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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

RYAN MUTH vs. CITY OF LEOMINSTER & another. [FN1]

+12-P-1498+

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Ryan Muth, appeals from a judgment affirming the decision of the Civil Service Commission (commission) denying his administrative appeal. Muth had appealed to the commission from a decision of the defendant city of Leominster (city) to terminate his employment as a firefighter for the city. We affirm.

Background. In brief, following a series of escalating on-and off-duty incidents involving Muth's abuse of alcohol and prescription drugs, the parties, on April 16, 2010, executed a 'Last Chance Agreement.' The agreement provides that Muth must meet certain conditions prior to returning to full, unrestricted duty. The agreement also states that 'if at any time [Muth]

. . . engages [in] the same or substantially similar conduct that resulted in his hearing before the Mayor [of the city], he may, at the option of the Mayor, be terminated. Muth and the [city firefighters] Union each waive any right to contest such termination; provided, however, that the action [may] not be arbitrary or capricious.' On May 2, 2010, prior to his full reinstatement, Muth was arrested for operating a motor vehicle while intoxicated (OUI) and negligent operation after he struck several cars in a parking lot, narrowly missed pedestrians, and failed field sobriety tests. The city held a disciplinary hearing on August 9, 2010, at which both parties presented evidence and had the opportunity to cross-examine witnesses. [FN2] At the conclusion of the hearing, the mayor of the city found just cause to terminate Muth's employment. Muth appealed to the commission, which, after a full evidentiary hearing, found the city had just cause to terminate his employment. Pursuant to G. L. c. 30A, § 14, Muth appealed to the Superior Court, which affirmed the commission's decision on the parties' cross motions for judgment on the pleadings.

Discussion. An agency decision may only be set aside if the court determines that it is 'unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or not in accordance with law.' *Coverall N. Am., Inc. v. Commissioner of the Div. of Unemployment Assistance*, 447 Mass. 852, 857 (2006), citing G. L. c. 30A, § 14(7).

On appeal, Muth claims that the decision here was arbitrary and capricious and contrary to law because the language in the agreement permitting his termination for the same or similar conduct applied only to conduct occurring after his reinstatement to full duty. Thus, because Muth was never reinstated to full duty, he argues that the incident in May of 2010 could not be used as a basis for his termination. Muth's analysis of the agreement is incorrect. The language of the agreement is unambiguous, and plainly provides that Muth may be terminated if 'at any time' he engages in 'the same or substantially similar conduct.' Nothing in the agreement places a condition

on the 'at any time' language, nor would such a reading of the agreement be logical. As the judge observed, 'there is no doubt that the [c]ity had a public safety interest in monitoring Muth's conduct prior to reinstatement.'

Muth also argues that his due process rights were violated at the commission hearing because in rendering its decision the commission, without giving him proper notice, considered other incidents prior to the May, 2010, triggering incident. Again, the claim is without merit. First, the commission's consideration of the prior incidents should have been anticipated by Muth, as the commission was required to determine whether the triggering incident constituted 'the same or substantially similar conduct.' Second, Muth failed to present his due process claim to the commission below, and it is accordingly waived. See *Green v. Brookline*, 53 Mass. App. Ct. 120, 128 (2001) (issues not raised below, including before administrative agency, deemed waived).

Having considered the city's argument for an award of attorney's fees and double costs pursuant to Mass.R.A.P. 25, as appearing in 376 Mass. 949 (1979), we decline this request.

Judgment affirmed.


By the Court (Rubin, Fecteau & Hines, JJ.),

Entered: August 1, 2013.

FN1. Civil Service Commission.

FN2. The city had held a prior disciplinary hearing on May 7, 2010, following which it terminated Muth's employment. Muth appealed to the commission, which determined that the city failed to follow proper procedure and dismissed the appeal without prejudice. The city agreed to reinstate Muth and conduct the disciplinary proceeding anew.

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