COMMONWEALTH OF MASSACHUSETTS

Appeals Court

SUFFOLK, ss. NO. 2024-J-0032

SHANNON O'BRIEN,
Plaintiff-Petitioner,

v.

DEBORAH B. GOLDBERG, TREASURER AND RECEIVER GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS,
Defendant-Respondent.

TREASURER AND RECEIVER GENERAL'S OPPOSITION TO PLAINTIFF'S PETITION FOR INTERLOCUTORY RELIEF UNDER G.L. c. 231, § 118, ¶ 1

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INTRODUCTION

Following two robust Superior Court hearings in December 2023, first on a motion for a temporary restraining order and then on a motion for a preliminary injunction, and the issuance of a thorough and reasoned decision by the Superior Court (Squires-Lee, J.), the Plaintiff-Petitioner, Shannon O'Brien, now seeks the "reversal of the denial of her motion for a preliminary injunction." Pet. ¶ 2. For the reasons set forth below and in the Superior Court's well-reasoned *Memorandum of Decision and Order on Motion for Preliminary Injunction* dated December 23, 2023 ("Decision"), *see* Record Appendix ("RA") 389-405, the Petition should be denied. In short, the record reveals ample support for the Superior Court's decision and Plaintiff-Petitioner fails in her "formidable task" of showing a clear abuse of discretion by the court below. *Lawless-Mawhinney Motors, Inc. v. Mawhinney*, 21 Mass. App. Ct. 738, 743 (1986).[1]

[1] "We 'will not reverse if there is a supportable basis for the [trial] court's action even if, on final analysis, it may prove to be mistaken.'" *Id.* (quoting *New England Patriots Football Club, Inc. v. University of Colorado*, 592 F.2d 1196, 1200 (1st Cir. 1979)).

BACKGROUND

The Defendant-Respondent, Deborah B. Goldberg, in her capacity as the Treasurer and Receiver General of the Commonwealth, ("Treasurer") will not repeat the procedural background set forth in the Decision below. RA 390-391. Before issuing the Decision denying injunctive relief on December 22, 2023, the lower court held two lengthy hearings on the Plaintiff-Petitioner's request for injunctive relief. *See* RA 138-216, 309-386. On January 19, 2024,[2] the Plaintiff-Petitioner filed the instant petition seeking interlocutory relief under G.L. c. 231, § 118, first par.

ARGUMENT

The petition should be denied because the trial court below did not abuse its discretion: rather, it "applied proper legal standards," and "the record discloses reasonable support"—indeed, ample support—"for its evaluation of factual questions." *Caffyn v. Caffyn*, 441 Mass. 487, 490 (2004) (internal quotations

[2] Although having 30 days to appeal, it is notable that Plaintiff-Petitioner waited until the 28th day to file her Petition. It continues a pattern of Plaintiff-Petitioner seeking to delay the very opportunity to be heard by the Treasurer that she originally filed her complaint to obtain.

omitted). Plaintiff-Petitioner thus has not shown the "clear entitlement to relief" typically required to obtain the "sparingly" granted relief from the Single Justice that she seeks. *Edwin R. Sage Co. v. Foley*, 12 Mass. App. Ct. 20, 23 (1981); *see also Jet-Line Services, Inc. v. Bd. of Selectmen of Stoughton*, 25 Mass. App. Ct. 645, 646 (1988) (relief from the Appeals Court Single Justice under G.L. c. 231, § 118, first para., denied "[i]n most cases, based upon the deference normally accorded determinations by the judge who heard the matter in the first instance"); *L.L. v. Commonwealth*, 470 Mass. 169, 184-85 & n.27 (2014) (no abuse of discretion unless the court makes "a clear error of judgment in weighing the factors relevant to the decision, such that the decision falls outside the range of reasonable alternatives") (citation omitted)). The power granted under Section 118, first para., is to be exercised in a "stinting manner" lest the single justice session be "turned into a morning after motion session[]." *Edwin R. Sage Co.*, 12 Mass. App. Ct. at 25.

Here, the Petition requests the following relief: (i) enjoining the Treasurer "from acting as the finder of fact" in the removal proceeding under G.L. c. 10, §

76(d); (ii) ordering a public removal hearing; (iii) an order requiring the Treasurer to provide "the report of investigator 2;" and (iv) ordering "a complete and proper notice of all charges, including the identity of all complainants that form the basis of [the] Treasurer[']s] decision to initiate removal proceedings under [] c. 10, § 76." As discussed below, each of the points of relief was carefully considered by the lower court and the Plaintiff-Petitioner fails to show a "clear entitlement to relief."[3] *Edwin R. Sage Co.*, 12 Mass. App. Ct. at 23.

I. The Superior Court Correctly Concluded That the Treasurer is the Finder of Fact.

The Superior Court did not abuse its discretion or err in concluding that the Treasurer could be the finder of fact concerning the potential removal. RA 402-404. The arguments advanced by Plaintiff-Petitioner here fall well short of showing any error of law—let alone a "clear error," *see L.L.*, 470 Mass. at 184-85—by the Superior Court. Pet. Mem. 34-50.

[3] Plaintiff-Petitioner devotes nearly 22 pages of her memorandum to a self-serving discussion of "facts" and procedural history. Pet. Mem. 6-27. The court should disregard the discussion because it departs from the permissible content of a supporting memorandum *of law* as set forth in Mass. App. Ct. R. 20.0(b).

The Plaintiff-Petitioner first argues that the Superior Court erroneously relied on Justice Greaney's decision in *Levy v. Acting Governor*, Supreme Jud. Ct. for Suffolk County, No. SJ-2001-0531, slip op. (Dec. 19, 2001). Pet. Mem. 34-37. The argument is without merit for several reasons.

First, without any support, Plaintiff-Petitioner argues, in essence, that Justice Greaney's decision in *Levy* should be disregarded as persuasive authority bearing on this case because he did not expressly discuss *Mathews v. Eldridge*, 424 U.S. 319 (1976), when he considered whether the Acting Governor could act as the finder of fact concerning the removal of members of the Massachusetts Turnpike Authority. Pet. Mem. 34-35. That the SJC Single Justice did not explicitly cite *Mathews* is not a basis to disregard *Levy*, where the Single Justice's decision was entirely focused on balancing the need for procedures that were fair to the employee, against the burden of procedures that would be disproportionate to the interest involved (*i.e.*, continued employment as an appointee of the Governor). *See generally Levy*, Supreme Jud. Ct. for Suffolk County, No. SJ-2001-0531, slip ops. (Dec. 19, 2001 and Jan 9, 2002); RA 110-114, 124-131. *Levy* was

thus concerned with what process was "due" to a political appointee of the Governor when the Governor seeks to remove the appointee, which is precisely the question presented here (albeit with respect to the Treasurer's potential removal of an official appointed by her under a separate statute, G.L. c. 10, § 76(d)). And it is the same question the Supreme Court answered (in a different context) in *Mathews*. In any event, in denying Plaintiff-Petitioner's preliminary injunction motion, the Superior Court expressly considered *Mathews*. RA 392-293.

Second, Plaintiff-Petitioner argues that the Superior Court should not have relied on *Levy* because it was "nothing more than a three-page order" that was decided over a two-day period. Pet. Mem. 35. In other words, Plaintiff-Petitioner argues that *Levy* is not persuasive authority because it was concise and promptly decided. However, brevity and speed of decision by Justice Greaney are not sound reasons for a lower court judge to disregard a squarely-on-point decision of a Justice of the Supreme Judicial Court. Additionally, Plaintiff-Petitioner's assertion, without any support, that *Levy* "hardly qualif[ies] as precedent, much less persuasive authority" should be

summarily rejected as inadequate argument because it fails to provide "citations to appropriate authorities" as required by Mass. App. Ct. R. 20.0(b). *See generally Cameron v. Carelli*, 39 Mass. App. Ct. 81, 85-86 (1995) (court need not address inadequate appellate argument).

Third, Plaintiff-Petitioner quarrels with the Superior Court because it did not, as Plaintiff-Petitioner would like, ignore *Levy* and "go[] to basic constitutional principles to determine appropriate procedure." Pet. Mem. 35-36. The argument is plainly flawed because it assumes, without any support, that *Levy* did not set forth "basic constitutional principles." Further, Plaintiff-Petitioner suggests—again without support—that *Levy* should not have been followed because it did not "involve a liberty interest." Pet. Mem. 36. This point is simply wrong. To the contrary, the liberty interest at stake in *Levy* was identical to the liberty interest at issue here—*i.e.*, the interest of a political appointee of an elected constitutional officer in their continued employment, in the face of allegations of misconduct that may warrant removal from office. There is no credible basis upon which to distinguish the liberty

interest at issue in *Levy* with the liberty interest involved here.

Fourth, Plaintiff-Petitioner argues that the Superior Court should not have relied on *Levy* because Justice Greaney in that case rested his decision in part on the assumption that the Acting Governor "will act impartially and with an open mind" as a finder of fact. Pet. Mem. 36. Without elaboration, the Plaintiff-Petitioner then seems to suggest, without any citation to supporting authority, that here the Treasurer should have been required to makes some sort of "attestation" in the face of Plaintiff-Petitioner's unsubstantiated claim she would be biased if she acted as the fact finder. Pet. Mem. 36. The argument should be rejected because there is nothing in Massachusetts law requiring such an attestation by the Treasurer here, and Massachusetts law generally assumes that government officials—and constitutional officers in particular—act lawfully, impartially, and in good faith to follow the law. *Levy, supra; see also Prescott v. Secretary of The Commonwealth*, 299 Mass. 194, 203-204 (1938) (reviewing Governor's declaration of an emergency law under article 48 of the Amendments to the Massachusetts Constitution and presuming that

the action of the Governor is valid and undertaken in good faith); *Rice v. The Governor*, 207 Mass. 577, 579 (1911); *Boston Inv. Ltd. v. Secretary of Envtl. Affairs*, 35 Mass. App. Ct. 391, 396 (1993) (government officials are assumed to carry out their official duties in compliance with law). Below, the Superior Court found no basis in the record to credit Plaintiff-Petitioner's assertion that the Treasurer would be biased if allowed to preside over the removal hearing, RA 402-404, and because Plaintiff-Petitioner's assertion of bias has no more support in this Court than it did in the Superior Court, it should also be rejected here.

Fifth, Plaintiff-Petitioner makes a conclusory one-paragraph argument, without any supporting citation, that had the Superior Court ignored *Levy* and instead applied the standard in *Matthews v. Eldridge*, *supra*, "the balance" would clearly require the recusal of the Treasurer as the finder of fact. Pet. Mem. 37-38. The argument fails because: (a) it is not supported by "appropriate authorities" as required by Mass. R. App. Ct. 20.0(b); and (b) fails to explain how the Superior Court committed a clear legal error. It is not enough for Plaintiff-Petitioner to argue

that the Superior Court should have engaged in a different analysis because Plaintiff-Petitioner says so. In any event, it also again mistakenly assumes without support that *Levy* was not consistent with *Mathews*.

Sixth, the Plaintiff-Petitioner argues that the Superior Court erred because it only concluded that there was no actual bias that prevented the Treasurer from serving as the fact finder without also weighing whether there was perceived bias that should prevent the Treasurer from being the finder of fact. Pet. Mem. 38-41. The argument fails because, among other reasons, the Plaintiff-Petitioner continues to rely on cases taken out of context. Plaintiff-Petitioner's reliance on *Commonwealth v. Cousins*, 484 Mass. 1042, 1046 (2020), is misplaced because that case dealt with only *judicial* bias in the context of a criminal case.[4] The case was clearly focused on the standard that applies only to the judicial branch. Plaintiff-Petitioner fails to explain why the court below would have been required to engraft that standard on to the Treasurer's consideration of removal under c. 10, §

[4] *Cousins* was not even raised below.

76(d).[5] For the same reason, Plaintiff-Petitioner's reliance on *Commonwealth v. Morgan RV Resorts LLC*, 84 Mass. App. Ct. 1, 9 (2013), is also misplaced.[6] It, too, dealt only with the standard that applies to a judge in the judicial branch of government. Plaintiff-Petitioner then rehashes *Williams v. Pennsylvania*, 579 U.S. 1 (2016), without explaining how the Superior Court erred in rejecting its application here. The Superior Court distinguished and explained the inapplicability of *Williams*, also a criminal case, at both oral argument, RA 333, and in its Decision, RA 403.

Finally, Plaintiff-Petitioner argues that the Superior Court erred because it did not agree with Plaintiff-Petitioner's assessment of the record below. Pet. Mem. 42-50. Supporting her argument, Plaintiff-Petitioner then sets forth nearly seven pages of factually unsupported and speculative assertions of malicious conduct by the Treasury. Pet. 43-50.[7] Again,

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[5] As discussed below, the Legislature charged the Treasurer with the power of removal under c. 10, § 76(d). RA 116, 167 lines 4-8, RA 331 lines 9-12.

[6] *Morgan RV Resorts* was not raised below.

[7] Plaintiff-Petitioner also makes a passing argument that the Superior Court erred in concluding that the Treasurer '"'is not the 'accuser' and 'adjudicator.'"' Pet. Mem. 42. But it has long been "well settled"

(footnote continued)

Plaintiff-Petitioner does not explain how the Superior Court abused its discretion and committed a clear error of law that required the court to adopt her view of the record. *Caffyn*, 441 Mass. at 490. There was reasonable support—indeed ample support—for the court's view of the record. *Id.* Consequently, Plaintiff-Petitioner fails to show a clear entitlement to relief as required by *Edwin R. Sage Co.*, *supra*, and its progeny discussed above.

In sum, taken singularly or in combination, the arguments asserted by Plaintiff-Petitioner do not show that the Superior Court erred in assessing whether the Treasurer could lawfully serve as the fact finder.

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that the combination of prosecutorial and adjudicative functions within the same agency does not violate due process. *School Comm. of Stoughton v. Labor Relations Comm'n*, 4 Mass. App. Ct. 262, 272 (1976) (citations omitted). Here, those functions will be kept separate during the proceedings, with outside counsel from Morgan Lewis & Bocious LLP presenting the grounds for removal, Attorney Thomas Maffei acting as the presiding officer, and Treasurer Goldberg serving as the ultimate adjudicator. RA 113, 275. Moreover, to the extent that Plaintiff-Petitioner asserts that the removal proceeding is an "adjudicatory proceeding" within the meaning of G.L. c. 30A, the argument should be rejected because the Superior Court observed that the Plaintiff-Petitioner agreed below that an appeal from final decision of the Treasurer would be governed by the certiorari statute, G.L. c. 249, § 4, and not c. 30A. RA 397 n.7.

II. Nothing Requires that the Removal Proceeding be Public.

Plaintiff-Petitioner fares no better with her argument that the opportunity-to-be-heard meeting with the Treasurer must be public. Pet. Mem. 50-52. The issue was robustly contested in the hearings below, and the Superior Court reasonably concluded that c. 10, § 76(d), which necessarily must be construed to incorporate the standards from *Levy*, *see* RA 394, does not require a public hearing. RA 401-402.

Plaintiff-Petitioner again fails to show any abuse of discretion committed by the court below. First, Plaintiff-Petitioner argues that the Superior Court erred in its analysis of what is required for a "name clearing" hearing. Pet. Mem. 50-51. But rather than doing the necessary hard work of explaining how the court misconstrued or misapplied *Fontana v. Commissioner of Metropolitan District Commission*, 34 Mass. App. Ct. 63 (1993), or the other cases relied on by the court, Plaintiff-Petitioner instead merely cites random Federal court cases she contends support her position. That is not enough to show clear error warranting relief. If anything, the cases cited by Plaintiff-Petitioner show that different courts reasonably conclude that what constitutes a sufficient

name-clearing hearing depends on the unique context of each case. Nothing in the cases cited by Plaintiff-Petitioner compels a different result here.

Next, Plaintiff-Petitioner reprises her "Star Chamber" argument. Pet. Mem. 51-52. Once again, Plaintiff-Petitioner quarrels with the Superior Court's decision but fails to show the clear error committed by the Court in following established Massachusetts case law. *See Fontana*, *supra.*

In sum, taken singularly or in combination, the Plaintiff-Petitioner's arguments do not show that the Superior Court abused its discretion in assessing whether the Treasurer was required to hold a public meeting with the Plaintiff-Petitioner.

III. The Treasurer Has Received the Second Investigative Report and Will Provide it to Plaintiff-Petitioner Pursuant to the Protocol.

Plaintiff-Petitioner next asserts that this Court should order the production of the second investigator's report. Pet Mem. 52-54. The Court need not reach this issue because the Treasurer is prepared to send Plaintiff-Petitioner the second investigator's report, which has now been delivered to the Treasurer by the Cannabis Control Commission. Although not properly part of the record in this proceeding

(because the record is limited to the record below and this Court has temporarily stayed that case), the Treasurer was in the process of preparing to deliver the report to Plaintiff-Petitioner along with an amended notice letter setting forth, among other things, the date for a meeting in February 2024. Delivery of the report and amended notice letter has now been delayed because the Plaintiff-Petitioner filed her Petition which, in turn, caused this Court to stay temporarily the proceedings while it considers the Petition.

In any event, it would be improper for this Court to order the Treasurer to provide the report because that was not part of the injunctive relief sought by Plaintiff-Petitioner below. Plaintiff sought only three items of injunctive relief below. RA 391. As summarized by the Superior Court, Plaintiff-Petitioner sought only an order that:

> (i) there should be an independent finder of fact . . . ; (ii) there must be a mechanism for the compulsory attendance of witness; and (iii) the hearing should be public.

RA 391. Plaintiff-Petitioner cannot now seek injunctive relief that goes beyond what was before the court below. To do so would be to depart from the limited scope of c. 231, § 118, first para. review.

The relief Plaintiff-Petitioner now seeks was not part of the "order" below which is on review. Put differently, Plaintiff-Petitioner is seeking this new relief for the first time in this Court.

IV. The Plaintiff-Petitioner Has Received Legally Sufficient Notice of the Charges and the Request For the Identities of Unidentified Complainants is Not Properly Before This Court.

To begin, although the Petition seeks an order that the Treasurer "provide . . . complete and proper notice of all charges," Pet. ¶ 4(b)(iv), Plaintiff-Petitioner makes no actual argument on the point. Accordingly, the argument should be deemed waived under Mass. App. Ct. R. 20.0(b) for failure to argue. But even if the court were to construe some passage in Plaintiff-Petitioner's 61-page memorandum as an argument on the point, it is not properly before the court for the reasons set forth in Argument.III. immediately above.

Likewise, Plaintiff-Petitioner's request that this Court order that she be provided with the identity of the unidentified complainants referenced in the first investigator's report, *see* Pet. Mem. 54-56, is beyond the proper scope of the Petition for the reasons set forth in Argument.III. immediately above.

Finally, if the court were to reach the merits of the issue concerning the identity of the unidentified witnesses, an order against the Treasurer would not be appropriate because the record does not support the unreasonable inference that the Treasurer knows the identity of the unidentified witnesses referenced in the first investigator's report. RA 45, 46, 51, 233. As Plaintiff-Petitioner's materials revealed in the proceedings below, only the first investigator knows the identity of the unidentified witnesses. RA 233. That investigator was not solicited by or hired by the Treasurer; instead, the investigator was retained by the Cannabis Control Commission, which—aside from the Treasurer's authority to appoint and remove the Chair under c. 10, § 76(d) and other limited powers set forth in the statute—is not subject to the control of the Treasurer. RA 390. The Treasurer cannot compel the investigator to provide her with the names of the unidentified witnesses referred to in the investigator's report. Accordingly, the relief sought by Plaintiff-Petitioner does not properly lie against the Treasurer.

V. The Superior Court Did Not Abuse Its Discretion in Finding Plaintiff-Petitioner Did Not Prove Irreparable Harm.

Although the Court need not reach the issue because Plaintiff-Petitioner has failed to demonstrate a likelihood of success on the merits, *see Foster v. Commissioner of Correction*, 484 Mass. 698, 712 (2020), the Superior Court was entirely justified in concluding that Plaintiff-Petitioner did not meet her burden of demonstrating irreparable harm, RA 404-405. Moreover, the record below is devoid of particularized evidence that Plaintiff-Petitioner suffered, or will suffer, irreparable harm as the result of proceeding with the meeting with the Treasurer that she specifically requested in her complaint below. RA 15, ¶66.

Finally, the "harm" claimed by Plaintiff-Petitioner is not the kind of harm that cannot be remedied by a successful appeal of a final decision on the merits. Such a claim of irreparable harm in the suspension and removal context was summarily rejected by Justice Spina in *Amorello v. The Governor*, Sup. Jud. Ct. for Suffolk County, No. SJ-2006-0311 (Spina, J.). RA 133-134.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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Dated: January 29, 2024

CERTIFICATE OF SERVICE

I hereby certify that on the below date I caused the instant Treasurer and Receiver General's Opposition to be served by email on counsel for the plaintiff-petitioner in the above-captioned action and a copy of this Opposition to be filed with the clerk's office for the Suffolk Superior Court as required by Appeals Court Rule 20.0(d).

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Date: January 29, 2024