

Commonwealth of Massachusetts
County of Plymouth
The Superior Court

CIVIL DOCKET# PLCV2007-00688B

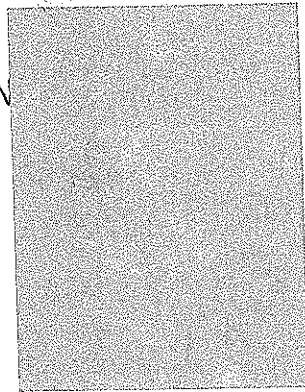
(SEAL)

Dorian Lapworth,
Plaintiff,

vs.

Civil Service Commission and The
Board of Selectmen of the Town of Carver,
Defendants.

Comm



JUDGMENT

This action came on before the Court, Robert C. Rufo, Justice, presiding, upon cross motions of the parties for judgment on the pleadings and the court after hearing and upon consideration thereof, issued a Memorandum of Decision and Order, allowing the defendants motion, therefore,

It is **ORDERED** and **ADJUDGED**:

That the complaint of the plaintiff, Dorian Lapworth, be and hereby is **DISMISSED** and that the decision of the Massachusetts Civil Service Commission be and hereby is **AFFIRMED**.

Dated at Plymouth, Massachusetts this 19th day of February, 2009.

Robert S. Creedon, Jr.,
Clerk of the Courts

By:
Assistant Clerk

AD/BS

Copies mailed 02/19/2009

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 07-00688-B

DORIAN B. LAPWORTH

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & another¹

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF DORIAN B.
LAPWORTH'S MOTION FOR JUDGMENT ON THE PLEADINGS AND DEFENDANT
TOWN OF CARVER'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS**

I. INTRODUCTION

The plaintiff, Dorian B. Lapworth ("Lapworth"), filed this case under G.L. c. 31 § 44 and c. 30A § 14(7), seeking to reverse a decision of the Massachusetts Civil Service Commission ("Commission") which upheld the Town of Carver's ("the Town") decision to terminate Lapworth. This matter is before the court on Plaintiff Dorian B. Lapworth's Motion for Judgment on the Pleadings and Defendant Town of Carver's Cross-Motion for Judgment on the Pleadings. For the reasons set forth below, Plaintiff Dorian B. Lapworth's Motion for Judgment on the Pleadings is DENIED and Defendant Town of Carver's Cross-Motion for Judgment on the Pleadings is ALLOWED.

II. BACKGROUND

The plaintiff, Lapworth, was employed by the Town of Carver Police Department ("the Department") from 1981 until May 9, 2003. He was terminated in 2003 because:

(1) he failed to respond or make proper arrangements to respond to an abandoned 911 call on January 23, 2003 in violation of the Department's policies and procedures; (2) he falsely stated that he failed to respond to the 911 call because he had a prisoner in custody in his cruiser when he was interviewed as a part of an internal investigation regarding his actions on January 23, 2003; and (3) he failed to arrange for the immediate booking of a prisoner in violation of the Department's policies and procedures.

¹ Board of Selectmen of the Town of Carver.

On January 23, 2003, Lapworth was working the night shift (midnight to 8:00 AM). Officer Lawrence Page ("Page") was the only other officer on duty at that time. At 7:00 AM on January 23, Lapworth and Page received an order to respond to an incident regarding a break-in and a stolen dirt bike. Page arrived on the scene first and he and the owner of the dirt bike, William Punchard ("Punchard"), followed some shoe prints and tire tracks and located the dirt bike in a shed at 25 Quaker Road. Page directed Lapworth to come directly to the 25 Quaker Road location. Page and Lapworth spoke to the owner of the 25 Quaker Road location. The owner informed Page and Lapworth that the other occupant of that address, Paul Franke ("Franke"), and his associate, Steven Crandall ("Crandall") had been at 25 Quaker Road but left the house at 4:00 AM.

At 7:42 AM, the police dispatcher radioed Lapworth and informed him that there had been an abandoned 911 call from 20 Purchase Street. Lapworth had previously investigated the occupant of 20 Purchase Street, Gary Phillipio ("Gary"), who had been indicted for attempted murder. Lapworth also knew that an infant who was waiting for an organ transplant lived at that address. Lapworth told the dispatcher "We're tied up here. It's going to be a few minutes." Per a 1996 General Order of the Department, abandoned 911 calls require the officer to go to the location to check the well-being of persons. Department policy also requires that emergency calls receive immediate police assistance.

At 7:44 AM Lapworth and Page received a radio report of a break-in at 3 Quaker Road. At 7:53 AM, Page left 25 Quaker Road to respond to 3 Quaker Road. At some point, the Officers asked the owner of 25 Quaker Road for permission to search his home and found Franke inside. They escorted Franke outside, questioned him and placed him under arrest, at which point he was handcuffed and placed in the back of Lapworth's cruiser. Page and the Department contend that Franke was not in Lapworth's custody when Page left 25 Quaker Road at 7:53AM or when he returned there at 8:03AM. Lapworth contends that Franke was in his custody since before the abandoned 911 call came in at 7:42AM.

At approximately 7:55AM the dispatcher informed Lapworth of another report of theft at 17 John's Pond Road. Lapworth asked the dispatcher to make a general broadcast for Crandall, Franke's associate, who was not found at 25 Quaker Road.

Officer Robert Akin ("Akin") of the Environmental Police arrived at 25 Quaker Road right before 8AM and started to make a perimeter of the search area in an attempt to find

Crandall. At this time, Lapworth was filling out paperwork for the recovered property and other evidence to maintain a chain of custody.

The day shift officers, whom Lapworth had requested back-up from around 7:53 AM, reported for duty around 7:55 AM. Officers Anthony Luca ("Luca") and Heidi Bassett ("Bassett") were directed to respond to the abandoned 911 call at 20 Purchase Street before assisting Officers Page and Lapworth on Quaker Road. The Officers arrived at 20 Purchase Street at about 8:10AM where Kimberly Phillipo ("Kimberly") reported that she and her brother Gary had gotten into a verbal and physical altercation. She said that Gary punched her several times and pushed her into a wall before ripping the phone from the wall and leaving the house with his girlfriend and son. Later that day, Gary went to the Police Station to complain that Kimberly had hit him with an iron. Gary was arrested for domestic assault and Kimberly had criminal charges filed against her.

At 8:11 AM Lapworth requested a K-9 officer to track Crandall. At 8:56 AM a break-in in progress was reported and the Middleborough police reported that they arrested a suspect who matched Crandall's description. When Lapworth was relieved by the day shift officers he took Franke to Middleborough to identify Crandall. Lapworth then took Franke to the Carver Police Station for booking. Lapworth and Franke arrived at the station at 9:49 AM.

Officer Luca, of the day shift, later complained to Sergeant O'Donnell that Lapworth had left the 911 call for his shift to answer. O'Donnell wrote a formal complaint to the Acting Chief. On April 16, 2003, the Town Board of Selectmen notified Lapworth that it would conduct a disciplinary hearing. The dispatcher testified that he had seen calls waiting at a shift change before. During the Town's investigation, Lapworth testified that he did not respond to the 911 call because "I had a prisoner in the cruiser, I was sitting on a couple thousand dollars worth of stolen property that couldn't be left alone or it would, there was a good possibility it was going to disappear." The Town found that Lapworth did not have Franke in custody at 7:42 AM when 911 call came in. On May 9, 2003, the Town informed Lapworth that he was being discharged. Lapworth appealed to the Commission. The Commission held hearings on January 30, 2006, April 7, 2006 and April 21, 2006 and upheld the termination in a final decision issued May 3, 2007.

Lapworth filed this appeal under G.L. c. 30A § 14 against the Commission and the Town on May 31, 2007. The instant motions were filed on February 20, 2008. Oral arguments were

heard on February 2, 2009. Relying on the administrative record, the Commission did not appear at the oral arguments nor submit any documentation with regard to the instant motions.

III. DISCUSSION

A. Review of Administrative Decisions Under G. L. c. 30A, § 14(7)

Pursuant to G.L. c. 30A, § 14(7), this court may reverse, remand, or modify an agency decision if "the substantial rights of any party may have been prejudiced" because the agency decision is based on an error of law or on unlawful procedure, arbitrary and capricious or unwarranted by facts found by the agency and supported by substantial evidence. The plaintiff bears the burden of demonstrating the invalidity of the agency's decision. Merisme v. Board of Appeal on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989). 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. G.L. 30A, § 14(7) (1997); Flint v. Comm'r 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).

B. Plaintiff Lapworth's Motion for Judgment on the Pleadings and Defendant Town of Carver's Cross-Motion for Judgment on the Pleadings

Lapworth argues that the Commission's decision is in excess of statutory authority conferred to it, is based on error of law, is unsupported by substantial evidence and unwarranted by factual record, and is arbitrary, capricious, and constitutes an abuse of discretion. The Town alleges that Lapworth has not met his burden to prove that the Commission's decision is invalid and asks the court to give due weight and substantial deference to the Commission's experience, competence and judgment, as well as its fact finding.

1. *Substantial Evidence*

The decision of an administrative agency may be set aside if it is not supported by substantial evidence. Cobble v. Comm'r of the Dept. of Social Servs., 430 Mass. 385, 390 (1999). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30A, § 1(6). In order to meet this standard, the agency's conclusion only has to be based on reasonable evidence and it does not have to rise to the level of a preponderance of the evidence. Lisbon v. Contributory Retirement Appeal Bd., 41 Mass. App. Ct. 246 (1996). The function of the Commission is to assess the credibility of witnesses. School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978); Doherty v. Retirement Bd. of Med., 452 Mass. 130, 141 (1997). It is entitled deference in this assessment and the court cannot substitute its own judgment for that of the Commission, nor can it make a de novo determination of the facts. Pyramid Co. v. Architectural Barriers Bd., 403 Mass. 126, 130 (1988), quoting Medi-Cab of Mass. Bay, Inc. v. Rate Setting Comm'n, 401 Mass. 357 (1987).

Lapworth contends that the Commission did not consider the entire administration record, including information that "detracts from the evidence's weight." Arnone v. Comm'r of the Dept. of Social Servs., 43 Mass. App. Ct. 33, 34 (1997). Specifically, he contends that the Commission erred when it based its conclusion that he lied about having Franke in custody at the time of the 911 call on Officer Page's testimony. Page testified that "from what I recalled" and "to the best of my knowledge" Lapworth did not have Franke in custody until at least 8:03AM. Page also admitted that this was "one of the biggest cases [he's] ever had." Lapworth argues that on January 23, Page was focused on finding the stolen items and locating Crandall and not on Lapworth's actions. Lapworth also alleges that the Commission ignored his testimony, the testimony of Officer Akin and of Punchard, and the dispatch records. Finally, Lapworth argues that although Luca and Bassett were found to be highly credible, their testimony is irrelevant since it did not relate to when he took Franke into custody.

The Town responds the Commission's decision is supported by the testimony of Officer Page and sequence of events documented in the dispatch tapes and police reports. The Town alleges that the weight of the credible evidence and the inferences reasonably drawn from it support Page's account of the events. The Commission found Punchard's testimony to be inconsistent with all the other evidence. In the end, the Town contends that the Commission's

decision is supported by substantial evidence and Lapworth is asking the court to re-weigh the evidence and substitute its judgment for the Commission's, which it cannot do.

Lapworth alleges that some evidence is more reliable or has more weight than other evidence. He has presented no new evidence nor has he shown that evidence relied on by the Commission was false. A reasonable mind could look at the evidence presented to the Commission and come to the same conclusion as the Commission. The court cannot substitute its own judgment for that of the Commission. Pyramid Co., 403 Mass. at 130. The Commission's decision, therefore, will not be set aside for a lack of substantial evidence.

2. *Error of Law*

Lapworth contends that the Commission made two errors of law: (1) finding that Lapworth did not properly respond to the 911 call, and (2) finding that he did not properly transport Franke. Lapworth contends that the "General Considerations and Guidelines" for responding to 911 calls and for the "Transportation and Custody of Arrestees" are not mandatory and that his actions were reasonable. A discussion of these guidelines is unnecessary here, because Lapworth's contentions do not rise to the level of errors of law. Lapworth is simply disputing findings of fact made by the Commission using its discretion and authority. Again, the court cannot substitute its judgment of that of the Commission. There were no errors of law in this case upon which to set aside the Commission's decision.

3. *Arbitrary and Capricious*

An agency decision is arbitrary and capricious where it is "devoid of any conceivable ground upon which [the decision] may be upheld." American Grain Prod. Processing Institute v. Dept. of Pub. Health, 392 Mass. 309, 329 (1984), quoting Purity Supreme, Inc. v. Attorney Gen., 380 Mass. 762, 776 (1980). An agency has the discretion to choose between two fairly conflicting views as long as its decision is supported by reasonable evidence. Libson v. Contributory Retirement Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996), quoting Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n, 386 Mass. 414, 420 (1982). An agency decision should be based on adequate evidence, factual support and reasoned decision making. Scheffler's Case, 419 Mass. 251, 258 (1994). However, even if a decision is "fairly debatable," the court cannot substitute its judgment of that of the agency. Arthur D. Little, Inc. v. Comm'r of Health & Hosps. of Cambridge, 395 Mass. 535 (1985).

Lapworth alleges that the Commission's decision is arbitrary and capricious because it "smacks with bias," but he provides no support for this allegation. Lapworth also notes that Sergeant O'Donnell, who filed the complaint against him, had previously failed to respond to an abandoned 911 call because he was eating lunch and he was not fired. Indeed, he was later promoted to Acting Chief. In contrast, Lapworth argues, he did not immediately respond to the 911 call because was legitimately busy with "real work" and he was terminated.

The Town responds that Lapworth's unsupported allegation of bias is insufficient to overturn the Commission's decision because it is based on adequate evidence, factual support and reasoned decision making. The Town also contends that the Commission's decision was not arbitrary and capricious. Rather, it was a proper choice between two conflicting views.

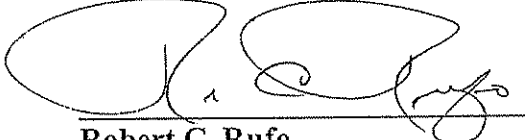
The Commission's decision is supported by reasonable evidence. Lapworth makes assertions without any support, but does not show that the Commission's decision was arbitrary or capricious. The court again will not substitute its own judgment for that of the Commission. The Commission's decision must stand as there is no evidence that it was arbitrary and capricious.

In the end, the Commission's decision is based on substantial evidence, has no errors of law and is not arbitrary or capricious, so it must be affirmed.

IV. ORDER

It is therefore **ORDERED** that Plaintiff Dorian B. Lapworth's Motion for Judgment on the Pleadings is **DENIED** and Defendant Town of Carver's Cross-Motion for Judgment on the Pleadings is **ALLOWED**.

DATED: February 19, 2009



Robert C. Rufo
Justice of the Superior Court