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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2021-06256

MICHAEL LYNCH

vs.

COREY F. WILLIAMS & another[1]

MEMORANDUM OF DECISION AND ORDER ON AFSCME COUNCIL 93'S MOTION FOR SUMMARY JUDGMENT

After the Town of Arlington ("Town") passed over plaintiff Michael Lynch ("Lynch") for a civil service position in favor of Brian Mount ("Mount"), Lynch appealed the Town's decision to the Civil Service Commission ("Commission") with the assistance of his union, defendant AFSCME Council 93 ("Union") and the Union's associate general counsel defendant Corey F. Williams ("Attorney Williams"). The Commission upheld Mount's appointment, and Attorney Williams filed a complaint for judicial review in Suffolk Superior Court. Attorney Williams failed to comply with Superior Court Standing Order 1-96(4)'s requirement to serve a motion for judgment on the pleadings within thirty days of the filing of the administrative record. More than six months after the filing of the administrative record, Attorney Williams's successor counsel filed a motion for extension of the tracking order, and the Commission cross-moved to dismiss for lack of prosecution. The court (Buckley, J.) allowed the Commission's motion.

[1] AFSCME Council 93

Lynch commenced this action against Attorney Williams and the Union for breach of the duty of fair representation in the Superior Court.[2] This case is before the court on the Union's motion for summary judgment. For the following reasons, the Union's motion is **ALLOWED**.

BACKGROUND

The court considers the facts in the summary judgment record in the light most favorable to the nonmoving party. The court reserves additional facts for discussion.

The Town of Arlington hired Michael Lynch as a laborer in the Department of Public Works ("DPW") in 1988; the Town promoted him to truck driver in 1991, parks craftsman in 1999, and working foreman in 2005. Exhibit 2, at 7-8. The working foreman position is in the Parks Division of the DPW. See Statement of Fact ("SOF"), #5.[3] Throughout his career with the Town, Lynch has been a member of the Union. Exhibit 2, at 9-10.

The Town internally posted the position of Parks Supervisor on March 26, 2019, with a closing date of April 2, 2019. Exhibit 8. The position of Parks Supervisor is within the DPW and is covered by the civil service law and rules. See SOF, #6, #7. Lynch applied for this position which was one grade higher than his position of working foreman. See SOF, #8. The Town did not select Lynch and instead selected Town employee Brian Mount, a working foreman in the Water and Sewer Division of the DPW. See Exhibit 19 (DPW organizational chart).[4] Mount's position was also one grade lower than the Parks Supervisor position. SOF, #20.

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[2] This court allowed Attorney Williams's motion to dismiss under Mass. R. Civ. P. 12(b)(6) on September 28, 2022.

[3] As discussed below, Lynch's argument that the Town did not have the authority to place the Parks Division in the DPW without the approval of the Town's Select Board is incorrect.

[4] Lynch relies on this chart as support for his claim that the Parks Division and the Water and Sewer Division are not within the same "departmental unit" as the Parks Division. See SOF, Response to #20. The chart, however, shows that both divisions are within the DPW which, as discussed below, is the relevant "department unit" for purposes of civil service considerations.

Lynch appealed the Town's decision to the Commission on August 16, 2019. Exhibit 7, at 1. In a decision dated May 7, 2020 ("Commission Decision"), the Commission found that the position of Parks Supervisor is an "official service position" in the Town, and that the Town filled the Parks Supervisor position as a "provision promotion" because the Town did not post the position as a provisional appointment and considered only internal candidates. Exhibit 7, at 3. The Commission next set out the "framework regarding provisional promotions that is relevant to this appeal: G.L. c. 31, § 15 permits a provisional promotion of [1] a permanent civil service employee [2] from the next lower title [3] within the departmental unit of an agency, [4] with the approval of" the State's Human Resources Division ("HRD"). Exhibit 7, at 4 (underlining in original). Based on that framework, the Commission decided:

> "First, there is no dispute that both [Lynch] and [Mount] were permanent civil service employees prior to this provisional promotion.
>
> "Second, the Town has established that both [Lynch] and [Mount] were serving in a position in the next lower title. In fact, if [Mount] cannot be considered to have been serving in the next lower title at the time of the promotion, the same would apply to [Lynch], potentially undermining his appeal on other grounds.
>
> "Third, the applicable Special Acts of the Legislature explicitly state that the Town's [Select Board] may establish a 'Department Public Works' managed by a 'Superintendent of Public Works' under which there are 'divisions'. This, along with the supporting documentation regarding guidance provided to the Town regarding prior layoffs, establish that the applicable 'departmental unit' here is the Department of Public Works, as opposed to the *divisions* that fall under the DPW. . . . Both [Mount] and [Lynch] served in the DPW at the time of the promotion.
>
> ". . . [Fourth, as] to whether the Town was required to obtain HRD's approval before making this promotion, HRD, since 2009, has delegated the vast amount of decision-making authority regarding permanent appointments and promotions to cities and towns. Under that delegation, for example, cities and towns are no longer required to submit bypass reasons to HRD for approval regarding permanent appointments and promotions. Further, . . . the vast majority of non-public safety civil service appointments and promotions have been done provisionally across Massachusetts for decades with no objection from HRD. In this context, the approval referenced here in regard to *provisional* promotions,

> even if not explicitly listed in the delegation agreements, has truly become a ministerial function."

Exhibit 7, at 4 (underlining and emphasis in original). The Commission concluded that the Town "complied with those parts of the civil service law and rules regarding provisional promotions" and dismissed Lynch's appeal. Id.

Lynch sought judicial review of the Commission Decision by filing a complaint in Suffolk Superior Court on June 4, 2020 ("Superior Court case"), against the Commission and, in an amended complaint, against the Town.[5] Attorney Williams, a staff attorney for the Union, filed the case on Lynch's behalf. Exhibit 10, at 1; SOF, #28. Attorney Williams did not satisfy Superior Court Standing Order 1-96(4)'s requirement that the plaintiff serve a motion for judgment on the pleadings within thirty days of the filing of the administrative record. Exhibit 10, at 1. On April 30, 2021, more than six months after the Commission filed the administrative record, successor counsel to Attorney Williams filed a Motion to Extend Tracking Order and Establish a Briefing Schedule. Exhibit 10, at 1. See Exhibit 10, at 2 (Superior Court decision describing Lynch's motion as, "in reality a motion seeking relief from the requirements of" Superior Court Standing Order 1-96(4)). The Town opposed this motion and cross-moved to dismiss for failure to prosecute. Exhibit 10, at 1-2.

After a hearing at which "the court was unpersuaded by the lack of sworn facts in the affidavits submitted by [Lynch] as to why the deadline was missed[,]" the court "gave the parties additional time to file supplemental briefs and affidavits." Exhibit 10, at 2. Lynch filed affidavits from Attorney Williams, current counsel, and two Union members. Id. These affidavits, however, did "little to inform the court as to a rational basis for counsel's failure to file

[5] Lynch vs. Civil Serv. Comm'n, 2084CV001170.

the motion within the" thirty-day time frame and provided no reason or information "to explain why Attorney Williams, counsel of record for [Lynch,] missed the deadline and . . . [why] [Lynch's] [current] counsel waited for over 138 days to file the present motion." Id. The court concluded that the affidavits Lynch filed were "insufficient to establish good cause or a [justifiable] basis for the court to find excusable neglect on behalf of [Lynch's] counsel." Exhibit 10, at 3. In a decision dated July 15, 2021 ("Superior Court decision"), the court denied Lynch's motion, allowed the Town's motion, and dismissed Lynch's complaint. Id.

In August 2022, the Town posted the position of Parks Supervisor as a "Provisional Appointment" after Mount voluntarily left the position to take a supervisor position in the Water and Sewer Division. Exhibit 5, at 72; Exhibit 12.[6] Lynch applied for this position and, after he was not selected, he again appealed to the Commission in January 2023. Exhibit 13, at 1. The Commission denied Lynch's appeal, see Exhibit 13, at 9, and Lynch filed a complaint for judicial review in Suffolk Superior Court.[7] See generally Exhibit 14. That case is still pending.

DISCUSSION

I. Summary Judgment Standard

Summary judgment is granted where there are no genuine issues of material fact and where the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); Cassesso v. Commissioner of Corr., 390 Mass. 419, 422 (1983); Community Nat'l Bank v. Dawes, 369 Mass. 550, 553 (1976). The moving party bears the burden of affirmatively demonstrating the absence of a triable issue, and that the summary judgment record entitles the

[6] Lynch denies that the 2022 posting used the terminology "provisional appointment." SOF, Response to #35. The term, however, is expressly included at the bottom of the posting under the **"Other Information"** heading. Exhibit 12 (bold in original).

[7] Lynch vs. Civil Service Comm'n, 2384CV01948.

moving party to judgment as a matter of law. Flesner v. Technical Commc'ns Corp., 410 Mass. 805, 808-809 (1991); Pederson v. Time, Inc., 404 Mass. 14, 16-17 (1989). See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991). To succeed, the moving party "need not submit affirmative evidence to negate one or more elements of the other party's claim" but may demonstrate, "by reference to material described in Mass. R. Civ. P. 56(c), unmet by countervailing materials, that the party opposing the motion has no reasonable expectation of proving an essential element of that party's case." Kourouvacilis, 410 Mass. at 716. "Where the movant has supported the motion for summary judgment by admissible evidence, a nonmoving party may not rest on unsupported allegations; instead, the nonmoving party must come forward with admissible evidence setting forth specific facts showing that there is a genuine issue for trial." Ortiz v. Morris, 97 Mass. App. Ct. 358, 362 (2020), citing Madsen v. Erwin, 395 Mass. 715, 721 (1985). "[B]are assertions and conclusions . . . are not enough to withstand a well-pleaded motion for summary judgment." Polaroid Corp. v. Rollins Envtl. Servs., Inc., 416 Mass. 684, 696 (1993).

II. **Analysis**

Lynch argues that the Union breached its duty of fair representation by failing to file a motion for judgment on the pleadings in the Superior Court case in compliance with Superior Court Standing Order 1-96(4)'s prescribed time frame, resulting in this court's dismissing the Superior Court case after finding a lack of good cause or excusable neglect. See Superior Court Standing Order 1-96(4) (permitting court to "alter the time to serve or file for good cause shown"). The Union seeks summary judgment on the basis that Lynch suffered no damages because the Commission Decision underlying the Superior Court case was correct and, even if it were not, vacating the promotion is not an available remedy.

"'Breach of the duty of fair representation occurs if a union's actions toward an employee are arbitrary, discriminatory, or in bad faith.'" Collective Bargaining Reform Ass'n v. Labor Relations Comm'n, 436 Mass. 197, 207 n.12 (2002) (citations and internal quotation marks omitted). While "'ordinary negligence may not amount to a denial of fair representation, lack of a rational basis for a union decision and egregious unfairness or reckless omissions or disregard for an individual employee's rights may have that effect.'" Graham v. Quincy Food Serv. Emps. Ass'n, 407 Mass. 601, 606 (1990). To survive summary judgment, the plaintiff must show that his grievances were arguably meritorious, id. at 607, and he must set forth substantial evidence of bad faith that was intentional, severe, and unrelated to legitimate union objectives. Id. at 609. Lynch cannot satisfy this burden.

A. Merits of Superior Court Case

"In order to survive summary judgment, the plaintiff need not show with complete certainty that [his] grievances were meritorious, so that if the union had not failed to represent [him], [he] would have been entirely successful in obtaining the full relief sought. Rather, [he] need show on this point only that [his] grievances were *arguably* meritorious." Id. at 607 (emphasis in original). Here, Lynch argues that the Union breached its duty of fair representation by missing a deadline in the Superior Court case which was an administrative appeal of the Commission Decision.

Pursuant to G.L. c. 31, § 44, the judicial review of Commission decisions is "governed by the provisions of" G.L. c. 30A, § 14. In conducting this review, "[t]he court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G.L. c. 30A, § 14(7). "The party appealing from an administrative decision has the burden of proving its invalidity." Brackett v.

Civil Service Comm'n, 447 Mass. 233, 242 (2006). See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 263-264 (2001) (holding that plaintiff has "a heavy burden" because of "'substantial'" and "considerable" deference court gives agency's decision).

The merits of the Superior Court case therefore depend on the merits of the Commission Decision. Lynch contends that the Commission Decision confirming Mount's promotion was erroneous because the Town failed to secure the approval of the State's Human Resources Division in violation of G.L. c. 31, § 15, and because the Town lacked authority to group Mount and Lynch in the same departmental unit.

1. *HRD's Approval*

Section 5 of G.L. c. 31 sets out the powers and duties of the personnel administrator of the HRD. See Sherman v. Randolph, 472 Mass. 802, 803 n.2 (2015) ("[T]he terms administrator and HRD are largely interchangeable."). Among the duties are the obligations "[t]o administer, enforce and comply with the civil service law and rules and the decisions of the commission[,]" G.L. c. 31, § 5(a), which, in turn, includes the duty to approve an appointing authority's "provisional promotion of a civil service employee . . . ." G.L. c. 31, § 15. The Town did not obtain HRD's approval for Mount's promotion.

In the Commission Decision, the Commission concluded that the Town was not "required to obtain HRD's approval before" promoting Mount because "since 2009, [HRD] has delegated the vast amount of decision-making authority regarding permanent appointments and promotions to cities and towns." Exhibit 7, at 4. The question here is whether Lynch can show that his challenge to this conclusion under G.L. c. 30A, § 14, is arguably meritorious. See Graham, 407 Mass. at 607. See also Brackett, 447 Mass. at 242 (holding that courts "'are required to overturn

commission decisions that are inconsistent with governing law'"). Lynch cannot satisfy this burden.

As the Commission Decision notes, on August 7, 2009, the State Chief Human Resources Officer sent the following memorandum ("2009 memo") to municipal appointing authorities, human resources directors, and fire and police chiefs, delegating away its approval duty:

> "Because of recent budget reductions, the Human Resources Division (HRD) will begin delegating the civil service appointment and promotion approval process to municipalities effective September 1, 2009. We plan to contact you to schedule meetings to learn about your needs as we plan this transition.
>
> "Before any process is finalized, we will be soliciting your feedback and suggestions.
>
> "HRD will continue to issue lists to communities when requested. Each municipality will be responsible for contacting the candidates, making appointments and promotions from the eligible list and providing bypass and selection reasons to the applicants in accordance with civil service law and rules. After August 31, 2009, HRD will no longer review and approve appointments and promotions. Appeals will be made directly to the Civil Service Commission.
>
> "HRD will be responsible for maintaining and updating the eligible list for each municipality as applicants, such as veterans, become eligible to be added to the list.
>
> "HRD will provide technical assistance as needed to assist the municipalities in making appointments and promotions from the eligible list. Additionally, HRD will send a technical certification manual to each city and town and will be conducting information sessions in September.
>
> "We will be sending regular communications to you during this transition process, so that we might work together on making this change as problem-free as possible."

Exhibit 16. Accord Exhibit 9, at 29 (Personnel Administration Rule,[8] par. 22, "Delegation of Official Service Functions" providing that "[t]he administrator [of HRD] may, to the extent he deems practicable, delegate official service functions to municipalities and state agencies in which official service positions are subject to the civil service law. The administrator will issue delegation procedures outlining the scope of the delegated authority"); Exhibit 7, at 2, 3 (Commission Decision concluding that Parks Supervisor "is an official service position").

Section 5(*l*) of G.L. c. 31 authorizes the HRD "[t]o delegate the administrative functions of the civil service system, so far as practicable, to the various state agencies and cities and towns of the commonwealth." Lynch argues that this delegation authority does not extend to the approval of promotions under G.L. c. 31, § 15, because that approval process is not an administrative function. I disagree. "By virtue of G.L. c. 31, § 5, the personnel administrator has general responsibility for administration of the civil service laws." Staveley v. Lowell, 71 Mass. App. Ct. 400, 404 (2008). See Black's Law Dictionary 44 (7th ed. 1999) (defining "administration" as "management or performance of the executive duties of a government, institution, or business" and, "[i]n public law, the practical management and direction of the executive department and its agencies"). One such responsibility contained within G.L. c. 31, § 5, as noted above, is "[t]o administer, enforce and comply with the civil service law and rules and the decisions of the commission[,]" G.L. c. 31, § 5(a), such as approving the appointing authority's provisional promotion of a civil service employee. G.L. c. 31, § 15.

Both Lynch and the Union rely on Malloch v. Hanover, 472 Mass. 783 (2015), in support of their respective positions regarding the propriety of the delegation of this administrative

[8] Section 3 of G.L. c. 31 authorizes the HRD administrator to "make and amend rules which shall regulate the recruitment, selection, training and employment of persons for civil service positions . . . ." See G.L. c. 31, § 1 (defining "rules" as "the rules promulgated by the personnel administrator pursuant to civil service law").

function. There, the Supreme Judicial Court considered whether the 2009 memo "permissibly delegated [the HRD's] function under G.L. c. 31, § 27, to appointing authorities." Id. at 788. See id. at 787-788 (explaining that "[w]henever an appointing authority chooses to bypass a higher-ranked candidate [for an open civil service position]," G.L. c. 31, § 27 requires it to "file a written statement of its reasons for appointing a candidate with a lower score. . . . Such an appointment will not be effective until the written statement has been '*received by*' the administrator" (emphasis added)). "In reaching his conclusion that HRD's delegation of receipt of bypass reasons was impermissible, the Superior Court judge interpreted the statutory requirement that the statement of such reasons must have 'been received' by the administrator, G.L. c. 31, § 27, as also requiring the administrator to conduct a substantive review of the appointing authority's statement of reasons for the bypass, and to approve those reasons, in order for an appointment or promotion to become effective." Id. at 789. "The judge determined that it was not practicable for an appointing authority to conduct a review of its own reasons for a bypass." Id.

The Supreme Judicial Court disagreed with the lower court's statutory interpretation, holding that the language of G.L. c. 31, § 27, "indicates that the Legislature did not intend to require the administrator to approve a list of bypass reasons. To the contrary, . . . the administrator is to accept an appointing authority's reasons, as stated, rather than to approve them." Id. The Court "therefore conclude[d] that the administrator permissibly could delegate its administrative functions under G.L. c. 31, § 27." Id. at 795.

I do not read Malloch as standing for the proposition that HRD's approval power under G.L. c. 31, § 15, is not delegable. The Supreme Judicial Court concluded only that the Superior Court incorrectly read the "approval" obligation into G.L. c. 31, § 27, and that the HRD could

practicably delegate the obligation to receive statements of reasons supporting bypass promotions. See Malloch, 472 Mass. at 785. The Court did not hold that the HRD could not delegate an approval obligation.

Moreover, the Commission Decision described the approval process as having "truly become a ministerial function." Exhibit 7, at 4. See Black's Law Dictionary 1011 (7th ed. 1999) (defining "ministerial" as "[o]f or relating to an act that involves obedience to instructions or law instead of discretion, judgment, or skill"). This decision appears to contradict a 1995 decision in which the Supreme Judicial Court disagreed with the argument that the HRD's approval was "a merely ministerial function[,]" Kelleher v. Personnel Adm'r of Dep't of Pers. Admin., 421 Mass. 382, 388 (1995), describing it instead as a "substantial" requirement. Id. at 387. The Commission Decision points out, however, that "for decades," there have been no statewide examinations for Parks Supervisor and "almost all other non-public safety positions," causing appointing authorities to fill vacancies "through a provisional appointment or [as here,] provisional promotion. This is commonly referred to as the 'plight of the provisionals' in Massachusetts." Exhibit 7, at 3. As these appointments and promotions "have been done provisionally across Massachusetts for decades with no objection from HRD. . . ., the approval . . . in regard to *provisional* promotions . . . has truly become a ministerial function." Exhibit 7, at 4 (emphasis in original).[9] Indeed, in an earlier decision, the Commission wrote:

[9] The Commission explained this situation in more detail in an earlier decision:

> "The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for decades. These provisional appointments and promotions have been used as there have been no 'eligible lists' from which a certification of names can be made for permanent appointments or promotions. The underlying issue is the Personnel Administrator's (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists. This is not a new issue – for the Commission, HRD, the legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions.

> "When . . . HRD's role is more technical or ministerial than judgmental, HRD's functions may be delegated to the appointing authority. . . . To be sure, in general, it would be preferable for an appointing authority to comply with the letter of the statute calling for HRD approval of a provisional promotion. The reality is that, with no possibility that an examination will be given, *such compliance now serves essentially a perfunctory role*."

Felder v. Boston, G2-14-16, 2016 WL 4248946 at *9 (Mass. CSC July 21, 2016) (emphasis added) (internal citations omitted).

Where a reviewing court must "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it[,]" G.L. c. 30A, § 14(7), Lynch cannot meet his burden of showing that his argument regarding the propriety of HRD's delegation of its approval obligation was arguably meritorious. See Graham, 407 Mass. at 607.

2. *Departmental Unit*

The Commission found that the Town complied with the requirement in G.L. c. 31, § 15, that it "make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit" because the Parks Supervisor position was a DPW position

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> "It has been long established that '[p]rovisional appointments or promotions . . . are permitted only in what are supposed to be exceptional instances' . . . . However, after decades without HRD holding competitive examinations for many civil service titles, and the professed lack of appropriations to permit examinations in the near future, hiring and advancement of most civil service employees now can be lawfully accomplished only provisionally. Thus, as predicted, the exception has now swallowed the rule and an appointment 'which is provisional in form may be permanent in fact.' . . .
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> "The Commission and the courts have wrestled with the issues surrounding the so called 'plight of the provisional' and regularly exhort the civil service community of the corrosive effects of the excessive use of 'provisional' appointments and promotions. . . . Little has been done, however, or will be done, to wean the system from this practice without further appropriations from the legislature. As a result, there appears no end to the reality that the vast number – probably most – current non-public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy."

Phillips v. Cambridge, G2-16-068, 2016 WL 4248956 at *2 (Mass. CSC July 7, 2016) (alteration in original) (internal citations omitted) (included in Compendium of Civil Service Cases Cited).

and Lynch, in the Parks Division, and Mount, in the Water and Sewer Division, both "served in the DPW at the time of the promotion." Exhibit 7, at 4. Lynch argues that that this conclusion was erroneous because "the Town had unlawfully transferred the functions of its Park and Recreation Commission (which should have directed Lynch) to its Department of Public Works without the approval of its Select Board." Lynch's Opposition, at 11. This reasoning is incorrect as a matter of law and, therefore, not meritorious, arguably or otherwise.

First, in arguing that the Town did not have the authority to place the Parks Division in the DPW without the approval of the Town's Select Board, Lynch relies on St. 1952, c. 503, § 20, which authorizes "[t]he Town Manager, subject to the approval of the Select Board, . . . [to] appoint a Park and Recreation Commission to consist of five suitably qualified persons." Exhibit 17, § 20. This commission, however, is not the Parks Division. See Exhibit 18, at 32, 39 (deposition testimony of former Town Manager Adam Chapdelaine explaining that Park and Recreation Commission "was a separate entity appointed by the town manager" consisting of "citizens who would serve in a voluntary capacity" and that "operational experts that knew how to use power tools and heavy equipment were all in the" DPW's Parks Division while "people who knew how to plan the land use of parks and open space were in the parks and recreation commission"). The legislation that created the precursor to the Town's DPW, St. 1904, c. 3, included within the DPW's "powers, rights, duties and liabilities" the "public squares, playgrounds, . . . sewers, [and] drains . . . ." Exhibit 4, at § 5. Thereafter, in the legislation establishing a town manager form of government for the Town, St. 1952, c. 503, the Select Board was authorized to create a DPW, and the Town Manger was authorized to appoint a superintendent and to "establish such divisions and subordinate offices within the Department of Public Works as [the Town Manager] deems necessary and shall prescribe the powers, rights,

duties and liabilities of the same." Exhibit 17, § 27. Additionally, the Town's organizational chart for the DPW shows that the "Parks Maintenance Supervisor" and "Water Sewer Supervisor" fall under the DPW. Exhibit 19. The Parks Division is therefore properly within the DPW, as is the Water and Sewer Division.

Second, a "departmental unit" within the meaning of G.L. c. 31, § 15, is "a board, commission, department, or any division, institutional component, or other component of a department established by law, ordinance, or by-law." G.L. c. 31, § 1. As demonstrated above, the DPW was expressly established by law. See St. 1904, c. 3, § 5; St. 1952, c. 503, § 27. Cf. Andrews v. Civil Serv. Comm'n, 446 Mass. 611, 619 (2006) (holding that Bureau of Special Investigations "was created by statute, St. 1999, c. 127, § 26, and therefore qualified under the definition" of departmental unit).

Therefore, as the DPW was the proper departmental unit as a matter of law, Lynch also cannot meet his burden of showing that his argument on this issue was arguably meritorious. See Graham, 407 Mass. at 607.

B. Union's Failure to Act

Even if Lynch were able to prove at trial that the Superior Court case was arguably meritorious, "[d]emonstration that [a plaintiff's] grievances were arguably meritorious is insufficient, by itself, for the plaintiff to survive summary judgment. . . . There must be 'substantial evidence' of bad faith that is 'intentional, severe, and unrelated to legitimate union objectives' in order to show a breach of the duty of fair representation." Graham, 407 Mass. at 609. "Moreover, in order to survive summary judgment, the plaintiff must adduce 'more than a "skeletal set of bland allegations"' in support of [his] contention that the union officials' motivations were improper." Id.

"'Bad faith is a general and somewhat indefinite term that goes beyond bad judgment or negligence, suggesting a dishonest purpose or some moral obliquity, a conscious doing of wrong, or a breach of a known duty through some motive of interest or ill will[.]'" Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of Dep't of Developmental Servs., 492 Mass. 772, 790 (2023) (citations omitted). "In effect, bad faith requires an inquiry into the subjective intent behind a party's actions, in addition to the actions themselves." Id.

In the Superior Court case, the court concluded that there was no good cause to enable it to find excusable neglect in the Union's failure to file the motion for judgment on the pleadings in compliance with Superior Court Standing Order 1-96(4). The absence of good cause, however, does not equate to bad faith. Cf. Smith-Pfeffer v. Superintendent of the Walter E. Fernald State Sch., 404 Mass. 145, 151 n.6 (1989) ("[L]ack of good cause for termination of at-will employment does not by itself give rise to a cause of action for bad faith." (citing Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 670-671 (1981))). Further, "negligence . . . is not sufficient, by itself, to constitute a breach of the duty of fair representation." Graham, 407 Mass. at 610. Cf. Bruno v. Zoning Bd. of Appeals of Tisbury, 93 Mass. App. Ct. 48, 54 (2018) ("Generally, there can be no finding of bad faith [by zoning board] in the absence of evidence of improper motives, harassment, or causing needless delay or unnecessary cost.").

Lynch has not demonstrated that he will be able to prove at trial that the Union acted in bad faith by failing to file a motion in the Superior Court case. See Graham, 407 Mass. at 609. Compare Office & Prof'l Emps. Int'l Union, Local 6, AFL-CIO v. Commonwealth Emp't Relations Bd., 96 Mass. App. Ct. 764, 768-769 (2019) (affirming defendant board's "conclusion that the union's conduct was 'perfunctory' and 'demonstrative of gross inexcusable negligence'" where its "failure to follow the basic step of filing the arbitration demand by the deadline

specified in" collective bargaining agreement "was a ministerial act requiring no 'complex legal interpretations'" (citation omitted)).

C. Remedy[10]

The court briefly address the issue of the remedy available to Lynch if his claim of breach of the duty of fair representation had survived summary judgment, proceeded to trial, and succeeded before a fact finder. "As in a legal malpractice case, the union is liable for what the plaintiff would have received had the union fulfilled its duty" of fair representation. Leahy v. Local 1526, Am. Fed'n of State, Cnty., & Mun. Emps., 399 Mass. 341, 353-354 (1987). The Union would have fulfilled its duty here by filing a motion for judgment on the pleadings in the Superior Court case. Taking this hypothetical further, the allowance of such a motion would have likely resulted in the vacating of the Commission decision and the remand of the matter to the Town[11] with the instruction to submit Mount's promotion to HRD for its approval, with a

[10] The court rejects the Union's argument that Lynch already received the appropriate remedy when he was considered for the Parks Supervisor position in 2022 after Mount left.

[11] On these facts, where the purported error occurred at the Town level, remand to the Commission directly would not be appropriate. That said, the Commission has broad discretion to fashion a remedy: "If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights." St. 1993, c. 310, § 1. See Burns v. Civil Serv. Comm'n, 60 Mass. App. Ct. 1124, 2004 WL 615047 at *1 (2004) (Rule 1:28 decision) (holding that "St. 1993, c. 310, affords the commission broad discretion in fashioning a remedy" and citing cases). See, e.g., Pease v. Department of Revenue, G2-08-132 & G2-08-133, slip op. at 11 (Mass. CSC Dec. 10, 2009) (included in Compendium of Civil Service Cases Cited) (acting pursuant to St. 1993, c. 310, §1, and concluding that while Commission was "not disposed to invalidate the two . . . promotions in this particular case that were erroneously filled by" unqualified candidates, Commission "order[ed] that the [defendant agency] put [the plaintiffs] in line for at least one additional consideration for future selection to a . . . position which they would be willing to accept if it was offered to them, on the same terms under which they should have been considered for the promotion in question. The Commission expects that, so long as either or both of the [plaintiffs] are able to demonstrate that they remain qualified for the position(s) and no other qualified permanent civil service employees apply, they will be selected for such position(s). To ensure the [plaintiffs] receive such serious consideration, and, in addition to whatever other rights, if any, she may have, in this particular case, if either [plaintiff] is not selected in favor of another applicant . . . [who is not qualified], she will be allowed to contest the non-selection in further proceedings before the Commission on the grounds that such non-selection was inconsistent with the requirements of this Decision").

further order that the HRD's consideration should include whether the Town complied with the "departmental unit" requirement of G.L. c. 31, § 15. See, e.g., Malloch, 472 Mass. at 785 (stating that, after allowing plaintiff's motion for judgment on the pleadings, lower court "ordered the town to submit its statement of bypass reasons to the [HRD] . . . and remanded the matter to HRD and the [C]omission"). That remedy is far different than the remedy sought by Lynch.

ORDER

For the foregoing reasons, the Union's motion for summary judgment is **ALLOWED**.

Christopher K. Barry-Smith
Justice of the Superior Court

DATED: September 24, 2024