

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MICHAEL J. FLYNN

Appellant

v.

CASE NO: D1-10-8

CITY OF ATTLEBORO

Respondent

Appellant's Representative

Salvatore Romano
Regional Coordinator
Mass.Laborers District Council
7 Laborers Way
Hopkinton, MA 01748

Appointing Authority Attorney:

Janice Silverman, Esq.
City of Attleboro
77 Park Street
Attleboro, MA 02703

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Michael J. Flynn, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §43, from the decision of the City of Attleboro (Attleboro) to discharge him from his position of Special Motor Equipment Operator/Laborer. On February 12, 2010, and supplemented in February 26, 2010, Attleboro moved to dismiss the appeal for lack of jurisdiction on the grounds that the appeal was untimely. On March 3, 2010, the Appellant filed his opposition. A hearing on the motion was held by the Commission on March 26, 2010 at the University Of Massachusetts School Of Law at Dartmouth, which was digitally recorded. The Commission received additional information from the Appellant dated March 30, 2010 and from Attleboro dated April 5, 2010.

FINDINGS OF FACT

Giving appropriate weight to the submission and argument of the parties, I find the following material facts to be undisputed:

1. The Appellant, Michael J. Flynn, held the tenured labor service position of Special Motor Equipment Operator/Laborer with the Attleboro Department of Public Works (DPW). (*Attleboro Motion; Claim of Appeal*)

2. On December 3, 2009, Attleboro DPW Superintendent John Clover issued Mr. Flynn a written notice of a five-day suspension for misconduct reported to have occurred while on duty the day before. Mr. Flynn was notified of his civil service right to a hearing before the Appointing Authority and future right to appeal his suspension to the Commission. He was also informed that Superintendent Clover had recommended that the Appointing Authority (Attleboro Mayor Kevin J. Dumas) take steps to terminate Mr. Flynn's employment. (*Attleboro Motion, Exhibit 2*)

3. On December 7, 2009, Mr. Flynn and his Union Steward (Public Employees Local Union #1144, LIUNA, AFL-CIO) appeared at the Attleboro Personnel Office where Mr. Flynn duly received in hand written notice of a hearing to be held before the Appointing Authority on December 11, 2009 regarding the 5-day suspension and proposed termination for misconduct on December 2, 2009. This notice also duly informed Mr. Flynn of his civil service rights to hearing and appeal. (*Attleboro Motion, Exhibit 3*)

4. The hearing scheduled for December 11, 2009 was rescheduled for December 17, 2009 at the request of Mr. Flynn's union representative. (*Attleboro Motion*)

5. On December 17, 2009, an evidentiary hearing was conducted by a hearings officer designated by the Appointing Authority. Attleboro presented the testimony of two witnesses. Mr. Flynn attended the hearing accompanied by his union representative but did not testify. (*Attleboro Motion*)

6. On December 18, 2010, the hearing officer recommended to the Appointing Authority (Attleboro Mayor Kevin J. Dumas) that Mr. Flynn be terminated. Mayor Dumas accepted the recommendation and issued a letter to the Appellant which duly informed him that he was discharged effective immediately, which letter was delivered in hand to Mr. Flynn by Attleboro Police Officer Paul McCann. (*Attleboro Motion, Exhibits 4, 5, 6*)

7. The Appellant submitted a Claim of Appeal to the Commission dated December 28, 2009 and mailed it to the Commission. The postmark date on the envelope containing the Claim of Appeal is illegible. A Money Order in the amount of the filing fee of \$50.00 was enclosed. The Commission received and dated stamped the Claim of Appeal on January 21, 2010. (*Claim of Appeal; Administrative Notice of Commission Practice and Procedure; Appellant's Opposition*)

8. Mr. Flynn contends that he originally mailed his Claim of Appeal, to the Commission, without any filing fee, on or about December 28, 2010 and that the Claim of Appeal was returned as incomplete because he did include the filing fee. Mr. Flynn contends that he purchased a Money Order in the amount of the filing fee payable to the Civil Service Commission and resubmitted his Claim of Appeal by mail to the Commission, which the Commission acknowledged as filed as of January 21, 2010. (*Attleboro Motion, Exhibits 7, 8,9; Appellant's Opposition; Claim of Appeal*)

9. The Commission has followed a consistent practice when it receives a Claim of Appeal which does not include a filing fee. The Claim of Appeal is photocopied, date-stamped and marked “Incomplete Appeal No Filing Fee Included” and the original is returned to the sender. A copy of the returned appeal papers is maintained in a chronological file of rejected appeals. If the prospective appellant has listed a telephone number on the Claim of Appeal, the Commission makes a telephone call to the prospective appellant explaining the reason that the appeal is being rejected and advising the appellant that it must be refilled with the fee within the applicable prescribed filing deadline in order to be considered a timely appeal. (*Administrative Notice of Commission Practice & Procedure*)

10. The Commission has no record of having received any Claim of Appeal from the Appellant, with or without a fee, until January 21, 2010. There is no copy of such paperwork in the Commission’s rejected appeal file. (*Administrative Notice*)

11. The Appellant claims that he was not aware of the requirement for a filing fee when he originally submitted his appeal and that economic hardship precluded him from obtaining the funds for the fee until January 19, 2010. (*Appellant’s Opposition*)

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. Mr. Flynn], Attleboro has presented substantial and credible evidence that Mr. Mr. Flynn has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that Mr.

Flynn 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).

The Commission’s jurisdiction to hear disciplinary appeals is limited by statute. G.L.c.31, §43 requires that a person aggrieved by a decision of an appointing authority disciplining him or discharging him from employment pursuant to G.L.c.31, §41, “shall, within ten days after receiving written notice of such decision, appeal in writing to the commission” The failure to file an appeal with the Commission within the statutory time is jurisdictional, or akin to a statute of limitations, and cannot be improperly expanded by the Commission. See Town of Falmouth v. Civil Service Comm’n, 441 Mass. 814, 822-23 (2006); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); Volpicelli v. Woburn, 22 MCSR 448 (2009); Novia v. City of Boston, 20 MCSR 639 (2007); Maurice v. Massachusetts Dep’t of Mental Health, 19 MCSR 328 (2006); Konikowski v. Department of Corrections, 10 MCSR 79 (1997); Springer v. Town of Saugus, 8 MCSR 154 (1995).

The Commission accepts a Claim of Appeal as timely filed, so long as the appeal is postmarked within the prescribed deadline for filing. See 801 CMR 1.00 (4)(b); Town of Falmouth v. Civil Service Comm’n, 441 Mass. 814, 822-23 (2006). Here, however, there is no convincing evidence that the Appellant’s claim of appeal was postmarked within the requisite 10 day period applicable to disciplinary appeals under G.L.c.31, §43. To the contrary, inasmuch as the Money Order for the required filing fee is dated January 19, 2010, and the Commission has no record in its rejected appeal file of having received a

prior claim of appeal from the Appellant, the substantial preponderance of the evidence infers that the Claim of Appeal received by the Commission on January 21, 2010 was the first claim that the Appellant sent, and that claim would have to have been postmarked on or after January 19, 2010, the date of the Money Order, and, therefore would be untimely.

Moreover, the Commission rules requiring timely payment of filing fees are clear:

“A filing fee has been required by law since January 13, 2003. Thus, individuals, including attorneys on behalf of their clients, who file an appeal with the Commission are required to include the [statutorily-mandated filing fee](#) with their [appeal form](#). **Effective December 1, 2006, any appeal that does not include the appropriate fee (or waiver form) will be returned to the Appellant or attorney who submitted it.**”

Information Pertaining To Commission Policies (Adopted August 17, 2006), posted at www.mass.gov/csc (emphasis in original)

The Claim of Appeal form, on its face, expressly states the filing fee must accompany the form. (*See Appellant’s Claim of Appeal*) The one exception upon which the Commission will waive a filing fee is when the Appellant established indigence, in accordance with the provisions of S.J.C. Rule 3:10. See Appeal Filing Fee & Request for Waiver of Appeal Fee, posted at www.mass.gov/csc.. The Appellant’s claim to “economic hardship” that precluded his obtaining funds for a month following his discharge does not rise to the level necessary to justify waiving the filing fee. Further, it is undisputed that the Appellant never submitted a waiver request with his appeal form.

In sum, Mr. Flynn duly received notice of and attended the disciplinary hearing; thereafter, on December 18, 2009, he received notice of Attleboro’s decision to discharge him; and he was duly advised of his civil service rights. The Appellant’s appeal was not filed until one month after receipt of notice of discharge and, therefore, is untimely.¹

¹ This Decision does not address Mr. Flynn’s additional argument that his termination constitutes unconstitutional double jeopardy, nor does it express any opinion on whether he may have other redress through collective bargaining or certiorari proceedings. But see, G.L.c.31, §41, ¶3 and §44.

Accordingly, for the reasons stated above, Attleboro's Motion to Dismiss is hereby, allowed, and the appeal of the Appellant, Michael J. Flynn is hereby, *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on May 6, 2010.

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:

Salvatore Romano. (for Appellant)

Janice Silverman, Esq. (for Appointing Authority)