

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

MICHAEL RIZZO,
Appellant

v.

D1-07-376

TOWN OF LEXINGTON,
Respondent

Appellant's Attorney:

James F. Lamond, Esq.
McDonald, Lamond & Canzoneri
153 Cordaville Road, Suite 210
Southborough, MA 01772
(508) 485-6600

Respondent's Attorney

Philip Collins, Esq.
Collins, Loughran & Peloquin, P.C.
320 Norwood Park South
Norwood, MA 02062
(781) 762-2229

Commissioner:

Christopher C. Bowman

**DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS
APPELLANT'S SECTION 42 APPEAL**

Procedural History

The Appellant, Michael Rizzo (hereafter "Rizzo" or "Appellant"), filed a timely appeal with the Commission to determine if the Appointing Authority, the Town of Lexington (hereafter "Appointing Authority" or "Town"), was compliant with procedural issues under G. L. c. 31, §§ 41 and 42 when they terminated him as a police officer on October 30, 2007. (Section 42 Appeal) Specifically, the Appellant's Section 42 appeal

stated that the Town did not: 1) hold a timely hearing; and 2) issue a timely decision. The Appellant subsequently withdrew his claim regarding whether the Town issued a timely decision, but maintained that the Town did not hold a timely hearing. The Appellant is also challenging whether or not the Appointing Authority had just cause for terminating the Appellant. (Section 43 Appeal)

On December 13, 2007, a pre-hearing conference was held at the Commission at which time the Appointing Authority submitted a Motion to Dismiss the Appellant's Section 42 appeal. On January 11, 2008, the Appellant filed an Opposition to Respondent's Motion to Dismiss the Section 42 appeal. A motion hearing was held at the Commission on February 11, 2008 at which time counsel for the Appellant and Appointing Authority offered oral argument.

Factual Background

It is undisputed that the Appellant was placed on paid administrative leave on January 9, 2007, pending a disciplinary hearing to be conducted by the Appointing Authority pursuant to G.L. c. 31, § 41. The disciplinary hearing subsequently commenced on August 1, 2007 and concluded on September 7, 2007. Based on this disciplinary hearing, the Appellant was terminated by the Appointing Authority.

Basis of Appellant's Section 42 Appeal

The Appellant argues that the seven month delay between the filing of charges and the commencement of the disciplinary hearing does not satisfy the "timely hearing" requirement. Moreover, the Appellant argues that the lengthy delay was prejudicial to him as: 1) the memory of key witnesses was likely to fade over this period of time; and

2) he was unable to work overtime and/or receive detail pay while on paid administrative leave.

Appointing Authority's Argument to Dismiss Section 42 Appeal

The Appointing Authority argues that it has met all of the procedural requirements of G.L. c. 31, §41. Further, the Appointing Authority argues that Section 41 contains no requirement that a hearing on the reasons for contemplated discipline be held within any particular time period. Rather, according to the Appointing Authority, Section 41 affords the employee only one right regarding the timing of the hearing, i.e. that he be afforded a minimum of notice.

Moreover, the Appointing Authority argues that the reason for the delay in holding a disciplinary hearing was directly related to the Town's efforts to respond to the Appellant's request for the personnel records of numerous other officers, in some cases going back 25 years.

Applicable Law

Prior to terminating a tenured civil service employee, G.L. c. 31, § 41 requires that the employee be given: 1) a written notice by the appointing authority; and 2) a full hearing before the appointing authority or a hearing officer designated by the appointing authority. The employee must be given written notice of the time and place of such hearing at least three days prior to the holding thereof.

If the Commission finds that the Appointing Authority failed to follow the above-referenced Section 41 procedural requirements and that the rights of said person have been prejudiced thereby, the Commission "shall order the Appointing Authority to restore

said person to his employment immediately without loss of compensation or other rights.” G.L. c. 31, § 42.

Conclusion

The Appointing Authority complied with all of the procedural requirements of G.L. c. 31, § 41. Hence, there is no merit to the Appellant’s appeal on procedural grounds under Section 42. There is no dispute that the Appointing Authority provided the Appellant with more than the statutorily-required 3-day notice of the disciplinary hearing. The Commission concurs with the Appointing Authority that Section 41 contains no requirement that the hearing be held within any particular time period.

Even, *assuming arguendo*, that there is an implied “timely hearing” requirement in Section 41, as argued by the Appellant, the Appointing Authority has complied with any reasonable interpretation of that purported requirement given the facts in this particular case. Specifically, the Appellant, subsequent to the January 9, 2007 notice from the Appointing Authority, submitted a renewed request for voluminous information to the Appointing Authority seeking the personnel records of other officers, some dating back 25 years. While the Appellant argues that this request was unrelated to the instant appeal, a January 16, 2007 letter from then-counsel for the Appellant stated in part, “I also need the information for evaluation and possible use in the pending disciplinary hearing...”. (See January 16, 2007 letter from Attorney McDonald to Attorney Collins). It would be a cynical irony to penalize the Town on procedural grounds as a result of their good faith effort to assist the Appellant in obtaining personnel records which he clearly believed could be of benefit to him at a disciplinary hearing.

The Appointing Authority complied with all of the procedural requirements under G.L. c. 31, § 41 and there is no evidence that the Appellant has been prejudiced by any action taken by the Appointing Authority. For these reasons, the Appointing Authority's Motion to Dismiss the Appellant's Section 42 appeal is allowed and the Appellant's Section 42 appeal is hereby ***dismissed***. The Appellant's just cause appeal under Section 43 will proceed as scheduled before the Commission beginning on March 18, 2008.

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on February 14, 2008.

A true Copy. Attest:

Commissioner
Civil Service Commission

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 to
James F. Lamond, Esq. (for Appellant)
Philip Collins, Esq. (for Appointing Authority)

