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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION NO.
MICV2012-03363-D

CITY OF WOBURN, & another[1]
Plaintiffs

vs.

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION, & others[2]
Defendants

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS

In 2007, defendant Thomas H. Martin ("Martin") was on the reserve list for a permanent firefighter position with plaintiff Woburn Fire Department ("WFD").[3] While he was on active military duty in 2007 and 2008, others on the reserve list were offered permanent positions. He was not considered because he was on active military duty. This violated, among other things, the Military Leave Policy, promulgated by Commonwealth of Massachusetts Human Resources Division ("HRD") in February 2003.

In February 2012, Martin, acting pro se, sent a letter to the Commonwealth of Massachusetts Civil Service Commission ("the Commission"), complaining about a number of issues related to the use of the reserve list by the WFD, including having been "unfairly treated because of [his] military duties;" and asking the Commission "to look into the hiring and use of

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1 Woburn Fire Department.

2 Commonwealth of Massachusetts Human Resources Division and Thomas H. Martin.

3 Plaintiffs Town of Woburn and Woburn Fire Department are together referred to herein as "Woburn."

the Woburn Fire Department Reserve list." After hearings in June and December 2012, the Commission found in Martin's favor. Procedurally, in response to Woburn's challenge, the Commission also ruled that Martin's complaint to the Commission was timely and that the Commission had jurisdiction to hear the complaint.

The case is before the court on Plaintiffs' Motion for Judgment on the Pleadings. After hearing, plaintiffs' motion is **DENIED**. Judgment shall enter affirming the Commission's decision.

BACKGROUND

A. Relevant Factual Findings

The Commission found the following facts after hearing:

In 2003 or 2004, Martin took and passed a civil service examination for a firefighter position. In November 2004, Martin and 12 other candidates were appointed as reserve firefighters and placed on a WFD reserve roster. Woburn considered all 13 candidates to be tied for purposes of future appointments.

On July 1, 2007, the Fire Chief of the WFD appointed permanent firefighters from the reserve roster. Martin was not considered for these permanent positions because at the time he was on active military duty.[4] See, e.g., Decision on Appellant's Request for Relief[5] ("July Decision") at 2 (July 26, 2012) ("Mr. Martin was on active military duty on July 1, 2007 when

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[4] The evidence also established, and Woburn admits, that on December 22, 2007 and April 23, 2008, the Fire Chief appointed additional permanent firefighters from the reserve roster, but Martin was then on active military duty and was not appointed. Similarly, on July 9, 2007, the Fire Chief appointed temporary firefighters from the reserve list. See generally Memorandum of the City of Woburn and Woburn Fire Department in Support of Their Motion for Judgment on the Pleadings at 3-4. Martin also was not considered for these positions because he was on active military duty.

[5] Administrative Record at 307. The Administrative Record is referred to herein as "AR at [page]."

two permanent full-time firefighter appointments were made from the reserve roster. Mr. Martin was not considered for permanent appointment at that time because of his active military duty status."). WFD did not provide Martin with notice that he was not considered for these permanent firefighter positions.

Martin was appointed as a permanent firefighter with the WFD on June 22, 2010.

B. **Procedural History**

By letter dated February 16, 2012, Martin initiated an action before the Commission. In his letter, Martin complained of a number of alleged irregularities in the use of the WFD's reserve list, stating, among other things, "I believe I was unfairly treated because of my military duties. I believe Chief Paul Tortolano did not hire me for a permanent position on the Woburn Fire Department because I was on active duty for the military during 4/2/07, 7/1/07, 11/21/07 and 4/23/08. I was told by Chief Paul Tortolano the reason I was not hired at those times was because I was on active duty and not around for the job." AR at 1. Martin asked the Commission "to look into the hiring and the use of the Woburn Fire Department Reserve list." AR at 2.

Shortly thereafter, on March 4, 2012, Martin filed a petition signed by 15 other permanent firefighters also claiming improprieties in handling the WFD Reserve List. AR at 8-9.

At an initial hearing on March 23, 2012, Martin, appearing pro se, was asked to file a more definite statement of his claim. He did so on or about April 11, 2012. Although far from a model of clarity, Martin's statement again claims, among other things, that he did not get the July 1, 2007 appointment "due to military obligations." AR at 245. See also AR at 248 ("When I inquired why I was not hired at any of these times, the Chief stated, 'you were not here to take

the job, you were on military orders.' This is a clear violation of the M.G.Ls [sic] as I was not even given consideration for any position."). In his conclusion, Martin wrote: "I have fought in two wars for our country and I believe all veterans should be given the same opportunity as other candidates. We should not be punished because of our military obligations[.] . . . If anything I am looking for the Commission to look into the hiring practices of the Woburn Fire Department as well as no need for a reserve list in the city of Woburn." AR at 247-248 (emphasis added).

The Commission's Chair, Christopher C. Bowman ("Bowman"), conducted a hearing on June 25, 2012. He characterized three issues raised by Martin, but expressed particular interest in the arguments that Martin was "not considered during one hiring cycle[ ] because he was on active military duty" and that the Fire Chief was biased against him. June Tr. at 3-4. Bowman acknowledged familiarity with Woburn's argument that Martin's petition to the Commission was not timely, but appears to have relied on the Commission's ability to conduct investigations under G.L. c. 31, § 2(a). At the hearing on June 25, 2012, he stated: "In any case[ ] in which someone comes in and says, 'I wasn't considered, solely because or partially because I was on active military duty'[,] [t]he Commission has an obligation to do its due diligence and find out whether or not that was indeed true. That is an issue that I want to - at least - find out some additional information on today." Supplemental Administrative Record ("SAR"), Transcript Vol. 1 of 2, at 4 (emphasis added). "[T]he Commission always maintains its ability to open investigations under *General Law Chapter 31, Section 2-A.* [ ] [W]e do consider that those allegations are being raised years after the fact, but nevertheless, we don't completely shut the door on someone when they're sort of waving the flag about our core mission before us. We at least need to do some level of due diligence to find out what those allegations are and whether or

not they rise to the very high level of the Commission opening an investigation, which is effectively what's being asked for here." Id. at 4-5 (emphasis added).

After hearing, the Commission on July 26, 2012 decided in Martin's favor, finding Martin had been on active duty on July 1, 2007, but the Fire Chief had failed to consider Martin for a permanent position. It ruled that Martin's civil service seniority date should be adjusted from June 22, 2010 to July 1, 2007 "for civil service purposes only" and without "any additional pay or benefits or additional creditable service toward retirement." July Decision at 3. Although at the June hearing Bowman discussed the Commission's inquiry as an investigation, the July Decision refers to Martin's filing as an "appeal."[6] It acknowledges, but does not substantively address, Woburn's challenge to Martin's appeal as "untimely." Id. at 2.

Woburn moved for reconsideration and rehearing, principally to advance the argument that Martin's "appeal" had been filed out of time and therefore the Commission did not have jurisdiction to consider his arguments. The Commission conducted a hearing in December on the motion for reconsideration. Chairman Bowman again presided. During the hearing, testimony was presented making clear that the Woburn Fire Chief had not meaningfully considered Martin for the open permanent position because he was on active duty and was "doing me no good at the time," SAR, Transcript Vol. 2 of 2, at 15, and that he adhered to the same position with respect to considering applicants on active military duty at the time of the hearing (Dec. 2012) as he had in 2007. Id. at 28. At the hearing, the parties extensively argued the merits of Woburn's procedural challenge to the Commission considering Martin's petition. Woburn offered no authority to contradict Bowman's contention at the hearing that the

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[6] See, e.g., July Decision at 1 ("Martin . . . filed an appeal"), 2 ("The City argues that Mr. Martin's instant appeal is untimely . . ."), 3 ("Mr. Martin's appeal . . . is hereby ***allowed***.").

Commission had broad authority to investigate Martin's claim, including based on the prospect of a continuing violation. See, e.g., Id. at 27-31.

On January 10, 2013, the Commission rejected Woburn's procedural challenge in its Decision on Respondent's Motion for Reconsideration. The Commission found that Martin had not filed a bypass appeal subject to a 60-day limitations period under the Commission's rule; the petition was timely as an "appeal" because Woburn had not sent notice to Martin and therefore the 30-day appeals period under 801 C.M.R. 1.01(6)(b) was not triggered; and the Commission had jurisdiction to investigate Martin's complaint without time limit under G.L. c. 31, § 2(a). AR at 340-343.

Woburn filed this appeal and now challenges the Commission's decision that Martin's complaint to the Commission was timely and that the Commission had jurisdiction to hear it; and argues that the Commission's decision to hear Martin's petition was arbitrary and capricious.

DISCUSSION

A. Standard of Review

Woburn has appealed the final decision of the Commission, including its decision on reconsideration. Under G.L. c. 31, § 44, the provisions of G.L. c. 30A, § 14 govern this appeal. Under G.L. c. 30A, § 14, the court's review is limited to the administrative record where, as here, no party has alleged procedural irregularities before the Commission justifying the court taking additional evidence. G.L. c. 30A, § 14(5); Foxboro Harness, Inc. v. State Racing Comm'n, 42 Mass. App. Ct. 82, 85-86 (1997).

In reviewing the Commission's decisions, the court must accept the Commission's factual findings if substantial evidence supports them, Beverly v. Civil Serv. Comm'n, 78 Mass. App. Ct. 182, 188 (2012), quoting Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003),

and will affirm the Commission unless its decision "is based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance of law." McGuiness v. Dept. of Corr., 465 Mass. 660, 668 (2013), quoting Fitchburg Gas & Elec. Light Co. v. Dept. of Telecom & Energy, 440 Mass. 625, 631 (2004). The court must give deference to the Commission's specialized knowledge and discretionary authority, and may not substitute its judgment of the facts for that of the Commission. Brackett v. Civil Serv. Comm'n, 447 Mass. 233, 241-242 (2006) (and cases cited).

Moreover, it is the plaintiffs, the parties aggrieved by the Commission's decision, which have the burden of proving that the court should not affirm the Commission's action. See Id. at 242 ("The party appealing from an administrative decision has the burden of proving its invalidity.").

B. **The Commission's Jurisdiction**

The Commission did not exceed its authority in interpreting its enabling statute as authorizing it to consider Martin's petition. First, the Commission has the "power[] and dut[y]" under its enabling statute "[t]o conduct investigations at its discretion or upon the written request of . . . . an aggrieved person, or by ten persons registered to vote in the commonwealth." G.L. c. 31, § 2(a). Martin's pro se petition, as expanded by his more definite statement, sought, among other things, an inquiry or investigation by the Commission of the hiring practices by the WFD, and particularly as it related to the permanent hiring of those on active military duty. A petition was also submitted to the Commission to look into the WFD's use of its reserve list. Given these requests, or on its own initiative, the Commission had the authority to conduct an investigation into the WFD's use of its reserve roster and its policy, which was still ongoing in 2012, of not

considering for a permanent firefighter position those individuals on the reserve roster who were then on active military service.

Woburn does not point to any sources to suggest that the Commission did not have such authority or that the Commission had to use a particular procedural mechanism to initiate or conduct an investigation. Nor does Woburn advance any reason the court should not defer to the Commission's conclusion that it had the jurisdiction to conduct an investigation of Martin's complaint. See Superior Court Rule 9A(a)(1). The Commission rightly considered this matter to fall within its "core mission," and found the WFD policy to violate the important policy in the Commonwealth promulgated by HRD that those on active duty not be disadvantaged in hiring. See AR at 329. This policy has been recognized and upheld in other contexts. See, e.g., McLain v. City of Somerville, 424 F. Supp. 2d 329, 332-333 (D. Mass. 2006). Nor can Woburn fairly complain that it was caught unaware that the Commission considered Martin's petition to be, among other things, a request for investigation. If Martin's papers were not clear enough, the discussion at the outset of the June 2012 hearing, as described above, see, supra at 4-5, made clear Bowman's position that the matter was ripe for investigation.[7]

While the Commission's authority to consider Martin's petition was clear and sufficient to justify its actions under G.L. c. 31, § 2(a), the Commission also did not err, or act arbitrarily and capriciously, in concluding alternatively that Martin's petition did not violate the 30-day rule for an "appeal" where, as here, the WFD did not send Martin notice of its action. 801 C.M.R. 1.01(b)(b) requires a person seeking an adjudicatory proceeding with an agency to initiate such a proceeding "within the time prescribed by statute or Agency rule. In the absence of a prescribed

[7] Woburn does not argue, or point to any authority to suggest, that the Commission lacked the authority to issue the order that it did as a result of a valid investigation under G.L. c. 31, § 2(a).

time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party." (Emphasis added). Here, Woburn points to no statute or rule of the Commission which requires the filing of a claim to an adjudicatory proceeding within a certain amount of time, other than a bypass hearing (60 days), which the Commission and Woburn agree was not the nature of this case.

Absent a specific time period, the only other jurisdictional time limit is the general 30-day limit in 801 C.M.R. 1.01(6)(b). It starts to run, however, "from the date that the Agency notice of action is sent." That is, the 30-day period begins to run when the agency takes affirmative action to send notice. Woburn sent no such notice to Martin. There is no provision in 801 C.M.R. 1.01 which starts a 30-day limitation period running based on when a claimant should have known of an adverse agency action, or even from a time when the claimant had actual notice. It was therefore not unlawful or an abuse of discretion for the Commission to consider the merits of Martin's petition as an appeal under G.L. c. 31, § 2(b).

For these reasons, it is ORDERED as follows:

ORDER

Plaintiffs' Motion of Judgment on the Pleadings is **DENIED**. The decision of the Commission is **AFFIRMED**. Judgment shall enter accordingly.

Dated: July 17, 2013

Peter B. Krupp
Justice of the Superior Court