COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. 09-5239-D

JOSEPH SCHIAVONE

vs.

CIVIL SERVICE COMMISSION & another[1]

Notice sent
10/12/2011
F. R. H.
H. H. K. & C.
R. L. Q.,JR.
M. E. R.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

(sc)

Introduction

The plaintiff, Joseph Schiavone ("Schiavone"), brings this action pursuant to G. L. c. 30A, § 14 to appeal a decision of the Civil Service Commission ("Commission"), upholding a one-year suspension imposed by the City of Medford ("City"). Schiavone claims error in the Commission's decision, issued after remand ordered by the Superior Court (Kenton-Walker, J.). After consideration of the parties' arguments and written submissions, the plaintiff's motion for judgment on the pleadings is **DENIED**.

BACKGROUND

All of the facts recited in the following background narrative are taken from the administrative record. Schiavone commenced employment with the City's Department of Public Works ("DPW") in 1994 as a motor equipment operator. Prior to the disciplinary action which prompted this appeal, the City disciplined Schiavone on two other occasions for behavioral misconduct. In 1995, the City suspended Schiavone for ninety days for threatening and/or harassing co-workers on five separate occasions. In 1997, the City disciplined Schiavone a second time after he engaged in a loud and profane argument with a co-worker within earshot of mourners in a funeral procession. When a private citizen who was part of the funeral procession

[1] The City of Medford

objected to his outburst, Schiavone yelled vulgarities at this person. The City imposed a one hundred and eighty-day suspension without pay and ordered Schiavone to participate in an anger management program.

In early 2005, Albert Gill ("Gill") complained to the City that on three separate occasions, Schiavone taunted him with homophobic slurs and threatened him with physical harm. The City launched an investigation and, after a hearing on March 31, 2005, determined that Schiavone's behavior toward Gill constituted "conduct unbecoming a municipal employee, a violation of the City's sexual harassment policy and a violation of the Massachusetts Civil Rights Act (MCRA), G. L. c. 12, § 11H and §11I." Following the hearing, the City on May 4, 2005, imposed on Schiavone a one-year suspension without pay. As a condition of Schiavone's continued employment after the suspension, the City again ordered him to participate in an anger management program and sexual harassment counseling.

Schiavone appealed the City's disciplinary action to the Commission. On October 4, 2007, a magistrate designated by the Division of Administrative Law Appeals conducted a hearing on the appeal. After a review of all of the testimony and evidence, the magistrate made following findings of fact pertinent to the issues raised in this appeal:

1. The Appellant, Joseph Schiavone, commenced employment as an MEO 2/Laborer with the City of Medford DPW in 1994 (stipulation of the parties).

2. His duties include driving heavy motor equipment as well as general maintenance and repair work for the city (testimony of the Petitioner).

3. On December 11, 1995, the Appellant was issued a ninety day suspension without pay for arguing with other city employees (Exhibit 6).

4. In 1997, the Appellant was given a one hundred eighty day suspension as a result of arguing with other city employees. He appealed this suspension to the Civil Service Commission and on May 29, 1999, the Commission upheld this suspension (Exhibit 17).

5 During the period of 1997 through 1998, the Appellant underwent a nine-session course of anger management training offered by Robert Montgomery, a licensed psychologist (stipulation of the parties).

6. From 1998 until the complaint issued by Mr. Gill in 2005, the Appellant has not been the subject of any anger-based warnings or allegations (stipulation of the parties).

7. On or about July 7, 2004, the Appellant received a copy of the City of Medford's Equal Employment Opportunity & Sexual Harassment Policy Statement ("Policy") dated July 7, 2004 (stipulation of the parties).

8. In addition, all city employees including the Appellant attended a mandatory training session with the Human Resource Division designed to explain the Sexual Harassment Policy (testimony of Brian Kerins).

9. During the early winter of 2005, the Appellant was assigned to work the 4:00 p.m. to midnight shift (testimony of the Appellant).

10. On a morning in January of 2005, Mr. Albert Gill, a manager at Office Depot, drove to the Dunkin' Donuts located at Mystic Avenue in Medford, approximately five hundred yards from his home (testimony of Albert Gill).

11. While standing in line awaiting his turn at the counter, Mr. Gill looked out through the glass window of the Dunkin' Donuts store to check on his dog, who he had left in his vehicle (testimony of Albert Gill).

12. Upon exiting Dunkin' Donuts, Mr. Gill entered his car and mumbled to his dog. At this juncture, the Appellant, who was off duty from the DPW and whom Mr. Gill had never previously met, approached the vehicle and said "do you want to go a couple of rounds around the corner, you fucking faggot?" (testimony of Albert Gill).

13. Mr. Gill replied "what are you talking about?" (Testimony of Albert Gil).

14. The Appellant then said "You like to stare. I will give you something to look at, let's go around the corner" (testimony of Albert Gill).

15. Mr. Gill proceeded to drive away from the scene. As he was driving home, Mr. Gill heard the Appellant shout "you fucking faggot" (testimony of Albert Gill).

16. Approximately one month later, Mr. Gill went to a different Dunkin' Donuts, also located in Medford, for his morning coffee. He had avoided the Dunkin' Donuts near his home for fear of encountering the Appellant (testimony of Albert Gill).

17. Upon entering the Dunkin' Donuts, Mr. Gill observed the Appellant sitting with other City of Medford DPW workers who were wearing DPW shirts. As Mr. Gill entered the establishment, he heard the Appellant mumbling "here's the faggot now. Here's the pussy" (testimony of Albert Gill).

18. Mr. Gill felt embarrassed, berated, and upset. He chose not to respond and immediately left the restaurant (testimony of Albert Gill).

19. On February 18, 2005, Mr. Gill went back to the first Dunkin' Donuts located on Mystic Avenue near his home. After positioning himself in the coffee line, Mr. Gill recognized the Appellant, who was ahead of him in line (testimony of Albert Gill).

20. The Appellant immediately motioned towards Mr. Gill and muttered to the other patrons, stating: "This guy is a pussy. He's a troublemaker. He's a faggot" (testimony of Albert Gill).

21. Mr. Gill was afraid that the Appellant would physically harm him (testimony of Albert Gill).

22. After Mr. Gill got his coffee, he left the restaurant. The Appellant also exited and said to Mr. Gill "let's go" (testimony of Albert Gill).

23. Mr. Gill did not respond but proceeded to his car to drive home. The Appellant then followed Mr. Gill in a city vehicle. Mr. Gill became very afraid and deliberately drove past his house as he did not want to exit his vehicle. The Appellant eventually took another route and ceased following Mr. Gill (testimony of Albert Gill).

24. The next day, Mr. Gill sent an email to the City of Medford indicating that he thought that the individual who had harassed him was a City DPW worker as he (the Appellant) was talking to City DPW workers and also drove a City vehicle (Exhibit 1).

25. After conducting an investigation relative to the complaint filed by Mr. Gill, the City of Medford, on March 24, 2005, sent the Appellant a notice of contemplated action and on March 31, 2005, a hearing was held pursuant to G. L. c. 31, § 41 (Exhibit 1).

26. On May 4, 2005, the Appointing Authority sent the Appellant written notice that he was suspended without pay for the period of one year from his position as an MEO 2/Laborer with the City of Medford Department of Public Works (Ex. 3).

27. On May 11, 2005, the Appellant filed a timely appeal of this decision with the Civil Service Commission (stipulation of the parties).

Based on these findings, the magistrate concluded that the City met its burden to demonstrate just cause to impose a one-year suspension without pay. According to the magistrate, just cause was established for two reasons: (1) Schiavone's targeting of an individual for repeated harassment because of that person's perceived sexual orientation was substantial misconduct which violated the City's sexual harassment policy and the MCRA; and (2) the particular discipline, a one year suspension, was warranted because of Schiavone's prior disciplinary history. In her analysis, the magistrate showed her awareness that under G. L. c. 31, §41, "just cause" is not simple, generic misconduct but only that misconduct which "adversely affects the public interest by impairing the efficiency of the public service." She reasoned that Schiavone's conduct met this test because it was prohibited by a specific written policy adopted by the City to set a standard of behavior for all its employees, whether on or off duty. In reaching this conclusion, she relied on the uncontested testimony of Brian Kerins, the City's Deputy DPW Commissioner. Kerins testified that the City intended a broad application of the sexual harassment policy in order to encourage all City employees to conduct themselves in an appropriate manner during their interactions with others whether on or off duty.

The magistrate rejected Schiavone's argument that under the rule articulated in Baldasaro v. Cambridge, 50 Mass. App. Ct. 1 (2000), the City failed to prove just cause. In Baldasaro, the court upheld the Commission's reversal of disciplinary action imposed by the city of Cambridge on an off-duty employee who screamed vulgar and abusive remarks at a city meter maid. The court held that the discipline was not supported by just cause because the city of Cambridge failed to cite either the violation of a work rule *or* conduct affecting the employee's fitness to perform his duties as a heavy equipment operator as the basis for the discipline. Id. at 4. Here, the magistrate concluded that Baldasaro is not controlling because the City established that

Schiavone violated a "work rule," the City's sexual harassment policy. Therefore, she recommended that the Commission affirm the City's disciplinary action against Schiavone.

On August 14, 2008, the Commission voted to adopt the magistrate's findings of fact and concurred with her conclusion that the City had just cause to impose the one-year suspension. The Commission, however, declined to base its decision on the magistrate's finding that Schiavone violated the MCRA.[2] The Commission affirmed the discipline "based on the fact that [Schiavone's] egregious conduct in this case, which occurred off-duty, was a continuation of the same egregious on duty conduct for which the Appointing Authority had already severely punished [Schiavone] and put him on notice that failure to control his anger would result in further discipline."

In September 2008, Schiavone filed a timely appeal of the Commission's decision to the Superior Court. On June 19, 2009, the Superior Court (Kenton-Walker, J.) vacated the suspension and remanded the matter to the Commission. The Court found that "even though the magistrate had specifically limited the use of the previous misconduct [to . . . ensure the punishment was proper after just cause was determined], the Commission used that previous misconduct substantively to establish just cause for the present incident . . . ."[3] Schiavone v.

---

[2] The Commission found G.L. c. 12, § 11H-I inapplicable because the Commission lacks the authority to enforce the statute which provides for "the protection of rights within the laws of the United States or Massachusetts . . . and specifies relief within the jurisdiction of the Superior Court, not the Commission." Schiavone v. City of Medford, Case No D-05-178 at 3 (CSC Decision Aug. 14, 2008).

[3] I respectfully disagree with the court's interpretation of the Commission's stated reasons for its decision. First, the Commission was explicit in rejecting *only* the violation of the MCRA as a basis for the discipline. Second, the Commission's reference to the prior discipline is more consistent with an intent to express its agreement with the duration of the suspension. Nonetheless, I consider the plaintiff's appeal on the grounds asserted in his motion for judgment on the pleadings.

Civil Service Comm'n, SUCV2008-4112-D, slip op. at 6 (Mass. Super. Ct. June 19, 2009) (Kenton-Walker, J.). Based on her conclusion that the Commission made improper use of the prior misconduct, the Court ruled that the decision was unsupported by substantial evidence and based upon an error of law which prejudiced Schiavone's substantial rights. The matter was remanded to the Commission, apparently to reconsider "just cause" without reference to the prior discipline.[4]

On remand, the Commission on November 9, 2009, affirmed its prior decision. In addition, the Commission also made explicit rulings on the correlation or nexus between Schiavone's off-duty conduct and his employment. Specifically, the Commission noted that Gill identified Schiavone as a DPW employee and that on one occasion, Schiavone "was in the presence of uniformed, on-duty DPW workers when he taunted Gill, and he encouraged them to join in the harassment." Further the Commission found that, "[o]n all the reported occasions of harassment, [Schiavone] was in a place where his actions were observable by the public. Thus, his comments and actions could have been construed as representative of DPW's culture and more. There is no way to gauge how many people witnessed [Schiavone's] conduct (and realized he was a DPW employee), and further how many of those same witnesses relayed a report of that conduct, while identifying [Schiavone] as a DPW employee, to others." As a result, the Commission found that "[Schiavone's] conduct could only cause a diminishment of

---

[4] The post-remand proceedings focused, unnecessarily in my view, on the nexus between the alleged wrongful conduct and Schiavone's fitness to perform his job duties. This misdirected focus was caused, it appears by the court's statement that the Commission had rejected both the violation of the sexual harassment policy and the violation of the MCRA as a basis for the discipline. As I read the Commission's decision, this statement is incorrect. As stated above, the Commission did not reject the magistrate's conclusion that Schiavone violated the City's sexual harassment policy. In addition, I understand the Commission's reference to the past misconduct as support for the duration of the suspension imposed on Schiavone.

respect, confidence, and trust for the DPW and City employees in general." Additionally, the Commission concurred with the magistrate that the one-year suspension without pay was justified based on Schiavone's pattern of misconduct.

In December 2009, Schiavone filed a timely appeal in this court of the Commission's decision after remand. The matter is now before this court on Schiavone's motion for judgment on the pleadings.

DISCUSSION

A. Standard of Review

As the party challenging the administrative decision, Schiavone bears the burden of establishing the decision's invalidity. Fisch v. Bd. of Registration in Med., 437 Mass. 128, 131 (2002); Coggins v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 587 (1997). On appeal, the judge is required to give "due weight to the experience, technical competence and specialized knowledge of the agency, as well as to the discretionary authority conferred on it." G. L. c. 30A. See Cobble v. Comm'r of Dep't of Soc. Servs., 430 Mass. 385, 390 (1999). The judge's role is not to "make a de novo determination of the facts or draw different inferences from the agency" or to substitute her judgment for that of the agency. Vaspourakan, Ltd. v. Alcoholic Beverages Control Comm'n, 401 Mass. 347, 351 (1987). An administrative agency's decision may be set aside only on the grounds set forth in G. L. c. 30A, § 14(7). Howard Johnson Co. v. Alcoholic Beverages Control Comm'n, 24 Mass. App. Ct. 487, 490 (1987). These grounds include such reasons as the agency's decision is in excess of the statutory authority or jurisdiction of the agency, is based upon an error of law, is not supported by substantial evidence, is arbitrary and capricious, or is otherwise not in accordance with law. G. L. c. 30A, §§ 14 (7)(b), 9©), (e), (g). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support

a conclusion." G. L. c. 30A, § 1(6). See Arnone v. Comm'r of Dep't of Soc. Servs., 43 Mass. App. Ct. 33, 34 (1997). The court should affirm the agency's decision if it is based on substantial evidence. G. L. c. 30A, § 14(1). See Doe No. 10216 v. SORB, 447 Mass. 779, 787 (2006). The determination of whether any agency decision is supported by substantial evidence must be based on the entire administrative record taking into account whatever in the record fairly detracts from the weight of the evidence. Edward E. v. Dep't of Soc. Servs., 42 Mass. App. Ct. 478, 481 (1997).

The Commission's authority in the review of a disciplinary action is derived from G. L. c. 31, §§ 41, 43 which require that the discipline be supported by "just cause." See School Comm. of Brockton v. Civil Serv. Comm'n, 43 Mass. App. Ct. 486, 488 (1997). "Just cause" is defined as "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 411 (2000) (internal quotations omitted), quoting Murray v. Second Dist. Ct. of E. Middlesex, 389 Mass. 508, 514 (1983). If, however, an employee establishes that the appointing authority's action is based "upon an error of law, harmful error in the application of the appointing authority's procedure or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained . . . ." G. L. c. 31, § 43. Baldasaro, 50 Mass. App. Ct. at 4 (2000) (where there was no evidence or finding . . . that the city worker's off-duty "inappropriate conduct affected his continuing fitness to perform his job . . . the commission was justified in setting aside the . . . suspension").

The issue for the Commission on an appeal by an employee is "not whether it would have acted as the appointing authority has acted, but whether, on the facts . . . there was reasonable justification for the action taken by the appointing authority in the circumstances found . . . to

have existed when the appointing authority made its decision." Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 800 (2004) (citing Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983)). The court "must accept the findings of the commission's hearing officer as adopted by the commission, if supported by substantial evidence." Arria, 16 Mass. App. Ct. at 334, 335 (noting that the court must look at the record to determine if the Commission acted properly. **B. Analysis of the Commission's Post-Remand Decision**

The argument at the heart of Schiavone's appeal is that the Commission's finding of a nexus between his off-duty conduct and his fitness for the job cannot be sustained because the magistrate made no findings on this issue and the record is devoid of evidence from which such a finding could possibly be made. Without such a connection between his off-duty conduct and his employment with the City, Schiavone argues that the City lacks just cause for the one-year suspension and the Commission's decision is based on an error of law.

This argument, which is based on a misinterpretation of Baldasaro, lacks merit. While the Commission went to great lengths to establish a nexus between Schiavone's misconduct and fitness for his job duties, it was not necessary to do so. Schiavone is correct that the cases interpreting G. L. c. 31, § 41 require a nexus analysis. See e.g., Police Commr. of Boston v. Civil Serv. Commn., 39 Mass. App. Ct. 594, 601-612 (1996). However, the required nexus is present if, as here, the discipline is based on the violation of a specific work rule or policy. See McIsaac v. Civil Serv. Commn., 38 Mass. App. at 474-475 (nexus established where police officer charged with violation of a "regulation"); School Comm. of Brockton, 43 Mass. App. Ct. at 492 ("relevant regulation or **explicit job standard**." sufficient to establish nexus.)(emphasis supplied). The violation of a particular rule, regulation or standard is presumptively connected to the employee's fitness to perform his job duties. Only in the absence of such a rule regulation

or policy, is the appointing authority obligated to justify its action by establishing a nexus between the misconduct and the employee's fitness for his/her job

The Commission's decision adopts the magistrate's finding that Schiavone violated the City's sexual harassment policy and the record contains substantial evidence to support that decision. First, all of the acts committed by Schiavone clearly were proscribed by the City's sexual harassment policy. Schiavone does not argue otherwise. Rather, he maintains that the policy was not intended to apply to off-duty conduct toward non-city employees. In rejecting this contention, the magistrate could and did credit the uncontested testimony of DPW Deputy Commissioner Brian Kerins that the City intended a broad application of the policy to avoid conduct likely to bring the City into disrepute. The Commission properly deferred to the City's right to promulgate a code of conduct for its employees, whether on or off duty. Our courts have recognized the right of appointing authorities in similar situations to regulate off-duty employee conduct, as the City sought to do in this case. See Pereira v. Commr. of Social Services, 432 Mass. 251 (2000)(affirming the termination of an employee who told a racist joke while off-duty at a public event). The City could lawfully apply its policy where employee conduct was found to reflect poorly on the City's reputation for fairness to and tolerance of its diverse population. Second, the conduct at issue here was not so private as to preclude any association between Schiavone and the City. Though Schiavone was off-duty, he engaged in such conduct in the presence of uniformed on-duty DPW workers, and in doing so made Gill, the victim, aware of his affiliation with the City.

ORDER

It is therefore **ORDERED** that the Plaintiff's Motion for Judgment on the Pleadings **DENIED** and a judgment shall enter affirming the Commission's decision that the City had just cause to impose a one-year suspension on Joseph Schiavone.

10/9/11
DATE

Geraldine S. Hines
Justice of the Superior Court