COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL ACTION
NO.2009-01851

BARRY THORNTON
PLAINTIFF

VS.

CIVIL SERVICE COMMISSION AND
TOWN OF ANDOVER
DEFENDANTS

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

This is an appeal pursuant to G.L. c. 31, §44 from the decision of the defendant Civil Service Commission dismissing the plaintiff Barry Thornton's appeals pursuant to G.L. c. 31, §42 and allowing the plaintiff's appeal pursuant to G.L. c. 31, §43 only in part. The administrative record having been filed, the plaintiff now moves for Judgment on the Pleadings seeking to reverse dismissal of his §41 appeal and the partial denial of his §43 appeal. The defendants Commission and Town of Andover oppose the motion.

BACKGROUND

The plaintiff, Barry Thornton, is a Lieutenant with the Fire Rescue Department of the Town of Andover. By letter dated May 29, 2008, the plaintiff was notified by Michael B. Mansfield, Fire Chief of the Andover Fire Rescue, that he was being suspended without pay for a period of four (4) days for conduct unbecoming an officer of the Fire Rescue Department and for failing to adhere to specified rules, regulations, memoranda and Standard Operating Guidelines of the Department listed in the notice. The date of the plaintiff's alleged infraction was May 3, 2008. According to the letter of May 29, 2008, the suspension was to take effect at 08:00 hours

on June 22, 2008 through 08:00 hours on July 7, 2008. In addition, the plaintiff was forbidden to participate in any Fire Rescue details during that period. The May 29, 2008 letter purported to include copies of G.L. c. 31, §§ 41-45 as well as copies of the specified Department Rules and Regulations. However, the parties have stipulated that a copy of §41 was included together with copies of the Rules and Regulations but copies of §§ 42-45 were not.

Pursuant to G.L. c. 31, §41, on May 29, 2008, the plaintiff (through counsel) filed a timely request for a hearing before the Appointing Authority, the Manager of the Town of Andover, Reginald Stapczynski. By letter dated June 6, 2008 from the Appointing Authority, the plaintiff was notified that the hearing on his suspension was scheduled for June 12, 2008. On June 6, 2008, the plaintiff filed his first appeal with the Civil Service Commission pursuant to G.L. c. 31, §42, asserting that the Fire Chief lacked authority to suspend him, that he had not received proper notice, that the Fire Chief had not given him copies of G.L. c. 31, §§ 42-45 and that the appointing authority failed to give him a timely hearing. The plaintiff notified the appointing authority of his appeal to the Commission and, through counsel, requested that the appointing authority withdraw the notice of a hearing for June 12 pending decision of the Civil Service Commission acted.

The appointing authority responded to the request of plaintiff's counsel by letter dated June 11, 2008 which included the following:

> In response to your fax of today's date, please be advised that I intend to proceed with the scheduled disciplinary hearings as noticed to Barry Thornton whether or not you and your client choose to attend. My decision will be based upon the facts as presented to me by Fire Chief Mansfield.

The appointing authority noted the plaintiff's appeal to the Civil Service Commission concerning

the fact the hearing was scheduled more than five (5) days following receipt of the plaintiff's request. However, it was his position that there was no prejudice to the plaintiff.

The hearing began on June 12, 2008 with the plaintiff and counsel present. The §41 procedural objections were again raised. The hearing was continued to July 16, 2008.

On June 17, 2008, the Fire Chief, noting the plaintiff's objection raised at the hearing, conceded the sections of G.L. c. 31 had not been included with the notice of May 29, 2008. Notwithstanding the fact that he saw no prejudice to the plaintiff, the Fire Chief sent the plaintiff copies of §§42-45 of G.L. c. 31.

By letter dated June 20, 2008, the appointing authority responded to the plaintiff's §41 procedural objections which had been raised at the hearing. He first addressed the issue of whether the Fire Chief had been delegated authority to impose a suspension of up to five days. Apparently there was no written delegation but the appointing authority stated that during his 18 years as Town Manager, the Fire Chief had the authority to impose suspensions of up to five days. He further found that the Fire Chief had not exceeded his authority in suspending the plaintiff from June 22, 2008 through July 7, 2008 stating "[t]he fact those workdays, based on the Fire Department work schedule, extended over more than five days when considering days off, does not in [his] opinion, translate the suspensions being greater than five days." (A. 99).

The appointing authority also found that the prohibition on the plaintiff performing details during that period did not implicate Civil Service since compensation from details was not considered regular earnings. The appointing authority also held that the remaining procedural objections were not supported except as to the failure to include §§ 42 through 45 with the notice dated May 29, 2008. The appointing authority found that the plaintiff was not

prejudiced by the omission of §§42 to 45 and denied the plaintiff relief on procedural grounds.

On July 11, 2008, the plaintiff (through counsel) notified the appointing authority of his objection to the rulings on procedural issues and requesting reports/statements relating to the charges as well as any evidence to be introduced at the hearing. On July 16, 2008, the appointing authority held the hearing to determine whether there was just cause for the plaintiff's suspension.

The appointing authority issued a decision by letter dated August 6, 2008. Based upon information provided by the Fire Chief at the hearing, the appointing authority summarized the events giving rise to the suspension. On May 3, 2008, the plaintiff and two subordinate firefighters were dispatched to a medical call concerning an elderly man who had fallen on the street and who had a laceration on his hand and nose. The man was given a bandage and he refused further treatment. The plaintiff classified the call on his report as "a citizen assist" rather than as a patient refusal. The Fire Chief investigated the call to determine why a patient refusal had not been documented which would have enabled the Town to seek a $75.00 reimbursement from the person's medical insurance. The Chief had notified members of his department in December of 2007 that a $75.00 charge would be assessed for EMS calls. The investigation was initiated after a call from someone wanting to thank the department for assistance. The Chief checked for the EMS report but only found a citizen assist form for the incident. Initially, the plaintiff denied having directed his subordinates not to file the EMS report. The appointing authority denied the plaintiff's appeal and upheld the plaintiff's suspension. On August 15, 2008, the plaintiff filed his second appeal to the Civil Service Commission, appealing the just cause determination made by the appointing authority.

Hearing was held before a hearing officer designated by the Civil Service Commission on January 27, 2009. There were four witnesses called to testify for the Town and two for the plaintiff (including the plaintiff). The parties also filed a stipulation which provided *inter alia* that officers of the Andover Fire Rescue Department work 24-hour shifts. A 24-hour shift on duty is followed by a 24-hour shift off duty and then by one 24-hour shift on duty. The second 24-hour shift is followed by five 24-hour shifts off-duty. This pattern repeats itself. During the period from June 22, 2008 through July 7. 2008, the plaintiff was scheduled to work a 24-hour shift on duty on June 22, June 28, June 30 and July 6.

DISCUSSION

The plaintiff is appealing from the Commission's decisions both in his appeal claiming the his suspension without a hearing exceeded the five days permitted under § 41 and in his appeal from the finding of just cause under §43. Judicial review pursuant to G.L. c. 31, §44 is governed by G.L. c. 30A §14 which provides that the court may set aside or modify a decision of the Civil Service Commission in certain specified situations, including *inter alia* that its decision is based upon an error of law; or that it is unsupported by substantial evidence.

"'In reviewing [the commission's] action under G.L. c. 30A, § 14(7), it was not open to the Superior Court judge to substitute [her] judgment for that of the commission.' *Thomas v. Civil Serv. Comm'n,* 48 Mass.App.Ct. 446, 451 (2000). . . . . Further, a judge is required to 'give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.' *Iodice v. Architectural Access Bd.*, 424 Mass. 370, 375-376 (1997), quoting G.L. c. 30A, § 14(7). 'This standard of review is highly deferential to the agency on questions of fact and reasonable inferences drawn therefrom.' *Flint*

v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992)." *Brackett v. Civil Service Com'n*, 447 Mass. 233, 241-242 (2006). However, deference does not mean abdication. *Quincy v. Massachusetts Water Resources Auth.*, 421 Mass. 463, 468 (1995).

G.L.c . 31, §42 provides in pertinent parts:

> 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. . . . 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.
> . . .

The plaintiff's appeal pursuant to § 42 asserts that the appointing authority failed to follow the requirements of § 41 because his suspension exceeded the five days allowed under § 41. In response to the plaintiff's objection, the appointing authority found that the Fire Chief had only suspended the plaintiff for 4 days because the term day means work-day. In its decision, the Civil Service Commission noted that G.L. c. 31, §41 and related sections "are silent as to the actual number of work hours in the work day of a civil service employee. Instead, the statute appears to speak to 'calendar' work days, be it 8 hours or, in this case more than 8 hours." The Commission cites two of its decision, *Baldasaro v. City of Cambridge*, 10 MCSR 134, 137 (1997)[1] and *Ouilette v. City of Cambridge*, 19 MCSR299, 303 (2006). Thus the Commission

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[1] In *City of Cambridge v. Baldasaro* , 50 Mass.App.Ct. 1 (2000) further app. rev. denied 432 Mass. 1110 (2000), the Appeals Court did not address the construction or meaning of the word "days" in §41.

concluded that the plaintiff was only suspended for 4 days. A.R. 167-168.

G.L. c. 31, § 41¶ 2 provides that:

> 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 . . . .

Section 41 does not define "days" nor does it reference or limit the suspension to work days or shifts. It does expressly provide that "Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section."

"The duty of statutory interpretation is for the courts, *United States Jaycees v. Massachusetts Comm'n Against Discrimination*, 391 Mass. 594, 600 (1984), but an administrative agency's interpretation of a statute within its charge is accorded weight and deference. See *School Comm. of Wellesley v. Labor Relations Comm'n*, 376 Mass. 112, 116 (1978). . . ." *Massachusetts Med. Soc. v. Commissioner of Ins.*, 402 Mass. 44, 62 (1988) as quoted in *Eastern Cas. Ins. Co. v. Commissioner Of Ins.*, 67 Mass.App.Ct. 678, 683 (2006).

"When construing a statute that does not define its words, '[courts] give them their usual and accepted meanings, as long as these meanings are consistent with the statutory purpose.' *Commonwealth v. Zone Book, Inc.*, 372 Mass. 366, 369 (1977). 'We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions.' *Ibid.*" *Eastern Point, LLC v. Zoning Bd. of Appeals of Gloucester*, 74 Mass.App.Ct. 481, 486 (2009).

In 1935, the Supreme Judicial Court was called upon to construe c. 1, § 1, art. 2 of the Constitution of the Commonwealth which provided that "if any bill or resolve shall not be

returned by the governor within **five days** after it shall have been presented, the same shall have the force of law." *Opinion of the Justices* 291 Mass. 572 (1935). The Governor had held the bill in question seven days, of which one, April 19, was a legal holiday and another a Sunday. The Court noted that neither legal holidays nor Sundays were mentioned in c. 1, § 1, art. 2. To determine the meaning and method of calculating the five days, the Court relied upon Federal precedent, stating "It was said in *The Pocket Veto Case*, 279 U. S. 655 at 679, in holding that the 'ten days (Sundays excepted)' allowed by art. 1, s. 7 of the Constitution of the United States to the President for consideration of bills passed by the Congress did not mean legislative days, that 'The word "days," when not qualified, means in ordinary and common usage calendar days.'" *Id.* 577. Thus the Court concluded that, in calculating the five days in c. 1, § 1, art. 2 neither legal holidays nor Sundays were to be excluded.

The issue of how to construe the word "day" was again addressed in *Booker v. Chief Eng. of the Fire Dept. of Woburn*, 324 Mass. 264, 266 (1949), coincidentally in the context of a Fire Department. The issue presented was the interpretation of language in St. 1948, c. 661, § 2 which required that hours of duty for members of the Woburn Fire Department "within a **calendar day** shall be consecutive." Section 2 further provided that members of the department "shall be entitled to not less than one **day** off in each calendar week." The problem which arose related to the city's firefighting force working in three shifts of 8 hours each. As a result, one day per week a firefighter would be required to work until 3 am on one shift and the begin working on his next shift at 7 pm that same evening and the day off would run from 3 A.M. to 3 A.M. The Court held that the schedule did not meet the requirements of the statute in issue. In so deciding the Court said:

> ... It is true that in that part of Section 2 which provides that the "members shall be entitled to not less than one day off in each calendar week" the word "calendar" before the word "day" is omitted, although earlier in the same sentence in dealing with hours of duty the expression "calendar day" is used (emphasis supplied). Nevertheless, we think that the word "day" means a calendar day. Words and phrases used in our statutes (with the exception of those which are technical or have acquired a peculiar meaning in law) "shall be construed according to the common and approved usage of the language." G. L. (Ter. Ed.) c. 4, Section 6, Third. It has generally been held that the word "day" when not qualified means a calendar day. *The Pocket Veto Case*, 279 U.S. 655, 679. *Kuznitsky v. Murphy*, 381 Ill. 182. *State v. Richardson*, 16 N. D. 1, 8. *Long v. Wichita Falls*, 142 Texas, 202, 206. See *Opinion of the Justices*, 291 Mass. 572, 577. ***And a calendar day is the space of time that elapses between two successive midnights***. *Kuznitsky v. Murphy*, 381 Ill. 182. *Moag v. State*, 218 Ind. 135, 141. *State v. Brown*, 22 Minn. 482. *Pannell v. Glidewell*, 146 Miss. 565, 568. *Shaw v. Dodge*, 5 N. H. 462. *Kane v. Commonwealth*, 89 Pa. 522, 525.

More recently in *Glass v. City of Lynn,* 49 Mass.App.Ct. 352 (2000), the Appeals Court reversed a decision of the Superior Court construing that provision in G.L. c. 33, § 59 granting a "seventeen day military allowance." The Superior Court held that the seventeen day period did not run consecutively (i.e to calendar days) but applied to workdays only. The Appeals Court applied the plain meaning and common usage rules of statutory construction and interpreted the pay entitlement to apply to the first seventeen calendar days of an annual tour, noting that "[t]his construction is supported by case law holding that 'the word "day" when not qualified means a calendar day.' *Booker v. Chief Eng. of the Fire Dept. of Woburn*, 324 Mass. 264, 266 (1949). See *Opinion of the Justices*, 291 Mass. 572, 577 (1935). There is nothing in the statute which indicates that the word 'day' is to be construed as a work day or that the period of entitlement to pay should extend for varying periods of time beyond the first seventeen calendar days of an

annual tour of duty, depending on the number of an employee's work days that fall within those seventeen days." *Id.* at 355. The Appeals Court also noted:

> While acknowledging the plain meaning of the section, the judge looked past its narrow purpose in order to limit the financial loss to the plaintiffs. 'To stretch the meaning of a statute so as to adjust an alleged injustice, inequity or hardship could cause a multiplicity of interpretations as each alleged injustice, inequity, or hardship arose." *Milton v. Metropolitan Dist. Commn.*, 342 Mass. 222, 227 (1961). Given the variety of work schedules of government employees and the different durations of military tours of duty, as here illustrated, our decision reduces the potential for such a multiplicity of interpretations. Moreover, because the statutory language is reasonably clear and essentially unambiguous, we have no occasion to consider whether its application in this case works any hardship. . . . To the extent there may be hardship resulting from the express limitations imposed by § 59 on those whose annual tours of military duty exceed the traditional two-week training period, amelioration must be left to the Legislature.

G.L. c. 31, § 41 does not qualify the term "days" except as to the omission of Saturdays, Sundays and legal holidays. There is not expression of legislative intent that the term apply to work days. "A general term of a statute may not be construed differently from its plain meaning, especially in the absence of any evidence of legislative or administrative intent so to construe it ... and we may apply that same principle to the regulation." *Purity Supreme, Inc. v. Attorney Gen.*, 380 Mass. 762, 782 (1980). The Civil Service law was re-codified in by St. 1978, c. 393, § 11, after the decisions in *Opinion of the Justices*, 291 Mass. supra and *Booker v. Chief Eng. of the Fire Dept. of Woburn*, 324 Mass. supra were decided. Decisions of the Supreme Judicial Court construing similar provisions take priority over inconsistent decisions of the Civil Service Commission itself.

This court construes the phrase "five days or less" in § 41 to mean five calendar days, i.e.

"the space of time that elapses between two successive midnights." The suspension of the plaintiff began at 08:00 hours on June 22, 2008 and lasted until 08:00 hours on July 7, 2008. June 22 and 29 and July 6 were Sundays, June 28 and July 5 were Saturdays and July 4 was a legal holiday. Workdays consisted of two calendar days. On days off, the plaintiff was prohibited from working any details which would otherwise have been available.

In calculating the days on which the plaintiff was suspended, the court excludes Saturdays, Sundays and legal holidays as required under § 41. Using this formulation, the plaintiff was suspended without a hearing for ten (10) days in violation of G.L. c. 31, § 41.[2]

ORDER

Based upon the foregoing, the court **ALLOWS** the Plaintiff's Motion for Judgment on the Pleadings and **ORDERS** that the plaintiff be reinstated without loss of compensation.

Regina L. Quinlan
Associate Justice of the Superior Court

Date: April 14, 2010

Notice sent
04.15.10
(MD)

[2] The court notes that whether a permanent employee is on duty or on a day off he/she continues to receive compensation. When an employee is off duty, there are in many instances opportunities for overtime and details which would not be available to a suspended employee.