Decision mailed: 3/25/11
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
One Ashburton Place
Boston, MA 02108
(617) 727-2293

JOSEPH McDOWELL,
Appellant

v.

CITY OF SPRINGFIELD,
Respondent

D-05-148

DECISION ON RESPONDENT'S MOTION FOR RECONSIDERATION

On May 6, 2010, the Commission issued a decision, effective July 1, 2010, allowing the Appellant's appeal in part, by modifying the penalty of termination to a 19-month suspension.

The Respondent filed a Motion for Reconsideration and the Appellant filed an opposition thereto.

A Motion for Reconsideration must identify a clerical or mechanical error in the decision or a significant factor the Commission or the presiding officer may have overlooked in deciding the case.

In his brief, the Appellant identified two scrivener's errors. The second paragraph of page 27 of the decision should read:

"For all of the above reasons, the Appellant's appeal is *allowed in part*. The termination is hereby modified to a 19-month suspension from April 15, 2005 to November 15, **2006**. The Appellant is deemed to be reinstated to his permanent civil service position of Carpenter as of November 16, **2006**.[1]"

More substantively, the Respondent argues that in determining the appropriate remedy, the Commission should consider after acquired evidence, specifically the Appellant's federal felony conviction on tax charges in 2007.[2]

It is undisputed that the Appellant was terminated on April 15, 2005 and filed an appeal with the Commission on April 22, 2005. In its May 6, 2010 decision[3], the

[1] The decision erroneously stated 2007.
[2] Prior to the issuance of the decision, I informed the parties that this issue should be addressed in a motion for reconsideration after the decision was issued, assuming it was still relevant.
[3] The cycle time related to this appeal was longer than usual in part due to jurisdictional issues raised. Notwithstanding those issue, it is regrettable that a decision was not issued in a more timely manner and the Commission apologizes for the delay.

Commission allowed the appeal in part, reducing the Appellant's termination to a 19-month suspension, from April 15, 2005 to November 15, 2006.

On or about April 13, 2007, the Appellant was indicted on five counts of filing false income tax returns under 26 U.S.C. 2706 (1), each of which was a felony. On November 27, 2007, the Appellant entered a guilty plea to these charges and a judgment was entered.

At this time, the Appellant was no longer employed by the Respondent as a result of his 2005 termination. In the May 6, 2010 decision, the Commission reinstated the Appellant to his position as a Carpenter, retroactive to November 16, 2006.

The Respondent argues that had the Appellant been reinstated as of November 16, 2006, the City would have suspended him under G.L. c. 268A, § 25 on April 13, 2007 and terminated him under G.L. c. 31, § 50 on November 27, 2007.

According to the Appellant, this "after acquired evidence" should be considered by the Commission in determining the appropriate remedy. The Respondent argues that the remedy should be termination.

The Appellant argues that the criminal charges and conviction are not "after acquired evidence", but "subsequent occurring events" that occurred after the Respondent's improper termination of the Appellant and after the 2006 Commission hearing. The Appellant argues that these subsequent events had no bearing on the termination and should not be considered in determining the appropriate remedy issued by the Commission.

The Appellant argues that G.L. c. 268A, § 25 is inapplicable as the charges regarding the filing of false income tax returns did not constitute "misconduct in office" The Appellant also argues that even if this statute is applicable, it does not *mandate* suspension, but *allows* it. Further, it is unknown whether the Respondent would have exercised its discretion to suspend the Appellant at that time.

In regard to G.L. c. 31, § 50, the Appellant argues that Section 50 forbids the *hiring* of an individual who has been convicted of a crime within one year of the date of hiring, but it does not prohibit the *retaining* of a tenured employee after a felony conviction Further, Section 50 grants an exemption from the hiring restriction when there is a sentence of less than six months' confinement to a penal institution Since the Appellant was sentenced to probation in February 2008, and served no time in a penal institution, he argues that he fell within that exemption.

CONCLUSION

G.L. c. 268A, § 25 states in relevant part:

"An officer or employee of a ... city ... may, during any period such ... employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him, be suspended by the appointing authority, whether or not such appointment was subject to approval in any manner ... Any person so suspended shall not receive any compensation

or salary during the period of suspension ... If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement." (emphasis added)

Multiple appellate cases have addressed the phrase "misconduct in such office", many of which are referenced in Attorney Gen. v. McHatton, 428 Mass. 790, 792-794 (1999).

In McHatton, the court concluded that the defendant's felony conviction for federal income tax evasion, while he was a police officer in the City of Chelsea, constituted "misconduct in office," which barred him from serving as a city councilor. The court relied in part on the fact that police officers are held to a higher standard of conduct that than imposed on ordinary citizens.

In Leavitt v. Lynn, 55 Mass. App. Ct 12 (2002), the Appeals Court stated: "the basic tenet remains; an indictment for a crime arising from an employee's off-duty conduct is not generally considered misconduct 'in office'", citing Opinion of the Justices, 308 Mass. 619, 627 (1941); Tobin v. Sheriff of Suffolk County, 377 Mass. 212, 213 & N.3 (1979).

In Leavitt, the Appeals Court concluded that the authority to suspend employees who fall under indictment for misconduct in office or employment did not apply to a situation in which the human resource manager of the City of Lynn's school department was indicted on two charges arising out of his filing a false claim in order to defraud an automobile insurer, where the human resource manager's duties did not include active involvement with students, his office was located in a school administration building, and the crimes committed were unrelated to his official duties.

In the instant matter, I draw the reasonable inference that the false income tax returns in question related to McDowell's business, McDowell and Sons, and covered a five-year period of time, during which time he was simultaneously employed by the City.

In the decision, the Commission concluded that McDowell: 1) used his City-owned Nextel phone for 14 minutes on 11 occasions during regular work hours regarding matters related to his private business, McDowell and Sons; 2) used a City-owned fax machine on at least two occasions for matters related to this private business; 3) asked a City employee to provide professional advice during City time on matters related to this private business; and 4) compiled and /or reviewed proposals and prices related for a project related to this private business during normal City work hours.

For these reasons, I conclude that had the Appellant been reinstated as a carpenter on November 16, 2006, the City would have been on firm ground to suspend him without pay under G.L. c. 268A, § 25, effective upon his indictment for federal tax evasion on April 13, 2007.

G.L. c. 31, § 50 states in relevant part:

"No person ... shall be appointed to or employed or retained in any civil service position, nor shall any person be appointed to or employed in any such position within one year

after his conviction of any crime except that the appointing authority may, in its discretion, appoint or employ within such one-year period a person convicted of any of the following offenses: a violation of any provision of chapter ninety relating to motor vehicles which constitutes a misdemeanor or, any other offense for which the sole punishment imposed was (a) a fine of not more than one hundred dollars, (b) a sentence of imprisonment in a jail or house of correction for less than six months, with or without such fine, or (c) a sentence to any other penal institution under which the actual time served was less than six months, with or without such fine. Violations of statutes, ordinances, rules or regulations regulating the parking of motor vehicles shall not constitute offenses for purposes of this section." (emphasis added)

The City argues that, upon the Appellant pleading guilty to the federal tax evasion charges on November 27, 2007, it would have terminated him, even though it had the discretion to retain him since he did not serve any actual time in a penal institution for the crimes committed.

The Appellant argues that Section 50 only pertains to the *hiring* of an individual who has been convicted of a crime within one year of the date of hiring. This argument is without merit. The plain language of the statute states that an individual shall not be *retained in* any civil service position within one year of his conviction, with the appointing authority maintaining the discretion referenced above. It is a familiar canon of statutory construction that "statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353 (2001).

For this reason, I conclude that the City could have lawfully exercised its right to terminate the Appellant under G.L. c. 31, § 50 effective November 27, 2007 had he been employed as a carpenter at that time.

The unpaid suspension and termination were precluded as McDowell had already been terminated and his appeal was pending before the Commission. Had the Commission heard the Appellant's appeal in a more timely manner, reaching the same result as we did here regarding the modified penalty, the Appellant would have been reinstated to his position as a Carpenter and would have been serving in that capacity at the time of his indictment and guilty pleas.

For all of the above reasons, the City's Motion for reconsideration is hereby ***allowed in part*** as follows:

- The Appellant's discipline is modified from termination to a 6-month suspension to be served from April 15, 2005 to October 15, 2005;[4]
- The Appellant's reinstatement is limited to the following approximate 18-month time period from October 16, 2005 to April 13, 2007, at which point he was indicted on charges of federal tax evasion and would have been suspended by the City without pay under G.L. c. 268A, § 25;

[4] The decision regarding the initial modified penalty of 19 months was made under the assumption that the Appellant would be permanently restored to his employment. In light of this allowed motion for reconsideration and a further review of the record, which shows that the City failed to prove the vast majority of allegations leveled against the Appellant, I conclude that a modified penalty of a 6-month suspension is more appropriate.

- Since the City would have terminated the Appellant upon his pleading guilty to five felony charges on November 27, 2007 and balancing any appeal rights granted to the Appellant under G.L. c. 31, §§ 41 – 45, the Appellant is considered terminated effective November 27, 2007. The Appellant shall have ten (10) days from the date of this decision, not including Saturdays, Sundays and holidays to file an appeal with the Commission contesting this termination.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on March 24, 2011.

A true record. Attest:

Commissioner

Commissioner Marquis was absent on March 24, 2011

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
John S. Ferrara, Esq. (for Appellant)
Maurice M. Cahillane, Esq.
John Marra, Esq. (HRD)