

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

BRIAN P. COOPER,
Appellant

v.

CASE NO: D-21-242

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellant:

Ernest H. Horn, Esq.
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12 Asylum Street
Mendon, MA 01756

Appearance for Respondent:

Siobhan E. Kelly, Esq.
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Commissioner:

Paul M. Stein

Summary of Decision

The Commission dismissed the appeal of a Massachusetts State Trooper who resigned his position after he was suspended for refusing to comply with the vaccination mandate of Executive Order 595 for lack of subject matter jurisdiction and as untimely.

DECISION ON MOTION TO DISMISS

On December 15, 2021, the Appellant, Brian P. Cooper, appealed to the Civil Service Commission (Commission) following his resignation on November 22, 2021 from the position of Massachusetts Department of State Police (MSP) Trooper, after the MSP denied his request for a religious and / or medical exemption from the vaccination mandate set forth in Executive Order 595. A remote pre-hearing conference was held by this Commission on January 18, 2022. The Appellant also filed a Charge of Discrimination with the Massachusetts Commission Against Discrimination (MCAD), which remains pending.

On January 21, 2022, the MSP filed a "Motion to Dismiss" the appeal for lack of subject matter jurisdiction and as untimely. A remote pre-hearing conference was held by the

Commission on May 17, 2022. Pursuant to the Commission's Procedural Order dated June 30, 2022, the MSP filed a renewed Motion to Dismiss dated August 19, 2022, seeking to dismiss the appeal on essentially the same grounds as the original motion. The Appellant did not file an Opposition to either Motion to Dismiss.

After careful review of the Motion to Dismiss, I conclude that, under the applicable facts and the law, the Appellant's appeal must be dismissed. Claims arising from MSP's denial of the Appellant's request for exemptions from Executive Order 595 and his resignation must be dismissed because they did not arise as a result of discipline imposed by an MSP Trial Board. Even assuming the Commission could take subject matter jurisdiction of an appeal from those actions, the Appellant's appeal must be dismissed in its entirety because it was untimely filed.

For purposes of the decision on this motion, the following relevant facts are adopted as set forth in the Motion to Dismiss.

1. The Appellant Brian Cooper commenced service with the MSP as a uniformed State Trooper in 1999. (*Motion to Dismiss*)

2. On August 19, 2021, Governor Baker issued Executive Order 595 requiring all Executive Branch Employees to be vaccinated against the COVID-19 virus by October 17, 2021. (*Motion to Dismiss, Exhibit A*).

3. On October 8, 2021, the Appellant requested religious and medical exemptions from the vaccine requirement. (*Motion to Dismiss, Exhibit B*)

4. On November 16, 2021, the Appellant received notification that his request for exemptions was denied. (*Motion to Dismiss, Exhibit C*)

5. On November 22, 2021, the Appellant resigned from his position with the MSP. (*Motion to Dismiss, Exhibit D*)

6. The Appellant filed this appeal with the Commission on December 15, 2021.

(Motion to Dismiss; Claim of Appeal)

The MSP's Denial of the Appellant's Request for Exemption from EO 595

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 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. G.L. c. 22C, § 10 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 43.¹

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 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 to the contrary, 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 on December 2, 2021, the Commission must dismiss the appeal as it 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.

¹ 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)

Resignation

Appeals to the Commission from disciplinary actions are governed by G.L. c. 31, §§ 41 to 43. Section 41 provides, in relevant part:

“Except for just cause . . . , a tenured employee shall not be discharged, removed, suspended . . . , laid off, transferred from his position without his written consent . . . , lowered in rank or compensation without his written consent, nor his position be abolished.”

Resignation is not one of the employment actions enumerated in Section 41. A tenured employee who voluntarily resigns from a civil service position has no right to invoke the notice, hearing, and appeal provisions of Sections 41 through 45 of Chapter 31. See generally, Spencer v. Civil Service Comm’n, 479 Mass. 210 (2018).

In addition, the MSP argues that the Commission’s review of the Appellant’s resignation is precluded for the same reasons as an appeal from the MSP’s denial of his requests for exemption – it involves no Trial Board decision from which he may appeal.

Thus, insofar as the Appellant seeks review by the Commission for the purpose of revoking his resignation, the Commission lacks subject matter jurisdiction over such an appeal.

Timeliness

Section 43 of Chapter 31 provides, 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”

Chapter 31, § 42 requires that “complaint[s] . . . be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action.”

The ten-day filing deadlines are jurisdictional and are strictly enforced. *See, e.g., Town of Falmouth v. Civil Service Comm’n*, 64 Mass. App. Ct. 606, 608-609 (2005),

rev'd other grounds, 447 Mass. 814 (2006); McGoldrick v. Boston Police Dep't, 30 MCSR 161 (2017); Poore v. City of Haverhill, 29 MCSR 260 (2016); Stacy v. Department of Developmental Services, 29 MCSR 164 (2016); Volpicelli v. City of Woburn, 22 MCSR 448 (2009); Williamson v. Department of Transitional Assistance, 22 MCSR 436 (2009).

In this case, the Appellant's appeal was filed at the Commission on December 15, 2021. Not counting intervening Saturdays, Sundays and holidays, this was twenty days after he was notified that his requests for exemptions were denied and sixteen days after he resigned. Thus, even if it were determined that the Commission could exercise subject matter jurisdiction over this appeal, the appeal must be dismissed for lack of jurisdiction as untimely.²

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein
Commissioner

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

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

² As the Appellant's appeal must be dismissed, in total, for lack of jurisdiction, the Commission is not required to address the other arguments raised in the MSP's Motion to Dismiss—i.e., that, if the appeal were to proceed to a full hearing, the Commission lacks authority to address questions of constitutional law or claims of discrimination that fall within the purview of the MCAD.

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 to:

Ernest H. Horn, Esq. (for Appellant)

Siobhan E. Kelly, Esq. (for Respondent)