

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place
Room 503
Boston, Massachusetts 02108

KIMBERLYN LYDON,
Appellant

v.

D1-18-115

TOWN OF STOUGHTON,
Respondent

Appearance for Appellant:

Patrick N. Bryant, Esq.
Pyle Rome Ehrenberg, PC
2 Liberty Square, 10th Floor
Boston, MA 02109

Appearance for Respondent:

John F. Dolan, Jr., Esq.
Lighthouse Legal Counsel, LLC
775 East Falmouth Highway
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Commissioner:

Christopher C. Bowman

DECISION

On June 26, 2018, the Appellant, Kimberlyn Lydon (Ms. Lydon), pursuant to the provisions of G.L. c. 31, § 42, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Stoughton (Town) to terminate her employment without first affording her due process requirements provided to tenured employees by G.L. c. 31, § 41. On July 31, 2018, the Town filed a Motion to Dismiss arguing that Ms. Lydon was terminated before the expiration of her probationary period and that the Commission therefore lacked jurisdiction to entertain an appeal pursuant to G.L. c. 31, § 41-45. In the alternative, the Town argued that Ms. Lydon resigned her position as a Stoughton Police Officer. On August 14, 2018, Ms. Lydon filed an opposition to the Town's motion to dismiss, arguing that, at the time of her termination, she had completed her probationary period, and thus, was a permanent, tenured civil

service police officer. Since there were factual disputes regarding various issues, I scheduled a full evidentiary hearing, which I held at the offices of the Commission on September 5, 2018.¹ At the commencement of the hearing, I denied the Town's motion pending the evidence to be produced and the arguments to be raised. The hearing was digitally recorded and both parties were provided with a CD of the recording.² Both parties submitted post-hearing briefs on October 5, 2018.

FINDINGS OF FACT:

Based on the stipulations of the parties, the exhibits entered into evidence (Attachments A through H from the Town's Motion to Dismiss, Attachment A from the Appellant's Opposition to Respondent's Motion to Dismiss), the Affidavit of Stoughton Police Chief Donna McNamara, and the testimony of:

Called by the Town:

- James Blake, Boston Police Sergeant and Registrar, Boston Police Academy;
- Donna McNamara, Police Chief, Town of Stoughton;

Called by Ms. Lydon:

- Kimberlyn Lydon, Appellant;

and taking administrative notice of all matters filed in the case, pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following:

1. By letter dated November 7, 2016, the Town appointed Ms. Lydon as a Student Officer,

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, these CDs should be used to transcribe the hearing.

effective December 5, 2016. (Attachment A to Appellant’s Opposition to Motion to Dismiss)

2. The November 7, 2016 letter stated, in relevant part:

“Dear Ms. Lydon:

As you are aware, the Town of Stoughton (‘Town’) extended a conditional offer of employment to you as a full-time permanent Police Officer, subject to you satisfactorily completing a pre-employment physical and psychological fitness for duty evaluation, physical abilities test, as well as a complete background investigation. I am pleased to inform you that those conditions have now been met and the Town is prepared to appoint you as a Police Recruit effective December 5, 2016. As a student officer, you will be required to attend and successfully complete the basic police academy offered by the Town. You will be a probationary employee for one year from the date of graduation from the police academy. Further information regarding these benefits will be provided to you prior to reporting for your first day of employment.” (Id.)

3. The November 7, 2016 letter was signed by the then-Town Manager, who is the Appointing Authority. (Id.)
4. The Boston Police Academy (BPA) provides training for new Boston Police recruits. Where space permits, the Academy allows other communities to send their recruits, for a fee, to attend. The BPA’s Massachusetts Criminal Justice Training Council-approved program is about 30 weeks in length and divided into two sections: curriculum and practicum. [Blake]. The curriculum or written portion involves training in laws, rules, and tactics, and evaluations by examinations. The second part, which occurs about 2.5 months after the start of the Academy program, is practical or hands-on training. (Testimony of Sgt. Blake)
5. In this particular class, there were approximately forty (40) Boston police recruits and approximately fourteen (14) to fifteen (15) recruits, including Ms. Lydon, from “outside agencies”. (Testimony of Sgt. Blake)
6. Ms. Lydon began her required training at the Boston Police Academy on December 5, 2016 (Stipulated)

7. At some point during her Academy training, the Town issued Ms. Lydon and each of the other Stoughton recruits guns in order to participate in firearms training. The guns were never retrieved by the Town. (Testimony of Lydon)
8. The last day of training was June 16, 2017. (Testimony of Lydon and Sgt. Blake) On that day, the Boston Police Commissioner came to the Boston Baptist Academy, a facility being used that day for training, and swore in the Boston student officers as Boston police officers. After being sworn in, the Boston recruits were issued a badge and a gun. The reason for swearing in the Boston recruits that day was so Boston recruits could serve as full sworn Boston Police officers during the “Sail Boston” event that was scheduled to occur that weekend. (Testimony of Sgt. Blake)
9. On June 21, 2017, a graduation ceremony was held at the IBEW Union Hall in Boston. (Testimony of Sgt. Blake, Appellant and Chief McNamara)
10. The Town supplied a badge to Ms. Lydon a few days before her graduation from the Academy for purposes of photographs and rehearsal. (Testimony of Chief McNamara and Appellant).
11. During the graduation ceremony, the Boston Police Commissioner administered an oath of office referencing the Boston Police Department. (Attachment B to Town’s Motion to Dismiss)
12. With respect to student officers from jurisdictions other than Boston, the administration of the oath of office is ceremonial. (Testimony of Sgt. Blake)
13. The Town has a policy requiring that police officers take and subscribe the Stoughton Oath of Office before beginning to carry out their duties.(Attachment C to Town’s Motion to Dismiss and Testimony of Chief McNamara)
14. The Town’s Policy, issued on October 13, 2011 and reviewed on October 13, 2014, states in

relevant part:

“Before beginning to carry out their duties, a person appointed as a police officer of the Stoughton Police Department will take an subscribe to the following Oath of Office. Officers will be required to take and abide by the oath of office prior to assuming sworn status as an Officer as directed by the appointing authority and performed by the Town Clerk.

This will be recorded on the Clerk’s register to include the date, sworn Officer’s name, and signature. A signed Oath of Office form will be filed in the personnel file of newly-hired officers.” (Attachment C to Town’s Motion to Dismiss)

15. Attached to the Town’s above-referenced police is a “Stoughton Police Department Oath of Office.” (Attachment D to Town’s Motion to Dismiss)
16. On June 22, 2017, Ms. Lydon took and subscribed to the Stoughton Oath of Office (Attachment E to Town’s Motion to Dismiss and Testimony of Chief McNamara)
17. Ms. Lydon was not eligible for details, shifts or other police duties until she took the Stoughton Police Department Oath of Office. (Testimony of Chief McNamara).
18. There was no extension of the statutorily-required twelve month probationary period (Stipulated)
19. After Chief McNamara shared some concerns about the conduct of Lydon during her probationary period, the Interim Town Manager decided to terminate Ms. Lydon’s employment and prepared a letter. (Attachment F to Town’s Motion to Dismiss) to that effect (Testimony of Chief McNamara).
20. On June 21, 2018, the Interim Town Manager and Chief McNamara met with Ms. Lydon and her union president and delivered the termination letter to Ms. Lydon .(Testimony of Chief McNamara).
21. The termination letter was delivered in hand to Lydon at approximately 10:00 a.m. on June 21, 2018. (Testimony of Chief McNamara).
22. Shortly after delivery of the letter to Ms. Lydon, the union president returned to the Interim

Town Manager's office and was advised that Ms. Lydon's resignation would be accepted by the Town if she chose to resign (Testimony of Chief McNamara).

23. A few minutes later, the union president returned once again and presented a letter (Attachment G to Town's Motion to Dismiss) signed by Ms. Lydon stating that she was resigning her position as a police officer "immediately". (Testimony of Chief McNamara).
24. Later that day, at about 2 p.m., Ms. Lydon emailed the Interim Town Manager seeking to rescind her resignation. (Testimony of Chief McNamara)

Applicable Law

G.L. c. 31, §41 provides:

"Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action ..., and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof ..." (emphasis added)

G.L. c. 31, §61 states:

"Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a town where the civil service law and rules are applicable to such position, a person shall actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he shall be considered a full-time tenured employee in such position, except as otherwise provided by civil service rule. The administrator, with the approval of the commission, may establish procedures to ensure the evaluation by appointing authorities, prior to the end of such probationary period, of the performance of persons appointed as regular police officers or fire fighters." (emphasis added)

Analysis

The parties agree that if Ms. Lydon was within the probationary period at the time of her termination, the Commission lacks jurisdiction to conduct an appeal pursuant to G.L. c.31 §§ 41-45. See Board of Selectmen of Brookline v. Smith, 58 Mass.App.Ct. 813 (2003); Patterson v. Town of Plymouth, 21 MCSR 650 (2008);; Peterson v. Town of North Attleborough, 16 MCSR 44 (2003). The Town concedes that in reliance on its understanding that Ms. Lydon was still within her probationary period, the Town did not attempt to meet the “just cause” standard nor did it comply with the procedures required by G.L. c.31, §41 for the termination of a “tenured” Civil Service Employee.

In Board of Selectmen of Brookline v. Smith, Smith was assigned to the Norwood Police Academy on April 13, 1998, and graduated on February 12, 1999. He was appointed to the position of police officer in the Brookline Police Department effective February 23, 1999, and was sworn in on the same day. Id. Smith was placed on administrative leave on December 8, 1999 and served a notice of his termination on February 2, 2000. Id. The court here addressed the issue of whether the applicant’s probationary period began on (1) the date of his assignment to the academy, or whether it began (2) on the date of his appointment ‘as a Police Officer’ and his taking the oath of office. Id. at 815. The court, in agreement with the Appointing Authority, held that Smith’s probationary period began when he was appointed a police officer. Id. Pursuant to G.L. c.31 § 34, “‘actual performance of the duties of such position’ refers to the *graduated* officer with the authority to exercise police powers, as distinct from the student officer, who is in the process of learning to exercise such powers properly.” Id. at 817 (emphasis added). Thus, the ‘actual performance’ standard requires that an officer successfully graduate the academy *and* be sworn-in, in order to commence the one-year probationary period.

Patterson.

In Patterson, Patterson graduated the Academy on Friday, August 11, 2006 *and was sworn*

in that same day. In holding that Patterson possessed authority to exercise police powers at that moment, the Commission noted that Plymouth officers were allowed to begin covering shifts and working details immediately upon graduation and taking the oath of office.

In regard to the instant appeal, Stoughton recruits are not authorized to cover shifts or details or engage in any police work, apart from additional training *until they are administered the Stoughton Police Department Oath of Office, which did not occur until June 22, 2017.* Sgt. Blake testified credibly that the Boston oath, administered by the Boston Police Commissioner at the graduation ceremony a day earlier, was intended to be ceremonial in nature as to student officers from other jurisdictions. Further, the formal swearing in by the Boston Police Commissioner days earlier was limited to Boston Police recruits only so they could perform police duties at the Sail Boston event scheduled for that weekend.

I considered each of the arguments raised by Ms. Lydon. First, Ms. Lydon argues that “twelve months” should be defined as 360 days, with each month equal to thirty (30) days. No prior Commission decision on this issue supports this novel argument. Rather, prior Commission decisions regarding probationary periods appear, when relevant, to have adopted the formula used here (i.e. – one month after January 1st is February 1st).

Second, the Appellant reads Patterson to support her argument that her probationary period began upon graduation. It does not. As noted above, Patterson’s graduation and taking of the oath of office for Plymouth Police Officer occurred on the same day. Here, Ms. Lydon’s oath of office as a Stoughton Police Officer did not occur until one day later, leaving her one (1) day short of completing her twelve (12)-month probationary period.

Third, the Appellant cites to Cardarelli v. City of Medford, 28 MCSR 22 (2015), to argue that the Commission has concluded that a recruit may perform the duties and responsibilities of a police officer upon graduation. That argument is not persuasive as the Commission, in

Cardarelli, never addressed whether the oath of office and graduation occurred on the same day.

Fourth, the Appellant argues that, since she was issued a badge and a gun, that argues in favor of a conclusion that she was able to perform the duties and responsibilities of a police officer at least as of June 21, 2017. I don't agree. The gun was issued to recruits mid-way through the Academy *to participate in firearms training*. Although it is shocking that Stoughton allows recruits to maintain their firearms months prior to being sworn in as police officers, this questionable practice does not, as argued by the Appellant, bestow a recruit with the authority to perform the duties and responsibilities of a police officer. Nor does the Town's decision to allow recruits to be issued badges for picture-taking purposes equate to being a sworn police officer.

Finally, the Appellant references the November 7, 2016 letter she received stating that the probationary period would conclude "one year from the date of graduation from the police academy." The language in this letter, which the Town acknowledges was an error, cannot overrule the statutory requirements related to serving a probationary period.

A termination notice to a probationary employee must be delivered prior to the end of the probationary period. Lydon's probationary period commenced when she took and subscribed to the Stoughton oath on June 22, 2017. Her termination notice was delivered on June 21, 2018. This notice was within her 12-month probationary period. Consequently, Ms. Lydon was not a tenured civil service employee at the time of her termination; she was not entitled to the protections afforded to tenured civil service employees under Section 41; and the Commission lacks jurisdiction to hear the instant appeal.

Conclusion

For all of the above reasons, Ms. Lydon's appeal under Docket No. D1-18-115 is hereby *dismissed*.³

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman,
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 25, 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)(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 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. 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 to:
Patrick N. Bryant, Esq. (for Appellant)
John F. Dolan, Jr., Esq. (for Respondent)

³ Since I have concluded that the Appellant, as of June 21, 2018, had not completed her probationary period, I need not address the other issues raised by the Town, including the Appellant's resignation letter and timing of day that the graduation took place as compared to the time of day in which the Appellant was terminated.