

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

JESSIE HARVEY,  
Appellant

v.

G2-12-202

CITY OF ATTLEBORO &  
HUMAN RESOURCES DIVISION,  
Respondents

Appearance for Appellant:

David Brody, Esq.  
Law Office of Joseph Sulman, Esq.  
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Boston, MA 02110

Appearance for City of Attleboro:

Janice Silverman, Esq.  
City of Attleboro  
77 Park Street  
Attleboro, MA 01609

Appearance for Human Resources Division:

Ernest Law, Esq.  
Human Resources Division  
One Ashburton Place: Room 211  
Boston, MA 02108

Commissioner:

Christopher C. Bowman

**DECISION**

On June 18, 2012, the Appellant, Jessie Harvey (Ms. Harvey), formerly a firefighter / paramedic in the City of Attleboro (City)'s Fire Department, pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), seeking to be placed on the reemployment list for firefighter under the provisions of G.L. c. 31, § 40. Ms. Harvey argues that she resigned "for reasons of illness," and as a result was eligible to be placed on the City's reemployment list.

A pre-hearing conference was held at the offices of the Commission on August 21, 2012 and was attended by Ms. Harvey, her counsel, counsel for the City and counsel for the state's Human Resources Division (HRD). A full hearing was held at the UMASS Dartmouth School of Law in North Dartmouth on October 26, 2012. HRD was not required to attend the full hearing. The hearing was digitally recorded and a CD was provided to all parties.<sup>1</sup> Post-hearing briefs were received by all parties.

The City and Ms. Harvey stipulated to sixteen (16) facts and entered eleven (11) joint exhibits.

### **FINDINGS OF FACT**

Based on the stipulated facts, the exhibits, a review of the post-hearing briefs and the testimony of:

*For the City:*

- Scott T. Lachance, Fire Chief, City of Attleboro;

*For Ms. Harvey:*

- Jessie E. Harvey, Appellant;

I make the following findings of fact:

1. Ms. Harvey was appointed to the Attleboro Fire Department (Department) in April 2007.

(Stipulated Fact)

2. In or around March 2009, Ms. Harvey injured her back (two herniated discs and a separated joint in her spine) during her part-time work as a paramedic for a private company.

(Stipulated Fact)

3. As a result of that injury, on March 27, 2009, Ms. Harvey filed a request for unpaid Family Medical Leave (FMLA) with the City. (Stipulated Fact and Exhibit 1)

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<sup>1</sup> In the event that any party requires a written transcript of the proceeding, they should use the CD provided to them.

4. On or about July 3, 2009, Ms. Harvey was still medically unable to return to work, but had exhausted her FMLA time. Then-Fire Chief Ronald Churchill filed a request, with the Mayor's approval, to place Ms. Harvey on a medical leave of absence. That leave, like her FMLA, was also unpaid. In the Chief's request to transfer Harvey to a medical leave of absence, he stated, "it is my understanding she will be in therapy for another 6 weeks."  
(Stipulated Facts and Exhibit 4)
5. In or about August of 2009, Ms. Harvey expressed to Chief Churchill that her continued inability to work due to injury and her unpaid leave status was causing her extreme financial hardship. (Stipulated Fact)
6. Ms. Harvey raised the prospect of having to resign due to her injury in order to access her retirement savings. Ms. Harvey made it clear to the Chief that she desired to return to work as soon as she was medically cleared to do so. (Stipulated Facts)
7. Following consultation with the City's Personnel Department, Chief Churchill counseled Ms. Harvey against resigning. (Stipulated Fact)
8. On September 15, 2009, Ms. Harvey submitted a letter to the City's Personnel Department which stated in its entirety:

"I, Jessie Harvey, am officially resigning from my position as Firefighter / Paramedic from the City of Attleboro due to personal hardship at this time. I would like to thank the City of Attleboro for providing me with the opportunity of employment. It has been an honor to serve the residents of Attleboro as a Firefighter and a Paramedic and also to have worked with such great personnel with in (sic) the department it self (sic). Thank you,

Jessie E. Harvey" (Exhibit 6)

9. On or about September 25, 2009, the City submitted an "Absence and Termination Notice / Form 56" (Form 56) to HRD notifying the Commonwealth of Ms. Harvey's resignation. On

that form, the City checked the area for “resigned” and not “resigned due to illness.” A copy of this form was never provided to Ms. Harvey. (Stipulated Fact and Exhibit 7)

10. On or about February 8, 2010, Dr. John P. Doweiko, Ms. Harvey’s physician, cleared Ms. Harvey to return to work, calling her “fit for duty as a fire fighter / paramedic without any restrictions on her activity.” (Stipulated Fact)

11. On or about the same day, Ms. Harvey contacted HRD and inquired about being reinstated to the City’s Fire Department. Ms. Harvey was told by an HRD representative that this was a local matter and that she would need to file a request with the City. (Testimony of Ms. Harvey)

12. Later that same day, based on the information from HRD, Ms. Harvey wrote to the City seeking to rejoin the Department. Her letter enclosed her physician’s medical clearance and stated in relevant part:

“I would like to request reinstatement of my position as Firefighter / Paramedic with the City of Attleboro Fire Department. My resignation was a result of financial duress due to an injury which I sustained outside of my position with the Attleboro Fire Department. The decision to resign was an absolute last resort and was necessary to prevent loss of my ability to provide for a place to reside.

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I hope to regain employment as I have invested so much of myself in the community thus far and the community and city have as well invested (sic) in me. Therefore, I respectfully request reinstatement of my position as Firefighter / Paramedic with the City of Attleboro Fire Department.”

(Stipulated Fact and Exhibit 8)

13. The City did not respond to Ms. Harvey’s request. (Stipulated Fact)

14. On or about February 9, 2010, Ms. Harvey contacted HRD again to inquire about whether there were any guidelines regarding when the City must reply to her request. She was told

that there were no standardized guidelines and that this was a local matter. (Testimony of Ms. Harvey)

15. Ms. Harvey inquired with the Department and the City regularly about when she would be rehired through repeated phone calls and visits to City Hall and communications with the Chief. Ms. Harvey was never allowed to meet with the Mayor, however, and the City's Personnel Department never returned her calls. (Stipulated Facts)
16. Ms. Harvey spoke with then-Fire Chief Churchill about rejoining the Department and he told her that the Department first needed funding before they could consider whether or not to re-hire her. (Testimony of Ms. Harvey)
17. Just prior to July 25, 2011, Ms. Harvey spoke with newly-appointed Fire Chief Lachance and inquired about whether the City was hiring new firefighters. Chief Lachance told Ms. Harvey that new appointments were imminent and suggested that she request a meeting with the Mayor or the City's Personnel Director [who also served as counsel for the City for this proceeding]. (Testimony of Ms. Harvey)
18. Ms. Harvey made a second request in writing to the City on or about July 25, 2011 in which she stated "I would like to again request reinstatement of my position as Firefighter / Paramedic with the City of Attleboro Fire Department. My first request was given on 02/02/2010 and I have not yet received a response from the city." Ms. Harvey went on to include the same language from her first written request. (Stipulated Facts and Exhibit 9)
19. In a sworn statement to the Massachusetts Commission Against Discrimination, the City acknowledged Ms. Harvey's reemployment rights stating:

"Under G.L. c. 31, § 40, when 'a permanent employee resigns for reasons of illness' and later recovers, 'his name shall be placed on [a reemployment] list upon his request made in writing to the administrator [of the state Human Resources Division' within two years from the date

of such resignation.’ The complainant did not make such a request to the administrator of the state Human Resources Division within the 2-year period. If she had, and if she had indicated a willingness to work in Attleboro, the Department would have been obliged to take her back the next time it hired a firefighter.” (Stipulated Fact)

20. The City has appointed eight firefighters since Ms. Harvey’s February 8, 2010 request for reinstatement. (Stipulated Fact)

21. On June 18, 2012, Ms. Harvey filed an appeal with the Commission.

22. The City was aware that they could “reinstate” Ms. Harvey, at their discretion, under Section 46 of Chapter 31, but chose not to do so based on Ms. Harvey’s disciplinary history while she was employed as a firefighter / paramedic with the City. (Testimony of Chief Lachance)

#### *Analysis*

G.L. c. 31, § 40 states, in pertinent part:

“If a permanent employee resigns for reasons of illness his name shall be placed on such [reemployment] list upon his request made in writing to the administrator [HRD] within two years from the date of such resignation.”

The City submitted Ms. Harvey’s Form 56 to HRD on September 30, 2009, stating that Ms. Harvey had “resigned” from her position effective September 15, 2009. Ms. Harvey never received a copy of this Form 56 and thus was not aware that the City opted not to check the area on the Form 56 which states “Resigned for illness”. Had the City done so, there is no dispute that Ms. Harvey would have had two years to file a written request with HRD asking that her name be placed on a reemployment list, thus triggering her re-employment with the City upon the next vacancy for firefighter / paramedic.

Ms. Harvey argues that the City knew that she resigned due to her injury and that the City erred by failing to notify HRD that she resigned “due to illness”. HRD argues that the burden was on Ms. Harvey to ensure that the appropriate notification regarding her resignation was

made to HRD. The City argues that Ms. Harvey did not state in her resignation letter that she was resigning due to illness. Rather, Ms. Harvey stated that she was resigning due to “personal hardship” and, therefore, according to the City, they acted appropriately by notifying HRD that Ms. Harvey had “resigned” as opposed to “resigned for illness.”

HRD’s argument that it was *Ms. Harvey’s* responsibility to ensure that the appropriate notification was made to HRD regarding the reason for her resignation is unpersuasive. The Form 56, found on HRD’s website under “*Appointing Authority* Forms”, has no place for an employee signature and does not indicate that the employee must receive a copy of the Form 56, nor is there any statement on the form that the employee has a right to contest what the *Appointing Authority* lists as the reason for separation. It is abundantly clear that it is the Appointing Authority’s responsibility to complete this form and accurately notify HRD of the reason for the employee’s separation.

That leads to the more difficult question regarding whether the City erred by failing to state on the Form 56 that Ms. Harvey “resigned *for illness*.” Ms. Harvey’s resignation letter plainly states that her resignation was due to “personal hardship” and makes no reference to illness. However, it is undisputed that the City was aware at the time it completed the Form 56 that Ms. Harvey’s personal hardship was inexorably tied to an off-duty injury that resulted in her taking unpaid leave under FMLA and a subsequent unpaid medical leave of absence, for which the City had received medical verification. I am also mindful that Ms. Harvey: 1) was never notified that the City forwarded a Form 56 to HRD; 2) could not have known that the form contained a section in which the Appointing Authority could check “resigned for illness” and 3) was never given an opportunity to contest this highly-consequential bureaucratic decision by the City. For these reasons, I conclude that the City erred by failing to indicate on the Form 56 that Ms.

Harvey resigned for illness and that Ms. Harvey was aggrieved by the City's decision not to do so.

Both the City and HRD also argue that Ms. Harvey failed to submit a request in writing "to the administrator" *within two years* of her resignation. Section 1 of Chapter 31 defines the administrator as "the personnel administrator of the human resources division within the executive office for administration and finance [HRD]." I credit Ms. Harvey's testimony that she contacted HRD in February 2010, approximately six (6) months after her resignation, inquiring about how to become reemployed as a firefighter / paramedic in the Attleboro Fire Department and was told to contact the City.

Ms. Harvey, after speaking with HRD, promptly filed a written request with the City. Counsel for the City makes much ado that Ms. Harvey, who was not then represented by counsel, used the term "reinstatement" in her written request as opposed to "reemployment." Thus, the City argues that Ms. Harvey must have been referring to the City's *discretion* to reinstate her under Section 46, as opposed to her right to be *reinstated* under Section 40. This argument would carry more weight if the City had actually notified Ms. Harvey that it was denying her request under Section 46. Instead, the City failed to even acknowledge Ms. Harvey's written request.

I have also considered the undisputed fact, which all parties to this appeal are aware, that HRD delegated various duties and responsibilities of the "administrator" to cities and towns in October 2009, including the authority to approve non-selection reasons for candidates seeking appointment or promotions to civil service positions, including firefighter. Here, however, HRD states that, "HRD is the administrator for purposes of Section 40" and that Ms. Harvey's written request should have been filed directly with HRD. Since 2009, even the Commission has



struggled to determine which responsibilities HRD has (or has not) delegated to cities and towns since October 2009. See Carroll v. Town of Stoneham, 25 MCSR 559 (2012) and Radochia v. City of Somerville, 25 MCSR 548 (2012). The point, applied here, is that Ms. Harvey could not have been expected to know whether HRD had delegated this Section 40 responsibility to cities and town. Further, when she did contact HRD, she was told to submit her request to the City, which she did almost immediately and well within the two-year statutory timeframe for filing such a request.

Finally, the City argues that Ms. Harvey failed to file a timely appeal with the Commission. According to the City, Ms. Harvey's reemployment rights, assuming they existed, expired on September 15, 2011. As such, the City, referencing 801 CMR 1.01(6)(b), argues that Ms. Harvey had thirty (30) days to file an appeal with the Commission and that she failed to do so.

Ms. Harvey was not required to file a complaint with the Commission within thirty (30) days of September 15, 2011. The regulation provides in pertinent part: "In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date the Agency notice of action is sent to the Party." The City never sent Ms. Harvey a "notice of action" informing her that she was not being reemployed. Since no notice of action was sent to Ms. Harvey, the 30-day time period established by 801 CMR 1.01(6)(b) does not render Ms. Harvey's complaint untimely.

### *Conclusion*

For all of the above reasons, Ms. Harvey's appeal under G2-12-202 is hereby ***allowed***. Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1. The City shall amend the Absence and Termination Notice / Form 56, retroactive to September 15, 2011, to indicate that Ms. Harvey resigned for illness.
2. HRD shall consider Ms. Harvey's February 8, 2010 as a timely request under G.L. c. 31, § 40 to be placed on the appropriate reemployment list for firefighter / paramedic.
3. When the next vacancy arises for firefighter / paramedic in the City, HRD shall issue the reemployment certification to the City upon which Ms. Harvey's name shall appear.
4. The City, upon receiving the reemployment certification, shall provide Ms. Harvey with the reemployment rights granted under civil service law and rules.

Civil Service Commission

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Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis and Stein, Commissioners [McDowell – Absent]) on February 21, 2013.

A true record. Attest:

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Commissioner

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 this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

David Brody, Esq. (for Appellant)  
Jan Silverman, Esq. (for Respondent)  
Ernest Law, Esq. (for HRD)