

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

SEAN MARTIN,
Appellant,

v.

CASE NO: D1-14-57

CITY OF WOBURN,
Respondent,

Appearance for Appellant:

Richard W. Kendall, Esq.
348 Park Street, Suite 203
North Reading, MA 01864

Appearance for Respondent:

Ellen Callahan Doucette, City
Solicitor
Woburn City Hall
10 Common Street
Woburn, MA 01801

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Sean Martin, appeals to the Civil Service Commission (Commission), pursuant to M.G.L.c.31,§41-45, claiming to be aggrieved by the decision of the City of Woburn (Woburn), which terminated him from the position of a Reserve Police Officer with the Woburn Police Department (WPD). Woburn filed a Motion to Dismiss the appeal on the grounds that the Commission lacked statutory jurisdiction over the matter. Although the Appellant did not file an opposition, the Commission deemed that the Appellant opposed the motion for the reasons stated in the Appellant's Pre-Hearing Brief previously filed. On June 18, 2014, Woburn filed a Reply Memorandum in further support of its motion. The matter was taken under advisement on the papers submitted by the parties.

FINDINGS OF FACT

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

1. Woburn Mayor Scott D. Galvin appointed the Appellant, Sean Martin, to the position of Permanent Intermittent Police Reserve Officer effective on September 3, 2013. (*Respondent's Motion, Exh. A; Appellant's Pre-Hearing Brief, Exh.M*)
2. Officer Martin was assigned to attend the Reserve Academy conducted by the Massachusetts Law Enforcement Training Alliance which began on or about September 3, 2013 and continued for a period of fourteen (14) weeks, ending on or about December 14, 2013, for a total of 209 hours of training. (*Respondent's Motion, Exhs. B & C; Appellant's Pre-Hearing Brief; Respondent's Reply, Exh. E*)
3. Officer Martin experienced problems with performance and attendance during his academy training, including missing classes and other disciplinary issues, but he did, eventually, receive his Certificate of completion of the required training for Police Reserve Officer. (*Respondent's Motion, Exhs. B, C & D; Appellant's Pre-Hearing Brief, Exhs. N, P & Q*)
4. After finishing the academy, Officer Martin was required to attend further training on WPD policies and procedures. He failed to attend training on January 19, 2014. (*Respondent's Motion, Exh. D; Appellant's Pre-Hearing Brief, Exh. R*)
5. Apart from attending the Reserve Academy and other WPD training events, Officer Martin did not perform the duties of a police officer. (*Respondent's Reply, Exh. E*)

6. Officer Martin was compensated by the WPD during the period of his attendance at the Reserve Academy. (*Respondent's Reply, Exh. E*)
7. Officer Martin is a military veteran who attributed his attendance problems to difficulty associated with his adjustment upon return from a deployment to Afghanistan. (*Appellant's Pre-Hearing Brief, Exh. R*)
8. On February 20, 2014, Officer Martin met with Mayor Galvin and WPD Chief Ferullo. He was handed a letter of resignation to sign, which he refused. (*Appellant's Pre-Hearing Brief, para. 12*)
9. On Friday, February 28, 2014, Mayor Galvin issued a letter to Officer Martin notifying him that he was terminated from his position as a WPD Police Reserve Officer. (*Respondent's Motion, Exh. D; Appellant's Pre-Hearing Brief, Exh. R*)
10. The Appellant's Pre-Hearing Brief states the letter of termination was hand-delivered to him by WPD Captain Rufo on February 28, 2014. (*Appellant's Pre-Hearing Brief, para. 12*)

CONCLUSION

The party moving for summary disposition pursuant to 801 C.M.R. 1.01(7)(g)(3) or (h) in an appeal before the Commission is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., if, “viewing the evidence in the light most favorable to the non-moving party [i.e. Mr. Martin] Woburn has presented substantial and credible evidence that Mr. Martin has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that he has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts

Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

Specifically, this motion to dismiss must be allowed unless Mr. Martin raises “above the speculative level” sufficient facts “plausibly suggesting” that the Commission has statutory jurisdiction because he lacked the status of a tenured civil service employee which is required for the Commission to take jurisdiction under G.L.c.31, §41-45. See generally Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss. cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

The Commission’s jurisdiction to hear disciplinary appeals is limited by statute. G.L.c.31,§41 provides:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged . . .” (*emphasis added*)

See, e.g., Selectmen of Brookline v. Smith, 58 Mass.App.Ct. 813, 815 (2003) (“if [the employee] was not tenured, then the [Civil Service] Commission lacked jurisdiction to hear his appeal”); City of New Bedford v. Civil Service Comm’n, 6 Mass.App.Ct. 549, 51 (1978) (“The structure and content of the civil service laws impels our conclusions; they provide an administrative hearing for tenured employees . . . but not for probationary employees”)

G.L.c. 31, 1 defines a “tenured employee” as a person “who is employed following n 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, ¶4, which provides:

“Following his original appointment as a permanent employee to a less than full-time civil service position, including 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 . . . 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 be terminated . . . shall be deemed to be a tenured employee upon the termination of such period.” (emphasis added)

See Brouillard v. City of Holyoke, 74 Mass.App.Ct. 1128 (2009) (vacating a decision ordering reinstatement of a permanent, part-time reserve police officer during his probationary period).

In the present appeal, Mr. Martin was appointed on September 3, 2013 and, therefore, his probationary period ran through March 3, 2014. He admits that he received notice of the termination by hand on its effective date (Friday, February 28, 2014), as he claimed in his Pre-Hearing Brief. His six-month probationary period had not be completed prior to his termination.¹

In sum, the undisputed facts establish that Officer Martin was terminated on February 28, 2014, within the six-month probationary period, and therefore prior to achieving the status of a tenured civil service employee entitled to appeal that decision to the Commission. This requirement is jurisdictional and cannot be administratively expanded by the Commission. See Town of Falmouth v. Civil Service Comm’n, 441 Mass. 814, 822-23 (2006); Long v. Town of North Andover, 27 MCSR 283 (2014); Flynn v.

¹ In view of these facts, the Commission need not address whether or not Officer Martin’s probationary period commenced only after he completed his academy training, or whether or not it was extended beyond March 3, 2014, because he had not yet actually “performed the duties” of a police officer for at least thirty working days. cf. Papleacos v. Town of Tewksbury, 81 Mass.App.Ct. 1133, rev.den., 463 Mass. 1105 (2012) (intermittent police officer’s probation began on date of appointment not on date of completing academy)

Attleboro, 23 MCSR 279 (2010); Mancuso v. City of Waltham, 22 MCSR 554 (2009); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); Novia v. City of Boston, 20 MCSR 639 (2007); Maurice v. Massachusetts Dep't of Mental Health, 19 MCSR 328 (2006); Konikowski v. Department of Corrections, 10 MCSR 79 (1997); Springer v. Town of Saugus, 8 MCSR 154 (1995).

Accordingly, for the reasons stated above, Woburn's Motion to Dismiss is hereby, allowed, and the appeal of the Appellant, Sean Martin, is hereby, *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell & Stein, Commissioners) on October 16, 2014.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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)(1), 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 (30) 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.

Notice to:

Sean Martin (Appellant)

Richard W. Kendall, Esq.(for Appellant)

Ellen Callahan Doucette, City Solicitor (for Respondent)