COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2085CV00462D

GREGORY LEWANDOWSKI

vs.



CIVIL SERVICE COMMISSION & another[1]

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

The plaintiff, Gregory Lewandowski (plaintiff or Lewandowski), filed this action against the defendants, the Civil Service Commission (commission) and the Town of Charlton (town) (together, the defendants), under G. L. c. 31, § 44, and G. L. c. 30A, § 14, to appeal the commission's decision affirming the town's termination of the plaintiff's employment with town police department. The plaintiff moves for judgment on the pleadings, contending that the commission's decision is based on errors of law and fact, is not supported by substantial evidence, is unwarranted by facts found by the agency, is arbitrary and capricious, is an abuse of discretion, is violative of the constitution, and is otherwise not in accordance with the law. The defendants have cross-moved for judgment in their favor. For the reasons discussed below, the plaintiff's motion is **DENIED**, the defendants' cross motion is **ALLOWED**, and the commission's decision is **AFFIRMED**.

## BACKGROUND

On October 17, 2018, the town terminated the defendant from his position as Lieutenant of the town police department. On October 18, 2018, the plaintiff appealed that decision with

[1] Town of Charlton

the commission. Chairman Christopher Bowman (chairman) held a de novo hearing on the matter on March 11-12 and June 12, 2019. Thirteen witnesses testified, including the plaintiff, and numerous exhibits were admitted. On April 9, 2020, the commission issued a written decision affirming the town's decision to terminate the plaintiff. The commission's findings and conclusions are as follows, with the court reserving certain additional findings for discussion below.

In the commission's thirty-one page decision,[2] the chairman found that the plaintiff was untruthful multiple times. For instance, the chairman determined that the plaintiff could not offer a credible explanation for why a second $200 longevity payment he received was not an error or, if it was, why he didn't notify the town. "Instead, [the plaintiff] offered non-responsive and vague answers that appeared designed to obfuscate and confuse those individuals . . . who were looking for a valid explanation." A.R. 242.

In addition, the plaintiff's other actions "called into question his honesty." A.R. 243. The hearing officer found that the plaintiff was untruthful when he answered, "yes," to Chief Maxfield's question asking whether he had been with the town police department for fifteen years, before Chief of Police Graham Maxfield (Chief Maxfield) signed off on crediting the plaintiff with an additional week of vacation time, when the plaintiff knew he only had twelve years of continuous service toward vacation credit.

The chairman also found the "most troubling" the plaintiff's actions and statements related to a sick leave audit. A.R. 243. The plaintiff, "who had never questioned the conclusions of [a] prior audit, went back and conducted an audit of his own time from his date of hire, *failing to deduct any sick time usage between 2005 and 2008 that was entered manually* prior to the

[2] The decision is found in the Administrative Record, hereinafter cited to as A.R., at pages 217-247.

process being computerized." A.R. 244. The chairman found that the town's upward adjustment to the plaintiff's sick time balance "was based solely on [the plaintiff's] misrepresentation." A.R. 244.

The chairman did not believe that the investigation was a pretext for firing the plaintiff because it began after Chief Maxfield learned that the plaintiff had received a longevity payment of $200 in July 2017, while Chief Maxfield was preparing to submit his first budget proposal. Chief Maxfield was not aware that the police chief and lieutenant, non-union positions, were receiving longevity payments, and did not understand why the plaintiff would have received a second $200 payment in November 2017. The chairman found that Chief Maxfield "took the reasonable step of asking [the plaintiff] to provide an explanation." A.R. 239. After the plaintiff provided "a partially non-responsive reference to anniversary dates," Chief Maxfield asked the plaintiff to provide a written response that raised further questions and "justified, if not compelled" "a full investigation regarding all issues related to longevity payments, sick time accrual and usage of vacation time." A.R. 239-240.

The chairman also found that the plaintiff's termination was not based on any personal or political bias. He found that the plaintiff and Chief Maxfield had a "cordial, working relationship" when Maxfield was promoted to Chief and that an incident from ten years earlier[3] did not play a role in Chief Maxfield's decision to conduct the investigation. A.R. 240.

Regarding the issue of disparate treatment, the chairman noted that there was "evidence that the Town treated other similarly situated individuals differently from the [plaintiff]

[3] The chairman considered the plaintiff's "testimony that Chief Maxfield may have had a personal animus against him based on an incident over a decade ago when Chief Maxfield, then a police sergeant, was apparently encouraging auxiliary police officers not to work paid details in a show of solidarity with the police union" and that "[a]pparently, [the plaintiff] may have provided information to the Police Chief at the time regarding Maxfield's actions." A.R. 240.

regarding receipt of the longevity payment." A.R. 246-247. More specifically, regarding Town Administrator Robin Craver (Craver) targeting the plaintiff for termination, the chairman noted the "multiple examples of how, in regard to some of the individual charges . . . Craver seemed to inexplicably give certain other employees, including [Chief Maxfield], the benefit of the doubt about their actions or inactions regarding similar circumstances, while simultaneously concluding that [the plaintiff] was acting in bad faith."[4] A.R. 240. Nevertheless, the chairman concluded that "the record does not show that . . . other employees engaged in multiple instances of untruthfulness, thus distinguishing them from the [plaintiff]." A.R. 246-247. Thus, because "there were multiple allegations against [the plaintiff], most of which came about and/or were compounded by [the plaintiff's] then-ongoing statements and actions," the chairman concluded that Craver "would have been negligent in her duties if she did not authorize and/or encourage an investigation into the multi-faceted unfolding allegations." A.R. 240-241.

Ultimately, the chairman concluded that, "[t]aken together, those multiple instances of proven untruthfulness constitute substantial misconduct adverse to the public interest that provide just cause for the Town's decision to discipline [the plaintiff]." A.R. 245. The commission then upheld the town's termination of the plaintiff's employment.

## DISCUSSION

### I. Standard of Review

"Under the civil service law, G. L. c. 31, an appointing authority cannot discharge or remove an employee without 'just cause.'" *Brookline* v. *Alston*, 487 Mass. 278, 292 (2021), citing G. L. c. 31, § 41. "Although the civil service law does not define what constitutes 'just

[4].The chairman concluded that "[g]iven the glaring disparity regarding how the Town handled the overpayment received by [the plaintiff] as opposed to others, including Chief Maxfield," the plaintiff's conduct as to the $200 overpayment "would not standing, alone, justify [his] termination, even when taking into account his non-responsive and vague answers." A.R. 243.

cause,' we have held that it exists where the employee has committed substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service" (quotation and citation omitted). *Id.* "After making its de novo findings of fact, the commission must pass judgment on the penalty imposed by the appointing authority." *Falmouth* v. *Civil Serv. Comm'n*, 447 Mass. 814, 823 (2006). "[T]he commission does not act without regard to the previous decision of the town, but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'" (quotation and citation omitted). *Id.* at 824.

The court may set aside or modify the commission's decision, or remand the matter, if it determines that the decision prejudiced "the substantial rights" of the individual because it was unconstitutional, exceeded the agency's statutory authority or jurisdiction, was based upon an error of law or unlawful procedure, was unsupported by substantial evidence,[5] unwarranted by the facts, arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. G. L. c. 30A, § 14(7). The court's review is limited to the administrative record and 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." G. L. c. 30A, § 14(7). "This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom" (quotation and citation omitted). *Brookline*, 487 Mass. at 299. "Accordingly, as the party challenging the commission's order here, the [plaintiff], bears a heavy burden" (quotation and citation omitted). *Id.*

[5] "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1(6).

II. In Camera Review

The plaintiff contends that the chairman made an unconstitutional error of law when he refused to conduct an in camera review of an April 5, 2018 email Chief Maxfield sent to special town counsel. According to the plaintiff, the email, which was not privileged, was probative of pretextual termination. He states that "from the outset," Chief Maxfield and Craver targeted him for termination "with the assistance of special counsel employed for the express purpose of investigating and building a case for termination rather than assisting the Town in removing an officer that the Town had already investigated and determined to be worthy of removal."[6] Pl.'s Mem. 1. According to the plaintiff, his termination was "the result of illicit political considerations, bias, inequitable treatment among similarly situated individuals, and favoritism in governmental employment decisions." Pl.'s Mem. 4.

First, it is not clear that the chairman refused to conduct an in camera review of the email. The record reflects that, in the context of a discussion with Attorney Peloquin and Attorney Kiley, the chairman made a general comment that he was waiting on the parties to let him know whether they wanted an in camera review, and that he would then take the matter under advisement.[7] Where the plaintiff does not indicate that he responded to the chairman's request, this court cannot conclude that the chairman erred in not reviewing the email.

[6] There appears to have been some confusion or disagreement about the attorney who received the April 5 email. The plaintiff merely refers to "Special Town Counsel" throughout his memorandum, while the hearing transcript reflects that Lewandowski's attorney, Dale Kiley (Attorney Kiley), stated at the commission hearing during his cross-examination of Chief Maxfield, "And you sent a letter to town counsel. You're claiming it was to Cosgrove. We believe it was to Attorney Peloquin because you people were looking to discharge [the plaintiff]." A.R. 1265. The attorney representing the town at the hearing, Leo Peloquin (Attorney Peloquin), later explained that he was outside counsel, not town counsel. A.R. 1275.

[7] The chairman stated, "Why don't you think about it. Why don't you think about it and whether or not you want to have an in camera review. Take that into consideration of whether you want to do an in camera review or not. I don't know whether it's a big deal or not. But think about it, and then let me know, and I'll make a decision on it later. Under advisement." A.R. 1321.

Second, any error the commission may have made as to the email does not rise to the level of a constitutional violation, nor does it affect the substantial rights of the plaintiff to warrant the reversal or remand of the commission's decision. As the plaintiff notes, Attorney Peloquin stated at the hearing that "there was also something else in the email related to the matter that would be of the type of the chief seeking advice from attorney Cosgrove." A.R. 1321. Although the plaintiff contends that "[t]here were at least some indicia for the [commission] to conclude that the April 5th email contained material and relevant probative facts on the very issue of pretextual termination," Pl.'s Mem. 6, Attorney Peloquin's statement appears to put the email squarely within the protection of the attorney-client privilege. See *Suffolk Constr. Co.* v. *Division of Capital Asset Mgt.*, 449 Mass. 444, 450 n.9 (2007) (setting forth elements of attorney-client privilege). Attorney Peloquin said as much at the hearing when he stated that he reviewed the email and it was his opinion that the email involved advice between a client and his attorney. See A.R. 1320-21.

Finally, even if the email was somehow probative of pretextual termination, was reviewed in camera, and was determined not to be privileged, production of that email and its contents would not change the fact that there was substantial evidence supporting the chairman's conclusion that the plaintiff's dishonesty warranted his termination. The chairman found that, as a part of his duties, the plaintiff signed weekly payrolls in 2017 and was involved in multiple department-wide audits of accrued time off, including sick time. As a part of one such audit, the plaintiff verified his own sick time balance as 626 hours in October 2014. In February 2017, he conducted another accrued leave audit, certifying his sick time balance as 844 hours as of March 1, 2017. Nevertheless, after an audit conducted at the end of that same year, the plaintiff contended that he was somehow owed substantially more than one hundred additional hours of

sick time.[8] The plaintiff was also found to be untruthful in obtaining an additional week of vacation time, as he affirmed that he had been with the department for fifteen years when asked by Chief Maxfield, even though he knew he had only twelve years of continuous service upon which vacation time accrual could be based. Simply put, the facts of this case warranted the plaintiff's termination, and the commission did not abuse its discretion or make an arbitrary or capricious decision in affirming the termination.

III. Disparate Treatment

The plaintiff also contends that the substantial evidence showed disparate treatment as to the issues of longevity pay, an additional week of vacation, the sick leave audit, and multiple instances of untruthfulness, and that the town's findings were erroneous and a pretext for termination. Again, this court does not conclude that the commission's decision should be disturbed on this basis, particularly when the chairman addressed explicitly the issue of disparate treatment. He noted that Craver appeared to give some employees the benefit of the doubt as to their conduct, while at the same time concluding that the plaintiff was acting in bad faith. However, he also noted that there were multiple allegations against the plaintiff, compounded by

[8] When two town employees, a new administrative assistant and an assistant human resources director, conducted the late-2017 audit and asked the plaintiff to confirm that his sick time balance was 904, the plaintiff believed he was entitled to 912 hours based on the amount showed on his December 28, 2017 pay advice. When Chief Maxfield asked him to "prove it," the plaintiff audited his sick leave since he started his full-time employment in 2005. He calculated the total amount of hours he could have accrued since he started, but only subtracted his sick time usage as found in the software used to track sick time since July 2008. His calculations therefore did not include any sick time he used from 2005 to July 1, 2008, when the process was not computerized and a "sick book" was used to track sick time used. Based on this information, the plaintiff represented that his sick time balance should be 1186 hours as of December 28, 2017.

The difference between the 1186 hours the plaintiff asserted he had accrued and the 844 hours reflected in his audit was 342 hours. However, the termination letter he received dated October 17, 2018, stated that he "purposefully inflated [his] accrued sick leave by at least 240 hours in Department records." Finally, after the plaintiff was terminated and before the commission hearing, the town found and reviewed the sick book pages used to record sick time taken during the period from 2005 to 2008; they reflected that 160 hours were not accounted for in the plaintiff's analysis. If the 160 hours were subtracted from the plaintiff's 1186 tally, his sick leave balance would have been 1026.

his conduct, which necessitated Craver authorizing or encouraging an investigation. To the extent the plaintiff challenges the credibility of Chief Maxfield and others as to these issues. it is not the role of this court to reassess credibility determinations made by the chairman. See *Brookline*, 487 Mass. at 305.

In addition, although there may have been evidence of disparate treatment as to some issues like longevity, there was nevertheless substantial evidence that the plaintiff was untruthful multiple times, including in how he handled his request for additional sick time. As someone who was involved in the 2014 and 2017 accrued leave audits and signed payroll as the second in command, the plaintiff conducted himself in such a way as to this particular issue that he was not similarly situated to other town employees. See *Boston Police Dep't* v. *Collins*, 48 Mass. App. Ct. 408, 413 (2000) (noting "the high standard of conduct required of police officers and the need for the commission to respect that standard"). The plaintiff also knew that, when he was asking Chief Maxfield to sign off on an additional week of vacation time, he had only twelve years of continuous service, not the fifteen years he affirmed with Chief Maxfield. Based on the substantial evidence found in the record, the hearing officer acted within his discretion in affirming the town's termination of the plaintiff. Cf. *Brookline*, 487 Mass. at 304 ("[I]t is the job of the commission, not this court, to weigh the evidence before it and determine whether a municipality had just cause to terminate an employee.").

## ORDER

For the foregoing reasons, it is **ORDERED** that the plaintiff's motion for judgment on the pleadings is **DENIED**, the defendants' cross motion for judgment on the pleadings is **ALLOWED**, and the commission's decision is **AFFIRMED**.

DATED: August 20, 2021

David M. Hodge
Justice of the Superior Court