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JOAQUIN KILSON vs. CITY OF FITCHBURG & another.¹

1 Civil Service Commission.

15-P-198**APPEALS COURT OF MASSACHUSETTS****2016 Mass. App. Unpub. LEXIS 98****February 2, 2016, Entered**

NOTICE: SUMMARY DECISIONS ISSUED BY THE APPEALS COURT PURSUANT TO ITS *RULE 1:28, AS AMENDED BY 73 MASS. APP. CT. 1001 (2009)*, ARE PRIMARILY DIRECTED TO THE PARTIES AND, THEREFORE, MAY NOT FULLY ADDRESS THE FACTS OF THE CASE OR THE PANEL'S DECISIONAL RATIONALE. MOREOVER, SUCH 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. SEE CHACE V. CURRAN, 71 MASS. APP. CT. 258, 260 N.4 (2008)*.

JUDGES: Green, Vuono & Hanlon, JJ.³

3 The panelists are listed in order of seniority.

OPINION**MEMORANDUM AND ORDER PURSUANT TO RULE 1:28**

The plaintiff, Joaquin Kilson, was employed by the city of Fitchburg (the city) as a lieutenant in the Fitchburg police department (department). The city terminated his employment following an internal investigation that disclosed that Kilson had associated with known drug dealers and had tipped off potential targets of a law enforcement investigation. He appeals from a Superior Court judgment affirming a decision of the Civil Service Commission (commission) that dismissed

his appeal for failure to file a timely appeal in compliance with the ten-day period provided by *G. L. c. 31, § 43*.²

2 *General Laws c. 31, § 43*, as appearing in St. 1981, c. 767, § 20, provides in relevant part that a "person aggrieved by a decision of an appointing authority . . . shall, within ten days after receiving written notice of such decision, appeal in writing to the commission."

Background. The commission found that Kilson was a police officer employed by the city. The department, after an investigation, pressed several inappropriate conduct charges against Kilson, most of which merited termination. The department conducted a full evidentiary hearing at which Kilson was represented by his union. After concluding that Kilson was guilty of six of the seven charges, the city terminated Kilson's employment. Kilson received notice of the May 18, 2012, decision.

Kilson did not appeal to the commission. Instead, there ensued a series of communications by and between the police chief and the union. In these communications the union indicated that it wanted to pursue arbitration, and the police chief generally indicated, with reservations, that he was in agreement. The parties agreed on an appropriate grievance and arbitration procedure and the matter eventually was submitted to an arbitrator. The arbitrator concluded that she lacked jurisdiction to consider the matter because Kilson's discharge was not subject to arbitration under the relevant collective bargaining agreement. A Superior Court judge confirmed the arbitrator award. Kilson did not appeal.

Within one week of receiving the arbitrator's decision, on November 30, 2012, Kilson filed his appeal to the commission. The commission, noting that Kilson's appeal was untimely under c. 31, § 43, see note 2, *supra*, dismissed the appeal. In doing so the commission considered and rejected Kilson's argument that the communications between the police chief and the union constituted a waiver of the city's right to object on the grounds of timeliness.

Kilson then filed a complaint for judicial review in the Superior Court. Following a hearing on Kilson's motion for judgment on the pleadings, a judge of Superior Court denied Kilson's motion, concluding that the ten-day period set forth in § 43 "is jurisdictional in nature and cannot be enlarged or modified by the Commission." The judge further explained, in ordering that judgment enter for the defendants, that the communications between Kilson's union and the city never amounted to a waiver or estoppel on the city's part.

Discussion. Kilson argues that the judge's "finding of fact" is wrong, that, in fact, the communications by and between himself, the union, and the department operated as a waiver of the time deadlines imposed by § 43. The question, however, is whether the *commission's* factual finding is so unsupported as to constitute arbitrary or capricious action (or an error of law). We have reviewed the record carefully and conclude that the commission's finding is well supported. More fundamentally, as both the commission and the judge noted,

the ten-day limitation is jurisdictional and may not be waived or extended. See *Falmouth v. Civil Serv. Commn.*, 64 Mass. App. Ct. 606, 608-609 (2005), S.C., 447 Mass. 814 (2006).

Kilson also argues that the judge failed to appreciate that the commission, on other occasions, has permitted untimely appeals to go forward and that, therefore, the commission's decision here is arbitrary and capricious. We disagree. The commission decision upon which Kilson relies, *Ung v. Lowell Police Dept.*, is distinguishable because the disciplined employee in that case, in fact and unlike here, filed a timely commission appeal.

The city has requested an award of its appellate attorney's fees and double costs on the ground that Kilson's appeal is frivolous. We agree that Kilson's appeal is frivolous. Thus the city may submit an application for appellate attorney's fees and double costs, with supporting documentation, within fourteen days of the date of this decision. See *Fabre v. Walton*, 441 Mass. 9, 10 (2004). Kilson will be afforded ten days thereafter to respond. *Id. at 10-11.*

Judgment affirmed.

By the Court (Green, Vuono & Hanlon, JJ.³),

3 The panelists are listed in order of seniority.

Entered: February 2, 2016.