

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

16-P-747

WILLIAM LEEMAN & another¹ RECEIVED

vs.

2017 JUN 26 AM 10 05

CITY OF HAVERHILL & another.² CIVIL SERVICE COMMISSION

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiffs, William Leeman and Christopher Pagliuca, are police officers employed by the Haverhill police department. They appeal from a Superior Court judgment that affirmed a decision of the Civil Service Commission (commission) upholding a ten-day suspension of Leeman and a five-day suspension of Pagliuca imposed by the city of Haverhill. The suspensions arose from the plaintiffs' failure to fully report and to investigate an incident involving a retired lieutenant colonel of the Massachusetts State police who had stopped his vehicle after allegedly driving while intoxicated and crashing into a utility pole, causing extensive damage. We affirm for substantially the reasons set forth in the judge's well-reasoned

¹ Christopher Pagliuca.

² Civil Service Commission.

memorandum of decision and order on the parties' cross motions for judgment on the pleadings.

Background. After a two-day evidentiary hearing, at which Leeman and Pagliuca testified, the commission found the following facts. On March 30, 2012, Pagliuca was one of four police officers who responded to a reported incident of operation of a motor vehicle while intoxicated. The driver of the vehicle was Charles Noyes. The investigation revealed that Noyes had knocked down a utility pole in West Newbury and then continued to drive into Haverhill where he eventually stopped on the side of the road. Following the incident, Pagliuca wrote a report that was reviewed and approved by Leeman. The report contained numerous omissions, including: Noyes's statements to paramedics that he had been drinking; Noyes's statements that he should be let go because he was a retired State trooper; the fact that Noyes actually was a retired State trooper; and that all of the officers at the scene, including Pagliuca, believed Noyes was intoxicated.

The police chief of the Haverhill police department, Alan DeNaro, reviewed Pagliuca's report and determined that it was incomplete and "appeared to be purposely designed to avoid supporting that there was sufficient probable cause at the scene to make an arrest." DeNaro ordered an internal investigation, after which Leeman was suspended for ten days and Pagliuca was

suspended for five days, for violations of Haverhill police department rule 130 ("Reports submitted . . . shall be truthful and complete"), rule 111 ("Officers shall perform their duties in a manner that will maintain the highest standards of efficiency"), and canons of police ethics art. X ("[Law enforcement officers] shall ascertain what constitutes evidence and shall present such evidence impartially").

The plaintiffs appealed their suspensions to the commission. On July 11, 2013, the commission issued a unanimous decision upholding the suspensions. As regards Pagliuca, the commission found that he ignored evidence that Noyes was intoxicated, did not administer a field sobriety or breathalyzer test, failed to adequately search for Noyes's car keys, and wrote an untruthful and incomplete report. The commission found that Leeman, as shift commander, failed to ensure that Pagliuca's report was truthful and accurate and discouraged a subordinate officer from correcting the report. In so doing, the commission considered comparative discipline and noted that there was no evidence of bias or disparate treatment. The plaintiffs then filed a complaint for judicial review in the Superior Court. The parties filed cross motions for judgment on the pleadings and, after a hearing, the judge denied the plaintiffs' motion and allowed the defendants' motion.

Discussion. Under G. L. c. 31, § 44, we review the commission's decision "to determine if it violates any of the standards set forth in G. L. c. 30A, § 14(7)." Plymouth v. Civil Serv. Commn., 426 Mass. 1, 5 (1997). The judge found, and we agree, that the plaintiffs waived their arguments that the commission decision was not supported by substantial evidence, was arbitrary or capricious, or was an abuse of discretion because they failed to submit a transcript of the commission hearing in the Superior Court. See Superior Court Standing Order 1-96. We are therefore bound by the commission's factual findings, and our review is limited only to determining whether there was an error of law. See Covell v. Department of Social Servs., 439 Mass. 766, 782-783 (2003). See also Connolly v. Suffolk County Sheriff's Dept., 62 Mass. App. Ct. 187, 193 (2004).

The plaintiffs first argue that they should not have been suspended because the facts known to Pagliuca, and subsequently transmitted to Leeman, were insufficient to support probable cause to arrest Noyes for operating while under the influence or to support Haverhill's jurisdiction to make an arrest. Even if we were to assume that these arguments had merit (which we do not), they are irrelevant because the plaintiffs were not suspended for failing to arrest Noyes; rather, they were

suspended because Pagliuca wrote an inaccurate and incomplete report that Leeman subsequently reviewed and approved.

Next, the plaintiffs argue that the commission decision was arbitrary and capricious because it upheld greater discipline in this case than it did in a 2011 incident involving another Haverhill police officer. Contrary to the plaintiffs' claim, it is clear that the commission concluded that the 2011 case was not comparative because it did not involve the submission of an inaccurate and incomplete report or a commanding officer's direction to a subordinate not to correct the report. Because "there is no indication that any evidence was arbitrarily discounted, the decision cannot be considered arbitrary or capricious" (emphasis supplied). Selectmen of Natick v. Labor Relations Commn., 16 Mass. App. Ct. 972, 973 (1983).

Haverhill has requested appellate attorney's fees. We conclude that an award of fees is appropriate. Counsel for Haverhill may submit a petition for appellate attorney's fees, with supporting materials, within fourteen days of the date of

the rescript; the plaintiffs shall have fourteen days thereafter to respond. See Fabre v. Walton, 441 Mass. 9, 10-11 (2004).

Judgment affirmed.

By the Court (Vuono, Meade & Maldonado, JJ.³),

Handwritten signature of Joseph F. Stanton in cursive script.

Clerk

Entered: June 20, 2017.

³ The panelists are listed in order of seniority.