**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION**
**One Ashburton Place – Room 503**
**Boston, MA 02108**
**(617) 727-2293**

**BETH A. REUTER,**
**Appellant**

**v.**

**Case No. D1-13-75**

**METHUEN PUBLIC SCHOOLS,**
**Respondent**

Appearance for Appellant:

Michael F. Hogan, Esq.
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37 Walker Road
North Andover, MA 01845

Appearance for Respondent:

Sarah Catignani, Esq.
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Commissioner:

Paul M. Stein, Esq.[1]

## DECISION ON MOTIONS FOR SUMMARY DECISION

The Appellant, Beth A. Reuter (hereinafter "Reuter") appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31, §§41-45, from the decision of the Methuen Public Schools' (MPS or Respondent) to terminate her employment. Ms. Reuter filed a Motion for Summary Decision, arguing that the doctrine of collateral estoppel and the terms of a "Settlement and General Release" in a previous matter before the Commission barred the MPS' action in terminating her employment as a matter of law. The MPS opposed the Appellant's

[1] The Commission acknowledges the assistance of Law Clerk Amanda Belanger in the drafting of this decision.

motion, contending that collateral estoppel does not apply because the dismissal of her prior Commission appeal was not made on the merits.

The MPS also filed a Motion for Summary Decision to dismiss the appeal on the grounds that Ms. Reuter's termination was the result of a subsequent criminal conviction covered by G.L.c.31, §50, and her unauthorized absences while incarcerated, covered by G.L.c.31, §38, neither of which are grounds for termination that are reviewable by appeal to the Commission. Ms. Reuter contends tha6t the notices of termination referring to her unexcused absences failed to assert that the MPS's action was taken pursuant to G.L.c.31, §38 and failed to inform Reuter of her §38 remedies, thereby rendering the notice procedurally defective.

A hearing on the motions of the parties was held by the Commission on June 3, 2013.

*Background*

Reuter began working for the MPS as a permanent full-time building custodian on September 6, 1988. On June 21, 2000, Reuter was appointed as a permanent Senior Building Custodian by MPS. On February 1, 2008, Reuter admitted to criminal charges of drug possession of a class B substance (M.G.L. c. 94 § 34) and conspiracy to violate drug law (M.G.L. c. 94 § 40) and received a one-year probation sentence. Reuter was subsequently reassigned to the Central Administration Building on May 9, 2008 due to those pending criminal charges.

On November 10, 2011, Reuter received a thirty (30) day suspension and demotion for one year following a Settlement Agreement and General Release (hereinafter "Agreement"). The terms of the Agreement also provided that both Reuter and MPS "agree that this Agreement shall only apply to the instant matter, and shall not, either whole or in part, serve as precedent in any other matter or dispute between the parties. Except as may be required by M.G.L. c. 31 § 50, the MPS will not undertake any further disciplinary action against Reuter for the allegations

contained in the Notice of Hearing for Civil Service Letter Dated May 17, 2011 which served as the basis for her termination and Civil Service Appeal. A decision was rendered by the Commission on December 1, 2011 The Agreement was not filed and not incorporated into the final Commission Decision, mailed to the parties on December 5, 2011. [2].

On February 13, 2013, Reuter was convicted under M.G.L. c. 266 § 30 for larceny over $250 by a single scheme following a jury trial held at Lawrence District Court. She was sentenced to one-year at a house of correction, with thirty days committed. She was incarcerated at MCI Framingham and at the Essex County Sheriff's Department's Women in Transition Center. Reuter did not report to work for fifteen (15) consecutive days due to her incarceration. On February 22, 2013, MPS gave written notice of an Appointing Authority hearing to be held at MCI Framingham on March 1, 2013. On March 1, 2013, MPS provided a revised notice of the hearing stating that it was to be held at the Essex County Sherriff's Department Women in Transition Center on March 5, 2013.

On March 5, 2013, a hearing was held pursuant to M.G.L. c. 31 § 41. On March 7, 2013, MPS terminated Reuter's employment. On March 15, 2013, Reuter appealed to the Commission.

*Discussion*

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

[2] Although the Agreement is entitled "Settlement and General Release", in fact, there was no general or other release contained in the document.

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, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 (2008).

> M.G.L c. 31 § 50 provides:
> 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 offense 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.

In this present case, I find that prong (c) of section 50 applies to Reuter as her sentence was served for "less than six months" at the time Ms. Reuter was terminated, which is the relevant point for application of the statute.. Although the Appellant had served less than six months at that point, she was still prohibited from employment for one year after her conviction, unless the MPS, in its discretion, chose to allow her to continue in employment. An employee who is not employable for one year, whether by operation of law or by the Appointing Authority's decision not to exercise its discretion when the statute so permits, is terminable for just cause. See O'Sullivan v. Brookline School Department, 23 MCSR 574 (2010) (termination upon failure to exercise discretion although permitted); Clancy v. Brockton Public Schools, 18 MCSR 66 (2005) (finding that Appointing Authority is required by law to terminate Appellant if sentence is out of statute's discretion limits). Thus, under the terms of Section 50, MPS is not obligated to exercise discretion to waive the requirements of Section 50 that render Ms. Reuter unemployable, and the

Commission will not substitute its judgment for that of the MPS in this respect. Therefore, unless the statutory provisions can be, and were, the subject of a legally enforceable waiver in the Agreement, MPS had the option to exercise discretion to continue to employ Reuter as would any other appointing authority similarly situated.

The interpretation of an unambiguous agreement or contract is a question of law. Lexington Insurance Company v. All Regions Chemical Labs, Inc., 419 Mass. 712, 713 (1995); Lawrence-Lynch Corp. v. Department of Environmental Management, 392 Mass. 681, 682-83 (1984). The Commission is not charged with the responsibility of examining and approving contracts. See G.L. c. 31, § 2. Contrast Children's Hospital Corporation v. Rate Setting Commission, 410 Mass. 66, 68-69 (1991) (where trial court should have accorded due deference to the Rate Setting Commission's interpretation of a contract because the agency is charged with analyzing contracts in order to determine rates).

In regards to the Agreement between Reuter and MPS, I find it to be unambiguous and clear. Reuter and MPS are bound by the plain language of their agreement as a matter of law. The Agreement clearly states that, "**Except as may be required by M.G.L. c. 31 § 50**, the MPS will not undertake any further disciplinary action against Reuter for the allegations contained in the Notice of Hearing for Civil Service Letter Dated May 17, 2011 which served as the basis for her termination and Civil Service Appeal".(**emphasis added**) Nothing in this plain language can be fairly construed to mean that MPS waived its right to take action against Ms. Reuter should she eventually be convicted of a crime or to terminate her in exercise of the MPS's sound discretion in that event. If that had been the intent, the parties could easily have so stated in plain and unambiguous language.

Reuter also contends that MPS should be barred from terminating Reuter because it arises out of the same facts previously litigated before the Commission and a final judgment was entered. Reuter suggests that her first case was determined by a full hearing, and a settlement agreement filed with a Joint Request for Dismissal with Prejudice. Reuter distinguishes her case from Chittenden Trust C. V. Edward M. Levitt, in which the agreement never went to judgment, was not signed, or filed, thus excluding it as a final judgment. Chittenden Trust C. V. Edward M. Levitt, 26 Mass. App. Ct. 208, 210 (1988). Furthermore, Levitt "adheres to the minimum requirement that a document identifying itself as a judgment, and containing a distinct and definite order purporting to dispose of all claims, be prepared and filed in the case and that the docket entry recording that filing should flag it as a judgment." 26 Mass. App. Ct. 208 at 211. The Agreement between Reuter and MPS, although signed by both parties, was not filed or labeled as a final judgment. Therefore, collateral estoppel does not apply to Reuter's second case, as the Agreement was not filed with the final decision.

Since MPS' decision to terminate Reuter is justified under Section 50, consideration of MPS' reason for termination under G.L. c.31, § 38 is not necessary, but it deserves comment. G.L. c.31, § 38 concerning unauthorized absences, provides:

> Upon reporting an unauthorized absence to the administrator pursuant to section sixty-eight,[3] 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.
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> 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

[3] Mass.G.L.c.31, §68 states, in part: "Each appointing authority shall report in writing forthwith to the administrator of any . . . unauthorized absence.

> 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, 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).

Reuter suggests that Section 38 cannot apply to her because she received no statutory required notice which included a right of appeal of the unexcused absence in either of the Notices of Hearing. Furthermore, she contends that MPS's termination was procedurally defective as the evidence submitted only demonstrated 12 days of absence and that MPS did not respond to her request for use of available leave time. Reuter contends the reason that her absence was known to MPS and that she reasonably requested use of leave time. These issues all would be appropriate to be raised by appeal to the Personnel Administrator (HRD), not to the Commission.

For all of the above reasons, Reuter's Motion for Summary Decision is DENIED and the MPS Motion for Summary Decision is GRANTED. The appeal of the Appellant, Beth Reuter under Docket No. D1-13-75 is hereby ***dismissed***.

Civil Service Commission

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Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman and McDowell, Marquis, Commissioners, on June 27, 2013.

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:
Michael F. Hogan, Esq. (for Appellant)
Sarah Catignani, Esq. (for Respondent)