COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

JOSE SANTIAGO,
Appellant

v.

Case Nos.: D-05-113
D-04-424

METHUEN POLICE DEPARTMENT
CITY OF METHUEN,
Respondent

Appellant's Attorney: Anthony R. DiFruscia, Esquire
302 Broadway
Methuen, MA 01844

Respondent's Attorney: Peter J. McQuillan, Esquire
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41 Pleasant St.
Methuen, MA 01844

Commissioner: John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, §§ 2(b) and 37[1], the Appellant, Jose Santiago (hereinafter "Santiago" or "Appellant"), appealed the decision of the Respondent, the City of Methuen (the "City") Police Department (the "Department"), in refusing to reinstate him as a Police Officer. (D-05-113) The Appellant also seeks review of the decision by the Human Resources Division ("HRD") in affirming the Respondent's action. (D-04-424) The Appeal was

[1] Although this appeal was filed under G.L. c. 31, § 37, the Commission will also review the appeal under Section 2(b).

timely filed. A full hearing was held on April 30, 2007 at the offices of the Civil Service Commission. Two (2) audiotapes were made of the hearing. As no notice was received from either party, the hearing was declared private. The parties submitted Proposed Decisions thereafter, as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 through 30) and the testimony of Jose Santiago and Chief of Police Joseph E. Solomon, I find the following:

1. Jose Santiago ("Santiago") was appointed a permanent police officer on October 18, 1982. He was appointed as a temporary Sergeant on January 21, 1990 and as a permanent Sergeant on July 3, 1990. (Exhibit 27)

2. On September 27, 1996, the Appellant was involved in an incident while on duty and was placed on injured in the line of duty (ILD) status under G.L. ch. 41, § 111F by then-Police Chief Bruce MacDougall. (Id.)

3. By letter dated October 7, 1997, Chief MacDougall ordered the Appellant to return to the position he held prior to his absence as a Patrol Supervisor, effective October 12, 1997, based on the determination of the state-appointed Regional Medical Panel that the Appellant was capable of resuming the work of a police officer without restriction. (Exhibit 4)

4. The Appellant returned to duty for five days and then used his accrued sick and vacation days beginning on November 12, 1997. (Exhibit 27)

5. The Appellant has not been on duty since November 11, 1997. His last pay date was

December 4, 1997. (Testimony of Appellant and Exhibit 27)

6. By decision of the Division of Administrative Law Appeals (DALA) dated November 8, 1999, (Santiago v. Methuen Retirement Board, Docket No. CR-97-1798) the Appellant was denied accidental disability retirement benefits. (Exhibit 23)

7. In 1998, the Appellant was elected to the office of State Representative. He was re-elected in 2000. In order to serve in the General Court, he applied for and received unpaid leaves of absences from the Department from January 1, 1999 through December 31, 2002. (Exhibits 5 and 27)

8. By letter of March 1, 2002, the Appellant requested to return to work on April 1, 2002 in a light duty capacity. (Exhibit 27)

9. By letter of March 8, 2002, the Appellant's attorney advised the City that the Appellant was not resigning as a State Representative and had a right to pick a shift that would not be in conflict with his duties as a legislator. By letter of March 13, 2002, the City responded that it was unaware of any contract provision allowing the Appellant to choose his own shift, but would review any document he submitted to support this claim. The Appellant did not respond to the City's March 13 letter. (Exhibits 7 and 8)

10. By letter dated January 15, 2003 to the Mayor and Chief, the Appellant requested a return to duty with restrictions relating to light duty and withdrew his leave of absence.

(Exhibit 9)

11. By letter dated January 22, 2003, the Department advised the Appellant that, according to the Massachusetts Criminal Justice Training Council (MCJTC) and pursuant to 555 C.M.R. 3.03(6)(c), he was required to complete training prior to returning to duty due to his interruption in service of five (5) or more years. The Department further advised that it would sponsor Santiago but he would be required to pay for such training. (Exhibits 10 and 11)

12. By letter dated February 4, 2003, the Appellant advised the Department and Chief Joseph E. Solomon, who had become Chief in 2002, that they had violated various statutes, including G.L. c. 31, Section 41, and the union contract. He asserted that he be reinstated to his duties as a Sergeant with retroactive pay. (Exhibit 12)

13. By letter dated March 3, 2003, Chief Solomon requested clarification from Santiago's legal counsel as to why his client should not undergo retraining. The Appellant did not respond. (Exhibit 13)

14. On March 11, 2003, the Appellant filed a Request for Hearing with the Civil Service Commission pursuant to G.L. c. 31, Section 37, making a demand for reinstatement with retroactive pay to January 7, 2003. On April 24, 2003, the Appellant filed a second request for hearing pursuant to G.L. c. 31, Sections 37, 39 and 41 and requesting reinstatement and retroactive pay to January 7, 2003. (Exhibit 14)

15. By letter to the Respondent dated November 26, 2003, Santiago demanded that he be

returned to work and advised that he would report to duty on December 1, 2003. (Exhibit 15)

16. By letter dated November 26, 2003, Chief Solomon advised the Appellant that the law required an officer who has been away from duty for five (5) or more years to attend a basic police academy, that the Department would arrange for him to attend such an academy and that the Appellant should contact him to arrange for sponsorship. The Chief closed the letter by stating that the Appellant should contact him immediately if he would like assistance in the process. (Exhibit 16)

17. By letter dated December 4, 2003, Chief Solomon sent the Appellant an application packet for retraining along with other documentary information regarding the process. In the letter he stated that he had called the Appellant at his home on December 1, 2003 and left a message with his wife that he had an information packet for the Appellant to attend the next academy, on January 26, 2004. He wrote that he had asked her to have the Appellant call him but, as of December 4, 2003, the Chief had not heard back from the Appellant. The Chief enclosed the application for enrollment in a police academy and a medical examination form, information provided by the MCJTC, as well as additional information: full-time recruit academy process, standard equipment list, MCJTC academies, MCJTC policy on transporting of firearms by student officers, and MCJTC tentative academy start dates. (Exhibit 17)

18. By letter dated December 23, 2003, the Appellant's attorney wrote that the Appellant

was ready, willing and able to return to active duty immediately and would attend any reasonable retraining program as part of these duties at the expense of the Town of Methuen. (Exhibit 17)

19. On January 27, 2004, a Civil Service Commission hearing was held on the Appellant's case on Docket No. D-03-224. At that time, the Appellant voluntarily withdrew his request for hearing by the Commission. (Exhibit 27)

20. On March 4, 2004, the Appellant filed a request for hearing with the HRD pursuant to G.L. c. 31, s. 37. (Exhibit 18)

21. Chief Solomon testified that, as of June 2004, he had not received a response from the Appellant or any notice that the Appellant applied for retraining so he withdraw the Police Department's sponsorship. On June 25, 2004, the Chief sent the Appellant a letter withdrawing sponsorship to the Police Recruitment Academy stating that his repeated attempts to aid the Appellant in completing reinstatement requirements had not been complied with as the Appellant had continually failed to seek to attend the academy. (Exhibit 19)

22. The Appellant testified that his application became lost and stated that in early June 2004 he sent an application to the Training Council without first submitting it to the Chief for his signature. He also stated, on cross examination, that he had never spoken with the MCJTC to learn what was required for retraining. The Appellant's testimony on the issue of his submission of an application was not credible. He

became increasingly unresponsive during questioning about the application process and was clearly attempting to craft his answers to conform to his assertions rather than simply providing a straightforward account. (Testimony and Demeanor of Appellant)

23. On June 27, 2004 Mayor Sharon Pollard sent a letter to Santiago terminating his employment. She stated that due to the Appellant's ineligibility for retraining, based on his refusal to comply with the state requirements for retraining over the past year and a half, he was ineligible under Chapter 31, Section 37, for reinstatement. (Exhibit 20)

24. The Chief testified that no other Methuen Superior Officer has sought to return to active and continued duty after having been out of service for over five (5) years. He stated that an officer away for less than that amount of time, who had been retired, had had to undergo retraining at her own expense. The Police Department has required officers to pay for training when state law has not mandated that the City pay for it. No Methuen officer has ever been paid wages during CJTC retraining. (Testimony of Chief Solomon)

25. I found Chief Solomon to be professional in his demeanor and knowledgeable of the subject matter at hand. His answers to questions were responsive and appropriate. He was unhesitant in providing testimony that was clear, detailed and informative. His statements had all the hallmarks of reliability. (Demeanor of Chief Solomon)

26. On September 16, 2004, a hearing on the Appellant's request was held before the HRD on the issues of reinstatement and payment for training. (Exhibit 27)

27. On March 23, 2005, the HRD issued a decision affirming the actions of the Respondent in refusing to reinstate the Appellant due to his failure and refusal to comply with the retraining/restatement requirements of G.L. c. 31, § 37 and 550 CMR 3.03 at his own expense. The decision stated that the Respondent was not required to pay Santiago his regular wages while he was undergoing retraining. Additionally, the decision stated that the only issue being decided was that of reinstatement, and that the issues of whether the Appellant should have been allowed to return on light duty status and his objection to his termination would not be addressed. (Exhibit No. 22)

28. On April 5, 2005, Santiago appealed the HRD's decision to the Civil Service Commission. His appeal alleged constructive discharge, failure to pay retraining fees, failure to pay retroactive wages, failure to reinstate and failure to assign to light duty. (Id.)

CONCLUSION:

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43

Mass. App. Ct. 300, 304 (1997). Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is "justified" when it is "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." City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

The issue for the commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision." Watertown v. Arria 16 Mass. App. Ct. 331, 334 (1983). See Commissioners of Civil Serv. v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-728 (2003).

Here, the issue is whether the Respondent was justified in requiring the Appellant to complete retraining at his own expense in order to be reinstated as a police officer. Pursuant to G.L. c. 31, § 37, Leaves of Absence, the Appellant requested and received two unpaid leaves of absences from the Department from January 1, 1999 through December 31, 2002. The Appellant withdrew his leave of absence from the Department after losing his re-election bid for State Representative in 2002. Subsequently, the Department informed the Appellant that he was required to complete retraining prior to returning to duty due to his interruption in service of five

(5) or more years, pursuant to 550 C.M.R. 3.03(6)(c).[2] The Department advised that it would sponsor the Appellant, but that he would be required to pay for such retraining. The Appellant maintained that he was willing to complete retraining, but only at the Department's expense, and that the Department also must pay him his regular wages during retraining. As of June 2004, Chief Solomon had not received a response from the Appellant or notice that the Appellant applied for retraining so he (the Chief) withdrew the Police Department's sponsorship. Shortly thereafter, Mayor Pollard terminated the Appellant's employment, stating that due to the Appellant's ineligibility for retraining, based on his refusal to comply with the state requirements for retraining over the past year and a half, he was ineligible under Chapter 31, Section 37, for reinstatement.

The Respondent was justified in its action. Both documentary evidence and testimony showed that the Appellant did not make a genuine, good faith effort to apply for retraining. The Appellant's lack of credible testimony regarding the submission of an application to the MCJTC is very relevant to the outcome of this case. Despite being provided the opportunity by the Respondent to undertake or avail himself of the required retraining, the testimony of both the Appellant and Chief Solomon demonstrated he did not do so. In light of this, the Appellant's arguments, discussed below, do not sway the Commission.

The Appellant argues that the Department should have petitioned for him to be exempted from retraining pursuant to 550 C.M.R. 3.03 but does not submit persuasive evidence to substantiate this argument.

[2] 550 CMR 3.03 (6) (b) Enrollment, (6) Officers Returning to Duty After an Interruption in Service. (C) Interruptions of Five or More Years. Successfully complete an additional Council-approved basic police recruit academy subject to department sponsorship and compliance with admission requirements.

Additionally, the Appellant argues that G.L. Chapter 41, § 96B requires that he be paid his regular wages while in training, and that the Department must pay the expenses of training. The Appellant refers to the paragraph of § 96B which provides that appointees to a full-time position in a police department shall be paid regular wages and reasonable expenses while in training. The following paragraph in the statute also provides that officers receiving in-service training or supervisory training shall receive their regular wages and reasonable expenses. However, § 96B does not refer to officers who are returning to duty after an absence and whether such officers should be paid their regular wages and expenses. Similarly, the language of the current statute, requiring regular wages to be paid in certain training situations, cannot be used to require regular wages to be paid for training that is not addressed in the statute.[3]

Finally, the Appellant argues that the Respondent's mode of operation was politically based and that the City acted arbitrarily and capriciously. An important part of the Civil Service system is assuring that all employees are protected against coercion for political purposes and are protected from arbitrary and capricious actions. Callanan v Personnel Adm'r for Comm., 400 Mass. 597 (1987). However, the Appellant did not submit evidence to support his allegation that political factors played a role in his case.

The underlying reasons for imposing retraining requirements on police officers were stated in detail in the case of Sullivan vs. Town of Brookline, 435 Mass. 353 (2001). The court stated:

[3] The Department submitted a 1978 Attorney General Opinion Letter interpreting an older version of the statute. In this opinion, the Attorney General contends that the pay requirements of the first and second paragraphs of the statute cannot be extended to other paragraphs that do not contain such language. "It is an established rule that statutory omissions cannot be supplied by the courts or those charged with administering the law."

> "The retraining requirement set forth in G.L. c. 31, § 39 recognizes that, after five or more years away from the job, the former employee will not be familiar with the procedures, policies, practices, or even equipment involved in performing the job, as many of those aspects of the work will have undoubtedly changed since the retiree last held the position." *Sullivan* supra at 361.

"Reinstated" officers may also expose the municipality to liability to third parties if they remain untrained and, if reinjured while retraining, they will be able to receive new and possibly higher benefits under G.L. c. 41, § 111F, or G.L. c. 32, § 7." Id. at 361.

In sum, the Respondent showed by a preponderance of the credible evidence that it had just cause to refuse to reinstate the Appellant as a police sergeant when he refused to comply with retraining requirements.

For all of the above stated findings of fact, discussion and conclusion, the decision of the HRD is hereby affirmed and the Appellant's appeals under Docket Nos. D-04-424 and D-05-113 are ***dismissed.***

Civil Service Commission

_____
John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Taylor, Marquis, Henderson and Guerin, Commissioners) on August 23, 2007.

A true record. Attest:

_____
Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. 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.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
Peter J. McQuillan, Esq.
Anthony R. DiFruscia, Esq.