

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

JOHN MELSON,
Appellant
v.

CITY OF BOSTON,
Respondent

Case No.: G1-09-384

**ORDER GRANTING RELIEF UNDER
CHAPTER 310 OF THE ACTS OF 1993**

The Appellant, John Melson, filed this appeal with the Civil Service Commission pursuant to G.L. c.31, § 2(b)

A pre-hearing conference was conducted at the offices of the Commission on November 10, 2009 which was attended by the Appellant and counsel for the City of Boston (City).

As a result of the pre-hearing conference, the parties were instructed to prepare a Joint Request for Relief under Chapter 310 of the Acts of 1993 for the Commission to consider. Counsel for the City drafted a proposed order and forwarded it to the pro se Appellant for his review and signature. The Appellant did not reply.

Notwithstanding the Appellant's failure to facilitate a joint request for relief to the Commission, the undisputed facts in this case warrant an order of relief by the Commission.

The Appellant was on active military duty continuously from 2005 to July 2009. He took the 2004 civil service examination for firefighter and received a "527 Notification Form" while he was on active duty in Iraq.

On October 4, 2005, the Appellant's father sent correspondence to the City confirming that his son was on active military duty and that he wished to "reserve any right that he may have to be considered for permanent appointment." The City conveyed this information to the state's Human Resources Division (HRD) on January 9, 2006.

While the Appellant was on active military duty in Afghanistan in 2006, he did not receive any "527 Notification Form". He was unaware that his name appeared on Certification No. 260302 for the position of firefighter, issued on April 11, 2006. As a result of not signing the Certification, he was not considered for appointment.

St. 1941, c. 708, § 4 provides in part:

"Any person whose name is on an eligibility list or register of the division of civil service at the time of his commencing said military or naval service, shall, upon his request in writing filed with the director of civil service within one year after the termination

of said service, be continued on or restored to such list or register for a period following such request equal to the remainder of the term of his eligibility thereon at the time he commenced said military or naval service; and any person who otherwise becomes entitled to have his name place on an eligible list or register on account of an examination or registration prior to commencing such service shall, upon a like request in writing filed within a similar period, be entitled to have his name placed upon the proper eligible list or register as of the date of such request, and it shall thereafter remain thereon for the full regular period of eligibility provided for by the civil service law and rules.”

A March 7, 2003 HRD Memorandum to Appointing Authorities; Mayors; Town Managers and Selectmen in Massachusetts states in part, “Although there is no requirement pursuant to federal or state law that requires a community to select a military candidate, this same candidate cannot be dismissed without consideration because they have been called to active military duty. When a community that is in the process of selecting individuals for appointment to the police or fire force, discovers that the top individuals appearing on a certification list are on active military service and are not available to accept an appointment, it may request to establish an intermittent Police or Fire force”.

The U.S. District Court of Massachusetts recently applied the Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C.S. § 4311, et seq.) to a case involving an active duty applicant for the position of Somerville police officer. McLain v. Somerville, 424 F. Supp. 2d 329 (D. Mass. 2006). In McLain, the federal court found that the plain meaning of the federal statute bars discrimination against an applicant for employment who is in the uniformed services.

For all of the above reasons, the Commission, pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, orders the Human Resources Division to take the following action:

The Civil Service Commission directs the Human Resources Division to place the name of John Melson at the top of future certifications for the position of permanent full-time firefighter within the Boston Fire Department for as long as it takes the City to hire at least one permanent full-time firefighter.

Further, if the Appellant is selected for appointment, he shall receive a retroactive seniority date for civil service purposes equivalent to the earliest civil service seniority date of any candidates selected from Certification No. 290920 issued on September 22, 2005.

This retroactive seniority date is not intended to provide the Appellant with any additional and/or retroactive compensation and should not be used to determine time served in the position of police officer in regard to eligibility for any future civil service promotional examinations.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 28, 2010.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:

Robert Boyle, Esq. (for City of Boston)
John Melson (Appellant)

John Marra, Esq. (HRD)