

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

GERALD ALSTON,

Appellant

v.

TOWN OF BROOKLINE,

Respondent

D1-16-170

Appearance for Appellant:

Brooks A. Ames, Esq.
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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, Gerald Alston, acting pursuant to G.L.c.31,§41-§43, appealed to the Civil Service Commission (Commission), contesting his termination by the Town of Brookline (Brookline) from his position as a Firefighter with the Brookline Fire Department (BFD).¹ A pre-hearing conference was held on November 15, 2016, after which Brookline filed a Motion for Summary Decision on the grounds that the Commission lacks jurisdiction over the appeal because the undisputed facts establish that it is untimely and that, even if timely, Mr. Alston admits that he cannot perform the duties of a BFD Firefighter now or at any future time. Mr. Alston opposed the motion and proffered that his inability to perform is solely caused by Brookline’s creation of a hostile work environment and cannot be used as “just cause” for his

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

termination. The appeal follows dismissal nisi of a prior appeal to the Commission complaining, inter alia, about Brookline's delay in rendering its decision to terminate the Appellant. (*Alston v. Town of Brookline, CSC No. D1-16-155 [Alston CSC I]*), Brookline also argues that Mr. Alston has a federal civil rights lawsuit pending against Brookline that involves, essentially, the same disputed issues and the federal forum, not the Commission, is the proper place to adjudicate Mr. Alston's claims. I held a hearing on the Motion for Summary Decision on January 17, 2017 which was stenographically recorded. For the reasons explained below, I conclude that Brookline's Motion for Summary Disposition should be granted and the appeal be dismissed.

PROCEDURAL HISTORY

This appeal arrived at the Commission after a long history. In May 2010, Firefighter Alston was recovering from an on-duty injury when he reported that his BFD Lieutenant had made racial slurs directed at him. (*Appellant's More Definite Statement (MDS), Exhs. A & B*) Following this incident, Firefighter Alston's relationship with his fellow BFD co-workers started to deteriorate, eventually leading to his complaints of racial discrimination, harassment and retaliation against the BFD and Brookline, initially through internal grievances in July 2010 and later in the Massachusetts Commission Against Discrimination (MCAD) in 2012, and lawsuits in Massachusetts and federal courts. (*MDS, Exhs. A & B; Brookline's Motion for Summary Decision, Exh.1 [Alston Federal Action; Administrative Notice [http://archive.boston.com/your-town/news/brookline/2013/08/brookline_firefighter_sues_town_over_alleged_racial_slur.html]*)²

In December 2013, following a workplace incident (the so-called "Leave" incident), Firefighter Alston was placed on administrative leave pending a fitness for duty examination. (*Alston CSC I, Amended Appeal; MDS, Exh. B*) In May 2014, Firefighter Alston was transferred

² The Superior Court action was subsequently dismissed on procedural grounds in July 2015.. (*Brookline's Motion for Summary Decision, Exh.2[Superior Court Docket, CA No.1382CV00898]*)

from administrative leave to sick leave and, in October 2014, upon exhaustion of his accrued sick time, he was placed on unpaid leave. (*Alston CSC I, Amended Appeal; MDS, Exh. B*). In November 2014, Firefighter Alston protested the termination of his pay through an appeal under Brookline's Anti-Discrimination Policy and he was restored to administrative leave status in February 2015. (*Alston CSC I, Amended Appeal*)

In December 2015, Firefighter Alston filed a civil action in the United States District Court (D.Mass.) (*Alston Federal Action*), alleging various federal civil rights claims against Brookline and others (*Alston CSC I, Amended Appeal; Brookline's Motion for Summary Decision*)

In February 2016, Brookline again terminated Firefighter Alston's administrative leave and placed him on sick leave and, upon exhaustion of his accrued sick leave, he again reverted to unpaid leave status. (*Alston CSC I, Amended Appeal*)

In June 2016, Firefighter Alston, through counsel, filed a complaint with the Massachusetts Attorney General challenging the validity of his removal from administrative leave on the grounds that decision was taken by the Brookline Board of Selectmen (BOS) in executive session without proper notice in violation of the Massachusetts Open Meeting Law, G.L.c.30A, §§18-25. (*Alston CSC I, Claim of Appeal, Letter from Office of the Attorney General dated 8/8/2016; Letter dated 9/17/2016, Office of the Attorney General, OML 2016-142*)³

In August 2016, Brookline initiated proceedings to terminate Firefighter Alston for "incapacity to report to work and to perform the essential functions of [his] position as a Firefighter with or without reasonable accommodations." An Appointing Authority hearing on the contemplated termination was held before a hearing officer designated by Brookline on August 30, 2016. (*Alston CSC I, Amended Appeal; MDS, Exh.A*)

³ The Attorney General dismissed the Open Meeting Law complaint concerning the February 2016 executive session as untimely without addressing the merits of the alleged violation. (*Administrative Notice [Letter dated 9/17/2016, Office of the Attorney General, OML 2016-142]*)

On September 21, 2016, Firefighter Alston filed Alston CSC I, in which he alleged that Brookline had violated his civil service rights by failing to render a decision “forthwith” after the completion of the August 30, 2016 Appointing Authority hearing. On September 29, 2016, Alston CSC I was dismissed nisi, to become effective October 12, 2016, unless Brookline had not issued its decision on the pending disciplinary action before then.

On October 4, 2016, Firefighter Alston filed an “Amended Appeal” in Alston CSC I, claiming back pay for Brookline’s allegedly unlawful prior terminations of his administrative leave that had deprived him of compensation he claimed was due from May 2014 to February 2015 and from February 2016 to the date of his appeal. (Alston CSC I, Amended Appeal)

On October 5, 2016, the Brookline BOS voted to adopt the findings contained in the hearing officer’s report (dated September 29, 2016) and terminated Firefighter Alston from his employment as a BFD Firefighter, effective October 5, 2016. Firefighter Alston was informed of Brookline’s decision by letter dated and received on October 6, 2016. (*Claim of Appeal; MDS, Exh A*)

On October 21, 2016, at 3:58 PM, the Appellant filed this appeal. (*Claim of Appeal*) At the pre-hearing conference, Brookline filed a Motion to Dismiss the Appellant’s Amended Complaint filed on October 4, 2016 in Alston CSC I, which motion was received and docketed in this appeal. The Appellant was allowed leave to file a More Definite Statement to state which claims, if any, from Alston CSC I that he continued to assert in this appeal. A full hearing was scheduled for January 2017. (*Brookline Motion to Dismiss; Notice of Full Hearing*)

On November 25, 2016, the Appellant filed a More Definite Statement for Relief, which stated that Appellant contested the October 5, 2016 termination as being without just cause and incorporated all of his prior claims to back pay originally asserted in Alston CSC I.

Brookline responded to the Appellant's More Definite Statement on November 29, 2016 by way of a Motion for Summary Decision. The Appellant filed an Opposition to Brookline's Motion for Summary Decision on December 9, 2016. (*MDS; Brookline Motion for Summary Decision; Appellant's Opposition to Summary Decision*)

After reviewing the Appellant's More Definite Statement and the Motion for Summary Decision and Appellant's Opposition, the Commission converted the scheduled full hearing to a hearing on the Motion for Summary Decision which I held on January 17, 2017. (*Administrative Notice [CSC E-mail trail 12/12/2016]*)

FINDINGS OF FACT

Based on the submissions of the parties, 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, Gerald Alston, a black male in his 40s, was born and raised in Boston and attended Natick High School as a METCO student. After a brief singing career, he worked as an MBTA subway operator and held other odd jobs. He then took and passed the firefighter's civil service examination and became a BFD Firefighter in 2002. (*MDS, Exh. A [Price IME, Hearing Officer's Report]; Brookline Motion for Summary Decision, Exh. 1 [Alston Federal Action]*)

2. Firefighter Alston enjoyed good working relationships with peers and superior officers at the BFD until an on-duty injury (broken tailbone) put him out of work in May 2010. (*MDS, Exh. A [Price FFDE]; Brookline Motion for Summary Decision, Exh. 1 [Alston Federal Action]*)

3. Within days of his injury, Firefighter Alston received a voicemail message from his superior officer, a BFD Lieutenant, who used the phrase "f---g n ---r". The Lieutenant later apologized and said his statement was not about Firefighter Alston, but a black "gangb---ger"

who cut him off in traffic. (*MDS, Exh. A [Price IME]; Brookline Motion for Summary Decision, Exh.1 [Alston Federal Action]*)

4. After hearing the Lieutenant make his second unwelcome racial slur, Firefighter Alston wrote a letter of complaint which resulted in the Lieutenant's suspension for four tours (two-day suspension) in August 2010. Then, just as Firefighter Alston was about to return to work in September 2010, the Lieutenant was promoted to Acting Captain and awarded a medal of valor for actions in the line of duty. (*MDS, Exh. A [Price IME], Exh. B [Carter IME]; Brookline Motion for Summary Decision, Exh.1 [Alston Federal Action]*)⁴

5. Upon his return to duty from injured leave, Firefighter Alston perceived a major shift in the attitude and treatment demonstrated towards him by the Lieutenant (now) Captain about whom he had complained, as well as others at the BFD. He took particular offense to what he viewed as insensitivity toward racial discrimination and retaliation against him for his having complained about the racially hostile atmosphere he was experiencing. For example, when, following his complaints, the BFD instituted a formal policy against racial discrimination and mandated training, some called the sessions "Gerald" or "Alston" training. (*MDS, Exh. A [Price IME, Appellants Hearing Statement], Exh. B [Carter IME]; Brookline's Motion for Summary Decision, Exh.1 [Alston Federal Action]*)

6. On November 24, 2010, after a verbal altercation with coworkers, Firefighter Alston was transported to the Emergency Department of Beth Israel Hospital where he was placed in restraints due to "risk of injury to self or others." A drug screen tested positive for cocaine. He reported that he had been using marijuana since July 2010 to calm him down and "used cocaine yesterday" for the first time but never wanted to use it again. (*MDS, Exh. A [Price IME]*)

⁴ The Lieutenant was promoted to permanent Fire Captain in 2013 (*Brookline Motion for Summary Decision, Exh.1 [Alston Federal Action]*) and now serves as the Deputy Fire Chief (See Finding of Fact, ¶25, *infra*)

7. Beginning in October 2010, Firefighter Alston had started treatment through various providers to deal with the feeling of workplace betrayal, anger and harassment he was experiencing. He was prescribed medication to alleviate his symptoms. His ten-year marriage fell apart in 2011 and he agreed to a divorce in 2013. (*MDS, Exh. A [Price IME], Exh. B [Carter IME]; Brookline's Motion for Summary Decision, Exh.1 [Alston Federal Action]*)

8. On December 19, 2013, shortly after he expressed an intent to transfer to another fire station, Firefighter Alston saw the word "Leave" drawn in the dust accumulated on a piece of BFD apparatus. He viewed the message to refer to him and to have been written with malicious intent.⁵ When he reported for his next tour, on December 22, 2014, his Lieutenant held a work group discussion about the so-called "Leave" incident. The parties do not agree on the exact words that were exchanged or their intent, but it is undisputed that Firefighter Alston took the "Leave" incident as a highly offensive attack on him personally, acknowledged that he was under considerable stress, and, at some point during the discussion, he mentioned the phrase "going postal". (*Amended Appeal; MDS, Exh. A [Price IME], Exh. B [Carter IME]*)

9. On December 26, 2013, Firefighter Alston was placed on administrative leave, pending an investigation of the "Leave" incident and a determination whether he presented an immediate threat of violence and whether he was fit to perform the essential functions of a firefighter. (*Alston CSC I, Amended Appeal, Exh. A; MDS, Exh. A [Price IME], Exh. B [Carter IME]*)

10. On January 5, 2014, Firefighter Alston saw psychiatrist Andrew Brown, M.D., who performed a Fitness for Duty Examination (FFDE) and consulted with Firefighter Alston's treating psychiatrist. Dr. Brown opined that he found "no evidence of an unacceptably high risk

⁵ The previous day, Firefighter Alston had been scheduled to cook the meal for the work group, but no one wanted to help him and they ordered take-out instead. Firefighter Alston took this incident as an example of how he was being "shunned" and, that evening, had stated that things had become so unbearable that he was contemplating a transfer to another fire station. (*MDS, Exh. B [Carter IME]*)

that Firefighter Alston would engage in workplace violence”, but he also opined that Firefighter Alston was not fit for duty due to a high risk for behavioral outbursts that he would have difficulty in controlling in the workplace. (*MDS, Exh. A [Price IME]*)

11. On March 14, 2014, still on administrative leave, Firefighter Alston requested a transfer from his current assigned duty to another fire station. (*Alston CSC I, Amended Appeal*)

12. By letter dated May 14, 2014, BFD Fire Chief Paul Ford informed Firefighter Alston of the status of the investigation into the “Leave” incident, the conditions for his return to duty with the BFD and the status of his transfer request. The letter stated, in part:

- As to Firefighter Alston’s complaint of racial harassment, the investigation was unable to determine who wrote the words on the fire apparatus and, as they were not considered “inherently” racist, that it did not rise to the level of harassment prohibited by Brookline’s Policy Against Discrimination, Sexual Harassment and Retaliation. Brookline agreed to conduct regular training of all BFD firefighters in the type of conduct that would violate the policy.⁶
- Firefighter Alston’s return to duty depended on his completing an approved treatment plan, attend certain training prescribed by Brookline’s Human Resources Department, and successfully complete a re-evaluation IME.
- Effective May 15, 2014, Firefighter Alston’s status was changed from administrative leave to sick leave until such time as “you are able to return to full duty”
- Firefighter Alston’s request to transfer to another fire station was deferred and would be addressed “upon your return to duty.”

(*Alston CSC I, Amended Appeal, Exh. B*)

13. By letter dated October 23, 2014, Brookline’s Benefits Administrator informed Firefighter Alston that he had “exhausted all available leave” and October 30, 2014 would be his last paycheck and, “assuming you will be returning to work in December”, he would need to make arrangements to pay his share of the premiums himself to continue his health insurance and life insurance benefits until he returned to duty. (*Alston CSC I, Amended Appeal, Exh. C; MDS, Exh. A [Appellant’s Statement]*)

⁶ Firefighter Alston separately was disciplined for his “going postal” remarks during the “Leave” incident, receiving a two-tour suspension. (*Alston CSC I, Amended Appeal; MDS, Exh. A [Price IME & Appellant’s Statement]*)

14. On November 24, 2014, Firefighter Alston filed an appeal under Brookline’s Policy Against Discrimination, Sexual Harassment and Retaliation, requesting that he be restored to administrative leave. (*Alston CSC I, Amended Appeal; MDS, Exh. A [Appellant’s Statement]*)

15. On December 19, 2014, after Firefighter Alston had appeared before the Brookline Board of Selectmen (BOS) to request an independent investigation, the BOS announced that the newly created Diversity, Inclusion, and Community Relations Commission (DICR) would conduct a “Racial Climate Review” of Brookline’s workforce. (*MDS, Exh. A [Appellant’s Statement]*)

16. On February 12, 2015, Firefighter Alston met with Marilyn Price, MD, a psychiatrist at the Massachusetts General Hospital, who was retained by Brookline to conduct a re-evaluation of Firefighter Alston’s fitness for duty after Firefighter Alston refused to return to see Dr. Brown. (*Alston CSC I, Amended Appeal; MDS, Exh. A [Price IME & Appellant’s Statement]*)

17. On February 13, 2015, Brookline restored Firefighter Alston to paid administrative leave status. (*Alston CSC I, Amended Appeal; MDS, Exh. A [Price IME & Appellant’s Statement]*)

18. On March 23, 2015, Dr. Price completed her evaluation and submitted a 50-page report to Chief Ford. Dr. Price opined that Firefighter Alston would be able to return to work full time if a return plan can be arranged with sufficient accommodations to reduce his stress and if Firefighter Alston commits to appropriate treatment. The conditions to return to duty recommended by Dr. Price included:

“Firefighter Alston should be in treatment . . . to handle stressors he is likely to encounter upon returning to work . . . for at least a month prior to attempting to return to work. . . . [I]f he encounters behavior that he interprets as discriminatory or is in fact discriminatory, it is possible that he could have an emotional outburst. . . . Being in appropriate treatment would help him to cope more effectively and be more confident in his ability to contain his behavior.”

“In my opinion, Firefighter Alston’s compliance with treatment should be monitored for a period of at least 1 year.”

“It would be helpful for Firefighter Alston to have a designated workplace monitor to whom he can bring concerns so that issues can be addressed”

“It would be difficult for Firefighter Alston, or any firefighter to work effectively and feel secure that he would be backed up in dangerous situations if he/she does not trust members of the team. . . . [T]here would need to be a plan specifically tailored for Firefighter Alston so that he is not assigned to work with persons whom he perceives as acting previously in a discriminatory manner. Unless there can be accommodations so that Firefighter Alston feels safe in returning, then there would be a continued risk of . . . behavior that lead to this evaluation.”

“Unless the work environment can be modified so that Firefighter Alston’s level of stress is decreased, it is very unlikely that he would be able to work effectively and have the level of trust of his fellow firefighters that is required. Irritability and anger would interfere with his ability to respond effectively in dangerous situations.”

“If a less stressful work environment cannot be arranged with Firefighter Alston’s input, then it is likely that symptoms . . . would intensify and Firefighter Alston would be at greater risk of behavioral outbursts.”

“Firefighter Alston would need to have random toxic screens for a period of at least 2 years to ensure that he does not rely on alcohol, cocaine or marijuana to deal with his symptoms.”

(MDS, Exh. A [Price IME])

19. On January 5, 2016, the Chair of the DICR appeared before the Brookline BOS and reported that the DICR had reached the following unanimous conclusion:

“The Board of Selectmen, as an institution of Town government, has allowed a culture of institutional racism to exist The [DICR] calls upon you, as the elected leaders of this Town, to exercise your responsibilities and duties, as commissioner of the police and fire departments . . . to stamp out this culture. . . . This is a matter of extreme urgency which the [BOS] needs to address with actions, not words, now.”

(MDS, Exh. A [Appellant’s Statement])

20. By letter dated February 5, 2016 to Firefighter Alston’s legal counsel, Brookline Town Counsel stated that Brookline anticipated that Firefighter Alston would return to duty on March 7, 2016 provided that: (1) he demonstrated that he had complied with Dr. Price’s recommendation to obtain psychiatric treatment and provide a medical release to enable Brookline to confirm this treatment; (2) he meet with Fire Chief Ford to arrange for reasonable

accommodations to his duty assignment; and (3) submit to a pre-return toxic drug screen on February 10, 2016. (*MDS, Exh. A [Town Counsel's Letter dated 2/5/16]*)

21. By letter dated February 17, 2016, Brookline's Town Counsel informed Firefighter Alston, through his counsel, that, due to his failure (1) to provide Brookline with a medical release, (2) to meet with Chief Ford to discuss reasonable accommodations, and (3) to participate in a toxic screen on February 10, 2016, his "conditional paid administrative leave had been terminated, effective at 8:00 AM today." Firefighter Alston was advised that he had a balance of accrued sick leave in his sick bank and, on or about February 22, 2016, he was placed back on sick leave. (*Alston CSC I, Amended Appeal, Exh. E; MDS, Exh. A [Town Counsel's Letter dated 2/5/2016, Town Counsel's e-mail dated 2/29/16]*)

22. On May 18, 2016, Chief Ford retired without having met with Firefighter Alston to discuss his return to duty. (*MDS, Exh. A [Town Counsel e-mail dated 5/5/2016, Chief Ford Letter dated 5/11/2016, Acting Chief Ward Letter dated 5/25/16]*)

23. By letter dated May 25, 2016, Brookline's Human Resources Director informed Firefighter Alston that he again had exhausted his sick leave and was being reverted to "unpaid leave status". The letter set forth the amount he needed to pay to cover his share of premiums so that health care coverage would not be interrupted. (*Alston CSC I, Amended Appeal, Exh. F; MDS, Exh. A [HR Director's Letter dated 5/25/16]*)

24. On June 8, 2016, Chief Ford's successor, Acting Fire Chief Ward, met with Firefighter Alston. Following this meeting, by letter to Firefighter Alston's legal counsel, Brookline's Town Counsel again requested a medical release and a copy of a psychiatric evaluation that Firefighter Alston had mentioned to Acting Chief Ward during their recent meeting. (*MDS, Exh. A Town Counsel's e-mail dated 6/14/2016*)

25. On or about July 18, 2016, after the Brookline BOS met in executive session, the Fire Lieutenant (then Captain) who had been the subject of Firefighter Alston's 2010 complaint, was appointed as the BFD's Acting Deputy Fire Chief.⁷ (MDS, Exh. A [Appellant's Statement]; Administrative Notice [[http://www.brooklinema.gov/979/Minutes-Archive\(6/21/16, 7/12/15\); http://brookline.wickedlocal.com/news/20160713/brookline-selectmen-opt-to-promote-controversial-fire-captain-paul-pender](http://www.brooklinema.gov/979/Minutes-Archive(6/21/16,7/12/15);http://brookline.wickedlocal.com/news/20160713/brookline-selectmen-opt-to-promote-controversial-fire-captain-paul-pender)])

26. By letter dated July 21, 2016, Brookline's Human Resources Director wrote to Firefighter Alston, in which she stated:

"I understand that you have reached out to the Fire Department regarding your ability to perform outside work. . . . Fortunately, there are now opportunities for modified duties for firefighters who cannot perform their full job duties. We are confident that we can provide you a modified duty opportunity and perhaps you are now able to return to full duty."

". . . [G]iven your representation that you have some work capacity, we have scheduled a return to work evaluation . . . [to] include a physical examination and a toxic screen. I am also working with Dr. Marilyn Price's office to schedule a return to duty psychological examination. Once the medical examination, drug screen and psychological evaluation are complete we can work with you to determine which modified duty, if any, may be appropriate for you."

"Please report to New England Baptist, Occupational Health Center . . . on Tuesday August 2, 2016 . . . for your medical evaluation and toxic screen. Please bring any current medicals with you to the evaluation, which will expedite your return. I will send another letter with an appointment time and date for Dr. Price in the next few days."

"Finally, please sign the enclosed release that will allow New England Baptist and Dr. Price to speak to your treating physicians regarding your current medical and psychological status."

(MDS, Exh. A [HR Director's Letter dated July 21, 2016; See also Town Counsel's e-mail dated 5/5/16])

⁷ Firefighter Alston also complained that the executive sessions of the BOS in which Capt. Pender's appointment to Deputy Fire Chief was discussed violated his right to be notified under the Open Meeting Law, which complaint was rejected by the Office of the Attorney General in September 2016. (*Alston CSC I, Claim of Appeal [Letter from Office of Attorney General dated 8/8/2016; Administrative Notice [Letter dated 9/17/2016, Office of the Attorney General, OML 2016-142]*)

27. By letter dated August 17, 2016, Brookline's Town Administrator notified Firefighter Alston that, due to his failure to appear for the medical evaluation on August 2, 2016 and failure to provide medical documentation showing a capacity to perform some or all of the essential function of his job as a BFD Firefighter, Brookline cannot continue to hold a job position for him "when we do not know when, if ever, you will be able to return to work. Therefore, in accordance with [G.L.c.31,§41] you are hereby given notice that the Town is contemplating separating you from employment for incapacity to report to work and to perform the essential functions of your position as a Firefighter with or without reasonable accommodations." A hearing was scheduled for August 30, 2016. (*Alston CSC I, Claim of Appeal [TA's Letter dated 8/17/16]; Amended Appeal; MDS, Exh. A [TA's Letter dated 8/17/16]*)⁸

28. A hearing on the contemplated termination of Firefighter Alston's employment was held on August 30, 2016 before a Hearing Officer designated by the Brookline Town Administrator on behalf of the Brookline BOS, which is the Appointing Authority for the BFD. (*MDS, Exh. A [Hearing Officer's Report, Hearing Transcript]*)

29. On September 28, 2016, the Hearing Officer delivered his Report to Brookline. The Report concluded:

"The issue here is [Firefighter Alston's] capacity to perform his duties. Dr. Price opines . . . that he would have the capacity if certain conditions were met. Those conditions included steps that Alston was advised to take (i.e., treatment by a psychiatrist and therapist), steps that the Town had to take (i.e. workplace accommodations) and steps jointly to be taken (i.e. toxic screenings)."

"It was incumbent on Alston to cooperate with the Town in arriving at the accommodations [t]hat relate to his capacity to work."

⁸ The Town Administrator's August 17, 2016 letter also stated that "effective today, the Town considers you to be on unauthorized absence from work as you . . . have been absent from duty without authorization and without pay since on or about June 1, 2016" without a response to the Town's request for "information pertaining to your work status" and the Town reserved its right to initiate alternative proceedings to terminate Firefighter Alston under G.L.c.31,§38. (*Alston CSC I, Claim of Appeal [TA's Letter dated 8/17/16] & Amended Appeal; MDS, Exh. A [TA's Letter dated 8/17/16]*) The Town did not, however, follow through with such a Section 38 termination notice.

“Alston . . . had refused to participate in the interactive process concerning reasonable accommodations. This had been done without justification. . . . He has declined to provide . . . information that relates to whether or not he has the capacity to return to work. That leads to the conclusion that either he does not have any information . . . or that he does not want to share that information with [Brookline].”

“Alston . . . wanted to meet with the Board of Selectmen. However, while the Board may be the Appointing Authority, for all practical purposes the Fire Department is administered by the Chief. . . . [Alston] is not in the position of dictating to the Town how it is to handle the situation. He is required to cooperate. He has declined and refused to do so. . . .”

“As late as the actual hearing the Town . . . offered to suspend the hearing if Alston represented that he had the capacity to return to work and agreed to go to a FFDE If it showed he did not have the capacity to return to work it would have explained why and when he might reasonably have that capacity.”

“Yet . . . Alston remained defiant and continued to refuse to . . . produce any documentation to . . . address his capacity to return to work.”

“Simply stated . . . [Firefighter Alston’s] lack of meaningful participation in the process . . . indicates that he does not have the capacity to return to work to perform the essential functions of his position as a firefighter with or without reasonable accommodations.”

(MDS, Exh. A [Hearing Officer’s Report])

30. On October 5, 2016, at a meeting declared public at Firefighter Alston’s request, the Brookline BOS adopted the Hearing Officer’s findings and recommendations and, for the reasons stated in the Hearing Officer’s Report, voted to terminate Firefighter Alston on the grounds of incapacity to perform the essential functions of his position as a BFD Firefighter, effective October 5, 2016. By letter dated October 6, 2016, the Chair of the BOS notified Firefighter Alston of his termination. *(MDS, Exh. A [BOS Chair’s letter dated 10/6/16]; Administrative Notice [<http://www.brooklinema.gov/979/Minutes-Archive> (10/5/16)])*

31. By letter dated October 18, 2016, Dr. Cynthia S. Carter, MD, transmitted to Mr. Alston’s legal counsel a 54-page Independent Medical Examination (IME) she had conducted at counsel’s request. Dr. Carter described the scope of her engagement as follows:

“1. Has Mr. Alston been the victim of racism, undue bias and/or other harassment during his tenure as a Firefighter in the Town of Brookline?”

2. Has Mr. Alston been the victim of a hostile work environment during his tenure as a Fire Fighter in the Town of Brookline?
3. If so, what if any psychological damage has Mr. Alston sustained as the direct result of his experiences?
4. Is Mr. Alston able to return to work as a Brookline Fire Fighter, with or without accommodations?"

Dr. Carter's evaluation was based on her clinical interviews with Mr. Alston on August 6, 2015 and November 24, 2015, subsequent telephone interviews of Mr. Alston's ex-wife and his former treating psychiatrist, review of the prior FFDE and IMEs performed by Dr. Brown and Dr. Price, as well as numerous other medical, personnel and other records. *[MDS, Exh. B [Carter IME]]*⁹

32. As to the question regarding the extent to which Mr. Alston was able to return to work as a Brookline Fire Fighter, Dr. Carter stated:

"In my opinion, with reasonable medical certainty, Mr. Alston is not able to return to duty as a Brookline Fire Fighter under any circumstances, either on full or restricted duty. I cannot identify any policy, training or other educational tool that would alter this. My opinion is based on the following:

As a direct result of the racial slur, subsequent experiences of bias, retaliation and a hostile work environment, Mr. Alston is no longer able to trust his co-workers in [the] performance of life threatening duties.

In addition, he has developed a heightened racial sensitivity/awareness that causes him to have more difficulty managing racism now as compared to prior to 5.30.10. He is more sensitive to covert racism than in the past. He is more prone to notice incidences that, in the past, he could have easily brushed off. He is also more prone to question the motives of others in the context of race. As I mentioned earlier, these questions cannot be answered. The lack of answers will only frustrate him further.

In the event that Mr. Alston were to return to work, he would likely display behavior that vacillates between depression and rage. While medication may mitigate his symptoms, they would persist as they represent a legitimate response to the environment within the BFD. Amounts of medication required to eliminate his symptoms would be sufficiently sedating to significantly interfere with his performance of his duties."

(MDS, Exh. B [Carter IME])

⁹ Dr. Carter also attempted to interview the BFD Captain responsible for the initial racial slurs, as well as another BFD Fire Lieutenant, but was unable to do so. *(MDS, Exh. B [Carter IME])*

STANDARD OF REVIEW

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)

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 day 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 also may hear appeals alleging that an appointing authority "failed to follow the requirements of section forty-one [prior notice and hearing] in taking action which has affected his employment or compensation." G.L.c.31,§42. Section 42 requires:

"Such complaint must be filed within ten days, exclusive of Saturdays, Sundays and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow said requirements. If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights."

"A person who files a complaint under this section may at the same time request a hearing as to whether there was just cause for the action of the appointing authority in the same manner as if he were a person aggrieved by a decision of an appointing authority made pursuant to all the requirements of section forty-one. . . ."

The ten-day filing deadlines are jurisdictional and are strictly enforced. See, e.g., Town of Falmouth v. Civil Service Comm'n, 64 Mass.App.Ct. 606, 608-609 (2005), rev'd other grounds,

447 Mass.814 (2006); Poore v. City of Haverhill, 29 MCSR 260 (2016); Stacy v. Department of Developmental Services, 29 MCSR 164 (2016); Volpicelli v. City of Woburn, 22 MCSR 448 (2009); Williamson v. Department of Transitional Assistance, 22 MCSR 436 (2009).¹⁰

ANALYSIS

The undisputed facts presented to the Commission establish that, as a matter of law, Mr. Alston’s appeal must be dismissed. As to the claim that Brookline unlawfully removed him from the payroll in October 2014 and, again, in February 2016, his appeal (both Alston CSC I and this second appeal) is untimely and, therefore, the Commission lacks jurisdiction to consider any claim that such actions violated his civil service rights. As to the appeal from his October 2016 termination as without “just cause”, the undisputed facts establish that, as of the date of his discharge, Brookline had reasonable justification to conclude that he was not then capable of performing the duties of his position as a BFD Firefighter and that there was no reasonable basis to expect his return to duty at any time in the foreseeable future, with or without accommodations. As the matter must be dismissed on these two grounds, the Commission is not obliged to address the merits of Mr. Alston’s claims that Brookline’s actions amount to unlawful discrimination under federal law, which are best deferred for adjudication in that forum.

Claims for Back Pay

Mr. Alston was removed from the BFD payroll twice prior to his discharge in October 2016. He was first transferred from administrative leave and placed on “no pay” status after exhausting his sick leave accrual in October 2014 and, again, in February 2016 for the same reasons. The undisputed evidence makes it clear that Mr. Alston knew of each of these “actions” by Brookline

¹⁰ In contrast to the short window for administrative appeals, §42 provides a more flexible six-month deadline rule to file a civil action for §42 violations, as an alternative, and (unlike the administrative appeal statutes) authorizes the court to extend the time to bring such a judicial action “for good cause shown.” G.L.c.31,§42,¶3. See generally, Jamieson v. Department of Correction, 91 Mass.App.Ct. 1108 (Rule 1:28) (2017), citing Mello v. Mayor of Fall River, 22 Mass.App.Ct. 974, rev.den. 398 Mass. 1104 (1986)

on or about the date(s) they occurred, two years prior to his present appeal and ten months prior to his present appeal, respectively. The time to challenge those “actions” as a violation of his civil service rights, if any, accrued upon his learning, or having reason to know, that they occurred. His mistaken belief, if any, in relying on an assumption that Brookline would rectify the error, or that he didn’t know that he had any right of appeal to the Commission until a much later date, does not serve to toll the jurisdictional deadline for appeal to the Commission. See, e.g., Canavan v. Civil Service Comm’n, 60 Mass. App.Ct. 910, rev.den., 445 Mass. 1107 (2004) (mistaken belief by appellant and his representatives that he was not covered by civil service did not toll Commission deadline); Allen v. Taunton Public Schools, 26 MCSR 376 (2013), *aff’d sub nom*, Allen v. Civil Service Comm’n, 1384CV03239 (Sup.Ct.2104), *citing*, United Steelworkers v. Commonwealth Employee Relations Bd, 74 Mass.App.Ct. 656, 663-64 (2009) (eight month delay not excused as union officials have duty to know and advise regarding Commission filing deadlines); Kilson v. City of Fitchburg, 27 MCSR 106 (2014) (failure to make timely Commission appeal not excused due to mistaken belief that claim was arbitrable); Marqus v. City of Waltham, 23 MCSR 285 (2010) (Commission dismissed appeal one month late when appellant had union representation)

In sum, Mr. Alston’s claims that Brookline unlawfully removed him from administrative leave and/or placed him on “no pay” status must be dismissed as untimely.

Claim for Termination Without Just Cause

“At the risk of stating the obvious, attendance is an essential function of any job.” Rios-Jimenez v. Principi, 520 F.3d 31 (1st Cir. 2008) and cases cited. The principle is well-established that an appointing authority has just cause to terminate the employment of a tenured civil service employee who has been absent from duty for an extended period of time with no reasonable

expectation that the employee will be able or willing to come to work in the foreseeable future. See, e.g. Vinard v. Town of Canton, 29 MCSR 399 (2016) and cases cited (inability to perform due to psychological stress after being denied a promotion). See also Marcus v. City of Chelsea, 29 MCSR 279 (2016) (psychological incapacity); Morgan v. Town of Billerica, 28 MCSR 503 (2015) (work-related physical incapacity of undetermined duration); Puza v. Westfield Police Dep't, 27 MCSR 623 (2104) (depression, anxiety & substance abuse); Riveira v. Department of Correction, 26 MCSR 502 (2013) (medical disability due to workplace injury); Melchionno v. Somerville Police Dep't, 20 MCSR 443 (2007) (tendency to disruptive workplace behavior and diminished capacity for appropriate interpersonal relationships); Freeman v. City of Cambridge, 6 MCSR 157 (1993) (physical limitations and inability to cope with stress)

As a logical corollary to this principle, an appointing authority is entitled to require an employee to submit to reasonable requirements imposed by the appointing authority that are necessary to determine the fitness of the employee to return to duty, with or without reasonable accommodations. See, e.g., Nolan v. Police Comm'r of Boston, 383 Mass. 625, 630 (1981); Bistany v. City of Lawrence, 26 MCSR 136 (2013), aff'd, 2014 WL 6708807 (Super.Ct.2014), aff'd, 88 Mass.App.Ct. 1105 (2015) (Rule 1:28); Dalrymple v. Civil Service Comm'n, 82 Mass.App.Ct. 1107 (2012) (Rule 1:28); Bowman v. City of Brockton, 27 MCSR 605 (2014); Brackett v. Gloucester Housing Auth., 10 MCSR 127 (1997); Beal v. Town of Hingham, 6 MCSR 137 (1993)

Here, the undisputed facts establish that Mr. Alston has been out of work since December 26, 2014 and he was found unfit for duty in January 2015. From that time until his termination in October 2016, nearly two years later, he remained a BFD employee, either on sick leave, paid administrative leave or unpaid leave status. He twice sought reinstatement from unpaid leave to

administrative leave but never sought reinstatement to duty. Following Dr. Price's evaluation in March 2015, she found that Firefighter Alston remained unfit for duty, but recommended the treatment plan and need for accommodations as conditions to his ability to return to work at some future date. That plan included a period of psychiatric counseling, random drug screens, and establishment of mutually agreeable accommodations that would minimize the risk of his reversion to the behavioral issues that had rendered him unfit for duty in the past. Brookline repeatedly sought to work with Firefighter Alston to implement the treatment plan recommended by Dr. Price and to identify the conditions necessary for his return to work, but Mr. Alston was either unable or unwilling to engage with Brookline to implement the treatment plan or meet to discuss how to accommodate his return to duty, either on a full-time or limited duty basis. Despite numerous requests, he never provided any documentation necessary to establish his compliance with the counseling he required as a condition to return to work; he repeatedly failed to appear for drug screens and return to work evaluations scheduled for him; he repeatedly failed to participate in meetings with Fire Chief Ford and his successor Acting Fire Chief Ward, to develop the accommodations that would facilitate his return to work. At no time after he left work in 2014 did he express a specific intent or ability to return to work as BFD Firefighter, with or without accommodations. In sum, viewing the evidence most favorably to Mr. Alston, there was just cause to separate him from employment for his failure to demonstrate, after nearly two years of absence, that there was any reasonable basis upon which to expect he could meet, or would agree to the conditions for his return to duty (either on a full-time or limited duty basis) at any time in the near future, with or without accommodations.

In reaching the conclusion that Brookline had just cause to terminate Firefighter Alston, I give no weight to the conclusions rendered by Dr. Carter in her report, as that report was not available

to Brookline at the time the decision to terminate Firefighter Alston was made. Thus, I need not resolve the dispute between the parties as to whether or not Dr. Carter's report confirms Brookline's conclusion that Mr. Alston remained unfit for duty and would never be able to return to work as a BFD Firefighter. I do note, however, that Dr. Carter's opinions appear to have been based on interviews and documentation from the period May 2010 through June 2016, which do precede the termination.¹¹

The Appellant seeks to distinguish his case by claiming that his failure to respond to Brookline's requests and his inability to return to work is excused because it is rooted in Brookline's unlawful discriminatory and hostile work environment for which Brookline is responsible and which unlawful actions excuse his own behavior that might otherwise be treated as grounds for termination. The Appellant argues that, although he does not intend to return to work as a BFD firefighter due to the arguably irremediable hostile racial environment there, as described by Dr. Carter, he is NOT unfit to perform as a firefighter for a fire service somewhere other than in Brookline. He contends that he is entitled to a plenary evidentiary hearing to establish this claim, though, among other things, expert testimony from Dr. Carter to that effect. This argument also falls short of the mark.

First, the ability of an appointing authority to terminate an employee who is unable to perform the duties of his or her position does not turn on whether the cause of the disability is attributable to the employer, the employee or a third party. The well-established precedent upon which just cause to terminate such employees, cited earlier, includes cases in which all of these situations were presented. Although the Commission has, at times, recognized that termination of an employee whose injuries were no fault of his own, can appear draconian, the decision to remove

¹¹ Brookline's argument does have some force, as Dr. Carter expressly opined, in part: "Mr. Alston is not able to return to duty as a Brookline Fire Fighter under any circumstances, either on full or restricted duty. I cannot identify any policy, training or other educational tool that would alter this."

and replace an employee for the efficiency of the public service is a judgment vested with the appointing authority and, the cause of the incapacity, alone, does not necessarily state a claim for violation of civil service law in which the Commission may intervene to remediate. See, e.g., Morgan v. Town of Billerica, 28 MCSR 503 (2015) (employee not required to be kept on payroll pending approval of disability retirement so he could remain covered by town's health insurance plan); Bistany v. City of Lawrence, 26 MCSR 136 (2013), aff'd, 2014 WL 6708807 (Super.Ct.2014), aff'd, 88 Mass.App.Ct. 1105 (2015) (Rule 1:28) (breakdown and misinformation in communications with appointing authority from employee and her medical providers); Valente v. City of Newton, 23 MCSR 399 (2010) (termination justified despite city's bureaucratic mistakes in communicating with employee)

Second, the Appellant misses the point by the semantic argument that, unlike other cases in which an employee was terminated for failing to comply with return to work orders, Mr. Alston was never "ordered" to comply with any such conditions. The fact that Mr. Alston repeatedly failed to respond to Brookline's clear and unequivocal requests for medical reports, to appear for a drug screen, to attend meetings to discuss accommodations and to submit to a return to work exam is not disputed. Brookline is entitled to construe his non-responsive attitude to constitute non-compliance, and this conclusion does not turn on the form of words used to direct him to take these actions.

Third, while apparently conceding that Mr. Alston never intends to comply with Brookline's requests and does not intend to return to work as a BFD Firefighter, the Appellant claims that he is still entitled to reinstatement to the payroll (but not to duty) so that he can then transfer to a different fire service somewhere other than in Brookline. There is simply no precedent or authority for the Commission to order an appointing authority to administratively reinstate a

firefighter to the payroll, although he is not functionally fit to report to work, simply to facilitate the employee's desire to be hired by someone else. Thus, even if the Appellant were able to prove his premise that his inability to work in Brookline, but not elsewhere, is the product of discrimination, he is still left without any remedy (i.e., reinstatement to his position) that the Commission would be empowered to provide. Thus, it would be futile for the Commission to conduct a plenary hearing on Mr. Alston's discrimination claims when, even were they proved, would lead to no relief that the Commission could order.

In sum, although many of the facts that Mr. Alston has asserted in support of his claims of discrimination certainly raise an eyebrow,¹² the Commission's decision does not turn on the existence of a factual dispute on the issue of discrimination. Rather, the dismissal is driven by otherwise undisputed facts that, even assuming those claims could be proved, the Commission would be without authority to grant any relief under civil service law to reinstate the Appellant to a position with the BFD that, by his conduct, and as to which he now concedes, he could not be restored with or without any form of accommodations. Nothing in this Decision is intended to affect, nor should it be construed to affect, the merits of Mr. Alston's claims in the prior pending action in the federal court that also allege claims of racial discrimination which remain viable, and, if proved, may also provide him appropriate and effective relief.

¹² In particular, I note the elevation of a fire officer to the position of Deputy Fire Chief after having been disciplined for his racially-insensitive behavior, the allegedly cavalier approach to the "Leave incident" which resulted in disciplining Firefighter Alston for his outburst but deeming the anonymous note that promoted his outburst not "inherently" discriminatory in nature and worthy of no further investigation, and the suggestion by the Brookline DICR Commission that a "culture of institutional racism" existed in Brookline and needed to be addressed with "extreme urgency . . . with actions not words."

CONCLUSION

Accordingly, for the reasons stated, Brookline's the Motion for Summary Decision is GRANTED. The appeal of the Appellant, Gerald Alston, under Docket No. D1-16-170, is *dismissed*.

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 April 13, 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:

Brooks A. Ames, Esq. (Appellant)

Patricia Correa, Esq. (for Respondent)