

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place – Room 503
Boston, MA 02108
617-979-1900**

NICHOLAS J. HOLDEN,
Appellant

CASE NO. D1-20-124

v.

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellant:

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Commissioner:

Paul M. Stein

DECISION ON RESPONDENT’S MOTION TO DISMISS

The Appellant, Nicholas J. Holden, appealed to the Civil Service Commission (Commission), purporting to act pursuant to G.L.c.22C,§13 and G.L.c.31,§41 - §43, to contest his termination by the Department of State Police (Department) from his position as a tenured State Trooper. On September 9, 2020, the Department filed a Motion to Dismiss the appeal for lack of jurisdiction, which the Appellant duly opposed. I heard oral argument from counsel for both parties via remote videoconference hearing (Webex) on October 29, 2020. For the reasons stated below, the Department’s Motion to Dismiss, is granted and this appeal is dismissed.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following material facts are not disputed:

1. Mr. Holden was appointed as a State Trooper on August 22, 2002. (*Procedural Order dated 9/17/20; Stipulated Facts*)

2. On August 17, 2017, Trooper Holden signed a “Settlement Agreement & Release” (SAR) with the Department. (*Department Motion, Exh.A; Appellant’s Opposition, Exh, A*)

3. The SAR memorialized the parties’ mutual agreement to settle all preferred charges then pending against Trooper Holden that emanated from four separate internal affairs investigations conducted by the Department into Trooper Holden’s conduct over a period of approximately four years beginning in March 2014, as well as his agreement to withdraw, with prejudice, a civil action brought against the Department. (*Department Motion, Exh. A; Appellant’s Opposition, Exh, A*)

4. Pursuant to the SAR, Trooper Holden agreed to waive his right to a Trial Board hearing on the charges against him and accepted the discipline stipulated in the SAR, including, among other things, an 18-month suspension without pay, and, as a condition to a return to duty, satisfactory completion of a prescribed program of testing, counseling and treatment during the period of his suspension. (*Department Motion, Exh.A; Appellant’s Opposition, Exhs, A & B*)

5. The terms of the SAR also included the following:

¶1(xv) “Trooper Holden acknowledges and agrees that if he is, at any time after execution of this Settlement Agreement & Release, charged with any violation of a Department Rule and such violation/charge is sustained against him, he shall, without the right to a trial board or hearing and/or any right of grievance, claim or appeal pursuant [to] Article 6 of the Department’s Rules and Regulations, M.G.L.c.22C, §13, M.G.L.c.22C, §43 and/or the Commonwealth-State Police Association of Massachusetts Collective Bargaining Agreement, be immediately discharged and terminated from the Massachusetts State Police”

¶6. “Trooper Holden understands and acknowledges that, by executing this Agreement, he forever waives, forfeits and abandons any and all rights, claims, actions, grievances or

appeals he possesses or ever may possess in connection with his employment with the Department as a result of, or in relation to, in any manner, the facts and circumstances attending [the four internal affairs investigations or the civil action he brought against the Department]. Trooper Holden hereby forever discharges, releases, and relieves the Commonwealth, the Department of State Police, the Colonel and their designees, employees and assigns from any any all such all [sic] rights, claims, actions, grievances or appeals.”

¶7. “The terms of this Agreement shall be considered a complete and total settlement of all issues related to or arising from the facts and circumstances associated with attending the four internal affairs investigations or the civil action he brought against the Department].and shall not, except to enforce the terms of this Agreement, be disputed or grieved in any forum.”

¶8. “Trooper Holden and the Department acknowledge and understand that their respective reasons/justifications for entering into this Agreement are particular and unique to the Parties and the facts and circumstances surrounding this matter only and that the disciplinary measures and other terms and conditions agreed upon and imposed by this Agreement are the produce of a negotiated settlement that shall not serve as precedent in any future discipline . . .”

¶9 “The parties acknowledge by signing this Agreement that they have been given every opportunity to consult with their respective representatives and attorneys, that they fully understand all the terms of the Agreement, and that they voluntarily accept and agree to all such terms”

(Department Motion, Exh. A; Appellant’s Opposition, Exh, A)

6. In or after March 2019, upon satisfactory completion of the terms of the SAR, Trooper Holden returned to full duty with the Department. *(Stipulated Facts)*

7. In or about June 2020, the Department initiated an internal affairs investigation which resulting in a sustained finding that Trooper Holden was responsible for an improper social media post in violation of the Department’s Rules and Regulations. *(Department Motion, Exh. B; Procedural Order dated 9/17/20)*

8. On August 4, 2020, after a “Duty Status Hearing” at which Trooper Holden testified and other evidence was presented, the Department terminated Trooper Holden from his position as a Massachusetts State Trooper. *(Department Motion, Exh. B; Procedural Order dated 9/17/20)*

9. Also, on or about August 4, 2020, the Department suspended Mr. Holden’s license to carry a firearm issued by the Colonel of the Massachusetts State Police. (*Procedural Order dated 9/17/20*)¹

10. The Department granted Mr. Holden an opportunity to pursue a “Section 43” appeal (pursuant to G.L.c.22C, §43), limited to certain evidence on the merits of the 2020 alleged violation of Department rules, but excluding other evidence proffered by Mr. Holden and declining to allow Mr. Holden to raise objections to the validity of the SAR. The Department also declined, based on the SAR, to grant his request for a Trial Board hearing but agreed that, but for the SAR, the Department would have convened a Trial Board on the ultimate decision to discharge Mr. Holden. (*Procedural Order dated 9/17/20; Colloquy at Motion Hearing*)

11. On August 10, 2020, Mr. Holden brought this appeal to the Commission (*Claim of Appeal*)

APPLICABLE LEGAL STANDARD

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

¹ I was informed at the motion hearing that the revocation of the LTC is under judicial review but this has not been documented. (*Colloquy with Counsel*)

ANALYSIS

This appeal comes to the Commission on the heels of recent judicial decisions which seek to reconcile the unique statutory relationship between the broad disciplinary authority of the Colonel of the Massachusetts State Police over State Troopers under his/her command (G.L.c.22C§§1,10 & 43) with appellate rights granted to State Troopers pursuant to Civil Service Law (G.L.c.31,§§41-45). State Troopers are not “civil service employees” as defined by G.L.c.31,§1. See G.L.c.22C, §10. State Trooper are granted the right to appeal certain discipline imposed on them for de novo review by the Commission pursuant to a specific provision of Chapter 22C which provides:

“Any uniformed member of the state police who has served for 1 year or more and against whom charges have been preferred shall be tried by a trial board to be appointed by the colonel or, at the request of the officer, may be tried by a board consisting of the colonel. Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45 inclusive of chapter 31. A uniformed officer of the state police who has been dismissed from the force after trial before such a trial board, or who resigns while charges to be tried by a trial board are pending against him, shall not be reinstated by the colonel.”

G.L.c.22C, §13 (*emphasis added*).

Chapter 22C, §3 and §43 authorize the Colonel of the State Police to make rules, regulations and orders governing the operation of the Department and the supervision and control of its officers. Pursuant to that authority, the Department promulgated “Regulations Establishing Disciplinary Procedures and Temporary Relief from Duty” that establish the process through which the Colonel may act to impose good order and discipline within the Department.

- Sections 6.4 through 6.9 of the regulations establish the process for “Trial Boards” convened pursuant to G.L.c.22C,§13, *infra*. The Trial Board is “analogous to a military court martial”. See Burns v. Commonwealth, 430 Mass. 444, 448 n.6 (1999). After an officer against whom charges have been preferred is provided an opportunity to be heard,

represented by counsel, present evidence and cross-examine witnesses, the Trial Board makes a finding of “guilty” or “not guilty” and, if guilty, recommends the discipline to be meted out, subject to approval by the Colonel, which may include discharge, suspension, reduction in rank as well as a variety of other sanctions specific to the State Police, such as reassignment or forfeiture of accrued leave, detail opportunities and overtime. An officer aggrieved by a finding of the Trial Board may appeal to the Commission as provided by G.L.c.22C, §13, *infra*.

- Section 6.2 of the regulations establishes an alternative procedure for addressing the “Duty Status” of officers who, among other things, are the subject of criminal proceedings, domestic abuse proceedings and other violations of Department procedures and orders. After hearing before a “Duty Status Board”, the board is authorized to recommend, subject to the Colonel’s approval, whether to retain the officer on full duty, restricted duty or suspension with or without pay. An officer who is aggrieved by a finding under G.L.c.22C, §43 may appeal that decision for judicial review by the Superior Court as provided by that statute. If and when charges are ultimately preferred, the officer may request a Trial Board under G.L.c.22C, §13.

In Doherty v. Civil Service Comm’n, the Supreme Judicial Court, held that the G.L.c.22C,§13 right of appeal to the Commission from a Trial Board decision was limited to those sanctions that were expressly contained in G.L.c.31,§43. In Doherty, because the sanction imposed was a forfeiture of accrued leave, which the SCJ held was not the type of discipline listed in G.L.c.31,§41² and, therefore, could not be appealed to the Commission.

² "Except for just cause . . . a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, . . . lowered in rank or compensation without his written consent, nor his position be abolished." G.L.c.31, §41.

In another recent decision, the Superior Court vacated the Commission's decision to take jurisdiction over an appeal from a group of State Troopers who had been suspended indefinitely without pay after a "Duty Status" hearing, but before formal "charges" had been "preferred" and a Trial Board decision had been made. See "Memorandum of Decision and Order on Parties' Cross Motions for Judgment on the Pleadings", Massachusetts State Police et al v. Civil Service Commission et als., C.A. No. 2019-1370 (Suffolk Sup.Ct. 2020) (Donatelle, J.) ("MSP v. CSC"). In its opinion in MSP v. CSC, the Superior Court rejected the Commission's conclusion that the indefinite suspension violated the officers' rights to a "pre-deprivation" administrative hearing under G.L.c.31, §41 and was an unlawful use of G.L.c.22C "duty status" hearings to make an end run around the officer's right to rectify such procedural irregularities by appeal to the Commission under G.L.c.31, §41 & §43. The Superior Court held that (1) the question as to when the Commission had subject matter jurisdiction to hear the appeals was a question of statutory interpretation of G.L.c.22C, to be decided de novo by the Court; (2) since the Department, not the Commission, is the agency charged with enforcement of Chapter 22C, the Commission's interpretation of that statute, while "relevant" was not entitled to the "special deference" the Commission would receive in construing civil service law contained in Chapter 31; and (3) Chapter 22C expressly limited the Commission's subject matter jurisdiction to appeals from Trial Board decisions rendered under G.L.c.22C,§13, but not otherwise, and, specifically, the Commission "does not have jurisdiction to hear appeals of Duty Status decisions."

While the Commission may have good reason to question the logic of these decisions, Doherty is binding on the Commission and MSP v. CSC, while not binding, per se, remains the sole holding interpreting the scope of jurisdiction granted to the Commission under Chapter 22C

to hear appeals by State Troopers. With this recent precedent in mind, I turn to the specific issues presented in this appeal.

Jurisdiction To Hear Appeal From The Appellant's Discharge Prior To A Trial Board.

To the extent the Appellant's appeal challenges the Department's decision to summarily discharge him because of a flawed process that deprived him of a Trial Board, that claim can be summarily rejected on the basis of the Doherty and MSP v. CSC decisions. The undisputed facts establish that the Department did not "prefer charges" against Trooper Holden and that no Trial Board was convened prior to his discharge. Thus, in that respect, this appeal is on all fours with Doherty and MSP v. CSC, i.e., the statutory prerequisite to an appeal to the Commission has not been met. Thus, unless that precedent is overruled, based on the current state of judicial construction of Chapter 22C, the Commission is without subject matter jurisdiction to hear the Appellant's appeal, no matter how meritorious it may seem.

Jurisdiction to Hear An Appeal Challenging the Enforceability of the SAR

The Appellant seeks to distinguish his appeal on the grounds that, unlike the officers in cases such as MPS v. CSC, who are ultimately entitled to a Trial Board on charges when and if they are preferred, here, the Department contends that Trooper Holden forever waived his right to a Trial Board and the Department has no intention of ever granting him a Trial Board. The Appellant argues that the Department's decision is the result of an unlawful and erroneous application of the SAR. But for the SAR he would have been afforded the right to a Trial Board with further right to appeal to the Commission, a matter that the Department does not dispute.

Specifically, the Appellant contends that (1) the conduct in which he allegedly engaged that resulted in his termination was not a "violation of a Department Rule" that would have triggered his immediate discharge under Section 1(xv) of the SAR; (2) his conduct, at most, was a minor infraction in which other Department personnel also engaged without discipline; and (3) the so-

called “last chance” provision in Section 1(xv) and prospective waiver of a right to a Trial Board is unenforceable as a matter of law and as applied to the specific facts of the Appellant’s case. The Department contends that the Commission has no authority to interpret the SAR and, if the Appellant is aggrieved by any such violations, his sole recourse is an appeal to Superior Court under G.L.c.22C,§43 (or, perhaps a civil action for declaratory and injunctive relief).³ See, e.g., Bickford v. Colonel, 76 Mass.App.Ct. 209, 212-213 (2010). Alternatively, the Department argues that, as a matter of law, the “last chance” provision of Section 1(xv) is valid and enforceable as written to justify the Department’s decision to terminate Trooper Holden without recourse to a Trial Board or any other right of grievance, claim or appeal. The Appellant retorts that the remedy of a Section 43 appeal is narrowly limited to an “arbitrary and capricious” standard, citing Sullivan v. Superintendent, 92 Mass.App.Ct. 1128 (2018), that makes it an unsuitable alternative in a case that involves complex and novel questions of law.

I have carefully considered the authorities presented by the parties and arguments of counsel. I agree with the Department that, in order to reach the issues raised by the Appellant, it would require the Commission to conduct an evidentiary hearing to make inquiry into the Appellant’s contentions that the underlying circumstances which resulted in his termination constituted a violation of a Department rule and/or disparate treatment of the Appellant, and possibly, whether the Appellant’s waiver of his Chapter 22C rights to a Trial Board for any and all future discipline was valid and enforceable. Moreover, assuming there were bona fides disputed issues of fact on any of those matters (which I need not decide), none of those issues would raise questions that call for application of Massachusetts civil service law but, rather, as the authorities cited by the parties demonstrate, call for interpretation of the public policy that would enable or prohibit

³ Counsel appear to agree that the Collective Bargaining Agreement would not authorize a grievance to contest the validity of the SAR, but might have permitted grievance of the whether the alleged conduct properly triggered the application of the immediate termination provision in Section 1(xv).

waiver of a State Trooper's Chapter 22C rights, as well as the application of constitutional law and contract common law. See, e.g., BourgeoisWhite LLP v. Sterling Lion, LLC, 91 Mass.App.Ct. 114, 119 (2017); Smart v. Gillette Company LTD Plan, 70 F3d 173, 181 (1st Cir. 1995); Higgins v. Town of Concord, 322 F.Supp.3d 218, 225 (D.Mass.2018); cf. Emma v. Department of Correction, 30 MCSR 287, *clarified*, 30 MCSR 404x (2017) (invalidating prospective waiver of civil service employee's disciplinary hearing and appeal rights of civil service employee); Kenney v. Cambridge Housing Auth., 20 MCSR 160 (2007) (invalidating prospective waiver of rights of housing authority employee granted the same rights to a pre-deprivation hearing and appeal to the Commission "as if said office or position were classified under [c.31]")

In sum, Mr. Holden's appeal must be dismissed for lack of jurisdiction. I conclude that Appellant's claim that his summary discharge was unlawful depend, in essence, on a determination as to whether or not his 22C rights have been violated by application of the "last chance" provision of the SAR. This issue is not within the purview of the Commission whose jurisdiction has been narrowly construed, as a general rule, to be limited to appeals from Trial Board decisions, and does not encompass adjudication of whether the waiver of the Chapter 22C right to a Trial Board was unlawful as a matter of civil service law. The Appellant's recourse to redress such claims lies in a different forum. Of course, should a court order that the Commission is vested with jurisdiction or that the Appellant is entitled to and receives a duly appealable adverse finding by a Trial Board on any or all of the claims he has raised, further proceedings before the Commission would become appropriate.

CONCLUSION

In sum, for the reasons stated herein, the Motion to Dismiss is hereby *granted* and the appeal of the Appellant, Nicholas J. Holden, CSC No. D1-20-124, is *dismissed*.

Civil Service Commission
/s/Paul M. Stein
Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 11, 2021.

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:

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Christine M. Dowling, Esq. (for Respondent)
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