel Park Police Department Policy and Procedures Manual, specifically subsections B (Courtesy), C (General Conduct of Members), E (Obedience to Laws, Regulations and Orders), and F (Derogatory Language)). (R.R. at 58a-61a.)

v. Civil Service Commission of Jenkintown (Lizzio), 478 A.2d 941 (Pa. Cmwth. 1984), a case also involving the suspension of a borough officer for conduct unbecoming an officer, we reversed the decision of a civil service commission to modify the penalty imposed by borough officials. *Borough of Jenkintown*, 478 A.2d at 942. There, we opined that the commission's purpose is to protect employees from arbitrary or discriminating township action, not to usurp the functions of the elected township officials in the administration of their duties. *Id.*, see also *Banks v. Board of Commissioners of Uppermerland Township*, 298 A.2d 923, 925 (Pa. Cmwlth. 1973).

Before this Court, Officer Radinick argues that the Commission produced an extensive, complete and substantial record, with 44 findings of fact and 19 conclusions, and where a Commission's findings are supported by substantial evidence – that being relevant evidence such that a reasonable mind might accept as adequate to support a conclusion – a reviewing court may examine that evidence, but not weigh it, given the Commission's position as finder of fact, and this Court may not substitute its judgment for that of the Commission. However, our examination of the record reveals the complete absence of evidence to substantiate the Commission's conclusion that the five-day suspension was punitive, and delivered in retaliation for Officer Radinick's request for an investigation. The sole basis for the Commission's conclusion that the suspension was punitive was the disparity in the penalties imposed on Officer Radinick and Officer Zinsmeister. The Commission, however, found that Officer Radinick's conduct was significantly worse. The Commission stated unequivocally that Officer Radinick was the aggressor, called his fellow officer a “mother f-----g coward” and other vulgarities in a very loud voice, in view and in hearing distance

of members of the public, and, five days after the incident, when Officer Zinsmeister approached him to reduce the tension, Officer Radinick responded by threatening his fellow officer, telling him that “a fight could be arranged.” (F.F. ¶¶ 26, 29, 34-35, 37, R.R. at 72a-73a.)

The Commission’s findings and conclusions regarding Officer Zinsmeister are exceedingly few; he did not initiate the aggressive behavior of Officer Radinick, but he too used profane language and raised his voice, and he contributed to the escalation of the argument with his efforts to continue it. (F.F. ¶¶ 34, 40, R.R. at 73a-74a, Conclusions ¶18, R.R. at 77a.) Indeed, the Commission arrived at this conclusion notwithstanding its factual finding that “when Officer Zinsmeister tried to retreat to the sergeant’s room, Officer Radinick followed him. When Officer Radinick finally began to walk away from Officer Zinsmeister he returned at least three times to re-engage Officer Zinsmeister.” (F.F. ¶ 33, R.R. at 86a.) Moreover, the Commission makes clear that Officer Zinsmeister’s fundamental responsibilities are unrelated to monitoring the radio and responding to calls, and he was not even aware that there was a gun threat until after he was confronted by Officer Radinick. (F.F. ¶ 41, R.R. at 74a, Conclusions ¶¶ 8-9, R.R. at 76a.) In sum, the evidence before the Commission, and the Commission’s own findings establish that Officer Radinick’s behavior was decidedly worse than the conduct of Officer Zinsmeister.

For the foregoing reasons, we conclude that there was not substantial evidence to support the Commission’s finding that Officer Radinick’s penalty was arbitrary, discriminatory, and an abuse of discretion; therefore, the Commission was prohibited, under Section 1112(B) of Bethel Park’s Civil Service Rules and Regulations, from modifying the penalty. Accordingly, the order of the Court of

Common Pleas of Allegheny County in this matter must be reversed, and the penalty fixed by the Police Chief of the Municipality of Bethel Park reinstated.

JAMES GARDNER COLINS, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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| Municipality of Bethel Park, | : |
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| Appellant | : |
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| Bethel Park Civil Service Commission | : |
| and Kenneth Radinick | : |

ORDER

AND NOW, this 27th day of January, 2014, the order of the Court of Common Pleas of Allegheny County entered April 12, 2013 in the above matter is REVERSED, and the penalty fixed by the Police Chief of the Municipality of Bethel Park is hereby reinstated.

JAMES GARDNER COLINS, Senior Judge