

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

DAVID DONNELLY,
Appellant,

v.

Case No. D1-08-120

CAMBRIDGE PUBLIC SCHOOLS,
Respondent.

DECISION ON MOTION TO DISMISS

Respondent Cambridge Public Schools (hereinafter referred to as “CPS”) filed a motion, pursuant to the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. 1.01(7)(g)(3) and M.G.L.c. 31, §2(b), for the Massachusetts Civil Service Commission to dismiss the complaint of Appellant David Donnelly (“Donnelly”) for lack of jurisdiction to hear a matter pursuant to G.L.c. 31, §38. As set forth more fully below, CPS states that the appeal in the above captioned matter should be dismissed in its entirety as there is good cause for the Civil Service Commission to dismiss the appeal, pursuant to 801 C.M.R. 1.01(7)(g)(3), for lack of jurisdiction to hear a matter pursuant to G.L.c. 31, §38, as Donnelly has “permanently and voluntarily separated himself” from his employment.

The Appellant, Donnelly filed his appeal at the Commission on May 19, 2008. The Respondent, CPS, filed its Motion to Dismiss on October 1, 2008. The Appellant failed to file any opposition to the Motion.

This matter was called for a Full Hearing at the Commission on October 29, 2008. At that hearing, the parties made a joint request for a continuance for the purpose of giving the Appellant a final opportunity to explore the possibility of pursuing a “leave of absence” from the personnel administrator for the Commonwealth. This matter was then scheduled for a Status Hearing at the Commission on November 20, 2008 and the parties were directed to the offices of the Human Resources Division, HRD, on the Third floor.

The Appellant failed to appear at the Status Hearing on November 20, 2008. Attorney MacFarlane appeared for the Respondent and relayed that the parties did indeed conference the matter with a representative of HRD on October 29, 2008. However, the Appellant failed to subsequently follow-up with any written correspondence with either the Respondent or HRD.

This matter involves the issuance of a letter on April 8, 2008 by CPS to Donnelly, pursuant to G.L.c. 31, §38, informing Donnelly that he was considered to have permanently and voluntarily separated himself from the employ of the Cambridge Public Schools. Section 38 of chapter 31 of the General Laws provides, in pertinent part, that “no person who has been reported as being on unauthorized leave of 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.” *See Martin Novia v. City of Bedford*, D-06-62 (Nov. 21, 2007) (Commission dismissed Appellant’s appeal seeking a full hearing as to whether there was reasonable justification to terminate him as the matter involved issuance of letter pursuant to M.G.L.c. 31, §38). *Accord Sisca v. City of Fall River*, 65 Mass. App. Ct. 266, 270 (2005) (Court noted “[t]here is no right of review or opportunity to secure relief from the civil service commission by way of any procedure

that is set forth in G.L.c. 31, §§41-45. General Laws c. 31, §38 brooks no departure from the avenue of review laid down by the Legislature.”) (citations omitted); *Police Commissioner of Boston v. Civil Service Commission*, 29 Mass. App. Ct. 470 (1990), *rev. denied*, 409 Mass. 1102 (1991), *appeal after remand*, 39 Mass. App. Ct. 360 (1995), *review granted*, 421 Mass. 1108 (1995), *and superseded, remanded* 423 Mass. 1017 (1996) (Court held Commission lacked jurisdiction to review case of police officer who was terminated for extended absences from work without authorized sick leave or leave of absence pursuant to M.G.L.c. 31, §38).¹

Further, Donnelly’s appeal was filed at the Commission on May 19, 2008, forty-two (42) days after CPS issued its April 8, 2008 letter pursuant to M.G.L.c. 31, section 38 notifying Donnelly that he was considered to have voluntarily and permanently separated himself from employment with the Cambridge Public Schools, and twenty-five (25) days after CPS issued its April 25, 2008 letter informing Donnelly that his belated request for leave was denied and reiterating that as he had not requested a hearing before the appointing authority within ten (10) days of the issuance of the April 8, 2008 letter, he was considered to have voluntarily and permanently separated himself from employment with the Cambridge Public Schools. Thus, Donnelly’s appeal also does not meet the statutory ten (10) day filing requirement and is untimely. As a result, for this reason as well, the Commission has a ground to dismiss Donnelly’s appeal.

¹ The only action which G.L.c. 31, §38 contemplates is the Commonwealth’s administrator conduct a review “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 notice was reasonable under the circumstances.”

The Appellant was afforded every opportunity by the Respondent, to pursue a leave of absence in compliance with the requirements of G.L.c. 31, §38 and he failed to do so.

The provisions of 801 C.M.R. 1.01(7)(g)(3) provide that “the Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petition to state a claim upon which relief can be granted or because the pendency of a prior, related action in any tribunal that should be decided first.” The Commission is precluded from jurisdiction to hear this matter by application of the clear language of G.L.c. 31, §38. Wherefore, in light of the foregoing, the Commission concludes that it lacks jurisdiction in this matter to hear Appellant’s appeal.

WHEREFORE, the Cambridge Public School’s Motion to Dismiss for Lack of Jurisdiction to Hear a Matter Pursuant to M.G.L.c. 31, §38 is hereby allowed. The appeal, Docket No. D1-08-120 is *dismissed*.

Civil Service Commission

Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Stein and Taylor Commissioners), on December 4, 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:
Maureen A. MacFarlane, Atty.
James Rudser, Atty.
John Marra, Atty. - HRD