

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARK GILBERT,
Appellant

D-16-33

v.

CITY OF CHICOPEE,
Respondent

Appearance for Appellant:

Shawn P. Allyn, Esq.¹
Allyn & Ball, P.C.
98 Lower Westfield Road
Suite M
Holyoke, MA 01040

Appearance for Respondent:

Thomas J. Rooke, Esq.
73 Chestnut Street
Springfield, MA 01103

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On February 4, 2016, the Appellant, Mark Gilbert (Mr. Gilbert), a Captain in the City of Chicopee (City)'s Police Department, filed a multi-count action in Federal Court. Among the numerous counts was a "whistleblower" claim (See Count 3) against the City, the City's Mayor and the City's Police Chief, that was based in part, on discipline (five (5)-day suspension) imposed on Mr. Gilbert on January 27, 2016.

Mr. Gilbert appealed that five (5)-day suspension and, after a local (City) hearing, the discipline was increased to a ten (10)-day suspension on February 17, 2016.

¹ Attorney Allyn did not represent Mr. Gilbert at the pre-hearing conference. He filed an appearance with the Commission on June 3, 2016.

On February 23, 2016, Mr. Gilbert, pursuant to G.L. c. 31, §§ 41-43, filed an appeal of his discipline with the Commission. A pre-hearing was held on March 9, 2016 and a full hearing was scheduled to be held on June 8, 2016.

G.L. c. 149, § 185(f) states:

“Nothing in this section shall be deemed to diminish the rights, privileges or remedies of any employee under any other federal or state law or regulation, or under any collective bargaining agreement or employment contract; except that the institution of a private action in accordance with subsection (d) *shall be deemed a waiver by the plaintiff of the rights and remedies available to him, for the actions of the employer, under any other contract, collective bargaining agreement, state law, rule or regulation, or under the common law.*” (emphasis added)

Courts have interpreted § 185(f) of the statute as applying to “related claims seeking damages essentially for the same conduct – e.g., a discharge that constituted the core retaliation for the whistle-blowing and not for other claims ... that are distinct from the claim to recover for the retaliatory action.” Bennet v. City of Holyoke, 230 F. Supp. 2nd 207, 220-221 (D. Mass. 2002).

Since Mr. Gilbert’s federal whistleblower complaint is based, in part, on the discipline presently before the Commission, Mr. Gilbert’s right to an appeal under the state law (Chapter 31) has been waived and the Commission must dismiss this appeal for lack of jurisdiction. See Donahue v. Dep’t of Mental Retardation, 10 MCSR 230 (1997); (termination appeal to Civil Service Commission dismissed because the Appellant filed a complaint based on the same discipline in Superior Court under c. 149, § 185.) Walker v. City of Holyoke, 20 MCSR 330 (2007); (multiple suspension appeals to Civil Service Commission dismissed because the Appellant filed a complaint in federal district court based on the same discipline referencing c. 149, § 185) and Saunders v. Town of Hull, G2-14-291 (2015) (promotional bypass appeal

dismissed and request for investigation denied because the Appellant filed a complaint in federal district court regarding the same issue referencing c. 149, § 185).

Conclusion

Mr. Gilbert's appeal under Docket No. D-16-33 is *dismissed*.²

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Littleman and Stein, Commissioners [Tivnan – Absent]) on June 23, 2016.

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:

Shawn A. Allyn, Esq. (for Appellant)

Thomas J. Rooke, Esq. (for Respondent)

² The full hearing scheduled for June 8, 2016 did not go forward.