

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503
Boston, MA 02108

KEVIN M. KELLEY,
Appellant

v.

D1-18-247

CITY OF BOSTON,
Respondent

Appearance for Appellant:

Pro Se
Kevin M. Kelley

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.
City of Boston
Office of Labor Relations
Boston City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

1. On December 20, 2018, the Appellant, Kevin M. Kelley (Mr. Kelley), filed an appeal with the Civil Service Commission (Commission), contesting the City of Boston (City)'s decision to terminate his employment as a Heavy Equipment Operator.
2. On January 2, 2019, the City filed a Motion to Dismiss Mr. Kelley's appeal, arguing that the Commission had no jurisdiction over this matter, which, according to the City, falls under G.L. c. 31, § 38, as Mr. Kelley was separated due to his absence without leave.
3. On January 15, 2019, I held a pre-hearing conference which was attended by Mr. Kelley, counsel for the City and a representative from the City.
4. At the pre-hearing, Mr. Kelley acknowledged that he was absent without leave, but he argued that he did contact the City by telephone at some point, although his primary focus was seeking medical attention for addiction-related issues.

5. Mr. Kelley was given ten (10) days to file a reply to the City’s Motion to Dismiss, but he failed to do so.

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

“Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight,¹ 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 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.”

¹ Mass.G.L.c.31, §68 states, in part: “Each appointing authority shall report in writing forthwith to the administrator of any . . . absence for more than a month because of illness or injury, unauthorized absence [and]. . . leave of absence for more than a month. . . .” See also PAR.13 (governing prior notice for leaves of absence longer than three months)

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).

Accordingly, since this termination was made under Section 38, the Commission is obliged to dismiss the appeal for lack of jurisdiction. Nothing in this decision, however, is meant to decide whether Mr. Kelley has a right of appeal to HRD, even as of this date, or whether Mr. Kelley has a right of appeal in another forum.

Finally, nothing in this decision prevents the City, based on the facts presented by Mr. Kelley, from unilaterally deciding that Mr. Kelley, consistent with the City's stated objectives of being "a City of second chances, a City of heart and hope" deserves one of the those second chances as he successfully works through his recovery.

Conclusion

For all of the above reasons, Mr. Kelley's under Docket No. D1-18-247 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 28, 2019.

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)(I), 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).

Notice:

Kevin Kelley (Appellant)
Robert J. Boyle, Jr., Esq. (for Respondent)