COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

JOSEPH ANDRADE,
Appellant

v.

D1-17-189

CITY OF CAMBRIDGE,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

On September 22, 2017, the Appellant, Joseph Andrade (Mr. Andrade), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Cambridge (City) to terminate him from employment with the City's Fire Department.

On November 7, 2017, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Andrade, his counsel and counsel for the City. As part of the pre-hearing conference, the City submitted a Motion to Dismiss. Mr. Andrade filed an opposition on December 7, 2017.

Based on the City's motion, with attachments and Mr. Andrade's opposition, with attachments, it appears that the following facts are not in dispute:

1. On March 13, 2016, Mr. Andrade began his employment as a firefighter with the City's Fire Department.
2. On February 1, 2017, Mr. Andrade was arrested for a domestic assault and battery.
3. On February 2, 2017, the City's Fire Department, as a result of this arrest, placed Mr. Andrade on paid administrative leave.
4. On March 7, 2017, the City's Acting Fire Chief posted a General Order stating that Mr. Andrade and eight other " … Firefighters on Probation (F.F.O.P.) have reached the status of firefighter, effective March 13, 2017 at 0700 hours."
5. On April 12, 2017, Mr. Andrade was arrested for assault and battery and witness intimidation, regarding a second incident involving the same alleged victim (his girlfriend) that was involved in the February 1st incident.
6. On April 14, 2017, a temporary restraining order was issued against Mr. Andrade, ordering, among other things, that Mr. Andrade stay away from the alleged victim.
7. In a letter dated April 19, 2017, the City Manager (who serves as the civil service appointing authority), notified Mr. Andrade that he (Mr. Andrade) was suspended without pay and that a hearing would be held to determine if Mr. Andrade should be terminated.
8. On April 20, 2017, the temporary restraining order issued against Mr. Andrade was extended through April 20, 2018.
9. On May 30, 2017, the City's Personnel Director held a hearing, which was attended by Mr. Andrade, a union representative and his counsel.
10. In a memorandum dated September 8, 2017, the City's Personnel Director recommended that the City Manager terminate Mr. Andrade from the City's Fire Department.
11. On September 14, 2017, the City Manager terminated Mr. Andrade's employment.

Relevant Civil Service Law

G.L. c. 31, § 34 states in relevant part:

"During the probationary period, he may be subject to a performance evaluation during his first two months of service and a second evaluation may be conducted at least one month prior to his sixth month anniversary date of service. The appointing authority may extend the probationary period for a period of two months if the second evaluation of the probationary employee is unsatisfactory. Such evaluation may be utilized by the appointing authority, but in no instance shall the appointing authority be required to consider the results of such evaluation in a determination of granting such employee permanent or tenured status. Nothing contained herein shall require an appointing authority to evaluate a probationary employee and in no such instance shall such evaluation grant such probationary employee any greater rights than those contained in this section.

…

If the conduct or capacity of a person serving a probationary period or the character or quality of the work performed by him is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such notice, such person shall be deemed to be a tenured employee upon the termination of such period."

G.L. c. 31, § 41 states in relevant part:

"Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee

a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. In the case of a second or subsequent suspension of such employee for a period of more than five days, reinstatement shall be subject to the approval of the administrator, and the notice of contemplated action given to such employee shall so state. If such approval is withheld or denied, such employee may appeal to the commission as provided in paragraph (b) of section two."

G.L. c. 31, § 61 states:

"Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a town where the civil service law and rules are applicable to such position, a person shall actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he shall be considered a full-time tenured employee in such position, except as otherwise provided by civil service rule. The administrator, with the approval of the commission, may establish procedures to ensure the evaluation by appointing authorities, prior to the end of such probationary period, of the performance of persons appointed as regular police officers or fire fighters."

Analysis

The City argues that, at the time he was terminated, Mr. Andrade could not have been a tenured employee because he had not performed the duties of his position for twelve months as required by Section 61. Therefore, since Mr. Andrade was not a tenured employee, the Commission has no jurisdiction to hear this appeal. Mr. Andrade concedes that he was placed on paid administrative leave and that he did not perform the duties of his position for twelve months. However, Mr. Andrade argues that he became a tenured employee when the City failed to extend his probationary employee under Section 34 and, therefore, the Commission has jurisdiction to hear his appeal to determine if there was just cause to terminate his employment.

Among the cases cited by the City to support its argument that Mr. Andrade was not a tenured employee at the time of his termination is Police Commissioner of Boston v. Cecil, 431 Mass. 410 (2000). Mr. Andrade argues that the facts here are distinguishable from Cecil.

In Cecil, the SJC summarized the facts found by the Commission as follows:

“Cecil was appointed a Boston police officer on March 22, 1995, and thus began his one-year probationary period in the position. On March 12, 1996, the Probate and Family Court issued an ex parte protective order against Cecil pursuant to G. L. c. 209A. Cecil notified his captain of the existence of the order, as required by the department's rules and regulations, and that a hearing was scheduled for March 22. He surrendered his service weapon, also in accordance with the department's rules and regulations.

Cecil was the subject of an ongoing departmental investigation that had begun earlier in March, 1996, involving his marital circumstances, prior military experience, and a civilian complaint. As a result of that investigation, the bureau of internal investigations (bureau) had recommended that Cecil was unfit for duty.

The commissioner notified Cecil on March 13, 1996, that, effective the next day, he was being placed on paid administrative leave and relieved of his duties as a Boston police officer pending the outcome of the investigation. On March 21 the commissioner notified Cecil that pursuant to G. L. c. 31, s. 34[3], his probationary period was being extended for two months to May 21, 1996. No reasons for the extension were stated.

On March 22, 1996, the ex parte protective order was vacated. Accordingly, Cecil notified his captain and requested permission to return to his duties. He received no response. His request was renewed on March 25, 1996, by counsel, who also requested rescission of the extension of his probationary period. There was no response.

The bureau, as part of its ongoing investigation of Cecil, sought an evaluation of his fitness for duty from the department's medical unit. Cecil was evaluated by a psychologist during July, 1996, and a report was submitted to the bureau in October. On October 22 the commissioner notified Cecil pursuant to s. 34, fifth par., that his employment was terminated for unsatisfactory "conduct and capacity" during his probationary period. The letter referred to the psychological report and recent information indicating "a propensity for untruthfulness and violence . . . characteristics . . . unsuitable for a Boston [p]olice offficer.

Cecil appealed to the commission pursuant to G. L. c. 31, §§ 42 and 43, on October 29, 1996, and a hearing took place before the division of administrative law appeals. The administrative magistrate concluded that the department's use of the administrative leave to extend Cecil's probationary period of employment was inconsistent with the "basic merit principles[4]" of civil service because it was intended, at least in part, to block his attainment of tenure and the accompanying job protections afforded by G. L. c. 31, §§ 41-45. The administrative magistrate also concluded that, absent statutory authority to extend or toll the probationary period of employment during an administrative leave, such leave can have no such effect, wherefore Cecil must be deemed to have completed his probationary period of employment and entitled to tenure. She recognized the legitimate purpose of the department's investigation into Cecil's conduct and capacity to serve as a Boston police officer, but discounted it for the reasons stated. She recommended that Cecil be recognized as having acquired tenured status such that the department was required to follow the procedural requirements of G. L. c. 31, §§ 41-42, before terminating his employment. She further recommended that Cecil be restored to his position with back pay. The commission adopted the findings of the administrative magistrate and ordered the

recommended action. The Superior Court affirmed the decision of the commission.

The SJC offered the following analysis in overruling the Superior Court:

“When interpreting an earlier version of s. 34 we said that its "manifest purpose is that the fitness of an appointee be actually demonstrated by service within a probationary period." Younie v. Director of Div. of Unemployment Compensation, 306 Mass. 567, 570 (1940). This purpose is "designed to benefit the public." Leominster v. International Bhd. of Police Officers, Local 338, 33 Mass.App.Ct..121, 127 (1992). "With respect to police officers and fire fighters, in particular, the Legislature recognized the special need of a prolonged probationary period by extending the period from six months to one year. See St. 1977, c. 348, and now G. L. c. 31, s. 61. Courage, good judgment, and the ability to work under stress in the public interest and as part of an organization, are qualities that are not quickly perceived. The policy of the statute is to ensure sufficient time for a careful determination whether they are present in sufficient degree." Id. Where s. 61 calls for a newly appointed police officer to "actually perform the duties of such position on a fulltime basis for a probationary period of twelve months" (emphasis added), the intent of the Legislature could not be clearer. The commission exceeded its authority when it credited Cecil the nine days he did not serve in his probationary period.

The department has a legitimate interest in placing any officer on administrative leave pending the outcome of an investigation concerning that officer's fitness to continue serving. There is no challenge to the department's authority to take such action, nor is there any serious dispute here as to the department's basis for taking such action against Cecil. The commission concluded that, because the department could conduct its investigation against Cecil as a tenured employee just as easily as it could if he were a probationary employee, then he should not be deprived of the "basic merit principles" of civil service. That reasoning is hollow. We have made clear that care must be taken "not to hobble the employer unduly in the process of selection for tenure because dislodgment thereafter is notoriously difficult; the rigidities in removing unfit tenured employees which have led to attempts at Federal reform teach a lesson as to the pretenure period also." Costa v. Selectmen of Billerica, 377 Mass. 853, 860-861 (1979). The department proceeded judiciously in this case, taking care to make an informed decision as to Cecil's fitness. It did so out of fairness to him, because it was mindful of its responsibility to the public, and because of the time, training, and money it had invested in Cecil's appointment. It is not disputed that the commissioner could have sent Cecil a termination notice on March 13, 1996, based on the G. L. c. 209A order and the other matters then under investigation. The commissioner chose not to act in haste, and for that Cecil may receive no windfall. The commission's suggestion that the commissioner could have waited until Cecil was tenured before placing him on administrative leave disregards the commissioner's responsibility to the public as well as the public interest, and does nothing to legitimately advance "basic merit principles."

The legitimacy of the need promptly to take a probationary officer out of service pending an investigation as to his fitness justifies the need for tolling his twelve-month probationary period, in the public interest. Other jurisdictions have taken this view. In Matter of Garcia, 225 A.D.2d 123 (N.Y. 1996), aff'd, 90 N.Y.2d 991 (1997), a probationary period was extended pending a fourteen-month investigation into the propriety of an officer's response at the scene of a crime. The officer was placed on modified duty, not one of the statutorily permitted grounds for

extending the period of probation, and the officer made an argument similar to that made here. The court concluded that "because [the officer] was not performing 'police duties,' " the probationary period was tolled. Id. at 126. The court reasoned that the tolling was "consistent with the function of probation, which is to permit the appointing officer the opportunity to evaluate the officer's merit and fitness to perform the duties of police work." Id. The court further reasoned that, consistent with the premise of probation, the department should not be denied the opportunity to conduct a complete and thorough investigation before taking action. Id. at 127. We think the court's reasoning in Matter of Garcia, supra, is applicable here.

The commission's expressed concern that tolling the probationary period pending an investigation opens the process to abuse is answered by the facts of the case. Cecil's leave was not indefinite, but tied to the outcome of the investigation. He was being paid his full salary while the investigation was being conducted, so the department had an interest in concluding the investigation in a timely fashion. See Pennsylvania Dep't of Pub. Welfare v. State Civil Serv. Comm'n, 707 A.2d 589, 591 (Pa. Commw. Ct. 1998) (probationary period may be extended for purpose of good faith evaluation and not as pretext for improper purpose).

Finally, Cecil argues that he was denied a "name-clearing" hearing. See Costa v. Selectmen of Billerica, supra at 862; Fontana v. Commissioner of Metro. Dist. Comm'n, 34 Mass.App.Ct. 63, 70 (1993). He is entitled to such a hearing, but he must request one within a reasonable time after the rescript issues herein. Such a hearing is independent of his termination.

We conclude that the paid administrative leave imposed on Cecil pending the outcome of the investigation into specific matters that affected his fitness to serve tolled his probationary period, and that such tolling was consistent with the purpose of probationary employment and the public interest. The commission's conclusion that administrative leave could not toll the probationary period is an error of law.

The judgment of the Superior Court is vacated. The case is remanded to the Superior Court for the entry of a judgment setting aside the decision of the commission and affirming the commissioner's termination of Cecil's employment. The order for back pay is vacated."

Mr. Andrade argues that Cecil is distinguishable for the following reasons:

1. There are no facts in Cecil indicating that the officer was identified as a full-time employee during the extension of his probationary period and time leading up to his dismissal. In contrast, Mr. Andrade argues that he was identified by the City's Acting Fire Chief as a full-time firefighter effective March 13, 2017, the date his probationary period would have ended (and other later dates where he was listed on fire department rosters).

2. Cecil was placed on paid administrative leave *pending an investigation*.

3. The Boston Police Department *extended Cecil's probationary period* for two months one day before his probationary period would have ended.

The City's motion is accompanied by an affidavit by the Acting Fire Chief stating that his General Order was a mistake and that he had no intention of conferring permanent status on Mr. Andrade. Even, for the purposes of this decision, if I conclude that it wasn't a mistake, the Fire Chief's General Order cannot supersede the statutory requirements regarding when a firefighter obtains tenure.

That leaves the more substantive issue of whether the City's failure to extend Mr. Andrade's probationary period under Section 34 resulted in Mr. Andrade becoming a tenured employee, notwithstanding the requirement in Section 61 that firefighters must perform the duties of the position for twelve months before obtaining tenure.

While it is true that, in Cecil, the Boston Police Department extended Cecil's probationary period under Section 34, pending an internal investigation, the SJC's decision, when read in its entirety, emphasizes the Legislature's clear intent on ensuring that firefighters and police officers *actually perform the duties of the position for twelve months* prior to obtaining tenure stating:

"Where s. 61 calls for a newly appointed police officer to "actually perform the duties of such position on a fulltime basis for a probationary period of twelve months" (emphasis added), the intent of the Legislature could not be clearer. The commission exceeded its authority when it credited Cecil the nine days he did not serve in his probationary period."

Further, just as in Cecil, there is no serious dispute regarding the legitimacy of the City's decision to place Mr. Andrade on paid administrative leave as he had just been arrested for the serious charge of domestic assault and battery. The City's failure to extend Mr. Andrade's probationary period under Section 34 did not result in Mr. Andrade *actually performing the duties of firefighter for the twelve months* as required by the Legislature in Section 61 and, for that reason, Mr. Andrade's probationary period had not ended at the time he was terminated.

Conclusion

Since Mr. Andrade was not a tenured employee at the time of his termination, the

Commission has no jurisdiction to hear his appeal regarding whether there was just cause for his termination, which eventually occurred after he was arrested and charged a second time for a serious crime against the same alleged victim and had a restraining order issued against him that was extended for one year. For this reason, Mr. Andrade's appeal under Docket No. D1-17-189 is hereby ***dismissed.***

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 15, 2018.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:
Alfred Gray, Jr., Esq. (for Appellant)
Philip Collins, Esq. (for Respondent)