COMMONWEALTH OF MASSACHUSETTS

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

NATHAN DEJONG,
Appellant

v. D1-22-059

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellant: Ernest H. Horn, Esq.
12 Asylum Street
Mendon, MA 01756

Appearance for Respondent: Siobhan E. Kelly, Esq.
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Commissioner: Christopher C. Bowman

SUMMARY OF COMMISSION ORDER[1]

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 . . . as a condition of continuing employment." Since the Appellant has also filed a discrimination complaint with the Massachusetts Commission Against Discrimination, 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, entered in response to a motion in limine by the State Police, provides a framework for the issues to be considered.

[1] The fact pattern of this case is substantially similar to that of eight others, for which the Commission issued identical decisions on February 23, 2023: Cila v. State Police, D1-21-249; MacDonald v. State Police, D1-22-013; Mace v. State Police, D1-22-001; McClure v. State Police, D1-22-019; Parker v. State Police, D1-21-251; Rossini v. State Police, D1-22-060; Staback v. State Police, D1-22-016; and Ware v. State Police, D1-22-027.

ORDER OF DISMISSAL WITH FUTURE EFFECTIVE DATE

Procedural Background

On April 14, 2022, the Appellant, Nathan DeJong, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of State Police to terminate him from the position of Trooper. The termination was for failure to comply with Executive Order 595 (EO 595), which required all executive department employees to demonstrate that they had received COVID-19 vaccination (and would maintain "full" COVID-19 vaccination) as a condition of continuing employment.

On May 13, 2022, Commission General Counsel Robert Quinan and I held a remote pre-hearing conference, which was attended by the Appellant, his counsel, and counsel for the State Police. 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.

Executive Order 595

EO 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 . . . ." EO 595 required the Commonwealth's Human Resources Division (HRD) to develop a policy to implement this mandate, with said policy including the following elements relevant to this appeal:

- 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;
- 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
>
> - 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.

EO 595, pp. 2-3.

On September 22, 2021, the State Police issued Superintendent's Memo 21-SM-14. The memo, referring to EO 595, states in relevant part: "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 first paragraph of the memo continues: "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 four, the 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). Relevant to this appeal are four provisions of the HRD Policy, outlined below.

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 "General Provisions," the HRD Policy states: "It is the Executive Department policy that all employees demonstrate that they have received COVID-19 vaccination by October 17, 2021." The Policy further states: "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:

> [T]he 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) In paragraph 6 of "Procedures and Instructions," the HRD Policy states:

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

Facts Underlying the Instant Appeal

1. The Appellant was appointed by the State Police as a Trooper on August 14, 2017.
2. On October 7, 2021, the Appellant requested a religious exemption from EO 595.
3. The Appellant was notified on November 12, 2021 that his request for a religious exemption had been denied.
4. The State Police informed the Appellant that he had three days to become in compliance with EO 595 or resign. If the Appellant did not exercise either option by November 17, 2021, the State Police would initiate an internal affairs investigation against him.
5. The Appellant did not comply with EO 595 or resign by November 17, 2021.
6. Accordingly, on November 19, 2021, the State Police charged the Appellant with insubordination and unsatisfactory performance.
7. The same day, the State Police initiated an internal investigation against the Appellant for his noncompliance with EO 595 and Superintendent's Memo 21-SM-14.

8. The State Police also held a duty status hearing on November 19, 2021, and placed the Appellant on indefinite suspension without pay.
9. The State Police conducted three separate Trial Boards on December 10, 2021; January 10, 2022; and February 14, 2022 to consider, respectively, whether the Appellant should be suspended for five days; suspended for ten days; and then terminated.
10. The State Police notified the Appellant on December 16, 2021; January 18, 2022; and April 8, 2022 that the Colonel had accepted and imposed the discipline recommended by the Trial Boards.[2]
11. On April 14, 2022, the Appellant filed a timely appeal with the Commission to contest his termination from the State Police. The Appellant did not appeal any of his suspensions and those disciplinary matters are not before the Commission.
12. The Appellant has no prior discipline in his employment with the State Police.
13. On February 23, 2022, the Appellant filed a complaint with the Massachusetts Commission Against Discrimination (MCAD). The complaint alleges discrimination based on religion, in violation of G.L. c. 151B, § 4 and Title VII of the Civil Rights Act of 1964.
14. On May 20, 2022, MCAD notified the Appellant that it had selected his complaint, along with others filed by similarly situated individuals, for "expedited investigation."

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[2] 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 the Commission or MCAD), the Colonel should consider removing this designation forthwith.

15. On May 23, 2022, the State Police filed a "Consolidated Motion for the Commission to Hold Appeals in Abeyance Pending Outcome of Complaints Before the Massachusetts Commission Against Discrimination." This global motion to stay relates to the instant appeal and those of several other State Troopers, involving similar claims, in which the appellants also filed MCAD complaints (see footnote 1, *supra*).
16. I issued a Procedural Order on June 28, 2022, allowing the State Police to file a motion in limine and for the Appellant to file a reply, after which the Commission would issue appropriate rulings.

Respondent's Argument

In its motion in limine, the State Police argues three points:

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 suspension imposed following a duty status hearing, such 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 EO 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, EO 595 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 the Appellant's response to the State Police's motion in limine, he presents three counterarguments:

1) The Commission may adjudicate the Appellant's civil service appeal as it relates to discrimination.
2) The Commission has jurisdiction to review the suspension imposed by the Duty Status Board.
3) The Commission may consider constitutional questions.

Analysis

1. <u>The MCAD complaint should be adjudicated first</u>.

The State Police would also seek to stay this appeal until the MCAD complaint has been adjudicated. It is undisputed that the Appellant has a complaint *pending* at MCAD, the agency statutorily charged with determining whether the State Police violated state and federal anti-discrimination laws, including through its denial of the Appellant's request for a religious exemption from receiving the COVID vaccine. I concur with the State Police that it would be prudent to allow MCAD to rule on the Appellant's discrimination claim(s) prior to proceeding with a full hearing before the Civil Service Commission.[3]

For that reason, the Appellant's appeal before the Civil Service Commission should be *dismissed nisi*, to become effective twenty-one days after MCAD issues a decision regarding the

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[3] 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 the 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 [Chapter 151B] issue is authoritatively put to rest . . . ." *Id.* at 416, n.7 (citation omitted).

Appellant's complaint.[4] Upon the issuance of MCAD's final decision, the Commission will consider a Motion to Revoke this Order of Dismissal Nisi, to be filed no later than twenty days after the issuance of MCAD's final decision. 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, twenty-one days after the issuance of MCAD's final decision regarding the Appellant's G.L. c. 151B claim(s). Should the Appellant seek to revoke this dismissal at that time, the Commission will weigh MCAD's decision appropriately while conducting further proceedings on the Appellant's just-cause appeal, 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, 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.

The Appellant has not appealed any of his suspensions to the Commission, so no discussion is warranted on this point. The only matter before the Commission in the instant matter is the Appellant's termination from the State Police.

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

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[4] The Commission recommends that the Appellant inform MCAD what his Chapter 31 claims are, so that Chapter 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 [Appellant's Chapter 31 claims] should anything prevent a prompt [MCAD] determination." See *id*. at 413 (citation omitted).

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 Board*, 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 supplies "an appropriate record for the Superior Court to consider on appeal in determining 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)."[5] *Id.*

[5] The Supreme Court has repeatedly observed that "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *England*, 375 U.S. at 416-17, quoting *Townsend v. Sain*, 372 U.S. 293, 312 (1961).

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 EO 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 constitutionality of EO 595 is closely intertwined with the facts of this specific appeal, as EO 595 triggered Superintendent's Memo 21-SM-14 (which ordered compliance with EO 595), and is the primary basis for the discipline against the Appellant. The Appellant's arguments imply that but for EO 595, he would continue to be employed as a State Trooper and this dispute would not exist. Whether EO 595 and the religious exemption process was constitutional as written, ordered, and/or imposed is inescapably intertwined with the facts of the Appellant's argument that the State Police did not have just cause to terminate him.

At this time, it would be a mistake to preclude 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. See G.L. c. 31, § 1. The State Police does not cite, nor is the Commission aware of, any Commission proceeding regarding a termination in

which 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 termination was consistent with basic merit (inclusive of constitutional) principles. In that case, the Commission's role would be to make the factual findings necessary to address the constitutional question, providing the Superior Court with a record to decide on appeal whether the Commission's determinations comply with constitutional provisions. See *Doe*, 488 Mass. at 20.

The parties are undoubtedly aware of the steep climb involved in challenging EO 595 on constitutional grounds.[6] Dismissing a complaint filed by several tenured civil service employees challenging the constitutionality of EO 595, the Massachusetts federal district court recently declared that under *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), it has long been settled that compulsory vaccination is within the police power of a state. See *Massachusetts Correction Officers Federated Union v. Baker*, No. CV 21-11599-TSH, 2022 WL 4329680, at *4 (D. Mass. Sept. 19, 2022), citing *Zucht v. King*, 260 U.S. 174, 176 (1922). The court concluded that "EO 595 is rationally related to the legitimate government interest in stemming the spread of COVD-19, and the vaccines are a safe and effective way to prevent the spread of COVID-19. It is also, 'unquestionably a compelling interest.'" *Id.*, quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020).

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[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).

Likewise, in *Brox v. Hole*, the federal district court denied the plaintiff employees' renewed motion for a preliminary injunction against a public ferry authority's vaccination mandate. See 590 F. Supp. 3d 359 (D. Mass. 2022). Judge Stearns explained:

> The court has no doubt that the [vaccination mandate] has a "real and substantial relation" to public health and safety and is not a "palpable invasion of [plaintiffs'] rights." . . . "Stemming the spread of COVID-19 is unquestionably a compelling interest." 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. . . . Rather, the [P]olicy coerces employees to be vaccinated but does not force them." Because the Policy does not violate any of plaintiffs' fundamental rights under the Fourteenth Amendment, plaintiffs' claim cannot succeed.

Id. at 369 (citations omitted), first quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905), then quoting *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020), and then quoting *Local 589, Amalgamated Transit Unit v. Mass. Bay Transp. Auth.*, 2021 WL 6210665, at *6 (Mass. Super. Dec. 22, 2021).

Conclusion

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 twenty-one 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 twenty 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, exactly twenty-one 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 vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney and Tivnan, Commissioners [Stein – Absent]) on February 9, 2023.

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.

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:
Ernest H. Horn, Esq. (for Appellant)
Thomas J. O'Loughlin, Esq. (for Appellant)
Siobhan E. Kelly, Esq. (for Respondent)

[7] I note 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.