

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

WILLIAM MURRAY,  
Appellant

v.

D-17-097

DEPARTMENT OF CORRECTION,  
Respondent

Appearance for Appellant:

*Pro Se*  
William Murray

Appearance for Respondent:

Joseph Santoro  
Department of Correction  
P.O. Box 946: Industries Drive  
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

**CORRECTED COPY WITH CORRECT DOCKET NUMBER ON FINAL PAGE  
DECISION ON RESPONDENT’S MOTION TO DISMISS**

On May 16, 2017, the Appellant, William Murray (Mr. Murray), a Correctional Program Officer C (CPO C) with the Department of Correction (DOC), filed an appeal with the Civil Service Commission (Commission), contesting DOC’s decision to suspend him for one (1) day.

On May 30, 2017, I held a pre-hearing conference, which was attended by Mr. Murray and a DOC representative. Prior to the pre-hearing conference, the DOC representative filed a Motion to Dismiss based on Mr. Murray’s failure to request a hearing from DOC within 48 hours of being notified of his suspension. On May 30<sup>th</sup>, Mr. Murray filed an opposition.

The following relevant facts are not disputed, unless otherwise noted:

1. Mr. Murray was appointed as a CPO C by DOC on July 20, 1997.

2. Mr. Murray is a permanent, tenured civil service employee in the title of CPO C.
3. DOC records show that Mr. Murray has a lengthy disciplinary history including a one-day suspension (1999); a three-day suspension (2000); a two-day suspension (2002); a three-day suspension (2002); a letter of reprimand (2002); a letter of reprimand (2005); a ten-day suspension (2014); and a five-day suspension (2015).
4. In 2015, Mr. Murray appealed the five-day suspension to the Commission.
5. According to Mr. Murray, that matter was settled, resulting in his voluntary withdrawal of the 2015 appeal.
6. On May 15, 2017, Mr. Murray acknowledges that he received a letter dated May 11, 2017 stating that he was being suspended for one day for violating DOC policies, including privacy and confidentiality policies by sending a series of emails, which were copied to the Governor and Lt. Governor.
7. The final sentence of the letter states: “You may appeal this finding within forty-eight (48) hours of receipt to the Appointing Authority, the Commissioner of Correction. I have attached a copy of M.G.L. c. 31, §§ 41-45 for your information.”
8. Mr. Murray does not dispute that he received the letter, which contained the above-referenced language, but alleges that the referenced civil service law was not actually attached to the letter.
9. Mr. Murray did not file an appeal with the Appointing Authority.
10. On May 16, 2017, Mr. Murray filed an appeal with the Commission.

*Applicable Civil Service Law*

G.L. c. 31, s. 41 states in relevant part:

“A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. Such suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions, or by a chief of police or officer performing similar duties regardless of title, or by a subordinate to whom such chief or officer has delegated such authority. Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that **he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension.** If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request. Whenever such hearing is given, the appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing. A person whose suspension under this paragraph is decided, after hearing, to have been without just cause shall be deemed not to have been suspended, and he shall be entitled to compensation for the period for which he was suspended. A person suspended under this paragraph shall automatically be reinstated at the end of such suspension. An appointing authority shall not be barred from taking action pursuant to the first paragraph of this section for the same specific reason or reasons for which a suspension was made under this paragraph.” **(emphasis added)**

G.L. c. 31, s. 42 states:

“Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. **If the commission finds that the appointing authority has failed to follow said requirements 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.** ***(emphasis added)***

A person who files a complaint under this section may at the same time request a hearing as to whether there was just cause for the action of the appointing authority in the same manner as if he were a person aggrieved by a decision of an appointing authority made pursuant to all the requirements of section forty-one. In the event the commission determines that the subject matter of such complaint has been previously resolved or litigated with respect to such employee, in

accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with said section eight, the commission shall forthwith dismiss such complaint. If said complaint is denied, such hearing shall be conducted and a decision rendered as provided by section forty-three.

The supreme judicial court or the superior court shall have jurisdiction over any civil action for the reinstatement of any person alleged to have been illegally discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose civil service position is alleged to have been illegally abolished. Such civil action shall be filed within six months next following such alleged illegal act, unless the court upon a showing of cause extends such filing time.”

G.L. c. 31, s. 43 states:

“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. Said hearing shall be commenced in not less than three nor more than ten days after filing of such appeal and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. If the commission determines that such appeal has been previously resolved or litigated with respect to such person, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal. If the decision of the appointing authority is based on a performance evaluation conducted in accordance with the provisions of section six A and all rights to appeal such evaluation pursuant to section six C have been exhausted or have expired, the substantive matter involved in the evaluation shall not be open to redetermination by the commission. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.

Any hearing pursuant to this section shall be public if either party so requests in writing. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

The decision of the commission made pursuant to this section shall be subject to judicial review as provided in section forty-four. Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.”

### *Parties' Arguments*

DOC, citing Hurley v. City of Lynn, 23 MCSR 252 (2010), argues that, since Mr. Murray did not request a hearing with DOC, the Commission has no jurisdiction to hear his appeal.

Mr. Murray, citing Foley v. Boston Police Dep't, 22 MCSR 54 (2009), argues that he may file an appeal directly with the Commission, without first requesting a hearing before the Appointing Authority. Further, citing those provisions of Section 42 that allow a person to simultaneously file an appeal under Section 41, Mr. Murray argues that the Commission must conduct a hearing to determine if there was just cause for the discipline imposed upon him.

### *Analysis*

Hurley controls here. In making its decision in Hurley, the Commission was well aware of prior Commission decisions, including Foley, where the Commission assumed jurisdiction of disciplinary appeals involving a five-day or less suspension even where the Appellant had not first requested a hearing with the Appointing Authority. In Hurley, the Commission stated in relevant part:

“The DALA Magistrate arrived at his recommended decision based on a well-reasoned and thorough review of the Commission’s rulings concerning the obligations of appellants to exhaust their remedies to an appointing authority hearing in cases, such as the present one, in which the discipline involved a suspension of less than five days. In ruling to deny the City of Lynn’s Motion to Dismiss, the DALA recommended decision accurately reconciled the Commission’s recent decisions in Burns v. Holyoke, 21 MCSR 627 (2008), Cokely v. Cambridge Public Schools, 20 MCSR 613 (2007), and Handy v. Lynn, CSC Docket No. D-09-46 (2009). The Commission’s decisions had construed that civil service law prescribed a strong preference for pursuing the right to an administrative remedy, although the civil service law did not require that a hearing be held at the appointing authority level in cases of discipline less than five days.

Based on the facts and arguments presented in this case, however, the Commission has revisited this issue and concludes that the City of Lynn has made a compelling argument that the present

case differs from the Burns case in an important and material respect. Specifically, in the Burns case, the appellant had requested a disciplinary hearing but the appointing authority failed to conduct the hearing and render a decision within the statutorily prescribed period. The Commission was persuaded in those circumstances, and especially when the Appellant also contended that the Appointing Authority had delayed the scheduled hearing to a date knowingly inconvenient to the Appellant, that the Appellant was not obliged to suffer such further delay but could take an immediate Section 42 appeal to the Commission, together with a Section 43 appeal on the merits. The Commission will continue to permit such appeals which are limited to the circumstances such as those presented in the Burns case.

**However, the Commission agrees with the City of Lynn that civil service law is best served by requiring, in future cases, that an appellant, prior to asserting an appeal to the Commission, should exhaust the statutory right to request a hearing before the appointing authority, and to allow the appointing authority a fair opportunity to conduct such a hearing and render a decision within the statutorily prescribed time frame, in all disciplinary matters, including suspensions of five days or less. Thus, in future cases, an appellant shall be expected to first request a hearing and afford the appointing authority the opportunity to conduct such a hearing and render a decision within the prescribed time periods, five days and seven days respectively, established by G.L.c.31,§41,¶2.** This interpretation is best believed to accomplish the statutory intention that an appointing authority have the opportunity, in the first instance, to hear evidence in support of, and in opposition to discipline (including the testimony of the employee himself), while protecting the employee from undue delay in particular cases involving procedural irregularities (such as Burns) in seeking redress before the Commission. See generally, Falmouth v. Civil Service Comm'n, 447 Mass. 814 (2006) (appointing authority may draw adverse inference from failure of employee to testify on his or her own behalf in discharge case when hearing is required prior to imposing discipline)." (**emphasis added**)

Applied here, the Commission does not have jurisdiction to hear this appeal as Mr. Murray failed to request a hearing before DOC prior to filing an appeal with the Commission.

Further, Mr. Murray misconstrues the language in Section 42 which simply allows him to simultaneously file an appeal under Sections 41 and 42. It does not, as argued by Mr. Murray, require the Commission to assume jurisdiction regarding the just cause (Section 41) portion of his appeal and conduct an evidentiary hearing on that issue.

Also, Mr. Murray alleges that DOC failed to attach a copy of Sections 41-45 of the civil service law to the suspension letter that he received on May 15<sup>th</sup>. I accept, solely for the purposes of this decision, that these Sections were not attached to his letter, potentially triggering

a procedural appeal under Section 42.

In order to prevail under Section 42, the Appellant must show that DOC failed to follow the procedural requirements of the civil service law *and* that his rights were prejudiced by said failure. He has not done so. First, included in the text of the actual suspension letter, is language informing Mr. Murray that he had forty-eight (48) hours to request a hearing with DOC. Thus, he cannot reasonably argue that the failure to attach these provisions of the civil service law resulted in him being unaware of said requirement. Second, as referenced above, Mr. Murray is not unfamiliar with the appeals process, given his lengthy disciplinary history, which includes prior suspensions of five (5) days or less. For these reasons, he cannot show that he was prejudiced by DOC's purported failure to attach the civil service law to the suspension letter.

Although I made this decision solely for the reasons cited above, it is clear to me that Mr. Murray was aware of the need to request a hearing with DOC, but simply didn't want to based on his belief that it was a foregone conclusion that DOC would affirm the suspension. Finally, it is noteworthy that, as part of the pre-hearing conference, although it was suggested to Mr. Murray that he may still have recourse under those provisions of the collective bargaining agreement regarding grievances and arbitration, he dismissed that as an option.

*Conclusion*

The Commission does not have jurisdiction to hear this appeal. DOC's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. D-17-097 is *dismissed*.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 8, 2017.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or 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 this order or 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 this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

William Murray (Appellant)

Joseph Santoro (for Respondent)