

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

Suffolk, ss.

One Ashburton Place
Boston, MA 02108
(617) 727-2293

Jorge A. Amaral,
Appellant

v.
City of New Bedford,
Respondent

Case No. D-05-408

DECISION ON RESPONDENT'S MOTION TO DISMISS

Jorge A. Amaral (hereinafter referred to as "Appellant"), a Sanitarian for the City of New Bedford (hereinafter referred to as "Respondent"), filed this appeal on November 27, 2005, challenging the Appointing Authority's decision to terminate him for voluntary separation from employment pursuant to G.L. c.31, §38 on November 2, 2005. Days before the Appellant filed his appeal with the Civil Service Commission, he sent the Commission a copy of the letter he had sent to Mr. Thatcher in New Bedford in which he included 3 pages of information related to his leave and his health, as well as requested a hearing before the City of New Bedford. The above-entitled matter had a Pre-Hearing Conference at this Commission on March 30, 2006 at 11:30 AM. At the Pre-Hearing Conference, the Appellant appeared pro se.

The Respondent filed a Motion to Dismiss at the Pre-Hearing Conference on March 30, 2006. On March 15, 2006, the Respondent, represented by Jane Medeiros Friedman, the Respondent's First Assistant City Solicitor, filed a Memorandum in Support of Respondent's Motion to Dismiss with the Commission. With the Motion to Dismiss, the Respondent filed exhibits (A-K). The Respondent's evidence included: the affidavit of Respondent's Deputy Building Commissioner Robert Thatcher dated March 6, 2006 (A); Appellant's Personnel Department file (B); Respondent's letter noting the Appellant's Medical Leave dated August 10, 2005 (C); Appellant's letter explaining his medical condition dated September 21, 2005 (D); the affidavit of Respondent's Director of Labor Relations and Personnel Angela M. Natho's dated March 10, 2006 (E); Respondent's letter explaining the Appellant's voluntary separation from employment dated October 31, 2005 (F); certificate of service for Exhibit F (Respondent's letter to the Appellant) from the US Postal Service dated November 2, 2005 (G); Appellant's letter requesting a hearing dated November 12, 2005 (H); Appellant's completed Discipline Appeal Form dated November 22, 2005 (I); Notice of Hearing from Appointing

Authority dated November 29, 2005 (J); Respondent's letter confirming the discipline taken after the Hearing dated December 2, 2005 (K).

The Appellant appeared pro se at the Pre-Hearing Conference and did not respond in writing to the Respondent's Motion to Dismiss, although the Appellant had until April 30, 2006 to respond. The Appellant did not make any substantial oral arguments during the Pre-Hearing Conference.

Written in the Respondent's Motion to Dismiss, pursuant to 801 CMR 1.01 (7)(g)(3), the Respondent moved to dismiss the appeal on the basis that the Commission lack of jurisdiction to decide the matter. From the evidence in the record, I find:

1. The Appellant was appointed to the permanent position of Sanitarian on February 4, 1991 by the Respondent. (Exhibit A).
2. On July 1, 2003, there was a departmental re-organization within the City of New Bedford and the Sanitarians, including the Appellant were transferred from the Health Department to the newly-created Department of Inspectional Services. (Exhibit A).
3. As the Commissioner of Inspectional Services, Robert Thatcher serves as department head and Appointing Authority for those civil service employees employed by the City of New Bedford Department of Inspectional Services. (Exhibit A).
4. The Appellant used up his paid sick days as of October 24, 2004. After October 24, 2004, the Appellant was on "No Pay" status and was using a "Sick Leave Bank." (Exhibit B).
5. The Appellant received a medical leave of absence for the period of time beginning March 21, 2005 through May 25, 2005. (Exhibit A).
6. The Appellant received a second medical leave of absence for the period of time beginning May 25, 2005 through June 30, 2005. (Exhibit A).
7. The Appellant received a third medical leave of absence for the period of time beginning July 1, 2005 through August 26, 2005. (Exhibit A).
8. On August 10, 2005 Commissioner Thatcher sent the Appellant a letter advising him to complete the enclosed Family Medical Leave Act paperwork and submit it to the Personnel Office, in the event he was unfit for duty at the expiration of his medical leave of absence. (Exhibit C; Exhibit A).
9. On September 21, 2005, the Appellant sent a letter to Commissioner Thatcher indicating that he had received the August 10, 2005 letter. The Appellant indicated in his letter that he remained unfit for duty, that he had an appointment with his physician on October 11, 2005 and that he would forward further information after that appointment. (Exhibit D; Exhibit A).

10. The Appellant did not request an additional leave of absence, he did not submit the request for Family Medical Leave Act to the Personnel Office and he failed to provide additional information to the City after October 11, 2005. (Exhibit E; Exhibit A).
11. The Personnel Administrator has delegated authority to Angela Natho, Personnel Director, to act in the capacity of administrator for the City of New Bedford, with respect to the civil service functions including notice to the administrator pursuant to G.L. c. 31, §38. (Exhibit E).
12. On October 31, 2005, Commissioner Thatcher sent Ms. Natho a letter indicating that the Respondent had not heard from the Appellant since September 21, 2005, and that the Appellant had permanently and voluntarily separated from employment, pursuant to G.L. c.31, §38 and §68. By sending a copy of this letter to the Appellant, the Appellant was advised that he could request a hearing before Commissioner Thatcher within ten days of the notice. (Exhibit E; Exhibit A; Exhibit F).
13. The Appellant received Mr. Thatcher's letter dated October 31, 2005 on November 2, 2005. (Exhibit G; Appellant Exhibit 1).
14. On a work status form dated November 1, 2005, the Appellant's treating physician Dr. William Creevy recommended the Appellant not return to work. (Exhibit D; Appellant Exhibit 1).
15. On November 12, 2005, the Appellant sent a letter requesting a hearing and also requesting a leave of absence. In the letter, the Appellant states, "At present I remain and continue under physician's care for my knee injury with both the Department of Orthopedic Surgery at Boston Medical Center and the Lahey Clinic located in Greater Boston, MA. My next scheduled visit with the Dept. of Orthopedic Surgery at Boston Medical Center in Boston, MA is for December 13, 2005." (Exhibit D; Exhibit H; Exhibit A; Appellant Exhibit 1).
16. On November 27, 2005, the Appellant filed an Appeal with the Civil Service Commission pursuant to G.L., c. 31, §42 and §43. (Exhibit J; Exhibit A).
17. On November 27, 2005, Commissioner Thatcher scheduled a hearing in New Bedford on December 1, 2005. (Exhibit J; Exhibit A)
18. A Hearing was held on December 1, 2005 in the City of New Bedford. On December 2, 2005, Commissioner Thatcher sent a letter to the Appellant advising him that further leaves of absence would not be granted. In addition, the Commissioner advised the Appellant that he could contact him if he is deemed fit for duty at a later date. (Exhibit K; Exhibit E; Exhibit A).

19. After receiving Commissioner Thatcher's denial of a further leave of absence, the Appellant made no request for review by the delegated administrator, Personnel Director, Angela Natho. (Exhibit E).

The role of the Civil Service Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). In order to show reasonable justification, the appointing authority must demonstrate that "the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of the public service." School Committee of Brockton v. Civil Service Commission, 43 Mass. App. Ct. 486, 488 (1997). This burden must be proven by a preponderance of the evidence. Town of Falmouth v. Civil Service Commission, 61 Mass. App. Ct. 796, 800 (2004). The Commission does not possess the authority "to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Id.

Pursuant to G.L. c. 31, §38:

"Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight, an appointing authority shall send by registered mail a statement to the person named in the report, informing him that (1) he is considered to have permanently and voluntarily separated himself from the employ of such appointing authority and (2) he may within ten days after the mailing of such statement request a hearing before the appointing authority. A copy of such statement shall be attached to such report to the administrator.

The appointing authority may restore such person to the position formerly occupied by him or may grant a leave of absence pursuant to section thirty-seven if such person, within fourteen days after the mailing of such statement, files with the appointing authority a written request for such leave, including in such request an explanation of the absence which is satisfactory to the appointing authority. The appointing authority shall immediately notify the administrator in writing of any such restoration or the granting of any such leave.

If an appointing authority fails to grant such person a leave of absence pursuant to the provisions of the preceding paragraph or, after a request for a hearing pursuant to the provisions of this section, fails to restore such person to the position formerly occupied by him, such person may request a review by the administrator. The administrator shall conduct such review, provided that it shall be limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.

No person who has been reported as being on unauthorized absence under this section shall have recourse under sections forty-one through forty-five with respect to his separation from employment on account of such absence

For the purposes of this section, unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven."

Due to the fact that the Appellant was deemed to have permanently and voluntarily separated himself from his employ with the City of New Bedford on October 31, 2005,

pursuant to the provisions of G.L. c. 31, §38, the Commission lacks jurisdiction to review this matter. In a similar case, the Appeals Court confirmed this clear interpretation of section 38. Police Commissioner of Boston v. Civil Service Commission, 29 Mass. App. Ct. 470 (1990)(Commission lacked jurisdiction to review discharge of police officer for unauthorized absence exceeding 14 days).

On October 31, 2005, the Respondent sent the Appellant requisite notice that he was considered to have permanently and voluntarily separated himself from the employment of the City of New Bedford under the provisions of G.L. c. 31, §38. This notice was sent after the Appellant failed to appear at work after his medical leave expired on August 26, 2005, well more than the 14-days required by G.L. c. 31, §38.

Consequently, Civil Service Commission has no jurisdiction in this case. The Respondent's Motion to Dismiss is *allowed* and the Appellant's appeal is *dismissed*.

Civil Service Commission

Donald R. Marquis,
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Guerin, Marquis, Taylor; Commissioners) on December 7, 2006.

A true record. Attest:

Commissioner.

Either Party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, §14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, §44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.

Notice to:

Jorge A. Amaral
Jane Medeiros Friedman, First Assistant City Solicitor