

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

SCOTT BURNS,
Appellant

v.

CASE NO: D-08-155

CITY OF HOLYOKE,
Respondent

Appellant, Pro Se:

Scott Burns
[REDACTED]

Appointing Authority's Attorney:

Layla G. Taylor, Esq.
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Commissioner:

Paul M. Stein

DECISION ON MOTIONS FOR SUMMARY DECISION

The Appellant brought this appeal pursuant to G.L.c.31, §§41 thru 43, asserting a Section 43 “just cause” claim contesting a two day suspension imposed by the Appointing Authority, the City of Holyoke (Holyoke) on the merits, and a Section 42 “procedural” claim contesting Holyoke’s failure to afford the Appellant a timely hearing. On August 21, 2008, the Appellant moved for Summary Decision. Holyoke opposed the Appellant’s motion and submitted a cross-motion for summary decision on August 26, 2008. A hearing was held by the Commission on August 27, 2008 at which time the motions were argued and the possibility of alternative resolutions discussed. The Commission subsequently was informed that alternative resolution was not possible. The Commission received a supplemental Statement from Mr. Burns in support of his position on September 17, 2008.

Statement of Facts

1. The Appellant, Scott Burns is employed by the City of Holyoke as a 9-1-1 Police Dispatcher, originally part-time in July 2000 and full-time since 2001. (*Burns Motion; Holyoke Motion*)

2. Holyoke and SEIU, Local 888 are parties to a collective bargaining agreement which includes the Dispatcher position as a represented position. Dispatcher Burns has served as the President of the Holyoke Municipal Employees Chapter of the SEIU Local 888 from November 2003 to the present. (*Burns Motion; Holyoke Motion*)

3. Dispatcher Burns also holds a part-time position as a Special Police Officer with the South Hadley Police Department. The collective bargaining agreement between Holyoke and Local 888 does not prohibit such employment. (*Burns Motion*)

4. On June 9, 2008, Dispatcher Burns called in sick for his regularly scheduled tour of duty from 8:00 a.m. to 4:00 p.m. (*Burns Motion; Holyoke Motion*)

5. After calling in sick to the Holyoke Police Department on June 9, 2008, Dispatcher Burns worked an assignment as a Special Police Officer for the South Hadley Police Department, directing traffic on that date during the time that Dispatcher Burns had been scheduled to work that day. (*Burns Motion; Holyoke Motion*)

6. On June 10, 2008, Holyoke's Chief of Police notified Dispatcher Burns that he was imposing a two (2) day suspension for misuse of sick time privileges in violation of Holyoke Police Department rules. (*Burns Motion; Holyoke Motion*)

7. Dispatcher Burns filed an appeal of the suspension with the Mayor of Holyoke, as the Appointing Authority, requesting an Appointing Authority hearing pursuant to

Mass.G.L.c.31, §41, which appeal was received by the Mayor's agent on June 13, 2008.
(Burns Motion; Holyoke Motion)

8. Dispatcher Burns also filed a grievance of the suspension with the Holyoke Chief of Police pursuant to the applicable collective bargaining grievance procedures, which grievance was denied on June 24, 2008 after a grievance hearing on June 20, 2008.
(Burns Motion; Holyoke Motion)

9. Dispatcher Burns served the two (2) day suspension on June 16th and 17th of 2008.
(Burns Motion; Holyoke Motion)

10. On June 25, 2008, Dispatcher Burns received a written notice dated June 24, 2008, informing him that the Mayor of Holyoke would conduct a Section 41 Appointing Authority hearing of his appeal at the start of his shift at 8:00 a.m. on June 27, 2008.
(Burns Motion; Holyoke Motion)

11. By telephone call and letter to the Mayor's office on June 25, 2008, Dispatcher Burns informed the Mayor that he would not be attending the June 27th hearing and would be exercising his right of appeal to the Civil Service Commission under Sections 42 and 43 of the Civil Service Law. *(Burns Motion; Holyoke Motion)*

12. Dispatcher Burns also asserts that the Mayor's office had scheduled the hearing in such a way as to interfere with an ongoing union contract vote and that the Chief of Police and the Mayor pressured Dispatcher Burns to attend the hearing and did not offer any alternative dates. *(Burns Motion)*

13. On June 26, 2008, Dispatcher Burns filed the present appeal with the Commission. *(Burns Motion; Appeal Documents)*

14. The Holyoke Chief of Police asserts that he informed Dispatcher Burns that he would be excused from his shift on June 27, 2008 as needed to attend the Appointing Authority hearing. (*Holyoke Motion*)

15. The Mayor conducted the Appointing Authority hearing on June 27, 2008 as scheduled. Dispatcher Burns did not attend nor did any representative attend on his behalf. On June 30, 2008, the Mayor issued a decision to uphold the suspension. (*Holyoke Motion*)

16. Holyoke asserts that Dispatcher Burns's actions in calling in sick and then working the "road job" for the South Hadley Police Department violated of Police Department rules and regulations and the terms of the collective bargaining agreement concerning sick time. Holyoke also asserts that the discipline imposed on Dispatcher Burns was justified because of prior discipline for sick time abuse. (*Holyoke Motion*)

17. Dispatcher Burns asserts that neither the collective bargaining agreement nor the Holyoke Police Department rules and regulations prohibited his conduct and that the practice and policy of the Holyoke Police Department has permitted such conduct in the past with respect to other police department personnel. He contends that the discipline imposed on him, in the past and in the present appeal, amount to disparate treatment of him because of a bias against him for impermissible reasons, including engaging in protected union activities. (*Burns Motion*)

Conclusion

After considering the submissions and arguments of the parties, the Commission concludes that the undisputed facts compel dismissal of the Appellant's Section 42 claim (for failing to provide a timely Appointing Authority hearing under Section 41 of the

Civil Service Law) but that the Appellant's Section 43 claim (just cause appeal) may not be dismissed and shall proceed to a full hearing of the evidence.

Section 42 Appeal

Under Section 41 of the Civil Service Law, a tenured civil service employee may be suspended for a period of more than five days only after a prior hearing by the appointing authority; but an employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. G.L. c.31,§41. In the latter case, upon request, the employee "shall" be given a hearing by the appointing authority within five days after receipt of the request and a decision rendered within seven days after the hearing. Nothing in Section 41, precludes the appointing authority from deferring the employee's service of a suspension of five days or less pending such a hearing. Id. See Stanton v. Boston Police Dep't. 8 MCSR 33 (1995) (five-day suspension served six week prior to the Appointing Authority hearing)

Section 42 provide a remedy for procedural violations of Section 41:

"An employee who alleges that an appointing authority has failed to follow the requirements of section forty-one . . . may file a complaint with the commission. . . . If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to this employment immediately without loss of compensation or other rights.

"A person who files a complaint under this section may at the same time request a hearing [before the commission] as to whether there was just cause for the action of the appointing authority in the same manner as if he were a person aggrieved by a decision of the appointing authority made pursuant to all the requirements of section forty-one. . . ."

G.L. c. 31, §42 .¹

¹ Section 43 authorized appeals by "persons aggrieved by a decision of an appointing authority made pursuant to section forty-one. . ." G.L. c.31, §43.

Absent refusing to hold any hearing whatsoever or other flagrant violation of Section 41, most appellants generally face a significant burden to establish that they have suffered harm as a result of any procedural misstep, which the statute specifically requires to justify a Section 42 appeal. See, e.g., Rizzo v. Lexington, 21 MCSR 70 (2008) (discharge; §42 appeal denied); Coronella v. Mashpee, 19 MCSR 67 (2006) (discharge; §42 appeal denied); Gariepy v. Department of Correction, 19 MCSR 211 (2006) (discharge; §42 appeal denied); Fopiano v. Scituate, 12 MCSR 154 (1999) discharge; §42 appeal denied); Dodge v. Athol Police Dep't, 11 MCSR 207 (1998) (discharge; §42 appeal denied); Carey v. Nahant, 6 MCSR 149 (1993) (discharge; §42 appeal denied). In the case of a suspension of five days or less, when a prior Appointing Authority hearing is not required, the Commission is hard-pressed to envision how any appellant could establish the necessary prejudice that would justify a Section 42 appeal in such a situation. See Burke v. Quincy, 19 MCSR 86 (five day suspension; §42 appeal denied); Meaney v. Woburn, 12 MCSR 253 (1999) (two day suspension; §42 appeal denied); Stanton v. Boston Police Dep't, 8 MCSR 33 (1995) (five day suspension; §42 appeal denied)

The Commission believes that the overall intent of the Civil Service Law is best accomplished by encouraging public employees and appointing authorities to make an honest, good faith use of the hearing at the Appointing Authority level as a means of expeditiously resolving disputes whenever possible, including those cases involving a suspension of five days or less. Even when the case is not resolved at the Appointing Authority level, a hearing can be useful to the parties and to the Commission to narrow the issues and produce a more efficient appeal process at the Commission level.

Accordingly, in order to facilitate this objective, the Commission construes that a tenured employee who is suspended for five days or less, as a practical matter, is given two options: (1) Forego the Appointing Authority level hearing and take an immediate appeal from the discipline under Section 43 within 10 days of the notice of the discipline. From the Commission's perspective, this is a disfavored option, but one that any such employee is lawfully entitled to exercise. (2) Request an Appointing Authority level hearing and appeal to the Commission within 10 days after the decision of the Appointing Authority in the same manner as an appeal could be taken from the decision of a pre-disciplinary hearing. In other words, by requesting a hearing at the Appointing Authority level, the time for filing a "just cause" appeal under Section 43 is suspended until such time as the Appointing Authority issues a final decision regarding the employee's appeal, even if the hearing and decision are made outside the statutory time frames specified in Section 41.

In this case, the Commission finds that Mr. Burns has suffered no prejudice from Holyoke's failure to provide him with a timely hearing. The Commission further deems that by appealing his two-day suspension after receiving notice that he would receive a hearing, Mr. Burns, in effect, waived his Section 42 claim in this case. The Commission, therefore, will deny the Section 42 claim and will treat this appeal solely as a "just cause" appeal under Section 43.

Section 43 Appeal

The Appellant's Motion for Summary Decision and Holyoke's cross-motion for Summary Decision are both denied, without prejudice, as to the Appellant's Section 43 claim, at this time. Although there are clearly many facts upon which there can be no

dispute, a number of disputed issues of fact and mixed questions of fact and law remain as to the Appellant's Section 43 just cause claim on which a statutory right to a hearing before the Commission is necessary and appropriate. These issues include, for example, Holyoke's alleged custom and past practice as to the use of sick time, the alleged issue of disparate treatment of the Appellant due to alleged unlawful bias against the Appellant, and the circumstances surrounding the Appellant's prior discipline and inferences that may be drawn from it. As noted above, however, Mr. Burns is not precluded necessarily from raising alleged procedural irregularities, such as those that formed the basis for his Section 42 appeal, as evidence in the Section 43 appeal, if they can be shown to be relevant to the allegation that the Appellant was not treated fairly, with an "unprejudiced mind" and without bias, as prescribed by the civil service law.

For the reasons stated, the Appellant's Section 42 appeal is hereby *dismissed*. The Appellant's Section 43 appeal will proceed to the full hearing scheduled for January 14, 2009 at 11:00 a.m. to be held in Springfield, Massachusetts.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on November 6, 2008.

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. 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. 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 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.

Notice to:

Scott Burns, Pro Se [Appellant]

Layla G. Taylor, Esq. [Appointing Authority]