

(08757)

SUPERIOR COURT
SUCV-11-04981

4391

vs.

**MEMORANDUM OF DECISION AND ORDER ON THE PARTIES' CROSS-MOTIONS
FOR JUDGMENT ON THE PLEADINGS**

Dararith Ung brings this action pursuant to G. L. c. 30A, § 14 and G. L. c. 31, § 44, seeking review of the Massachusetts Civil Service Commission's decision to uphold the City of Lowell's decision to terminate his employment as a police officer. Ung moves for judgment on the pleadings, arguing that the Commission's decision was in excess of its statutory authority, unsupported by substantial evidence, erroneous as a matter of law, arbitrary and capricious, and an abuse of discretion. Ung also moves to dismiss Lowell's counterclaim, which alleges that the Commission lacked jurisdiction to reopen Ung's appeal in 2009.⁵ Lowell opposes Ung's motion and has cross-moved for judgment on the pleadings. For the reasons that follow, Ung's motions are **DENIED**, and Lowell's motion is **ALLOWED**.

Active
SEH
C7H5
CO
LO

HPS
C6H5

RLQ
Ate

(mid)

² City of Lowell, Plaintiff in Cross-Claim

² Ung seeks to dismiss Lowell's counterclaim arguing that it is not dire. Lowell correctly points out, however, that Ung is a necessary party to affect Ung's right to appeal his dismissal. See Mass. R. Civ. P. 19(a) ("action if (1) in his absence complete relief cannot be accorded among the parties; or (2) there is some other compelling reason for joinder of the party") and interest relating to the subject of the action. . . .")

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BACKGROUND

The following is a summary of facts taken from the administrative record. Ung is a former Lowell Police Officer. Lowell terminated Ung from his position by letter dated June 12, 2008, citing three reasons for his dismissal: (1) making false statements to a superior officer; (2) malfeasance of duty; and (3) neglect of duty, failure to discover, report or take appropriate action on a detectable crime in an area of responsibility. Lowell decided that just cause existed to terminate Ung based on two false reports related to stolen or unauthorized use of a motor vehicle jointly owned by Rath Sar and Mom Chan and on a failure to take appropriate action regarding a dispute involving racial slurs directed at a Market Basket customer.

I. Procedural History

On June 18, 2008, Ung filed an appeal of Lowell's decision with the Commission pursuant to G. L. c. 31, § 43. On July 9, 2008, Ung voluntarily moved to dismiss his appeal, because he believed that his collective bargaining agreement required him to arbitrate his termination. On the same date, the Lowell Police Association (the "Union") filed an action with the American Arbitration Association on behalf of Ung. The Commission allowed Ung's motion to voluntarily dismiss his appeal on July 17, 2008.

On October 30, 2008, Lowell filed an action in Middlesex Superior Court seeking a declaratory judgment that Ung's collective bargaining agreement did not permit him to arbitrate his termination. Lowell also filed a motion to stay the pending arbitration on the same date, which the court subsequently allowed. After a hearing on the parties' cross-motions for summary judgment, the court issued a declaratory judgment on March 18, 2009, stating that "... the matter of a police officer's termination is subject to the jurisdiction (albeit not exclusive) of the

Civil Service Commission by virtue of G. L. c. 31, 41-42" and entered judgment for Lowell.

On March 26, 2009, Ung moved to reopen his appeal with the Commission. Lowell opposed this motion on April 1, 2009. On April 7, 2009, the Union appealed the court's March 18, 2009 declaratory judgment. The Commission held a hearing on the matter on May 4, 2009, and issued its decision denying without prejudice, subject to certain conditions, Ung's motion to reopen his appeal on August 21, 2009.⁴

Ung moved to reopen his appeal on February 17, 2010. Lowell opposed this motion on February 19, 2010. The Appeals Court subsequently upheld the Superior Court's March 18, 2009 declaratory judgment in favor of Lowell. On September 24, 2010, the Commission allowed Ung's motion to reopen his appeal. Lowell then sought unsuccessfully to dismiss Ung's appeal based on lack of jurisdiction. The Commission held hearings on Ung's termination on November 3 and 19, 2010 and December 7, 2010, and upheld Lowell's termination of Ung for just cause on November 3, 2011.

II. The Commission's Decision

The Commission made the following findings of fact and conclusions of law. Ung was a full-time Lowell police officer from 1992 until his termination in 2008. Ung served as a Khmer interpreter in the course of one homicide and many other investigations conducted in partnership with the DEA, FBI, and Secret Service.

Ung had a record of prior disciplinary action. On November 21, 1993, he received a written order not to carry his service weapon off duty and an official reprimand for two instances

⁴ The Commission provided Ung six months within which to: (1) file certified copies of the Superior Court decision and an appellate rescript affirming that decision; and (2) represent in writing that he knowingly and voluntarily waived any benefits to be restored between July 24, 2008 and March 26, 2009.

of brandishing his weapon in public that occurred on September 21, 1993 and October 29, 1993. Also, on June 11, 1996, Ung was placed on a 172 day suspension for failing to obey the written order not to carry his service weapon while off-duty. Lowell Police Department's Professional Standards Unit subsequently investigated Ung concerning two citizen complaints that became the grounds for his termination: (1) the Rath Sar investigation in 2004; and the (2) Market Basket investigation in 2005.

A. Rath Sar Investigation

Prior to 2004, Ung was personally acquainted with Rath Sar and another woman named Mom Chan. Both women frequented Ung's family-owned convenience store. Chan owned rental units in Lowell and rented one to Sar. In 2003, Sar sought to purchase a vehicle, but lacked the necessary credit. Chan agreed to co-sign on Sar's auto loan so that she could purchase a new, white Lexus vehicle. The Lexus was registered with the Massachusetts Department of Motor Vehicles in both Sar's and Chan's names.

On September 2, 2004, Ung filed a report of unauthorized use of a motor vehicle and/or stolen motor vehicle with respect to a 2003 Lexus on Chan's behalf. The report indicated that Chan had left the Lexus in her driveway during a trip to Cambodia and had returned to discover that Sar had taken it without authorization and refused to return it. Lowell police acting on the report arrived at Sar's apartment to recover the Lexus. At some point, Ung also arrived at the scene and told Sar to drive the car to Chan. After running a Criminal Justice Information System ("CJIS") inquiry, the police realized that both Chan's and Sar's names were listed as owners and consequently did not tow the Lexus.

After September 2004, Sar obtained individual financing for the Lexus and had Chan sign

documents transferring the title into Sar's name. Subsequently, on June 14, 2005, Ung filed a second report of a stolen vehicle concerning Sar's Lexus.⁵ In the report, Chan claimed that Sar was using her vehicle without authority and that Chan wanted her license plate back and her name off the title. Two Lowell police officers responded to the call about the stolen vehicle. Ung subsequently arrived on the scene. Sar requested that Ung look on his computer to see that the Lexus was registered in her name, but he refused. Ung then instructed the tow truck driver to seize Sar's vehicle.

On June 30, 2005, Sar and her attorney filed a complaint against Ung regarding the June 14, 2005 seizure of her automobile. As a result, the Lowell Police Department investigated Ung's September 2, 2004 and the June 14, 2005 unauthorized use or stolen vehicle reports concerning Sar's Lexus. The Lowell's investigators concluded that Ung had falsified the reports.⁶

B. The Market Basket Investigation

On September 24, 2005, Ung was dispatched to an incident at Market Basket involving allegations that two customers had made racial slurs to another customer of Pakistani descent. Ung was familiar with one of the customers accused of taunting the Pakistani customer. The second police officer who responded to the scene was familiar with the other customer allegedly engaged in the taunting. The private citizen who reported the incident stated that Ung told the

⁵ Sar had not yet received the title to the vehicle on June 14, 2005. When she called the bank on the same date, it informed her that the title had been sent to her old address, the apartment owned by Chan.

⁶ Ung subsequently filed an unrelated civil action against Sar, which concerns \$1000 that Ung gave Sar after her husband passed away in 2004. Sar considered it a gift, but Ung characterized the money as a loan. After receiving the \$1000, Sar declined Ung's requests to go out on a few dates. According to her, Ung requested the money back and threatened to report her to immigration officials. On February 9, 2005, Ung filed a civil action against Sar in the Lowell District Court small claims session regarding the \$1000, which is still pending.

Pakistani customer that if she did not leave the store, she would be arrested. The Lowell Police Department investigated this incident and concluded that Ung had wilfully neglected his duties and failed to take appropriate action.

The Commission determined that on two occasions, Ung had filed a false report of unauthorized use and/or stolen motor vehicle when he knew that the vehicle in question was jointly owned by Sar and Chan. On both occasions, Ung knew that the information was false. The Commission recognized that Ung made no attempt to confirm the ownership of the vehicle on the CJIS system and was well-aware of a personal dispute between Sar and Chan as to the first report made on September 2, 2004. On June 14, 2005, the Commission concluded that Ung performed no computer query about the ownership of the vehicle, and had he done so, he would have discovered that it was jointly owned by Sar and Chan and that a financial dispute existed between these two individuals. Ung effected an unlawful seizure of Sar's vehicle on that date. The Commission determined that Ung made false statements to Lowell investigators about his attempts to query information about the Lexus that was the subject of his stolen vehicle reports. Ung also failed to disclose during Lowell's investigation, which involved only the June 14, 2005 incident, that he had filed an initial stolen vehicle report on September 2, 2004.

As to the Market Basket incident, the Commission determined that Lowell had not satisfied its burden of showing by a preponderance of the evidence that Ung's investigation of the dispute between Market Basket customers was insufficient. Notably, Lowell failed to interview the individuals accused of making racial slurs and an employee who observed the incident. Further, the Commission was troubled by Lowell's decision to discipline only Ung and its failure to file a report that could support criminal charges against the individuals accused of

making racial slurs. As such, the Commission determined that it was inappropriate for Lowell to discipline Ung based on the Market Basket incident.

The Commission then analyzed whether termination was an appropriate level of discipline for Ung's filing of two false reports related to use of the 2003 Lexus and his making false statements during the subsequent internal investigation of these incidents. It determined that Ung's misconduct and untruthfulness related to the Rath Sar investigation justified his termination for cause.

DISCUSSION

General Laws c. 31, § 44 authorizes this court to review the Commission's decisions. When reviewing an agency decision, the court 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." G. L. c. 30A, § 14(7). The court may reverse or modify an agency's decision "if it determines that the substantial rights of any party may have been prejudiced because the agency decision is unsupported by substantial evidence; or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* "The open question on judicial review is whether, taking the facts as found, the action of the commission was legally tenable." *Leominster v. Stratton*, 58 Mass. App. Ct. 726, 728 (2003) (discussing discharge of police officer) (citations omitted).

At the outset, Lowell argues that the Commission lacked jurisdiction to reopen Ung's appeal because he waived his right to review by voluntarily dismissing the action. Ung maintains that the Commission had discretion to reopen his appeal, but contends that the Commission's decision is based upon errors of law, unsupported by substantial evidence, in excess of the

Commission's statutory authority, and arbitrary and capricious. In essence, Ung claims that the Commission's decision to affirm his termination is unsupported by substantial evidence because the Commission did not find supported all the instances of misconduct on which Lowell based Ung's termination. After review of the record, the court determines that the Commission did not abuse its discretion in reopening Ung's appeal, and that the Commission's decision to affirm Ung's termination for just cause is supported by substantial evidence.

I. Jurisdiction to Reopen an Appeal

Lowell opposes Ung's request for judgment on the pleadings, arguing that the Commission lacked jurisdiction to reopen Ung's appeal following his voluntary dismissal of the action. Lowell contends that the Commission is bound by a ten-day period for appeal from an agency decision prescribed within G. L. c. 31, § 43, and lacks discretion to review a filing that falls outside of § 43's time standards.

General Laws c. 31, § 43 provides:

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days after filing of such appeal and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable.

See id. Lowell accurately represents that the Appeals Court has recognized that the filing deadline for § 43 review is a jurisdictional limit that the Commission lacks discretion to modify. See Falmouth v. Civil Serv. Comm'n, 64 Mass. App. Ct. 606, 608-609 (2005), reversed on other

grounds by Falmouth v. Civil Serv. Comm'n, 447 Mass. 814 (2006). However, the timely filing of Ung's initial appeal is not at issue here, as the parties agree that Ung complied with this requirement before moving to voluntarily dismiss his action. As such, the cases that Lowell cites analyzing a plaintiff's failure to strictly comply with § 43's filing standards are inapposite to the outcome here.

More closely analogous are cases in which courts have recognized that agencies "have inherent power to reopen their concluded proceedings in compelling situations as justice may require." Covell v. Department of Social Servs., 42 Mass. App. Ct. 427, 434 (1997) (reasoning that this power extends beyond cases which suggest that fraud affected the decision-making process), citing Aronson v. Brookline Rent Control Bd., 19 Mass. App. Ct. 700, 703-706 (1985). An agency's authority to reopen proceedings, however, "should be exercised by an agency with due circumspection — 'sparingly . . .'" Covell, 42 Mass. App. Ct. at 433 (citations omitted). The parties have not directed the court to, nor has the court discovered precedent that limits the application of an agency's inherent power to reopen cases in compelling circumstances in the context of § 43 review.

The situation before the court is one in which, in the absence of such contradictory precedent, the Commission reasonably exercised its discretion to reopen Ung's appeal. As the Commission recognized, Ung timely filed an appeal in 2008. Ung then dismissed the appeal based on his good faith belief that his collective bargaining agreement permitted him to arbitrate the termination for just cause. Shortly after this court issued a declaratory judgment supporting the opposite conclusion, Ung moved to reopen his § 43 appeal. Ung agreed to the Commission's request to waive backpay for the time period during which he pursued relief through arbitration

as a condition of reopening his appeal. Under these circumstances, the Commission acted reasonably in reopening Ung's appeal. Contrast with Alliance to Protect Nantucket Sound, Inc. v. Department of Public Utilities, 461 Mass. 190, 195 (2011) (reasoning that the mere existence of additional evidence does not justify agency's decision to reopen the proceedings).

II. The Commission's Decision

Ung seeks to overturn the Commission's decision arguing that the Commission was not justified in terminating him for just cause, based on its finding that Lowell was only able to prove by a preponderance of the evidence misconduct by Ung related to the Rath Sar investigation. The court determines that the Ung's misconduct in filing two false reports of stolen or unauthorized use of a vehicle related to the Rath Sar investigation and his subsequent dishonesty is sufficient to support the Commission's decision.

General Laws c. 31, §§ 41-43 govern the Commission's review of an agency decision to discharge a civil service employee. A tenured civil service employee may only be terminated for just cause. G. L. c. 31, § 41. "Just cause" is defined as "substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." Boston Police Dept. v. Collins, 48 Mass. App. Ct. 408, 411 (2003) (citations omitted). The Commission must decide whether the agency proved by a preponderance of evidence that just cause existed for an employee's termination. Id. (citations omitted). In analyzing the agency's decision, the Commission must consider "the fundamental purposes of the civil service system — to guard against political considerations, favoritism, and bias in governmental employment decisions . . . and to protect efficient public employees from political control." Id. at 412. In making this determination, the Commission cannot substitute its judgment for that of the agency. Id. (holding

that it was inappropriate for the Commission to modify police officer's period of suspension after finding that police officer had acted disrespectfully toward superior).

The Commission's decision affirming Ung's termination from the Lowell Police Department is supported by the substantial evidence in the record. There is no indication that the Commission substituted its judgment for Lowell simply because it did not affirm all of Lowell's reasons for Ung's termination. Although the Commission determined that Lowell had not properly investigated the facts surrounding the incident at Market Basket and could not discipline Ung with respect to it, the Commission's decision to uphold Lowell's termination of Ung for cause was well-supported by the misconduct related to the Rath Sar investigation.

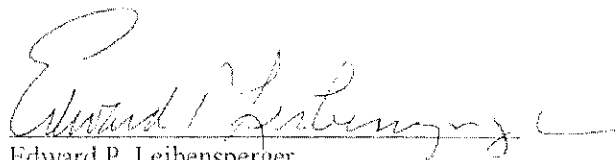
Lowell showed by a preponderance of the evidence that Ung filed two false police reports, wrongfully seized a vehicle, and made false statements to investigators concerning his attempts to identify the owner of the Lexus that was the subject of these police reports. No question arises that the Commission's decision upholding Lowell's termination of Ung for just cause based on his misconduct and dishonesty concerning the Rath Sar investigation was legally tenable. See Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997) (recognizing that police officer's "demonstrated willingness to fudge the truth in exigent circumstances" is particularly troubling because "[p]olice work frequently calls upon officers to speak the truth when doing so might put in question a stop or a search or might embarrass a fellow officer.""). Accordingly, the court must uphold its decision to terminate Ung for just cause.

ORDER

For the reasons stated above, plaintiff's Motion for Judgment on the Pleadings and his Motion to Dismiss are DENIED. Lowell's Motion for Judgment on the Pleadings is ALLOWED, and the Commission's decision to uphold Lowell's termination of Ung for just cause is AFFIRMED. Judgment dismissing this action shall enter.

Date: July ¹⁶____, 2012

By the Court:



Edward P. Leibensperger
Justice of the Superior Court

Letter sent
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