COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

GREGORY NICHOLAS,
Appellant
v.
HUMAN RESOURCES DIVISION,
Respondent

B2-14-266

Appearance for Appellant: Gregory Nicholas, *Pro Se*

Appearance for Respondent: Michelle M. Heffernan, Esq.
Deputy General Counsel
Human Resource Division
One Ashburton Place
Boston, MA 02108

Appearance for Boston Fire Dep't: David LaChappelle, Esq.
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Commissioner: Paul M. Stein

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

The Appellant, Gregory Nicholas, a Firefighter with the Boston Fire Department (BFD), acting pursuant to G.L.c.31,§2(b), appealed to the Civil Service Commission from the decision of the Massachusetts Human Resources Division (HRD), denying his request to take the 2014 Boston Fire Lieutenant Examination. HRD moved to dismiss the appeal on the grounds that the Appellant lacked the minimum three years of service after appointment with the Boston Fire Department (BFD) required by G.L.c.31,§59,¶2 to be qualified to take the examination. The Appellant opposed the motion and claimed that HRD's refusal to allow him to take the examination violated his rights as a veteran under the Uniformed Services Employment and Re-

employment Act of 1994 (USERRA), 38 U.S.C. §4301 *et seq*. and Massachusetts Civil Service Law, G.L.c.31. A hearing on the cross-motions was held by the Commission on February 5, 2015. After considering the submissions of the parties and the arguments presented at the hearing, I conclude that HRD correctly decided that the Appellant was not eligible to take the 2014 Boston Fire Lieutenant Examination because he did not meet the minimum qualifying requirements prescribed by G.L.c.31, §59,¶2 and that nothing in USERRA prohibits HRD from applying those requirements mandated by Massachusetts law.

FINDINGS OF FACT

I find the following facts are not in dispute:

1. The Appellant, Gregory Nicholas, took and passed the April 2010 Boston Firefighters Examination and his name was placed on the Eligible List established in November 2010 for future original appointment as a BFD Firefighter. At the time he took the examination, Mr. Nicholas was on active military duty with the United States Marine Corp. (*Appellant's Motion; Administrative Notice [Eligible List attached to HRD E-mail dated 12/19/2014]*)

2. On March 31, 2011, on request by BFD, HRD issued Certification No. 204795 from the eligible list for appointment of 35 BFD firefighters. Mr. Nicholas's name appeared in the 67th position, tied with 31 other candidates, all veterans. He received notice of the Certification by post-card issued by HRD. At the time, Mr. Nicholas was still on active military duty, assigned to Camp Lejeune, North Carolina, and so notified BFD. (*Appellant's Motion; Administrative Notice [Certification & HRD Notice Card attached to HRD E-mail dated 12/19/2014]; Appellant's Undisputed Statements at Hearing*)

3. In accordance with BFD policy, which HRD supports, because Mr. Nicholas was on active military duty and would not complete his duty before the BFD's appointments were to be made

from Certification No. 204795, Mr. Nicholas was not provided an application packet or further processed for appointment as a BFD firefighter. His candidacy was "deferred" and a place was held for his future consideration upon completion of his military service. (*Appellant's Statements at Hearing; HRD's Undisputed Statements at Hearing*)[1]

4. On or about November 7, 2011, BFD appointed 37 candidates from Certification No. 204795 as BFD firefighters. All of the candidates who were appointed were veterans. Twenty-seven candidates were disabled veterans or veterans ranked above Mr. Nicholas. Ten candidates were veterans ranked with Mr. Nicholas's tie group. (*Appellant's Motion; Administrative Notice [Certification & HRD Form 14 attached to HRD E-mail dated 12/19/2014]*)[2]

5. On February 23, 2012, Mr. Nicholas was honorably discharged from the Marine Corps. Mr. Nicholas reported his discharge to BFD and informed BFD that he desired to remain in consideration for appointment as a BFD firefighter. (*Appellant's Motion; Appellant's Unemployed Statements at Hearing*)

6. On July 9, 2012, Mr. Nicholas was appointed as a BFD firefighter, with a civil service seniority date of November 7, 2011, the same seniority date of the other candidates in his tie group hired from Certification No. 204795 on that effective date. (*Appellant's Motion; HRD's Reply/Cross-Motion; HRD's Undisputed Statements at Hearing*)

7. On September 20, 2014, Firefighter Nicholas signed up to take the 2014 Boston Fire Lieutenant Examination. (*Appellant's Motion*)

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[1] Mr. Nicholas asserts that he was not given the option to pursue his application or to have a slot held for him until his military duty was completed. BFD disputes this assertion, claiming that it was Mr. Nicholas's choice to defer his appointment. This factual dispute is not material to the Commission's decision for the reasons explained in the analysis below.

[2] On November 11, 2011, BFD also appointed three candidates from Certification No. 14795, a "Reemployment List" of firefighters who had been laid off by other civil service fire services and were entitled to priority in reemployment under G.L.c.31,§40. (*Administrative Notice [Certification & HRD Notice Card attached to HRD E-mail dated 12/19/2014]*)

8. On November 3, 2014, HRD issued a Notice to Appear for the 2014 Boston Fire Lieutenant Examination. (*Appellant's Motion*)

9. On November 4, 2014, HRD rescinded the Notice to Appeal, stating that Mr. Nicholas was ineligible to take the 2014 Boston Fire Lieutenant Examination. (*Appellant's Motion*)

10. Mr. Nicholas duly appealed to the Commission on November 5, 2014. (*Claim of Appeal*)

11. HRD administered the 2014 Boston Fire Lieutenant Examination on November 15, 2014. (*HRD Reply/Cross-Motion*)

12. Boston is a city with a population in excess of 50,000. (*HRD Reply/Cross-Motion; Administrative Notice*)

STANDARD OF REVIEW

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7) (h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is "no reasonable expectation" that a party can prevail on at least one "essential element of the case". See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

ANALYSIS

HRD is authorized to "conduct examinations for the purpose of establishing eligible lists" from which civil service appointments and promotions are made. G.L.c.31,§5(e). The Commission generally defers to HRD's discretion to design and administer competitive civil service examinations.

> "There can be little doubt that the cited [civil service] statutes reflect a Legislative intent to endow HRD with considerable discretion in crafting, administering and scoring examinations, as well as crediting education as part thereof."

Carroll v. Human Resources Division, 27 MCSR 157 (2014). See generally Merced v. Human

Resources Division, 28 MCSR 396 (2015) (affirming HRD's requirement that university teaching credit required faculty status of adjunct professor or higher); Cataldo v. Human Resources Division, 23 MCSR 617 (2010) (noting HRD's broad authority to determine the "type and weight" given to training and experience) While HRD's discretion is not unfettered, so long as the rule has been clearly established, it is reasonable and firmly grounded in common sense", and HRD has uniformly applied it, the Commission will not disturb HRD's rational judgment in matters that directly involve its technical expertise in the administration of examinations. E.g., Clarke v. Boston Police Dep't, CSC No. B2-15-58, 29 MCSR --- (2016); Merced v. Human Resources Division, 28 MCSR 396 (2015)

Promotional examinations in the municipal fire service are governed by G.L.c.31,§59, which was added to the civil service law by St.1978, c.393, and amended by St.1989, c.174. G.L.c.31, §59,¶2, provides:

> "*An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force*, except that if the number of such employees, or the number of applicants eligible for the examination is less than four, the examination shall be opened to permanent employees in the next lower titles in succession in such force until either four such eligible employees have applied for examination or until the examination is open to all permanent employees in lower titles in such force; *provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open; and provided, further, that no such examination for the first title above the lowest title in the police or fire force of a city or town with a population in excess of fifty thousand shall be open to any person who has not been employed in such force in such lowest title for at least three years after certification. (emphasis added)*

The requirements of G.L.c.31,§59,¶2 have been construed by the Massachusetts appellate courts and the Commission to establish a "two-prong" test for eligibility to sit for a public safety promotional examination: (1) the candidate must be serving in the "next lower title" on the date of the promotional examination; and (2) the candidate must have been "employed in the force"

[meaning in the same police or fire department, but not necessarily in the "next lower title"] for one year prior to the date of the examination (or three years in communities over 50,000 population) after the candidate's name was first "certified" for appointment in the "next lower title." See Weinburgh v. Civil Service Comm'n, 72 Mass.App.Ct. 535, rev.den., 452 Mass. 1110 (2008); City of Lawrence v. Civil Service Comm'n, 66 Mass.App.Ct. 309 (2006); O'Donoghue v. Human Resources Div., 27 MCSR 485 (2014); McNamara v. Human Resources Div., 27 MCSR 402 (2014); Daniels v. Human Resources Div., 26 MCSR 9 (2013); Bettencourt v. Massachusetts Human Resources Div., 24 MCSR 522 (2011); Dickinson v. Human Resources Div., 24 MCSR 200 (2011); Minor v. City of Chicopee, 9 MCSR (1966)

Mr. Nicholas met the first prong – he was serving as a BFD firefighter on the date of the 2014 Boston Fire Lieutenant Examination. The issue presented in this appeal involves the second prong – was Mr. Nicholas "employed" in the BFD fire service for three years prior to the date of the examination?

- HRD counts Mr. Nicholas's employment from the date he was appointed as a BFD firefighter – July 9, 2012 – and calculates that he was "employed in such force" within the meaning of G.L.c.31,§59,¶2 for less than 2½ years as of November 15, 2014, the date of the Boston Fire Lieutenant Examination.
- Mr. Nicholas claims that the relevant date on which he was first "employed" by BFD is November 7, 2011, the same date on which the other appointments were made from Certification No. 204795, which is also the "retroactive civil service seniority date" he received following his completion of military service and appointment in July 2012.

Under Massachusetts Civil Service Law, Three Years of Employment After Appointment is Required to be Eligible to Take a BFD Promotional Examination.

Chapter 31 does not define "employed", but it does define "civil service employee" as "a person holding a civil service appointment." G.L.c.31,§1. Contrary to Mr. Nicholas's belief, having his name placed on a civil service eligible list or certification is not an "appointment" to a civil service position and creates no contractual employment relationship under Massachusetts law. See, e.g., Bielawski v. Personnel Admin'r, 422 Mass. 459, 466 (1966) (appearance at top of civil service list creates no "property interest"); Kelleher v. Personnel Admin'r, 421 Mass. 382, 389 (1995) (candidate with highest examination score "has no property interest in the fire chief position merely because his name appears on a civil service eligible list"); Callanan v. Personnel Admin'r, 400 Mass. 597, 600-601 (1987) ("individuals do not have a vested right in their particular positions on the eligible list"). See also, Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) (An "expectation of selection based on his position on a civil service list" does not rise to the level of a constitutionally protected property right.)

Thus, under G.L.c.31,§59, to be eligible to sit for the 2014 Boston Lieutenant Examination, Mr. Nicholas must have held an "appointment" to a civil service position and "actually" beem employed" in the position at least three years prior to November 15, 2014 to be eligible to take that examination. Having been granted a "retroactive seniority date" in the title of firefighter is not equivalent to actually being employed in the force for that period. See Weinburgh v. Civil Service Comm'n, 72 Mass.App.Ct. 535, 538, rev.den., 452 Mass. 1110 (2008) (employee must "actually serve in the force" for requisite period of time).[3] As the Commission decided in the

[3] I note that a person cannot be "employed" in a civil service position without first being appointed, but "serving" in the position is not necessarily synonymous with "actually performing the duties" of the position. That distinction appears elsewhere in Section 59 with regard to periods of part-time service "actually performed" as a reserve, intermittent or call police officer or firefighter, but not with respect to full-time appointments under Section 59,¶2. See also G.Lc.31,§34 (probationary employee must "actually perform the duties" of the position to earn tenure); G.L.c.31,§61 (police officers and firefighters must "actually perform the duties" for twelve months to earn tenure).

appeal of Dickinson v. Human Resources Div., 24 MCSR 200, 206-207 (2011):

> "Although a candidate's civil service seniority date has been back-dated by one year, he must still serve in the force for at least one year prior to being eligible to sit for a promotional examination in the next higher title of lieutenant. Thus, the candidate's retroactive civil service seniority date is not being used to determine his eligibility to sit for the promotional examination."

In sum, HRD's conclusion that, for purposes of eligibility to sit for the Boston Lieutenant Examination under Massachusetts civil service law, Mr. Nicholas was not "appointed" and, therefore, was not "employed" as a BFD firefigher until July 9, 2012. Therefore, he had less than the requisite three years of actual service prior to the exam date. Thus, HRD correctly interpreted G.L.c.31,§59,¶2 to require that Mr. Nicholas did not qualify to sit for that examination.

USERRA Does Not Supersede the Massachusetts Three Year Employment Eligibility Rule

Mr. Nicholas makes the additional argument that, if G.L.c.31,§59,¶2, as written or as applied by HRD, is construed to disqualify him from taking the 2014 Boston Lieutenant Examination, that interpretation is invalid because it deprives him of his rights as a veteran under USERRA. Mr. Nicholas contends that, but for his active duty military status at the time his name was reached by BFD for appointment from Certification No. 204795, he would have been processed for and appointed to the BFD on November 7, 2011 along with other candidates (which included several appointed from his tie group). In essence, he claims that, by putting his application "on hold" in 2011 until he completed his active duty military service, rather than processing him immediately, he was denied an employment opportunity that later prevented him from taking the 2014 promotional exam, two years after his military discharge, all in violation of USERRA.[4]

[4] There is a factual dispute between the parties as to whether BFD gave Mr. Nicholas a choice to be processed or put on hold. BFD claims that he was given the option and elected to be deferred; Mr. Nicholas claims he never received that choice but was told he would be put on hold until he was released from active duty. I do not need to resolve this factual issue but, for purposes of this motion, I assume the facts most favorable to Mr. Nicholas; namely, that he was only given one option – to be deferred.

As a threshold matter, HRD contends that the Commission's inquiry must end with the determination that HRD correctly applied Massachusetts civil service law as written and that the Commission is not vested with authority to interpret USERRA. HRD is correct that a complaint for relief to enforce non-compliance with a veteran's rights under USERRA must be asserted through intervention of the Secretary of Labor and/or the Attorney General of the United States, or through a civil action in federal court (or, in the case of a violation by a "State", also in a state court of competent jurisdiction). 38 U.S.C.§§4322,4323. See generally Panarello v. State of Rhode Island, 88 A.3d 350 (R.I. 2014) (alleged USERRA violation by RI Dep't of Corrections)[5]

The fact that the Commission lacks jurisdiction over a formal USERRA complaint, however, does not preclude, and has not precluded, the Commission from inquiry to assure that the civil service rights provided by Massachusetts law are consistent with the requirements to which veterans have been granted under USERRA. See, e.g., Gilbody v. City of Quincy, 27 MCSR 322 (2014) (USERRA did not conflict with requirements for timely claiming veteran's status and process for issuance of certifications); Amaral v. City of Fall River, 22 MCSR 653, 659 fnt.6 (2009) (relationship of USERRA rights to requirements for layoffs); Sullivan v. Town of Sandwich, 21 MCSR 150 (2008) (USERRA does not prohibit tolling of civil service probation for period that employee was called to active duty); McGrath v. Boston Police Dep't, 19 MCSR 316 (2006) (noting USERRA in granting veteran a retroactive seniority date).

Indeed, assuring fair treatment of veterans is also deeply embedded in the basic rights and "merit principles" of Massachusetts civil service law, which includes a variety of preferential treatment for veterans over non-veterans in hiring, promotions and retention. See, e.g.,

[5] The present appeal is asserted against HRD, a "State" agency, not BFD, a municipal political subdivision of the Commonwealth. Presumably, both entitles would be subject to USERRA as an "employer", HRD because the State's regulation of examinations constitutes "control over employment opportunities" and BFD as a "private employer", that "pays salary or wages for work performed" as well "has control over employment opportunities." 38 U.S.C.§§4303(3),(4)(A)(iii) & (14); 38 U.S.C.§4323(i)

G.L.c.30,§9A; G.Lc.31,§§1, 3(f), 26, 28, 58A; Dupuis v. Town of Bourne, 28 MCSR 603 (2015 (discussing veterans' preferences in hiring and promotions); Arty v. Human Resources Div., 24 MCSR 329 (2011) (grandfathering veterans from age requirements); Grealish v. Registry of Motor Vehicles, 21 MCSR 172 (2008) (veterans' preference in provisional appointments); Campagna v. Department of Environmental Protection, 8 MCSR 70 (1995) (preference for hiring a "qualified" veteran even over a "more qualified" non-veteran) See also Younie v. Doyle, 306 Mass. 567 (1940) (discussing history and scope of veteran's preference in Massachusetts civil service law)

USERRA does not affect benefits provided to veterans under Massachusetts civil service law and rules which are "more beneficial" to a veteran than the rights provided under USERRA, but USERRA does "supersede any State law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits or eliminates, in any manner an right or benefit provided by [USERRA], including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit." 38 U.S.C. §4302. See also 20 C.F.R. §1002.7 ("USERRA establishes a floor, not a ceiling, for the employment and reemployment rights and benefits of those it protects. In other words, an employer may provide greater rights and benefits than USERRA requires, but no employer can refuse to provide any right or benefit guaranteed by USERRA.")

USERRA was enacted in 1994 as the successor to a series of laws going back to the Selective Training and Service Act of 1940 which were intended to protect the employment and reemployment rights of veterans. In general, USERRA's provisions "should be broadly construed in favor of military service members as its purpose is to protect such members." See, e.g., Rivera-Melendez v. Pfizer Pharmaceuticals, LLC, 730 F.3d 49, 54 (1st Cir. 2013) It bears

notice that, also, "Congress sought . . . to strike an appropriate balance between benefits to employee-service persons and costs to employers. USERRA does not authorize the courts to add or detract from that guarantee or to restrike that balance." Rogers v. City of San Antonio, 392 F.3d 758, 769-70 (5th Cir.2004), cert. den., 545 U.S. 1129 (2005). USERRA does not endow a court with the power to "sit as a super-personnel department that oversees a company's general employment practices. . . " Lisdahl v. Mayo Foundation, 633 F.3d 712, 722 (8th Cir. 2011)

Two related provisions of USERRA arguably have relevance here. The first is an anti-discrimination statute that prohibits disparate treatment in employment of any person who is "a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service". 38 U.S.C. §4311(a) & (b) Under the specific burden-shifting framework of USERRA, a plaintiff makes out a prima facie case of such discrimination by showing that military service was "a motivating factor in the employer's action." Id., 38 U.S.C. §4311(c)(1). Military service is a motivating factor if the employer "relied on, took into account, considered or conditioned the decision" on the person's military-related absence or obligation. See, e.g., Kane v. Town of Sandwich, 123 F.Supp.3d 147, 154 (D.Mass. 2015). The employer must then "prove that the action would have been taken in the absence of such membership." Id.[6]

Second, USERRA spells out in detail specific "reemployment" rights applicable to employees who are called away from their civilian jobs to perform military service obligations. 38 U.S.C. §4312 through §4316. USERRA requires that such employees be "deemed on furlough or leave of absence while performing such service" and, upon return to work, "reemployed" with "the seniority and other rights and benefits determined by seniority" that the

[6] This two-prong paradigm for establishing discrimination under USERRA – which is markedly different from the three-prong *McDonnell-Douglas* burden shifting paradigm used in civil rights discrimination cases – was enacted to overrule a U.S. Supreme Court interpretation of prior law that required such discrimination be "motivated *solely*" by military status. See, e.g., Velazques-Garcia v. Horizon Lines of Puerto Rico, Inc., 473 F.3d 11, 15-17 (2007)

person had on the date of the commencement of service in the uniformed services "plus the additional seniority and rights and benefits that such person would have attained if the person had remained continuously employed." 38 U.S.C. §4316(a) & (b)(1) (A). These rights, referred to the "escalator clause", include reemployment in the job position that the returning veteran "would have attained with reasonable certainty" but for the absence due to uniformed service. 38 U.S.C. §4313(a); 20 C.F.R. §1002.191. In addition, a returning veteran is entitled to non-discriminatory "equal but not preferential treatment" with respect to those "other rights and benefits not determined by seniority" as are generally provided by the employer to other similarly situated non-military personnel. 38 U.S.C. §4316(b)(1)(B); 20 C.F.R. §1002.150. See, e.g., Gross v. PPG Industries, Inc., 536 F.3d 884, 889-891 (7th Cir. 2011); Rodgers v. City of San Antonio, 392 F.3d 758 (5th Cir. 2004), cert. den., 545 U.S. 1129 (2005)

Research has disclosed no precedent that expressly applies the provisions of USERRA to the specific facts presented in this appeal. Although language can be found that, taken out of context, may appear to lend support to Mr. Nicholas's claim, the substantial weight of authority fails to support his position.

Section 4311 of USERRA provides, in relevant part, that any person who is a member of, performs, or has an obligation to perform service in a uniformed service "shall not be denied initial employment, reemployment, retention in employment, promotion or any benefit of employment by an employer on the basis of that membership . . . performance . . .or obligation." 38 U.S.C. §4311(a). Mr. Nicholas's claim does not fit any of these categories of discriminatory treatment.

First, Mr. Nicholas was never "denied initial employment". His application was put on hold, without any action taken, pending his completion of active duty, at which time he was duly

processed and appointed as a BFD firefighter, with a retroactive civil service seniority date equivalent to the other BFD firefighters hired from the same Certification. This is the typical relief provided under Massachusetts law, to applicants for civil service positions who, for whatever reason (mistake, unlawful bypass, etc.), receive a delayed consideration from a certification on which they appeared. The Commission has consistently afforded this type of relief to applicants whose appointment was delayed due to a military service obligation. See, e.g., Geary v. Town of Foxborough, 27 MCSR 417 (2014) (bypassed veteran ordered to be placed at the top of the next certification for appointment); Lombardozzi v. Town of Leicester, 27 MCSR 298, 303 (2014 (veteran on active duty appointed to intermittent roster granted retroactive seniority date); Honan v. Human Resources Division, 27 MCSR 246 (2014) (veteran not notified or considered due to HRD's erroneous mailing); Giacalone v. City of Gloucester, 21 MCSR 460 (2008) (veteran left off list by mistake ordered to be placed properly on next list); McGrath v. Boston Police Dep't, 19 MCSR 316 (2006) (offer of employment to veteran withdrawn after he was called to active duty and later hired, ordered to be given retroactive seniority date). See generally St.1947, c.11 (authorizing retroactive seniority date to veterans)

Thus, Mr. Nicholas's appointment and subsequent eligibility to take the 2014 examination was not handled disparately in any way. The Commission has been clear that nothing prohibits BFD from pre-employment processing of candidates while on active duty but nothing requires that they be given an appointment and actually "employed" until they have been discharged from active duty. See generally, "Findings", Inquiry Regarding Active Military Service Candidates in the Boston Police Department, CSC Tracking No. 1-13-190 (March 20, 1014) The critical point remains that a BFD firefighter is "employed in such [BFD] force" beginning on his or her appointment date (which may not always be the same as the employee's seniority date). Mr.

Nicholas's actual period of "employment" was calculated in precisely the same way as HRD would calculate that period of service for any other person whose original appointment date was deferred for any different reason.

Second, even if the Commission were to accept Mr. Nicholas's assertion that he should have been processed sooner, along with the rest of the candidates on Certification No. 204795, it cannot be disputed that he would not have been eligible for actual appointment to the BFD until his discharge from active duty in February 2012 at the earliest. Thus, hypothetically, assuming Mr. Nicholas had made it through the hiring process and was appointed as soon as he was discharged, he would still not have accrued the necessary three years of actual "employment in such force" required to be eligible to take a November 2014 promotional examination.

Mr. Nicholas appears to claim that, although he was not (and could not be) actually appointed until he finished active duty, an exception should be made for him because of his military service so that he is deemed, in effect, "constructively appointed" sooner than he was, in fact, appointed and actually able to serve. This argument clearly cannot be credited as it is plainly a demand that he be given "preferential", not "equal" treatment in "initial employment", which is precisely what USERRA does not require. See, e.g., Rogers v. City of San Antonio, 392 F.3d 758, 770-771 (5th Cir. 2004), cert. den., 545 U.S. 1129 (2005) (rejecting a "constructive presence" theory as inconsistent with legislative intent and judicial precedent under USERRA). See also Sandoval v. City of Chicago, 560 F.3d 703 (7th Cir.), cert. den., 130 S. Ct. 196 (2009) (rejecting claim that veterans would have been promoted sooner if exams has been conducted in location more convenient to their duty stations, as seeking "preferential" not "equal" treatment); Paxton v. City of Montebello, 712 F.Sup.2d 1007, 1013 (C.D. Cal. 2010) (USERRA does not

excuse veterans from actual service for the full probationary period required of all employees); Sullivan v. Town of Sandwich, 21 MCSR 150 (2008) (same)

Third, Mr. Nicholas places undue reliance on the federal case of Beattie v. Trump Shuttle, Inc., 758 F.Supp. 30 (D.D.C. 1991) and McLain v. City of Somerville, 424 F.Supp.2d 329 (D.Mass. 2006). These two cases involved employers who rejected applicants because they had a military service obligation that precluded them from commencing employment on a date selected by the employer. These cases stand for the proposition that "unavailability" to start work immediately due to a military service obligation, alone, did not justify rejecting otherwise qualified applicants for employment, but that is not what happened to Mr. Nicholas, who was not denied employment but was, in fact, hired. Indeed, the McLain opinion noted that the appropriate response would have been the very action that BFD took here, namely to "hold a permanent job open" and "delay permanent hiring", rather than reject the applicant entirely. See McLain v. City of Somerville, 424 F.Supp.2d 329, 334-335 (D. Mass. 2006); cf. Panarello v. State of Rhode Island, 88 A.3d 350, 372 (R.I. 2014) (employee on military leave was denied promotion that "anyone who was not immediately available would not be awarded. . . regardless of the reason for his or her unavailability" but, later, promoted at the next opportunity after returning from military duty)

Fourth, this is not a case in which there has been any evidence, direct or circumstantial, to suggest that HRD or BFD harbored any actual bias against Mr. Nicholas because of his military status, which is something that would not be condoned under USERRA or Massachusetts civil service law. See, e.g., Martin v. Woburn Fire Dep't, 26 MCSR 24 (2013); King v. Medford Fire Dep't, 19 MCSR 317 (2006)

Fifth, Mr. Nicholas is not entitled to preferential treatment under the "escalator" provisions of USERRA, which apply only to "reemployment" of an veteran who, after employment, took a military leave of absence that cause the employee to miss an opportunity for promotion that arose during that leave of absence. See 38 U.S.C. §4303(2) ("benefit of employment" means specific types of benefits that accrue "by reason of an employment contract or agreement or an employer policy, plan or practice"); 38 U.S.C. §4312(a) (reemployment "rights and benefits" apply to a veteran who leaves "a position of employment" to perform military duty). In other words, the protection against discriminatory action in "reemployment . . . promotion, or any benefit of employment" only applies after a military service member has entered an "employer/employee relationship. . . and reemployment has occurred. . .after they return from a deployment" See Clegg v. Arkansas Dep't of Correction, 496 F.3d 922 (8th Cir. 2007); Paxton v. City of Montebello, 712 F.Supp.2d 1007, 1011-1012 and cases cited (C.D. Cal. 2010).

Sixth, even with respect to reemployment rights, not all "adverse employment actions" are considered sufficiently "disruptive" and not "everything that makes an employee unhappy" rises to the level of a material violation of USERRA. See generally Vega-Colon v. Wyeth Pharmaceuticals, 625 F.3d 22, 33 (1st Cir. 2011) (denial of access to plant while on military leave); Crews v. City of Mt. Vernon, 567 F.3d 860, 865-870 (7th Cir. 2009) (changes in scheduling requirements for work missed performing military service); Clegg v. Arkansas Dep't of Correction, 496 F.3d 922 (8th Cir. 2007) (changes in job following reemployment that arguably threatened eligibility for future bonus); Conners v. Billerica Police Dep't, 679 F.Supp.2d 218, 227 (D. Mass. 2010 (oral reprimand not "adverse employment action" under USERRA) For example, under USERRA's reemployment's "escalator" rights (not applicable here as noted above), a returning veteran must still pass any qualifying examination and training

required before receiving a promotion missed during a military absence. Although completing these requirements may cause a "reasonable" delay in the promotion, that delay is not the loss of a "benefit of employment" that must be accommodated, even under the reemployment "escalator" provisions of USERRA.

> "Passing the Fire Lieutenant Exam gives an employee an advantage or gain with respect to possible promotion to Fire Lieutenant. However, a person has not necessarily been deprived of an advantage or gain merely because he has not been afforded as many opportunities as other employees to be tested. This is particularly true when the opportunity to take the test is provided at reasonable intervals, such that a uniformed service member who missed the last test because of military service may take the test within a reasonable time."

Dominguez v. Miami-Dade Co., 669 F.Supp.2d 1340, 1347 (S.D. Fla. 2009), aff'd per curium, 416 Fed. Appx. 884 (11th Cir. 2011) See also 20 C.F.R. §1002.193(b) (employer given "reasonable time" after reemployment to offer returning veterans the opportunity to take a missed promotional exam); Melendez-Garcia v. Sanchez, 629 F.3d 25, 40 (1st Cir. 2010) (same); Huhmann v. FedEx Corp., 2015 WL 6449488 (S.D. Cal. 2015) (returning veteran given a fresh opportunity to train for job he would have been scheduled to learn if he had not been deployed)

In sum, although the USERRA statute and the cases described above do not precisely cover the facts of this appeal, they are sufficiently definitive to lead to the conclusion that USERRA should not be construed to supersede the uniformly applied requirements of Massachusetts civil service law relevant here, i.e., in order to take a promotional examination, Mr. Nicholas must have actually been "employed" as a BFD firefighter for three years, as measured from his actual date of appointment, the same as required of all BFD firefighters. Mr. Nicholas was lawfully denied the opportunity to take the 2014 Boston Fire Lieutenant Examination. Presumably, he will be eligible to take the next examination once he has completed a full three years of actual employment in the force after appointment as a BFD firefighter.

<u>CONCLUSION</u>

Accordingly, for the reasons stated, HRD's Motion for Summary Disposition is ***<u>allowed</u>*** and the Appellant's Motion for Summary Decision is ***<u>denied</u>***. The Appellant's appeal under Docket No. B2-14-266 is ***<u>dismissed.</u>***

Civil Service Commission

<u>/s/ *Paul M. Stein*</u>
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso [absent], Ittleman, Stein & Tivnan, Commissioners) on July 7, 2016.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration <u>does not</u> toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Gregory Nicholas (Appellant)
Michelle M. Heffernan, Esq. (for Respondent)
David LaChapelle, Esq. (for BFD)
Robert J. Boyle, Jr., Esq. (for BFD)