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SUPERIOR COURT
CIVIL ACTION
NO. SUCV2011-2554E

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06-11-13
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COMMONWEALTH OF MASS.
CIVIL SERVICE COMMISSION

ELLIOT CLARK,
Appellant,

vs.

(LAT)

BOSTON HOUSING AUTHORITY,
Respondent.

**MEMORANDUM OF DECISION AND ORDER ON MOTION OF DEFENDANT,
BOSTON HOUSING AUTHORITY, FOR JUDGMENT ON THE PLEADINGS**

Elliot Clark has appealed an April 25, 2011 decision of the Civil Service Commission ("Commission") finding that respondent Boston Housing Authority ("BHA") had just cause, pursuant to G.L. c. 31, sec. 43, to terminate Mr. Clark from his position as a leased housing inspector.¹ After a careful review of the record, the Court affirms the Commission's decision, and allows the respondent's motion for judgment on the pleadings.

The Legal Standard

Pursuant to G.L. c. 30A, sec. 14(7), this Court may reverse, remand, or modify an agency decision only if the decision is "based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 867-868 (1997). Clark bears the burden of demonstrating the invalidity of the Department's decision. Merisme v. Board of Appeal on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989). In

¹ By decision dated June 17, 2011, the Commission denied Mr. Clark's motion for reconsideration of its ruling.

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. G.L. c. 30A, sec. 14(7) (1997); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988). The reviewing court may not substitute its judgment for that of the agency. Southern Worcester County Regional Vocational Sch. v. Labor Relations Comm'n, 386 Mass. 414, 420-21 (1982), citing Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n, 372 Mass. 152, 154 (1977). Nor may a court reject an administrative agency's choice between two conflicting views, even though the court justifiably would have made a different choice had the matter been presented *de novo*. Zoning Bd. of Appeals v. Housing Appeals Comm'n, 385 Mass. 651, 657 (1982) (citations omitted). In deciding whether an appointing authority had "just cause" to terminate an employee, the Commission must decide whether the employee engaged in "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486 (1987), quoting Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983).

Application of the legal standard to Clark's appeal

The Commission conducted a two-day hearing on February 5 and February 6, 2009 before Commissioner Paul M. Stein. Four witnesses were called by the BHA, and Clark testified on his own behalf. Twenty-one exhibits were admitted into evidence.

Certain core evidence was undisputed. Clark worked for BHA from 1995 until he was terminated in March 2008. During the relevant time period, he was a leased housing

inspector. Tyneikia Smith was, at all relevant times, a Section 8 program participant, and an employee of the City of Boston ("City"). In the fall of 2007, Smith presented the City with three purported BHA documents to explain why she needed to miss work. David Barrett, a Manager of Inspections at BHA, determined that two of these documents were forgeries.

The Commission found that on October 2, 2007, Clark improperly faxed to Smith blank forms that Smith used to perpetrate a fraud on the City by providing a fabricated reason for why Smith had to miss work. (A. 260-261; 271-274)² The Commission further found that, "[e]ven if Mr. Clark was not in 'cahoots' with Ms. Smith at the outset, once he came to learn that he may have (whether intentionally or unwittingly) facilitated her misconduct, rather than come clean, he fabricated a lack of knowledge of his involvement, which, then, led to his being required to fabricate further untruths..." (A. 274-275)

The Commission's finding that Clark was untruthful when questioned about the October 2, 2007 faxes from BHA to Smith weighed heavily in its decision. The Commission found that, when BHA personnel commenced their investigation shortly after October 2, 2007, they had no premonition that they would focus on Clark, but the evidence led in that direction. (A. 271) Among Clark's statements to BHA that the Commission found not credible, and the contrary evidence, were the following: (1) that there was at most a "possibility" that Clark had contact with Smith in October 2007; Clark's Nextel phone records showed numerous conversations between him and Smith during that time period, including six calls on October 2, 2007, the day of the improper faxes to Smith (A. 260; 272); (2) that Clark never used the fax machine at his BHA office; the blank forms used by Smith to fabricate documents were faxed to her from the BHA Inspectional Department office

² Citations are to the Administrative Record.

where Clark worked at 4:30 p.m. on October 2, 2007 (A. 260; 272-272); (3) that Clark generally left work at 3:30 p.m.; this statement was rebutted by a BHA supervisor (A. 272-273); and (4) that Clark did not recognize the blank forms that were faxed to Smith; the evidence showed that the forms were “very commonly used” in Clark’s BHA department. (A. 272)

The Commission concluded that Clark’s improper faxing of blank BHA forms to Smith on October 7, 2007 used by Smith to perpetrate a fraud, combined with Clark’s repeated untruths to BHA personnel, “clearly represents misconduct that BHA was justified to consider to adversely affect his work in the public service and established just cause for his termination.” (A. 275) ³

On appeal, Clark asks the Court to consider extensive evidence that was not part of the record below.⁴ The Court, however, must limit its review to the record below, except in limited circumstances that are not present here. See G.L. 30A, sec. 14(5). Clark also argues that, in light of his 13 years of service to BHA, it was arbitrary and capricious for the Commission to find much of his testimony not to be credible.

In assessing Clark’s argument that it was arbitrary and capricious to find that much of his testimony lacked credibility, the Court is mindful that “assessing the credibility of witnesses is a preserve of the [Commission] upon which a court conducting judicial review treads with great reluctance.” City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003). Here, the Commission took admirable care to marshal documentary support for its

³ The Commission further found that, in February 2007, Clark had provided documentation to Smith from her BHA tenant file in contravention of BHA policy, but that the policy was not entirely clear and this action alone did not rise to the level of justifying significant discipline.

⁴ The Court has granted respondent’s motion to strike purported factual material that was not part of the record before the Commission, after reviewing a portion of these materials.

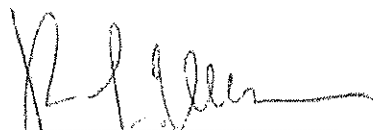
credibility findings. (A. 258-261; 271-273) Moreover, it separately considered each portion of Clark's testimony, finding, for example, that he was "probably truthful to state that he did not act 'in cahoots' with Ms. Smith." (A. 273) Notably, the Commission did not credit hearsay statements attributed to Smith, unless they were corroborated by other testimony. (A. 259) Under these circumstances, there is no basis for this Court to second-guess the Commission's credibility findings.

The Court finds no error of law, unsupported factual finding or other grounds to overrule the Commission's decision. The Commission carefully considered the evidence, and had a sufficient basis to hold that Clark's conduct "clearly represents misconduct that BHA was justified to consider to adversely affect his work in the public service and established just cause for his termination." (A. 275)

Conclusion and Order

For the above reasons, the Motion Of Defendant, Boston Housing Authority, For Judgment On The Pleadings, is ALLOWED, and the decision of the Commission is affirmed.

By the Court,

A handwritten signature in dark ink, appearing to read 'R. L. Ullmann', written over a horizontal line.

Robert L. Ullmann
Justice of the Superior Court

Dated: June 10, 2013