COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place
Room 503
Boston, Massachusetts 02108

EMANUEL BRANDAO,
Appellant

v. D1-19-087

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:
Bryan Decker, Esq.
Decker & Rubin, PC
295 Freeport Street
Boston, MA 02122

Appearance for Respondent:
Winifred Gibbons, Esq.
Office of the Legal Advisor
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

Commissioner:
Christopher C. Bowman

DECISION ON MOTION TO DISMISS

Procedural History

On April 8, 2019, the Appellant, Emanuel Brandao (Mr. Brandao), pursuant to the provisions of G.L. c. 31, § 42, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Police Department (BPD) to terminate his employment without first affording him due process requirements provided to tenured employees by G.L. c. 31, § 41. On May 14, 2019, I held a pre-hearing conference which was attended by Mr. Brandao, his counsel and counsel for the BPD. At the pre-hearing, the BPD submitted a Motion to Dismiss Mr. Brandao's appeal, arguing that, at the time of his termination, Mr. Brandao was a probationary employee, who was not entitled to the due process requirements provided to tenured civil service

employees, including a local appointing authority hearing and the right to file an appeal with the Commission. On May 23, 2019, Mr. Brandao filed an opposition to the BPD's Motion to Dismiss.

Background

The following facts do not appear to be in dispute:

1. The Boston Police Academy (BPA) provides training for new Boston Police recruits. The BPA's Massachusetts Criminal Justice Training Council-approved program is about 30 weeks in length and divided into two sections: curriculum and practicum. The curriculum or written portion involves training in laws, rules, and tactics, and evaluations by examinations. The second part, which occurs about 2.5 months after the start of the Academy program, is practical or hands-on training.
2. Mr. Brandao began his required training at the Boston Police Academy on December 5, 2016.
3. Upon beginning the Boston Police Academy on December 5, 2016, the student officers, including Mr. Brandao, received a copy of Boston Police Academy Rules and Procedures which state in part that a probationary period does not include time spent on a leave of absence.
4. The last day of training at the Academy was June 16, 2017. On that day, the Boston Police Commissioner came to the Boston Baptist College, a facility being used that day for training, and swore in the Boston student officers as Boston police officers. After being sworn in, the Boston recruits were issued a badge and a gun. The reason for swearing in the Boston recruits that day was so Boston recruits could serve as full sworn Boston Police officers during the "Sail Boston" event that was scheduled to occur that weekend.
5. On June 17, 2017, Mr. Brandao began performing the duties of a Boston Police Officer as part of the Sail Boston event.

6. On June 21, 2017, a graduation ceremony was held at the IBEW Union Hall in Boston.
7. A Police Commissioner's Personnel Order dated June 21, 2017 stated, "the following named Student Officer [including Mr. Brandao], assigned to the Bureau of Professional Development, Student Officer Unit, Org. #71020, are hereby appointed Probationary Police Officers, effective Friday, June 16, 2017 and hereby reassigned to the BPD / Academy, Org. # 71000. The Probationary Police Officers will be detailed to the below assignments effective Saturday, June 24, 2017."
8. Pursuant to a memorandum from the state's Human Resources Division (HRD) dated March 21, 2003, " … a police officer's twelve-month probationary period begins upon successful completion of the police academy and allowed to perform the duties of a police officer."
9. Consistent with the 2003 HRD directive, the Commission, in Patterson v. Town of Plymouth, 21 MCSR 650 (2008), concluded that Mr. Patterson's probationary period began upon graduating from the Police Academy and being sworn in as a police officer (as opposed to a future date when he worked his first shift).[1]
10. Mr. Brandao took a leave of absence for military leave from October 5, 2017 to November 14, 2017.
11. Mr. Brandao took a second leave of absence for military leave from January 8, 2018 to December 27, 2018.
12. The BPD did not issue Mr. Brandao a written notice that it was extending his probationary period by the number of days he was on military leave following his leaves.

[1] The Commission relied on Board of Selectmen of Brookline v. Smith, 58 Mass.App.Ct. 813, 792 (2003) to support its conclusion in Patterson regarding the probationary period start date. However, in Smith, the question of whether the date of swearing in or the date of actual work was the starting point was not at issue. The issue in Smith was whether time in the Police Academy counted toward the probationary period. Although Smith referred to the swearing in date as the start of the probationary period, there was no indication that Smith did or did not work that day, a matter that was irrelevant in that case. The Commission's decision in Patterson, however, was consistent with the 2003 HRD directive and the Commission has not issued a decision contrary to Patterson in regard to the start date of a probationary period since its issuance.

13. On February 4, 2019, the BPD placed Mr. Brandao on paid administrative leave.

14. As of February 4, 2019, Mr. Brandao had performed the duties of a police officer on a full-time basis for 197 days.

15. On March 28, 2019, the BPD issued Mr. Brandao a termination letter, stating in part:

> "I hereby notify you that your conduct during your probationary period has been unsatisfactory and renders you unfit to be a police officer with the Boston Police Department. Specifically, on or about February 2, 2019, while off-duty and in Rhode Island, you failed to properly secure your Department-issued firearm when you gave you[r] vehicle keys to a civilian and that civilian used those keys to take your firearm."

16. By letter dated April 2, 2019, the BPD notified the Personnel Administrator (HRD) of Mr. Brandao's termination.

17. The BPD did not provide Mr. Brandao with the due process rights provided to permanent, tenured civil service employees, including prior notice, a local hearing, and copies of the civil service law regarding appeal rights, as they concluded that he was in his probationary period at the time of his termination.

Applicable 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.

If a full-time civil service employee is unable to work because of illness during the serving of his probationary period, the appointing authority may postpone the serving of such period, provided that such employee has served an amount of time adequate to satisfy the appointing authority that his services should be retained and provided, further, that such employee shall, upon resuming employment, be required to perform service equal to a full probationary period.

If a person at the time of his appointment or during the serving of his probationary period is not actually employed because of educational leave, he shall not be regarded as a tenured employee until he has served a full probationary period or the remainder thereof, as the case may be, following the termination of said educational leave and his commencing of or return to employment.

The probationary period of an employee shall not be deemed to be interrupted by his temporary appointment pursuant to section six to a position in a higher title in the same departmental unit, by his temporary promotional appointment pursuant to section seven, or by his provisional promotion pursuant to section fifteen."

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."

The Personnel Administration Rules state in relevant part:

PAR.12 PROBATIONARY PERIOD

(2) The probationary period may be extended by the appointing authority beyond the period provided by law by the actual number of days of absence during the statutory period; written notice of such extension shall be given to the employee prior to the expiration of the statutory probationary period.

PAR.13 LEAVES OF ABSENCE

(1) A civil service employee seeking a leave of absence or renewal of same for a period longer than three months shall submit a written request for the leave or renewal to the appointing authority at least twenty-one days before the leave unless submission within such time period is impracticable.

(2) When an appointing authority requests prior approval of the administrator for an employee leave of absence or renewal of a leave of absence under M.G.L. c. 31, §37, for a period to exceed three months, such approval shall be requested at least fourteen days before the leave or renewal of leave of the employee is to commence unless request within such time period is impracticable. Said request shall be in writing. A copy of the request shall be delivered to the affected employee. If approval is granted, the written notice of said approval by the administrator shall be delivered to the applicant.

Arguments

Mr. Brandao argues that: a) the BPD was required to notify him that his probationary period was being extended due to his leave of absence for military leave; b) the BPD failed to notify him that his probationary period was extended; and c) as a result of the failure to notify him of an extension of his probationary period, he had gained permanent status as of the time of his termination and was entitled to all of the due process rights afforded to permanent, tenured civil service employees,

which were not provided to him, warranting his reinstatement.

The BPD argues that, since Mr. Brandao has not performed the duties of a police officer on a full-time basis for twelve months, he cannot be considered a tenured employee. The BPD argues that Mr. Brandao's military leave of absence was not an extension of the probationary period, but, rather, it tolled the probationary period, which does not require a notice under the Personnel Administration Rules. If such notice is required, the BPD argues that the Rules given to Mr. Brandao while enrolled in the Police Academy clearly state that leaves of absences toll the probationary period.

Analysis

Although it is not central to this appeal, Mr. Brandao's probationary period here *began* on June 16, 2017, the day he had completed all of the requirements of the Police Academy and, most importantly, *was sworn in as a Boston police officer*. This probationary period start date is consistent with prior Commission decisions and guidance offered by HRD dating back to 2003.

The legislature provided for an *extension* of this probationary period for one reason: unsatisfactory performance of the probationary employee. In such cases, the Legislature stated that the probationary period could be extended for a maximum of two months, effectively increasing the number of months a probationary police officer shall actually perform the duties of such position on a full-time basis from twelve months to up to fourteen months.

It is undisputed that Mr. Brandao, at the time of his termination, had not performed the duties of a police officer for twelve months. Although Mr. Brandao seeks to distinguish this appeal from the SJC's decision in Police Commissioner of Boston v. Cecil, 431 Mass. 410 (2000), the Court, in Cecil, unequivocally reinforced the need to actually perform the duties of a police officer for twelve months before becoming a permanent, tenured police officer.

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" 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. (emphasis added)

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." (emphasis added)

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***. (emphasis added)

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. Brandao rightfully points out that the underlying facts in Cecil are distinguishable from the facts before the Commission as part of the instant appeal, including that the BPD provided Cecil with notice that the paid administrative leave would impact his probationary period. However, nothing in Cecil stands for the proposition that police officers, such as Mr. Brandao, can be **granted tenure** without actually performing those duties for at least twelve months.

Mr. Brandao also argues that the Commission, in Patterson v. Town of Plymouth, 21 MCSR 650 (2008), previously ruled that the failure of the appointing to notify Patterson that his probationary period was being extended due to a short medical leave, effectively required the police department to credit that time toward the probationary period, giving Patterson tenure as a police officer. The findings in Patterson do state that Patterson took a short-term medical leave and that he was not

notified that his probationary period was being extended. Based on a full reading of the decision, it appears that Patterson could only be considered tenured if those weeks on leave were credited toward the probationary period. The Commission's analysis in Patterson does not explicitly draw that conclusion, however, and more importantly, the primary issue in Patterson appeared to be when the probationary period *began* --- at the time of being sworn in as a police officer or days later when Patterson worked his first shift.

The Commission has more squarely addressed the issue of an alleged lack of notice in cases unrelated to performance-related extensions in Andrade v. City of Cambridge, 31 MCSR 90 (2018) (currently pending appeal in Superior Court). In Andrade, the City, approximately six weeks prior to the expiration of Mr. Andrade's probationary period, placed him on paid administrative leave after he was arrested for a domestic assault and battery. Mr. Andrade never returned to performing his duties as a firefighter and the City terminated him several months later. The City never notified Mr. Andrade that this paid administrative leave would interrupt his probationary period.

In Andrade, the Commission concluded:

> "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", 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.'(emphasis added)*
>
> 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."

Just as in Andrade, the parties in the instant appeal do not dispute that Mr. Brandao had *not actually performed the duties of police officer for twelve months at the time of his termination*. Thus, his probationary period had not ended at the time of his termination and he had not become a permanent, tenured police officer.

That leaves the issue of whether, as argued by Mr. Brandao, the Personnel Administration Rules, carve out an exception to the statutory requirement that an employee is actually required to perform the duties of a police officer before gaining tenure. They do not.

As referenced above, the statute allows for ***one*** circumstance in which a probationary period can be ***extended*** requiring the probationary police officer or firefighter to actually perform the duties of police officer or firefighter for up to two ***additional*** months. That extension, and ***additional*** work requirement, may occur only when the appointing authority has documented performance-related issues and provided the police officer or firefighter with proper notice in a timely manner. Failure of the appointing authority to follow these requirements, including providing the employee with notice, results in the probationary period not being extended and no ***additional*** hours of work being required of the police officer or firefighter in order to obtain tenure. Failure to provide the employee with notice does ***not*** relieve the probationary employee of the *statutory* requirement of the probationary employee to actually perform the duties of a police officer or firefighter before obtaining tenure.

The PARs cannot supersede the statutory requirement of having to actually perform the duties of a police officer or firefighter for twelve months before obtaining tenure, nor do I believe they were intended to. As referenced above, PAR 12.02 states:

"PAR.12 PROBATIONARY PERIOD

(2) The probationary period may be extended by the appointing authority beyond the period provided by law by the actual number of days of absence during the statutory period; written notice of such extension shall be given to the employee prior to the expiration of the statutory probationary period."

Although PAR 12.02 references an "extended" probationary period and an "extension" of the probationary period, it does not – and cannot – actually be referring to an extension in the statutory sense, which term appears only once in the context of performance related extensions of the probationary period, that provides for up to a total of fourteen months of "actual performance" before the employee obtains tenure.

Rather, when read in the proper context, the PARs are clearly referencing additional reasons why a probationary period may be "postponed" (or tolled) absences other than the reasons listed in Section 34 (illness and educational leave). Put another way, the PARs are referring to circumstances in which the *period of time* during which the employee must actually perform the duties for twelve months is being tolled. For example, under PAR 12.02 the BPD may extend the *period of time* that an employee on military leave, such as Mr. Brandao, is given to actually perform the duties of a police officer for twelve months. On the one hand, HRD's rule would not (and could not) enable an appointing authority, other than for performance-related reasons for which specific notice is given, to require the employee to perform the duties of said position for more than twelve months. On the other hand, HRD is fully justified to conclude and provide by rule, that many circumstances beyond illness and educational leave could trigger the need for a postponement or tolling of the probationary period. Importantly, the statutory provisions for postponing or tolling the probationary time for employees on sick or educational leave explicitly state that the employee is not relieved from actually performing the duties for the required number of months before obtaining tenure and there is no statutory notice required in those circumstances. While the PARs can be used to expand the list of reasons for a postponement or tolling, they cannot

be used to override and restrict application of the unequivocal requirement mandated by statute and judicial instruction that a probationary police officer or firefighter actually perform the duties of the position for twelve months before obtaining tenure. I do not construe the HRD rule to intend to impose a notice requirement on the appointing authority that absences for additional reasons will postpone or toll the statutory twelve months' period of service as required by law.

Assuming, arguendo, that the PARs could override the statute in this regard, the BPD did provide Mr. Brandao with fair notice when he first enrolled in the Police Academy, that a probationary period does not include time spent on a leave of absence.

Conclusion

Mr. Brandao had not performed the duties of a probationary police officer for twelve months at the time of his termination. As such, he was not entitled to the due process rights afforded to tenured civil service employees. For this reason, Mr. Brandao's appeal under Docket No. D1-19-087 is hereby ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman,
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on July 18, 2019.

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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 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. 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 to:
Bryan Decker, Esq. (for Appellant)
Winifred B. Gibbons, Esq. (for Respondent)