COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

KEVIN J. SULLIVAN,
Appellant

v.

D1-07-167

TOWN OF SANDWICH,
Respondent.

Appellant's Attorney:

Michael E. Williams, Esq.
Int'l Brotherhood of Police Officers
159 Burgin Parkway
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Respondent's Attorney:

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Commissioner:

Donald R. Marquis

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

Procedural and Factual Background

Pursuant to G.L. c. 31, § 2(b), the Appellant, Kevin J. Sullivan (hereafter "Appellant"), filed this appeal on May 1, 2007, with the Civil Service Commission (hereafter "Commission") claiming that he had been terminated by the Respondent, the Town of Sandwich (hereafter "Town" or "Appointing Authority"), as Appointing Authority. The appeal was timely filed.

The Appellant was employed by the Town from January 13, 2006 through August 19, 2007, as a police officer. Memorandum in Support of Respondent, The Town of Sandwich's, Motion to Dismiss at 2-3 (hereafter "Motion to Dismiss"). From August 5, 2006 through October 10, 2006, the Appellant took 41 days for military training school. Appellant Kevin Sullivan's Opposition to the Respondent Town of Sandwich's Motion to Dismiss at 2 (hereafter "Opposition").

On February 20, 2007, in a meeting between the Appellant and the Chief of Police, the Appellant was notified that his probationary period was being extended for two months "due to concerns with Sullivan's performance during the field training and evaluation program." Motion to Dismiss at 2. A February 22, 2007 correspondence corroborated this meeting. In this same correspondence, it was also stated that the Appellant's probationary period had previously been extended for 41 days as a result of the Appellant's 41 days of military training school. Id. Overall, the Appellant's probationary period was extended from its original date of January 13, 2007, for 41 days, until February 23, 2007, and then by an additional two months, until April 23, 2007. Id. at 3. On April 19, 2007, the Appellant was notified by the Chief of Police that he was being terminated for performance-related reaons. Id.

Appointing Authority's Grounds for Dismissal of the Appeal

In support of its Motion to Dismiss, the Town asserts that the Appellant was not a tenured employee, thus the Commission lacks jurisdiction to hear his appeal.

The Town asserts that, pursuant to G.L. c. 31, § 61, the Appellant's employment with the Town was governed by a one-year probationary period. Motion to Dismiss at 4. In addition, this probationary period could be extended at the discretion of the Appointing Authority. The Town emphasizes that G.L. c. 31, § 61 specifically states that "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 . . ." Id. (emphasis added).

Originally, the Appellant's probationary period was supposed to end on January 13, 2007, one year after he commenced working for the Town. Motion to Dismiss at 5. According to the Town, however, the Appellant's 41-day military training leave gave the Town the discretion to extend his probationary period until February 23, 2007, effectively adding his 41-day leave to his probationary period. Id. The Town states that the extension was "necessary and consistent with the statutory allowance of a one year review period for the purpose of gauging Sullivan's ability to perform the difficult responsibilities of a police officer for the Town of Sandwich." Id.

On February 20, 2007, the Chief of Police met with the Appellant to inform him that his probationary period was being extended an additional two months because of concerns with his performance. Id. at 2. The Town asserts that this two-month probationary period was implemented before the end of the Appellant's original probationary period, with the military leave factored in, which was February 23, 2007. When the Appellant was informed that he would be terminated on April 19, 2007, the Town argues that the Appellant was still under this probationary period, thus not qualifying him as a tenured employee. Id. at 3.

Appellant's Arguments in Opposition to the Motion to Dismiss

The Appellant believes that, at the time of his discharge, he was a tenured civil service employee and was discharged in violation of G.L. c. 31, §§ 41-43. The Appellant asserts that his twelve-month probationary period ended on January 13, 2007, thus when he was informed that he was terminated, he was entitled to appeal rights under G.L. c. 31, §§ 41 - 43. Opposition at 2-3.

According to the Appellant, he was not notified of the extension of his probationary period related to his military leave. Id. G.L. c. 149, § 52 states, in pertinent part, "[a]bsence for military training shall not affect the employee's right to . . . advancement and other advantages of his employment normally to be anticipated in his particular position." The Appellant argues that he was granted leave under the assumption that there would be no adverse affect on his work status. Opposition at 4. In addition, the Appellant suggests that since G.L. c. 31, § 34 specifically mentions education and illness as two types of leave that trigger the tolling of the probationary period, military leave, since not specifically mentioned, should not adversely affect the Appellant's probationary period. Id.

The Appellant also states that according to the "fundamental principles of fairness and justice . . . the employer is bound to notify an individual prior to the termination of a probationary period of their desire to extend said probationary period." Id. at 5.

Finally, the Appellant argues that his probationary period was not extended by the Appointing Authority, but rather was done by the Chief of Police, who is not part of the Appointing Authority. Id. at 6. The Appellant suggests that the Board of Selectmen and the Town Administrator of Sandwich are collectively the Appointing Authority. Id. According to the Appellant, "the Town has failed in the first instance to provide the proper notice of the continuation of the probationary period" because of the Chief of Police notifying the Appellant of the extension of his probationary period. Because he received no notice by the Appointing Authority, the Appellant suggests that the Appellant had a "reasonable expectation that his probationary period would end on January 13, 2007," and thus the Appellant should have had tenured civil service status. Id. at 6-7.

Conclusion

Probationary police officers are governed by G.L. c. 31, § 61, which requires an employee to "actually perform" the duties of his position. Actually performing the duties of the position include tolling the probationary period to satisfy twelve months of actual performance as necessary. According to *Police Commissioner of Boston v. Cecil*, 431 Mass. 410, 414 (2000), "Where § 61 calls for a newly appointed police officer to '*actually perform* the duties of such position on a full-time basis for a probationary period of twelve months,' the intent of the Legislature could not be clearer." In discussing the *Cecil* case, the Court in *David A. Wilson v. CSC*, 2005 WL 4927121 (2005), stated that "neither the [Town] nor the Commission can grant tenured status by crediting [the Appellant] with days he did not actually serve as an officer of the law." Ultimately, the plain language of the statute indicates that tolling is allowed in order for the probationary police officer to actually perform his duties for twelve months.

The Appellant, in part, relies on G.L. c. 149, § 52A, which provides specific protections for members of the armed forces. However, the Appellant misconstrues the applicability of G.L. c. 149, § 52A in this situation. In pertinent part, the statute states that:

> Any member of an organized unit of the ready reserve of the armed forces, who, in order to receive military training with the armed forces of the United States *not exceeding seventeen days in any one calendar year*, *leaves a position other than a temporary position in the employ of any employer*, and who shall give notice to his employer of the date of departure and date of return for the purposes of military training, and of the satisfactory completion of such training immediately thereafter, and who is still qualified to perform the duties of such position, shall be entitled to be restored to his previous, or a similar, position with the same status, pay and seniority, and such period of absence for military training shall be construed as an absence with leave and, within the discretion of the employer, said leave may be with or without pay.

(emphasis added). The Appellant's military training leave was admittedly for 41 days, which exceeds the 17-day allowance that G.L. c. 149, § 52A permits. In addition, it appears that this statute applies specifically to tenured employees, as it indicates the statute applies to positions "other than a temporary position . . ." Id.

The Appellant's leave could also be considered educational leave, which, as the Appellant acknowledges, is a specific situation in which the statute specifies tolling of the probationary period. G.L. c. 31, § 34; Opposition at 4. The Appellant's leave was for military school training and not for active military duty, which could constitute an educational leave under the statute.

The Appellant's argument that he is a tenured civil servant because he received no notification of the extension of his probationary period must fail. The Appointing Authority is correct when it states "there is no statutory or common law requirement for the type of written, advance notice from the appointing authority of a tolling period . . ." Motion to Dismiss at 3.

The Appointing Authority is also correct in stating that G.L. c. 31, § 34 requires notice only for termination, and not for the extension of the probationary period. The Appellant did receive notice of termination on April 19, 2007. Motion to Dismiss at 2-3. Importantly, the notice of termination was signed by the Town Administrator, an individual who the Appellant concedes falls under the auspices of the Appointing Authority. Opposition at 6. Since there is no requirement for the notice of extension of probationary periods, the letters signed by the Chief of Police are beyond what was required of the Appointing Authority.

At the request of the Commission, the Appointing Authority addressed whether or not McLain v. City of Somerville, 424 F.Supp.2d 329 (D.Mass. 2006), a case that discusses the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. §§ 4301-4333, applied to the instant appeal.. The McLain court's narrow holding reflected its very specific issue, which is not relevant to this case: "whether USERRA prevents discrimination in initial hiring on the basis of unavailability due to active service in the military." Id. at 333. The relevant part of USERRA states:

> A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment

> by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. § 4311(a). The purpose of this statute is to prevent discrimination in employment for members of the armed services. In McLain, the Appointing Authority refused to hire a member of the armed services because the dates coincided with training. This is not the case here, however. The Appellant here was not discriminated against when his probationary period was tolled because he had to go on military leave; instead, his probationary period was tolled in order to allow him to complete his one year probationary period, a requirement of all probationary police officers.

Ultimately, as stated in Cecil, "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 [G.L. c. 31, § 61] is to ensure sufficient time for a careful determination whether they are present in sufficient degree." Cecil at 414. The one-year probationary period was tolled for the Appellant in order for the Appellant, a probationary police officer, to complete the full one-year requirement, and thus he was not a tenured civil service employee. Accordingly, the Commission lacks jurisdiction over the Appellant's appeal.

For the above reasons, the Appointing Authority's Motion to Dismiss is allowed and the Appellant appeal under Docket No. D1-07-167 is hereby ***dismissed***.

Civil Service Commission

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Donald Marquis, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis and Taylor, Commissioners [Henderson – Absent]) on March 13, 2008.

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)(l), 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:
Michael E. Williams, Esq. (for Appellant)
Matthew R. Tobin, Esq. (for Appointing Authority)