

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MARK CARDARELLI,
Appellant

D1-14-253

v.

CITY OF MEDFORD,
Respondent

Appearance for Appellant:

Lisa McGonagle
Boston Fraud Examiners, LLC
400 West Cummings Park
Ste. 1725 #136
Woburn, MA 01801

Appearance for Respondent:

Mark Rumley, Esq.
City Solicitor
City of Medford
85 George P. Hassett Drive
Medford, MA 02155

Commissioner:

Christopher C. Bowman

DECISION ON CITY OF MEDFORD'S MOTION FOR SUMMARY DECISION

On October 30, 2014, the Appellant, Mark Cardarelli (Mr. Cardarelli), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Medford (City) to terminate him from the civil service position of police officer.

On November 25, 2014, I held a pre-hearing conference at the offices of the Commission which was attended by Mr. Cardarelli, his representative, co-counsel for the City and the City's Police Chief. As part of the pre-hearing conference, I heard oral argument from both parties regarding the City's Motion for Summary Decision and Mr. Cardarelli's opposition, both of which had been submitted prior to the pre-hearing.

Unless otherwise noted, the following appears to be undisputed:

1. On June 25, 2012, the City appointed Mr. Cardarelli, a Marine veteran, as a police officer.
2. On June 28, 2012, Mr. Cardarelli was enrolled in the Massachusetts Bay Transportation Authority (MBTA) Police Academy.
3. On October 6, 2012, while enrolled in the MBTA Police Academy, Mr. Cardarelli penned an eleven (11)-page, single-spaced, letter to the Training Unit Commander of the City's Police Department. That letter primarily focused on allegations of mistreatment and misconduct by trainers at the MBTA Police Academy.
4. As a result of the October 6, 2012 letter, the City's Mayor decided to transfer Mr. Cardarelli to the Municipal Police Training Committee (MPTC)'s Police Academy in Boylston and to refer Mr. Cardarelli's allegations to officials at the MBTA for their review.
5. On November 29, 2013, Mr. Cardarelli graduated from the MPTC Police Academy and began performing full police powers as a Medford police officer.
6. On June 4, 2014, a Captain from the Internal Affairs Division of the City's Police Department completed an investigative report regarding three (3) alleged off-duty motor vehicle-related incidents involving Mr. Cardarelli that allegedly occurred between December 7, 2013 and April 3, 2014.
7. On August 25, 2014, the City's Police Chief recommended that the City's Mayor terminate Mr. Cardarelli as a police officer.
8. On August 26, 2014, the City delivered a notice of termination to Mr. Cardarelli in-hand.

Applicable Law

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.” (*emphasis added*)

G.L. c. 41, § 96B states in relevant part:

“Every person who receives an appointment to a position on a full-time basis in which he will exercise police powers in the police department of any city or town, shall, prior to exercising police powers, be assigned to and satisfactorily complete a prescribed course of study approved by the municipal police training committee. The provisions of chapter thirty-one and any collective bargaining agreement notwithstanding, any person so attending such a school shall be deemed to be a student officer and shall be exempted from the provisions of chapter thirty-one and any collective bargaining agreement for that period during which he is assigned to a municipal police training school, provided that such person shall be paid the regular wages provided for the position to which he was appointed and such reasonable expenses as may be determined by the appointing authority and be subject to the provisions of chapter one hundred and fifty-two.” (*emphasis added*)

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.

...

If a person employed under a provisional appointment for not less than nine months is discharged as a result of allegations relative to his personal character or work performance and if the reason for such discharge is to become part of his employment record, he shall be entitled, upon his request in writing, to an

informal hearing before his appointing authority or a designee thereof within ten days of such request. If the appointing authority, after hearing, finds that the discharge was justified, the discharge shall be affirmed, and the appointing authority may direct that the reasons for such discharge become part of such person's employment record. Otherwise, the appointing authority shall reverse such discharge, and the allegations against such person shall be stricken from such record. The decision of the appointing authority shall be final, and notification thereof shall be made in writing to such person and other parties concerned within ten days following such hearing." (*emphasis added*)

G.L. c. 31, § 42 states in relevant part:

"Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. 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 his employment immediately without loss of compensation or other rights." (*emphasis added*)

G.L. c. 31, § 43 states in relevant part:

"If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority." (*emphasis added*)

Analysis

The parties agree that, at the time of his termination on August 26, 2014, Mr. Cardarelli was a probationary employee, as opposed to a tenured employee, as he had not actually performed the duties of a police officer on a full-time basis for a probationary period of twelve months. Rather, he graduated from the Police Academy and began his probationary period on November 29, 2013. Thus, he would not be a tenured employee until November 29, 2014.

Conceding his probationary status, Mr. Cardarelli does not argue that he is entitled to a “just cause” hearing before the Commission under Section 43 of the civil service law. Rather, Mr. Cardarelli, citing the language in G.L. c. 31, § 42 which states that: “*any person* who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the Commission,” argues that the Commission can hear and decide whether the City followed all of the procedural requirements of the law -- and, if not, order Mr. Cardarelli to be reinstated as a police officer.

In terms of what procedural requirements were not followed, Mr. Cardarelli states that: “the envelope did not contain his final paycheck including 88 hours of vacation pay he also did not receive his notification of rights under COBRA within the statutory 14 days of separation, and only on October 6, 2014 did he receive a notice from his insurer advising his (sic) to contact his employer.”

First, the alleged procedural violations cited by Mr. Cardarelli as the basis of his Section 42 appeal do not fall under the civil service law. Provisions related to the payment of vacation time

and COBRA notification rights for terminated employees fall under other statutes unrelated to civil service, including the so-called wage and hour laws.

Second, even if Mr. Cardarelli was arguing (which he did not in his brief) that the City failed to follow procedural requirements related to proper notice or the right to a so-called “name clearing” hearing (if requested) before the Appointing Authority, his probationary status would still bar the Commission from hearing his appeal. (See Brouillard & Civil Service Commission v. City of Holyoke, Mass. App. Ct. Rule:128 Decision 08-P-1379 (2009), FN2: (“We note that Brouillard, as a terminated probationary employee, is not left entirely without recourse. If the termination concerns allegations about an employee’s reputation, the employee may be entitled to a “name-clearing” hearing *in court*. Police Commr. Of Boston v. Cecil, 431 Mass. 410, 416 (2000). The *courts* have also considered declaratory judgment actions and mandamus actions filed by probationary employees concerning whether a notice of termination was adequate. See Thibeault v. New Bedford, 342 Mass. 552, 553, 558 (1961); Costa v. Selectmen of Billerica, 377 Mass. 853, 855, 861-862 (1979). (*emphasis added*)

Conclusion

As the Commission lacks jurisdiction to hear this appeal, the City’s Motion for Summary Decision is allowed and Mr. Cardarelli’s appeal under Docket No. D1-14-253 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on January 8, 2015.

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.

Notice:

Lisa McGonagle (for Appellant)

Mark Rumley, Esq. (for Respondent)