

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

BRENNAN POLIDORO,
Appellant

v.

D1-22-153

CITY OF PITTSFIELD,
Respondent

Appearance for Appellant:

Pro Se
Brennan Polidoro

Appearance for Respondent:

Russell Dupere, Esq.
94 N. Elm Street
Suite 307
Westfield, MA 01085

Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

The Commission dismissed the Appellant's appeal as it lacks jurisdiction to hear a disciplinary appeal from a probationary firefighter. Further, based on a careful review, the Commission opted not to initiate an investigation.

DECISION

Background

On November 14, 2022, the Appellant, Brennan Polidoro (Appellant), filed a discipline appeal with the Civil Service Commission (Commission), contesting the decision of the City of Pittsfield (City) to terminate him as probationary firefighter in the City's Fire Department. On December 13, 2022, I held a remote pre-hearing conference which was attended by the Appellant, counsel for the City, the City's Mayor and City's Human Resources Director.

As part of the pre-hearing conference, the parties stipulated to the following:

- A. On October 30, 2021, the Appellant took the written portion of the firefighter examination administered by the state's Human Resources Division (HRD).
- B. On March 15, 2022, HRD established the eligible list for firefighter.
- C. On August 18, 2022, HRD issued certification no. 08815 to the City of Pittsfield.
- D. On October 17, 2022, the City appointed the Appellant as a firefighter from this certification.
- E. One other candidate, ranked above the Appellant on the certification, was also appointed as a firefighter from this certification.
- F. On November 9, 2022, during the Appellant's probationary period, the City terminated the Appellant's employment.
- G. The Appellant subsequently filed this appeal with the Commission on November 14, 2022.

According to the City, a review of the Appellant's employment was prompted by new information it received after the Appellant's appointment which related to the Appellant's prior employment with the Town of Lanesborough's Police Department. The City acknowledges that this information was brought to its attention by the incoming District Attorney, who had just recently been elected to that post in the November 2022 election.¹ While the City was satisfied with the Appellant's response regarding his employment with the Lanesborough Police Department, the City, as part of this new review, also came to learn that the Appellant had failed

¹ The Appellant asserts that the then-District Attorney-Elect's involvement was a conflict of interest as, according to the Appellant, the District Attorney, while in private practice, had previously represented an individual involved with the underlying alleged incident affecting the Appellant's employment in Lanesborough.

to disclose on his application his prior employment with the Town of Monterey as well as employment at a local supermarket, an omission the Appellant now acknowledges. The City stated that, based on their review, the Appellant had negative employment issues related to both of these undisclosed employers. The City stated that, based on the Appellant's failure to disclose these prior employers during the hiring process, they terminated his employment as a probationary firefighter.

At the pre-hearing, as referenced above, the parties stipulated that no candidate ranked below (or even tied with) the Appellant on the certification was appointed. Rather, only one other candidate ranked *above* him was appointed.

After the pre-hearing, I issued a Procedural Order giving the Appellant 30 days to effectively amend his appeal to request that the Commission consider initiating an investigation under G.L. c. 31, § 2(a).

Applicable Civil Service Law

Discipline Appeals

Pursuant to G.L. c. 31, § 41, a civil service appointing authority may not impose certain types of discipline, including discharge, upon a "tenured employee" without "just cause". A "tenured employee" is defined as one "who is employed following . . . 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." G.L. c. 31, § 1. After receiving an original appointment as a permanent, full-time fire fighter, a person must "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." G.L. c. 31, §§ 34 and 61. The Commission only has jurisdiction to hear disciplinary appeals of tenured employees. See Selectmen of Brookline v.

Smith, 58 Mass. App. Ct. 813, 815 (2003). This is clear from the structure and content of the civil service law which "provide[s] an administrative hearing for tenured employees, G.L. c. 31, § 43, but not for probationary employees." New Bedford v. Civil Serv. Comm'n., 6 Mass. App. Ct. 549, 551 (1978).

A termination that concerns allegations about an employee's reputation, may entitle the employee to a judicial "name-clearing" hearing or civil action for declaratory relief in court. See, e.g., Brouillard v. City of Holyoke, 74 Mass. App. Ct. 1128 fnt.2 (2009) (unpublished disposition). See also, G.L. c. 31, § 42, ¶ 3 ("The supreme judicial court or the superior court shall have jurisdiction over any civil action for the reinstatement of any person alleged to have been illegally discharged . . . Such civil action shall be filed within six months next following such alleged illegal act, unless the court upon a showing of cause extends such filing date.")

Bypass appeals

Original appointments of civil service employees are made from a list of candidates, called a "certification", whose names are drawn in the order in which they appear on the applicable civil service "eligible list", using what is called the 2n+1 formula. G. L. c. 31, §§ 6 through 11, 16 through 27; Personnel Administration Rules, PAR.09. An appointing authority must provide specific, written reasons – positive or negative, or both -- consistent with basic merit principles – *for bypassing a higher ranked candidate in favor of a lower ranked one*. G.L. c. 31, § 27; PAR.08(4). A person may appeal a bypass decision under G.L. c. 31, § 2(b) for de novo review by the Commission.

Investigations

Section 2(a) of Chapter 31 vests the Commission with the power and duty "[t]o conduct investigations at its discretion or upon the written request of the governor, the executive council,

the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the Commonwealth.” In accordance with Section 72 of Chapter 31, the Commission may “investigate all or part of the official and labor services, the work, duties and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings and methods of promotion in such services.” Sections 73 and 74 of Chapter 31 provide the Commission additional authority in addressing and penalizing violations of the civil service law and rules.

The Commission exercises its discretion to conduct an investigation only “sparingly”; typically only when there is clear and convincing evidence of systemic violations of Chapter 31 or an entrenched political or personal bias that can be rectified through the Commission’s affirmative remedial intervention into personnel processes.

Analysis

The Commission lacks jurisdiction to hear this matter either as a discipline appeal or a bypass appeal. Since it is undisputed that the Appellant was still in his probationary period at the time of his termination, he did not enjoy the due process protections afforded to permanent, tenured employees, including the right to contest his termination to the Commission.

I also considered whether the Commission could review this matter as a bypass appeal, as, arguable, what occurred here was the rescission of a conditional offer of employment based on new information that became available to the City. However, the one other candidate appointed from the certification relevant to this appeal was ranked above the Appellant, meaning that no bypass occurred, even under the expansive interpretation referenced above.

I now turn to whether the Commission should exercise its broad authority to initiate an investigation under Section 2(a) of the civil service law, something it does only sparingly. Had

the City's decision to terminate the Appellant been based on the information received from the newly-elected District Attorney, for which the Appellant raises potentially legitimate concerns, it may have been appropriate for the Commission to exercise its investigative authority. That is not the case here. Rather, as acknowledged by the Appellant, the City, as part of its fresh review, discovered employment information that was omitted in the Appellant's application for employment. As part of the pre-hearing conference, the Appellant was not able to offer a legitimate reason for failing to disclose this information to the City. For these reasons, I do not believe an investigation is warranted.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. D1-22-153 is ***dismissed*** and his request for investigation is ***denied***.

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 23, 2023.

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 to:
Brennan J. Polidoro (Appellant)
Russell Dupere, Esq. (for Respondent)