COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
One Ashburton Place
Boston, MA 02108
(617) 727-2293

THOMAS MARTIN,
Appellant

v.

WOBURN FIRE DEPARTMENT,
Respondent

G1-12-61

DECISION ON RESPONDENT'S MOTION FOR RECONSIDERATION

The Woburn Fire Department (Fire Department or Respondent) filed a Motion for Reconsideration of a decision of the Commission, dated July 26, 2012, allowing the aforementioned appeal.

A motion hearing was held on December 3, 2012, at which time I heard oral argument from counsel for both parties and took additional testimony from the Fire Chief and the Appellant.

The most substantive portion of the Respondent's Motion for Reconsideration, at Page 6, states:

> "The HRD memorandum does not stand for the proposition that an individual called to active military duty must be appointed or no one should be appointed, as stated by the Chairman. An individual on active military duty is only entitled to consideration for appointment, the appointment is not mandated. Indeed, individuals on active military duty may be bypassed for appointment, as long as that bypass is not based solely on the active military status."

This argument misconstrues the Commission's decision, is not supported by the record and is contrary to federal and state law.

The Commission's decision does not state that an active military duty candidate must be *appointed*. Rather, the decision states, explicitly, that a candidate cannot be dismissed without consideration because they have been called to active military duty.

At the motion hearing, counsel for the Fire Department, citing McLain, argued that, as long as the individual's active military duty status is not the *sole* reason for not selecting the candidate, their active military duty status *can* be used as a reason for non-selection.

The Fire Chief explained how a candidate's active military duty status has factored into his selection process, stating, "I considered them. However, they weren't available … they weren't available so they were doing me no good at the time. I needed someone to go to work at the time."

This is precisely the argument that was *rejected* by the Court in McLain. If an individual is unavailable due to his duty to perform military duty, that *cannot* be used as a reason for non-selection.

While McClain is distinguishable in that the candidate had already received a conditional offer of employment, which was rescinded based on his unavailability to attend a police academy, the language explicitly prohibiting the discrimination of active military duty applies to all parts of the hiring process.

The Fire Department's argument that the Appellant's non-selection *may* have been based in part on his EMT status at the time fails for similar reasons. The Fire Chief's unambiguous testimony leaves no question that an individual will *not* be appointed if he / she is on active military duty at the time of the hiring process. Thus, the Appellant, because of his active military duty, would not have been considered, regardless of his EMT status.

The Fire Chief was not prohibited from filling the vacancy through a temporary appointment – and then making a final decision regarding a permanent appointment when the Appellant returned from active military duty. As the record shows, Woburn actually maintains a reserve roster that minimizes any disruption or hardship. If, upon the Appellant's return, he was considered and appointed, the individual who had been appointed to the temporary position would return to his place on the reserve roster. If, after receiving full consideration, the Appellant was not selected for appointment, the individual who had been appointed to the temporary position could be appointed permanently.

The Fire Department's other primary reason for seeking reconsideration is that the Appellant's appeal was not timely.

First, the instant appeal is not a bypass appeal, so the Commission's 60-day statute of limitations (a Commission rule) regarding bypass appeals does not apply here.

Second, 801 CMR 1.01(6)(b), cited by the Respondent, states in relevant part that … "In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date the Agency notice of action ***is sent*** to the Party." (***emphasis added***) There is nothing in the record to show that the Appellant was sent a notice of action informing him that: 1) he was not selected for appointment on July 1, 2007; and/or 2) the Fire Department's practice of using an individual's active military duty status as a reason for

non-selection. In fact, it has taken a pre-hearing and two motion hearings (in 2012) before the Commission for the Fire Department to finally acknowledge that an individual's unavailability due to their active military duty status is used as a reason for non-selection.

Third, the Commission has broad authority, under G.L. c. 31, §2(a), to conduct investigations *at its discretion*. The issue here appears to be an ongoing violation and misapplication of the law and rules regarding the requirement to give fair and impartial consideration to all candidates, including those on active military duty. There is no time bar regarding the initiation of such investigations.

Fourth, I considered whether the Fire Department was prejudiced by considering an action that occurred in 2007. Here, the Commission limited its relief to providing the Appellant with a retroactive civil service seniority date for civil service purposes only and expressly prohibited "any additional pay or benefits or additional creditable service toward retirement." The Fire Department has failed to show any harm or prejudice incurred by this relief. In fact, as confirmed by the union representative[1] present at the motion hearing, no grievances have been filed by any firefighters, including those who had a more beneficial seniority date prior to the Commission's decision.

Finally, while this appeal is governed by the civil service law and rules, I am mindful that USERRA, as stated in McLain, "includes no statute of limitations itself and expressly disclaims the applicability of any state statue of limitations." 38 U.S.C. s. 4323(i)

For all of the above reasons, the Respondent's motion for reconsideration is ***denied.***[2]

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, Stein and McDowell, Commissioners) on January 10, 2013.

A true record. Attest:

_____
Commissioner

Notice to:

[1] Richard English
[2] The decision does contain one clerical error. The Appellant's appeal was actually filed on February 21, 2012, not April 11, 2012, as stated in the first sentence of the decision.

Richard Kendall, Esq. (for Appellant)
Ellen Callahan Doucette, Esq. (for Respondent)
Tsuyoshi Fukuda, Esq. (HRD)
John Marra, Esq. (HRD)