

1 City of Salem.

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16-P-383

COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

APPEALS COURT OF MASSACHUSETTS

2017 Mass. App. Unpub. LEXIS 88

January 25, 2017, Entered

**NOTICE:** SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009), ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH 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. SEE *CHACE V. CURRAN*, 71 MASS. APP. CT. 258, 260 N.4, 881 N.E.2d 792 (2008).

**JUDGES:** Green, Meade & Blake, JJ.

## OPINION

### MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff appeals from a Superior Court judgment upholding the decision of the Civil Service Commission (commission) affirming his termination from the Salem fire department (department). On appeal, he claims that the judge erred in denying his motion for judgment on the pleadings and allowing the cross motion of the defendant city of Salem (city). We affirm.

A court may set aside or modify a decision of an administrative agency if it determines that the party's substantial rights were prejudiced because the decision is

"(a) [i]n violation of constitutional provisions; or (b) [i]n excess of the statutory authority or jurisdiction of the agency; or (c) [b]ased upon an error of law; or (d) [m]ade upon unlawful procedure; or (e) [u]nsupported by substantial evidence; or (f) [u]nwarranted by facts found by the court on the record . . . [i]f the court is constitutionally required to make independent findings of fact; or (g) [a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law."

G. L. c. 30A, § 14(7), as appearing in St. 1973, c. 1114, § 3. The standard is highly deferential to the commission "on questions of fact and reasonable inferences drawn therefrom." *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420, 589 N.E.2d 1224 (1992). Here, our review is limited to whether the findings were made without adequate support in the record. See *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711 (2003). The plaintiff has the burden of proving the decision's invalidity. See *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 263-264, 748 N.E.2d 455 (2001).

In its decision, the commission reviewed the evidence including the report prepared by O'Connor, an accountant, submitted by the city, and determined that there were six instances where the plaintiff misappropriated funds from the union's account, and that there were five instances in which the plaintiff was untruthful about what happened to those funds. The commission did not

credit all of the conclusions in the O'Connor report, but instead adopted those that were supported by corroborating evidence.<sup>2</sup> The judge correctly determined that the commission's decision was supported by substantial evidence, and that the evidence established "substantial misconduct" by the plaintiff.

## FOOTNOTES

<sup>2</sup> The commission determined the plaintiff to have been dishonest concerning monies he claimed to have paid out from the union's fundraising account to the Stephen O'Grady Fund; the Salem High School golf team; the Salem recreation department; the Robert Mullins Fund; and the Salem Cartoon Basketball League. The commission also pointed to his failure to reimburse the account for personal travel for himself and his wife to a Fallen Firefighters event in Colorado.

The judge was not compelled to accept the plaintiff's claim that the city withheld exculpatory documents. The city gave the plaintiff access to any and all documents that it had, and the receipts the plaintiff claims were in the possession of the union were never found. The judge concluded that the plaintiff presented no credible reason for relief on this ground. We agree.

Similarly, the plaintiff has not shown any bias on the part of the commission's chairman, who authored the commission's decision. The plaintiff did not raise this issue with the commission during the administrative proceedings, and the claim accordingly is waived on appeal. See *Santiago v. Russo*, 77 Mass. App. Ct. 612, 618, 933 N.E.2d 164 (2010). Even if this claim were properly before us, the plaintiff has not established a violation of his due process rights. The only evidence the plaintiff cites to support his claim is the chairman's expressed displeasure with the general spending habits associated with the union's fundraising account. However, the commission's decision makes clear that the chairman separated his conclusion from his expression of displeasure: "there is a stark distinction between the overall unappealing nature of this enterprise and the misconduct engaged in by [the plaintiff]. On at least five (5) occasions, he was untruthful, by stating that funds were withdrawn from the fundraising account and given to local charities." As the judge ruled, "[a]dverse findings of fact made against a party by a hearings officer without more cannot sustain an actionable claim of bias against the hearings officer."

Finally, the plaintiff's claim that he suffered disparate treatment is without merit. The commission found essentially the same facts and misconduct as the city had found, and the commission determined that the sanction of termination was appropriate in this case where the plaintiff had misappropriated charitable funds and made false statements including some "wildly unbelievable" testimony. The motion judge appropriately concluded that termination was within the range of options the city had available to it. Misappropriating funds destined for charitable uses, as well as lying to his superiors and fellow firefighters about such misconduct, is certainly adverse to the public interest. See *Murray v. Second Dist. Ct. of E. Middlesex*, 389 Mass. 508, 514, 451 N.E.2d 408 (1983) (civil service employee properly terminated for "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service"). The main purpose of the fundraising account was to "burnish" the image of the local firefighters union, and the plaintiff's misconduct only served his own purposes: using fake donations to local charities as cover for his own embezzlement. This misconduct also spurred a lack of trust in the department, and termination was warranted.

*Judgment affirmed.*

By the Court (Green, Meade & Blake, JJ.)<sup>3</sup>

## FOOTNOTES

<sup>3</sup> The panelists are listed in order of seniority.

Entered: January 25, 2017.