

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

JEFFREY K. REGER,
DANIEL E. CRESPI,
JOHN F. ADAMS &
JEFFREY J. RUSSELL,
Appellants

v.

D-18-178 (Reger)
D-18-179 (Crespi)
D-18-180 (Adams)
D-18-181 (Russell)

DEPARTMENT OF STATE POLICE,
Respondent

Appearance for Appellants Reger & Crespi:

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Appearance for Appellants Adams & Russell:

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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

SUMMARY OF DECISION

In August 2018, the Appellants, four Massachusetts State Troopers, were summarily “suspended without pay”, pending further inquiry into overtime abuse allegedly committed by the Appellants in 2015 and 2016, i.e., claiming pay for shifts not actually, or not fully, worked. If proved, the Appellants alleged overtime abuse, which is tantamount to stealing the public’s money, would be a serious breach of the duty of honesty and integrity demanded from all sworn

law enforcement officers, and the Civil Service Commission would not serve as a safe haven for those proven to be engaged in such misconduct. That, however, is not the issue presented to the Commission here. Rather, the issues before the Commission are: a) whether, prior to being suspended, the Troopers were provided with due process; and b) whether the Troopers have a right of appeal to the Commission. A review of the entire record and, in my opinion, a correct reading of the law, shows that the Troopers have *not* been afforded due process and *do* have a right of appeal to the Commission.

The Troopers were suspended without pay on two days' notice, after a "hearing" by a State Police Duty Status Board, at which no testimony or evidence was taken other than identification of the implicated number of shifts and time frames involved. The Appellants requested a further hearing before the Colonel in charge of the Department, but, as of the date of the full hearing before the Commission, no such hearing had been held, the Appellants had not been provided with all of the evidence collected by the Department to substantiate their alleged abuse, no criminal charges had been preferred and the Appellants' "duty status" remained "suspended without pay" for the foreseeable future.

The Appellants appealed to the Commission, alleging that the Department's actions violated their statutory rights as tenured State Troopers to be able to defend themselves at a prior evidentiary hearing, at which the Department must first establish just cause, before they can be suspended or discharged, with further recourse to appeal any discipline for another *de novo* hearing before the Commission. Over the objection of the Department, and under the authority granted to the Commission pursuant to G.L.c. 22C, § 13 and G.L.c. 31, § 42 & § 43, the Commission takes jurisdiction of these appeals, sets aside the Appellants' suspensions without pay, and orders the Department to reinstate the Appellants to paid status and to impose no further suspension or other discipline until the Appellants have been afforded their statutory right to a just cause hearing.

Nothing in this Decision prevents the Department from duly completing its investigation and, after affording the Appellants their statutory right to a just cause hearing, imposing appropriate discipline for any misconduct that the preponderance of the evidence establishes. Nor does this Decision affect the Department's right, as expressly authorized by G.L.c.30, § 59, to remove any Appellant from the payroll should they be indicted for misconduct in office.

DECISION

Procedural History related to Civil Service Commission Appeals

1. On September 17th, 18th and 21st, 2018, Jeffrey Reger, Daniel Crespi, John F. Adams and Jeffrey J. Russell (the Appellants), all Troopers with the Department of State Police (Department), filed appeals with the Civil Service Commission (Commission), contesting whether the State Police had just cause to suspend them without pay, effective August 15,

2018 (G.L. c. 31, § 43 Just Cause Appeals) and alleging that the Department failed to follow proper procedural requirements (G.L. c. 31, § 42 Procedural Appeals) (See Appeal Forms).

2. On October 16, 2018, I held a pre-hearing conference which was attended by the Appellants, their counsel, counsel for the State Police and representatives of the State Police Association of Massachusetts (SPAM).
3. As part of the pre-hearing conference, the State Police submitted four (4) identical motions to dismiss the Appellants' appeals, arguing that the Commission lacks jurisdiction on "... any result that stems from a Duty Status hearing ..." which is the case here.
4. Counsel for the Appellants argued that the Commission does have jurisdiction to hear appeals from Troopers who receive unpaid suspensions and argued that the Commission should deny the motions and proceed with the scheduling of a full hearing, including a discovery schedule.
5. Consistent with the discussion at the pre-hearing conference, the Appellants had until October 24, 2018 to submit an opposition to the motions to dismiss; and a motion hearing was scheduled.
6. On October 24, 2018, the Appellants submitted their oppositions to the Department's motions to dismiss.
7. On October 26, 2018, I held a motion hearing, which was digitally recorded, at the offices of the Commission and heard oral argument from all parties.
8. After reviewing the parties' briefs and oral arguments, I denied the Department's motions to dismiss and scheduled a full evidentiary hearing regarding the Appellants' appeals.
9. On November 23, 2018, the Department filed motions for reconsideration regarding my decision to deny the Department's motions to dismiss the Appellants' appeals.
10. On November 28, 2018, the Appellants filed oppositions to the Department's motions for reconsideration.
11. On November 29, 2018, I commenced a digitally-recorded full, evidentiary hearing at the offices of the Commission. Present were: counsel for the Department; counsel for the Appellants; and the Appellants.
12. At the outset of the full evidentiary hearing, I denied the Department's motions for reconsideration.
13. Counsel for the Department stated that it would not be presenting any evidence (i.e. – no witnesses, exhibits) as the Department maintained that the Commission has no jurisdiction to hear the instant appeals.

14. Counsel for the Appellants stated that, since the burden of proof is on the Respondent, they would not be presenting any exhibits or witnesses.

15. All parties submitted post-hearing briefs.

Findings of Fact

Based on the briefs, statements made at the motion and full hearing, and a full review of the record, the following facts appear to be undisputed, unless otherwise noted:

1. The Appellants are all Troopers with the Department of State Police with the following appointment dates:

- A. Jeffrey K. Reger: November 1, 2004;
- B. Daniel E. Crespi: March 4, 2002;
- C. John F. Adams: June 15, 2000;
- D. Jeffrey J. Russell: March 4, 2002.

2. On or around August 13, 2018, each of the Appellants was informed via phone that they were being placed on paid administrative leave and a “duty status hearing” was scheduled for August 15, 2018.

3. By letters dated August 14, 2018, Appellants Reger and Crespi were informed that they were the subject of an Internal Affairs Investigation as a result of an Audit of the former “Troop E” (which was primarily responsible for patrol of the Mass. Turnpike) for the years 2015 and 2016.

4. The August 14, 2018 letter to Trooper Reger stated in part that: “ ... it appears that you were not present for seven (7) Community Action Team (CAT) overtime patrols in 2015 and not present for thirty-two (32) CAT overtime patrols in 2016. Additionally, it appears that you were partially present for nine (9) CAT overtime patrols in 2015 and fourteen (14) CAT overtime patrols in 2016. Also, it appears that you secured early from your assigned Evening Shift CAT patrol early on eight (8) occasions in 2015 and eighteen (18) occasions in 2016.” (Attachment B to Reger’s Opposition to Motion to Dismiss)

5. The August 14, 2018 letter to Trooper Crespi stated in part that: “ ... it appears that you were not present for sixty-six (66) Community Action Team (CAT) overtime patrols in 2015 and seventy-one (71) CAT overtime patrols in 2016. Also, it appears you were only partially present for fifteen (15) CAT overtime patrols in 2015 and twenty-six (26) CAT overtime patrols in 2016. Additionally, it appears you secured early from your assigned Evening Shift CAT patrol on fifty-one (51) occasions in 2015 and on sixty-five (65) occasions in 2016.” (Attachment B to Crespi’s Opposition to Motion to Dismiss)

6. Similar letters for Appellants Adams and Russell are not included in the record before the Commission. However, internal to/from memos dated August 9, 2018 are included in the record and outline the allegations against each trooper.

7. The August 9, 2018 to/from memo regarding Trooper Adams stated in part that: “ ... As a result of conducting an audit of the Troop E overtime to include Community Action Team (CAT) overtime patrols, irregularities were discovered involving Trooper John F. Adams. Specific examples include, but are not limited to, the following: Based upon an examination of CJIS ... history and the Department radio affiliation data, it appears that Trooper Adams was not present for six (6) CAT overtime patrols on [dates in January – March 2015]. Additionally, it appears Trooper Adams left his assigned eve-shift CAT patrol early by securing prior to 11:00 P.M. on seven occasions ...” (Attachment A to Appellant Adams’s Opposition to Motion to Dismiss)
8. The August 9, 2018 to/from memo regarding Trooper Russell stated in part that: “ ... it appears that Trooper Russell was not present for thirty-one (31) CAT overtime patrols on [various dates in 2015] ... was only partially present for eleven (11) CAT overtime patrols on [various dates in 2015] ... left his assigned eve-shift CAT patrol early by securing prior to 11:00 P.M. on twenty-eight (28) occasions on [various dates in 2015].” The to/from also states that “it appears” that the same discrepancies occurred in 2016, allegedly not present for 26 overtime patrols, only partially present for 26 overtime patrols and left shift early on 12 occasions. (Attachment A to Appellant Russell’s Opposition to Dismiss)
9. On August 15, 2018, the Appellants learned that their licenses to carry a firearm (LTCs) had been suspended. All of the Appellants have appealed this LTC revocation decision to District Court.
10. Also on August 15, 2018, a “duty status hearing” was held by the “Duty Status Board” regarding each of the Appellants. Other than the to/from memos referenced above, no testimony or other additional evidence was presented at the duty status hearing.
11. At the conclusion of the duty status hearings, each Appellant, effective immediately, was “suspended without pay.” (Department Motion to Dismiss)
12. Each of the Appellants filed an appeal with the Department for a hearing by the Colonel.
13. In connection with their request for hearing by the Colonel, the Appellants made discovery requests for disclosure of the evidence that, among other things, could establish whether or not they were present and performing the shifts as they had reported and for which they were paid.
14. As of the date of the full hearing before the Commission, the Department had offered to allow the Appellants to review the documents on-site at the Department, but had not agreed to provide any further discovery.
15. Each of the Appellants filed an appeal with the Civil Service Commission. In addition to asking what discipline is being appealed, Commission appeal forms also ask: “Are you

alleging that the Respondent failed to follow any procedural requirements?” Each of the Appellants answered “Yes” on their individual appeal forms.

16. As of the date of the full hearing, no criminal charges had been filed against any of the Appellants.

Applicable Law

The Appellants brought these appeals to the Commission, invoking the jurisdiction granted to the Commission to review discipline imposed on uniformed members (Troopers) of the Department, set forth in Section 13 of Chapter 22C, which provides:

“Any uniformed member of the state police who has served for 1 year or more and against whom charges have been preferred shall be tried by a board to be appointed by the colonel or, at the request of the officer, may be tried by a board consisting of the colonel. Any person aggrieved by the finding of such a trial board may appeal the decision of the trial board under sections 41 to 45, inclusive of chapter 31. A uniformed officer of the state police who has been dismissed from the force after trial before such a trial board, or who resigns while charges to be tried by a trial board are pending against him, shall not be reinstated by the colonel.” *(emphasis added)*

G.L.c. 22C, § 13, enacted by St.1991, c.412, § 22, as amended by St. 2002, c.43.

The current version of Section 13 contains the same first sentence providing for trial board adjudication of Trooper disciplinary charges, but the original version contained in the 1991 legislation¹ provided that review of the Trial Board was taken by petition to the District Court:

“ . . .Any person aggrieved by the finding of such trial board may within sixty days . . . file a petition in the district court . . . [T]he court, after such notice to the colonel as the court deems necessary . . .shall review such findings and determine whether or not upon all the evidence such finding and punishment was justified. . . . [T]he court, in its discretion may direct that the record of the departmental trial board be supplemented by such additional evidence or testimony as the court deems necessary for a just resolution of such review. If the court finds that such finding and punishment was justified the action of the department trial board shall be affirmed; otherwise it shall be reversed and the petitioner shall be reinstated to his office without loss of compensation or other benefits. The decision of the court shall be final and conclusive upon the parties” *(emphasis added)*

The 1991 version of Section 13 tracks the procedures that had been in place since at least 1971, which had been interpreted to provide a relatively narrow standard of review. See

¹ Chapter 412 of the Acts of 1991 was omnibus legislation consolidating the state police force with several other state law enforcement agencies and placed them all within the Department under the supervision and control of the colonel of the state police. The omnibus legislation exempted all officers from the requirement of Chapter 31 (civil service law) but does require that the “classification of such positions shall be subject to the provisions of section forty-five of chapter 30. See, G.L.c.22C,§10.

Commissioner of Public Safety v. Treadway, 368 Mass. 155, 159 (1975). See also, Johnson v. Superintendent, Massachusetts State Police, 416 Mass. 616 (1993) (Section 13 granted District Court exclusive jurisdiction to review Trial Board Decisions); Concannon v. Commissioner of Public Safety, 324 Mass. 503 (1949) (limited review of prior version of disciplinary review board modeled after a military court martial).

The 2002 amendment that substituted the right of appeal to the Commission for District Court review, and incorporated the civil service rights and procedures contained within G.L. c. 31, § 41 through §45 (“inclusive”) to State Police disciplinary matters, carried with it several significant changes. For example, the Commission gives de novo review of disciplinary decisions and the appointing authority (the Department) bears the burden of proving just cause for the discipline by a preponderance of the evidence presented to the Commission.² Other significant differences include: the parties are allowed broad latitude to call and subpoena witnesses; the Commission is a five-member board that decides all matters by majority vote after deliberation; the Commission’s decisions are subject to judicial review and the Commission makes a verbatim record and publishes decisions that contain sufficient findings and conclusions to support that review; substantively, the Commission has the express power to modify discipline and to entertain and resolve complaints that an appointing authority failed to follow the procedural requirements, which include, among other things, the right to notice, prior hearing and a decision explaining the reasons for the discipline, before an employee may be “discharged, removed, suspended for a period of more than five days . . . [or] lowered in rank or compensation.” See G.L.c. 31, § 41 through § 45.

The Department relies on separate provisions in Chapter 22C as authority for the actions taken against the Appellants. Specifically, G.L. c. 22C, § 3 & § 10 authorize the Colonel of the State Police, as the executive and administrative head of the Department, to promulgate “all necessary rules and regulations for the government of the department”, and “subject to the provisions of [c.22C] and of chapter one hundred and fifty E [collective bargaining law] make rules and regulations for the force, including matters pertaining to the discipline [of officers]” G.L.c. 22C, § 10.

The Department’s Rules and Regulations include Article 6, effective since February 1, 2001 entitled “Regulations Establishing Disciplinary Procedures and Temporary Relief from Duty”.

² Under civil service law, the Commission determines just cause for discipline by inquiring, “whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service.” School Comm. v. Civil Serv. Comm’n, 43 Mass. App. Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ ” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The Commission’s decisions are also informed by the tenet of “basic merit principles” of civil service law that discipline must be remedial, not punitive, designed to “correct inadequate performance” and only “separating employees whose inadequate performance cannot be corrected.” G.L. c. 31, § 1.

- Section 6.1 provides the procedure for placing a Trooper who is “unfit for duty” due to a physical, mental or emotional condition on paid leave for up to five days, pending a fitness for duty evaluation and, thereafter, placed on “appropriate leave or duty status”, to include Full Duty, No Duty or Temporary Modified Duty.
- Section 6.2 provides the procedure for convening a “duty status hearing” of a Trooper who (1) is “subject of a criminal investigation, is arrested or indicted or, if a criminal complaint is issued” ; (2) “is the subject of an internal investigation”: (3) “engages in a strike or prohibited job action”: (4) “failed to attend and successfully complete” mandatory training; (5) “is subject to a court order . . . to refrain from abusing a family or household member”; or (6) exceptional circumstances exist which warrant such duty status hearing. The “hearing” is conducted by a Duty Status Board who shall “expeditiously gather sufficient facts” and “after a review of the facts” recommend, subject to the approval of the Colonel, “whether the Trooper should be continued on full duty, or placed on restricted duty, suspended with pay or suspended without pay.”
- Sections 6.3 through 6.4 provide the procedures for initiating “disciplinary action” after “investigation” for violations of Department Rules, Regulations, Policies, Procedures, Orders and Directives, preferring charges, and disposing of the charges without hearing.
- Sections 6.5 through 6.9 provide the procedure for a Trooper who has been “formally charged” to request a Trial Board and prescribes detailed rules for conducting the Trial Board (witnesses are called and cross- examined under oath) and making findings and recommendations to and for the approval of the Colonel.

In addition, the Department relies on the provisions of G.L.c. 22C, § 43, which provides:

“Any person affected by an order of the department or of a division or officer thereof, may, within such times as the colonel may fix, which shall not be less than ten days after notice of such order, appeal to the colonel who shall thereupon grant a hearing, and after such hearing the colonel may amend, suspend or revoke such order. Any person aggrieved by an order approved by the colonel may appeal to the superior court; provided, that such appeal is taken within fifteen days from the date when such order is approved or made. The superior court shall have jurisdiction in equity upon such appeal to annul such order if found to exceed the authority of the department or upon petition of the colonel to enforce all valid orders issued by the department. Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy.”

Analysis

Prior State Police Challenges to Commission Jurisdiction

The Department's position here follows what has become a familiar pattern. Rather than defend the merits of the action taken, the Department claims that, as a matter of law, the Commission has no jurisdiction to review what they have done. Thus, the Department chose to offer no evidence to justify its decision to indefinitely suspend the Appellants without pay. Rather, the Department contends that they have taken no action to initiate disciplinary proceedings reviewable by the Commission under G.L.c. 22C, § 13, but, rather, acted under authority of the Department's enabling statute and regulations which grant broad discretionary "administrative" powers over which the Commission has no power of oversight and review. Time and again, the Department has failed to prevail in this effort to insulate itself from Commission oversight and deprive its tenured members the full panoply of "basic merit principles" that preclude the involuntary suspension, discharge or separation without prior notice and hearing, that the legislature intended to guarantee them.

The State Police began making jurisdictional challenges to the authority of the Commission granted under the 2002 revision to Section 13 in an appeal brought by a Trooper terminated by the Colonel after a Trial Board hearing and recommendations. In Reilly v. Department of State Police, 19 MCSR 107 (2006), the Commission allowed the Trooper's appeal in part and, under the authority provided by G.L.c.31, § 43, ¶2, modified the termination to a long-term suspension. On appeal to the Superior Court, the Department argued that the "only intent (or result) of the 2002 amendment of [G.L. c. 22c] Section 13 was to *create an unbiased forum* [i.e. – the Commission] for an aggrieved member to *voice a complaint* . . . *The disciplinary authority of the Colonel of the Massachusetts State Police is simply not, under Massachusetts General Laws, Chapter 22C, § 13 or any other mandate, subject to the jurisdiction of the Commission.*" (Dep't of State Police v. Civ.Serv.Comm'n & Reilly, 24 Mass. L. Rptr. (Suffolk Sup. 2008)(Reilly) (*emphasis added*)).

The Reilly Court (McDonald, J.), rejected the Department's argument and affirmed the Commission's decision, stating in part:

"The problem with the position of the State Police is that runs afoul of the basic principle of statutory construction that a court 'will not interpret a statute so as to render it or any portion of it meaningless or superfluous'". [Citations omitted]

The parties agree that the 2002 amendment of Section 13 was filed on behalf of the State Police Association of Massachusetts (the "Association"). . . . Its clear purpose was to obtain what was perceived as the greater protection for Troopers and Sergeants of review by the Commission. The State Police acknowledges that the 2002 revision entitles a Trooper to a hearing before the Commission, but as quoted above, it submits the appellate remedy is limited to the hearing itself, i.e. that it provides no authority in the Commission to alter the Colonel's discipline. Apart from the inherent illogic of such an outcome, this interpretation would result in troopers having substantially less protection from alleged administrative

error than they previously had. There is no support in the statutory text or in the legislative history of the 2002 revision for the [Department's] position. Among other things, the legislative history included the event that the Acting Governor's veto of the revised statute (such veto reasonably seen as intended to protect the executive prerogatives of the Colonel) was overridden in the Senate by a vote of 32 to 2". Reilly, 24 Mass.L.Rptr. 35, at 1-2.

The Court's opinion also noted the Commission's specific substantive rights and procedural oversight under civil service law that the Commission applied in Trooper Reilly's appeal as a result of the incorporation of those rights and power of oversight through Section 13, as amended:

"In advancing its argument that the Commission lacked substantial evidence and just cause to vacate two violations found by the Colonel and to modify the Colonel's sanctions, the State Police runs into the obstacle that it failed to incorporate into the appellant record a transcript of the proceedings before the Commission [citing Covell v. Department of Social Services, 439 Mass. 766, 782 (2003) . . . found that the State Police had failed to inform Reilly of their purpose in advance of the interview in violation of her rights under . . . the collective bargaining agreement. . . .found that the sanction against Reilly was disproportionate when viewed against sanctions imposed in comparable cases . . . [a]nd was inequitable when measured against the State Police's actions against her superior who was complicit in Reilly's underlying misconduct . . ."

". . . [J]udicial deference to the Commission's judgment . . . is especially appropriate where the Commission is acting out of its statutory function to guard against inequitable treatment between similarly situated persons . . . and to protect employees from 'overtones of political control or objectives unrelated to merit standards.'" Reilly, 24 Mass.L.Rptr. 35, at 3.[citations omitted]

In Hickey v. Department of State Police, 20 MCSR 436 (2007), the Commission allowed the appeal by a Trooper who had been required to forfeit twenty (20) days of vacation time by the Colonel after a hearing before the Trial Board. The Commission ordered the twenty (20) days of vacation time restored. On appeal, the Department (a) renewed the argument made in Reilly that .. the Commission had no authority to modify a decision of the Colonel under the amended statute; and (b) the Commission had no authority to review imposition of a forfeiture of vacation time because that form of penalty was not specifically enumerated in G.L. c. 31, §§ 41-45. Once again, the Department's arguments failed. The Court rejected the Department's first argument for the same reasons cited in Reilly. In rejecting the Department's second argument, the Court stated in part:

"The purpose of the statute in affording appellate rights would be defeated if that purpose could be subverted merely by the meting out of an equivalent penalty under a different name). See Sullivan v. Chief Justice for Admin. & Mgmt. of the Trial Court, 448 Mass. 15, 24 (2006) ('if a liberal, even not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a

whole, such interpretation is to be adopted rather than one which defeat that purpose’). Even though the loss of accrued time is not specifically enumerated in the statute, the Court holds that such penalty is equivalent to a suspension under the Guidelines and is therefore properly appealable to the Commission.”

Department of State Police v. Civ.Serv.Comm’n, Suffolk Sup. Ct. No. 07-3766-A(2008)

In 2017, the Department again argued that the Commission had no authority to review a decision by the Colonel to require the forfeiture of vacation time of a Trooper. The Court rejected the Department’s challenge for the same reasons stated in Hickey. (See Doherty v. Dep’t of State Police and Civ. Serv. Comm’n, Suffolk Sup. Ct. No. 16-2143-H (May 5, 2017) (ruling on Department’s Motion to Dismiss).

In 2014, three (3) Troopers filed appeals with the Commission to contest their termination by the Colonel. See Gately v. Dep’t of State Police, 28 MCSR 294 (2015); McGarry v. Dep’t of State Police, 28 MCSR 305 (2015); and Walsh v. Dep’t of State Police, 28 MCSR 309 (2015). The underlying facts regarding all three (3) appeals were similar. In each case, based on alleged misconduct, the Colonel suspended the Trooper’s license to carry a firearm and then, according to the Department, “administratively discharged” each Trooper. Each of the Appellants filed an appeal with the Commission.

In each of the above cases at the Commission, the Department argued that the Commission lacked jurisdiction to hear these appeals. The record in Walsh shows that Trooper Walsh had elected to pursue his rights to a Trial Board under G.L. c. 22C, §13, and a Trial Board was actually scheduled to be conducted on September 30, 2014 through October 3, 2014. Prior to September 30th, the Department “administratively discharged” Trooper Walsh and the Trial Board did not go forward. The Department, via a Motion to Dismiss dated October 29, 2014, argued that:

“The Commission should dismiss this appeal based on a lack of jurisdiction where Appellant was generally discharged through an administrative process and not dishonorably discharged following a disciplinary proceeding. Although granted a limited right of appeal to the Commission by Section 13 of Chapter 22C, tenured members of the uniformed branch of the State Police are not civil service employees and are, in fact, specifically exempted from the requirements of Chapter 31 by M.G.L. c. 22C, § 10. Under M.G.L. c. 31, §§ 41-45, only specific disciplinary actions taken or recommended by an employer or appointing authority is subject to Commission review. To sustain a cognizable appeal, the requirements of both Chapter 22C, §13 and Chapter 31, §§ 41 and 43 must be satisfied. That is, the Appellant must establish that he or she is ‘aggrieved’ by the findings of a Trial Board and that the discipline imposed is subject to the Commission’s limited authority under §§41-45 of Chapter 31. This is not the case here where no Trial Board was held and the Appellant’s discharge was not disciplinary in nature.”

”As further grounds of the Commission’s lack of jurisdiction over this matter, the Appellant has simultaneously filed for an appeal hearing pursuant to M.G.L. c.22C, §43 ... The law is clear in providing the Appellant, who has been ‘affected by an order of the department’, with an appeal hearing pursuant to M.G.L. c.22C, §43. Appellant has demonstrated his awareness of this proper means of recourse, as he timely filed for such an appeal with the Department, and that appeal is pending.”

In McGarry, Trooper McGarry also filed a complaint against the Department in United States District Court. The Department filed a Motion for Judgment on the Pleadings in the U.S. District Court which was heard by Judge William G. Young on March 5, 2015. As part of that hearing, counsel for the Department stated:

“Mr. McGarry’s clearly taking issue with the fact that he was discharged and was not given a hearing under the Trial Board procedure which is set forth in the state police rules under I believe it’s Rule 6.7. Now, the case law and, I believe, these are cited in our brief, both O’Neill and Hadfield and others, um, set forth the analysis on the first prong of Parratt-Hudson in that you have to look at whether, um, is this in the state of the official or is this an issue with actual procedure in place?”

“Now, clearly here the state police has adequate procedure in place for disciplinary discharges such as the trial court. So once we acknowledge that, we move on to the second prong, which is are there adequate state remedies that Mr. McGarry can seek, um, post-deprivation remedies. And there are.”

“Under Chapter 22C, Section 13, he can appeal to the Civil Service Commission and he has done that. He can also appeal under Chapter 22C, Section 43, to the Superior Court seeking review of the Colonel’s decision, um, and he has done that as well”

McGarry v. Alben, United States District Court No. 1:114-cv-13407-WGY (2015) (Motion Hearing Transcript)

On June 11, 2015, the Commission issued “Orders of Dismissal Pending a Future Effective Date” in McGarry and Walsh that would allow the Troopers to re-open their appeals after the disposition of the pending Superior Court actions.³ In those orders, the Commission stated:

“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[s] without a Trial Board process, whether the Commission is without jurisdiction to review the ‘just cause’ for the termination under any

³ The Gately appeal was dismissed as Trooper Gately had subsequently retired with an effective retirement date that preceded the discipline.

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.”

Current State Police Challenge to Commission’s Jurisdiction

In the four present appeals, as it did in in Walsh and McGarry, the Department argues that the Appellants have not been suspended through a *disciplinary* process, but, rather, through an *administrative* process that is not subject to review by the Commission, claiming that the Department’s action was taken pursuant to the Colonel’s power to order “any person” be “suspended without pay” on the recommendation of a Duty Status Board, pursuant to G.L.c. 22C, § 43 and Section 6.2.4 of Article 6 of the Department’s Rules and Regulations (“Regulations Establishing Disciplinary Procedures and Temporary Relief From Duty”). The Department asserts that the Appellants have not been disciplined, no “charges” have been “preferred” and no Trial Board hearing has been held. Thus, the Department contends that the Colonel’s actions do not come within the scope of G.L.c. 22C, § 13, cannot be appealed to the Commission and the Appellants’ remedy is limited to an appeal to the Superior Court after a “Section 43” hearing (that is yet to occur) before the Colonel.

This new variation on the same theme presents the most direct challenge yet to the Commission’s oversight of the Department’s discipline of its uniformed members and defies logic and commonsense. For several months, the Appellants have been removed from the payroll of the State Police, receiving no pay and no benefits, including loss of employer-sponsored health insurance benefits for themselves and their families. G.L. c. 31, § 1 makes no distinction between so-called disciplinary and non-disciplinary suspensions defining a suspension as: “a *temporary, involuntary separation* of a person from his civil service employment by the appointing authority.” Each of the Appellants has, at least, been temporarily and involuntarily separated from their employment. The Legislature, via the 2002 amendment to Section 13, clearly intended for uniformed members of the State Police to be entitled to access the Commission for all adverse employment actions that fall within the scope of G.L. c. 31, § 41, and that includes removal from the payroll, i.e. suspensions without pay.

That leads to the next, related argument of the Department. The Department argues that the Commission’s only authority is to review a decision made after a Trial Board has been conducted, arguing in part that: “... the Commission’s jurisdiction or ‘just cause’ review of Department Trial Board decisions is, pursuant to M.G.L. c. 22c, §13, expressly limited to those matters where a member is both aggrieved by the finding of a trial board and as a consequence of that finding, discharged, removed, suspended laid off, transferred, lowered in compensation, or the subject of position elimination as contemplated by M.G.L. c. 31 §§ 41-45. That contradicts what the State Police argued before Judge Young in Federal District Court in March 2015 in McGarry. In that case, Trooper McGarry had not been provided with a Trial Board proceeding before being disciplined, yet the State Police stated in part that: “under Chapter 22C, Section 13,

he [McGarry] can appeal to the Civil Service Commission and he has done that. He can also appeal under Chapter 22C, Section 43, to the Superior Court seeking review of the Colonel's decision, um, and he has done that as well". [emphasis added]. The State Police's argument in McGarry more closely aligns with the plain language of G.L. c.22C, § 43 which states in part: "Nothing herein contained shall be construed to deprive any person of the right to pursue any other lawful remedy." The Commission's authority to hear and rectify procedural flaws in the appointing authority's actions, in addition to, as well as independent of, the merits of any disciplinary actions is precisely what the Legislature intended by making express provision for such oversight in Sections 42 and 43 of the civil service law.

Here, however, the Department argues that any and all of the Appellants' appeal rights are limited to the Superior Court, *after* the Appellants receive a Section 43 hearing, which, as of the date of the full hearing, had still not been held. The Department argues that all due process requirements will be met as the Appellants will receive (at a time chosen by the State Police) a hearing and that the judicial appeal of the Department's position will require the State Police to show that their decision was based on substantial evidence. This argument fails for several reasons.

First, it is entirely unclear what standard of review applies to a "Section 43" appeal to Superior Court. In the most recent appellate decision in which the issue is discussed, the Department was arguing that the Superior Court must apply a Chapter 30A "arbitrary and capricious" standard under a Chapter 30A review, not a "substantial evidence" standard".

Second, whatever the form of judicial review standard may be, it plainly falls short of the "de novo" review that applies to a Commission appeal. See, e.g., Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-28, rev.den.. 440 Mass. 1108 (2003). The significantly greater level of scrutiny that the Commission gives to a Trooper's appeal from the type of "30A" review that the Trooper would receive in a Superior Court stands as one of the core benefits that the Legislature intended to provide when it amended Section 13. It places form over substance to claim that Section 13 does not apply because the Appellants have not been "formally charged" with misconduct and have not been tried and convicted by a Trial Board, when it is the Department's flouting of those requirements that is the cause of that dilemma.

Third, the summary nature of the "administrative" process that the Department claims permits the Colonel to remove a tenured Trooper from the payroll, pending a hearing that has no specific time frame, rules or procedures to govern it, makes further review of any type virtually impossible. Cutone v. Colonel McKeon and Dep't of State Police, Hampden Sup. Ct. No. 16-570 (2017), a "Section 43" appeal in which the Court applied a "substantial evidence" test over the objection of the Department, offers important insight into just how little "due process" the Department believes it needs to provide to uniformed members in a Section 43 proceeding . In

Cutone, the Colonel had denied the Trooper permission to engage in certain outside employment. The Superior Court judge made the following conclusions:

“It is plain from this administrative record that the defendants [State Police] made strategic decisions which had a deleterious effect on the meaningfulness of Trooper Cutone’s § 43 hearing. Despite holding strong opinions, the Colonel elected not to appear at the hearing and testify in support of his reasons for opposing Trooper Cutone’s proposed off-duty employment. Neither did the defendants designate any other witness to testify in support of the denial. This tactic effectively insulated the defendants’ motivation from any meaningful scrutiny at the hearing, either by Trooper Cutone, his legal counsel, or the hearing officer. Trooper Cutone was deprived of an opportunity at the hearing to assess and cross-examine the Colonel, or his designee on the accuracy or legitimacy of the reasons for denial. And because defendants present no testimony, Trooper Cutone was further deprived of any opportunity to present rebuttal testimony. Instead, the defendants elected to sit back, discount the § 43 hearing process guaranteed to one of its troopers, and hold in reserve their perceived right to arbitrarily overrule the hearing officer’s findings and conclusions, without providing the Trooper any further administrative recourse. This ‘hiding in the weeds’ or ‘rope a dope’ hearing tactic, as some judges have labeled it, deprived Trooper Cutone of a meaningful due process hearing.”

See also, Costa v. DiFava, 12 Mass.L.Rptr. 45 (Sup.Ct. 2000) (Colonel required to promulgate rules and regulations governing the appeals regarding promotional examinations).

The Court’s description of the process in Cutone has a familiar ring to it. Here, in the instant appeals, the Appellants were removed from the payroll after a brief duty status hearing in which the only evidence presented was a hearsay memo to which the Appellants effectively had no opportunity to respond. With the Appellants now off the payroll, the Department unilaterally decides when the Section 43 hearing will be held, thus keeping the Appellants on unpaid leave and preventing them even from filing an appeal in Superior Court. Here, as of the date of the full hearing, the Appellants had been without pay or benefits for several months. During the motion hearing proceeding, I asked counsel for the Department, if, after a Section 43 hearing, no formal disciplinary charges were preferred, whether the Troopers would receive their lost pay and benefits. The equivocal answer I received was that the Troopers could make a “request” to be reimbursed. This does not strike me as being consistent with the due process rights required of public employees whose pay and benefits have been stopped by their employer. As tenured members of the Department (more than one year of service), the Appellants possess a protected property interest in continued employment and have a right to due process before the Department can deprive them of it. E.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). See Dasey v. Anderson, 304 F.3d 148, 157-57 (1st Cir. 2002) (distinguishing probationary Troopers, who may be discharged without any pre-termination hearing, from tenured troopers with more than one year experience, who are guaranteed the right to a pre-termination hearing under G.Lc.22C,§13, MSP Rule 6.5.1 and a collective bargaining agreement); Gurry v. Colonel, Dep’t of State Police, 88 Mass.App.Ct. 1101 (2015 (Rule 1:28 decision) (same).

More broadly, when the Legislature intended public employers to have the ability to remove employees from the payroll without typical due process protections such as a prior hearing, it has said so, as it has in G.L. c. 30, § 59 which states:

An officer or employee of the commonwealth, or of any department, board, commission or agency thereof, or of any authority created by the general court, may, during any period such officer or employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him, ... if he was appointed by some other appointing authority, be suspended by such authority, whether or not such appointment was subject to approval in any manner. Notice of said suspension shall be given in writing and delivered in hand to said person or his attorney, or sent by registered mail to said person at his residence, his place of business, or the office or place of employment from which he is being suspended. Such notice so given and delivered or sent shall automatically suspend the authority of said person to perform the duties of his office or employment until he is notified in like manner that his suspension is removed. A copy of any such notice together with an affidavit of service shall be filed with the state secretary.

Any person so suspended shall not receive any compensation or salary during the period of such suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits or seniority rights, nor shall any person who retires from service while under such suspension be entitled to any pension or retirement benefits, notwithstanding any contrary provisions of law, but all contributions paid by him into a retirement fund, if any, shall be returned to him, subject to section 15 of chapter 32. The employer of any person so suspended shall immediately notify the retirement system of which the person is a member of the suspension and shall notify the retirement board of the outcome of any charges brought against the individual.

...

....

If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement." (emphasis added)

The Department has cited no authority, and I have been made aware of none, that has construed Section 43 and/or Department Rule 6.2 (Duty Status Hearing) to circumvent the established disciplinary process set forth in Department Rules 6.4 through 6.9, and, similarly, allow the removal of a Trooper from the payroll without the prior investigation, charges and pre-discipline Trial Board hearing that the latter requires.⁴

⁴ The Department's citation to a footnote in McCormack v. Department of State Police, D1-12-308, (2014) that the Commission has "long recognized" that uniformed members of the State Police appeal to the Commission regarding

In addition, the use of the “duty status” approach to making what amount to findings of serious misconduct is fraught with problems for the accuser, as the absolute privilege for defamatory statements in internal affairs investigations attaches only when proceedings are “quasi-judicial” in nature, [and a trial board would qualify but a duty status board probably would not. See Fisher v. Lint, 69 Mass.App.Ct. 360 (2007).

There may well be circumstances under which Section 43 may be invoked to enable the Colonel to effect true administrative changes in the “duty status” of tenured (as opposed to probationary) uniformed members of the Department.⁵ See, e.g., Gray v. Foley, 26 Mass.L.Rptr. 239 (2009) (demotion of major to captain without affording officer the right to answer charges before a trial board “may have been a technical violation of G.L.c.22C, §13 and Articles 6.5 and 6.7 of the Rules and regulations”, the Colonel had the complete discretion to select members of his “command staff” and “whatever procedural irregularities” occurred, the officer was not entitled to any relief under any applicable law); Greaney v. Colonel, Dep’t of State Police, 52 Mass.App.Ct. 789 (2000), aff’d, 438 Mass. 1008 (2002). Using Section 43, however, as an exclusive means to replace the proper channels for investigating, charging and reviewing Departmental disciplinary actions in the guise of administrative “duty status” changes would create an absurd result that, in effect, would invite use of that process in nearly every future disciplinary matter, essentially nullifying the 2002 amendment of Section 13, an outcome that is clearly inconsistent with the overall purpose of the law and the intent of the Legislature. See generally, Benoit v. Hillman, 1998 WL 1181783 (Supt Ct. 1998) (citing authority to suggest that, by the proviso in the final sentence of Section 43, the Legislature expressed an intent that Section 43 would not be the exclusive vehicle to redress injury caused by Departmental orders even when covered by that section of the law).

Conclusion and Relief to be Granted

For all of the above reasons, I have concluded that: (1) the Appellants have been deprived of their right to a hearing before they may be suspended without pay, as intended by the provisions of G.L.c. 22C, § 13, G.L.c. 31, § 41 through 45, Department Rules 6.4 through 6.9, and, to the

an order to suspend a Trooper without pay following a duty status hearing is inapposite. McCormack never filed a timely appeal with the Commission challenging his suspension without pay after a duty status hearing and the Commission Decision did not turn on this point. Moreover, the Commission’s position on this issue was squarely addressed in its more recent decisions in Walsh and McGarry, referenced above.

⁵ Department Rule 6.2.1 identifies some examples that would seem appropriate for administrative action, including a member who has been indicted, under a domestic abuse order, and Rule 6.2.4 provides for placing an officer on “restricted duty” or “suspended with pay”, which are actions that would not offend the rights of tenured troopers under Section 13 or the collective bargaining agreement. Allowing such actions for an officer who is “the subject of an internal investigation” or in other undefined “exceptional circumstances” however, are situations that are problematic and offend those rights. Where the provisions of Department Rule 6.2 purport to authorize “suspension without pay” under other circumstances that lack statutory support and are in conflict with the provisions of the applicable collective bargaining agreement, that is when they are unlawful and unenforceable. See, e.g., Dasey v. Anderson, 304 F.3d 148 (1st Cir. 2002); Sullivan v. Superintendent, Dep’t of State Police, 92 Mass.App.Ct. 1128 (2018)

extent applicable, the provisions of the collective bargaining agreement governing their employment with the Department; and (2) the Appellants may contest their suspensions to the Commission, which has jurisdiction to rectify procedural irregularities pursuant to G.L.c.31, §42, as well as require that the Department prove just cause for their suspension by a preponderance of the evidence, pursuant to G.L.c.31, § 43.

The relief to be granted in this situation would be the same whether the Commission acts under its authority to rectify procedural error under G.L.c.31, § 42, or for the failure of the Department to meet its burden to establish just cause for the suspensions by a preponderance of the evidence presented to the Commission. As the Department has violated the Appellants' procedural rights to a hearing prior to imposing the suspensions, and has chosen to present no evidence at the full hearing, the Appellants are entitled to be reinstated to their positions. Nothing in this Decision precludes the Department from initiating appropriate disciplinary proceedings to investigate, charge, and after a Trial Board hearing, convict, one or more of the Appellants, for the misconduct which has been established, subject to the Appellants further appeal, if necessary, for a de novo review by the Commission.

G.L.c.31, § 42 states:

Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. *If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights. (emphasis added)*

G.L. c.31, § 43 states:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.” (emphasis added)

In sum, the Appeals of the Appellants are *allowed*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 28, 2019.

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 Kittredge, Esq. (for Appellants Reger and Crespi)

Daniel Moynihan, Esq. (for Appellants Adams & Russell)

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