

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

FRANK A. TRANFAGLIA,
Appellant

v.

D1-14-83

TOWN OF WINTHROP,
Respondent

Appearance for Appellant:

Thomas J. McCarthy, Esq.
McCarthy Law Offices
15 Sea View Avenue
East Boston, MA 02128

Appearance for Respondent:

Howard L. Greenspan, Esq.
200 Broadway, Suite 304
Lynnfield, MA 01940

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION ON RESPONDENT’S MOTION TO DISMISS

On March 31, 2014, pursuant to G.L. c. 31, § 42, the Appellant, Frank A. Tranfaglia (“Mr. Tranfaglia” or “Appellant”), filed this appeal with the Civil Service Commission (“Commission”) contesting the decision of the Town of Winthrop (“Town”) to terminate him from his position as a permanent reserve police officer. A pre-hearing conference was held on April 22, 2014 at the offices of the Commission, which was attended by Mr. Tranfaglia, his counsel, and counsel for the Town.

On April 22, 2014, pursuant to 801CMR §1.01(7)(g), the Town submitted a Motion to Dismiss (“Motion”), arguing that the Commission has no jurisdiction to hear the appeal because, according to the Town, Mr. Tranfaglia is not a tenured civil service employee. On April 29, 2014, the Respondent submitted a Memorandum of Law in support of its Motion to Dismiss

¹ The Commission acknowledges the assistance of Law Clerk Todd M. Hirsch in the drafting of this decision.

(“Memorandum”). On May 8, 2014, Appellant filed an Opposition to Respondent’s Motion (“Opposition”). A hearing on the Respondent’s Motion to Dismiss was held on August 28, 2014 at the offices of the Commission.² The hearing was digitally recorded and both parties were provided with a CD of the hearing.³

Findings of Fact

Based on Motion, Memorandum, Opposition, the documents produced by the parties before and after the hearing,⁴ the stipulations of the parties, the parties’ arguments, and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations and policies, the following is undisputed:

1. On May 7, 2012, the Appellant filed a completed employment application with the Town of Winthrop Police Department. (Appellant’s Opposition)
2. On July 19, 2012, the Town of Winthrop sent the Appellant a conditional offer of employment. (Appellant’s Opposition)
3. On November 5, 2012, the Town of Winthrop Police Department sent a letter to the Appellant notifying him that he would be appointed as a Reserve Police Officer. (Appellant’s Opposition)
4. Appellant was sworn in as a Reserve Police Officer in the Town of Winthrop on November 15, 2012. (Appellant’s Opposition)
5. After being sworn in, the Appellant completed training at the Massachusetts Law Enforcement Training Alliance Reserve/Intermittent Recruit Officer Course. The

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. Chapter 31, or any Commission rules, taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

⁴ The parties produced documents post-hearing in response to my request at the hearing.

Appellant graduated on May 4, 2013. There was no swearing in ceremony following the completion of this course of study. Rather, he was sworn in prior to training.

(Appellant's Opposition)

6. The Appellant's first shift for the Town of Winthrop as a Reserve Police Officer was on September 9, 2013, which was several months after his initial six month probationary period. (Appellant's Opposition; Affidavit of Chief Terence M. Delehanty; Administrative Notice)
7. Between September 9, 2013 and March 26, 2014, the Appellant worked twelve (12) shifts for the Town of Winthrop Police Department, which amounted to 93 hours. The last shift he worked there was on December 1, 2013. (Administrative Notice)
8. The Appellant was supervised by Officer Feeley and Officer Freeman. An evaluation of the Appellant's performance was completed after each one of the twelve (12) shifts. On September 22, 2013, the Appellant's third shift, Officer Freeman wrote that Officer Tranfaglia's "tunnel vision causes him to miss things." On October 27, 2013, the Appellant's ninth shift, Officer Feeley wrote that Officer Tranfaglia "still has no idea where many of the streets in Winthrop are and ends up driving to incorrect streets." On November 9, 2013, the Appellant's tenth shift, Officer Freeman wrote that Officer Tranfaglia "continues to make the same mistakes that he did on day 1." (Administrative Notice)
9. The Appellant was terminated on March 26, 2014. (Appellant's Opposition; Affidavit of Chief Terence M. Delehanty)
10. Prior to the Appellant's appointment to the position of Winthrop Reserve Police Officer, the Appellant graduated from the Boston Special Police Academy on May 3, 2012. The

Appellant was contracted as a Special Police Officer for the City of Boston on May 29, 2012. (Appellant's Opposition)

11. After his termination from the Winthrop Police Department, the Appellant filed the instant appeal.

DISCUSSION

Legal Standard for Motion to Dismiss

The United State 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 factors 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 of the allegations in the appeal are true, even if doubtful in fact. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008).

The Standard Adjudicatory Rules of Practice and Procedure ("Rules") govern administrative adjudication where applicable. 810 CMR 1.01, *et seq.* The Commission adopted the Rules in 1999. Pursuant to 801 CMR 1.01(7)(g)(3), the Commission may dismiss an appeal for lack of jurisdiction or, in the event the appeal fails to state a claim upon which relief can be granted. Id. Such motions are decided under the well-recognized standards for summary disposition as a matter of law, which state, "viewing the evidence in the light most favorable to the non-moving party," the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of

the case.” See e.g., Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 550 (2008); Maimonides Sch. v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Mass. Parole Bd., 18 MCSR 216 (2005).

Applicable Civil Service Law and Related Statutes

The Commission’s jurisdiction to hear disciplinary appeals is defined by statute. Pursuant to G.L. c. 31, § 41, an employer may not impose certain types of discipline, including discharge, upon a “tenured employee” without “just cause.” G.L. c. 31, § 41.

G. L. c. 31, § 1 defines a “tenured employee” as a person “who is employed following an original appointment to a position ... and the actual performance of the duties of such position for the probationary period required by law.” The probationary period applicable to persons, such as the Appellant, appointed to the position of police reserve officer, is prescribed by G.L. c. 31, § 34, which states in relevant part:

Following his original appointment as a permanent employee to a less than full-time civil service position, including a reserve, intermittent, call, recurrent, or part-time position, a person shall serve a probationary period of six months immediately following such appointment, which shall include the actual performance of the duties of such position for not less than thirty working days or the equivalent thereof during such period, before he shall be considered a less than full-time tenured employee, provided that if such person has not performed such duties for such thirty working days or the equivalent thereof, his probationary period shall be extended for an additional twelve months, at the end of which time such person, if his employment has not been terminated in accordance with the provisions of this section, shall be deemed to be a tenured employee.
(Id.)

G.L. c. 41, § 96B states in relevant part: “Each person appointed as a reserve, or intermittent police officer, in a city or town shall, prior to exercising police powers, satisfactorily complete a course of study prescribed by said committee.” Id.

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 laws, which “provide an administrative hearing for tenured employees, G.L. c. 31, § 41, but not for probationary employees.” New Bedford v. Civil Service Comm’n, 6 Mass.App.Ct. 549, 551 (1978). A tenured employee may have further rights under G.L. c. 31, §§ 41-45, including the right of appeal to the Commission. However, if a person is a probationary employee when his employment is terminated, the Commission lacks jurisdiction over the appeal. See Brouillard v. City of Holyoke, 74 Mass.App.Ct. 1128 (2009).

Parties’ Arguments

The Appellant avers that the Commission has jurisdiction to hear his appeal. Although he does not dispute that he was sworn in on November 15, 2012, that his first shift assignment was on September 9, 2013, and that he worked twelve (12) shifts, the Appellant argues that his time in training qualifies as the actual performance of police duties, and, therefore, it should be counted as the performance of police duties pursuant to G.L. c. 31, § 34. Furthermore, the Appellant argues that because he had already completed training at the Boston Special Police Academy, he was qualified to perform actual police duties before completing training in Winthrop. As a result, the Appellant argues that in the six-month period from November 15, 2012 to May 15, 2013, he performed police duties for the requisite thirty days. Thus, he believes that his probationary period should not have been extended for an additional twelve-months because he was already a tenured employee by May 15, 2013. Thus, the Appellant argues that he was a tenured police officer by the time of his termination in March 2014, requiring the Respondent to have conducted a hearing before terminating his employment and providing the Commission with jurisdiction to hear his appeal.

The Respondent argues that the Appellant was a probationary employee at the time of his termination and, thus, it was authorized to terminate his employment and the Commission has no

jurisdiction to hear this appeal. It is the Respondent's contention that the Appellant's time spent in training should not be counted toward the satisfaction of the necessary probationary period because time in training is time spent learning, not performing the actual duties of a police officer. Therefore, the Respondent argues that in the six months after being sworn in, the Appellant worked only twelve (12) shifts, falling short of the requisite thirty days. Thus, the Respondent avers that the total probationary period was extended by twelve months, per G.L. c. 31, § 34, from November 15, 2012 to May 15, 2014. In this way, the Respondent argues that the Appellant was terminated at a point in time while he was still serving the probationary period and he has no right to appeal here.

Analysis

The Appellant was within the probationary period of employment at the time of his termination and, therefore, the Commission lacks jurisdiction to hear this appeal pursuant to G.L. c. 31, §§ 41-45. Pursuant to G.L. c. 41, § 96B, an officer is required to complete training "prior to exercising police powers." *Id.* Further, the Appellant's time in training is not counted toward completion of the probationary period because training does not constitute the actual performance of the duties of a reserve police officer, as required by G.L. c. 31, § 34. See *Selectmen of Brookline v. Smith*, 58 Mass.App.Ct. 813 (2003) (holding that training at the Academy was not part of the actual duties of a police officer). Officers in training are learning how to perform their duties but they are not actually performing them. In other words, the probation period does not begin until student officers complete the obligatory training and begin working.

As a Reserve Police Officer, the Appellant's probationary period ran from the date of his swearing in ceremony on November 15, 2012 until May 15, 2013, a period of six months,

pursuant to G.L. c. 31, § 34. However, the Appellant did not perform the actual duties of a police officer during this period. Since he did not perform the duties of a police officer for thirty (30) working days within the six (6) month period, the Appellant's probationary period was extended by twelve (12) months, for a total probationary period of eighteen (18) months, pursuant to G.L. c. 31, § 34, ending November 15, 2012 until May 15, 2014. It was during this extended probationary period that the Appellant worked twelve (12) shifts. The long duration of the probationary period is required to ensure that a part-time officer is capable of performing the duties that are required of a police officer. Police Commr. of Boston v. Cecil, 431 Mass. 410, 414 (2000)(finding that applicant must possess "courage, good judgment, and the ability to work under stress in the public interest.")

A student officer cannot exercise police powers and, thereby, actually perform the duties of a police officer until she or he graduates from training. Selectmen of Brookline v. Smith, 58 Mass.App.Ct. 813, 815 (2003). The Appellant relies on Smith to argue that he should have been sworn in after he completed training instead of being sworn in prior to training so that his probationary period was unduly extended. The facts in Smith are distinguishable from the facts of the instant case because in Smith, the officer was sworn in after completing his training. Here, the Appellant was sworn in before his training commenced. However, the Town was not required to swear the Appellant in after he was trained. Further, even if the Appellant was sworn in after he graduated from training on May 4, 2013, he still did not perform actual police duties for the requisite thirty working days in the six month period that followed. Therefore, the Appellant's interpretation of Smith is without merit.

It remains clear, in view of the applicable statutes, that training does not count toward the actual performance of police duties. The Commission has confirmed the applicable statutes,

holding that before the “actual performance” of police duties can commence, an officer must both (1) successfully graduate from the academy and (2) be sworn in. See Patterson v. Town of Plymouth, 21 MCSR 650 (2008). For this reason, the Appellant could not perform the actual duties of a Reserve Police Officer until after he graduated from the Massachusetts Law Enforcement Training Alliance Reserve/Intermittent Recruit Officer Course on May 4, 2013. Furthermore, the Appellant’s graduation from the Boston Special Police Academy is irrelevant to his abilities to perform the functions of a reserve police officer in Winthrop.

The Appellant has failed to plead sufficient facts to state a claim for relief that is plausible on its face or above the speculative level, even assuming that his allegations are true, in view of the clear applicable statutes and case law. The Appellant was terminated on March 26, 2014 while he was still a probationary Reserve Police Officer, not a tenured civil service employee, and that his probationary period did not end until May 15, 2014. His initial six (6) month probationary period was properly extended by twelve months because he did not actually perform the duties of a reserve police officer for thirty days during his initial six-month probationary period, as required by statute. Having been terminated during his probationary period, the Appellant does not have the rights of a tenured civil service employee under G.L. c. 31, §§ 41-45, such that the Commission has no jurisdiction to hear this appeal.

Conclusion

For the foregoing reasons, the Respondent’s Motion is hereby granted and the Appellant’s appeal is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on August 6, 2015.

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:

Thomas J. McCarthy, Esq (for Appellant)

Howard L. Greenspan, Esq. (for Respondent)