

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

PAUL FAGGIANO,	G2-08-29
ROBERT JONES,	G2-08-30
FRANK CAPPuccio,	G2-08-31

Appellants

v.

CITY OF MEDFORD,
HUMAN RESOURCES DIVISION,

Respondents

v.

RICHARD MONAGLE,
JAMES MORSE,
RANDALL RIDEOUT

Joined as interested parties

Attorney for the Appellants:	John M. Becker, Esq. Sandulli Grace P.C. One State Street, Suite 200 Boston, MA 02109
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Attorney for the City:	Mark Rumley, Esq. City of Medford Law Department City Hall – Room 206 85 George P. Hassett Drive Medford, MA 02155
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Attorney for HRD:	Martha Lipchitz O'Connor Human Resources Division One Ashburton Place, Rm. 207 Boston, MA 02108
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Attorney for Richard Monagle:	F. Robert Houlihan Heavy, Houlihan, Kraft & Cardinal 229 Harvard Street Brookline, MA 02446
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Attorney for James Morse and Randall Rideout:	Robert C. Benoit, Esq. 310 Highland Avenue Somerville, MA 02144
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Commissioner:	Donald Marquis
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DECISION ON HRD'S MOTION FOR SUMMARY DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellants Paul Faggiano, Robert Jones and Frank Cappuccio (hereinafter "Appellants") seek an order to overturn the decision of the state's Human Resources Division (hereinafter "HRD) not to release a promotional certification list for the position of Lieutenant in the Medford Fire Department. A pre-hearing conference was conducted at the offices of the Civil Service Commission (hereinafter "Commission") on March 3, 2008 and continued to March 10, 2008. At the pre-hearing conference, the Commission ordered that the three returning retirees: Richard Monagle, James Morse and Randall Rideout (hereinafter "Retirees") be joined as parties to these appeals and requested that they submit position statements regarding this appeal. On March 21, 2008, HRD filed a Motion for Summary Decision.

One (1) tape was made of the pre-hearing conference and is retained by the Commission.

FINDINGS OF FACT

Based on the

- Brief of Appellants,
- Respondent's Motion for Summary Decision,
- Affidavit of John Marra, HRD General Counsel, and the
- Position Statements of Retirees Monagle, Morse and Rideout;

I make the following findings of fact:

1. Paul Faggiano, Robert Jones and Frank Cappuccio (“Appellants”) are the three firefighters employed by the City of Medford Fire Department (“City”) on the civil service promotion list for lieutenant in the City. (Respondent’s Exhibit B)
2. Massachusetts G.L. c. 31 § 8 compels reinstatement of disabled retired employees once properly cleared by the Public Employee Retirement Administration Commission (hereinafter “PERAC”) and a vacancy exists.
3. Massachusetts G.L. c. 31 § 39 requires retirees who have been away from the job for “a period of time greater than five years” to complete a retraining program established by the appointing authority, and approved by the personnel administrator before they are entitled to return to full employment.
4. Pursuant to G.L. c. 31 § 39, the Chief of the Medford Fire Department designates the manner in which its firefighters are trained or retrained. Although the City may elect to operate their own academy, it has usually elected to send its firefighters to the Massachusetts Fire Training Academy (hereinafter “Academy”), operated by the Massachusetts Fire Training Council (hereinafter “Council”) (Brief of Appellants)
5. Richard Monagle, Randall Rideout, and James Morse (“Retirees”) are formerly injured and retired firefighters who have been cleared by PERAC and are awaiting reinstatement by the Medford Fire Department. (Affidavit of John Mara)
 - a. Mr. Monagle was cleared by PERAC to return to duty on May 13, 2005. On January 18, 2006, the Medford Fire Department, in accordance with G.L. c. 31 § 39, submitted a retraining program to HRD for approval. On January 19, 2006, HRD approved the retraining program submitted for Mr. Monagle. (Affidavit of John Marra)

- b. Mr. Rideout was cleared by PERAC to return to duty on January 8, 2007. On July 23, 2007, the Medford Fire Department submitted a retraining program for Mr. Rideout for HRD approval. On July 26, 2007, HRD approved the retraining program submitted by Mr. Rideout. (Affidavit of John Marra)
 - c. Mr. Morse was cleared by PERAC to return to duty on May 30, 2007. The City has not submitted a retraining program to HRD for Mr. Morse. It has been approximately eleven (11) months since Mr. Morse's clearance by PERAC. (Affidavit of John Marra)
6. The approved training program for Mr. Monagle and Mr. Rideout are identical and require that each complete all of the following in order:
- a. Practice for sixteen (16) weeks to prepare for the Physical Abilities Test ("PAT").
 - b. Provide a valid Massachusetts driver's license and a certified successful driving record including information regarding accidents.
 - c. Pass a Criminal History Systems Board Criminal Offender Record Investigation (CORI) to ascertain any convictions and/or pending criminal case information.
 - d. Pass a five-panel drug test.
 - e. Pass a complete background investigation conducted in conjunction with the Medford Police Department.
 - f. Pass a full body / complete physical examination using Human Resource Division Medical Standards.
 - g. Pass a full Physical Abilities Test ("PAT") administered by the Human Resource Division.
 - h. Pass a psychological examination in accordance with the plan on file and approved by Human Resource Division.

- i. Mandatory attendance at and successful completion of an approved Fire Academy / Drill School as designated by the Chief of the Medford Fire Department. (Respondent's Exhibit D; Position Statements of Rideout, Morse, and Monagle)
7. After their respective retraining programs were approved by HRD, it was discovered that it is against the policy of the Council to admit returning disabled retirees who have previously had more than five years of full-time service. (Appellant Brief)
8. The Council, however, allows a Department to petition the Council for a waiver of this five-year restriction in the event of unusual circumstances. (Respondent's Exhibit E)
9. As of this date, the City has not requested waivers from the Council, has not taken alternative steps to provide the Retirees with an Academy equivalent - such as on the job training, nor submitted a new feasible plan to HRD.
10. It has been the HRD's longstanding and consistent practice not to issue certifications to an appointing authority when there are retirees available, who have been cleared by PERAC to return to duty. HRD has adopted this practice in an effort to uphold the law as provided by G.L. c. 31 § 39 and G.L. c. 32 § 8. (Affidavit of John Marra)
11. On or about January 14, 2008, HRD received a requisition from the City of Medford requesting a certification for promotional appointment to Fire Lieutenant. (Appellant's Exhibit 1, Respondent's Exhibit C, Affidavit of John Marra)
12. On or about January 29, 2008, HRD informed the City that they would not issue a certification for the position in question because there were three individuals who had been cleared by PERAC to return to duty as Lieutenants. (Appellant's Exhibit 1, Respondent's Exhibit C)

CONCLUSION

A Motion for Summary Decision is properly allowed where “there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law.” 801 CMR 1.01(7)(h), City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). The Civil Service Commission’s standard of review is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Id. The Commission must decide whether the Human Resources Division (HRD) had reasonable justification for the action it undertook at the time that it did so. Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003).

The Legislature has provided HRD discretion over the creation, maintenance, expiration and revocation of eligible lists and, consequently, the establishment and issuance of certifications from those eligible lists. G.L. c.31 § 25(a). G.L. c.31 § 39 states “[i]f a permanent employee who has become separated from his position because of disability shall be subsequently capable of employment ... such employee shall be placed in a position ... in the department from which he was separated ... prior to the appointment from any civil service list; provided, however, that ... such employee[‘s] ... placement right shall be subject to the completion by such employee of a retraining program established by the appointing authority and approved by the personnel administrator.”

In accordance with these civil service laws and rules, HRD has a longstanding practice to withhold a certification to an appointing authority that has disability retirees medically cleared by PERAC to return to duty for the position in question. This policy has been consistently

followed in order to comply with G.L. c. 31 § 39, in conjunction with G.L. c. 32 §8, requiring that disability retirees who have been medically cleared by PERAC be placed in an available position prior to any appointment from a civil service list. To require HRD to issue a certification when an appointing authority has disability retirees medically cleared by PERAC would allow appointing authorities to circumvent the law. Consequently, disability retirees would not be reinstated in accordance with statutory mandates.

In the present case, the City was notified of Mr. Monagle's clearance by PERAC on May 13, 2005. In 2006, Chief Giliberti refused to permit Monagle to take a statutorily-required PAT re-test. Monagle appealed to this Commission which, in Monagle v. Medford Fire Department, Docket No. G1-06-44 (April 6, 2007), ordered HRD to schedule the PAT re-test and ordered the City of Medford to reinstate Monagle, assuming he completes the retraining program. On May 8, 2007, Monagle passed the PAT re-test, leaving only the Fire Academy / Drill School requirement to be completed. Based on the facts presented before this Commission, it appears that the Medford Fire Department has made no attempt to retrain Monagle or the other Retirees. If the City had allowed the Retirees to partake in a retraining program in a timely manner, the benefits afforded to them by c. 31, §39 would be realized in this current vacancy. It is disingenuous of the City to argue that there is a need to fill this vacancy immediately when they have had three qualified and fit individuals available, except for the hurdle they cannot meet due to the City's inaction.

The City elected to utilize the Academy to train its firefighters. The City has been aware, however, for at least several months, that the Academy does not regularly admit firefighters with over five years experience, a description of all the Retirees. Despite this knowledge, the City has done nothing to correct or amend their retraining program requirements. The Academy allows

the City to petition the Council for a waiver in the event of unusual circumstances. The City has made no such request. Moreover, the City has failed to submit a revised training program to HRD and/or the Medford Fire Department to devise its own retraining program by providing in-house or on-the-job training within Department.

The City argues that, similar to other small departments, they may not have a vacancy for a long period of time. Therefore, processing a returning retiree through his retraining program for a position that may not arise for a significant length of time is not a proper use of its resources. The City asserts that they should not need to train returning retirees until a vacancy occurs. If the Council were to accept a waiver, there may be a waitlist for candidates and the Academy itself takes weeks to complete. If the Commission were to agree with the City's premise that it has to wait until there is a vacancy in order to seek a retiree's admission to the Academy, it would be more likely than not that the City would never be able to immediately reinstate the retiree to the vacancy because he has not completed his retraining program.

Despite the reasonable alternatives available to the City and enumerated in this decision, the City continues to fail to develop a functional retraining program in direct contravention of the interest of G.L. c. 31 §39 and G.L. c. 32 §8. The Retirees' right to reinstatement should not be skirted or abridged by the City's refusal to accommodate their retraining. For all of the above reasons, the Commission concedes that HRD's decision not to issue a certification was not arbitrary or capricious. Rather, it was consistent with their longstanding practice to ensure compliance with G.L. c. 31 § 39 and G.L. c. 32 § 8.

Therefore, the Appellants' appeals filed under Docket Nos. G2-08-29, G2-08-30, and

G2-08-31 are hereby *dismissed*.

Civil Service Commission

Donald Marquis
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein, and Taylor, Commissioners) on July 3, 2008.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

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