

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

KENDRICK REESE

Appellant

v.

CASE NO: D-10-218

CITY OF PITTSFIELD

Respondent

Appellant's Attorney:

Louis A. Piccone, Esq.
519 Kirchner Road
Dalton, MA 01226

Appointing Authority Attorney:

Fernand J. Dupere, Esq.
Dupere Law Offices
223 College Highway
Southampton, MA 01073

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Kendrick Reese, acting pursuant to G.L.c.31, §41-§43, asserts an appeal to the Civil Service Commission (Commission) against the City of Pittsfield (Pittsfield), Appointing Authority, challenging his 60-day suspension from his position as a Pittsfield Firefighter. On October 13, 2010, during the pre-hearing conference, Pittsfield filed a Motion to Dismiss the Appeal for lack of jurisdiction on the grounds that the appeal was untimely. The Appellant, through counsel, orally opposed the motion at the pre-hearing conference but the Commission has received no written opposition from the Appellant.

FINDINGS OF FACT

Giving appropriate weight to the submission and argument of the parties, I find the following material facts to be undisputed:

1. The Appellant, Kendrick Reese, was appointed a permanent Firefighter for the Pittsfield Fire Department on or about January 4, 2000. (*Claim of Appeal*)

2. The Appellant acknowledges that, on August 2, 2010, he received notice of the 60-day suspension from which he appeals and that his Claim of Appeal was filed with the Commission (pro se, not by present counsel) by letter postmarked August 18, 2010. (*Claim of Appeal; Pittsfield Motion*)

CONCLUSION

The party moving for summary disposition pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) in an appeal before the Commission is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party [i.e. Mr. Reese], Pittsfield has presented substantial and credible evidence that Mr. Reese has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that he has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

Specifically, this motion to dismiss must be allowed unless Firefighter Reese raises “above the speculative level” sufficient facts “plausibly suggesting” that his alleged appeal was timely under applicable civil service law and rules. See generally 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)

The Commission's jurisdiction to hear disciplinary appeals is limited by statute. G.L.c.31, §43 requires a person aggrieved by a decision of an appointing authority disciplining him or discharging him from employment pursuant to G.L.c.31, §41, "shall, within ten days after receiving written notice of such decision, appeal in writing to the commission" The failure to appeal to the Commission within the statutory ten day time period is jurisdictional, akin to a statute of limitations, and cannot be administratively expanded by the Commission. See Town of Falmouth v. Civil Service Comm'n, 441 Mass. 814, 822-23 (2006); Flynn v. Attleboro, 23 MCSR 279 (2010); Mancuso v. City of Waltham, 22 MCSR 554 (2009); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); Novia v. City of Boston, 20 MCSR 639 (2007); Maurice v. Massachusetts Dep't of Mental Health, 19 MCSR 328 (2006); Konikowski v. Department of Corrections, 10 MCSR 79 (1997); Springer v. Town of Saugus, 8 MCSR 154 (1995).

The undisputed facts establish that Mr. Reese received notice of the Pittsfield's decision to suspend him for 60-days on August 2, 2010. Since the Appellant's appeal was filed on August 18, 2010, which is more than 10 days later (excluding weekends and holidays), it is clearly untimely. The fact that the Appellant then acted pro se, unfortunately, cannot alter this conclusion.¹

¹ This Decision does not address Pittsfield's second grounds for dismissal that the Appellant is allegedly pursuing a grievance pursuant to the applicable collective bargaining agreement and has waived his right to civil service appeal. But see G.L.c.31, §43, ¶1, third sentence; G.L.c.150E §8. See also Ung v. Lowell Police Dep't, 22 MCSR 471(2009) (discussing the Commission's interpretation of the election of remedy provisions in Chapters 31 and 150E)

Accordingly, for the reasons stated above, Pittsfield's Motion to Dismiss is hereby, allowed, and the appeal of the Appellant, Kendrick Reese is hereby, *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on December 16, 2010.

Commissioner McDowell was
absent on December 16, 2010.

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)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Louis A. Piccone, Esq. (for Appellant)

Fernand J. Dupere, Esq. (for Appointing Authority)