COMMONWEALTH OF MASSACHUSETTS

**SUFFOLK, ss.**

**SUPERIOR COURT**
**CIVIL ACTION**
**NO. 19-0853-D**

RECEIVED

APR - 3 2019

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

**TOWN OF BROOKLINE,**
**Plaintiff,**

vs.

**GERALD ALSTON and**
**MASSACHUSETTS CIVIL SERVICE COMMISSION,**
**Defendants.**

## ORDER ON MOTION FOR STAY

This c. 30A appeal from a determination by the Civil Service Commission ("Commission") was brought by the Town of Brookline ("Town"), to contest the Commission's reinstatement of firefighter Gerald Alston ("Alston"). The Town has filed a "Superior Court Rule 9A(d)(1) Emergency Motion to Stay Enforcement of Agency Decision Pursuant to M.G.L. c. 30A, § 14(3)" ("Motion"), which Alston and the Commission oppose. After a hearing on March 28, 2019, the Town's Motion is **DENIED, with an order to expedite proceedings on the merits**.

## BACKGROUND

The procedural history of the dispute between the Town and Alston is set forth in this court's prior decision in Alston v. Town of Brookline, Civil No. 2017-1489, dated April 11, 2018 (Wilkins, J.), which remanded this dispute to the Commission for an evidentiary hearing and is incorporated herein ("Remand Order"). Upon remand from this court, the Commission held ten days of hearings in the summer of 2018, during which it received 280 exhibits.

By Decision dated February 14, 2019 ("Decision"), the Commission unanimously voted: "as the Town has failed to show just cause for terminating Firefighter Alston, 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 Commission's decision, covering 83 pages, extensively finds the facts, with citations to record evidence. It set forth the following summary of its findings (at pp. 1-2):

> A white Brookline Fire Lieutenant made the racist comment "fucking [n-word]" to describe a motorist who the lieutenant believed to be black of 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.
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> 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.
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> 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.
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> 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.

## DISCUSSION

A motion for a stay pending appeal typically requires consideration of the "likelihood of success on appeal, and irreparable harm such that the balance of hardships cuts in favor of a stay." Care and Protection of Patience, 81 Mass. App. Ct. 1137 (2012) (Rule 1:28 Decision). The factors regulating the issuance of a stay are: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the stay applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776 (1987).

Brookline asserts that, during the pendency of this c. 30A appeal, it will be irreparably harmed by returning Firefighter Alston to his position without loss of compensation or other rights. The court is not convinced.

For one thing, the Town previously retained Firefighter Alston in his position, on leave, for over a year before the termination. For another, the Town represented, at the hearing and in its papers, that it presently has (and will for the foreseeable future have) 114 firefighters. It acknowledged that returning Alston to his position will not affect the number of firefighters actually on active duty in Brookline during the time period in question. Third, the affidavit of the Brookline Fire Chief asserts great concern that enforcement of the Decision "will cause upset and a detrimental effect on the good order and function of the Department." The fact that some members of the Fire Department may be upset at the Commission's Decision on remand may not be surprising, but it is not irreparable harm. A stay would cause at least as much upset to those who agree with the Commission and would improperly undercut the Commission's enforcement of basic

merit principles by issuing its strong order to eliminate unfairness based upon race. If any members of the Department are "upset" by an order enforcing basic merit principles, they must nevertheless acknowledge and fulfill their sworn duty to uphold those principles. Finally, the Town's financial injury is not "irreparable" and in any event pales in comparison to the other interests involved here. To the extent that the Town may suffer any adverse impacts at all, other than those mandated by law, the court mitigates those impacts by ordering expedited briefing and consideration of this case on the merits.

At this point, the Town has also not proven the necessary likelihood of success on the merits. The Remand Order (at 15-16) already rejected the Town's argument that the Decision exceeded the scope of the Commission's available remedies. In a passage quoted in the Commission's Decision (at 82-83), this court pointed out that that the Commission was not only authorized, but was required, to restore Alston to his position upon a finding that he was terminated without just cause:

> The question of remedy is also not up to the Commission, because the statute itself prescribes the remedy: "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.
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> In any event, a mandatory reinstatement remedy creates, at most, a cost or an inconvenience in this case, but no real inconsistency with law. If the Commission found a lack of just cause and ordered reinstatement to Alston's position, with pay, that would not necessarily require a return to duty in Brookline – which both sides agree is not appropriate at present. The status of firefighter on leave with pay would not be unfair to a Town that violates the "just cause" and "basic merit principles" requirements. Such a status arguably would treat fairly an employee who is a victim of racial bias in violation of the civil service laws. Even if the Commission had the power to question the legislative remedy, therefore, the answer in this case is not so clear that the Commission could proceed without an evidentiary hearing.

The Commission has now found that just cause did not exist to terminate Alston and has ordered "that Firefighter Alston be returned to his position without loss of compensation or other rights." Having done just what the Legislature required, the Commission cannot possibly be faulted on appeal.

Nor does Brookline have a likelihood of success on its argument that the Commission lacked authority in the civil service laws for finding a lack of just cause when a town requires an employee to return to a workplace violates basic merit principles by failing to ensure fair treatment without regard to race or color. Again, the Remand Decision (at 7-8) squarely held that the Commission has exactly this power:

> 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 [summary decision] Decision acknowledged other aspects of basic merit principles, but not subparagraph (e). AR 496.[1] It recited "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."'" Id., quoting Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) (emphasis added).
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> 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

[1] The Decision does not expressly state that consideration of racial fairness is for another forum, although it does allude to Alston's ability to litigate that issue in the federal court. Such a statement would have been error. The Court reads the Decision as preserving the Commission's duty and authority to consider racial fairness under the "just cause" test.

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.

On remand, the Commission applied these principles to the facts it found. The Town is not likely to succeed in refuting them.

The Town next asserts that the Massachusetts Commission Against Discrimination ("MCAD") is the only administrative form authorized to determine issues of racial discrimination and hostile work environment. That is essentially an 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.[2]

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.

Finally, Brookline may advance arguments challenging the existence of substantial evidence to support the Commission's Decision. 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

[2] 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.

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).

Brookline is not likely to meet its heavy burden of showing a lack of substantial evidence to overturn the Decision. The Commission has carefully and extensively reviewed the record and provided record citations for its findings, noting where it has drawn inferences from the evidence. On its face, the Decision appears amply supported by the record. That could turn out not to be the case once the entire record is reviewed, but, so far, the Town has provided no basis to conclude that any aspect of the Decision is unsupported by substantial evidence.

While the failure of the Town to show any significant, legally cognizable harm or any real likelihood of success dooms its Motion, the court also notes that Alston would suffer significant harm during the pendency of a stay. To the extent that there are financial harms on both sides, the amount of money at issue is obviously far more meaningful to Alston, as an individual who needs to pay bills and expenses of living during this case, than the same amount is to the Town.

The non-financial harms to Alston and to the public in the event of a stay are also highly significant. The difficulties in living day-to-day without compensation for months or perhaps years, cannot be undone by a retroactive payment. As noted in the papers and at the hearing, Alston at one point was forced to live out of his car. Moreover, Alston has suffered reputational harm and emotional or even psychological distress, caused by the failure to the Town to observe basic merit principles. The court will not add to that psychic burden by delaying further the remedy that the Commission has ordered. To do so could even be seen as minimizing the significance of the wrongs committed here through indifference, which the Commission has tried to right.

Avoiding such minimization not only eliminates harm to Alston, but also protects the public interest. There is a fundamental public interest in public agency compliance with basic merit principles, including racial fairness. If courts undermine administrative enforcement of those principles, they may become the perceived (or even the actual) instruments of racial indifference. The court must not let that happen.

Finally, Alston's opposition includes a request that the court order the Town to comply with the Commission's order. The court will act on that request if necessary. However, the Town has a right to appeal this order and may seek a stay pending appeal, should it so choose. A stay by an appellate court would moot any enforcement by this court. Alternatively, the Town may decide to comply with the Decision, either with or without an appeal. In the absence of an appellate stay or voluntary compliance with the Decision, the court stands ready to decide the request for enforcement.

## ORDER

1. The Town of Brookline's Superior Court Rule 9A(d)(1) Emergency Motion to Stay Enforcement of Agency Decision Pursuant to M.G.L. c. 30A, § 14(3) is **DENIED.**

2. The plaintiff shall serve its Motion for Judgment on the Pleadings within 45 days of the hearing date (i.e. by May 12, 2019), with a response due no later than 30 days thereafter. The court anticipates a hearing in June, 2019. The Commission is ordered to expedite preparation of the record and proceedings on the merits of this appeal. If a certified administrative record is not yet available when the parties serve their papers on the motion for judgment on the pleadings, they shall refer to the original record; once the certified record is available, they shall serve or file (as appropriate) updated memoranda, changing only the form of citation to reflect the pagination of the administrative record.

3. Firefighter Alston's request for enforcement is deferred, until it becomes clear whether there will be a stay by an appeals court or voluntary compliance by the Town.

Dated: April 1, 2019

Douglas H. Wilkins
Associate Justice of the Superior Court