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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

JOSEPH **SCHIAVONE** *vs.* **CIVIL SERVICE COMMISSION** & another. [FN1]

12-P-502

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Joseph Schiavone, appeals from a judgment ordered by a judge of the Superior Court that dismissed his complaint for judicial review, brought under the provisions of G. L. c. 30A, § 14, and G. L. c. 31, § 44. [FN2] He claims as error the judge's affirmance of the decision of the Civil Service Commission (commission) after remand, [FN3] which upheld the discipline imposed by the appointing authority, on the grounds that the commission's decision lacks substantial support and is based upon an error of law; specifically, he contends that the city's sexual harassment policy did not apply in the circumstances of this case and, even if it did, an insufficient nexus was shown to exist between his job duties and his off-duty conduct. We affirm. The plaintiff's appeal from the adverse decision of the appointing authority (appointing authority or city), to the commission is governed by G. L. c. 31, § 43, as amended by St. 1981, c. 767, § 20, which states in relevant part that: 'If the commission by a preponderance of the evidence determines that there was just cause for an action taken against [the employee] it shall affirm the action of the appointing authority, otherwise it shall reverse such action . . . .' Just cause for discipline has been defined as whether 'the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.' *School Comm. of Brockton v. Civil Serv. Commn.,* 43 Mass. App. Ct. 486, 488 (1997) (citations omitted).

We, in turn, need only inquire whether the commission's decision was 'legally tenable,' accepting the commission's factual determinations unless they are unsupported by substantial evidence on the record as a whole. *Commissioner of Health and Hosps. of Boston v. Civil Serv. Commn.,* 23 Mass. App. Ct. 410, 410- 411 (1987). See *Andrews v. Civil Serv. Commn.,* 446 Mass. 611, 615-616 (2006). As explained in *Brackett v. Civil Serv. Commn.,* 'a 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 upon it.' ' This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom." 447 Mass. 233, 241-242 (2006) (citations omitted). In *Falmouth v. Civil Serv. Commn.,* the court noted that 'the commission does not act without regard to the previous decision of the town, but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." 447 Mass. 814, 824 (2006), quoting from *Watertown v. Arria,* 16 Mass. App. Ct. 331, 334 (1983).

Indeed, '[t]he commission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.' *Falmouth v. Civil Serv. Commn., supra.* See *Police Commr. of Boston v. Civil Serv. Commn.,* 39 Mass. App. Ct. 594, 600 (1996). 'However, in promoting these principles, the commission cannot detach itself from the underlying purpose of the civil service system -- 'to guard against political considerations, favoritism, and bias in governmental employment decisions.' 61 Mass. App. Ct. 796, 800 (2004), quoting from *Cambridge v. Civil Serv. Commn.,* 43 Mass. App. Ct. 300, 304 (1997).' *Falmouth v. Civil Serv. Commn.,* 447 Mass. at 824. In other words, '[u]nless the commission's findings of fact differ significantly from those reported by the town or interpret the relevant law in a substantially different way, the absence of political considerations, favoritism, or bias would warrant essentially the same penalty.' *Falmouth v. Civil Serv. Commn., supra* at 824.

This case involves complaints from a citizen that Schiavone committed acts of misconduct towards him; after the city investigated, it decided to suspend Schiavone for one year without pay, citing Schiavone for conduct unbecoming a city employee and violations of the city's sexual harassment policy [FN4] and the State civil rights act. [FN5]

Schiavone timely challenged the decision and the matter went for a hearing before a magistrate from the division of administrative law appeals. The magistrate generally concluded that the city had 'just cause' to discipline Schiavone, and that a suspension for a period of one year was fully warranted by the facts and circumstances of this case. She concluded:

'By verbally harassing and acting in an assaulting manner

towards [the victim], the Appellant violated the City of Medford's Sexual Harassment Policy. The fact that the Appellant's misconduct occurred while he was off duty did not preclude the Appointing Authority from imposing disciplinary action as he had violated an established policy of his employer. . . . In conclusion, the Appointing Authority has demonstrated by a preponderance of the evidence that the Appellant, by verbally assaulting and acting in a harassing manner towards [the victim], engaged in conduct in violation of the rules and regulations of the City of Medford.' [FN6]

On remand, the Commission again affirmed the magistrate's recommended decision:

'The Appellant's appalling conduct, as described by the

Magistrate, qualifies as substantial misconduct. The nature of his behavior, the harassment, sexual comments, and derogatory and homophobic remarks only served to diminish the reputation of the DPW and the City in general. His behavior harmed the good name of the City, and his actions belied the City's reputation as a progressive employer of a civilized, nondiscriminatory work force. [FN7] Appellant's public behavior adversely affected the public interest in that it is unlikely that the residents of Medford would choose to have their tax dollars spent to pay the salary of someone who acts like an uncouth bigot. The Appellant's behavior failed to meet the standard of acceptable, as opposed to criminal, behavior in today's society; behavior that comports with the City's norms of conducting business or, more broadly, any standard of decency.'

Here, given the similarity of fact-finding of the magistrate and the appointing authority, the case of *Falmouth v. Civil Serv. Commn.,* 447 Mass. at 824, is significant in the resolution of this case. As in *Falmouth, supra,* here 'there was no finding by the commission that the penalty was rooted in any consideration other than [the employee's] behavior on [the date in question], in concert with his prior record of misconduct.'

Schiavone argues, nonetheless, that the city lacks just cause for the one-year suspension and the commission's decision is based on an error of law. Specifically, the plaintiff contends that the

commission's conclusion of a sufficient 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. However, in affirming the commission's decision, the judge noted that the magistrate had specifically found that the city could reasonably have concluded that Schiavone violated a written work rule, the city's sexual harassment policy, 'an established policy of his employer,' unlike the facts in *Baldasaro v. Cambridge,* 50 Mass. App. Ct. 1 (2000), upon which the plaintiff relies. There was substantial evidence to support the conclusion of the magistrate that the sexual harassment policy applied to off-duty conduct based upon the policy together with the broad interpretation intended by the city as communicated to the plaintiff through the mayor's cover letter and the training as described by Brian Kerins, Medford's DPW deputy commissioner. Moreover, there was substantial evidence to support the conclusion that violation of the policy constituted 'just cause' for the discipline imposed. [FN8]

From this the judge properly concluded that Schiavone's argument lacks merit, reasoning that 'the required nexus is present if, as here, the discipline is based on the violation of a specific work rule or policy. . . . 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.' Thus, as the decision of the commission is 'legally tenable,' there was no error in its affirmance.

Judgment affirmed.

By the Court (Fecteau, Hanlon & Sullivan, JJ.),

Entered: March 12, 2013.

FN1. City of Medford.

FN2. Procedurally, his motion for judgment on the pleadings was denied and judgment entered affirming the Civil Service Commission's decision.

FN3. Another Superior Court judge had earlier vacated the commission's decision and remanded for further consideration, based upon the apparent concern that the commission's decision was infirm because of reliance upon Schiavone's prior disciplinary history on the issue of 'just cause' for the suspension, while the magistrate appears to have relied on that history only insofar as the proposed penalty was 'appropriate.' While we need not address that ruling, its absence from our discussion implies neither agreement nor disagreement.

FN4. In 2004, the city distributed to all employees, including Schiavone, its formal sexual harassment policy, in writing, along with a cover letter from the mayor, both of which were later entered as exhibits during the hearing before the administrative magistrate. The city also required Schiavone to attend a mandatory workshop explaining the city's sexual harassment policy.

FN5. The city's case concerns three incidents involving the plaintiff's interaction with the same citizen on three different dates, all of which occurred during early winter, 2005, and all while Schiavone was 'off duty.' Since Schiavone does not contest the facts as found by the magistrate, there is no need to rehearse them in detail. From those findings, the commission concluded that Schiavone engaged in 'harassment, sexual comments, and derogatory and homophobic remarks' directed towards a citizen within and outside two different Dunkin' Donuts stores in Medford -- once in the company of other city employees who, the commission found, implicitly from the credible testimony, had been encouraged by Schiavone to join in the harassing conduct.

FN6. As found by the magistrate in findings adopted by the commission, Schiavone, an employee of the city since about 1994, had twice been disciplined, in 1995 and 1997, by Medford for inappropriate behavior prior to the incidents at issue here. Between the 1997 incident and 2005, Schiavone was not subject to any discipline.

FN7. Schiavone takes issue with certain of the commission's findings, contending that they do not appear in the magistrate's record and thus, are arbitrary and capricious. After review, we conclude that the commission did not make new findings, but merely drew permissible conclusions based on the record below.

FN8. As the judge stated: 'In rejecting [Schiavone's contention that the city's sexual harassment policy was not intended to apply to off-duty conduct], 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 . . . . 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 . . . the victim aware of his affiliation with the City.'

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