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COMMONWEALTH OF MASSACHUSETTS

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WORCESTER, ss.
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

SUPERIOR COURT
CIVIL ACTION
NO. 2014-00417

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JOAQUIN KILSON,
Plaintiff

OFFICE OF THE ATTORNEY GENERAL
ADMINISTRATIVE LAW DIVISION

vs.

MASSACHUSETTS CIVIL SERVICE
COMMISSION and CITY OF FITCHBURG,
Defendants

**MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION
FOR JUDGMENT ON THE PLEADINGS UPON THE PETITION FOR
REVIEW, PURSUANT TO G.L. c. 30A, § 14, OF THE CIVIL SERVICE
COMMISSION'S DECISION DISMISSING PLAINTIFF'S
ADMINISTRATIVE APPEAL**

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This matter concerns an administrative appeal seeking judicial review, pursuant to G. L. c. 30A, § 14, of the Civil Service Commission's (Commission) dismissal of Joaquin Kilson's (Kilson) appeal of his termination as a Lieutenant in the Fitchburg Police Department. Before the court is Kilson's Motion for Judgment on the Pleadings. The defendant, City of Fitchburg (City), has filed an opposition to this motion.

A hearing was held on October 14, 2014, at which counsel for all parties were heard. Upon a careful review of the administrative record and considering the arguments and memoranda of counsel, Kilson's Motion is **DENIED** for the foregoing reasons.

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BACKGROUND

The administrative record reveals the following relevant facts. Following an internal police investigation, Kilson was terminated from the Fitchburg Police Department by written Notice of Termination from the Mayor, Lisa A. Wong (Mayor Wong), dated May 18, 2012. This decision was not appealed to the Commission until November 30, 2012. On February 6, 2014, the Commission issued a decision granting the City's Motion to Dismiss, thereby dismissing Kilson's appeal, due to Kilson's failure to file a timely appeal in compliance with the ten-day period required by G. L. c. 31, § 43.

Prior to this decision, Kilson initially sought to appeal his termination under the Collective Bargaining Agreement (CBA) between the City and the Police Union. The Chief of Police, Robert DeMoura, denied the grievance and Mayor Wong upheld this denial.

Kilson then filed for arbitration pursuant to the union grievance procedure. In arbitration, on October 10, 2012, the City moved for dismissal, arguing that since this was a disciplinary matter, it was not substantively arbitrable, pursuant to the terms of the CBA. The arbitrator agreed and ruled on November 21, 2012, that disciplinary matters were not covered by the grievance arbitration process.¹ This decision was thereafter affirmed by the Superior Court (Frison, J.) in a decision issued June 6, 2013.

On November 30, 2012, within ten days of the notice of the dismissal of the arbitration, Kilson filed the appeal at issue with the Commission, pursuant to G. L. c. 31, § 43. Upon the City's Motion to Dismiss, the Commission held that Kilson's appeal was untimely, and therefore granted the City's

¹ The arbitrator ruled that Article V, Section 6 of the CBA controlled. That section provides that "matters within the purview of Civil Service, including terminations, are exempt from the grievance/arbitration process . . ." The arbitrator also ruled that the City had not waived the issue of substantive arbitrability and that this issue could be raised at any time.

motion on February 6, 2014.

Under the provisions of G. L. c. 30A, § 14, Kilson now seeks judicial review of the dismissal of his appeal by the Commission. Upon the joining of issues by the Commission's filing of the Administrative Record, Kilson moves for judgment on the pleadings.

DISCUSSION

I. Standard of Review

Kilson's motion for judgment on the pleadings is governed by G. L. c. 30A, § 14. Under said statute, this court may reverse, remand, or modify an agency's decision if the "substantial rights of any party may have been prejudiced" because the decision is based on an error of law or on unlawful procedure, is arbitrary and capricious, unwarranted by the facts, or is unsupported by substantial evidence. *Merisme v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989). The plaintiff bears the burden of demonstrating the invalidity of the agency decision. *Bagley v. Contributory Retirement Appeal Bd.*, 397 Mass. 255, 258 (1986).

In reviewing an agency decision the court is required to "give due weight to the expertise, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it" by statute. G. L. c. 30A, § 14(7); *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992). The reviewing court may not substitute its judgment for that of the agency. *Southern Worcester County Reg. Vocational Sch. v. Labor Relations Comm'n*, 386 Mass. 414, 420-421 (1982). A court may also not reject an administrative agency's choice between two conflicting views, even though the court justifiably could have made a different choice had the matter been presented de novo. *Zoning Bd. of Appeals v. Housing Appeals Comm'n*, 385 Mass. 651, 657 (1982).

II. Analysis

In dismissing Kilson's appeal, the Commission ruled that "appeals of an appointing authority's decision to discipline a tenured civil service employee must be filed ' . . . within ten (10) days after receiving written notice' of an appointing authority's decision to discipline an aggrieved person pursuant to G. L. c. 31, § 43." This statutorily prescribed time limit for the filing of petitions for review is jurisdictional in nature and cannot be enlarged or modified by the Commission. See *Town of Falmouth v. Civil Serv. Comm'n*, 447 Mass. 814, 818-819 (2006) (appeal to Commission must at least be post-marked within ten days of town or city's decision); *Cheney v. Assessors of Dover*, 205 Mass. 501, 503 (1910) (when "a remedy has been created by statute and the time within which it must be pursued is one of the prescribed conditions under which it can be availed of, the [commission] has no jurisdiction to entertain proceedings for relief begun at a later time."). Kilson, having filed an appeal with the Commission over six months following his termination, clearly did not satisfy the ten-day requirement found in G. L. c. 31, § 43.

Kilson argues that at all times, the City knew and acquiesced in his decision to first pursue his assumed rights of appeal under the CBA. Kilson supports this position by evidence of various communications with the City concerning arbitration proceedings under the CBA. These communications by the City, however, never amounted to an estoppel or waiver on the City's part. Moreover, the parties themselves, through agreement, cannot bestow jurisdiction upon the Commission where it does not exist due to late filing.

Furthermore, the decision of *Canavan v. Civil Serv. Comm'n*, 2002 WL 3142, 1757 (Mass. Super. 2002), relied upon by Kilson, is clearly distinguishable on its facts and has no precedential value. In that matter, the Superior Court judge found that Officer Canavan had been terminated as a Boston Municipal Police Department (BMPD) officer on May 20, 1999, at a time when the BMPD

did not have Civil Service status. Subsequent to the grievance arbitrator's decision upholding the termination, Canavan appealed to the Commission, almost a year after his termination. The Superior Court in *Canavan* deemed this filing timely since the BMPD had been granted civil service status during the period after his termination, but prior to the arbitrator's decision. In so ruling, the Superior Court judge relied, in part, upon the communications between the city and Canavan during the arbitration process and, most importantly, the city's failure to notify Canavan of his newly acquired rights when civil service status was granted to the BMPD. This non-disclosure occurred at a time prior to the arbitrator's decision.

The facts presented in this matter are not uniquely unfair or capricious, as was the case in *Canavan*. Moreover, and something not raised by Kilson in placing his reliance on *Canavan*, is that the Superior Court judge's decision was *reversed* by the Appeals Court. *Canavan v. Civil Serv. Comm'n*, 60 Mass. App. Ct. 910 (2004). Therein, the Appeals Court found that both Canavan, and the City, erred in believing that civil service status was not granted to the BMPD until December 24, 1999. *Id.* at 912. In fact, the *Canavan* court held that, "as matter of law St. 1998, c. 282, effectively conveyed permanent civil service status on [B]MPD officers . . . long before Canavan's termination in May of 1999" *Id.* at 912.

Thus, the Superior Court's decision in *Canavan*, on which Kilson relies, is clearly distinguishable from the facts at bar and nonprecedential. The Appeals Court decision in *Canavan* does, however, stand for the proposition that even a mutual mistake of law or fact does not toll the running of the ten-day period for filing since a plaintiff "and his representatives, commencing legal proceedings in an employment termination matter, are held to notice of the applicable law, and despite any ambiguity, there is no legal basis . . . to excuse [plaintiff from the law's requirement]." *Id.* at 912.

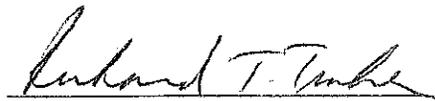
Similarly, the Commission's decision in *Ung v. Lowell Police Dep't*, CSC Case No.: D1-08-150 (August 20, 2009) does not suggest a different outcome. In *Ung*, the Commission dealt with the issue of "[p]ublic employees with civil service status who are members of a collective bargaining unit [who] derive their rights to contest adverse employment decisions under the panoply of several intersecting statutes as well as under contractual rights provided in negotiated collective bargaining agreements." *Id.* at *7. There, the Commission allowed Ung to reopen his timely filed appeal to the Commission concerning his termination as a police officer despite Ung's prior voluntary dismissal of that appeal in favor of contesting his termination under the CBA through arbitration. In the arbitration, Ung faced the same hurdle as Kilson—that the nature of his termination, pursuant to the CBA could, not be arbitrated. While his appeal of the arbitrator's dismissal of the arbitration upon this issue remained pending, the Commission conditionally allowed Ung's motion to reopen his prior appeal.

Kilson states that the *Ung* decision is a recent example of the Commission "allowing a case to proceed *on the merits* to a Commission hearing where an individual's selection of the arbitration process has been foreclosed." (emphasis in original). Therefore, Kilson argues, this court should allow him to also proceed to a Commission appeal hearing. Unlike in *Ung*, however, Kilson never filed a timely appeal to the Commission. This factor prevents the Commission from hearing his appeal. The Commission's decision in *Ung* evidences why Kilson, unlike Ung, may not proceed to a Commission appeal—the lack of an appeal filed with the Commission in compliance with the ten-day requirement located in G. L. c. 31, § 43.

In light of the above discussion Kilson cannot proceed to the Commission on appeal. The Commission's order dismissing Kilson's appeal is affirmed.

ORDER

For the above stated reasons, Kilson's Motion for Judgment on the Pleadings is **DENIED** and judgment is **ORDERED** to enter for defendants.



Richard T. Tucker
Justice of the Superior Court

DATED: November 19, 2014