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MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2018-1200

RECEIVED

MA Off. of Attorney General
Administrative Law Division

JOSEPH ANDRADE

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION and another¹

REC'D CIV. SERVICE COMM
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**MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR
JUDGMENT ON THE PLEADINGS**

Under M.G.L. c. 31, § 61, the state civil service law, Plaintiff Joseph Andrade was a probationary Cambridge firefighter. More than ten months into his employment, he was arrested for domestic assault and battery, and the Defendant City of Cambridge, through its Fire Department, placed him on paid administrative leave. While still in that status, but more than a year after his employment began, Mr. Andrade was arrested again, for assault and battery and witness intimidation. The City then placed him on unpaid leave, and eventually terminated his employment.

Mr. Andrade appealed his termination to the defendant Massachusetts Civil Service Commission (the "Commission"), arguing that he had become a tenured employee by the time of his termination, and so the termination was improper. Finding that he was still a probationary employee when the City terminated him, the Commission dismissed Mr. Andrade's appeal in a unanimous decision dated March 15, 2018 (the "Decision"). Mr. Andrade filed a motion for reconsideration, which the City opposed. After reviewing the briefs, the Commission unanimously denied the motion for reconsideration on April 12, 2018.

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¹ City of Cambridge

Mr. Andrade then brought this case, appealing the decision of the Civil Service Commission under M.G.L. c. 30A § 14 and M.G.L. c. 31 § 44. The parties filed cross-motions for judgment on the pleadings. I heard oral argument on October 1, 2019. I will allow the City's motion, and deny the motion of Mr. Andrade.

Background

The following facts appear in the Decision or the Administrative Record ("AR").

Mr. Andrade began his employment as a firefighter on March 13, 2016. On February 1, 2017, he was arrested for domestic assault and battery. As a result, the next day the City's Fire Department placed him on paid administrative leave.

While Mr. Andrade was on paid administrative leave, on March 7, 2017 the City's Acting Fire Chief posted a General Order listing him among several probationary firefighters who "have reached the status of firefighter, effective March 13, 2017." Decision at 2. The Acting Fire Chief has testified by affidavit that "the General Order was a mistake. I had no intention of conferring permanent status on Mr. Andrade who was on leave pending the investigation of serious charges of domestic violence." AR at 38. On later dates, Mr. Andrade was listed on Fire Department rosters. Decision at 7. Those rosters, Mr. Andrade's brief concedes, were maintained by his union, not the Fire Department. Andrade Brief at 10-11.

On April 12, 2017, Mr. Andrade was again arrested for assault and battery, and this time for witness intimidation, regarding a second incident involving the same alleged victim, his girlfriend. Two days later, a court issued a temporary restraining order directing that Mr. Andrade stay away from the alleged victim. Shortly thereafter, the court extended that order through April 20, 2018.

The City Manager, who was the civil service appointing authority for the City, then notified Mr. Andrade in a letter dated April 19, 2017 that he was suspended without pay. There followed a hearing before the City's Personnel Director, attended by Mr. Andrade, his lawyer, and a union representative. Following this hearing, in a memorandum dated September 8, 2017, the City's Personnel Director recommended that the City Manager terminate Mr. Andrade. The City Manager did so on September 14, 2017.

Analysis

1. The Law Governing Administrative Appeals

Under M.G.L. c. 30A, § 14,² this court may reverse, remand, or modify an agency decision if the agency decision is in violation of constitutional provisions, based upon an error of law, unsupported by substantial evidence, arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. Mr. Andrade bears the burden of demonstrating the invalidity of the Decision. See *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989).

"A court should not reverse an agency decision unless the errors alleged have prejudiced the substantial rights of a party." *Boston v. Massachusetts Comm'n Against Discrimination*, 47 Mass. App. Ct. 816, 819 n.6 (1999). In reviewing an agency decision, the court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it" by statute. M.G.L. c. 30A, § 14(7). The court also "accords due weight and deference to an agency's reasonable interpretation of a statute within its charge." *Police Comm'r of Boston v. Cecil*, 431 Mass. 410, 413 (2000), citing *Massachusetts Med. Soc'y v. Comm'r of Ins.*, 402 Mass. 44, 62 (1988).

² Although Mr. Andrade also brings his appeal under M.G.L. c. 31 § 44, he does not contend that this other jurisdictional basis changes the usual analysis under M.G.L. c. 30A § 14.

2. Application of the Law to the Decision

While a municipal employer must provide a tenured employee with an administrative hearing before terminating him, the civil service law provides no such right for a probationary employee. *New Bedford v. Civil Service Comm'n*, 6 Mass. App. Ct. 549, 551 (1978). A newly appointed firefighter remains a probationary employee for 12 months. Specifically, the civil service law requires that he “actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he shall be considered a full-time tenured employee in such position.” M.G.L. c. 31 § 61.

“If [an employee] was not tenured, then the commission lacks jurisdiction to hear his appeal.” *Selectmen of Brookline v. Smith*, 58 Mass. App. Ct. 813, 815 (2003). In its Decision, the Commission ruled, “Since Mr. Andrade was not a tenured employee at the time of his termination, the Commission has no jurisdiction to hear his appeal regarding whether there was just cause for his termination.” Decision at 8-9. He was not a tenured employee, according to the Commission, because he had not “*actually perform[ed] the duties of firefighter for the twelve months* as required by the Legislature in [M.G.L. c. 31] Section 61 and, for that reason, Mr. Andrade’s probationary period had not ended at the time he was terminated.” Decision at 8 (emphasis in original).

Mr. Andrade cannot argue that he actually performed the duties of a firefighter for 12 months, because it is undisputed that he was placed on administrative leave six weeks or so before the first anniversary of his hiring. Mr. Andrade asserts that, nonetheless, he had become a tenured firefighter for other reasons.

Mr. Andrade first contends, confusingly, that the City never formally extended his probationary period beyond his one-year anniversary, and therefore his probationary period must

have ended on that one-year anniversary. Because the City terminated him after the one-year anniversary, it terminated him while he was a tenured employee, Mr. Andrade argues. This argument is without merit, for two reasons.

First, Mr. Andrade himself defeats this argument by conceding that “[a]n employee who is placed on paid, administrative leave pending the outcome of an investigation against them has their probationary period tolled.” Andrade Brief at 6. If this is so, it follows that the City had no need to extend the probationary period, because Mr. Andrade would remain on probationary status, six weeks away from tenure, until the City took its next action. Had the City reinstated him, Mr. Andrade would still have been required to serve as a firefighter for six more weeks before he attained tenure. As it turned out, however, the City’s next action was to terminate him, with six weeks still to go in his probationary period.

The second problem with Mr. Andrade’s argument is that it flies in the face of governing case law. In *Police Comm’r of Boston v. Cecil*, 431 Mass. 410 (2000), the Commission ruled that a police officer placed on administrative leave nine days before his first anniversary “must be deemed to have completed his probationary period of employment and entitled to tenure.” *Id.* at 412-413. The Supreme Judicial Court ruled that this was simply wrong, and reversed. “Where § 61 calls for a newly appointed police officer to ‘*actually perform*’ the duties of such position on a full-time basis for a probationary period of twelve months (emphasis added [by *Cecil* court]), the intent of the Legislature could not be clearer. The commission exceeded its authority when it credited Cecil the nine days he did not serve in his probationary period.” *Id.* at 414. Perhaps chastened, the Commission quoted *Cecil* at great length in its Decision here. See Decision at 5-7. Mr. Andrade’s attempts to distinguish *Cecil* are as unpersuasive in this court as they were at the Commission.

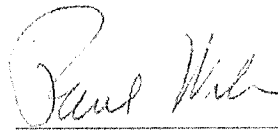
Mr. Andrade next argues that he became a tenured firefighter when the Acting Fire Chief announced that he and his classmates would attain that status on their first anniversary. (Mr. Andrade was on administrative leave when the Acting Fire Chief posted that General Order, and on the date identified in that Order as the effective date of tenure of the named firefighters.) As authority, Mr. Andrade relies only on two decisions from New York federal and state courts. Both cases discuss a specific New York law, not the Massachusetts statute that governs today's case. Those decisions are neither binding nor relevant.

In the Decision, the Commission noted the Acting Fire Chief's testimony by affidavit that Mr. Andrade's inclusion on the list of firefighters attaining tenure was a mistake. Turning to the relevant law, the Decision said that, even if it were not a mistake, "the Fire Chief's General Order cannot supersede the statutory requirements regarding when a firefighter obtains tenure." Decision at 8. The same is true of the erroneous inclusion of Mr. Andrade's name on duty rosters -- which, as Mr. Andrade concedes, were maintained by the union, not the Fire Department. The Commission committed no error of law in concluding that the statutory requirements govern, and that clerical errors or mistakes by the Fire Department or by the union cannot override them.

Mr. Andrade's remaining argument is that the hearing held by the City was a sham, and the conclusion reached there, that he was unfit to be a firefighter, was unsupported. This argument is irrelevant, because the City was not required to provide a hearing before terminating Mr. Andrade during his probationary period. Because his probationary period was tolled once he was put on administrative leave, he was still six weeks short of tenure when he was terminated.

Conclusion and Order

For these reasons, Plaintiff Joseph Andrade's Motion for Judgment on the Pleadings is **DENIED**. The City of Cambridge's cross-motion for Judgment on the Pleadings is **ALLOWED. JUDGMENT IS TO ENTER** affirming the Decision of the Defendant Civil Service Commission.



Paul D. Wilson
Justice of the Superior Court

October 25, 2019