

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

20-P-610

TOWN OF ROCKLAND

vs.

CIVIL SERVICE COMMISSION & another.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The town of Rockland (town) appeals from a Superior Court judgment that affirmed the decision of the Civil Service Commission (commission) to overturn the thirty-day suspension of Craig Erickson, a lieutenant firefighter. On appeal, the town argues only that the commission erred in accepting Erickson's discipline appeal form as timely filed. We affirm.

Background. The following facts are drawn from the administrative record. On Thursday, April 27, 2017, the town hand delivered a notice of suspension to Erickson. The notice advised Erickson of his right to appeal his suspension pursuant to the procedures outlined in G. L. c. 31, §§ 41 to 45. Under that statutory scheme, Erickson was afforded ten days, excluding

¹ Craig Erickson, intervener.

weekends and legal holidays, to appeal in writing from the disciplinary decision to the commission. See G. L. c. 31, § 43. Pursuant to the regulations then in effect, Erickson was permitted to submit his appeal to the commission by mail, and all papers filed by mail were "deemed filed on the date contained in the U.S. postal cancellation stamp or U.S. postmark, and not the date contained on a postal meter stamp." 801 Code Mass. Regs. § 1.01(4)(b) (1998).

To satisfy the statutory deadline, Erickson was required to perfect his appeal on or before Thursday, May 11, 2017. On Tuesday, May 16, 2017, the commission received Erickson's discipline appeal form by mail. The envelope containing the form had postage stamps affixed to it, but no postmark or postal cancellation stamp.

The town subsequently moved to dismiss Erickson's appeal on the ground that he failed to meet the statutory deadline for appealing from his suspension. In response to the town's motion, Erickson submitted an affidavit indicating that he mailed the form at the Rockland post office "on Monday morning[,] before the 10 days to file." The affidavit did not further identify the particular Monday by date or otherwise. However, Erickson also submitted a printout of a text message exchange between him and his union president from Tuesday, May 9, 2017. In that exchange, the union president referenced the

ten-day deadline and asked whether Erickson had filed the appeal. Erickson responded, "I mailed it."

Prior to commencing a full hearing on Erickson's appeal, the commission chair addressed several preliminary matters, including the town's motion to dismiss. The commission chair explained that when the commission receives a form by mail without a postmark, the commission generally affords "three to four business days" for mail processing. The commission chair further explained that applying that rule, "[t]he fourth business day, if you backed it up, would happen to be Thursday, May 11th of 2017."

The commission chair then turned to Erickson's affidavit and the text messages, explaining that he inferred Erickson's position was that he mailed the form on Monday, May 8, 2017.² The commission chair proceeded to take testimony from Erickson on the issue, and Erickson testified under oath that, in fact, he did mail the form on Monday, May 8, 2017.

After hearing argument, the commission chair explained that applying the "three to four day mail handling rule," the form would have been mailed no later than Thursday, May 11, 2017, rendering it timely filed. The commission chair then stated,

² Erickson's discipline appeal form was signed and dated May 8, 2017.

"So based solely on that, I'm going to deny the motion to dismiss."

Following a full hearing, the commission overturned Erickson's suspension, concluding that "this case is a stark and troubling example of disparate treatment." The town commenced an action in the Superior Court seeking to set aside the commission's decision solely on the basis that Erickson's appeal was untimely and, as a result, that the commission lacked jurisdiction to consider the merits.³ The town then filed a motion for judgment on the pleadings, which a Superior Court judge denied in a written memorandum of decision and order. Judgment subsequently entered affirming the commission's decision and dismissing the town's complaint. The town now appeals from that judgment.

Discussion. The town argues that the commission's application of the "mail handling rule" exceeded the commission's authority under G. L. c. 31, § 43, was inconsistent with 801 Code Mass. Regs. § 1.01(4)(b) (1998), and was otherwise arbitrary, capricious, and an abuse of discretion. "Pursuant to 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), and cases construing those standards."

³ Erickson was permitted to intervene in the Superior Court action.

Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 242 (2006), quoting Plymouth v. Civil Serv. Comm'n, 426 Mass. 1, 5 (1997). See Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 817 n.4 (2006) (reviewing court owes "considerable deference [to the commission] in appropriate circumstances"). We must overturn any decision of the commission that is inconsistent with governing law. See Brackett, supra. The party appealing from the commission's decision bears the burden of proving its invalidity. See id.

There is no dispute that the statutory period for Erickson to appeal from his suspension expired on Thursday, May 11, 2017. See G. L. c. 31, § 43.⁴ The issue then is whether the discipline appeal form received by mail on Tuesday, May 16, 2017, without a postmark satisfies that statutory requirement. On this point, we find the Supreme Judicial Court's decision in Falmouth, supra, instructive.

In Falmouth, 447 Mass. at 815, the court concluded that the commission properly interpreted G. L. c. 31, § 43, to permit its promulgation of the so-called "postmark rule," then in effect,

⁴ "General Laws c. 31, § 43, allows for a hearing before the commission '[i]f a person aggrieved by a decision of an appointing authority made pursuant to [§ 41] shall, within ten days after receiving written notice of such decision, appeal in writing to the commission" Falmouth, 447 Mass. at 817. The ten-day period does not include weekends and legal holidays. See G. L. c. 31, § 43.

that deemed papers placed in the United States mail filed on the date of the postmark.⁵ Accepting the validity of that rule, the court affirmed the commission's decision to accept a written appeal, received by mail two days after the statutory deadline, as timely filed. See id. at 827.

Relevant to our discussion here is that the record in that case was entirely devoid of any evidence concerning the actual date of the postmark because the envelope was not in the record. See Falmouth, 447 Mass. at 816 & n.3. While the court observed that it was troubled by this lack of evidence, it nonetheless concluded based on the date on the appeal letter, the date of receipt by the commission, and the presumptions employed by other State entities that mail delivery takes between two and five days, that "it would have been reasonable to infer, and therefore substantial evidence exists, to support a finding that

⁵ The commission's postmark rule was subsequently replaced by the standard adjudicatory rules of practice and procedure at issue here, that similarly provide that papers received by mail are deemed filed on the date of the postmark. See Falmouth, 447 Mass. at 817 n.4. See also 801 Code Mass. Regs. § 1.01(4)(b) (1998). The standard adjudicatory rules have since been amended to require that all documents be filed by e-mail, "unless otherwise ordered by the Presiding Officer for good cause or the Respondent or Petitioner lacks access to sufficient Electronic Medium." 801 Code Mass. Regs. § 1.01(4)(a) (2020). To the extent that one of those conditions is met and a party is permitted to submit documents by mail, the postmark date still controls. See id.

the letter was postmarked on or before [the statutory deadline]." Id. at 816 n.3.

Here, the envelope is not missing from the record; rather, the record demonstrates that the discipline appeal form was delivered by mail with no postmark.⁶ We see no reason why in this circumstance, where the absence of a postmark is attributable to the postal service and not the parties, the commission would be precluded from affording three to four business days for mail handling.⁷

The town's arguments to the contrary are unavailing. The commission's use of the mail handling rule in this context does not exceed or expand the commission's jurisdiction under G. L. c. 31, § 43. The statute is silent on the particular act

⁶ In its brief, the town explicitly accepted as undisputed that the commission received Erickson's appeal by mail, but at oral argument intimated that the lack of a postmark might mean that it was hand-delivered. We do not reach the issue. Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019) ("The appellate court need not pass upon questions or issues not argued in the brief"). If we did, we would see no reason to disturb the commission chair's factual finding that Erickson's appeal form did indeed arrive by mail without a postmark. See McIsaac v. Civil Serv. Comm'n, 38 Mass. App. Ct. 473, 476 (1995) (reviewing court may not "substitute its judgment on questions of fact").

⁷ Although the commission chair made no explicit decision whether to credit Erickson's account that he mailed his discipline appeal form on May 8, 2017, we note that Erickson's testimony, his affidavit, the text message exchange, and the date on the discipline appeal form all support the commission's ultimate conclusion that the appeal was mailed by, at the latest, May 11, 2017.

required to perfect an appeal for the purposes of the ten-day deadline. See Falmouth, 447 Mass. at 818-819.⁸ Where the commission is permitted under the statute to deem an appeal perfected on the date of the postmark, it is not precluded from establishing a reasonable procedure for determining the date of mailing in the absence of a postmark. Cf. id. at 823 ("The act of mailing the . . . letter was the first act of the 'proceedings,' as that term is commonly understood, before the commission because it had the effect of initiating the appeal").

The mail handling rule also is not inconsistent with 801 Code Mass. Regs. § 1.01(4)(b) (1998), which is silent on the issue of when an appeal arriving by mail must be deemed filed in the absence of a postage cancellation stamp or postmark.⁹ We will not disturb the commission's method of determining when a postmark should have been affixed to the envelope where, as

⁸ As discussed in Falmouth, the statute does not require that the appeal be filed or received by the commission within the ten-day statutory period; rather, it requires only that a person aggrieved by a disciplinary action "appeal in writing" to the commission within that time period. Id. at 818, quoting G. L. c. 31, § 43.

⁹ We are not persuaded by the town's argument that in the absence of a postmark, the regulation requires application of the catchall provision which provides that "[p]apers filed by all other means shall be considered hand-delivered, and shall be deemed filed on the date received by the Agency during usual business hours" (emphasis added). 801 Code Mass. Regs. § 1.01(4)(b) (1998). Erickson's appeal was filed by mail as explicitly permitted by the regulation and, therefore, this provision does not apply.

here, it is not "patently wrong, unreasonable, arbitrary, whimsical, or capricious" (citation omitted). Falmouth, 447 Mass. at 822. Indeed, the commission's practice of affording three to four business days for mail handling is consistent with the practice of other State entities. See id. at 816 n.3.

We also are not persuaded that the commission was required to memorialize this rule in writing or to provide a record of other instances where it has been applied. The rule reflects matters of common knowledge and common sense, and the commission is permitted to develop such a policy informally. See Arthurs v. Board of Registration in Med., 383 Mass. 299, 312-313 (1981) ("It is a recognized principle of administrative law that an agency may adopt policies through adjudication as well as through rule-making"). See also Anusavice v. Board of Registration in Dentistry, 451 Mass. 786, 795 (2008) (where policy "does not suffer from a constitutional defect, is not contrary to the language of its enabling statute, and is rationally related to furthering the board's purpose . . . , it will be upheld"). Cf. Falmouth, 447 Mass. at 821 n.10 ("Whereas matters of timeliness, filing and jurisdiction may not be within the specialized knowledge of the commission, there can be little doubt of its experience as an adjudicatory body").

In sum, we discern no error in the commission's decision to accept Erickson's appeal as timely filed and, relatedly, to reach the merits of his appeal from his suspension.¹⁰

Judgment affirmed.

By the Court (Milkey, Hand & Grant, JJ.¹¹),



Clerk

Entered: June 2, 2021.

¹⁰ Given our conclusion that use of the mail handling rule was permissible, we need not reach the commission's request that we take judicial notice of the fact that Erickson's discipline appeal form was mailed just prior to Mother's Day weekend and as a result of the holiday, mail processing may have been particularly slow.

¹¹ The panelists are listed in order of seniority.