

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

JONATHAN MCELROY,
Appellant,

CASE NO: E1-09-215

v.

CITY OF FALL RIVER,
Respondent

Appellant Pro Se:

Jonathan McElroy
[REDACTED]

Appointing Authority's Attorney:

James W. Clarkin, Esq.
84 North Main Street
P.O. Box 267
Fall River, MA 02722

HRD Attorney:

Martha Lipchitz O'Connor, Esq.
One Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Jonathan McElroy, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31, §2(b) and §§41-45, claiming that the City of Fall River Fire Department (FRFD) and the Massachusetts Human Resources Division (HRD) incorrectly calculated his seniority date, by failing to include his prior service as a Fall River Police Officer, which came to light in connection with the calculation of his seniority used in the layoff of the Appellant and other firefighters with the FRFD in March 2009.¹ On August 13, 2009, HRD moved to dismiss the appeal on the grounds that the Appellant's seniority date was correctly calculated as a matter of law and,

¹ The Appellant was a part of a group who contested the layoff of FRFD Firefighters for lack of "just cause" under G.L.c.31, §43 (See CSC Case No. D1-09-167). As a result of the subsequent receipt of funding from the Commonwealth of Massachusetts, the Appellant, along with the other FRFD Firefighters were reinstated to their positions and the "just cause" appeals have been withdrawn.

therefore, he cannot establish any claim for relief. The Appellant opposed the motion and FRPD supported the motion. By Procedural Order dated August 18, 2009, the Commission requested additional information from the parties and a hearing on the Motion to Dismiss was held on November 18, 2009 at the Southern New England School of Law in North Dartmouth MA. The hearing was digitally recorded.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the argument of counsel and the inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Jonathan McElroy, holds the permanent civil service appointment as a full-time Firefighter with the FRFD. (*Claim of Appeal; HRD Motion, Exhibit B*)

2. On January 14, 2002, the Fall River Police Department (FRPD) appointed Mr. McElroy as a full-time permanent Police Officer. (*HRD Motion, Exhibit B*)

3. On June 23, 2003, after service of 1 year, 5 months and 9 days, but while still serving his probationary period, the FRPD terminated Mr. McElroy from his position as a full-time permanent Police Officer. (*Stipulated Facts at Hearing; HRD Motion, Exhibits B & C*)

4. On May 2, 2005, FRFD appointed Mr. McElroy to a full-time permanent position of Firefighter. (*Claim of Appeal; HRD Motion, Exhibit B*)

5. On March 25, 2009, FRFD laid off Mr. McElroy from his full-time permanent position as Firefighter as part of a reduction in force pursuant to G.L.c.31,§39. (*HRD Motion, Exhibits B & F*)

6. In determining Mr. McElroy's length of service for purposes of the seniority date used to determine the rank order of firefighters to be laid off, FRFD used the date May 2, 2005, provided by HRD, as the date on which he was originally appointed as a permanent full-time FRFD Firefighter. (*HRD Motion Exhibits B & F*)

7. With the layoffs imminent, Mr. McElroy made inquiry of HRD as to his seniority date and received information that appeared to indicate that HRD's Municipal Record showed his seniority date to be January 14, 2002 (which is the date he was first appointed as a FRPD Police Officer). (*Appellants Opposition; HRD Motion Exhibits D&E*)

8. Mr. McElroy claims that HRD failed to provide him with accurate information about his seniority date, leading him to understand that the proper date for his seniority should be January 14, 2009. According to HRD, Mr. McElroy was informed that the HRD Municipal Record did not accurately reflect his correct seniority date because it had not taken into account his gap in service between his discharge as a Police Officer and original appointment as a Firefighter. (*HRD Motion, ¶12, Exhibit D; Appellant's Opposition*)

9. The gap in service between June 23, 2003 (the date of Mr. McElroy's termination as a FRPD Police Officer) and May 2, 2005 (the date of his appointment as FRFD Firefighter) is 1 year 10 months and 9 days. (*Administrative Notice*)

10. If Mr. McElroy's service as a FRPD Police Officer were added to his service as a FRFD Firefighter (excluding the 1 year 10 month 9 day hiatus) he would be given a seniority date of November 23, 2003. (*Administrative Notice*)

11. If given a seniority date of January 14, 2002 (his FRPD appointment date) or November 23, 2003 (excluding the gap in service), it would move Mr. McElroy ahead of other firefighters in terms of length of service and could have made his March 2009 layoff improper. (*Administrative Notice of Roster filed in CSC Case No. D1-098-167*)

CONCLUSION

Summary

The Appellant's civil service seniority date, properly calculated under Section 33 of the Civil Service Law is the date on which he was originally appointed to the position of full-time permanent Firefighter with the FRFD. Neither HRD nor FRFD, nor any official of either entity may lawfully alter that date, without prior authority of the Commission. In this case, the Commission finds that, where the Appellant's seniority date has been determined in accordance with the applicable statute, the Appellant has not been prejudiced and is not entitled to equitable relief to provide him with a retroactive seniority date inconsistent with the letter of the law.

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h).

These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential

element of the case”, and has not rebutted this evidence by “plausibly suggesting” the existence of “specific facts” to raise “above the speculative level” the existence of a material factual dispute requiring evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

Relevant Civil Service Law

When a public employer is required to layoff civil service personnel in a reduction in force, G.L.c.31,§39 prescribes:

“If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of their positions, they shall . . . be separated from employment according to their seniority in such unit . . . so that employees senior in length of service, computed in accordance with section thirty three, shall be retained the longest. . . .”

G.L.c.31, §33 sets forth the specific rules for determining seniority. As a general rule:

“For the purposes of this chapter, seniority of a civil service employee shall mean his ranking based on length of service, computed as provided in this section. *Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the department unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original employment.* . . .”

G.L.c.31,§39, ¶1.

Section 33 also contains special rules covering “reinstatements”, “appointments”, “transfers” and “reemployment” from one civil service employer to another:

“If, as a result of a reinstatement made pursuant to section forty-six, a person is restored to employment in a departmental unit other than that in which he formerly held full-time employment as a permanent employee, his length of service shall be computed from the date of his first employment under such reinstatement, but upon continuous service in such unit for three years or twice the length of his absence from the payroll, whichever is greater, his length of service shall be computed as though such earlier employment had been in the departmental unit to which he has been reinstated.” (§2)

“If the employment of such full-time employee is changed through an original or promotional appointment or transfer . . . from one departmental unit to another within the same department in a city or town, the length of service of such employee in the unit to which the appointment or transfer is made shall be computed from the date which was used to compute his length of service immediately prior to such appointment or transfer. If the employment of such full-time employee is changed through an original or promotional appointment . . . from one departmental unit to another not within the same department in a city or town, from one city or town to another . . . the length of service of such employee shall be computed from the date of such change of employment, but if the employee completes one year of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the change of employment.” (§3)

“If the employment of such full-time employee is changed by transfer . . . from one departmental unit to another not within the same department in a city or town, from one city or town to another . . . the length of service of such employee shall be computed in the following manner: (1) if the transfer was made upon the request of the employee, the length of service shall be computed from the date of such transfer, but if the employee completes three years of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the transfer; (2) if the transfer was not upon the request of the employee, the length of service shall be computed from the date which was used to compute the employee's length of service immediately prior to the transfer. In determining the seniority of a firefighter for the purpose of reduction in rank or reduction in force, his ranking shall be based on his length of service in the fire department in which such reduction is to take place.” (§4)

...

Any person in such service who has received an appointment from a reemployment list, as set forth in section forty, shall carry forward their seniority as prescribed herein; provided, however, that any lay-offs occurring after a reemployment date shall have such reemployment date as the determining factor in lay-offs by seniority.” (§6)

G.L.c.31,§33, §§2-6 (*emphasis added*)

In the case of each of these special provisions, the statute provides that an employee who has prior service within a different “departmental unit” in a city or town or a

different city or town may, after a prescribed period of time, recapture the prior service in calculating seniority in the new position. None of these special provisions, however, apply to Mr. McElroy. He was not “reinstated” after a gap in service to his position of Police Officer within the meaning of G.L.c.31, §33, ¶2; he was not “reemployed” from a re-employment list within the meaning of G.L.c.31, §33, ¶6; his employment was not “changed” from Police Officer to Firefighter, either by “appointment” within the meaning of G.L.c.31, §33, ¶3 or by “transfer” within the meaning of G.L.c.31, §33, ¶4, both of which contemplate no gaps in service between the two civil service positions.

The Appellant points to the Commission’s recent decision concerning the seniority calculations of other FRFD Firefighters in the March 2009 layoff, whose prior service properly applied to determine their seniority status. Ponte, et al v. Fall River, CSC Case Nos. D1-09-155 thru D1-09-158, 22 MCSR --- (2009). The prior service of the firefighters in the Ponte case, however, involved continuous civil service employment as EMTs in the FRFD or another Fall River or other municipal department immediately preceding their appointment as permanent FRFD firefighters, and those personnel had served in their positions as firefighters for the requisite time needed to recapture that prior service within the meaning of G.L.c.31, §33, ¶3 or ¶4.² The Commission is not aware of any case in which the provisions of G.L.c.31, §33, ¶3 or ¶4, have been applied to a situation such as that of Mr. McElroy, who did not “change” employment or “transfer” directly from one appointing authority to another.

² It was brought to the Commission’s attention at the motion hearing that the Ponte case contained an error concerning Firefighter Durette, one of the firefighters whose seniority date was questioned by the appellants in that case. After reviewing the record in the Ponte case, the Commission notes that Firefighter Durette did not previously work in the Fall River School Department, as stated in Finding 6.d., but had six years of continuous prior service as an EMT in the FRFD, followed by six months service as a firefighter in another municipal department immediately prior to his appointment to the position of FRFD Firefighter. (*Administrative Notice of the Record in CSC Case Nos. D1-09-155 thru D1-09-158*) The error does not change the Commission’s ultimate conclusion in Ponte or affect the Decision in this case.

Thus, the provision of Section 33 that applies to the calculation of Mr. McElroy's seniority date is found in the first paragraph. This paragraph establishes the date from which to measure his length of service to be the date of first employment in the "departmental unit". G.L.c.31,§33,¶1. Since the FRFD is clearly a separate "departmental unit" from the FRPD, Mr. McElroy's seniority date is properly measured by the date he was first appointed as a FRFD Firefighter, i.e. May 2, 2005.

The Commission considered the argument that Mr. McElroy should be entitled to claim the benefit of language in G.L.c.31,§33,¶1, which provides that an employee whose prior service has been "interrupted" by an "absence from the payroll" may recapture "such" service for seniority purposes after his "restoration to the payroll" under certain conditions. The Commission concludes, however, that the plain meaning of Paragraph 1 limits its applicability to employees who return to "such" service in the same "departmental unit" and was not intended to apply to an employee who has been terminated from one department and then obtains a entirely new appointment to a different department under a different appointing authority at a later point in time. The Commission does not find persuasive Mr. McElroy's argument that his "payroll" check for service with both the FRPD and FRFD came from "The City of Fall River". The method of producing a payroll is largely a function of fiscal policy and it does not change the fact that, under civil service law, the police and fire services are considered different "departmental units" and, in Fall River, are actually different "appointing authorities" for civil service purposes. For these reasons, the Commission concludes that, in establishing the order in which to layoff firefighters in March 2009, FRFD was fully justified to use May 2, 2005 as the appropriate seniority date for Mr. McElroy as calculated by HRD

under Section 33, Paragraph 1. The Commission finds no reason to require a retroactive equitable adjustment to that seniority date at this point in time, with the attendant impact on the seniority ranking of other members of the FRFD.³

While the Commission can appreciate that the various paradigms for determining seniority under Section 33 may seem somewhat opaque, especially to laypersons, absent the existence (not present in this record) of unique and compelling circumstances that would warrant the exercise of its authority under Chapter 310 of the Acts of 1995, the Commission is obliged to apply the statute as the legislature has written it. While there may be good reason to question the distinctions that the statute makes in the status of what could be argued to be essentially comparable circumstances, it remains for the legislature, not the Commission to make whatever changes seem appropriate in that area.

In sum, for the reasons stated above, HRD's Motion to Dismiss will be and hereby is granted and the appeal of the Appellant, Jonathan McElroy, is hereby, *dismissed*.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [absent]; Henderson, Marquis, Stein and Taylor, Commissioners) on December 3, 2009

A True Record. Attest:

Commissioner

³ Even Mr. McElroy does not now dispute that the January 14, 2002 seniority date shown on the HRD Municipal Record he first received and originally claimed was erroneous, as that date cannot possibly be his correct seniority date, since it would purportedly give him service credit for the 1 year, 10 months and 9 days in which he had held no civil service employment whatsoever and to which he would clearly not be entitled under any possible Section 33 scenario.

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:

Jonathan McElroy (Appellant)

James W. Clarkin, Esq. (for Respondent Appointing Authority)

Martha Lipchitz O'Connor, Esq. (HRD)