COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL NO. 2019-853

TOWN OF BROOKLINE

v.

GERALD ALSTON AND THE CIVIL SERVICE COMMISSION

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff, Town of Brookline ("Town" or "Brookline") brought this administrative appeal under G.L. c. 31, § 44 from a decision dated February 14, 2019 ("Decision" or "Alston III") by the Massachusetts Civil Service Commission ("Commission"), reinstating firefighter Gerald Alston ("Alston") to his position in the Brookline Fire Department ("Fire Department"), where he had been a firefighter since 2002. After the Commission filed the Administrative Record ("AR"), the Town filed "Plaintiff Town of Brookline's Motion for Judgment on the Pleadings" ("Motion") pursuant to Superior Court Standing Order 1-96.[1] Alston opposed that motion and filed "Gerald Alston's Cross-Motion for Judgment on the Pleadings." ("Cross-

[1] Without leave of court, the Town filed a 40-page memorandum, twice as long as permitted by Superior Court Rule 9A(a)(5), even accepting the excessively long, single-spaced, small-type footnotes, one of which exceeds an entire page (see FN 22, pp. 26-28). The memorandum also violates Superior Court Rule 9A(a)(6) ("The title of . . . any memorandum exceeding 20 pages must note the date on which leave was allowed."). Presumably, the Town believed that this length was justified by the plaintiff's assent to filing a 40-page brief, but that is not the same as obtaining leave of court. The court need not agree with or accept the parties' stipulation, particularly where the question is whether a longer brief is necessary, is useful or will aid in resolving the Motion. Indeed, Alston's Memorandum stayed within the 20-page limit.

A review of the Town's Memorandum confirms the court's longstanding view that a long brief only serves to dilute focus and detract from any arguments that may have merit. Moreover, much of the Town's argument amounts to a request for this court to reconsider Alston II. No extended repetition of prior arguments is necessary to preserve these previously-rejected points for appeal. For those reasons, the court denies the motion to file a 40-page brief. It sees no benefit, however, in a further round of briefing, because the limited issues that the reviewing court may consider under G.L. c. 30A, § 14, appear clear on their face.

Motion"). After hearing on February 15, 2018, the Motion is DENIED and the Cross-Motion is ALLOWED.

In an earlier Memorandum and Opinion in this court, dated April 11, 2018 in Alston v. Town of Brookline, Civil No. 2017-1489 (Suffolk Superior Court) ("Alston II"), the Court vacated and remanded the Commission's decision dated April 13, 2017 ("Alston I").[2] In Alston I, without benefit of an evidentiary hearing, the Commission had upheld the defendant's action terminating Alston's employment with the Fire Department. The present appeal is from the Commission's decision on remand from Alston II. On April 1, 2019, this court denied the Town's Emergency Motion to Stay Enforcement of Agency Decision Pursuant to M.L. L. c. 30A, § 14(3) ("Stay Decision").

BACKGROUND

On remand, the Commission held ten days of hearings, during which it received 280 exhibits. The Commission's "summary of decision" (Alston III at 1-2) states:

> A white Brookline Fire Lieutenant made the racist comment "fucking [n-word]" to describe a motorist who the lieutenant believed to be black or Hispanic. That racist comment inadvertently ended up on the voice mail of the lieutenant's employee, Gerald Alston, an African American firefighter in the Brookline Fire Department.
>
> Town officials responded with a minor, short-term suspension of the lieutenant followed by his almost-immediate promotion. Thereafter, Town officials: granted further promotions of the lieutenant; failed to prevent retaliatory behavior against Firefighter Alston; and enabled the lieutenant to use his position to lobby many other members of the force against Firefighter Alston and paint himself as the victim.
>
> These actions by the Town were arbitrary, capricious, and in violation of Firefighter Alston's rights under the civil service law to be treated fairly ". . . without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for . . . basic rights outlined in [the civil service law] and constitutional rights as citizens . . ." G.L. c. 31, § 1.

[2] The court also upheld dismissal of Alston's back pay claim for lack of a timely appeal from the February 2016 suspension without pay.

> The Town's own actions and inactions were the reasons that made it impossible for Firefighter Alston to return to work, which formed the basis of the Town's decision to terminate his employment.
>
> When a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for discharging the employee from his tenured position.
>
> For these reasons, Firefighter Alston's appeal is allowed.

The Commission's detailed findings support this conclusion. Brookline Fire Lieutenant Paul Pender left the above-quoted racial slur on Alston's voice mail in May 2010. Lt. Pender later apologized and, adding insult to injury, said his statement was not about Alston but a black "gangbanger" who cut him off in traffic. Alston is African-American.

After Alston complained about these two racial slurs, the Brookline Fire Department disciplined Lt. Pender for two tours (four days) in August 2010. Although the Town's Fire Chief had promised Alston on July 30, 2010 that Pender would be ineligible for promotion, the Town promoted Lt. Pender to Acting Captain in September 2010. On September 22, 2010, Pender received a medal of valor at the White House for heroism during a 2008 fire. To Alston, it appeared that Pender was being built up in a way that detracted from the seriousness of the offense. In July, 2016, Brookline appointed then-Captain Pender as the Brookline Fire Department's Acting Deputy Fire Chief. Alston reported this to the Fire Chief, who did not investigate, but said he would ask the Union to remove the post.

On September 21, 2010, Alston returned to work. Two days later, another firefighter posed a derogatory message on the union's blog, referring to Alston as a "faceless coward."

On December 19, 2013, Mr. Alston "saw the word 'Leave' drawn in the dust accumulated on a piece of BFD apparatus" ("leave incident"), which he took as "a highly offensive attack on him personally." "[A]t some point during the discussion, he mentioned the

phrase 'going postal,'" although the content and intent of that remark is unclear enough that the court must assume, on summary decision, that this did not refer to actions by Alston himself. Following the leave incident, Mr. Alston was placed on administrative leave pending fitness for duty determination.

Dr. Andrew Brown evaluated Mr. Alston. Dr. Brown concluded "that Firefighter Alston was not fit for duty due to his difficulty in controlling his behavioral outbursts in the workplace, and Firefighter Alston's insistence that he be insulated from any risk of job termination if such outbursts should occur in the future." Subsequently, Dr. Marilyn Price evaluated Mr. Alston on February 12, 2015. In a report dated March 18, 2015, she concluded 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 [she] would recommend." Her recommendations were: (1) "treatment with a psychiatrist and a therapist . . . to be better able to handle stressors he is likely to encounter upon returning to work,"; (2) modification of the work environment "so that Firefighter Alston's level of stress is decreased,"; and (3) "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." The Commission found, however, that Dr. Price did not have the benefit of the full record presented to the Commission, which showed multiple acts and omissions by Town officials and employees that served as stressors.[3]

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[3] In a crucial part of the Decision (at 73-81), the hearing officer found and elaborated upon the following additional stressors:

> Those actions and inactions included the following additional intolerable behavior: A. Failing to comprehend the seriousness of Mr. Pender's use of the racial epithet and failing to take the necessary steps to repair the damage Mr. Pender had done that would have enabled Firefighter Alston to return to the workplace. B. Enabling retaliatory behavior against Firefighter Alston by Mr. Pender and others and enabling Mr. Pender to paint himself as the victim. C. Attacking

Following Dr. Price's evaluation, Fire Chief Paul D. Ford sent a letter dated March 25, 2015 to Mr. Alston along with a copy of Dr. Price's report. In his letter, Fire Chief Ford noted Dr. Price's specific recommendations for Mr. Alston's return to work and requested a meeting to be held on April 2, 2015. On February 5, 2016, the Town Counsel noted that it anticipated Mr. Alston's return to work and listed three conditions. Specifically, the Town requested that Mr. Alston (1) return medical releases so that it "may confirm his treatment in compliance with" Dr. Price's first condition; (2) schedule a meeting with Fire Chief Ford to discuss "reasonable accommodations"; and (3) attend pre-return toxic drug screen. On February 17, 2016, the Town Counsel noted that Mr. Alston failed to meet the conditions. On May 11, 2016, Fire Chief Ford requested a meeting to be held on May 18, which Mr. Alston appears to not have attended.

On June 8, 2016, Mr. Alston met with Acting Fire Chief Ward. On June 14, 2016, Town Counsel requested a medical release and a copy of Mr. Alston's medical evaluation. On July 21, 2016, the Town requested that Mr. Alston submit his medical evaluation and toxic screen as part of fitness to duty evaluation. On August 17, 2016, Town notified its intent to terminate Mr. Alston citing his alleged failure to provide medical documentation indicating that he has complied with conditions previously set by the Town or that he has work capacity.

On October 5, 2016, The Town officially discharged him from his employment as a firefighter, effective October 5, 2016 "on the ground of incapacity to perform the essential functions of [his] firefighter position." The Town based its decision on Mr. Alston's failure "to participate in the interactive dialogue or otherwise return to work or produce sound and sufficient

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Firefighter Alston's credibility and taking other actions that appeared to lack bona fides and proper regard for fundamental fairness and good faith.

evidence as to why he cannot return to work." The Town communicated the decision to Mr. Alston by a letter dated October 6, 2016. [4]

The court considers additional facts below, in the course of the Discussion.

DISCUSSION

Under G.L. c. 31, § 44, the Court may set aside the Decision if it determines "that the substantial rights of any party may have been prejudiced because the agency decision is in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the agency; based on an error of law; made on unlawful procedure; unsupported by substantial evidence; unwarranted by the facts found by the court on the record as submitted or as amplified; or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." Malloch v. Town of Hanover, 472 Mass. 783, 795 (2015) (internal quotation marks omitted), quoting Rivas v. Chelsea Housing Authority, 464 Mass. 329, 334 (2013). When reviewing an agency decision, the court must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). The appealing party's burden to demonstrate the invalidity of the agency decision "is heavy.'" Springfield v. Dep't of Telecomms. & Cable, 457 Mass. 562, 568 (2010) (citation omitted).

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[4] In a report dated October 18, 2016, Dr. Carter concluded that "Mr. Alston is not able to return to work as Brookline Fire Fighter under any circumstance, either on full or restricted duty. I cannot identify any policy, training, or other educational tool that would alter this" Her report supports the inference that Brookline's racially hostile environment has caused the very same problems upon which Brookline relies to prove Alston's alleged "unfitness:"

> 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.

Report of Dr. Cynthia Carter. However, the hearing officer did not rely upon Dr. Carter's testimony.

Applying these deferential tests, the court upholds the Commission's decision. Indeed, this court essentially held in Alston II that the findings and conclusions the Commission has now reached lie within the agency's authority on the facts of this case. The court incorporates its analysis of the facts and law in Alston II and the Stay Decision. In this Memorandum, the court supplements and, to a degree, repeats that analysis as it applies to the Commission's now-final determinations.

I.

In Alston II, the court set forth its analysis of the civil service law upon which Alston III now rests. For convenience, the court restates this aspect of Alston II:

The Commission's jurisdiction derives from G.L. c. 31, § 43, which provides in relevant part:

> If the commission by a preponderance of the evidence determines that there was **just cause** for an action taken against such person it shall affirm the action of the appointing authority, **otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights**; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based **upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position**, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. . . .. [emphasis added].

The Commission thus has the statutory duty is to "determine[] . . . just cause" whenever an employee files a timely appeal. By imposing that duty, § 43 "protects persons employed by the Commonwealth and its subdivisions against removal or the abolition of their positions 'except for just cause.'" Cambridge Housing Authority v. Civil Service Com'n, 7 Mass. App. Ct. 586, 588 (1979).

G. L. c. 31, §§ 1, 43 do not define "Just cause," but § 1 does define the cognate phrase, "basic merit principles" to include, among other things: "(e) assuring fair treatment of all

applicants and employees in all aspects of personnel administration **without regard to . . . race, color**, . . . basic rights outlined in this chapter and constitutional rights as citizens . . .." [Emphasis added]. The right to racially fair treatment is an important part of "the principle of uniformity and the 'equitable treatment of similarly situated individuals' . . . as well as the 'underlying purpose of the civil service system "to guard against political considerations, favoritism **and bias** in governmental employment decisions."'" See Alston I. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) (emphasis added).

Alternatively, the employee may show that his termination was "based . . . upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position . . .." Race may easily qualify as a "factor." The phrase "based . . . upon" looks to motivation and intent, which are extremely difficult concepts to address in a summary decision. Terminating an employee because he does not fit into a racially hostile environment falls within this language. A termination for failure to prove ability to work in a racially hostile environment is also "not reasonably related to the fitness of the employee to perform in his position." The court construes this language to refer to "fitness to perform" job duties without enduring such a violation of basic merit principles as racial hostility.

Perhaps most basically, the paragraph of § 43 quoted above looks not only to the fitness of the employee, but also the fitness of the workplace. Wisely, the Legislature has recognized that the Commission cannot sensibly ask whether an employee is "fit" without also asking whether the employer has maintained an environment where merit principles prevail. An employee cannot be unfit simply because leadership think that he does not "belong" in an unfit and racially hostile workplace. In that instance, to comply with basic merit principles, the workplace must change.

Two basic and highly relevant principles follow from this statute. First, an employer lacks "just cause" if a termination would not have occurred but for the employer's racially hostile environment, maintained in violation of basic merit principles. Second, under those principles, an employer has no right to demand proof that an otherwise fit employee can perform job duties in a racially hostile environment.

II.

The Town's action will be upheld if the Town had "reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303 (1997). A public employer has authority to determine its employee's fitness for duty. The Supreme Judicial Court has recognized "a public duty" of a Police Commissioner "to oversee the performance of police officers." Nolan v. Police Comm'r of Boston, 383 Mass. 625, 630 (1981). The Commission "has the authority and duty to determine a police officer's fitness to perform his duties or to return to full working status." Id.; Bistany v. Civil Service Com'n, 88 Mass. App. Ct. 1105 (Rule 1:28) (2015) (recognizing that determination of police officer's fitness to return to active duty is "both reasonable and lawful"). When an officer violates reasonable orders given to determine her fitness for duty, then that officer may be subject to "discipline and, ultimately, termination." Id. (Rule 1:28). Given that both police officers and firefighters are public employees, similar principles apply to firefighters.

While the Town may enjoy "some scope for the exercise of discretion," that decision must be grounded in just cause, reasonable and made in good faith. Mayor of Somerville v. District Court of Somerville, 317 Mass. 106, 120 (1944). The good faith requirement in removal

decisions "adds something to the requirement of proper cause therefor." Id. Thus, "even if the evidence would have warranted a finding by the reviewing officer that the removal was for 'proper cause' the removal should be reversed if it appeared affirmatively that it was made 'in bad faith' as would be the case if this cause was a 'mere pretext or device to get rid of' the employee for some other and improper cause." Id.; Cambridge Housing Authority v. Civil Service Com'n, 7 Mass. App. Ct. 586, 591 (1979) (quoting Mayor of Somerville, 317 Mass. at 120).

These traditional principles of civil service and employment discrimination law support, if not compel, the Commission's conclusion. On the facts found by the Commission, the Brookline Fire Department failed to create a racially fair environment and to eradicate the ongoing effects of racism within its ranks. It follows that there was no "just cause" or that Alston's termination for "unfitness" was based upon the racially hostile environment, which was the main reason why this African American firefighter allegedly did not "fit" in.

While the Town points to several appropriate actions it took, including anti-discrimination training from October 2010 through the Spring of 2011, approval of an anti-discrimination policy in January, 2011 and attempts to reach out to Alston and his attorney (albeit without offers to change the fundamental problems in the workplace), it was for the Commission, as fact-finder, to determine whether these measures sufficed to address Alston's own experiences of bias at work and remedied the violation of basic merit principles. Likewise, it was for the Commission, as fact-finder – i.e. not in a role that requires medical or psychological expertise – to determine whether the "stressors" caused by racially unfair treatment had been eradicated. Nothing compelled the Commission to agree with Brookline's presentation on that question.

With some prodding at the hearing, the Town ultimately stressed that its substantial evidence argument focused upon the hearing officer's conclusions regarding Alston's ability to serve, because the hearing officer considered "additional stressors" not considered by Dr. Price. The law does not support that argument; it was appropriate for the fact-finder to draw this conclusion after comparing the complete record to the more abbreviated facts available to Dr. Price, particularly where Alston's experts disagreed with Dr. Price. See Police Department of Boston v. Kavaleski, 463 Mass. 680, 694 (2012) ("The commission was entitled to discredit [Dr.] Reade's assessment of Kavaleski even though Kavaleski offered no expert testimony of her own."). Cf. Doe No. 68549 v. SORB, 470 Mass. 102, 112 ("SORB is not statutorily required to present expert testimony in support of its position before the examiner.").[5]

There substantial evidence about stressors not disclosed to Dr. Price. Indeed, the Town's present appeal conspicuously avoids a meaningful discussion of the passage in the decision that describes "collective actions and inactions by the Town, many of which Dr. Price was unaware of, prevented Firefighter Alston from returning to a workplace where he would be isolated, even if he satisfied the conditions outlined by Dr. Price in her report." See Decision at 73-81. The hearing officer detailed these facts, and their impact upon Alston, in careful and compelling

[5] To be sure, the Sex Offender Registry Board has regulations setting forth factors that reflect psychological research and validation, but general principles of administrative law allow lay examiners to reject petitioners' expert reports if the examiners identify factors not addressed by the petitioners' expert. See the cases cited in the text above. See also, Doe, Sex Offender No. 203108 v. SORB, 87 Mass. App. Ct. 313, 319-230 (2015), quoting Doe, Sex Offender Registry Bd. No. 3974 v. Sex Offender Registry Bd., 457 Mass. 53, 62 (2010) ("nothing in the statute or regulations . . .requires the board to treat mitigating conditions of release as superseding other aggravating factors."). Cf. Doe, Sex Offender Registry Bd. No. 291554 v. Sex Offender Registry Bd., 87 Mass. App. Ct. 210, 215 (2015). "A hearing examiner does not violate either [substantial evidence or due process principles] where, as here, she classifies an offender without expert testimony by relying on SORB's expertise embodied in its regulations. See Doe, Sex Offender Registry Board No. 10216 v. Sex Offender Registry Bd., 447 Mass. 779, 785-786 (2006)." Doe, Sex Offender Registry Board No. 390998 v. Sex Offender Registry Bd., No. 17-P-1269 (March 11, 2019) (Rule 1:28 Decision).

fashion. Id. He concluded:

> In sum, the Town chose not to impose meaningful discipline on Mr. Pender for use of the racist comment (which the evidence demonstrated was clearly insufficient to remediate his behavior), chose to overlook the initial and ongoing retaliation against Firefighter Alston by Ms. Pender and others, and actively promoted a false narrative that painted Firefighter Alson as a paranoid employee who simply couldn't "move on" from racist comments by a purportedly remorseful supervisor years earlier. By these errors and omissions, the Town acted in bad faith and in a manner prohibited by basic merit principles which requires, in relevant part, "fair treatment of . . . employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for . . . basic rights outlined in this [civil service] chapter and constitutional rights as citizens . . ." When a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for discharging the employee from his tenured position.

Alston III at 81. The Town has not shown a lack of substantial evidence for these findings.

If the Town's actions, including its alleged accommodation efforts, were mere a pretext for discrimination or failed to eradicate racial bias in violation of merit principles, then there cannot be "just cause" for Alston's termination. By finding that the Town acted in bad faith (i.e. not honestly or for the reasons stated)[6] and in violation of basic merit principles, the Commission made the necessary findings. Cf. Cambridge Housing Authority, 7 Mass. App. Ct. at 589-591 (affirming Civil Service's Commission's order of reinstatement when municipal housing authority's reorganization was found to be a mere pretext for removal of an employee).

III.

The Town raises two related legal objections, grounded in the relationship between the Civil Service Laws and the anti-discrimination provisions of G.L. c. 151B. The Stay Decision (at 6-7) addressed both of these arguments:

> The Town next asserts that the Massachusetts Commission Against Discrimination ("MCAD") is the only administrative forum authorized to determine issues of racial discrimination and hostile work environment. That is essentially an

[6] Definitions of "bad faith" are near-synonyms for deliberate forms of "pretextual" justifications. See Bank of America, N.A. v Prestige Imports, Inc., 75 Mass. App. Ct. 741, 754-755 (2009) and cases cited.

argument (Town Mem. at 16) that G.L. c. 151B, § 4 implicitly repealed the "basic merit principles" set forth in G. L. c. 31, § 1(e). But G.L. c. 151B, § 9 states that "nothing contained in this chapter shall be deemed to repeal any provision of any other law of this commonwealth relating to discrimination. . .." True, it goes on to say that "as to acts declared unlawful by section 4, the administrative procedure provided in this chapter under section 5 shall, **while pending**, be exclusive, [emphasis added]" but Alston's c. 151B proceedings are no longer pending, if violation of basic merit principles even qualifies as an act "declared unlawful by section 4" of c. 151B.

Moreover, implicit repeals are strongly disfavored and therefore are a weak argument in favor of a stay. See e.g. George v. National Water Main Cleaning Company, 477 Mass. 371, 378 (2017). That is particularly true where the addition of a definition for "basic merit principles" by St. 1981, c. 767, § 10 occurred when G.L. c. 151B had already been on the books for decades, with a "right to work without discrimination because of race [or] color" in effect since St. 1946, c. 368. Moreover, the two statutes have a different reach, as Brookline's own arguments implicitly acknowledge, so they are not really in conflict.[7]

Brookline also has very little likelihood of success in arguing that the Commission's Decision is precluded by dismissal of Alston's lawsuit in Norfolk Superior Court on procedural grounds on July 8, 2014. Alston could not have challenged the October 5, 2016 termination at issue here in the case in the Norfolk Action, because that termination had not yet occurred. Since the Norfolk Action did not determine any facts, other than those of procedural default, it has no issue-preclusive effect. See generally Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988). The Commission was entirely within its authority to consider evidence of all circumstances, including those prior to July 8, 2014, in deciding whether the Town had "just cause" to terminate Alston in 2016.

The Court reaffirms this analysis, except that, instead of phrasing it in terms of likelihood of success, the court now adopts this reasoning definitively, as its ruling on the merits. It notes that the Norfolk Action precludes a c. 151B claim based on the same facts, but resolved no issues concerning violation of merit principles at that time, let alone at the time of Alston's termination.

Indeed, the argument that the Commission cannot consider the events preceding the termination would bar consideration of the full context in which the parties are acting, including

[7] Ironically, the Town (Mem. at 14) takes the Commission to task for failing to apply traditional c. 151B law by making "a determination that the Town created a hostile work environment without actual findings which would support such a conclusion under the applicable McDonnell-Douglas framework of G.L. c. 151B law." This argument implicitly acknowledges that the Commission did not duplicate the work of the MCAD – basic merit principles require racial fairness in personnel administration, even in circumstances that c. 151B may not reach.

the ongoing impact of historical events upon current questions of fitness, causation, compliance with merit principles and motivation. The Town's approach would compel the Commission to uphold an appointing authority terminating an employee for failure to fit in to a workplace whose racial hostility had played out over many years – an ongoing environment made all the worse for its persistence. When resolving a timely termination appeal, the Commission need not consider only the last straw.

IV.

The Town again questions the Commission's authority to issue a remedy. It argues that the Commission lacks authority to direct the Town to keep Firefighter Alston on medical leave. The Commission's order does not contain that directive. It simply requires reinstatement: "the Commission hereby allows Firefighter Alston's appeal under Docket No. D1-16-170, reverses the action of the Town of Brookline and orders that Firefighter Alston be returned to his position without loss of compensation or other rights." The Town has overstated its position on this point.

It is now up to the Town to decide how to reinstate Firefighter Alston, mindful of the principles that led to the decision in Alston III. While it therefore could not require Alston to return to a racially unfair employment environment, that flows from the law itself, not from any action or direction of the Commission in Alston III.

The Commission quoted and agreed with this court's prior analysis of the mandatory remedy upon a determination that there was no just cause for termination. See Alston III at 82, quoting Alston II at 15-16. On remand, the Commission simply ordered the remedy that the statute prescribes: "the person concerned shall be returned to his position without loss of compensation or other rights." G. L. c. 31, § 43. If the Legislature wanted the Commission to

withhold decision upon "just cause" whenever the agency was concerned about remedy, it would certainly have chosen different language. Failure to follow the statutory command is a particularly serious error or law if, as the Commission had to assume, Alston's "inability to work in Brookline, but not elsewhere, is the product of discrimination . . .." AR 503.

While even a mandatory reinstatement remedy creates a cost or an inconvenience in this case, that concern can only be addressed by the legislature. Indeed, the status of firefighter on leave with pay is not unfair to a Town that violates the "just cause" and "basic merit principles" requirements. It treats fairly an employee who is a victim of racial bias in violation of the civil service laws.

CONCLUSION

For the above reasons,

1. Defendant Brookline Fire Department's Motion for Judgment on the Pleadings is DENIED.
2. Gerald Alston's Cross-Motion for Judgment on the Pleadings is ALLOWED.
3. Final Judgment shall enter affirming the Decision of the Civil Service Commission, dated April 3, 2019.

Dated: August 2, 2019

Douglas H. Wilkins
Associate Justice of the Superior Court