**COMMONWEALTH OF MASSACHUSETTS**
**CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

**One Ashburton Place – Room 503**
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**TARA REARDON,**
Appellant,
*v.*
**CITY OF LAWRENCE,**
Respondent

**CASE NO: G2-11-215**

Attorney for the Appellant:

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Commissioner:

Paul M. Stein

## DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

The Appellant, Tara Reardon, appealed to the Civil Service Commission (Commission), claiming that the City of Lawrence ("Lawrence") violated her civil service rights under G.L.c.31, §39 by filling certain vacancies in the position of Lieutenant in the Lawrence Fire Department (LFD) through promotional appointment of others, rather than by returning her to that position, which she had held prior to her being laid off for budgetary reasons in July 2010. Lawrence claims that the Appellant did not have any Section 39 rights to be recalled as a Lieutenant when it made the promotions in question. The Commission invited cross-motions for summary decision and heard oral argument on the motions on November 7, 2011.

**Findings of Fact**

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

1. The Appellant, Tara Reardon, was employed by the LFD as a full-time permanent Firefighter on November 29, 2002. She was promoted to Lieutenant on June 24, 2007. *(Stipulated Facts; Appellant's Motion, Exh. 1; Lawrence Motion, Exh. B)*

2. In June 2010, Lawrence Mayor Lantigua submitted a proposed budget for FY2011, which noted a cumulative deficit of approximately $24 million for the fiscal year that necessitated a reduction of 89 personnel, including 23 LFD personnel. (*Lawrence Motion, Exhs. A; Bergeron Aff't , ¶21, Exhs A &. C*)

3. On June 2. 2010, Lt. Reardon received notice informing her that she would be laid off from her position of Fire Lieutenant, effective July 1, 2010. (*Bergeron Aff't, Exh. A; Appellant's Aff't to Opposition to Lawrence Motion*)

4. On or about June 7, 2010, Lt. Reardon executed a "Notice of Consent to Demotion" to the next lower title of Firefighter. The form stated:

> "I do so reserving the right to remain in my present title should an agreement be reached . . . that would allow me to do so. In the event of a demotion pursuant to this Consent, *I reserve my right to recall to my present title at the earliest opportunity that such recall is available under law.*"

(*Appellant's Motion, Exh. 3; Lawrence Motion, Exh. B*) (*emphasis added*)

5. Lt Reardon asserts that she executed the Consent based on her understanding that it was necessary to permit her to be recalled to the position of Firefighter, if an opening for Firefighter should arise sooner than an opening for Lieutenant. This understanding was based on information that she apparently was provided by her collective bargaining representative and by a representative from the Massachusetts Human Resources Division (HRD) who came to

Lawrence to give guidance to employees about the impending layoffs. (*Appellant's Aff't to Opposition to Lawrence Motion; Bergeron Aff't to Lawrence Opposition to Appellant's Motion*)

6. On June 16, 2010, Lawrence conducted a hearing on the justification for the proposed layoffs. By letter dated July 6, 2010, Lt. Reardon (and presumably the others slated for layoff) were informed by Mayor Lantigua that the reasons for the layoffs were sustained by the hearing officer. (*Bergeron Aff't, Exh. C*)

7. LFD General Order #21, dated July 6, 2010, implemented certain personnel actions, including:

> "On Wednesday, July 7, 2010 at 0800 hours the following demotions, as ordered by Mayor William Lantigua, will take effect . . . .Lieutenant Mark Alberti . . .[and] Lieutenant Tara Reardon [are] demoted to the rank of Firefighter. . . . "
>
> . . .
>
> "On Wednesday July 7, 2010 at 0800, as ordered by Mayor William Lantigua, Firefighters . . .Mark Alberti . . . Tara Reardo. . . [and 22 others]. . . are hereby terminated."

(*Appellant's Motion, Exh. 2; Bergeron Aff't, Exh. D*)

8. At the time of the layoffs, Lt. Reardon had more tenure with the LFD than the other lieutenant, Mark Alberti slated for layoff. Among the most junior firefighters slated to be laid off, a dozen had more tenure with the LFD than she did. Lt. Reardon knew that by consenting to demotion to firefighter, her "bumping rights" would not prevent her from being laid off. (*Appellant's Motion, Exh. 4; Bergeron Aff't, ¶6 & Exh. H*)

9. On or about July 22, 2010, Lt. Reardon's name was placed first on a "Lawrence Public Safety/Fire Div" Reinstatement List for Fire Lieutenant, with a civil service seniority date of 11/29/2002. The Appellant was also placed her on the statewide Firefighter Full Time Reemployment list. (*Appellant's Motion, Exhs 4 & 5; Lawrence Motion, Exh.C ; Lawrences' Reply*)

10. Lawrence prepared its own Firefighter "reemployment" list, which listed Lt. Reardon with a seniority date of 12/2/2002, which placed her junior to twelve (12) other officers. Lawrence did not prepare any "reemployment" list for Lieutenant. (*Bergeron Aff't, ¶24, Exh. H*)[1]

11. On September 19, 2010, Lawrence promoted Firefighters Michael Blanchard and David Ferris, to provisional Lieutenant. They each had a civil service seniority date of July 1994, and, thus, had more tenure in the LFD than Lt. Reardon. Neither had been laid off as part of the reduction in force. They were ranked first and third on the current eligible list. Neither had served previously in the position of Lieutenant. (*Stipulated Facts; Appellant's Motion, Exhs.2 & 6; Bergeron Aff't to Lawrence Motion,¶¶12-16, Exhs. H & I*)

12. On October 3, 2010, Lawrence reinstated Firefighter James Driscoll from layoff to the position of Firefighter. Although Firefighter Driscoll was listed with the same civil service seniority date as the Appellant (12/2/2002), he was reinstated ahead of her based on his earlier date of birth, which Lawrence used as the tie-breaker for determining seniority among employees with the same civil service length of service. (*Stipulated Facts; Appellant's Motion, Exh. 8; Bergeron Aff't to Lawrence Motion, ¶¶17-20, 23, 26, Exh.H*)

13. On January 30, 2011, Lt. Blanchard became a permanent Lieutenant and Firefighter Driscoll, the second (and only remaining) name on the eligible list, was promoted to permanent Lieutenant.(*Stipulated Facts;Appellant's Motion, Exh.7;Bergeron Aff't to Lawrence Motion*)

14. On February 15, 2011, Lawrence offered the Appellant the opportunity to be reinstated to the position of Firefighter, and she was returned to duty with LFD as a Firefighter on March 13, 2011. (*Stipulated Facts; Bergeron Aff't to Lawrence Motion, Exhs. F & G*)

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[1] A discrepancy exists between Lt. Reardon's civil service seniority date maintained by HRD (11/29/2002) and the date used by Lawrence (12/2/20002). This discrepancy does not appear material to the Decision, although the Commission would infer that HRD's date is the correct one, and that date also applies to the other officers assigned a 12/2/2002 date on the Lawrence internal Firefighter's "reemployment" list.

15. On March 14, 2011, the Appellant was promoted from the position of Firefighter to provisional Lieutenant. At some unspecified time prior to August 17, 2011, her status was changed to permanent Lieutenant. (*Stipulated Facts; Appellant's Motion*)

**Conclusion**

Summary of Conclusion

This appeal raises another issue of first impression arising from layoffs in the City of Lawrence that requires the Commission to interpret G.L.c.31, §39 & 40, concerning the rights of civil service employees in a reduction in force due to lack of money to be "reinstated" or "restored" to their former positions. In Scheffen et al v. City of Lawrence, 24 MCSR 524 (2011), the Commission rejected claims of certain superior officers in the Lawrence Police Department who had been demoted to patrol officer and contended that they had the right to be restored to their positions as Captains and Lieutenants before Lawrence could reinstate or hire any other patrol officers. The Commission determined that Lawrence acted appropriately within its discretion, when funds became available, to choose to first enhance the rank and file patrol officer force instead of filling superior officer positions.

The present case presents a different question. Lt. Reardon asserts that Section 39 required that, once sufficient funds became available following her layoff and Lawrence decided to fill positions of Lieutenant, Lawrence was obliged to reinstate her as a Lieutenant before promoting others to a Lieutenant's position. Lawrence argues that, since Lt. Reardon was laid off from the position of Firefighter, to which she had consented to be demoted, her reinstatement rights were limited to the position of Firefighter, in order of seniority among the 22 firefighters laid off, and she had no direct reinstatement rights to the position of Lieutenant. Only after she first had been reinstated as a Firefighter, would she be in line to again become a Lieutenant.

The Commission concludes that, unlike in Scheffen, Lawrence has misapplied the applicable civil service law. For purposes of reinstatement and restoration rights under G.L.c.31, §39, Lt Reardon must be treated to have been separated and laid off from her position of Lieutenant, and, as the senior-most separated Lieutenant at the time of the layoff, she was entitled to be reinstated to Lieutenant when funds became available and Lawrence decided to fill the position, before promoting any other individual to Lieutenant. In this case, her simultaneous demotion and layoff as a Firefighter was no more than a paper exercise which cannot be construed to have any substantive effect on her civil service rights to such reinstatement as a Lieutenant. Accordingly, the Commission finds that Lt. Reardon should have been reinstated to Lieutenant when the position was first filled post-layoff in September 2010. She is entitled to be restored to all compensation and benefits lost as a result of the failure to reinstate her as required by law.

Applicable Legal Standard

A motion for summary decision of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h) when "there is no genuine issue of fact relating to all or part of a claim or defense" and the moving party is "entitled to prevail as a matter of law." These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., after 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., Pease v. Department of Revenue, 22 MCSR 754 (2009); 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

The statutes upon which the Appellant relies include Sections 39 and 40 of Chapter 31, and PAR.15 of the Personnel Administration Rules promulgated by the Massachusetts Human Resources Division, pursuant to Sections 3 & 4 of Chapter 31.

Section 39 provides:

> *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 positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.*
>
> Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the [just cause] provisions of section forty-one. *Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority . . . written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.*

G.L.c.31§39 (*emphasis added*)

Section 40 provides:

> *If a permanent employee shall become separated from his position because of lack of work or lack of money or abolition of his position, his name shall be placed by the administrator on a reemployment list*, or if a permanent employee resigns for reasons of illness his name shall be

placed on such list upon his request made in writing to the administrator within two years from the date of such resignation.

The names of persons shall be set forth on the reemployment list in the order of their seniority, *so that the names of persons senior in length of service at the time of their separation from employment, computed in accordance with section thirty-three, shall be highest. The name of a person placed on such reemployment list shall remain thereon until such person is appointed as a permanent employee after certification from such list or is reinstated, but in no event for more than two years. The administrator, upon receipt of a requisition, shall certify names from such reemployment list prior to certifying names from any other list* or register if, in his judgment, he determines that the position which is the subject of the requisition may be filled from such reemployment list.

*If the position of a permanent employee is abolished as the result of the transfer of the functions of such position to another department, division, board or commission, such employee may elect to have his name placed on the reemployment list or to be transferred, subject to the approval of the administrator, to a similar position* in such department, division, board or commission without loss of seniority, retirement or other rights, notwithstanding the provisions of section thirty-three.

G.L.c.31§40 (*emphasis added*)

PAR.15 provides:

**LAYOFF FROM CIVIL SERVICE POSITIONS**

(1) All civil service rights of an employee rest in the position in which he holds tenure.
(2) When one or more employees must be separated from positions in the same title and departmental unit due to lack of work, lack of money or abolition of position, all persons filling positions provisionally in the designated title must be separated first, followed by all persons filling positions in temporary status in the designated title, before any civil service employees holding the designated positions in permanent status shall be separated from such positions.
(3) When one or more civil service employees holding permanent positions in the same title and departmental unit must be separated from their positions due to lack of work, lack of money, or abolition of position, the employee with the least civil service seniority computed pursuant to M.G.L. c. 31, §33 shall be separated first; provided that all disabled veterans are accorded the preference provided by M.G.L. c. 31, §26.
(4) When one or more persons among a larger group of civil service employees holding permanent positions in the same title and departmental unit are to be separated from their positions due to lack of work, lack of money or abolition of position, and the entire group has the same civil service seniority date, the appointing authority has the discretion to select for separation among those with equal retention rights, applying basic merit principles.

The rules of statutory construction instruct that inquiry into legislative intent must begin with the language of the statute and, if the plain and ordinary meaning of that language "provides a clear answer, it ends there as well." See, e.g., Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999); Camara v. Attorney General, 458 Mass. 756, 760n.10 (2011); Law v. Griffith, 457 Mass. 349, 352 (2010); Commonwealth v. Cory, 454 Mass. 59, 563 (2009); Commonwealth v.

Brown, 431 Mass. 772, 775 (2000). This Commission must "read and apply [civil service law] in a way which yields an effectual and harmonious piece of legislation compatible with the legislative goals that motivated its passage . . . To do this, we look first to the language of the statutes, and in the absence of uncertainty or ambiguity, we need go no further". Worcester v. Civil Service Comm'n, 18 Mass.App.Ct. 278, 280, rev.den., 392 Mass. 1104 (1984) and cases cited. See also City of Fall River v. AFSCME Council 93, 61 Mass.App.Ct. 404, 408, 411 (focusing on "fundamental purpose" and "policy choices" reflected in language of civil service law); McLean v. Town of Natick, 14 Mass.App.Ct. 187, 189, rev.den., 387 Mass.1103 (1982) (court is "mindful of the policy considerations behind the civil service law and the intention of the Legislature" in construing the statute)

The Commission begins with the relatively straight-forward premise that, putting the demotion to Firefighter aside, had Lt. Reardon simply been laid off from her position of Lieutenant, there would be no doubt that she would have been entitled to be recalled to duty as a Lieutenant once funds became available to employ a Lieutenant, ahead of the promotion of any other Firefighters who were then on the eligible list for promotion to Lieutenant. This is required by the plain language of the first paragraph of Section 39 which states that: "Employees separated from positions under this section shall be reinstated *prior to the appointment of any other applicants*". G.L.c.31, §39, ¶1 (*emphasis added*). See generally Bedinotti v. City of Springfield, 23 MCSR 238 (2010); Hayes v. Town of Middleborough, 19 MCSR 98 (2006); Karvelis v. Quincy School Dep't, 7 MCSR 42 (1994). Although Lawrence has discretion to decide the sequence to recall superior officers and/or or rank-and-file officers, and/or how many of each, see Scheffen et al v. City of Lawrence, 24 MCSR 524 (2011), once those decisions are made, the recall rights of any officers laid off from the positions to be filled must be respected.

In this case, the parties diverge on whether or not the additional fact that Lt. Reardon accepted a demotion to Firefighter prior to her layoff altered her reinstatement rights to the position of Lieutenant from that which she would have enjoyed, but for the demotion. For several reasons, the Commission agrees with Lt. Reardon that she did not lose her civil service right to be returned to the first available opening for Lieutenant solely because her separation took the form of a simultaneous demotion and layoff, rather than a straight-forward layoff.

First, Lt. Reardon's demotion to Firefighter was merely a paper exercise having no operational consequences. Both the demotion and layoff took effect on July 7, 2010 at precisely the same time – 0800. The result was clearly pre-determined ahead of time. Lt. Reardon never actually worked as a Firefighter after her "demotion". Basic merit principles are not consistent with the idea that a tenured employee's civil service rights turn on such fictional events that can be subject to manipulation or collusion. While no suggestion of subterfuge is made here, the principle still applies – the civil service law will not be interpreted to permit the rights of a civil service employee to turn on distinctions without a difference.

Second, the Commission rejects Lawrence's point that, on advice from her union and HRD (and, possibly LFD Chief Bergeron), Lt. Reardon made a conscious choice to trade her reinstatement rights to a Lieutenant's position so that she would be positioned to be reinstated as a Firefighter, presumably because the latter scenario was more likely to arise sooner than an opening for Lieutenant. See generally, Scheffen et al v. City of Lawrence, 24 MCSR 524 (2011) (Lawrence brought back police officers before superior officers) The flaw in this argument is the fact that Section 39 entitles employees separated from positions in a layoff to be reinstated to "such positions or similar positions", in order of their seniority. Thus, it was not necessary for Lt. Reardon to accept a demotion to Firefighter to be considered for recall to that "similar" lower

title position; she would be entitled to be reinstated to that position if funds were available and she was then the most senior LFD officer who had not yet been recalled.

The Commission agrees with Lawrence that an employee must live with the consequences of conscious choices they make. See, e.g., Regan v. City of Salem & HRD, 24 MCSR 490 (2011); Monk v. City of Salem & HRD, 24 MCSR 481 (2011); Kochansky v. City of Salem & HRD, 24 MCSR 472 (2011); Fontaine v. HRD, 24 MCSR 469 (2011); Bourgeois v. HRD, 24 MCSR 466 (2011); Delaney v. HRD, 24 MCSR 110 (2011); Caccamo v. HRD, 24 MCSR 100 (2011). This principle does not apply, however, where there was no such "choice" made or required. Indeed, while it may be true that Lt. Reardon believed (erroneously) that she needed to accept a demotion to be considered for reinstatement to Firefighter, there is no evidence to suggest that she took that step consciously believing that it meant she was giving up her reinstatement rights to the position of Lieutenant. To the contrary, the qualifying language included in the Consent form can fairly be construed to show that her understanding was expressly to the contrary. In any event, her signing the Consent form could not, and did not, deprive her of any rights of reinstatement to the next available position of Lieutenant as prescribed by civil service law.

Third, it is inconsistent with the intended purpose of "bumping" rights under Section 39, and contrary to basic merit principles, to give legal effect to a paper demotion under the facts of this case, as Lawrence's position would require. The second paragraph of Section 39 contains the relevant provisions that govern the election of an employee slated for layoff to accept a demotion to a lower title by "bumping" an employee in such lower title who is "junior to him in length of service." The stated purpose of the second paragraph of Section 39 was intended to provide such "bumping rights" as an "alternative to ... separation". G.L.c.31,§39,¶2. The clear intention of the provisions of the second paragraph of Section 39 were not to deprive a tenured

civil service employee who had previously been duly promoted to a more responsible permanent civil service position of rights granted under the first paragraph of Section 39, but, rather, to allow such tenured employee an additional option to be retained in employment by "bumping" into a lower-ranked position, without prejudice to her restoration back to the higher title. In fact, the second paragraph of Section 39 expressly preserves the higher-ranking employee's right, after "bumping", to be "restored . . . to the title" from which she was demoted when such a position becomes available. G.L.c.31,§39,¶2 The statutory scheme would be undermined if "bumping" under Section 39 were construed to mean a superior officer could lose both her right of retention in a lower title as an "alternative" to being laid off and the right to be "restored . . . to the title" from which she was "demoted" for so long as the officer remained out of work.

In sum, the express language of Section 39 clearly contemplated that it would be exercised by an employee to ensure that he or she was retained in employment, with the right to be restored to the higher title when funds became available. The fact that neither party has presented any prior example in which Section 39 "bumping" has been exercised by a superior officer who was going to be laid off immediately anyway and not retained, reinforces the view that the statute does not contemplate such a counter-intuitive use of "bumping" rights.

Finally, Lawrence argues that Lt. Reardon was not employed as a Firefighter by the LFD at the time the post-layoff promotions to Lieutenant became available and was not eligible for such promotions as were the Firefighters who received those promotions (from an eligible list under G.L.c.31,§8). This argument, however, is misplaced. Of course, Lt. Reardon was unemployed by the LFD at the time, but that is precisely why Section 39 reinstatement and restoration rights were enacted to trump the promotional appointment process and compel her return to employment ahead of any appointment of existing employees to her former position. In other

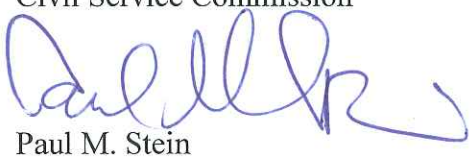
words, the statutory scheme creates a clear presumption that tenured employees who had earned a promotion through taking and passing the necessary civil service exam, who were selected from a prior eligible list ahead of their peers, and who actually served their communities in the title (in this case for three years), must receive preference to be returned to their positions, when funds become available after a layoff, before further promotional appointments of other candidates can be made. The erroneous interpretation Lawrence seeks to give to the statutes would imply just the opposite of what the legislature intended, by giving preference in promotion to individuals who were not adversely affected by a layoff and never served in the senior title and would tend to prolong the periods of unemployment of qualified superior officers who had served in the positions and were laid off through no fault of their own.

Relief to be Granted

Pursuant to the authority granted to the Commission by Chapter 310 of the Acts of 1993, Lt. Reardon is deemed to have been reinstated to the position of permanent Fire Lieutenant effective September 19, 2011. Lawrence and HRD are ordered to adjust the civil service records of the Appellant, Tara Reardon to reflect such reinstatement date. Lt. Reardon is entitled to be restored any compensation and other benefits which she has lost since that date as a result of the LFD's failure to reinstate her as required by civil service law.

Accordingly, for the reasons stated above, the Appellants' Motion for Summary Decision is GRANTED and Lawrence's Cross-Motion for Summary Decision is DENIED. The appeal of the Appellant is ***allowed.***

Civil Service Commission



Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson & Stein, Commissioners; Marquis [absent] & McDowell [absent]) on February 23, 2012

A true record. Attest:

Commissioner

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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final 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.

Notice to:

Joseph L. Sulman, Esq. (for Appellant)
Sean P. O'Connor, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)