COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Suffolk, ss.

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WILLIAM TROWBRIDGE, JR.
Appellant
v.
CITY OF FALL RIVER,
Respondent

D1-16-101

Appearance for Appellant:

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Commissioner:

Paul M. Stein

DECISION ON APPELLANT'S MOTION TO REVOKE ORDER OF DISMISSAL

The Appellant, William Trowbridge, appealed to the Civil Service Commission (Commission) on May 23, 2016 seeking review of his termination from his position of Paramedic with the Fall River Fire Department (FRFD), following an incident that resulted in the suspension of his ability to practice as a Paramedic.[1] At a status conference on September 23, 2016, the parties reported that a decision by the Massachusetts Office of Emergency Services (OEMS) on review of the Appellant's licensure was imminent and, depending on the outcome, the parties intended to explore settlement (if the license was restored) or Mr. Trowbridge's appeal would become moot and withdrawn (if his license were revoked). Accordingly, by agreement of the parties, the Commission dismissed the appeal nisi, effective November 30, 2016. A motion to revoke the dismissal could be filed on or before that date "if the parties do not finalize a settlement agreement."

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

On November 28, 2016, the Commission received the "Appellant's Motion to Revoke Order of Dismissal", which Fall River opposed. After receiving written memoranda from each of the parties, I held a hearing on the Appellant's motion on April 28, 2017 which was digitally recorded.[2] For the reasons explained below, I conclude that the Appellant's Motion to Revoke Order of Dismissal should be denied.

FINDINGS OF FACT

Based on the parties' submissions, including all documents, affidavits and memoranda, and the representation of counsel at the motion hearing, and viewing the evidence most favorably to the Appellant, I find the following material facts are not in dispute:

1. The Appellant, William Trowbridge, served as a tenured Paramedic employed with the FRFD, EMS Division, from July 2007 until his termination in May 2016. (*Appellant's Motion; Pre-Hearing Stipulation; Appellant's Motion, Attch.I*)

2. In order to perform the duties of a Paramedic for the FRFD, which includes rendering Advance Life Support (ALS) services, Mr. Trowbridge was required to hold (1) an EMT/Paramedic certification (license) issued by OEMS and (2) an "Authorization to Practice" issued by the physician designated as the Affiliate Hospital Medical Director (AHMD) pursuant to an "Affiliation Agreement" entered into between FRFD and an affiliated hospital authorized to provide medical control to Advanced Life Support services under applicable OEMS rules and regulations. (*Appellant's Motion; FRFD Opposition; Administrative Notice [105 CMR 130.1500 et seq. & 170.000 et seq.]*)

[2] Copies of the CDs of the hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the stenographic or other written transcript of the 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.

3. From January 1, 2015 through December 31, 2016, the FRFD operated pursuant to an Affiliation Agreement with Southcoast Hospitals Group, Inc. (Southcoast) under which Arthur Carter, MD, served as the AHMD. (*Appellant's Motion, Attch.C; FRFD Opposition*)

4. At all times relevant, Dr. Wayne C. Christiansen, served as FRFD's Medical Director. Dr. Christiansen is an employee of the FRFD. (*Appellant's Motion, FRFD Opposition*)

5. Under the Southcoast Affiliation Agreement, Dr. Christiansen, as FRFD Medical Director, worked in collaboration with Dr. Carter in handling clinical and patient care aspects of the FRFD, EMS Division. Consistent with OEMS rules and regulations, Dr. Carter, as the AHMD, had "ultimate responsibility for the duties and responsibilities" of the FRFD Medical Director. Dr. Carter, as AHMD, had sole authority to revoke an Authorization to Practice although it had been his practice to solicit and adopt Dr. Christiansen's recommendations on whether to grant or revoke an Authorization of Practice. (*Appellant's Motion; FRFD Opposition; Administrative Notice [105 CMR 130.1500 et seq. & 170.000 et seq.]*)

6. By letter dated May 4, 2016, Dr. Christiansen, FRFD's Director of EMS, informed Mr. Trowbridge that, due to a complaint regarding his clinical care of a patient on April 20, 2016, he was placed on administrative leave, pending an investigation, from May 4, 2016 through May 10, 2016. (*Administrative Notice [Pre-Hearing Submission]*)

7. By letter dated May 5, 2016, FRFD Fire Chief John D. Lynch informed Mr. Trowbridge that, after investigation of the April 20, 2016 incident, his employment with the FRFD "was being terminated" under M.G.L.c Chapter 31, Section 41. The letter further advised that he would receive separate "notification from Dr. Wayne Christianson regarding the clinical outcome of the investigation." The letter also informed Mr. Trowbridge that he was entitled to request a hearing within 48 hours to contest his termination. This letter does not indicate that it contained any enclosures. (*Appellant's Motion, Attch.B; FRFD Opposition*)

8. By separate letter dated May 5, 2016 from Madeline Coelho, the City of Fall River's Human Resources Director, also notified Mr. Trowbridge that he was "terminated effective May 5, 2016" and: "Per Chapter 31, Civil Service Section 41A [sic] a hearing has been scheduled for Thursday May 12, 2016." This letter also does not indicate that it contained any enclosures. (*Administrative Notice [Pre-Hearing Submission]*)

9. Also by letter dated May 5, 2016, jointly signed by Dr. Carter and Dr. Christiansen, Mr. Trowbridge was informed that his Authorization to Practice was suspended indefinately, effective immediately. The reasons for this action were stated as follows:

> "This letter is in regard to issues with care rendered by you on 4/20/16 run #16-1435"
>
> "After review of the . . . statements from you and your partner, the medical record, interviews with the patient and family as well as personal interviews with you and your partner, the following conclusions have been reached:
>
> 1) You failed to follow the Service Policy regarding the proper execution of a refusal of care. A blind, non-English speaking patient was allowed to sign a refusal of care without explanation.
> 2) You failed to follow the Service Policy regarding the prohibition of ambulating patients.
> 3) You failed to document the method of extrication from the patient's residence.
> 4) You failed to properly assess and protect your patient from spinal injury."
>
> "As this is the <u>fourth</u> incident in which you have been sited [sic] for improper documentation of a refusal to carry a patient, resulting in progressive disciplinary action, there is no confidence that you will correct your behavior."
>
> "For that reason, effective immediately, your Privilege to Practice for Fall River EMS is hereby suspended indefinitely."

(*Appellant's Motion, Attch.D; FRFD Opposition [*<u>emphasis in original</u>*]*)

10. A hearing was held on May 12, 2016 before a FRFD-designated review examiner who concluded that FRFD did have just cause to terminated Mr. Trowbridge for his violation of patient care requirements and noting that the suspension of his "privileges to practice for an indefinite amount of time only complicates this matter" and "may make any such appeal moot." (*Pre-Hearing Stipulation; Administrative Notice [Pre-Hearing Submission]*)

11. On or about May 20, 2016, Mr. Trowbridge received notice that, after hearing, his termination was affirmed. He thereafter duly appealed to the Commission. (*Pre-Hearing Stipulation; Claim of Appeal*)

12. At the pre-hearing conference held by the Commission on June 13, 2016, the Appellant raised procedural claims that his termination had not complied with his civil service rights to prior notice and hearing as required by G.L.c.31, §41 & §42. By Procedural Order dated June 13, 2016, the parties were ordered to negotiate an arrangement that would avoid the Commission having to decide the appeal on procedural grounds. By e-mail dated September 12, 2016, counsel for the Appellant confirmed that "the procedural issue raised by the Appellant has been resolved by the Parties." (*Procedural Order dated 6/13/2016; Counsel's e-mail dated 9/12/2016*)

13. On or about June 16, 2016, the FRFD entered into a new Affiliation Agreement with Steward St. Anne's Hospital Corporation (St. Anne's) effective January 1, 2017. Pursuant to the St. Anne's Affiliation Agreement, effective January 1, 2017, Dr. Andrew Old replaced Dr. Carter as the designated AHMD for the FRFD, EMS Division. Under this agreement, Dr. Christiansen continued to operate as the FRFD Medical Director, under the direction and control of Dr. Old, as AHMD. Dr. Old retained the sole authority over the Authorization to Practice of FRFD Paramedics. (*Appellant's Motion, Attch.F; FRFD Opposition*)

14. On November 4, 2016, OEMS issued a "Letter of Reprimand/Order to Correct" following the review of Mr. Trowbridge's conduct in providing care to an EMS patient on April 20, 2016. The Letter of Reprimand/Order to Correct found that "such conduct constitutes a failure to exercise reasonable care, judgment, knowledge or ability in the performance of duties, or to perform those duties within the scope of your training and certification and in accordance with the Statewide Treatment Protocols under 105 CMR

170.940." The Letter of Reprimand/Order to Correct required that Mr. Trowbridge successfully complete a remedial education plan in coordination and with the approval of an affiliate medical director within 60 days. (*Appellant's Motion, Attch.G*)

15. By email dated December 16, 2016, Mr. Trowbridge received confirmation that "Your remediation is complete." (*Appellant's Motion, Attch.H*)

16. The OEMS did not at any time revoke or suspend Mr. Trowbridge's certification (license) as an EMT/Paramedic. (*Appellant's Motion, Attchs. G through I*)

17. The FRFD Medical Director, Dr. Christiansen, submitted new applications for Authorization to Practice and each FRFD Paramedic then employed by FRFD received a new Authorization to Practice from Dr. Old, effective January 1, 2017. St. Anne's stated in a e-mail to FRFD dated December 16, 2016, that "Dr. Old would only provide ATP [Authorization to Practice] after that employee has [been] recommended for ATP by the Service Medical Director [Dr. Christiansen]." (*Appellant's Motion, Attch.F; FRFD Opposition; Representation of Counsel at Motion Hearing*)

18. Mr. Trowbridge informally inquired whether Dr. Old, as the new AHMD for the FRFD, would issue him a new Authorization to Practice. No evidence was proffered that either Dr. Christiansen recommended or Mr. Trowbridge submitted a formal application for a new Authorization to Practice as was required. To date, Mr. Trowbridge had not received any acknowledgement of his inquiry. (*Appellant's Motion, Attch.I*)

19. By letter dated February 14, 2017, without specifically referencing Mr. Trowbride or his circumstances, Dr. Old confirmed that, in general, he will defer to Dr. Christiansen as the FRFD Medical Director to "advise the AMHD [Dr. Old] to recommend or not recommend Provider Authorization to Practice." (*FRFD Opposition, Exh. B*)

STANDARD OF REVIEW

The Commission is vested with "inherent" discretionary power to reopen a closed proceeding in an appropriate case. See Moe v. Sex Offender Registry Bd., 444 Mass. 1009 (2005) (rescript) ("in absence of statutory limitations, agencies generally retain inherent authority to reconsider their decisions"). Such power to reopen "should be exercised by an agency with due circumspection – 'sparingly' as the cases say." Covell v. Department of Social Services, 42 Mass.App.Ct. 427, 433 (1997). Compare Ung v. Lowell, 22 MCSR 471 (2009), (permitting reopening previously withdrawn appeal subject to conditions); O'Brien v. Town of Norwood, G1-01-283 (2007) (reopened proceeding to enter order authorizing HRD to implement terms of settlement) with Malone v. Civil Service Comm'n, 38 Mass.App.Ct. 147, 153-54 (1995) (affirming Commission's refusal to reopen appeal absent "undue haste" in granting the Personnel Administrator's motion to dismiss or any "general equities of the problem. . .upon which to rest the extraordinary decision to reopen the administrative proceeding") citing Aronson v. Brookline Rent Control Bd., 19 Mass.App.Ct. 700, 706, FAR.den., 395 Mass. 1102 (1985) and Davis, ADMINISTRATIVE LAW TEXT §18.09, at 370 (3rd ed. 1972).

The Commission may dispose of an appeal summarily, as a matter of law, pursuant to 801 C.M.R. 1.01(7) when undisputed facts affirmatively demonstrate "no reasonable expectation" that a party can prevail on at least one "essential element of the case". See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 fn.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

The likelihood that an appeal would not survive a motion for summary decision as a matter of law is a factor that an Appointing Authority may fairly raise in opposition to a motion to reopen, and it is one that the Commission may properly consider in deciding

whether or not reopening an appeal would be a futility. See Dawson v. Department of Correction, 26 MCSR 132 (2012), citing Sunderland v. Department of Correction, 1 MCSR 129 (1988), vacated on other grounds sub nom Dawson v. Civil Service Comm'n, 2012SUCV2857 (Suffolk Sup.Ct.2014); Keller-Brittle v. Boston Police Dep't, 23 MCSR 276 (2010) (reopening denied when appellant failed to show any basis to believe he could overcome evidence that reliance on proof of prior drug use was not reasonable justification for his bypass for appointment as a Boston Police Officer)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be disciplined or discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L.c.31,§41. An employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31,§41, may appeal to the Commission within ten days after receiving written notice of the appointing authority's decision. G.L.c.31,§43.

Under Section 43, the Commission's role is to hold "a de novo hearing for the purpose of finding the facts anew" and to determine "whether the appointing authority has sustained its burden of proving [by a preponderance of evidence] that there was reasonable justification for the action taken by the appointing authority." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited; City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38

Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

The Commission determines justification 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 Service 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' [both within and across different appointing authorities]" 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. It is also a basic tenet of the "merit principles" which governs Civil Service Law that discipline be remedial, not punitive, and designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31,§1.

The Commission has repeatedly upheld the termination of an employee who was unable to obtain or maintain a license that was an essential requirement to perform the duties of the civil service position to which the employee was appointed. See Bean v. Bourne, 24 MCSR 1 (2011) (revocation of Paramedic's Authorization to Practice); McKeown v. Town of Brookline, 23 MCSR 749 (2010) (failure to obtain hoisting license); Canella v. North Andover Fire Dep't, 21 MCSR 266 (2008) (failure to obtain EMT certification); Britt v. Department of Public Health, 20 MCSR 364 (2007); cf. City of Attleboro v. Civil Service Comm'n, 84 Mass.App.Ct. 1130 (Rule 1:28), rev.den., 467 Mass. 1104 (2014) (vacating Commission's decision to reduce termination of MEO to period of license suspension as exceeding its statutory authority to modify penalties). See also Hogan v. Town of Ludlow, 28

MCSR 337 (2015) (bypass of EMT reasonably justified because the AHMD would not approve "medical control", i.e., Authorization to Practice at ALS level)

ANALYSIS

The undisputed evidence shows that, at the time of his termination, Mr. Trowbridge had not lost his OEMS EMT/Paramedic license certification and has never lost that certification. His license status remained uncertain, however, until November 4, 2016, pending OEMS review, and his continued certification thereafter depended on his satisfactory completion of a remediation plan required by OEMS which he fulfilled on or about December 2, 2016.

The undisputed evidence also shows that, at the time of his termination, Mr. Trowbridge's Authorization to Practice as a Paramedic had been suspended indefinitely, that suspension had not been rescinded as of December 31, 2016 (the expiration of Dr. Carter's tenure as AHMD) and no new Authorization to Practice has been issued by the current AHMD under the St. Anne's Affiliation agreement as of the date of the hearing on the present Motion to Revoke Order of Dismissal. The undisputed evidence also established that, OEMS certification alone did not enable Mr. Trowbridge to perform the essential duties of his position as a FRFD Paramedic. Without an Authorization to Practice, Mr. Trowbridge was unable to do so from and after May 5, 2016 to date.

These undisputed facts lead to the inescapable conclusion that FRFD's decision to terminate Mr. Trowbridge in May 2016 based on his inability to perform the essential duties of his position for an indefinite and unknown period of time established just cause for the termination decision. The facts that the suspension has continued to this day, simply reinforces the conclusion that FRFD was not required to continue to employ someone whose ability to perform the duties of his position did, in fact, persist for months and, now, more than a year later, that fact remains unchanged. In sum, based on these undisputed facts, Mr.

Trowbridge has "no reasonable expectation" that he could establish a violation of his civil service rights that would entitle him to reinstatement or other relief from this Commission.

The Appellant mounts several arguments to suggest he is entitled to a plenary hearing of his discharge appeal, notwithstanding these undisputed facts. I carefully considered each of those arguments and find them insufficient to alter the conclusion that the Commission has no authority to grant Mr. Trowbridge relief and that reopening this appeal would be a futility.

First, the Appellant rightly contends that an Appointing Authority must provide an employee with specific written reasons for his termination and provide him with an opportunity for a hearing prior to termination and, after termination, provide notice of his rights of appeal to the Commission. He argues, here, that the FRFD failed to follow these procedures and that FRFD's reasons for his termination were limited to his alleged substandard patient care and never provided notice that his loss of Authorization to Practice was also a basis for the termination.

To be sure, FRFD failed to follow all proper procedures in effecting Mr. Trowbridge's termination. He was purportedly terminated summarily on May 5, 2016, without prior notice or a hearing, which was not held until May 12, 2016. These procedural errors prompted the Procedural Order issued in June 2016 that led to the parties' negotiated agreement that resolved the procedural issues. In addition, despite those procedural errors, such flaws are not fatal to the appointing authority's actions unless an appellant's rights were "prejudiced" by the errors, which is not shown here. G.L.c.31,§42,¶2. For these two reasons, to the extent that the Appellant relies on the procedural errors, per se, in the initial termination process as reason to reopen his appeal, those arguments clearly fail.

Second, the Appellant argues that his inability to practice as a Paramedic cannot form the basis for FRFD's justification of his termination at any hearing on the merits because the

suspension of his Authorization to Practice was not one of the grounds stated in his termination letter. I do not find that argument persuasive. Mr. Trowbridge received two letters on May 5, 2016, one from FRFD that purportedly terminated him and a second letter from the AHMD that suspended his Authorization to Practice. At the time of the hearing on his termination on May 12, 2016, both the suspension and the underlying behavior were considered and referenced by the hearing officer in support of the decision to uphold the termination. It would put form over substance to suggest that Mr. Trowbridge did not have notice that his loss of privileges as a Paramedic was not part of the basis for FRFD's decision.

Third, the Appellant argues that the loss of Mr. Trowbridge's Authorization to Practice does not necessarily prohibit the Commission from granting him relief because of the unique situation presented here, namely, that the FRFD now operates under a different AHMD than the AHMD who made the decision to suspend him. The Appellant suggests that the Commission could grant relief that would convert his termination into an indefinite suspension (now more than one year), conditioned on restoration of his Authorization to Practice by the new AHMD, whom he argues never formally rejected his suitability. Nothing in this record supports the possibility that such relief is appropriate.

Whether or not to grant an Authorization to Practice lies within the sole authority of the AHMD. See G.L.c.111C; 105 CMR 170.020; Appellant's Motion, Attch F [St. Anne's Affiliation Agreement, ¶2.2]. The facts are not disputed that Mr. Trowbridge lost his Authorization to Practice in May 2016 and that neither the former AHMD nor the current AHMD, both of whom defer to the recommendation of the FRFD Medical Director, has agreed to issue him a new one. Indeed, although Mr. Trowbridge indicated that he "inquired" about reinstatement, no evidence was proffered that he actually made a formal written application to Dr. Old or Dr. Christinsen for a new Authorization to Practice, as would be

required. It is mere speculation that the situation will change at any time in the future. The Commission will not grant relief based on such a speculative premise and, more importantly, will not compel an appointing authority to do so either. See, e.g., Hogan v. Town of Ludlow, 28 MCSR 337 (2015); Bean v. Bourne, 24 MCSR 1 (2011). See also City of Attleboro v. Civil Service Comm'n, 84 Mass.App.Ct. 1130 (Rule 1:28), rev.den., 467 Mass. 1104 (2014).

CONCLUSION

Accordingly, for the reasons stated, the Motion to Revoke Order of Dismissal is DENIED. By this Decision, ***dismissal*** of the appeal under Docket No.D1-16-101 is now ***final***.

. Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on June 8, 2017.

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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's 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: Philip Brown, Esq. (for Appellant)
Gary P. Howayeck, Esq. (for Appointing Authority)