COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

MICHAEL O'HARE, Appellant	)	
v.	)	Docket No. D-04-346
CITY OF BROCKTON, Respondent	)	ON THE RESPONDENT'S MOTION TO DISMISS

DECISION

Pursuant to the provisions of M.G.L. c. 31, § 43, the Appellant, Michael O'Hare (hereinafter "Appellant"), filed this appeal with the Civil Service Commission (hereinafter "Commission") claiming that an action by the Respondent, City of Brockton (hereinafter "City") as Appointing Authority, terminated him from his employment as a permanent firefighter in the Brockton Fire Department (hereinafter "Department"). The City asserts that it served notice to the Appellant on July 12, 2004 that, as of June 11, 2004, the Appellant was deemed to have "permanently and voluntarily" separated himself from the employ of the City, pursuant to M.G.L. c. 31, § 38, as he had been on an unauthorized absence since March 28, 2004. Subsequent to the Appellant's filing of this appeal, the City filed this Motion to Dismiss said appeal (and accompanying exhibits of evidence) on July 27, 2004, in accordance with the provisions of the Standard Adjudicatory Rules of Practice and Procedure 801 CMR 1.01 (7)(g)(3), claiming that the Appellant has failed to state a claim upon which relief can be granted and, that the

Commission lacks jurisdiction to hear the appeal. The Appellant filed no opposition to the Motion to Dismiss.

In order to file an appeal with the Commission pursuant to M.G.L. c. 31, § 43, a person must be aggrieved by an action or decision of an Appointing Authority rendered pursuant to M.G.L. c. 31, § 41. The City has provided credible evidence that it never issued a decision to terminate the Appellant pursuant to § 41. Moreover, the City has provided credible evidence that it properly served noticed to the Appellant and appropriately held a hearing pursuant to § 38 in order to determine if the Appellant had "permanently and voluntarily" separated himself from the City's employ. The Commission finds that, in accordance with § 38, the City did determine that the Appellant had separated himself from employment; that the City deemed the Appellant to be terminated as of June 11, 2004 due to this voluntary separation; and, that the Appellant's unexplained request for a leave of absence was denied. A brief background and discussion of this process ensues.

The Appellant was hired as a firefighter for the City on May 14, 1997. The Appellant had experienced significant sick days, injured-on-duty days and, non-paid days from 2001 to the date of his § 38 hearing on July 8, 2004. Of note were 66 non-paid days between 2002 and 2003. At some point in 2002, Fire Chief Kenneth Galligan (hereinafter "Chief") counseled the Appellant regarding his excessive sick leave and, pursuant to this conversation, assigned the Appellant to lighter duty in the Fire Prevention Office on July 17, 2002 where, by all accounts, the Appellant excelled in his new duties.

On August 30, 2002, the Chief issued General Order Number 486 requiring all firefighters to notify the officer in charge of their duty station of their inability to report for their tour of duty at least two hours prior to the start of their tour. Because the Appellant's excessive sick leave use persisted, on November 15, 2002 the Chief cautioned the Appellant in writing that "Your recent conduct with regard to the use of Sick Leave, failure to communicate with the Chief's Office, and frequent time off of the payroll is not consistent with the conduct expected of a Member of the Brockton Fire Department. Should your conduct continue as has been in the recent past, you may be positioning yourself for possible disciplinary action."

Following this notice, the Appellant expressed a desire to again be assigned to an apparatus. The Chief, once again, counseled the Appellant as to the seriousness of being off the payroll and outlined options available to the Appellant to remedy any problem which may have been causing the Appellant's continuing need for time off. The Chief further explained that, if the problem worsened, the Appellant could be charged with job abandonment. On December 16, 2002, the Chief acceded to the Appellant's wishes and transferred him from Fire Prevention to Engine Company 4, Group 4.

On March 28, 2004, the Appellant notified his duty station that he would not be reporting to duty as his wife was ill. There was no further contact between the Appellant and the Department until April 26, 2004. By that time, the Appellant had used up all his sick leave and had not reported his absences to anyone in the Department. The April 26 contact was a call to the Chief from the Appellant who stated that he "needed help and

that he was over the edge" and then, hung up the phone. The Chief immediately dispatched a Deputy Chief to check on the Appellant and his wife. The Deputy Chief was able only to meet with the Appellant's wife who indicated that her husband's situation "usually plays itself out". Concerned about the Appellant's state of mind, the Chief enlisted the help of the Plymouth County Stress Team, which is designed to help firefighters relieve problems with tension and mental flashbacks. On May 4, 2004, the Stress Team reported to the Chief that they were unsuccessful in making contact with the Appellant.

On May 10, 2004, the Appellant contacted the Chief and indicated that he had made an appointment with Dr. Dunn with the City's Employment Assistance Program (EAP). There is no record that the appointment was ever kept and there was no further contact from the Appellant with the Department. On June 11, 2004, the city notified the Appellant that he was considered to have permanently and voluntarily separated himself from employment with the Department and was deemed to be terminated as of that date pursuant to M.G.L. c. 31, § 38. In accordance with § 38, the Appellant was allowed ten (10) days to request a hearing, which he did on June 21, 2004. The City then properly noticed the Appellant, on June 29, 2004, of a hearing date of July 8, 2004. Said hearing took place that day. The Appellant was present at the hearing with union representation and declined to make any statements relative to the matter. Precedent to that hearing, the Appellant requested from the City, pursuant to § 38, a leave of absence for "personal and medical reasons". Following the hearing on the matter, the Hearing Officer recommended to the Mayor, as Appointing Authority for the City, the following findings:

that the Appellant had permanently and voluntarily separated himself from the employ of the City; that the Appellant should, therefore, be deemed terminated from said employ; and, that the Appellant's request for a leave of absence should be denied because he had not provided an explanation for the leave which is satisfactory to the Appointing Authority.

The Mayor of Brockton, John T. Yunits, Jr., adopted the findings of the Hearing Officer and officially noticed the Appellant, pursuant to § 38, that he was deemed terminated from his position as firefighter in the Brockton Fire Department as of June 11, 2004 and, that his request for a leave of absence was denied. Pursuant to M.G.L. c. 31, § 38, an Appellant's means of appeal is to request a review from the Personnel Administrator which is limited to a determination by the Administrator as to whether the Appellant failed to give proper notice regarding his absence and whether the failure to give such notice was reasonable.

In this case, the Appellant appealed to the Commission pursuant to M.G.L. c. 31, § 43. In order for the Commission to hear a § 43 appeal, the filing party must have been aggrieved by an action taken by the Appointing Authority in accordance with the provisions of § 41. We find that no such action took place. The Appellant clearly experienced a precipitous deterioration in his capacity to report for duty since 2001. The Department made several, sincere attempts to ameliorate this situation by offering help to the Appellant. For reasons known only to the Appellant, he was either unwilling or unable to accept this assistance. As a result, the City moved to determine that the

Appellant had permanently and voluntarily separated himself from employment with the City due to his unauthorized absence which § 38 describes as, "*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."* The City considered the Appellant on unauthorized leave from March 28, 2004 until at least June 11, 2004.

The Appellant, who was fully aware that the Appointing Authority was taking action pursuant to § 38[1], failed to perfect his request for a leave of absence. Section 38 states in relevant part:

> "The appointing authority may restore such person to the position formerly occupied by him and 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.*** (Emphasis added.)

In his July 2, 2004 written request for a leave of absence, addressed to Mayor Yunits, the Appellant writes one sentence: *"I would like to request a leave of absence from the Brockton Fire Department because of personal and medical reasons."* The Appointing Authority was reasonably justified in dismissing "personal and medical reasons" as being too vague and ambiguous to be considered a "satisfactory" explanation of the Appellant's absence, as is required by the statute.

[1] The Appellant clearly received proper notice of a § 38 action from the Appointing Authority and participated in the process so prescribed by that section of the statute. In fact, it is evident that the Appellant was familiar with his rights under the section as he timely filed a request for a hearing, as well as a request for a leave of absence in accordance with the provisions thereof.

For all of the aforementioned reasons, it is our finding that the City had properly pursued the termination of the Appellant in accordance with the provisions of M.G.L. c. 31, § 38 because the Appellant had been away from his job on an unauthorized absence. That being so, the Appellant is barred from appealing the decision of the Appointing Authority in this matter pursuant to § 43. The language contained in § 38 is unambiguous in this regard, "*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 Commission finds that it lacks jurisdiction to hear this appeal and, in the alternative, that the Appellant has failed to state a claim upon which relief can be granted. Therefore, the respondent's Motion to Dismiss the appeal is allowed and the appeal on Docket No. D-04-346 is hereby ***dismissed.***

Civil Service Commission

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John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Taylor, Marquis and Bowman, Commissioners) [Guerin, Commissioner absent] on January 4, 2007.

A true record. Attest:

_____
Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 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:
James M. McCormick, Esq.
Paul T. Hynes, Esq.