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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 17-03463-E

GLENN LAVERY

vs.

COMMONWEALTH OF MASSACHUSETTS CIVIL SERVICE COMMISSION &  
another<sup>1</sup>

REC'D CIV. SERVICE COMM  
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Notice sent  
3/06/2019  
F. C. C.  
C. LAW., LLC.  
S. J. M.  
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S. D. W.  
J. C. F.  
V. D. & H.  
W-H.C.

MEMORANDUM OF DECISION AND ORDER ON  
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

INTRODUCTION

(sc) This suit arises out of the termination of the plaintiff, Glenn Lavery ("Lavery"), from his position as a Firefighter/EMT with the Town of North Attleborough (the "Town"). The Town terminated Lavery's employment following an alleged incident of domestic violence, and Lavery challenged his termination before the Massachusetts Civil Service Commission ("Commission"). After a hearing, the Commission upheld the Town's termination decision, and Lavery sought judicial review by this court. He now moves for judgment on the pleadings, arguing principally that the Commission improperly relied on evidence presented, and/or took administrative notice of facts, after the close of the hearing. The Town opposes Lavery's motion and seeks judgment on the pleadings in its favor. For the reasons stated, Lavery's motion is DENIED and the Town's motion is ALLOWED.

<sup>1</sup> Town of North Attleborough.

## BACKGROUND

On November 21, 2015, Lavery was involved in an incident of alleged domestic violence ("November 21 Incident"), which resulted in assault and battery charges being brought against both him and Jane Doe ("Doe"). After the parties appeared on November 23, 2015, the Attleborough District Court granted Doe's request for a 209A restraining order against Lavery.<sup>2</sup>

On November 24, 2015, the Town's Board of Selectmen ("BOS") issued to Lavery a "Notice of Intent to Discharge," stating that the BOS was contemplating terminating his employment as a firefighter. On December 3, 2015, the BOS met to consider the termination, and after voting in favor, issued a termination letter to Lavery. In relevant part, the letter stated<sup>3</sup>:

After considering all of the evidence presented at the hearing, the Board finds that:

1. On or about November 21, 2015, you assaulted Ms. [Doe], a female whom you knew was pregnant, by attempting to strangle this female by placing your hands around her neck, kneeling on her stomach and covering her mouth with your hand; and
2. The conduct referenced in paragraph #1 took place at your residence in North Attleborough and constituted the seventh domestic incident involving you and Ms. [Doe] in the past few years; and
3. On or about November 23, 2015, the court issued an order prohibiting you from any contact with Ms. [Doe] for the period of one year and requiring that you stay away from Ms. [Doe] at her home in North Attleborough, MA; and
4. On or about November 23, 2015, you were arraigned in Attleboro [sic] District Court and charged with the following:
  - a. Aggravated Assault and Battery on a pregnant female by placing your hands around her neck and kneeling on her stomach; and
  - b. Witness intimidation.

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<sup>2</sup> It appears from the record that both Lavery and Doe sought 209A restraining orders and that both were granted restraining orders on Nov. 23, 2015.

<sup>3</sup> In relevant part, the "Rules and Regulations" referenced in the termination letter state:

The following acts, actions or activities by members of the Fire Department are prohibited or restricted.

- A. Conduct Unbecoming of a Firefighter, Officer or Member of the Fire Department - The commission of any specific act or acts of immoral, improper, disorderly or intemperate personal conduct which reflects discredit on the member; upon fellow members or upon the reputation of the Fire Department.

North Attleborough Fire Department Rules and Regulations, Article XXIV, § 1.

Your actions listed in #1 and #2 above, together and individually, constitute conduct unbecoming a Firefighter, are in violation of Article XXIV Section 1 of the Rules and Regulations of the North Attleborough Fire Department, and negatively impact the reputation of the North Attleborough Fire Department. Such behavior is inherently incompatible with your continued employment as a firefighter.

Furthermore, as the court has issued an order prohibiting you from having any contact with Ms. [Doe] including contact with her at her home in North Attleborough, you are incapable of working as you would be unable to respond to emergency calls in certain areas of Town where Ms. [Doe] resides.

Together with your prior disciplinary record, the above-cited inability to perform your duties and the violations of the Rules and Regulations of the North Attleborough Fire Department, collectively and separately, are just cause to discharge you from your employment with the Town.

On December 7, 2015, Lavery appealed his termination to the Commission.

On January 3, 2016, Lavery was involved in another domestic violence incident in which he allegedly assaulted a different woman ("January 3 Incident"). This resulted in the filing of criminal charges against him. On April 19, 2016, the North Attleborough Town Administrator issued to Lavery a "Notice of Intent to Terminate -- Second Discharge" ("Second Discharge Notice"). On April 22, 2016, Lavery's counsel sent a copy of the Second Discharge Notice to the Hearing Commissioner, Paul Stein ("Stein"). On April 28, 2016, the BOS voted not to proceed with a termination hearing.<sup>4</sup>

Stein held a hearing over five days between May 2016 and January 2017. On the last day, January 20, 2017, he closed the record, subject to the submission of certain November 2015

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<sup>4</sup> Lavery previously filed a Motion for Leave to Present Testimony of Irregularity in Procedure Before the Agency Not Shown in the Record. In that motion, he contended that before Stein began taping on the first hearing day, Stein ruled that he would take no evidence on the January 3 Incident but that Stein later improperly considered certain factual admissions Lavery made to resolve the criminal case arising from the January 3 Incident. The Town filed an opposition, arguing that: Stein's ruling was apparent from the record; there was no irregularity in Stein's use of Lavery's admission; and Lavery had waived the grounds for his motion because his own counsel had freely provided the information. On July 13, 2018, this court (Giles, J.) denied the motion "for the reasons set forth in the opposition."

BOS meeting minutes. No further evidence relating to the January 3 Incident was presented during the hearing.

On August 15, 2017, Stein contacted counsel for Lavery and the Town by email and requested the November 2015 BOS meeting minutes. He further stated:

I also would appreciate an update regarding the "second termination" proceeding that was described in a letter filed with the Commission dated April 19, 2016 (and relates to an incident that occurred on January 3, 2016), and which [Plaintiff's Counsel] advised by e-mail on May 6, 2016 that the BOS "voted not to go forward with the so-called 2nd termination." I would appreciate a copy of the BOS minutes of their meeting and a copy of the court docket, or other clarification so that I know whether the Town considers the second termination proceeding, in fact, closed or is simply in limbo.

Town counsel, Wendy Chu, responded by confirming that the Town did not go forward with the second termination in April 2016, and stating that she was providing the criminal docket from the January 3 Incident arrest.<sup>5</sup> She also reported her understanding that Lavery had admitted to sufficient facts on an assault and battery charge on July 27, 2016, and that the matter was continued without a finding ("CWOFF") for one year with certain conditions. Stein responded:

I do believe the April 2017 [sic] BOS minutes would be useful to see. As to the second criminal case, I received the Criminal Complaint and the NAPD Incident Report but not the docket. I would also appreciate knowing the conditions of the CWOFF and whether the case has now been dismissed.

Lavery's counsel, Paul Hynes, responded, "I suspect that this request is directed at me so I will contact Mr. Lavery's defense attorney and contain [sic] the Docket for the so-called second case." Hynes subsequently forwarded to Stein and Town counsel correspondence he received from Lavery's criminal defense attorney, Eliot Brais, in which Brais reported, with respect to the January 3 Incident, that "Count I, assault and battery on family household member, was an admission of sufficient facts; the matter was continued without a finding for a period of 1 year. Count II, Witness/Juror/Police/Court Official, Intimidate, dismissed." Brais further stated that he

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<sup>5</sup> Stein subsequently noted that attached to this email were copies of the criminal complaint and incident report relating to the January 3 Incident.

had obtained documentation executed by a Probation Officer that indicated that the end of the CWO term was July 27, 2017, and that, as a result, "this matter has been dismissed administratively from [Lavery's]'s record." Attached to the email that Hynes forwarded to Stein were an attested copy of certain court documents relating to the January 3 Incident and the Clerk's Office documentation executed by the Probation officer.

On September 28, 2017, the Commission issued its decision upholding the termination and dismissing Lavery's appeal. Stein wrote an opinion, with which the four remaining members of the Commission concurred in a separate opinion.

In his opinion, Stein found the following, uncontested facts relating to the November 21 Incident. Prior to the November 21 Incident, Lavery learned that Doe was pregnant as a result of a liaison with him in September 2015. After an argument between the two on or about November 19, Lavery blocked Doe on his cell phone so that he did not receive any messages from her. On November 21, soon after 8 A.M., Doe arrived uninvited at Lavery's apartment. She entered through an unlocked door and proceeded to his bedroom, where a verbal and physical confrontation ensued. Doe departed, and Lavery dressed and drove to the North Attleborough Police Department ("NAPD") headquarters to report the incident and seek a "no contact" order. Sometime later, Doe arrived at NAPD headquarters. The police interviewed and photographed each of Doe and Lavery. The photos depicted wounds to Lavery's hands and face, and red areas around Doe's neck and chest area. The police conferred with one another and re-interviewed Lavery after their initial interviews of each party. In his interviews, Lavery contended that Doe "shouldn't" have any marks on her, and that he would "never" hit a woman. He denied grabbing her neck or choking her. The police concluded that Doe was more believable and that Lavery's version of relevant events "defied logic" because he did not offer a

plausible explanation for Doe's "choke marks." The police further concluded that Lavery and Doe had each committed an assault and battery on the other, that Lavery was the "primary aggressor," and that Lavery should be arrested. Lavery was arrested for aggravated assault and battery and witness intimidation. On November 23, 2015, Lavery and Doe appeared in Attleborough District Court. Among other things, the Court granted Doe's request for a 209A order, "which required, in part, that Lavery not 'contact' . . . Doe, 'stay at least 100 yards away' from her and 'stay away from [her] residence' and 'workplace' for one year."

The Commission concluded that the Town had met its burden to show just cause to terminate Lavery's employment because it had proved that he had engaged in an act of domestic violence that fit within the definition of "conduct unbecoming" a firefighter. In his opinion, Stein stated that he could not conclude from the NAPD interviews and testimony alone that the Town had met its burden to prove that Lavery "attempted to strangle" Doe or inflicted "the specific injuries she had alleged and on which North Attleborough based its decision to terminate his employment." Stein further noted that if Lavery had not been involved in another incident of alleged domestic violence, "for which he admitted to sufficient facts to warrant a finding of guilty on charges of assault and battery," he "would have been inclined to conclude that North Attleborough did not prove by a preponderance of evidence that . . . Lavery had used a degree of force that would have left any 'red' marks on Ms. Doe's neck during their struggle." However, Stein explained:

[E]very NAPD police officer credibly testified to seeing some sort of a red mark on Ms. Doe's neck. This undisputed fact, together with the fact that Mr. Lavery admitted to domestic violence in an incident barely one month after his very similar altercation with Ms. Doe, tips the calculus on this very close call. I conclude that Mr. Lavery's testimony that he would "never" hit a woman is not credible. In addition, I find that Mr. Lavery's other quick, self-serving responses to the NAPD, and failure to elaborate, about how Ms. Doe 'shouldn't' have 'any' marks on her and it was 'Not True' that he grabbed her neck, were also a prevarication....

Stein ultimately concluded that Lavery had used “some unreasonable degree of force during his physical altercation” with Doe that “put her at risk of serious harm,” and that his conduct met the definition of conduct unbecoming a firefighter. He clarified that he considered the January 3 Incident and CWOFF admission “for the limited purpose of informing [his] own credibility assessment of Mr. Lavery’s testimony and state of mind concerning the November 21, 2015 [I]ncident” and that the decision “in no way reflects the Commission’s judgment on the merits of the subsequent January 2016 [I]ncident.”

As to the Town’s other stated grounds for termination, Stein did not find merit in the Town’s finding that the restraining order against Lavery disqualified him from performing his duty. More specifically, Stein found that the Town had not shown beyond a speculative level that Lavery would be called upon to respond to any incident that would result in a violation of the restraining order against him. Stein also did not credit the Town’s finding that there had been seven domestic violence incidents involving Lavery and Doe in the few years prior to the November 2015 Incident. He found that Lavery had made one call to the police to report that Doe was harassing him, and Lavery had brought, or was about to bring, five complaints against Doe.

In their opinion, the four other Commissioners concurred in the result, but disagreed with Stein’s opinion insofar as it “appears to state that there is no nexus between the restraining order issued against [Lavery] and his employment.” Specifically, they noted that “firefighters may be called to the scene of domestic violence by police to provide medical care, indicating that firefighters need to be able to respond appropriately to domestic violence” and emphasized that the police had determined that Lavery was the dominant aggressor in the November 21 Incident. They concluded that the Town had just cause to terminate Lavery’s employment because Lavery

“was the subject of a domestic violence restraining order, for which there is adequate nexus to his employment, which constitutes conduct unbecoming and that the [Town] had just cause to discipline [him].”<sup>6</sup>

In his motion, Lavery requests that this court set aside the Commission’s decision and reinstate him to his former position as a North Attleborough firefighter/EMT. In its cross-motion, the Town opposes Lavery’s motion and seeks a judgment affirming the Commission’s decision.

### **DISCUSSION**

Under G.L. c. 30A, § 14, a reviewing court may remand, set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, “if it determines that the substantial rights of any party may have been prejudiced because the agency 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 (g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.” G.L. c. 30A, § 14(7). Lavery bears the burden of demonstrating that the Commission’s decision is invalid. Bagley v. Contributory Retirement Appeal Bd., 397 Mass. 255, 258 (1986). This 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.” G. L. c. 30A, § 14(7). It also ““must defer to [the] agency’s fact-finding role, including its right to draw reasonable inferences from the facts found.”” School Comm. of Brookline v. Bureau of Special Educ. Appeals, 389 Mass. 705, 716 (1983), quoting Smith College v. Massachusetts Comm’n Against Discrimination, 376 Mass. 221, 224 (1978).

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<sup>6</sup> The concurring Commissioners added: “To us, such conduct is alarming and highly offensive, not just ‘unbecoming’ and [Lavery’s] employment was appropriately terminated....”



However, “to the extent that an agency determination involves a question of law, it is subject to de novo judicial review.” Souza v. Registrar of Motor Vehicles, 462 Mass. 227, 230 (2012), quoting Raytheon Co. v. Director of Div. of Employment Sec., 364 Mass. 593, 595 (1974).

Here, Lavery challenges the Commission’s consideration of his admission to sufficient facts to support the assault and battery on a family or household member charge against him relating to the January 3, 2016 Incident.<sup>7</sup> He argues that such consideration violated the applicable Standard Adjudicatory Rules of Practice and Procedure, which provide that “[n]o evidence shall be admitted after the close of the record unless the Presiding Officer reopens the record.” 801 Code Mass. Regs. § 1.01(10)(k)(2). He also contends that it violated 801 Code Mass. Regs. § 1.01(10)(h), pertaining to administrative notice, which incorporates the requirement of G.L. c. 30A, § 11(5) that “[p]arties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed.” Lavery argues that the Commission’s decision is unlawful because Stein did not reopen the record or provide him with notice of, or an opportunity to contest, such evidence.<sup>8</sup>

I disagree. The record reflects that Lavery was fully aware of the submission of the evidence that he now challenges, but failed to object before the Commission to its use. Indeed, Lavery’s own counsel submitted evidence relating to the January 3 Incident to Stein without reservation or objection. As a result, Lavery has waived any right to challenge the Commission’s consideration of such evidence on appeal. See City of Springfield v. Dep’t of Telecomms. & Cable, 457 Mass. 562, 573 & n. 15 (2010) (where party failed to raise objection to an alleged procedural error before the agency, ground of appeal is waived). This is not a case

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<sup>7</sup> Citing G.L. c. 30A, § 14(7), Lavery alleges that the decision was: made upon unlawful procedure; based upon an error of law; unsupported by substantial evidence; violated his constitutional right to due process; and was arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law.

<sup>8</sup> It is not clear how Lavery could now contest the accuracy of the factual admissions he previously made in the criminal case against him.

in which an agency, without prior notice to the parties, took notice of facts. Compare Sex Offender Registry Bd. No. 89230 v. Sex Offender Registry Bd., 452 Mass. 764, 782 (2008) (Spina J., concurring) (psychiatric manual relied upon without notice to petitioner of hearing examiner's intent to use it).

Lavery's appeal also fails because the concurring opinion of four Commissioners states a basis for affirming the Town's decision to terminate his employment that is independent of the challenged evidence. See Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 691 (2012) (where Commission improperly relied on certain information, decision affirmed because Commission did not "decide [the] appeal on that basis alone" and there was substantial evidence in record, independent of disputed information, to support decision). Final decisions of the Commission are made by "[a] majority of the members constituting the Agency or the Agency Panel authorized by the Agency," 801 Code Mass. Regs. § 1.01(11)(d). Thus, conclusions expressed by a majority of the Commissioners in the concurrence represent a decision of the Commission. See McGuinness v. Dep't of Corr., 465 Mass. 660, 665 (2013) ("801 Code Mass. Regs. § 1.01(11)(d) states a commonsense principle that, as a general matter, a majority is required for the commission to take affirmative action.").

Here, a clear majority of the Commissioners concluded that there was a nexus between the restraining order against Lavery and his employment. After emphasizing that the police had determined that Lavery was the "dominant aggressor" in the November 21 Incident, the majority concluded that the conduct which resulted in the November 23, 2015 issuance of a restraining order against Lavery was "alarming and highly offensive, not just 'unbecoming', and [that Lavery's] employment was appropriately terminated...." Only after reaching that conclusion did

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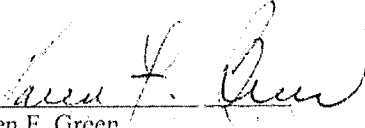
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the concurring Commissioners state that Lavery's admission relating to the January 3 Incident "render[ed] his assertions regarding Ms. Doe that 'I'd never hit a woman', meaningless at best."<sup>9</sup>

**ORDER**

It is therefore **ORDERED** that:

1. the Plaintiff's motion for judgment on the pleadings is **DENIED**;
2. the Defendant's cross-motion for judgment on the pleadings is **ALLOWED**; and
3. the Commission's decision upholding the Town's termination of the Plaintiff's employment is **AFFIRMED**.

  
Karen F. Green  
Justice of the Superior Court

DATED: March 4, 2019

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<sup>9</sup> Lavery also objects to citation in the concurring opinion to "various governmental guidelines with regard to domestic violence, which were not presented at hearing." However, those materials were cited for the general propositions that "[t]he Commonwealth's policies against domestic violence are evident across all three branches of government" and "the Commonwealth has established its desire and commitment to address and prevent domestic violence."