COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place: Room 503
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JAMES K. RICE, JR.,
Appellant **D1-16-207**
v. **D-17-042**
MARLBOROUGH FIRE DEPARTMENT,
Respondent

Appearance for Appellant: James K. Rice, Jr., Pro Se

Appearance for Respondent: Donald V. Rider, Jr., Esq.
City Solicitor – City of Marlborough
City Hall, 4th Floor
140 Main Street
Marlborough, MA 01752

Commissioner: Paul M. Stein

DECISION ON RESPONDENT'S MOTIONS TO DISMISS

The Appellant, James K. Rice, Jr., acting in reliance on G.L.c.31,§41-§43, brought these two related appeals to the Civil Service Commission (Commission), contesting certain alleged disciplinary actions that he claims denied him reinstatement to duty as a firefighter with the City of Marlborough Fire Department (Marlborough or MFD) and other benefits.[1] A pre-hearing conference was held in the first appeal (D1-16-207) on November 15, 2016, after which Marlborough filed a Motion to Dismiss on the grounds that the Commission lacks jurisdiction because Mr. Rice alleged no disciplinary action that violated his civil service rights, his appeal was untimely, and his claims were the subject of pending arbitration. Mr. Rice opposed this motion. Prior to hearing on that Motion to Dismiss, one of the pending arbitration cases was withdrawn and Mr. Rice filed a second appeal (D-17-042). After the pre-hearing conference on

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

the second appeal, Marlborough filed another Motion to Dismiss, again asserting that the Commission lacked jurisdiction of that appeal, which motion Mr. Rice also opposed. The two appeals were consolidated and I held a hearing on both Motions on April 28, 2017, which was digitally recorded.[2] Thereafter, the parties submitted further documentation and argument requested by the Commission at the motion hearing.

For the reasons explained below, I conclude that Marlborough's Motions to Dismiss should be granted and both appeals must be dismissed.

FINDINGS OF FACT

Based on the submissions of the parties, including all documents, affidavits and memoranda, after hearing argument at the motion hearing, and viewing the evidence most favorably to the Appellant, I find the following material facts are not in dispute:

1. The Appellant, James K. Rice, Jr., holds the tenured position of an MFD Fire Fighter. (*Undisputed Fact; Claim of Appeal [D-17-042]*)

2. In or about July 2014, FF Rice went out of work claiming injured-on-duty (IOD) status. (*Undisputed Fact; City's Motion to Dismiss[D-17-042], Exh. 8; City's Supplemental Motion [D-16-207], Exh. 2; Appellant's 4/30/17 Submission, Exh. 5*)

3. FF Rice attributes his injury to a pattern of harassment directed at him due to his "whistleblowing" activity which created a hostile work environment that caused him severe emotional distress, headaches, anxiety and panic attacks. (*Appellant's 3/16/2017 Submission, Exhs. 3 through 8, 11; Appellant's 4/11/17 Submission, Exhs. 1, 5 through 6, 6A, 6B; Appellant's 4/30/17 Submission, Exhs 5, 6 8 & 9; City's Motion to Dismiss [D-17-042], Exh.6)*

[2] Copies of the CDs of the motion hearing were provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

4. Marlborough initially placed FF Rice on paid Administrative Leave, pending a medical evaluation of his injury. After obtaining certain medical information, Marlborough denied the IOD claim, although FF Rice continued to be paid for a time through the combination of Administrative Leave and use of his accrued benefit time. (*City's Supplemental Motion [D-16-207], Exh. 7; Appellant's 3/15/17 Submission, Exh. 8 through 11, 13 through 18; Appellant's 4/11/17 Submission, Exhs.3 through 6, 6A & 6B; Appellant's 5/10/17 Submission, Exhs. 5 & 6*)

5. In September 2014 and, again, in May 2015, FF Rice's union, Local 1714, International Association of Fire Fighters, AFL-CIO (the Union), filed grievances against Marlborough for failing to confirm FF Rice's IOD status and forcing him to exhaust his accrued benefits. FF Rice personally filed employment discrimination charges against Marlborough with the Massachusetts Commission Against Discrimination (MCAD). (*City's Motion to Dismiss [D-17-042] Exh. 6; City's Supplemental Motion [D-16-207], Exh. 7; Appellant's 3/16/17 Submission, Exh. 11*)

6. By letter dated June 11, 2015, and confirmed by letter dated July 8, 2015, Marlborough Town Manager Arthur Vigeant informed FF Rice that nothing in the medical documentation provided to date established FF Rice's claim to incapacity and his claim to injured leave was denied. The letter also informed FF Rice that the "pay granted to you far exceeds any sick leave or vacation leave you had accumulated" and, therefore, FF Rice would be placed on leave without pay, effective June 22, 2015. (*City's Supplemental Motion [D-16-207], Exhs. 1 & 3; Appellant's 4/11/17 Submission, Exh. 2; Appellant's 5/10/Submission, Exh. 2*)

7. Marlborough last paid FF Rice through August 22, 2015 by allowing him additional credit for accrued leave time. (*City's Supplemental Motion [D-16-207], p.3 & Exh. 7*)

8. In June 2015, Kevin Breen, formerly the Fire Chief in Salem NH, assumed the position of MFD Fire Chief. (*City's Supplemental Response [D-16-207], Aff't of Chief Breen*)

9. After exhausting further efforts to obtain FF Rice's medical records, and an unsuccessful mediation on July 8, 2016, the pending arbitration cases involving FF Rice's claims for IOD status were scheduled for hearing in December 2016. (*City's Supplemental Motion [D-16-207], Vigeant Aff't & Exh. 7* (*City's Supplemental Response [D-167-207*)

10. On August 16, 2016, FF Rice met with Town Manager Vigeant to discuss his claims. (*City's Supplemental Motion [D-16-207], Vigeant Aff't)*

11. On September 10, 2016, Marlborough informed FF Rice that it had initiated an application for his involuntary retirement. (*City's Supplemental Motion [d-17-207]; City's 5/26/17 Response [D-116-207], p. 1*)[3]

12. On September 12, 2016, FF Rice produced a letter dated September 9, 2016, from a Newton psychiatrist, which stated:

> "James Rice has been under my care since January 2016. He has been compliant with his appointments and treatment. He is stable at present and there are no psychiatric contraindications for him returning to work at this time."

(*City's Supplemental Motion [D-16-207], Exh. 4*)

13. The Newton psychiatrist's September 9, 2016 letter was the first record that Marlborough had received from that provider. Its receipt prompted requests for further information about FF Rice's medical history. (*City's Supplemental Motion [D-16-207], Exhs. 5, 6 & Aff't of TM Vigeant; City's Supplemental Response [D-16-207], Aff't of Chief Breen*)

14. By letter dated October 12, 2016, MFD Fire Chief Breen informed FF Rice that Marlborough still awaited further medical records that it deemed necessary in order to determine his IOD status and fitness to return to duty. (*City's Supplemental Motion, Exh. 6. See also Appellant's Claim of Appeal [D-15-207] with Chief Breen's 10/12/16 Letter attached*)

[3] The involuntary retirement application was subsequently withdrawn.

15. On November 1, 2016, the Union filed a new grievance that asserted Marlborough was in violation of the applicable collective bargaining agreement by refusing to return FF Rice to duty after he had provided the required return to work notice from the Newton physician. (*City's Supplemental Motion [D-16-207], Exh. 8 & 9A; City's Motion to Dismiss [D-17-2017], Exhs. 1A & 1B; Appellant's 3/15/17 Submission [D-16-207], Exh. 12)*

16. Shortly after the filing of the November 1, 2016 grievance, but for unrelated reasons (illness of counsel), the parties agreed to postpone the scheduled December 2016 arbitration hearing until February 2017. (*City's Supplemental Motion [D-16-207], p.6; City's Supplemental Response [D-16-207], Aff't of Chief Breen*); *City's Motion to Dismiss, Exh. 3*)

17. On or about November 18, 2016, Marlborough received and began review of copies of FF Rice's medical records concerning his treatment with the Newton psychiatrist and others, which included many records not previously seen. (*City's Supplemental Motion [D-16-207], Exh. 7; City's Supplemental Response [D-16-207], Aff't of Chief Breen; Appellant's May 12, 2017 Email*)

18. On December 1, 2016, the Union filed a demand for arbitration on the new "return to duty" grievance, which described the nature of the dispute as follows:

> City has failed to follow procedure and failed to allow James Rice to return to work as full time firefighter, September 9, 2016.

The demand sought the following relief:

> Follow procedure for return from IOD, return grievant to work in proper position; cease and desist order; make whole order [for the period on and after 9/9/16]; other appropriate relief.

(*City's Supplemental Motion [D-16-207], Exhs. 9B, 13 & 14*)

19. The parties agreed that this third arbitration case would be heard by the same arbitrator scheduled to hear the two pending cases involving FF Rice's IOD status claims for the periods prior to September 2016. (*City's Supplemental Motion [D-16-207], p.5*)

20. On December 12, 2016, FF Rice filed his appeal in CSC No. D-16-207, alleging that he was notified on September 9, 2016 that: "They will not let me back to work" and that Marlborough failed to follow procedural requirements for imposing such discipline under civil service law. (*Claim of Appeal [D-16-207]*)

21. On or about January 13, 2017, the Union withdrew, with prejudice, the December 1, 2016 arbitration demand regarding the failure to return FF Rice to duty in September 2016. (*City's Supplemental Motion [D-16-207], p.5; City's Motion to Dismiss {d-17-042], Exh. 8*)

22. On February 7, 2017, Marlborough and the Union reached agreement to settle the two other pending arbitration cases and cancelled the hearing on those disputes scheduled to commence later that week. The settlement provided two options – a three-party agreement or a two-party agreement – depending on whether or not FF Rice agreed to the terms of settlement.

A. The three-party agreement provided for a global settlement of the two arbitration cases, as well as the settlement of FF Rice's MCAD complaint, in exchange for an agreement to grant him IOD status, but only from July 26, 2014 through June 30, 2016 and to pay him back pay and emotional distress damages for that period. FF Rice would be required to voluntarily resign his position as a MFD fire fighter, for the purpose of superannuation retirement, but without prejudice to his seeking an accidental disability retirement to the extent allowed by law, and would grant Marlborough a general release from all other claims to IOD status, reinstatement and reemployment.

B. In the event that FF Rice did not agree to the terms of the three-party settlement, the Union and Marlborough would enter into a two-party agreement that granted FF Rice a "tax letter" confirming his IOD status for the period of July 25, 2014 through August 22, 2015, and provided that Marlborough was not obligated to grant any additional leave to FF Rice or provide him with any further pay or benefits over and above what he has already received.

C. Under either option, the pending arbitration cases were to be withdrawn. The agreement also acknowledged the Union's prior withdrawal of the December 2016 arbitration case with prejudice.

(*City's Supplemental Motion [D-16-207], p. 6 & Exh. 12; City's Motion to Dismiss [D-17-042], pp.2-3, Exhs.3, 6 & 8; Appellant's 4/11/17 Submission, Exh. 7*)

23. On February 8, 2017, FF Rice met with his Union's counsel who explained the two settlement options. FF Rice learned that he had until February 15, 2017 to decide whether or not to accept the three-party settlement and if he did not accept that settlement, Marlborough and the Union would proceed to execute the two-party settlement. *(Appellant's Claim of Appeal [D-17-042; City's Supplemental Motion [D-16-207], p. 6 & Exh. 12; City's Motion to Dismiss [D-17-042], pp.2-3, Exhs.3, 6 & 8; Appellant's 4/11/17 Submission, Exh. 7*)

24. FF Rice declined to accept the three-party settlement and, on February 15, 2017, Union counsel so informed Marlborough counsel. (*City's Motion to Dismiss [D-17-042], Exh. 7*)

25. On February 23, 2017, the Union and Marlborough executed the two-party settlement agreement and, on March 1, 2017, the Union withdrew the two remaining cases from arbitration. (*City's Motion to Dismiss [D-17-042], Exhs. 2 & 8*)

26. On February 24, 2017, FF Rice filed his appeal in CSC No. D-17-042, claiming that on "2-8-17/2-15-17" he was notified of "no IOD status" and "I was told on the 8th that I had to decide by the 15th. They said the arbitration was finished. Not true." He also claimed procedural error. (*Claim of Appeal [D-17-042]; City's Motion to Dismiss [D-17-042}, Exhs. 4 & 5*)

27. Shortly after meeting with FF Rice on February 28, 2017, Fire Chief Breen continued to receive treatment records from FF Rice's medical providers. In reviewing these records, Fire Chief Breen noted, among other things, that FF Rice was taking 2-3 doses of Clonazepam a day, his recent symptoms reportedly included "sleeplessness, trouble being focused, and anxiety present every day", he was reported to "having mild panic attacks when various situations arise". He also came across a note from the Newton psychiatrist that FF Rice was "doing left arm exercises at home to keep his arm strong s/p rotator cuff surgery in August." (*City's Supplemental Response, Exhs. 13, 15 through 18, 18A & Aff't of Chief Breen*)

28. As the shoulder injury was not previously disclosed, on March 28, 2017, Fire Chief requested that FF Rice provide the names of all providers who had treated him for that injury and to sign releases to obtain the medical records regarding the rotator cuff surgery mentioned in the psychiatric treatment note. (City's Supplemental Response, Exh. 18 & Aff't of Chief Breen)

29. By letter dated April 6, 2017, Fire Chief Breen notified FF Rice that Marlborough was going to schedule him for a IME to determine his fitness for duty and was in the process of determining what specialists will be performing the examination(s).

30. On or about April 18, 2017, Marlborough received copies of the medical records regarding FF Rice's previously undisclosed shoulder surgery. These records disclosed that in or about February 2016, FF Rice complained of shoulder pain and began treating with an orthopedic surgeon which culminated in a rotator cuff repair on August 2, 2016, followed by

approximately three months of physical therapy. The records contained a number of medical notes that ordered FF Rice "out of work" from August 2, 2016 through October 3, 2016. (*City's Supplemental Response [D-167-207], Exhs. 18A. 19 through 29 & Aff't of Chief Breen*)

31. Based on the recent information he had received, on or about May 22, 2017, Fire Chief Breen ordered FF Rice to submit to two IMEs – one by an orthopedic physician and a second IME by a psychiatrist. (*City's Supplemental Response {D-16-207], Aff't of Chief Breen; City's Response to Appellant's Supplemental Filing and E-Mail, Exh. 31*)

32. On or about June 5, 2017, Marlborough received the IME report from the orthopedic physician, who opined:

> "The purpose of today's examination is to determine whether I see any limitations to Mr. Rice being able to undergo a functional capacity examination. At this time, I see no restrictions on his strength or range of motion. He stated he is working in a heavy construction job. I don't see any reason why he cannot participate in this examination."

(Email dated 7/14/2017 from City's Counsel w/IME report attached)

33. On or about July 12, 2017, Marlborough received the IME report from the psychiatrist, who opined, in part:

> "Mr. Rice is not fit to work as a firefighter for the City of Marlboro [sic] . . . Mr. Rice has a Category A medical condition ("chronic or frequent treatment with" specified medicines) because he has for an extensive period been taking Clonazepam, which is classified as a sedative-hypnotic medication because it suppresses the central nervous system. Under Section 6.24.1 of the Medical Standards, Mr. Rice's use of up to three pills per day a number of days per week meets the frequency element of this standard, and his prolonged use over a course of years meets the chronicity element as well.
>
> "I find his inability to work permanent given the length of his mental health issues and their consistency over time and persistence."

(Email dated 7/14/2017 from City's Counsel w/IME report attached)

34. On July 14, 2017, citing "the collective bargaining agreement", FF Rice requested a "third Doctor's opinion" selected by the "medical board". (*Email dated 7/14/2017 from Appellant*)

STANDARD OF REVIEW

The Commission may dispose of an appeal summarily, as a matter of law, pursuant to 801 C.M.R. 1.01(7) when undisputed facts affirmatively demonstrate "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 fn.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may not be "discharged, removed, suspended . . . laid off, transferred from his position . . . lowered in rank or compensation, nor his position abolished" without "just cause" after due notice and hearing, and upon written decision "which shall state fully and specifically the reasons therefore." G.L.c.31,§41. An employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31,§41, may appeal to the Commission within ten day after receiving written notice of the appointing authority's decision. G.L.c.31,§43.

The Commission also may hear appeals alleging that an appointing authority "failed to follow the requirements of section forty-one in taking action which has affected his [civil service] employment or compensation." G.L.c.31,§42. Section 42 requires:

> "Such complaint must be filed within ten days, exclusive of Saturdays, Sundays and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow said requirements. If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights."
>
> "A person who files a complaint under this section may at the same time request a hearing as to whether there was just cause for the action of the appointing authority in the same manner as if he were a person aggrieved by a decision of an appointing authority made pursuant to all the requirements of section forty-one. . . ."

The ten-day filing deadlines are jurisdictional and are strictly enforced. See, e.g., Town of Falmouth v. Civil Service Comm'n, 64 Mass.App.Ct. 606, 608-609 (2005), rev'd other grounds, 447 Mass.814 (2006); Poore v. City of Haverhill, 29 MCSR 260 (2016); Stacy v. Department of Developmental Services, 29 MCSR 164 (2016); Volpicelli v. City of Woburn, 22 MCSR 448 (2009); Williamson v. Department of Transitional Assistance, 22 MCSR 436 (2009).[4]

ANALYSIS

Untimeliness

The 2016 Appeal. The date which triggered Mr. Rice's December 2016 appeal occurred no later than October 12, 2016, the date on which Chief Breen unequivocally informed FF Rice in writing that his September 9, 2016 return to duty letter would not be honored. In fact, FF Rice's 2016 Claim of Appeal asserted that he was on verbal notice even earlier – about September 9, 2016 – that Marlborough "would not let me back to work." On November 1, 2016, the Union filed a grievance on FF Rice's behalf, alleging that Marlborough's refusal to return him to work was unlawful. Thus, the undisputed evidence makes it clear that, if Marlborough's actions in refusing to return him to duty upon receipt of the September 9, 2016 physician's letter constituted as violation of any of Mr. Rice's substantive or procedural civil service rights, he knew of those actions months before filing the December 2016 appeal.

The 2017 Appeal. Although FF Rice's 2017 appeal form is dated February 23, 2017, the appeal is deemed filed on February 24, 2017, the postmark date of the letter to the Commission containing the appeal form and filing fee. Town of Falmouth v. Civil Service Comm'n, 447

[4] In contrast to the short window for administrative appeals, §42 provides a more flexible six-month deadline rule to file a civil action for §42 violations, as an alternative, and (unlike the administrative appeal statutes) authorizes the court to extend the time to bring such a judicial action "for good cause shown." G.L.c.31,§42,¶3. See generally, Jamieson v. Department of Correction, 91 Mass.App.Ct. 1108 (Rule 1:28) (2017), citing Mello v. Mayor of Fall River, 22 Mass.App.Ct. 974, rev.den. 398 Mass. 1104 (1986)

Mass. 814, 817-23 (2006). According to FF Rice, he was told on February 8, 2017 that the Union and Marlborough had made a firm agreement to settle the pending arbitration cases and that he had one week to accept the three-party agreement providing that, in exchange for his agreement to resign and retire (and to release Marlborough from all other pending and future claims to IOD status, reinstatement or reemployment), Marlborough would grant him IOD status and approximately $75,000 in further compensation through June 30, 2016, but not beyond that date. (He would also receive $7,500 in emotional distress damages.) If he did not agree to the three-party settlement, however, he would be given only a "tax letter" granting him IOD status through August 22, 2015 and he would be entitled to receive no further compensation, benefits, damages or other relief. In either case, the arbitration cases would be dismissed. FF Rice's 2017 Appeal of "no IOD status" came eleven days after he knew of that alleged violation.

Based on these uncontroverted facts, it cannot now be disputed that both the 2016 Appeal and the 2017 Appeal are untimely. If Marlborough's failure to honor the September 9, 2016 "return to duty" letter and/or the settlement of the arbitration claims were allegedly made in violation of FF Rice's civil service rights, the time to challenge those "actions" by appeal to the Commission, accrued upon his learning, or having reason to know, that they occurred. His mistaken belief, if any, in relying on an assumption that Marlborough would rectify the error, through his Union's grievance or otherwise, or that he didn't know that he had any right of appeal to the Commission until a much later date, does not serve to toll the jurisdictional deadline for appeal to the Commission. See, e.g., Canavan v. Civil Service Comm'n, 60 Mass. App.Ct. 910, rev.den., 445 Mass. 1107 (2004) (mistaken belief by appellant and his representatives that he was not covered by civil service did not toll Commission deadline); Allen v. Taunton Public Schools, 26 MCSR 376 (2013), *aff'd sub nom*, Allen v. Civil Service Comm'n, 1384CV03239 (Sup.Ct.2104), *citing*,

United Steelworkers v. Commonwealth Employee Relations Bd, 74 Mass.App.Ct. 656, 663-64 (2009) (eight month delay not excused as union officials have duty to know and advise regarding Commission filing deadlines); Alston v. Town of Brookline, 30 MCSR 179 (2017); Kilson v. City of Fitchburg, 27 MCSR 106 (2014) (failure to make timely Commission appeal not excused due to mistaken belief that claim was arbitrable); Mercedes v. Springfield Housing Auth., 26 MCSR 16 (2013) (initial pursuit of CBA grievance did not excuse late-filed appeal); Marqus v. City of Waltham, 23 MCSR 285 (2010) (Commission dismissed appeal that was one month late when appellant had union representation)

FF Rice seeks to finesse the untimeliness of the 2017 appeal by claiming that he was on notice of the alleged violation on "2-8-17/2-15-17" because he had been "told on the 8th that I had to decide by the 15th" and it "wasn't true" that the arbitration was "finished". This argument is not persuasive. First of all, the date on which notice of unlawful discipline is received, not the date that discipline is imposed, is the relevant trigger for an appeal to the Commission, particularly as the appeal alleges that the action was taken in violation of a tenured civil servant's procedural rights. See, e.g. McGoldrick v. Boston Police Dep't, 30 MCSR 161 (2017) (appeal time triggered when appellant rescinded allegedly coerced prior resignation, not when she learned rescission would not be accepted). Second, if the gravamen of FF Rice's 2017 appeal is, as he stated it, a claim that his being given "no IOD status" was a violation of his civil service rights, his knowledge of that violation was well known to him for well over a year, as he was first placed on "no pay status" in August 2015.

In sum, FF Rice's claims that Marlborough unlawfully refused to return him to duty and/or denied him IOD status must be dismissed as untimely.

Effect of Arbitration Proceedings

Marlborough correctly points out that the Commission is divested of jurisdiction of any appeal that "has previously been resolved or litigated . . . or is presently being resolved" through arbitration in accordance with the provisions of G.L.c.151E,§8, the Massachusetts Public Employee Relations Law. G.L.c.31,§43,¶1. The Commission has consistently held that a tenured public employee who is also a member of a collective bargaining unit is free – if the CBA permits it – to contest discipline by filing an appeal with the Commission and also to appeal through the grievance procedures of the employee's CBA, but, once a demand for arbitration is made on the employee's behalf, that constitutes a binding and irrevocable election that requires the Commission to abstain from exercising jurisdiction over the same subject matter. See, e.g., Saunders v. Town of Hull, 28 MCSR 250 (2015); James v. Boston Police Dep't, 28 MCSR 185 (2015); Ung v. Lowell Police Dep't, 22 MCSR 471 (2009); Rose v. Peabody School Dep't, 7 MCSR 256 (1994).

Here, the subject matter that FF Rice raises in his appeals to the Commission is identical to that previously asserted in the three arbitration cases that his Union brought on his behalf, all prior to his filing of these appeals with the Commission. The first two arbitration cases (brought in 2014 and 2015) presented claims to IOD status for various periods from July 2014 to September 2016; the third arbitration proceeding (brought in 2016) protested Marlborough's failure to return FF Rice to duty in September 9, 2016 and demanded a "make whole" remedy. Thus, it is clear that these arbitration cases "cover the field" and constitute a binding election to have those claims resolved through the arbitration process. [5]

[5] Marlborough points out that, whatever dissatisfaction FF Rice has with the outcome of arbitration, his recourse, if any,lies not with the Commission, but, perhaps, by a claim against his Union for breach of a duty of fair representation {DFR], a matter of exclusive jurisdiction of the Labor Relations Commission. See, e.g., Johnston v. School Comm. of Watertown, 404 Mass. 23, 27 (1989); Leahy v. Local 1526, AFSCME, 399 Mass. 341, 347 (1987)

With respect to the 2014 and 2015 arbitration cases, those matters were settled and the arbitration cases withdrawn by agreement between the Union and Marlborough. FF Rice claims that those arbitrations are not "finished" because he had not participated in and did not agree to the result. While FF Rice may well have reason to take issue with terms of the settlement of the arbitration dispute, his objections do not change the fact that the arbitration "resolved" the dispute within the meaning of the civil service law (G.L.c.31,§43,¶1) and the collective bargaining law (G.L.c.151E, §8,¶2). To now allow him to pursue an IOD status appeal before the Commission for relief that is inconsistent with the terms of an arbitration settlement is a classic example of the prohibited attempt to get "two bites at the apple" which the election of remedy requirement was expressly designed to prevent.

The same principle applies to the 2016 arbitration case seeking a return to duty and a "make whole" remedy on and after September 9, 2016. This claim presented the very issue that prompted FF Rice's 2016 appeal to the Commission filed two weeks after the Union had demanded arbitration. FF Rice asserts that, since that arbitration was later withdrawn without "being resolved" on the merits, the prior election of remedy was, in effect, rescinded, and he should be permitted to press the same claim by appeal to the Commission. Marlborough contends that an election, once made, is final and a voluntary dismissal of the arbitration case "with prejudice" does not restore the Commission with jurisdiction once divested. No authority appears to be directly on point. The only instances in which the Commission entertained the possibility to "claw back" its jurisdiction after an election of arbitration concern questions of "arbitrability", i.e., allowing reinstatement of a timely appeal filed before the demand for arbitration and after a judicial determination that the matter was not arbitrable as a matter of law. See, e.g., Ung v. Lowell Police Dep't, 22 MCSR 471 (2009); Rose v. Peabody School Dep't, 7

MCSR 356 (1994). This case is not the occasion to extend that principle. Here, the arbitration was filed before appeal to the Commission and then voluntarily withdrawn, a situation which would seem to unduly invite forum shopping and should not be encouraged.

The Merits of Appellant's Claims to IOD Status and/or Return to Duty

Although, as indicated above, these appeals must be dismissed for lack of jurisdiction, it is also worth noting that, for several reasons, the appeals appear substantively problematic on the merits as well.

First, insofar as FF Rice seeks to have the Commission establish his right to IOD status, the Commission has made clear that, as a general rule, it does not have the authority to adjudicate such a claim. See, e.g., Bistany v. Civil Service Comm'n, 26 MCSR 136 (2013), aff'd, 88 Mass.App.Ct. 1105 (2015); Norton v. City of Melrose, 21 MCSR 530 (2008).

Second, as a disciplinary claim, FF Rice would face a high hurdle to overcome the established principle that an appointing authority has no obligation to reinstate an injured employee unless the employee has demonstrated a fitness for duty and, as a logical corollary to this principle, an appointing authority is entitled to expect and require an employee to submit to reasonable requirements necessary to determine the fitness of the employee to return to duty, with or without reasonable accommodations. See, e.g., Nolan v. Police Comm'r of Boston, 383 Mass. 625, 630 (1981); Dalrymple v. Civil Service Comm'n, 82 Mass.App.Ct. 1107 (2012) (Rule 1:28); Bowman v. City of Brockton, 27 MCSR 605 (2014); Brackett v. Gloucester Housing Auth., 10 MCSR 127 (1997); Beal v. Town of Hingham, 6 MCSR 137 (1993). See also Vinard v. Town of Canton, 29 MCSR 399 (2016) and cases cited (inability to perform due to psychological stress after being denied a promotion); Marcus v. City of Chelsea, 29 MCSR 279 (2016) (psychological incapacity); Morgan v. Town of Billerica, 28 MCSR 503 (2015) (work-related

physical incapacity of undetermined duration); Puza v. Westfiled Police Dep't, 27 MCSR 623 (2014) (depression, anxiety & substance abuse); Bistany v. City of Lawrence, 26 MCSR 136 (2013), aff'd, 2014 WL 6708807 (Super.Ct.2014), aff'd, 88 Mass.App.Ct. 1105 (2015) (Rule 1:28) (breakdown and misinformation in communications with appointing authority from employee and her medical providers); Valente v. City of Newton, 23 MCSR 399 (2010) (termination justified despite city's bureaucratic mistakes in communicating with employee); Freeman v. City of Cambridge, 6 MCSR 157 (1993) (physical limitations and inability to cope with stress)

Here, FF Rice has asserted (somewhat inconsistent) claims that Marlborough refused to reinstate him to duty after he established he was fit to return and, also, has denied him IOD status for periods when he claims he was not fit for duty. While it is not necessary to address the merits of these claims, I note that the claim to be returned to duty in September 2016 is particularly problematic, as the undisputed evidence from FF Rice's own treating medical providers include orders that he remain out of work from August 2, 2016 through at least October 2, 2016, a matter that FF Rice never disclosed to Marlborough until March 2017. In addition, the recent medical opinion stating that he has long suffered, and continues to suffer, from a permanently disqualifying "Category A" medical condition, presents another serious obstacle to FF Rice's claim to reinstatement as the Commission has virtually no authority to overturn such a determination if supported by the evidence, although that is not always the result that the Commission would prefer. See, e.g., Grajales v. City of Attleboro, 28 MCSR 110 (2015); Corcoran v. Boston Fire Dep't, 28 MCSR 100 (2015).

CONCLUSION

Accordingly, for the reasons stated, Marlborough's Motions to Dismiss are GRANTED. The appeals of the Appellant under Docket No. D1-16-207 and Docket No. D-17-042 are ***dismissed.***

Civil Service Commission
/s/ *Paul M. Stein*
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [Absent]; Camuso, Ittleman, Stein & Tivnan, Commissioners) on August 3, 2017.

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 does not 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:
James K, Rice, Jr.. (Appellant)
Donald V. Rider, Jr., Esq. (for Respondent)