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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

MICHAEL RIZZO vs. TOWN OF LEXINGTON &amp; another. [FN1]

+10-P-691+

## MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Michael Rizzo, was employed as a police officer in the town of Lexington (town). He was discharged following an investigation which disclosed that he engaged in improper conduct including, among other improprieties, the use of excessive force. He appeals from a judgment of a Superior Court judge affirming the decision of the Civil Service Commission (commission) that his discharge was proper. We conclude that the decision of the commission was supported by substantial evidence and was not arbitrary and capricious, and therefore, we affirm.

*Background.* The disciplinary action against Rizzo resulted from an incident that took place on August 27, 2006. In the early morning hours, Rizzo and another officer, Hsien Kai Hsu responded to a domestic disturbance at the home of Jack DeLillo. DeLillo had called the police to report that his former girlfriend (girlfriend) was outside his home, yelling and banging on his door. DeLillo also reported that the girlfriend was intoxicated. As Rizzo and Hsu were talking with the girlfriend, DeLillo's neighbor (and cousin), Michael Santo, came over to inquire about the well-being of DeLillo. Rizzo and Hsu told Santo that DeLillo was 'fine' and directed Santo to return home. However, Santo kept asking questions, causing Rizzo and Hsu to escort him back to his yard. Hsu testified before the commission that Santo was 'calm' and that he (Hsu) had no 'reason to believe that . . . Santo was drinking that night.'

Eventually, the officers decided to drive the girlfriend home. The plan was for Hsu to transport the girlfriend in his cruiser and Rizzo, pursuant to Lexington Police procedure, would follow Hsu until he reached his destination. As they were departing, however, Rizzo saw Santo standing in his driveway talking on the phone and pulled into Santo's driveway, leaving Hsu to drive the girlfriend home without any back-up. The testimony about what occurred next is contradictory. According to Santo, however, whom the hearing officer expressly found to be credible, Rizzo accused Santo of causing a disturbance by talking on the telephone and ordered him inside his house. When Santo objected, Rizzo 'grabbed Santo's left arm, pulled him forward; spun him around; put one hand on his elbow; pushed his left arm up; and then slammed Santo against the trunk of [a car] . . . .' Santo asked Rizzo to stop, to which Rizzo responded 'shut up' and then pushed Santo's left arm up even further, causing an avulsion fracture to his elbow. After Rizzo left the area, Santo woke up his father who brought him to the hospital. Santo's father then reported the incident to the chief of police.

Ultimately, Santo filed a complaint against Rizzo alleging excessive force. Following an investigation, the complaint was substantiated. In addition, the investigation disclosed that Rizzo lied about the incident to investigators and failed to make a proper report. This conduct formed the

basis for discharging Rizzo. Rizzo appealed to the commission. After a lengthy hearing, the commission determined that 'there was just cause' for the discharge. See G. L. c. 31, § 43. From that decision, Rizzo sought judicial review under G. L. c. 31, § 44, and, as noted, a judge of the Superior Court affirmed the decision.

*Discussion.* The principles guiding judicial review of the commission's decisions are well-settled. The commission's role is to determine de novo 'whether, on the basis of the evidence before it, the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.' *Cambridge v. Civil Serv. Commn.*, 43 Mass. App. Ct. 300, 303 (1997). Our review of the commission's decision is conducted according to the principles prescribed in G. L. c. 30A, § 14(7). We accept the commission's findings of fact if supported by substantial evidence, and give deference to the commission's assessment of the credibility of witnesses. See *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 727 (2003).

Boiled down to the essentials, Rizzo's argument is that the commission erred in making certain credibility determinations of the witnesses who appeared at the hearing. He argues that the decision to credit Santo's account of the encounter over his own and the failure to give weight to evidence favorable to him renders the decision arbitrary and capricious. This argument fails. In appeals brought under G. L. c. 30A, this court is simply 'not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts found' by the commission. *Pyramid Co. of Hadley v. Architectural Barriers Bd.*, 403 Mass. 126, 130 (1988). Moreover, we discern no basis in the record to conclude that the commission's credibility determinations were arbitrary or capricious. To the contrary, the commission's findings explain in great detail (and with ample record support) the variety of reasons for assessing the credibility of witnesses as it did. *Cobble v. Commissioner of the Dept. of Social Servs.*, 430 Mass. 385, 390 (1999) (a reviewing court will not disturb an administrative agency's findings of facts, especially those concerning the credibility of witnesses, unless they are

unsupported by the record).


*Judgment affirmed.*

By the Court (Kafker, Vuono & Rubin, JJ.),

Entered: August 9, 2011.

FN1. The Massachusetts Civil Service Commission is a nominal party in this appeal.

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