COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108

TIMOTHY O'SULLIVAN,
Appellant

v.

D1-10-77

BROOKLINE SCHOOL DEPARTMENT,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS
AND APPELLANT'S OPPOSITION TO MOTION TO DISMISS

The Appellant, Timothy O'Sullivan (hereinafter "O'Sullivan" or "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") on April 16, 2010 contesting the decision of the Brookline School Department (hereinafter "Department" or "Appointing Authority") to terminate him from his position as a senior custodian for multiple misdemeanor convictions resulting in a ninety (90) day incarceration and for being absent without leave for more than fourteen (14) days.

A pre-hearing conference was conducted at the offices of the Commission on May 11, 2010. The Department filed a Motion to Dismiss (hereinafter "Department's Motion") on May 19, 2010, and the Appellant filed an Opposition to Motion to Dismiss (hereinafter Appellant's Motion"), on August 11, 2010. A hearing on the motions was held at the offices of the Commission on August 23, 2010. The motion hearing was digitally recorded.

The following facts appear to be undisputed:

1. The Appellant was a civil service employee employed as a Senior Custodian by the Department. He was last assigned to a two-school position at the Baldwin and Lynch Schools. (Appellant's Motion)
2. On November 12, 2009, the Appellant was found guilty of Assault and Battery under M.G.L c. 265, § 13 in West Roxbury District Court and received a two-year suspended sentence. (Department's Motion)
3. On December 18, 2009, the Appellant entered a guilty plea to a five-count criminal charge in West Roxbury District Court. These crimes included (1) violation of an abuse prevention order under M.G.L. c. 209A, § 7 (2) Assault and Battery in violation of M.G.L c. 265, § 13 and (3) three counts of Assault and Battery on a Police Officer in violation of M.G.L. c. 265, § 13D. (Department's Motion)
4. As a result of the December 18, 2009 guilty plea, the Appellant was sentenced to a jail term of ninety (90) days in the House of Correction. (Department's Motion)
5. During his incarceration, the Appellant received vacation pay until it was exhausted on January 31, 2010. The Appellant also received pay for three (3) administrative

days. He did not receive any additional income for the remainder of his incarceration. (Appellant's Motion)

6. The Appellant contends that payroll records dated January 7, 2010, indicate that the Appellant's employment status was changed to "absent without pay" beginning December 28, 2009. (Appellant's Motion)
7. The Appellant contends that Jay Pagliarulo (hereinafter "Pagliarulo"), Director of Building Services, made assurances to Appellant's family that the Appellant's job would be waiting for him when he was released, and that Pagliarulo authorized the vacation pay as well as the payment for the three (3) administrative days. (Appellant's Motion, Affidavit of Rachel O'Sullivan)
8. The Appellant was released with probationary terms on February 22, 2010. (Appellant's Motion)
9. On March 5, 2010, Dr. William H. Lupini (hereinafter "Lupini"), Superintendent of Schools, sent notice of a hearing scheduled for March 12, 2010 to discuss the Appellant's contemplated discharge and the reasons therefor. (Department's Motion)
10. As grounds for potential separation from employment, Lupini advised the Appellant that:

> Pursuant to Massachusetts General Laws ("M.G.L.") chapter 31 § 50, you are no longer eligible for employment with the Public Schools of Brookline based on your recent conviction of a crime(s). M.G.L. c. 31, § 50 provides that: '[n]o person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position, nor shall any person be appointed to or employed in any such position within one year after his conviction of any crime…' You have reported that you were recently convicted of a crime(s), and you informed your supervisor that as a result of such conviction you were incarcerated for a period of approximately 90 days. Therefore, pursuant to M.G.L. c. 31, § 50, you are no longer eligible for employment in your civil service position with the Public Schools of Brookline. (Department's Motion)

11. The hearing was rescheduled for March 16, 2010. (Department's Motion)

12. At the March 16, 2010 hearing, the Appellant was represented by representatives of his union, AFSCME, as well as the attorney who had represented him in his criminal proceedings. (Department's Motion)

13. The hearing was held open to provide the Appellant with the opportunity to pursue a settlement agreement. (Department's Motion)

14. On April 5, 2010, the hearing was closed and Lupini issued a Notice of Separation and Discharge dated April 6, 2010. (Department's Motion)

15. In the Notice of Separation and Discharge, Lupini made the following findings in support of termination:

    1. You were recently convicted of the crimes of assault and battery and other violations of law, for which you were incarcerated for 90 days. Therefore, pursuant to M.G.L. c. 31 § 50, you are no longer eligible for employment in your civil service position with the Public Schools of Brookline.
    2. You were absent without leave for more than fourteen days. Therefore, in accordance with M.G.L. c. 31 § 38, you are considered to have permanently and voluntarily separated yourself from employment with the Public Schools of Brookline.
    3. You engaged in criminal conduct, specifically assault and battery, were unavailable to report to work during your incarceration, and were absent without leave.

    Each of the above cited findings, collectively and separately, together with your prior disciplinary and performance record, either required separation of your employment or justified discharge of your employment pursuant to M.G.L. c. 31. Your behavior was inherently incompatible with your continued employment with the Public Schools of Brookline. (Department's Motion)

16. The Appellant appealed the decision with the Commission on April 16, 2010. (Department's Motion)

Department's Argument

The Department argues that Section 50 of M.G.L. c. 31 makes the Appellant ineligible for public service, absent an exercise of discretion by the Department. The Department was under no obligation to exercise said discretion, and chose not to. M.G.L. c. 31 § 50 plainly states that "[n]o person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position, nor shall any person be appointed to or employed in any such position within one year after his conviction of any crime…" The Appellant was convicted of a series of crimes in November and December of 2009. Due to these events he became ineligible to remain in the civil service job he retained as of the date of his hearing on March 16, 2010. The statute further provides that an Appointing Authority "may, in its discretion, appoint or employ within such one-year period a person convicted of any of the following offenses"- listing certain offenses including those for which the sentence was less than six months in the house of correction. M.G.L. c. 31 § 50 . Although the Appellant's ninety (90) day sentence falls within the Statute's discretionary range, there is no requirement to exercise that discretion, nor does the Appellant appear to argue that the Department abused its discretion by not choosing to continue his employment.

The Department relies on Festa v. Suffolk Cty. Sheriff's Dept., 7 MCSR 150, 151 (1994) for the proposition that "[u]nder Chapter 31, Section 50, the Appointing Authority appears … to have had no discretionary right to retain the Appellant in office within one year after his conviction. Even if it had such discretion, that discretion would be unreviewable under Sections 41-43" based upon the plain language of Section 50.

In addition to finding that the Appellant's convictions rendered him ineligible for employment in his civil service position, the Department argues that the Appellant was

"absent without leave for more than fourteen days" which, under M.G.L. c. 31, § 38, means that he voluntarily and permanently separated himself from employment with the Department. The Department argues that the Appellant engaged in criminal assault and battery, was incarcerated, unable to report to work, and thereby absent without leave. The Department relies on McHatton v. Chelsea, 7 MSCR 186, 187 (1994) for the proposition that an employee who does not report to work due to incarceration may be regarded as on an unauthorized leave of absence and has therefore "permanently and voluntarily separated himself" from employment. The Department contends that M.G.L. c. 31, § 38 expressly states that any action taken by an appointing authority pursuant to Section 38 must be appealed exclusively to the Personnel Administrator [HRD] and therefore the Commission lacks jurisdiction over Section 38 appeals.

Lastly, the Department also relies on McHatton for the proposition that a conviction of a person in a position within the civil service requires no hearing. The conviction obviates the need for a hearing by the appointing authority. The Department argues that "to require a hearing before discharge…when there was nothing to be decided by the appointing authority would be stultifying." Id. at 187. Therefore, the Department argues, it was not even required to provide the Appellant with an initial hearing at all.

Appellant's Argument

The Appellant contends that his misdemeanor convictions resulted in a house of correction sentence of three (3) months [or ninety (90) days], which is under the M.G.L. c. 31, § 50 limit of six (6) months, therefore the Department had the discretionary power to continue his employment after his release from incarceration. The Appellant further argues that the Department already exercised its statutory discretionary power under

Section 50 in late December, 2009, by changing his work status to "absent without pay" rather than "absent without leave", by continuing to pay the Appellant his regular salary for the duration of his vacation payout, by authorizing payment for the use of three (3) administrative days, and by making representations, through Jay Pagliarulo, Director of Building Services, to the Appellant and his family that he would be able to return to work after his scheduled release date. The Appellant contends that the Department was fully apprised of his record of convictions, past and present, and of the length of his incarceration period at mid-December, prior to his work status change to "absent without pay", and therefore, it exercised its discretion at that time and is estopped from employing these same facts to terminate him in March of 2010. The Appellant further contends that if the Department has changed its mind, and wishes to exercise its statutory discretion in another direction, then it bears the burden of just cause and must provide fresh grounds for termination.

The Appellant also rejects the Department's contention that he voluntarily and permanently separated himself from employment with the Department under M.G.L. c. 31, § 38. The Appellant argues that (1) the Appellant's work status change to "absent without pay" prevents self-separation, rather, it authorizes his absence and it is analogous to receiving a leave of absence while he receives pay from his vacation bank and (2) the Department's notice does not comport with any of Section 38's requirements, and is thus, void per se. M.G.L. c. 31, § 68 requires that any such notice and any unauthorized absence contention be served on the Personnel Administrator in writing. Appellant's discovery shows that this was not done. In addition, the target must get a notice letter by registered mail (not first class mail) informing him/her that the absence constitutes self-

separation and that within 10 days he/she may apply for a leave of absence. The Appellant contends that he was never informed that he may apply for a leave of absence, nor was he informed that a denied leave of absence is appealable to the Personnel Administrator.

Finally, the Appellant rejects the Department's contention that the Section 38 ground is not a matter for this Commission's jurisdiction. Without appropriate notice under G.L. c. 31, § 38 to the administrator of the "unauthorized absence", the Personnel Administrator never obtained jurisdiction of the matter. Therefore, the jurisdiction remains with this Commission.

Conclusion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., "viewing the evidence in the light most favorable to the non-moving party", the movant has presented substantial and credible evidence that the opponent has "no reasonable expectation" of prevailing on at least one "essential element of the case", and that the non-moving party has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Bd., 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

Based on the parties' motions, as well as the arguments presented at the motion hearing, it is evident that the parties are in agreement as to the facts of this case. They also agree that the issues to be decided are (1) whether the Department exercised its

discretion under M.G.L. c. 31, § 50 and agreed to allow the Appellant to return to work following a ninety (90) incarceration and (2) whether the Appellant voluntarily and permanently separated himself from employment with the Department pursuant to M.G.L. c. 31, § 38. These are questions of law and therefore, summary decision is an appropriate avenue for resolution.

The M.G.L. c. 31, § 50 Issue

M.G.L. c.31, §50, concerning persons ineligible for civil service, provides, in relevant part:

> *No person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position, nor shall any person be appointed to or employed in any such position within one year after his conviction of any crime except that the appointing authority may, in its discretion, appoint or employ within such one-year period a person convicted of any of the following offenses: a violation of any provision of chapter ninety relating to motor vehicles which constitutes a misdemeanor or, any other offenses for which the sole punishment imposed was (a) a fine of not more than one hundred dollars, (b) a sentence of imprisonment in a jail or house of correction for less than six months, with or without such fine, or (c) a sentence to any other penal institution under which the actual time served was less than six months, with or without such fine. Violations of statutes, ordinances, rules or regulations regulating the parking of motor vehicles shall not constitute offenses for purposes of this section.*

Section 50 plainly states that any person convicted of a crime is ineligible for a civil service position within one year of the conviction, absent an exercise of discretion by the appointing authority. In this case, although the Appellant's ninety (90) day sentence falls within the statute's discretionary range, the Department is not obligated to exercise that discretion.

The Appellant's argument that the Department already exercised its discretion by changing his employment status to "absent without pay" must fail, because a mere

change in payroll status is not an active exercise of discretion. The Department afforded the Appellant the right to a hearing, and only after the hearing, in the Notice of Separation and Discharge, did it choose not to exercise its discretion.

The M.G.L. c. 31, § 38 Issue

M.G.L. c.31, §38, concerning unauthorized absences, provides, in relevant part:

> *Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight,*[1] *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 a 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,*

[1] Mass.G.L.c.31, §68 states, in part: "Each appointing authority shall report in writing forthwith to the administrator of any . . . absence for more than a month because of illness or injury, unauthorized absence [and]. . . leave of absence for more than a month. . . ." See also PAR.13 (governing prior notice for leaves of absence longer than three months)

or for which no leave was granted pursuant to the provisions of section thirty-seven.

Section 38 has been interpreted consistently to mean that jurisdiction to review a decision by an appointing authority to separate an employee for "unauthorized absence" lies exclusively with the Personnel Administrator [HRD]. See, e.g., Police Comm'r v. Civil Service Comm'n, 29 Mass.App.Ct. 470 (1990), rev.den., 409 Mass. 1102 (1991), appeal after remand sub nom, Police Comm'r v. Personnel Adm'r, 39 Mass.App.Ct. 360 (1995), aff'd, 423 Mass. 1017 (1996). See also Canney v. Municipal Ct., 368 Mass. 648 (1975); Sisca v. City of Fall River, 65 Mass.App.Ct. 266 (2005), rev.den., 446 Mass. 1104 (2006); Town of Barnstable v. Personnel Adm'r, 56 Mass.App.Ct. 1106 (2002) (Rule 1:28 opinion); DeSimone v. Civil Service Comm'n, 27 Mass.App.Ct. 1177 (1989). The Commission's decisions have been uniformly to the same effect. Alves v. Fall River School Dep't, 22 MCSR 4 (2009); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); O'Hare v. Brockton, 20 MCSR 9 (2007); McBride v. Fall River, 19 MCSR 325 (2006); Fontanez v. Boston Police Dep't, 19 MCSR 159 (2006); Pimental v. Department of Correction, 16 MCSR 54 (2003), aff'd sub nom, Pimental v. Civil Service Comm'n, Suffolk Superior Civ. No. SUCV2003-5908 (June 6, 2005); McDonald v. Boston Public Works, 14 MCSR 60 (2001); Sheehan v. Worcester, 11 MCSR 100 (1998); Brindle v. Taunton, 7 MCSR 112 (1994); Tomasian v. Boston Police Dep't, 6 MCSR 221 (1993).

The Appellant makes the argument that his employment status as "absent without pay" prevents self-separation, rather, it authorizes his absence and it is analogous to receiving a leave of absence, therefore, he cannot be deemed to be on an "unauthorized absence" within the meaning of Section 38. Furthermore, the Appellant argues that the

Department's notice does not comport with any of the Statute's requirements. The Statute requires that any such notice and any unauthorized absence contention be served on the Personnel Administrator in writing and this was not done. Furthermore, the target must get the notice letter by registered mail (not first class) informing him/her that the absence constitutes self-separation and that within ten (10) days he/she may apply for a leave of absence. That later part is missing, together with notice that a denied leave of absence is appealable to the administrator.

These arguments, however, are not properly directed to the Commission. The threshold questions he presents, i.e., whether his absence was authorized and whether or not appropriate notice was given, are precisely the essential issues described in Section 38 that must be addressed through review by the Personnel Administrator, not the Commission.

Accordingly, insofar as the Appellant purports to appeal a termination for unauthorized absence under Section 38, as the Department correctly argues, the Commission is obliged to dismiss the appeal for lack of jurisdiction. Moreover, even if the Commission were not divested of jurisdiction, the Section 38 issue would seem to be mooted by the fact that the Appellant's termination under Section 50 was clearly proper and stands as an independent reason for his discharge.

For all the reasons stated above, the Department's Motion to Dismiss is hereby allowed and the appeal of the Appellant, Timothy O'Sullivan, under Docket No. D1-10-77 is hereby ***dismissed***.

Civil Service Commission

_____
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on September 23, 2010.

A true Copy. Attest:

_____
Commissioner
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
F. Robert Houlihan, Esq. (for Appellant)
Robert D. Hillman, Esq. (for Respondent)