

Commonwealth of Massachusetts

ESSEX, ss

METHUEN PUBLIC SCHOOLS
Plaintiff

v.

MASSACHUSETTS CIVIL SERVICE
COMMISSION and EUGENE CASEY
Defendants

SUPERIOR COURT
ESCV 2010-2495-A

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COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

ESSEX, ss

EUGENE CASEY
Plaintiff

v.

MASSACHUSETTS CIVIL SERVICE
COMMISSION and METHUEN PUBLIC SCHOOLS
Defendants

SUPERIOR COURT
ESCV 2011-00089-B

MEMORANDUM OF DECISION AND ORDERS ON DEFENDANT METHUEN PUBLIC SCHOOL'S EMERGENCY MOTION TO STRIKE MOTION OF THE PLAINTIFF, EUGENE CASEY, FOR JUDGMENT ON THE PLEADINGS AND ON THE MOTION OF THE PLAINTIFF, EUGENE CASEY, FOR JUDGMENT ON THE PLEADINGS IN 11-00089 AND ON THE MOTION OF THE PLAINTIFF, METHUEN PUBLIC SCHOOLS, FOR JUDGMENT ON THE PLEADINGS IN 10-2495

INTRODUCTION

This is an action in which the Defendant, Methuen Public Schools ("MPS") pursuant to Rule 12(c) of the Massachusetts Rules of Civil Procedure and Standing Order I-96 of the Superior Court, seeks to have this court order that judgment be entered on the pleadings reversing the decision ("Decision") of the Civil Service Commission ("Commission") dated

November 4, 2010. This court will not strike the Motion of the Plaintiff, Eugene Casey, for Judgment on the Pleadings merely because it is a few days late. This court will make its decision based on the merits of the Defendant's and Plaintiff's case. Therefore, the Defendant's motion to strike is **DENIED**. For the following reasons, the Motion of Methuen Public Schools for Judgment on the Pleadings is **ALLOWED** and the Motion of the Plaintiff, Eugene Casey, for Judgment on the Pleadings is **DENIED**.

BACKGROUND

The following facts are taken from the record and viewed in the light most favorable to the non-moving party. See Attorney Gen. v. Bailey, 386 Mass. 367, 371 (1982). Eugene Casey ("Casey") was appointed as a permanent custodian by the Methuen Public Schools on May 4, 2004. Casey was indicted by an Essex County Grand Jury, Docket No. ESCR 2006-535-001; 002; 003 & 004 in March of 2006. The indictments alleged violations of the gaming laws of the Commonwealth of Massachusetts. Said indictments were the result of an ongoing criminal investigation by the Massachusetts State Police into illegal gambling operations in Essex County. Casey was arraigned in the Essex County Superior Court on these indictments on April 25, 2006 and was suspended without pay on April 26, 2006 by Jeanne Whitten ("Whitten"), who was the Superintendent of Schools for the Methuen Public Schools. The indictments alleged that during the period of October 2005 through January 2006 Casey was taking, recording and disseminating bets by telephone while on duty as a school custodian and that he used the school copy machine to make copies of betting slips. On January 19, 2007 Casey plead guilty to indictment ESCR2006-535-001, using telephone for gambling; the other three indictments were nolle prossed.

On February 23, 2007, Whitten served Casey with a Notice of Hearing on whether or not to take disciplinary action. That hearing was held on March 13, 2007 and Casey was represented by counsel. On March 14, 2007, Whitten terminated Casey from his position as custodian. Casey filed a timely appeal of the termination with the Civil Service Commission pursuant to G.L.c. 31, § 41. A full hearing before Commissioner Daniel Henderson of the Civil Service Commission was held on May 28, 2008. The Commissioner issued a 3-2 decision on November 4, 2010 modifying the penalty imposed from a discharge to a suspension without pay for a period of three and one-half years.

DISCUSSION

I. Standard of Review

A court's review of an administrative agency appeal is to be based on the administrative record. *Cohen v. Bd. of Registration in Pharmacy*, 350 Mass. 246, 253 (1996). In addition, G.L.c. 31, § 2(b) requires the commission to find whether "the appointing authority has sustained its burden of proving that there was a reasonable justification for the action taken by the appointing authority..." *City of Cambridge v. Civil Service Commission*, 43 Mass. App. Ct. 300, 304 (1997). A decision by the appointing authority fails this standard and is arbitrary and capricious when it lacks any rational explanation that a reasonable person might support. *Id.* "Justified," in the context of review, means "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Id.* However, it is not within the authority of the commission to substitute its judgment for an appointing authority's decision when the decision is founded on a valid exercise of discretion based on merit or policy considerations. *Id.*

The substantial evidence standard for judicial review of an administrative agency decision does not permit the reviewing court to substitute its judgment for that of the agency, even if there is evidence to support the court's point of view. See M.G.L.A. c. 30A, § 1(6); See G.L. c. 31 § 44 (Judicial Review of a Civil Service Commission is governed by M.G.L.A. c. 30A). In addition, "M.G.L.A. c. 30A, § 14(7) expressly provides that the reviewing court in engaging in judicial review of the final decision of a state administrative agency in an adjudicatory proceeding under M.G.L.A. c. 30A, § 14 shall apply the seven standards of judicial review to determine the propriety or impropriety of the agency's decision." 40 Mass. Prac., Administrative Law & Practice § 1567. The seven standards which allow a "reviewing court... to take appropriate corrective or remedial action where the substantial rights of any party are prejudiced because an agency's decision" is:

- (a) in violation of constitutional provisions; or
- (b) in excess of the statutory authority or jurisdiction of the agency; or
- (c) based upon an error of law; or
- (d) made upon unlawful procedure; or
- (e) unsupported by substantial evidence; or
- (f) unwarranted by facts found by the court on the record as submitted or as amplified ...in those instances where the court is constitutionally required to make independent findings of fact; or
- (g) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. Id.

Further, "the open question on judicial review is whether, taking the facts as found, the action of the Commission was legally tenable." Leominister v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). The court is not required to accept the Commission's findings of fact if they are unsupported by substantial evidence. See Id. However, "a reviewing court is bound to accept the findings of fact of the Commission's hearing officer" when that decision is supported by substantial evidence. M.G.L.A. c. 31, § 44.

II. Analysis

The Defendant claims the main issues here are whether the Commission's decision was in excess of its statutory authority, an abuse of discretion, arbitrary and capricious, unsupported by substantial evidence. This comes down to whether MPS had just cause for the termination and whether the Commission erroneously substituted its judgment for that of the Appointing Authority by overturning Casey's termination and, instead, imposing, a 3.5 year suspension without pay. The Defendant claims the Commission made an error of law by reinstating Casey because the hearing officer did not find Casey's crime grievous enough for termination, relied on bad testimony, was based on factual errors, was obligated to grant wide deference to the appointing authority and substituted its own judgment for that of Whitten. The Plaintiff argues the Commission had the authority to modify Casey's penalty because there was not just cause for MPS to terminate Casey. Further, the Plaintiff believes both the Commission and MPS misapplied M.G.L. c. 268a, § 25 to his case and he should be entitled to full back pay minus the mitigating income that he earned since he was inappropriately terminated from his job with MPS.

The Commission's role is not find the facts and make their own decisions, but to examine the facts available to the appointing authority when it made its decision and see if the authority had a good reason to make that decision. *See Town of Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983). Since the Commission is obligated to grant "substantial deference to the appointing authority's exercise of judgment," the hearing officer's contrary decision is incorrect and improper in deciding whether any possible publicity reasons Whitten may have considered in terminating Casey were insufficient. *City of Beverly v. Civil Service Commission*, 78 Mass. App. Ct. 182, 188 (2010). The Commission can only judge the Appointing Authority's decision based

on the evidence which was before the Appointing Authority at that time. The Commission is not allowed to search for more or other facts in order to establish the decision of Whitten was inappropriate. *Arria, supra* at 334. Simply, "the Commission cannot substitute its judgment about a valid exercise of discretion based on merit principles or policy considerations." If Whitten can justify on a public policy or other basis her decision to terminate Casey, then the Commission cannot overturn that decision. *City of Cambridge, supra* at 304.

The hearing officer seems to feel the publicity of the event was a key reason for Casey's termination. The Defendant, on the other hand, claims the reasons Whitten fired Casey was supported by overwhelming evidence without relying on publicity concerns. As long as the Appointing Authority's reasons can be justified, the hearing officer is not allowed to make his own judgment on the reasons which Whitten used to vindicate the termination of Casey as long as those reasons can be justified. *Id.*

One of the most important questions to be decided is whether the Commission used the correct standard in reviewing the decision to made to terminate Casey. The Commission, according to the Defendant, applied the "basic merit principles" under G.L. c. 31, § 43. The Defendant claims the Commission should have, instead, simply decided whether the Superintendent had just cause to terminate Casey under M.G.L. Chapter 31 § 43. The Commission's obligation in this case was to determine if Whitten demonstrated a "reasonable justification" for terminating Casey and the standard for that determination is, "Absent proof that the city acted unreasonably...the commission is bound to defer to the city's exercise of its judgment." *Id.* at 191. In this case, it appears the Commission used the wrong standard and improperly substituted its own judgment.

When determining whether the Commission properly deferred to the Appointing Authority's judgment, case law holds that, "Unless the commissions' findings of fact differs significantly from those reported by the town or interpret the law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially same penalty." *Town of Falmouth v. Mass. Civil Commission*, 447 Mass. 814, 824 (2006). In addition, "The commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation." *Id.* Due to this case law, it was the Commission's obligation to only review whether Whitten had just cause to fire Casey. However the Commissioner exceeded that standard. Both the Commission and the city found Casey performed illegal gambling activities on school grounds and, since there is very little difference between the factual findings of the two, the Commission was bound to defer to the Appointing Authority's judgment and not modify the termination penalty Metheun imposed.

Further, the Defendant argues Whitten had just cause to terminate Casey because he used school facilities and took calls while at work to help facilitate an illegal gambling ring. The Defendants assert that public employees are held to a higher standard than just merely refraining from criminal actions. *Leavitt v. City of Lynn*, 55 Mass. App. Ct. 12, 14 (2002). Whether or not that is the case for a janitor need not be decided here. Since it is not contradicted that Casey performed his illegal activities during work time when he was at school, there was just cause to terminate him. (*Adm. Rec. p. 87, Decision*)

In addition, Massachusetts' courts have held an employee can be fired for just cause even if his acts of misconduct are "in no way related to the office held or duties of said office." *Opinion of the Justices*, 308 Mass. 619 (1941). Therefore, while the gambling violations

performed by Casey may have no correlation to his duties as a janitor, this does not mean Whitten could not find good cause to terminate Casey. The judgment of Whitten should not have been overturned because the Commission is required to defer to Whitten and not substitute its judgment for that of the Appointing Authority so long as the authority has sufficient basis, which she did.

The Defendant claims the Commission's decision was arbitrary and capricious because it concerned matters which were not before the Commission as Casey never appealed his suspension. By considering the suspension, the Commission made a decision in excess of its statutory authority under G.L. c. 31, § 43. Further, the Defendants argue the hearing officer raised an irrelevant issue by bringing up whether Casey was not provided a copy of G.L. c. 268A § 23(f). The Defendant points out that neither party at any time raised the issue of the application of the statute making that issue beyond the scope of judicial review and in excess of the hearing officer's authority. Since the Commission made decisions on both the suspension and whether the statute was provided, neither of which were appealed or presented to the Commission, this court finds the decisions on those issues by the Commission to be in "excess of the statutory authority or jurisdiction of the agency." M.G.L.A. c. 30A, § 14.

The Defendant also claims the Commission was in error of law when it relied on the testimony of a Mr. Joseph Salvo ("Salvo"). The Defendant establishes that Mr. Salvo had no authority over hiring or firing employees at the Methuen schools and claims the hearing officer was incorrect in substituting his opinion on Salvo's testimony with that of Whitten which is not allowed by case law. City of Cambridge, supra at 304. In addition, the Defendant points out that the hearing officer was incorrect in his findings, specifically the reasons Whitten terminated

Casey.

There is also a discrepancy between the Defendant and Plaintiff over the extent of Casey's involvement in the gambling ring. The evidence establishes that Casey's home was used and investigated in some manner; the plaintiff claims his involvement at work is disputed. However, the Commission is obligated to grant wide deference to Whitten and a hearing officer cannot make findings to support his own view of the case. *See City of Beverly, supra* at 188. Therefore, the evidence found by the Appointing Authority which showed Casey used his phone at work for three months to take, record and disseminate bets by telephone, all while on duty, must be accepted by the Commission.

The Plaintiff argues Whitten's decision to terminate Casey was rightly overturned by the Commission because Whitten gave contradictory testimony, may not have known the felony accounts against Casey were nolle prossed, and it is the burden of the Appointing Authority to prove just cause for terminating an employee's employment by a fair preponderance of evidence. *See School Committee of Brockton v. Civil Service Commission*, 43 Mass. App. Ct. 486, 488 (1997). However, Whitten expressly stated she knew Casey only plead guilty to one of the counts he was indicted for when she terminated him. Further, while it is the burden of the Appointing Authority to prove there was a "reasonable justification for the action taken," this court believes this burden was satisfied. The Commission was incorrect in reviewing issues which were not presented to it and which were separate and apart from whether a reasonable basis existed for the termination. *City of Cambridge, Supra*, at 304. In addition, the Plaintiff contends his "unblemished record" should have been considered and a "progressive discipline" procedure applied. Whitten, as the Appointing Authority, had the right to decide whether such a

record existed, whether it was persuasive and whether to implement that procedure. It is not in this court's or the Commission's authority to question that judgment, so long as the appointing authority has sustained its burden of proof that there was reasonable justification for the action it took. *Id.*

The Plaintiff accurately claims it is established "an indictment for a crime arising from an employee's off duty conduct is not generally considered misconduct "in office." M.G.L.A. c. 268A, § 25. The Plaintiff relies on *Leavitt v. City of Lynn* where a terminated employee was reinstated because his misconduct was performed off of school grounds and off duty. *Leavitt, Supra*, at 14. However, *Leavitt* differs from the facts of this case because "Leavitt's responsibilities, however, did not include teaching or contact with the student population, and his position was unrelated to any law enforcement or security duties within the school district." *Id.* Unlike *Leavitt*, Casey performed his illegal activities on the premises of the school and during a portion of his work day when he was in contact with the student population. *See id.* Custodians, while not dealing with students as closely as teachers, still are placed in a position of trust by both the school and community to help keep the school and the students safe. Therefore, the illegal misconduct of Casey was a violation of this public trust, especially since the crimes were performed on school grounds during his working hours.

Courts have held that it is against public policy to reinstate those who have violated the public trust as long as that public policy is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *City of Boston v. Boston Police Patrolmen's Ass'n*, 443 Mass. 813, 818 (2005). While the crimes committed by the police officer in *City of Boston v. Boston Police*

Patrolmen's Association, are far worse than those committed by Casey in this case, both employees of the respective city committed their misconduct while on duty and violated obvious public policies while doing so. *Id.* The public has an interest in keeping schools safe and any illegal conduct committed during working hours at a school is potentially severe and violates that public interest.

ORDER

For the foregoing reasons, the Defendant Methuen Public Schools's Emergency Motion to Strike Motion of the Plaintiff, Eugene Casey, for Judgment on the Pleadings is **DENIED**, the Motion of Methuen Public Schools for Judgment on the Pleadings is **ALLOWED** and the Motion of the Plaintiff, Eugene Casey, for Judgment on the Pleadings is **DENIED**. The Decision by the Civil Service Commission is therefore vacated. The decision of the Methuen Public Schools terminating Casey is affirmed.



Elizabeth M. Fahey
Justice of the Superior Court

DATED: July 26, 2011