

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT
CIVIL ACTION NO. 12-3501-B

Notice sent
12/06/2013
R. B. R.
R. L. Q., JR.
S. L. S.

KEVIN HOWARD

VS.

(sc)

MASSACHUSETTS CIVIL SERVICE COMMISSION
and TOWN OF NAHANT

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

In this action for judicial review under G. L. c. 31, § 44 and G. L. c. 30A, § 14 and for declaratory relief under G. L. c. 231A, § 1, plaintiff Kevin Howard ("plaintiff") seeks the court's review of a decision of defendant Massachusetts Civil Service Commission ("Commission") upholding the decision of the plaintiff's employer and appointing authority, defendant Town of Nahant ("Town"), terminating his employment as a firefighter. The matter is before the court on the plaintiff's motion for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c) and Superior Court Standing Order 1-96. After hearing, and for the reasons stated below, the motion is **DENIED**.

BACKGROUND

Prior to being terminated on April 5, 2011, the plaintiff had been employed for approximately ten years as a firefighter for the Town's Fire Department ("Department"). As such, he was a tenured civil service employee of the Department. From 2002 until February 2010, the plaintiff served as president of the firefighter's union, the Nahant Fire Fighters

Association ("Union"). On March 1, 2010, he was promoted to the position of Acting Fire Chief.

On April 27, 2010, the plaintiff requested and was approved for a medical leave of absence from his position as firefighter with the Town. On May 24 and June 23, 2010, he asked for additional medical leave. On August 6, 2010, he provided the Town with a letter from his health care provider stating that he would be out of work for an indefinite period of time due to his medical condition.

On July 6, 2010, Town Firefighter Joshua Mahoney applied for a criminal complaint for larceny over \$250 against the plaintiff in Lynn District Court. On August 16, 2010, a clerk-magistrate of that court found probable cause for the issuance of the complaint against the plaintiff.

On August 20, 2010, Mark Cullinan, the Town Administrator ("Cullinan"), provided the plaintiff with notice pursuant to G. L. c. 31, §§ 41-45 that a disciplinary hearing would be conducted for the purpose of the plaintiff's contemplated termination. At the plaintiff's request, that hearing was continued twice. The plaintiff then objected to the appointment of a certain hearing officer, who ultimately informed the Town that he would be unavailable to serve as hearing officer. At the request of the plaintiff's counsel, the plaintiff was granted additional time to review documents proffered by the Town.

Finally, on February 7, 2011, the plaintiff was notified that a disciplinary hearing would be conducted on February 18, 2011, for the purpose of his possible termination. On February 18, 2011, a hearing pursuant to G. L. c. 31, §§ 41-45 was held before a new hearing officer, Attorney David F. Grunebaum ("Atty. Grunebaum"). On March 30, 2011, Atty. Grunebaum filed his report with the Town; and, on April 5, 2011, the plaintiff was notified of Atty. Grunebaum's

decision to terminate him from his position as a firefighter with the Department.

Pursuant to G. L. c. 31, §§ 42 and 43, the plaintiff filed appeals with the Commission contesting the Town's procedural handling of the hearings and whether the Town had just cause to terminate him. In response, the Commission conducted hearings before a five-Commissioner panel, chaired by Commissioner Christopher C. Bowman ("Commissioner Bowman"), over five days, heard the testimony of eighteen witnesses, and considered sixty-nine exhibits. On advice of counsel, the plaintiff asserted his Fifth Amendment privilege and did not testify; Commissioner Bowman drew an adverse inference against the plaintiff based on his failure to testify before the Commission.

Among his sixty-five findings of fact, Commissioner Bowman found the following facts. After noticing misappropriations in the Union's bank account, several Union members approached the plaintiff, who admitted making unauthorized withdrawals and purchases and offered to make restitution. Thereafter, the plaintiff's mother, father, and brother also offered to make restitution on his behalf; and, in June 2010, his mother gave the Union two checks totaling \$11,603.14. The plaintiff told Cullinan that "I fucked up" and that "I stole money from the union." The plaintiff also confessed to misappropriating Union funds to David Coleman, the District Vice President of the International Association of Firefighters ("Coleman"). The plaintiff subsequently submitted his resignation as Acting Fire Chief. Sometime during the summer of 2010, Cullinan was informed by the Town's Treasurer that, on eight occasions, the plaintiff had submitted and received \$1,145.42 in personal reimbursements from the Town for items that were purchased with Union funds. An August 14, 2010, article in the *Lynn Daily Item* reported that the plaintiff, "who went out on sick leave in April after the embezzlement

allegations surfaced, admitted he purchased and used cocaine at the fire station.” On April 20, 2012, before a judge in Lynn District Court, the plaintiff admitted to sufficient facts to warrant a finding of guilty of the crime of larceny over \$250; as part of his plea agreement, the plaintiff agreed to reimburse the Union \$12,854.42 and the Town \$1,145.42. In his statement to the court, the plaintiff stated, “I violated the Union’s trust funds. I misappropriated some of the funds [inaudible] my family, my friends, and most of the firefighters from my former union . . .”

In June 2012, the Town was permitted to reopen the record for the purpose of introducing the record of the case disposition and the transcript of the plaintiff’s sworn allocution in Lynn District Court. On August 23, 2012, the Commission issued a twenty-five-paged decision dismissing the plaintiff’s appeal and finding that the Town had complied with all procedural requirements contained in G. L. c. 31, § 41 and that the Town had shown by a preponderance of the evidence that the plaintiff had engaged in misconduct which provided just cause for his termination. The instant action ensued.

DISCUSSION

I. Judicial Review Standard

Judicial review under the Administrative Procedures Act is narrow and deferential to the agency, *Buchanan v. Contributory Ret. Appeal Bd.*, 65 Mass. App. Ct. 244, 246 (2005); but it is not abdication, *Arnove v. Commissioner of Dep’t. of Soc. Servs.*, 43 Mass. App. Ct. 33, 34 (1997). A court may set aside an agency decision only if the court determines that the substantial rights of any party may have been prejudiced because the decision is in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the agency; based upon an error of

law; based on unlawful procedure; unsupported by substantial evidence; unwarranted by facts found by the court on the record as submitted; or arbitrary, capricious, or an abuse of discretion. G. L. c. 30A, § 14(7)(a)-(g) (2001). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Lycurgus v. Director of Div. of Employment*, 391 Mass. 623, 627-28 (1984), quoting *New Boston Garden Corp. v. Assessors of Boston*, 383 Mass. 456, 466 (1981); see *Doe, SORB No. 10800 v. SORB*, 459 Mass. 603, 632 (2011). "This standard is highly deferential to an agency . . ." *Ten Local Citizen Group v. New England Wind, LLC*, 457 Mass. 222, 228 (2010).

The party challenging the agency's decision bears the burden of demonstrating the invalidity of the administrative determination. *Merisme v. Bd. of Appeals of Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). The court must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." *Doe, SORB No. 10216 v. SORB*, 447 Mass. 779, 787 (2006), quoting G. L. c. 30A, § 14 (7).

II. Analysis

After a lengthy hearing and detailed decision, the Commission determined that the plaintiff had been terminated from his position as firefighter for two reasons: submitting claims for personal monetary reimbursement to the Town for expenses that had already been paid for by the Union, and committing acts of larceny while employed by the Town by misappropriating Union Funds. The Commission concluded that the Town had demonstrated by a preponderance of the evidence that the plaintiff had engaged in misconduct constituting just cause to impose

discipline on him.

This court concurs with Commissioner Bowman's judgment that the evidence supporting the charges against the plaintiff was "overwhelming." First, the plaintiff confessed to two credible witnesses, Cullinan and Coleman, that he had embezzled funds from the Union;¹ his admissions were corroborated by documentary evidence furnished by the Town Treasurer. Furthermore, the plaintiff admitted unequivocally in Lynn District Court to misappropriating funds from the Town and the Union, both of which he agreed to reimburse. Contrary to the plaintiff's assertion, his stealing of Town and Union funds had everything to do with his duties as a firefighter: his criminal and well-publicized actions substantially violated the trust of both the public and his fellow firefighters. Thus, the plaintiff's admitted wrongdoing, which "adversely affect[ed] the public interest by impairing the efficiency of public service," *School Comm. v. Civil Service Comm'n*, 43 Mass. App. Ct. 486, 488 (1997), provided the Commission had ample justification for his termination.

The plaintiff appears to be arguing that he was denied due process in not being allowed to testify after the hearing was reopened to admit evidence of the Lynn District Court proceedings. His argument is without merit: he would have been collaterally estopped from relitigating before the Commission his admission to larceny in court. See *Jones v. Maloney*, 74 Mass. App. Ct. 745, 748 (2009). Furthermore, the "basic merit principles" embodied in G. L. c. 31, § 1 and invoked by the plaintiff do not preclude an appointing authority from separating a civil service

¹The plaintiff confessed his misdeeds to several of his fellow firefighters as well, but Commissioner Bowman gave that testimony little weight for a variety of reasons, including a controversy over questionable EMT training reported by some of the firefighters. He also discounted the self-serving testimony of the plaintiff's wife. Accordingly, the court has not considered the testimony of any of these witnesses in assessing the adequacy of the evidence before the agency.

employee who has demonstrated such incorrigible misconduct as the plaintiff here has.

(sc)

ORDER

For all the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that:

1. the plaintiff's motion for judgment on the pleadings be **DENIED**;
2. the Commission's decision upholding the Town's termination of the plaintiff be

AFFIRMED:

3. it be **DECLARED** that the Commission's subject decision, failure to award back pay, and failure to reopen the proceedings to permit the plaintiff to testify was *not* based upon unlawful procedure, was *not* unsupported by substantial evidence, was *not* arbitrary or capricious, and was *not* based on abuse of discretion or otherwise not in accordance with law; and

4. the complaint be **DISMISSED**.



Linda E. Giles,
Justice of the Superior Court

Dated: December 5, 2013