

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

ANGEL LUGO,
Appellant

v.

D1-23-220

CITY OF HOLYOKE,
Respondent

Appearance for Appellant:

Pro Se
Angel Lugo

Appearance for Respondent:

Kathleen E. Degnan, Esq.
City of Holyoke
20 Korean Veterans Plaza
Holyoke, MA 01040

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION TO DISMISS

Procedural Background

On October 24, 2023, the Appellant, Angel Lugo (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the City of Holyoke (City) to terminate his employment as a firefighter with the City’s Fire Department.

On December 5, 2023, I held a remote pre-hearing conference that was attended by the Appellant, counsel for the City and the City’s Fire Chief. After the pre-hearing, the City filed an amended motion to dismiss the Appellant’s appeal based on a lack of jurisdiction. The Appellant did not file an opposition.

Undisputed Facts

Based on the City's motion, with attachments and the statements of the parties at the pre-hearing, it appears that the following facts are not in dispute:

1. On November 7, 2022, the Appellant began his employment as a firefighter with the City's Fire Department.
2. On October 19, 2023, while the Appellant was still serving his 12-month probationary period, the City's Board of Fire Commissioners (Board) held a local appointing authority hearing to determine whether the Appellant should be terminated for performance-related reasons.
3. That same day, October 19, 2023, the Board verbally notified the Appellant that he was being terminated from employment.
4. There is no dispute that the Appellant did not perform the duties of a firefighter after October 19, 2023.
5. On October 24, 2023, the Appellant filed an appeal with the Commission, indicating that he had been notified of his termination on October 19, 2023.
6. Due to a delay attributable to the postal service, the Appellant did not receive written notice of his termination from the Board until November 10th or November 12th, 2023.

Summary Decision Standard

When a Respondent before the Commission is of the opinion there is no genuine issue of disputed material fact relating to the Appellant's stated claim, no viable ground of appeal on the facts stated, and the Respondent is entitled to prevail as a matter of law, this party may move, with or without supporting affidavits, either to dismiss the entire appeal or for summary decision on a particular claim. 801 CMR 1.01(7)(h). Such 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 substantial and credible evidence established that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case,” and has not rebutted this evidence by “plausibly suggesting” the existence of “specific facts” to raise “above the speculative level” the existence of a material factual dispute requiring an evidentiary hearing. *See, e.g., Nigro v. City of Everett*, 30 MCSR 277 (2017); *Lydon v. Massachusetts Parole Bd.*, 18 MCSR 216 (2005). *Accord Milliken & Co. v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008). *See also Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss); *cf. R.J.A. v. K.A.V.*, 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss). *See also Zachary v. Civ. Serv. Comm’n & Dept. of Correction*, Suffolk Sup. Ct. No. 07-3197 (2008) (Commission was justified in upholding a 5-day suspension without a full hearing when the Appellant admitted that he engaged in the alleged misconduct.)

Relevant Civil Service Law

Section 34 of Chapter 31 states in relevant part:

During the probationary period, he may be subject to a performance evaluation during his first two months of service and a second evaluation may be conducted at least one month prior to his sixth month anniversary date of service. The appointing authority may extend the probationary period for a period of two months if the second evaluation of the probationary employee is unsatisfactory. Such evaluation may be utilized by the appointing authority, but in no instance shall the appointing authority be required to consider the results of such evaluation in a determination of granting such employee permanent or tenured status. Nothing contained herein shall require an appointing authority to evaluate a probationary employee and in no such instance shall such evaluation grant such probationary employee any greater rights than those contained in this section.

...

If the conduct or capacity of a person serving a probationary period or the character or quality of the work performed by him is not satisfactory to the appointing

authority, he may, at any time after such person has served thirty days and prior to the end of such probationary period, give such person a written notice to that effect, stating in detail the particulars wherein his conduct or capacity or the character or quality of his work is not satisfactory, whereupon his service shall terminate. The appointing authority shall at the same time send a copy of such notice to the administrator. In default of such notice, such person shall be deemed to be a tenured employee upon the termination of such period.

Section 41 of Chapter 31 states in relevant part:

Except for just cause and except in accordance with the provisions of this paragraph, a ***tenured employee*** shall not be discharged, removed, suspended for a period of more than five days, laid off ... Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority ...

Section 43 of Chapter 31 states in relevant part:

If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission ...

Section 61 of Chapter 31 states:

Following his original appointment as a permanent full-time police officer or fire fighter in a city, or in a town where the civil service law and rules are applicable to such position, ***a person shall actually perform the duties of such position on a full-time basis for a probationary period of twelve months before he shall be considered a full-time tenured employee in such position***, except as otherwise provided by civil service rule. The administrator, with the approval of the commission, may establish procedures to ensure the evaluation by appointing authorities, prior to the end of such probationary period, of the performance of persons appointed as regular police officers or fire fighters.

Analysis

The City argues that, at the time he was terminated, the Appellant could not have been a tenured employee because he had not performed the duties of his position for 12 months as required by Section 61. Therefore, since the Appellant was not a tenured employee, the Commission has

no jurisdiction to hear this appeal. The Appellant concedes that he did not perform the duties of a firefighter for 12 months, but, at the pre-hearing conference, suggested that he had received satisfactory performance evaluations, both in writing and verbally, effectively calling into question the City's stated reason for terminating him.

Although the issue before me is one of jurisdiction, I asked the City to provide supplementary information regarding the performance evaluations of the Appellant and any other employee from the most recent hiring cycle who was terminated for performance reasons. I received and reviewed that information, which sufficiently shows that the City had legitimate concerns about certain aspects of the Appellant's ability to satisfactorily perform all required duties of a firefighter.

In Police Commissioner of Boston v. Cecil, 431 Mass. 410 (2000), the SJC reaffirmed that police officer and firefighters who have not actually served their entire 12-month probationary period have no right of appeal to the Commission, stating in part that:

When interpreting an earlier version of s. 34 we said that its "manifest purpose is that the fitness of an appointee be actually demonstrated by service within a probationary period." *Younie v. Director of Div. of Unemployment Compensation*, 306 Mass. 567, 570 (1940). This purpose is "designed to benefit the public." *Leominster v. International Bhd. of Police Officers, Local 338*, 33 Mass.App.Ct. 121, 127 (1992). "With respect to police officers and fire fighters, in particular, the Legislature recognized the special need of a prolonged probationary period by extending the period from six months to one year. See St. 1977, c. 348, and now G. L. c. 31, s. 61. Courage, good judgment, and the ability to work under stress in the public interest and as part of an organization, are qualities that are not quickly perceived. The policy of the statute is to ensure sufficient time for a careful determination whether they are present in sufficient degree." *Id.* Where s. 61 calls for a newly appointed police officer to "actually perform the duties of such position on a fulltime basis for a probationary period of twelve months" (emphasis added), the intent of the Legislature could not be clearer. The commission exceeded its authority when it credited Cecil the nine days he did not serve in his probationary period.

Since there is no dispute that the Appellant, at the time of his termination, had not

completed the statutorily required probationary period, he never became a tenured civil service employee. Thus, the Commission lack jurisdiction to hear this termination appeal under Section 43 of the civil service law.

Conclusion

The Appellant's appeal under Docket No. D1-23-220 is hereby ***dismissed***.

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 February 8, 2024.

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:

Angel Lugo (Appellant)

Kathleen Degnan, Esq. (for Respondent)