

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

WILLIAM MCKEON,
Appellant,

v.

Docket No. D1-11-198

CITY OF QUINCY,
Respondent

DECISION ON MOTION TO DISMISS

Pursuant to G.L.c. 31 §43, the Appellant, William McKeon (hereinafter the "Appellant") filed an appeal with the Civil Service Commission (hereinafter "the Commission") on June 16, 2009, claiming that the City of Quincy (hereinafter "the City" or "Quincy"), did not have just cause to terminate his employment as a "Parking Control Officer, Special Constable" with the City Traffic and Parking Dept. (hereinafter "TPD"). The Appellant was terminated for an incident of drinking alcoholic beverage while on duty on April 22, 2011. The City also relied on the facts of Appellant: having a history of prior discipline and poor performance including chronic tardiness and no show/no call on employment days.

A scheduled hearing was held on July 5, 2011 at the offices of the Commission. The parties filed a stipulation of facts and other related documents at that hearing. The City raised the matter of the Appellant filing a late appeal at the Commission and its intention

to file a Motion to Dismiss for lack of jurisdiction due to the untimely filed appeal. The facts of the mailing and receipt of the notice of the termination letter were explored.

On or about July 11, 2011 the City filed a Motion to Dismiss for lack of jurisdiction, with attached exhibits, for the Appellant's failure to file a timely appeal under M.G.L. c. 31 § 43. The Appellant filed an Opposition to the Motion on July 12, 2011.

Based on the case file, pleadings, parties' argument and other documents provided and the reasonable inferences therefrom; that the following facts are established and proven,

FINDINGS OF FACT:

1. The Appellant, ("McKeon") has been employed by the City since December 19, 2005 (Stipulated Facts). At that time, he was hired as a Parking Control Officer/Laborer. He is a tenured civil service employee (Stipulated Facts). While employed by the City, he has worked both day and evening shifts.
2. Mr. McKeon has been disciplined multiple times during his employment with the City (Stipulated Facts). The specific facts resulting in said discipline are not relevant to this motion, however. After his most recent suspension in May 2011, Mayor Koch convened a disciplinary hearing informing McKeon of such on May 9, 2011 by certified letter (Exhibit 1).
3. The hearing was scheduled on May 12, 2011 at 1:00. PM. The letter informed McKeon that the purpose of the hearing was to determine his April 22, 2011 behavior (resulting in the suspension) warranted additional

disciplinary action--including termination, and notified McKeon of his right to obtain representation at the hearing. A copy of G.L. c. 31 §§ 41-45 was enclosed with the letter to McKeon.

4. The hearing on May 12, 2011 was held as scheduled (Stipulated Facts).
The following parties were present at that hearing: the appellant, McKeon; Joseph McArdle, Business Agent Local 1139; Dan Mooney, Shop Steward; Don Hatch, President of Local 1139; John Gillon, Director of Traffic and Parking; Fred Sousa, Operations Manager for Traffic and Parking; and attorney Michael Maxey representing the City.
5. At the hearing, McKeon and McArdle did not dispute McKeon's disciplinary history or the underlying facts resulting in the recent five day suspension issued to McKeon.
6. The hearing officer, Stephen McGrath, appointed by Mayor Thomas Koch, issued a report to the appointing authority recommending that McKeon be terminated from his employment immediately. This report was issued to the Mayor on May 17, 2011. (Exhibit 2).
7. On May 18, 2011, Mayor Thomas Koch notified McKeon by letter that he adopted McGrath's findings and recommendations and terminated McKeon immediately. He also provided McKeon with a copy of McGrath's findings and recommendations. McKeon stated in his Commission appeal that he received notice of the City's decision on May 18, 2011. (Exhibit 3, stipulation)

8. McKeon filed his appeal with the Civil Service Commission on June 16, 2011, twenty business days (excluding weekends and holidays) after notice of his termination (Exhibit 4, Commission's case file).
9. On July 5, 2011 a pre-hearing was held between the parties where each party stipulated to the fact that McKeon received notice of his discharge on May 18, 2011 and that the appeal was filed June 16, 2011. (stipulation)

CONCLUSION

The Commission's jurisdiction to hear disciplinary appeals is limited by statute. 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 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 Town of Falmouth v. Civil Service 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. City of 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. Town of Saugus, 8 MCSR 154 (1995).

The Commission accepts a Claim of Appeal as timely filed, so long as the appeal is actually received or is postmarked within the prescribed deadline for filing. See 801 CMR 1.00 (4)(b); Town of Falmouth v. Civil Service Comm'n, 441 Mass. 814, 822-23 (2006). Here, however, there is no convincing evidence that the Appellant's claim of

appeal was actually filed nor postmarked within the requisite 10 day period applicable to disciplinary appeals under G.L.c.31, §43. To the contrary, inasmuch as the Money Order for the required filing fee is dated June 15, 2011, and the Commission has no record in its rejected appeal file of having received a prior claim of appeal from the Appellant. The Appellant's appeal is actually date stamped with the Commission's stamp as being received on June 17, 2011. However, the Commission formally acknowledged receipt of the appeal being filed on June 16, 2011. The date of June 16, 2011 is the official Commission filing date. The clear preponderance of the evidence infers that the Claim of Appeal received by the Commission on January 16, 2011 was the first claim that the Appellant sent, and that claim is dated only one day after the date of the required, filing fee Money Order, and, therefore would be untimely.

Pursuant to G.L. c. 31 § 43 a person aggrieved by the decision of the appointing authority pursuant to § 41 of the same chapter must file an appeal with the Commission within ten (10) days of receipt of notice of the appointing authority's decision.

Here, the parties have stipulated that McKeon received notice of his termination on May 18, 2011, and that his appeal was filed on June 16, 2011—a period of twenty business days after he received notice of his termination. Even if the appeal was post-marked prior to June 16, 2011, the appeal filing fee money order submitted by the appellant is dated June 15, 2011—20 business days after he received notice of his termination (See Town of Falmouth v. Civil Service Commission, 447 Mass. 814, 822 (2006)). The appeal was filed in an untimely manner and must be dismissed.

For the above stated reasons the City's Motion to Dismiss is allowed and the Appellant's appeal, Docket No. D1-11-198 is hereby *dismissed*.

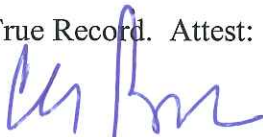
Civil Service Commission,



Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Stein and McDowell, Commissioners) [Marquis absent] on July 28, 2011.

A True Record. Attest:



Commissioner

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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

Under the provisions of MGL c. 31 S. 44, 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

S.L. Romano- Appellant
Deirdre Jacobs Hall, Atty. - City of Quincy