

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

CARLOS GARZA, Jr.,
Appellant

v.

ABINGTON POLICE DEPARTMENT,
Respondent

D1-23-229
D-24-050

Appearance for Appellant:

Thomas O'Loughlin, Esq.
Ernie Horn, Esq.
Horn & O'Loughlin Law Office, LLC
12 Asylum Street
Mendon, MA 01756

Andrew Gambaccini, Esq.
Reardon, Joyce and Akerson, P.C.
4 Lancaster Terrace
Worcester, MA 01609

Appearance for Respondent:

Richard Massina, Esq.
Clifford & Kenney, LLP
31 Schoosett Street, #405
Pembroke, MA 02359

Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

The Commission allowed the procedural appeal of an Abington Police Officer and rescinded his 3-day suspension after the Abington Police Department violated the civil service law by failing to conduct a local hearing as requested by the police officer to contest the suspension and then sought to use that suspension as the basis of progressive discipline as part of a termination appeal currently pending before the Commission.

DECISION ON CROSS MOTIONS FOR SUMMARY DECISION¹

Procedural Background

On November 4, 2023, the Appellant, Carlos Garza, Jr. (Appellant), filed an appeal with the Civil Service Commission (Commission) contesting whether the Abington Police Department (APD) had just cause to terminate his employment as a permanent, tenured, full-time police officer (Just Cause Appeal). As part of that same appeal, which the Commission docketed under D1-23-229, the Appellant contested whether the APD violated the procedural requirements of the civil service law by failing to conduct a local hearing that he had requested regarding a prior 3-day suspension (Procedural Appeal).

On December 12, 2023, I conducted a remote pre-hearing conference. On January 5, 2024, the APD filed a motion to dismiss the Appellant's suspension-related Procedural Appeal and the Appellant filed an opposition. The APD's motion had seven attachments (R1 – R7) and the Appellant's opposition had three attachments (A1 – A3). On March 12, 2024, the Appellant subsequently submitted an affidavit which has been marked as A4. A motion hearing was held on March 13, 2024 which was audio / video recorded via Webex.² On April 16, 2024, after the motion hearing, the Appellant filed with the Commission an additional, stand-alone Procedural Appeal related to the 3-day suspension, docketed under D-24-050. I held a remote pre-hearing on April 30, 2024. At my request, on May 24, 2024, counsel for the Appellant (Gambaccini)

¹ The Respondent filed a motion to dismiss and the Appellant filed an opposition. Consistent with a colloquy at a pre-hearing held on April 30, 2024, I am treating these filings as cross motions for summary decision.

² Since that motion was submitted under the appeal docketed as D1-23-229, it was heard by Commissioner Angela C. McConney, who is assigned to hear that appeal. I have reviewed the audio /video of that recording and the remainder of the record as it pertains to the suspension, procedural-related appeal.

also submitted relevant email correspondence between himself and counsel for the Respondent, which I marked as A5.

Undisputed Facts

The following is undisputed:

1. By letter dated February 4, 2022, the APD notified the Appellant that he was being placed on paid administrative leave while the APD conducted internal affairs investigations, with one investigation regarding alleged misconduct by the Appellant while on duty on February 1, 2022 (i.e. – performance issues related to a response to a health and wellness call) and another investigation regarding alleged misconduct by the Appellant while on duty on February 2, 2022 (Appellant’s interaction with a superior officer including allegedly “shoulder-checking” him). (R3)
2. On May 6, 2022, the APD Police Chief, after completion of the internal affairs investigation into the health and wellness check incident, sent an email to the Appellant which stated in relevant part: “Please see the attached Notice of Unpaid Suspension Letter. You are hereby ordered to report to Lt. Sullivan at the police station on Monday, May 9th at 10:00 a.m. Lt. Sullivan will provide you with a copy of the attached letter in-hand which you will need to sign acknowledging receipt thereof.” (A1)
3. On May 9, 2022, the Appellant reported to the police station and was served in-hand with the notice of a three-day unpaid suspension to be served on May 10th, 11th, and 12th, 2022.

Consistent with G.L. c. 31, § 41, the notice of suspension stated in part that:

You are informed that you may, within 48 hours of receipt of this notice, request in writing a hearing by the Appointing Authority, the Chief of Police, on the just cause for the suspension.

(R2)³

4. After receiving the notice of suspension, in-hand, the Appellant submitted a written request which stated:

Dear Chief Del Papa:

On Friday, May 6, 2022, I received an email with a letter from you notifying me of an unpaid suspension of three days. The letter instructed me to report to the station on May 9, 2022 to receive a physical copy of the notice and to sign for receipt of this notice. While the letter indicates that copies of G.L. c. 31, Sections 41-45 were attached, those provisions were not attached to the letter or email that I received on May 6, 2022 and I presume I will receive copies on May 9, 2022.

I contend that there is no just cause for the discipline and I am requesting an appointing authority hearing pursuant to G.L. c. 31, Section 41.

For purposes of scheduling and hearing, my attorney is Andy Gambaccini of Reardon, Joyce & Akerson, P.C. His email is [redacted] and his telephone number is [redacted]. I am willing to waive that portion of Section 41 that requires a hearing within five days in favor of scheduling a hearing date that works for all concerned.

Lastly, through this correspondence, I am requesting a complete copy of the internal affairs file for this matter, including the report of Lieutenant Sullivan and any attachments, as well as any other material generated or received during the course of the investigation (including dispatch recordings, video recordings, interview recordings and witness statements).

Carlos Garza
Abington Police Department (A1)⁴

³ After serving the suspension, the Appellant remained on paid administrative leave while the APD continued to conduct an investigation regarding the alleged misconduct by the Appellant on February 2, 2022 (the “shoulder-checking” incident).

⁴ The text of the letter was prepared by Attorney Gambaccini, who was representing the Appellant in regard to the 3-day suspension related to alleged on-duty misconduct.

5. By July 26, 2022, the APD had decided that it was going to move forward with a hearing to terminate the Appellant after completing its investigation of the matter related to the on-duty “shoulder check” incident. (A5)
6. In email exchanges between counsel for the APD and counsel (Gambaccini) for the Appellant, the parties were discussing conducting a hearing for both the 3-day suspension and the potential termination. In a July 26th email, counsel for the APD wrote in part: “I would think our best option would be to choose two days and do a hearing for the suspension appeal and then follow-up on a second day for the termination hearing.” August 18th and August 22nd were set as possible dates. (A5)
7. On or about July 27, 2022, the APD received notice from the North Smithfield, RI Police Department that the agency arrested the Appellant the day prior for “Domestic Violence – Disorderly Conduct” which resulted in the suspension of the Appellant’s license to carry a firearm. Upon receipt of this information, the APD expanded its investigation to investigate the July 26th event in addition to other charges that arose, including, but not limited, living outside the required geographical radius required by civil service law and APD rules. (R4)
8. On August 12, 2022, counsel for the Appellant inquired with counsel for the APD about the status of the August 18th and August 22nd hearing dates. One day prior to the August 18th hearing date reference in the July 26th email exchange, counsel for the Appellant emailed counsel for the APD, stating in part that he assumed the hearing was not going forward the next day and asked for an update on outstanding discovery requests. (A5)
9. Approximately two weeks later, on August 25, 2022, counsel for the APD sent an email to counsel for the Appellant stating that the APD intended on amending the termination later,

adding new charges; and working with the APD-designated hearing officer to get dates in “mid-late September”. (A5)

10. On October 20, 2022, counsel for the APD sent the following email to counsel for the

Appellant:

Hi Andy,

I know it’s been awhile since we spoke, but the Town has finally completed all of the investigation work to move forward with Garza’s appeal of his suspension and also for the forthcoming contemplated termination. I should have that letter out to you in the next day or so, but I wanted to reach out about dates so that we can hopefully lock in dates before sending out the notice.

Currently, we would like to hold the hearings on consecutive days during the week of 11/14. If I had to break up the dates a bit, I don’t think that would be a problem, but I figured I would see if consecutive days work for you that week. Please let me know if you are available and, if so, what dates that week work best for you. If it doesn’t work, I can go back to the hearing officer for more availability. Thank you.

Best,
Rich (A5)

11. On January 30, 2023, counsel for the APD sent an email to co-counsel⁵ for the Appellant

which stated, in its entirety:

Good morning,

On behalf of Chief Del Papa, attached, please find the notice of contemplated termination sent to Carlos Garza this past Friday.⁶ Please note that the date currently scheduled is stated as February

⁵ The parties agree that Attorney Gambaccini was representing the Appellant in regard to the 3-day suspension, but that Attorney Ernest Horn would be representing the Appellant in regard to the contemplated termination. “Co-counsel” refers to Attorney Gambaccini and Attorney Horn.

⁶ The email submitted to the Commission, marked as R5, does not contain the referenced notice of termination. What is in the record is a notice of contemplated termination dated April 5, 2023, which is marked as R4.

6, 2023. If that date does not work, please let me know at your earliest convenience so that we may reschedule the hearing.

Additionally, I know the matter of Officer Garza's appeal on the 3-day suspension that [sic] pre-dates the matter at hand. I wanted to hear both of your thoughts on potentially waiving that appeal through the Appointing Authority stage, right up to arbitration. That way, we will only have to deal with one (rather lengthy) hearing instead of two over the course of at least that may [sic] days (and possibly more). Thank you.

Best,
Rich Massina. (R5)

12. On January 31, 2023, counsel for the Appellant (Gambaccini) and counsel for the APD

(Massina) spoke via telephone. (A3 and Respondent Motion)⁷

13. By letter dated April 5, 2023, the APD sent the Appellant another "Notice of Contemplated

Termination" notifying the Appellant of an agreed-upon new date for the local hearing to be held on April 10, 2023. There is no reference in the notice to the prior 3-day suspension related to the health and wellness call on February 1, 2022. Rather, the notice focuses on alleged misconduct by the Appellant on February 2, 2022, and dates thereafter. (R4)

14. On April 10th, June 23rd and June 27th, 2023, an APD-designated hearing officer conducted a local appointing authority hearing related to whether there was just cause to terminate the

⁷ According to counsel for the Respondent, "Attorney Gambaccini explained the scope of his representation, stating that where Officer Garza was waiving the hearing for his suspension and there were no additional charges related to Officer Garza's actual [on-duty] police work for the contemplated termination, he would no longer be involved in the defense." Attorney Gambaccini, in a sworn affidavit submitted as part of this appeal, wrote in relevant part that: "I never told Attorney Massina that Officer Gaza was waiving his right to contest the three-day suspension. Such a decision only could be made by a client and that decision never was made by Officer Garza" and "I also did not engage Attorney Massina's idea to waive the local hearing on the suspension in favor of proceeding to the next appellate steps because I then thought, and still think, that the local level hearing could be useful for discovery."

Appellant based on the reasons listed in the April 5, 2023 “Notice of Contemplated Termination”. (A2)

15. At the outset of the local hearing, counsel for the Appellant in the termination proceeding (O’Loughlin) objected to the Town’s attempt to introduce the notice of the three-day suspension as an exhibit, stating in part that “ ... the matter is on appeal.” In reply, counsel for the Respondent (Massina) stated in part that:

... we’re not gonna be relying on the facts of that investigation or of the evidence of the unpaid suspension, but rather it’s included to sort of set up the timeline and to, you know show our work with progressive discipline to, to make sure everyone understands that. I don’t have a problem with removing it, and if the parties could stipulate to the fact that he received a three-day suspension and that it’s under appeal, I have no problem with that. (A2)⁸

16. On October 30, 2023, the local hearing officer issued a report finding that the APD had just cause to discipline the Appellant, up to and including termination. On the final page of the report, the local hearing officer references the February 1, 2022 incident [which resulted in the prior 3-day suspension], writing: “Relatedly, he [Appellant] also got into an argument with a person suffering from mental health issues. Importantly, he called the person ‘crazy’. He also failed to accomplish the initial reason he was at the person’s home which was to do a wellness check.” (R6)
17. On November 3, 2023, the APD Police Chief, “adopting and incorporating” the hearing officer’s report, issued the Appellant a “notice of termination”. There is no explicit reference to the 3-day suspension in the Chief’s four-page notice of termination.⁹

⁸ The local hearing officer ultimately accepted the notice of suspension into evidence and decided to give it “such weight as I deem appropriate in the totality of the evidence.”

⁹ There is one potential, albeit, ambiguous reference in the termination letter, which stated: “This instance of misconduct [on February 2, 2022] alone does not constitute termination, but the clear

18. On November 4, 2023, the Appellant filed a termination appeal with the Commission. In the appeal, the Appellant stated in part that:

I was not afforded certain opportunities with my appeals process before I was terminated. I was suspended for three days without pay & was not allowed to appeal the suspension. (R1)

Applicable Civil Service Law

Section 41 of the Chapter 31 states in relevant part that:

A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. Such suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions, or by a chief of police or officer performing similar duties regardless of title, or by a subordinate to whom such chief or officer has delegated such authority. Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request.

Section 42 of Chapter 31 states in relevant part 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. 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

an [and? Sic] intentional insubordination is a continuation of the pattern uncovered and established throughout these investigations.”

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.*

Analysis

The APD's actions here constitute a form of rope-a-dope that is inconsistent with the due process protections afforded to tenured employees under the civil service law. There is no documentary evidence that the APD even *asked* counsel for the Appellant to forego a local hearing related to the suspension. Rather, the inquiry from counsel for the APD to counsel for the Appellant referenced: “ ... potentially waiving that appeal *through the Appointing Authority stage, right up to arbitration*. That way, we will only have to deal with one (rather lengthy) hearing instead of two over the course of at least that may [sic] days (and possibly more).” Put another way, the APD was simply asking that the Appellant's opportunity for a hearing on whether there was just cause for the suspension be consolidated with the issue of whether there was just cause for an anticipated decision to terminate the Appellant.

Further, there is no documentary evidence to support the eyebrow-raising claim of the APD that counsel for the Appellant waived the Appellant's right to a local hearing regarding the 3-day suspension. The APD's argument that such a waiver was agreed to during a phone conversation between counsel on January 31, 2023 is contradicted by a statement by counsel for the APD more than two months later, at which time he explicitly told a hearing officer presiding over the termination proceeding that the Appellant's 3-day suspension was still “under appeal”. Importantly, counsel for the APD also told the hearing officer [and the Appellant] that “ ... we're not gonna be relying on the facts of that investigation or of the evidence of the unpaid suspension.” In other words, the Appellant was not, as part of that hearing, going to be given the

opportunity to respond to the findings of the investigation related to the suspension which, according to counsel for the APD was still “under appeal” as of April 10, 2023. Yet, in his report to the Appointing Authority, the hearing officer appears to reference the alleged misconduct underlying the 3-day suspension to support his conclusion that there was just cause for the termination.

The APD now argues in their January 6, 2024 motion to dismiss that:

Where the Appellant waived his right to an appointing authority hearing on or around January 30, 2023, he would have been free to file an appeal pursuant to the arbitration clause in the collective bargaining agreement between the Town and the Police Union or file within the ten (10) day timeline provided under the Civil Service Law (whether he believe there was a procedural error or lack of just cause). (emphasis added)

That statement is illogical. If, as argued by the APD, the Appellant had ten days [from January 30th] to file an appeal with the Commission regarding the suspension, then why would counsel for the APD, more than two months after January 30th, explicitly state to a hearing officer that the suspension was still “under appeal”? The answer is obvious: the Appellant never waived his right to a hearing on the suspension matter. The APD’s argument also misstates the requirements of the civil service law. Civil service employees who are suspended for five days or less cannot simply opt to skip the local appointing authority hearing and unilaterally decide to have a just cause hearing before the Commission. Rather, the suspended employee, *prior* to filing an appeal with the Commission, must first request a local hearing.

There is, however, another avenue for the parties to forego a local hearing laid out in Section 41A of the civil service law which states in part that:

Upon the request of the appointing authority and a tenured employee, who is entitled to a hearing pursuant to the first paragraph of section forty-one, a hearing before a disinterested hearing officer,

designated by the chairman of the commission, may be held in lieu of a hearing before the appointing authority. Such hearing officer shall make findings of facts and may make recommendations for decision to the commission.

Such a “41A hearing” at this point appears entirely consistent with what counsel for the APD was suggesting in his January 30, 2023 letter to counsel for the Appellant when he wrote: “I wanted to hear both of your thoughts on potentially waiving that appeal through the Appointing Authority stage, right up to arbitration.”¹⁰

However, even after producing no documentary evidence to show that the Appellant ever waived his right to a local hearing *and* after representing to a local hearing officer months later that the suspension was still “under appeal”, the APD now argues that: a) the suspension is *not* under appeal; b) the APD is not required to – and will not – conduct a local hearing; c) the Commission cannot rule on whether there was just cause for the suspension because the Appellant’s suspension appeal was not timely; and d) the APD should be able to use that 3-day suspension as evidence of progressive discipline to justify the Appellant’s termination.

An appointing authority cannot, on the one hand, represent that a matter is still “under appeal” and then, on the other hand, argue that the Appellant should have known that it wasn’t, thus triggering an imaginary starting point to apply the ten-day statutory filing deadline.

¹⁰ Disciplinary actions against APD civil service employee can be appealed through arbitration or through an appeal to the Civil Service Commission, but not both. Here, the Appellant opted to file an appeal with the Civil Service Commission.

The APD has violated the civil service law and prejudiced the Appellant by refusing to give him the opportunity to contest his three-day suspension, despite representations to the contrary.

Conclusion

For all of the above reasons, the Appellant's appeal is ***allowed***¹¹; his suspension is rescinded, and he shall be restored to his employment related to those three days immediately without loss of compensation or other rights.¹²

CIVIL SERVICE COMMISSION

/s/ Christoher C. Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney, and Stein, Commissioners) on May 30, 2024.

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. 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).

¹¹ For clarity, the suspension-related appeal is being dismissed under Docket No. D-24-050. The Appellant's termination appeal before the Commission remains open under Docket No. D1-23-229.

¹² Given that the Appellant was subsequently terminated, which is currently under appeal, the practical application of this order is that the suspension is rescinded and the Appellant shall be reimbursed for the three days of lost pay.

Notice to:

Andrew Gambaccini, Esq. (for Appellant)

Ernie Horn, Esq. (for Appellant)

Thomas O'Loughlin, Esq. (for Appellant)

Richard Massina, Esq. (for Respondent)