

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

TIMOTHY J. BARRY,
Appellant

v.

D1-22-008

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

SUMMARY OF COMMISSION ORDER

The Appellant filed an appeal with the Civil Service Commission contesting the decision of the State Police to terminate him as a Trooper for failing to comply with Executive Order 595, which required all executive branch employees to demonstrate that they had “received COVID-19 vaccination and [to] maintain full COVID-19 vaccination as a condition of continuing employment.” Since the Appellant has also filed a discrimination complaint with MCAD, the Civil Service Commission is dismissing this appeal until MCAD has issued a final decision on the Appellant’s complaint. Should the Appellant wish to re-open his appeal with the Civil Service Commission at that time, this order, in response to a motion in limine by the State Police, provides a framework for the issues to be considered by the Commission at that time.

ORDER OF DISMISSAL WITH FUTURE EFFECTIVE DATE

Procedural Background

On January 21, 2022, the Appellant, Timothy J. Barry (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of State Police (State Police) to terminate him from the position of Trooper for failing to comply with [Executive Order 595 \(EO 595\)](#), which required all executive department employees to demonstrate that they had received COVID-19 vaccination and maintain full COVID-19 vaccination as a condition of continuing employment.

On February 15, 2022, Commission General Counsel Robert Quinan and I convened a remote pre-hearing conference, which was attended by the Appellant and counsel for the State Police. At or near the outset of the pre-hearing conference, the Appellant stated that he was in the process of obtaining counsel to represent him regarding this appeal. For that reason, the pre-hearing was continued until a future date. On March 23, 2022, co-counsel for the Appellant filed Notices of Appearance with the Commission along with a motion to consolidate this appeal with that of another Trooper who had been terminated from the State Police for similar reasons. The motion to consolidate was denied, but the Commission agreed to conduct the pre-hearings regarding both appeals concurrently.

On May 24, 2022, Commission General Counsel Robert Quinan and I held a re-scheduled remote pre-hearing conference which was attended by the Appellant, his co-counsel and counsel for the State Police. (The Appellant regarding the other appeal being heard concurrently was also present.) As part of the pre-hearing conference, the parties stipulated to certain facts and

provided an overview of their arguments regarding jurisdictional issues and whether there was just cause for the discipline imposed here.

Chronology of the issuance and implementation of EO595

Executive Order 595, issued by the Governor on August 19, 2021, states in relevant part that: “... all executive department employees shall be required to demonstrate that they have received COVID-19 vaccination and maintain full COVID-19 vaccination as a condition of continuing employment ...”. Executive Order 595 required the state’s Human Resources Division (HRD) to develop a policy to implement this mandate with said policy to include the following elements that are relevant to this appeal: “1) a requirement that all executive department employees demonstrate no later than October 17, 2021 to their employing agency ... that they have received COVID-19 vaccination and, going forward, that they demonstrate they are maintaining full COVID-19 vaccination; 2) a procedure to allow limited exemptions from the vaccination requirement where a reasonable accommodation can be reached for any employee who is unable to receive COVID-19 vaccination due to medical disability or who is unwilling to receive COVID-19 vaccination due to a sincerely held religious belief; and ... 5) appropriate enforcement measures to ensure compliance, which shall include progressive discipline up to and including termination for non-compliance and termination for any misrepresentation by an employee regarding vaccination status.” E.O. 595, pp. 2-3.

On September 22, 2021, the State Police issued a “Superintendent’s Memo”. The memo, referencing Executive Order 595, states in relevant part that: “Being an Executive Branch agency, all employees of the Department, who are not on extended leave, shall submit proof of COVID-19 vaccination, by self-attestation, to the Commonwealth’s Human Resources Division *or* receive an Approved medical or religious exemption with reasonable

accommodations no later than Sunday, October 17, 2021.” The memo continues in paragraph 1 of page 1 to state: “ Any sworn or civilian member who chooses to resign or retire, with an effective date of October 18, 2021, or sooner, must submit their resignation, in writing, to their Division Commander no later than **Monday, October 4, 2021**. After that date, sworn and civilian members will be bound by Rules and Regulations Article 7.3.1, and may be subject to discipline.” In paragraph 4 of page 1, the Superintendent’s Memo states: “The following employees shall not be permitted to work or enter any Department facility effective midnight on Monday, October 18, 2021, and may be subject to disciplinary action: 1) Employees who have not submitted the Self-Attestation Form to the Commonwealth’s Human Resources Division; 2) Employees who are not fully vaccinated prior to midnight on Monday, October 18, 2021; and 3) Employees who have not received an **approved** medical or religious exemption with reasonable accommodations prior to midnight on Monday, October 18, 2021. Non-compliance with Executive Order 595 will result in progressive discipline, up to and including termination.” (emphasis in original)

On October 15, 2021, HRD issued a “[COVID 19 Vaccination Verification Policy for Executive Department Agencies](#)” (HRD Policy). Among the provisions of the HRD Policy relevant to this appeal are:

- A) COVID-19 Vaccination is defined as: “The full required regimen of vaccine doses of a vaccine authorized or approved for use by the Food and Drug Administration (FDA) or the World Health Organization (WHO) to provide acquired immunity against COVID-19. COVID-19 vaccination is the full required regimen as determined by the Centers for Disease Control (CDC) and adopted by the Department of Public Health as the standard applicable to Executive Order 595 and this Covid19 Vaccination Verification Policy.”

B) Under the “General Provisions” of the HRD Policy, it states: “It is the Executive Department policy that all employees demonstrate that they have received COVID-19 vaccination by October 17, 2021.” It goes on to state that: “Employees shall thereafter be required to demonstrate that they continue to maintain COVID-19 vaccinations in accordance with the CDC definition of fully vaccinated and as adopted by the Massachusetts Department of Public Health.” The [CDC’s website](#), as of the date of this Decision, states in relevant part that: “... the definition of fully vaccinated has not changed and does not include a booster. Everyone is still considered fully vaccinated two weeks after their second dose in a two-dose series, such as the Pfizer-BioNTech and Moderna vaccines, or two weeks after the single-dose J&J/Janssen vaccine. Fully vaccinated, however, is not the same as having the best protection. People are best protected when they [stay up to date with COVID-19 vaccinations](#), which includes getting boosters when eligible.”

C) Under paragraph 6 of “Procedures and Instructions”, the HRD Policy states, in its entirety:

“Employees may be approved for exemption from the requirement to provide documentation confirming COVID-19 vaccination under the following circumstances:

a. Employees who verify and document that the vaccine is medically contraindicated, which means administration of the COVID-19 vaccine to that individual would likely be detrimental to the individual’s health, provided any such employee is able to perform their essential job functions with a reasonable accommodation that is not an undue burden on the agency. Documentation must be provided from an employee’s medical/health care provider to support the request.

b. Employees who object to vaccination due to a sincerely held religious belief, provided that any such employee is able to perform their essential job functions with a reasonable accommodation that is not an undue burden on the agency.”

D) Paragraph 9 of “Procedures and Instructions” states: “Employees who fail to comply with this policy and are not otherwise subject to paragraph 6 or on an approved full-time continuous leave will be subject to progressive discipline, up to and including termination.”

Stipulated Facts Regarding the Instant Appeal

The parties have stipulated to the following facts, both in regard to the Appellant’s employment and how EO 595 was implemented in relation to this appeal:

1. On January 21, 2019, the Appellant was appointed by the State Police as a Trooper.
2. On September 27, 2021, the Appellant filed a request for exemption from EO 595, due to what he argued is a sincerely held religious belief that prevents him from receiving the COVID-19 vaccination.
3. On October 23, 2021, the Appellant received notification that his request for a religious exemption was denied.
4. On November 3, 2021; November 23, 2021; and December 13, 2021, the State Police conducted three separate Trial Boards to consider, respectively, whether the Appellant should be suspended for 5 days; suspended for 10 days; and then terminated. (At the pre-hearing, the State Police stated that the first Trial Board, which resulted in the 5-days suspension, actually did not go forward as the Appellant “pled guilty” to the charges.)
5. The Appellant did not testify at the above-referenced Trial Board proceedings.

6. The Appellant was notified on November 10, 2021; December 6, 2021; and January 14, 2022 that the Colonel of the State Police had accepted and imposed the recommended discipline of the Trial Boards.¹
7. On January 21, 2022, the Appellant filed an appeal with the Commission to contest his termination from the State Police.
8. The parties agree that the termination appeal filed with the Commission was timely filed. (The Appellant did not file an appeal with the Commission to contest the 5-day or 10-day suspensions.)
9. The Appellant has no prior discipline.
10. As of the date of the pre-hearing (May 24, 2022), the Appellant had not filed a charge of discrimination with the Massachusetts Commission Against Discrimination (MCAD). (Subsequent to the pre-hearing, however, the Appellant did file a complaint with MCAD.)

Commission Issues Procedural Order

Based in part on the fact that the Appellant had not sought relief from MCAD at the time of the pre-hearing and because the parties had divergent points of view regarding what issues regarding this appeal could be adjudicated by the Commission as part of a full evidentiary hearing, I issued a Procedural Order on June 28, 2022 allowing the State Police to file a motion

¹ In sharp contrast to how other state agencies implemented EO 595, the Colonel of the State Police chose to take an additional step and designate these discharges as “dishonorable”. This designation, which is permitted, but not required under State Police rules, has potentially permanent adverse consequences for the terminated Troopers. I do not believe EO 595 contemplated such an outcome and there is nothing in the record that supports the Colonel’s decision to take such a punitive step against Troopers whose separation from employment is solely related to not complying with a vaccination requirement. Regardless of the outcome of these appeals (at CSC or MCAD), the Colonel should consider removing this designation forthwith.

in limine and for the Appellant to file a reply, after which the Commission would issue appropriate rulings. As referenced above, subsequent to the issuance of the Procedural Order, counsel for the Appellant notified the Commission that the Appellant would be filing a complaint with MCAD, arguably putting this appeal on the same procedural footing as several other appeals pending before the Commission in which the Appellants have a parallel complaint pending with MCAD. Since, after reviewing the Appellant's reply, the parties appear to be in agreement on the implications of the Appellant's decision to file a complaint with MCAD, I did not find it necessary to require the State Police to submit an amended motion to dismiss.

State Police's Argument

In its motion in limine, the State Police argues that:

1. The Commission may not adjudicate claims under G.L. c. 151B, nor make a finding of discrimination based on acts declared unlawful under G.L. c. 151B, § 4.
2. To the extent the Appellant is challenging the period of suspension following a duty status hearing, such an issue is beyond the limited jurisdiction of the Commission to review the State Police's employment decisions.
3. The Commission may not consider challenges to the constitutionality of Executive Order 595 because neither findings of fact nor the Commission's expertise will assist a court with determining its constitutionality. Moreover, according to the State Police, the Order is not relevant to the question of whether the State Police had just cause for terminating the Appellant where the State Police had no discretion with respect to the application of EO 595 to its employees.

Appellant's Argument

In his reply to the State Police's motion in limine, the Appellant states that:

1. The Commission can adjudicate the Appellant's civil service appeal as it relates to discrimination, but not while a complaint is pending at MCAD.
2. The Commission does not have jurisdiction over the action taken by the Duty Status Board.
3. The Commission may consider constitutional questions.

In light of the Appellant's decision to go forward with filing an MCAD complaint, the Appellant argues that "the Commission should stay the proceedings until the MCAD resolves the religious claims before it" and "upon moving forward with the Appellant's appeal, the Commission should permit and consider evidence relevant to the discrimination claim and give that evidence due consideration in determining the claims in the Appellant's [case]. Additionally, the Commission should allow evidence and testimony of the constitutionality of Executive Order 595 and the resulting orders, policies and procedures imposed upon the Appellant, including the application process for the religious exemption."

Analysis

1. The MCAD complaint should be adjudicated first.

As referenced above, the Appellant, at the time of the pre-hearing conference and the subsequent issuance of the Procedural Order, had not filed a complaint with MCAD. For that reason, the State Police had not included the Appellant in a global motion to stay that was filed in regard to several other State Police-related appeals involving similar appeals in which the Appellants had indeed filed MCAD complaints at the time. It is clear that, given that the Appellant has now filed complaint with MCAD, the State Police would seek to stay this appeal

as well, until such time as the MCAD complaint has been adjudicated, *a position shared by the Appellant.*

The parties have divergent views regarding whether, and if so, how, an act of alleged discrimination can be considered by the Commission as part of deciding whether there was just cause to terminate his employment. It is undisputed, however, that the Appellant, has, or soon will have, a complaint *pending* at MCAD, the agency statutorily charged with addressing whether the State Police violated state and federal anti-discrimination laws, including the State Police's decision to deny the Appellant's request for a religious exemption from receiving a COVID vaccination. I concur with the parties that it would be more prudent to allow the MCAD to rule on the Appellant's discrimination claim(s) prior to proceeding to a full hearing before the Civil Service Commission.²

For that reason, the Appellant's appeal before the Civil Service Commission should be *dismissed nisi*, to become effective 21 days after the issuance of a decision by MCAD regarding the Appellant's complaint.³ Upon the issuance of a final decision by MCAD, the Civil Service Commission will consider a Motion to Revoke this Order of Dismissal Nisi, to be filed no later than 20 days after the issuance of a final MCAD decision. In the absence of a Motion to Revoke

² Abstention is the judicially-recognized vehicle for according appropriate deference to the respective competence of parallel court systems. England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 415 (1964). Here it seems appropriate for this Commission to invoke a form of this doctrine to the end "that decision of the [civil service law] question be deferred until the potentially controlling [G.L. c. 151B] issue is authoritatively put to rest[.]" Id. at 416, n.7 (citation omitted).

³ The Commission recommends that the Appellant inform the MCAD what his Chapter 31 claims are, so that G.L. c. 151B may be construed in light of those claims. See England, *supra*, 375 U.S. at 420. Today's disposition, although styled a *dismissal nisi*, should be understood as permitting this Commission to "retain[] jurisdiction to take such steps as may be necessary for the just disposition of the litigation [*i.e.*, the Appellant's c. 31 claims] should anything prevent a prompt [MCAD] determination." Id. at 413 (citation omitted).

within this time period, the dismissal of this appeal shall become final for purposes of G.L. c. 31, § 44, 21 days after the issuance of the final MCAD decision regarding the Appellant's G.L. c. 151B claim(s). Should the Appellant seek to revoke this dismissal at that time, the Commission, as part of its further proceedings regarding the Appellant's just cause appeal, will give the MCAD's final decision the appropriate weight that it merits guided in part by the Supreme Judicial Court's framework outlined in Town of Brookline v. Alston, 487 Mass. 278 (2021).

Although it is not necessary to address the other two issues raised in the parties' briefs, one of which actually leads them to a position of agreement, I do so to ensure clarity regarding this and other related appeals.

2. The Commission does not have jurisdiction over "administrative suspensions" of State Troopers ordered by a "Duty Status Board" prior to a Trial Board.

State Troopers are not expressly included in the definition of a "Civil service employee," a "Permanent employee" or a "Tenured employee," under Massachusetts civil service law, G.L. c. 31, § 1, and likewise the position of a Massachusetts State Trooper is not a "Civil service position" within "Official service" or a position made by "Civil service appointment" as defined by G.L. c. 31, § 1. Section 10 of G.L. c. 22C provides that the appointment of State Troopers " ... shall be exempt from the requirements of chapter thirty-one."

Instead, the Commission's purview over the discipline of State Troopers is defined by the State Police statute. That statute, G.L. c. 22C, § 13, provides, in relevant part:

Section 13. (a) A uniformed member of the state police who has served for at least 1 year and against whom charges have been preferred shall be tried by a board to be appointed by the colonel or . . . a board consisting of the colonel. A person aggrieved by the finding of the trial board under this subsection may appeal the decision of the trial board under sections 41 to 45, inclusive, of chapter 31. . . .
(b) Notwithstanding subsection (a), the colonel may administratively suspend without pay a uniformed member who has served for at least 1 year if: (i) the

uniformed member had a criminal complaint or indictment issued against them; (ii) the department has referred the uniformed member to a prosecutorial agency for review for prosecution; or (iii) there are reasonable grounds to believe that the uniformed member has engaged in misconduct in the performance of the uniformed member's duties that violates the public trust.

Prior to such administrative suspension, the department shall provide the uniformed member notice of, and the underlying factual basis for, the administrative suspension. After such notice, the colonel or the colonel's designee shall hold a departmental hearing at which the uniformed member shall have an opportunity to respond to the allegations. Following the departmental hearing and upon a finding that there are reasonable grounds for such administrative suspension without pay, the colonel may administratively suspend without pay such uniformed member immediately. The administrative suspension without pay shall not be appealable under sections 41 to 45, inclusive, of chapter 31; provided, however, that the administrative suspension without pay may be appealed as provided in section 43.⁴ *Id.* (emphasis added)

In Massachusetts Dep't of State Police v. Civil Service Comm'n, 2020 WL 3106264 (Mass. Super. Ct. 2020), the Court held that State Troopers may appeal to the Commission under G.L. c. 31, §§ 41-45, *after they have been both charged before and aggrieved by the finding of a MSP Trial Board*. The Court stated that, in the absence of such a charge and finding, the Commission simply has no jurisdiction. *Id.*

The Court expressly rejected the Commission's argument that it could, in some circumstances, exercise jurisdiction over an appeal brought by a State Trooper who alleged that he had been unlawfully suspended or terminated even if no charges had been "preferred" against

⁴ Section 43 of G.L. c. 22C provides: "Any person affected by an order of the department or of a division or officer thereof, may, within such times as the colonel may fix, which shall not be less than ten days after notice of such order, appeal to the colonel who shall thereupon grant a hearing, and after such hearing the colonel may amend, suspend or revoke such order. Any person aggrieved by an order approved by the colonel may appeal to the superior court; provided, that such appeal is taken within fifteen days from the date when such order is approved or made. The superior court shall have jurisdiction in equity upon such appeal to annul such order if found to exceed the authority of the department or upon petition of the colonel to enforce all valid orders issued by the department. Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy." (emphasis added)

the Trooper and the Trooper had not been found guilty of such charges by a Trial Board. In the absence of an appellate decision or legislative clarification of Chapter 22C, the Commission will hew to the holding in Massachusetts Dep't of State Police v. Civil Service Comm'n, *supra*.

Thus, insofar as the Appellant seeks to appeal the administrative suspension imposed by the Duty Status Board, the Commission lacks subject matter jurisdiction to review such a matter.

The Appellant's remedy, if any, is limited to direct judicial review as set forth in G.L. c. 22C, § 43.

3. The Appellant may argue constitutional issues before the Commission as the issues are "closely intertwined" with the facts of this particular appeal, but the Appellant faces a high bar to show that that EO 595 is unconstitutional given longstanding and recent caselaw on this subject.

The Legislature explicitly granted the Commission with the authority to ensure that employment decisions are consistent with basic merit principles, defined as:

... (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) *assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and **constitutional rights as citizens***, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

G.L. c. 31, § 1 (emphasis added).

The context in which the Commission may address constitutional issues, however, is laid out in Doe v. Sex Offender Registry Bd., 488 Mass. 15 (2021). Specifically, the Appellant may argue constitutional issues where those issues are closely intertwined

with the facts of a specific case subject to agency adjudication. The Commission should “make the factual findings necessary to address the constitutional question and apply its expertise to the construction and application of any related statutes or regulations in light of the constitutional question.” *Id.* at 20. In turn, this process will provide a record for the Superior Court to consider on appeal to determine “whether the agency’s determinations were made in compliance with or in violation of constitutional provisions, pursuant to G.L. c. 30A, §14(7)(a).” *Id.*⁵

This is not new ground for the Commission. For example, in Rowe v. Boston Fire Department, 32 MCSR 314 (2019), the Commission was required to address Rowe’s argument that his termination for misconduct (centered on divisive social media posts) violated his freedom of speech protections under the Constitution. Similarly, in Matchem v. City of Brockton, 34 MCSR 52 (2021), the Commission was also required to address that appellant’s constitutional claims of freedom of speech regarding the City’s decision to bypass the appellant for appointment based on his tattoos.

The State Police argues that the Commission’s area of expertise – the civil service statute – is not necessary to assist a court presented with the question of the constitutionality of the vaccine mandate, arguing that the Appellant’s argument is a facial challenge to Executive Order 595 and there are no facts specific to this case that are needed or would benefit the court’s eventual adjudication of the challenge.

The Appellant argues that the constitutionality of Executive Order 595 is closely intertwined with the facts of this specific appeal, arguing that Executive Order 595 triggered the Superintendent’s Memo 21-SM-14, ordering compliance with Executive Order 595, and is the

⁵ The Supreme Court repeatedly has observed that “[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.” England, *supra*, 375 U.S. at 416-417, quoting Townsend v. Sain, 372 U.S. 293, 312 (1961))

primary basis for the discipline against the Appellant. But for Executive Order 595, the Appellant argues that he would continue to be employed as a State Trooper and this dispute would not exist. Additionally, the Appellant argues that the relatively detailed process set out by Executive Order 595, which he contends was inconsistent and unreasonable, provided the primary direction and change in work conditions that the Appellant attempted to follow in good faith, including the religious exemption process. Whether Executive Order 595 and the religious exemption process was constitutional as written, ordered, and/or imposed is, according to the Appellant, without question, intertwined with the facts of the Appellant's argument that the State Police did not have just cause to terminate him and that he was treated differently than other employees.

Having carefully reviewed the parties' arguments, I conclude that it would be a mistake to preclude, at least at this time, the Appellant from raising constitutional questions related to whether the State Police's decision to terminate his employment was done "with proper regard for ... his constitutional rights." G.L. c. 31, § 1. The State Police does not cite, nor is the Commission aware of, any Commission proceeding related to an Appellant's termination where the Commission prohibited the Appellant from even raising the issue of constitutional protections. Rather, only after conducting a full evidentiary hearing, should it be necessary, could the Commission determine whether the facts of this appeal are indeed intertwined with the constitutionality of EO 595 and whether the decision was consistent with basic merit (inclusive of constitutional) principles. As stated in Doe, however, the Commission's role would be to make those factual findings necessary to address the constitutional question, providing the Superior Court, on appeal, with a record to determine whether any determination by the appointing authority or the Commission was made in compliance with or violation of constitutional provisions.

To ensure clarity, however, the parties are undoubtedly aware of the steep climb involved in challenging Executive Order 595 on constitutional grounds.⁶ Dismissing a complaint filed by several tenured civil service employees seeking a declaration that EO 595 is unconstitutional, the federal district court in Boston declared last month that “it has long been ‘settled that it is within the police power of a state to provide for compulsory vaccination’” and “EO 595 is rationally related to the legitimate government interest in stemming the spread of COVID-19[.]” See Memorandum of Decision and Order on Defendants’ Motion to Dismiss (at pp. 8-9), Massachusetts Correction Officers Federated Union v. Baker, No. CV 21-11599-TSH, 2022 WL 4329680 (D. Mass. Sept. 19, 2022) (appeal filed Oct. 2022) (quoting Zucht v. King, 260 U.S. 174, 176 (1922)). Likewise, in Brox, et al. v. Woods Hole, Martha’s Vineyard, and Nantucket Steamship Authority, et al., No. CV-22-10242-RGS, 2022 WL 715556 (March 10, 2022) (appeal filed April 2022), the United States District Court for the District of Massachusetts, in denying the plaintiffs’ request for a renewed preliminary injunction stated:

The court has no doubt that the Policy [vaccination mandate for employees] has a “real and substantial relation” to public health and safety and is not a “palpable invasion of [plaintiffs’] rights.” *Jacobson [v. Massachusetts]*, 197 U.S. [11,] at 26 [(1905)]. “Stemming the spread of COVID-19 is unquestionably a compelling interest.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam). And the Policy, which is crafted to protect the Authority’s staff and patrons from COVID-19, unquestionably bears a substantial relation to that interest. Moreover, the Policy does not invade plaintiffs’ rights to refuse medical treatment as “nothing in the [P]olicy compels employees to submit to vaccination.” *Local 589, Amalgamated Transit Unit v. Mass. Bay Transp. Auth.*, 2021 WL 6210665, at *6

⁶ As of earlier this year, “there have been forty-one judicial decisions or votes in federal district and appellate courts involving substantive-due-process challenges and nine involving free-speech challenges to vaccine mandates, zero of which have resulted in a win for vaccine objectors.” Zalman Rothschild, Individualized Exemptions, Vaccine Mandates, and the New Free Exercise Clause, 131 Yale L.J. Forum 1106, 1110 n.16 (2022) (noting, however, that a free exercise of religion challenge to a government vaccination mandate might well fare better).

(Mass. Super. Dec. 22, 2021). “Rather, the [P]olicy coerces employees to be vaccinated but does not force them.” *Id.* Because the Policy does not violate any of plaintiffs’ fundamental rights under the Fourteenth Amendment, plaintiffs’ claim cannot succeed.

Brox, *supra*, at *6.

Conclusion

The Commission concurs with the parties that the Appellant’s MCAD complaint should be adjudicated prior to any full evidentiary hearing, if necessary, before the Civil Service Commission. For that reason, the Appellant’s appeal before the Civil Service Commission is *dismissed nisi*, to become effective 21 days after the issuance of a final decision by MCAD regarding the Appellant’s complaint. Upon the issuance of a final decision by MCAD, the Civil Service Commission will consider a Motion to Revoke this Order of Dismissal Nisi, to be filed no later than 20 days after the issuance of a final MCAD decision. No additional filing fee would be required. In the absence of a Motion to Revoke within this time period, the dismissal of this appeal shall become final for purposes of G.L. c. 31, § 44, 21 days after the issuance of the final MCAD decision regarding the Appellant’s complaint.⁷

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on October 20, 2022.

⁷ I convened a status conference with counsel for the parties on October 19, 2022. At that time, I asked the parties to provide the Commission with any substantive status updates regarding the Appellant’s MCAD complaint on a going forward basis. Also, at the request of counsel for the State Police, I confirmed that the parties reserve any rights to amend or supplement any motions already filed with the Commission depending on the results of any rulings or decisions by MCAD.

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)(1), 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:

Daniel Moynihan, Esq. (for Appellant)

Mark Russell, Esq. (for Appellant)

Siobhan E. Kelly, Esq. (for Respondent)