COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Suffolk, ss.

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

DAVID T. SIMMONS,
Appellant
v.

DEPARTMENT OF CONSERVATION & RECREATION,
Respondent

Case No.: D1-12-2

Appellant's Attorney:

Scott A. Lathrop, Esq.
Attorney-At-Law
176 Fitchburg Road
Townsend, MA 01469

Respondent's Attorney:

Frank Hartig, Esq.
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251 Causeway Street, Suite 600
Boston, MA 02114-2119

Commissioner:

Cynthia A. Ittleman

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

On December 30, 2011, David T. Simmons ("Appellant") filed an appeal with the Civil Service Commission ("Commission") alleging that the Department of Conservation ("Department") wrongly terminated his employment in violation of G.L. c. 31, § 43 and that the Department failed to follow the requirements of G.L. c. 31, §§ 41-45, prejudicing the Appellant by failing to inform him of his rights. The Department filed a "Motion for Summary Decision to

Dismiss Appellant's Appeal" relying upon 801 Code of Massachusetts Regulations[1] ("CMR") 1.01(7). Since 801 CMR 1.01(7) pertains to motions to dismiss and the standard cited by the Department alleges that Commission has no jurisdiction regarding this appeal, the Commission addresses, and refers to the Department's motion as a "Motion to Dismiss." The Appellant filed an Opposition to the Department of Conversation and Recreation's Motion for Summary Decision to Dismiss Appellant's Appeal ("Opposition") on March 27, 2012. A hearing on the Motion to Dismiss was held April 9, 2012. The Department filed a "Department of Conservation and Recreation's Supplemental Memorandum of Law" ("Supplemental Memo") on April 10, 2012. The Appellant filed a "Reply to the Department of Conservation and Recreation's Supplementary Memorandum of Law ("Reply") on April 13, 2012.

Findings

Based on all matters filed in this case, the parties' arguments, and reasonable inferences therefrom, and taking administrative notice of pertinent statutes, caselaw, rules and policies, a preponderance of the evidence establishes the following undisputed facts:

1. The Appellant began employment in the Department October 17, 2005 in the Labor Service title of Maintenance Equipment Operator II ("MEO II") and he was assigned to the Wachusett/Sudbury section. (Motion to Dismiss and Opposition)
2. On November 8, 2011, Department Regional Director John Scannell held a meeting with Heavy Equipment staff at the Department headquarters in West Boylston, which meeting was attended by Assistant Regional Director Scott Murphy; Supervisor Mike

[1] The Standard Rules of Adjudicatory Practice and Procedure, located at 801 CMR 1.01, *et seq*, guide these proceedings except wherein they conflict with the provisions of G.L. c. 31, in which case the statute prevails.

Tomaiolo; Supervisor Mike Ponyta; MEOs David Sargent, Troy Flanders and the Appellant. (Motion to Dismiss and Opposition)

3. Following the November 8, 2011 meeting, Mr. Scannell sent a letter, dated November 14, 2011, to the Appellant. (Motion to Dismiss, Exhibit A) This letter states,

> "On Tuesday November 8, 2011 I convened a meeting with the Heavy Equipment staff. Present at the meeting were Scott Murphy, Mike Tomaiolo, Mike Ponyta, Dave Sargent, Troy Flanders and you. One of the purposes of the meeting was try to resolve on-going issues between Mr. Sargent and you. During the meeting both you and Mr. Sargent began screaming and were not able to stop, even after repeated attempts by me to calm the conversation. This prompted met to immediately halt the meeting.
> After further discussions with you or supervisors, we agreed that Mr. Sargent and you are not to be working on the same assignment. You are to have no interaction with Mr. Sargent except if necessary in the normal course of business. In addition, you should not be talking about Mr. Sargent with other staff. This was all communicated to you verbally by Mr. Murphy and me later that day.
> This letter also serves as official notice of your violation of the Code of Conduct found in the Unit 3 Union Contract. Staff must maintain professional communications at all times. Further violations of the Code of Conduct will subject you to further disciplinary action."
>
> (Motion to Dismiss, Exhibit A (sic))

4. Also on November 14, 2011, Mr. Scannell sent a letter to Mr. Sargent. (Motion to Dismiss, Exhibit B) This letter has the same wording as the November 14 letter sent to the Appellant except the third sentence is different. (Id.) It states,

> "**Although you did not initiate the altercation**, during the meeting both you and Mr. Simmons began screaming and were not able to stop, even after repeated attempts by me to calm the conversation."
>
> (Motion to Dismiss, Exhibit B (sic) (emphasis indicates text appearing in the letter to Mr. Sargent and not in letter to the Appellant))

5. After lunch break on December 1, 2011, the Appellant drove Mr. Sargent from Clinton, Mass. to a backhoe in West Boylston, Mass. (Motion to Dismiss and Opposition)

6. Scott Murphy is Assistant Regional Director of the Wachusett/Sudbury Section of the Department of Conservation and Recreation Division of Water Supply Protection Department. (Motion to Dismiss, Affidavit of Scott Murphy) Mr. Troy Flanders, a co-worker of the Appellant, told Mr. Murphy and John Scannell, Regional Director, that he (Mr. Flanders) was in the car with the Appellant and Mr. Sargent during the post-lunch drive to a backhoe in West Boylston, Massachusetts. (Motion to Dismiss, Affidavit of Scott Murphy). Mr. Flanders also told Mr. Murphy and Mr. Scannell that while riding in the car to West Boylston he did not observe anything indicating that Mr. Sargent had been drinking or was impaired. (Motion to Dismiss, Affidavit of Scott Murphy)
7. On December 1, 2011, the Appellant reported to the West Boylston Police that he believed Mr. Sargent had had "a liquid lunch." (Opposition)
8. The West Boylston Police conducted some type of sobriety test/s on Mr. Sargent and Mr. Sargent passed the tests. (Motion to Dismiss, Opposition) The West Boylston Police did not find that Mr. Sargent was alcohol impaired. (Opposition, Exhibit A)
9. The Department conducted an investigation of the events leading to the report to West Boylston Police and concluded that Mr. Simmons filed a false statement against Mr. Sargent in violation of Department policies, constituting harassment under the state Zero Tolerance For Workplace Violence Policy. (Motion to Dismiss)
10. By letter dated December 13, 2011, Ms. Marissa Hunnewell, the Department Director of Labor Relations, sent a letter to the Appellant stating,

> "You are hereby notified that as provided for by Article 23 of your applicable collective bargaining agreement, **or if you are a civil service employee, in accordance with general law chapter 31 §§ 41-44**, a show cause hearing has been scheduled for Monday, December 19, 2011 at 10:00am at 251 Causeway

Street, 6th fl Conference Room, Boston, MA to show cause why you should not be terminated as a result of you making and filing false allegations with the West Boylston Police Department against a fellow employee which created a hostile work environment.

You may attend this hearing with your union representative, if you choose and have the opportunity to present evidence and/or witnesses.

If you have any questions, please contact me at (617) 626-1464."

(Motion to Dismiss, Affidavit of Penny Carney, Exhibit B (emphasis added))

11. The Appellant received the December 13, 2011 letter on December 16, 2011. (Motion to Dismiss; Opposition) The December 13, 2011 letter did not include copies of sections 41-44 of G.L. c. 31 as referenced in the letter. (Opposition)[2]

12. The following people attended the Show Cause hearing: Penny Carney, Department Director of Human Relations; Marissa Hunnewell, Director of Labor Relations; John Scannell, Regional Director; Scott Murphy, Assistant Regional Director; Leo Monroe, National Association of Government Employees ("NAGE") Unit 3 President; Skip Howland, NAGE Union Steward; and the Appellant. (Motion to Dismiss; Opposition)

13. Ms. Carney conducted the Show Cause Hearing. (Motion to Dismiss; Opposition) Ms. Carney said that the hearing was for violating the Department Hostile Workplace Policy in the form of harassment by filing a false report with the West Boylston Police accusing Mr. Sargent with operating a Department backhoe under the influence of alcohol. (Motion to Dismiss; Opposition) Ms. Carney advised the Appellant he could face discipline up to termination. (Motion to Dismiss; Opposition)

[2] Section 41 of G.L. c. 31 requires appointing authorities to provide appellants with copies of sections 41-45 of the statute.

14. At the Show Cause hearing, Ms. Carney told the Appellant that she would meet with the Department Commissioner to discuss her recommendations for discipline and that she hoped to have a decision on the hearing by the end of the week. (Motion to Dismiss)

15. At the Show Cause hearing, Ms. Carney told the Appellant that he had the right to resign at any time. (Motion to Dismiss; Opposition)

16. At the end of the Show Cause hearing, Ms. Carney told the Appellant not to report to work, that he was on administrative leave with pay pending the outcome of the hearing, that he was not to have contact with Mr. Sargent or any other Department employees until the matters were resolved. (Motion to Dismiss, Exhibit A (Affidavit of Ms. Carney))

17. By letter dated December 21, 2011, addressed to the Department at 251 Causeway Street in Boston, the Appellant resigned stating,

> "To Whom It May Concern:
>
> I, David F. Simmons, M.E.O. II @ Wachusett Reservoir in Clinton hereby resign my position, effective December 21, 2011."

(Motion to Dismiss, Affidavit of Penny Carney, Exhibit D; Opposition)

18. There is no evidence that the Appellant's resignation was the result of fraud, coercion or duress. Administrative Notice.

19. Ms. Carney accepted the resignation. (Motion to Dismiss, Affidavit of Penny Carney)

20. By letter dated December 23, 2011, the Appellant hand-delivered a letter to the Department stating,

"To Whom It May Concern:

At the show cause hearing on December 19, 2011, I was told that if I did not resign I would be terminated. Initially I thought it better to resign. I have now reconsidered it, so I am now hereby revoking my resignation. Please therefore reschedule my show cause hearing." (Opposition, p. 5)

21. By letter dated December 27, 2011, Ms. Carney notified the Appellant,

"Dear Mr. Simmons:
The Department is in receipt of your request dated December 23, 2011 to revoke your resignation dated December 21, 2011.
After further review, the Department is denying your request for re-instatement."

(Opposition)(sic)

22. The Appellant filed an appeal at the Commission December 30, 2011.

(Administrative Notice)

DISCUSSION

The Legal Standard for Consideration of a Motion to Dismiss

The Standard Adjudicatory Rules of Practice and Procedure (the "Rules"; 801 CMR 1.01, *et seq.*) guide administrative adjudication at the Commission but Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail. There appears to be no conflict here. The Rules indicate that the Commission may dismiss an appeal in the event the appeal fails to state a claim upon which relief can be granted. (801 CMR 1.01(7)(g)(3)) In addition, the United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. (*See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007)) Thus, the non-moving party must plead enough fact to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. (*See* id. at 545) Similarly, the Massachusetts Supreme

Judicial Court has held that an adjudicator cannot grant a motion to dismiss 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. (*See* Iannacchino v. Ford Motor Co., 451 Mass. 623, 890 (2008))

The essence of the City's Motion to Dismiss is that the Commission lacks jurisdiction concerning the Appellant's appeal because the Appellant resigned before he was terminated and, therefore, the Appellant is not aggrieved by an action of the appointing authority, pursuant to G.L. c. 31, §§ 2(b) and (c). In opposition thereto, the Appellant asserts that the Commission has jurisdiction over his appeal because he was not given copies of sections 41 – 45 of G.L. c. 31 in a timely manner informing him of his right to appeal the Department's actions against him and, although he resigned before his employment was terminated, he did so involuntarily and he changed his mind when he found out about his right to appeal to the Commission and sought to repeal his resignation from employment at the Department.

Commission Jurisdiction of the Instant Appeal

The Commission has two methods of providing relief to an employee who has been disciplined, one is pursuant to G.L. c. 31, § 42 and the other is pursuant to G.L. c. 31, § 43. Section 42 provides a remedy when the appointing authority does not afford an appellant the protections in section 41 of the statute in the course of discipline and he was prejudiced thereby. A remedy under section 43 is available when the Commission finds that the appointing authority lacked just cause to terminate an employee. Appeals are subject to dismissal if the appellant resigned before his or her employer terminated his or her employment. *See, e.g.*, Travers v. City of Fall River, D1-07-90 (April 18, 2008); Liswell v. Registry of Motor Vehicles, 20 MCSR 355

(2007); Maynard v. Greenfield, 6 MSCR 165 (1996). Absent fraud, coercion or duress, a public employee may end his or her employment by resigning. David K. Jones v. Town of Wayland, 374 Mass. 249, 259 (1978). That that an appellant faces a choice " … between comparably unpleasant alternatives – e.g., resignation or facing disciplinary charges – does not of itself establish that a resignation was induced by duress or coercion, hence was involuntary." Stone v. University of Maryland Medical System Corp., 855 F.2d 167, 175 (1988)(cited by the First Circuit of the U.S. Court of Appeals in William P. Monahan v. Willard Mitt Romney, et al, 625 F.3d 42 (2010), as establishing the legal standard to determine resignation voluntariness).

Section 41 of G.L. c. 31 requires appointing authorities to provide copies of sections 41 – 45 of the civil service statute to employees regarding certain disciplinary matters. The Commission finds that the Department failed to include copies of sections 41-45 in its notice to the Appellant regarding the scheduled Show Cause hearing. Section 42 of the civil service statute provides that if an appellant's rights have been prejudiced by the failure to follow the provisions of section 41 of the statute, the Commission shall order the appointing authority to restore the appellant to his employment. The Appellant in the instant case was not prejudiced by the Department's failure to provide the Appellant with copies of sections 41-45 in the notice regarding the Show Cause hearing. The Department sent the Appellant notice of the Show Cause hearing, referencing sections 41-44 of the civil service statute, although it failed to provide copies of sections 41-45, as required. In addition, two union officials represented and advised at the hearing. Further, before the Department issued a decision that could have terminated him, the Appellant resigned. Finally, there is no evidence that the Appellant's resignation was the result of fraud, coercion or duress. Therefore, the Appellant's resignation is deemed voluntary. [3]

[3] In Cynthia Champion v. Weymouth Fire Department, Case No. D1-11-142), an unrelated case, the Commission today issues a decision involving an employee resignation in which we reach a different conclusion than in the

The Appellant in the instant case believed that the Department intended to terminate him. However, even if we assume that an employer intended to terminate an employee, " …the existence of a future intent to possibly terminate an employee does not constitute a termination for the purposes of obtaining relief under the civil service law. *See* Director of Civil Defense Agency and Office of Emergency Preparedness v. Civil Service Commission, 373 Mass. 401, 411 (1977)(the court made a determination as to when an employee was terminated for purposes of determining when the statute of limitations to file an appeal began)." *See* Travers, Liswell and Maynard, *supra*. An appointing authority cannot discharge an employee who has resigned and the Commission cannot hold an appointing authority responsible for action is it has not yet taken. Id.; *see also* Sawicki v. City of Malden, Case No. E-11-225 (April 5, 2012) and cases cited therein at p. 6 (employee has no right to appeal to the Commission under G.L. c. 31, §§ 41-43 since he resigned and was not discharged).

The Appellant also argues that the Department should have allowed him to withdraw his resignation. Specifically, the Appellant argues that since the Department failed to provide him with copies of sections 41 – 45 of G.L. c. 31 prior to the Department's Show Cause hearing, the Appellant was not informed that he could request Commission review if the Department decided to terminate his employment. In addition, the Appellant asserts that he did not learn that he could appeal a Department decision to the Commission until after he submitted his resignation, although he does not say how and specifically when he learned this. Had he known this, he asserts, he would not have submitted his resignation. Moreover, the Appellant suggests that his union representation at the Department Show Cause hearing was flawed because the union representatives present at the Show Cause hearing were also representing Mr. Sargent. For these

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instant case. The Commission finds in the instant case that the Appellant voluntarily resigned, whereas, in Champion the Commission finds that the appellant in that case lacked capacity to voluntarily resign.

reasons, the Appellant avers, the Department should have allowed him to withdraw his resignation. The Appellant's assertions in these regards lack merit based on reasons cited above finding that the Appellant was not prejudiced by the Department's failure to include copies of the appropriate sections of the civil service statute. Any concerns the Appellant may have with regard to the union's possible representation of Mr. Sargent at the time of the union was representing the Appellant are beyond the reach of the Commission. However, it is undisputed that the Appellant was represented and advised by Mr. Munroe and Mr. Howland through the Show Cause hearing.

In any event, the central issue here is that the Appellant voluntarily submitted his written resignation to the Department December 21, 2011, which was two days after the Department's Show Cause hearing but before the Department rendered a decision that may have terminated his employment. As noted above, it is well established that an employee who voluntarily resigns from employment is not aggrieved by the actions of his employer for the purposes of civil service law. At the Show Cause hearing, the Appellant heard the evidence against him, he testified, he was represented by two union officials, he was told he may be terminated and, in the alternative, he could resign. Based on that information, the Appellant resigned before the Department issued its decision and the Department accepted his resignation. When the Appellant attempted to withdraw his resignation, the Department declined. Therefore, the Appellant's resignation was undisturbed.

Conclusion

Pursuant to the findings of fact and the law cited herein, a preponderance of the evidence establishes that the Appellant has not pleaded facts that state a claim to relief that is plausible,

nor has the Appellant pleaded enough facts to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. Therefore, the Department's motion is hereby allowed and the appeal is ***dismissed***.

Civil Service Commission

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Cynthia A. Ittleman, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners [Marquis – absent] on June 14, 2012.

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 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:

Scott A. Lathrop, Esq. (for Appellant)
Frank T. Hartig, Esq. (for Respondent)
John Marra, Esq. (HRD)