

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200

Boston, MA 02114

(617) 979-1900

SAVIEL COLON,

Appellant

v.

BOSTON POLICE DEPARTMENT,

Respondent

D1-23-218

Appearance for Appellant:

Pro Se

Saviel Colon

Appearance for Respondent:

Omar Bennani, Esq.

Office of the Legal Advisor

Boston Police Department

1 Schroeder Plaza

Boston, MA 02120

Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

The Commission dismissed the Appellant’s appeal as the Commission lacks jurisdiction to hear this appeal for two reasons. First, the Commission may not hear an appeal regarding a separation from employment for being absent without leave (AWOL). Pursuant to Section 38 of Chapter 31, AWOL-related matters must be appealed to the Appointing Authority, with further appeal rights to the state’s Human Resources Division (HRD). Second, the Appellant failed to appeal his prior suspension to the Commission within the 10-day time statutory filing deadline.

DECISION ON RESPONDENT’S MOTION TO DISMISS

Procedural Background

On October 24, 2023, the Appellant, Saviel Colon (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting his unpaid leave (or suspension) as of October 26, 2021 and his separation from employment from the Boston Police Department (BPD) on July 13, 2023, based on a determination by the BPD that he had been absent without leave (AWOL) for

more than 14 days. The BPD subsequently filed a motion to dismiss the Appellant's appeal based on a lack of jurisdiction to hear an AWOL-related appeal and the Appellant filed an opposition. On November 21, 2023, I held a remote pre-hearing which was attended by the Appellant and co-counsel for the BPD at which time I heard oral argument regarding the parties' submissions.

Summary of Facts

While the parties disagree on the facts, the statutory authority on whether the Commission has jurisdiction to hear this appeal is clear. Prior to October 2021, the Appellant had served as a police officer for the BPD with no disciplinary record. In October 2021, the BPD, in response to the global pandemic, required all BPD personnel to obtain a COVID vaccination *or* participate in a COVID testing regimen every seven days. The Appellant objected, arguing that his sincerely held religious beliefs prevented him from *both* the vaccination and the testing regimen. The BPD placed the Appellant on unpaid administrative leave (suspended) in October 2021. He did not file an appeal with the Commission at the time contesting this suspension.

In or around May 2023, the BPD lifted its requirement that personnel obtain a COVID vaccination or engage in testing. On May 25, 2023, the BPD notified the Appellant that he was required to return to work from his status on unpaid administrative leave. The Appellant obtained counsel and his counsel sent correspondence to the BPD with a series of grievances and asked that the parties engage in settlement discussions. The Appellant did not return to work as ordered.

On July 13, 2023, the BPD notified the Appellant that, pursuant to Section 38 of Chapter 31, it deemed the Appellant voluntarily separated from employment. The written notice advised Appellant that he had 10 days to request a hearing with the BPD regarding this determination. The Appellant never requested a hearing with the BPD. Months later, on October 24, 2023, the Appellant filed this appeal with the Commission.

Summary Decision Standard

When a Respondent before the Commission is of the opinion there is no genuine issue of disputed material fact relating to the Appellant’s stated claim, no viable ground of appeal on the facts stated, and the Respondent is entitled to prevail as a matter of law, this party may move, with or without supporting affidavits, either to dismiss the entire appeal or for summary decision on a particular claim. 801 CMR 1.01(7)(h). Such motions are decided under the well-recognized standards for summary disposition as a matter of law—*i.e.*, “viewing the evidence in the light most favorable to the non-moving party,” the substantial and credible evidence established that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case,” and has not rebutted this evidence by “plausibly suggesting” the existence of “specific facts” to raise “above the speculative level” the existence of a material factual dispute requiring an evidentiary hearing. *See, e.g., Nigro v. City of Everett*, 30 MCSR 277 (2017); *Lydon v. Massachusetts Parole Bd.*, 18 MCSR 216 (2005). *Accord Milliken & Co. v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008). *See also Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss); *cf. R.J.A. v. K.A.V.*, 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss). *See also Zachary v. Civ. Serv. Comm’n & Dept. of Correction*, Suffolk Sup. Ct. No. 07-3197 (2008) (Commission was justified in upholding a 5-day suspension without a full hearing when the Appellant admitted that he engaged in the alleged misconduct.)

Section 38

G.L. c. 31, § 38, concerning unauthorized absences, states:

Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight, an appointing authority shall send by

registered mail a statement to the person named in the report, informing him that (1) he is considered to have permanently and voluntarily separated himself from the employ of such appointing authority and (2) he may within ten days after the mailing of such statement request a hearing before the appointing authority. A copy of such statement shall be attached to such report to the administrator.

The appointing authority may restore such person to the position formerly occupied by him or may grant a leave of absence pursuant to section thirty-seven if such person, within fourteen days after the mailing of such statement, files with the appointing authority a written request for such leave, including in such request an explanation of the absence which is satisfactory to the appointing authority. The appointing authority shall immediately notify the administrator in writing of any such restoration or the granting of any such leave.

If an appointing authority fails to grant such person a leave of absence pursuant to the provisions of the preceding paragraph or, after a request for a hearing pursuant to the provisions of this section, fails to restore such person to the position formerly occupied by him, such person may request a review by the administrator [HRD]. The administrator shall conduct such review, provided that it shall be limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.

No person who has been reported as being on unauthorized absence under this section shall have recourse under sections forty-one through forty-five with respect to his separation from employment on account of such absence.

For the purposes of this section, unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven.

Section 38 has been interpreted consistently to mean that jurisdiction to review a decision by an appointing authority to separate an employee for “unauthorized absence” lies exclusively with the Personnel Administrator [HRD]. *See, e.g., Police Comm’r v. Civil Service Comm’n*, 29

Mass. App. Ct. 470 (1990), rev. den., 409 Mass. 1102 (1991), appeal after remand sub nom, *Police Comm'r v. Personnel Adm'r*, 39 Mass. App. Ct. 360 (1995), aff'd, 423 Mass. 1017 (1996). See also *Canney v. Municipal Ct.*, 368 Mass. 648 (1975); *Sisca v. City of Fall River*, 65 Mass. App. Ct. 266 (2005), rev. den., 446 Mass. 1104 (2006); *Town of Barnstable v. Personnel Adm'r*, 56 Mass. App. Ct. 1106 (2002) (Rule 1:28 opinion); *DeSimone v. Civil Service Comm'n*, 27 Mass. App. Ct. 1177 (1989). The Commission's decisions have been uniformly to the same effect. *Alves v. Fall River School Dep't*, 22 MCSR 4 (2009); *Donnelly v. Cambridge Public Schools*, 21 MCSR 665 (2008); *O'Hare v. Brockton*, 20 MCSR 9 (2007); *McBride v. Fall River*, 19 MCSR 325 (2006); *Fontanez v. Boston Police Dep't*, 19 MCSR 159 (2006); *Pimental v. Department of Correction*, 16 MCSR 54 (2003), aff'd sub nom. *Pimental v. Civil Service Comm'n*, Suffolk Superior Civ. No. SUCV2003-5908 (June 6, 2005); *McDonald v. Boston Public Works*, 14 MCSR 60 (2001); *Sheehan v. Worcester*, 11 MCSR 100 (1998); *Brindle v. Taunton*, 7 MCSR 112 (1994); *Tomasian v. Boston Police Dep't*, 6 MCSR 221 (1993); *Hoarty v. Boston Fire Department*, 26 MCSR 118 (2013).

Analysis

The Appellant does not dispute that the BPD provided him with his appeal rights in the May 25, 2023 notice and that he failed to request a hearing with the BPD within the requisite 10 days. Rather, the Appellant argued at the pre-hearing that the outcome of any such hearing would be a foregone conclusion. He likened an appearance at an Appointing Authority hearing to the experience of a domestic violence victim returning to an abuser. For that reason, he did not request a hearing. Nonetheless, Section 38 explicitly states that the Appellant's rights lie with the Appointing Authority and HRD. The Commission has no jurisdiction to hear his AWOL-related appeal.

In regard to the Appellant's prior unpaid suspension, first issued in October 2021, his October 2023 appeal to the Commission is well beyond the 10-day statutory deadline for filing such an appeal. G.L. c. 31, §§ 42-43. *See Allen v. Civ. Serv. Comm'n and Fall River Public Schools*, Suffolk Sup. Ct. No. 2013-259B (2013). Again, the appeal must fail for lack of jurisdiction.

Conclusion

For all the above reasons, the BPD's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. D1-23-218 is hereby ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on November 30, 2023.

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 the 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. 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:

Saviel Colon (Appellant)

Omar Bennani, Esq. (for Respondent)

David Fredette, Esq. (for Respondent)