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COMMONWEALTH OF MASSACHUSETTS

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HAMPDEN COUNTY
CIVIL SERVICE COMMISSION

SUPERIOR COURT
CIVIL ACTION
NO. 13-00349

KENNETH MOREHOUSE

HAMPDEN COUNTY
SUPERIOR COURT
FILED

vs.

DEC - 3 2014

CIVIL SERVICE COMMISSION and another¹

[Signature]
CLERK OF COURTS

**MEMORANDUM OF DECISION AND ORDER ON THE PLAINTIFF'S
MOTION FOR JUDGMENT ON THE PLEADINGS**

On or about January 5, 2012, after a hearing, Kenneth Morehouse was terminated from his civil service position as firefighter for the Town of Weymouth Fire Department (WFD) for allegedly smoking cigarettes on or about October 4, 2011, in violation of G. L. c. 41, § 101A, which prohibits smoking tobacco products by police officers and firefighters. General Laws Chapter 41, § 101A, provides:

“Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment as a police officer or firefighter in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products. The personnel administrator shall promulgate regulations for the implementation of this section.”
G.L. c. 41, § 101A.

On January 12, 2012, Morehouse appealed the termination decision to the Civil Service Commission, pursuant to G. L. c. 31, §§ 42 and 43, on the ground that he was exempt from the smoking prohibition statute. WFD moved to dismiss the appeal, and Morehouse moved for summary judgment. On June 11, 2012, the Commission held a

¹ The Town of Weymouth Fire Department.

hearing on Morehouse and WFD's dispositive motions, and on April 18, 2013, granted WFD's motion to dismiss the matter.

Morehouse timely filed this action for judicial review of the Commission's decision pursuant to G. L. c. 31, § 44 and G. L. c. 30A, § 14. The matter is now before the court on Morehouse's motion for judgment on the pleadings.

Morehouse requests that this court order that he be reinstated to his position without loss of pay or benefits and that he be awarded reasonable attorney's fees and costs. For the following reasons, Morehouse's Motion for Judgment on the Pleadings must be **DENIED**.

BACKGROUND

The facts underlying the Commissioner's decision are as follows. Morehouse was a firefighter, part-time and then full-time, either actively or "laid off," from October 13, 1986, through his termination date, January 5, 2012.² He began his career as a part-time "call firefighter/EMT" in Boxborough, Massachusetts, a non-civil service community.³ From September 1991 through November 1996, Morehouse worked as a full-time firefighter/EMT for Boxborough. In November 1996, Morehouse was appointed to the position of firefighter in Longmeadow, Massachusetts, also a non-civil service position, where he worked until June or July, 2002.

² Morehouse supplemented his income as a part-time "electrician's helper" for his brother from 1989 through 2003.

³ "Call firefighters respond to fires from their homes or places of employment." *Morse v. Board of Selectmen of Ashland*, 7 Mass. App. Ct. 739, 744 n.7 (1979). See generally, *Wenham v. Labor Relations Comm'n*, 44 Mass. App. Ct. 195, 196 (1998) for discussion of the position and obligations of call firefighters.

In July 2002, Morehouse was appointed to the permanent position of full-time firefighter in Springfield, Massachusetts, a civil service community, where he served until he was laid off on March 6, 2003.

On September 5, 2003, Morehouse was appointed as a firefighter with the WFD, a civil service position, where he served until his termination on January 5, 2012. At the time of his appointment with WFD, Morehouse signed a notice given him pursuant to G.L. c. 41, § 101A, that states, "I understand that I am prohibited by law from smoking tobacco products, at any time, as long as I am employed by the City/Town of Weymouth as a firefighter, regardless of rank, and that I must be terminated if I smoke."⁴ (Admin. R. 70).

On October 4, 2011, a video camera recorded Morehouse as he was smoking. Though the recording was viewed at Morehouse's pre-termination disciplinary hearing, WFD was unable to produce the video recording for the Commission. Morehouse's disciplinary hearing record also included medical records, which refer to Morehouse as a "current smoker." The medical records were made a part of the administrative record.

The Commissioner who conducted the hearing and decided this matter relied "on the parties' motions, opposition, oral argument, subsequent electronic messages, and reasonable inferences therefrom; [took] administrative notice of all other matters filed in this case, including, without limitation, documents provided by the Human Resources Division . . . and [took] administrative notice of pertinent statutes, regulations and policies." (Decision at 2).

The Commissioner found that Morehouse had not contested that he had smoked tobacco while a WFD firefighter either at the disciplinary hearing or in the civil service

⁴ Morehouse, apparently mistakenly, dated the document, "9/5/02."

appeal, and found by a preponderance of the evidence that Morehouse had smoked tobacco while so employed. She determined, therefore, that the sole remaining issue was “whether [Morehouse] is subject to G. L. c. 41, § 101A . . . which bars people who smoke tobacco products from being appointed as a police officer or firefighter after January 1, 1988.” The Commissioner determined that Morehouse was subject to the statute and upheld his termination.

DISCUSSION

Morehouse, as the party seeking review under G. L. c. 30A, § 14, bears the burden of demonstrating the invalidity of the agency decision. *Andrews v. Division of Med. Assistance*, 68 Mass. App. Ct. 228, 231 (2007). In 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.’” *Springfield v. Department of Telecomm. & Cable*, 457 Mass. 562, 567 (2010), quoting G. L. c. 30A, § 14 (7). The review is confined to the record. G. L. c. 30A, § 15. The court must also defer to the agency’s determinations of fact and its reasonable inferences drawn from the record. See *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992).

“Thus, a court may not displace an administrative board’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” *Gauthier v. Director of the Office of Medicaid*, 80 Mass. App. Ct. 777, 783 (2011) (quotations and citations omitted). A court may, however, reverse, remand, or modify an agency decision if the “substantial rights of any party may have been prejudiced because the agency decision is based on an error of

law or an unlawful procedure; is arbitrary and capricious or unwarranted by facts found by the agency; or is unsupported by substantial evidence." G. L. c. 30A, § 14 (7).

General Laws chapter 41, § 101A, provides:

"Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment as a police officer or firefighter in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products. The personnel administrator shall promulgate regulations for the implementation of this section." G. L. c. 41, § 101A.

The statute and the rules promulgated thereunder by the Commonwealth's Human Resources Division (HRD) apply to both civil service and non-civil service firefighters.⁵

Morehouse argued to the Commission, as he does now, that if a person was appointed to *any* firefighter position prior to January 1, 1988, he or she is forever exempt from the statutes prohibitions, and may take a position in another community or move from a non-civil service to a civil service firefighter position without having to quit smoking. "The language of the statute clearly dictates that it is not meant to apply to those who began their career as a firefighter, whether appointed to a civil or non-civil service position, prior to the effective date." (Pl.'s Mem. 7). He further argues that to interpret the statute otherwise "can have negative implications on the vertical and horizontal mobility of civil service employees.... It would preclude a whole class of people from seeking employment in other communities and departments." (Pl.'s Mem. 9).

Neither the statutory language nor the HRD rules specify that an exemption is "portable," i.e., that one who is exempt may accept an appointment in another community

⁵ The HRD regulations are known as the Personnel Administrator Rules.

even though they smoke tobacco products, and may thereafter continue to smoke. Morehouse makes the argument that the duration and portability of the exemption is evidenced by the HRD definitions of "appointment."⁶ Under the HRD rules, a civil service appointment is "any appointment whether provisional, temporary or permanent, full-time, part-time, intermittent or reserve, to a firefighter position *from an eligible list established as the result of a civil service examination administered after January 1, 1988.*" PAR 23.1 (a) (emphasis added). A non-civil service appointment includes "provisional, temporary or permanent, full-time, part-time, intermittent or reserve" appointments to a firefighter position *after January 1, 1988.* PAR 23.1 (b). Morehouse argues that because he was a firefighter prior to January 1, 1988, he was exempt from the prohibitions of G. L. c. 41, § 101A, and he was not appointed to the WFD from a list established after a civil service examination, so he was not "appointed" under the HRD rules pertaining to the statute, and, therefore, he continued to be exempt.

The Commissioner who heard and decided Morehouse's case noted in a footnote that the HRD definitions do not specify appointment of "call firefighters,"⁷ notwithstanding that for non-civil service positions, the rule covers "provisional, temporary or permanent, full-time, part-time, intermittent or reserve [firefighters]," and G. L. c. 32, § 4, gives a "call firefighter" the same status as a reserve, or permanent-

⁶ Rule 23.1, Definitions, "appointment":

- a. for positions subject to chapter 31 of the General Laws, means any appointment whether provisional, temporary or permanent, full-time, part-time, intermittent or reserve, to a covered position from an eligible list established as the result of a civil service examination administered after January 1, 1988.
- b. for positions not subject of chapter 31 of the General Laws, means any appointment whether provisional, temporary or permanent, full-time, part-time, intermittent or reserve, to a covered position after January 1, 1988.

⁷ Decision at 11, fn. 3.

intermittent firefighter, for purposes of calculation of retirement benefits. See *Colo v. Contributory Retirement Appeal Bd.*, 37 Mass. App. Ct. 185, 190-191 (1994). See also, *Pierce v. Cotuit Fire Dist.*, 2013 U.S. Dist. LEXIS 38641, *2-*3 (D. Mass. 2013). A person hired as a call firefighter can, in certain circumstances, be regarded as “appointed” under chapter 31 for purposes of calculation of retirement benefits or seniority. However, despite the Commissioner’s finding that the HRD rules applying G. L. c. 41, § 101A did not contemplate “call fighters,” and perhaps because she understood those definitions “to supplement, not supplant” the definition(s) of appointment in the civil service laws (Decision at 10), the Commissioner’s finding that the HRD rules applying section 101A did not pertain to call firefighters did not bear on her ultimate decision.

In making her ruling upholding WFD’s decision to terminate Morehouse, the Commissioner did not rely upon the definitions of appointment found in the HRD rules promulgated after the statute, but instead used a definition of ‘appointment’ derived from G. L. c. 31, §§ 6 and 40. (Decision at 6, 7, 11). General Laws chapter 31, § 1, defines “original appointment” as an appointment made pursuant to either section 6 or section 28 of that chapter.⁸ Section 6 states that an original appointment is one made from an active civil service examination list, except as provided in certain other sections.⁹ One of those “other sections” is section 40, which provides, in pertinent part, that, “[i]f a permanent

⁸ Section 28 pertains to appointments to labor service.

⁹ “Each appointment to a civil service position shall be made by an original appointment pursuant to the provisions of this section or by a promotional appointment pursuant to the provisions of section seven, except as otherwise provided by this chapter or other law.

Each such original appointment in the official service shall be made after certification from an eligible list established as the result of a competitive examination for which civil service employees and non-civil service employees were eligible to apply, except as otherwise provided by sections twenty-six, forty, forty-seven, fifty-six, and sixty.” G. L. c. 31, § 6.

employee shall become separated from his position because of lack of work or lack of money or abolition of his position, his name shall be placed by the administrator on a reemployment list The name of a person placed on such reemployment list shall remain thereon *until such person is appointed as a permanent employee after certification from such list* or is reinstated, but in no event for more than two years.”

G.L. c. 31, § 40 (emphasis added). The Commissioner found that Morehouse was hired by the WFD off of such a reemployment list, and thus he was “appointed” under Sections 1 and 40, though the appointment might not have been an “appointment” as defined by HRD Rule 23.1(a), i.e., he was not appointed from an eligible list established *as the result of a civil service examination*.

The Commissioner wrote:

“The Appellant was not appointed to the Weymouth Fire Department following an examination. Rather, he was laid off from his position in the Springfield Fire Department in March, 2003, and the Respondent appointed the Appellant from reemployment certification No. 230621 in July, 2003. Since the Appellant’s appointment to the Weymouth Fire Department occurred in 2003, his appointment occurred long after the January 1, 1988 date in the statute.” Decision at 12.

It appears that the Commissioner found that, though the language of the HRD Rule may have narrowed the breadth of the definition of appointment in the civil service laws, HRD could not, and did not intend to limit the application of G. L. c. 41, § 101A to only those persons who were “appointed” under Rule 23.1’s definitions. In other words, any firefighter or police officer appointed to civil service position pursuant to G. L. c. 31 after the enactment of the anti-smoking statute was in a “covered” position, subject to its prohibitions. Thus, regardless of Morehouse’s job status before 2003, he was subject to the smoking prohibition of G. L. c. 41, § 101A when appointed to the WFD.

The Commissioner was not persuaded by Morehouse's argument on policy grounds that, unless he was perpetually exempt his opportunity for transfer to firefighter positions in other communities would be impaired. Rather, the Commissioner focused on the policy considerations behind enactment of the statute as articulated in *Town of Plymouth v. Civil Serv. Comm'n*, 426 Mass. 1 (1997), "to prevent police officers and firefighters from increasing their risk of hypertension and heart disease by smoking and, therefore, their eligibility for disability retirement benefits under G. L. c. 32, § 94... so that, over a period of time, police and fire departments will have a workforce free of serious disease-causing addiction." *Id.*, at 7. The decision merely placed him in the same status as other smokers who might wish to seek an appointment to a covered position; he had to quit smoking.

Morehouse raises for the first time in this petition the issue of the uniformity of enforcement of the smoking ban. Petitioner argues that there was no evidence presented to the Commission to support a finding that G. L. c. 41, § 101A was uniformly enforced, and therefore his termination was arbitrary or capricious. The defendant has moved to strike the argument because the issue was not raised before the Commission.

I agree that the argument cannot properly be raised at this juncture.¹⁰ But even if I were to consider it, it would be of no avail to Morehouse. First of all, Morehouse provided no evidence at any level that the policy was *not* uniformly enforced. Second, as the Commissioner noted in her decision, the anti-smoking statute and rules promulgated thereunder mandate that a proven violation of the statute requires termination. *Town of Plymouth*, 426 Mass. at 5-6 (plain wording of the statute expresses mandatory directive that violator may not continue in employment). While failure to enforce an employment

¹⁰ See endorsement allowing defendant's motion to strike.

policy may bring into question whether a discharged employee understood that a violation might have severe consequences, *Still v. Commissioner of Employment and Training*, 423 Mass. 805, 813 (1996), G.L. c. 151A, § 25, the consequences of smoking are set forth in the statute without ambiguity. A municipality's failure to uniformly enforce the law would not create an exemption for anyone violating it.

CONCLUSION

The Civil Service Commission's decision appears to be based on the plain language of G. L. c. 41, § 101A, and G. L. c. 31, and cannot be said to be based on an error of law. It is not arbitrary and capricious or unwarranted by the facts found by the Commission.

ORDER

Accordingly, it is hereby ORDERED that Kenneth Morehouse's Motion for Judgment on the Pleadings is DENIED, and the Commissioner's decision, dated April 18, 2013, is AFFIRMED, and that Judgment shall enter for the defendants, Town of Weymouth Fire Department and the Civil Service Commission.

December 2, 2014



John S. Ferrara
Justice of the Superior Court