

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

MICHAEL JOSTI,
Appellant

v.

D-17-009

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellant:

Daniel J. Moynihan, Esq.
271 Main Street, Suite 302
Stoneham, MA 02180

Appearance for Respondent:

Suzanne T. Caravaggio, Esq.
Department of State Police
470 Worcester Road
Framingham, MA 01702

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION TO DISMISS

On January 17, 2017, the Appellant, Michael Josti (Mr. Josti), a Trooper employed by the Department of State Police (State Police), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the State Police related to the forfeiture of five (5) days of accrued time off.

On January 24, 2017, I held a pre-hearing conference which was attended by Trooper Josti, his counsel and counsel for the State Police. At the pre-hearing conference, the State Police filed a Motion to Dismiss the Appellant’s appeal, arguing that the Commission lacks jurisdiction to hear this appeal. On February 27, 2017, the Appellant filed an opposition to the Motion to Dismiss.

Relevant Facts

The following relevant facts are undisputed:

1. On December 1, 2016, the State Police Trial Board recommended that the Colonel order the Appellant to forfeit five (5) days of accrued time off.
2. On January 5, 2017, the Colonel adopted the findings and recommendations of the Trial Board ordering Trooper Josti to forfeit five (5) days of accrued time off.
3. Just prior to the Colonel ordering Trooper Josti to forfeit five (5) days of accrued time off, Trooper Josti had 32 hours of personal leave and approximately 27 hours of vacation leave which he needed to use or otherwise lose by the end of the pay period ending January 7, 2017.
4. The five (5) days which Trooper Josti forfeited was deducted from Trooper Josti's "use it or lose it" time for the pay period ending January 7, 2017 as follows: 32 hours of personal leave and 8 hours of vacation leave. Trooper Josti gave up or lost another approximately 19 hours of vacation leave where it was not used by January 7, 2017.

Parties' Arguments

First, the State Police argues that the Commission lacks jurisdiction over the loss of accrued time where it is not a penalty contemplated under G.L. c. 31, s. 41. The Commission has consistently concluded otherwise and two (2) Superior Court decisions have affirmed the Commission's position that a forfeiture of vacation time is equivalent to a suspension which a uniformed member of the State Police can appeal to the Commission. See Doherty v. Mass. Dept. of State Police and Mass. Civil Service Comm'n, Suffolk Civil No. 16-2143-H (May 5, 2017) ("This Court joins at least one other Superior Court judge who has held that the Commission has jurisdiction to review decisions by the Colonel of MSP to forfeit accrued leave

of MSP employees”) citing Massachusetts Department of State Police v. Hicks and Civil Service Comm’n, Suffolk Civil No. 07-3766 (July 25, 2008).

Second, the State Police argues that Trooper Josti’s appeal has been rendered moot where he forfeited “use it or lose it” time. Therefore, according to the State Police, Trooper Josti has suffered no harm as the five (5) days were to be lost within two (2) days of the order just like the other 19 hours he did not use. The State Police argues that Trooper Josti’s employment status was not impacted negatively, he was not lowered in rank or compensation, nor did the forfeited time affect his pension. Finally, the State Police argues that, even if the Commission were to assume jurisdiction of this matter, there is no relief that could be ordered as the forfeited leave cannot be restored to Trooper Josti’s vacation and personal leave balance.

Trooper Josti argues that his employment status has been harmed as he no longer has an unblemished record as a result of the Trial Board’s findings and that the Trial Board’s findings could, based on progressive discipline, result in a harsher penalty than would otherwise be the case if he is the subject of future discipline. Further, Trooper Josti argues that the guilty finding from the Trial Board could serve as an impediment to positions in another future selective enforcement unit and/or future endeavors after his retirement from the State Police.

Analysis

The Commission's jurisdiction in discipline cases is limited to appeals when an employee covered by the civil service law (i.e. – uniformed members of the State Police) have been "discharged, removed, suspended . . . laid off [or] transferred from his position without his written consent . . ." G.L.c.31,s.41.

As referenced above, the Commission has consistently ruled that the forced forfeiture of accrued time is equivalent to a suspension. For the first time, however, the Commission must

address whether we retain jurisdiction in the rare circumstance presented here where the Appellant was allowed to use accrued time that he already planned on forfeiting through the “use it or lose it” policy to satisfy the penalty imposed.

Based on these unique circumstances, the forfeiture of accrued time here is not equivalent to a suspension. Trooper Josti acknowledges that, even if the Trial Board had taken no action against him, he would have still forfeited these five (5) days of accrued time as part of the annual “use it or lose it” policy. Trooper Josti did not lose any additional accrued time as a result of the Trial Board’s action here. That, to me, distinguishes this case from prior Commission decisions regarding the forfeiture of accrued time.

Further, as noted by the State Police, even if the Commission were to rule in Trooper Josti’s favor, there is no relief that could be granted since time forfeited through the “use it or lose it” policy cannot be restored. Trooper Josti’s argument that a favorable decision by the Commission would effectively remove a blemish from his record that could be used against him in future disciplinary matters is not persuasive. Rather, it is the same argument that could be made by civil service employees who are subject to verbal or written warnings, which are not subject to the review of the Commission.

For these reasons, the Respondent’s Motion to Dismiss is allowed and the Appellant’s appeal under Docket No. D-17-009 is *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 25, 2017.

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:

Daniel J. Moynihan, Esq. (for Appellant)

Suzanne T. Caravaggio, Esq. (for Respondent)