

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

MARTIN NOVIA,
Appellant

v.

D-06-62

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:

Donald J. Fleming, Esq.
86 Church Street
Mattapoisett, MA 02739
(508) 758-6982

Respondent's Attorney:

Jane Medeiros Friedman, Esq.
City of New Bedford
Office of the City Solicitor
133 William Street: Room 203
New Bedford, MA 02740
(508) 979-1460

Commissioners:

Donald R. Marquis
Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

Pursuant to G.L. c. 31, § 43, the Appellant, Martin Novia, (hereafter "Appellant" or "Novia") filed an appeal with the Civil Service Commission on March 27, 2006 indicating that he wanted to appeal the decision of the City of New Bedford (hereafter "the City" or "Appointing Authority") to "discharge" him.

A pre-hearing conference was held at the offices of the Civil Service Commission on November 16, 2006. Prior to the pre-hearing conference, the City filed a Motion to Dismiss the Appellant's appeal on August 9, 2006. The Appellant filed a response to the

Motion to Dismiss on December 7, 2006 and the City filed a reply to the Appellant's answer on January 9, 2007. On November 14, 2007, the Commission conducted a motion hearing before Commissioners Marquis and Bowman, which was attended by counsel for both parties, the Appellant and the current police chief for the City of New Bedford. There was one tape of the proceedings.

Factual Background

The Appellant was appointed as a police officer by the City of New Bedford on October 25, 1987. It is undisputed that the Appellant, approximately 15 years later, requested a leave of absence from the City on March 31, 2003. The Appellant's written request, stated, in its entirety:

“Dear Chief,

I have been offered a contract position with the U.S. Government. While not a military assignment per se, the assignment is paramilitary in nature.

Due to this offer I am asking for a leave of absence from my employment with the New Bedford Police Department.

Please inform me of time limits and general rules regarding such a leave.

Sincerely,

Off. Martin J Novia 3725”

(Appellant's March 31, 2003 letter to City)

It is also undisputed that the City denied the Appellant's above-referenced request for a leave of absence, via written notification, on April 4, 2003.

Subsequent to being denied his request for a leave of absence, the Appellant took advantage of a provision in the applicable collective bargaining agreement which allows

police officers to “swap” shifts. New Bedford Police Chief Ronald Teachman, who was Captain for administrative services in 2003, stated at the motion hearing that this provision of the collective bargaining agreement was typically used by officers to “swap” an occasional shift they were scheduled to work (i.e. – swapping a day shift for a night shift). Using the above-referenced swapping provision, the Appellant, shortly after being denied his leave of absence, arranged for another officer to cover all of his shifts for several months. During this period of time, the Appellant was a full-time contract employee in Afghanistan; the other officer was working the Appellant’s full-time schedule (in addition to his own full-time schedule); and the Appellant was being paid by the City of New Bedford as a full-time police officer, even though the shifts were being worked by another officer.

While the above-referenced arrangement is only an ancillary issue as it pertains to the instant appeal, the Commission takes note of this highly unusual – and problematic – practice. Surprisingly, the City, throughout the proceedings at the Commission, was unable to state whether the leadership of the New Bedford Police Department was aware of how the swapping provision was being utilized in this case and whether or not such long-term arrangements are still sanctioned today. The City has a fiduciary responsibility to the taxpayers to find out.

Regardless of the problematic nature of how the swapping provision was utilized in the instant matter, it is undisputed that in October 2003, the City informed the officer who was covering the Appellant’s full-time schedule that he could no longer continue to do so. While the City did not provide the Appellant with written notification that the swapping arrangement had ended, the City did stop making payments to the Appellant.

Further, it is not disputed that the Appellant was aware, at least by November 2003, that the swapping arrangement had ended.

Asked by the Commission, why, in November 2003, when he was fully aware that his voluntary leave of absence had been denied and that the swapping arrangement had ended, he did not attempt to resume his duties as a New Bedford police officer, the Appellant stated, “I made a commitment to the position I had over in Afghanistan and...my commitment to my position in Afghanistan was more important than preserving my right to my retirement.”

The Appellant’s reference to his retirement was an overarching issue throughout these proceedings. In summary, the Appellant was attempting to purchase retirement time credit for his military service, including service in the Rhode Island National Guard. While first told by the local retirement board that he could purchase for retirement purposes the time served in the Rhode Island National Guard, the state’s Public Employment Retirement Administration Commission (PERAC) determined in November 2003 that the Appellant could not purchase the time served in the Rhode Island National Guard. In August 2005, PERAC subsequently notified the local retirement board that, as a result of a law change, individuals could now purchase for retirement purposes time served in the National Guard for a state other than Massachusetts. However, such time could not be purchased for retirement purposes if the Appellant was not currently an active employee with the New Bedford Police Department.

By August 2005, the Appellant was not an employee of the New Bedford Police Department as the City had terminated him over 16 months earlier, on March 10, 2004. Specifically, on March 10, 2004, several months after the above-referenced swapping

arrangement had ended, the City notified the Appellant in writing that, “In accordance with Massachusetts General Laws, Chapter 31, Section 38, you are considered to have permanently and voluntarily separated yourself from the employ of the City of New Bedford Police Department. You have been absent from work for a period of more than fourteen (14) days for which no notice has been given. You may, within ten (10) days of the mailing of this notice, request a hearing.” (March 10, 2004 letter from City to Appellant)

The Appellant, who was working in Afghanistan in March 2004, stated that he did not become aware of the March 10, 2004 letter until the Summer of 2004. Whether the Appellant received the above-referenced letter in March 2004 or during the Summer of 2004, there is no dispute that the Appellant never contacted the City during the Summer of 2004 seeking a hearing. Further, as referenced-above, the Appellant did not file an appeal with the Civil Service Commission until March 27, 2006, more than 20 months after he was informed by the City that they considered him to have permanently and voluntarily separated himself from the employ of the City.

The Appellant is seeking a full hearing to determine whether or not the Appointing Authority had reasonable justification to terminate, arguing at the motion hearing that the denial of the voluntary leave request was a pretext to terminate him for reasons related to prior military leave and the Appellant’s involvement with the arrest of a former state legislator. The relief being sought by the Appellant is to be restored as a police officer in the New Bedford Police Department for at least one day, so that he can then, as an active employee, purchase for retirement purposes, the time he served in the Rhode Island

National Guard, providing him with more than 20 years of credibility service, a prerequisite for qualifying for retirement before the age of 55. The Appellant is now 43.

The City argues that the Commission, given the undisputed facts of the case, does not have jurisdiction to hear the Appellant's appeal pursuant to the plain language of G.L. c. 31, § 38. Further, the City argues that the appeal does not meet the statutory 10-day filing requirement in regard to discipline appeals filed with the Commission.

Conclusion

The Commission does not have jurisdiction to hear the instant appeal. G.L. c. 31, § 38, states, in relevant part, "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." The Appellant, given the undisputed facts in this case, has no appeal rights to the Civil Service Commission. (*See Police Commissioner of Boston v. Civil Service Commission*, 29 Mass. App. Ct. 470 (1990) (The Commission lacked jurisdiction despite a dispute regarding whether the Appellant gave notice of absences and whether the discharge was for unauthorized absence exceeding 14 days was the precise issue left for decision.) Further, the Appellant's appeal is untimely, by at least 18 months.

Pursuant to 801 CMR 1.01 (7)(g)(3), "the presiding officer may at any time, on his own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should first be decided."

As the Commission lacks jurisdiction in this matter, the Appellant's appeal under Docket No. D-06-62 is hereby *dismissed*.

Civil Service Commission

Donald R. Marquis
Commissioner

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on November 21, 2007.
A True copy. 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)(I), 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:
Donald J. Fleming, Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Appointing Authority)