

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

Germano Depina,
Appellant

v.

DOCKET NO: G1-11-137

Boston Police Department,
Respondent

Appellant:

Germano Depina, *Pro se*

Respondent:

Amanda E. Wall, Atty.
Boston Police Department
Office of the Legal Advisor
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Daniel M. Henderson

DECISION ON MOTION TO DISMISS

Pursuant to the provisions of G.L. c. 31, s. 2(b), the Appellant, Germano Depina (hereinafter the "Appellant" or "Depina") seeks review of the Human Resources Division's (HRD) decision in accepting reasons proffered by the Respondent-Appointing Authority, Boston Police Department (hereafter the "Department", "Appointing Authority" or "BPD"), for the bypass of the Appellant for original appointment to the position of Boston police officer.

The parties appeared at a scheduled pre-hearing conference on May 16, 2011. There, the BPD stated its intent to file a Motion to Dismiss on the ground of lack of jurisdiction

due to the Appellant's late filing of his appeal. The BPD explained that it had mailed the "bypass letter" to the Appellant, on December 13, 2010 and that the Appellant did not file his appeal with the Civil Service Commission (hereafter "Commission") until April 28, 2011. This filing is well beyond the sixty (60) day filing deadline mandated by the Commission. At the PHC, the parties filed a signed Stipulation of Facts stating all of the relevant facts. The Appellant, Germano Depina, admitted that he did receive the bypass letter shortly after it had been mailed and that he read the notice of appeal rights and the sixty day filing deadline, which were contained in the letter. His only excuse for the late filing of his appeal at the Commission was that he felt "hopeless".

At the conclusion of the pre-hearing conference the BPD was ordered to file a written Motion To Dismiss, with notice to the Appellant, on or before May 23, 2011. The Appellant thereupon, was allowed the opportunity to oppose the Motion by filing a written Response on or before May 31, 2011.

The BPD filed its Motion to Dismiss *with attachments* on May 20, 2011. The Appellant did not file any response.

FINDINGS OF FACT

Based on the Commissions case file, the Stipulation of Facts, the information provided at the pre-hearing conference, the BPD's Motion *with attachments* and the inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The BPD mailed its "bypass letter" to the Appellant on or about December 13, 2010, notifying him of his bypass and non-selection for the position of police officer and

his right of appeal to the Commission, with a filing deadline of sixty days from receipt of the letter.

2. The Appellant, Depina, received the bypass letter at his home shortly after it was mailed on December 13, 2010 and read the contents of the letter, including the notice of a sixty day filing deadline at the Commission for the appeal.

3. The Appellant, Depina, filed his appeal at the Commission on April 28, 2011. The Appellant filed his appeal at the Commission approximately one hundred thirty-six (136) days after it was mailed to him.

4. The only excuse that the Appellant offered for filing his appeal beyond the sixty day filing deadline was his feeling of “hopelessness”.

CONCLUSION

The party moving for summary disposition pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) in an appeal pending before the Commission is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party [i.e. Depina], BPD has presented substantial and credible evidence that Mr. Depina has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that Mr. Kearney has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

In the absence of a statutorily prescribed period of limitations, the time within which the Appellant is required to file an appeal with the Commission to redress a violation of the Civil Service Law is governed by the Commission's administrative rules. In the case of "bypass" appeals, the Commission, by administrative rule, has established a sixty-day period for taking an appeal from the approval of HRD of a "bypass" under G.L.c.31, §2(b) and a thirty-day period after "Agency notice of action is sent to a party", in the case of any other claim of appeal for which a statutory period has not been prescribed.. Commission By-Pass Statute of Limitations (adopted effective October 1, 2000); 801 CMR 1.01(6)(b).

The BPD contends that the Commission lacks jurisdiction to hear the Appellant's appeal due to its late filing or untimeliness. The facts presented on this record are sufficient to determine that this bypass appeal was filed by the Appellant at the Commission approximately 136 days after mailing of the bypass letter. The Appellant offered an unacceptable excuse for exceeding the sixty-day period or filing deadline. The present appeal is untimely, having been filed more than 75 days after the Appellant was notified of his non-selection

Accordingly, for the reasons stated above, the BPD's Motion to Dismiss is hereby allowed, and the appeal of the Appellant, Germano Depina is *dismissed*.

Civil Service Commission,

Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and McDowell Commissioners) [Marquis absent] on June 2, 2011.

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:

Germano Depina, Pro Se (Appellant)

Amanda E. Wall, Atty. (for Appointing Authority)

John Marra, Atty (HRD)