

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

KEVIN SULLIVAN

Appellant

v.

CASE NO: D1-08-257

CITY OF TAUNTON,

Respondent

Appellant's Representative

Anthony "Tony" Pini
Legislative Director
Mass. Laborers' District Council
7 Laborers' Way
Hopkinton, MA 01748

Appointing Authority Attorney:

Robert M. Spiegel, Esq.
Deutch, Williams, Brooks, DeRensis
& Holland, P.C.
One Design Center Place – Suite 600
Boston, MA 02210

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS AND FOR SUMMARY DISPOSITION

The Appellant, Kevin Sullivan, acting pursuant to G.L.c.31, §42 and §43, asserts an appeal against the City of Taunton (Taunton), challenging the procedures and reasons for the termination of his employment as a laborer with the Taunton Department of Public Works (DPW). Taunton filed a "Motion for Summary Decision and Dismissal" which asserts that the Commission lacks jurisdiction of the appeal because the Appellant resigned his employment, which the Appellant opposed on the grounds that his resignation was procured under duress. A hearing on the motion was held by the Civil Service Commission (Commission) on January 12, 2009, which was digitally recorded. In addition to the written submissions of the parties, the Commission received oral testimony from the Appellant and Cathal O'Brien, and received one documentary Exhibit

in evidence. The record remained open to permit the Appellant to submit additional evidence, which the Commission received on January 16, 2009.

FINDINGS OF FACT

Giving appropriate weight to the submission and argument of the parties, the affidavits of Taunton Director of Human Resources Maria Gomes, the affidavit of Joseph DeMoura submitted on behalf of the Appellant, the testimony of Ms. Gomes, the Appellant and Taunton DPW Water Services Supervisor Cathal O'Brien, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Kevin Sullivan, was a 22-year tenured employee in the position of laborer in the Taunton DPW Water Division, until his resignation on September 23, 2008.

(Gomes Affidavit; Testimony of Sullivan)

2. On September 23, 2008, Anthony Abreau, the Taunton Assistant DPW Commissioner, came to learn that two crates of metal tops (valued at approximately \$3,000) used for municipal signs were missing from the DPW and he traced them to the Old Colony Scrap Yard. Assistant Commissioner Abreau and Ms. Gomes went to the Old Colony Scrap Yard and met with Mr. Shay Pearce, a representative of the scrap yard, who reported that an individual who called himself "Kevin Morse" from the Taunton DPW had sold the metal tops to the yard. After being shown unlabeled photographs of all Taunton DPW employees. Mr. Pearce positively identified Mr. Sullivan as the person called "Kevin Morse" and produced receipts for the metal tops made out to Kevin Morse.

(Gomes Affidavit)

3. Mr. Sullivan's supervisor, Cathal O'Brien, ordered Mr. Sullivan to the DPW Commissioner's office where he appeared with Joseph DeMoura, a member of Laborers'

Local 1144, which is the bargaining unit covering Mr. Sullivan's position. Also present were DPW Commissioner Fred Cornaglia, Assistant Commissioner Abreau, Mr. O'Brien, and Ms. Gomes. (*Gomes Affidavit; DeMoura Affidavit; Testimony of Sullivan, O'Brien*)

4. At the commencement of the meeting, Ms. Gomes read the "Miranda Rights" to Mr. Sullivan, specifically, informing him that he had the right to remain silent, but that anything he said can be used against him in court, and further informed him that he had the right to have an attorney present. (*Gomes Affidavit; Sullivan Testimony*)

5. Ms. Gomes told Mr. Sullivan that the DPW had discovered the theft of certain items that had been traced to the Old Colony Scrap Yard and that Mr. Sullivan has been positively identified as the individual who sold the stolen items to the scrap yard. Ms. Gomes informed Mr. Sullivan that this was a criminal matter. (*Gomes Affidavit*)

6. Mr. Sullivan "readily admits to taking the pole caps and scrapping them for profit". (*Appellant's Opposition; Gomes Affidavit*)

7. Ms. Gomes states that she offered Mr. Sullivan two options; (1) resign his position or (2) be placed on immediate suspension (or administrative leave without pay) pending the completion of a police investigation and civil service hearing, notice for which she would issue later that day. She offered Mr. Sullivan the opportunity to consult with Arthur Lopes, the union representative/steward, and offered to call him on the telephone. (*Gomes Affidavit; Affirmation of Gomes; Affirmation of Appellant's Representative; Testimony of Sullivan*)

8. Mr. Sullivan testified that Ms. Gomes told him that, unless he resigned immediately, she would have him "arrested on the spot". Both Mr. O'Brien and Ms. Gomes dispute this assertion. Mr. DeMora's affidavit fails to corroborate Mr. Sullivan's

specific assertion of immediate arrest, but does attest that Mr. Sullivan’s “options were clear, resignation or prosecution.” (*Testimony of Sullivan, O’Brien; Gomes Affidavit; DeMoura Affidavit*)

9. Ms. Gomes told Mr. Sullivan to “punch out” and Mr. Sullivan and Mr. DeMoura stepped out of the meeting and, while Mr. O’Brien watched from the doorway of the conference room, the two of them discussed the situation. Mr. DeMoura recommended that Mr. Sullivan resign rather than humiliate himself and his family. They returned to the meeting and Mr. Sullivan asked for consideration of his impaired state due to a substance abuse issue (which had been the subject of a recent prior discipline). This suggestion was rejected by Ms. Gomes. There may also have been some discussion about the fact that, if Mr. Sullivan were found guilty, he could lose his pension rights. (*Testimony of Sullivan, O’Brien*)

10. Prior to leaving the meeting, Mr. Sullivan signed a statement which reads:

9/23/8
I /s/ Kevin Sullivan
hereby resign my position
with the Taunton Water Department.

(*AA Exhibit I*)

11. Mr. Sullivan turned in his ID badge, and Mr. O’Brien accompanied him to his locker to clean out his personal effects. (*Gomes Affidavit*)

CONCLUSION

The party moving for summary disposition pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) in an appeal pending before the Commission is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party [i.e. Mr. Sullivan], Taunton has

presented substantial and credible evidence that Mr. Sullivan has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that Mr. Sullivan has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

The Commission’s jurisdiction to hear disciplinary appeals is limited by statute to cases in which a tenured employee is “discharged, removed, suspended . . . laid off, transferred from his position without his written consent . . . lowered in rank or compensation without his written consent [or] his position be abolished.” G.L.c.31, §41. The Commission has consistently held that a civil service employee who voluntarily chooses to resign his employment is not entitled thereafter to the benefit of a hearing pursuant to Section 42 of the Civil Service Law before the appointing authority and may not appeal the termination to the Commission pursuant to Sections 42 or 43, even though the resignation was prompted by impending discipline or discharge of the employee by the appointing authority. See, e.g., Travers v. City of Fall River, 21 MCSR 182 (2008) (EMT’s appeal dismissed from resignation “under protest” after learning that appointing authority intended to terminate him); Liswell v. Registry of Motor Vehicles, 20 MCSR 355 (2007) (appeal of teller dismissed after resignation prompted by appointing authority’s initiating of investigation of cash discrepancies for which larceny charges were subsequently brought); Crowell v. City of Woburn, 14 MCSR 167 (2001) (highway foreman’s appeal dismissed despite claim of a lack of mental capacity to understand the

consequences of a resignation); Maynard v. Greenfield, 6 MCSR 165 (1996) (police officer resigned in lieu of termination proceedings for substandard performance)

The Commission is not aware of any prior decision by the Commission or a court that has interpreted the scope of Section 41 of the Civil Service Law to include a “constructive” discharge or which suggests that an employee who resigns under “duress” may bring such a claim before the Commission under Section 41 or Section 42. The prior decisions of the Commission appear uniformly to have rejected that notion, at least implicitly. The Commission believes those decisions rest on a proper interpretation of the plain meaning of the statutes and sound public policy. Civil remedies may be available to challenge a wrongful termination in such a circumstance, see, e.g., Baron v. Hickey, 242 F.Supp.2d 66, 74-75 (D. Mass. 2003) citing, Hargray v. City of Hallandale, 57 F.3d 1560, 1567-68 (11th Cir. 1995), but the Commission is not inclined to expand its jurisdiction to permit de novo review of an employee’s after-the-fact recanting of a decision to resign. No compelling case has been made to do so here.

Moreover, even if a “duress” claim were properly within the Commission’s jurisdiction, the Commission cannot find that Mr. Sullivan has presented a basis to conclude that he has any “reasonable expectation” that his claim of duress in this case would be established at a hearing on the matter. Even taking as true the assertion that Mr. Sullivan was threatened with “arrest on the spot”, the totality of the circumstances clearly doom his claim of duress. See generally, See, e.g., Hargray v. City of Hallandale, 57 F.3d 1560 (11th Cir. 1995) (applying a “totality of the circumstances test” to reject a claim of coerced resignation, where plaintiff resigned after being given choice of resignation or facing criminal charges); Stone v. University of Md. Medical Sys. Corp.,

855, F.2d 167, 173 (4th Cir. 1988) (“The mere fact that the choice is between comparably unpleasant alternatives . . . does not of itself establish that a resignation was induced by duress or coercion.”)

Mr. Sullivan admits to the larceny of Taunton property; admits that he was “read his Miranda rights” before being confronted with the charges against him and declined to seek advice of counsel or exercise the option to speak to his union representative; he brought an uninvolved fellow union member with him to 4th meeting who advised him privately to resign. No duress is implicated in any of these decisions. Nor does Mr. Sullivan present a material issue that the threat of immediate arrest (if true) forced his hand because he wanted to avoid embarrassment to him and his family. It must be inferred that Mr. Sullivan knew Taunton had caught him red-handed and certainly had good cause to take the matter to the authorities and/or to terminate him for cause. Mr. Sullivan made his bargain and got the benefit he desired. Second-thoughts and possible “Monday-morning quarterbacking” are not sufficient grounds upon which to overcome the evidence that the decision to resign without further consultation or opportunity for a hearing, although unpleasant, was an act of his own free will in weighing his options at the time.

Accordingly, for the reasons stated above, the Respondent’s “Motion for Summary Decision and Dismissal” is hereby, allowed, and the appeal of the Appellant, Kevin Sullivan is hereby, *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on February 5, 2009.

A True Record. Attest:

Commissioner

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)(I), 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:

Anthony "Tony" Pini. (for Appellant)

Robert M. Spiegel, Esq. (for Appointing Authority)