

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108**

**COLLEEN HEATH,
Appellant**

v.

CASE NO: D1-13-102

**MASSACHUSETTS PAROLE BOARD,
Respondent**

Appearance for Appellant:

Sol J. Cohen
Cohen and Sales
221 Crescent St, Suite 206
Waltham, MA 02453

Appearance for Respondent:

Peter M. Mimmo
12 Mercer Road
Natick, MA 01760

Commissioner:

Paul M. Stein¹

DECISION ON RESPONDENT'S MOTION TO DISMISS

On April 12, 2013, the Appellant, Colleen Heath (Ms. Heath) appealed to the Civil Service Commission (Commission) contesting her termination as a field parole officer by the Massachusetts Parole Board (Parole Board). A pre-hearing conference was held at the offices of the Commission on May 14, 2013 and a motion hearing was held on June 10, 2013 to hear the Parole Board's Motion to Dismiss. I heard oral arguments from counsel for Ms. Heath and counsel for the Parole Board.

¹ The Commission acknowledges the assistance of Law Clerk Hannah Filkins in the drafting of this decision.

Based on the statements of the parties and the documents submitted, I find the following:

1. Until her termination, Ms. Heath was a permanent tenured civil service employee who held the position of Parole Officer A/B.
2. From June 25, 2012 to December 24, 2012, Ms. Heath was on approved medical leave of absence for her own serious health condition related to her right knee. By December 24, 2012, Ms. Heath had exhausted all of her accrued vacation and sick leave.
3. Ms. Heath requested additional medical leave for her right knee and provided the requisite documentation to the Parole Board. The Parole Board granted Ms. Heath an additional 12 weeks of leave, expiring on March 19, 2013.
4. In February 2013, Ms. Heath requested additional leave to treat her left knee, which was scheduled for surgery on March 26, 2013. Ms. Heath again provided the Parole Board with medical documentation supporting her need for leave.
5. The Parole Board sought verification of Ms. Heath's condition by contacting her physician, Dr. Geary. In addition, to questioning Dr. Geary about Ms. Heath's fitness for duty, the Parole Board asked Dr. Geary whether Ms. Heath's left knee surgery was a "medical necessity". Dr. Geary responded that the left knee surgery was not a "medical necessity" at this point time and that in his opinion Ms. Heath was fit for duty.
6. On March 19, 2013, The Parole Board telephoned Ms. Heath to notify her that her physician had deemed her medically fit for duty and starting March 20, 2013 if she remained away from work she would be considered to be on an unauthorized leave. The Parole Board stated that Ms. Heath would face subsequent disciplinary action if she did not return to work within 14 days, or by April 2, 2013. By certified mail dated March 20, 2013, the Parole Board sent Ms. Heath a summary of the previous day's telephone conversation.

7. Ms. Heath did not return to work by April 2, 2013². In response to Ms. Heath's failure to return to work, the Parole Board, via certified mail dated April 2, 2013, stated that Ms. Heath had ten (10) days from the date of the letter to request that she be restored to her former position. Pursuant to the letter, Ms. Heath requested a review from the Appointing Authority.
8. On April 3, 2013, the Parole Board submitted an "Absence and Termination Notice/Form 56" regarding Ms. Heath to the Human Resource Department.
9. On April 26, 2013, the appointing authority held a hearing regarding Ms. Heath's leave.
10. By registered mail dated May 10, 2013, the Parole Board denied Ms. Heath's additional leave and considered her to have permanently and voluntarily separated herself from employment. The letter stated if Ms. Heath desired, she could request a review from the Personnel Administrator.
11. Ms. Heath has not sought a review from the Personnel Administrator regarding this matter.

Appellant's Argument

The Appellant argues that the Respondent failed to comply with the statutory obligations as set forth in M.G.L. c.31 §68 (to notify the Personnel Administrator [HRD] of any "unauthorized absences"), that such prior notice was necessary to trigger a Section 38 termination and that this procedural error negated the validity of the Section 38 termination, thus giving jurisdiction to the Commission to hear the appeal under G.L.c.31, §41-45. The Appellant also maintains she was wrongfully terminated as she was in contact with the Parole Board between the stipulated period of March 20, 2013 and April 2, 2013. The Appellant

² The parties dispute whether or not there was contact or communication between Ms. Heath and the Parole Board from March 20, 2013 to April 2, 2013. For reasons stated below, this dispute is not material to the legal issue of the Commission's jurisdiction presented in the present motion.

contends that the Parole Board was well aware of her ongoing medical problems and need for additional leave.

Respondent's Argument

The Respondent argues that the Commission has no jurisdiction to hear an appeal where the termination was made under Section 38. The Respondent reaffirms that they met all the requisite statutory requirements established in M.G.L. c.31 §38. Furthermore, the Respondent asserts that Ms. Heath can still bring this claim before the Personnel Administrator, or in the alternative, Ms. Heath has other venues to assert her claim outside of the Commission.

Analysis

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) 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”, the movant has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that the non-moving party has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Bd., 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 (2008).

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

Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight,³ 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

³ Mass.G.L.c.31, §68 states, in part: “Each appointing authority shall report in writing forthwith to the administrator of any . . . unauthorized absence . . .”

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 a 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. 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. (emphasis added)

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).

The question presented by Ms. Heath, as to whether or not she was considered to be on unauthorized leave is an issue described in Section 38 that must be addressed through review by HRD, not the Commission. Ms. Heath's claim that Section 68 required the Parole Board to give prior notice to the Administrator at the inception of the period of Section 38 unauthorized leave is not persuasive. Section 38 defines unauthorized leave as a fourteen (14) day period of absence without proper notice to the appointing authority. The Parole Board correctly waited until Ms. Heath had not returned to work for a fourteen (14) day period before classifying her leave as unauthorized and subsequently giving notice to the Administrator.

Accordingly, since this termination was duly made under Section 38, the Commission is obliged to dismiss the appeal for lack of jurisdiction. Nothing in the statute bars Ms. Heath from filing an appeal with HRD, even as of this date. There appears to be bona fide issues that could raise appeal to HRD, such as, whether or not Ms. Heath was unfairly denied a review of her request for further FMLA extension or other leave prior to being considered on unauthorized leave; whether or not the Parole Board's contact with Ms. Heath's physician can be allegedly acted upon without first giving her notice; whether the Parole Board's decision to deem Ms. Heath fit for duty in lieu of affording her the opportunity to seek a second opinion is appropriate;

and whether the Parole Board should have taken the initiative to provide reasonable accommodations to Ms. Heath prior to considering her out on unauthorized leave. Unfortunately, the Commission is not authorized to inquire into the merits of these issues, which must be left to a review by HRD.

Conclusion

For all of the above reasons, Ms. Heath's appeal under Docket No. D1-13-102 is hereby *dismissed*.

Civil Service Commission

Paul M. Stein

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on June 27, 2013.

A true Copy. Attest:

Commissioner
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
Sol J. Cohen (for Appellant)
Peter M. Mimmo (for Respondent)