COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

BRENDA JAMES,
Appellant
v.
BOSTON POLICE DEPARTMENT,
Respondent

CASE NO. D-14-298

Appearance for Appellant: Brenda James, Pro Se

Appearance for Respondent: Peter M. Geraghty, Esq.
Staff Attorney
Office of the Legal Advisor
Boston Police Department
One Schroeder Plaza
Boston MA 02120

Commissioner: Paul M. Stein

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Brenda James, a Police Officer with the Boston Police Department, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §41-§45, to contest the alleged disciplinary action of the BPD to place her on paid administrative leave. Following a pre-hearing conference before the Commission on March 3, 2015, the BPD filed a Motion to Dismiss the appeal for lack of jurisdiction on the grounds that the subject matter of the appeal was pending arbitration, the appeal was untimely and the appellant's administrative leave did not amount to discipline. The Appellant opposes the motion.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following material facts are not disputed:

1. The Appellant, Brenda James, is a tenured civil service employee with the BPD who holds the position of Police Officer. (*Claim of Appeal; BPD Motion, Exhs. A & B*)

2. On or about September 11, 2014, following a prolonged period of medical leave, Officer James was cleared for "light duty" by the BPD departmental physician, effective September 15, 2014. (*Claim of Appeal; BPD Motion, Exhs. A & C*)

3. On September 12, 2014, Police Commissioner Evans placed Officer James on paid administrative leave, effective September 15, 2014. The alleged grounds for the BPD's action was a pending investigation into Officer James's alleged failure to report for a hair drug test on more than one occasion. (*Claim of Appeal, BPD Motion, Exhs. A & B*)

4. The Boston Police Patrolmen's Association (BPPA) is a duly authorized municipal employee union established pursuant to G.L.c.150E and serves as the bargaining agent for BPD Police Officers pursuant to a Collective Bargaining Agreement (CBA) with the BPD. Officer James is a member of the BPPA. (*Claim of Appeal; BPD Motion*)

5. The BPPA filed two grievances pursuant to the CBA regarding the two above described actions of the BPD on behalf of Officer James: (a) Grievance No. 16-2174 related to the September 12, 2104 letter from Commissioner Evans that placed Officer James on Administrative Leave, which the BPPA contended was done without explanation and in violation of the CBA; and (b) Grievance No. 16-2175 related to the September 11, 2014 order that cleared Officer James for "light duty", which the BPPA contended was punitive, without medical justification and in violation of the CBA. The remedy requested for these alleged violations of the CBA was to require the BPD to return Office James to full duty and to make her whole for details and overtime going back to the date she was medically fit for duty. Each of these grievances were processed through Step 4 and denied. (*BPD Motion, Exhs. B & C*)

6. On November 6, 2014, the BPPA submitted the above two grievances, among others, for Expedited Arbitration in accordance with the CBA. (*BPD Motion, Exh. D*)

7. On December 22, 2014, Officer James filed the present appeal with the Commission. (*Claim of Appeal*)

CONCLUSION

Applicable Legal Standard

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". . See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

Analysis

Section 43 of G.L.c.31 provides for appeal to the Commission within ten days of the receipt of written notice by any tenured civil service employee of a decision by an appointing authority (taken under G.L.c.31,§41) to contest the just cause for having "discharged, removed, suspended . . . laid off, transferred . . . lowered in rank or compensation. . . [or] his position abolished." Id. That statute specifically provides that:

> If the commission determines that such appeal has been previously resolved or litigated with respect to such person, in accordance with the provisions of section eight of chapter one hundred and fifty-E, or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal."

Section 8 of G.L.c.150E provides, in relevant part:

> [B]inding arbitration hereunder shall be enforceable under the provisions of chapter one hundred and fifty C and shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any

> such grievance involving suspension, dismissal, removal or termination, notwithstanding any contrary provisions of sections thirty-nine and forty-one through forty-five of chapter thirty-one . . . .

Under the plain meaning of these statutory provisions, when a dispute involving a public employee, who is a member of a union, has been submitted to arbitration under a collective bargaining agreement between the union and the public employer, the Commission is divested of any jurisdiction to hear an appeal involving the subject of that grievance. See, e.g., Canavan v. Civil Service Comm'n, 60 Mass.App.Ct. 910, rev.den, 441 Mass 1107 (2004); Dinocola v. City of Methuen, 22 MCSR 504 (2009) and cases cited. For this reason, the BPD correctly asserts that Officer James's appeal must be dismissed for lack of jurisdiction.

Alternatively, the BPD argues that, contrary to her contention, the decision to place Officer James on paid administrative leave does not amount to any form of "discipline" or other enumerated action affecting employment that is covered by G.L.c.31,§41 and, therefore, cannot be appealed to the Commission pursuant to G.L.c.31,§43, citing Police Comm'r of Boston v. Cecil, 431 Mass. 410 (2000). Although not necessary to this Decision, this question warrants the Commission's analysis.

The Cecil case did not specifically involve the question of whether action placing a civil service employee on paid administrative leave was appealable. Rather, in Cecil, the Commission addressed whether the one-year probationary period of service required for newly appointed police officers to obtain tenure, as prescribed by G.Lc.31, 61, was tolled during the period that an officer had been placed on paid administrative leave, pending an investigation into allegations that questioned his fitness to perform as a police officer and which resulted in his subsequent termination for unsatisfactory performance. The Commission adopted recommendations of a DALA magistrate who had heard the officer's appeal, and decided that a period of administrative

leave did not toll the one-year period of probation, and, therefore, the officer had achieved tenure and had been unlawfully terminated without having been afforded the hearing and appeal rights afforded to tenured officers (but not required for termination of a probationary officer). See Cecil v. Boston Police Dep't, 10 MCSR 150 (1997). A Superior Court affirmed the Commission's decision, but the Supreme Judicial Court reversed, holding that nothing in civil service law generally, or Section 61 in particular, prohibited the use of paid administrative leave and that tolling the probationary period while an employee was under investigation was "consistent with the purpose of probationary employment and the public interest" and fully justified under basic merit principles. In reaching this conclusion, the SJC noted that the probationary period's "manifest purpose is that the fitness of an appointee be *actually demonstrated by service* within a probationary period" (*emphasis added*), citing Younie v. Doyle, 306 Mass. 567 (1940). Thus, the Court found the Commission's determination that administrative leave would not toll the probationary period was an error of law and that the BPD had lawfully terminated the officer within the probationary period before he had achieved the rights of a tenured employee. Police Comm'r of Boston v. Cecil, 431 Mass. at 413-16 (2000)

In Brooks v. Department of Correction, 13 MCSR 181 (2000), the Commission was presented with an appeal of a correction officer who had been found unfit for duty and temporarily placed on paid administrative leave pending further psychiatric evaluation of his fitness for duty and, about two months later, due to a lack of cooperation in submitting to such evaluations, was removed from administrative leave and placed on unpaid medical leave. The employee duly appealed the later action placing him on unpaid medical leave claiming that he had been constructively "suspended" or "discharged". He did not appeal the earlier action placing him on administrative leave. The Commission dismissed the appeal, adopting the

recommendations of a DALA magistrate that the decision placing the employee on medical leave was not an appealable "disciplinary decision" that required prior notice and hearing and, having failed to assert a timely appeal when first placed on administrative leave, the employee had waived his right to appeal the subsequent action to the Commission. On judicial review, the Superior Court found that the Commission had erred in finding that the employee was not entitled to notice and hearing upon being placed on unpaid medical leave and had not waived his right of appeal by failing to appeal the action putting him on administrative leave. The Superior Court vacated the Commission's decision and ordered the employee to be compensated for the lost pay for the ten months[1] he had been on medical leave. Brooks v. Civil Service Comm'n, 17 Mass.L.Rptr. 568 (2004)

In the course of its analysis of the issues in Brooks, the Superior Court decision cited G.L.c.31, §1 which defines a "suspension" as a "temporary, involuntary separation of a person from his civil service employment by the appointing authority" and noted that there is no specific provision in G.L.c.31 authorizing an appointing authority to place an employee on "paid administrative leave". The Superior Court decision stated that "[W]hatever its basis, because such leave interrupts the employee's regular work, it should be regarded as a "suspension" within the meaning of G.L.c.31, §§1 and 41", citing Police Commissioner v. Cecil, 431 Mass. 410 (2000). The Superior Court, however, then acknowledged, as "sound", the contention that "Brooks is aggrieved by the loss of pay that resulted from being placed on medical leave . . . and not by the separation of employment . . . when he was placed on administrative leave." Brooks v. Civil Service Comm'n, 17 Mass.L.Rptr. 568 at 4 (2004).

The statement by the Superior Court that paid administrative leave is to be "regarded" as a "suspension" is dicta that is not essential to the holding in that case and is not binding on the

[1] The employee was eventually cleared for duty ten months after first being placed on unpaid medical leave.

Commission. The statement is neither supported by nor consistent with the SJC's decision in Cecil. The appeal in Brooks was from the unpaid medical leave and no appeal or challenge was asserted from the administrative leave nor relief ordered as to that action. Moreover, contrary to the Superior Court's statement that nothing within G.L.c.31 authorizes paid administrative leave, Cecil expressly endorsed the use of paid administrative leave as consistent with basic merit principles. Nor does Cecil support the conclusion that paid administrative leave is "regarded", as a matter of law, as a "suspension" within the meaning of G.L.c.31 as the Superior Court inferred. So far as can be determined, the question has not been addressed in any subsequent judicial opinions.

The plain meaning of G.L.c.31,§§1 & 41 does not support a conclusion that placing an employee on paid administrative leave pending investigation into the employee's fitness for duty, ipso facto, falls into one of the enumerated categories intended to trigger the right of hearing and appeal prescribed by civil service law. The action is certainly not expressly included and, as a general rule, should not be inferred. See, e.g., Police Comm'r of Boston v. Cecil, 431 Mass. at 413 (2000)(A familiar "maxim of statutory construction . . . suggests that a statutory expression of one thing is an implied exclusion of other things omitted from the statute") As to administrative leave, the "beneficial purpose" of such action, in general, would actually be frustrated, not enabled, by uniformly treating such action as a form of discipline. Id. To do so would likely have the effect of chilling whatever incentive exists to continue to pay an employee pending the outcome of an investigation, thus doing the employee more harm than good. While the Commission should acknowledge that, in rare cases, some facially apparent political or other unlawful motivation may appear in which an employee is left in "administrative leave" limbo for an extended period that could warrant exercise of the Commission's discretion to investigate

under G.L.c.31,§2(a), the Commission should not adopt an interpretation of G.L.c.31 that requires the Commission to accept an appeal in every case of administrative leave, no matter how legitimate it appears. That approach tends to fit the teaching of the Cecil decision and the general statutory scheme of civil service law and rules in which administrative leave has a clearly legitimate place. The present situation fits that profile as the decision to place Officer James on administrative leave was based on an undisputed fact that she was being investigated for violation of BPD rules, namely, failure to report for a drug test. Thus, were the Commission not required to dismiss this appeal on the grounds that Officer James's alleged improper placement on administrative leave is being litigated in arbitration, the Commission would be warranted in dismissing the appeal because it does not allege that the BPD has taken action that fits within any of the enumerated categories subject to hearing and appeal under Chapter 31.

Finally, as the claims asserted by this appeal are not within the scope of those permitted to be appealed under G.L.c.31, §43, it is not necessary to reach the BPD's third contention, that the appeal is untimely. Had the matter been deemed a proper subject for civil service appeal, however, the undisputed facts suggest that Officer James knew or should have known that those civil service rights were violated when the initial actions were taken and grievances filed in September 2014, months before this appeal was perfected, leaving the timeliness of the appeal very problematic as well. See, e.g., Kilson v. City of Fitchburg, 27 MCSR 106 (2014); Walker v. City of New Bedford, 26 MCSR 398 (2013); Allen v. Taunton Public Schools, 26 MCSR 376 (2013); Mercedes v. Springfield Housing Auth., 26 MCSR 156 (2013); Murzin v. City of Westfield, 24 MCSR 610 (2011).

In sum, for the reasons stated herein, the Commission lacks jurisdiction to hear this appeal. Therefore, HRD's Motion to Dismiss is hereby ***granted*** and the appeal of the Appellant, Brenda James, is ***dismissed.***

Civil Service Commission

/s/Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on April 2, 2015.

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.

Notice:
Brenda James (Appellant)
Peter M. Geraghty, Esq. (for Respondent)