

Smoking Requires Mandatory Termination

**Any Officer Hired After January 1, 1988
Will Be Within The Statute**

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Smoking Requires Mandatory Termination (Hired After 1/1/88)

Officers Hired After January 1, 1988 Will Be Within The Statute

In **Town of Plymouth v. Civil Service Commission**, 426 Mass. 1 (1997), the SJC held that a police officer hired after or promoted after January 1, 1988 who smokes or otherwise uses tobacco products shall be subject to mandatory termination.

GL. C. 41, § 101A reads as follows:

“Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment as a police officer or firefighter in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products. The personnel administrator shall promulgate regulations for implementation of this section.”

The Rules Of The Personnel Administrator Pertaining To Smoking

On appeal, the SJC upheld her termination. In fact, they held that based on the language used in the statute and the promulgated rules of the Personnel Administrator, *termination was mandatory*. Because her appointment occurred after January 1, 1988, she was subject to the smoking prohibition contained in the statute. As a civil service employee, she was also subject to the smoking prohibition rule, contained in paragraph 23 of the personnel administration rules, promulgated on October 6, 1988, by the personnel administrator to implement G.L. c. 41, § 101A. Paragraphs 23.2, 23.5, and 23.6 of this rule, *which read as follows*:

23.2 No person appointed to a covered position [subsequent to January 1, 1988] shall, subsequent to appointment, smoke any tobacco product at any time during his or her employment in any position covered by section 94 of chapter 32 of the General Laws. This prohibition includes all time off the job as well as all time on the job.

23.5 Appointing authorities have the responsibility to enforce the prohibition against smoking tobacco products. Any employee subject to the prohibition who is found, after a hearing ... to have smoked any tobacco product subsequent to appointment shall be terminated.

23.6 Before an employee is terminated pursuant to this Rule, such employee shall be given a written notice by the appointing authority which shall include the contemplated termination and the specific reason or reasons for the termination, 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.... [A]n employee also has any rights to hearing or appeals procedures to which he or she may be entitled under chapter 31 or a collective bargaining agreement. If ... a finding is made that an employee did smoke a tobacco product subsequent to appointment to a covered position, termination from that position or any subsequent promotional position is mandatory.

Alcohol Versus Tobacco

G.L. c. 31, § 50, states that “[n]o person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position....” Rossborough argued that it was unreasonable to allow an employee with a serious alcohol problem to remain in office following rehabilitation, while requiring mandatory termination of an employee for smoking cigarettes. The SJC stated that, “[t]here are important differences between both the language and legislative purposes of §§ 50 and 101A.

DISCRETION IN THE ALCOHOL LAW: The alcohol chapter, C. 31 § 50, directs that “[n]o person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position ...” This language allows for discretion by the appointing authority and the commission in evaluating whether an employee’s alcohol consumption has reached a chronic level that violates the statute. By contrast, § 101A contains no such discretionary language and, unlike § 50, expressly delegates to the personnel administrator the authority to enforce the statute in a manner that obviates the case-by-case determinations usually made under § 50.

LEGISLATIVE PURPOSES BEHIND THE STATUTES ARE DIFFERENT: The SJC stated that while the legislative history

is sparse, C. 31 § 50 was likely enacted because serious abuse of alcohol presumptively has a negative effect on job performance. Allowing an employee to be reinstated after completion of an alcohol rehabilitation program and demonstration of satisfactory job performance is consistent with ameliorating deficient job performance.

SMOKING STATUTE CONCERNS INCREASED RISK OF HYPERTENSION & HEART DISEASE: The purpose of C. 41 § 101A is to prevent police officers and fire fighters from increasing their risk of hypertension and heart disease by smoking and, therefore, their eligibility for disability retirement benefits under G.L. C. 32, § 94. Unlike C. 31 § 50, § 101A does not apply to all civil service employees, but only to police officers and fire fighters who, because of the nature of their jobs, are already at high risk for developing hypertension and heart disease. The Legislature appears to have made a policy decision, based on financial interests, that employment in these positions should no longer be open, after January 1, 1988, to persons who smoke tobacco products so that, over a period of time, police and fire departments will have a workforce free of a serious disease-causing addiction. It is common knowledge that tobacco smoking has been identified as a contributing risk factor in both of these conditions, and heart disease is a leading cause of disability retirement among public safety personnel. The Legislature apparently enacted C. 41 § 101A in an effort to reduce the number of police officers and fire fighters who obtain substantial disability benefits from public funds under G.L. c. 32, § 94, also known as the “Heart Law,” as a result of heart disease due to smoking.

Questions & Answers From Civil Service On Smoking

Q: What is the authority for the Smoking Prohibition for municipal Police and Fire Departments under Civil Service?

A: The rule has been adopted under the authority of the Pension Reform Act, Ch. 697 of the Acts of 1987. Section 117 of the Act adds the following to Chapter 41 of the General Laws:

“Section 101A. Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment as a police officer or firefighter in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products. The personnel administrator shall promulgate regulations for the implementation of this section.”

Q. Who is covered by the Smoking Prohibition Rule (Personnel Administration Rules, PAR.23)?

A. The smoking prohibition applies to all police and firefighter appointments made from eligible lists established after January 1, 1988.

Employees appointed prior to the coverage date, January 1, 1988, are “grand-fathered”.

Note that this includes ALL personnel REGARDLESS of status: provisional, temporary or permanent; full-time, part-time, and intermittent, call or reserve.

Q. What happens when a police officer or firefighter is promoted in regards to the Smoking Prohibition Rule (Personnel Administration Rules, PAR. 23)

A. The Smoking Prohibition Rule will not affect the promotion status of any person if their original appointment was before 1/1/88. However, any such person who accepts a new original appointment to any covered title on or after 1/1/88 is covered by the Smoking Prohibition Rule no matter when they originally started working, and must quit the use of tobacco on or before the date of appointment.

Q. What Smoking Prohibition conduct is prohibited?

A. Employees to whom the prohibition applies may not, subsequent to appointment, smoke any tobacco product at any time whatsoever. This includes cigars, cigarettes, pipes or any other tobacco product; and includes time when the employee is on duty, off duty, on sick leave, vacation, leave of absence, and any and all other status.

Q. Who enforces the Smoking Prohibition Rule?

A. The appointing authority is responsible for enforcement of the smoking prohibition rule.

Q. What happens if a covered employee violates the Smoking Prohibition Rule?

A. He or she is entitled to a hearing, procedures for which are outlined in the rule. If it is established that the rule was violated, the employee must be terminated from his or her position. The employee could, however, be retained in another capacity not covered by the smoking prohibition. (Personnel Administration Rules, PAR. 23)

Q. How are prospective employees notified about the Smoking Prohibition Rule?

A. Applicants for civil service examinations for covered positions will be notified by the appointing authority at the time of Certification/Interview.

Further, it is recommended that appointing authorities confirm that candidates selected for appointment understand the Smoking Prohibition Rule and the consequences of violation. They may wish to have appointees acknowledge notification in writing. A sample form might include the text of Ch. 41, sec. 101A the following, to be signed and dated:

“I understand that I am prohibited by law from smoking tobacco products, at any time, as long as I am employed by the (city/town of [blank]) as a (police officer/fire fighter), regardless of rank, and that I must be terminated if I smoke.”

Q. Why was the Smoking Prohibition law enacted and this rule adopted?

A. Police officers and firefighters are eligible for special retirement benefits for impairment of health due to hypertension or heart disease, under the provisions of MGL Ch. 32 sec. 94, known as the “Heart Law.” Tobacco smoking has been identified as a contributing risk factor in heart disease and hypertension; and heart disease is a leading cause of disability retirement among public safety personnel. The legislature has determined that henceforth employment in positions with “Heart Law” benefits will not be available to persons who by smoking increase their own risk of heart disease and hypertension.

Q. Where should specific Smoking Prohibition questions be addressed?

A. Specific questions regarding Smoking Prohibition should be directed to the Legal Department of the Human Resources Division at (617) 727- 3777.

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