COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place – Room 503
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ROBERT E. JORDAN,
Appellant

v.

CITY OF LYNN,
Respondent

CASE NO: E-11-3

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Commissioner:

Paul M. Stein

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

The Appellant, Robert E. Jordan, acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission), claiming to be aggrieved by the failure of City of Lynn (Lynn) to reinstate him to his position with the Lynn Fire Department (LFD).[1] The Commission heard oral argument on the parties' cross-motions for summary decision on October 24, 2011, which was digitally recorded, and received post-hearing submissions dated November 11, 2011 and December 8, 2011, from Lynn and the Appellant, respectively. The Commission also received documentation from the Massachusetts Human Resources Division (HRD) containing information regarding the Appellant's civil service history.

[1] The Commission previously decided a separate issue involving the Appellant's eligibility to take a promotional examination for Fire Captain. See Jordan v. Human Resources Division, 24 MCSR 208 (2011) [Jordan I]

Findings of Fact

Giving due weight to the documents submitted by the parties, the argument of counsel and inferences reasonably drawn from the evidence, I find the following undisputed facts:

1. The Appellant, Robert E. Jordan, is a tenured civil service employee with the LFD, currently serving as a Fire Lieutenant. (*Claim of Appeal; Administrative Notice [Jordan I]*)

2. The LFD duly appointed Mr. Jordan to the position of Fire Lieutenant on September 15, 2004 and, one day later, he was voluntarily demoted to Firefighter for fiscal reasons. (*Administrative Notice [Jordan I*]; *Lynn's Post Hearing Submission*)

3. On June 24, 2006, Mr. Jordan retired from his position as an LFD Firefighter with cancer and began receiving accidental disability retirement benefits pursuant to M.G.L.c.32. (*Appellant's Post-Hearing Submission; Administrative Notice [Jordan I*])

4. Mr. Jordan eventually made a successful recovery. On January 23, 2009, the Public Employee Retirement Administration Commission (PERAC) determined that Mr. Jordan was able to perform the essential duties of the position from which he retired. PERAC ordered:

> "In accordance with G.L.c.32,§8(2)(a), [Mr. Jordan] must be returned to the position from which he/she retired. If such a position is not vacant, [Mr. Jordan] will be given preference for the next available position, or similar position for which he/she is qualified."

(*Appellant's 2/15/11 Submission; Lynn's Opposition to Appellant's Motion; Appellant's Post-Hearing Submission; Administrative Notice [Jordan I*])

5. On December 10, 2008, Lynn's Treasurer/CFO wrote to LFD Acting Fire Chief James Carritte, informing him of impending financial issues and requesting a budget plan for reducing the Fire Department budget by 5% for the months of January through June 2009 (i.e., a 10% cut on an annual basis for FY2009). This level of reduction amounted to a cut of $772,135.70 from the LFD salary line, of which $414,888.57 was covered by an accrued salary surplus and the remaining cuts required reduction in the overtime account. (*Lynn's Post-Hearing Submission*)

6. On January 31, 2009, LFD Firefighter Richard Biagiolti retired. He was not replaced. The Appellant was not notified. (*Appellant's 2/15/11 Submission; Lynn's Opposition to Appellant's Motion; Appellant's Post-Hearing Submission*)

7. On February 11, 2009, Mr. Jordan wrote to then Lynn Mayor Clancy, indicating he was eager to return to duty, pointing out: "Currently I am a liability to the system at a rate of 72% of full pay for doing nothing. For an additional 28%, the City would have a willing and able body firefighter back on the job and contributing to the system." He also noted: "I don't envy your position considering the state of the city, state and federal governments. I do recognize this and can't truly know how difficult your job must be at this time." (*Appellant's 2/15/11 Submission*)

8. On February 23, 2009, Lynn made "9C" cuts from the LFD budget totaling $433,431.00. Lynn laid off a number of employees in several different departments in order to meet this financial shortfall. (*Lynn's Post-Hearing Submission*)

9. On March 11, 2009, the Lynn Treasurer/CFO issued a memorandum to all department heads stating: "Positions that are now unfilled due to the recent '9C' cuts should not be budgeted for fiscal year 2010. In addition, departments are required to submit budgets showing *at least a 5% cut* from your reduced fiscal year 2009 budget." (*Lynn's Post-Hearing Submission*)

10. On or about May 2, 2009, LFD Deputy Chief Gecoy retired, Captain James McDonald was permanently promoted to Deputy Chief, Lt. Lynch was permanently promoted to Captain and Firefighter Gonzales was permanently promoted to Lieutenant. (*Appellant's 2/15/11 Submission; Lynn's Post Hearing Submission; Appellant's Post Hearing Submission*)

11. According to Chief Carmody, on June 30, 2009, the LFD returned $91,327.13 to the Lynn Treasurer, representing unexpended funds from the LFD salary line. (*Lynn's Post Hearing Submission*)

12. From January 1, 2009 through March 2010, the LFD hired no firefighters. There were a total of 25 firefighters retired between 2006 and 2010 who were not replaced. (*Lynn's Opposition to Appellant's Motion; Lynn's Post-Hearing Submission*)

13. Lynn began to rehire employees thereafter as funds became available. Sean Martin was the first Firefighter rehired, on March 7, 2010. (*Representation of Counsel; Lynn's Post Hearing Submission*)

14. On February 22, 2010, Fire Chief Carmody wrote to HRD seeking clarification as to the position to which Mr. Jordan should be reinstated. (*Lynn's Post-Hearing Submission*)

15. On March 9, 2010, HRD responded to Chief Carmody:

> "In accordance with M.G.L.c.32,§8(2)(a), the Department [LFD] must return Mr. Jordan to the position from which he retired. If there is no vacant Firefighter position, he must be given preference for the next available position, or a similar position, for which he is qualified. Pursuant to M.G.L.c.31,§39, as soon as sufficient work or funds are available, the Department must then restore Mr. Jordan, according to seniority in the unit, to the position of Fire Lieutenant."

(*Appellant's 2/15/11 Submission; Lynn's Post Hearing Submission*)

16. On April 15, 2011, Chief Carmody notified the Lynn personnel department to initiate the necessary paperwork to reinstate Mr. Jordan as a LFD Fire Lieutenant, and, as a result, he was duly returned to duty as an LFD Fire Lieutenant, effective April 25, 2010. (*Lynn's Post Hearing Submission; Administrative Notice [Jordan I]*)

17. The base pay of an LFD Fire Lieutenant for FY 2009 and FY2010 was $87,000 per year. The base pay of a Firefighter was 16% less, or approximately $73,000 per year. During the relevant period that Mr. Jordan received disability retirement pay, he was paid 72% of his Firefighter's salary, without deductions for taxes and fringe benefits, which he stated to be approximately $50,000 per year. (*Appellant's 2/15/11 Submission; Appellant's Post Hearing Submission*)

Conclusion

Summary of Conclusion

The Commission's jurisdiction encompasses appeals that allege a violation of statutory rights of tenured civil service employees specified in Mass.G.L.c.31 and certain other specifically enumerated laws. Accordingly, the Commission reviews this appeal solely through the lens of the Appellant's rights under the applicable civil service statute, G.L.c.31,§39. Under that statute, the employment of another Firefighter in March 2010 was a clear violation of the Appellant's rights of reinstatement under the provisions of G.L.c.31,§39,¶3, which covers the return of employees who recover from a disability. Nothing in Section 39, however, can be construed to mean that Lynn was required to reinstate the Appellant to his former position of Lieutenant as a matter of civil service law. A plausible argument could be made that, once the Appellant was cleared for duty under G.Lc.32, he should have been immediately returned to duty as a Firefighter as early as January 2009, as a matter of retirement law and, then, reinstated as a Lieutenant under civil service law (G.Lc.31,§39,¶2) upon the next opening for Lieutenant, i.e., in May 2009. The predicate to such relief depends on a question of law under G.L.c.32, however, i.e., did a "vacancy" exist within the meaning of the retirement law when an unfilled position of Firefighter clearly existed but was not funded? The Commission has no authority to enforce a violation of the Massachusetts Retirement Law, G.L.c.32 and declines to answer that question of law outside its primary jurisdiction.

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary decision of an appeal before the Commission, in

whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h) when "there is no genuine issue of fact relating to all or part of a claim or defense" and the moving party is "entitled to prevail as a matter of law." These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., after viewing the evidence in the light most favorable to the non-moving party, the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring evidentiary hearing. See, e.g., Pease v. Department of Revenue, 22 MCSR 754 (2009); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Relevant Civil Service Law

Mass. G.L.c.31, Section 39 provides:

> *If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.*

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the [just cause] provisions of section forty-one. *Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority . . . written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.*

If a permanent employee who has become separated from his position because of disability shall be subsequently capable of employment as determined pursuant to section eighth of chapter thirty-two by the retirement board, as defined in section one of chapter thirty two, *such employee shall be placed in a position in the same or similar title in the department from which he was separated* or any other department *prior to the appointment from any civil service list*; provided, however, that in the event that such placement of such employee occurs after a period of time greater than five years from the date of such separation or results in such employee occupying a position in a different title from the title of the position from which he was separated, such 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 [HRD].

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.

G.L.c.31§39 (*emphasis added*)

Section 8(2)(a) of the Massachusetts Employee Retirement Law provides, in relevant part:

(a) *If, within two years of the date that a member is retired [for disability], a regional medical panel determines that the retired member is able to perform the essential duties of the position from which he retired* . . . the member shall be returned to such position and his disability retirement shall be revoked; provided, however . . . if the retired member is able to perform the essential duties of a similar job within the same department for which he is qualified, as determined by [HRD], and such position is vacant, said member shall return to such position; provided further, that *if such position is not vacant, then the last person appointed to that rank or position will be reduced in rank or position* and shall be placed at the top of the list to fill such rank or position for a two year period.

If after two years of the date that a member is retired [for disability], the regional medical panel determines that the retired member is qualified for and able to perform the essential duties of the position from which he retired or a similar position within the same department, as determined by [HRD], said member shall be returned to said position, provided the position is vacant. If the position has been filled, the member shall be granted a preference for the next available position or similar position for which he is

> *so qualified. When under the provisions of this section, no vacancy exists in the same or similar position he shall continue to receive such retirement allowance until such reinstatement takes place* . . . .

G.L.c.32,§8(2)(a) (*emphasis added*)

The seminal rules of statutory construction impel that inquiry into legislative intent must begin with the language of the statute and, if the plain and ordinary meaning of that language "provides a clear answer, it ends there as well." See, e.g., Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999); Camara v. Attorney General, 458 Mass. 756, 760n.10 (2011); Law v. Griffith, 457 Mass. 349, 352 (2010); Commonwealth v. Cory, 454 Mass. 59, 563 (2009); Commonwealth v. Brown, 431 Mass. 772, 775 (2000). As aptly put by the Appeals Court, this Commission must "read and apply [civil service law] in a way which yields an effectual and harmonious piece of legislation compatible with the legislative goals that motivated its passage . . . To do this, we look first to the statute's language and, absent uncertainty or ambiguity, we need go no further". Worcester v. Civil Service Comm'n, 18 Mass.App.Ct. 278, 280, rev.den., 392 Mass. 1104 (1984) and cases cited. See also City of Fall River v. AFSCME Council 93, 61 Mass.App.Ct. 404, 408, 411 (focusing on "fundamental purpose" and "policy choices" reflected in language of civil service law); McLean v. Town of Natick, 14 Mass.App.Ct. 187, 189, rev.den., 387 Mass.1103 (1982) (court "mindful of the policy considerations behind the civil service law and the intention of the Legislature" in construing the statute)

The Commission has recently considered appeals which required interpretation of the reinstatement rights of employees under Section 39. In Scheffen et al v. City of Lawrence, 24 MSCR 524 (2011), judicial appeal pending, the Commission addressed a dispute as to whether patrol officers could be reinstated after a layoff before restoring senior officers (Lieutenants and Sergeants) to their former positions. The Commission applied the settled law that grants an

appointing authority discretion to "prudently manage its affairs" and, when faced with competing demands for limited funds, may chose the nature and level of its services and allocate its funds accordingly, and may decide when to fill vacant positions, either on a permanent or temporary basis. Thus, the Commission construed Section 39 to allow appointing authorities considerable management discretion in determining which vacancies in which ranks of employees and in which departments it would reinstate first, when funds became available following a reduction in force. See also Town of Billerica v. International Ass'n of Firefighters, Local 1495, 415 Mass 692, 694 (1993); City of Gloucester v. Civil Service Comm'n, 408 Mass. 292,299-301(1990); Newton School Comm. v. Labor Relations Comm'n, 388 Mass. 557, 563 (1983); Debnam v. Town of Belmont, 388 Mass. 632, 635-36 (1982); City of Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, 597 (1985); Kelly et al v. Boston Fire Department, and cases cited, 25 MCSR --- (2012), judicial appeal pending. See generally, Worcester v. Civil Service Comm'n, 18 Mass.App.Ct. 278 (1984) (Section 39 was "clear and unambiguous" that a police sergeant who elected to be demoted to patrol officer waived his Section 39 right to request a "just cause" appeal that the reduction in force was not justified for a lack of funds)

In Reardon v. Lawrence, 25 MCSR --- (2012), the Commission considered the appeal of a Fire Lieutenant demoted to Firefighter and then, in a purely paper exercise, laid off the same day in a reduction in force. While unemployed, Lawrence promoted other Firefighters to Lieutenant and did not restore Ms. Reardon to Lieutenant until she had first been reinstated as a Firefighter, which took time because, although she was the senior Lieutenant laid off, there were other Firefighters who had more departmental seniority and were reinstated (as Firefighters) ahead of her. The Commission determined that, once having decided to fund and fill a "vacancy" in the Lieutenant's position from which she had been separated and simultaneously laid off, Section 39

required that former Lt. Reardon was entitled to be restored to that position ahead of any other person and her status as an unemployed "Firefighter" did not change those rights.

Civil Service Reinstatement As a Recovered Disabled Retiree

In the present appeal, Lynn's failure to reinstate Lt. Jordan as a Firefighter in March 2010, and, instead, bring back another Firefighter at that time, violated G.L.c. 31, Section 39, ¶3, governing the civil service rights to reinstatement granted to a disabled retiree. Lt. Jordan was cleared for duty as a Firefighter as of January 23, 2009 and, under Section 39,¶3, he should have been placed in the first available position filled from "any civil service list", which includes any eligible list, reinstatement list or reemployment list. This result is not only compelled by the clear and unambiguous language of Section 39,¶3 but it is consistent with the clear statutory intent expressed in the retirement law (G.L.c.32), incorporated into G.L.c.31,§39, to place a high priority on the right of return to employment by an employee who recovers from disability and to assure that any "vacancy" is filled by re-employment of such persons ahead of any others. See also Faggiano v. City of Medford, 21 MCSR 290 (2008) (HRD lawfully refused to issue certification when there were disabled retirees ready to return to fill the positions) [2]

Whether or not Lt. Jordan had a right to be returned to duty as a Lieutenant under the recovered disabled retiree provisions of civil service law is more complex. A permanent Lieutenant's vacancy was created in May 2009 by promotion of the incumbent to Captain and Lynn filled and funded the position by promotional appointment. This event (within five years of retirement) would trigger returning former Lt. Jordan as a Lieutenant only if the Lieutenant's

[2] Indeed, the high statutory priority to return rehabilitated employees to duty is further illustrated by the fact that, under retirement law, an employee who is rehabilitated in less than two years (not the case here), actually may displace another existing employee. G.L.c.32,§8(2)9(a)¶1. Moreover, as Lt. Jordan's letter to then Lynn Mayor Clancy noted, a disabled retiree received 72% of his former pay, tax free, while out on disability for "doing nothing", which would be another motive behind returning able bodied civil service employees to duty as soon as possible.

position fit the statutory definition of "a *position in the same or similar title in the department from which he was separated or any other department* [to which he was entitled to be placed] prior to the appointment from any civil service list." G.L.c.31, §39,¶3 (*emphasis added*)

The Commission finds it difficult, however, to read Section 39,¶3 of the civil service law to encompass a legislative intent that a retiree who returns to duty after recovering from a disability may be returned to duty at a higher rank than that from which he was retired, i.e., a Firefighter returns as a Lieutenant or, theoretically, even a Captain. The Commission concludes that, while the term "similar position" may encompass a return to a position of lower rank, it would be impermissible to construe the language "similar position" to mean one of higher rank, in the context of the recovered disabled retiree provisions of Section 39,¶3.

Civil Service Reinstatement To A Separated Position Through Layoff or Demotion

The Commission has also considered whether or not Lt. Jordan had the right under civil service law governing layoffs and demotions to an earlier "reinstatement" under Section 39,¶1, or "restoration" under Section 39,¶2, to the Lieutenant's position that was created and filled on May 31, 2009.[3] His initial demotion, unlike the facts presented to the Commission in the Reardon case, was a distinct, substantive prior employment decision, rather than simply a paper exercise, and, more importantly, his separation from employment was due to disability retirement, not a lack of money, and not causally connected to the prior demotion. These are

[3] Since no Firefighter positions were filled prior to March 2010 and Lt. Jordan did not assert or prove that failure to re-hire Firefighters until March 2010 was a pretext or subterfuge, Lt. Jordan would not, in any case, have had any reinstatement and/or restoration rights to the Firefighter position under the layoff provisions of Section 39 (¶1 & ¶2) prior to March 2010. See, e.g., Commissioner of Health & Hospitals v. Civil Service Comm'n, 23 Mass.App.Ct. 410, 413 (1987); Debnam v. Belmont, 388 Mass 632, 634 (1983); School Comm. of Salem v. Civil Service Comm'n, 348 Mass. 696, 698-699 (1965); Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 926, rev.den., 417 Mass. 1105 (1994) See also Scheffen et al v. City of Lawrence, 24 MCSR 524 (2011), judicial appeal pending; Ameral v. City of Fall River, 22 MCSR 653 (2009); Carroll v. Worcester Housing Auth., 21 MCSR 309 (2008); Bombara v. Department of Mental Health, 21 MCSR 255 (2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995); Snidman v. Department of Mental Health, 8 MCSR 128 (1993); Soucy v. Salem School Committee, 8 MCSR 64 (1995)

important distinctions. In a different context, it may be appropriate to consider whether or not the two layoff paragraphs of Section 39, read in concert, imply that an employee who first takes a voluntary demotion under ¶2 in one layoff and is then later separated from his demoted position under ¶1in a future layoff, still preserves his earlier right to reinstatement to the higher rank, should that opportunity arise first. The Commission did not address that specific situation in Reardon, where the two employment actions were simultaneous and not separated in time, and it does not need to do so here. The Appellant's separation was not through layoff at all, but through retirement (which, unlike a layoff, implicitly presumes that the employee's career has ended and the right to return to work, if any, is more the purview of PERAC and the terms of retirement law, than an appointing authority's responsibility under the layoff provisions of civil service law). Thus, the Appellant's reinstatement rights in this case are confined to those granted to recovered disabled retirees under Section 39,¶3.

Possible Claim Under Retirement Law

There are persuasive arguments in Lt. Jordan's favor in this case, however, when the synergy of the two relevant and related statutes – the retirement law and the civil service law – are taken into account. There is no dispute that Lt. Jordan clearly did have a right to reinstatement as Firefighter as of January 23, 2009, provided he met the conditions prescribed by the retirement law. Had he been so reinstated, he then would have held the position of Firefighter in May 2009, when the Lieutenant's position was opened to promotional appointment, and he should then have been "restored", under Section 39,¶2 of the civil service law, to his former position of Lieutenant, before anyone else was promoted into that position.

More specifically, Lt. Jordan arguably had the right to be reinstated to the position of Firefighter at all times on or after January 23, 2009, under retirement law (G.Lc.32(8)(2)(a)¶2), if

there was such a "vacant" position. That question, however, calls for interpretation of the retirement law, not civil service law, i.e., whether G.Lc.32 would be construed to consider a legal "vacancy" to exist within the meaning of that law, when a municipality choses to leave a physical "vacancy" unfilled due to an asserted lack of money to fund the position.

The parties have not addressed these issues, which necessarily turn, in part, on construction of G.L.c.32 and may or may not parallel the civil service law on this point. The Commission notes that, under civil service law, there is no express definition of what constitutes a "vacancy", and appointing authorities are generally allowed reasonable discretion in deciding when and what "vacancies" will be filled as a prerogative of sound management of its fiscal and staffing affairs, as to which, in the absence of arbitrary or capricious behavior, the Commission does not generally intrude. See, e.g., Mayor of Lawrence v. Kennedy, 57 Mass.App.Ct.904, 906 (2003); City of Boston v. Boston Police Superior Officers Federation, 52 Mass.App.Ct. 296, 299-301 (2001); Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, 597, rev.den., 395 Mass. 1102 (1985); Maccarone v. City of Lawrence, 24 MSCR 449 (2011) and cases cited; Gillespie et al v. Boston Police Dep't, 24 MCSR 170 (2011); O'Toole v. Newton Fire Dep't, 22 MCSR 563 (2009); Mandracchia v. City of Everett, 21 MCSR 307 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007).

Thus, the Commission confines its Decision to Lt. Jordan's rights that are clearly established under the disability reinstatement provisions of the civil service law, G.L.c.31,§39,¶3, and declines to answer a question of law outside its primary jurisdiction.

Relief to Be Granted

Pursuant to G.L.c.31,§39,¶3, Lt. Jordan should have been reinstated to the Lynn Fire Department, effective March 7, 2010 (the date on which Lynn returned the first Firefighter to

duty after Lt. Jordan was cleared to return to duty) and the evidence warrants the inference that, on and after that date, there were sufficient funds to have restored him immediately to his position of Lieutenant, pursuant to G.L.c.31,§39,¶2. Accordingly, by the authority provided by M.G.L.c.31 and Chapter 310 of the Acts of 1993, the Commission orders the Massachusetts Human Resources Division and/or the City of Lynn to take such action as may be necessary to retroactively adjust the civil service employment history of the Appellant, Robert E. Jordan, to reflect his reinstatement in the Lynn Fire Department, in the position of Fire Lieutenant, effective March 7, 2010. It is the intent of this Decision that the Appellant be restored to all compensation and other benefits he lost as a result of the unlawful delay in his reinstatement to the position of Lieutenant for the period from March 7, 2010 through April 25, 2010, net of any retirement benefits he had received covering that period. Nothing in this decision in intended to control the additional rights, if any, that Lt. Jordan may have under G.L.c.32 with respect to his employment status.[4]

For the reasons stated above, the Appellant's Motion for Summary Decision is ALLOWED IN PART and Lynn's Cross-Motion for Summary Decision is DENIED. The appeal of the Appellant is ***allowed, in part.***

Civil Service Commission

Paul M. Stein
Commissioner

[4] A computation of lost compensation and benefits is beyond the scope of the Commission's Decision and is left to the parties. The Commission suggests, however, that, the differential should not be large. With an apples-to-apples comparison of the difference between the seven weeks pre-tax equivalent of retirement gross pay (i.e., $50,000 tax-free, grossed up from 72% = approximately $69,000 pre-tax gross pay equivalent x 7/52 = $9,200) vs. the seven weeks of lost pre-tax Lieutenant's gross pay (approximately $87,000 x7/52=$11,700), the differential in the gross pay from March 7, 2010 to April 25, 2010, would be approximately $2,500.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on April 5, 2012.

A true record. Attest:

_____
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 the 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 a Civil Service Commission's final 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.

Notice to:
Richard M. Callahan, Esq. (for Appellant)
David F. Gruenbaum, Esq. (for Respondent)
John Marra, Esq. (HRD)