COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **CIVIL SERVICE COMMISSION**

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

WILLIAM ROACH,
Appellant

v.

D-04-311

CITY OF BOSTON,
Respondent

Appellant's Attorney: Dana Johnson, Esq.
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Respondent's Attorney: Robert Boyle, Esq.
City of Boston
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Commissioner: Christopher C. Bowman

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

Background

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, William Roach (hereafter "Roach" or "Appellant") seeks to have the City of Boston (hereafter "City" or Appointing Authority") compensate him for overtime and paid detail opportunities he allegedly lost while on paid administrative leave and/or light duty at the Boston Fire

Department from December 2002 to May 2004. Further, the Appellant seeks reimbursement for $5,940 in legal fees incurred as well as $3400 paid for medical evaluations.

The City filed a Motion to Dismiss the instant appeal on May 22, 2007 and a hearing on this motion was held at the offices of the Commission on June 22, 2007, at which time the Appellant filed an Answer to the City's Motion to Dismiss and counsel for both parties made oral arguments.

It is undisputed that at all times relevant to the instant appeal, the Appellant remained in his civil service position of firefighter with the Boston Fire Department, a position for which he was originally appointed in December 1982. It is also undisputed that at some time in December 2002, the Appellant was suspended for two weeks for an incident in which, according to the City, he inaccurately reported a call for a stove fire as a call for a medical assist. While that suspension is not the subject of the instant appeal, the underlying incident, coupled with several similar incidents involving the Appellant since 1992, caused the City to conclude that the Appellant, upon return from his suspension, should undergo "cognitive testing through EAP [Employee Assistance Program]to evaluate any potential cause and or extent of this difficulty and to determine what actions, if any, can be taken to correct the situation." The City assigned the Appellant to light duty pending evaluation of his fitness for full duty.

Pursuant to the provisions of the relevant collecting bargaining agreement, the City paid for the above-referenced evaluation which was conducted by Dr. John A. Greene, a licensed psychologist. Dr. Greene, in an evaluation dated December 14, 2002, concluded in relevant part that, "It is my professional opinion that (the Appellant) is not cognitively

or psychologically fit for fire duty at this point in time and should be transferred to a less demanding post within the department..."

Also pursuant to the relevant collecting bargaining agreement, the Appellant opted to get a second medical opinion, for which he was required to pay $2500. In March 2003, Dr. Stephen Heisel administered a cognitive function evaluation on the Appellant. Although Dr. Heisel found mild cognitive difficulties, he stated that these were amenable to modification.

Again pursuant to the relevant collective bargaining agreement, the parties, given the conflicting medical opinions, agreed to secure the services of an "Independent Medical Examiner (IME)" who would be paid jointly by the Appellant and the City. The Appellant argues that this third IME was unduly delayed for several months as the City refused to contact the evaluator, Dr. Zimmerman, to confirm that the City would pay for one half of the testing. According to the Appellant, the City did not provide this confirmation to Dr. Zimmerman until October 2003, thus delaying her evaluation and report until March 1, 2004, 14 months from the time the Appellant was first placed on administrative leave and then light duty.

On March 1, 2004, Dr. Zimmerman issued her report to both parties. Dr. Zimmerman's reported stated in relevant part, "I defer to Dr. Greene's professional opinion written following his examination performed in December, 2003, and agree that at that time, it was likely that Mr. Roach was 'not cognitively or psychologically fit for fire duty…' However, at present Mr. Roach is functioning in the Average range of overall intellectual ability…The present evaluation provided no evidence of a permanent, ongoing cognitive impairment that would interfere with Mr. Roach's ability to function

effectively as a firefighter…" Sometime in May 2004, the City, based on the Independent Medical Examination, reassigned the Appellant to full duty.

Arguments of the Parties

As referenced above, the Appellant seeks to have the City compensate him for overtime and paid detail opportunities he allegedly lost while on paid administrative leave and/or light duty at the Boston Fire Department from December 2002 to May 2004. Further, the Appellant seeks reimbursement for $5,940 in legal fees incurred as well as $3400 paid for medical evaluations.

The City, in its Motion to Dismiss, argues that the instant appeal must be dismissed as the Commission has no jurisdiction to interpret the relevant collective bargaining agreement. Moreover, the City argues that the appeal is not a viable claim under Chapter 31 because his civil service rank at all times remained that of firefighter and the Appellant was not demoted and/or subject to any personnel action referenced in G.L. c. 31, §§ 39 or 43.[1]

The Appellant argues that the Commission *does* have jurisdiction to hear the instant appeal as the Appellant incurred lost wages as the result of being unable to accept overtime and detail opportunities while on light duty. Further, the Appellant argues that the decision to place the Appellant on administrative leave and/or light duty and require a psychological evaluation was not made in good faith and, thus, was contrary to basic merit principles.

[1] The City also argued that the appeal was not timely filed with the Commission. As the instant appeal was intertwined, literally and procedurally, with two other related appeals that were previously dismissed, it is impossible to determine the exact filing date of the instant appeal. However, the Appellant has made a plausible argument that the instant appeal was indeed timely filed, but for administrative mistakes on the part of the Commission.

Conclusion

The Appellant is a tenured civil service employee in the position of firefighter with the Boston Fire Department. At all relevant times which are the subject of the instant appeal, the Appellant remained in the position of firefighter. The City, after several incidents which caused them to be concerned about the cognitive abilities of the Appellant, placed the Appellant on paid administrative leave and then light duty, pending a medical evaluation. At each point in the medical evaluation process, which eventually included reports from three separate psychologists, the parties were guided by provisions of the relevant collective bargaining agreement in place at the time. Upon a successful final evaluation by an Independent Medical Examiner, the Appellant was reassigned to full duty.

Even, assuming *arguendo*, that the City, as argued by the Appellant, dragged its feet throughout the medical evaluation process, the Commission lacks jurisdiction to hear this appeal for two reasons. First, the Commission agrees with the City that the Appellant, via this appeal, is asking the Commission to interpret provisions of a collective bargaining agreement, which is beyond the scope of the Commission's jurisdiction. See Brienzo v. Acushnet, 14 MSCR 125, 125 (2001); ("The Commission has no jurisdiction to determine the collective bargaining rights of civil service employee"); Puopolo v. Department of Correction, 12 MCSR 169, 170 (1999); ("The Commission finds that the rejection of the Appellant's request to use sick leave time accrued is in the area of collective bargaining and not within the purview of c. 31, § 41); Sullivan v. Cambridge, 11 MCSR 206, 207 (1998) ("[T]he Commission does not have jurisdiction pursuant to G.L. c. 31 to interpret the provisions of the contract.").

Second, a good-faith decision by an Appointing Authority, particularly those charged with public safety, to place an employee on paid administrative leave or light duty, pending verification that the employee is fit for duty, can not be appealed to the Commission, even if it results in missed overtime or paid details opportunities. If, as the Appellant suggested at the conclusion of oral argument, that there may have been tinges of racial discrimination at play here, then the correct venue is the Massachusetts Commission Against Discrimination, where the Appellant has already filed a complaint. However, the Commission, given the undisputed facts in this case, will not open the door to hearing appeals from civil service employees placed on paid administrative leave or light duty pending a fitness for duty evaluation.

Civil Service Commission

_____
Christopher C. Bowman
Commissioner

By vote of the Civil Service Commission (Henderson, Chairman; Bowman, Guerin, Marquis and Taylor, Commissioners) on June 28, 2007.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. The motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice:
Robert Boyle, Esq. (for Appointing Authority)
Dana Johnson, Esq. (for Appellant)