Decision mailed: 9/19/08
Civil Service Commission
03

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

PAUL NORTON,
Appellant
v.

CASE NO: D1-08-148

CITY OF MELROSE,
Respondents

Appellant's Attorney	John J. McNaught, Jr., Esq. McNaught Law Offices 6 Eastman Place, 3rd Floor Melrose,MA 02176 jjm@mcnaughtlaw.com
City of Melrose Attorney:	Robert Van Campen, Esq. City Solicitor City of Melrose 502 Main Street Melrose, MA 02176 rvancampen@cityof Melrose.org
Commissioner:	Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Paul Norton, acting pursuant to G.L.c.31, §41, appealed a decision of the Respondent, the City of Melrose, as Appointing Authority, denying his request for benefits under G.L.c.41,§111F (Leave With Pay For Incapacitated Employees). The Respondent moved to dismiss the appeal on grounds of (1) timeliness, (2) jurisdiction and (3) failure to exhaust collective bargaining remedies. On August 21, 2008, the Commission held a hearing on the motion. Oral arguments and written submissions were received in support of the motion (Exhibits 1 through 6) One tape recording was made of the hearing. The Respondent orally waived the "failure to exhaust remedies" claim at the hearing.

FINDINGS OF FACT

Based on the pleadings, the documents in the record and the testimony at the hearing by the Appellant and by Mary Long, the Human Resources Director of the City of Melrose, I find there is no genuine dispute as to the following facts:

1. For all times relevant, the Appellant, Paul Norton has held the tenured civil service position of Lieutenant in the Melrose Police Department. (*Exhibit 21*)

2. On May 11, 2007, Lt. Norton reported for duty at the Melrose Police station. While on duty, Lt. Norton reported symptoms of dizziness and double vision and was taken to Melrose Wakefield Hospital, where he was diagnosed with having suffered a stroke. (*Exhibits 2, 4, 5*)

3. As a result of his stroke, Lt. Norton was out of work from May 14, 2007 through November 22, 2007, for which he was paid through the use of 824 hours of sick time, 160 hours of vacation time and 48 hours of comp time. (*Exhibit 2*)

4. Lt Norton duly applied for benefits under G.L.c.41,§111F (LWP benefits) which provides, in relevant part:

> "Whenever a police officer . . . of a city or town is incapacitated for duty because of an injury sustained in the performance of his duty without fault of his own, or a police officer . . . assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity. . . .All amounts payable under this section shall be paid in the same times and in the same manner as, and for all purposes shall be deemed to be the regular compensation of such police officer . . . ."

5. By letter dated September 7, 2007, the City of Melrose informed Lt. Norton that his claim for c.41,§111F LWP benefits was denied. The grounds for denial were stated to be based on a medical evaluation that concluded Lt. Norton had not suffered his stroke "as not injured on duty". (*Exhibits 1, 2 & 4*)

6. The September 7, 2007 letter did not inform Lt. Norton of any right of appeal to the Commission from the denial of his claim to LWP benefits. (*Exhibit 1*)

7. On or about October, 27, 2008, Lt Norton sought to grieve his denial of LWP benefits through the four step collective bargaining grievance procedures established by Article 22 of the applicable collective bargaining agreement (CBA) between the labor union to which he belonged (Melrose Superior Police Officers Association) and the City of Melrose. (*Testimony of Mary Long; Exhibits 1, 2*)

8. The grievance process appears to have proceeded through "Step 3", namely the review by the Mayor's designee, Mary Long, at which time the City agreed to obtain a second medical opinion. Upon receipt of this second medical opinion, on about February 26, 2008, Lt. Norton's union representative was informed that the City's original decision remained unchanged and Lt. Norton's stroke was not attributed to an "on-duty" event. (*Testimony of Mary Long; Exhibits 1, 2,3 & 5*)

9. Unfortunately, Lt. Norton did not receive notice of the "Step 3" denial until his Union representative sent him an e-mail which he received on May 29, 2008. (*Testimony of Lt. Norton, Mary Long; Exhibits 1 & 2*)

10. On June 12, 2008, Lt. Norton requested his Union to file a demand for arbitration as to the denial of his LWP benefits, but, to date, no arbitration has been demanded. There is a 30-day window following the denial of a "Step 3" grievance to demand arbitration under the applicable CBA. Although the parties may extend that deadline by agreement, it appears that the City has not agreed to arbitrate this dispute. (*Testimony of Mary Long and Lt. Norton; Exhibits 2, 3 & 6*)

11. This appeal was filed on June 12, 2008.

CONCLUSION

A tenured civil service employee aggrieved by action taken by an Appointing Authority may appeal to the Commission for relief under G.L.c.31, §§42 & 43. These statutes authorizes an employee to appeal when "an appointing authority has failed to follow the requirements of section forty-one [of Chapter 31] in taking action which has affected his employment or compensation" and to challenge "whether there was just cause for the action taken by the appointing authority [under Section 41]".

Thus, not all Appointing Authority actions are appealable to the Commission. As expressly provided in Sections 42 and 43, appeals to the Commission under those statutes must fit into one of the categories that are specified by G.L.c.31,§41, namely a claim that the employee has been "discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent . . . lowered in rank or compensation without his written consent [or] his position . . . abolished." See, e.g., Williams v. Stoughton, 19 MCSR 130 (2006) (no jurisdiction over disability determination); Harris-Gows v. Boston Police Dep't, 9 MCSR 96 (1996) (no jurisdiction to order compensation for the extra tax burden of receiving her back pay in one lump sum); Roderick v. Plymouth, 6 MCSR 142 (1993) (involuntary retirement)

Appeals must be taken within 10 days (exclusive of weekends and holidays) after the receipt of written notice of the Appointing Authority's action under Section 41, which notice much include "the specific reasons or reasons for such action and a copy of sections forty-one through forty-five [of G.L.c. 31] and [the employee] shall be given a full hearing concerning such reasons for such action before the appointing authority or a hearing officer designated by the appointing authority." G.L.c.31,41.

Timeliness

The evidence clearly established that Lt. Norton never received any "written notice" of the City's decision denying him LWP benefits that complies with the requirements of G.L.c.31,§41. The City's failure to comply with the notice requirements is understandable, given the City's good faith understanding that a LWP benefits decision was not covered by the Civil Service Law. Nevertheless, it remains true that the original September 7, 2007 letter does not constitute a sufficient written notice required by Section 41 of the Civil Service Law to trigger the running of the ten-day statute of limitations for appeal to the Commission, and the Appellant's appeal from the May 29, 2008 notice (also not compliant with Section 41) was timely filed. Accordingly, the Commission will not dismiss this appeal on the grounds of timeliness.

Jurisdiction

The Commission is aware of no case in which it has assumed jurisdiction over an appeal challenging an Appointing Authority's decision to deny LWP benefits under G.L.c.41, §111F and the parties have cited none. The issues presented in such a case typically have been addressed by civil action (for declaratory relief) or by collective bargaining arbitration. See, e.g., Todino v. Town of Wellfleet, 448 Mass. 234, 860 N.E.2d 1 (2007); Jones v. Town of Wayland, 474 Mass. 249, 373 N.E.2d 199 (1978); Carvalho v. City of Cambridge, 372 Mass. 464, 362 N.E.2d 522 (1977); Town of Reading v. Reading Patrolmen's Ass'n, 50 Mass.App.Ct. 468, 737 N.E.2d 1268 (2000); Mard v. Town of Amherst, 350 F.3d 184 (1st Cir. 2003); Patterson v. Tortolano, 359 F.Supp.2d 13 (D Mass. 2005).

LWP benefits under G.L.c.41, §111F, "shall be paid in the same times and in the same manner as, and *for all purposes shall be deemed to be the regular compensation* of such police officer" (*emphasis added*). Thus, the Appellant appears to argue that denial of such benefits is a loss of "compensation" within Sections 41 through 43 of the Civil Service Law over which the Commission has jurisdiction. The Appellant's position is certainly arguable, but, in the absence of any specific authority within either Chapter 31 or Chapter 41 that vests the Commission with jurisdiction of a LWP dispute, the Commission does not construe its statutory authority to extend to such matters.

The basic purpose of the Civil Service Law is "to guard against political considerations, favoritism, and bias in governmental employment decisions, including, of course, promotions, and to protect efficient public employees from political control. [Citations]. When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission." See City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, 926, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997).

A dispute over denial of LWP benefits under G.L.c.41, §111F would seem to turn on expert medical opinions about the nature of the employee's injuries and whether the injuries are "work-related" or not. This type of dispute does not fit the normal profile of a civil service appeal typically brought before the Commission. The Commission can appreciate that an employee aggrieved by a denial of LWP benefits might well prefer having an administrative remedy to the Commission, which is generally less expensive and quicker to resolution than either a civil action or arbitration proceeding. However, on

balance, the Commission does not read any clear mandate from any relevant statutory language that indicates a legislative intent to confer jurisdiction of LWP disputes upon the Commission. The long-standing practice of appointing authorities, unions and employees under this law, which has been on the books for decades, appears to confirm that general understanding. Indeed, if the legislature had thought an administrative remedy necessary, there are other agencies, such as the Division of Industrial Accidents, that appear to have greater expertise in the adjudication of the factual and legal issues involved and would be a more logical fit.

Accordingly, for the reasons stated above, the Commission allows the Respondent's Motion to Dismiss, and the appeal is hereby ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Marquis, Stein, Taylor and Henderson, Commissioners) on September 18, 2008.

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)(l), 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:
John J. McNaught, Jr., Esq.. (Appellant)
Robert Van Campen, Esq. (Appointing Authority)