

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

RUSSELL A. FIORE,
Appellant,

v.

CASE NO: D1-13-220

**MASSACHUSETTS STATE
POLICE,**
Respondent,

Appearance for Appellant:

Russell A. Fiore, Pro Se

Appearance for Respondent:

Michael B. Halpin, Esq.
Chief Legal Counsel
Massachusetts State Police
470 Worcester Road
Framingham, MA 01702

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Russell A. Fiore, appeals to the Civil Service Commission (Commission), pursuant to M.G.L.c.22C,§13 and M.G.L.c.31,§41-45, claiming to be aggrieved by the decision of the Massachusetts State Police (MSP), which has refused to reinstate him as a MSP State Trooper. The MSP filed a Motion to Dismiss the appeal on the grounds that the Commission lacked statutory jurisdiction over the matter, which the Appellant opposed. A hearing of the Motion to Dismiss was held by the Commission on October 22, 2013. The Commission received an additional exhibit from the MSP (marked Resp.P.H.Exh.H) on February 6, 2014.

FINDINGS OF FACT

Giving appropriate weight to the submission and argument of the parties, I find the following material facts to be undisputed:

1. The Appellant, Russell A. Fiore, became a State Trooper in December 1986 and served in that position until October 2001. (*Claim of Appeal; Appellant's Pre-Hearing Memorandum; Appellant's Memorandum of Law*)

2. As a result of injuries suffered on July 25, 2000, the MSP Surgeon recommended that Tpr. Fiore be retired involuntarily. (*Appellant's Pre-Hearing Memo; Appellant's Memo of Law*)

3. On or about June 17, 2001, Tpr. Fiore requested a disability retirement from the MSP. (*App.P.H.Exh.J [Letter from Tpr Fiore dated 6/17/2010]*)

4. Tpr. Fiore was retired on accidental disability effective October 16, 2001. (*MSP Motion [Exh.C]; Resp.P.H.Exh.H*)

5. On October 18, 2001, a MSP Trial Board issued Findings and Recommendations regarding Tpr. Fiore, finding him Guilty of three charges of misconduct and recommending his termination. (*MSP Motion [Exh.B]*)

6. By Personnel Order No 01PER422 dated October 22, 2001, Tpr. Fiore was Honorably Discharged by reason of retirement. (*Appellant's Memo of Law [Exh.B]*)

7. By letter dated October 24, 2012, the MSP notified Mr. Fiore the Public Employees Retirement Administration Commission (PERAC) determined that "you are able to perform the essential duties of the job from which you retired. . . . Accordingly, we hereby acknowledge your pursuit of Restoration to Service under M.G.L.c.22C and c.32." (*Appellant's Memo of Law[Exh.G]*)

8. Mr. Fiore thereafter proceeded to complete a background investigation and physical and psychological testing that was required to qualify him for appointment to the State Police Academy with the 81st Recruit Training Troop (RTT) and complete the necessary retraining to obtain certification for reinstatement as a Massachusetts State Police Trooper. (*MPS Motion[Exh.A]; Appellant's Memo of Law[Exhs.A, D, E & G]*)

9. On June 20, 2013, MSP wrote to Mr. Fiore to inform him that he was not approved for reinstatement. The letter stated:

On 6/6/2013 a State Police Review Board was convened at General Headquarters in Framingham to assess your candidacy for the 81st RTT. You have been eliminated from further appointment because you resigned from the Department of State Police with charges pending. By this action, you may not be reinstated pursuant to M.G.L.c.22C, §13.

In addition to the aforementioned statutory preclusion:

Candidate's license to carry is suspended.

Candidate was the subject of numerous complaints while a state trooper prior to retirement.

Candidate received unanimous recommendation for termination from a trial board in 2001.

After considering all background information you are being eliminated from further consideration for appointment to the 81st RTT. The reasons supporting this decision preclude you from all future appointment.

(*MSP Motion [Exh.G]; Appellant's Memo of Law [Exh.H]*)

10. On September 9, 2013, Mr. Fiore wrote to Lt. Col. John F. Flynn, MSP Chief Administrative Officer, acknowledging receipt of the June 20, 2013 letter and requesting clarification about the basis for the decision. (*Appellant's Memo of Law[Exh.H]*)

11. On September 11, 2013, Lt. Col. Flynn responded with the information Mr. Fiore had requested. (*Appellant's Memo of Law[Exhs. H, I, I-1 & I-2]*)

12. On September 30, 2013, Mr. Fiore filed his present appeal with the Commission. (*Claim of Appeal*)

CONCLUSION

The party moving for summary disposition pursuant to 801 C.M.R. 1.01(7)(g)(3) or (h) in an appeal before the Commission is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., if, “viewing the evidence in the light most favorable to the non-moving party [i.e. Mr. Fiore], the MSP has presented substantial and credible evidence that Mr. Fiore has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that he has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

Specifically, this motion to dismiss must be allowed unless Mr. Fiore raises “above the speculative level” sufficient facts “plausibly suggesting” that the Commission has statutory jurisdiction and the appeal was timely under applicable civil service law and rules. See generally Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss. cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

The Commission’s jurisdiction to hear disciplinary appeals is limited by statute. The exclusive statutory authority that empowers the Commission to hear appeals from discipline imposed on uniformed members of the MSP (who are not otherwise generally subject to civil service law) is governed by G.L.c.22C,§13.

Prior to May 13, 2002, G.L.c.22C,§13 provided that appeals from such disciplinary decisions were to be taken to the Boston Municipal Court. See St.1991, c.412,§22, Amended by St.2002, c.43. effective May 13, 2002. The statute was amended to grant the

right of appeal to the Commission from findings of a trial board that sustain charges preferred against the officer. Id. Chapter 22C, §13 appeals to the Commission are subject to the procedures for appeals by tenured civil service employees set forth in M.G.L.c.31, §§41 through 45, which require, among other things, that a person aggrieved by a decision of an appointing authority disciplining him or discharging him from employment “shall, within ten days after receiving written notice of such decision, appeal in writing to the commission”

A sworn member of the MSP who has been retired for disability pursuant to Chapter 32 is given priority for reinstatement to duty upon a determination that the officer is fit for duty, but such member must “obtain the prior written certification by the colonel” and “shall not return to work in such position if such member does not meet the appointment standards of said department as set forth in section 14 of chapter 22C, regarding criminal misconduct. In addition, a member who has more than one year break in service must “successfully pass a background investigation, drug testing, applicable physical fitness testing, psychological testing and complete retraining as determined by the colonel.. A member who is denied certification to return to work may appeal the denial to the justice of the Superior Court who may “direct that a position be made available to the petitioner if he finds that there was no reasonable ground for refusing such certification and that the petitioner was not prohibited by the hiring standards from [return to duty.]” G.L.c.22C, §24A. In addition, Section 13 of Chapter 22C prohibits the colonel from reinstating any officer who was dismissed from the force after a trial board or who “resigns while charges . . . are pending.”

In view of the Commission's limited scope of review over MSP officers, and the undisputed facts of this case, Mr. Fiore plainly cannot establish any basis upon which the Commission may accept jurisdiction over his present appeal.

First, insofar as Mr. Fiore purports to complain about the 2013 refusal to certify his return to duty, G.L.c.22C,§24A plainly prescribes that the proper forum in which to challenge that action is the Superior Court. The Commission lacks jurisdiction to hear an appeal from such denial. While Mr. Fiore's claim does appear, at least in part, to challenge the validity of the MSP's legal contention that his retirement represented a "resignation while charges were pending" within the meaning of G.L.c.22C,§13, the jurisdiction to adjudicate the validity of that claim, along with his challenge to the other grounds for MSP's denial of certification, are all matters that, by virtue of the provisions of G.L.c.22C,§24A are within the exclusive purview of the Superior Court.

Second any contention that Mr. Fiore has a right of appeal to the Commission pursuant to G.L.c.22C,§13 founders for at least two reasons. The Commission lacks jurisdiction to hear an appeal from the October 18, 2001 trial board findings because: (1) if any appeal from those findings was proper at the time, which is not entirely certain, the proper forum for appeal then would have been to the Boston Municipal Court, not the Commission; and (2) even if 2002 amendment to Section 13 were to be retroactively applied to permit the Commission to accept an appeal from a 2001 disciplinary order, the Commission has been clear that a member's retirement that is effective prior to imposition of any discipline, negates the right of appeal to the Commission, even if such effective date is retroactively established. See Bishop v. Department of State Police, 23 MCSR 613 (2010) (backdated retirement date); Gray v. Department of State Police, 21

MCSR 332 (2008) (back-dated retirement date) Raneo-Wilson v. Department of State Police, 21 MCSR 225 (2008) (pre-amendment discipline); Grover v. Department of State Police, 21 MCSR 153 (2008) (prior retirement); Sheehan v. Town of Hudson, 19 MCSR 15, 17 (2006) (retroactive retirement date); cf. Silva v. Department of Correction, 20 MCSR 409 (2007) (subsequent retirement distinguished)

Third, viewing the facts in a light most favorable to Mr. Fiore, for purposes of civil service law, the latest date by which he was on notice that his civil service rights had been violated was September 9, 2013, the date on which he acknowledged receipt of the MSP's June 20, 2013 letter informing his that he was denied reinstatement. Mr. Fiore's appeal to the Commission was filed on September 30, 2013, twenty-one days later. The failure to appeal to the Commission within the statutory ten day time period is jurisdictional, akin to a statute of limitations, and cannot be administratively expanded by the Commission. See Town of Falmouth v. Civil Service Comm'n, 441 Mass. 814, 822-23 (2006); Flynn v. Attleboro, 23 MCSR 279 (2010); Mancuso v. City of Waltham, 22 MCSR 554 (2009); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); Novia v. City of Boston, 20 MCSR 639 (2007); Maurice v. Massachusetts Dep't of Mental Health, 19 MCSR 328 (2006); Konikowski v. Department of Corrections, 10 MCSR 79 (1997); Springer v. Town of Saugus, 8 MCSR 154 (1995).

Accordingly, for the reasons stated above, the MSP's Motion to Dismiss is hereby, allowed, and the appeal of the Appellant, Russell A. Fiore, is hereby, ***dismissed***.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on February 20, 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)(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 (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 to:

Russell A Fiore (Appellant)

Michael B. Halpin, Esq. (for Respondent)