

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

HAMPDEN COUNTY
SUPERIOR COURT
FILED

SEP 21 2020

BENNETT WALSH

SUPERIOR COURT
CIVIL ACTION
NO. 2079CV00194


CLERK OF COURTS

vs.

BOARD OF TRUSTEES FOR THE SOLDIERS' HOME IN HOLYOKE and another¹

**MEMORANDUM OF DECISION AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, Bennett Walsh, brings this action against the defendants, the Board of Trustees for the Soldiers' Home in Holyoke ("Board") and the Commonwealth of Massachusetts Executive Office of Health and Human Services ("Commonwealth" or "EOHHS"). Walsh, the former superintendent of the Soldiers' Home in Holyoke ("Holyoke Soldiers' Home" or "Soldiers' Home"), seeks injunctive relief barring the Board from conducting a termination hearing (Count I) and a declaratory judgment that his termination by the Commonwealth was invalid and is void. (Count II). The Commonwealth has filed a Counterclaim seeking a declaratory judgment that the termination was valid and must stand. The Commonwealth and Walsh have now moved for judgment on the pleadings as to Count II of the Complaint and the Commonwealth's Counterclaim on a "case stated" basis, and those parties have filed a Joint Stipulation of Facts with appended documents.² After a hearing and review of the parties' submissions, the Commonwealth's motion is **Denied** and Walsh's motion is **Allowed**.

¹ Commonwealth of Massachusetts, Executive Office of Health and Human Services

² The Board has not joined either motion. At hearing, counsel for the Board expressed that the Board takes no position on whether the Commonwealth had the authority to terminate Walsh.

BACKGROUND

The following facts are taken from the Joint Stipulation of Facts and the exhibits attached thereto, with some facts reserved for later discussion.

On December 21, 2015, Governor Charles Baker sent a letter to the Board regarding the need to appoint a new superintendent for the Holyoke Soldiers' Home due to the announced retirements of the Superintendent and Deputy Superintendent then serving. The Governor wrote that past practice for appointment of a superintendent had been that the Board would conduct recruitment and interviews of applicants and then forward a recommendation to the Governor for approval, which he noted was "standard practice for boards operating under the supervision of the executive department." The Board interviewed prospective candidates for the superintendent's position and referred three candidates to the Governor for his consideration. The Governor selected Walsh. Though the pleadings and supporting documents do not specify that Walsh was, in fact, one of the three candidates submitted by the Board, I infer that he was from the absence of objection by the Board.

On May 26, 2016, the Secretary of EOHHS sent a letter to Walsh notifying him that she was appointing him as Superintendent of the "Holyoke Soldiers' Home in Massachusetts." The letter bore the Governor's signature verifying his approval. The letter instructed Walsh that he had to take and subscribe to an oath of office within three months or the appointment would be void.³ The appointment letter erroneously advised Walsh that he was being appointed "pursuant to Massachusetts General Laws Chapter 6 Section 40." That statute pertains to the appointment of the superintendent of the Massachusetts Soldiers' Home, which is situated in Chelsea, ("Chelsea Soldiers' Home") not the Holyoke Soldiers' Home. Under G.L. c. 6, §40, the

³ See G.L. c. 30, §11, "Oaths of office", and § 12 "Failure to Take Oath of Office Voids Appointment"

Secretary of EOHHS is designated as the appointing authority for the Chelsea Soldiers' Home.⁴ The appointment of the superintendent of the Holyoke Soldiers' Home is governed by M.G.L. c. 6, § 71, which grants the authority to appoint to the Board of Trustees of that Soldiers' Home.⁵

Walsh began serving as Superintendent of the Holyoke Soldiers' Home in May, 2016, and was administered an oath of office to that position by the Governor on July 6, 2016. Walsh served in that capacity for almost four years. In February and March of this year, numerous patients and residents of the Holyoke Soldiers' Home were infected by and succumbed to coronavirus disease 2019 (abbreviated as "COVID-19"). On March 30, 2020, the Deputy Secretary of EOHHS notified Walsh that he was being placed on paid administrative leave pending an investigation into the health and safety policies and procedures of the Soldiers' Home. The letter instructed Walsh that he was required to fully cooperate with the investigation, he was prohibited from visiting the Soldiers' Home or contacting staff there, and that his access to email and the EOHHS network was deactivated. Governor Baker appointed Attorney Mark Pearlstein to conduct an investigation into the circumstances underlying the deaths of residents at the Holyoke Soldiers' Home.

On April 2, 2020 the Board notified Walsh "pursuant to M.G.L. c. 30A, § 21(a)(1)," a section of Massachusetts' Open Meeting Law, that there would be two meetings on April 4, 2020

⁴ G.L. c. 6, § 40 provides in pertinent part: "The secretary of health and human services shall appoint, with the approval of the governor, the superintendent of the soldiers' home, who shall have the title of commandant, and who shall serve at the pleasure of the secretary and may be removed by the secretary at any time, subject to the approval of the governor."

⁵ G.L. c. 6, § 71 provides: "The board of trustees of the Soldiers' Home in Holyoke shall manage and control the Soldiers' Home in Holyoke and all property, real and personal, of the commonwealth that is occupied or used by the home. In the management and control of the home, the board of trustees shall: ... (ii) appoint a superintendent. The superintendent shall be the administrative head of the home. The superintendent shall, subject to the approval of the trustees, appoint and may remove a medical director, a treasurer and an assistant treasurer...."

to consider his continued employment at the Soldiers' Home; one in executive session, followed immediately by a telephonically conducted public meeting. The meetings were re-scheduled in response to a request of Walsh's counsel, and a second notice was sent on April 6, 2020 notifying Walsh that the meetings would be held on April 11, 2020.

On April 10, 2020, Walsh filed this action seeking to enjoin the Board from proceeding with the hearings on due process grounds and also his concern that his attendance would expose him and family members to COVID-19. Walsh contended that his having been barred from contacting employees and witnesses at the Soldiers' Home and having been denied access to relevant documents unfairly interfered with his ability to present his position at the hearings. He also argued that he had received late notice that there would be witnesses and that he could present witnesses. A temporary restraining order issued prohibiting the hearings from going forward and a hearing on his request for a preliminary injunction was scheduled for April 16, 2020. The Board then moved to continue the hearing on a preliminary injunction; the hearing was continued to April 30, 2020. The parties then jointly moved to further continue the hearing and it was continued to July 30, 2020.

On June 24, 2020, Attorney Pearlstein issued an investigation report and that same date the Secretary of EOHHS ("the Secretary") sent Walsh a letter, approved by the Governor, notifying him that his employment was terminated pursuant to M.G.L. c. 6, § 40. On July 13, 2020, Walsh filed an Amended Complaint adding a second count in which he seeks a declaratory judgment that the Commonwealth's termination of him via that letter was invalid and void.

On July 27, 2020, the parties jointly moved to continue the July 30, 2020 hearing and proposed that the Commonwealth would file an answer to the Amended Complaint and the

parties would then file cross-motions for judgment on the pleadings. That motion was allowed. The parties' filed their cross-motions. Arguments were heard on September 8, 2020.

DISCUSSION

A. Declaratory Judgment

The Commonwealth and Walsh both seek a declaratory judgment pursuant to G. L. c. 231A as to the validity of the Commonwealth's termination of Walsh. The purpose of a declaratory judgment action is "to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations." G. L. c. 231A, § 9. "In proceedings under the declaratory judgment act, it is the duty of the judge to adjudicate the decisive issues involved in the controversy and to make binding declarations concerning such issues, thus putting the controversy to rest." *Zaltman v. Daris*, 331 Mass. 458, 462 (1954). Though the Board did not file any pleadings and took no position on the motions filed, "[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affect by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." G.L. c. 231A, § 8.

B. Standard of Review

Walsh and the Commonwealth have agreed that their cross-motions may be decided on a "case-stated" basis, and the Board did not object. "Where a statement of agreed facts contains all the material facts on which the rights of the parties are to be determined in accordance with law, it constitutes a 'case stated.'" *Mass. Bay Transp. Auth. v. City of Somerville*, 451 Mass. 80, 84 (2008), quoting *Caissie v. Cambridge*, 317 Mass. 346, 347 (1944). The court's duty in such a case is "to order the judgment that [is] required by the application of the correct principles of law to the facts stated." *Caissie*, 317 Mass. at 347. Judgment on the pleadings on a "case stated"

basis is therefore comparable to summary judgment. However, unlike summary judgment, in reviewing a 'case stated' the court "is at liberty to draw from the facts and documents stated in the case any inferences of fact which might have been drawn therefrom at a trial, unless the parties expressly agree that no inferences shall be drawn." *Town of Ware v. Town of Hardwick*, 67 Mass. App. Ct. 325, 326 (2006), quoting Nolan & Henry, Civil Practice § 33.7 (3d ed. 2004). In other words, rather than "viewing the evidence in the light most favorable to the nonmoving party," *Augat v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991), the court may draw reasonable inferences in favor of either party.

C. Termination of Walsh Under G.L. c. 6, § 40 Was Not Valid

The dispute as to the validity of Walsh's termination from his position as Superintendent derives in large part from the erroneous citation to G.L. c. 6, § 40 in both the letters of appointment and termination. The Commonwealth and Walsh both argued that the power to appoint an administrator generally confers upon the appointing authority the power to terminate that appointment, and Massachusetts case law supports their position.^{6,7} "It is a wellnigh universal rule that, where no definite term of office is fixed by law, the power to remove an incumbent is an incident to the power to appoint, in the absence of some constitutional or statutory provision to the contrary." *Adie v. Mayor of Holyoke*, 303 Mass. 295, 300 (1939).

⁶ The Commonwealth makes that argument in its motion at pages 5 to 6, and Walsh stipulated to that proposition during oral argument on the cross-motions.

⁷ The Commonwealth goes further, and argues that general supervisory authority implies the power to terminate, but the case it cites, *N.L.R.B. v. Health Care & Retirement Corporation of America*, 511 U.S. 571, 573, 114 S. Ct. 1778, 1780, 128 L. Ed. 2nd 586 (1994), does not support that proposition. In that case, the Supreme Court noted that employees who are authorized to engage in any of twelve specified activities using independent judgment, including hiring and firing, in the interest of their employer, are considered supervisors, and are not covered under the National Labor Relations Act, 29 U.S.C. § 152(3),(11). It does not hold the converse; that supervisors necessarily have the power to hire or fire, and it is a matter of common knowledge that many people in supervisory positions do not have such independent authority.

Walsh argues that the June 24, 2020 termination letter from the Secretary of EOHHS, approved by the Governor, was invalid because neither the Secretary nor the Governor had the power to appoint him, and, therefore, could not terminate him.

Walsh is correct that the Secretary did not have the authority to appoint him, with or without the approval of the Governor. The Legislature has the power to grant authority for the appointment of government officials to officers or boards other than the Governor or the Governor's Council. *In re Opinion of the Justices*, 302 Mass. 605, 621–22 (1939); Massachusetts Constitution, Part 2, c. 1, § 1, art. 4. It did so in this instance. The power to appoint the superintendent of the Holyoke Soldiers' Home vests in the Board under G.L. c. 6, § 71. It is well settled that a "statute is to be construed as written, in keeping with its plain meaning." *Stop & Shop Supermarket Co. v. Urstadt Biddle Props.*, 433 Mass. 284, 289 (2001) and cases cited. Only the Board had clear statutory authority to appoint Walsh and presumably to terminate him.

The termination letter suggests that the Secretary errantly believed she had the same powers with respect to the superintendent of the Holyoke Soldiers' Home as she did with respect to the superintendent of the Chelsea Soldiers' Home. Under G.L. c. 6, § 40, she had the power to appoint the superintendent of the Chelsea Soldiers Home, who serves at her pleasure "and may be removed by the secretary at any time, subject to the approval of the governor." *Id.* She did not have that authority with respect to Walsh, and the Governor's "approval" of her action could not confer upon her the authority to terminate him.

The Commonwealth argues that the Governor's written approval endorsed on the termination letter constitutes his dismissal of Walsh, and that he had authority to do so because both the Board and Superintendent of the Soldiers' Home "serve under" the Governor pursuant

to G.L. c. 6, § 17. General Laws c. 6, § 17 lists a number of commissions and boards that expressly “serve under the governor, and shall be subject to such supervision as the governor deems necessary and proper.” These include “the superintendent, the board of trustees of the Soldiers’ Home in Holyoke, who shall have the title of superintendent and is appointed by the board of trustees of the Soldiers’ Home in Holyoke” G.L. c. 6, § 17. The Commonwealth also points to the overall supervisory structure of the EOHHS, which serves as “the principal agency of the executive department” for purposes of managing “the departments, commissions, offices, boards, divisions and institutions” within the executive office. G.L. c. 6A, § 16. The EOHHS includes “the department of veterans’ services under the direction of the secretary of veterans’ services, . . . which shall include the Soldiers’ Home in Massachusetts and the Soldiers’ Home in Holyoke. . . .” *Id.*

The Commonwealth further argues that rules of statutory construction require that G.L. c. 6, §§ 17 and 71 “can and should be read together as providing that the Governor may exercise his authority over the Superintendent directly or via the Board, which he appoints. . . .”⁸ It posits that the Governor’s power to supervise both the Board and the Superintendent, in conjunction with the Board’s power to appoint and terminate a superintendent, means that the Governor had co-equal termination authority with the Board and could unilaterally exercise the power to terminate Walsh.

The Commonwealth cites no specific case that supports its argument that the Governor has that unfettered discretionary authority, and I do not find any appellate case directly on point. Regardless of whether the Commonwealth is correct as to the scope of the Governor’s G.L. c. 6, § 17 authority, the record does not establish that it was properly exercised in this case. The

⁸ The Governor appoints the Board of Trustees pursuant to G.L. c. 6, § 70.

termination letter does not state that the Secretary was acting on behalf of the Governor exercising his supervisory authority under G.L. c. 6, § 17. It does not appear that the Governor could exercise that authority in this instance through the Secretary. Under G.L. c. 6A, § 16, the Secretary has authority to exercise numerous specified powers on behalf of the Governor. Those powers include a catchall provision, subpart (m), which permits the Secretary to “serve as the executive and administrative head of each office, department, division, bureau, section, agency and other administrative unit within the executive office, except as specifically provided by law.” (emphasis added). The management of the Holyoke Soldiers’ Home and the appointment of the superintendent is specifically provided by law, and it is delegated to the Board. The plain language of the termination letter indicates that the Governor merely approved the action of the Secretary of EOHHS, who had acted beyond the scope of her authority.

G.L. c. 6 §§ 17 and 71, and the other related statutory provisions, can be read as a harmonious whole if they are understood to mean that the Governor and Board collaborate in supervision of the Soldiers’ Home, including the appointment of a Superintendent as occurred in this case. The Board of Trustees consists of seven persons appointed by the governor, with the advice and consent of the governor’s council, to serve for seven years. They serve without compensation. A previous version of the statute controlling appointment of trustees, G.L. c. 6, § 70, required that the trustees be residents of the western area of the Commonwealth, but a 1971 amendment revised the statute to mandate that they be residents of the four Western Massachusetts counties, with each county having at least one member on the Board. It is clear that the purpose of the legislation is to assure input from Western Massachusetts residents in the management of the Soldiers’ Home, including the appointment of its superintendent. The Governor’s supervisory authority certainly includes recommending, and perhaps even directing,

that the Board terminate a superintendent. In this matter, had the Governor recommended the Board terminate Walsh, there is no reason to believe that the Board would not have complied. The Board, and not the Secretary, was the proper vehicle through which the Governor could have exercised any authority to terminate the Superintendent pursuant to G.L. c. 6, § 17.

D. The Commonwealth's Alternative Argument That Walsh Was Never Properly Appointed as Superintendent and Therefore Cannot Protest His Termination Is Without Merit

The Commonwealth argues, in the alternative, that because Walsh's appointment letter stated that he was being appointed pursuant to § 40, then either he is subject to termination by the Secretary or Governor under § 40, or he was never properly appointed in the first place and is subject to summary termination. See *O'Connell v. City of Lynn*, 54 Mass. App. Ct. 583, 586 (2002) (mayor entitled to terminate administrator of city agency not properly appointed under city charter, without going through charter removal process). That argument is without merit. At the Governor's behest, the Board engaged in recruitment and interviews of prospective candidates for the Superintendent's position in 2016, and referred three potential candidates to the Governor for his review. The Governor selected Walsh. The minutes of the Board's meetings, attached as Exhibit B to the Commonwealth's Counterclaim, indicate that the Board's intentions and actions were consistent with its exercise of authority to appoint the superintendent of the Soldiers' Home under § 71. That the Secretary of EOHHS erred in her letter notifying Walsh of the statute under which he was being appointed does not negate the manifest intent and the actions of the Board and the Governor. Furthermore, Walsh took and subscribed to an oath required to qualify him for the position without objection of the Board, and served for almost four years. His appointment through the Board was valid. His termination without input from the Board was not.

E. Walsh Does Not Have a Right to a Hearing

Since the ruling on the cross-motions bears on both the authority of the Board and possible future actions of the Governor and the Board, it is provident and necessary under G.L. c. 231A, § 8, to address the question of whether Walsh is entitled to a hearing regarding his possible termination from the position of superintendent.

In a footnote in his motion, Walsh argues that he was entitled to a hearing under the Veterans' Tenure Act, G.L. c. 30, § 9A, ("the Act") which provides that a veteran who holds an office or position in the service of the Commonwealth for three years may not be terminated except subject to provisions under Massachusetts' Civil Service laws, G.L. c. 31, § § 41 through 45. Those sections require that termination of a veteran covered under the Act be for just cause, and provide for the right to a hearing and judicial review. The Act does not benefit veterans who are appointed to middle and upper level management positions, which are specifically exempted under G.L. c. 30, § 46F. See *Greaney v. Colonel*, 52 Mass. App. Ct. 789, 793-795 (2001). It is clear that the position of superintendent of the Soldiers' Home is a management position exempted from coverage under the Act. The superintendent is "the administrative head of the home," and appoints and may remove a medical director and other officers of the Soldiers' Home, subject to the approval of the Board, and may also appoint and remove other persons necessary for the operation of the facility. G.L. c. 6, § 71.

Walsh is not otherwise entitled to a hearing as he was not appointed for a fixed term, and there is no statutory provision mandating that his dismissal must be for good cause. "In this Commonwealth, ... where the statutory ground for the removal is 'for cause,' the statute is construed as giving to a public officer the right to notice of the charges against him and to an

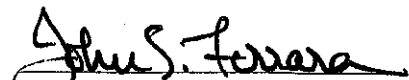
opportunity to be heard on those charges.” *Murphy v. Casey*, 300 Mass. 232, 234 (1938), and cases cited therein. A prior version of G.L. c. 6, 71, did provide:

“The superintendent may be removed by said board of trustees for inefficiency, failure to perform duties properly or other good cause. A superintendent sought to be removed shall be notified of the proposed action, shall be furnished with a copy of the reasons therefore and shall be give a hearing before said board of trustees and be allowed to answer the charges preferred against him, either personally or by counsel.”

That entire sentence was redacted when the statute was amended in 2016, and the current version contains no requirement that removal must be for good cause or that a superintendent has any right to a hearing regarding his dismissal.

ORDER

For the foregoing reasons, the plaintiff, Bennett Walsh’s motion is **ALLOWED** and the defendant, Commonwealth’s motion is **DENIED**. Judgment shall enter for the plaintiff on Count II of his Complaint, and it is **DECLARED** that his termination via the letter from the Secretary of EOHHS was invalid and is void.


John S. Ferrara
Justice of the Superior Court

DATED: September 21, 2020