

NOTIFY

V514

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
NO. 1984CV02606-C

NOTICE SENT

05-06-20

B.P.D.

W.B.G.

MA.A.G.

R.L.D. JR.

D. + R.

J.E.R.

B.C.D.

EMMANUEL BRANDAO

v.

BOSTON POLICE DEPARTMENT and
MASSACHUSETTS CIVIL SERVICE COMMISSION

MEMORANDUM OF DECISION AND ORDER ON PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiff Emmanuel Brandao (the "Plaintiff") and Defendants Boston Police Department (the "Police Department" or "BPD") and Massachusetts Civil Service Commission (the "Commission") (collectively, the "Defendants") have cross-moved for judgment on the pleadings in respect to Plaintiff's complaint for judicial review of a decision of the Commission. In that decision, the Commission upheld the BPD's dismissal of Plaintiff's challenge to the termination of his employment as a police officer. Plaintiff maintained below that his termination had not been conducted in accordance with the due process required for tenured police officers. The BPD, however, determined, and the Commission agreed, that Plaintiff had not completed the mandatory 12-month probationary period at the time of his termination. Under the governing statute, therefore, Plaintiff was not entitled to pre-termination process, and the Commission dismissed his challenge for lack of jurisdiction. Plaintiff's appeal to this Court followed.

FACTUAL BACKGROUND

Plaintiff was sworn in as a full-time police officer on June 16, 2017. Under the Massachusetts civil service law, officers serve a one-year probationary period. See Mass. G.L. c. 31, § 61. In order to complete the probationary period, a police officer “shall actually perform the duties of such position on a full-time basis for a ... period of twelve months before he shall be considered a full-time tenured employee” Id. Until the 12-month probationary period is satisfied, a police officer will not qualify as a “permanent, tenured civil service employee,” and will thus have no right to appeal the termination of his employment to the Commission. See G.L. c. 31, § 41.

Plaintiff took a leave of absence from the Police Department on October 5, 2017, and returned to active duty on November 14, 2017. Plaintiff then began a military leave of absence (in which he served abroad) that lasted from January 8, 2018 through December 27, 2018.

Although the BPD had not separately notified Plaintiff in writing during either of his leaves of absence that his time off would operate to extend his probationary period, Plaintiff had been provided with a copy of the Boston Police Academy Rules and Procedures (the “Rules”) prior to the commencement of his employment. The Rules set forth the duties and responsibilities of a probationary police officer, and state explicitly that the 12-month probationary period does not include “[t]ime spent on light duty, worker’s compensation, injured on duty leave, sick time, leaves of absence, administrative leave or suspension.”

On February 4, 2019, the Police Department placed Plaintiff on administrative leave while it conducted an internal investigation into allegations that had been made against him. Plaintiff had, at this point, served approximately 200 days of active duty as a police officer, well short of what is required to have completed his 12-month probationary period.

On March 28, 2019, the Police Department notified Plaintiff by letter that his employment was being terminated. The letter stated in relevant part as follows:

“[Y]our 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 your vehicle keys to a civilian and that civilian used these keys to take your firearm.”

Because, consistent with its published Rules, the Police Department did not credit Plaintiff with active duty service during the pendency of his leaves of absence, it did not regard him as having completed his 12-month probationary period. The Plaintiff contests this premise, and such dispute forms the center of the present appeal.

DISCUSSION

I. STANDARD OF REVIEW

Under G.L. c. 30A, § 14,¹ the Court may reverse, remand or modify an agency decision if it is in violation of constitutional provisions, based upon an error of law, is unsupported by substantial evidence, arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. In this case, Plaintiff bears the burden of demonstrating the invalidity of the Commission’s decision. See Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

In reviewing an administrative decision in these precincts, the Court is required to “give due weight to the experience, technical competence, and specialized knowledge of the agency, as

¹ Although Plaintiff has also brought his appeal under G.L. c. 31, § 44, he does not contend that this companion jurisdictional challenge affects the customary analysis under Chapter 30A. It does not. See Plymouth v. Civil Serv. Comm’n, 426 Mass. 1, 5 (1997).

well as to the discretionary authority conferred upon it" by statute. G.L. c. 30A, § 14(7). The reviewing court may not substitute its judgment for that of the agency, but rather must "accord due weight and deference to an agency's reasonable interpretation of a statute within its charge." Police Comm'r of Boston v. Cecil, 431 Mass. 410, 413 (2000).

II. ANALYSIS

While a municipal employer must afford a tenured civil servant an administrative hearing before terminating his employment, the law provides no such right to a probationary employee. New Bedford v. Civil Serv. Comm'n, 6 Mass. App. Ct. 549, 551 (1978). In this regard, the civil service law requires that a police officer "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." G.L. c. 31, § 61. An officer who is still in his probationary period may be relieved of duty without the pre-termination administrative hearing accorded to tenured police; and, in that circumstance, the Civil Service Commission "lacks jurisdiction to hear his appeal." Selectmen of Brookline v. Smith, 58 Mass. App. Ct. 813, 815 (2003).

This was the determination made by the Commission in the case at bar. The Commission found that, as of the date of his termination, Plaintiff had completed just 200 days of actual service as a probationary police officer. Consistent with the published Rules of the BPD (which Plaintiff had received prior to the commencement of his employment as a police officer), the Commission affirmed the Police Department's decision not to treat the nearly one year's time Plaintiff had been on military leave as credited service toward the completion of his 12-month probationary period. For this reason, the Commission determined that Plaintiff had not completed his probationary period, had not served the 12 months of "actual" police duty required to qualify him for tenured status, and was thus ineligible for the pre-termination administrative

hearing he was demanding. The Commission dismissed Plaintiff's appeal on this basis. See G.L. c. 31, § 42.

Upon review of the matter, and granting this agency the deference in the construction of the civil service law to which it is entitled, the Court concludes that the decision of the Commission is fully in accord with the terms and intentions of the statute. G.L. c. 31, § 61 states clearly that "[f]ollowing his original appointment as a permanent full-time police officer ..., 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." Interpreting this language, the SJC has held that the Civil Service Commission exceeded its authority when it treated a police officer who had been placed on administrative leave nine days before the first anniversary of his hire as having completed his probationary period and thereby earned tenure. The Court wrote:

"Where § 61 calls for a newly appointed police officer to *actually perform* the duties of such position on a full-time 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."

Cecil, 431 Mass. at 414 (emphasis in original). Accord Andrade v. Mass. Civil Serv. Comm'n, 2009 WL 6769577 (Mass. Super. Ct. Oct. 25, 2019) (Wilson, J.) (affirming summary dismissal of police officer placed on leave six weeks prior to his one-year hire anniversary, and rejecting contention that officer had become tenured because Police Department "never formally extended his probationary period" prior to terminating his employment).

In his appeal to this Court, Plaintiff argues that Cecil and Andrade are distinguishable on two grounds. First, Plaintiff maintains that neither case addressed the effect of the Commission's Personnel Administration Rule (PAR) No. 12(2). PAR 12(2) states:

“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 probation period.”

The Court recognizes that neither the BPD nor the Commission provided Plaintiff with any days of absence-specific notice that his probationary period was being extended by reason of his leaves of absence.² This fact, however, is of no consequence to the matter of Plaintiff's *tenure* status. The text of PAR 12(2) does *not* state that a failure by the Police Department to notify an employee on leave in writing that his probationary period was being “extended” would operate to convert such time away from work into creditable service toward tenure.³ Indeed, the “actually perform” language of § 61 of the civil service law, the SJC's long-standing construction of the statute in Cecil, and the express terms of the Boston Police Academy Rules and Procedures furnished to Plaintiff prior to the commencement of his employment are to the precisely opposite effect.

² Once again, however, Plaintiff was fairly on notice that this would be the case, having received the Boston Police Academy Rules and Procedures (informing him explicitly that time spent on leaves of absence would not be counted toward his probationary service requirement).

³ A police department might have any number of reasons for wanting to afford an officer additional time to complete the 12-month service requirement needed to attain civil service tenure; and PAR 12(2) provides an administrative vehicle for so informing the officer. But nothing in this rule states (or even implies) that failure of a police officer on leave to receive such a notice means that the officer's non-working leave time will count toward his probationary service in the job.

Our courts have repeatedly recognized the critical role played by the probationary period in the conferral of job-protected tenure status on municipal police and firefighters. The “manifest purpose” of this 12-month window is “that the fitness of an appointee be actually demonstrated by service within a probationary period.” Younie v. Director of Unemployment Compensation, 366 Mass. 567, 570 (1940). As the SJC has declared:

“With respect to police officers and fire fighters, in particular, the Legislature recognized the special need for a prolonged probationary period 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 of whether they are present in sufficient degree.”

Cecil, 431 Mass. at 414.

In these circumstances, the Court agrees with the Commission that automatic tolling of a police officer’s probationary period during the pendency of a leave of absence in which he is not “actually perform[ing] the duties of such position” is “consistent with the purpose of probationary employment and the public interest.” Cecil, 431 Mass. at 416. The Court discerns no error in the Commission’s refusal to allow an internal rule like PAR 12(2), whatever its application might be, to override the provisions and purposes of the civil service law itself.

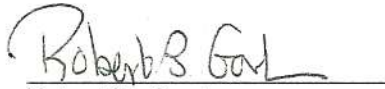
Plaintiff alternately argues that Cecil and Andrade may be distinguished on the ground that such cases involved employees who had been accused of criminal misconduct. The argument appears to be that an extension of the probationary period may be justified on “public policy” grounds where the employee is on leave because he has been accused of misconduct that “calls into question their qualifications to be public safety officers.” Plaintiff’s Memorandum, at 8. This is not the case with employees who take leave to serve in the military, a type of absence

“entirely consistent with his duties as a police officer.” Id. The Court does not agree. Nothing in either the statute or judicial interpretations thereof suggest a legislative intent to accord different tenure-crediting treatment to probationary employees based on the type of leave they take or the underlying circumstances of same. To the contrary, the unmistakable purpose of § 61 of the statute is to ensure that all employees receive a full 12 months of oversight in their “actual” performance on the job before being invested with tenure. The particular reason for the employee’s absence from job service is immaterial.

CONCLUSION AND ORDER

In accordance with the foregoing, the Plaintiff’s Motion for Judgment on the Pleadings is **DENIED**, and the Defendants’ Cross-Motion for Judgment on the Pleadings is **ALLOWED**.

SO ORDERED


Robert B. Gordon
Justice of the Superior Court

Dated: May 1, 2020
(5/1/20)