

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503

Boston, MA 02108

(617) 727-2293

SEAN M. MCGARRY,

Appellant

Docket No.: D1-14-87

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
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Framingham, MA 01095

Commissioner:

Cynthia A. Ittleman

ORDER OF DISMISSAL PENDING FUTURE EFFECTIVE DATE

The Appellant, Sean M. McGarry (“Mr. McGarry” 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 April 7, 2014, contesting the action of Massachusetts State Police Department (“Department” or “Respondent”) in terminating his employment as a State Police Trooper (“Trooper”) on April 2, 2014 without notice and a hearing.

On May 2, 2014, 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 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 avers that the Commission lacks

jurisdiction in this case because its actions were not taken by the Department's Trial Board under G.L. c. 22C, s. 13 notwithstanding the Appellant's appeal to the Commission. The Department filed an Amended Motion to Dismiss ("Amended Motion") on August 5, 2014 adding that in March, 2014 it received a letter from the Appellant regarding substance abuse, which led to its review of the Appellant's employment history and subsequent revocation of his firearms license. Further, the Department averred, the Appellant could appeal his firearms revocation to Massachusetts District Court and could appeal the Colonel's actions in Superior Court under G.L. c. 22C, s. 43.

The Appellant filed an opposition to the Amended Motion ("Opposition") on September 4, 2014 stating that his administrative discharge based on his gun license revocation was a new attempt to circumvent his right to a hearing on a disciplinary matter before the Department Trial Board and his right to appeal any such Trial Board's decision against him to the Civil Service Commission under G.L. c. 22C, s. 13. In addition, the Appellant asserts that the Department's actions and/or inactions violated his constitutional rights to protected property and liberty interests without due process. Further, the Appellant avers that the Department's actions and/or inactions violated the Department's rules requiring a Trial Board regarding alleged violations of Department rules, orders, regulations and policies; that there is no statutory or regulatory authority to terminate a Trooper via an administrative discharge; that the Department's revocation of his firearms license was disciplinary since the Department advised him that in deciding to revoke his license, the Department also considered charges (sustained or not) against the Appellant as well as other concerns; and that other Troopers had been permitted to continue working when they did not possess a valid unrestricted gun license.¹

A pre-hearing conference was held at the offices of the Commission on May 6, 2014. A hearing on the Motion was held at the Commission on September 23, 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 the appeal should be dismissed because the Appellant was statutorily disqualified from having a firearms license under G.L. c. 140, s. 131(d)(iii)⁴ for substance abuse

¹ At or around the same time as the events involving Mr. McGarry, the Department similarly revoked the gun licenses 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. 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. McGarry. The other two Troopers requested a Department review of the Colonel's decision to administratively discharge them, the discharges were upheld, and, it appears, one of those two Appellants (in addition to Mr. McGarry) appealed further to the Superior Court under G.L. c. 22C, s. 43; the other Trooper retired effective prior to his termination and the Commission accordingly denied his appeal since he is not aggrieved as required under G.L. c. 31, s. 43 and G.L. c. 22C, s. 13.

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.

⁴ G.L. c. 140, s. 131(d)(iii) authorizes the Colonel to issue a firearms license to an applicant unless, e.g. the applicant "... is or has been under treatment for or confinement for drug addiction or habitual drunkenness, unless such applicant is deemed to be cured of such condition by a licensed physician, and such applicant may make application for such license after the expiration of five years from the date of such confinement or treatment and

and that the Appellant's remedy was to apply to the appropriate Massachusetts District Court to seek reversal of the Colonel's decision to revoke his gun license under G.L. c. 140, s. 131(f), request a review of the Colonel's decision to administratively discharge him and appeal such decision under G.L. c. 22C, s. 43. The Appellant argued at the Commission hearing that G.L. c. 22C, s. 13, was intended to cover all discipline, including his termination such that the Commission has jurisdiction here; this case does not involve a question of the Appellant's fitness for duty; the Appellant requested a review of the Colonel's decision but the Department failed to schedule it; and that the Department had filed a motion to dismiss the Appellant's appeal his firearms license revocation in Massachusetts District Court even though it argues here that he can appeal his firearms license revocation to that court.

On May 22, 2015, pending a decision on the Motion, I asked the parties to report whether the Department had conducted a review of the Colonel's administrative discharge of the Appellant, the Department upheld the discharge, the Appellant had appealed the discharge to Superior Court, 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 that it had reviewed the Colonel's administrative discharge and upheld it on November 12, 2014, that the Appellant appealed the Department's decision in Superior Court pursuant to G.L. c. 22C, s. 43 (McGarry v. Department of State Police, 1481CV08641, in Middlesex Superior Court), that such appeal was still pending, that Mr. McGarry had appealed to the Massachusetts District Court (McGarry v. Col. Alben, Framingham District Court, C.A. No. 1449CV377) the Colonel's decision to revoke his license to carry a firearm and that such case was also still pending. The Department has filed a Motion to Dismiss Mr. McGarry's appeal in the Massachusetts District Court alleging, *inter alia*, that it is not the firearms licensing authority who revoked the Appellant's license and that the Appellant is statutorily disqualified from having a firearms license under G.L. c. 140, s. 131(f)⁵ and s.

upon presentment of an affidavit issued by such physician stating that such physician knows the applicant's history of treatment and that in such physician's opinion the applicant is deemed cured;" Id.

⁵ G.L. c. 140, s. 131(f) provides, "A license issued under this section shall be revoked or suspended by the licensing authority, or his designee, upon the occurrence of any event that would have disqualified the holder from being issued such license or from having such license renewed. A license may be revoked or suspended by the licensing authority if it appears that the holder is no longer a suitable person to possess such license. Any revocation or suspension of a license shall be in writing and shall state the reasons therefor. Upon revocation or suspension, the licensing authority shall take possession of such license and the person whose license is so revoked or suspended shall take all actions required under the provisions of section 129D. No appeal or post-judgment motion shall operate to stay such revocation or suspension. Notices of revocation and suspension shall be forwarded to the commissioner of the department of criminal justice information services and the commissioner of probation and shall be included in the criminal justice information system. A revoked or suspended license may be reinstated only upon the termination of all disqualifying conditions, if any." Id.

Any applicant or holder aggrieved by a denial, revocation or suspension of a license, unless a hearing has previously been held pursuant to chapter 209A, may, within either 90 days after receiving notice of such denial, revocation or suspension or within 90 days after the expiration of the time limit during which the licensing authority is required to respond to the applicant, file a petition to obtain judicial review in the district court having jurisdiction in the city or town wherein the applicant filed for, or was issued, such license. A justice of such court, after a hearing, may direct that a license be issued or reinstated to the petitioner if such justice finds that there was no reasonable ground for denying, suspending or revoking such license and that the petitioner is not prohibited by law from possessing same.

131(d)(iii) (for habitual drunkenness and having been or being treated therefor in a facility). A hearing on the motion in District Court is being scheduled. In the Superior Court case, the Department's Answer to the Complaint asserts an affirmative defense that Mr. McGarry failed to exhaust administrative remedies, which would only apply if the Commission had jurisdiction over the matter, which the Department argues here it does not. McGarry has also filed a complaint against Colonel Alben, of the Department, in U.S. District Court (MA), in which the Department asserted at a March 5, 2015 hearing on the Department[Respondent]'s Motion for Judgment on the Pleadings, in part, that "[u]nder Chapter 22C, Section 13, [the appellant] 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.) McGarry v. Alben, U.S. District Court (MA), Civil Action No. 14-cv-13407-WGY.

The Commission has serious concerns that the Respondent may have circumvented the civil service right of a Trooper to notice and a pre-deprivation hearing prior to his termination of employment; that while the Department has averred that the Appellant's remedy regarding revocation of his firearm license is in the Massachusetts District Court, the Department filed a Motion to Dismiss for lack of jurisdiction⁶; and that in the U.S. District Court (MA) the Department filed a motion for judgment on the pleadings and stated in oral argument that the Appellant can appeal to the Commission but then files a Motion to Dismiss at the Commission for lack of jurisdiction. However, in view of the pending civil actions involving the parties here, in the interest of administrative and judicial efficiency, and in an effort to avoid conflicting dispositions, the instant appeal to the Commission is dismissed effective thirty (30) days following the effective date of the final judgment in the civil action in Middlesex Superior Court in McGarry v. Colonel Alben, et al, 1481CV08641. Within thirty (30) days of the Superior Court's dispositive decision, either party may file a Motion to Re-open the instant appeal for such further consideration by the Commission as may appear appropriate.

Nothing in this decision is intended to express any opinion on the merits of the Department's actions in terminating the Appellant's employment in this matter or to decide whether the Department acted within lawful statutory authority to terminate the Appellant without a Trial Board process, whether the Commission is without jurisdiction to review the "just cause" for the termination under any circumstances, or what effect, if any, the final determinations in the pending civil actions under G.L. c. 140 or G.L. c. 22C, s. 43 may have on such further proceedings before the Commission.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

⁶ The Respondent's motion to dismiss for lack of jurisdiction in Framingham District Court avers that the Appellant cannot maintain a firearms license under G.L. c. 140, s. 131(d)(iii) and that that Court lacks equity jurisdiction to address the Appellant's request for declaratory relief.

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)

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CONCURRING OPINION OF COMMISSIONER STEIN

I concur in the result, as I agree that a plenary consideration of the issues presented in the appeal under civil service law are intertwined with questions of law concerning other statutes that are more properly determined after judicial construction of all the relevant statutes that can be best addressed initially in the related civil actions. Thus, it makes sense to defer further proceedings in the civil service appeal, pending a determination of the scope of the authority of the Department of State Police under Section 43 of Chapter 22C and Section 131 of Chapter 140. For example, a determination that the Department acted within or in excess of its statutory authority under those laws could inform how the Commission addresses the Section 13 appeal claim pending here.

I do believe, however, that the Commission's interest in the statutory purpose and intent of Section 13 of Chapter 22C bears notice. That statute states that a uniformed trooper against whom charges are preferred "shall" be entitled to a Trial Board and appeal to the Commission from any adverse employment action taken against him. In contrast to Section 43 of Chapter 22C and Chapter 140, that are not civil service laws that strictly fall within the purview of the Commission's jurisdiction to interpret or enforce, the Commission does have an interest in how the scope of the Department's authority to act under those statutes interrelate to the authority vested in the Commission under Section 13 of Chapter 22C which provide a process for review of all "charges" of misconduct that affect a trooper's employment status. In this regard, I would make clear that, in my view, the authority to issue and enforce "orders" under Section 43 of Chapter 22C or revoke a license to carry under Chapter 140, is not necessarily inconsistent with the Appellant's claim that he is entitled, as a matter of statute and due process, to a Trial Board and Commission review of action taken in reliance on decisions under those other laws that results in adverse employment action. Similarly, I think is also important to note that, while the Commission is charged with a "de novo" review in appeals brought before it (which courts have noted is the trigger for due process compliance), the statutory scheme of civil service law neither

prohibits nor requires a Section 13 Trial Board from recommending discipline, up to and including discharge, or the Commission from finding “just cause” for such discipline as a result of lawful “orders” under Section 43 of Chapter 22C or license revocation under Chapter 140. The Commission has considered similar matters on a case by case basis. In sum, the Appellant’s statutory and constitutional procedural claims to a Section 13 Trial Board and Commission review should not be discounted out of concern for the level of substantive review that the Commission would give to the underlying reasons for the Department’s actions in this, or any other specific case.

/s/ Paul M. Stein