

Term 

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

NANCY **◀DALRYMPLE▶** vs. CIVIL SERVICE COMMISSION & another. [FN1]

11-P-580

*MEMORANDUM AND ORDER PURSUANT TO RULE 1:28*

The plaintiff, Nancy Dalrymple, a police officer for the town of Winthrop, appeals from a judgment affirming the Civil Service Commission's (the Commission) decision to deny her administrative appeal. Dalrymple had appealed from the decision of the town (which is the appointing authority) to suspend her without pay for five days for noncooperation and insubordination.

In 2006, Dalrymple was injured on her job as a police officer and was on leave for an extended period. After returning to work, Dalrymple was initially placed on light-duty service, later returning to full service. Shortly after returning, the police chief ordered Dalrymple to qualify on a newly issued weapon. Dalrymple began to train on the weapon.

In May, 2007, the police chief met with Dalrymple. He ordered that she demonstrate qualification on the new weapon. Dalrymple responded that she had begun the training, but that qualification would take some time. The chief asked whether Dalrymple was disobeying his order. Dalrymple denied any such disobedience. During this confrontation, Dalrymple began visibly experiencing shortness of breath. Dalrymple declined the chief's offer to call for an ambulance, but stated that she would go home ill. On her way home, she stopped by the fire house to have her blood pressure checked (it was high). Dalrymple then took several days of sick leave. After about two weeks of such leave, the chief asked Dalrymple to provide medical documentation supporting her absence. Dalrymple provided a doctor's note which stated that she was under a cardiologist's care, but the note provided no further information concerning her condition. Some months later, the chief ordered Dalrymple to report to a designated physician for a fitness-for-duty evaluation. Dalrymple initially agreed to report for the physician examination and to waive confidentiality. Dalrymple reported to the physician and was examined. However, after the examination had been conducted, Dalrymple refused to waive confidentiality, and therefore, the physician filed no report concerning her fitness to work.

At this point, the town notified Dalrymple that it was considering terminating her employment for insubordination. However, after a hearing, rather than pursuing termination, the town suspended Dalrymple for five days without pay for insubordination. Further, the town determined that Dalrymple would be placed on administrative leave without pay, until such time as she consented to a fitness-for-duty medical examination and waived confidentiality with respect to the production thereof. [FN2]

Dalrymple appealed to the Commission. At a hearing before the Commission, Dalrymple testified that she would only be willing, at her election, to provide certain medical documentation from her own physician and from the town-designated physician, and she insisted on the right to limit the medical disclosures (Dalrymple apparently believed that, if the town became aware of her full personal medical history, the town might attempt to "retire her out.") The Commission denied Dalrymple's appeal, generally concluding that the chief was within his rights to require a fitness-for-duty medical evaluation, that Dalrymple had no right to limit the medical information provided, and that adequate safeguards had been taken to ensure the confidentiality of Dalrymple's medical records.

On Dalrymple's appeal, a Superior Court judge affirmed the Commission's decision. The judge wrote as follows:

"The administrative record shows that substantial evidence supported the Commission's conclusions that the Town was within its lawful power to order Dalrymple to undergo an independent medical examination and that the plaintiff can not unilaterally determine which portions of a doctor's fitness for duty evaluation should be conveyed to the Town. . . . Specifically, with regards to plaintiff's claim that the Town of Winthrop singled her out in ordering her to undergo a sick leave examination, the plain language of the [CBA] in effect at the time allows for such an examination. . . . The Commission found that 'after personally witnessing one of his police officers complain of breathing problems while on duty and after several weeks of that employee taking extended sick leave, it was reasonable and appropriate for the Police Chief to require such an independent examination.' . . . The Commission found that the Town's actions were reasonable and that it should not be in the position of second-guessing such a decision. . . . Likewise, this court is not in a position to second-guess the findings of the Commission. This court can only review whether its findings were based upon substantial evidence, were arbitrary or capricious, or were made based on an error of law. Given the substantial evidence supporting the Town's position that was presented before the Commission, this court cannot find that the Commission's findings were unreasonable, arbitrary or capricious."

We agree with the determination of the Superior Court judge affirming the Commission's decision.

We note that under *Nolan v. Police Commr. of Boston*, 383 Mass. 625, 630 (1981), a police department head "has the authority and duty to determine a police officer's fitness to perform his duties or to return to full working status." As the Commission concluded, "[t]hat duty can not be carried out if it is left to the police officer being examined to determine what portions of the fitness for duty evaluation will be transmitted to the Town."

Dalrymple argues that the Commission's decision lacks adequate factual support. Reduced to its essentials, however, Dalrymple's argument is not that the Commission's factual findings lack evidentiary support, but rather that the Commission should have found her testimony more credible and relied on it.

Dalrymple raised a similar evidentiary challenge in the Superior Court, but failed to file the Commission hearing transcript. This omission may be deemed to constitute a waiver. Superior Court Standing Order 1-96 (2) requires that a party "alleging that an agency's decision is not supported by substantial evidence or is arbitrary or capricious, or is an abuse of discretion" provide a transcript of the hearing testimony, or portions thereof, to the court. "[T]he rule '[t]hat a transcript must be submitted to support a claim that the evidence was insufficient is not some hypertechnical requirement, but a reflection of the fact that resolution of such a claim requires the reviewing court to see the entirety of the evidence that was presented.'" *Forman v. Director of the Office of Medicaid*, 79 Mass. App. Ct. 218, 223 n.5 (2011) quoting from *Covell v. Department of Social Servs.*, 439 Mass. 766, 782 (2003). See *MacLean v. Board of Registration in Nursing*, 458 Mass. 1028, 1030 (2011). Thus, Dalrymple's failure to file the transcript in the Superior Court would be an independent ground to deny this challenge to the Commission's evidentiary findings.

Putting waiver to one side and turning to the merits, Dalrymple's appeal fails nonetheless. The Commission's findings are sustainable on the record and did not constitute error of law. [\[FN3\]](#)

Finally, Dalrymple argues that the Commission did not conduct a meaningful de novo review, make independent findings, or otherwise conduct a "searching" record review. But, the record is to the contrary. [\[FN4\]](#) [\[FN5\]](#)

*Judgment affirmed.*

By the Court (Berry, Smith & Rubin, JJ.),

Entered: July 16, 2012.

[FN1.](#) Town of Winthrop.

[FN2.](#) Ultimately Dalrymple provided the medical information and was reinstated in the police department. Dalrymple pursue this appeal because, as noted by her counsel at oral argument, the issue of back pay and retirement benefits with respect to the time she was out of service remain open issues in dispute.

[FN3.](#) Dalrymple also presents a confidentiality argument attempting to draw an analogy between self-incrimination protections applicable to criminal proceedings and what she calls the forced disclosure of her personal medical information. The analogy is not sustainable.

FN4. The Commission conducted a full evidentiary de novo hearing on February 24, 2009, and March 18, 2009, where Dalrymple was represented by counsel, submitted exhibits, and presented witnesses, including herself. The town also submitted exhibits and called witnesses. The transcript of the proceedings totals 309 pages in two volumes.

FN5. The town has requested attorney's fees. The request is denied.

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