COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-797

BRIAN GONSALVES

vs.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, Brian Gonsalves, appeals from a decision of the Commonwealth Employment Relations Board (board) affirming the dismissal of his prohibited practice charge filed against the City of Melrose (city). We affirm.

Gonsalves filed a charge against the city with the Department of Labor Relations (DLR), alleging that the city engaged in prohibited practice under G. L. c. 150E, § 10 (a) (3) and (4) when the city terminated his employment as a fire fighter one week prior to the end of his probationary period in retaliation for reporting elevated carbon monoxide levels at a fire station during a union meeting.[2] The DLR dismissed the

[1] City of Melrose.

[2] It is undisputed that Gonsalves's report to the union about the elevated carbon monoxide levels constituted concerted, protected activity under G. L. c. 150E, § 2.

§ 10 (a) (3) charge after an investigation found that Gonsalves had failed to show that the city was aware that Gonsalves had reported elevated carbon monoxide levels to the union.[3] Gonsalves appealed DLR's decision to dismiss to the board, claiming that the DLR investigator did not consider whether there was inferential evidence of the city's knowledge. The board affirmed DLR's decision to dismiss, finding that there was no direct or inferential evidence that the city knew that Gonsalves had reported elevated carbon monoxide levels to the union. Gonsalves now appeals the board's decision, claiming that (1) his First Amendment rights were violated because the city fired him based on protected speech at the union meeting,[4] (2) the board erred in finding that there was not sufficient evidence to support an inference of employer knowledge, and (3) the board erred in finding that, as a probationary employee, Gonsalves did not have a right to challenge his termination.

Discussion. "We review the board's decision in accordance with the standards set forth in G. L. c. 30A, § 14 (7), governing appeals from final administrative agency decisions. See G. L. c. 150E, § 11 (i)." Somerville v. Commonwealth

[3] The charges under § 10 (a) (3) and (4) were both dismissed; however, Gonsalves seeks review of the dismissal of the § 10 (a) (3) claim only.

[4] Gonsalves did not make this argument before the board, and it therefore will not be addressed as it is waived. McCormick v. Labor Relations Comm'n., 412 Mass. 164, 170 (1992).

Employment Relations Bd., 470 Mass. 563, 567-568 (2015). A "final administrative agency decision will be set aside if, among other grounds, it is '[u]nsupported by substantial evidence,' G. L. c. 30A, § 14 (7) (e), or '[a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law,' G. L. c. 30A, § 14 (7) (g)." Commissioner of Admin. & Fin. v. Commonwealth Employment Relations Bd., 477 Mass. 92, 95 (2017). "Substantial evidence [is] such evidence as a reasonable mind might accept as adequate to support a conclusion. The applicable standard of review is highly deferential to the agency and requires the reviewing court to accord due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." Cave Corp. v. Conservation Comm'n of Attleboro, 91 Mass. App. Ct. 767, 773-774 (2017) (quotations omitted). We will not set aside a finding of the board unless the administrative record "points to an overwhelming probability of the contrary." Anderson v. Commonwealth Employment Relations Bd., 73 Mass. App. Ct. 908, 910 (2009) (quotation omitted).

Gonsalves, as the charging party, bore the burden of showing that the city "engaged in [a] prohibited practice." Quincy City Hosp. v. Labor Relations Comm'n., 400 Mass. 745, 749 (1987). He argues here, like he did to the board, that there

was sufficient evidence to support an inference of the city's knowledge of his report of elevated carbon monoxide levels during a union meeting. In his appeal to the board, Gonsalves claimed that an inference of knowledge could be drawn based on the "small plant doctrine" and other circumstantial evidence including the timing of the termination, the employer's general knowledge of union activities, the employer's general animus against the union and the pretextual reasons given for the termination. In affirming the DLR dismissal, the board reviewed the investigative record and the arguments of the parties. Additionally, the board's decision carefully analyzed Gonsalves's claim that the board should infer employer knowledge. We are satisfied that the record supports the board's finding that Gonsalves had not shown that the city was directly or inferentially aware that he had reported the elevated levels of carbon monoxide to the union.

To the extent Gonsalves argues that the board erred in finding that he had no remedy as a probationary employee, we conclude this argument is without merit. While G. L. c. 150E protects employees from retaliation and discrimination for engaging in protected activity, the board demonstrated that Gonsalves failed to present sufficient evidence of these claims. Had there been evidence of such discrimination, Gonsalves's

status as a probationary employee would not have barred him from pursuing legal action and the board did not find otherwise.

Given the limited scope of our review on appeal, we cannot conclude that the board's decision was unsupported by substantial evidence, not in accordance with the law, or otherwise arbitrary, capricious, or an abuse of discretion.

Decision of the Commonwealth Employment Relations Board affirmed.

By the Court (Blake, Neyman & Lemire, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: May 26, 2022.

[5] The panelists are listed in order of seniority.