

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

UNDREY SANDERS,
Appellant

v.

D-21-252
E-21-253

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellant:

Alan H. Shapiro, Esq.
Sandulli Grace, P.C.
44 School Street, 11th Floor
Boston, MA 02108

Appearance for Respondent:

Joseph A. McClellan, Esq.
Office of the Legal Advisor
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

The Commission dismissed the Appellant's appeals challenging whether the Boston Police Department followed proper procedures in issuing a 3-day suspension against him as the appeal was received approximately 10 years after the Appellant received notice of the action, well beyond the statutory 10-day filing deadline.

DECISION ON CROSS MOTIONS

On December 30, 2021, the Appellant, Undrey Sanders (Appellant), a police officer for the Boston Police Department (BPD), filed two appeals (discipline appeal: D-21-252 and non-bypass equity appeal: E-21-253) with the Civil Service Commission (Commission), contesting the decision of the BPD to suspend him for three days on September 11, 2008. I held a remote pre-hearing conference on February 1, 2022 which was attended by the Appellant, his counsel and counsel for the BPD. After the parties failed to reach a settlement agreement, the BPD submitted a motion to dismiss or, in the alternative, summary decision on July 7, 2022. The Appellant filed an opposition and cross motion on August 15, 2022.

Based on the record, it appears that the following is undisputed, unless otherwise noted:

1. On July 2, 2008, the Appellant worked a paid detail.
2. On September 11, 2008, the Appellant was issued a three-day suspension alleging neglect of duty and insubordination. As part of the notice of suspension, he was provided a copy of G.L. c. 31, §§ 41-45 notifying him, in part, that he had 48 hours to request a (local) hearing to contest the 3-day suspension.
3. On September 12, 2008, the Appellant requested a hearing to contest his 3-day suspension.
4. By letter dated October 14, 2008, the Appellant was notified that a hearing would take place on December 1, 2008. The October 14, 2008 letter stated in part that "... This letter also serves as notification to you that if just cause is found to warrant your suspension I may increase, decrease, or affirm the length of the suspension that was imposed by your Commanding Officer."
5. The December 1, 2008 hearing did not take place.

6. Subsequent to the issuance of the three-day suspension, the BPD conducted an internal affairs investigation. The investigating officer found that the Appellant was untruthful during the internal affairs investigation as it related to the underlying events on July 2, 2008.
7. On September 17, 2009, the Appellant was notified of the result of the internal affairs investigation, which added untruthfulness to the charges of neglect of duty and insubordination.
8. On November 24, 2009, a local appointing authority hearing was conducted at which the Appellant was represented by counsel.
9. At the commencement of the local appointing authority hearing, the BPD hearing officer stated that the hearing was being held to address the charges of neglect of duty, insubordination and untruthfulness.
10. By letter dated April 28, 2011, the Appellant was notified by the BPD Commissioner that he (the Commissioner) was upholding the three-day suspension for neglect of duty and insubordination *and* that the Appellant was suspended for thirty days for untruthfulness.
11. The Appellant, through his union, appealed the 30-day suspension to arbitration, arguing that it constituted double jeopardy after the Appellant has already been suspended for three days for the same conduct.
12. On August 2, 2012, the arbitrator issued a “ruling and award” reversing the 30-day suspension on the grounds of double jeopardy.
13. Between 2012 and 2014, counsel for the Appellant sent five emails to the BPD, arguing that:
 - a) “technically” the Appellant had never received a hearing regarding his 3-day suspension;
 - b) the alleged misconduct was now “stale”; and
 - c) if there was not a resolution of the matter,

he (counsel for the Appellant) may have to file an appeal with the Civil Service Commission pursuant to G.L. c. 31, § 42.

14. On December 30, 2021, the Appellant filed a discipline appeal with the Commission, pursuant to G.L. c. 31, § 42, arguing that the BPD did not follow the proper procedures regarding the issuance of the 3-day suspension and a non-bypass equity appeal under G.L. c. 31, § 2(b).

Summary Disposition Standard

When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the party may move, with or without supporting affidavits, for summary decision on the claim or defense. 801 CMR 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 substantial and credible evidence established that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and has not rebutted this evidence by “plausibly suggesting” the existence of “specific facts” to raise “above the speculative level” the existence of a material factual dispute requiring an evidentiary hearing. See e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). Accord Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635 36, (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss).

Relevant Civil Service Law

Section 41 of G.L. c. 31 states in 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 ... [b]efore 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 ... [w]ithin 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.

...

A civil service employee may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. Such suspension may be imposed only by the appointing authority or by a subordinate to whom the appointing authority has delegated authority to impose such suspensions, or by a chief of police or officer performing similar duties regardless of title, or by a subordinate to whom such chief or officer has delegated such authority. Within twenty-four hours after imposing a suspension under this paragraph, the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority within five days after receipt by the appointing authority of such request. Whenever such hearing is given, the appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing ... An appointing authority shall not be barred from taking action pursuant to the first paragraph of this section for the same specific reason or reasons for which a suspension was made under this paragraph.”

Section 42 of G.L. c. 31 states (with emphasis added) in relevant part:

“Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and

legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements.”

801 CMR 1.01 (6)(b) states that:

“Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or *Agency rule*. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party.” (emphasis added)

Analysis

Even when viewing the facts most favorable to the Appellant, his appeals to the Commission are not timely. It is undisputed that, by letter dated April 28, 2011, the Appellant was notified by the BPD Commissioner that the BPD, after conducting a hearing, was upholding a three-day suspension for neglect of duty and insubordination *and* that the Appellant was suspended for thirty days for untruthfulness.

More than a decade later, the Appellant now argues that he “... never had the opportunity to challenge the 3-day suspension” and that “the transcript of that appointing authority hearing contains no specific reference to the 3-day suspension.” I have read the transcript. At that hearing, the parties discussed, in detail, the underlying charges that formed the basis of the 3-day suspension (neglect of duty and insubordination) as well as the additional charge of untruthfulness, which formed the basis of the additional 30-day suspension, both of which the Appellant received prior notice.

Even, however, if the appointing authority hearing did not address the three-day suspension, the Appellant received written notification that, based on the hearing, the three-day suspension was being upheld and additional 30 days of suspension was being imposed. Pursuant to Section 42 of the civil service law, the Appellant had ten business days to file an appeal with

the Commission alleging that the BPD "... failed to follow the requirements of section forty-one in taking action which [] affected his employment or compensation." He did not do that. The email communication from 2012 to 2014 explicitly references the option to file an appeal under Section 42 with the Commission, showing that the Appellant was aware of that appeal right under the statute, but the Appellant simply chose not to pursue the matter until approximately 10 years after he received notice that the 3-day suspension was upheld. Based on those undisputed facts, any procedural appeal is not timely and there is no reason for the Commission to consider whether the statutory timeframe should be tolled. See [Allen v. Civ. Serv. Comm'n and Taunton Public Schools](#), Suffolk Sup. Ct. No. 2013-3239-B (2014) (the fact that the Appellant had the advice and counsel of a union representative weighed against considering whether the Commission should effectively toll the time period of an appeal that was received several months after the filing deadline.)

Finally, the Appellant's appeal under Section 2(b) of Chapter 31 is also not timely as an appeal under this section, assuming it is applicable, requires the appeal to be filed within 30 days of receiving the agency notice.

Conclusion

For all of the above reasons, the Appellant's appeals under Docket No. D-21-252 and E-21-253 are hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on August 25, 2022.

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. 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:

Alan Shapiro, Esq. (for Appellant)

Joseph McLellan, Esq. (for Respondent)