

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KENNETH MOREHOUSE,
Appellant

v.

D1-12-17

WEYMOUTH FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Marshall T. Moriarty, Esq.
Moriarty Law Firm
34 Mulberry Street
Springfield, MA 01105

Appearance for Respondent:

George E. Lane, Jr., Esq.
87 Broad Street, P.O. Box 29
Weymouth, MA 02188

Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

The Appellant, Kenneth Morehouse (hereafter “Appellant” or “Mr. Morehouse”), pursuant to G.L. c. 31, §§ 42 and 43, duly appealed to the Civil Service Commission (hereafter “Commission”) on January 12, 2012, opposing the decision of the Weymouth Fire Department (hereafter “the Department” or “Respondent”), terminating his employment at the Department. A prehearing conference was held on February 21, 2012 and the Department filed a “Motion for Partial Dismissal of Appeal.” On April 6, 2012, the Appellant filed a Motion for Summary Judgment. On May 4, 2012, the Respondent filed an Opposition to the Motion for Summary

Judgment. A hearing was held on the parties' motions on June 11, 2012. For the reasons stated herein, Appellant's motion is denied and the Respondent's motion is granted such that the appeal is dismissed.

Based on the parties' motions, opposition, oral argument, subsequent electronic messages, and reasonable inferences therefrom; taking administrative notice of all other matters filed in the case including, without limitation, documents provided by the Human Resources Division (hereinafter "HRD"); and taking administrative notice of pertinent statutes, regulations and policies; a preponderance of the evidence establishes as follows:

1. Mr. Morehouse is a forty-five (45) year old man who was appointed by the Department to the full-time, tenured civil service position of firefighter on September 5, 2003.
2. Previously, Mr. Morehouse was a call firefighter who worked part-time in Boxborough beginning October 13, 1986. He received his first compensation in this capacity on December 13, 1986.
3. Mr. Morehouse worked as a full-time firefighter/EMT at the Boxborough Fire Department from September 1991 until November, 1996.
4. Boxborough is not a civil service community.
5. By letter dated May 11, 1998, the Boxborough Treasurer indicated that Mr. Morehouse received payments for his part-time work as a firefighter from sometime in October, 1986 through September 30, 1991 and that Mr. Morehouse became a member of the Middlesex County Retirement System on October 16, 1991.
6. By letter dated March 9, 2004, the Weymouth Retirement Board wrote to Mr. Morehouse indicating that the Middlesex Retirement Board voted to accept liability for his creditable

service to Boxborough from part of 1986 to part of 1991 provided that he “ ... make[s] the appropriation buyback payment to the Weymouth Retirement Board. ...”

7. From 1989 until March, 2003, Mr. Morehouse also worked as an electrician’s helper.
8. In November, 1996, Mr. Morehouse was appointed to the position of firefighter in Longmeadow where he worked until June or July, 2002.
9. In July, 2002, Mr. Morehouse was appointed to the permanent position of full-time firefighter in Springfield, a civil service community, from Certification No. 211322.
10. Mr. Morehouse was laid off from the Springfield Fire Department March 6, 2003.
11. While employed in the Springfield Fire Department, Mr. Morehouse contributed to the Springfield Retirement System.
12. On September 5, 2003, Mr. Morehouse was appointed to the permanent position of full-time firefighter in Weymouth, a civil service community, from Reemployment Certification No. 230621.
13. Also on September 5, 2003, Mr. Morehouse signed and dated a form that states,

“City/Town of Weymouth¹

Notice Relative to Public Safety Smoking Prohibition
Department of Personnel Administration PAR. 23

Massachusetts General Laws Chapter 41, section 101A.

‘Subsequent to January first, nineteen hundred and eighty-eight, no person who smokes any tobacco product shall be eligible for appointment in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products. The personnel administrator shall promulgate regulations for the implementation of this section.’

¹ There is a blank for the name of the city or town using the form in order for someone to write the name of the city or town. Based on the handwriting elsewhere on the form, it appears that Mr. Morehouse wrote “Weymouth” into the form.

I understand that I am prohibited by law from smoking tobacco products, at any time, as long as I am employed by the City/Town of Weymouth as a firefighter, regardless of rank, and that I must be terminated if I smoke.

Name _____

Date _____

Witness _____”

14. Mr. Morehouse’s retirement contributions to the Springfield Retirement System were transferred to the Weymouth Retirement Board.
15. On October 4, 2011, a video camera recorded Mr. Morehouse as he was smoking. The recording was viewed at the Department’s disciplinary hearing that led to this appeal but the Department was unable to produce the video recording for the Commission.
16. At the Commission hearing, the Appellant did not deny that he smoked tobacco.
17. Also at the Department’s disciplinary hearing, certain of Mr. Morehouse’s medical records were introduced into the record, two of which refer to Mr. Morehouse as a “current smoker.” Those two medical records are dated August 26 and September 2, 2011, respectively.
18. By letter dated December 22, 2011, the Department notified Mr. Morehouse there would be a hearing on January 4, 2012 regarding allegations that Mr. Morehouse was smoking tobacco in violation of G.L. c. 41, § 101A, which warranted his termination. The January 4, 2012 hearing was held.
19. By letter dated January 5, 2012, the Department notified Mr. Morehouse of his immediate termination based on the evidence adduced at the January 4 hearing determining that:
 - a. Mr. Morehouse was appointed to the position of firefighter in Weymouth on September 5, 2003;

- b. on September 5, 2003, Mr. Morehouse signed a statement stating, “I understand that I am prohibited by law from smoking tobacco products, at any time, as long as I am employed by the City/Town of Weymouth as a firefighter, regardless of rank, and that I must be terminated if I smoke.”
 - c. A video viewed at the January 4, 2012 hearing shows Mr. Morehouse smoking two (2) cigarettes on October 4, 2011;
 - d. two (2) medical reports produced by Mr. Morehouse refer to him as a “current smoker”;
 - e. although HRD Personnel Administration Rules (hereinafter “PAR”) exempt firefighters appointed prior to 1988 from the statutory smoking prohibition, Mr. Morehouse was appointed to the Weymouth Fire Department on September 5, 2003, at which time he signed a statement indicating that he was not exempt from being terminated for smoking.
20. There is no evidence that Mr. Morehouse has denied that he was smoking on October 4, 2011 while he was employed by the Department.
21. Mr. Morehouse filed this appeal at the Commission on January 12, 2012.
22. Mr. Morehouse retired from his position as a Weymouth firefighter on March 20, 2012.

Pertinent Statutes and Regulations

G.L. c. 41, § 101A, *supra*.

PAR.23 Smoking Prohibition Rule (Effective October 6, 1988), promulgated pursuant to G.L. c. 41, § 101A, provides in pertinent part:

“23.1 Definitions as used in this Rule:

‘appointment’

- a. For positions subject to chapter 31 of the General Laws, means any appointment whether provisional, temporary or permanent, full-time, part-time, intermittent or reserve, to a covered position from an

eligible list established as the result of a civil service examination administered after January 1, 1988.

- b. For positions not subject to chapter 31 of the General Laws, means any appointment whether provisional, temporary or permanent, full-time, part-time, intermittent or reserve, to a covered position after January 1, 1988.

‘covered position’ means the following appointive titles:

... firefighter – municipal

... fire chief – when filled as an original appointment

Positions filled on a promotional basis are not covered positions if the person promoted received an original appointment to a covered position prior to January 1, 1988, or in the case of positions covered by Chapter 31, if the person promoted received an original appointment to a covered position from an eligible list established as the result of a civil service examination administered prior to January 1, 1988. ...

- 23.2 No person appointed to a covered position shall, subsequent to appointment, smoke any tobacco product at any time during his or her employment in any position covered by section 94 of chapter 32 of the General Laws. This prohibition includes all time off the job as well as all time on the job.” ...

G.L. c. 31, § 1 provides definitions of civil service terms, including definitions of the following pertinent terms:

“‘Civil service employee’, a person holding a civil service appointment. ...

‘Civil service position’, an office or position, appointment to which is subject to the requirements of the civil service law and rules. ...

‘Eligible list’, a list established by the administrator, pursuant to the civil service law and rules, of persons who have passed an examination; or a re-employment list established pursuant to section forty; or a list of intermittent or reserve fire or police officers as authorized under the provisions of section sixty; or any other list established pursuant to the civil service rules from which certifications are made to appointing authorities to fill positions in the official service. ...

‘Original appointment’, an appointment pursuant to section six [*see infra*] or section twenty-eight [regarding labor service]. ...

‘Permanent employee’, a person who is employed in a civil service position (1) following an original appointment, subject to the serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment; or (2) following a promotional appointment, without restriction as to the duration of his employment. ...

‘Reinstatement’, the restoration of an employee to a position pursuant to the civil service law and rules. ...

‘Tenured employee’, a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2) a promotional appointment on a permanent basis. ...”

G.L. c. 31, §6 provides in pertinent part:

“Each appointment to a civil service position shall be made by an original appointment pursuant to the provisions of this section or by a promotional appointment pursuant to the provisions of section seven, except as otherwise provided by this chapter or other law.

Each such original appointment in the official service shall be made after certification from an eligible list established as the result of a competitive examination for which civil service employees and non-civil service employees were eligible to apply, except as otherwise provided by section[] ... forty” [*see infra*]

G.L. c. 31, § 40 provides in pertinent part:

“If a permanent employee shall become separated from his position because of lack of work or lack of money or abolition of his position, his name shall be placed by the administrator on a reemployment list

... The name of a person placed on such reemployment list shall remain thereon until such person is appointed as a permanent employee after certification from such list or is reinstated, but in no event for more than two years. The administrator, upon receipt of a requisition, shall certify names from such reemployment list prior to certifying names

DISCUSSION

The Legal Standard for Consideration of a Motion to Dismiss

The Department filed a motion to dismiss the instant appeal. The Appellant filed a motion for summary decision. The Standard Adjudicatory Rules of Practice and Procedure (hereinafter “Rules”) govern administrative adjudication, as adopted by the Commission, with G.L. c. 31 taking precedence over any conflicting Rules. 801 CMR 1.01, *et seq.* There appears to be no such conflict here. The Rules provide that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be

granted. 801 CMR 1.01(7)(g)(3). In assessing a motion to dismiss, the Commission is informed by the ruling in Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), which determined that dismissal is precluded if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. The Rules further provide that a party may move for summary decision when the party is of the opinion that there is no genuine issue of fact relating to his or her claim or defense and the party is entitled to prevail as a matter of law. 801 CMR 1.01(7)(h).

The Parties' Arguments

The Appellant vigorously asserts that he became a firefighter in Boxborough in 1986, well prior to the January 1, 1988 cutoff date and, consequently, the statute and PAR.23 do not apply to him. He acknowledges that his Boxborough Fire Department employment did not fall under civil service but states that the statute and PAR.23 apply to both civil service and non-civil service employment as a firefighter. The Appellant also argues that PAR.23 indicates that even someone who is promoted after January 1, 1988 is not subject to the statute as long as the person was originally appointed prior to that date. Further, the Appellant asserts that to interpret the statute as the Respondent does it would violate his constitutional rights to pursue employment in place of his choosing and where to live, it would require him to remain employed in Boxborough, it would bar him from being re-employed and from taking examinations for employment in other Fire Departments, and it would cause him to forfeit his seniority. In addition, the Appellant avers that if PAR.23 is interpreted to apply to him under the circumstances then the Personnel Administrator acted ultra vires in promulgating it. With respect to the form that he signed when he was appointed to the Weymouth Fire Department, the

Appellant argues that the form is simply the notice that PAR.23 requires appointing authorities to provide to appointees. As evidence of his pre-1988 appointment, the Appellant states that Exhibit 4, a December 27, 2011 letter from the Weymouth Retirement Board, shows that he worked twenty-five years, indicating that his employment dates at least as early as 1987. As further evidence, the Appellant notes that Exhibit 2, a document from the Boxborough Treasurer, shows that the Appellant was appointed to the position of call firefighter/EMT on October 13, 1986. The Appellant acknowledges the public policy behind G.L. c. 41, § 101A, which is to gradually reduce the number of police and firefighters who smoke tobacco in order to reduce costly pensions resulting from higher lung and heart disease related to smoking. However, he avers that he is one of the employees protected by the statute and to abruptly apply the statute to him at this point in time does not serve the public policy behind the statute.

The Respondent counters that the Appellant was appointed to the Weymouth Fire Department long after January 1, 1988 and, therefore, he is subject to the statute requiring termination of the Appellant's employment for smoking tobacco. As further evidence thereof, the Appellant signed a document indicating that he was aware he would be terminated for smoking tobacco when he was appointed to the Weymouth Fire Department. Further, the Respondent avers that the Appellant was a *call* firefighter in Boxborough, which did not afford him the protected status of someone appointed a regular, full-time employee pursuant to the statute and PAR.23. In fact, the Respondent asserts, there is no evidence of the Appellant's civil service status until 2002 when he was appointed to the Springfield Fire Department. The Weymouth Retirement Board letter indicating that the Appellant has worked for twenty-five years (dating back to approximately 1987) is not dispositive here, the Respondent asserts. Further, the Respondent avers, as the Supreme Judicial Court has indicated, the text of the statute

is clear and straight forward, effectively mandating termination in this case and limiting the response of the Commission to this appeal. Moreover, the public policy behind the statute has been reviewed and recognized by the Supreme Judicial Court and is applicable here. Finally, the Respondent asserts that the Appellant is raising constitutional arguments here for the first time, not having raised them at the local hearing, as if to suggest that it is inappropriate for the Appellant to assert such claims here.²

Analysis

A preponderance of the evidence establishes that the Appellant smoked tobacco while he was a Weymouth firefighter. Therefore, the sole remaining issue is whether the Appellant is subject to G.L. c. 41, § 101A (or hereinafter “statute”), which bars people who smoke tobacco products from being appointed as a police officer or firefighter after January 1, 1988 and provides that, “... no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products. ...”

G.L. c. 41, § 101A makes it clear that after January 1, 1988, no one who smokes tobacco “shall be eligible for appointment in a city or town and no person so appointed after said date shall continue in such office or position if such person thereafter smokes any tobacco products.” G.L. c. 41, § 101A. PAR.23, promulgated by HRD pursuant to G.L. c. 41, § 101A, defines “appointment” with regard to a civil service job as an appointment to a “covered position from an eligible list established as the result of a civil service examination administered after January 1, 1988.” It defines “appointment” with regard to a *non*-civil service job as an appointment to a covered position after January 1, 1988. This regulation has been in effect since it was promulgated October 6, 1988 and upheld. In Town of Plymouth v. Civil Service Commission, et al, 426 Mass. 1 (1997), the Supreme Judicial Court specifically stated,

² At the motion hearing, it was indicated that the Appellant was represented by counsel at the local hearing.

“ ... we reject the argument that the personnel administrator’s rule goes beyond the statutory language of s. 101A. The plain wording of the statute expresses a mandatory directive requiring that ‘no person ... appointed after [January 1, 1988] shall continue in [the] office [of police officer or fire fighter] if such person thereafter smokes any tobacco products.’ G.L. c. 41, § 101A. The personnel administrator’s rule, requiring mandatory termination for violation of the smoking prohibition, is consistent with the legislative directive, and, therefore, has the force of law.”

Town of Plymouth, at pp. 5-6 (citations omitted). There is no evidence in the instant case that the regulation was changed such that it now exceeds HRD’s authority where it did not before. Therefore, the Appellant’s allegation that PAR.23 is an ultra vires exercise of the Personnel Administrator’s authority is unavailing.

The statute and PAR.23 effect both appointments to positions that are subject to G.L. c. 31 and positions that are not subject to G.L. c. 31. PAR.23 states that this includes appointments that are provisional, temporary or permanent, full-time, part-time, intermittent or reserve.³ The operative word here is “appointment.” G.L. c. 41, § 101A states clearly that it applies to persons “appointed” after January 1, 1988. G.L. c. 31 is the central civil service statute and it includes definitions of applicable terms. I understand the definition of “appointment” in PAR.23 to supplement, not supplant its use in G.L. c. 31. Section 1 of G.L. c. 31 refers to original appointments and promotional appointments. At issue here is the Appellant’s original appointment to the Weymouth Fire Department. Pursuant to G.L. c. 31, § 6, an original appointment shall be made following an examination and certification except as provided otherwise, as is applicable here, pursuant to G.L. c. 31, § 40. Section 40 provides that the name of a permanent civil service employee who is separated from his position because of a lack of work or lack of money or abolition of his position shall be placed on a reemployment list. Further, section 40 specifically provides that the name of the person on the reemployment list, “ ... shall remain thereon until such person is appointed as a permanent employee after

³ It does not include call firefighters.

certification from such list or is reinstated, but in no event for more than two years. ...” The Appellant was not appointed to the Weymouth Fire Department following an examination. Rather, he was laid off from his position in the Springfield Fire Department in March, 2003 and the Respondent appointed the Appellant from reemployment certification No. 230621 in July, 2003. Since the Appellant’s appointment to the Weymouth Fire Department in occurred in 2003, his appointment occurred long after the January 1, 1988 date in the statute. When the Respondent found that the Appellant was smoking tobacco, the Respondent had just cause to terminate the Appellant’s employment.

In reaching this decision I am further guided by the Supreme Judicial Court’s articulation of the public policy reasoning behind G.L. c. 41, § 101A. Specifically, the Court noted,

“ ... the purpose of s. 101A is to prevent police officers and fire fighters from increasing their risk of hypertension and heart disease by smoking and, therefore, their eligibility for disability retirement benefits under G.L. c. 32, s. 94. (citation omitted) Unlike [the alcohol prohibition in G.L. c. 31, s. 50] , s. 101A does not apply to all civil service employees, but only to police officers and fire fighters who, because of the nature of their jobs, are already at high risk for developing hypertension and heart disease. The Legislature appears to have made a policy decision, based on financial interests, that employment in these positions should no longer be open, after January 1, 1988, to persons who smoke tobacco products so that, over a period of time, police and fire departments will have a workforce free of a serious disease-causing addiction.”

Town of Plymouth, at p. 7 (citations omitted). Combining this policy with the central reference to “appointments” in the statute and in PAR.23, in conjunction with its meaning in the context of G.L. c. 31, I can come to no other conclusion than that the Appellant was appointed to the Weymouth Fire Department in 2003 and the Respondent had just cause to terminate the Appellant pursuant to the statute when it found that the Appellant smoked tobacco.

Conclusion

Based on the findings of fact, the law, and the analysis herein the Appellant's motion is denied, the Respondent's motion is granted and the appeal is hereby *dismissed*.

Civil Service Commission

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners on April 18, 2013.

A True Record. Attest:

Commissioner

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)(1), 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 as stated below.

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 from the effective date specified in 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.

Notice to:

Marshall T. Moriarty, Esq. (for Appellant)
George E. Lane, Jr., Esq. (for Respondent)