COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

MARC A. SAVAGE,
Appellant

v. Case No.: E-22-063

SPRINGFIELD FIRE DEPARTMENT,
Respondent

Appearance for Appellant: Mark A. Savage, *Pro Se*

Appearance for Respondent: Maurice M. Cahillane, Esq.
Egan, Flanagan & Cohen, LLP
67 Market Street; P.O. Box 9035
Springfield, MA 01103

Presiding Officer: Robert L. Quinan, Jr.

SUMMARY OF DECISION

The Commission dismissed an equity appeal seeking to enlist the Commission as the reviewer of the contents of a now-retired former municipal fire service officer's personnel file, notwithstanding other avenues for resolving any disputes over potential mischaracterizations reflected in the retiree's employment records.

DECISION ON RESPONDENT'S MOTION TO DISMISS

On April 22, 2022, the Appellant, Marc A. Savage (Appellant), filed a non-bypass-related Request for Equitable Relief with the Civil Service Commission (Commission) "centered on recently/newly discovered evidence" that he alleges shows that "certain members of the Springfield Fire Department" (SFD) caused false information to be included in an August 2017 investigative report (or related documents) regarding certain of the Appellant's actions some six years ago—an action that now allegedly threatens the Appellant's future (non-SFD-associated)

employment prospects. The Appellant asks that the Commission review the entire record of his (now concluded) 43-year career with the SFD "to make sure there's nothing in there that could harm [his] employment status moving forward." On or about June 21, 2022, the Respondent SFD filed with the Commission a Motion to Dismiss asserting that the Appellant has failed to state a claim over which the Commission has jurisdiction.

On May 31, 2022, I held a remote pre-hearing conference (via WebEx), which was attended by the Appellant, counsel for the City, the City's Fire Chief, and personnel from the City's Human Resources & Labor Relations Office. Unless otherwise noted, there appears to be no dispute as to the following:

A. The Appellant retired at the end of April 2022 from the Springfield Fire Department (SFD) at the rank of District Chief, following a decades-long (over 40 year) career within that organization.

B. Since 2016, the Appellant has been the lead plaintiff in a lawsuit pending in state superior court that names as defendants the City of Springfield, the SFD, and the city's former Fire Commissioner, Joseph Conant (both personally and in his official capacity). *Savage, et al. v. City of Springfield, et al.*, Hampden Super. Ct. no. 1679CV00364. This lawsuit challenges the promotions of certain employees of the SFD, to positions as high as district chief, when allegedly these employees are not in compliance with a Springfield ordinance that requires them to reside within city limits as a condition of employment.

C. The Appellant is also the lead plaintiff in a federal court employment discrimination lawsuit, pending since 2018, that likewise names as defendants the City, the SFD, former Fire Commission Conant, plus the current Springfield Fire Commissioner,

Bernard J. Calvi. *Savage, et al. v. City of Springfield, et al.*, C.A. no. 3:18-cv-30164 (U.S.D.C. Mass.).

D. In August of 2017, former SFD Deputy Chief Glenn Guyer signed an investigative report that formed the basis for a one-day suspension of the Appellant. After a hearing before a magistrate of the Division of Administrative Law Appeals, the parties agreed in writing that this discipline would be reduced to a written reprimand and (even though the precise contents of that reprimand remained in dispute) an earlier Chapter 31 appeal brought by the Appellant resolved on that basis some four years ago. *See* Commission and DALA decisions published on January 17, 2019 in *Savage v. Springfield Fire Department*, Case No.: D-17-247.[1]

The Appellant's contentions

In his pre-hearing memorandum, the Appellant asserted that deposition testimony of an SFD Deputy Chief (elicited in December of 2021 as part of above-referenced litigation) and certain deposition testimony of an SFD Lieutenant (elicited in February of 2022) "reveals that the investigative report completed on August 15, 2017—regarding the one-day suspension of [the Appellant]—is wrought with misrepresentations, mischaracterizations, and outright lies." The alleged untruths have been perpetrated, the Appellant contends, "to harass and retaliate against [him] for engaging in the protected activity of compelling the City of Springfield,

[1] The Commission does not have the legal authority to disturb a reprimand issued by a municipal employer. *E.g.*, *Bretta v. Department of State Police*, Civil Serv. Comm'n No. D-05-1, at 52 (Jul. 31, 2008) (finding commission lacks jurisdiction to address discipline of "reprimand" under provisions of G. L. c. 31, § 41). I take administrative notice of Commission records indicating that, by agreement of the parties, this particular written reprimand was scheduled to be removed from the Appellant's personnel file in September of 2019. The Appellant admitted during this case's prehearing conference to not having made any effort since then on his own to ascertain whether his personnel file still contains a copy of the reprimand (or any other adverse documentation).

Massachusetts to enforce its residency ordinance[.]"

During the pre-hearing conference, the Appellant declined to become more specific about facts or evidence supporting those allegations, other than to assert an inconsistency between the August 2017 report and later deposition testimony as to when complaints first were lodged with the Deputy Chief regarding the Appellant's interactions with the lieutenant in the first half of 2017. Rather, the Appellant broadly alleges that "the city and [its fire] department continue to put forth false negative narratives regarding my professionalism and tenure with the [SFD]."

The Appellant claims that in his retirement, once he earns a degree in public administration, he will seek other employment in the public sector and he believes that a "false narrative" will be offered by the SFD that could harm his future employment opportunities.

The Respondent's Motion to Dismiss

Asserting that the Appellant has yet to advance a claim over which the Commission has jurisdiction, or even point to a violation of Chapter 31 that the Commission could remedy, the Respondent moved to dismiss this appeal in its entirety. The SFD argues that "[t]he Appellant's appeal does not describe in any particular or specific fashion what action of the Respondent is being appealed or what actual harm has occurred to him as a result." Rather, by asking the Commission to review his personnel file in order to decrease the chances that negative material could be utilized against him in the future should he apply for another job, the Appellant has not identified any actual harm that has occurred. The Respondent points out that the Appellant acknowledged at the Commission's pre-hearing conference that he is already pursuing a comprehensive employment remedy in his federal court suit.[2] Moreover, a state statute that

[2] The Appellant explicitly stated during the recorded pre-hearing conference: "I'm not asking you [the Commission] to provide a remedy for the harassment and intimidation." Rather, he argues that the Commission should engage in fact-finding in aid of a "friend of the court" brief

envisions no role for the Commission—G.L. c. 149, § 52C—empowers the Appellant to take effective action should an SFD record unfairly malign his reputation.[3]

Motion to Dismiss and Summary Decision Standards

The Standard Rules of Adjudicatory Practice and Procedure (Formal Rules), codified at 801 Mass. Code Regs. 1.01, establish (in subsection 7(g)) that "[t]he Presiding Officer may at any time, on his or her own motion or that of a Party, dismiss a case for lack of jurisdiction to

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the Commission might file with the federal court should it uncover evidence of anything untoward in his personnel file. Although counsel for the Respondent pointed out that the Appellant could readily have undertaken discovery into the contents of his personnel file in conjunction with the federal court litigation, the Appellant acknowledged during the pre-hearing conference that he had not sought to review his file for some three years.

[3] Entitled "Personnel records; review by employee; corrections; penalty," Section 52C of G.L. c. 149 states, in parts most relevant here:

> An employer shall notify an employee within 10 days of the employer placing in the employee's personnel record any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action. An employer receiving a written request from an employee shall provide the employee with an opportunity to review such employee's personnel record within 5 business days of such request. . . .
>
> If there is a disagreement with any information contained in a personnel record, removal or correction of such information may be mutually agreed upon by the employer and the employee. If an agreement is not reached, the employee may submit a written statement explaining the employee's position which shall thereupon be contained therein and shall become a part of such employee's personnel record. The statement shall be included when said information is transmitted to a third party as long as the original information is retained as part of the file. If an employer places in a personnel record any information which such employer knew or should have known to be false, then the employee shall have remedy through the collective bargaining agreement, other personnel procedures or judicial process to have such information expunged. . . .
>
> An employer of twenty or more employees shall retain the complete personnel record of an employee as required to be kept under this section without deletions or expungement of information from the date of employment of such employee to a date three years after the termination of employment by the employee with such employer. . . .
>
> Whoever violates the provisions of this section shall be punished by a fine of not less than five hundred nor more than twenty-five hundred dollars. . . .

decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted, or because of the pendency of a prior, related action in any tribunal that should first be decided."

Additionally, when a Respondent before the Commission is of the opinion there is no genuine issue of disputed material fact relating to the Appellant's claim, no viable ground of appeal, and the Respondent is entitled to prevail as a matter of law, this party may move, with or without supporting affidavits, either to dismiss the entire appeal or for summary decision on a particular claim. 801 CMR 1.01(7)(h). Such motions are decided under the well-recognized standards for summary disposition as a matter of law—i.e., "viewing the evidence in the light most favorable to the non-moving party," the substantial and credible evidence establishes 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 an evidentiary hearing. *See, e.g., Nigro v. City of Everett,* 30 MCSR 277 (2017); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005). *Accord Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008). *See also Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss). *Cf. R.J.A. v. K.A.V.*, 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss).

Applicable Civil Service Law

Section 2(b) of G.L. c. 31 authorizes appeals to the Commission by persons aggrieved by certain actions or inactions by the state's Human Resources Division (HRD) or, in certain cases,

by appointing authorities to whom HRD has delegated its authority,[4] when those actions have abridged their rights under civil service laws. This statute, however, expressly conditions the right to pursue such an appeal before the Commission as follows:

> *No person shall be deemed to be aggrieved . . . unless such person has made* ***specific*** *allegations* in writing that a decision, action, or failure to act on the part of the administrator [HRD] was in violation of this chapter, the rules or basic merit principles promulgated thereunder *and said allegations* ***shall show*** *that such person's rights were abridged, denied, or prejudiced in such a manner as to cause* ***actual harm*** *to the person's employment status*.

Id. (*emphases* added). The phrase "basic merit principles" refers to a fundamental tenet of civil service law. Section 1 of G.L. c. 31 defines basic merit principles as

> ... (a) recruiting, selecting and *advancing of employees on the basis of their relative ability, knowledge and skills* including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) *assuring fair treatment of all applicants and employees* in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are *protected from arbitrary and capricious actions*.

Id. (*emphases* added).

Chapter 310 of the Acts of 1993 confers certain discretionary authority upon the Commission to remediate a violation of civil service law:

> *If the rights of any person* acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder *have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights* notwithstanding the failure of any person to comply with any

[4] Section 2(c) of G.L. c. 31 states that "all references [in Section 2(b)] to the administrator shall be taken to mean the local appointing authority or its designated representative" and, thus, this Appellant must show here, *inter alia*, that Springfield's Fire Commissioner or the SFD violated some provision of Chapter 31 or the state Personnel Administration Rules.

> requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.

Id. (*emphases* added). See *Thomas v. Civ. Serv. Comm'n*, 48 Mass. App. Ct. 446 (2000).

The fundamental mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31, which command, among other things, "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, § 1. *See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban*, 434 Mass. 256, 259 (2001); *MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 635 (1995), *rev. den.*, 423 Mass. 1106 (1996). "A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 303 (1997) (internal citations omitted).

Analysis

I have carefully scrutinized the contentions the Appellant presented at the pre-hearing conference and the arguments he outlines in his written submissions. For reasons elaborated upon below, the Commission lacks jurisdiction to hear this appeal. The Appellant cannot show that he is an aggrieved person under Section 2(b); nor would it be appropriate for the Commission to exercise its discretionary authority under Section 2(a) to initiate an investigation or independent review of his SFD personnel file. *See, e.g.*, *Busch v. Town of Whitman*, 34 MCSR 267 (2021), WL 8894171, at *6 (June 17, 2021).

Nothing in General Laws Chapter 31 gives the Commission plenary authority to investigate the possible chances of some *future* adverse job action by a civil service municipal

respondent; and much less is the Commission empowered at a retiree's request to review municipal personnel records for material that reflects negatively on a former civil service employee or vet the raw material underlying some *possible* future reference being offered to another public (or private) employer. The Appellant may have recourse—were he to establish in fact the existence of anything inappropriate in his personnel file—in some other forum under Gen. Laws c. 149, § 52C. The Commission, however, has no role to play under that statute. See statutory text in footnote 3, *supra*.

Moreover, the Appellant is not currently a person "aggrieved" within the meaning of G.L. c. 31, § 2(b). Most importantly, he has not "made specific allegations in writing . . . that show" he suffered "actual harm to [his] employment status", *id.*, as a result of any actions by the Springfield Fire Department that he has specified with reasonable particularity. In general, a person may be aggrieved "if he suffers some infringement of his legal rights." *Planning Board v. Hingham Campus*, 438 Mass. 364, 368-369 (2003) (and cases cited). Here, the Appellant's claim that his former civil service employer has introduced putatively libelous material into his personnel file and would slander him in response to a future employment-related inquiry is little more than sheer speculation.[5] Unadorned references to a "coverup" or vague allusions to the "manufacturing of lies" do not suffice to thwart the Respondent's Motion to Dismiss.[6]

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[5] See *Pugsley v. Police Dept. of Boston*, 472 Mass. 367, 373 (2015) ("[v]iewing all inferences in the light most favorable to the plaintiff, we cannot conclude, in the absence of articulated facts or controlling authority, that the alleged injury is sufficiently concrete and imminent as to confer proper standing on the plaintiff" to litigate a claim under G.L. c. 31, § 2(b)).

[6] Even at this early stage of proceedings, it was the Appellant's obligation, as I clearly delineated at the pre-hearing conference, to submit a written statement of allegations "possess[ing] enough heft to 'sho[w] that [he] is entitled to relief.'" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007). *See* G.L. c. 31, § 2(b). "[L]abels and conclusions . . . will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (citations and internal quotation

Conclusion

For the foregoing reasons, I recommend that the Commission allow the City of Springfield's Motion to Dismiss under the provisions of 801 CMR 1.01(7) (g) and (h) and dismiss the Appellant's non-bypass equity appeal docketed as C.S.C. no. E-22-063.

/s/ *Robert L. Quinan, Jr.*
Commission General Counsel
and assigned Presiding Officer for case no. E-22-063

By a vote on March 9, 2023, the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) dismissed the Appellant's appeal.

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 this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission 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:
Marc A. Savage (Appellant)
Maurice Cahillane, Esq. (for Respondent)

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marks omitted). *Accord Kennedy v. Commonwealth*, 92 Mass. App. Ct. 644, 648, *rev. denied*, 479 Mass. 1107 (2018) ("a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions …. Factual allegations must be enough to raise a right to relief above the speculative level …. What is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief"); *Doe v. CVS Pharmacy, Inc.*, No. 2184CV0807BLS2, 2021 WL 5630358, at *1 (Mass. Super. Ct., Aug. 3, 2021) ("Because Doe's assumption that she was injured does not substitute for facts sufficient to show that she was, she has no standing to bring a claim").