

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION 10-0697

HAMPDEN COUNTY
SUPERIOR COURT
FILED

CITY OF SPRINGFIELD

MAY - 4 2012

vs.


CLERK-MAGISTRATE

MASSACHUSETTS CIVIL SERVICE COMMISSION and another¹

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

Pursuant to G. L. c. 31, § 44, the plaintiff, the City of Springfield ("City" or "Appointing Authority"), brought this action against the Civil Service Commission ("Commission") and Joseph McDowell ("McDowell"), seeking judicial review of the Commission's decision under G. L. c. 30, § 14. The City challenges the Commission's decision allowing McDowell to appeal his termination from his position as Deputy Director of Maintenance of the Springfield Department of Parks, Building and Recreation Management. The action is now before the Court on the City's Motion for Judgment on the Pleadings. McDowell has cross-moved for Judgment on the Pleadings, challenging the Commission's decision to suspend and later discharge him under G. L. c. 268A, § 25 and G. L. c. 31, § 50.

For the reasons stated below, the plaintiff's Motion For Judgment on the Pleadings is DENIED, McDowell's Cross-Motion for Judgment on the Pleadings is DENIED, and the Commission's decision is AFFIRMED.

BACKGROUND

The administrative record reflects the following facts. The City hired the defendant McDowell in 1987 as a skilled laborer in its Department of Facilities Management, which later

¹ Joseph McDowell.

became the Department of Parks, Buildings and Recreation. In 1989, McDowell received a permanent appointment as a carpenter. There is no dispute between the parties that McDowell was a permanent, tenured civil service employee when he worked as a skilled laborer and carpenter for the City of Springfield from 1989 to 1993. In 1993, McDowell was provisionally promoted to Assistant Deputy Director of Maintenance and was then provisionally promoted to Deputy Director of Maintenance.² In this capacity, he was responsible for assigning work to tradesmen and skilled laborers working in approximately fifty-two city-owned buildings. McDowell also owned "McDowell and Sons," a company he had founded in 1994.

On January 25, 2005, McDowell received a notice of suspension from Patrick Sullivan, as the Appointing Authority, advising McDowell that he was being suspended for five days. The City's investigation had uncovered that McDowell was using city property and equipment for his own personal benefit, and had conducted business for his company, McDowell and Sons, during working hours. The Appointing Authority conducted a disciplinary hearing on March 29, 2005, and on April 7, 2005. McDowell did not testify. On April 15, 2005, the Appointing Authority terminated McDowell's employment, finding that McDowell had violated the personnel policy by using City property and equipment for his own personal benefit and conducting private business on City time. Pursuant to G. L. c. 31, § 43, McDowell filed an appeal with the Civil Service Commission, on the grounds that there was no just cause for his dismissal.

² On July 1, 2000, McDowell entered into a written contract with the City, which stated in part:

"If through any cause the Deputy Director of Maintenance fails to timely and properly observe and comply with any of its obligations under this Agreement, the City shall have the right to terminate this Agreement with or without cause and Deputy Director of Maintenance shall have no rights under Civil Service laws or any collective bargaining during the course of this agreement."

The Civil Service Commission referred the case to the Division of Administrative Appeals and on December 18, 2006, a full hearing was held before a Magistrate. The City made an oral motion to dismiss the appeal, arguing that McDowell was promoted to a "provisional" position and, therefore, had lost his right to appeal to the Commission. Despite initially denying the oral motion to dismiss, the Magistrate later recommended a finding that McDowell, by contract, only had the rights of a "provisional employee," and, therefore, did not have the right to appeal to the Commission. However, the Commission declined the Magistrate's recommendation in an Interim Order issued May 7, 2009, holding that McDowell's employment contract had not waived his civil service rights. The Commission concluded that the terms of the contractual waiver were unenforceable as against public policy.³ On February 11, 2010, the Commission affirmed the Interim Order, declining to follow the Magistrate's recommendation and concluding that a provisional employee, such as McDowell, has the right to appeal to the Commission to contest the just cause for his discharge under G. L. c. 31, § 41. It concluded that a provisionally appointed employee, who had previously worked in a tenured position, could appeal his discharge from the provisional position and seek reinstatement to his prior tenured position. The Commission reasoned that this conclusion closely aligned with the legislative intent of the civil service law to assure that employees do not lose their tenured status without just cause.

On May 6, 2010, the Commission issued a final decision on the issue of just cause. It concluded that the City had reasonable justification for disciplining McDowell, but lacked

³ The Commission stated that it would run afoul of the legislative purpose behind G. L. c. 31, if an employee was permitted to waive his future civil service rights by agreement. Furthermore, it emphasized its decision not to enforce agreements that would give the Appointing Authority "unchecked discretion to treat an employee as it wishes without the need to justify its actions."

reasonable justification to terminate him.⁴ McDowell's termination was modified to a nineteen-month suspension beginning on April 15, 2005, and ending on November 15, 2006. He was to be reinstated on November 16, 2006.

On May 14, 2010, the City filed a Motion for Reconsideration, requesting the Commission to consider McDowell's indictment on April 13, 2007, for filing false tax returns. The City argued that it would have suspended McDowell on April 13, 2007 - the day of the indictment - under G. L. c. 268A, § 25.⁵ Subsequently, the City would have terminated him on November 27, 2007, pursuant to G. L. c. 31, § 50.⁶ On March 24, 2011, the Commission issued an order allowing the City's motion in part. It concluded that the City was justified in suspending McDowell for his "misconduct in office," because "the false income returns in question related to McDowell's business, McDowell and Sons, and covered a five-year period of time, during which . . . he was simultaneously employed by the City." The Commission modified McDowell's termination to a six-month suspension and his reinstatement was limited to the eighteen-month period from October 16, 2005 to April 13, 2007. Because the City would

⁴ The Commission agreed that McDowell had engaged in misconduct by (1) using a City-owned fax machine on at least two occasions for matters related to his private business; (2) asking a City employee to provide professional advice during City time on matters related to his private business; (3) compiling and/or reviewing proposals and prices related to his private business.

⁵ General Laws c. 268A, § 25, states:

"An officer or employee of a county, city, town or district, or of any department, board, commission or agency thereof may, during any period such officer or employee is under indictment for misconduct in such office . . . be suspended by the appointing authority, whether or not such appointment was subject to approval in any manner."

⁶ General Laws c. 31, § 50, states, "[No] person [shall] be appointed to or employed in any [civil service] position within one year after his conviction of any crime . . ." The appointing authority has discretion to appoint or employ within the one-year period a person convicted of an offense listed in G. L. c. 31, § 50.

have terminated him upon his guilty plea to the felony charges, his termination was considered effective November 27, 2007.

DISCUSSION

1. The City's Motion

Judicial review of the Commission's decision is governed by G. L. c. 30A, § 14. In reviewing a statutory interpretation by the Commission, "[the court] must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Middleborough v. Housing Appeals Comm.*, 449 Mass. 514, 524 (2007). As a general rule, in reviewing the interpretation of a statute by an administrative body, a court shall give due weight to the experience, technical competence and specialized knowledge of the agency." *U. S. Jaycees v. Massachusetts Comm'n Against Discrimination*, 391 Mass. 594, 600 (1984). The party appealing from an administrative decision has the burden of proving its invalidity. *Brackett v. Civil Serv. Comm'n*, 447 Mass. 233, 242 (2008). General Laws c. 30A, § 14 (7), permits the Commission's decision to be set aside if based upon an error of law.

The City challenges the Commission's decision allowing McDowell to appeal his discharge to the Commission. The City asserts that this constituted an error of law because McDowell, as a provisional civil service employee, was not protected by G. L. c. 31, § 41, and thus, could be discharged at any time without notice or a hearing. The Commission rests its decision on G. L. c. 31, § 41, which governs the discharge, removal, or suspension of tenured civil service employees. It acknowledges that McDowell's promotion to Assistant Deputy Director of Maintenance was a provisional appointment. The Commission, however, interprets

§ 41 to include provisional employees who could claim tenured status in a previously held civil service position. Because McDowell had claimed tenured status as a laborer and carpenter, and "suffered the loss of rights attributable to [this] tenured position," he had the right to bring a just cause appeal, seeking reinstatement to his prior tenured position.

The Commission has chosen a justifiable interpretation of the civil service law for which this court may not substitute its judgment. By its express terms, G. L. c. 31, § 41, extends due process protection only to tenured employees. Although McDowell was working as a provisional service employee at the time of his discharge, the parties do not dispute that he had worked as a tenured civil service employee in the four years preceding his promotion. In that capacity, he was entitled to the safeguards of §§ 41 and 43. Moreover, the Commission's decision is consistent with the purpose of the civil service legislation "to free public servants from political pressure and arbitrary separation but not to prevent removal of those who have proved to be incompetent or unworthy to continue in public service." *School Comm. of Brockton v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 488 (1997). Having held that the contractual waiver of McDowell's future civil service rights was unenforceable as against public policy, the Commission intended to preserve McDowell's right to appeal and prevent any arbitrary separation. See *id.* The Commission's interpretation of § 41, as applied to McDowell, is thus not lacking in evidentiary support or based upon an error of law.

2. McDowell's Cross-Motion

McDowell brings a Cross-Motion for Judgment on the Pleadings pursuant to G. L. c. 30A, § 14. He argues that the "after-acquired evidence" of the defendant's indictment for filing false tax returns and his plea of guilty to those charges, should not have been considered by the

Commission. Secondly, he contends that the Commission was incorrect in holding that the City was on firm ground to suspend him under G. L. c. 268A, § 25, because his off-duty conduct did not constitute "misconduct in office." Lastly, he argues that he falls within the exception to G. L. c. 31, § 50 that gives the City discretion to retain employees who have been convicted of a crime, but served less than six months of confinement. He asks that the suspension of six months be upheld and his termination declared void. He requests back pay from October 15, 2005, to present, plus interest and the value of benefits, and reinstatement to the position of carpenter.

As a tenured employee, McDowell could not be discharged or suspended but for "just cause." G. L. c. 31, § 41. The Commission 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." *School Comm. of Brockton*, 43 Mass. App. Ct. at 489. The Commission determines justification for discipline by inquiring "whether the employee has been guilty of substantial misconduct which adversely affects the public interest." *Id.* at 488. Under G. L. c. 268A, § 25, an employee under indictment for misconduct in such office or employment, may be suspended by the appointing authority. Pursuant to G. L. c. 31, § 50, an individual shall not be retained in a civil service position within one year of his conviction of any crime, with certain exceptions.⁷

⁷ "The appointing authority has discretion to appoint or employ within such one-year period any person convicted of any of the following offenses: a violation of any provision of chapter ninety relating to motor vehicles which constitutes a misdemeanor or, any other offense for which the sole punishment imposed was (a) a fine of not more than one hundred dollars, (b) a sentence of imprisonment in a jail or house of corrections for less than six months, with or without such fine, or (c) a sentence to any other penal institution under which the actual time served was less than six months, with or without such fine. Violations of statutes, ordinances, rules or regulations regulating the parking of motor vehicles shall not constitute offenses for purposes of this section." G. L. c. 31, § 50.


In reviewing administrative agency decisions, this and all other courts are 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." *Raytheon Co. v. Director of Div. of Employment Sec.*, 364 Mass. 593, 595 (1974), quoting G. L. c. 30A, § 14 (7). Accordingly, the Court has the limited task of examining whether there was substantial evidence for the Commission's decision. G. L. c. 30A, § 14 (e). Thus, if the decision is supported by "such evidence as a reasonable mind might accept as adequate to support a conclusion," G. L. c. 30A, § 1, "it will not be disturbed by a reviewing court." *Raytheon Co.*, 364 Mass. at 595.

McDowell argues that the criminal charges and conviction are not "after-acquired evidence," but rather, "subsequent occurring events." He argues that the Commission should not have considered them in coming to its final conclusion that McDowell was rightfully terminated effective November 27, 2007. The Commission did not err in considering this evidence. McDowell erroneously conflates what are technically two "terminations." In regard to McDowell's appeal of his termination on April 15, 2005, the Commission focused solely on the evidence concerning his use of City property for his personal benefit. Basing its decision on these events, the Commission modified the termination to a six-month suspension. On the other hand, the criminal charges and conviction do not constitute "after-acquired evidence" or even "subsequent occurring events," because they form the basis for the McDowell's "second" termination: this time, on November 27, 2007. McDowell's argument is without merit and the Commission properly considered the criminal charges and the guilty plea the final decision it issued on March 23, 2011.

McDowell also argues that G. L. c. 268A, § 25, does not apply because the tax evasion charges did not constitute "misconduct in office." The Commission concluded that McDowell's filing of false income tax returns related to his private business, McDowell and Sons, and covered the five-year period in which McDowell was employed by the City. Because McDowell had used city-owned property to conduct his private business and worked on private projects during city hours, the tax evasion also constituted "misconduct in office." Despite having the discretion to retain McDowell, the City rightfully terminated him pursuant to G. L. c. 30, § 50. There are no errors in the Commission's interpretation and analysis of McDowell's claims under G. L. c. 268A, § 25 and G. L. c. 31, § 50. Even where statutory language can be read in two ways, "where the Commissioner's statutory interpretation is reasonable . . . [the court] does not supplant his judgment." *Eastern Cas. Ins. Co. v. Commissioner of Ins.*, 67 Mass. App. Ct. 678, 683 (2006). The Commission's decision was supported by substantial evidence and not based upon an error of law.

CONCLUSION

Accordingly, for the reasons stated above, the plaintiff's Motion for Judgment on the Pleadings is DENIED, and McDowell's Cross-Motion for Judgment on the Pleadings is DENIED. The Commission's decision is affirmed and judgment shall enter for the defendant Civil Service Commission.


Bertha D. Josephson
Justice of the Superior Court

Dated: May 2, 2012