COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

HEATHER TURCO,
Appellant

v. E-17-118

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant: Eric B. Langfield, Esq.
Cohen Cleary, P.C.
10 Commerce Way, Suite 4
Raynham, MA 02767

Appearance for Respondent: Andrew S. McAleer, Esq.
Department of Correction
Industries Drive: P.O. Box 946
Norfolk, MA 02056

Commissioner: Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

1. On March 26, 1995, the Appellant, Heather Turco (Ms. Turco), began her employment with the Massachusetts Department of Correction (DOC) as a Correction Officer I (CO 1).

2. On September 8, 2015, Ms. Turco completed "Section A" of State Retirement Board (SRB)'s "Group Classification Questionnaire" requesting a "20/50" retirement which correction officers may apply for pursuant to G.L. c. 32, s. 28M which states:

   "Notwithstanding the provisions of sections one to twenty-eight, inclusive, to the contrary, any employee of the department of correction, classified under Group 4, whose major responsibilities include the care and custody of prisoners, and any transportation officer working within the department of correction, ***who has performed services*** in the department of correction for not less than twenty years shall, at his own request, be retired by said retirement board. Upon retirement under the provisions of this section a member shall receive a retirement allowance to become effective on the date of his retirement. Payments under such allowance shall be made as provided for in section twelve and thirteen and the normal

yearly amount thereof shall be equal to one-half of the annual average rate of his regular compensations during the twelve-month period of his creditable service immediately preceding the date his retirement allowance becomes effective; provided, however, that the total amount of the allowance shall be increased by one-twelfth of one percent for each full month of service in excess of twenty years' service and prior to the last day of the month in which such member will attain the age of retirement. Any member retired under the provisions of this section who is a veteran as defined in section one shall receive an additional yearly retirement allowance of fifteen dollars for each year of creditable service or fraction thereof; provided, however, that the total amount of said additional retirement allowance shall not exceed three hundred dollars in any case." (***emphasis added***)

3. On September 11, 2015, the retirement application was filed with the SRB.

4. Between September 8, 2015 and September 10, 2015, Ms. Turco, her supervisor and a representative from DOC's Human Resources Department, signed "Section B" of the SRB Questionnaire. As part of Section B, Ms. Turco stated that she wished to retire on "12/23/15" with "20 years and 0 months of service".

5. On November 2, 2015, Ms. Turco received correspondence from the SRB stating in relevant part:

   "On October 29, 2015, the State Board of Retirement ("Board") pursuant to the Board's Group Classification procedure considered your request under the 20/50 Corrections Bill. This letter will inform you that your request has been approved subject to verification in accordance to Massachusetts General Law Chapter 32, Section 28M and the particular facts and circumstances of your request."

6. Via letter dated December 1, 2015, Ms. Turco informed the SRB that she would like to change her retirement date from December 23, 2015 to December 19, 2015.

7. While Ms. Turco's retirement application was pending and sometime before December 19, 2015, Ms. Turco was informed that she must attend a DOC fact-finding hearing to address issues related to alleged violations of DOC's time and attendance policies. Ms. Turco did not attend.

8. On December 17, 2015, DOC received correspondence from the SRB dated December 13, 2015, seeking information regarding Ms. Turco's dates of employment, compensation and any absences.

9. The above-referenced correspondence from SRB to DOC stated in part: "This employee may be eligible for and will be retired as of: DEC. 19, 2015. This employee's name must not appear on your payroll for any payment of regular compensation for services rendered after the date indicated above. No deductions for retirement purposes shall be made for

unused sick time or vacation leave payouts. Determinations as to Regular Compensation shall be made by the State Retirement Board." (emphasis in original)

10. Effective December 19, 2015, Ms. Turco ceased receiving compensation from DOC.

11. DOC never completed and/or forwarded an Absence and Termination Notice - **Form 56** with the state's Human Resources Division (HRD) regarding Ms. Turco.

12. By letter dated March 4, 2016, the SRB forwarded correspondence to Mr. Turco stating in relevant part:

    "At its meeting held October 31, 2015, the Board voted to approve your request to have your position so classified, subject to verification that you met the statutory requirements … Unfortunately, while subsequently processing your application, Board staff determined that you did not accrue the required twenty (20) years of creditable service to qualify for a benefit pursuant to G.L. c.32, §28M. Specifically, DOC reported significant time off payroll through the duration of your employment. Enclosed, please find a breakdown of your creditable service. You will note that the Board has been able to verify that you actually accrued 19 years and 5 months of creditable service during your employment with DOC from March 26, 1995 to December 19, 2015. Board records indicate that you are presently 46 years of age. Based on your age and the amount of creditable service that you have accrued, you are not currently eligible to retire. Based on the foregoing, Board staff is not authorized to process you retirement application further. At the present time, you may leave your funds on account with the Massachusetts State Employees' Retirement System and defer receipt of a retirement allowance until you attain age 55. In the alternative, if you were to return to employment with DOC you would be required to return to service and accrue an additional seven (7) months of creditable service to qualify for a benefit pursuant to G.L. c.32, §28M."

13. On March 14, 2016, Ms. Turco appealed SRB's decision to the Division of Administrative Law Appeals (DALA).

14. On December 23, 2016, DALA affirmed SRB's decision.

15. On December 28, 2016, Ms. Turco forwarded an email to DOC stating:

    "Kelley, this e-mail, per our conversation today, is a request to be re-hired. I did retire from Lemuel Shattuck Hospital December 19, 2015. Upon the State Board of Retirement assessing my ability to retire they informed me on February 29, 2016 that I needed to make up 7 more months due to a maternity leave. With this information, I did file an appeal, had a hearing with DALA in August and received my decision today, December 28, 2016 that they affirmed the State Retirement Boards decision. As a result of this decision I am asking to be rehired so that I may work the 7 more months to get my full 20 years and retire under the

20/50 bill for State Corrections Officers. I am requesting that I be rehired at the Lemuel Shattuck hospital if possible or at my second choice of Boston Release."

16. By letter dated January 3, 2017, the DOC Commissioner notified Ms. Turco that: "I am in receipt of your letter requesting reinstatement to the Department of Correction as a Correction Officer I. The Department is denying your request at this time due to fiscal constraints."

17. On June 1, 2017, Ms. Turco filed an appeal with the Civil Service Commission (Commission).

18. On June 27, 2017, I held a pre-hearing conference at the offices of the Commission which was attended by Ms. Turco, her counsel and counsel for DOC. At the conclusion of the pre-hearing conference, I asked the parties to develop a joint set of stipulated facts.

19. On July 21, 2017, DOC filed a Motion for a More Definite Statement (by Ms. Turco).

20. On September 5, 2017, I held a status conference, which was attended by Ms. Turco, her counsel and counsel for DOC, at which time I was provided with an unsigned "Joint Proposed Stipulations".

21. At the conclusion of the status conference, I notified the parties that I would be contacting the SRB to inquire about this matter in general, and, more specifically, if the SRB has faced similar situations and, if so, how the matter has been resolved.

22. Based on my contact with the SRB, it appears that the SRB's ability to resolve such related matters is limited by c.32, section 4(1)(c): which states:

"Creditable service in the case of any member shall include any period of his continuous absence with full regular compensation, or in the event of his absence with partial regular compensation such period or portion thereof, if any, as the board shall determine. Creditable service in the case of any member may be allowed by the board for any period of his continuous absence without regular compensation which is not in excess of ***one month***. Any portion of any leave or period of continuous absence of any member without regular compensation which is in excess of one month shall not be counted as creditable service except as specifically otherwise provided for in this section, but no duly authorized leave or period of absence shall be deemed to be a termination of membership or service." **(*emphasis added*)**

23. At the pre-hearing conference and status conference, counsel for Ms. Turco argued that Ms. Turco never resigned from DOC. Rather, she applied for retirement, but was denied.

24. DOC argued that Ms. Turco voluntarily ended her employment with DOC by filing her application for retirement and suggested that Ms. Turco's recourse, if any, is against the SRB, and not DOC. Further, DOC argues that nothing in the civil service law gives the Civil Service Commission jurisdiction to hear this appeal.

25. G.L. c. 31, s. 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)

26. 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.

The supreme judicial court or the superior court shall have jurisdiction over any civil action for the reinstatement of any person alleged to have been illegally discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose civil service position is alleged to have been illegally abolished. Such civil action shall be filed within six months next following such alleged illegal act, *unless the court upon a showing of cause extends such filing time*." (***emphasis added***)

27. G.L. c. 31, s. 43 states in relevant part:

"If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission. Said hearing shall be commenced in not less than three nor more than ten days after filing of such appeal and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. If the commission determines that such appeal has been previously resolved or litigated with respect to such person, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal. If the decision of the appointing authority is based on a performance evaluation conducted in accordance with the provisions of section six A and all rights to appeal such evaluation pursuant to section six C have been exhausted or have expired, the substantive matter involved in the evaluation shall not be open to redetermination by the commission. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by

a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority. (emphasis added)

28. Chapter 310 of the Acts of 1993 states:

"If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights." (emphasis added)

29. As part of a Procedural Order entered on September 25, 2017, I informed the parties that, setting aside the issue of timeliness, the Commission potentially has jurisdiction to hear Ms. Turco's appeal pursuant to multiple statutes. If, as argued by Ms. Turco, that she never voluntarily resigned, then DOC potentially violated Section 41 of the civil service law by failing to provide Ms. Turco with notice and a hearing prior to removing her from her position, thus triggering an appeal under Section 42. Similarly, Ms. Turco could argue that DOC's actions here were "based upon harmful error in the application of the appointing authority's procedure …", which would provide the Commission jurisdiction under Section 43 of the civil service law. Finally, Ms. Turco could argue that her rights were prejudiced through no fault of her own, potentially providing the Commission with authority to provide relief under Chapter 310 of the Acts of 1993.

30. Appeals based on any of the above, however, come with filing deadlines. Section 43 states in relevant part: "If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission." (emphasis added)

31. Section 42 states in relevant part: "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." (emphasis added)

32. The standard rules of practice and procedure, which the Commission operates under, state in part: " … Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or Agency rule. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party."

33. The latest "action" or "decision" date by DOC that would be most favorable to Ms. Turco in regard to timeliness here appeared to be January 3, 2017, the date that DOC notified Ms. Turco (in writing) that her request for "reinstatement" was denied. Ms. Turco failed to file an appeal with the Commission until approximately five (5) months after January 3, 2017, well beyond any of the above-referenced filing deadlines.

34. Based on all of the above, I concluded that the most prudent (and efficient) procedural step forward here was for DOC to file a Motion to Dismiss addressing the issue of timeliness with the Appellant having ten (10) days thereafter to file a reply.

35. DOC subsequently filed a motion to dismiss and the Appellant filed a reply.

Arguments in Parties' Briefs regarding timeliness

DOC cites a prior Commission decision and judicial decisions to argue that the statutory filing deadlines are jurisdictional and must be strictly enforced. See McGoldrick v. Boston Police Dep't, 30 MCSR 161 (2017) at 8,9. See e.g. Falmouth v. Civ. Serv. Comm'n, 64 Mass.App.Ct. 606, 608-609 (2005), rev'd other grounds, 447 Mass. 814 (2006); Poore v. Haverhill, 29 MCSR 260 (2016); Stacy v. Dep't of Dev. Services, 29 MCSR 164 (2016); Volpicelli v. Woburn, 2 MCSR 448 (2009); Williamson v. Dep't of Transitional Assistance, 22 (MCSR 436 (2009).

Using the date that I deemed most favorable to the Appellant (January 3, 2017), DOC argues that the filing of the instant appeal falls well outside any of the prescribed deadlines contained in the civil service law.

Further, DOC argues that, even assuming that the Appellant could advance a claim seeking relief under Chapter 310 of the Acts of 1993, she is outside the 30-day deadline in 801 CMR 1.01 (6).

The Appellant now argues that: 1) her reason for separation was due to fiscal constraints; 2) her name should have been placed on a statewide re-employment list pursuant to G.L. c. 31, s. 40; 3) she did not become aware of this until the pre-hearing conference before the Commission on September 15, 2017; and therefore, 4) her appeal is timely.

Analysis

The Appellant is conflating issues and sections of the civil service law. She was not separated because of fiscal constraints. She was separated because she filed an application for retirement benefits and the Retirement Board informed DOC to stop making any payments to her, which the Appellant was aware of in December 2015. In January 2017, DOC notified the Appellant that they were denying her request to be re-hired because of fiscal constraints.

G.L. c. 31, s. 40 states in relevant part: "If a permanent employee ***shall become separated from his position*** **because of** lack of work or **lack of money** or abolition of his position, his name shall be placed by the administrator on a reemployment list, or if a permanent employee resigns for reasons of illness his name shall be placed on such list upon his request made in writing to the administrator within two years from the date of such resignation."

Section 40 is simply not applicable here. Rather, when reviewing those statutes and Acts that are potentially applicable (Sections 41 and 42 and Chapter 310 of the Acts of 1993), the Appellant's appeal is untimely, even when considering the date that would be most favorable to her, January 3, 2017 (the date that DOC refused to re-hire her).

When, as here, the civil service employee has failed to file appeal regarding their separation, the only applicable civil service law regarding reinstatement is G.L. c. 31, s. 46 which states in Paragraph 1:

> A permanent employee who becomes separated from his position may, with the approval of the administrator, be reinstated in the same or in another departmental unit in a position having the same title or a lower title in the same series, provided that the appointing authority submits to the administrator a written request for such approval which shall contain the reasons why such reinstatement would be in the public interest. No such request shall be approved if the person whose reinstatement is sought has been separated from such position for over five years and there is a suitable eligible list containing the names of two or more persons available for appointment or promotion to such position; provided, however, that no such limitation shall apply to the reinstatement of persons whose qualifications for reinstatement to a former position have been determined pursuant to section eight of chapter thirty-two. If the administrator fails to approve the reinstatement of such person within thirty days after such request, the appointing authority or such person may make a written request for a hearing before the administrator, who shall hold such hearing forthwith and render his decision. Nothing herein shall affect the rights of persons to reinstatement under section thirty-nine." (emphasis added)

The second paragraph of Section 46, which does indeed reference "defective" retirements, only applies to city and town employees stating:

> The administrator shall reinstate any employee of a city or town who has been separated from a civil service position through retirement pursuant to the provisions of any law if such retirement is invalidated and the retirement allowance discontinued because the proceedings relative to such retirement were illegal or defective; and such employee applies to the administrator for reinstatement within one year after the last payment of such retirement allowance. The administrator shall reinstate such person, without loss of compensation, in the same position or in a position with the same title as that formerly held by him.

I am not aware of any other section of the General Laws which provides similar rights regarding "defective" retirements to state employees.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. E-17-118 is not timely and is hereby ***dismissed***.

Nothing in this decision is meant to address and/or limit Ms. Turco's consideration of pursuing potential appeal rights under that portion of Section 42 which states: "**The supreme judicial court or the superior court shall have jurisdiction over any civil action for the reinstatement of any person alleged to have been illegally discharged, removed, suspended, laid off, transferred, lowered in rank or compensation, or whose civil service position is alleged to have been illegally abolished. Such civil action shall be filed within six months next following such alleged illegal act, *unless the court upon a showing of cause extends such filing time*.**" (***emphasis added***)

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, Commissioners) on November 9, 2017.

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 to:
Eric Langfield, Esq. (for Appellant)
Andrew McAleer, Esq. (for Respondent)