

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place
Room 503
Boston, Massachusetts 02108

RALPH PATTERSON,
Appellant

v.

D1-07-284

TOWN OF PLYMOUTH,
Respondent

Appellant's Attorney:

William M. Straus, Esq.
15 Hamilton Street
New Bedford, MA 02740

Respondent's Attorney:

Edward F. Lenox, Jr., Esq.
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300 Crown Colony Drive, Suite 410
Quincy, MA 02169

Commissioner:

John E. Taylor

DECISION ON RESPONDENT'S MOTION TO DISMISS

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Ralph Patterson (hereinafter "Patterson" or "Appellant"), appeals the August 13, 2007 decision of the Plymouth Police Department (hereinafter "Appointing Authority") to terminate the Appellant's employment due to the Appellant allegedly producing sub-standard written work-product and, despite supervisor assistance, failed to improve the quality of his written work during the twelve-month probation period. The appeal was timely filed at the Civil Service Commission (hereinafter "Commission") and a full hearing date set for March 25, 2008. The Appointing Authority filed a Motion to

Dismiss on October 25, 2007. On March 13, 2008, the Appointing Authority filed a Motion to Cancel the “Full Hearing” and requested a hearing on its Motion to Dismiss. The Commission allowed this motion the same day. A hearing on the Motion to Dismiss was held on March 25, 2008 at the Commission offices. One tape was made of the hearing.

The Respondent’s Motion to Dismiss is hereby *denied* and the Appellant shall be returned to his position as patrolman in the Plymouth Police Department with no loss of pay and benefits.

FINDINGS OF FACT:

Based on the 11 exhibits entered into evidence (Exhibits A through H from the Appointing Authority’s Motion to Dismiss, Exhibits I through K from the Appellant’s Motion in Opposition), the affidavits of Richard Pomeroy, Diana Goodwin, Mark Silva, and the Appellant, I make the following findings of fact:

1. The Appellant, Ralph Patterson, was appointed as a Student Police Officer for the Town of Plymouth Police Department on February 7, 2006 (Exhibit A).
2. Newly appointed police officers, including Patterson, are required to complete training at the Massachusetts Criminal Justice Training Academy in Plymouth (hereinafter “the Academy”) (Affidavit Pomeroy para 2).
3. Patterson began his training at the Academy on March 20, 2006 (Affidavit Pomeroy para 3)
4. Patterson completed training and graduated from the Academy on Friday, August 11, 2006 (Exhibit D – Completion Certificate)
5. The State Human Resources Division stated in a letter to Municipal Appointing Authorities in part:

The Human Resources Division has defined that a police officer's twelve- month probationary period begins upon successful completion of the police academy and allowed to perform the duties of a police officer. (Appellants Exhibit A)

6. Patterson was sworn-in on August 11, 2006, and was told at the conclusion of the graduation ceremony by Police Academy Director DeGutis that he and his classmates were now sworn police officers with full legal authority. (Patterson Affidavit para 7, 10)
7. Patterson was paid for the full day at the patrolman's rate of pay by the Town of Plymouth on August 11, 2006. (Patterson Affidavit para 6, 10)
8. It is undisputed that Patterson could have worked a detail or overtime the same day as his graduation. (Affidavit Pomeroy, Affidavit Patterson, Affidavit Goodwin)
9. Pursuant to G.L. c.31 § 61, newly appointed police officers serve a probationary period of twelve months during which time the officers are observed and evaluated by superior officers. Patterson's supervising officers were Chief of Police Robert Pomeroy and Captain of Operations Michael Botieri (Affidavit Pomeroy para 7).
10. That following Monday, August 14, 2006, the Appellant started his first shift as a full-time police officer in the Plymouth Police Department.
11. Patterson was hurt during the course of his duties as police officer on January 2, 2007 and was placed on Injured on Duty Leave effective that date. (Pomeroy Affidavit 13, Exhibit F)
12. Patterson returned to full-time duty on February 25, 2007. (Pomeroy Affidavit para 14)
13. At no time was Patterson given a written notice of a extension of his probationary period by the Town of Plymouth as required by Personnel Administration Rules, number 12 (2).
14. Personnel Administration Rules 12 (2) states: *The probationary period may be extended by the appointing authority beyond the period provided by law by the actual number of days of*

absence during the statutory period; written notice of such extension shall be given to the employee prior to the expiration of the statutory probationary period.

15. During the twelve-months following Patterson's graduation from the Academy, the Appointing Authority alleges that Patterson continuously encountered difficulty in writing police reports of sufficient quality. (Patterson Affidavit Exhibit C; Pomeroy Affidavit para 15, 16).
16. Plymouth Town Manager Mark Sylva planned to visit Japan in August 2007 (Affidavit Sylva para 2). Prior to the Town Manager's departure, Chief Pomeroy met with him to discuss Patterson's performance problems: specifically the claim that he was not making significant improvements in his writing abilities despite the assistance of supervising officers (Affidavit Sylva para 2).
17. On August 9, 2007, Plymouth Police Chief Robert Pomeroy wrote to Plymouth Town Manager Mark Sylva, recommending that Patterson be terminated due to his failure to bring his written reports up to an acceptable level. (Affidavit Pomeroy para 16; Pomeroy Affidavit para 16; Exhibit G).
18. This correspondence was received by Melissa Arrighi, Assistant Town Manager for the Town of Plymouth, who contacted Sylva by telephone in Japan and relayed the contents and recommendation of Pomeroy's correspondence (Affidavit Sylva para 3).
19. Ms. Arrighi drafted Patterson's termination letter, consistent with Pomeroy's recommendation, and read said draft to Mr. Sylva over the telephone (Affidavit Sylva para 3). With his permission, she signed Mr. Sylva's name on the August 9, 2007 letter. (Affidavit Sylva para 3).

20. On August 13, 2007 Patterson received the termination letter from the Town of Plymouth (Exhibit H).

21. Patterson's termination letter stated that Mr. Sylvia based his decision to terminate Patterson "upon [Patterson's] consistent inability to write complete and accurate police reports... despite the efforts of [Patterson's] supervisors to work with [him] to improve [his] performance" (Exhibit H).

CONCLUSIONS AND FINDINGS

If the Appellant was within the probationary period at the time of his termination, the Commission lacks jurisdiction to conduct an appeal pursuant to G.L. c.31 §§ 41-45. *See Board of Selectmen of Brookline v. Smith*, 58 Mass.App.Ct. 813, 792 N.E.2d 1050 (2003); *Peterson v. Town of North Attleborough*, D-02-108, October 8, 2003. The Appointing Authority concedes that in reliance on its assumption that Patterson was still within his probationary period, the Appointing Authority did not attempt to meet the "just cause" standard nor did it comply with the procedures required by G.L. c.31 §41 for the termination of a "tenured" Civil Service Employee. Therefore the Appointing Authority's Motion to Dismiss presents a dispositive issue.

General Laws c. 31 § 61, states in pertinent part: "Following his original appointment to a civil service position as a permanent full-time employee, a person *shall actually perform the duties of such position on a full-time basis* for a probationary period of [twelve months, as provided by G.L. c. 31, § 61,] before he shall be considered a full-time tenured employee" (emphasis added). Furthermore G.L. c. 41, § 96(b) explicitly exempts student officers from the civil service law and prohibits them from exercising any police powers until graduation. The exercise of police powers is required in order to "actually perform the duties" of a police officer

for the probationary year. Board of Selectmen of Brookline v. Smith, 58 Mass.App.Ct. 813, 792 N.E.2d 1050 (2003). Actual performance for the specified twelve-month duration is necessary to “ensure sufficient time for a careful determination” of whether the Applicant possesses “courage, good judgment, and the ability to work under stress in the public interest.” Police Commr. of Boston v. Cecil, 431 Mass. 410, 414 (2000).

In Board of Selectmen of Brookline v. Smith, 58 Mass. App. Ct. 813, 792 N.E. 2d 1050 (2003), Smith was assigned to the Norwood Police Academy on April 13, 1998, and graduated on February 12, 1999. He was appointed to the position of police officer in the Brookline Police Department effective February 23, 1999, and was sworn in on the same day. Id. Smith was placed on administrative leave on December 8, 1999 and served a notice of his termination on February 2, 2000. Id. The court here addressed the issue of whether the applicant’s probationary period began on (1) the date of his assignment to the academy, or whether it began (2) on the date of his appointment ‘as a Police Officer’ and his taking the oath of office. Id. at 815. The court, in agreement with the Appointing Authority, held that Smith’s probationary period began when he was appointed a police officer. Id. Pursuant to G.L. c.31 § 34, “‘actual performance of the duties of such position’ refers to the graduated officer with the authority to exercise police powers, as distinct from the student officer, who is in the process of learning to exercise such powers properly.” Id. at 817. Thus, the ‘actual performance’ standard requires that an officer successfully graduate the academy *and* be sworn-in, in order to commence the one-year probationary period.

In the matter at hand, it is undisputed that Patterson graduated the Academy on Friday, August 11, 2006. The facts in record are sufficient to establish that the graduation conveyed sworn law enforcement authority to Patterson on the date of graduation.

Officer Goodwin's affidavit states that "Without any exception which I can recall, new officers assume the authority to exercise police powers immediately upon completing the graduation ceremony. Such officers are immediately on the departmental lists to receive overtime and so-called 'outside detail' paid assignments as Plymouth Police officers. I can recall new officers even receiving and taking such police work opportunities on the same day as their graduation" (Affidavit Goodwin para 3). This belief was held by the Appellant, who states that he was sworn-in on August 11, 2006, and possessed the rights and responsibilities afforded to police officers (Patterson Affidavit para 7 & 10).

The Academy graduation in Smith contained two distinct events occurring on the same day: the certification of graduation and the swearing in under oath. Id at 814-815. The holding in Smith is clear: if the Appellant, as he contends, was sworn-in on graduation day (August 11, 2006), he would possess the *authority* to exercise police powers during the two-day weekend prior to his first full day of work after graduation, and said days would be included in the twelve-months of actual performance required by G.L. c. 31, § 34. However, if the Appellant was not sworn in until the first day of post-Academy work (August 14, 2006) then he would not have possessed the authority to exercise police powers during that two-day weekend prior.

The record at hand is sufficient to conclude the date on which Patterson was sworn-in. The Appointing Authority has not introduced evidence or exhibits regarding the Town of Plymouth or the Massachusetts Criminal Justice Training Academy's policies, practices, or procedures to disprove that Academy graduates are sworn-in on the date of graduation.

A termination notice to a probationary employee must be delivered prior to the end of the probationary period. The Appellant succeeded in establishing that his probationary period commenced upon graduation (August 11, 2006), thus the August 13, 2007 delivery of the

termination letter fails to comply with the statutory requirement because it will have been two days after the probationary period ended.

The Respondent's Motion to Dismiss under Docket No. D1-07-284 is hereby *denied*.

The Appellant's appeal is *allowed* and shall be reinstated forthwith to his position as patrolman in the Plymouth Police Department with no loss of pay and benefits.

Civil Service Commission

John E. Taylor

Commissioner

By vote of the Civil Service Commission (Henderson, Stein and Taylor, yes Marquis, no [Bowman, Chairman absent], Commissioners) on November 20, 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 sent to:

William M. Straus, Esq.
Edward F. Lenox, Jr., Esq.