

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 08-4112-D

RECEIVED
2009 JUN 29 A 9 48
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

JOSEPH SCHIAVONE

v.

CIVIL SERVICE COMMISSION AND
CITY OF MEDFORD

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

This is an appeal, pursuant to G.L. c. 30A §14, by the plaintiff Joseph Schiavone ("Schiavone"), seeking review of a decision by the defendant, Civil Service Commission (the "Commission"), upholding Schiavone's one year suspension without pay from his position as a Motor Equipment Operator 2 Laborer with the defendant City of Medford's (the "City"). Schiavone contends that the decision was based on an error of law and unsupported by substantial evidence. The case is now before the Court on Schiavone's motion for judgment on the pleadings. For the reasons set forth below, I conclude that the motion must be ALLOWED, the Commission's decision upholding the City's suspension of Schiavone must be VACATED, and the matter REMANDED to the Commission for further proceedings consistent with this decision.

BACKGROUND

The Administrative Record before the Court reveals that Schiavone commenced

employment with the City's Department of Public Works (the "DPW") in 1994 as a motor equipment operator. Schiavone was previously disciplined in 1995 and 1997 for arguing with other city employees. He received a ninety day suspension without pay in 1995 and a one hundred eighty day suspension without pay in 1997, along with anger management treatment and training. Schiavone had no subsequent anger based warnings or discipline until 2005.

On various dates between January and February of 2005, Schiavone, while off duty, verbally harassed and acted in an assaulting manner towards a private citizen. Following that citizen's complaint, the City conducted an investigation, a full hearing was held, and a decision reached that Schiavone's actions "constitute[d] conduct unbecoming a municipal employee, a violation of the sexual harassment policy of the City and a violation of G.L. c. 12 § 11H-I." On May 4, 2005, the City suspended Schiavone without pay for one year and ordered him to participate in anger management and sexual harassment counseling as a condition of continued employment. Schiavone appealed to the Commission.

On October 4, 2007, an administrative magistrate from the Division of Administrative Law Appeals (the "DALA magistrate") conducted a full hearing. After review of all the testimony and evidence, she made specific findings of facts and concluded that the City had demonstrated by a preponderance of the evidence that just cause had existed to suspend Schiavone. She found that by verbally harassing and acting in an assaulting manner towards the private citizen, Schiavone had engaged in conduct in violation of the rules and regulations of the City, namely the City's sexual harassment policy and the provisions of G.L. c.12 §11H. Based on Schiavone's prior disciplinary record and his actions in this matter, the DALA magistrate concluded that the City's imposed discipline was warranted and recommended that the

Commission affirm the action of the City.

In August 2008, the Commission voted to adopt the findings of fact found by the DALA magistrate and concurred with the magistrate's conclusion that the City had reasonable justification for imposing a one-year suspension against Schiavone. The Commission did not base its decision on a finding that Schiavone had violated the City's sexual harassment policy or that he had violated G.L. c. 12 § 11H-I. Rather, the Commission reached its conclusion "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 [City] had already severely punished [Schiavone] and put him on notice that failure to control his anger would result in further discipline." The Commission specifically relied upon the two prior disciplinary matters from 1995 and 1997 and the 2005 events as the basis for finding that the City had acted appropriately. The Commission specifically found that G.L. c. 12 §11H - I was inapplicable in that the Commission did not have jurisdiction.

In September 2008, Shiavone filed a timely appeal of the Commission's decision to this Court.

DISCUSSION

The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Coggins v. Massachusetts Parole Bd.*, 42 Mass. App. Ct. 584, 587 (1997); *Boston v. Outdoor Advertising Bd.*, 41 Mass. App. Ct. 775, 782 (1996) *citing Merisme v. Bd. Of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). In reviewing the agency decision the court is required to give due weight to the agency's experience, technical competence, specialized knowledge, and the discretionary authority

conferred upon it by statute. *Iodice v. Architectural Access Bd.*, 424 Mass. 370, 375-376 (1997) citing G.L. c. 30A sec. 14(7). The court should affirm the agency's decision if it is based on substantial evidence. G.L. c. 30A, sec. 14(1); see *Edward E. v. Department of Social Services*, 42 Mass. App. Ct. 478, 479 (1997). Substantial evidence, "as a matter of statutory definition, 'is such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Arnone v. Commissioner of Dept. of Social Services*, 43 Mass. App. Ct. 33, 34 (1997) citing G.L. c. 30A, sec. 1(6). 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 evidence. See *id.*

Pursuant to G.L. c. 30A, § 14(7), this Court may reverse, remand, or modify an agency decision if that decision is based on an error of law or on unlawful procedure, is arbitrary and capricious, or if there is a lack of substantial evidence to support the decision. The reviewing court may not substitute its judgment for that of the agency. *Southern Worcester Regional Vocational Sch. Dist. v. Labor Relations Comm'n*, 386 Mass. 414, 420-421 (1982), citing *Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n*, 372 Mass. 152, 154 (1977). Further, a court may not dispute an administrative agency's choice between two conflicting views, even though the court would justifiably have made a different choice had the matter come before it de novo. *Seagram Distillers Co. v. Alcoholic Beverage Control Comm'n*, 401 Mass. 713, 721 (1988), *Zoning Bd. Of Appeals of Wellesley v. Housing Appeals Comm'n*, 385 Mass. 651, 657 (1982). When reviewing a decision under G.L. c. 30A, § 14, the Court must examine the cumulative weight of the evidence and its inquiry does not end simply because "a rational mind may draw an inference in support of the agency's decision." *Cobble v. Comm'r of Dep'. of*

Soc. Servs., 430 Mass. 385, 390 (1999).

The Commission's authority is based on G.L. c. 31, §§ 41, 43. The suspension of Schiavone must be supported by "just cause." G.L. c. 31, §§ 41, 43. "Just cause" is defined as "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." *Boston Police Department v. Collins*, 48 Mass.App.Ct. 408, 411 (2000), quoting *Murray v. Second District Court of East Middlesex*, 389 Mass. 508, 514 (1983). The role of the Commission "was to determine whether the department proved, by a preponderance of the evidence, just cause for the action taken." *Id.*; *School Commissioner of Brockton v. Civil Service Commission*, 43 Mass.App.Ct. 486, 488 (1997).

The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts as found by the commission, 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." *Falmouth v. Civil Service Commission*, 61 Mass.App.Ct. 796, 800 (2004); *Watertown v. Arria*, 16 Mass.App.Ct. 331, 334 (1983). If the Commission has not substituted its judgment for that of the appointing authority, the Commission decision must be affirmed unless it was arbitrary, unsupported by substantial evidence or based upon an error of law or unlawful procedure that prejudiced the substantial rights of a party. *Boston Police Department v. Collins*, *supra* at 412; *Police Commissioner of Boston v. Civil Service Commission*, 22 Mass.App.Ct. 364, 369 (1986).

In the present case, the City found that Schiavone's actions constituted conduct unbecoming a municipal employee, a violation of the City's sexual harassment policy and a violation of G.L. c. 12 §11H-I. The City further found that Schiavone's conduct was the "latest

in a series of episodes in which he displayed poor judgment and unmanaged anger in his interactions with either fellow employees or members of the public,” which had resulted in two previous suspensions. The Commission needed to determine whether that represented “just cause” for the City’s decision to suspend Schiavone.

The DALA magistrate found that the City had demonstrated by a preponderance of the evidence that just cause existed to suspend Schiavone based on her finding that Schiavone had violated the City’s sexual harassment policy and G.L. c. 12 §11H-I. The magistrate specifically did not consider Schiavone’s past conduct as a basis for “just cause.” In fact, she specifically stated at the hearing that “the prior discipline goes in terms of if the magistrate, if I were to determine that there was just cause to discipline Mr. Schiavone, then I would look at the prior discipline to determine the appropriateness of the discipline. But that’s when it comes in to play, not to establish the truth of the matter asserted with respect to the incident that is before me at this time concerning the one-year suspension.” Transcript of DALA Hearing, October 4, 2007, Page 8-9.

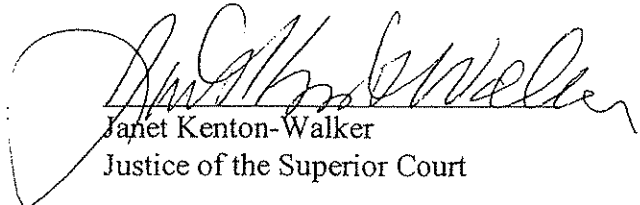
In its decision, the Commission adopted the findings of the DALA magistrate and concurred that the City had reasonable justification for imposing the one-year suspension against Schiavone. Even though the Commission adopted the magistrate’s findings, it found just cause based only on Schiavone’s previous misconduct and not on a finding that Schiavone violated the City’s sexual harassment policy or a violation of G.L. c. 12 §11H-I. In essence, even though the magistrate had specifically limited the use of the previous misconduct, the Commission used that previous misconduct substantively to establish just cause for the present incident, but made no finding that the City had based its decision on that prior misconduct.

Since the Commission adopted the DALA magistrate's findings, which specifically excluded the previous incidents of misconduct as a basis for finding just cause, but then rejected both the City's and the magistrate's determination that Schiavone had violated the City's sexual harassment policy and G.L. c. 12 §11H-I, it is unclear from this record what evidence the Commission based its decision on. It appears as if the Commission has substituted its judgment for that of the City in this matter, while at the same time rejecting the City's basis for finding just cause.

As a result, the Commission's decision is unsupported by substantial evidence and based upon an error of law, which has prejudiced the substantial rights of Schiavone.

ORDER

For the forgoing reasons, Schiavone's motion for judgment on the pleadings is ALLOWED, the Commission's decision upholding the City's suspension of Schiavone is VACATED, and the matter REMANDED to the Commission for further proceedings consistent with this decision.


Janet Kenton-Walker
Justice of the Superior Court

Dated: June 19, 2009

notice sent
to all parties
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