

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place
Room 503
Boston, Massachusetts 02108

MARIA SANCHEZ,
Appellant

v.

D1-19-032

SPRINGFIELD POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se
Maria Sanchez

Appearance for Respondent:

Maurice M. Cahillane, Esq.
Egan, Flanagan & Cohen
67 Market Street
P.O. Box 9035
Springfield, MA 01103

Commissioner:

Christopher C. Bowman

DECISION ON MOTION TO DISMISS

1. On February 8, 2019, the Appellant, Maria Sanchez (Ms. Sanchez), filed an appeal with the Civil Service Commission (Commission), contesting her “forced resignation” from her position as police officer from the Springfield Police Department (SPD).
2. On March 27, 2019, I held a pre-hearing conference at the Springfield State Building in Springfield, MA which was attended by Ms. Sanchez and counsel for the SPD.
3. At the pre-hearing, the SPD submitted a pre-hearing memorandum stating that, as of the date of her resignation, Ms. Sanchez was still a probationary employee. Thus, according to the SPD, the Commission had no jurisdiction to hear this appeal.
4. The parties agreed to the following at the pre-hearing:
 - A. On November 30, 2017, Ms. Sanchez graduated from the Police Academy.
 - B. On December 1, 2017, Ms. Sanchez was sworn in as a police officer and issued a firearm.
 - C. On December 3, 2017, Ms. Sanchez was assigned to her first shift as a police officer.
 - D. On November 28, 2018, the SPD, citing performance issues, extended Ms. Sanchez’s probationary period by two months.

- E. On February 1, 2019, Ms. Sanchez submitted her letter of resignation. Ms. Sanchez alleges it was a “forced resignation”.
5. On April 26, 2019, the SFD submitted a Motion to Dismiss the Appellant’s appeal, arguing that the Appellant’s probationary period began on December 3, 2017, the day she was assigned to her first shift. Thus, according to the SPD, the Appellant’s probationary period would not end until February 3, 2019 fourteen months (twelve months plus two extended months) after her first shift on December 3, 2019.
 6. On May 27, 2019, Ms. Sanchez submitted a reply that did not address the substantive issue of when her probationary period began (i.e. – December 1, 2017 or December 3, 2017). She did, however, reference that she had been on injured leave from “for an approximate total time of 4 months” [the injured leave time actually included approximately six (6) weeks from 4/10/18 to 4/29/18 and again from 7/3/18 to 8/10/18].
 7. On June 24, 2019, I notified the parties via email that I was taking administrative notice of the following March 21, 2003 memorandum from the state’s Human Resources Division (HRD) regarding the start of a police officer’s probationary period: [memorandum from the state’s Human Resources Division \(HRD\) dated March 21, 2003](#). That memo states 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.”
 8. Applying the HRD memorandum to the instant appeal, Ms. Sanchez’s probationary period began on December 1, 2017, not December 3, 2017, as argued by the SPD.
 9. On July 1, 2019, the SPD submitted a reply effectively arguing that HRD’s memorandum was inconsistent with caselaw.
 10. On July 8, 2019, Ms. Sanchez submitted a response which did not address the issue raised in the HRD memorandum.
 11. On June 24, 2019, I notified the parties that I would be holding a motion hearing to address various issues, including but not limited to: the HRD memorandum referenced above; the period of injured leave referenced in the Appellant’s May 27, 2019 submission; as well as whether the Appellant’s resignation could or could not be construed as a constructive discharge.
 12. On July 18, 2019, the Commission issued the following two (2) decisions related to, among other things, when the probationary period of a police officer begins:
 - [**Qirici, Enxhi v. Boston Police Department 7/18/19**](#)
 - [**Brandao, Emanuel v. Boston Police Department 7/18/19**](#)
 13. In both of these decisions, the Commission, consistent with prior Commission decisions and HRD’s 2003 memorandum, concluded that the police officers’ probationary period began upon completing the police academy and being sworn in as a police officer.

14. On July 24, 2019, I held a motion hearing at the Springfield State Building which was attended by Ms. Sanchez and counsel for the SPD.
15. On August 13, 2019, the SPD submitted an amended Motion to Dismiss addressing the issue of Ms. Sanchez's injured leave and how, according to the SPD, it provided another reason why Ms. Sanchez had not completed her probationary period at the time of her separation from employment.
16. On August 25, 2019, Ms. Sanchez submitted a reply that argued, in part, that the SPD never notified her that her probationary period was being extended due to her injured leave. In the alternative, Ms. Sanchez argued that another non-minority police officer was out on injured leave for a period greater than her, and, to her knowledge, that police officer's injured duty leave did not impact the date upon which he became a tenured police officer.
17. In their respective submissions, neither party indicated whether the SPD had notified the state's Human Resources Division (HRD) of Ms. Sanchez's termination. On September 3, 2019, I sent an email to counsel for the SPD to inquire as to whether such notification to HRD was made by the SPD. In response, I received a reply stating that HRD was notified, which was accompanied by an "Absence and Termination Notice (Form 56) which stated that the Ms. Sanchez's last date of employment was "2-1-19". The SPD checked "Resigned" as opposed to "Terminated – Probationary Period, Section 34".

Applicable Law

G.L. c. 31, § 34 states in relevant part:

“During the probationary period, he may be subject to a performance evaluation during his first two months of service and a second evaluation may be conducted at least one month prior to his sixth month anniversary date of service. The appointing authority may extend the probationary period for a period of two months if the second evaluation of the probationary employee is unsatisfactory. Such evaluation may be utilized by the appointing authority, but in no instance shall the appointing authority be required to consider the results of such evaluation in a determination of granting such employee permanent or tenured status. Nothing contained herein shall require an appointing authority to evaluate a probationary employee and in no such instance shall such evaluation grant such probationary employee any greater rights than those contained in this section.

...

If the conduct or capacity of a person serving a probationary period or the character or quality of the work performed by him is not satisfactory to the appointing authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such notice, such person shall be deemed to be a tenured employee upon the termination of such period.

If a full-time civil service employee is unable to work because of illness during the serving of his

probationary period, the appointing authority may postpone the serving of such period, provided that such employee has served an amount of time adequate to satisfy the appointing authority that his services should be retained and provided, further, that such employee shall, upon resuming employment, be required to perform service equal to a full probationary period.

If a person at the time of his appointment or during the serving of his probationary period is not actually employed because of educational leave, he shall not be regarded as a tenured employee until he has served a full probationary period or the remainder thereof, as the case may be, following the termination of said educational leave and his commencing of or return to employment.

The probationary period of an employee shall not be deemed to be interrupted by his temporary appointment pursuant to section six to a position in a higher title in the same departmental unit, by his temporary promotional appointment pursuant to section seven, or by his provisional promotion pursuant to section fifteen.”

G.L. c. 31, § 41 states in relevant part:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. In the case of a second or subsequent suspension of such employee for a period of more than five days, reinstatement shall be subject to the approval of the administrator, and the notice of contemplated action given to such employee shall so state. If such approval is withheld or denied, such employee may appeal to the commission as provided in paragraph (b) of section two.”

G.L. c. 31, § 61 states:

“Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a town where the civil service law and rules are applicable to such position, a person shall

actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he shall be considered a full-time tenured employee in such position, except as otherwise provided by civil service rule. The administrator, with the approval of the commission, may establish procedures to ensure the evaluation by appointing authorities, prior to the end of such probationary period, of the performance of persons appointed as regular police officers or fire fighters.”

The Personnel Administration Rules state in relevant part:

PAR.12 PROBATIONARY PERIOD

(2) 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.

PAR.13 LEAVES OF ABSENCE

(1) A civil service employee seeking a leave of absence or renewal of same for a period longer than three months shall submit a written request for the leave or renewal to the appointing authority at least twenty-one days before the leave unless submission within such time period is impracticable.

(2) When an appointing authority requests prior approval of the administrator for an employee leave of absence or renewal of a leave of absence under M.G.L. c. 31, §37, for a period to exceed three months, such approval shall be requested at least fourteen days before the leave or renewal of leave of the employee is to commence unless request within such time period is impracticable. Said request shall be in writing. A copy of the request shall be delivered to the affected employee. If approval is granted, the written notice of said approval by the administrator shall be delivered to the applicant.

Analysis

Consistent with prior Commission decisions and guidance offered by HRD dating back to 2003, Ms. Sanchez’s probationary period start date is December 1, 2017, the date that Ms. Sanchez was *sworn in as a Springfield Police Officer* after completing the Police Academy.

Based on performance reasons, the SPD extended Ms. Sanchez’s probationary by two (2) months, increasing the amount of time that Ms. Sanchez must actually perform the duties and responsibilities of a police officer from twelve (12) to fourteen (14) months.

As of February 1, 2019, the date of separation, Ms. Sanchez had not performed the duties and responsibilities of a Springfield Police Officer for fourteen (14) months as she had been on injured leave for approximately six (6) weeks. In order to complete her probationary period, Ms. Sanchez would have had to have actually performed the duties and responsibilities of a police officer for an additional six (6) weeks.

The SJC’s decision in Police Commissioner of Boston v. Cecil, 431 Mass. 410 (2000), unequivocally reinforced the need to actually perform the duties of a police officer for twelve

months [or, as in this case, fourteen (14) months when the probationary period has been extended] before becoming a permanent, tenured police officer. (“The policy of the statute is to ensure sufficient time for a careful determination whether they are present in sufficient degree.” *Id.* Where s. 61 calls for a newly appointed police officer to “actually perform the duties of such position on a fulltime basis for a probationary period of twelve months” (emphasis added), the intent of the Legislature could not be clearer.”)

Further, Section 34 explicitly states that:

“If a full-time civil service employee is unable to work because of illness during the serving of his probationary period, the appointing authority may postpone the serving of such period, provided that such employee has served an amount of time adequate to satisfy the appointing authority that his services should be retained and provided, further, that **such employee shall, upon resuming employment, be required to perform service equal to a full probationary period.**” (emphasis added)

Solely for the purposes of reaching a decision on this motion to dismiss, I accept as true the Appellant’s statement that the SPD never notified her that her probationary period was being extended due to her injured leave. In Patterson v. Town of Plymouth, 21 MCSR 650 (2008), a similar issue was raised. The findings in Patterson state that Patterson took a short-term medical leave and that he was not notified that his probationary period was being extended. Based on a full reading of the decision, it appears that Patterson could only be considered tenured if those weeks on leave were credited toward the probationary period. The Commission’s analysis in Patterson does not explicitly draw that conclusion, however, and more importantly, the primary issue in Patterson appeared to be when the probationary period *began* --- at the time of being sworn in as a police officer or days later when Patterson worked his first shift.

The Commission has more squarely addressed the issue of an alleged lack of notice in cases unrelated to performance-related extensions in Andrade v. City of Cambridge, 31 MCSR 90 (2018) (currently pending appeal in Superior Court). In Andrade, the City, approximately six weeks prior to the expiration of Mr. Andrade’s probationary period, placed him on paid administrative leave after he was arrested for a domestic assault and battery. Mr. Andrade never returned to performing his duties as a firefighter and the City terminated him several months later. The City never notified Mr. Andrade that this paid administrative leave would interrupt his probationary period.

In Andrade, the Commission concluded:

“That leaves the more substantive issue of whether the City’s failure to extend Mr. Andrade’s probationary period under Section 34 resulted in Mr. Andrade becoming a tenured employee, notwithstanding the requirement in Section 61 that firefighters must perform the duties of the position for twelve months before obtaining tenure.

While it is true that, in Cecil, the Boston Police Department extended Cecil’s probationary period under Section 34, pending an internal investigation, the SJC’s decision, when read in its entirety, emphasizes the Legislature’s clear intent on ensuring that firefighters and police officers *actually perform the duties of the position for twelve months* prior to obtaining tenure stating:

'Where s. 61 calls for a newly appointed police officer to "actually perform the duties of such position on a fulltime basis for a probationary period of twelve months" (emphasis added), the intent of the Legislature could not be clearer. The commission exceeded its authority when it credited Cecil the nine days he did not serve in his probationary period.'

Conclusion

Ms. Sanchez was approximately six (6) weeks shy of completing her probationary period at the time she was separated from employment due to her prior injured leave. As such, she was not a tenured employee entitled to the due process rights afforded to tenured civil service employees, regardless of whether the separation was a voluntary resignation or, as argued by the Appellant, a constructive discharge. For this reason, Ms. Sanchez's appeal under Docket No. D1-19-032 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman,
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on October 10, 2019.

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 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Maria Sanchez (Appellant)
Maurice Cahillane, Esq. (for Respondent)