

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

DARELL RIVERA,
Appellant

v.

DEPARTMENT OF CORRECTION,
Respondent

**CASE NOS: D1-12-98
D1-14-51**

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION ON MOTIONS FOR SUMMARY DECISION

The Appellant, Darrell Rivera, brought these related appeals to the Civil Service Commission (Commission) from a decision the Department of Correction (DOC) terminating his employment as a DOC Correction Officer II (Sergeant), allegedly without notice or just cause in violation of G.L.c.31 and a November 2013 decision of the Commission (CSC No. D1-12-98). After a series of preliminary hearings and procedural orders, DOC reinstated Sgt. Rivera to his position effective October 16, 2014. The matter comes before the Commission on the Appellant's renewed Motion for Summary Decision based on a claim that his termination was made without just cause and his reinstatement was unlawfully delayed. He claims, as a matter of law, to be entitled to be made whole for lost pay and benefits, exclusive of workers' compensation insurance, for the period from original termination in March 2012 through October 16, 2014. The DOC opposes the motion and seeks an order dismissing the appeals.

PROCEDURAL HISTORY

These appeals were brought by Sgt. Rivera as part of his long-standing effort to return to duty following an assault by an inmate in 2008 during which Sgt. Rivera suffered serious injury to his back and his right hand and wrist. After two surgeries, he returned to work for about a year but was relieved of duty in January 2010 and resumed receiving workers' compensation. In March 2012, the DOC terminated his employment on the grounds that he was unfit for duty, which resulted in Sgt. Rivera's first appeal to the Commission (CSC No. D1-12-98).

The 2012 appeal was heard by a DALA Magistrate, who found that the evidence was "replete with conflicting medical evidence" and that DOC had not considered "all [the evidence] that was available". The Magistrate concluded that DOC lacked reasonable justification for its decision to terminate Sgt. Rivera as being unfit for duty, recommended that DOC's termination of Sgt. Rivera be reversed and that he be afforded a "fuller, more complete consideration", to include a "physical exam to determine if he is fit." By Decision dated November 14, 2013, the Commission voted to affirm and adopt the Magistrate's recommendations and ordered as follows:

The decision of the Appointing Authority [DOC] to terminate the Appellant is reversed and the Appellant's appeal is *allowed*. Consistent with the conclusion of the Magistrate, the Department of Correction may require the Appellant to undergo a further medical examination before he is returned to duty. The Appellant shall not be entitled to any back pay or benefits for the time period preceding the date upon which a further medical examination determines him fit for duty.

Rivera v. Department of Correction, 26 MCSR 502 (2013) (*Rivera I*).

In March 2014, Sgt. Rivera sought to reopen the appeal in *Rivera I* and, also, brought this second appeal, alleging that DOC had, again, terminated him from employment as unfit for duty, based a review of medical information preceding the Commission's

November 2013 Decision, without having afforded him the opportunity for a further medical examination and without prior notice and hearing as required by G.L.c.31, §41. At the initial pre-hearing conference held on March 25, 2014, DOC acknowledged that it had made the decision to terminate Sgt. Rivera without conducting a further medical examination, but claimed that the documentation it had on file (predating the decision in *Rivera I*) was sufficient to establish that Sgt. Rivera was unfit for duty. DOC did not construe the Commission's Decision to require that it conduct a further medical examination. The Appellant disputed these contentions. By Procedural Order dated April 10, 2014, Commission Chairman Bowman ordered:

After listening to the statements of the parties and reviewing the documentation that was presented to me, I am confident that, as of the date of the pre-hearing, there is no medical documentation that conclusively shows whether the Appellant can or cannot perform the duties and responsibilities of a correction officer.

Consistent with my statements at the pre-hearing conference, the intent of the Commission's November 14, 2013 [Decision] was for the Appellant to undergo a complete fitness for duty evaluation in order to determine whether he could perform the duties and responsibilities of a correction officer. If that evaluation were to show that he can perform such duties and responsibilities, the intent of the Commission's order was for the Appellant to be reinstated as of that date.

For all of the above reasons, DOC shall, forthwith, schedule the Appellant for a fitness for duty evaluation. (emphasis added)

As of the next scheduled status conference with the Commission, however, held on June 3, 2014, DOC had not yet contracted with a physician to perform the fitness for duty examination, but expected to do so within the next day or two. By further Procedural Order, the Appellant was provided sixty (60) days within which to file a motion for summary decision, to which DOC had thirty (30) days to reply, and a motion hearing was scheduled for September 11, 2014, unless mooted by results of the medical examination. (Procedural Order dated 6/4/14, Bowman, Chairman)

On August 4, 2014, Sgt. Rivera filed the “Appellant’s Motion for Summary Decision”. In response, DOC filed the “Appointing Authority’s Cross-Motion for Summary Decision” on September 5, 2014. On September 8, 2014, CO Rivera filed an “Appellant’s Motion to Strike Appointing Authority’s Cross Motion for Summary Decision.” A hearing on these motions was held before this Commissioner on September 11, 2014.

As of the date of the motion hearing, DOC still had not yet made a definitive determination as to Sgt. Rivera’s fitness for duty. He had been examined by Dr. Jesse B. Jupiter, a surgeon and hand-specialist selected by DOC, who made certain medical findings but was unable to provide DOC with a definitive opinion as to Sgt. Rivera’s fitness for duty, recommending, instead, that a DOC supervisor evaluate him to make that determination. The DOC was in the process of scheduling these evaluations. Sgt. Rivera contended that he long ago had provided DOC with numerous sufficient reports from other physicians who opined that he was fit for duty. He also proffered a video that purported to show that he was recently evaluated by a DOC Sergeant who found him able to perform the duties of a correction officer. Sgt. Rivera contended that further evaluations were wholly unnecessary and the evidence showed, as a matter of law, that he was entitled to an order of reinstatement, effective as of the Commission’s November 2013 Decision in *Rivera I*, with restoration of pay and benefits from that date.

After review of the submissions and hearing argument of the parties, I issued an Interim Order, taking the motions under advisement, pending the compliance by the parties with the terms of the Interim Order which provided a process intended to enable the parties to reach definitive closure as to Sgt. Rivera’s present fitness for duty.

At a status conference on October 15, 2014, the parties reported that, pursuant to the Interim Order, Sgt. Rivera was evaluated and cleared for duty effective October 16, 2014. The Appellant was granted leave to renew his Motion for Summary Decision to explain what further relief, including any back pay or benefits, if any, he still contended he was due. Sgt. Rivera subsequently filed the “Appellant’s Motion for Summary Judgment” November 7, 2014, which the DOC opposed in the “Respondent’s Opposition to Appellant’s Motion For Back Pay and Benefits.” This Decision disposes of all pending motions and allows the Appellant’s present appeal, in part.

FINDINGS OF FACT

Based on the submissions of the parties and taking administrative notice of the applicable statutes and regulations and orders of the Commission, I find the following material facts are not in dispute:

1. The Appellant, Darrell Rivera is a Correction Officer II (Sergeant) with approximately twenty (20) years of service with DOC. (*Rivera I*)

2. On June 8, 2008, Sgt. Rivera was assaulted on duty by an inmate, causing him to suffer serious hand, wrist and back injuries that required two surgeries and left him with limited function in several of the fingers of his right hand. He initially returned to duty in March 2009 and worked under a restricted duty accommodation until January 2010. At that time, due to some miscommunication his restricted duty accommodation was allowed to lapse, and DOC relieved him of duty. (*Rivera I*)

3. Sgt. Rivera continued treatment. He reapplied for and was reinstated on workers’ compensation benefits, although DOC disputed the scope of benefits. In January 2011, he applied for an accidental disability retirement but, due to conflicting evidence of his ability to perform the essential functions of his job, the application was denied in April

2012. Meanwhile, however, based on one of the medical reports that had found Sgt. Rivera's condition was "permanent and he is totally disabled from all forms of employment", DOC elected to terminate Sgt. Rivera as unfit for duty. This decision was appealed to the Commission and overturned in November 2013. (*Rivera I; Claim of Appeal [DOC 2/21/14 Letter]; DOC Opposition to Renewed Motion for Summary Decision, Exh. 7*)

4. On or about December 6, 2013, apparently at Sgt. Rivera's request, Dr. Avanish Mehta examined Sgt. Rivera. By letter dated December 12, 2103, Dr. Mehta opined that Sgt. Rivera was "fit for duty and able to return to work without restrictions." (*Claim of Appeal [DOC 2/21/14 Letter]; DOC Opposition to Renewed Motion for Summary Decision, Exh.7*)

5. On or about January 29, 2014, DOC informed Sgt. Rivera, through counsel, that DOC's "evaluation of all medical documentation" regarding Mr. Rivera's ability to perform the essential functions of his job "is underway" and requested any "medical evidence" that Sgt. Rivera was "fit for duty", specifically, the evidence to which Sgt. Rivera had referred in an e-mail to Commission Chairman Bowman on January 19, 2014 (presumably, Dr. Mehta's report.) Sgt. Rivera's counsel responded that "not knowing how the Department intends to use the letter, I am wary of providing it when we are under no obligation to do so", but he would provide the medical note if, upon its receipt, DOC would agree to "put him back to work without further evaluation." In response, DOC reiterated the request for the information. (*Claim of Appeal [DOC 2/21/14 Letter]; DOC Cross-Motion for Summary Decision, Exh. 1; DOC Opposition to Renewed Motion for Summary Decision, Exhs.7, 9 & 10*)

6. On or about February 4, 2014, Sgt. Rivera, through counsel, filed a civil action in the nature of mandamus against DOC to enforce the Commission's Decision in Rivera I. A copy of Dr. Mehta's December 12, 2013 letter was attached to a preliminary injunction motion filed in the action and provided to DOC. (*Claim of Appeal [DOC 2/21/14 Letter]; DOC Opposition to Renewed Motion for Summary Decision, Exhs.7, 9 & 10*)

7. By letter dated February 21, 2014, DOC Commissioner Spencer informed Sgt. Rivera that, again, he was being separated from employment with DOC, effective immediately because "you are unable to perform the essential functions of a correction officer." This decision relied on two medical reports both preceding the Commission's Decision in Rivera I, one issued in May 2013 by Dr. Steven McCloy, who examined Sgt. Rivera at the request of his workers' compensation attorney, and a second examination in July 2013 by Dr. Stanley Horn, a hand surgeon chosen by DOC.

- Dr. McCloy opined that Sgt. McCloy had a 49% loss of function in his right upper extremity. Due to the limitations observed about Sgt. Rivera's right hand and wrist, Dr. McCloy "did not test the degree of strength because of [sic] I did not believe he could safely and comfortably hold the dynamometer."
- Dr. Horn diagnosed a probable "chronic regional pain syndrome" but questioned the diagnosis after viewing video surveillance videos which were "not consistent with exam findings". He opined that Sgt. Rivera could return to work in a "modified capacity", with restrictions on "lifting [in the area of approximately 15-20 pounds], pushing, pulling, chronic/repetitive or strenuous right hand or wrist activities."

DOC's letter also noted that it had received Dr. Mehta's December 12, 2013 letter as well as a February 13, 2012 medical note from Dr. Pradeep Chopra, who was treating Sgt. Rivera and had reported he could work with accommodation, namely a brace on his right hand. DOC discounted Dr. Mehta's December 2013 letter, stating that it lacked sufficient specificity to know what examination Dr. Mehta had performed or whether he knew the seven specific "essential functions" of the job of a correction officer. DOC discounted

Dr. Chopra's February 2013 medical note because it was inconsistent with a more recent note, dated September 30, 2013, submitted in connection with Sgt. Rivera's workers' compensation case, in which Dr. Chopra opined that Sgt. Rivera was "Temporarily Totally Disabled from the work-related injury of 6/5/2008". (*Claim of Appeal [DOC 2/21/14 Letter]*). See also *Letter dated 3/4/2014 from Joseph A. Padolsky, Esq. to Commission Chairman Bowman; Appellant's Motion for Summary Decision, Exh. A; Aff't of Kelly Correia, Exh. B, attached to DOC Cross-Motion for Summary Decision; DOC Opposition to Renewed Motion for Summary Decision, Exh. 6)*

8. DOC's letter also noted that Sgt. Rivera had continued to cash his workers' compensation benefit checks as recently as January 2014, which by his endorsement, certify to his "inability to work to my full capacity." (*Claim of Appeal [DOC 2/21/14 Letter]; DOC Opposition to Renewed Motion for Summary Decision, Exh.7)*

9. On March 4, 2014, Sgt. Rivera, through counsel, wrote to the Commission, informing the Commission of the pending Superior Court enforcement action (SUCV2014-0409B), and requesting that the Commission re-open the appeal in Rivera I and re-order DOC to reinstate Sgt. Rivera or conduct a further medical examination within forty-eight hours. On March 6, 2014, prior to any action taken on the request, Sgt. Rivera, through counsel, filed his second appeal. (*Ltr dated 3/4/2014 from Joseph A. Padolsky, Esq. to Commission Chairman Bowman; Claim of Appeal*)

10. After the Commission's March 25, 2014 pre-hearing conference and the April 10, 2014 Procedural Order, through an e-mail exchange, DOC counsel informed Sgt. Rivera's counsel, on April 14, 2014, that "I have spoken to my clients. DOC will be scheduling a fitness for duty examination for Mr. Rivera following the DOC's normal process for such evaluations." (*Appellant's Motion for Summary Decision, Exh. A*)

11. The responsibility for scheduling Sgt. Rivera for the mandated examination fell to DOC's Acting Assistant Deputy Commissioner of Human Services Kelley J. Correia, (*Aff't of Kelly Correia*, ¶7, attached to *DOC Cross-Motion for Summary Decision*)

12. Rule 17(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction (the "Blue Book") provides:

Correctional service demands that you be in fit physical and mental condition during the official performance of your duty. You must permit and give your cooperation to a physical and/or mental examination if adjudged necessary by the Superintendent or Commissioner of Correction.

(*Aff't of Kelly Correia*, ¶7, attached to *DOC Cross-Motion for Summary Decision*)

13. DOC Sick Leave Policy, 103 DOC 209.07 also provides that, following a sick leave absence of more than five consecutive days, a DOC Superintendent, Division, Department or Unit Head, may require that an employee undergo a medical examination to determine his/her fitness for work upon return to duty. Depending on which collective bargaining unit the employee is affiliated with, the initial examination may be conducted by a physician selected by the employee, with a second examination by a physician selected by DOC in the event of a dispute over the results, or vice-versa (first exam by DOC's doctor, second exam by doctor of employee's choice). (*Appellant's Motion for Summary Decision, Exh. F*)

14. In processing the request for Sgt. Rivera to be examined as required by the Commission's April 10, 2014 Procedural Order, Ms. Correia followed what she understood was DOC's normal process, which required initial approval of the DOC Commissioner, followed by research to identify an appropriate physician who agrees to conduct the examination. DOC then informs the employee of where and when to report for the examination. Upon receipt of the fitness for duty examination report, Ms. Correia may ask for follow-up information from the physician, including a follow-up

examination of the employee. Upon completion of these steps, Ms. Correira and a representative of DOC's Employee Assistance Unit schedule a meeting with the employee and inform the employee of the results of the examination. (*Aff't of Kelly Correira*, ¶8, attached to *DOC Cross-Motion for Summary Decision*)

15. On May 2, 2014, upon inquiry from Sgt. Rivera's counsel about the status of scheduling an exam, DOC counsel reported: "The DOC is working on it. It is not easy to set these evaluations up." (*Appellant's Motion for Summary Decision, Exh. A*)

16. On May 6, 2014, DOC counsel advised that it had identified "one of the foremost hand and upper extremity specialists in the country", whom DOC was "hoping" would agree to perform the exam. The doctor had been out of the country but would be contacted by DOC upon his expected return on May 9th. In reliance on its "normal procedure", DOC declined to provide Sgt. Rivera with the name of the doctor. (*Appellant's Motion for Summary Decision, Exh. A*)

17. Meanwhile, on May 6, 2014, Sgt. Rivera, acting on his own initiative, was re-examined by Dr. Mehta, Board Certified in Internal Medicine. Dr. Mehta was provided with a copy of the DOC's written statement of the seven essential duties of a Correction Officer, which he reviewed with Sgt. Rivera and opined: "In my professional opinion, Mr. Rivera is fit for duty and may perform the seven essential duties as a correction officer without any restrictions." (*Appellant's Motion for Summary Decision, Exhs. B & C; Appellant's Renewed Motion for Summary Decision, Exh. B*)

18. On May 21, 2014, Sgt. Rivera was examined by Dr. Lawrence Lee, a Board Certified Orthopedic Surgeon and specialist in hand surgery, who took three x-rays of his hand and wrists, and who also reviewed DOC's description of the essential duties of a Correction Officer. Dr. Lee opined "it is my opinion, to a reasonable degree of medical

certainty, that [Sgt. Rivera] is able to fulfill the seven essential duties involved in his position as a correction officer without limitation or special accommodation. He is fit for duty and can resume duty immediately.” (*Appellant’s Motion for Summary Decision, Exh. D; Appellant’s Renewed Motion for Summary Decision, Exh. C*)

19. On June 2, 2014, Sgt. Rivera was re-examined by Dr. Marco Dirks, the orthopedic surgeon who performed the initial surgeries on Sgt. Rivera’s hand in 2008. Dr. Dirks, having reviewed the seven essential duties of a correction officer, opined: “It is my opinion [that] Mr. Rivera can return to his normal work as a correction officer and that he is fit for duty without medical restrictions regarding his right upper extremity injuries.” (*Appellant’s Motion for Summary Decision, Exhs. B & C; Appellant’s Renewed Motion for Summary Decision, Exh. B; Administrative Notice [Rivera I Decision, ¶6]*)

20. On June 26, 2014, Sgt. Rivera was examined by Dr. Jesse Jupiter, the hand surgeon whom DOC had identified in May. His report dated July 2, 2014 observed:

- His grip strength is 90 pounds versus 100 on the left.
- His pinch is 32 pounds versus 28 on the left.
- Overall, neurological exam with the exception of lack of active extension [two fingers of right hand] is intact.
- During the examination, Mr. Rivera demonstrated his ability to lift up his wife 4 feet off the ground and to perform 20 pushups with ease.
- I learned from him the requirements including operating a gun and placing handcuffs on a patient and restraining an inmate as well.
- [H]e functions well in all of the examples that he demonstrated

Dr. Jupiter concluded: “I would feel that the situation now is best suggested by an evaluation directly with a supervisor as to all of the tasks required, and they can make a clear decision as to his capability. Certainly, he could be viewed as an individual who has lost the function of two fingers, but yet can function overall well in the job requirements. [S]hould his supervisor evaluate him in an open and honest way . . . then he could be considered capable of returning to full duty without restriction.” (*Aff’t of Kelly*

Correira, ¶10 & Exh. A, attached to DOC Cross-Motion for Summary Decision; DOC Opposition to Renewed Motion for Summary Decision, Exh. 3)

21. Ms. Correira considered Dr. Jupiter's June 26, 2014 report "inconclusive", as it was unsigned and did not specifically opine about Sgt. Rivera's ability to perform the seven essential functions of a correction officer. She contacted Dr. Jupiter one month later, on July 29, 2014, and he replied to her questions on August 5, 2014:

1. Based on your examination of Mr. Rivera, do you believe that medically Mr. Rivera is able to perform all of the seven essential functions of a correction officer? I have addressed in my letter to you dated July 2 that it is not possible for me to assess all seven essential functions . . . my recommendation was that he have a nonbiased evaluation with a supervisor
2. Do you believe that his condition is permanent? Is there a likelihood of future improvement with the range of motion and strength in his right little finger? I do believe that at this point his condition is permanent and unlikely to achieve major change. Note that I mentioned in my letter to you that . . . the etiology is not always clear.
3. Do I believe that he has a current capacity of restraining struggling inmates' arms or legs while mechanical restraints are applied? I do believe he has the capacity to do this.
4. Can you provide more details on how you came to the conclusion that he functions overall well even when he has lost function of two fingers? I can refer you to many articles written in medical journals regarding one's ability to function well despite loss of digits. I particularly refer to an article . . . in the Journal of Hand Surgery many years ago looking at large number of physicians and surgeons who function exceptionally well despite loss of one or more digits. I do not believe that handicaps are always based upon the actual number of fingers and motivation is a very important factor in all of these situations
5. When you measured Mr. Rivera's grip strength, was he using three fingers or five on his right hand? I believe he was using three fingers.

(Aff't of Kelly Correira, ¶¶10, 11 & Exh. A, attached to DOC Cross-Motion for Summary Decision; DOC Opposition to Renewed Motion for Summary Decision, Exh. 3)

22. On September 10, 2014, DOC informed Sgt. Riviera that a supervisor's evaluation of his ability to perform the seven essential functions of a Correction Officer had been scheduled for September 17, 2014 and that a separate evaluation of his firearms

qualification would be scheduled on another unspecified future. (*DOC Opposition to Renewed Motion for Summary Decision, Exh. 4*)

23. At the motion hearing on September 11, 2014, Appellant's counsel represented that further testing of Sgt. Riviera was unnecessary because Sgt. Riviera had just been evaluated by a DOC training officer who tested his proficiency with a firearm and handcuffing a prisoner and that the tests had been video recorded on a CD that showed he passed these tests. I issued an Interim Order directing that the Appellant provide a copy of the CD to DOC and the Commission and that, after viewing the CD, DOC respond either (1) by affirming that the CD sufficed to establish that Sgt. Rivera was fit to perform the duties of a correction officer or (2) performing the further examination of his fitness by a DOC supervisor under conditions specific in the Interim Order not later than October 10, 2014. (*Letter dated September 11, 2014 from Attorney Padolsky to Attorney Colby; DOC Opposition to Renewed Motion for Summary Decision, Exh. 5*)

24. DOC was not satisfied that the CD video recording demonstrated Sgt. Rivera's fitness, mainly due to the poor quality of the recording. After viewing the CD, the Commission agrees that it is of poor quality and not conclusive of the ability to perform the required duties. (*DOC Opposition to Renewed Motion for Summary Decision, p. 7; Administrative Notice[CD "Riviera Firearm/Handcuff Demonstration]*)

25. As noted above, Sgt. Riviera was reinstated to full duty effective October 16, 2014. His partial disability payments under workers compensation were discontinued as of that date. (*See DOC Counsel e-mail dated April 21, 2015 and attached DIA Form 117*)

Applicable Legal Standard

A motion for summary decision in an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under

the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

Applicable Civil Service Law

Under G.L.c.31,§43, a tenured civil service employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31,§41, may appeal to the Commission. The Commission has the duty to determine, under a “preponderance of the evidence” test, whether the appointing authority met its burden of proof that “there was just cause” for the action taken. G.L.c.31,§43. See, e.g., Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, (2006); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct.473,477 (1995); Town of Watertown v. Arria, 16 Mass.App Ct. 331,334, rev.den.,390 Mass. 1102 (1983).

“Just cause” for discipline means that retention of the employee “adversely affects the public interest by impairing the efficiency of public service.” School Comm. v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). An action is "justified" if "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of

Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928)

G.L.c.31, Section 43 also vests the Commission with “considerable discretion” to affirm, vacate or modify a penalty imposed by the appointing authority, albeit “not without bounds”. E.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct. 594,600 (1996) and cases cited.

“It is well to remember that the *power to modify is at its core the authority to review and, when appropriate, to temper, balance, and amend*. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. *It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’.*”

Id., 39 Mass.App.Ct. at 600. (*emphasis added*). See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (modification cannot be justified on minor, immaterial differences in findings by Commission and appointing authority); School Committee v. Civil Service Comm'n, 43 Mass.App.Ct. 486, rev.den., 426 Mass. 1104 (1997) (upheld discharge modified to one-year suspension); Dedham v. Civil Service Comm'n 21 Mass.App.Ct. 904 (1985) (upheld discharge modified to 18-month suspension; Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102, (1983) (commission modification must be based on substantial evidence and supported by specific findings)

Analysis

The issue left to be decided here concerns whether Sgt. Rivera’s claim that DOC’s delay in finding him fit for duty and failing to reinstate him until October 16, 2014, nearly one year after this Commission’s decision overruling his termination in November

2013 and seven months after filing his second appeal in March 2014, which alleged a continuing violation of his civil service rights, now entitle him to relief from the Commission. He seeks, in effect, his reinstatement retroactive to his original termination date of March 5, 2012, with all attendant lost pay and benefits. The DOC contends that, until Sgt. Rivera was cleared for duty in October 2014 by a DOC designated evaluator, he had no right to be reinstated and, in fact, he had been sending mixed signals of his own about his fitness, so that he is not entitled to any retroactive reinstatement.

For the most part, DOC's position is well-founded. Nothing contained in the Commission's November 2013 Decision in Rivera I implied that DOC was obliged to reinstate Sgt. Rivera, retroactive to his March 2012 termination date. To the contrary, both the DALA Magistrate's recommended decision and the final decision adopted by the Commission in Rivera I, expressly declined to order reinstatement, concluding that Sgt. Rivera's then present fitness was not established and, therefore, reinstatement, appropriately, would be prospective only, subject to a further medical examination. DOC aptly points out that while Rivera I was pending, Sgt. Rivera had applied for a disability retirement and, as late as September 30, 2013, Sgt. Rivera's own treating physician had opined that Sgt. Rivera was "Temporarily Totally Disabled from the work-related injury of 6/5/2008". Also, although less conclusive, Sgt. Rivera, as a condition to receiving workers' compensation benefits continued to certify to his "temporary disability" well into 2014. Commission Chairman Bowman's Procedural Order of April 10, 2014, made clear that, even as of that date, the question of Sgt. Rivera's fitness was still an unresolved question of fact, stating: "[T]here is no medical documentation that conclusively shows whether the Appellant can or cannot perform the duties and responsibilities of a correction officer".

There is, however, also no material dispute that the Commission's intent in issuing the Decision in Rivera I was to defer Sgt. Rivera's future reinstatement so that DOC could obtain a "further medical examination [that] determines him fit for duty" and that this meant an actual, post-Rivera I physical evaluation of his ability to perform the duties of a correction officer as of the date of the evaluation. Thus, Sgt. Rivera is correct that DOC's second termination decision based solely on a "record review" of prior medical reports was inconsistent, as a matter of law, with the Commission's Decision in Rivera I. Accordingly, DOC's failure to adhere to the orders in Rivera I, leading it summarily to terminate Sgt. Riviera without a "further medical evaluation" or notice and hearing as provided by civil service law, is, as a matter of law, a violation of Sgt. Rivera's civil service rights.

The question remains, however, what particular relief, if any, is appropriate for the Commission to order, in the exercise of its discretion, to redress the violation involved here. It would not be equitable to take the extraordinary step of reopening Rivera I and revisiting the Commission's Decision there, which was limited to prospective reinstatement only, and properly so. That matter, therefore, must remain closed.

As to the second appeal, the question of relief is more complex. On the one hand, Sgt. Rivera's civil service rights have been violated by DOC's actions in terminating him without first conducting a proper "further medical evaluation". On the other hand, the undisputed evidence shows that Sgt. Rivera's fitness for duty remained as uncertain in April 2014 as it did when the Commission's November 2013 Decision issued in Rivera I. The uncontroverted evidence also shows that DOC had informed Sgt. Rivera, through colloquy with counsel, that DOC was reviewing his "medical documentation" and invited

all information that Sgt. Rivera could provide showing he was “fit for duty”, but DOC did not receive anything substantive until much later in time.¹

The landscape changed significantly, however, following Chairman Bowman’s April 10, 2014 Procedural Order. At that point, the parties were clearly on notice that, from the Commission’s perspective, DOC had an obligation to conduct a further medical examination of Sgt. Rivera, that DOC was entitled to control that examination (at least initially), and that the examination needed to be scheduled “forthwith”. Measured from that point forward, DOC’s lack of due diligence becomes problematic.

DOC had been ordered on April 10, 2014 to take steps to schedule Sgt. Rivera for evaluation “forthwith”. Nevertheless, as of a June 3, 2014 status conference, DOC had not yet done so. Repeated inquiries from Sgt. Rivera, through counsel, garnered the reply that DOC was “working on it.” This prompted Chairman Bowman to invite Sgt. Rivera to file a Motion for Summary Decision, which he did on August 4, 2014, with DOC still having made no definitive fitness for duty determination as of that date either.

Meanwhile, Sgt. Rivera undertook to obtain medical evaluations of his own. He procured a second opinion from Dr. Mehta, this time providing explicit evidence of the physician’s review of the “seven essential functions” of a correction officer. He also obtained a report of a clinical evaluation by Dr. Lee, a Board Certified surgeon and hand specialist, and a letter from Dr. Dirks, who performed the original surgery on Sgt. Rivera’s hand. All three opined with reasonable professional and medical certainty that Sgt. Rivera was fit for duty.

¹ At the time, both parties simultaneously had been pursuing somewhat inconsistent positions – DOC opposing Sgt. Rivera’s disability and workers’ compensation claims on the grounds he was not disabled while terminating him as “unfit for duty”, and Sgt. Rivera claiming, in those proceedings to be unable to work while professing the opposite in his civil service claims. Nothing is necessarily improper about seeking or preserving alternative remedies, but, to the extent that strategy leaves the ultimate issue in doubt, Sgt. Rivera must live with the consequences of such a strategy.

As it turned out, DOC's delay was due to its desire to employ one particular hand surgeon to perform the exam, namely Dr. Jupiter. Due to the doctor's unavailability, the exam did not take place until June 26, 2014. Dr. Jupiter transmitted his report to DOC shortly thereafter, which included a number of findings to support a belief that Sgt. Rivera could return to work. His report dated July 2, 2014 observed:

- His grip strength is 90 pounds versus 100 on the left.
- His pinch is 32 pounds versus 28 on the left.
- Overall, neurological exam with the exception of lack of active extension [two fingers of right hand] is intact.
- During the examination, Mr. Rivera demonstrated his ability to lift up his wife 4 feet off the ground and to perform 20 pushups with ease.
- I learned from him the requirements including operating a gun and placing handcuffs on a patient and restraining an inmate as well.
- [H]e functions well in all of the examples that he demonstrated.

Dr. Jupiter concluded: "I would feel that the situation now is best suggested by an evaluation directly with a supervisor as to all of the tasks required, and they can make a clear decision as to his capability. Certainly, he could be viewed as an individual who has lost the function of two fingers, but yet can function overall well in the job requirements." In other words, although all clinical signs pointed to Sgt. Rivera's fitness for duty, unlike the three other physicians who had examined Sgt. Rivera recently, Dr. Jupiter was unable to offer the medical opinion for which, after an exhaustive search, DOC has expressly retained him to provide.

Another month passed before DOC responded to Dr. Jupiter with follow-up questions, to which he replied, again suggesting that Sgt. Rivera was potentially able to return to work. Dr. Jupiter specifically dismissed Sgt. Rivera's limited use of his fingers as a disqualifying condition, noting that, while Sgt. Rivera did have a permanent, partial disability in the function of two of his fingers, this did not mean he could not be a correction officer, making specific reference to "an article . . . in the Journal of Hand

Surgery many years ago looking at large number of physicians and surgeons who function exceptionally well despite loss of one or more digits. I do not believe that handicaps are always based upon the actual number of fingers and motivation is a very important factor in all of these situations.” (See Finding No. 21)

It took DOC another two months, until October 15, 2014, and further intervention by the Commission, before DOC arranged for a DOC supervisory evaluation that confirmed Sgt. Rivera, indeed, was fit for duty. Overall, six months had elapsed since April 10, 2014, when DOC was ordered “forthwith” to perform a fitness for duty examination of Sgt. Rivera. From that time forward, until he was returned to duty on October 16, 2014, no new evidence was ever produced to warrant any inference that Sgt. Rivera was not fit and all the physicians who had examined him, save for Dr. Jupiter, had proffered credible medical opinions that he was fit to perform all seven essential functions of a correction officer. Indeed, even Dr. Jupiter’s medical examination does not support a finding that Sgt. Rivera was unable to return to duty but, rather, actually implies the opposite, namely, Sgt. Rivera’s condition had stabilized and, to the extent Dr. Jupiter did proffer his tentative opinions, they were equally, if not more, consistent with a return to duty.²

Thus, as of August 15, 2014 (following receipt and opportunity to review the Appellant’s Motion for Summary Decision and the medical opinions attached thereto) the available, undisputed evidence in this record supports a finding that Sgt. Rivera was ready, willing and able to return to work. DOC proffered no evidence that justified any reason for DOC to believe that Sgt. Riviera was unfit for duty, nor does the evidence leave any room to claim that DOC could prove, that Sgt. Rivera’s condition on August

² Due to the quality of the CD of the September examination and DOC’s dispute as to its conclusiveness, although nothing in the video is inconsistent with the other evidence of fitness, I agree with DOC that the video exam is not conclusive and I have not considered the video in reaching a decision on the pending motions.

15, 2014 was any different from his condition on October 15, 2014, when he was officially cleared for duty. This two month delay is substantially, if not entirely, a product of DOC's own dilatory actions, including the selection of the only physician whom, it turned out, took two-months to examine Sgt. Rivera and, even then, could not offer the opinion he was engaged to provide, which was followed by another three-month delay to line up a DOC supervisor to complete the evaluation (something that reasonably should take a few days, or weeks, but certainly not months).

In sum, DOC did not give this matter the priority that Sgt. Rivera deserved, and failed to complete its evaluation "forthwith" as the Commission ordered. But for DOC's unnecessary delay, through no fault of Sgt. Rivera, he should have been returned to duty long before October 16, 2014, without having been required to devote his further resources, as well as that of the Commission, to reach that result. Appropriate relief is warranted to remediate this violation of Sgt. Rivera's civil service rights and orders of this Commission. Although a credible argument could be mounted to support Sgt. Rivera's claim to reinstatement to a date earlier than August 15, 2014, that date is the appropriate point by which time there can be no genuine dispute that, had DOC duly completed the mandated evaluation "forthwith" as ordered, it would have found Sgt. Rivera fit for duty, as multiple other medical opinions had unequivocally attested and provided to DOC as of that date.

As the DOC failed to act diligently, in violation of Sgt. Rivera's civil service procedural and substantive civil service rights, the Commission is entitled to consider the unequivocal evidence of fitness proffered by Sgt. Rivera in fashioning appropriate relief. See Peck v Department of Correction, 26 MCSR 148 (2013) (appeal allowed when DOC failed to act on the basis of an ongoing investigation without "diligently proceeding to

conclude the investigation ” and then acting appropriately according to the outcome of the investigation); Mason v. Department of Correction, 26 MCSR 195 (2013 (same)).³

Sgt. Rivera’s final argument asserts that an order of retroactive reinstatement entitles him to be restored to all lost pay and other benefits from the date of reinstatement through October 15, 2014, and that no deductions are warranted for any money he received in payment for partial disability or permanent impairment through workers’ compensation. As a general rule, under civil service law, the Commission grants equitable relief (reinstatement without loss of compensation or loss of other benefits), but does not take evidence of, or award, specific monetary damages. Those matters are more appropriately left to be calculated by the parties and, if disputed, adjudicated in a civil action in the Superior Court. This is especially true here, where the issues are whether a deduction from such compensation, if any, should be made for an employee’s receipt of collateral benefit such as workers’ compensation, whether compensation carrier is entitled to “subrogation” for payments made, and/or how, if at all, a settlement of the workers’ compensation claims bear on the matter, all of which are technical matters of workers’ compensation, contract and/or common law, not within the purview of the civil service law. Accordingly, the Commission must leave that issue for determination in another forum. See Town of Dedham v. Dedham Police Ass’n, 46 Mass.App.Ct. 418, rev.den., 429 Mass. 1106 (1999) (Commission decision not determinative of meaning of benefits under collective bargaining agreement) See also Fernandez v. Attleboro Housing

³ This conclusion should not be read to infer that the DOC was required to accept medical opinions procured by Sgt. Rivera, in the first instance, and could not abide confirmation by a physician of its own choosing. As noted in the Findings of Fact (#13 & #14), the DOC’s rules appear to provide different procedures in this regard, depending on the nature of the injury or sickness, and the particular bargaining unit to which the employee belongs. Here, had DOC been diligent in complying with the Commission’s Decision in Rivera I, and the Procedural Orders in this appeal, the merits of the evaluation, not the unjustified delay in conducting it, would have been the sole relevant basis for review.

Authority, 470 Mass. 117 (2014) (distinguishing civil service statutory rights and other statutory and common law rights); Williams v. Town of Stoughton, 19 MCSR 130 (2006) (lack of jurisdiction to review retirement decision); Sheenhan v. Town of Hudson, 19 MCSR 15 (2006) (same); Roderick v. Town of Plymouth, 6 MCSR 142 (1993) (same)

Relief to Be Granted

Accordingly, for the reasons set forth above:

1. As to CSC Docket No. D1-12-98, the Commission declines to reopen the appeal and takes no further action in that matter.
2. As to CSC Docket No. D1-14-51: (a) the “Appellant’s Motion for Summary Decision” dated August 4, 2014, as supplemented by the “Appellant’s Motion for Summary Decision” dated November 7, 2014 is allowed, in part; (b) the “Appellant’s Motion to Strike Appointing Authority’s Cross Motion for Summary Decision is denied; and (c) the “Appointing Authority’s Cross-Motion for Summary Decision” dated September 5, 2014, and the “Respondent’s Opposition to Appellant’s Motion for Summary Decision is denied.”
3. The appeal of the Appellant, Darrell Rivera, in Docket No. D1-14-51, is allowed in part. His termination is modified and he is ordered to be reinstated to his position as Correction Officer II (Sergeant) with the DOC effective retroactive to August 15, 2014 without loss of compensation or other benefits from and after that date, if any, to which he may be entitled by law. Excepted as herein provided, this Decision is not intended to grant the Appellant any other or further compensation or benefits.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners) on April 30, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:
Joseph A. Padolsky, Esq. (for Appellant)
Carol A. Colby, Esq (for DOC)