COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

DAVID P. OSTER, Appellant	)	
V.	)	Docket No. D-03-410
TOWN OF WATERTOWN, Respondent	)	**ON RESPONDENT'S MOTION TO DISMISS**

DECISION

Pursuant to M.G.L. c. 31, § 43, the Appellant, Watertown Firefighter David P. Oster, filed this appeal on October 15, 2003 with the Civil Service Commission (hereinafter "Commission") seeking a just cause determination due to an action by the Respondent, Town of Watertown (hereinafter "Town") as Appointing Authority. According to the Appellant's appeal form, the action by the Town consisted of "1) Order fitness for duty, 2) not conform to Civil Service Guidelines in reporting the results of the exam." The Appellant also filed a complaint pursuant to § 42 claiming the Appointing Authority failed to "Follow Civil Service Law as it relates to Fitness for Duty and reporting such results." in violation of § 41. The appeal and complaint, filed together, were timely filed. The Town filed a Motion to Dismiss with the Commission on March 4, 2004 requesting that this appeal be dismissed due to the Commission's lack of jurisdiction in the matter.

The appeal stems from the Town placing the Appellant on administrative leave with pay in order to undergo a Fitness for Duty psychological evaluation on August 26, 2003. This directive from the Town was as a result of two incidents whereby the Appellant had complained about fellow firefighters tampering with his bedding by placing bodily fluids in his sheets in 1999 and, tampering with his food causing him to fall ill on August 11, 2003. The Appellant was examined by Mark S. Shaeffer, Ph.D. who issued a report to the Town on September 9, 2003 finding the Appellant fit for duty.

On September 15, 2003, Town Manager Michael J. Driscoll returned the Appellant to active duty without loss of pay, benefits or seniority. There is absolutely no evidence in the record of this appeal that even suggests that the Appellant's Civil Service rights were prejudiced, or that he suffered actual harm to his employment status, in any way by his being placed on administrative leave with pay in order to undergo a Fitness for Duty evaluation. Being temporarily separated from active duty while receiving full pay, benefits and time in service does not constitute a suspension under Civil Service law. Although a suspension could have *resulted* from this action, it clearly did not in this case. The Appellant was returned to regular duty without harm. The Commission fails to see where the Appointing Authority violated M.G.L. Chapter 31 (Civil Service law), the Personnel Administration Rules or basic merit principles in this matter.

Furthermore, on November 20, 2003, the International Association of Firefighters, Local 1347, of which the Appellant is a member, filed a Demand for Arbitration at the American Arbitration Association (hereinafter "AAA") asserting that the evaluation of

the appellant was in violation of the collective bargaining agreement (hereinafter "CBA") between the Union and the Town. The Commission's purview regarding issues where binding arbitration is selected as the means to resolve a grievance is unambiguous. M.G.L. c. 150E, § 8 states, in relevant part:

> ". . . where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one, section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and section fifty-nine B of chapter seventy-one."

Also, M.G.L. c. 31, § 43 provides in its relevant part:

> "If the commission determines that such appeal has been previously resolved or litigated with respect to such person, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal."

Whereas the Appellant and his Union have selected binding arbitration to grieve and assert that the Fitness for Duty evaluation was in violation of the CBA, the Commission has no jurisdiction to also hear the matter.

For all the reasons stated herein, the Commission finds that it lacks jurisdiction to hear this appeal because, pursuant to the Standard Adjudicatory Rules of Practice and Procedure CMR 801 1.01 (7)(g)(3), the Appellant has failed to state a claim upon which

relief can be granted (claim of suspension and/or selection of arbitration). Therefore Respondent's Motion to Dismiss is allowed and, the § 43 appeal and the § 42 complaint on Docket No. D-03-410 are hereby ***dismissed.***

Civil Service Commission

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John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairperson; Bowman, Guerin, Marquis and Taylor, Commissioners) on December 7, 2006.

A true record. Attest:

_____
Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
David P. Oster
David C. Jenkins, Esq.