

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

FRANK SOLEIMANI,
Appellant

D1-16-080

v.

MASSACHUSETTS ENVIRONMENTAL POLICE,
Respondent

Appearance for Appellant:

John K. Vigliotti, Esq.
Reardon, Joyce & Akerson, P.C.
4 Lancaster Terrace
Worcester, MA 01609

Appearance for Respondent:

Melissa Thomson, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

1. On April 27, 2016, the Appellant, Frank Soleimani (Mr. Soleimani), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Environmental Police (MEP) to terminate his employment as an Environmental Police Officer A/B (EPO A/B).
2. On May 24, 2016, I held a pre-hearing conference which was attended by Mr. Soleimani, his counsel, counsel for MEP and MEP's Chief Operating Officer (COO).
3. As part of the pre-hearing conference, the parties agreed that Mr. Soleimani was employed by MEP as an EPO A/B as of May 3, 2015; that he was terminated from that position on April 22, 2016 (approximately 11 ½ months later); and, as referenced above, that he filed an appeal with the Commission on April 27, 2016.

4. The parties further agreed that Mr. Soleimani was not provided with a pre-termination notice; that he was not given a hearing prior to his termination; and that he was never informed of any civil service appeal rights.
5. MEP argued that they were under no obligation to provide Mr. Soleimani with any of the above as he was in his probationary period, which, according to MEP, lasts 12 months, pursuant to G.L. c. 31, s. 61.
6. Mr. Soleimani argued that the probationary period in Section 61 only pertains to municipal police officers, not EPOs. Mr. Soleimani argued that the probationary period of an EPO is governed by G.L. c. 31, s. 34, and lasts for six (6) months.
7. The parties both agreed that no hearing was required and that they would submit cross-motions for summary decision, which the Commission has now received.
8. As part of a Procedural Order I issued on May 26th, I informed the parties that if the Commission determined that the probationary period here is six months, then Mr. Soleimani, pursuant to G.L. c. 31, s. 42, would be entitled to reinstatement and MEP would be required to provide him with all civil service rights, including a notice and hearing, prior to terminating his employment.

An Overview of the Massachusetts Environmental Police

The following overview of MEP's history, is, as noted below, taken from the parties' briefs.

As noted by Mr. Soleimani:

The MEP is an agency of the Massachusetts Office of Energy and Environmental Affairs subject to civil service laws. In 1975, the Department of Natural Resources was reorganized and became the Executive Office of Environmental Affairs (EOEA). See Comprehensive Review of the Office of Law Enforcement of the Commonwealth of Massachusetts Executive Office of the Environmental Affairs, p.4. Regarding the Division of Law Enforcement, the Secretary wrote in a special report following the reorganization:

“In order to achieve consistency in law enforcement, it is further commended the uniformed officers of the division be transferred to the Division of Law Enforcement in the Secretary's office and become a special unit of the state-wide complement of enforcement manpower. They should be empowered to enforce all laws of the Commonwealth and receive requisite training and compensation for such duties. In this fashion, the uniformed officer could be fully interchangeable and thus facilitate the assignment of the manpower required to serve all units of the Executive Office of Environmental Affairs.”

The Division of Law Enforcement ("DLE")'s duty was to: enforce all penal law which it is the duty of any agency within the Executive Office of Environmental Affairs to enforce, provision of the general laws or special laws to the contrary notwithstanding.

The DLE was serving the enforcement needs of all of the EOEA and was the only statewide enforcement agency with the primary responsibility to patrol natural woodlands, waterways and coastal territorial water to prevent violation of state environmental laws. This move clarified Law Enforcement's responsibility to assist with all environmental law enforcement needs. Id., p. 5.

Over the years the Division of Law Enforcement went through many changes and mergers and, in 1985, became known as the Massachusetts Environmental Police and officers were called Environmental Police Officers. Id., at p. 6. With this merger, the mission of the MEP broadened and created were a costal enforcement bureau, an inland enforcement bureau, a hazardous waste unit, a boating and recreational vehicle safety bureau, a hunter safety bureau and eventually a marine theft bureau. Id. The EPOs were no longer required to live within the district they patrolled. Id., pp. 6-7.

In 2003, the MEP was transferred back to the Executive Office of Environmental Affairs and called the Office of Law Enforcement reporting directly to the Secretary. Id., p. 7. The primary statutory authority for the Office of Law Enforcement can be found in G.L. c. 21A; c. 90B; c. 130, §§ 8A, 9 and 15A; and c. 131, §§ 87 and 88. Id. p. 8.

EPOs enforce all general laws of the Commonwealth, focusing on the protection of natural resources, waterways, commercial and recreational outdoor activities, and federal laws pertaining to the protection of the Commonwealth's natural resources. (See Commonwealth of Massachusetts Human Resources Division, Environmental Police Officer A/B Examination Pamphlet attached as Exhibit B.) EPOs' duties include the investigation of accidents and/or fatalities involving hunting, boating and recreational vehicles; providing a law enforcement presence regarding the environment, public safety and related educational activities within an assigned geographic area; performing basic maintenance and operation of motor vehicles, motorboats, snowmobiles, off road vehicles and related safety equipment. Id.

Also, as noted by MEP:

Chapter 231 of the Acts of 1985 granted full police powers to EPOs; specifically, EPOs "shall have and exercise throughout the Commonwealth ... all the authority of police officers..." Further, EPOs were granted explicit authority "to have in their possession and carry a firearm, revolver, club, billy, handcuffs, twisters, or any other weapon or article required in the performance of official duty," upon authorization of the Director. In 2001, after September 11th, EPOs began Homeland Security Patrols.

EPOs, like all municipal police officers, must attend and successfully complete a police academy approved by the Massachusetts Criminal Justice Training Council. Id. EPOs then

undergo additional classroom and field training. Annual, in-service training is required under the Municipal Police Training Committee's (MPTC) curriculum and requirements, the same as state and local police departments, in accordance with G.L. c. 41, § 96B.

Applicable Civil Service Law

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.” (emphasis added)

G.L. c. 31, § 42 states 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. *If the commission finds that the appointing authority has failed to follow said 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.*" (*emphasis added*)

G.L. c. 31, § 1 defines a tenured civil service employee as:

"A civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position *for the probationary period required by law* or (2), a promotional appointment on a permanent basis." (*emphasis added*)

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

"Following his original appointment to a civil service position as a permanent full-time employee, a person shall actually perform the duties of such position on a full-time basis for a probationary period of *six months* before he shall be considered a full-time tenured employee, except as otherwise provided by sections sixty-one and sixty-five, by other law, or by civil service rule." (*emphasis added*)

G.L. c. 31, § 61 states:

"Municipal police officers or firefighters; probationary period; evaluation.

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." (*emphasis added*).

G.L. c. 31, § 65 states in relevant part:

"Following his original appointment as a permanent full-time police officer in the Massachusetts bay transportation authority police force, 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. 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 police officers in such force.” (*emphasis added*)

There is not a specific statute that addresses the probationary period of EPOs. Sections 34, 61, and 65 of Chapter 31 were enacted in 1978. Section 61 has never been amended, and Section 34 was last amended in 1981, prior to the Legislature's granting EPOs "all the authority of police officers" and the express authority to carry firearms in 1985.

MEP's Argument in favor of dismissing appeal

Section 61 qualifies police officers for whom the one (1) year probationary period applies, as those "in a city, or in a town where the civil service law and rules are applicable to such position."

MEP argues, however, it must not be so strictly interpreted as to require employment by a city or town; rather, it must be interpreted to apply to include police officers employed by the Commonwealth for whom civil service law is applicable, such as EPOs. The maxim of statutory construction wherein expression of one thing is an implied exclusion of another "is not to be followed where to do so would frustrate the general beneficial purposes of the legislation." Police Commissioner of Boston v. Cecil, 431 Mass. 410 (2000) (holding that Section 34 must not be so strictly construed as to exclude paid administrative leave from the types of leave that toll the probationary period, even where only educational leave and that for illness are expressly included in the language of the section).

To exclude EPOs from the same one (1) year probationary period as municipal and MBTA police officers, MEP argues, would frustrate the general beneficial purposes of the legislation. MEP points to Police Commissioner of Boston, where the Supreme Judicial Court of Massachusetts stated with respect to the one (1) year probationary period for a Boston police officer: Courage, good judgment, and the ability to work under stress in the public interest and as part of an organization, are qualities that are not quickly perceived. The policy of the statute is to ensure sufficient time for a careful determination whether they are present in sufficient degree. Id. at 414; see also Bd. of Selectmen of Brookline v. Smith, 58 Mass.App. Ct. 813, 816 (2003).

MEP also cites Commission decisions where, applying the Police Commissioner of Boston case, the Commission likewise found that "the long duration of the probationary period is required to ensure that a[n] [] officer is capable of performing the duties that are required of a police officer." Tranfaglia v. Town of Winthrop, 28 MCSR 414, 416 (2016) (The Commission lacked jurisdiction to hear the appeal of a part-time police officer terminated in his probationary period).

Since EPOs have all the authority of police officers and must also exercise "courage, good judgment, and the ability to work under stress in the public interest and part of an organization", MEP argues that the one-year probationary period should be applied to them as well.

MEP argues that a probationary period of six (6) months for EPOs, instead of the one (1) year afforded police officers by Section 61, would disregard the public interest in having police officers employed by the Commonwealth and granted full police powers, to show over a sufficient period of time that they possess the appropriate characteristics required for the magnitude of responsibility they carry. Here, according to MEP, the Appellant was terminated approximately eight (8) months after completing training, as the MEP believed he did not have the characteristics required of a police officer. To afford the MEP only six (6) months to make the required "careful determination" of whether new EPOs have the characteristics required of a police officer is not a "sufficient" amount of time and places the safety of the public at risk according to MEP.

In summary, MEP argues that Chapter 31, § 61 must be interpreted as requiring police officers employed by the Commonwealth and subject to civil service law and rules, such as EPOs, to have a one (1) year probationary period. Any interpretation to the contrary, according to MEP, would defy the purpose of Section 61 and the public interest.

Mr. Soleimani's argument

Mr. Soleimani argues that MEP's position is contrary to the plain language of G.L. c. 31, § 61. The statute's plain language, according to Mr. Soleimani, clearly does not cover, nor can it be read to cover "police officers employed by the Commonwealth" such as state police officers, state university or college officers, or EPOs.

Mr. Soleimani argues that the Commission should not and cannot "read into [a] statute a provision which the Legislature did not see fit to put there, nor add words that the Legislature had an option to, but chose not to include", citing Commissioner of Correction v. Superior Court Dep't of the Trial Court for the County of Worcester, 446 Mass. 123, 126 (2006), citing General Elec. Co. v. Department of Env'tl. Protection, 429 Mass. 798, 803 (1999). The Respondent's argument and request to read language into this statutory scheme, according to Mr. Soleimani, is clearly wrong and far reaching. The statute's language clearly states that it only applies to a "full time police officer or firefighter in a city, or in a town where the civil service law and rules are applicable to such position." G.L. c. 31, § 61 (emphasis added). When interpreting statutory provisions, the Legislature has directed that "[w]ords and phrases shall be construed according to the common and approved usage of the language" G.L. c. 4, 6, clause third. There is no mention of the Executive Office of Environmental Affairs or any state agencies in G.L. c. 31, § 61. Therefore, according to Mr. Soleimani, the statute must be read to apply to city or town police officers, not all police officers as requested by the Respondent. "

Further, Mr. Soleimani argues that the illogical argument by the Respondent to include all officers employed by the Commonwealth would miss the mark as it fails to recognize that the Legislature has addressed, when it wanted to do so, other law enforcement agencies, such as the State Police, where G.L. c. 22C, § 13, which governs the Massachusetts State Police, establishes a one (1) year probationary period for Troopers. If the Legislative intent was to include all police officers under the umbrella of G.L. c. 31, § 61, Mr. Soleimani argues that there would have been no need to enact G.L. c. 22C, § 13.

Mr. Soleimani cites other examples of the Legislature enacting statutory authorities when lawmakers wanted to include EPOs in the same category as city and town police officers, including:

- G.L. c. 90B, § 12- that specifically gives EPOs, along with city and town police officers, authority to enforce the laws of c. 90B;
- G.L. c. 130, § 8A- gives authority to police officers employed on a full time, provisional or reserve basis, bordering on coastal waters, the authority granted to an environmental police officer;
- G.L. c. 130, § 9- gives EPOs and state police the authority to search without a warrant boats, vessels, storage and shipping containers, other than a dwelling or house when there is reasonable cause to believe there are illegally taken fish; and
- G.L. c. 131, § 87- gives EPOs authority to make arrest without warrants for individual violating provisions of chapter 131 or any other general or special law relating to fish, birds, mammals, or dogs.

According to Mr. Soleimani, these statutes clearly show that when the Legislature wanted to include environmental police and town and city police officers into the same statutory provision they clearly defined it. The focus of EPOs, argues Mr. Soleimani, is different than that of a traditional police officer, which can be seen in an EPO's job duties as having a much greater focus on environmental protection than that of a city or town police officer.

Another statutory example cited by Mr. Soleimani to show why the Respondent's argument fails is comparing G.L. c. 41, § 111 F and G.L. c. 21A, § 10J. G.L. c. 41, § 111 F is the statutory provision that provides injured on duty benefits to police officers and firefighters. G.L. c. 41, § 111 F reads in part, "[w]henever a police officer or fire fighter of a city, town or fire or water district is incapacitated for duty because of injury in the performance of his duty without fault of his own, or a police officer or fire fighter assigned to special duty by his superior officer, whether or not he is paid for such special duty by the city or town, is so incapacitated because of injuries so sustained, he shall be granted leave without loss of pay for the period of such incapacity". Mr. Soleimani argues that if the Commission were to adopt the Respondent's argument that when the Legislature refers to police officers of cities or towns that it meant to

include police officers employed by the Commonwealth, such as EPOs or the State Police, then EPOs would be included in the statute and receive the benefits thereof. Mr. Soleimani argues that MEP's argument here is contradicted by the Legislature's adoption of G.L. c. 21A, § 10J, by Chapter 475 of the Acts of 2014. (Act attached as Exhibit L). G.L. c. 21A provides the statutory authority for EPOs. The Legislature adopted c. 21A, § 10J. G.L. c. 21A, § 10J, which states "[w]henever an environmental police officer of the office of law enforcement is incapacitated and unable to perform the duties of such an office because of injuries sustained in the performance of the environmental police officer's duties, without the fault of the officer, the injured officer shall be granted leave without loss of pay for the period of the officer's incapacity". According to Mr. Soleimani, the Legislature needed to adopt that statute to give EPOs the protection because the plain language of G.L. c. 41, § 111F, despite mentioning police officers, did not apply to EPOs.

In summary, Mr. Soleimani argues that G.L. c. 31, § 34 clearly establishes a six (6) month probationary period to all permanent full time civil service employees, not otherwise covered by the statute. Since EPOs are not covered by G.L. c. 31, § 61, because they are not officers of a city or in a town, or in G.L. c. 31, § 65, because they are not under the jurisdiction of the Massachusetts Bay Transportation Authority, Mr. Soleimani argues that the only statutory scheme that covers them is the default probationary period of six (6) months under G.L. c. 31, § 34.

Analysis

None of the cases cited by the parties directly address the issue of whether the probationary period of Environmental Police Officers is governed by Section 34 (6 months) or Section 61 (1 year). In short, this is a case of first impression. There is no dispute that, if Section 61 does not apply to EPOs, then Section 34 does.

As cited above, Section 61 states:

“Municipal police officers or firefighters; probationary period; evaluation.

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.”

Mr. Soleimani argues that a plain reading of Section 61 makes it clear that it only applies to permanent-full time police officers (or firefighters) *employed by a city or town* that is covered by the civil service law, while MEP argues that it must be interpreted to apply to include police officers *employed by the Commonwealth* for whom civil service law is applicable, such as EPOs.

Thus, the first question for the Commission is whether the language of Section 61 is clear or whether it is “capable of being understood by reasonably well-informed persons in two or more different senses ... [thus making it] ... ambiguous” (*Falmouth v. Civ. Serv. Comm’n & another*, 447 Mass. 814 (2006) citing, *AT&T v. Automatic Sprinkler Appeals Bd.*, 52 Mass.App.Ct. 11, 14 (2001), quoting *Cohen v. Liberty Mut. Ins. Co.*, 41 Mass.App.Ct. 748, 753 (1996).

Since Section 61 was enacted in 1978, and EPOs were not created in their current form until 1985, it is clear that the Legislature, at the time, could not have intended for the probationary period to cover EPOs. Rather, the language, to me, unambiguously refers to *municipal police officers* who are *employed by a city or town* covered by the civil service law. Although the statute does not explicitly say “employed by” a city or town, that intent should be fairly self-evident to those versed in the civil service law. As an illustration, HRD maintains a public website of “[police departments covered by civil service](#)” listing city and town police departments where the civil law is applicable.

I have carefully reviewed the cases cited by MEP. In short, they reinforce years of judicial and Commission decisions regarding the importance of a one-year probationary period for police officers. These cases, however, involve police officers *employed by a city or town* covered by the civil service law, where there was no question that Section 61 was applicable.

In effect, what MEP has put forth here is a series of compelling reasons why the statute should be amended to extend the probationary period of Environmental Police Officers from 6 months to 12 months. That is a public policy decision for the Legislature to make after considering various factors including, but not limited to the mission of the Massachusetts Environmental Police and EPOs; jurisdictional restrictions, if any, of EPOs; and whether these factors support or detract from requiring EPOs to be subject to the same probationary period as municipal police officers employed by cities and towns covered by the civil service law.

In the end, the Legislature may ultimately determine, as they explicitly did regarding the State Police and MBTA Police Officers, that EPOs should be required to serve a 12-month probationary period. Again, that is ultimately a decision for the Legislature, not the Commission to determine.

Until such time as the Legislature establishes a specific probationary period for Environmental Police Officers, as they have done by statute with municipal police officers, state troopers and MBTA police officers, the 6-month probationary period referenced in Section 34 applies.

This does not mean that MEP is prevented from terminating EPOs for just cause after 6 months. Rather, it simply means that, after serving a 6-month probationary period, EPOs cannot be terminated without just cause and being afforded the due process requirements of the civil service law, including proper notice, a hearing and appeal rights to the Commission.

Conclusion

As a tenured employee at the time of his termination, Mr. Soleimani was entitled to all of the due process protections in Section 41 of the civil service law. MEP failed to meet these requirements when it failed to provide him with written reasons for the termination, a notice of hearing, the right to dispute the reasons at a hearing; and notification of his appeal rights, clearly prejudicing his rights. For this reason, and pursuant to Section 42 of the civil service law, Mr. Soleimani's motion for summary decision is ***allowed***; and MEP is ordered to restore Mr. Soleimani to his employment immediately without loss of compensation or other rights.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan) on September 1, 2016.

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)(l), 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:

John Vigliotti, Esq. (for Appellant)

Melissa Thomson, Esq. (for Respondent)