


2013 AUG 16 A 11: 19

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSIONTerm 

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

TIMOTHY **➤O'SULLIVAN➤** vs. BROOKLINE SCHOOL DEPARTMENT & another [FN1].**➤12-P-239➤**

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Timothy O'Sullivan, filed a complaint for judicial review, under G. L. c. 31, § 44, and G. L. c. 30A, of a decision of the Civil Service Commission (commission) that affirmed the Brookline School Department's (Brookline) termination of his employment. The parties filed cross motions for judgment on the pleadings. A judge of the Superior Court entered an order allowing the commission's motion, and judgment entered affirming the commission's decision. This appeal ensued. We affirm.

Background. The undisputed facts are as follows. O'Sullivan was employed by Brookline as a senior custodian. In November of 2009, he was found guilty of assault and battery and received a suspended sentence. One month later, O'Sullivan pleaded guilty to, among other things, assault and battery, assault and battery on a police officer, and violation of a G. L. c. 209A abuse prevention order. He was sentenced to serve ninety days in a house of correction on these charges. While he was incarcerated, O'Sullivan exhausted his accrued vacation pay and was paid for three administrative leave days. Brookline then placed O'Sullivan on 'absent without pay' status and, eventually, terminated O'Sullivan's employment as a consequence of his convictions, see G. L. c. 31, § 50, and because he was absent without leave for more than fourteen days, see G. L. c. 31, § 38. O'Sullivan then appealed to the commission, arguing that because his incarceration was for less than six months, Brookline had discretion under § 50 to reemploy him, which he alleged Brookline did in his case by (1) allowing him to exhaust his accrued vacation pay and administrative leave days; and (2) converting his status to 'absent without leave' thereafter. Moreover, according to O'Sullivan, his supervisor assured his family that his job 'would be waiting for him' upon his release. In addition, O'Sullivan claimed that Brookline did not comply with § 38's notice requirements and that, therefore, his employment could not be terminated on the ground that he was absent without leave for more than fourteen days.

The commission was not persuaded by O'Sullivan's arguments. As to O'Sullivan's claim that Brookline had discretion to reemploy him, the commission reasoned as follows:

'Section 50 plainly states that any person convicted of a crime is ineligible for a civil service position within one year of the conviction, absent an exercise of discretion by the appointing authority. In this case, although the Appellant's ninety (90) day sentence falls within the statute's discretionary range, the Department is not obligated to exercise that discretion.

'The Appellant's argument that the Department already exercised its discretion by changing his employment status to 'absent without pay' must fail, because a mere change in payroll status is

not an active exercise of discretion. The Department afforded the Appellant the right to a hearing, and only after the hearing, in the Notice of Separation and Discharge, did it choose not to exercise its discretion.'

As to O'Sullivan's argument regarding lack of notice the commission stated:

'[O'Sullivan's § 38] arguments [that Brookline did not provide proper notice for its contention that his employment had been terminated for being 'absent without leave for more than fourteen days'] . . . are not properly directed to the Commission. The threshold questions he presents, i.e., whether his absence was authorized and whether or not appropriate notice was given, are precisely the essential issues described in Section 38 that must be addressed through review by the Personnel Administrator, not the Commission.'

O'Sullivan then filed this appeal in the Superior Court. After hearing, the judge concluded that the commission's decision was in accord with the law and supported by substantial evidence. The judge stated that, 'allowing Mr. O'Sullivan to use accrued vacation days and administrative leave time in order to keep him on the payroll while he was incarcerated does not constitute an exercise of discretion by the Appointing Authority as contemplated by c. 31, § 50.' The judge went on to reject O'Sullivan's claim under § 38 on the grounds that the commission had no jurisdiction to consider O'Sullivan's appeal. Relying on *Police Commr. of Boston v. Civil Serv. Commn.*, 29 Mass. App. Ct. 470 (1990), the judge ruled that '[t]he plaintiff's avenue of appeal [with respect to the § 38 claim] was to the Massachusetts Personnel Administrator, Human Resources Division.'

O'Sullivan's arguments on appeal mirror those raised before the Superior Court judge. We have reviewed the record carefully, and agree with the reasoning and conclusions of the judge in all respects. Accordingly, we affirm the judgment affirming the decision of the commission.


Judgment affirmed.

By the Court (Cohen, Green & Vuono, JJ.),

Entered: June 21, 2013.

FN1. The Civil Service Commission.

END OF DOCUMENT

 Term

Adobe Reader is required to view PDF images.

