

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JAMES DAWSON,
Appellant

v.

DEPARTMENT OF CORRECTION,
Respondent

CASE NO: D-99-441

Appellant's Attorney:

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Appointing Authority's Attorney:

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Commissioner:

Paul M. Stein

DECISION ON PENDING MOTIONS (EFFECTIVE 6/1/2012)

This appeal was brought before the Civil Service Commission (Commission) by James Dawson, acting pursuant to G.L.c.31, §43, to challenge the decision of the Department of Correction (DOC), which demoted and reassigned him following an alleged excessive use of force on a DOC inmate on or about June 17, 1999. A full evidentiary hearing commenced on April 9, 2001, but was not completed, apparently due to the parties' attempts to reach a settlement. On December 26, 2001, prior to resumption of the hearing or consummation of a settlement, Mr. Dawson died.

The Estate of James Dawson (Estate) moved to be substituted as a party, which motion the DOC opposed and moved for Summary Decision dismissing the appeal. It appears that the Commission did not rule on these motions but, scheduled the matter for further evidentiary hearing in November 2002. Prior to that hearing, the DOC and the

Estate entered into a settlement agreement. On November 14, 2002, pursuant to the mutual agreement of the parties, the Commission dismissed the appeal.

On August 26, 2003, the Commission received an “Appellant’s Motion to Vacate Decision”, filed by the Estate, which asserted that the parties were unable to consummate the terms of the settlement because the Massachusetts State Board of Retirement would not honor the agreement, which required, in material part, a retroactive adjustment to Mr. Dawson’s status for the benefit of his surviving spouse. The DOC did not oppose the Appellant’s Motion to Vacate, as it agreed that the conditions of the settlement had not come to fruition. The DOC argued, however, that the matter was ripe for dismissal for lack of jurisdiction, relying on a prior Commission decision in Sunderland v. Department of Correction, 1 MCSR 129 (1988). The gist of the DOC’s position was that, since Mr. Dawson had died, there was no longer a tenured civil service employee who could be granted reinstatement, and that the Estate lacked standing to seek such a post-humus reinstatement or other relief. The DOC sought a ruling on that contention by “Motion for Reconsideration”.

Thereafter, neither party pressed the matter, however, and the sundry motions remained dormant without action until August 5, 2011, when the Commission received notice from counsel for the Estate, inquiring of the status. At a status conference before the Commission on August 22, 2011, the DOC and counsel for the Estate reported that they both remained interested in seeking to work out a private resolution that would pass muster with the State Board of Retirement. It appears, however, that, despite diligent efforts to that end, as of January 2012, the last report from counsel indicated that a settlement still has not been reached.

In view of the foregoing, the disposition of the pending motions is in order. The Appellant's motions and the DOC's motions present substantially identical issues and concerns, which turn on whether the appeal ought to be revived for further hearing that may be prosecuted by the Estate or whether the appeal should be or must be dismissed following his demise.

The DOC's principal argument asserts that Mr. Dawson's death divested the Commission of jurisdiction, as he ceased to be a tenured civil service employee, and G.L.c.31, §§41-43 restrict jurisdiction of the Commission to hear disciplinary appeals only from tenured employees. Similarly, DOC argues that the Estate is not, and has never been, a tenured employee, and would not have standing to press the appeal for the same reason. The Estate contends that the lost pay differential between the position held by Mr. Dawson and the position to which he was demoted materially affects the benefits received by his surviving spouse and, therefore, the demotion issue is not moot, survives the Appellant's death and ought to be decided on the merits.

The Commission does not appear to have decided whether an Appellant's death divests the Commission of jurisdiction to hear a disciplinary appeal commenced prior to the Appellant's death. None of the authority cited by either party is conclusive or seems persuasive. On the one hand, the Commission is not certain that G.L.c.228, §1, which relates primarily to survival of tort actions, controls the issue here, as the Estate claims. On the other hand, the DOC misconstrues the Commission's 1988 Sunderland Decision as holding that the Commission lacks jurisdiction over a deceased Appellant's disciplinary appeal. The Sunderland appeal was dismissed for mootness "because the Appellant's appeal cannot be perfected without his testimony, the appeal cannot survive

the Appellant's death." 1 MCSR 129. The other authority on which the DOC relies is also inapposite as it relates to reclassification appeals brought under G.L.c30,§49, in which the Appellant had resigned from her position prior to bringing the appeal. Duff v. Department of Mental Health, 12 MCSR 34 (1999). The Commission also has decided that retirement of a tenured employee does not require dismissal of such an appeal brought before the employee retired. See Silvia v. Department of Correction, 20 MCSR 409 (2007). Neither of these situations exactly matches the problem inherent in adjudicating the just cause for discipline of a subsequently deceased employee.

Absent specific statutory or judicial guidance, the Commission concludes that the issue should be decided as a matter of discretion inherent in any decision to reopen a closed appeal. See, e.g., Ung v. City of Lowell, 24 MCSR 567 (2011) (discussing the standards for reopening a closed Commission appeal). The Commission also may 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. 801 CMR 1.01(7)(g)(3). See Iannacchino v. Ford Motor Co. 451 Mass. 623, 635-36, (2008) (in order to survive a motion to dismiss, the "allegations must be enough to raise a right to relief above a speculative level") In addition, a motion for summary decision on any appeal before the Commission, in whole or in part, may be granted pursuant to 801 C.M.R. 1.01(7)(h), if "viewing the evidence in the light most favorable to the non-moving party", the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". To survive a motion for summary decision, the non-moving party must offer "specific facts" to establish "a reasonable hope" to prevail after an evidentiary hearing. Conclusory statements, general denials, and factual allegation not based on personal knowledge are

insufficient to establish a triable issues. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

After careful consideration, the Commission concludes that, as in Sunderland, it is clear that reopening this case would be a futility. There is no “reasonable expectation” that the Estate could produce any percipient witnesses to a 1999 incident who purportedly could offer credible evidence to rebut the DOC’s extensive documentary record that supports the decision to demote Mr. Dawson for a violation of the DOC’s use of force rules and regulations. Rather, the Estate has not raised “above the speculative level” the possibility that, given the particular circumstances of this case, even if the witnesses could be located, there are any such witnesses who would be able to give testimony favorable to the Estate with a sufficiently clear recollection of the events to be credible. The whereabouts of the six percipient DOC witnesses whom the Estate last identified as persons they intended to call is contained in a 2002 request for subpoenas (which was denied). Moreover, based on the investigatory documents presented by the DOC, substantially all of the testimony that those witnesses would be expected to provide would not be favorable to the Estate. In fairness, and in the interest of bringing closure, the Commission should not be required to reinstate this appeal at this time in a speculative effort to attempt to adjudicate a matter of this nature through such patently stale evidence and fruitless inquiry.

Accordingly, for the reasons stated, the Appellant’s Motion to Vacate the Decision is DENIED. The Appellant’s Motion to Substitute the Estate as a Party, and the DOC’s Motions for Summary Decision and Motion for Reconsideration are DENIED AS

MOOT. The Commission will suspend the effective date of this Decision until June 1, 2012, in order to afford the parties a final opportunity to resolve the matter privately, at which time the Commission will deem the appeal finally and irrevocably closed.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on April 19, 2012.

A True Record. Attest:

Commissioner

Notice to:
Kristen A. Zwicker Young Esq. (for Appellant)
Earl Wilson, Esq. (for Appointing Authority)