

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

ANTHONY PIERCY,)
)
 Petitioner,)
)
 vs.) Case No.18AC-CC00001
)
)
 THE MISSOURI STATE HIGHWAY)
 PATROL,)
)
 and)
)
 SANDRA KARSTEN,)
)
 Respondents.)

INTERLOCUTORY ORDER WITH RESPECT TO COUNTS I, II, III AND IV
OF PETITIONER'S REQUEST FOR JUDICIAL REVIEW

Petitioner Anthony Piercy ("Piercy") filed a five count Petition for Review of Administrative Decisions related to actions taken by his employer, the Missouri State Highway Patrol, and by and through its Superintendent, Sandra Karsten.

The first four counts all relate directly to the termination of Piercy's employment by the Superintendent. The Court will address those claims in this Order. Count V seeks a *de novo* review as a non-contested case under §536.150 RSMo arising out of the Superintendent's decision to withhold petitioner's pay and benefits pending final disposition of the other matters. There is no dispute that Count V requires a *de novo* review as an appeal of non-contested case under §536.150 RSMo and that a hearing will be required.

Counts I and II make identical legal arguments but in different statutory contexts. Piercy alleges in both Counts that §43.150 RSMo places two restrictions on the Superintendent's power to discipline members of the Highway Patrol. Count I makes the argument under §536.150 RSMo as an appeal of a non-contested case; and Count II makes the argument under §536.150 as an appeal of contested case.

Piercy has asked the Court to rule now on Counts I , and on Court II in the alternative. Piercy has filed a Motion for Summary Judgment as to Count I. This is an available remedy since normally in a §536.150 RSMo review of a non-contested case, a hearing would be required. However, if there are no contested facts and the case can be decided as a matter law, summary judgment would be available here just as in other civil cases.

The normal procedure in a review of a contested case under §536.140 RSMo would be for the attorneys to file briefs. Piercy has done so on the narrow statutory interpretation issue in Count II, and Respondents have done likewise.

Normally the threshold question of whether an appeal is under §536.140 RSMo as a review of contested case or under §536.150 as review of non-contested case would be critical since in the former no hearing typically required; and in the latter a *de novo* evidentiary hearing would be available. If Respondents prevail in both Counts I and Count II, this question will have to be addressed as the Court turns to the plenary reviews sought in Counts III and IV.

As the pleadings and motions are presently framed, the Court would not have to address the "contested vs. non-contested case" issue as we take up Piercy's Motion for Summary Judgment in Count I and the narrow legal issue briefed in Count II. This is because of a common thread in the grounds for reversal under both §536.140 RSMo and §536.150 RSMo. If, as argued by Piercy, his dismissal was in violation of limitations on the Superintendent's authority found in

§43.150, then the Superintendent's action was "in excess of [her] statutory authority" under §536.150 RSMo; and also "unlawful" under §536.140 RSMo.

Section 43.150 RSMo Analysis

Section 43.150 RSMo outlines the procedure for discipline of members of the Highway Patrol and references the role, and authority, of the Superintendent:

"After a probation period of one year the members of the patrol shall be subject to *removal*, reduction in rank or suspension of more than three days only for cause after a formal charge has been filed in writing before or by the superintendent and *upon a finding by a majority of a board of six members* randomly selected from troops or divisions other than that of the accused. The board shall be composed of six unbiased members including one nonvoting captain, one sergeant and four members of the same rank as the accused member. The randomly selected captain shall serve as presiding officer at the hearing. Within thirty days after the petition is filed, unless the accused consents to an extension of time, the board shall conduct a hearing and report to the superintendent the finding by the majority of the board, whether the charges are true and what discipline, if any, should be imposed. All lawful rules, regulations, and orders of the superintendent shall be obeyed by the members of the patrol who shall be subject to *dismissal as provided or* to one or more of the following:

- (1) Suspension *not to exceed thirty days*;
 - (2) Fine;
 - (3) Reduction in rank; or
 - (4) Disciplinary transfer at the member's expense; *as the superintendent may adjudge*. Nothing in this § shall be construed to prevent non disciplinary transfers of members if the superintendent determines that such transfers are for the good of the patrol. No hearings shall be required in the case of reprimands or suspensions of three days or less which may be imposed at the discretion of the superintendent."
- (emphases added).

The primary rule of statutory construction is to determine the intent of the legislature by considering the plain and ordinary meaning of words used in the statute. When ascertaining legislative intent, each word, clause, sentence, and section of a statute

should be given meaning, and a court should not interpret a statute so as to render some phrases mere “surplusage.”

Section 43.150.1 RSMo contains two separate, but related, components. The first part of the statute describes the complaint process and the hearing before the six member panel. A full range of disciplines (including removal) may be imposed “upon a finding” by a majority of the panel.

The second part of §43.150.1 describes how the Superintendent can proceed following a “finding” by the panel. Within the list of possible disciplinary actions there is a disjunctive “or” separating dismissal from lesser disciplines. The less severe disciplines following the “or” (suspension not to exceed thirty days, fine, demotion, and transfer) are followed by the clause “as the superintendent may adjudge.” Noticeably absent from this list is removal or dismissal. A reasonable interpretation of this part of §43.150.1 is that the Superintendent has broad discretion to choose among those less severe disciplines as he or she sees fit, *regardless* of the panel’s “finding.”

The “or” is important. If the legislature had intended dismissal to be part of the disciplines that can be imposed “as the superintendent may adjudge” the “or” would not be needed. Dismissal would simply be the first in list of disciplines followed by commas with a concluding “or” at the end of the list. The “or” after dismissal separates it from the rest of the disciplines. The dismissal is separated because dismissal is modified at this point by a critical phrase that does not modify the less severe disciplines. The phrase is “as provided.” Under the rules of statutory interpretation cited above, the legislature must have intended those words to have meaning. As with the “or,” we cannot interpret the statute as if those words were not present. The question is what do they mean.

The "as provided" sends the reader back to the first part of the statute where dismissal (there called "removal") is listed in the context of the panel making a "finding." The insertion of "as provided" reflects a legislative intent that the superintendent can only dismiss (or remove) a member of the highway patrol when there has been a "finding" by the panel that dismissal is the discipline that "should be imposed." The other forms of discipline (following the disjunctive "or") may be imposed "as the superintendent may adjudge" if the panel finds that some discipline is warranted, regardless of what discipline is recommended by the panel.

In Piercy's case, the panel not only did not find that dismissal "should be imposed." They found the opposite, recommending that Petitioner be reinstated to active duty.

Section 43.150.1 RSMo is designed to give the Superintendent maximum flexibility in suspensions of less than thirty days, fines, demotions and transfers, but it allows her to exercise the extreme remedy of removal (and suspensions greater than thirty days) only when a panel of the employee's peers finds that removal is appropriate.

There is another rule of statutory construction that reinforces the foregoing interpretation. Words of a statute must be considered in context, and sections of a statute considered *in pari materia*, in order to arrive at the true meaning and scope of the words.

It is noteworthy that the legislature specifically and clearly limited the Superintendent's ability to impose suspensions. In §43.150.1 RSMo suspensions "not to exceed thirty days" fall within the list of disciplines that the Superintendent can impose "as the Superintendent may adjudge." Without the thirty day limitation, the Superintendent could impose a multi-year "suspension" that would be tantamount to a dismissal regardless of what the panel recommended. The legislature elected to not afford the Superintendent that power. This

limitation on the power to suspend is analogous and consistent with the limitation on the power to dismiss.

In reading §43.150.1 RSMo as a whole, and reading its components *in pari materia*, it would make no sense for the legislature to *limit* the Superintendent's ability to suspend but give her *unfettered* discretion to dismiss or remove regardless of what the panel found to be an appropriate discipline. Instead, the logical way to interpret the statute is that the legislature did indeed intend that (regardless of the panel's recommendation) the Superintendent's ability to suspend be limited to thirty days; and also that her ability to remove or dismiss be limited to those occasions when the panel has recommended removal "as provided."

Facts Deemed Admitted

Respondents have not objected to any of the ten allegations in Piercy's Statement of Uncontroverted Facts and the following facts are deemed admitted. The Court also finds that there is no genuine issue as the following facts contained in Piercy's Motion for Summary Judgment:

1. Trooper Piercy is a natural person, a resident of Morgan County, Missouri and was a member of the Missouri State Highway Patrol until the disciplinary action that prompts this petition.

2. The Missouri State Highway Patrol ("MSHP") is an agency of the state of Missouri created by Chapter 43, RSMo.

3. Respondent Sandra K. Karsten ("the Superintendent") is, and at all pertinent times was, the Superintendent of MSHP.

4. While on marine duty on May 31, 2014, Trooper Piercy arrested an operator of a boat who appeared to be intoxicated. While transporting the operator to the zone office to

conclude the arrest process, Trooper Piercy put a Type III life jacket on the handcuffed operator rather than a Type I or II life jacket. When the operator fell or jumped into the water Trooper Piercy, despite his best efforts, was unable to retrieve him and the operator drowned.

5. On June 27, 2017, the special prosecutor withdrew a felony charge and instead charged Trooper Piercy with negligent operation of a vessel a class B misdemeanor as a result to the incident described above. Trooper Piercy entered a plea of guilty to the amended charge on June 27, 2017.

6. On September 19, 2017, Trooper Piercy was sentenced to 180 days incarceration to the county jail, with execution of the sentence suspended; and two years' supervised probation to include ten days of shock time in the county jail.

7. Following the plea of guilty to the class B misdemeanor and sentencing, MSHP initiated an investigation by and through its Professional Standards Division ("PSD").

8. The PSD report concluded with a finding that cause for discipline existed. As a result of that finding, a Review Board was convened by the Superintendent to conduct a hearing pursuant to MSHP General Order 26-01-1598, "Disciplinary Procedures." The Review Board was composed of five commissioned officers selected to ascertain whether the charges filed against Trooper Piercy were valid and, if so, to make a recommendation to the Superintendent for discipline.

9. The Review Board heard evidence at a hearing on December 11, 2017. Following the hearing, the Review Board issued its Findings of Fact, Conclusions of Law and Recommendation. Although the Review Board found that Petitioner's conduct did constitute a violation of General Orders, the Review Board unanimously recommended that Trooper Piercy be reinstated to active duty and transferred from his current troop assignment.

10. On December 15, 2017, the Superintendent issued her own Final Decision in which, contrary to the decision of the Review Board found in Exhibit B, terminated Trooper Piercy's employment.

Orders in Counts I and II

Based on the foregoing statutory interpretation and factual findings, Piercy's dismissal was in violation of limitations on the Superintendent's authority found in §43.150 RSMo. Therefore, the Superintendent's action was "in excess of [her] statutory authority" under §536.150 RSMo; and also "unlawful" under §536.140 RSMo.

The Court finds that the agency action would be properly reviewable under §536.150 RSMo as a non-contested case because the Superintendent was not bound by the panel's recommendation (except in the narrow, negative sense discussed above). She was free look outside the record if she chose to do so, and she could impose any of the lesser disciplines listed in §43.150.1 RSMo irrespective of the panel's recommendation. The Missouri Supreme Court decision in the recent case of *Nowden v. Division of Alcohol & Tobacco Control*, No. SC96496 (Mo. banc June 12, 2018) mandates a finding that the Superintendent's decision in this case would be reviewed as a non-contested case.

Piercy's Motion for Summary Judgment with respect to Count I is granted. Alternatively, if at some point the agency action is deemed to be a contested case reviewable on the record under §536.140 RSMo, Piercy's dismissal is ordered to be set aside as being unlawful.

Therefore, this case is remanded to the agency to allow the Superintendent to decide what discipline to impose among the lesser disciplines (suspension not to exceed thirty days, fine, demotion, or transfer) "as [she] may adjudge."

Orders in Counts III and IV

Counts III and IV seek plenary administrative review of Piercy's termination under §536.150 RSMo as an appeal of non-contested case (Count III) and, alternatively, under §536.140 RSMo as an appeal of contested case. Because in this Order we find in favor of Piercy in Count I and, alternatively, in Count II, Counts III and IV are moot, and they are hereby dismissed *sua sponte*.

Finality and Appeal

The only remaining Count (Count V) may include discovery and will require an evidentiary hearing. Count V is not directly related to the other counts or affected by these orders. The Court finds, pursuant to Rule 74.01(b) that there is no just reason for delay and the above orders shall be considered interlocutory and final for purposes of appeal.

Dated this 27 day of June, 2018.



Hon. Patricia S. Joyce