

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503

Boston, MA 02108

(617) 727-2293

SEAN GATELY,

Appellant

Docket No.: D1-14-196

v.

DEPARTMENT OF

STATE POLICE,

Respondent

Appearance for Appellant:

Joseph P. Kittredge, Esq.
Margaret A. Rubino, Esq.
Rafanelli & Kittredge, P.C.
1 Keefe Road
Acton, MA 01720-5517

Appearance for Respondent:

Glenn M. Rooney, Esq.
Michael Halpin, Esq.
Massachusetts State Police
740 Worcester Road
Framingham, MA 01095

Commissioner:

Cynthia A. Ittleman

ORDER OF DISMISSAL

The Appellant, Sean Gately (“Mr. Gately” or “Appellant”), acting pursuant to G.L. c. 31, ss. 42 and 43, and G.L. c. 22C, s. 13, filed an appeal with the Civil Service Commission (“Commission”) on August 11, 2014, contesting the actions and/or inactions of Massachusetts State Police Department (“Department” or “Respondent”) in terminating his employment as a State Police Trooper (“Trooper”) on August 4, 2014 without notice and a hearing prior to his termination.

On September 3, 2014, the Respondent filed a Motion to Dismiss (“Motion”) the appeal, averring that the Commission lacks jurisdiction in this matter since it involves “the administrative discharge of the Appellant following the revocation of [his] gun license[]” pursuant to G.L. c. 140, s. 131 by the Colonel of the Department, who then deemed the Appellant disqualified to be a State Police Trooper under G.L. c. 22C, s. 43 since Department Article 5.4.5 requires Troopers to have a valid unrestricted firearms license. In revoking the Appellant’s firearms license, the Department wrote to the Appellant stating that the revocation followed a variety of Department disciplinary charges, some of which were upheld, some of

which were not, as well as other concerns. The Department further averred that the Commission lacks jurisdiction in this case because its actions were not taken pursuant to G.L. c. 31, s. 43 and G.L. c. 22C, s. 13 notwithstanding Mr. Gately's appeal to the Commission.

The Appellant filed an opposition to the Motion ("Opposition") on September 26, 2014 stating that his administrative discharge based on his gun license revocation was a new attempt by the Department to circumvent his right to a hearing on a disciplinary matter before the Department Trial Board; his right to appeal any such Trial Board's decision against him to the Commission under G.L. c. 31, s. 43 and G.L. c. 22C, s. 13; and a violation of his constitutional rights to protected property and liberty interests without due process. The Appellant further averred that the Department's actions and/or inactions violated the Department's rules requiring a Trial Board regarding violations of Department rules, orders and policies; that there were no disciplinary matters pending against him at the time for which termination was warranted and that other Troopers were permitted to continue working when they did not possess a valid unrestricted gun license, indicating disparate treatment of the Appellant.¹

A pre-hearing conference was held at the offices of the Commission on September 9, 2014. A hearing on the Motion was held at the Commission on October 30, 2014.² Neither party requested a public hearing, so the hearing was deemed private. The hearing was digitally recorded and the parties were provided with a CD of the hearing³. At the hearing, the Department argued that if the Appellant had a remedy, it was to apply to the appropriate District Court, pursuant to G.L. 140, s. 131(f), to seek reversal of the Colonel's decision to revoke his gun license, to request a review of the Colonel's decision to administratively discharge pursuant to G.L. c. 22C, s. 43, and, if the Department upheld the Colonel's decision, appeal the matter to Superior Court under G.L. c. 22C, s. 43. At the hearing, the Appellant argued that his termination was disciplinary since there were charges pending against him in different matters at

¹ At or around the same time as the events involving Mr. Gately, the Department similarly revoked the gun license of two other State Police Troopers and administratively discharged them for being disqualified on that basis, rather than disciplining them pursuant to G.L. c. 31, s. 43 and G.L. c. 22C, s. 13, as in the instant case. Both of the two other State Police Troopers filed appeals at the Commission making arguments similar to Mr. Gately. Both such Appellants also requested a Department review of the Colonel's decision to administratively discharge them, the requests were denied, and the Appellants appealed further to the Superior Court. Curiously, in its Answer in one of the Superior Court cases, the Department affirmatively defends, *inter alia*, that the pertinent appellant failed to exhaust administrative remedies, which would only apply if the Commission had jurisdiction over such a case, which the Department here argues it does not. One of the two other Troopers so effected also filed a complaint against the Department in U.S. District Court (MA), in which the Department even asserted at a March 5, 2015 hearing on the Department's Motion for Judgment on the Pleadings, in part, that "[u]nder Chapter 22C, Section 13, he can appeal to the Civil Service Commission and he has done that ...[.]". The federal case has been "administratively closed" pending proceedings in other fora, including the "Civil Service appeal" referenced by the Court (Young, J.).

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

the time he was terminated. In addition, the Appellant averred that the Department has not cited any authority for terminating a Trooper via an administrative discharge.

On May 22, 2015, pending a decision on the Motion, I asked the parties to report whether the Department had conducted a hearing concerning the Colonel's administrative discharge of the Appellant, whether the Appellant had appealed any unfavorable ruling to Superior Court, whether the Appellant had pursued an appeal the of the Colonel's revocation of his gun license in District Court, as well as "the nature and status of any and all matters in which they (one party or both parties) are involved related to these Commission proceedings, directly or indirectly in any jurisdiction or forum." (May 22, 2015 email message to the parties) In its May 29, 2015 response, the Department advised, *inter alia*,

The Colonel affirmed the discharge order on or about December 15, 2014 According to State Board of Retirement records, Gately retired from State service, retroactively (effective) to June 17, 2014 (a date prior to his August 2014 General discharge). The Commission should dismiss his Appeal for this reason as well since he is neither factually or as a matter of law aggrieved by the August 2015 (sic) General Discharge. (Id.)

Appellant's counsel confirmed Mr. Gately's retirement in an email message dated June 1, 2015.

Under G.L. c. 22C, s. 13, a member of the State Police who has served for at least one year and has had charges preferred against him or her shall be tried by a Trial Board and, if that member is *aggrieved* by the decision of the Trial Board, he or she may appeal the decision to the Commission under G.L. c. 31, ss. 41-45. G.L. c. 31, s. 41 provides that a tenured civil service employee, "Except for just cause . . . shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent ... lowered in rank or compensation without his written consent, nor his position be abolished." The Commission, pursuant to s. 43, has jurisdiction to hear and decide appeals of any person *aggrieved* by a decision of an Appointing Authority made pursuant to s. 41.

The threshold decision to be made in order for the Commission to have jurisdiction to hear this appeal is to determine whether the Appellant is a "person aggrieved", pursuant to section 13 of G.L. c. 22C and section 41 of G.L. c. 31. I find that the Appellant's retirement made any discipline issued by the Department over which the Commission has jurisdiction a nullity. For Civil Service purposes, any such discipline is moot as the Appellant retired effective prior to his termination. Therefore, the Appellant could not have been aggrieved by an action of the Department. See Bishop v. Department of State Police, 23 MCSR 613 (2010) citing Grover v. Dep't of State Police, 21 MCSR 153 (2008); Gray v. Civil Serv. Comm'n, 21 MCSR 332 (2008); and Ford v. Brookline, D-05-46 (June 14, 2007).

Since the Appellant is not an "aggrieved party" in accordance with G.L. c. 22C, s. 13 and G.L. c. 31, s. 41, the Commission lacks jurisdiction over this appeal and the appeal is *dismissed*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on June 11, 2015.

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:

Joseph P. Kittredge, Esq. (for Appellant)
Margaret A. Rubino, Esq. (for Appellant)
Glenn M. Rooney, Esq. (for Respondent)
Michael Halpin, Esq. (for Respondent)