

Commonwealth of Massachusetts
County of Suffolk
The Superior Court

NOTIFY

14

CIVIL DOCKET# SUCV2007-04139

Kevin McKenna
vs.
Mass Civil Service Comm,
Boston Housing Authority

JUDGMENT

This action, defendant's motion for judgment on the pleadings, came on before the Court, Mitchell H. Kaplan, Justice, presiding, and upon consideration thereof,

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

That the motion for judgment on the pleadings is **DENIED** and the Civil Service Commission's decision is **AFFIRMED**. This action is hereby **DISMISSED**.

Dated at Boston, Massachusetts this 31st day of August, 2009.

Michael Joseph Donovan,
Clerk of the Courts

NOTICE SENT

9/2/09

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By: _____

Margaret M. Buckley
Assistant Clerk

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COMMISSION OF MASS
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JUDGMENT ENTERED ON DOCKET 9/2 20 09
PURSUANT TO THE PROVISIONS OF MASS. R. CIV. P. 52(a)
AND NOTICE SENT TO PARTIES PURSUANT TO THE PRO-
VISIONS OF MASS. R. CIV. P. 77(d) AS FOLLOWS

YOUR COPY OF THIS ORDER IS BEING FORWARDED TO THE CLERK OF THE COURT

Notify

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT
CIVIL ACTION
NO. 07-04139-B

SEP 03 2009
KEVIN MCKENNA,
PLAINTIFF,

vs.

(LAT)
MASSACHUSETTS CIVIL SERVICE COMMISSION AND BOSTON HOUSING
AUTHORITY,
DEFENDANTS.

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

The plaintiff, Kevin McKenna, brings this action to appeal a decision of the defendant, Massachusetts Civil Service Commission (the "Commission"), which dismissed an appeal taken by McKenna from a decision of the defendant, Boston Housing Authority (the "BHA"). The matter is before the Court on McKenna's motion for judgment on the pleadings. For the following reasons the motion is DENIED and the Commission's decision is affirmed.

BACKGROUND

McKenna was employed by the BHA as a police officer until November 2001. At that time, he informed the BHA that he required disability leave because of psychiatric issues. In November 2002, he inquired as to whether he could return to work. Two physicians examined McKenna and expressed concerns regarding his return to service as a police officer. The BHA wrote to McKenna on February 11, 2003 informing him that it could not approve McKenna's return to work. The BHA then applied for accidental disability retirement on behalf of

McKenna. On February 24, 2004, the Boston Retirement Board determined that McKenna was not eligible for disability retirement because he was not totally disabled. By letter dated February 5, 2005, the BHA again stated that it would not approve McKenna's return to work, and, by letter dated February 25, 2005, stated that his then current employment status was "inactive."

On December 1, 2005, McKenna filed a notice of appeal with the Commission citing G.L. c. 31, §§ 42 and 43. In his appeal, McKenna asserted that (1) the February 5, 2005 letter discharged him from employment with the BHA because it refused to allow him to return to work, and (2) the February 25, 2005 letter constructively discharged him. The BHA moved to dismiss the appeal, among other grounds, because the appeal was not timely filed.

By decision dated July 19, 2009, the Commission allowed the BHA's motion. The Commission explained that G.L. c. 31, §43 controlled his appeal and that statute requires an appeal from the decision of the BHA to be filed within ten days of its receipt. Because the latest BHA act referenced by McKenna was his receipt of the BHA letter dated February 25, 2005, his appeal was not timely filed. McKenna filed a motion for reconsideration of the Commission's decision dismissing his appeal. He argued, in part, that he had failed to file an opposition to the BHA's motion to dismiss as a result of excusable neglect and included his substantive arguments in opposition to the motion with his motion for reconsideration. The Commission denied the motion for reconsideration on August 16, 2007. It found that the motion for reconsideration had not identified any significant factor that the Commission overlooked in rendering its original decision. McKenna then filed the instant action in the Superior Court.

DISCUSSION

General Laws c. 30A, § 14, grants any person aggrieved by a decision of any agency in an adjudicatory proceeding the right to appeal that decision to the Superior Court. Unless irregularities in the agency proceedings are alleged, the court's review is confined to the administrative record. G. L. c. 30A, § 14(5). McKenna, as the appealing party, bears the burden of demonstrating that the Board's decision is invalid. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

In reviewing the Board's decision, this court is required to "give due weight to the experience, technical competence, and specialized knowledge of the [Board], as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). The decision may be set aside only "if the court determines that the decision is unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or not in accordance with law." Doe v. Sex Offender Registry Bd., 447 Mass. 779, 787 (2006), citing G. L. c. 30A, § 14(7)(e), (g). "If [the Board] has, in the discretionary exercise of its expertise, made a choice between two fairly conflicting views, and its selection reflects reasonable evidence, [a] court may not displace [the Board's] choice . . . even though the court would justifiably have made a different choice had the matter been before it de novo." Lisbon v. Contributory Retirement Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996) (internal quotation marks and citations omitted).

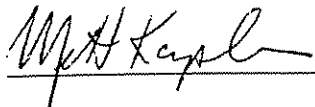
The Commission's decision is neither arbitrary or capricious, an abuse of discretion, nor not in accordance with the law. McKenna makes no argument that the time limits set out in G.L. c. 31, § 43 did not apply to his appeal to the Commission. The latest act on the part of the BHA

to which McKenna directs the court's attention that could constitute a BHA decision giving rise to right of appeal to the Commission was dated February 25, 2005. McKenna principally argues in his brief and during oral argument that the Commission should have exercised its discretion to look beyond the timing issue and consider his appeal on the merits. It is not clear that the Commission had such discretion, but even if it did, this court cannot substitute its judgment on such discretionary matters for that of the Commission. It must therefore affirm the Commission's decision dismissing McKenna's appeal.

ORDER

For the foregoing reasons, the plaintiff's motion for judgment on the pleadings is DENIED and final judgment shall enter dismissing this action.

Dated: August 28, 2009

A handwritten signature in dark ink, appearing to read "M. H. Kaplan", written over a horizontal line.

Mitchell H. Kaplan
Justice of the Superior Court