

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
Boston, MA 02108
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**JOSEPH KELLEY, PHILLIP SIFFORD,
MICHAEL FINN and LAWRENCE
MACDOUGALL,**

Appellants

**CASE NOS: G2-09-230 (Kelley)
G2-09-231 (Sifford)
G2-09-232 (Finn)
G2-09-233 (MacDougall)**

v.

CITY OF BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellants:

F. Robert Houlihan, Esq.
Houlihan, Kraft & Cardinal
229 Harvard Street
Brookline, MA 02446

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.
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Office of Labor Relations
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Commissioner:

Paul M. Stein

DECISION AFTER REMAND

The Appellants, Fire Lieutenants with the Respondent, City of Boston Fire Department (BFD), brought these appeals to the Civil Service Commission (Commission) claiming to be aggrieved by the BFD's alleged practice of making "out-of-grade" or "acting" temporary and permanent appointments outside of the civil service system to fill vacancies in the position of Fire Captain, rather than from the 2007 eligible list for Fire Captain on which their names appeared. The Commission dismissed the appeals by Decision dated January 12, 2012. Kelley et als v. Boston Fire Dep't., 25 MCSR 23, reconsideration denied, 25 MCSR 168 (2012). (*Kelley I*) The Appellants duly appealed to the Suffolk Superior Court and, by "Memorandum and Order on Cross-Motions for Judgment on the Pleadings", dated August 5, 2013 (Memorandum and

Order), the Superior Court (Leibensperger, J.) allowed the Appellants' Motion for Judgment on the Pleadings, and remanded the appeal to the Commission "to conduct a new evidentiary hearing" at which "Plaintiffs should be allowed to offer proof of specific appointments to temporary captain positions in the May 2007 to May 2009 period that (a) were in violation of the civil service law, and (b) they should have received because of their position on the promotional list." Kelley v. Massachusetts Civil Service Comm'n et al., No. SUCV 12-00571-H. (*R.Exh. 5*) BFD appealed to the Appeals Court, which, on November 18, 2014, dismissed the appeal as premature. Kelley v. Boston Fire Dep't, 86 Mass.App.Ct. 913 (2014). See also R.Exh. 44 [*Mass.App.Ct. Record Appendix*]

Procedural History After Remand

On January 20, 2015, I held a pre-hearing conference to review the status of this matter and schedule a new evidentiary hearing as required by the Superior Court's Memorandum and Order, which I construed to be limited to the claims to temporary appointment from the period May 2007 to May 2009.¹ The parties were ordered to confer and to come to the pre-hearing conference with certain information, to be stipulated to the extent possible, that identified the evidence of the specific Captain positions to which each of the four Appellants claimed they were unlawfully denied promotions; and to address the issue of what relief, if any, would be appropriate for the Commission to order, should it find that any of the Appellants' civil service rights were, in fact, violated. In particular, the parties were requested to address the Commission's long-standing practice that monetary relief has never been, and is not, authorized in bypass cases and whether there is any other form of non-monetary equitable relief that could be granted to the Appellants under in the circumstances of this case.

¹ In the Superior Court action, the Plaintiffs, Appellants before the Commission, abandoned their claims to permanent appointments. Memorandum and Order, p. 2.

At the pre-hearing conference, both BFD and the Appellants submitted memoranda and made oral representations about the issues described above. The Appellants contended that, as of April 2008, there were six (6) Lieutenants filling “acting” Captain positions, so that, in effect, as of that date, each of the Appellants was positioned on the Captain’s eligible list so as to be in line for appointment as a Temporary Captain to fill at least one of those positions. BFD disputed this contention, claiming that, as late as October 2008, Appellants Finn and MacDougall had not yet reached the “2n+1” window required for consideration as a Temporary Captain and that certain positions required specialized training that the Appellants did not possess.

As to the issue of relief, BFD submitted a Motion to Dismiss all the appeals on the grounds that the appeals were moot, as (1) there was no relief, monetary or non-monetary to which the Appellants were entitled, (2) Appellants Kelley and Finn had since retired, (3) Appellants Sifford and MacDougall failed to take the next Captain’s examination, and (4) none of the Appellants suffered harm to their “civil service” rights for which the Commission could grant them equitable relief pursuant to Chapter 310. The Appellants did not dispute the fact that Appellants Kelley and Finn had retired, but claimed that they, along with all other Appellants, were entitled to monetary relief and pension enhancement to replace the harm caused by their loss of time served as Temporary Captain to which they each claim they should have been appointed during the entire two-year-year life of the 2007 eligible list.

At the pre-hearing conference, I denied BFD’s Motion to Dismiss without prejudice and scheduled a full hearing to conduct a further evidentiary hearing on the disputed issues of fact in compliance with the Superior Court’s Memorandum and Order. I also issued a Procedural Order that directed the parties to engage in further consultation and disclosures designed to continue to narrow the issues and facilitate the evidentiary hearing.

The Appellants sought permission to conduct additional discovery beyond what was prescribed within the scope of the Procedural Order, which BFD opposed, and I denied, in substantial part, as beyond the scope of the remand. BFD moved to reconsider its Motion To Dismiss as to Appellants Kelley and Finn on the limited grounds that their retirement precluded any relief to them and mooted their the appeals, which I denied, again, without prejudice.

An evidentiary hearing was held on July 14, 2015 and September 14, 2015, which was digitally recorded. BFD transcribed the recording and, absent objection, I allowed BFD's motion to designate the transcripts (R.Tr.I & R.Tr.II) as the official hearing record. Witnesses were not sequestered. The Appellant, Joseph Kelley, testified. BFD called two witnesses (Regina Caggiano of the Massachusetts Human Resources Division (HRD) and BFD Deputy Fire Chief for Personnel Scott Malone). I received and take administrative notice of the original Kelley I, hearing record in over which I also presided, as contained in the Administrative Record thereof filed with the Superior Court (AR.I through AR.IV; Supp.AR.I through Supp.AR.V). I also received forty-seven (47) additional Remand Exhibits in evidence (R.Exhs.1, 1A, 2 through 5, 7 through 10, 10A, 10B, 10C, 11 through 16, 18 through 23, 24A, 24B, 25 through 36, 39 through 47) and marked four (4) additional exhibits for identification (R.Exhs.6ID, 17ID, 37ID & 38ID). The Commission received Post-Hearing briefs on October 30, 2015.

Summary of Conclusion

The Appellants have proved that BFD made only four temporary Captain appointments for which one or more Appellant was bypassed without compliance with civil service law. However, as all of these appointments were made outside the statutory deadline for filing a bypass appeal, the Appellants' claims must be dismissed as untimely. In addition, two Appellants have since retired and any claims they many have had to relief are now also moot.

Findings of Fact

Giving appropriate weight to the exhibits introduced into evidence, the testimony of the witnesses, the facts of which I take administrative notice, and the inferences reasonably drawn from that evidence as I find credible, I make the following findings of fact:

1. When these appeals began, the Appellants (Joseph Kelley, Phillip Sifford, Michael Finn and Lawrence McDougall) held positions as BFD Fire Lieutenants. (*Administrative Notice [AR:1022]; R.Tr.I;29-30[Kelley]*)

2. Each Appellant passed the promotional exam for Fire Captain administered by HRD on November 18, 2006 and their names were placed in rank order (according to their examination scores) on the eligible list established for promotion to BFD Fire Captain, effective May 1, 2007 (the 2007 Captain's List). Lt. Kelley and Lt. Sifford appeared tied in 11th place among the 48 names on the 2007 Captain's List. Lt. Finn appeared below them in 13th place and Lt. MacDougall appeared next in 14th place. (*Administrative Notice [AR: 1023, 1181-1187]*)

3. The 2007 Captain's List expired on May 22, 2009, when it was replaced, in the ordinary course, by a new eligible list established after the 2009 competitive examination for Fire Captain (the 2009 Captain's List). Lt. Sifford placed in the 44th position and Lt. MacDougall placed in the 52nd position, respectively, out of 52 names on the 2009 Captain's List. Lt. Kelley and Lt. Finn did not take and/or pass the 2009 examination for Fire Captain, and neither of their names appeared on the 2009 Captain's List. (*R.Exh.12; Administrative Notice, [AR:1023-1024]*)

4. On January 6, 2009, Lt. Kelley was injured on duty. He was placed on injured duty leave until May 10, 2012 when he took a voluntary Accidental Disability retirement. (*R.Exhs.11,34,42 & 42; R.Tr.I:30-32R.Tr.II:61-70,137-138 [Kelley]*)

5. In July 2012, Lt. Finn took a regular voluntary retirement. (*R.Exh.35*)

6. During the life of the 2007 Captain's List, BFD made ten promotions to the rank of permanent Fire Captain from the first ten names on the list, as follows::

<u>Officer</u>	<u>Rank on List</u>	<u>Promotion Date</u>
Johnathan Rodrigues	1 (tie)	09/12/2007
John P. Dolan	1 (tie)	10/23/2007
Joseph G. McNulty	1 (tie)	12/07/2007
Michael P. Dillon	4 (tie)	02/25/2008
Scott D. Wahlen	4 (tie)	02/25/2008
David C. Harrison	4 (tie)	04/08/2008
Steven E. Shaffer	4 (tie)	04/08/2008
Christopher M. Burke	8	04/08/2008
Colin P. Kelly	9 (tie)	04/17/2008
Steven P. McGillis	9 (tie)	09/26/2008 ²

(*Administrative Notice [AR:1023,1181-1183; R.Exhs. 13, 18 & 30]*)

7. No promotions from the 2007 Captain's List were made after September 26, 2008 due to "9C" cuts by Governor Patrick in October 2008, which resulted in a \$22.9 million reduction in local aid funding to the City of Boston. (*Administrative Notice [AR:1028]*)

8. On and after September 26, 2008 through the expiration of the 2007 Captain's List on May 22, 2009, Lt. Kelley and Lt. Sifford stood tied at the top of the list, Lt. Finn was third, and Lt. McDougall was fourth. (*Administrative Notice, AR:1179-1183]*)

9. The BFD structure includes two fire suppression (aka "field") divisions, cross-divided into four work groups (commanded by a Deputy Chief) and fifty-nine fire suppression companies responsible for specific apparatus (Engine 5, Ladder 21, etc.) assigned to eleven districts that cover the City of Boston (each district commanded by a District Chief). Thus, there are more than 200 separate company work groups within the BFD, four of which are assigned on a rotating shift schedule to each company. One work group is commanded by the company commander, who is a Captain, and the other three commanded by Lieutenants. In addition, there

² Lt. Kelley's name appeared, along with Lt. Sifford, on the Certification from which Lt. McGillis was promoted, but only Lt. Sifford, not Lt. Kelley, signed the Certification as willing to accept that promotion. (*R. Exh. 13*)

are various specialized and administrative (aka “headquarters”) positions such as Fire Prevention, Personnel, Training and Research, and an Officers’ Pool of unassigned officers. (*Administrative Notice [AR:1024-1032,1197-1427; R.Exhs.1 & 2; R.Tr.II:161-164[Malone]*)

10. At the time of the appointments involved in these appeals, BFD field personnel in each work group worked a schedule of 10 hour day shifts, followed by a 14 hour night shift, then a day off, another 10 hour day shift, a 14 hour night shift, and then three days off, when the same rotation started again. Headquarters personnel worked a five day a week “9 to 5” day shift. In practice, field personnel often “swapped” out shifts so that they worked two shifts (24 hours) back to back, which then provided more days off. Currently, BFD has moved to a total 24 hour shift rotation schedule. (*R.Exh.1; R.Tr.II:162-164,194 [Malone]*)

11. BFD is subject to a collective bargaining agreement (CBA) between the City of Boston and the Boston Fire Fighters Local 718, International Association of Fire Fighters, AFL-CIO, which prescribes, among other things, BFD staffing protocols. Prior to July 2009, BFD followed the so-called “senior man” policy prescribed by the CBA to fill “temporary” Fire Captain vacancies through “acting” or “out-of-grade” appointments of the senior Lieutenant in the company commanded by the absent Captain. BFD did not requisition a Certification from the 2007 Captains List or notify HRD when filling any such vacancies. *Administrative Notice [AR:1024-1032,1197-1427] See R.Exhs.10A through 10C, 14 through 16, 22,23,31 & 45)*

12. By letter dated June 19, 2009, HRD notified BFD that “pursuant to civil service law and rules, an appointing authority may not fill a temporary or permanent position on an ‘acting’, ‘out of grade’ or provisional basis for more than thirty days when a suitable eligible list exists from which a certification of more than three names of eligible individual appointment to the position may be issued.” (*R.Exh.4; R.; R.Tr.II:77-137 [Caggiano]*)

13. Regina Caggiano, HRD's Deputy Director of the Organizational Development Group and Civil Service Unit explained the function and role of HRD in the process of making appointments to civil service positions on a short-term basis, both when there is an active civil service list and when there is not. In practice, HRD plays little role in the day-to-day decisions on filling short-term absences in civil service positions. HRD does not receive, and has not required, reports from an appointing authority in cases in which the appointing authority chooses to fill an absence for less than thirty days. In cases that involve appointments longer than thirty days, when and how an absence should be filled (i.e., whether as a "permanent", "emergency" or "temporary" appointment to a vacancy) is left to the discretion of the appointing authority, subject to audit by HRD, which it rarely undertakes. HRD becomes involved in the process of filling temporary vacancies only when it receives a request for a "Certification" from an appointing authority to make a temporary appointment or promotion to fill a vacancy from an active eligible list. The process of issuing and processing such a "Certification" typically requires a month or more. HRD does not get involved in the process of reviewing emergency appointments unless the appointment lasts beyond thirty days in which case HRD approval is required. *(R.Tr.II:77-137 [Caggiano])*

14. When an appointing authority makes a temporary appointment using a Certification from an eligible list, HRD's approval of the appointment is valid for the duration of the vacancy, even when the vacancy extends beyond the expiration of the list from which the Certification was made. Director Caggiano, who has been employed with HRD for eighteen years, knows of no situation in which HRD has ever vacated a temporary appointment pursuant to civil service law. *(R.Tr.II:78, 128-129 [Caggiano])*

15. Per HRD's June 19, 2009 advisory, BFD Fire Chief Keating issued Special Order No. 25, effective July 1, 2009, which provided that, henceforth, BFD would "use promotional lists for any vacancy over 30 days". Thus "senior man" assignments "cannot exceed thirty tours of duty/working days within a sixty day period, which is the ceiling permitted by the civil service law." (*Administrative Notice [AR:1029-1032]; R.Exhs.30 & 46*)

16. As more fully described in Kelley I, a variety of circumstances can lead to an absence in a Captain's position that necessitated a Lieutenant filling in, some anticipated and some unanticipated. The reasons may include personal days off, vacation, bereavement, medical, suspension, temporary reassignment, or other contractually designated reasons for an absence. The published work assignments and other evidence in Kelley I established that, during the 2007 Captain's list, i.e., May 1, 2007 through May 22, 2009, BFD Lieutenants worked approximately 71,500 hours, in the aggregate, as "acting Captains" ("ACG" time) for one reason or another. (*Administrative Notice [AR:132-807,1030-1031,1436-1882,1030-1031]*. See *R.Exhs.14 through 16 & 20*)

17. In Kelley I, I found that none of the "acting Captain" assignments had lasted for more than sixty (60) days at a time and, therefore, were not unlawfully filled under the "senior man" rule. I also concluded that the Appellants had failed to provide sufficient proof as to which specific ACG assignments that were filled by "senior men" were merely short-term absences and which were vacancies that should have been made by appointing one of the Appellants instead. (*Administrative Notice [AR:1031-1032,1040-1045]*)

18. On appeal, the Superior Court held that the Commission's Decision in Kelley I was based on two errors of law: (1) the threshold for unlawful ACG appointments made without HRD approval was thirty (30) days, not the sixty (60) days applied in Kelley I; and (2) Kelley I

improperly placed the burden on the Appellants to show that civil service law had been violated, when, conversely, it was BFD's burden to establish that appointments lasting more than thirty (30) days had been made in compliance with the applicable law. (*R.Exh.5*)

19. The evidence presented at the remand hearing focused on a pre-hearing matrix of ACG appointments during the 2007 Captain's List. The Appellants identified seven (7) assignments in the matrix that began prior to the May 1, 2007 effective date of the 2007 Captain's List:

<u>Position</u>	<u>First Matrix Date</u>	<u>End Date</u>	<u>Workdays</u>	<u>Tours</u>
Ladder 14	05/01/2007	06/19/2007	11	20
Fire Prevention Hazard	05/01/2007	04/29/2009	337	337
Field Support	05/01/2007	01/10/2008	132	132
Rescue 2	05/01/2007	04/25/2008	139	139
Engine 24	05/02/2007	06/01/2007	7	12
Procurement Officer	05/04/2007	05/22/2009	525(est.)#	525(est.)#
Engine 8	05/10/2007	06/19/2007	9	18

Procurement Officer – Full Time 5 days/week

The Appellants also identified the following specific ACG assignments to fire companies and administrative units, after May 1, 2007, listed in chronological order by the first date of reported ACG time:

<u>Position</u>	<u>First Matrix Date</u>	<u>End Date</u>	<u>Workdays</u>	<u>Tours</u>
Ladder 1	05/09/2007	07/05/2007	9	15
Ladder 26	06/02/2007	09/19/2007	26	19
Engine 56	06/14/2007	08/07/2007	19	31
Engine 50	06/25/2007	07/06/2007	5	6
Ladder 2	06/26/2007	08/12/2007	15	24
Engine 20	07/06/2007	08/31/2007	20	20
Engine 2	07/08/2007	08/30/2007	14	23
Ladder 7	07/28/2007	12/24/2007	32	53
Engine 16	08/02/2007	09/14/2007	11	19
Ladder 14	08/09/2007	09/16/2007	10	18
Ladder 1	08/17/2007	08/23/2007	4	5
Engine 56	08/22/2007	08/31/2007	6	7
Engine 50	08/23/2007	08/23/2007	1	1
Engine 52	08/26/2007	12/16/2007	26	46
Engine 51	08/27/2007	10/12/2007	13	25
Ladder 1	09/11/2009	10/01/2007	7	10
Engine 50	09/21/2007	01/26/2008	45	52

<u>Position</u>	<u>First Date</u>	<u>End Date</u>	<u>Workdays</u>	<u>Tours</u>
Ladder 15	09/30/2007	12/27/2007	20	35
Engine 41	10/01/2007	11/29/2007	16	29
Ladder 18	10/25/2007	12/15/2007	16	22
Ladder 1	11/01/2009	12/23/2007	12	19
Engine 53	11/08/2007	12/27/2007	16	27
Marine Unit	11/14/2007	01/02/2008	15	26
Engine 2	11/26/2007	12/29/2007	8	15
Training & Research	12/12/2007	04/24/2008	63	63
Engine 24	12/21/2007	02/14/2008	18	25
Ladder 11	01/11/2008	04/27/2008	25	40
Fire Prevention	02/01/2008	05/08/2008	46	46
Ladder 4	02/17/2008	03/24/2008	10	15
Emergency Management	02/19/2008	12/31/2008	140	140
Engine 41	02/22/2008	04/10/2008	11	17
Engine 24	02/24/2007	04/29/2008	10	18
Fire Academy	03/14/2008	06/20/2008	56	56
Ladder 19	06/07/2008	07/13/2008	10	17
Engine 55	06/22/2008	07/28/2008	16	16
Engine 24	07/02/2008	08/08/2008	13	23
Ladder 14	07/03/2008	08/12/2008	11	20
Engine 32	07/03/2008	08/12/2008	10	19
Personnel	07/07/2008	07/10/2009*	120	120
Engine 30	07/10/2008	09/17/2008	13	24
Ladder 9	07/23/2008	08/31/2008	9	16
Fire Prevention Planning	07/29/2008	11/28/2008	57	57
Ladder 11	08/09/2008	09/10/2008	10	19
Fire Prevention Construction	08/01/2008	10/09/2008	22	22
Engine 52	08/04/2008	11/14/2008	21	34
Engine 10	09/29/2008	12/23/2008	44	46
Ladder 2	10/09/2008	12/26/2008	18	30
Engine 24	10/30/2008	12/01/2008	9	16
Training & Research	11/07/2008	07/10/2009**	148	148
Engine 37	11/03/2008	01/06/2009	16	22
Fire Prevention Construction	11/17/2008	12/31/2008	18	18
Fire Prevention	11/28/2008	12/28/2008	15	15
Marine Unit	12/16/2008	02/04/2009	19	27
Engine 22	01/28/2009	03/09/2009	9	16
Engine 39	02/01/2009	04/01/2009	18	22
Engine 14	02/09/2009	06/14/2009***	39	57
Engine 37	02/20/2008	03/15/2009	6	12
Ladder 7	03/06/2009	04/26/2009	12	22

* Includes 18 Workdays & 18 Tours after 2007 Captain's List expired

** Includes 34 Workdays & 34 Tours after 2007 Captains List expired

***Includes 8 Workdays & 12 Tours after 2007 Captain's List expired

(R.Exhs.1, 1A, 2 & 8, 47ID]; R.Tr.I:117-131 [Kelley], R.Tr.II:181-212 [Malone])

20. BFD Deputy Chief of Personnel Scott Malone analyzed the Appellants' matrix and found that many of the assignments identified by the Appellants as ACG appointments for more than thirty (30) days included "breaks" in the assignments, meaning that the ACG assignment did not coincide with a continuous absence in a Captain's position, but a series of several different ACG assignments, interrupted by a period of days, weeks and sometimes months, during which the position was not filled by ACG assignment, but by a Captain – either the Captain assigned to the apparatus, a "pool" Captain available for field assignments system-wide, or a Captain working overtime under the CBA's "Rank-for-Rank" system which enables officers an opportunity to work a contractually set minimum number of overtime shifts each year. (*R.Exhs.8 & 40; R.Tr.II:50-56 [Kelley]; R.Tr.II:181-212 [Malone]*)

21. For example, the Appellants' matrix shows that 44 tours covering 46 days on Engine 10 were filled with ACG appointments, but the appointments were actually a series of assignments for different reasons. What actually happened was as follows:

- Lt. Dewan was assigned for 36 continuous tours over 36 days from 9/29/08 through 11/14/2008, when he went out injured.
- A Captain then returned to the position and the ACG appointment ended.
- Thereafter, there were 7 additional, unrelated ACG assignments on 11/30/2008, 12/3/2008, 12/4/2008, 12/15/2008, 12/19/2008, 12/20/2008 and 12/23/2008.
- During the rest of the 2007 Captain's list, there were an additional 6 ACG tours, two in February 2009, three in March 2009, and the last one was April 2, 2009.

Thus, for purposes of counting ACG assignments over 30 days, there was actually one ACG assignment of 36 days and several others of one or two days, not a single 46 day assignment as the Appellants' matrix calculated. (*R.Exh.8; R.Tr.II:181-212 [Malone]*)

22. Similarly, the Appellants' matrix for Engine 56 showed two (2) breaks between 6/14/2007 and 8/31/2007. Ladder 7 shows six (6) breaks during the period from 7/28/2007 to 12/23/2007. Engine 52 shows three (3) breaks during the period from 8/25/2007 to 12/16/2007. Engine 50 shows at least three (3) breaks during the period from 9/21/2007 to 1/26/2008. Engine 14 showed 39 tours over 57 days from 2/9/2009 to 6/14/2009, but there were actually three separate breaks in this schedule when a Captain was assigned to work the shift. Thus, in fact, none of the ACG time at these four companies can be attributed to the absence of a Captain on these fire companies for more than 30 days. (*R.Exhs.1, 2 & 8; R.Tr.II:181-212 [Malone]*)

23. At the hearing, the Appellants asserted a new claim that "all ACG" appointments, not just those over 30 days, were illegal and proffered a reformatted matrix of ACG time that purported to infer additional "acting captain" opportunities that were not been previously identified as such in the pre-hearing matrix of assignments described above, with new annotations inserted by Lt. Kelley. BFD objected to these documents as untimely, in reliance on the pre-hearing procedural orders that required the Appellants to disclose all of the specific temporary appointments that they intended to claim were made in violation of civil service law. The documents were marked for identification and I have given no weight to any of the data or annotations on these exhibits that were not previously included in the original pre-hearing matrix and disclosures provided to the BFD, save for taking notice that the documents corroborated the undisputed fact that HRD did not receive any requests to fill vacancies at BFD as "emergency" appointments during the life of the 2007 Captain's list. (*R.Exh.37ID, 38ID, 39; R.Tr.I:137-143, 155-158; R.Tr.I:27, 50-60 [Kelley]73-81,94-108, 127-134,146-161; R.Tr.II.1-11 [Colloquy & Evidentiary Rulings]*)³

³ To the extent that the newly formatted matrix merely adds to the examples of ACG appointments for periods shorter than 30 days, the evidence would be immaterial to the Commission's decision, which, as explained below, turns on the application of the 30-day threshold, not the "even one day of ACG" threshold that the Appellants new theory asserted.

24. BFD Deputy Chief Malone also explained that ACG headquarters assignments stood on a different footing from field assignments. Most headquarters positions require particular training, skills and knowledge that field officers do not typically possess. (*R.Tr.II:154-173 [Malone]*)

25. Deputy Chief Malone also explained that many officers considered headquarters assignments, where fire suppression duty and overtime opportunity is limited, to be less desirable than field assignments. For this reason, for many years, BFD agreed to provide a so-called “headquarters add-on”, which is a stipend above an officer’s regular pay for filling a special assignment to headquarters position. Originally, “everybody worked their own deal” until the add-on was standardized under the CBA, with stipends depending on grade from \$6,000 to \$14,000 a year. Personnel who had a prior individual contractual agreement for a larger specific stipend “got to keep their deal” and continued to receive their individually negotiated “add on” amount in these “red-circled” positions. (*R.Tr.II:41-49[Kelley]*; *R.Tr.II:23-231 [Malone]*)

26. One of these “red-circled” positions was the Procurement Officer assignment that the Appellants had identified as having begun prior to the May 1, 2007 effective date of the 2007 Captain’s List and continued throughout the life of the list (and presumably beyond). This job was not a Captain’s position, however, but a Lieutenant’s position that was filled by George Patukonis, a firefighter who was working “FOG” (Firefighter Out of Grade). This was not an ACG assignment. The enhanced pay shown in the matrix documents for this assignment, although it appears comparable to a Captain’s pay, actually reflected the “red-circled” headquarters add-on to a Lieutenant’s pay. (*R.Tr.II:227-230 [Malone]*)

27. As to the Personnel Office headed by Deputy Chief Malone, the duties involve management of unique, often confidential, issues, including overseeing the medical office, payroll, labor relations and personnel policies. Most officers in the Personnel Office have been

assigned there for a decade or more. The selection of an officer for this assignment requires a demonstrated interest in the position and a “desire to stay in the position”, which requires months of training in order to become proficient. (*R.Tr.II:154-17, 245-247 [Malone]*)

28. Lt. Kelley did not know what specialized training or skills were required for the position of Captain in Personnel, Emergency Management or Fire Prevention Construction. He thought there were no such special requirements or training to perform as a Captain in the Marine Unit. As Lt Kelley was the only appellant who testified, there was no evidence as to the training and experience that qualified any of the other appellants for such headquarters assignments or evidence that, if offered the assignment, they would have accepted it. (*R.Tr.I:62-65 [Kelley]; R.Tr.II:16-40 [Kelley]*)

Applicable Civil Service Law

Under the applicable civil service law and rules, original and promotional appointments to fill a permanent or a temporary “vacancy” in a municipal fire service position must be made after a certification is requisitioned from HRD that is prepared from among the current eligible list of candidates ranked highest in the order of their marks on the qualifying competitive examination, according to the so-called “2n+1 rule”. See G.L.c.31, §§ 7, 25-27 & 59; PAR.07, PAR.08 & PAR.09.⁴ In general, each eligible list lasts for a period of two years, after which it expires and is replaced by a new eligible list compiled from the results of a newly administered examination. G.L.c.31, §25.

An appointing authority who selects a candidate from a Certification for permanent or temporary appointment ranked below a more highly ranked candidate within the 2n+1 formula, must provide “sound and sufficient” reasons to demonstrate “reasonable justification”, after a

⁴ The “2n+1 rule” means that a vacancy must be filled from the top listed candidates on the eligible list who sign a Certification as willing to accept the appointment. For one vacancy, that means the top three candidates, two vacancies means the top five, and so forth. PAR.09(1). See R.Exhs.24A, 24B, 25.

“thorough review”, for bypassing the higher ranked candidate, which is subject to “de novo” review by the Commission. G.L.c.31, §2(b) & §27; PAR.08(4). See, e.g., Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 688-89 (2012); Brackett v. Civil Service Comm’n, 447 Mass. 233, 241 (2006), citing G.L.c.31, § 2(b); Beverly v. Civil Service Comm’n, 78 Mass.App.Ct. 182, 187 (2010). The Commission requires a person aggrieved by an “action or inaction” which results in a bypass must bring an appeal within 60 days after notice of the bypass. Commission Rule effective October 1, 2000, <http://www.mass.gov/anf/hearings-and-appeals/oversight-agencies/csc/bypass-appeal-statute-of-limitations.html>.

Pursuant to the authority granted to the Commission under Chapter 310 of the Acts of 1993, a candidate who was bypassed without reasonable justification is entitled to be placed at the top of all current and future Certifications until the candidate has received at least one further consideration for appointment to the position involved. See St. 1976, c. 534 as amended by St. 1993, c. 310. See e.g., O’Connor v. Boston Police Dep’t, 22 MCSR 660 (2009) (police officers deprived of temporary appointments to police captain by unlawful “out of grade” assignments of other officers, ordered to be placed on the eligible list for police captain for as long as it took to make at least one temporary promotion to police captain); cf. Gagnon v. City of Chicopee, 25 MCSR 20 (2013) (remedy for firefighter unlawfully assigned to Lieutenant’s position “out-of-grade” instead of as temporary appointment given an adjusted retroactive seniority date if and when appointed to permanent Lieutenant); McDaid-Harris v. City of Peabody, 23 MCSR 363 (2010) (ordered adjustment to seniority date of police sergeants deprived of temporary appointments through unlawful “out-of-grade” assignments so that the period for they were eligible for such appointments [there, eight months] would be added to their seniority date. If and when they were later appointed as Lieutenant in the future)

Under G.L.c.31,§31, in lieu making “temporary” or “permanent” appointments from the applicable eligible list, in some cases, “emergency” appointments are authorized for periods of thirty days, subject to renewal with HRD’s approval: That statute provides, in relevant part:

An appointing authority may, without submitting a requisition to the administrator [HRD] and without complying with other provisions of the civil service law and rules incident to the normal appointment process, make an emergency appointment to any civil service position. . . for a total of not more than thirty working days during a sixty day period. Such appointment shall be made only when the circumstances requiring it could not have been foreseen and when the public business would be seriously impeded by the time lapse incident to the normal appointment process. Upon making such an appointment, the appointing authority shall immediately notify the administrator in writing, in such form and detail as the administrator may require, of the reason for the appointment and the expected duration of the employment thereunder. No renewal of such emergency appointment shall be made without the consent of the administrator.

An emergency appointment may, upon written request of the appointing authority and with the consent of the administrator, be renewed for an additional thirty working days. The administrator shall not consent to more than one such renewal of the appointment unless the position is in a department . . . connected with the public safety or public health and the public service would suffer if a second renewal were not granted, in which case the administrator may consent to a second renewal. No person shall receive more than one such appointment and renewal, as the case may be, in any twelve month period, except as otherwise provided in this section. (*emphasis added*)

Neither the civil service law, nor the Superior Court’s decision in Kelley I, specifically address what constitutes a “vacancy” or an “emergency”, or whether the vacancy is “permanent” or “temporary”. An appointing authority is granted considerable latitude in making those decisions as a prerogative of sound management control over staffing levels, assignments and duties as to which, in the absence of arbitrary or capricious behavior, the Commission will not generally intrude. See 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); 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)

Analysis

The principal purpose of the hearing after remand was to enable the Commission to reconsider its original decision in Kelley I to determine whether the decision would be any different by application of a 30-day threshold for requiring the requisition of a Certification to fill a vacancy in the position of a BFD Captain, as opposed to the 60-day threshold used by the Commission and declared unlawful by the Superior Court. In addition, each party raised other issues, some not previously asserted. The Appellants contended that every ACG appointment made throughout the life of the 2007 eligible list was illegal, not just those which had lasted over thirty days and they should have been “considered” for appointment for all of them, not just those that arose after they had reached the “2n+1” level at the top of the list. BFD argued that the subsequent retirement of Lt. Kelley and Lt. Finn mooted their claims and that all the Appellants claims to ACG appointments that were made more than 60 days prior to the filing of their appeals were time-barred. BFD also argued that mere loss of “consideration” for a temporary appointment did not rise to the level of prove the Appellants were aggrieved by an actual impairment of their civil service employment rights. BFD reasserted the contention that, contrary to the Superior Court’s opinion, the 60-day threshold was, in fact, the correct one.

First, the 60-day period within which a candidate must appeal to the Commission after notice of an “action or inaction” that resulted in an unlawful bypass is a jurisdictional matter that the Commission has strictly enforced. See, e.g., Lane v. Newburyport Police Dep’t, 28 MCSR 587 (2015), citing Pugsley v. City of Boston, 24 MCSR 544 (2011); Gagnon v. Boston Fire Dep’t, 28 MCSR 179 (2015); Costa v. City of Brockton, 28 MCSR 87 (2015)

BFD's point is well-taken that the Appellants are not entitled to seek relief from what amount to their allegedly illegal bypass for temporary appointments that were made more than 60 days prior to the filing of this appeal in April 2009. The evidence at the original hearing and at the remand hearing (see, e.g., assignment rosters such as R.Exhs.14 through 16) clearly established that it was well-known within the BFD that absences were filled by the use of the alleged "senior man" assignment under the CBA and not from civil service lists. The Appellants took no action to challenge this practice until the 2007 Captain's List was about to expire. They either were not on the next 2009 Captain's List or were far down on that list. The Appellants' laches in asserting an appeal provides compelling reason to confine the scope of their claim to relief, if any, to a 60-day look-back period consistent with the statutory limitations on bypass appeals. According to the matrix prepared by the Appellants, the last appointment over 60 days was in November 2008, five months before these appeals were filed. All other ACG appointments in 2009 lasted fewer than 30 days.

Second, even were the Commission to excuse the Appellants' laches and examine the matrix of assignments made throughout the life of the 2007 Captain's List, the Appellants overstate the number of those assignments that arguably should have been made as "temporary appointments" to one of the Appellants from the 2007 Captain's List.

- As to the assignments to positions that were in place before the effective date of the 2007 Captain's List, the evidence showed that, even if such appointments ought to have been made from a civil service list, the applicable list would have been the previous list in effect prior to May 1, 2007. Thus, the appointment made to such a position, as HRD Director Caggiano explained, would have lasted for the duration of that appointment. Even if these appointments were illegal, the Lieutenants at the top

of the prior list, not the Appellants, would be the only officers potentially aggrieved by such allegedly improper assignments.⁵

- As to the assignments made during the life of the 2007 Captain's list, the proper number of appointments that could arguably be ones that should have been made from a civil service list must be limited to those that covered a period of more than 30 working days. This is the standard that HRD follows and it was the standard enunciated by the Superior Court in its decision that remanded these appeals for further hearing. HRD has never imposed the requirement that appointments made to fill absences or vacancies, whatever the reason, must be reported to HRD any sooner than 30 days. HRD, does not, and is not required to, take any action to review, approve or validate any such appointments that last 30 days or less.⁶ Moreover, as the evidence showed, a month or more was typically needed for HRD to issue and BFD to process a certification. Thus, as a practical matter, appointments from a civil service list to fill all short-term absences simply are not viable, as the absence to be filled will no longer exist by the time the certification is processed and an appointment could be made.
- Some ambiguity exists as to whether the thirty (30) "working days" under G.L.c.31, §31 that triggers a requirement to seek approval from HRD for an "emergency" appointment means calendar "days", "shifts" or "tours". The question arises solely because most public safety work (police and fire) has gravitated to a unique shift

⁵ For the same reason, the full duration of any appointments made during the life of the 2007 Captain's List that extended after the expiration of that list would be the proper measure of the length of such appointments for purposes of the analysis of the Appellants' claims.

⁶ In this regard, even if the appointments were deemed "emergency" in nature, the statutory requirement to report that appointment to HRD "immediately" is a ministerial act that does not in any way affect the validity of the appointment. See, e.g., Malloch v. Town of Hanover, 472 Mass. 783 (2015) (HRD's duty to "receive" bypass reasons did not imply any intent that HRD make a substantive "review or issue a "decision")

rotation over a seven day work week that is atypical of most civil service “9 to 5” five days/week jobs. It is not likely that, when the legislature adopted G.L.c.31, §31, it had this situation in mind. In a related context, a firefighter’s suspension for four 24-hour shifts spread over a sixteen day period without a prior hearing was set aside because the Appeals Court held that the statute (G.L.c.31,§41) required a prior hearing unless the suspension was for a “period of five days or less”. See Thornton v. Civil Service Comm’n, 80 Mass.App.Ct. 441, rev.den., 461 Mass. 1102 (2011) Although a plausible argument can be made for a different interpretation, I conclude that the most rational interpretation that is consistent with the plain language of the statute and probable legislative intent, as well as most practical from an administrative perspective, is to apply the 30-day threshold under G.L.c.31,§31 to allow an appointing authority (which may or may not be a public safety agency) to fill an absence for thirty calendar “working days” prior to seeking approval for an extension from HRD. Under the specific facts of these appeals, however, the analysis of the Appellants’ claims produces no different results under whatever interpretation of “working days” may be used.

- Finally, I note that the second paragraph of G.L.c.31,§31 provides a special rule for a “department . . . carrying out functions connected with public safety or public health”, As such, BFD would not necessarily be limited to a single renewal of an “emergency” appointment. This proviso seems to provide further recognition that, in the public safety arena, the legislature contemplated that there would be circumstances in which interim appointments would be necessary for longer periods than might be typical for more traditional civil service employment setting.

Applying these principles, the ACG appointments that arguably required an “emergency” or “temporary appointment” from the 2007 Captain’s List are narrowed down to the following positions:

<u>Position</u>	<u>First Matrix Date</u>	<u>End Date</u>	<u>Workdays</u>	<u>Tours</u>
Engine 56	06/14/2007	08/07/2007	19	31
Ladder 7	07/28/2007	12/24/2007	32	53
Engine 52	08/26/2007	12/16/2007	26	46
Engine 50	09/21/2007	01/26/2008	45	52
Training & Research	12/12/2007	04/24/2008	63	63
Ladder 11	01/11/2008	04/27/2008	25	40
Fire Prevention	02/01/2008	05/08/2008	46	46
Emergency Management	02/19/2008	12/31/2008	140	140
Fire Academy	03/14/2008	06/20/2008	56	56
Personnel	07/07/2008	07/10/2009	120	120
Fire Prevention Planning	07/29/2008	11/28/2008	57	57
Engine 10	09/29/2008	12/23/2008	44	46
Training & Research	11/07/2008	07/10/2009	148	148

Third, the Appellants can arguably claim to be aggrieved by non-appointment to only some of these thirteen positions.

- As to the first four appointments, none of the Appellants had risen to within the top “2n+1” on the list as of the End Date of those appointments, so that, even assuming that the Appellants’ claims to those positions were timely, none were within range to be considered, as a matter of law, for those appointments.
- As to the remaining ten positions, the Appellants’ relative standing on the 2007 Captain’s List, and the respective, arguably available, ACG assignments at the time was as follows:

4/18/2008 – Upon promotion of Lt. Colin Kelley, Appellants Kelley and Sifford rose to be tied for second place on the list. Appellant Finn was third and Appellant MacDougall was fourth. At this time, there were only two ACG appointments still

on-going that continued for more than 30 days thereafter: (1) Emergency Management – 126 workdays remaining through 12/31/2008; and (2) Fire Academy – 34 workdays remaining through 6/20/2008. If the 2007 Captain’s list were used for these two appointments, the five officers within the “2n+1” range would include Lt. McGillis, first on the list, as the presumptive appointee, and Lt. Kelley or Lt. Sifford, tied for second, the presumptive appointee for the other position.

9/26/2008 – Upon promotion of Lt. McGillis, Appellants Kelley and Sifford moved to the top of the list, Lt. Finn to third and Lt. MacDougal to fourth. At this point, there were two more on-going ACG appointments that continued for more than 30 days thereafter: (1) Personnel – 76 workdays remaining through 7/10/2009; and (2) Fire Prevention Planning - 22 workdays remaining through 11/28/2008. At this point, assuming Lt. Kelley had been appointed to the Emergency Management vacancy above and was still serving in that job, the other three Appellants would be considered to be within the “2n+1” range and eligible for temporary appointment from the 2007 Captain’s List in their respective rank order, provided they all signed the hypothetical certification as willing to accept a temporary assignment at that time.

9/29/2008 – The ACG assignment on Engine 10 began and continued for 36 work days until Lt. Dewan was injured on 11/14/2008 and replaced by a Captain. Had this appointment been made from the 2007 Captain’s List, the “2n+1” range would include Lt. Kelley and Lt. Sifford at the top and Lt. Finn in second place. Lt. MacDougall would be within range only if one of the three of the Appellants ahead of him was still in another ACG position or did not sign the hypothetical certification as willing to accept the temporary assignment for some other reason.

11/7/2008 – The ACG assignment to Training and Research was made and lasted for 148 workdays through 7/10/2009. Assuming that at least one of the Appellants did not sign the hypothetical certification (presumably at least one Appellant would still be serving in an ACG capacity in one of the previously identified positions above), the other three Appellants would be within the “2n+1” range eligible for appointment to the Fire Prevention Planning Position so long as they were not already serving in an ACG position.

- I have concluded that the most likely and rational basis on which to reconstruct who would have been most likely to have received which of the appointments above if they had been made from the 2007 Captain’s List is to infer, in the absence of any evidence to the contrary, that the assignments would have been made in rank order from the Appellants’ respective standing on the eligible list as they came available.
- Finally, BFD made a credible argument that, with respect to the headquarters positions, there were special qualifications that would limit who BFD would consider for these assignments and that the Appellants were not qualified for these positions. Even assuming that were true, however, an Appellant who was bypassed for such a position would have had the opportunity to appeal that decision. Therefore, for purposes of the deciding the claims presented in the present appeal, i.e., whether or not an Appellant’s civil service rights have been violated), it is immaterial whether an Appellant should have been appointed to a ACG headquarters position or the BFD had “reasonable justification” to bypass him as not qualified.

In sum, I conclude that, in addition to the the untimeliness of the appeals, the Appellants’ evidence established that they were eligible only for the following four ACG assignments,

respectively, made during the life of the Captain's list that were either "temporary" promotions that should have been made from the 2007 Captain's List or were "emergency" appointments that lasted more than thirty days which should have been made either from that list under G.L.c.31, §8 or with renewal approval of HRD under G.L.c.31,§31::

4/18/2008 – one appointment - Lt. Kelley (Emergency Management [126 workdays through 12/31/2008])

9/26/2008 – one appointment each - Lt. Sifford (Personnel [76 workdays through 7/10/009] & Lt. Finn (Fire Prevention Planning [22 workdays through 11/28/2008])

9/29/20008 – one appointment – Lt. MacDougall (Engine 10 [36 workdays through 11/14/2008])

11./7/2008 – no appointments (all Appellants then serving in other ACG positions – position would be filled by the next Lt. on the 2007 Captain's List)

Fourth, the Appellants' other contentions can be addressed summarily. The Appellants devote a considerable portion of their argument (Appellants' Memorandum, pp. 15-30) to an effort to establish a scheme of "serial reappointments" throughout the BFD intentionally designed to frustrate the use of civil service lists for filing temporary absences and vacancies. As noted above, the evidence fails to establish any such intentional pattern or practice. BFD acknowledged that it had used the "senior man" system but did so because, until HRD advised it otherwise, had believed it was the required under the CBA. The Appellants' lengthy and obtuse efforts to prove some system-wide manipulation of officer assignments is not credible. Moreover, to the extent that the Appellants' arguments rest on interpretation of the terms of the CBA such as "minimum staffing" requirements, BFD correctly points out that these are matters for collective bargaining law and do not inform the subject of civil service rights as to which the Commission's decisions must be confined. Similarly, neither the Appeals Court's opinion in City of Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, rev.den., 396 Mass. 1102 (1985), nor the Commission's Decision in Greely v. Belmont, 19 MCSR 2006 provides

succor. The Somerville case involved an arbitrator's award that had ordered back pay to certain employees under a CBA. See also, City of Springfield v. Local Union No. 638, Int'l Ass'n of Firefighters, AFL-CIO, 88 Mass.App.Ct. 1 (2015) (arbitration award for back pay due under CBA for acting out of grade) The Greely appeal involved a single "provisional" appointment that deprived another firefighter who was at the top of the eligible list the opportunity for promotion to the position of permanent Lieutenant, which resulted in relief to that Appellant to assure he received another consideration for such a permanent promotion, clearly inapposite to the present issues involving temporary and emergency appointments.

Fifth, the Commission need not address BFD's contention that the Commission's original decision in Kelley I correctly applied the 60-day rule for "emergency" appointments under G.L.c.31, §31. The Commission is obliged, unless otherwise informed by further judicial review, to apply the holding of the Superior Court as mandated by its remand opinion and will not revisit that subject here.

Conclusion

As the Appellants failed to bring a timely appeal within the requisite 60-day time limit following any of the four ACG appointments that they have shown were not made in accordance with civil service law and for which they arguably should have been appointed, these appeals must be dismissed.

I also note that, as explained above, had these appeals been timely, the relief that the Appellants could have received from the Commission would have been the traditional, prospective equitable relief granted in bypass cases that the Commission provides to civil service employees who establish that they were unlawfully bypassed for a permanent or temporary civil service appointment. That relief provides for an order that an appellant's name be placed at the

top of the current and all future certifications for appointment to the position for which that appellant was denied consideration through no fault of his own so that the appellant receives at least one future consideration for such an appointment. See St. 1976, c. 534 as amended by St. 1993, c. 310; O'Connor v. Boston Police Dep't, 22 MCSR 660 (2009); Gagnon v. City of Chicopee, 25 MCSR 20 (2013); McDaid-Harris v. City of Peabody, 23 MCSR 363 (2010). The Commission has uniformly declined to grant retrospective monetary relief in a bypass case, leaving that issue to be addressed by mutual agreement of parties or in accordance with any applicable requirements of a collective bargaining agreement. See, e.g., City of Springfield v. Local Union No. 638., Int'l Ass'n of Firefighters, AFL-CIO, 88 Mass.App.Ct. 1 (2015); Schifone v. Town of Stoughton, 27 MCSR 543 (2014) I find there were no reasons shown in this case to depart from this well-established rule of the Commission. Thus, even if the Appellants had filed a timely appeal, the appropriate relief any of them would have received for their respective loss of one opportunity for a temporary appointment to Captain would have been to provide them each with one such future opportunity to be so appointed. They proved no right to any other or further relief.

In addition, the intervening retirement of Lt. Kelley and Lt. Finn also render moot any relief that those two Appellants might have received from the Commission. They no longer work for BFD. The Commission has no authority to alter their retirement status and restore them to active service with BFD. Lt. Kelley's claim that he is also aggrieved because he would have been retired as a Captain instead of Lieutenant simply is not supported by the facts. The one appointment to Captain that I find he arguably might have received (Emergency Management) would have ended on December 31, 2008, and, thus, he would have been serving as a Lieutenant when he was subsequently injured and first went out on disability in January 2009. Moreover,

even if he had been an acting Captain when he was placed on disability, he did not retire until May 2012. Whether or not he would be entitled to Captain's pay under the facts and the law is a matter of pension law, not civil service law. The Commission lacks jurisdiction to make any adjustments to the pension of a retired civil service employee.

For the reasons stated herein, the appeals of the Appellants, Joseph Kelley and Michael Finn are *dismissed as untimely and moot*. The appeals of the Appellants, Michael Sifford and Lawrence MacDougall are *dismissed as untimely*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein, and Tivnan, Commissioners) on March 17, 2016.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

F. Robert Houlihan, Esq. [for Appellants]

Robert J. Boyle, Jr., Esq. [for Respondent]

John Marra, Esq. [HRD]