

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

09-P-1460

CULLY ROSSI

vs.

CIVIL SERVICE COMMISSION, & another.<sup>1</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In this appeal of an administrative decision pursuant to G. L. c. 30A, § 14(7), the issue presented is the propriety of a six-month suspension imposed upon the plaintiff, Cully Rossi, formerly a Duxbury police officer, for failing to report to work as ordered. A judge of the Superior Court concluded that the decision of the Civil Service Commission upholding Rossi's suspension was not precluded by our decision in Duxbury v. Rossi, 69 Mass. App. Ct. 59 (2007) (Rossi I), and was supported by substantial evidence. The judge therefore denied Rossi's motion for judgment on the pleadings and entered final judgment dismissing his complaint. We affirm.

1. Effect of Rossi I. Both the commission and the judge correctly viewed Rossi I as "tangential" to the present dispute. In Rossi I, this court affirmed an arbitrator's award in favor of Rossi, concluding that the town unlawfully had denied him benefits for injury on duty and ordering that those benefits be paid until Rossi was deemed fit to return to work.

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<sup>1</sup> The town manager of the Town of Duxbury.



Significantly, however, Rossi I was based upon the state of affairs as they existed on March 14, 2003. This case, on the other hand, turns on subsequent developments: receipt by the town of a medical report from a physician verifying that Rossi was capable of returning to full duty if interaction between him and Lieutenant Roger Banfill was minimized; and the creation by the chief of police of a new work schedule for Rossi that was consistent with the physician's recommendations. The question for the commission in the present case was whether, in light of these later developments, Rossi could be disciplined for refusing to return to work. That issue was not controlled by Rossi I.

2. Appointment of the neutral physician. Rossi claims that the town retained the physician in question, Dr. Kathleen Leslie, in violation of article XIX, par. 9.5 of the applicable collective bargaining agreement (CBA), which requires the town and the union jointly to arrange for examination of the officer by a neutral physician. However, by its plain terms, this CBA provision governs the procedures for determining when an employee is able to return to work to perform light duty. It does not address the situation presented here, which is a return to full duty.

Because the CBA is silent as to a return to full duty, we look to G. L. c. 41, § 111F, relating to incapacitated municipal employees, to determine whether Dr. Leslie was properly



appointed. That statute states, in relevant part: "[w]henever a police officer . . . is incapacitated for duty because of injury sustained in the performance of his duty without fault of his own . . . he shall be granted leave without loss of pay for the period of such incapacity; provided, that no such leave shall be granted for any period after . . . a physician designated by the board or officer authorized to appoint police officers . . . determines that such incapacity no longer exists." (Emphasis supplied.) Under the broad language of this provision, the town unilaterally may appoint an examining physician, without having to engage in any interactive process with the officer or his union.<sup>2</sup>

Rossi nevertheless contends that the designation of Dr. Leslie contravened the statute, because she was appointed by the chief of police, Mark DeLuca, and the only official "authorized to appoint police officers" was the town manager. The problem with Rossi's argument, however, is that it fails to take into account the Duxbury Town Manager Act, St. 1987, c. 353. Under § 3.C(14) of this act, "[t]he town manager shall administer, either directly or through a person or persons appointed by him, in accordance with this act, all provisions of general and special laws applicable to said town . . . ." Accordingly, the

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<sup>2</sup> In fact, however, the town selected Dr. Leslie from the staff of physicians at the Jordan Occupational Health Center endorsed in article XIX, par. 9.5 of the CBA.



town manager was permitted to delegate to the police chief the authority to appoint a physician pursuant to G. L. c. 41, § 111F.

3. Substantial evidence. The Superior Court judge correctly determined that there was substantial evidence to support the commission's decision. Dr. Leslie's report plainly states that Rossi "should be able to work full time with no physical restrictions" if his conflict with Lieutenant Banfill is addressed. Dr. Leslie suggested two alternative ways to do this: by having Rossi and Lieutenant Banfill attend joint counseling, or by minimizing the interaction between them.

The affidavit of Chief Deluca sets forth the steps he and the Duxbury police department took to adopt Dr. Leslie's recommendations. He elected to reassign Rossi to a new shift where he would be under the supervision of another individual and have extremely limited contact with Lieutenant Banfill. Chief Deluca did not attempt to implement Dr. Leslie's alternative recommendation, joint counseling, because Rossi previously had refused to participate in counseling that was offered to him under the department's employee assistance program. Nevertheless, despite the accommodations made to facilitate his return to work, Rossi refused to report for duty. The imposition of discipline was justified.

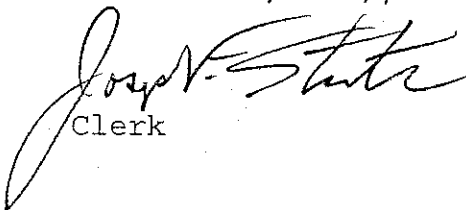
4. Conclusion. For the foregoing reasons, the judgment of the Superior Court denying Rossi's motion for judgment on the



pleadings and dismissing his complaint is affirmed.

So ordered.

By the Court (Lenk, Cypher &  
Cohen, JJ.),

  
Clerk

Entered: May 18, 2010.