

SUFFOLK, ss.
COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

ALBERT MARQUS,
Appellant

Docket No.: D-09-249

v.

CITY OF WALTHAM,
Respondent

Representative for Appellant: Salvatore R. Romano
Regional Coordinator
Mass. Laborer's District Council
226 South Main Street
Providence, RI 02903

Attorney for Respondent: Luke Stanton, Esq.
Assistant City Solicitor
City of Waltham
119 School Street
Waltham, MA 02451

Commissioner: John E. Taylor¹

DECISION ON MOTION TO DISMISS

The Appellant, Albert Marqus, (hereinafter "Appellant") filed an appeal pursuant to M.G.L. c. 31 § 43 with the Civil Service Commission (hereinafter "Commission"), claiming that the City of Waltham (hereinafter "Respondent" or "Appointing Authority") did not have just cause to dock his pay.

¹ Commissioner Taylor's term on the Commission expired before he was able to draft a written decision. The matter was assumed by the Commission's General Counsel, Angela C. McConney, Esq. Pursuant to 801 CMR 1.11 (e), when a Presiding Officer becomes unavailable before completing the preparation of the initial decision, the Agency shall appoint a successor to assume the case and render the initial decision. If the presentation of the evidence has been completed and the record is closed, the successor shall decide the case on the basis of the record. Otherwise, the successor may either proceed with evidence or require presentation of evidence from the beginning.

The Respondent filed a Motion to Dismiss, asking the Commission to dismiss the appeal because the Appellant had not filed his complaint within the ten (10) day time limit as required by statute. c. 31 §41. A hearing was held on October 21, 2009.

FINDINGS OF FACT

Four (4) exhibits were entered into evidence. Based on these exhibits and the testimony of:

For the Appointing Authority:

- Steve Pittorino, Business Manager, Water and Sewer Division
- Terry Cook, Clerk, Personnel Department

For the Appellant

- Albert Marqus, Appellant
- Bernie McDonald, President of Local 956, City of Waltham Laborers Union

I make the following findings of fact:

1. The Appellant has been employed by the City of Waltham since August 27, 1979.

(Testimony of Appellant)

2. On February 25, 2009, he was a video pipeline inspector in the Water and Sewer Division.

(Joint Exhibits C and G)

3. He is a member of Waltham Municipal Laborers Union Local 956 (hereinafter "Union").

(Joint Exhibit C)

4. Article XIII 8.4(a) of the Agreement between the Respondent and the Union states,

"The City and the Union agree that any misuse, abuse or excessive use of sick leave directly impacts on employee productivity and effectiveness of the municipal operation. An employee's misuse abuse or excessive use of sick leave may be grounds for employer disciplinary action." (Joint Exhibit B)

5. In a letter dated October 7, 2008, the Appellant was advised by the Respondent that his records reflected the use of twelve (12) sick days for the year. He was further advised that he would have to bring in doctors' notes for any future absences. (Joint Exhibits D and E)
6. On February 24, 2009, the Appellant had a doctor's appointment. (Joint Exhibit F)
7. The Appellant sought to have 1 ½ hours off to attend the appointment from Joan Lastovica and Steve Pittorino (hereinafter "Pittorino"), the Business Manager of the Water and Sewer Division. (Joint Exhibit C)
8. When he was informed that he would have to submit a doctor's note per the October 7, 2008 letter, the Appellant didn't think it was fair. He told the Respondent's representatives that he would be taking the whole day to prepare for his appointment because he was being made to get a note. (Joint Exhibit C)
9. Pittorino then informed the Appellant that he would be docked for 6 ½ hours pay. (Joint Exhibit C)
10. The Appellant's pay was docked for 6 ½ hrs. (Testimony of Terry Cook)
11. The Union filed a grievance on behalf of the Appellant on February 26, 2009. (Joint Exhibit C)
12. On April 1, 2009, the Respondent denied the grievance in a letter addressed to the Union field representative, Nelson Carneiro. (Exhibit A)
13. The Appellant saw the letter at the "beginning of April" or "early April." (Testimony of Appellant)
14. At that time, the Appellant asked Union president Jason Devane to appeal the Respondent's decision to the Commission. (Testimony of the Appellant)

15. Bernie McDonald (hereinafter “McDonald”) became the Union’s president on May 1, 2009.

(Testimony of the Appellant)

16. After McDonald became president, the Appellant checked with the Union on the status of his appeal at the Commission. (Testimony of the Appellant)

17. The Appellant found that the Union had not filed an appeal on his behalf at the Commission.

(Testimony of the Appellant)

7. The Union filed an appeal filed on behalf of the Appellant on May 15, 2009 with the Commission. (Exhibit G)

CONCLUSION

The party moving for summary disposition pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) in an appeal pending before the Commission 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 Respondent has presented substantial and credible evidence that the Appellant has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that the Appellant 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, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249, (2008).

The Commission’s jurisdiction to hear disciplinary appeals is limited by statute. M.G.L. c.31 §43 requires that a person aggrieved by a decision of an appointing authority disciplining him or discharging him from employment pursuant to M.G.L. c.31 §41, “shall, within ten days after receiving written notice of such decision, appeal in writing to the commission ...” The failure to file an appeal with the Commission within the statutory time is jurisdictional, or akin to a statute

of limitations, and cannot be improperly expanded by the Commission. *See Falmouth v. Civil Serv. Comm'n*, 441 Mass. 814, 822-23 (2006); *Donnelly v. Cambridge Public Schools*, 21 MCSR 665 (2008); *Volpicelli v. Woburn*, 22 MCSR 448 (2009); *Novia v. Boston*, 20 MCSR 639 (2007); *Maurice v. Massachusetts Dep't of Mental Health*, 19 MCSR 328 (2006); *Konikowski v. Department of Corrections*, 10 MCSR 79 (1997); *Springer v. Saugus*, 8 MCSR 154 (1995).

The Commission accepts a complaint as timely filed, so long as the appeal is postmarked within the prescribed deadline for filing. *See* 801 CMR 1.00 (4)(b); *See Falmouth v. Civil Serv. Comm'n* at 822-23 (2006). In this instance, the Appellant's grievance was duly filed by the Union and the Respondent issued its decision on April 1, 2009. However, the Commission did not receive the appeal until May 15, 2009, much greater than ten (10) days after the Respondent's April 1, 2009 decision. The Appellant testified credibly that he told the Union leadership that he wanted to file an appeal with the Commission. After the presidency changed, he checked on the status of his appeal and found that this had not been done.

Change in leadership does not make the Union less responsible to its members. Its duties and legal responsibilities are ongoing. It is not clear whether the Appellant spoke to the Union representative who was actually processing his matter, but that is of no consequence. The Respondent's April 1, 2009 letter was addressed to Nelson Carneiro, Field Representative. Mr. Carneiro filed the Objection to Respondent's Motion to Dismiss that is the subject of the within decision. The Commission is satisfied that the Union employed someone responsible for the Appellant's grievance claim and Civil Service appeal at all times relevant to this complaint.

The argument that the Respondent did not supply the Appellant with the copies of relevant sections of c. 31 has no merit. No evidence has been submitted to show that the failure of the

Respondent to supply those documents caused prejudice to the Appellant. The Appellant was aware of his right to appeal to the Commission and asked the Union to do so. The Union failed to file the appeal on his behalf to the Commission in a timely manner.

The courts have made it clear that appellants who rely on the advice of unions and union representatives do not have special privileges when that advice proves to be erroneous. *See Massachusetts Parole Bd. v. Civil Serv. Comm'n*, 47 Mass. App. Ct. 760, 766 (1999); *Tolland v. Boston Police Dep't*, 16 MCSR 19 (2003). In fact, the courts have found that “while union officials are not required “to make any complex legal interpretation [or] exhibit reasoning akin to that of the commission or that of a judge,” a union is not shielded from liability solely because its officials are mistaken about *readily recognizable issues* that arise during representation.” *United Steelworkers of America v. Commonwealth Employment Relations Bd.*, 74 Mass. App. Ct. 656, 663-664 (2009), *quoting Goncalves v. Labor Relations Comm'n*, 43 Mass. App. Ct. 289, 298 (1997) (*emphasis added*). Even if representation before the Commission were not expressly mentioned in the Agreement between the Union and the Respondent, the Union owed the Appellant the duty of fair representation. It appears that this duty was breached when the Union failed to file the appeal for the Appellant until almost forty-five (45) days after receiving the Respondent’s denial. *See United Steelworkers of America* at 664.

Since the complaint was not filed on time, the Commission cannot examine the merits of the case to determine whether just cause existed to discipline the Appellant.

For the reasons stated above, the Motion to Dismiss is *allowed*, and the appeal of the

Appellant, Albert Marqus, is hereby *dismissed*.

Civil Service Commission

Angela C. McConney, Esq.
General Counsel

By a vote of the Civil Service Commission (Bowman, Chairman [absent]; Henderson, Marquis, McDowell and Stein, Commissioners) on May 20, 2010.

A true record. Attest:

Commissioner

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:

Salvatore Romano (for the Appellant)

Luke Stanton, Esq. (for the Appointing Authority)