Decision mailed: 1/28/11
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
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JEFFREY TOBIAS,
Appellant,
v.
CITY OF NEWTON,
Respondent

CASE NO: D1-08-207

Appellant, Pro Se:

Jeffrey A Tobias
[redacted]

SSG Tobias, Jeffrey A
[redacted]

Appointing Authority's Attorney:

Donna B. Lynch Kahn, Esq.
Associate City Solicitor
City of Newton – City Hall
1000 Commonwealth Avenue
Newton Centre, MA 02459

Commissioner:

Paul M. Stein

DECISION ON MOTION FOR RECONSIDERATION

On September 1, 2010, the Appellant, Jeffrey Tobias, moved for reconsideration of the Decision of the Civil Service Commission (Commission) dated November 12, 2009, dismissing this appeal of his discharge by the City of Newton (Newton) from the position of Firefighter. The Appellant claims that he had no notice of the Commission's decision until August 2010 and that he had meritorious issues to present on a motion for reconsideration. The Appellant supplemented his motion by letter dated September 14, 2010, enclosing a copy of a court docket relating to the disposition of certain criminal charges against the Appellant in September 2010 that were pending at the time of the Commission's decision. Newton opposed the Appellant's motion by submission on September 30, 2010.

On September 8, 2010, the Commission received a Motion to Withdraw, filed by the Appellant's then counsel of record. No action has been taken on this Motion.

The Commission held a hearing on the Appellant's motion for reconsideration on October 4, 2010 which was digitally recorded. Notice of the hearing was sent on September 2, 2010, by regular mail, postage prepaid, to the Appellant at the Newton address provided by him in his motion for reconsideration, to the Appellant's counsel, and to Newton. Newton appeared at the hearing and confirmed that a copy of its' opposition to the Appellant's motion also was sent to him at the Newton address indicated in his current motion papers. The Appellant did not appear at the hearing, either personally or through counsel.

The Commission issued a procedural order to the Appellant on October 12, 2010, to provide the Appellant a further opportunity to respond to Newton's opposition to his motion. On October 27, 2010, the Commission received a letter from the Appellant, stating he had not received notice of the October 8, 2010 hearing and that he had been on Military Duty that day.

The Commission rescheduled the hearing on the motion for reconsideration to November 8, 2010. The Appellant and Newton appeared at the hearing which was digitally recorded. The Commission granted the Appellant the opportunity to make a further written submission, which the Commission received on November 27, 2010. Newton filed a response to this submission on December 8, 2010.[1]

[1] The Appellant also made a number of other submissions which sought to discover information from Newton and other sources purportedly relevant to the merits of his appeal. The Commission denied these requests by Procedural Order dated November 4, 2010.

Timeliness of the Motion for Reconsideration

In accordance with the Commission's practice, the Commission's Decision of November 12, 2009 prescribed a 10-day period within which a Motion for Reconsideration (also deemed a Motion for Rehearing pursuant to M.G.L.c.30A,§14(1), must be filed. There is no question that the Appellant, through counsel of record, received notice of the Decision and that no such motion for reconsideration was filed at any time prior to the receipt of the Appellant's September 1, 2010 letter to the Commission.

The Appellant purports to assert that his counsel failed to inform him of the Decision or advise him of the right of reconsideration. Based on the record presented by the Appellant, the veracity of the Appellant's claims remains quite dubious. However, giving the Appellant the benefit of all reasonable doubt, the Commission accepts, for purposes of deciding this motion, that the Appellant, in fact, did not receive the copy of the Commission's Decision (which also was published on the Commission's webpage within a week after it was mailed to the parties) that his counsel claimed to have sent him. The question remains, however, whether the failure of the Appellant to receive such notice warrants the Commission's accepting a late-filed Motion for Reconsideration.

On this question, the Commission believes that, as a general rule, it must be entitled to rely on receipt by counsel appearing of record for any party, as sufficient notice of the Commission's actions. Any other rule would leave the Commission's docket and the finality of its decisions with far too much uncertainty to be administratively feasible or fair to all persons who appear before the Commission and who reasonably rely on such finality in good faith. Accordingly, in the absence of evidence that neither the Appellant

nor his counsel received notice of the Commission's Decision on his appeal until August 2010 (which is not alleged), the Appellant's Motion for Reconsideration must be deemed untimely as a matter of law.

The Commission, however, is vested with "inherent" discretionary power to reopen a closed proceeding in an appropriate case. Ung v. Lowell, 22 MCSR 471 (2009). See also Moe v. Sex Offender Registry Bd., 444 Mass. 1009 (2005) (rescript) ("in absence of statutory limitations, agencies generally retain inherent authority to reconsider their decisions") [2]

While this proposition is true, such power to reopen "should be exercised by an agency with due circumspection – 'sparingly' as the cases say." E.g., Covell v. Department of Social Services, 42 Mass.App.Ct. 427, 433 (1997). See Malone v. Civil Service Comm'n, 38 Mass.App.Ct. 147, 153-54 (1995) (affirming Commission's refusal to reopen appeal absent "undue haste" in granting the Personnel Administrator's motion to dismiss or any "general equities of the problem. . .upon which to rest the extraordinary decision to reopen the administrative proceeding") citing Aronson v. Brookline Rent Control Bd., 19 Mass.App.Ct. 700, 706, rev.den., 395 Mass. 1102 (1985) and Davis, ADMINISTRATIVE LAW TEXT §18.09, at 370 (3rd ed. 1972).[3]

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[2] The Commission does not, however, have authority to extend the 30-day statutory time within which a claim for judicial review must be filed in the absence of a timely request for rehearing. See G.L.c.30A, §14(1); Curley v. Lynn, 408 Mass.39 (1990) (late-filed petition for reconsideration did not restart time for seeking judicial review)

[3] Professor Davis counseled: ". . . an "agency can readily find by experience that too much liberality in reconsidering cases may deprive decisions of dignity and force and may contribute to carelessness on account of undue reliance on reconsiderations"; "sometimes a specific limitation or reopening is desirable", but, "sometimes, the limitation should be indefinite and admit a wide margin of discretion" and "it would be a mistake to . . . harden the arteries of administrative procedure." Davis, ADMINISTRATIVE LAW TREATISE §18.09 at 605-609 (1958)

Evaluated under the mandate of authority described above, the Commission's exercise of discretion to excuse the Appellant from filing a timely motion to reopen his appeal is not justified, given the unreasonable delay (more than a year) during which the Appellant took little or no action of his own to discover the status of his appeal (his one-day hearing had been held on July 8, 2009), and the level of continuing uncertainty that exists about whether the Appellant's actions were due to his own inattention (in failing to keep his attorney advised of his whereabouts and, perhaps, even overlooking properly addressed notices from this Commission). See Fredette v. MBTA Police Dep't, 19 MCSR 94 (2006) (denying motion to reopen filed 10 months late) See also Owens v. Mukendi, 448 Mass. 66 (2006) (denying motion for relief from a judgment that was not filed within a "reasonable time" after entry of judgment); Christian Book Distributors, Inc. v. Wallace, 53 Mass.AppCt. 905 (2001), rev.den., 436 Mass. 1101 (2002) (default judgment upheld when defendant willfully and deliberately failed to respond to process, even if he had relied on erroneous legal advice)

The Merits of the Motion for Reconsideration

Although the Commission is warranted to deny this Motion for Reconsideration solely as untimely, it also bears notice that, on the merits, the Appellant presents little reason to expect that, even if the motion had been timely, it would have warranted any reconsideration or rehearing of his appeal. When a delay in the assertion of an Appellant's motion due to an alleged lack of notice has caused him no prejudice, that factor is further reason that the motion should not be allowed. See Keller-Brittle v. Boston Police Dep't, 23 MCSR 276 (2010) (denying motion to reopen for lack of prior notice when motion presented no basis upon which to believe the Appellant could prevail

if the case were reopened) See also Christian Book Distributor's, Inc. v. Wallace, 53 Mass.App.Ct. 905 (2001), rev.den., 436 Mass. 1101 (2002) (relief denied when defendant had no "fair shot at success" even if his case were reopened)

A Motion for Reconsideration or rehearing of a disciplinary Decision by the Commission must be supported by more than a contention that the losing party deserves a second chance to make a more persuasive case to explain their behavior. Rather, such Motions are justified only when there is proof of some specific clerical or mechanical error in the Decision or a specific and significant factor (i.e., material evidence or legal error) that the Commission or the presiding officer overlooked in the original hearing of the case, as prescribed by 801 C.M.R. 1.00(7)(*l*). That is not the case here.

In particular, the Appellant's termination was upheld by this Commission principally on findings that: (1) he had engaged in conduct that was unbecoming a Firefighter, on more than one occasion, (2) which had lead to his making a "Last Chance Agreement" with Newton and (3) thereafter, on June 27, 2008, he was implicated in domestic violence incident, which resulted in a charge of attempted murder against him, pending at the time of his hearing before the Commission. The Commission agreed that, based on that pattern of behavior, under basic merit principles (i.e., G.L.c.31,§1 [Definitions]), Newton was justified in concluding that the Appellant was unsuitable to continue to serve in his position as a Newton Firefighter.

It appears that the Appellant now alleges new information and extenuating circumstances to explain or excuse his conduct that he was not able to present at his original hearing. For the most part, it does not appear that such evidence is really "new" and was not available to be presented at the initial hearing (e.g., making the "Last

Chance" agreement under duress, 2009 disability records, etc) or that such evidence was presented, but overlooked, by the Commission.[4]

The only specific "new" post-hearing evidence the Appellant has described with any particularity involves the fact that he pled guilty to the charge of "simple" assault and battery (A&B) in September 2010, but that all the other charges against him arising from the June 27, 2008 incident, including the attempted murder charge, were "*nolle prosequi*". (See Criminal Docket MICR2008-01122, submitted by Appellant in his September 14, 2010 submission)

As noted above, however, the Commission's November 12, 2009 Decision to accept the recommendation of the DALA Magistrate, who was assigned by the Commission to hear the evidence, and uphold the Appellant's termination was made on the basis of proof of an underlying *pattern of risky behavior* in which he had (undisputedly) engaged, despite a "Last Chance" warning. The Decision does not turn on the enforceability of the agreement or the outcome or his conviction for any of the criminal charges which seems to be the focus of the Appellant's present arguments. The DALA Magistrate's conclusion stated:

"*The Appellant was involved in three instances of domestic violence in less than two years*. . . . He willingly signed the 'Last Chance Agreement' in February 2007. However, a little more than a year later, he was involved in the most serious of all of the domestic incidents . . . *Notwithstanding the lack of evidence in the record that any of the criminal charges ever resulted in actual criminal convictions, the Appellant's behavior stands alone as indicative of an alarming patter of violent behavior* by a fire fighter . . . .

Fire fighters necessarily enter the homes of citizens of Newton to carry out their duties. They are entrusted with the safety and well being of men, women and children of all ages at all times of the day and night. The Appellant has repeatedly proven himself unworthy of that public trust. . . ." (*emphasis added*)

[4] To the extent the Appellant contends that he was not properly represented by his union or counsel, his remedy for that allegation lies elsewhere than before the Commission. See, e.g., G.L.c.150,§10(b).

Nothing that the Appellant has presented would invite the Commission to revisit these findings and conclusions concerning the underlying behavior which formed the basis for upholding his termination, especially not the fact that the Appellant subsequently plead guilty and was convicted of one of the four pending charges against him for his (now admitted) violent criminal behavior on June 27, 2008. Indeed, the Appellant's guilty plea to the charge of "simple" assault and battery actually confirms the evidence presented at the July 2009 hearing regarding his culpable behavior in that regard. The disposition of the A&B charge included 2½ years suspended sentence and 2½ years probation, completion of a certified batters program, mental health counseling, and a no contact/stay away order from the victim. Thus, whatever new spin the Appellant now desires to make to explain or diminish his conduct, there is no reason to believe that it would change the Commission's findings or conclusions that the core conduct that supported the original Decision had occurred and had justified the discipline imposed See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited (fact that the exact nature of Appellant's violent behavior was proved to be somewhat different from what the Appointing Authority had assumed in imposing discipline did not justify Commission's decision to overturn the discipline)

Accordingly, for the reasons stated above, the Motion For Reconsideration by the Appellant, Jeffrey A. Tobias, must be and hereby is denied.

Civil Service Commission

Paul M. Stein

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on January 27, 2011.

A True Record. Attest:

Commissioner

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:

Jeffrey A. Tobias (Appellant)
Neil Osborne, Esq. (for Appellant)
Donnalyn B. Lynch Kahn, Esq. (for Appointing Authority)