

Term 

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COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

CITY OF **ATTLEBORO** vs. CIVIL SERVICE COMMISSION & another. [FN1]

13-P-797

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, the city of Attleboro (city), appeals from a Superior Court judgment affirming a Civil Service Commission (commission) decision finding that William O'Connell, a former heavy motor equipment operator (HMEO) for the city's department of public works, was wrongfully terminated after his commercial driver's license (CDL) was suspended following an arrest for operating while under the influence (OUI) while off duty. The city argues that the commission substituted its judgment for the city's when it reduced O'Connell's discharge to a ninety-day suspension. We agree, and reverse the judgment.

Background. During the OUI incident, O'Connell consented to a breathalyzer test and registered a blood alcohol content of .24. O'Connell's class D license and CDL both were then suspended. As a result, the city suspended O'Connell for failing to maintain a valid CDL, a requirement for his position as a HMEO; shortly thereafter, the city offered him a last chance agreement (LCA), which imposed certain conditions on his continued employment, including an agreement to refrain from alcohol use and the reinstatement of his CDL. O'Connell refused to sign or to negotiate the LCA. In other recent instances where city employees committed similar infractions, these employees also were offered LCAs as part of their discipline. [FN2] The employees signed the LCAs and continued their employment with the city. However, after O'Connell refused to sign the LCA, the city concluded that he should be discharged. The commission, in reviewing O'Connell's appeal from the city's termination, found that O'Connell's discharge was potentially the result of bias because he was terminated and other similarly situated employees were not.

Discussion. We review a final decision of the commission under G. L. c. 30A, § 14. We may set aside the commission's decision if it was "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law," G. L. c. 30A, § 14(7)(g), as appearing in St. 1973, c. 1114, § 3, such as where the commission substituted its judgment for that of the appointing authority -- in this case, the city. See *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. 300, 304 (1997).

Although the commission may modify a penalty imposed by an appointing authority, its decision to do so must be based on substantially different findings of fact, or on a finding of some improper bias or political motivation. *Falmouth v. Civil Serv. Commn.*, 447 Mass. 814, 824 (2006), citing *Police Commr. of Boston v. Civil Serv. Commn.*, 39 Mass. App. Ct. 594, 600 (1996). "It is not for the commission to assume the role of [the appointing authority], and to revise those employment determinations with which the commission may disagree." *Burlington v. McCarthy*, 60 Mass. App. Ct. 914, 915 (2004). Rather, the commission is "to guard against political considerations, favoritism, and bias in governmental employment decisions." *Falmouth*, *supra* (citation omitted).

There is no dispute here that the city demonstrated just cause to impose some discipline on O'Connell. But the commission determined that termination was unreasonable, justifying its decision to modify the penalty by its finding that "the potential for bias and/or favoritism . . . cannot be ignored" when comparing O'Connell's termination with discipline that was imposed on similarly situated employees through LCAs. In doing so, it ignored the critical point that O'Connell was discharged only after he refused to agree to an LCA. [FN3] The commission cannot substitute its judgment for that of the city regarding the wisdom or necessity of LCAs for HMEOs with OUI arrests. *Cambridge, supra* ("It is not within the authority of the commission . . . to substitute its judgment about a valid exercise of discretion based on . . . policy considerations by an appointing authority").

Additionally, the commission did not specifically find that one of the similarly situated employees -- a firefighter whose father was the former fire chief -- had been treated preferentially over O'Connell for political reasons. Absent such a finding, and in light of our conclusion that given the facts found by the commission the action taken by the city was reasonably justified, we cannot uphold the commission's modification of the penalty imposed by the city. See *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334 (1983) (question for commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority"); *Police Commr. of Boston*, 39 Mass. App. Ct. at 601 (reversing commission's modification of penalty where there was no "basis to believe that the discharge penalty unfairly singled out" employee).

Conclusion. For the reasons stated herein, we conclude that the commission improperly substituted its judgment for that of the city by reducing the penalty here from termination to a ninety-day suspension. The Superior Court judgment is vacated, and a new judgment shall enter reversing the commission's decision and ordering the commission to affirm O'Connell's termination.

So ordered.

By the Court (Grasso, Kafker & Graham, JJ.),

Entered: January 22, 2014.

FN1. William O'Connell.

FN2. In a less recent case from 2005, another HMEO did not receive any discipline after being arrested for an OUI offense.

FN3. In fact, O'Connell did not even attempt to negotiate the terms of the LCA. He declined the agreement outright, effectively neutralizing the city's options for ensuring that an employee responsible for operating heavy machinery would not again behave in a way that could affect his ability to perform his job safely and effectively.

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