

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

EDDIE OJEDA,  
Appellant

v.

D-08-208

CITY OF PITTSFIELD,  
Respondent

Appellant's Attorney:

Jeffrey S. Morneau, Esq.  
Donohue, Hyland & Donohue, P.C.  
1707 Northampton Street  
Holyoke, MA 01040

Respondent's Attorney:

Fernand J. Dupere, Esq.  
223 College Highway  
P.O. Box 373  
Southampton, MA 01073

Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT'S MOTION TO DISMISS**

*Procedural Background*

The Appellant, Eddie N. Ojeda, (hereinafter "Appellant" or "Ojeda"), once a tenured civil service employee serving as a firefighter in the City of Pittsfield (hereinafter "City" or "Appointing Authority"), filed an appeal with the Civil Service Commission (hereinafter "Commission") against the City, pursuant to G.L. c. 31, §§ 42 and 43.

A pre-hearing conference was held at the Springfield State Building in Springfield, MA on September 24, 2008. The City subsequently filed a Motion to Dismiss the Appellant's appeal and the Appellant submitted an Opposition to the City's Motion.

*Factual Background*

In December 2004, the Appellant was indicted on charges of rape of a child with force and indecent assault and battery on a child under 14. On January 7, 2005, a Notice of Suspension was hand-delivered to the Appellant by the City's Fire Chief, Stephen Duffy, informing him that he was suspended from his position as a firefighter without pay as a result of the criminal charges pending against him, pursuant to G.L. c. 268A, § 25.

On or about January 13, 2005, the Appellant asked the City's Retirement Board whether he could take a refund of his contributions to the retirement system to pay for his criminal defense. On the same day, the City's Retirement Board forwarded a letter to the Appellant which stated in its entirety:

“Dear Mr. Ojeda:

In regard to our conversation today, I have checked into whether you may take a refund of your contributions to the Retirement system. Should you resign from your position as a firefighter you may be able to withdraw your funds. However, this would need to go before the Board with evidence that the pending criminal proceedings are not in relation to your job. The next Board meeting is not scheduled until February 17, 2005, and should it be approved to release your funds the earliest the funds would be released would not be until the end of March or April or possibly longer depending on the outcome.

Should this be an option for your if you have any questions, please feel free to contact me.

Sincerely,

Karen L. Cancto  
Executive Director  
Pittsfield Retirement Board”

(Appellant's Attachment A)

On February 9, 2005, the Appellant submitted a letter of resignation to the City stating in its entirety:

“I Eddie N. Ojeda do resigne (sic) my position as a firefighter here in the City of Pittsfield MA this day of 2-9-05.

Eddie N. Ojeda”  
(City’s Attachment 3)

On February 11, 2005, the City Submitted Absence and Termination Notice / Form 56 to the state’s Human Resources Division indicating that the Appellant had resigned from his position as a firefighter, effective February 9, 2005. (City’s Attachment 4)

On January 18, 2008, the criminal proceedings against the Appellant concluded. The Appellant was not found guilty of any of the charges brought against him. Instead, he pled guilty to a lesser charge of assault and battery. (City’s Attachment 5)

The Appellant filed the instant appeal with the Civil Service Commission on September 2, 2008.

*Relevant Statutes*

The second paragraph of G.L. c. 268A, § 25 states in its entirety:

Any person so suspended shall not receive any compensation or salary during the period of suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights, nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstanding any contrary provisions of law, but all contributions paid by him into a retirement fund, if any, shall be returned to him, subject to section 15 of chapter 32. The employer of a person so suspended shall immediately notify the retirement system of which the person is a member of the suspension and shall notify the retirement board of the outcome of any charges brought against the individual. (emphasis added)

The last paragraph of G.L. c. 268, § 25 states, in its entirety:

“If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement.”

G.L. c. 31, § 43 provides tenured civil service employees the right to appeal the following actions by their Appointing Authority to the Commission: discharge; removal; suspension; transfer; abolition of office; or reduction of rank or pay.

In regard to filing deadlines, G.L. c. 31, § 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)

*City’s Argument in Favor of Motion to Dismiss*

The City argues that the Appellant’s appeal should be dismissed as he voluntarily resigned from his position “of his own free will” as of February 9, 2005 and the Commission does not have jurisdiction to hear appeals regarding a voluntary resignation. While the Appellant may have chosen to do so for economic reasons (i.e. – accessing his retirement funds to pay his legal bills), the City argues that this was still a decision made solely on the part of the Appellant without any coercion by the City.

Second, the City argues that, even if the Appellant hadn’t resigned, his appeal with the Commission falls well beyond the ten-day filing requirement outlined in Section 43,

regardless of whether you use an effective date of his last day of employment with the City the day in which he pled guilty to assault and battery.

*Appellant's Argument in Opposition to City's Motion to Dismiss*

The Appellant argues that his resignation was submitted “under duress and based upon inaccurate information provided by the City” and thus should be construed as a “constructive discharge.” Specifically, the Appellant argues that he was wrongfully informed by the City that he could only get his retirement contributions if he resigned. Citing the last paragraph of G.L. c. 268A, § 25, the Appellant appears to argue that he was entitled to have his retirement contributions returned to him during his suspension even if he didn't resign or retire from the City. Based on this alleged misinformation, the Appellant argues that his separation should be deemed a “constructive discharge” for which he argues the Commission would have jurisdiction to hear such an appeal.

In the alternative, the Appellant argues that, even if the Commission finds that the Appellant's resignation was not under duress, the resignation was not effective until February 9, 2005 and thus, he is entitled to compensation for the loss of pay and benefits due to him from January 7, 2005 until February 9, 2005.

*Conclusion*

The Appellant was not provided with misinformation by the City of Pittsfield's Retirement Board. Public employees suspended pursuant to G.L. c. 268A, § 25 are entitled to receive the contributions they made to their retirement account only if they resign or retire from the City. They are not, as argued by the Appellant, entitled to

receive the contributions made to their retirement account if they choose to remain employed by the City after being suspended under G.L. c. 268A, § 25. In this case, the Appellant was provided with accurate information from the City regarding this issue and he made a voluntary decision to resign, effective February 9, 2005.

The Appellant tendered his resignation, which the Appointing Authority accepted. Any public employee may voluntarily tender their resignation. Jones v. Town of Wayland, 374 Mass. 249, 259 (1978). Campbell v. City of Boston, 337 Mass. 676, 678 (1958). When the Appointing Authority accepts the resignation, the employee's employment status is conclusively severed. Jones at 260.

The Commission has two possible means by which to grant relief to a terminated employee, pursuant to the provisions of G.L. c. 31, s. 42 and/or pursuant to the provisions of c. 31, s. 43. An individual seeking review of a discharge in violation of the civil service rules must avail themselves of the remedies afforded by the rules. Massa v. Board of Selectmen of Fairhaven, 832 Mass. App. Ct. 5 (1977). Canney v. Municipal Ct. of Boston, 368 Mass. 648, 653 (1975). Nevins v. Bd. of Welfare in Everett, 301 Mass. 502, 504 (1938). The remedies provided for in s. 42 are for a failure by the Appointing Authority to exercise due process when engaged in termination procedures. The relief offered by s. 43 is only available when the Commission has found that the Appointing Authority lacked the requisite just cause to terminate the employee. An Appointing Authority has not discharged an employee if the employee in fact resigns from that position. Crowell v. City of Woburn, 14 MCSR 167 (2001). Hence, the Commission has no jurisdiction to hear this appeal. In regard to the Appellant's alternative argument, that he is entitled to compensation from the time of his suspension until the date of his

voluntary resignation, his appeal was filed with the Commission months after the statutory filing deadline.

For these reasons, the Appellant's appeal under Docket No. D-08-208 is hereby *dismissed*.

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Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 8, 2009.

A True copy. Attest:

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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 to:  
Jeffrey S. Morneau, Esq. (for Appellant)  
Fernand J. Dupere, Esq. (for Appointing Authority)