

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

TIMOTHY McGLYNN,
Appellant

v.

CITY OF TAUNTON,
Respondent

Case No.: D1-08-87

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on October 1, 2009 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 18, 2009. No comments were received by the Commission from either party. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 1, 2009.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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:
Anthony Pini, Laborers Union
Steven Torres, Esq. (for Appointing Authority)
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS
DIVISION OF ADMINISTRATIVE LAW APPEALS
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CIVIL SERVICE COMMISSION

August 18, 2009

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Timothy McGlynn v. City of Taunton
DALA Docket No. CS-08-538

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,


Richard C. Heidlage
Acting Chief Administrative Magistrate

RCH/das

Enclosure

cc: Anthony Pini
Steven Torres, Esq.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Timothy McGlynn,
Appellant

Docket No. D1-08-87
DALA No. CS-08-538

v.

City of Taunton,
Appointing Authority

Appearance for Appellant:

Anthony Pini
Laborers Union
7 Laborers Way
Hopkinton, MA 01748

Appearance for Appointing
Authority:

Steven Torres, Esq.
City Solicitor
City of Taunton
15 Summer Street
Taunton, MA 02780

Administrative Magistrate:

Joan Freiman Fink, Esq.

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RECOMMENDED DECISION

Pursuant to G.L. c. 31 §42¹, the Appellant, Timothy McGlynn, is appealing the August 4, 2006 decision of the Appointing Authority, the City of Taunton, discharging him from his position as a laborer for the City of Taunton Department of Parks,

¹ At the outset of the hearing, the Appellant waived his right to a hearing on the merits of the appeal pursuant to G.L. c. 31 §43 and asserted that his current appeal is brought pursuant to G.L.c. 31 §42, relating to his claim that the Appointing Authority violated his procedural rights under civil service law, *i.e.*, G.L. c. 31 §41.

Cemeteries, and Public Grounds (Exhibit 1). The Appellant filed an appeal of this decision with the Civil Service Commission on April 8, 2008 (Exhibit 6).

A hearing in this matter was held on September 4, 2008 at the offices of the Division of Administrative Law Appeals, 98 N. Washington Street, Boston, MA. As no written request was received from either party, the hearing was declared to be private. Various documents were entered into evidence at the hearing (Exhibits 1– 6). One cassette tape recording was made of the hearing.

The parties offered oral argument in lieu of testimonial evidence. The record in this case was left open until October 9, 2008 for the filing of written closing memoranda.

FINDINGS OF FACT

At the outset of the hearing, the parties agreed to the following stipulations of fact which I hereby adopt as findings Nos. 1- 18.

1. At all relevant times, the Appellant, Timothy McGlynn, held the civil service position of laborer for the City of Taunton Department of Parks, Cemeteries, and Public Grounds.
2. The Appointing Authority is the City of Taunton, a municipal corporation with an address of 15 Summer Street, Taunton, MA.
3. The Appellant commenced employment with the City of Taunton in 1990 as a laborer.
4. The Appellant had a record of disciplinary actions taken against him by the City of Taunton throughout his tenure including two verbal warnings, nine written warnings, two one-day suspensions, and a five day suspension (Exhibits 4 & 5).

5. Prior to imposing the five day suspension, the City of Taunton held a disciplinary hearing on March 28, 2006 concerning the Appellant's alleged abuse of sick time and attendance problems. Mr. McGlynn was represented by the union at this hearing
6. Before the hearing, the Appellant was provided with complete copies of G.L. c. 31 §§41-45, the statutes relating to civil service disciplinary procedures.
7. On July 3, 2006, the City of Taunton held a disciplinary hearing to address the Appellant's time and attendance problems. The Appellant was duly notified of the hearing as well as the fact that the Appointing Authority was considering disciplinary action up to and including termination. The Appellant was likewise provided with copies of G.L. c. 31 §§41-45.
8. The Appellant was represented by his union at the hearing on July 3, 2006.
9. At the July 3, 2006 hearing, the Appellant indicated that he had issues with alcohol abuse and needed help.
10. Through his union representative, the Appellant requested a "Last Chance Agreement" in lieu of termination.
11. The Appellant entered into a "Last Chance Agreement" with the City of Taunton on July 12, 2006 (Exhibit 2).
12. As part of the "Last Chance Agreement," the Appellant agreed among other things to a two year probationary period and to participate in the Human Resource Department's random drug and alcohol testing for a two year period (Exhibit 2).
13. The Appellant also agreed that if he violated the Last Chance Agreement by testing positive for drugs or alcohol, he would be terminated (Exhibit 2).

14. On August 4, 2006, the Appellant was randomly tested at work, with the results being positive for alcohol.
15. The Appellant does not dispute the results of the August 4, 2006 random drug and alcohol test, nor does he dispute that the positive alcohol test violated the "Last Chance Agreement."
16. The City of Taunton terminated the Appellant for the violation of the "Last Chance Agreement" on August 4, 2006 without holding a hearing and without providing him with copies of G.L. c. 31, §§41-45.
17. The Appellant filed an appeal of this termination with the Civil Service Commission on April 7, 2008.

CONCLUSION AND RECOMMENDATION

At the outset of the hearing, the Appointing Authority renewed its Motion to Dismiss on the grounds that the Appellant's appeal was not timely filed. On April 18, 2008, the Appointing Authority filed a Motion to Dismiss for Lack of Jurisdiction with the Civil Service Commission. In this Motion, the Appointing Authority noted that, pursuant to G.L. c. 31 §42 and §43, an employee aggrieved by an action taken by his employer has ten days exclusive of Saturdays and Sundays to file an appeal with the Civil Service Commission.

In the present case, on August 4, 2006, the Appointing Authority notified the Appellant that he was terminated from his employment as a laborer with the City of Taunton. The Appellant filed an appeal of this decision with the Civil Service Commission on April 7, 2008, twenty months after his termination from employment.

On April 24, 2008, the Civil Service Commission denied the Motion to Dismiss for Lack of Jurisdiction without comment. Subsequently, pursuant to the provisions of G.L. c. 31 § 43, the Civil Service Commission designated the Division of Administrative Law Appeals to hear this matter on the merits of the appeal.

At the hearing held on September 4, 2008, the Appellant fully acknowledged that he had violated the "Last Chance Agreement" by failing the random drug and alcohol test administered to him at work on August 4, 2006. However, he argued that since the Appointing Authority, prior to terminating him on August 4, 2006, failed to provide him with a hearing, it violated the provisions of G.L. c. 31 § 42. The Appellant further argued that this failure on the part of the Appointing Authority to follow the dictates of the statute prejudiced his rights and, as such, he is entitled to back pay for the entire period of time from the date of his termination on August 4, 2006 up to and including the present date.

In support of his assertion, the Appellant cites the case of *Thomas Kenney v. Cambridge Housing Authority*, D-04-386 (March 9, 2007), 20 MCSR 160, where the Civil Service Commission held that a "Last Chance Agreement" does not give an Appointing Authority license to ignore due process requirements."

Notwithstanding the Appellant's arguments in this case, I conclude that the decision of the Appointing Authority discharging the Appellant from his employment on August 4, 2006 should be affirmed.

G.L. c. 31 § 42 provides that if the Civil Service Commission finds that the Appointing Authority failed to follow the procedural requirements outlined in Section 41 of the statute and that the rights of said person have been prejudiced thereby, the Commission "shall order the Appointing Authority to restore said person to his

employment immediately without loss of compensation or other rights.” After reviewing the evidence presented in this case, I conclude that the Appellant’s rights were not prejudiced by the Appointing Authority’s failure to hold a hearing prior to terminating him from his employment with the City of Taunton.

In the case of *Dorothy Mello v. Mayor of Fall River & others*, 22 Mass. App. Ct. 974, 495 N.E. 2nd 876 (1986), the Appeals Court concluded that an employee is not entitled to reinstatement and back pay when she was not provided with a hearing prior to termination where there was no dispute as to the underlying cause for the termination. In *Mello, supra*, the Appellant commenced employment as a clerk-typist with the Town of Fall River on March 6, 1967. On January 5, 1980, she was promoted to the position of principal clerk. She had been at all times a resident of Fall River until September of 1984, when she moved to the neighboring town of Dartmouth. In 1977, the City of Fall River enacted an ordinance requiring all city employees hired or promoted after January 1, 1978 to be residents of the City. In 1982, the ordinance was amended to provide that all persons promoted by the city on or after the second day of January 1978 shall be, or within two years of such promotion become, a resident of the city and shall maintain residency during the time of employment by the city. Failure to comply with the terms of the ordinance was determined to be a reason for termination from employment.

Ms. Mello was notified on two occasions in 1984 that she needed to comply with the residency requirement. In December of 1984, she was terminated from her position without being afforded a hearing pursuant to G.L. c. 31 § 41. In affirming the action of the Appointing Authority despite its failure to follow the provisions of G.L. c. 31 § 41, the Court noted that the Appellant was not prejudiced by the failure as the facts of her case were not in dispute, i.e., she was not a resident of Fall River at the time of her

termination as required by city ordinance. Thus, the Court held that “to require a hearing before discharge in these circumstances, at risk of automatic reinstatement without loss of pay or other rights, when there was nothing to be decided by the appointing authority, would be stultifying.” *Id* at 876.

The case cited by the Appellant, *Kenney v. Cambridge Housing Authority*, *supra*, is distinguishable from the current case. In *Kenney*, the Appellant was terminated from his employment following a “Last Chance Agreement” on the grounds of sleeping while on duty. Mr. Kenney disputed that charge and maintained that he was not sleeping on the job. By terminating Mr. Kenney without holding a hearing pursuant to G.L. c. 31 § 41, the Appointing Authority denied him an opportunity to refute the charge of sleeping on duty as the underlying basis for his discharge under the “Last Chance Agreement.”

In the present case, as previously stated, the Appellant does not dispute that on August 4, 2006, he tested positive for alcohol consumption while on his job with the City of Taunton. He also does not dispute that, based upon the agreement which he himself initiated and voluntarily entered into with the Appointing Authority, his positive test result warranted the imposition of termination from employment. Thus, as in the *Mello* case, *supra*, to now require the Appointing Authority to reinstate the Appellant with greater than two years of back pay where there is no issue in dispute would serve no purpose whatsoever but to reward the Appellant for his misconduct. Moreover, in *Kenney*, the Civil Service Commission noted that its decision to disregard “Last Chance Agreements,” should “not be construed as an indication that public employment can serve as a safe harbor for poor-performing public employees in general.” 20 MCSR at 165.

For the foregoing reasons, I recommend that the Civil Service Commission affirm the action of the Appointing Authority discharging the Appellant from his position as a laborer with the City of Taunton Department of Parks, Cemeteries, and Public Grounds.

DIVISION OF ADMINISTRATIVE LAW APPEALS

A handwritten signature in cursive script, reading "Joan Freiman Fink", written over a horizontal line.

Joan Freiman Fink
Administrative Magistrate

Dated: **AUG 18 2009**