

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

TIMOTHY R. CARRIVEAU,
Appellant

v.

D1-12-210

CITY OF CHICOPEE,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

Shawn Willis, Esq.
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Commissioner:

Cynthia A. Ittleman, Esq.

DECISION ON RESPONDENT’S MOTION TO DISMISS

The Appellant, Timothy R. Carriveau (“Appellant” or “Mr. Carriveau”), filed this appeal pursuant to G.L. c. 31, §§ 42 and 43 with the Civil Service Commission (“Commission”) on July 10, 2012 against the City of Chicopee (“Respondent” or “City”), as Appointing Authority for the Chicopee Fire Department (“CFD”), challenging the termination of the Appellant’s employment as a Firefighter in the CFD. On July 19, 2012, the Respondent filed the instant Motion to Dismiss (“Motion”). The Commission conducted a prehearing conference in this case on July 25, 2012. The Appellant filed an Opposition to the Motion (“Opposition”) on August 10, 2012. The Respondent filed a Reply to the Opposition (“Reply”) on August 27, 2012. On September 4,

2012, the Appellant filed a Surreply. Based on the parties argument at the Prehearing Conference, their subsequent written submissions and the applicable law, the Motion is granted and the appeal is dismissed.

Findings of Fact

Giving appropriate weight to the parties' pleadings and arguments and considering the reasonable inferences therefrom, as well as the applicable law, a preponderance of the evidence establishes the following facts:

1. Mr. Carriveau was appointed to the position of permanent firefighter on March 5, 2012.
(Opposition) At all pertinent times thereafter, Mr. Carriveau was a probationary employee of CFD. *(Motion, Reply)*
2. Following his appointment, Mr. Carriveau successfully completed the CFD recruit training program. *(Opposition)* The CFD recruit training program is a thirteen (13) week firefighter training academy, which is administered "in-house" by a CFD Firefighter who has been approved as a training officer by the Massachusetts Fire Training Council ("MFTC"). *(Reply)*
3. After completion of the CFD training, Mr. Carriveau had to complete the Massachusetts Fire Training Council ("MFTC") training program in Stowe, Massachusetts.
(Opposition) In addition to Mr. Carriveau, all other recruits hired on March 5, 2012 were required to successfully complete the Firefighter I and II certifications from the MFTC training program. *(Reply)*
4. The CFD Fire Chief began requiring recruits to successfully complete the MFTC training program starting with the recruit class prior to Mr. Carriveau's class. *(Reply)*

5. MFTC certification is comprised of two parts, one written and one practical, which parts are administered on two (2) different days. (*Reply*) During the practical part, Mr. Carriveau failed two (2) skills tests; one test was Firefighter in Distress and the other test was Knot Tying. (*Id.*) Two (2) other recruits failed one (1) test each and were allowed to re-test. However, MFTC does not allow re-testing more than once. (*Id.*)
6. The Respondent, via Mayor Bissonnette, gave Mr. Carriveau notice of termination by letter dated June 28, 2012. (*Motion, Exhibit A thereto*). This letter states,

You were appointed as a Firefighter Recruit with the [CFD] on March 5, 2012. As a newly appointed recruit, you were required to successfully complete the recruit training program and pass all written and practical exams. Massachusetts Civil Service law also requires that you actually perform the duties of a full-time Firefighter for a probationary period of twelve (12) months before your appointment shall be considered a full-time tenured position.

On May 26, 2012 you failed two practical exams: the Firefighter in Distress and Knot Tying. Your inability to successfully complete the required training indicates you are unfit to continue as a Chicopee Firefighter and unable to serve for the required probationary period.

Therefore, based on your above-reference (sic) deficiencies and pursuant to Massachusetts General Laws, Chapter 31, Section 61, I am terminating your employment as a Chicopee Firefighter, effective immediately. (*Id.*)

7. The Respondent compensated Mr. Carriveau during training. (*Reply*)
8. On July 10, 2012, Mr. Carriveau filed the instant appeal at the Commission.

(*Administrative Notice*)

DISCUSSION

The Legal Standard for Consideration of a Motion to Dismiss

The United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007). Thus, the non-moving

party must plead enough facts to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. *See id.* at 545. Similarly, the Massachusetts Supreme Judicial Court has held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). The Standard Adjudicatory Rules of Practice and Procedure (hereinafter "Rules") govern administrative adjudication. 801 CMR 1.01, *et seq.* However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Applicable Civil Service Statutes and Rules

Civil service law requires original civil service appointees, such as the Appellant, to complete a probationary period before they are to be considered tenured. G.L. c. 31, § 34. A "tenured employee" is a person "who is employed following ... 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." G.L. c. 31, § 1. Section 61 of Chapter 31 specifically addresses the probationary period for law enforcement civil service employees. It states, in pertinent part,

Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a town where the civil service law and rules are applicable to such position, a person shall actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he shall be considered a full-time tenured employee in such position, except as otherwise provided by civil service rule....
(Id.)

Section 34 grants appointing authorities considerable discretion during the probationary period providing, for example,

... During the probationary period, he may be subject to a performance evaluation during his first two months of service and a second evaluation may be conducted at least one month prior to his sixth month anniversary date of service. The appointing authority may extend the probationary period for a period of two months if the second evaluation of the probationary employee is unsatisfactory. Such evaluation may be utilized by the appointing authority, but in no instance shall the appointing authority be required to consider the results of such evaluation in a determination of granting such employee permanent or tenured status. Nothing contained herein shall require an appointing authority to evaluate a probationary employee and in no such instance shall such evaluation grant such probationary employee any greater rights than those contained in this section. ...

Id.

This statutory discretion, especially in regard to law enforcement positions, is supported in appellate caselaw. *See, e.g., Police Commissioner of Boston v. Cecil and another*, 431 Mass. 410, 414 (2000)('We have made clear that care must be taken 'not to hobble the employer unduly in the process of selection for tenure because dislodgment thereafter is notoriously difficult'(citing *Costa v. Selectmen of Billerica*, 377 Mass. 853, 860-861 (1979)). This is also reflected, for example, in the Commission's decision in *Long v North Andover*, Docket No. D1-13-121 (July 25, 2013)(discharge upheld when probationary firefighter was discharged after academy informed Fire Chief that Long was "unlikely" to pass training course and Long had performance problems at the Department)(*see cases cited*).

Section 41 of Chapter 31 affords civil service employees a process when they have been discharged, for example. However, it specifically provides,

Except for just cause and except in accordance with the provisions of this paragraph, a ***tenured*** employee shall not be discharged, removed, suspended ...

Id. (emphasis added)

Section 42, which is related to section 41, provides certain procedural requirements to be followed by appointing authorities in regard to specific forms of discipline but, again, only with

regard to *tenured* civil service employees. Likewise, related section 43 of G.L. c. 31, providing for appeal to the Commission of an appointing authority's discharge, *inter alia*, applies only to *tenured* civil service employees. Thus, pursuant to pertinent statutes and caselaw, the Commission does not have jurisdiction to hear the disciplinary appeals of employees who are not tenured. See Selectmen of Brookline v. Smith, 58 Mass.App.Ct. 813, 815(2003)

Analysis

The Respondent's Motion asserts that the Commission has no jurisdiction in this case because the Appellant failed two parts of the required MFTC training, that MFTC permits re-testing when an employee fails only one part of the test, that this is an MFTC requirement beyond the Respondent's control, and that it is authorized to terminate the Appellant's employment because he was only three months into his statutory twelve (12) month statutory probation period at the time he was discharged. The Appellant avers that the Commission has jurisdiction over this appeal because he was not informed that he was required to pass the MFTC to maintain his employment as a CFD firefighter, that others who failed a part of the test were allowed to re-test and he was not so permitted, that tenured CFD firefighters were not required to take the MFTC training program, that he did not actually perform in the position of firefighter one day since he was being trained, and that even if his appeal does not survive under G.L. c. 31, §§ 42 and 43, it survives under G.L. c. 31, § 2(b) and/or because the Respondent acted in an unfair and arbitrary manner in violation of basic merit principles.

The applicable statutes and caselaw make it clear that in order for the Commission to hear an appeal under G.L. c. 31, §§ 42 and 43¹, a civil service employee must be tenured. A civil service firefighter is required to complete the statutory twelve (12) month probation period. The

¹ I take administrative notice that the Appellant noted on the appeal form that he filed at the Commission that he was appealing the Respondent's actions under G.L. c. 31, §§ 42 and 43.

Appellant was employed by the Respondent for approximately three (3) months, well short of the required twelve (12) month probation period. Having not completed the probationary period, the Appellant is not a tenured employee. Since the Appellant is not tenured, the Commission has no jurisdiction over this appeal and the Appellant has failed to state a claim to relief that is plausible on its face. The Respondent deemed the Appellant's failure of part of the MFTC training test unsatisfactory and chose to exercise its authority to discharge the Appellant, a decision that was within its civil service discretion in this regard.

The Appellant's argument that he did not actually perform as a firefighter at CFD and, therefore, that he was not a probationary employee is inapposite. First, the argument mistakenly conflates the arguments that are applicable only to civil service police officers by statute with provisions applicable to firefighters. Specifically, a full-time police officer is required to successfully complete a prescribed course before he or she exercises police powers. G.L. c. 41, § 96B.² Prior to successful completion of the required course, the police officer is a "student officer" exempted from G.L. c. 31. *Id.* Therefore, police officer probation does not begin until the student officer successfully completes the required training and actually performs the job. There is no similar civil service statutory provision applicable to firefighters. Where the Legislature has crafted a law specifically regarding only civil service police officers and their actual performance as a trigger of a probationary period and not crafted the same or a similar law

² Section 96B of G.L. c. 41 provides, "Every person who receives an appointment to a position on a full-time basis in which he will exercise police powers in the police department of any city or town, shall, prior to exercising police powers, be assigned to and satisfactorily complete a prescribed course of study approved by the municipal police training committee. The provisions of chapter thirty-one and any collective bargaining agreement notwithstanding, any person so attending such a school shall be deemed to be a student officer and shall be exempted from the provisions of chapter thirty-one and any collective bargaining agreement for that period during which he is assigned to a municipal police training school, provided that such person shall be paid the regular wages provided for the position to which he was appointed and such reasonable expenses as may be determined by the appointing authority and be subject to the provisions of chapter one hundred and fifty-two. ... Failure of an appointed person to comply with the provisions of this section prior to his exercising police powers, shall result in the appointed person's removal by the appointing authority, provided said person has not been exempted therefrom by said committee as herein provided. ..."

regarding firefighters, the Commission cannot appropriate the statutory provisions for police officers to firefighters. Secondly, the argument infers that a civil service firefighter who has not yet actually performed the function of a firefighter because he has been in training is not probationary and, therefore, has greater protection than a probationary civil service employee. This inference is untenable in view of the explicit provisions of the applicable statutes and caselaw and the absence of laws to the contrary.

The Appellant's other statutory arguments are also without merit. In particular, the Appellant's reliance on G.L. c. 31, § 2(b) is unavailing because that statute applies to persons "aggrieved by any decision, action, or failure to act by the administrator" *Id.*³ Since the Appellant is not appealing a decision of the administrator but of the City, this statute does not apply. Similarly, the Appellant's argument that the Respondent's conduct violates basic merit principles, as defined in G.L. c. 31, § 1, is misplaced.⁴ Fairly applying the law regarding untenured probationary civil service employees, as the Respondent did here, does not constitute a violation of civil service law. Consequently, the appeal has failed to state a claim to relief that is plausible on its face.

³ In Police Commissioner of Boston v. Cecil and another, 431 Mass. 410 (2000), the Supreme Judicial Court indicated that application of basic merit principles in a similar setting was not appropriate. (*Id.* at 414)

⁴ G.L. c. 31, §1 defines "basic merit principles" 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.

Conclusion

Based on the findings and the applicable law herein, the Respondent's Motion is *granted* and the Appellant's appeal is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on March 20, 2014.

A True Record. Attest:

Commissioner

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 as stated below.

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 from the effective date specified in 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.

Notice to:

George F. Kelly, Esq. (for Appellant)
Shawn Willis, Esq. (for Respondent)