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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT
CIVIL ACTION
NO. 1984CV03945-F

**JOSEPH KELLEY, PHILLIP SIFFORD,
MICHAEL FINN, and LAWRENCE MACDOUGALL**

vs.

**CITY OF BOSTON FIRE DEPARTMENT and
MASSACHUSETTS CIVIL SERVICE COMMISSION**

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFFS' AND CIVIL SERVICE COMMISSION'S
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS
AND BOSTON FIRE DEPARTMENT'S MOTION TO DISMISS**

Plaintiffs are former Fire Lieutenants with the Boston Fire Department ("BFD"). More than a decade ago, they filed an appeal to the Civil Service Commission ("Commission") claiming to be aggrieved by the BFD's use of a "senior man" system to fill temporary vacancies in the Fire Captain position. The appeal claimed that the BFD should have instead used the 2007-2009 list of persons eligible for promotion to Captain compiled by the Massachusetts Human Resource Department -- a list on which plaintiffs' names appeared. The Commission twice dismissed the appeal and this Court twice remanded the matter after concluding the Commission committed errors of law. The plaintiffs now seek review of the Commission's latest decision, which relates solely to the relief to be accorded to the plaintiffs. Both the plaintiffs and the Commission have moved for judgment on the pleadings pursuant to Rule 12(c), Mass.R.Civ.P. The BFD has separately moved to dismiss the Complaint. The Motion to

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Dismiss is **DENIED** but the Commission's Motion for Judgment on the Pleadings is **ALLOWED**.

BACKGROUND

Before 2009, the BFD engaged in a practice known as the "senior man" system in which the BFD, rather than using HRD's eligible list for promotion to Captain, filled temporary Captain vacancies through acting or out-of-grade appointments of the senior Lieutenant in the company commanded by the absent Captain. Kelley v. Boston Fire Dep't, 29 MCSR 176 (2016) (Kelley II); Ex. 2 to Pls. Memo. in Supp. at 7.¹ In July 2009, the BFD suspended use of this system for vacancies lasting more than 30 days. That was because HRD informed it 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 to make an appointment. Id. at 7, quoting HRD's June 19, 2009 letter. See also id. at 9; AR 58-59.

Plaintiffs were on HRD's 2007-2009 eligible list for promotion to Captain ("2007 Captain's List"). In April 2009, they filed an appeal with the Commission claiming that the BFD had violated the civil service law by filling temporary captain vacancies during the 2007-2009 period using the senior man system. They argued that, had BFD used the 2007 Captain's List as it should have, they would have been eligible to be placed in these vacancies. The Commission dismissed the appeal in January 2012, concluding that BFD's appointments during the years in question constituted permissible emergency appointments pursuant to G.L. c. 31, §

¹ The Commission's first decision in this proceeding (Kelley I), this Court's 2013 decision, and the Commission's second decision (Kelley II) are attached as exhibits to plaintiffs' Memorandum of Law. The page references herein are to those exhibits.

31.² Kelley v. Boston Fire Dep't, 25 MCSR 23 (2012) (Kelley I); Ex. 1 to Pls. Memo. in Supp. at 20-25. See also AR 85 (describing Kelley I). The plaintiffs appealed this decision to the Superior Court.

In an opinion dated August 5, 2013, the Court (Leibensperger, J.) allowed the plaintiffs' Motion for Judgment on the Pleadings. Kelley v. Boston Fire Dep't, No. 1284CV00571; Ex. 2 to Pls. Memo. in Supp. The Court found that the Commission's interpretation of G.L. c. 31, § 31 was mistaken; the Court further found that the Commission had improperly put the burden on the plaintiffs to prove that the statute did not apply to the appointments at issue. Ex. 2 to Pls. Memo. in Supp. at 6. Judge Leibensperger remanded the matter, instructing the Commission to "conduct a new evidentiary hearing" where the plaintiffs would "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) had the law been followed, they should have received because of their position on the promotional list." Id. at 7. See also AR 85-86 (describing Court's decision).

The Commission conducted a new evidentiary hearing, and in March 2016, again dismissed the plaintiffs' appeal (Kelley II). The Commission found that the BFD had made four invalid Captain appointments for which the plaintiffs would have been eligible. However, it also concluded that the appeal was untimely because the appointments resulted in bypasses of the plaintiffs and the plaintiffs had filed their appeal outside the deadline for bypass appeals. Ex. 4 to Pls. Memo. in Supp. at 4, 18-26. The Commission further found that the intervening retirements of plaintiffs Joseph Kelley and Michael Finn had rendered their appeals moot

² That statute provides an exemption from the civil service law and rules incident to the normal appointment process for emergency appointments.

because the Commission only provided prospective equitable relief in bypass cases -- namely, placement on the top of current and future eligibility lists. *Id.* at 26-27. The Commission noted that it had a long-standing practice of declining to grant retrospective monetary relief in a bypass case. *Id.* at 27. See also AR 86-87 (describing Kelley II).

The plaintiffs again appealed to the Superior Court and, by decision dated February 19, 2018, this Court (Tochka, J.) allowed the plaintiffs' Motion for Judgment on the Pleadings. Kelley v. Boston Fire Dep't, No. 1684CV01233; AR 1-6. The Court concluded that the Commission erred when it had classified the BFD's actions as a bypass and applied the bypass limitations period; that was because (in the Court's view) the BFD had not followed the formal bypass process described in G.L. c. 31, § 27. AR 4-5. The Court further concluded the determination that plaintiffs' appeals were moot was also in error, since that finding was based on the Commission's mistaken view that plaintiffs had been "bypassed." AR 6. The Court rejected the BFD's argument that the plaintiffs had not suffered a direct or substantial harm to their employment status and therefore lacked standing to appeal to the Commission or the Court. AR 5-6. The Court remanded the matter back to the Commission "to exercise its broad discretion to determine the appropriate equitable relief for each of the Plaintiffs under Chapter 310 of the Acts of 2003." AR 6. The Court's Order specifically provided: "The Commission's March 17, 2016 decision is **VACATED** with respect to its finding that a bypass occurred and that the Plaintiffs' appeal was untimely. This matter is **REMANDED** back to the Commission to determine the appropriate relief."³ AR 6.

³ The BFD filed a motion for reconsideration with the Court, which the Court denied with a margin endorsement: "This Court did not order, contrary to Defendants^[1] argument, the Commission to enter any particular type of relief, but rather left it to the Commission to 'determine the appropriate relief' under the circumstances." AR 7. Thereafter, the BFD filed an interlocutory appeal with the Appeals Court which was denied without prejudice on May 15, 2019. Kelley v. Boston Fire Dep't, 2019-P-0455 (2019); AR 87.

On remand, the Commission did not conduct an evidentiary hearing. Instead, it requested and received from the parties briefing regarding the appropriate relief to be awarded to the plaintiffs. AR 42, 88. The Commission thereafter issued its third decision (Kelley III). It ordered the BFD to compensate the plaintiffs for the “difference in pay between Fire Lieutenant and Fire Captain” as applied to the four assignments that the plaintiffs would have hypothetically been eligible to have received if the BFD had complied with civil service laws, as earlier determined in Kelley II. AR 90-91. In doing so, the Commission expressly declined the plaintiffs’ invitation to “revisit its findings in Kelley II regarding how many tours (at the higher title of temporary Captain) each of the [plaintiffs] lost out on due to the use of acting, out-of-grade appointments.” It did so because those findings had not been vacated by Judge Tochka when he remanded the case. AR 88. This lawsuit followed.

DISCUSSION

Appeals from decisions of the Commission are governed by G.L. c. 30, § 14. See G.L. c. 31, § 44. As such, judicial review of a Commission decision is “narrow and deferential,” Buchanan v. Contributory Retirement Appeal Bd., 65 Mass. App. Ct. 244, 246 (2005), and the party appealing its decision bears a “heavy burden” of demonstrating its invalidity. Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 263-264 (2001). The Court may only set aside the decision if it is “based on an error of law, unsupported by substantial evidence, or otherwise not in accordance with the law.” Police Dep’t of Boston v. Kavaleski, 463 Mass. 680, 689 (2012), citing G.L. c. 30A, § 14(7). The court “is not to substitute its judgment on questions of fact or exercise of discretion.” School Committee of Brockton v. Civil Service Comm’n, 43 Mass. App. Ct. 486, 490 (1997) (internal quotes omitted). The court must “accord due deference and weight not only to the Commission’s ‘experience,

technical competence, and specialized knowledge,' but also 'to the discretionary authority conferred upon it.'" *Id.*, quoting G.L. c. 30A, § 14(7).

As an initial matter, the Court rejects the BFD's assertion that the Complaint should be dismissed because the plaintiffs were awarded damages as a result of Kelley III and therefore are not "aggrieved persons" entitled to seek judicial review of the Commission's decision under G.L. c. 31, § 44. The plaintiffs are aggrieved persons because they contend that the Commission in Kelley III failed to afford them all the relief to which they were entitled. The Court also rejects the BFD's contention that the Complaint should be dismissed because Judge Tochka's 2018 ruling was in error. That ruling was already the subject of a motion for reconsideration by the BFD. This Court declines to revisit it.

Turning to the plaintiffs' and the Commission's Motions for Judgment on the Pleadings, the Court concludes that the Commission's decision must be upheld. The plaintiffs argue that the Commission erred in Kelley III by failing to hold an evidentiary hearing and by accepting, for purposes of calculating damages, the findings in Kelley II regarding which temporary appointments the plaintiffs were unlawfully denied. There was no error.⁴

In his 2018 decision, Judge Tochka did not find any error with or question the Commission's factual findings that BFD had made four invalid appointments to the position of Captain for which the plaintiffs would have been eligible. Instead, he concluded that the Commission should not have additionally ruled that the plaintiffs' claims were time-barred and moot. Judge Tochka then specified that the Commission's decision in Kelley II was only "**VACATED** with respect to its finding that a bypass occurred and that the Plaintiffs' appeal was untimely. " He sent the case back to the Commission to "determine the appropriate relief" that

⁴ At the hearing, the plaintiffs clarified that they do not contend that the Commission was required to award them certain pension enhancements or attorneys' fees.

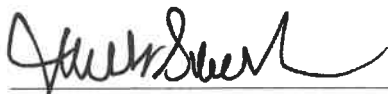
should be afforded to the plaintiffs. AR 6. Unlike the 2013 decision, the Court did not expressly require the Commission to hold a new evidentiary hearing.

In light of Judge Tochka's order, the only issue that remained for the Commission on remand was a determination of the appropriate remedy. In dealing only with that issue, the Commission adopted the findings of Kelley II regarding which Captain's positions plaintiffs were eligible for and used those findings to calculate damages. This Court sees no error in that approach. The plaintiffs had an opportunity to challenge the Commission's findings in Kelley II when they were before Judge Tochka but did not. Those findings therefore stand and this Court's review in this action is properly confined to Kelley III's determination of damages based on the facts found in Kelley II.

Reviewing that determination, the Court concludes that there was nothing unlawful about the damages the Commission awarded. As noted in Judge Tochka's 2018 decision, the Commission has broad discretion to fashion an appropriate remedy. There is nothing in the administrative record to indicate that the Commission abused that discretion when it issued Kelley III. See Boston Pres. All., Inc., 396 Mass. at 498; St. 1993, c. 310, § 1. At the time that the Commission issued this decision, the plaintiffs were all retired so that traditional forms of non-monetary relief (e.g., placement at the top of the next certification for the next civil service appointment) were not possible. Thus, the Commission reasonably sought to make the plaintiffs whole by granting them the difference in pay between Fire Lieutenant and Fire Captain for the four assignments they were denied due to the BFD's practices.

CONCLUSION AND ORDER

For the reasons set forth above, the plaintiffs' Motion for Judgment on the Pleadings is **DENIED**, the Civil Service Commission's Cross-Motion is **ALLOWED**. It is hereby **ORDERED** that judgment enter **AFFIRMING** the Commission's decision.



Janet L. Sanders
Justice of the Superior Court

January 20, 2022