

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

AIDA NIEVES,
Appellant

v.

D1-17-044

BOSTON PUBLIC SCHOOLS,
Respondent

Appearance for Appellant:

John J. Magner
SEIU, Local 888
25 Braintree Hill Office Park
Braintree, MA 02184

Appearance for Respondent:

Hilary Detmold, Esq.
Boston Public Schools
2300 Washington Street
Roxbury, MA 02119

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION TO DISMISS

1. On March 2, 2017, the Appellant, Ada Nieves, formerly employed as a Principal Clerk with the Boston Public Schools (BPS), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the BPS to terminate her employment.
2. On March 21, 2017, I held a pre-hearing conference at the offices of the Commission, which was attended by Ms. Nieves, her union representative and counsel for the BPS.
3. At the pre-hearing conference, the parties agreed that Ms. Nieves was appointed as a Principal Clerk in 1997; that she was a permanent, tenured civil service employee in that position; that she was terminated on November 17, 2016; and that she was notified of the decision to terminate her either on November 28, 2016 or December 2, 2016.
4. The termination letter, dated November 18, 2016, states:

“Dear Ms. Nieves:

You were on an approved leave of absence from August 19, 2016 through November 15, 2016 and you were expected to return to work on November 17, 2016. You did not return to work on that date, nor have you returned to work since then. The Office of Human Capital received the enclosed letter from your physician on November 21 (dated November 17) and, although you are welcome to apply for open positions within the district, the Boston Public Schools is unable to transfer or reassign you to another position.

Pursuant to Massachusetts civil service law, M.G.L. c. 31, § 37, you failed to return to your civil service position (school secretary at the Holmes) at or before completion of your approved leave of absence. I hereby notify you that I consider your employment to be terminated, effective November 17, 2016.

A copy of M.G.L. c. 31, §§ 37-38 is also enclosed for your review. I wish you well and I thank you for your many years of service to the children of the Boston Public Schools.

Sincerely,

Tommy Chang, Ed.D.
Superintendent”

5. Attached to the above-referenced termination letter was the correspondence dated November 17, 2016 from a medical doctor at Tufts Medical Center that Ms. Nieves had submitted to the BPS. That correspondence stated in part: “She [Ms. Nieves] was due to return to work on 11/17/2016 but in my opinion she is not fit to return to her same line of work but would benefit from a different job.”
6. At the pre-hearing conference, counsel for the BPS submitted a Motion to Dismiss, arguing that the appeal was not timely and that the Commission did not have jurisdiction to hear an appeal related to Section 37 of the civil service law.
7. At the pre-hearing conference, I stated that Ms. Nieves, or her union representative on her behalf, had two (2) weeks to file a reply to the Motion to Dismiss. No opposition was received by the Commission.

Applicable Civil Service Law

G.L. c. 31, § 37 states:

“An appointing authority may grant a permanent employee a leave of absence or an extension of a leave of absence; provided that any grant for a period longer than fourteen days shall be given only upon written request filed with the appointing authority by such person, or by another authorized to request such leave on his behalf, and shall be in writing. The written request shall include a detailed statement of the reason for the requested leave and, if the absence is caused by illness, shall be accompanied by substantiating proof of such illness. A copy of the written grant shall be kept on file by the appointing authority, who shall, upon request, forward a copy thereof to the

commission or administrator. No leave of absence for a period longer than three months, except one granted because of illness as evidenced by the certificate of a physician approved by the administrator, shall be granted pursuant to this paragraph without the prior approval of the administrator.

...

Any person who has been granted a leave of absence or an extension thereof pursuant to this section shall be reinstated at the end of the period for which the leave was granted and may be reinstated earlier. **If the appointing authority, upon demand of such person, shall fail to reinstate him to his civil service position, such person may request a hearing before the administrator. The administrator shall proceed forthwith to hold such a hearing and to render his decision.** (emphasis added)

If a person shall fail to return to his civil service position at or before completion of the period for which a leave of absence has been granted under any provision of this section, the appointing authority shall, within fourteen days after the completion of such period, give such person a written notice setting forth the pertinent facts of the case and informing him that his employment in such position is considered to be terminated, whereupon the employment of such person in such position shall terminate. The appointing authority shall file with the administrator a copy of such notice which shall state the date on which the employment of such person should be recorded as having terminated. **The provisions of sections forty-one through forty-five shall not apply to a termination made under this paragraph.** Nothing in this section shall be deemed to prevent the subsequent reinstatement of such person pursuant to section forty-six.” (emphasis added)

G.L. c. 31, § 38 states:

Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight, an appointing **authority shall send by registered mail a statement to the person named in the report, informing him** that (1) he is considered to have permanently and voluntarily separated himself from the employ of such appointing authority and (2) **he may within ten days after the mailing of such statement request a hearing before the appointing authority.** A copy of such statement shall be attached to such report to the administrator.

The appointing authority may restore such person to the position formerly occupied by him or may grant a leave of absence pursuant to section thirty-seven if such person, within fourteen days after the mailing of such statement, files with the appointing authority a written request for such leave, including in such request an explanation of the absence which is satisfactory to the appointing authority. The appointing authority shall immediately notify the administrator in writing of any such restoration or the granting of any such leave.

If an appointing authority fails to grant such person a leave of absence pursuant to

the provisions of the preceding paragraph or, after a request for a hearing pursuant to the provisions of this section, fails to restore such person to the position formerly occupied by him, such person may request a review by the administrator. The administrator shall conduct such review, provided that it shall be limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.

No person who has been reported as being on unauthorized absence under this section shall have recourse under sections forty-one through forty-five with respect to his separation from employment on account of such absence.

For the purposes of this section, unauthorized absence shall mean an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven.”

(emphasis added)

Analysis / Conclusion

In a case regarding a termination under Section 38, which also references Section 37, the Appeals Court in Sisca & another v. City of Fall River and others, 65 Mass.App.Ct. 266 (2005), reinforced that appeals regarding leaves of absence are to be filed with HRD, and not the Commission.

However, in O'Connor v. Civ. Serv. Comm'n & another, 38 Mass.App.Ct. 979 (1995), the Appeals Court decided a case involving a Commission decision regarding Section 37 and whether a grant of leave under Section 37 must be in writing.

Notwithstanding the decision in O'Connor, the plain language of Section 37 states that any appeal rights related to an Appointing Authority's decision to terminate an employee pursuant to Section 37 is limited to an appeal to the Appointing Authority and the *Administrator (HRD)*, not the Commission. For that reason, Commission has no jurisdiction to hear this appeal.

In the event that this termination is reviewed following the provisions of Sections 37 and 38, I would anticipate that various relevant issues including, but not limited to, whether Ms. Nieves, a 19-year employee of the Boston Public Schools, actually “failed to return to work” or, rather, at the end of her leave, simply sought an accommodation.

Conclusion

Ms. Nieves's appeal under Docket No. D1-17-044 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan, Commissioners [Ittleman – Absent]) on June 22, 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:

John Magner (for Appellant)

Hilary Desmond, Esq. (for Respondent)