

On December 6, 2007, the State Police filed a Motion for Summary Decision, pursuant to 801 CMR 1.01 7(h) to dismiss the Appellant's appeal, arguing that the Civil Service Commission (hereinafter "Commission") did not have jurisdiction to hear the appeal since it was filed after the Appellant had voluntarily retired and been honorably discharged from the State Police. At the January 3, 2008 pre-hearing conference, the

Appellant was instructed to file an opposition to the Department's motion. The Appellant submitted an Opposition to the Motion for Summary Decision to dismiss the appeal on February 4, 2008. The Commission denied the Department's Motion for Summary Decision on February 11, 2008 and scheduled a full hearing on the matter for April 4, 2008. On February 15, 2008, the Department filed a Motion for Reconsideration of the denial of its motion. The Motion for Reconsideration was also denied.

Before the full hearing of the instant appeal, the Commission had issued a decision in the matter of Robert Grover v. Department of State Police, D-07-368 on March 28, 2008. Citing the Commission's conclusions and the similar fact patterns in Grover, the Department filed a renewed Motion to Dismiss on April 3, 2008. The Appellant filed his opposition the same day. Instead of the full hearing as scheduled, on April 4, 2008 the parties were heard on their respective motions.¹ The Commission informed the Appellant that after he supplemented his opposition to the Department's motion, a decision would be issued.

Factual Background

The Appellant was a uniformed member of the Department, having attained the rank of Captain. He was investigated for sick leave abuse and several other charges related to the operation of his K-9 training business. As a result of the investigation, a Department Trial Board was convened and the Appellant was found "guilty" of various charges and specifications. The Trial Board recommended, and Colonel/Superintendent Mark F.

¹John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision on the Motion to Dismiss the Appeal.

Delaney (the Appointing Authority) concurred, that the Appellant be suspended without pay for nine (9) months and demoted to the rank of Lieutenant. In the face of the aforementioned discipline, the Appellant retired.

On Thursday, November 1, 2007, the State Police disseminated Personnel Order Number 07PER580 issuing the demotion and nine (9) month suspension to the Appellant. On Tuesday, November 6, 2007, the State Police disseminated Personnel Order Number 07PER588 Honorably Discharging the Appellant by reason of voluntary retirement, pursuant to the provisions of G.L. c. 32, § 28A and effective as of the close of business on Wednesday, October 31, 2007. The Appellant effectively retired prior to the discipline being meted out, therefore the suspension was never actually served. The Appellant timely filed this appeal on November 7, 2007 seeking to overturn the suspension and, thus, clear his name and record of the discipline.

Respondent's Grounds for Dismissal

The Department asserts that the Appellant's appeal was filed with the Commission on November 7, 2007 which was seven (7) calendar days after his voluntary retirement and Honorable Discharge from the State Police in accordance with G.L. c. 32, § 28A. The Department argues that, since the Appellant voluntarily retired from the State Police prior to the issued recommendation of the Trial Board and prior to the filing of this appeal, the Appellant knowingly waived all of the rights and benefits associated with his employment with the State Police, including any appeal rights under G.L. c. 22C, § 13 and/or c. 31, §§ 41 – 45. Essentially, the Department maintains that the appeal has been rendered moot by the Appellant's retirement.

Appellant's Opposition to the Dismissal

The Appellant asserts that he is a “person aggrieved”, as defined in G.L. c. 22C, § 13 and c. 31, § 41, and, as such, is entitled to a hearing of his appeal of the discipline he received before the Commission in accordance with the provisions of those sections. The Appellant argues that his discipline was so disparately issued and so onerous in its severity that retirement was his only option to mitigate the resulting damage to his reputation and opportunity for future employment.

Conclusion

G.L. c. 31, § 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 § 43, has jurisdiction to hear and decide appeals of any person aggrieved by a decision of an Appointing Authority made pursuant to § 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 § 41. We find that the effective date of the Appellant’s retirement made any discipline issued by the Department afterwards a nullity. The Appellant was never “suspended for a period of more than five days.” For Civil Service purposes, the discipline is considered moot because the Appellant has already retired, or retired almost simultaneously to the issuance of the suspension. Therefore, the Appellant could not have been aggrieved by an action of the Appointing Authority.

The Appellant had the option to remain employed by the Department and contest the discipline that he found so egregious. He did not. There is no evidence that he was coerced in any way into making the decision to retire instead. The Commission finds that, since the Appellant is not an “aggrieved party” in accordance with G.L. c. 31, § 41, the Commission lacks jurisdiction over this appeal. Therefore, for all of the reasons stated herein, the Respondent’s Motion for Summary Decision is allowed and the appeal on Docket No. D-07-377 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.

Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Taylor, Henderson, Marquis and Stein, Commissioners) on July 17, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Brian E. Simoneau, Esq.

Michael B. Halpin, Esq.