COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
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RONALD GARDNER,
Appellant

v. D1-21-236

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant: Scott Lathrop, Esq.
176 Fitchburg Road
Townsend, MA 01469-1261

Appearance for Respondent: Carol Colby, Esq.
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Department of Correction
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Commissioner: Christopher C. Bowman

SUMMARY OF COMMISSION ORDER[1]

The Appellant filed an appeal with the Civil Service Commission (Commission) contesting the decision of the Department of Correction (DOC) to terminate him as a DOC Captain 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." Because the Appellant has also filed a discrimination complaint with the Massachusetts Commission Against Discrimination (MCAD), the Commission is dismissing this appeal until the MCAD has issued a final decision on the Appellant's complaint. Should the Appellant wish to re-open his appeal with the Commission at that time, this Order, entered in response to a motion in limine by DOC, provides a framework for the issues to be considered.

[1] The fact pattern of this case is similar, but not identical, to that of *Barbosa v. Department of State Police*, D1-22-008 and *McLaine v. Department of State Police*, D1-22-022, in which the Commission issued decisions - on October 20, 2022 and December 15, 2022 respectively.

Procedural Background

On December 7, 2021, the Appellant, Ronald Gardner (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to suspend and terminate him from DOC. The Appellant, who began his employment with DOC on January 29, 2006, was serving in the non-civil service position of Program Manager VIII at the time of his termination, but he had civil service permanency in the title of DOC Captain.

On January 18, 2022, Commission General Counsel Robert Quinan and I held a remote pre-hearing conference which was attended by the Appellant and counsel for DOC. Subsequent to the pre-hearing conference, the Appellant retained counsel. Based on the information provided by the parties, the following, unless otherwise noted, is not in dispute.

Undisputed

1. On August 19, 2021, the governor issued Executive Order 595 (EO 595), ordering 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 state's Human Resources Division (HRD) to develop a policy to implement this mandate with said policy to include the following elements that are 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.

2. On October 1, 2021, the Appellant submitted a "COVID-19 Vaccination Religious Exemption Form" to Director Carol Thomas at DOC. Asked to "describe the religious principles that guide your objection to immunization" and to "indicate how your sincerely held religious belief conflicts with the COVID-10 vaccinate mandate," the Appellant replied with a two-page statement outlining what he considers to be his religious objections to the COVID-19 immunization.

3. On October 15, 2021, HRD issued a "COVID 19 Vaccination Verification Policy for Executive Department Agencies" (Vaccination Verification Policy). Relevant to this appeal are four provisions of the Vaccination Verification Policy, outlined below.

   - 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.

   - Under "General Provisions," the Vaccination Verification Policy states: "It is the Executive Department policy that all employees demonstrate that they have received COVID-19 vaccination by October 17, 2021." It 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 Procedural Order, states in relevant part that:

> the 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.

- In Paragraph 6 of "Procedures and Instructions", the Vaccination Verification Policy states, in its entirety:

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

- 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."

4. On November 4, 2021, DOC informed the Appellant of the following:

> After careful consideration of your request and the responses provided in the interactive process, we have denied your request for religious exemption. The

> documentation submitted in support of your sincerely held religious belief, articulates a philosophical viewpoint and not a religious belief. Therefore, you have not established that taking the vaccine would conflict with your stated religious beliefs, practices, or observances.
>
> For the reasons stated above, your request for an exemption has been denied. Notwithstanding the denial of your exemption, the Department would be unable to provide you an accommodation. The Department's obligation to protect the safety of your colleagues, prisoners, and members of the public during this ongoing and serious global pandemic, would require finding you a new position within the Department. This would be an undue hardship on the ability of the Department of Correction to manage its operations, Under Executive Order 595 you must be vaccinated by October 17, 2021, or you will be subject to progressive discipline and/or termination from your current position as an employee of the Commonwealth.

5. In a memo dated November 8, 2021, DOC notified the Appellant that he was being suspended for five days based on his failure to comply with EO 595.

6. Also on November 8, 2021, DOC notified the Appellant via letter that a hearing was scheduled for November 15, 2021,

> to determine whether, as of the date of the hearing, you are compliant with Executive Order 595 and the Vaccination Verification Policy. During this hearing you will be given the opportunity to address your compliance status. This hearing will serve as the basis for all future contemplated discipline related to non-compliance, including both a 10-day suspension and termination following the suspension.

7. On November 15, 2021, attorney Annabelle Cisternelli conducted a DOC hearing to determine if the Appellant was "compliant with Executive Order 595 . . . and the Vaccination Verification Policy." The hearing was attended by DOC counsel and the Appellant.

8. The Appellant testified at the above-referenced DOC hearing.

9. In a memorandum to DOC Commissioner Carol Mici dated November 29, 2021, DOC's Hearing Officer wrote in relevant part that:

> Deputy Superintendent Gardner failed to submit the requisite Self-Attestation form on or prior to October 17, 2021. Accordingly, he was found to be non-compliant with EO 595 and the VVP. As a result, he was issued a five-day

suspension on October 8, 2021. On the same date, he was instructed that there would be a pre-disciplinary hearing on his first scheduled work day immediately following his suspension, to determine whether he had become compliant as of the date of the hearing.

At the November 15th Commissioner's Hearing, Deputy Superintendent Gardner stated that he is not vaccinated and will not be getting the vaccine. He further added that the religious exemption process is ambiguous and not sincere. Furthermore, he indicated that according to the Vaccination Verification Policy (VVP), the Diversity Officer/ADA Coordinator should be hearing these exemption requests. Deputy Superintendent Gardner argued that the Department is not following their own VVP and that a ghost panel is conducting the reviews of these exemptions. On October 20th, he had a phone panel interview, three days after the vaccination deadline on October 17, 2021. He stated that he was permitted to work in his capacity as Deputy Superintendent even though he was unvaccinated for 13 days after the October 17, 2021 vaccination and self-satisfaction deadline. He argued that he should not have been treated any differently than employees who were immediately suspended, whereas his five (5) day suspension was imposed on November 8, 2021.

On October 1, 2021, Deputy Superintendent Gardner submitted a religious exemption and was interviewed by a panel over the phone on October 20, 2021, three (3) days after the October 17th vaccinated and self-attestation deadline. On November 4th he was emailed his unsigned religious exemption denial letter, which stated that it was denied for philosophical reasons. He noted that his religious exemption request and that of his wife, [], were identical and yet their denial letters stated two different reasons for the denial. He stated that it was telling on how the process is not being handled and reviewed properly. Deputy Superintendent Gardner argued that the religious exemption/reasonable accommodation process should be individual and interactive as required by the Civil Rights Act, Title 7.

Deputy Superintendent Gardner also stated that other people with access to inmates such as visitors and vendors can test on site and if no testing is available must wear masks. Specifically, he cited that on Mondays at MCI- Concord, the visitors of inmates in protected custody don't get tested because there aren't testing options for visitors during that time. As a 16 year veteran of the Department who has risen through the ranks as an SSI, Investigator and a confidential employee within the management team of Concord, he feels that his beliefs should not have been questioned and could have reasonably been accommodated particularly because he is not a threat to inmates. Deputy Superintendent Gardner stated that his feelings regarding the vaccine have not changed and have only gotten stronger.

Conclusion

> As of the date of the hearing, Deputy Superintendent Gardner was not vaccinated and indicated that he would not receive a vaccine. Accordingly, he is not compliant with EO 595 and the VVP.

10. On December 1, 2021, DOC notified the Appellant that he was suspended for ten days based on his failure to comply with EO 595 and the Vaccination Verification Policy.
11. On December 16, 2021, DOC notified the Appellant was notified that he was terminated based on his failure to comply with EO 595 and the Vaccination Verification Policy.
12. On December 7, 2021, the Appellant filed a timely appeal with the Commission.
13. The Appellant has no prior discipline.
14. The Appellant has also filed an appeal with the Massachusetts Commission Against Discrimination (MCAD) alleging discrimination based on religion, in violation of G.L. c. 151B, § 4, paragraphs 1, 1A, 4, and 4A, as well as Title VII of the Civil Rights Act of 1964.

Issuance of Procedural Order

The Appellant had sought relief from MCAD at the time of the pre-hearing and the parties had divergent points of view on what issues in this appeal could be adjudicated by the Commission in a full evidentiary hearing. For that reason, I issued a Procedural Order on June 28, 2022 allowing DOC to file a motion in limine and for the Appellant to file a reply, after which the Commission would issue appropriate rulings.

DOC's Argument

In its motion in limine, DOC 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) 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.
3) Moreover, according to DOC, EO 595 is not relevant to the question of whether DOC had just cause for terminating the Appellant, as DOC had no discretion with respect to the application of EO 595 to its employees.

Appellant's Argument

In the Appellant's response to the DOC's motion in limine, he presents two principal counterarguments:

1) The Commission can adjudicate the Appellant's civil service appeal as it relates to discrimination.
2) The Commission may consider constitutional questions.

Analysis

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

The parties have divergent views regarding whether—and if so, how—an act of alleged discrimination can be considered by the Commission as part of deciding whether there was just cause to terminate his employment. It is undisputed, however, that the Appellant has a complaint *pending* at MCAD, the agency statutorily charged with determining whether DOC 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. It would be more 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.[2] *See Town of Brookline v. Alston*, 487 Mass. 278, 294-295 (2021).

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 Appellant's complaint.[3] Upon the issuance of MCAD's final decision, 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 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).

2. 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

[2] 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 [G.L. c. 151B] issue is authoritatively put to rest . . . ." *Id*. at 416, n.7 (citation omitted).

[3] The Commission recommends that the Appellant inform MCAD what his Chapter 31 claims are, so that G.L. c. 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 Bd.*, 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)."[4] *Id.*

This is not new ground for the Commission. For example, in *Rowe v. Boston Fire Department*, 32 MCSR 314 (2019), the Commission address Rowe's argument that his

[4] 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).

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 considered Matchem's constitutional claims of freedom of speech regarding Brockton's decision to bypass him for appointment based on his tattoos.

DOC 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 Appellant effectively argues that the constitutionality of EO 595 is closely intertwined with the facts of this specific appeal.

Having carefully reviewed the parties' arguments, I conclude that it would be a mistake to preclude, at least at this time, the Appellant from raising constitutional questions related to whether DOC's decision to terminate his employment was done "with proper regard for . . . his constitutional rights." G.L. c. 31, § 1. DOC does not cite, nor is the Commission aware of, any Commission proceeding related to an Appellant's termination where 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.[5] 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).

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.

[5] As of about a year ago, "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).

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.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on January 26, 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:
Scott Lathrop, Esq. (for Appellant)
Carol Colby, Esq. (for Respondent)
Julie Daniele, Esq. (for Respondent)