

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street – Suite 200
Boston, MA 02114
617-979-1900

RICHARD ABREU,
Appellant,

v.

D1-23-257

CITY OF LAWRENCE,
Respondent

Appearance for Appellant:

Walter H. Jacobs, Esq.
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Appearance for Respondent:

Kevin P. Foley, Esq.
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Commissioner:

Paul M. Stein

SUMMARY OF DECISION

The Commission denied the Respondent’s Motion to Dismiss an appeal contesting the involuntary termination of the Appellant’s employment during his attendance at the police academy, made without prior notice or hearing, finding that the Respondent’s action was not a lawful termination of a police officer during his probationary period, but, rather, a withdrawal of a conditional offer of employment and a bypass which entitled the Appellant to an evidentiary hearing before the Commission regarding whether there was reasonable justification for the Respondent’s decision.

DECISION AND INTERIM ORDERS ON RESPONDENT’S MOTION TO DISMISS

On December 24, 2023, the Appellant, Richard Abreu, appealed to the Civil Service Commission (Commission)¹, contesting the action of the Respondent, City of Lawrence

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

(Lawrence), removing him involuntarily from the police academy and terminating his employment as a police officer with the Lawrence Police Department (LPD). The Commission held a pre-hearing conference on January 30, 2024, at which time the presiding Commissioner requested that Lawrence provide additional information to address whether the appeal should proceed as a bypass, which Lawrence provided on February 6, 2024.

On February 9, 2024, Lawrence filed a Motion to Dismiss the appeal, claiming that the Appellant was terminated during his probationary period and was not a “tenured employee” entitled to appeal his termination to the Commission, that the Commission lacked the authority to treat the appeal as a bypass appeal, and if so, the appeal must be dismissed as untimely. On February 13, 2024, the Appellant opposed the Motion to Dismiss.

On March 19, 2024, I held a remote video conference hearing (via Webex) on the Motion to Dismiss, which was recorded and a link to the recording provided to counsel for the parties. At my request, I received a Supplemental Opposition from the Appellant on March 25, 2024, and a Supplemental Argument in Support of the Motion to Dismiss from the Respondent on March 26, 2024.

After reviewing the submissions of the parties and considering the argument of counsel, I have determined that the Respondent’s Motion to Dismiss must be denied, that the Appellant’s appeal is properly deemed a revocation of the Appellant’s conditional offer of employment and decision to bypass him for appointment as a Lawrence Police Officer, and that the Commission should allow the bypass appeal to proceed as timely to a full evidentiary hearing on the merits of the reasonable justification for the bypass decision.

UNDISPUTED FACTS

Based on the submission of the parties, the following facts are not disputed:

1. The Appellant, Richard Abreu, took and passed the civil service examination for municipal police officer with a score of 87 and his name appeared on Certification #08854 issued by the Massachusetts Human Resources Division (HRD) to Lawrence for the appointment of additional municipal police officers to the LPD. (*Respondent's email to Commission dated 2/6/24; Appellant's Opposition to Motion to Dismiss*)

2. On or about October 19, 2022, Lawrence made a conditional offer of employment for the position of LPD Police Officer to the Appellant, as well as nine other candidates, four of whom were ranked below the Appellant on Certification #08854. (*Respondent's email to Commission dated 2/6/24; Appellant's Opposition to Motion to Dismiss*)

3. The conditional offer of employment was contingent on the Appellant "being found qualified by the medical screening; psychological screening, passing the Physical Abilities Test (PAT), MPTC Physical Test, and successful completion of the Municipal Police Training Committee (MPTC) operated police academy." (*Respondent's email to Commission dated 2/6/24; Appellant's Opposition to Motion to Dismiss*)

4. Prior to making the conditional offer of employment, Lawrence conducted a background investigation of the Appellant which included a review of his criminal history, driving record, interview and, in particular, the completion of an affidavit by the Appellant, dated September 12, 2022, in a form required by the Peace Officer Standards and Training Commission (POST). (*Motion to Dismiss; Appellant's Opposition to Motion to Dismiss; Respondent's Supplemental Argument in Support of Motion to Dismiss*)

5. After receiving the conditional offer of employment, the Appellant resigned from the job he then held. Beginning on or about February 20, 2023, he was duly enrolled at the police academy and completed approximately nineteen weeks of training prior to his involuntary withdrawal initiated by Lawrence that resulted in this appeal. (*Respondent's Pre-Hearing Memo, Exh.C; Appellant's Opposition to Motion to Dismiss; Respondents Supplemental Argument in Support of Motion to Dismiss*)²

6. On June 28, 2023, without prior notice, Lawrence informed the Appellant that he had been separated from employment with the City of Lawrence and that Lawrence had initiated his withdrawal from the police academy, effective immediately. The reason for his separation of employment and withdrawal from the police academy was stated to be “based on your misstatements and omissions of critical information on your POST application.” (*Motion to Dismiss; Respondent's Pre-Hearing Memo, Exhs B & C*)

7. On December 24, 2023, the Appellant filed this appeal with the Commission in which he alleged that his termination of employment was unlawful and made in violation of civil service procedural requirements. (*Claim of Appeal*)

LEGAL STANDARD FOR DISPOSITIVE MOTIONS

The Commission may, on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should be decided first. 801 CMR 1.01(7)(g)(3). When there is no genuine issue of fact relating to all or part of a claim or defense and the party is entitled to prevail as a matter of law, a party may move for summary disposition

² I infer that, as the Appellant was enrolled at the police academy, he had fulfilled the other contingencies to his conditional offer that were prerequisites to admission to the police academy, namely, satisfactory medical, psychological, and physical fitness examinations.

on the claim or defense pursuant to 801 CMR 1.01(7)(h). See Mangino v. HRD, 27 MCSR 34 (2014) and cases cited (“The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass. R. Civ. P. 56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing.”); Morehouse v. Weymouth Fire Dept, 26 MCSR 176 (2013) (“a party may move for summary decision when . . . there is no genuine issue of fact relating to his or her claim or defense and the party is entitled to prevail as a matter of law.”)

The Commission will decide a dispositive motion when the undisputed material facts, viewed “in the light most favorable to the non-moving party”, affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). If a motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues. 801 CMR 1.01(7)(h).

RELEVANT CIVIL SERVICE LAW

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, § 1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996).

Original appointments to permanent civil service positions, such as a municipal police officer, are made from a list, called a “certification”, with candidates’ names ranked in the order in which they appear on the applicable civil service “eligible list”, using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – for bypassing a higher ranked candidate in favor of a lower ranked one. G.L. c. 31, § 27; PAR.08(4). A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission to determine whether the appointing authority has shown, by a preponderance of the evidence, that it has “reasonable justification” for the bypass after an “impartial and reasonably thorough review” of the relevant background and qualifications bearing on the candidate’s present fitness to perform the duties of the position. Boston Police Dep’t v. Civil Service Comm’n, 483 Mass. 461, 474-78 (2019); Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Beverly v. Civil Service Comm’n, 78 Mass. App. Ct. 182, 187 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

The Commission also is vested with authority to hear and decide appeals from “tenured” civil service employees who have been discharged, demoted, laid off or suspended without “just cause”. G.L. c. 31, § 41 through § 45. A “tenured employee” is “a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law; or (2) a promotional appointment on a permanent basis. G.L. c. 31, § 1. A civil service employee who has not gained tenured status is not protected by the “just cause” requirements and does not have a right to appeal his or her discharge, demotion, or discipline to the Commission. See, e.g., Brandao v. Boston Police Dep’t, 32 MCSR 255 (2019), aff’d, Suffolk Sup. C.A.1984CV02606 (2020) *and*

cases cited (police officer still in probationary period); Downer v. City of Northampton, 31 MCSR 98 (2018), *aff'd*, 97 Mass. App. Ct. 1119 (2020) (Rule 1:28) (provisionally, not permanently, appointed employee).³

ANALYSIS

The first issue presented by this appeal involves the Appellant’s civil service status. Lawrence initially argued that the Appellant was serving as a probationary civil service LPD Police Officer while he attended the police academy and, as a non-tenured employee, he could be discharged without prior notice or reasons and without recourse to appeal the “just cause” for his discharge to the Commission. The Appellant argues that, until he graduated from the police academy and began to “actually perform” the duties of an LPD Police Officer, he was not governed by the rules governing probationary employees but, rather, remained protected under the provisions of civil service law governing bypasses and was entitled to appeal to the Commission for a de novo review of whether his “discharge” met the standards of “reasonable justification” required to bypass him in favor of the four lower-ranked candidates. I conclude that, on the facts and the law, the Appellant prevails on this issue and the Motion to Dismiss must be denied as the premise upon which the motion was made is unfounded.

First, Commission and judicial precedent has consistently construed the civil service law concerning the probationary period of a newly appointed police officer to commence only after the candidate has graduated from the police academy, as only then may they commence “actual

³ I also note that the Commission’s statutory appellate jurisdiction over bypasses and discipline is further enhanced by the inherent power and duty “[t]o conduct investigations at its discretion” into “all or part of the official and labor services” covered by civil service law and to address, remediate and penalize violations of civil service law. G.L. c. 31, § 2(a) & § 72 through § 74. See also St. 1993, c. 310 (Commission may take such action as will restore or protect the “rights of any person acquired under [civil service law] . . . prejudiced through no fault of his own” notwithstanding “the failure of any person to comply with any requirement of [civil service law] or rule . . .”).

performance” of the duties of a police officer; attendance at the academy is not “actual performance” of the duties of a police officer. See Board of Selectmen of Brookline v. Smith, 58 Mass. App. Ct. 813, 817 (2003). See also Lydon v. Town of Stoughton, 32 MCSR 194 (2019), *aff’d*, Suffolk Sup. C.A. 1984CV01694 (2021); Sunny v. Human Resources Div., 33 MCSR 95 (2020), *aff’d*, Suffolk Sup. C.A. 20 CIV 190 (2021). Thus, the right of an appointing authority to summarily dismiss a probationary employee does not apply here.

Second, I am not persuaded by the alternative argument made by Lawrence that, although the Appellant may not have been a probationary employee, nevertheless, he still was a “non-tenured” employee with no rights of appeal to the Commission. As the Appellant correctly points out, such a conclusion would mean that, in effect, once he received a conditional offer and entered the police academy, the Appellant lost all rights he had to challenge his subsequent non-selection, either as a bypass or as a discharge. This conclusion cannot be squared with a commonsense construction of the protections provided under civil service law to prevent arbitrary and unlawful hiring and promotion of qualified candidates for employment in civil service public safety positions. The Commission has consistently rejected such a notion, finding that, when an appointing authority determines to withdraw a conditional offer after it was made and reject a candidate who ranked higher on the certification over one or more others who were hired, the rejection of that higher ranked candidate is treated as a bypass. E.g., Castater v. Boston Police Dep’t, 34 MCSR 265 (2021) (treating as a bypass appeal the BPD’s withdrawal of a candidate from the police academy after coming to learn additional information about his background). See also Carnell v. Boston Police Dep’t, 33 MCSR 68 (2020) (allowing appeal by four candidates whose offers of employment had been rescinded after they failed to pass the MPTC physical fitness standards);

Rogers v. Boston Police Dep't, 33 MCSR 244 (2020) (allowing appeal of candidate whose conditional offer was rescinded after “failing” psychological screenings).

In sum, Lawrence’s actions in ordering the Appellant’s withdrawal from the police academy and denying him employment as an LPD police officer must be treated as a bypass for purposes of civil service law, for which an appeal to the Commission is duly permitted.⁴

That said, the further question remains whether the Appellant’s delay in bringing this appeal precludes the Commission from permitting it to proceed as a bypass appeal.

Unlike disciplinary appeals, which are governed by a strict statutory ten-day limit within which an appeal must be taken to the Commission by a tenured employee aggrieved by any discharge or other discipline, the civil service law prescribes no statutory limit within which a bypass appeal may be brought. The Commonwealth’s Standard Adjudicatory Rules of Practice and Procedure, specifically the provision codified at 801 CMR 1.01 (6)(b), states that:

“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.” (*emphasis added*)

By Standing Order adopted by the Full Commission, effective October 1, 2000, a bypassed candidate is allowed to file a bypass appeal with the Commission “within sixty (60) days from receipt of . . . notice” of the reasons for the bypass, which notice shall also inform the candidate of the right to appeal to the Commission. In the absence of good cause, the Commission will typically dismiss a bypass appeal that has not been filed within the 60-day window prescribed by the

⁴ I make no determination as to the merits of the alleged reason for discharge – i.e., untruthfulness on the Appellant’s POST application – stated in the letter of termination issued by Lawrence in Jun 2023. Although not mentioned in the letter of termination, a further issue concerning an alleged denial of the Appellant’s LTC application with the City of Methuen also appears to have surfaced. These issues will be decided based on the evidence presented by each party at the full hearing of the appeal.

standing order assuming that the appellant had been duly informed of the deadline at the time of receipt of the bypass decision. *See, e.g., Mel v. Boston Police Dep't*, 37 MCSR xxx (2024) (a “busy work schedule” was not good cause to toll the bypass filing deadline when the appellant had been properly notified of his right of appeal); *Legrice v. City of Brockton*, 36 MCSR 373(2023) (bypass appeal filed six months after receiving the notice of bypass with instructions on how to appeal to the Commission denied).

Here, the Appellant was removed from the police academy and discharged on June 23, 2023 for alleged “misstatements and omissions of critical information on your POST application”. The Appellant’s appeal with the Commission was not filed until December 24, 2023. In this case, I conclude that good cause does exist to toll the time within which the Appellant should be permitted to file a bypass appeal and to allow the bypass appeal to proceed to a full evidentiary hearing on the reasonable justification for Lawrence’s actions.

Several factors distinguish this matter from other cases in which the Commission has applied the 60-day deadline for filing a bypass appeal. Of particular significance, Lawrence erroneously treated the matter as a disciplinary discharge and never provided the Appellant with notice of his right of appeal as required by the Commission’s Standing Order. In addition, it does raise an eyebrow that (1) the reasons for the bypass appear to be based on alleged untruthfulness which pre-date the conditional offer made to the Appellant, which he now vigorously disputes; (2) Lawrence did not act on the alleged untruthfulness until the Appellant was well on his way to graduating from the police academy (the final prerequisite to fulfilling the conditions stated in the offer of employment); and (3) Lawrence did not disclose the specific details of the reasons for the alleged bypass until well after this appeal was filed. Thus, I am persuaded that, in this particular case, good cause exists to toll the time for filing of the appeal so that it is deemed timely.

Ordinarily, as the Presiding Commissioner assigned to the appeal, I am empowered to deny a dispositive motion without a vote of the Full Commission. As the non-dispositive decision to allow this appeal to proceed as a bypass appeal and to be deemed timely requires a tolling and/or waiver of the time prescribed by the Commission's Standing Order, however, I recommend that the Commission vote to ratify my analysis and recommendations to that effect.

CONCLUSION

For the reasons stated above, the Respondent's Motion to Dismiss is *denied*. The Commission takes jurisdiction of the appeal pursuant to G.L.c.31, §2(b). This appeal will proceed to a full hearing as a bypass appeal and will be deemed timely filed, notwithstanding any Commission rule or standing order to the contrary. Future filings shall bear Docket No. G1-23-257. Further procedural orders will be separately issued concerning the date of a full hearing and the procedures to be followed by the parties to prepare for and attend the hearing.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

Recommendation to toll the time for Appellant's filing of a bypass appeal and to deem the appeal timely filed as a bypass appeal, ratified by vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, and Tivnan, Commissioners) on April 18, 2024.

Notice to:

Walter H. Jacobs, Esq. (for Appellant)

Kevin P. Foley, Esq. (for Respondent)