

NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
DOCKET NO. 2084CV01354-B

TOWN OF ROCKLAND

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS
(Papers 16 and 17)**

The Town of Rockland (Rockland or Town) has brought this action pursuant to G. L. c. 31, § 44, and G. L. c. 30A, § 14, seeking judicial review of a final decision by the Massachusetts Civil Service Commission (Commission). That Decision of May 21, 2020: concluded that Craig Erickson (Erickson), a Rockland Fire Department (RFD) firefighter was properly subjected to discipline for certain misconduct; but modified the penalty the RFD had imposed upon Erickson, vacating his termination and ordering that he be demoted from lieutenant to firefighter, and suspended for 90 days.

The Town challenges the Commission's modification of discipline. Erickson was permitted to intervene as an interested party, for purposes of filing his own opposition to the Town's motion. Docket Entry November 24, 2020, unnumbered Paper. A hearing on the Motions was held February 23, 2021. Docket Entry. However, the parties decided after that hearing jointly to move for a stay of decision by the court, pending a decision by the Appeals Court on the related matter described below.¹ The stay entered, Docket endorsement of March 5,

¹ The Town argued in an earlier case before the Commission described below that Erickson's appeal of a 30-day suspension was untimely, and therefore the Commission had no authority to rule on the validity of that suspension. A copy of the Commission's 2018 Suspension Decision is Attachment B to Rockland's Memorandum of Law dated October 15, 2020. The Appeals Court has since upheld the Commission's 2018 Suspension Decision,

2021, and was not lifted until June 7, 2021. Once the parties notified the court of the related Appeals Court decision, Paper 20, the Motions addressed here were taken under advisement.

For the reasons explained below, the Commission's Motion is **ALLOWED**, and Rockland's Motion is **DENIED**.

Background Facts of Record

The following facts are taken from the Commission's Decision on Erickson's termination, the Administrative Record (Record),² and the Commission's 2018 Suspension Decision. The Commission took administrative notice of its 2018 Suspension Decision, and relied upon it in part in rendering the Decision at issue here.

Early Historical Events in Erickson's Employment

Erickson joined the RFD in 1983, eventually rising to the rank of Lieutenant in 1996. In addition to his employment at the RFD, Erickson occasionally worked for a private rescue company, as well as a federal disaster relief training and rescue program. Prior to his termination, Erickson was the RFD's longest serving member, and its sole African-American firefighter.

While working one day in 1996, Erickson was physically assaulted by a former Rockland Selectman in what was allegedly a race-based attack. Erickson subsequently developed Post-Traumatic Stress Disorder (PTSD).

rejecting the only argument of the Town on appeal that Erickson's appeal was not timely. Town of Rockland v. Civil Service Commission, 99 Mass. App. Ct. 1127, 2021 WL 2222597, at *1-*4 (2021).

² Due to some unspecified error in Volume I of the Record, the Attorney General filed a corrected version of the Commission's Decision (Paper13), bate-stamped AR SUPP 425 to SUPP 453, here Record Supp. at _____.

Scott Duffey (Chief Duffey) became the Fire Chief of the RFD in June 2010. In January 2011, he implemented a Standard Operating Guideline (SOG) addressing sick leave. The SOG provides in relevant part:

2. Sick leave is a benefit that is specifically intended to be used in the event of personal sickness or non-service connected injury of the employee. Sick leave shall not be utilized for any other reasons.

...

3. Sick leave is not a benefit provided to be used as a substitute for vacation or personal leave, nor does it provide the opportunity to work at outside employment.

3.1. If you are sick, it is expected you will stay home, except for a trip to the doctor's office, medical appointments or the pharmacy.

Exception: For some sick situations it may be permissible to resume nonfire department related activities even though you are unable to work. It is understood that non-physical, non-fire department related activities and employment may be performed during convalescence. These situations shall be clearly communicated through the Fire Chief. These activities shall not be unreasonably denied by the Chief.

4. Sick Leave abuse will be defined as follows:

4.1. Utilizing sick leave for purposes other than those outlined in Sections 2 and 3 of this SOG, or

...

4.4. Submitting false or inaccurate information concerning the reason the employee needed to use sick leave.

5. Sick leave misuse and abuse will not be tolerated. Employees failing to follow this SOG will face disciplinary action as outlined in the Rules and Regulations of the [RFD]

Record I at 119-120.

In 2012, RFD firefighter Thomas Heaney (Heaney) applied for promotion to Captain. Before Chief Duffey and Heaney joined the RFD, they worked together at the Norwell Fire Department. At the time of his application, Heaney did not live within ten miles of the Rockland town limits, as required by the operative civil service statute. Erickson, who was then serving as

a provisional Captain, believed this disqualified Heaney for promotion, and reported his concerns to the Commission, which opened an investigation. In response, Heaney moved his residence to an area that complied with the statute, and was then promoted to Captain.

Events Leading to Discipline and the Commission's 2018 Suspension Decision

In March 2013, Erickson received two reprimands, one verbal and one written. These were the first disciplinary actions Erickson faced since joining the RFD in 1983. However, thereafter Erickson received a second and third written reprimand in 2014; a fourth written reprimand in 2015; and fifth and sixth written reprimands in March, 2016. Chief Duffey acknowledged that some of these reprimands arose from relatively minor events, such as failing to complete incident reports or investigative paperwork. Between 2014 and 2016, Erickson grieved four of these reprimands, and accused the RFD of engaging in racial discrimination. Chief Duffey denied the grievances and denied the racial allegations.

On November 2, 2016, Erickson was serving as senior officer in command. In that capacity he ordered a subordinate firefighter, M.M., to respond to a mutual aid call from a neighboring town. M.M. refused Erickson's order, sought the opinion of another firefighter who was the local union president (T.H.),³ and then began arguing with T.H. T.H. eventually called Chief Duffey to settle the dispute. Chief Duffey ordered M.M. to respond. This series of interactions, identified as the November 2016 Incident for purposes of the Record before me, reportedly delayed the RFD's mutual aid response by several minutes.

³ Notwithstanding the identical initials, the Record does not independently support that T.H. is or is not Heaney or a relation. This question has no bearing on the court's decision.

Chief Duffey launched an RFD investigation into the November 2016 Incident, which resulted in Erickson's receiving, in December, 2016, a 48-hour suspension for lack of leadership. M.M., the insubordinate firefighter, received no formal discipline.⁴ Shortly thereafter, Chief Duffey launched a second investigation into whether Erickson had lied during the hearing on the November 2016 Incident.

Within months of the November 2016 Incident, Erickson suffered a relapse of PTSD symptoms. On February 21, 2017, Erickson's treating physician Dr. Richard Goldbaum alerted Chief Duffey to the relapse. Approximately two weeks later, on March 9, 2017, Dr. Goldbaum faxed a letter to Chief Duffey, advising that Erickson would take medical leave. Also included in that fax was additional information indicating Erickson had been ordered to deploy to California from April 3-7, 2017, for a training session with the federal disaster relief program for which Erickson occasionally worked.

On March 10, 2017, Erickson was scheduled to work at the RFD, but instead used sick leave. On March 13, 2017, Chief Duffey wrote Erickson a letter addressing his medical leave. The Chief warned Erickson: "if you are still on leave from [the RFD] for symptoms related to your current medical condition and you attend [the federal training session], this will be viewed as an abuse of sick leave and you will face further discipline." Record I at 131-132. Erickson subsequently used sick leave for a scheduled RFD shift on March 16, 2017.

Dr. Goldbaum communicated to Erickson sometime after March 30, 2017, but prior to the beginning of his scheduled April 3, 2017 shift at the RFD, that Erickson was fit to return to his duties. Without notifying the RFD of this information, Erickson departed for the federal

⁴ Erickson unsuccessfully grieved that suspension, but did not appeal to the Commission in that instance.

training session in California on the evening of April 2 or early in the morning on April 3, 2017. On April 3, 2017, Dr. Goldbaum sent a letter via fax to Chief Duffey, informing Duffey that Erickson was fit to return to work. Erickson received sick pay for his April 3, 2017 RFD shift.

On April 10, 2017, a hearing was convened to consider the untruthfulness charges pending against Erickson from the November 2016 Incident. The next day, Chief Duffey began investigating Erickson's use of sick leave (the sick leave investigation). As part of the sick leave investigation, Chief Duffey ordered Erickson to complete a questionnaire about his extended medical leave and outside employment, and Erickson did so. Unsatisfied with Erickson's responses, Duffey ordered Erickson to provide all payroll records for any outside employment Erickson had engaged in while on sick leave from RFD during the period February 20, 2017 through April 3, 2017. The union expressed concern about this request, but agreed that Chief Duffey could ask Erickson to produce a list of the dates he engaged in outside employment.

On April 27, 2017, the Town Administrator, in his capacity as hearing officer, issued a decision concluding that Erickson had been untruthful during the November 2016 Incident investigation. The Town Administrator imposed a 30-day suspension. Erickson unsuccessfully grieved the suspension and then appealed to the Commission, ultimately resulting in the 2018 Suspension Decision in favor of Erickson.

Ongoing Sick Leave Disputes Leading to the Commission's 2020 Termination Decision

On June 6, 2017, Chief Duffey interviewed Erickson in connection with his sick leave investigation. Erickson maintained he had not contacted the RFD when Dr. Goldbaum cleared him for duty because he was under doctor's orders not to communicate with the RFD. This proved to be false. During the same interview, Erickson gave Chief Duffey a list of the dates

that he had engaged in outside employment while out on sick leave. That list of dates indicated Erickson had engaged in outside employment at the private rescue company on March 10, 2017 and March 16, 2017, and at the federal government program on April 3, 2017. On those dates, Erickson had been scheduled to work for the RFD, but had instead received paid sick leave. Chief Duffey determined this circumstance violated the SOG, and ordered Erickson to provide payroll records to confirm the dates involved.

On June 12, 2017, Erickson participated in another interview with Chief Duffey. Erickson again repeated that he had been under doctor's orders not to communicate with the RFD, and accused Chief Duffey of having ordered him to return from his deployment. At one point, in response to a statement from Erickson, Chief Duffey stated, "let's not start throwing bombs that you're not ready to throw." Record Supplement at 27-28. During the interview, Chief Duffey again ordered Erickson to produce the requested payroll records. He also ordered Erickson to produce the dates and times Erickson had met with Dr. Goldbaum during the relevant time period.

Around this time, Dr. Goldbaum retired, and Dr. Robert Downes began treating Erickson. Dr. Downes notified the RFD on June 18, 2017, that Erickson's PTSD had recurred, and that Erickson would take extended sick leave. The next day, Chief Duffey sent a letter to Erickson notifying him that he had failed to provide the requested payroll records and was therefore knowingly violating an order, which could be the subject of separate discipline. Chief Duffey again requested the records. Erickson did not respond.

Later that month, on June 28, 2017, Erickson was scheduled to work, but did not report for duty or notify the RFD of his absence as required by RFD policy. The next day, Chief

Duffey sent Erickson a letter regarding this absence, and which once again demanded that Erickson provide the payroll records requested for the sick leave investigation.

At some point thereafter, Erickson provided the RFD with contact information for his supervisors at his two outside employers. The supervisors reported to RFD the dates Erickson had worked for them between February 24, 2017 and March 29, 2017. Based on this information, the RFD learned the private rescue company paid Erickson for work performed on March 10 and March 16, 2017, dates that Erickson was scheduled to work at the RFD but for which he was paid sick leave. Erickson did not provide the requested dates and times he had met with Dr. Goldbaum

On June 30, 2017, Dr. Downes again informed Chief Duffey that Erickson had suffered a recurrence of PTSD, and that Erickson should be placed on an extended medical leave of absence. In his July 6th response, Chief Duffey asked whether Dr. Downes had instructed Erickson not to communicate with the Chief or any other representative of the RFD. Dr. Downes notified Chief Duffey that he had not so instructed Erickson.

On July 13, 2017, the Commission held its evidentiary hearing which led to the 2018 Suspension Decision. A week later, on July 20, 2017, Chief Duffey notified Erickson in writing that Duffey was recommending Erickson be terminated because: (1) Erickson worked for the private rescue company on March 10 and March 16, 2017, while on paid sick leave and without Chief Duffey's permission in violation of the SOG; (2) Erickson failed to notify the RFD when Dr. Goldbaum cleared him for duty; (3) Erickson participated in the federal training session against Chief Duffey's orders, and received paid sick leave for a shift scheduled on one day of that training (April 3, 2017); (4) Erickson failed to produce the documents ordered by Chief

Duffey; and (5) Erickson failed to report for duty or call in sick on June 28, 2017. In the notification, Chief Duffey stated that he had also considered Erickson's prior record of discipline — from the first reprimand in 2013, through the 48-hour suspension issued in December 2016 — in reaching his decision, but that he had not considered the 30-day suspension arising from the November 2016 Incident that was then on appeal to the Commission.

The Town held a hearing in August, 2017 on the contemplated termination. Chief Duffey and Dr. Downes testified. Erickson, who was represented by counsel, declined to testify and was advised that an adverse inference could be drawn against him. The Town hearing officer issued a Report finding that Erickson had engaged in the alleged misconduct, and that the RFD would be justified in terminating him. The hearing officer considered Erickson's disciplinary record in rendering his ruling. The RFD terminated Erickson's employment effective October 14, 2017, and Erickson appealed his termination to the Commission.

The Commission's 2018 Suspension Decision

As noted above, Erickson filed an appeal with the Commission challenging Chief Duffey's decision to suspend him for 30 days because he had purportedly lied during the investigation of the November 2016 Incident. Erickson's 48-hour suspension for lack of leadership was not the subject of the appeal. The Commission held an evidentiary hearing on July 13, 2017, and issued a decision dated March 29, 2018, overturning the 30-day suspension. At the time the 2018 Suspension Decision issued, the Commission had already held an evidentiary hearing on Erickson's appeal of his termination, but had not yet issued a decision on that appeal.

During the July 13, 2017 evidentiary hearing before the Commission on the suspension question, Chief Duffey testified that the investigation which led to the 30-day suspension was initiated after two firefighters approached him and accused Erickson of lying during his testimony at the hearing on the November related to the first investigation. Those firefighters, however, testified before the Commission that they had no memory of making such allegations. Crediting the firefighters' testimony, the Commission found that they had not made allegations of untruthfulness against Erickson. Based on this finding and others, the Commission ultimately concluded that the 30-day suspension had not been justified. It explained:

[T]his case is a stark and troubling example of disparate treatment. [M.M., a] firefighter whose son sits on the Board of Selectmen and served with the Fire Chief [Chief Duffey] on the Fire Station Building Committee faced no formal discipline for: a) engaging in insubordination; and b) providing what appear to be less than credible responses during an internal investigation. On the other hand, Lt. Erickson, the only minority firefighter in the Rockland Fire Department, who recently exercised his right to request an investigation regarding whether certain firefighters [e.g., Heaney] were complying with a civil service requirement related to place of residence, was investigated and disciplined (twice) for issues related to the same incident.

2018 Suspension Decision at 16. The Town appealed this decision on the issue of the timeliness of Erickson's appeal to the Commission, first to the Superior Court and then to the Appeals Court. Both denied the Town's appeal. Town of Rockland v. Civil Service Commission, 99 Mass. App. Ct. 1127, 2021 WL 2222597, at *1-*4 (2021); Memorandum of Decision and Order on Motion for Judgment on the Pleadings, Rockland v. Civil Service Comm'n, 1883CV00466 (Paper 19)(Pasquale, J.).

The Commission's 2020 Termination Decision

On January 16, 2018, the Commission held an evidentiary hearing on Erickson's termination. Three witnesses — Chief Duffey, Erickson, and Dr. Downes — testified, and the

parties submitted more than 50 exhibits. The Commission issued the Decision now before the court on May 21, 2020.

The Commission found the Town had proved by a preponderance of the evidence that it had just cause to discipline Erickson for: (1) engaging in outside employment with the private rescue company on two days in March 2017 while on paid sick leave in violation of the SOG; (2) failing to report to work on June 28, 2017 without notifying the RFD of his absence; (3) failing timely to notify the RFD when he was cleared for duty by Dr. Goldbaum; and (4) failing to produce the dates on which he met with Dr. Goldbaum as ordered. These actions, the Commission concluded, “clearly constitutes substantial misconduct that adversely affects the public interest by impairing the efficiency of public services, thereby warranting discipline.” Record Supp. at 447.

However, the Commission determined the Town did not establish just cause to discipline Erickson for: (1) deploying to the federal training session in April 2017; or (2) failing to fulfill Chief Duffey’s order to produce payroll records of his outside employment. With regard to Erickson’s work for the federal government program, the Commission found: (1) it did not violate the SOG because, unlike the work for the private rescue company, it was for training and not physical work similar to the work the RFD performed; (2) the SOG did not explicitly require prior notice and approval of the Chief of such employment during sick leave; and (3) Erickson did not lack sufficient holiday leave time when he deployed to the program. Record Supp. at 447-449. With regard to the payroll records, the Commission found the Town had failed to establish that Erickson “did not produce the payroll information for the work he performed for

the private rescue company on March 10 and 16, 2017 since he produced it after multiple orders, albeit after the deadlines established in the orders he was given.” Record Supp. at 448.

In reaching these conclusions, the Commission drew an adverse inference against Erickson for failing to testify at the hearing that preceded his termination, and concluded that Erickson’s credibility was “limited.” Id. It noted that Erickson’s testimony, both before Chief Duffey and before the Commission, was at times “vague and/or evasive,” and that he had been untruthful before the RFD and the Commission when he claimed to have been under a doctor’s order not to communicate with the RFD. Id., at 449.

Although the Commission concluded the RFD had just cause to discipline Erickson, it further determined that “the disciplinary process here was inappropriately affected by animus toward [Erickson] that resulted in his termination.” Id., at 452. As grounds for this finding, the Commission pointed to Chief Duffey’s warning that Erickson “not start throwing bombs you’re not ready to throw” during the sick leave investigation; the “sudden” increase in disciplinary actions against Erickson, some of which were for minor offenses, after Erickson questioned Heaney’s eligibility for promotion;⁵ the abrupt escalation in the severity of the discipline imposed; and the 2018 Suspension Decision, which “laid bare the bias that the Fire Chief has developed against [Erickson].” Id., at 450-452. “Under the[se] circumstances, but in view of the findings here that some, but not all of the Appellant’s conduct involved in the instant appeal violated the cited RFD rules and sick leave policy,” the Commission concluded that “modification of the discipline . . . is warranted, while ensuring that the message is clear — that

⁵ The Commission stated that: “There can be little question that this left at least some members of the relatively small Department with hard feelings.” Id., at 451.

proven violations of RFD rules and its sick leave policy are unacceptable, especially when committed by a superior officer.” Id., at 452-453. The Commission allowed Erickson’s appeal in part, by vacating the termination, but ordered Erickson be demoted to firefighter, and suspended for 90 days. Id.

Discussion and Rulings

Court Standard of Review

A party aggrieved by a final decision of the Commission may seek judicial review pursuant to G. L. c. 31, § 44. The court’s review is governed by the standards set forth in G. L. c. 30A, § 14(7), and may set aside an agency decision if it is unsupported by substantial evidence, based upon on an error of law, arbitrary and capricious, or an abuse of discretion. Substantial evidence “means such evidence as a reasonable mind might accept as adequate to support a conclusion.” G. L. c. 30A, § 1(6). The court may not substitute its judgment for that of the Commission, Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 262-263 (2001), and “shall 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). A plaintiff thus bears the “heavy burden” of demonstrating the invalidity of the Commission’s decision. Abban, 434 Mass. at 263-264.

Standard Governing Commission’s Review of Erickson’s Employment

A public employee cannot be discharged without “just cause.” G. L. c. 31, § 41; Town of Brookline v. Alston, 487 Mass. 278, 292 (2021). “Although the civil service law does not define what constitutes ‘just cause,’ [the SJC has] held that it exists where the employee has committed ‘substantial misconduct which adversely affects the public interest by impairing the efficiency of

the public service.” Id., 487 Mass. at 292 (citations omitted). “The role of the [C]ommission [is] to determine whether the [appointing authority] proved, by a preponderance of evidence, just cause for the action taken.” Boston Police Dep’t v. Collins, 48 Mass. App. Ct. 408, 411 (2000). In making that determination, “the [C]ommission must focus on 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.” Cambridge v. Civil Serv. Comm’n, 43 Mass. App. Ct. 300, 304 (1997).

As such, the Commission appropriately intervenes “when there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy.” Id. The Commission, however, may not intervene “to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority.” Id.

When reviewing a termination decision, the Commission hears evidence and finds facts anew. City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 727 (2003). However, when “pass[ing] judgment on the penalty imposed by the appointing authority,” the Commission “does not act without regard to the previous decision of the town.” Town of Falmouth v. Civil Serv. Comm’n, 447 Mass. 814, 823-824 (2006). Rather, the Commission must decide “whether there was reasonable justification for the action taken by the appointing authority in the circumstances found by the [C]ommission to have existed when the appointing authority made its decision.” Id., at 824 (internal citations omitted). “[U]nless the [C]ommission’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. The [C]ommission is not free to modify the penalty imposed by the town on the basis of essentially similar fact finding without an adequate explanation.” Id.

Application of the Standards

The Town argues here that “the Commission’s award is beyond the statutory jurisdiction of the agency as it [sic] based on an error of law, lacks sufficient justification given the Commission’s own factual findings, is arbitrary or capricious, and an is [sic] abuse of discretion.” Plaintiff’s Memorandum in Support, at page 6.

The Bias Finding

Rockland argues the Commission’s Decision cannot stand because its finding of bias was not supported by the evidence.

First, the Town contends the Commission abused its discretion when it relied in part upon its own 2018 Suspension Decision, because the RFD did not consider the 30-day suspension when making its decision to terminate Erickson,⁶ and the Commission’s own earlier conclusions are “irrelevant” to Erickson’s appeal of his termination. Memorandum at pages 19-20. I cannot agree.

The 2018 Suspension Decision, which concerned discipline Erickson had received only months before his termination, and while the investigation into his sick leave use was ongoing, bore directly on the inquiry into whether Erickson’s termination had been, like the 30-day suspension, a product of bias. The Commission’s own experience with the history of the relationship between the parties, and its opportunity to observe them first-hand in two

⁶ As noted above, the Town’s argument that Erickson’s appeal of the 30-day suspension was untimely is now moot.

evidentiary hearings, is quite relevant. Moreover, the Decision before me clearly did not depend on the 2018 Suspension Decision alone. Other substantial and reliable evidence existed in the Record to support the 2020 Decision. Police Department of Boston v. Kavaleski, 463 Mass. 680, 690-691 (2012).

By way of example only, the Commission could reasonably have disagreed as a matter of fact on this Record with the Town's assessment that the 2012 events involving Erickson's reporting of the Heaney matter was "a minor incident with an unrelated firefighter."⁷ Memorandum in Support at page 15. Likewise the Commission need not have accepted as a matter of law the Town's argument that "[i]t is not necessary or within the scope of the Commission's review to determine the motivating factors of Erickson's misconduct." Id. at page 16.

Second, the Town argues the administrative record demonstrates the RFD neutrally applied its system of progressive discipline. Erickson's termination, it asserts, was merely the result of his repeated violations of RFD policies over the course of several years, rather than any bias towards him. Again I am constrained to disagree.

The Record demonstrates Erickson served the RFD for twenty-seven years without incurring any discipline, but that beginning in 2013 – shortly after Erickson questioned whether Heaney was eligible for promotion – Erickson experienced a sudden uptick in reprimands. Some of these reprimands were for minor matters. The Record also demonstrates that the minor reprimands were followed by more serious disciplinary actions (a 48-hour suspension and a 30-

⁷ The Record supports a finding that: Chief Duffey knew Heaney from their time together at the Norwell Fire Department; Heaney was forced to move closer to Rockland to comply with the residency requirement after Erickson reported the issue to the Commission; and Heaney obtained his promotion after complying.

day suspension), arising from Chief Duffey's two investigations of the November 2016 Incident, the second of which overlapped with Chief Duffey's investigation into Erickson's use of sick leave. The Commission's 2018 Suspension Decision determined that both of the November 2016 Incident investigations reflected disparate treatment,⁸ and that the second of those two investigations appeared to have been entirely without basis.

The court is satisfied that the Record as a whole supports the Commission's determination that the disciplinary process resulting in Erickson's termination was not a neutral one, but rather was infected by continuing and improper bias against him. Indeed, when the suspect 30-day and the 48-hour suspensions are excluded from Erickson's disciplinary history, the Commission reasonably viewed his termination as particularly abrupt and inequitable. Although the evidence before the Commission did not compel a finding that Erickson was subject to bias, there exists in this Record evidence of bias sufficiently substantial to permit the Commission's conclusion as a matter of law. Contrary to Rockland's arguments, the Commission's Decision does not "simply rel[y] on innuendo." Memorandum in Support, at page 16.

In further support of its Motion, the Town cites to a Massachusetts Commission Against Discrimination Investigative Disposition dated February 28, 2019, which concluded a lack of probable cause to support Erickson's allegations that he had been discriminated against by the Town on the basis of the statutorily-protected suspect classes of age, disability, or race. I do not

⁸ Although the 2018 Suspension Decision was focused on the second investigation and the 30-day suspension arising from it, which was the subject of the appeal, its analysis expressed concerns with the entirety of the disciplinary process arising from the November 2016 Incident. For example, the Commission emphasized that M.M., the insubordinate firefighter with whom the Chief sat on the Fire Station Building Committee and whose son served as a Rockland Selectman, was not subject to any discipline after the first investigation.

consider the MCAD Disposition in my decision, because I do not believe it is properly part of the Record before me. Abban, 434 Mass. at 262, 265-267 and n. 20 (review of Commission decision based solely on the record before the Commission). However, even were I to take judicial notice of the MCAD Disposition, that would not change this analysis, because the Disposition is not material to the issue presented.

The two agencies have distinct jurisdictions, properly reflected in the scope of their respective statutes, and in this Commission's Decision. The Supreme Judicial Court has recently made clear that the two statutes may interact, and when they do "we construe statutes to harmonize and not contradict each other." . . . The commission's mandate is to protect civil service employees from termination from employment for reasons that violate basic merit principles. As most relevant here, the commission may determine that an employee has been subject to, and rendered unfit by, racist and retaliatory acts and an arbitrary and capricious response to those acts by the municipality." Alston, 487 Mass. at 293-297, and cases cited.⁹

The focus of this Commission's Decision was not disparate treatment on the basis of age, disability, or race. Rather, it addressed the presence of personal bias within the workplace based on favoritism or political considerations, a matter over which it holds primary jurisdiction, and which is its fundamental purpose. Cambridge, 43 Mass. App. Ct. at 304. Rockland's argument that the Commission's Decision "rel[ies] upon this vague application of 'animus,'" Memorandum at page 16, is belied by the Record before me.

⁹ The Alston decision issued on April 27, 2021, after the briefing and argument in this case.

The Commission's Just Cause Findings

In addition to arguing that the Commission erred in finding bias, the Town argues the Commission erred in ruling that the Town had failed to establish just cause to discipline Erickson for: (1) receiving paid sick leave for his April 3, 2017 shift while deployed to the federal government program; and (2) failing to produce the payroll records ordered by Chief Duffey. The Commission argues in response that the factual record on these questions was equivocal at best. Defendant's Memorandum in Support, at pages 19-20.

The Commission made the first ruling based on its determination that Erickson's attendance at the federal government program fell within the exception in § 3.1 of the SOG, and that Erickson had sufficient holiday leave time when he deployed to the program. However, I agree with the Town that this finding conflicts with the Commission's other findings, that Erickson had been cleared to return to work prior to attending the program on April 3, 2017, and that he used sick leave on that date despite knowing so. My reading of the Record before me is that Erickson could not take advantage of any exceptions in the SOG, because he was not eligible for sick leave in the first instance, and he used sick leave in a manner that violated the SOG. The potential availability of holiday leave time is irrelevant on the plain reading of the policy – regardless of whether the RFD had discretionarily allowed such leave in the past.

As to the second finding, I discern no evidence in this Record that Erickson ever produced the payroll records requested. To be sure, Erickson provided secondary source information through the private employers, but not the records themselves. To the extent the Commission inferred – without explicitly finding – that these secondary sources constituted sufficient compliance by Erickson with RFD policy, it exceeded its authority in doing so.

However, in its Memorandum the Town in turn inappropriately goes beyond the Record to speculate: “The reality of this situation is that there is reasons Erickson refused to submit the payroll records in question: it is likely that those records showed that the payroll fraud was much more pervasive than just the two days he admitted.” Memorandum in Support at pages 11-12. On the payroll records issue, neither side is persuasive.

However, any error committed by the Commission in these two findings relied upon by the Town was harmless. The RFD was not prejudiced by these findings, because the penalty portion of the Commission’s Decision did not depend upon them. Rather, it is evident that the reduction of Erickson’s penalty was based primarily, if not entirely, on the Commission’s determination that the severity of Erickson’s discipline was motivated by personal bias against him, a finding which was supported by substantial evidence. As such, there is no reason to believe that, had the Commission credited these two additional grounds for discipline, it would have reached a different result on the penalty question. Kavaleski, 463 Mass. at 691-695 (although the commission erred in the considering certain expert testimony, error did not prejudice the department because the decision was supported by substantial evidence independent of the testimony); Catlin v. Board of Reg. of Architects, 414 Mass. 1, 6-7 (1992), quoting G. L. c. 30A, § 14(7) (“The appealing party has the burden of showing that [its] ‘substantial rights ... may have been prejudiced’ by the agency’s [alleged] error.”).

Given the entire Record before me, and taking into account what would fairly detract from the weight of the supporting evidence, I rule that substantial evidence existed to permit the Commission to find bias, and that it adequately explained its conclusion that the penalty the RFD imposed upon Erickson should be modified in light of that bias. Falmouth, 447 Mass. at 826


(Commission may modify disciplinary penalties influenced by improper bias or inequitable treatment even if a public employee is otherwise deserving of discipline). Given the substantial deference the court must accord the Commission, the Plaintiff has not met its heavy burden and the Decision is **affirmed**.

Conclusion

For the foregoing reasons, Plaintiff Town of Rockland's Motion for Judgment on the Pleadings (Paper 16) is **DENIED**, and the Civil Service Commission's Cross-Motion for Judgment on the Pleadings (Paper 17) is **ALLOWED**.

SO ORDERED.

Dated: October 1, 2021



Christine M. Roach