23-P-1196 Appeals Court

EMANUEL BRANDAO vs. BOSTON POLICE DEPARTMENT & another.[1]

No. 23-P-1196.

Suffolk. November 5, 2024. - January 16, 2025.

Present: Vuono, Meade, & Hand, JJ.

Police, Probationary period, Tenure, Discharge. Civil Service, Decision of Civil Service Commission, Police, Probationary period. Public Employment, Termination. Practice, Civil, Judgment on the pleadings. Administrative Law, Agency's interpretation of regulation.

Civil action commenced in the Superior Court Department on August 16, 2019.

The case was heard by Robert B. Gordon, J., on motions for judgment on the pleadings.

Bryan Decker for the plaintiff.
James J. Megee, Assistant Corporation Counsel, for Boston police department.

MEADE, J. The plaintiff, Emanuel Brandao, appeals from a judgment on the pleadings entered in the Superior Court

[1] Massachusetts Civil Service Commission.

affirming a decision of the Civil Service Commission (commission) to uphold the Boston police department's (department's) termination of the plaintiff's employment without the pretermination process prescribed by G. L. c. 31, § 41. The plaintiff claims that the judge erred in his interpretation of Personnel Administration Rule 12(2) (Par. 12[2]), which, if properly applied, should have entitled the plaintiff to tenured status under G. L. c. 31, § 61, and, consequently, the protections of § 41. We affirm.

Background. On June 16, 2017, the plaintiff was sworn in as a full-time police officer with the department. On February 4, 2019, the department placed the plaintiff on administrative leave while it investigated allegations of misconduct levied against the plaintiff. On March 28, 2019, the department terminated the plaintiff's employment due to the plaintiff's failure to properly secure his department-issued firearm while off duty.

Pursuant to G. L. c. 31, § 41, tenured civil service employees are entitled to written notice and a hearing prior to the termination of their employment. The parties do not dispute that the plaintiff did not receive such pretermination process. Rather, the disputed issue is whether the plaintiff had attained tenured status at the time of his termination. Pursuant to G. L. c. 31, § 61, for a newly appointed police officer to

attain tenured status, the officer must "actually perform the duties of [the] position on a full-time basis for a probationary period[2] of twelve months . . . , except as otherwise provided by civil service rule."

Ordinarily, the plaintiff would have completed the twelve months of active-duty police work necessary to attain tenured status in June 2018. However, at the time the plaintiff was placed on administrative leave in February 2019, he had been credited with only approximately 200 days of such work, as he had taken two military leaves of absence during the course of his employment: (1) from October 5, 2017, to November 14, 2017; and (2) from January 8, 2018, to December 27, 2018. During the pendency of each leave of absence, the department did not credit the plaintiff with time toward his statutory probationary period. As a result, the department did not regard the plaintiff as a tenured employee at the time of his termination.

Pursuant to G. L. c. 31, § 42, the plaintiff filed a complaint with the commission, arguing that the department

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[2] The term "probationary period" is used differently in § 61 and Par. 12(2). In § 61, the term refers to twelve months of actual, full-time performance of job duties. We will refer to this as the "statutory probationary period." In Par. 12(2), "probationary period" refers to the period of time in which the statutory probationary period is completed. We will refer to this as the "probationary period." In accordance with these definitions, we note that the "tolling" of the statutory probationary period is functionally equivalent to the "extension" of the probationary period.

failed to provide the plaintiff with written notice of the extension of his probationary period, as required by Par. 12(2), which operated as an exception to the default tenure requirements of § 61. Rather than providing the plaintiff with written notice after each military leave of absence, prior to the commencement of his employment, the department provided him with a copy of the Boston Police Academy Rules and Procedures (department rules), which stated that the statutory probationary period would not include "[t]ime spent on light duty, worker's compensation, injured on duty leave, sick time, leaves of absence, [and] administrative leave, or suspension." The commission proceeded to dismiss the plaintiff's complaint, concluding: (1) that the failure to provide written notice pursuant to Par. 12(2) does not operate as an exception to § 61; and (2) regardless, the copy of the department rules provided to the plaintiff satisfied the written notice requirement of Par. 12(2). Thereafter, pursuant to G. L. c. 31, § 44, the plaintiff instituted proceedings in the Superior Court for judicial review of the commission's decision under G. L. c. 30A, § 14. The judge affirmed the commission's decision and granted the department's cross motion for judgment on the pleadings. This appeal followed.

Discussion. The plaintiff claims that Par. 12(2) conditions the department's authority to extend an employee's

probationary period on the department's providing written notice of such extension. Therefore, the plaintiff's argument follows, the department's purported failure to provide written notice of the extension of his probationary period functioned as an exception to the default requirement of § 61 that he had to complete twelve months of actual, full-time police work before attaining tenured status. We disagree.

The traditional rules of statutory interpretation apply to rules and regulations. Cohen v. Board of Water Comm'rs, Fire Dist. No. 1, S. Hadley, 411 Mass. 744, 748 (1992). Accordingly, we apply to rules and regulations the principle that "where . . . statutory language is clear, it must be given its plain and ordinary meaning." Nationwide Mut. Ins. Co. v. Commissioner of Ins., 397 Mass. 416, 420 (1986). It therefore follows that, when "regulations are clear and unambiguous," we need not inquire into the unexpressed intent of the promulgating agency. See Cohen, supra at 749. Moreover, we need not accord deference to an administrative agency's interpretation of an unambiguous rule or regulation. DeCosmo v. Blue Tarp Redev., LLC, 487 Mass. 690, 700 (2021). A statute, and thus a rule or regulation, is ambiguous if it is "capable of being understood by reasonably well-informed persons in two or more different senses" (citation omitted). AT&T v. Automatic Sprinkler Appeals Bd., 52 Mass. App. Ct. 11, 14 (2001).

We conclude that Par. 12(2) is unambiguous. Therefore, we need not look further than its express terms, which must be given their plain and ordinary meaning. See Nationwide Mut. Ins. Co., 397 Mass. at 420. In full, Par. 12(2) states, "[t]he 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." The plaintiff claims that the second half of the rule, which establishes the obligation to provide written notice, operates as a condition precedent to the first half of the rule, which provides for the extension of the probationary period. Contrary to the plaintiff's assertion, the second half of the rule is not preceded by conditional language such as "if" or "so long as." Nor does the rule specify that the consequence of a failure to provide written notice would be to credit the days of absence towards the employee's statutory probationary period. See Massachusetts Mun. Wholesale Elec. Co. v. Danvers, 411 Mass. 39, 46 (1991), quoting Commerce Ins. Co. v. Koch, 25 Mass. App. Ct. 383, 385 (1988) ("'Emphatic words' are generally considered necessary to create a condition precedent that will limit or forfeit rights under an agreement").

The plaintiff's interpretation not only lacks textual support, but actually reverses the conditional relationship of the two halves of Par. 12(2). The plain meaning of Par. 12(2) is not that the department's authority to extend the probationary period is dependent on the sending of written notice, but rather that the obligation to send written notice is dependent on the extension of the probationary period. The word "shall" establishes an obligation on the part of the department to provide written notice,[3] but there is no grounding in the text of Par. 12(2) for the inference that such obligation operates as a condition precedent to the extension of the probationary period.[4] Therefore, an appointing authority's failure to provide written notice under Par. 12(2) does not preclude the tolling of a civil service employee's statutory probationary period; it does not operate as an exception "provided by civil service rule," G. L. c. 31, § 61, to the default requirement that a newly appointed civil service employee actually perform the job

[3] "It is axiomatic in statutory construction that the word 'shall' is an imperative." School Comm. of Greenfield v. Greenfield Educ. Ass'n, 385 Mass. 70, 81 (1982).

[4] The plaintiff also claims that the judge erred in departing from a prior decision of the commission purportedly interpreting the written notice requirement of Par. 12(2) as a condition precedent to an appointing authority's ability to extend an employee's probationary period. We disagree. Where, as here, the meaning of a rule is unambiguous, deference to an agency's interpretation (much less a prior interpretation) is not appropriate. DeCosmo, 487 Mass. at 700.

duties on a full-time basis for twelve months before attaining tenured status.

We also note that the plaintiff's argument runs counter to the purpose of G. L. c. 31, § 61. As recognized by the judge, "[t]he manifest purpose" of the statutory probationary period "is that the fitness of an appointee be actually demonstrated by service within a probationary period." Younie v. Doyle, 306 Mass. 567, 570 (1940). Indeed, in Police Comm'r of Boston v. Cecil, 431 Mass. 410, 414 (2000), the Supreme Judicial Court noted that "[t]his purpose is designed to benefit the public. With respect to police officers and fire fighters, in particular, the Legislature recognized the special need of a prolonged probationary period . . . ." (Quotation and citation omitted.) This is required because "[c]ourage, 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" (citation omitted). Id. This, of course, could not occur if an officer was credited with time during which he was not "actually perform[ing] the duties of" a police officer. G. L. c. 31, § 61.

Notwithstanding the above, we conclude that the department provided written notice in compliance with Par. 12(2). The

plaintiff contends that, since Par. 12(2) requires written notice of "such extension," and the actual number of days of absence can only be known after the employee's absence has concluded, the written notice must necessarily (1) be provided postabsence; and (2) numerically express the number of days of the extension. These inferences lack support from the unambiguous text of Par. 12(2), which must be given its plain and ordinary meaning. See Nationwide Mut. Ins. Co., 397 Mass. at 420. The sole temporal limitation imposed by Par. 12(2) is that written notice must be provided "prior to the expiration of the statutory probation period." While the written notice must be one of "such extension," which refers to an extension of the probationary period equal to the actual number of days of absence, Par. 12(2) does not specify that the written notice must communicate the duration of the extension through a numerical figure, as opposed to a formula. In the absence of such a requirement, we conclude that an appointing authority may provide written notice of "such extension" by communicating: (1) the circumstances that will trigger an extension; and (2) under such circumstances, the method or formula for ascertaining the duration of the extension. Such written notice may be provided in advance of an employee's leave of absence.

Here, the department provided the plaintiff with a copy of the department rules, which stated that the statutory

probationary period would not include time spent on leaves of absence. Stated differently, the department rules communicated that (1) a leave of absence would trigger an extension of the probationary period; and (2) the duration of the extension would be equal to the duration of the leave of absence. The plaintiff had sufficient information regarding the extension: he knew that each leave of absence would trigger an extension, he knew that the duration of each extension would be equal to the duration of each leave of absence, and he knew the duration of his leaves of absence. The department rules provided by the department to the plaintiff constituted sufficient written notice under Par. 12(2); the plain language of the rule requires nothing more.

Conclusion. For the reasons set forth above, we affirm the allowance of the defendants' cross motion for judgment on the pleadings.

Judgment affirmed.