

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

KEVIN McKENNA,
Appellant

v.

Docket No. D-05-416

BOSTON HOUSING AUTHORITY,
Respondent

Appellant's Representative:

Timothy G. Bailey, Esq.
International Brotherhood of Police
Officers
159 Burgin Parkway
Quincy, MA.02169

Respondent's Representative:

Douglas I. Louison, Esq.
Merrick, Louison & Costello, LLP
67 Batterymarch Street
Boston, MA 02110

Commissioner:

John J. Guerin, Jr.

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

Pursuant to G.L. c. 31, §§ 41, 42 and 43, the Appellant, Kevin McKenna, (hereafter "Appellant" or "McKenna") appealed the Boston Housing Authority's (hereafter "the Authority") refusal to allow him to return to work after receiving medical clearance. On or about February 15, 2007, the Authority submitted a Motion to Dismiss, contending that it never terminated the Appellant and that he filed his appeal after the

statutory deadline lapsed and was therefore not entitled to a hearing. The Appellant did not file a response.

Factual Background

In November 2001, the Appellant, an Authority police officer, began a stress based disability leave due to post-traumatic stress disorder. On November 22, 2002, the Appellant's psychologist informed the Authority that the Appellant's symptoms were in remission and "there are no contraindications to his returning to full-time status as a police officer." In addressing the Appellant's inquiry as to what steps he would need to take in order to return to duty, the Authority sent the Appellant a letter dated November 27, 2002, listing its standard requirements for its police officers as well as requiring the Appellant to undergo an independent psychological examination to ensure his fitness for duty. The results of this examination concluded that he remained partially disabled. As the Appellant did not submit evidence that he satisfied the requirements set forth in the letter, he was informed by letter dated February 11, 2003 that the Authority could not approve his return to work and that it would apply for accidental disability retirement for him. On February 24, 2004, the Boston Retirement Board determined that the Appellant was not eligible for disability retirement as he was not "totally and permanently disabled" by his post-traumatic stress disorder.

On December 1, 2005, the Appellant filed this appeal asserting that he was discharged by the Authority, in a February 5, 2005 decision, by its refusal to allow him to return to work after receiving medical clearance. He also claims that the Authority

constructively discharged him without just cause due to the decision he received on February 25, 2005 rejecting his disability retirement petition.

Respondent's Grounds for Dismissal

The Authority argues that the Appellant's appeal is not properly before the Commission because it does not fall under G.L. c. 31, § 41. This section provides, in relevant part, that a tenured employee has the right to a hearing prior to being discharged, removed, suspended for over five days, laid off, or transferred. The Authority maintains that it never terminated the Appellant but rather that the Appellant left his Authority police officer position in November 2001 on disability leave, and is therefore not entitled to a hearing under G.L. c. 31, § 41. The Authority states in a follow up letter to its Motion to Dismiss that the Appellant, as an employee of the Authority, was not a tenured Civil Service employee and is covered by G. L. c. 121B, § 29. This provision prevents the Authority from terminating an employee who has been continuously employed by the Authority for at least five years unless the employee is terminated in accordance with G.L. c. 31 (41-45). Again, the Authority asserts that it did not discharge the Appellant. It further argues that the Appellant remained on disability leave for over a year, during which time most of his qualifications to serve as a police officer had expired, and it was therefore justified in requiring confirmation of his suitability for duty.

Additionally, the Authority argues that the Appellant's appeal should be dismissed because it was filed with the Commission after the statutory ten-day deadline for filing an appeal under G.L. c. 31, §§ 42 and 43 had lapsed. The record shows that the Authority's

claim is correct. The Appellant filed his December 1, 2005 appeal over four years after he last performed his police officer functions for the Authority and nearly ten months after he received the Authority's relevant decisions on February 5 and 25, 2005 rejecting the disability retirement petition filed by Respondent. G.L. c. 31, § 43, in pertinent part, clearly and plainly requires that:

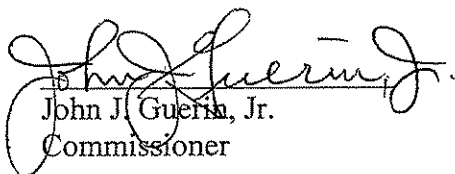
"If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission."

Therefore, his appeal is not timely and, as such, lacks standing to be heard by this Commission.

Conclusion

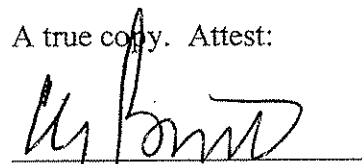
For the above reasons, Respondents' Motion to Dismiss is allowed and the Appellant's appeal filed under Docket D-05-416 is hereby *dismissed*.

Civil Service Commission


John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Taylor, Guerin and Marquis, Commissioners) on July 19, 2007.

A true copy. Attest:


Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 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:

Timothy G. Bailey, Esq.

Douglas I. Louison, Esq.