**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

PATRICK QUINLAN,
Appellant

*v.*

D1-10-118

CITY OF LOWELL,
Respondent

Appellant's Attorney:

Erin DeRenzis
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AFSCME Council 93
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Boston, MA 02108

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, Patrick Quinlan (hereinafter "Quinlan" or "Appellant"), pursuant to G.L. c. 31, § 43, filed an appeal with the Civil Service Commission (hereinafter "Commission") on June 4, 2010 contesting the decision of the City of Lowell (hereinafter the "City" or "Appointing Authority") to terminate him from his position as a maintenance man for being absent without leave for more than fourteen (14) days.

A pre-hearing conference was conducted at the offices of the Commission on June 22, 2010. The City filed a Motion to Dismiss on June 22, 2010, and a Supplemental Motion to Dismiss (collectively "City's Motions") on July 6, 2010. The Appellant filed an Opposition to Motion to Dismiss (hereinafter "Appellant's Motion"), on August 2, 2010. A hearing on the motions was held at the offices of the Commission on August 23, 2010. The hearing was digitally recorded.

The following facts appear to be undisputed:

1. The Appellant was a civil service employee employed as a Maintenance Man/Laborer with the Public Works Department of the City of Lowell. (City's Motions)
2. On January 19, 2010 the Appellant sustained a work-related injury and was unable to return to work. He received workers' compensation benefits due to the injury. (Appellant's Motion)
3. On April 14, 2010 the Appellant was examined by his treating physician, Dr. William Cook (hereinafter "Cook"), and was cleared to return to work full time with no restrictions. (Appellant's Motion)
4. On April 15, 2010 the City notified the Appellant in writing to return to work, and that his workers compensation benefits would terminate on April 22, 2010. (City's Motions)
5. On April 16, 2010, the City contacted the Appellant regarding his failure to return to work. The Appellant indicated that he would return to work on April 20, 2010. (City's Motions)
6. On April 20, 2010, the Appellant failed to report to work. (City's Motions)

7. The Appellant failed to report to work from April 14, 2010 through May 7, 2010, and he failed to provide any notice to the City regarding his absence. (City's Motions)
8. On May 7, 2010 the City issued a Statement of Voluntary and Permanent Separation from Employment to the Appellant informing him that he was considered to have permanently and voluntarily separated himself from employment due to his unauthorized absence in excess of fourteen (14) days. (City's Motions)
9. On May 10, 2010 the Appellant requested a hearing before the Appointing Authority. (City's Motions)
10. A hearing was held on May 18, 2010. (City's Motions)
11. On May 27, 2010, the city denied the Appellant's request for reinstatement. (City's Motions)
12. The Appellant appealed the decision to the Commission on June 4, 2010. (City's Motions)

*City's Argument*

The City argues that the Appellant cannot appeal his termination to the Commission, because the Commission lacks jurisdiction to hear the issue. "If a report of an unauthorized absence is issued, § 38 makes it clear that, unless the appointing authority restores the employee to his particular position, or grants leave under § 37, the employee may seek review from the Commonwealth's Personnel Administrator. There is no right of review or opportunity to secure relief from the civil service commission by way of any procedure that is set forth in G.L. c. 31, §§ 41-45." Sisca v. Fall River, 65 Mass. App. Ct. 266, 270 (2005), citing Canney v. Municipal Ct. of Boston, 368 Mass. 648, 654 (1975) and Police Comm'r. of Boston v. Civil Serv. Comm'n, 29 Mass. App. Ct. 470, 473-474

(1990). "General Laws c. 31, § 38 brooks no departure from the avenue of review laid down by the Legislature." Sisca at 270-271. See also De Simone v. Civil Serv. Comm'n, 27 Mass. App. Ct. 1177, 1178 (1989) ("In seeking judicial review from the Civil Service Commission, [Appellant] did not have the option of the review procedure which appears in G.L. c. 31, § 44, because G.L. c. 31, § 38, fourth par., forecloses recourse to § 44 by a person reported as being on unauthorized absence.")

The City contends that the facts show that the Appellant lacks any recourse to the Commission. The City issued a report of the Appellant's unauthorized absence, and thereafter terminated him pursuant to G.L. c. 31, § 38. The City did not restore the Appellant to his former position, nor did the City grant leave under G.L. c. 31, § 37. Accordingly, under the statute and relevant case law, the Appellant's only recourse is to seek review from the Commonwealth's Personnel Administrator.

*Appellant's Argument*

The Appellant rejects the City's contention that he voluntarily and permanently separated himself from employment with the Department under G.L. c. 31, § 38. The Appellant argues that the circumstances surrounding his separation from employment constitute a "constructive discharge," thus providing the Commission with jurisdiction to hear the instant appeal.

While G.L. c. 31, § 38 provides in relevant part that, "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 argues that the facts do not support an argument

that he "permanently and voluntarily separated himself" from the employ of the City pursuant to G.L. c. 31, § 38. See Id.

According to the Appellant, the April 15, 2010 letter from the City did not advise him to report to work immediately or his job would be in jeopardy. The letter simply advised the Appellant, in relevant part, to "Kindly consider this letter as a seven (7) day written notice that your weekly workers' compensation benefits will terminate on April 22, 2010 ... As you are aware, on April 14, 2010 you were examined by your treating physician, William Cook, MD. Dr. Cook opined that you may return to full duty work without restrictions. To date, you have not returned to work. Your position as a Maintenance Man is available at the Department of Public Works. You can return at any time." Id.

Following the City's April 15, 2010 letter to the Appellant, the City did not send any further correspondence until the May 7, 2010 document entitled "Statement of Voluntary and Permanent Separation From Employment Under M.G.L. c. 31 § 38." Prior to that time, the City did not send the Appellant any notice that he was in jeopardy of being considered to have abandoned his position, nor did the City send the Appellant any correspondence providing a certain date by which he was to return to work.

Upon receipt of the May 7, 2010 letter, the Appellant requested a hearing and received a document titled "Notice of Hearing Under M.G.L. c. 31 § 38." The Appellant was granted a hearing. After the hearing he was not reinstated to his position as Maintenance Man. Thus, according to the Appellant, he has been constructively terminated from his position.

The Appellant further argues that the facts in this case are clearly distinguishable from the facts in the cases cited by the City in its Motions. In Sisca v. Fall River, 65 Mass.

App. Ct. 266, 270 (2005), a firefighter was terminated following a period of absences unrelated to workers' compensation. Similarly, in another unrelated case cited by the City, De Simone v. Civil Serv. Comm'n, 27 Mass. App. Ct. 117 (1989) a social worker was also terminated following a period of absences. However, according to the Appellant, the Appeals Court found that the appropriate disposition was dismissal of the action for failure to join an indispensable party. Id.

Finally, the Appellant argues that the City failed to follow the procedures outlined in G.L. c. 31, § 38. The City did not submit a report to the Personnel Administrator. The record reflects that the City copied the Human Resources Division on both the May 7, 2010 letter entitled Statement of Voluntary and Permanent Separation From Employment Under G.L. c. 31 § 38 and the latter May 27, 2010 letter entitled Decision of Appointing Authority Notice of Decision Under G.L. c. 31 § 38.

As the City failed to meet the requirements of G.L. c. 31, § 38, the Appellant argues that it should be estopped from insisting that the sole means of review for the Appellant is the Personnel Administrator. Instead, the Appellant argues that this matter should be heard by the Commission as a constructive discharge appeal.

*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, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

Based on the parties' motions, as well as the oral arguments, it is evident that many of the facts are not in dispute. They agree that the threshold issue is whether or not the Commission is barred from hearing this case pursuant to G.L. c. 31, § 38. Thus, summary disposition is appropriate.

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.

[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)

> 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, 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 Serv. 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. 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 he did not voluntarily and permanently separate himself from employment, but was constructively discharged by the City. Furthermore, the Appellant argues that the City failed to follow the procedural requirements of Section 38.

The Appellant's argument, however, is not properly directed to the Commission. The threshold questions he presents, i.e., whether his absence was unauthorized and whether the procedural requirements of Section 38 were followed, are precisely the issues described in Section 38 that must be addressed through review by the Personnel Administrator, not the Commission.

For this reason, the City's Motion to Dismiss is hereby allowed and the appeal of the Appellant, Patrick Quinlan, is hereby ***dismissed*** for lack of jurisdiction.

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Christopher C. Bowman
Chairman

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

A true Copy. Attest:

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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:
Erin DeRenzis, Esq.  (for Appellant)
Brian W. Leahey, Esq. (for Respondent)