

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

ERIC DEJESUS,
Appellant
v.

Docket No.: D1-13-227

CITY OF LOWELL,
Respondents

Appearance for Appellant:

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Appearance for Appointing Authority:

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Commissioner:

Cynthia Ittleman¹

DECISION ON MOTION TO DISMISS/MOTION FOR SUMMARY DECISION

On October 18, 2013, the Appellant, Eric DeJesus (“Mr. DeJesus”), pursuant to G.L. c. 31, § 42, filed this appeal with the Civil Service Commission (“Commission”), regarding the decision of the City of Lowell (“City” or “Respondent”) to terminate his employment with the Lowell Fire Department (“Department”).

A pre-hearing conference was held on November 12, 2013. The Respondent filed a Pre-Hearing Conference Memorandum and a Motion to Dismiss/Motion for Summary Decision (“Respondent’s Motion”) on November 12, 2013. Mr. DeJesus filed an opposition to Respondent’s Motion (“Opposition”) on November 26, 2013. The Respondent filed a Reply

¹ The Commission acknowledges the assistance of Law Clerk Julie Muller in the drafting of this decision.

Memorandum in Support of Respondent's Motion ("Reply") on November 27, 2013. The Commission held a hearing on the Respondent's Motion on December 13, 2013. On December 26, 2013, Mr. DeJesus filed a document dated December 24, 2013 stating that Mr. DeJesus was certified as a Firefighter I/II. On January 24, 2014, Mr. DeJesus filed a Supplemental Opposition to the Motion. On January 27, 2014, the Respondent filed an opposition to Mr. DeJesus' December 24, 2013 submission, moving to strike the document therein. In addition, the parties submitted brief factual clarifications. The Respondent's January 27, 2014 motion to strike the December 24, 2013 document submitted by Mr. DeJesus is denied and the document will be given the evidentiary weight it is due.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the arguments presented by the parties, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed.

1. On February 2, 2012, prior to beginning his employment at the Department, Mr. DeJesus signed an agreement entitled, "Requirements of Employment," for the Department that states, in part,

"I further agree that following employment as a Firefighter, I will report for training at the Massachusetts Firefighter Academy when so ordered by the Chief of the Lowell Fire Department. While attending the Fire Academy, I will receive my full pay (42 hours per week) and will report to the Fire Academy for duty. **I understand that continued employment in this Department is contingent upon successful graduation from the Massachusetts Fire Fighting Academy and upon successfully passing the Firefighter Level I and Firefighter Level II Certification examination administered by the Massachusetts Firefighting Academy. I am aware that the final examination from the Massachusetts Firefighting Academy also serves as the Firefighter I and Firefighter II Certification Examination.** (Respondent's Motion, Tab C)(emphasis therein)

The same agreement signed by Mr. DeJesus also states, “I Eric DeJesus, understand that all appointments are probationary for a period of twelve (12) months in which I must demonstrate my fitness for continued employment by the Lowell Fire Department. . . .”

(Respondent’s Motion, Tab B)

2. Mr. DeJesus was appointed to the Department as a full-time firefighter on September 30, 2012. (Appellant’s Opposition; Respondent’s Motion, Tab A) He worked as a firefighter for approximately three months thereafter
3. Firefighters and police officers have a twelve (12) month probationary period. (Administrative Notice of G.L. c. 31, § 61) Therefore, Mr. DeJesus’ probation period ended September 30, 2013, or twelve (12) months after he was appointed on September 30, 2012. (Administrative Notice)
4. Following his September 30, 2012 appointment to the position of firefighter, Mr. DeJesus worked at the Lowell Fire Department for approximately three (3) months.² Thereafter, on or about April 1, 2013, Mr. DeJesus reported for duty to a twelve (12) week recruit training program at the Massachusetts Firefighting Academy (“Academy”), located in Stow, Massachusetts. (Appellant’s Opposition; Respondent’s Motion)
5. During the recruit training program, Mr. DeJesus did not report to Department headquarters for work but attended the Academy full-time for twelve (12) weeks, for which he was paid his usual salary. (Respondent’s Motion)

² The Appellant avers that on September 30, 2012 he was assigned to Ladder 1 and Rescue 1 and, upon his return from training, he was assigned to Ladder 3 and Engine 11, where he worked until his termination on October 9, 2013. (Appellant’s Opposition) The Respondent did not dispute that the Appellant actually worked as a firefighter at the Lowell Fire Department but it averred that the Appellant had not worked the requisite full twelve (12) month probationary period so that, “... he was not a tenured employee at the time of his October 9, 2013 termination.” (Respondent’s Motion, p. 1)

6. Mr. DeJesus, along with the rest of the Academy, took the Firefighter Level I and II certification examination at the end of Academy on June 19, 2013. The Department was notified that Mr. DeJesus did not pass the certification examination shortly thereafter.
(Respondent's Motion)
7. Mr. DeJesus was permitted to take a reexamination the next day, on June 20, 2013. He again failed the certification examination. (Respondent's Motion)
8. The Department permitted Mr. DeJesus a third chance to take the certification examination, this time on September 27, 2013. On or about October 7, 2013, which was beyond Mr. DeJesus' twelve (12) month probationary period, the Department was notified that Mr. DeJesus failed the certification examination for a third time.³
(Respondent's Motion)
9. The Respondent, via Bernard F. Lynch, City Manager, gave Mr. DeJesus notice of termination by letter dated October 9, 2013, nine (9) days after Mr. DeJesus' probationary period ended. (Respondent's Motion, Tab D). This letter states in full,

“As a new recruit, you were made aware that your continued employment with the Lowell Fire Department was contingent upon successful graduation from the Massachusetts Firefighting Academy (MFA) as well as successfully passing the Firefighter Level I and Firefighter Level II certification examinations, administered by the MFA.

You failed to pass the certification examinations on June 19th, June 20th, and again on September 27th of this year. It is therefore necessary to terminate your employment with the City of Lowell Fire Department effective Wednesday October 9, 2013.

³ On November 13, 2013, Mr. DeJesus filed an application to re-take the certification examination. (Affidavit of Appellant in Opposition to Respondent's Motion). He did not fill out the portion of the application that requested the applicant's fire department affiliation because his employment had been terminated. *Id.* A staff person at the Academy completed the fire department affiliation portion of the application, filling in “Lowell,” and therefore, he was allowed to take the certification examination. *Id.* Mr. DeJesus took the certification examination on December 19, 2013 and was informed on December 24, 2013 that he had passed the examination. *Id.* Because Mr. DeJesus was not employed with the Department at the time he took the certification examination for the fourth time, the fact that he passed the certification examination on December 19, 2013, is not relevant to this appeal.

Please return all Fire Department equipment issued to you (turnout coat, bunker pants, boots, helmet, badges, etc.) to the office of the Deputy Chief at the JFK Civic Center as soon as possible.”

10. Since implementing successful training as a condition of employment in 2005, no one in the Lowell Fire Department has been given, or required more than three reexaminations in order to pass the training test. (Supplemental Affidavit of Chief Edward J. Pitta)

11. Mr. DeJesus filed this appeal with the Commission on October 18, 2013. (Appellant’s Opposition; Respondent’s Motion)

DISCUSSION

The Legal Standard for Consideration of a Motion to Dismiss

After the ruling in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007), the Massachusetts Supreme Judicial Court 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). At the Commission, 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).

The Legal Standard for Summary Decision

Section 1.01(7)(h) of the applicable standard adjudication Rules of Practice and Procedure at 801 CMR provides that, “When a Party is of the opinion there is no genuine issue of fact relating

to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the 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). 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. See Catlin v. Board of Registration of Architects, 414 Mass. 1, 7 (1992); Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 782-83 (1980).

Relevant Civil Service Law

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.)(emphasis added)

Appointing authorities have considerable discretion during the probationary period. 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 during twelve month probation 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 G.L. Chapter 31 affords civil service employees a process when they have been disciplined in detailed circumstances. However, section 31 specifically provides, in pertinent part, that,

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).

G.L. c. 31, § 42 further provides that if the specified process is not provided, the tenured employee is to be restored to his employment. It states, in particular, “If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to

restore said person to his employment immediately without loss of compensation or other rights.” Id.

Analysis Regarding Motion to Dismiss

Mr. DeJesus appeals the actions, or inactions of the Respondent pursuant to G.L. c. 31, §§ 42 and 43. The legal standard to be applied in this regard is whether Mr. DeJesus’ allegations are enough to raise a right to relief above the speculative level, based on the assumption that his allegations are true even if doubtful in fact. (*See Bell Atlantic, supra*). It is undisputed that Mr. DeJesus began his employment at the Department on September 30, 2012, he performed the services of a firefighter, and he was terminated on October 9, 2013, or nine (9) days after his twelve (12) month probationary period ended. Critical to this determination is whether the twelve (12) week firefighter Academy training tolled Mr. DeJesus’ probationary period. If the Academy tolled Mr. DeJesus’ probationary period, he was a probationary employee when he was terminated and he was not entitled to an appointing authority hearing before being terminated and the Commission would lack jurisdiction to hear the appeal. If the Academy did not toll Mr. DeJesus’ probationary period, he was a tenured civil service employee when he was terminated on October 9, 2013 and he was entitled to the procedures required by G.L. c. 31, § 41,⁴ including an appointing authority hearing prior to termination. For the following reasons, Mr. DeJesus’ probationary period was not tolled for the twelve (12) week Academy and, therefore, he is a tenured civil service employee.

⁴ G.L. c. 31, §41 states in pertinent part, “Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. . . . Under other parts of § 41, a tenured employee may be disciplined for less than five (5) days prior to a hearing. Id.

While both firefighters and police have a twelve (12) month probationary period under civil service law, instead of the six (6) month period for most other civil service employees, they are treated differently for some purposes by law. Under G.L. c. 41 §96B,⁵ candidates who are appointed to a full time police officer position must complete a training course before he or she exercises any police powers. While in training the appointed person is designated a “student officer” and is exempted from the provisions of Mass. General Laws Chapter 31. Id. Therefore, for police officers, the probationary period is tolled until they have completed training. There is no similar statutory provision for firefighters.

The Respondent asserts that Police Comm’r of Bos. v. Cecil, 431 Mass. 410 (2000) requires the Commission to find that Mr. DeJesus’ probationary period was tolled. In Cecil, a police officer was fired after his twelve (12) month probationary period expired. The Court held that Mr. Cecil’s probationary period had tolled, thereby extending the probationary period, because Mr. Cecil was on administrative leave during his probationary period while being investigated for suspected domestic violence. The Supreme Judicial Court said further that even though administrative leave is not addressed statutorily, Mr. Cecil was not performing his duties while he was on paid administrative leave during the investigation. Therefore, the Court found that Mr. Cecil’s probationary period was tolled as a result of the paid administrative leave. This case is not dispositive here. First, since Mr. DeJesus was a firefighter, not a police officer, G.L. c. 41, § 96B is not applicable. Specifically, a firefighter is not statutorily barred from performing

⁵ G.L. c. 41, § 96B states, in pertinent part, “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. . . . Id. (emphasis added).

the duties of his position until he completes training. In fact, in this case, Mr. DeJesus performed the functions of a firefighter for approximately three (3) months prior to being sent to the academy and, apparently, additional time after the academy. The material facts here are not in dispute. Based on the applicable law and the facts, Mr. DeJesus has raised a right to relief above the speculative level such that the Respondent's Motion, as a motion to dismiss, is denied.

Analysis Regarding Motion for Summary Decision

For a Motion for Summary Decision to succeed, the moving party must prove that there are no genuine issues of material fact and that summary decision is warranted as a matter of law. There are no disputes regarding genuine issues of material facts here. Unlike probationary police officers, there is no statutory requirement that probationary firefighters complete training before they can begin actually performing their jobs. Absent such a requirement, Mr. DeJesus' probationary period was not tolled. As a result, the Respondent terminated Mr. DeJesus after his probationary period had ended and it failed to conduct a hearing prior to terminating his employment, as required by civil service law. This case is distinguishable from Carriveau v. City of Chicopee, 27 MCSR 192 (2014) in which the City terminated Mr. Carriveau during his probationary period based on his performance at the firefighter Academy.

The Respondent argues that the ruling in Mello v. Mayor of Fall River, 22 Mass.App.Ct. 974 (1986) is applicable and warrants a different conclusion than is reached here. In that case, Ms. Mello was terminated even though she was a tenured civil service employee because she knowingly failed to comply with a city ordinance that imposed a residency requirement on employees. Id. at 975. The Court held in that case that because Ms. Mello was well aware of the local law requiring that she reside in Fall River and she still failed to comply with the law, a hearing prior to her termination was not warranted and would be "stultifying." Id. at 976. Mr.

DeJesus' case is distinguishable from Mello in that the residency requirement referenced in Mello was a matter of law. In the instant case, Mr. DeJesus was terminated for having repeatedly failed the firefighter training exam, not for violating a law. Since the appellant in Mello failed to comply with the law, the Court upheld Fall River's decision to terminate her employment.

There are no genuine issues of material fact in the instant case. However, G.L. c. 31, § 42 provides that when, as here, an appointing authority fails to follow the requirements of G.L. c. 31, § 41, including providing a hearing to a tenured employee prior to terminating his employment, and the tenured employee is prejudiced thereby, " ... the Commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights." G.L. c. 31, § 42. Mr. DeJesus' rights were prejudiced when the Respondent terminated his employment without conducting a hearing wherein the parties could have addressed the time period within which it was necessary for the Appellant to pass the exams under the parties' reported agreement, and whether and what was the practice of the Lowell Fire Department and/or the Fire Academy that determined the number of times a firefighter is allowed to re-take the Firefighter I and II exams and in what period of time. For these reasons, the Respondent's Motion, as a motion for summary decision, is denied.

Conclusion

Based on the facts and the law as stated herein, the Respondent's Motion is ***denied*** such that the Respondent shall restore Mr. DeJesus to his employment immediately without loss of compensation or other rights, and it shall conduct a hearing according to applicable civil service law to determine if it has just cause to discipline the Appellant by terminating his employment for taking the Firefighter I and II exams three times and not passing them prior to the end of his

probation period. This decision does not preclude the Respondent from requiring Mr. DeJesus to take and pass the appropriate firefighter training exam within a fixed period of time. If the Lowell Fire Department had required newly appointed firefighters to successfully complete training prior to performing the duties of a firefighter, a different conclusion may have been reached but such is not the case.

Civil Service Commission

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman - YES; Ittleman - YES, McDowell - YES and Stein - NO, Commissioners) on October 16, 2014.
A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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.

Notice:

Paul T. Hynes, Esq. (for Appellant)

Gina M. Atwood, Esq. (for Appointing Authority)

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DISSENT OF COMMISSIONER STEIN

I respectfully dissent. In my opinion, the Commission lacks jurisdiction of this appeal. The Appellant had not completed his probationary period prior to his termination. I do not believe that the undisputed evidence proved that the Appellant actually performed the duties of a firefighter for a period of twelve months prior to his termination. I do not read the law to require that the City count the time the Appellant spent in training as performing the duties of a firefighter and do not find sufficient evidence to establish that he otherwise performed those duties for a period of at least twelve months. I would dismiss the appeal for lack of jurisdiction.