

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

RE:

Tracking Number: I-15-137

Request by Nicholas Suneson and three (3) others<sup>1</sup> to investigate “the City of Fall River Fire Department’s requirements that laid off Fall River firefighters submit to a medical evaluation, including substance abuse test, as a condition of re-employment.”

Appearance for Petitioners:

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Appearance for Human Resources Division:

Melinda Willis, Esq.  
Human Resources Division  
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Appearance for Fall River Fire Department:

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Commissioner:

Christopher C. Bowman

**FINAL RESPONSE TO REQUEST FOR INVESTIGATION**

On July 6, 2015, Nicholas Suneson and three (3) others (Petitioners), all laid off firefighters who were, at the time of this request, in the process of being reinstated to the Fall River Fire Department (Fire Department), filed a petition with the Civil Service Commission (Commission), asking the Commission to investigate “the City of Fall River Fire Department’s requirements that laid off Fall River firefighters submit to a medical evaluation, including substance abuse test, as a condition of re-employment.”

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<sup>1</sup> The Petition was actually filed by the Fall River Firefighters, Local 1314 IAFF & Nicholas Suneson [and three (3) others]. The Commission does not consider the local union to be an “aggrieved person” in the context of G.L. c. 31, § 2(a).

On July 28, 2015, I held a show cause hearing to give the Petitioners the opportunity to show why the Commission should initiate an investigation regarding this matter. The show cause hearing was attended by counsel for the Petitioners, counsel for the Town, the Town's Fire Chief and counsel for the state's Human Resources Division (HRD).

Per agreement, the Fire Department filed a brief in opposition to the Petitioner's request for investigation on August 18, 2015 and the Petitioners filed a reply on September 1, 2015. HRD did not submit any brief and declined to take any position on the issues presented here at the show cause hearing.

The following does not appear to be in dispute:

1. On July 11, 2014, the Fire Department separated twenty-six (26) firefighters for lack of funds pursuant to G.L. c. 31, § 39.
2. Approximately three (3) weeks later, the Fire Department reinstated three (3) of these firefighters pursuant to Section 39. These reinstatements were not contingent upon medical examinations and/or drug test.
3. On June 22, 2015, just under twelve (12) months after their separation, the Fire Department made conditional offers of reinstatement to an additional four (4) separated firefighters. These offers were contingent upon the requirement that the separated firefighters successfully complete a medical examination and drug test.
4. The Fire Department has not previously required firefighters to undergo a medical examination and drug test prior to reinstatement.
5. As of August 18, 2015, all medical and drug tests had been completed and all of the Petitioners have been reinstated pursuant to Section 39.

*Applicable Laws & Rules and Policies*

G.L. c. 31, § 2(a) provides that, in addition to its other powers and duties, the Commission shall have the following powers and duties:

“To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.”

G.L. c. 31, § 39 provides that:

“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 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, within seven days of receipt of such notice, a 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.

If a permanent employee who has become separated from his position because of disability shall be subsequently capable of employment as determined pursuant to section eight of chapter thirty-two by the retirement board, as defined in section one of chapter thirty-two, such employee shall be placed in a position in the same or similar title in the department from which he was separated or any other department prior to the appointment from any civil service list; provided, however, that in the event that such placement of such employee occurs after a period of time greater than five years from the date of such separation or results in such employee occupying a position in a different title from the title of the position from which he was separated, such placement right shall be subject to the completion by such

employee of a retraining program established by the appointing authority, and approved by the personnel administrator.

Nothing in this section shall impair the preference provided for disabled veterans by section twenty-six.” (emphasis added)

G.L. c. 31, § 40 provides that:

“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.”

HRD’s Civil Service Unit’s website’s “Frequently Asked Questions” Section states in relevant part:

*“29. If a community appoints a Firefighter or Police Officer from a reemployment list may the hiring community require a new medical, physical abilities test, and/or psychological examination? May a new background investigation be performed?”*

A medical examination may be administered and the results considered within the normal rules of selection and the provisions of the Americans with Disabilities Act (ADA), Chapter 151B.

Municipalities should follow the Medical Standards for policies regarding medical exams and psychological screenings for candidates. The Appointing Authority may also conduct a new background investigation on candidates from the reemployment list.

Under M.G.L. Chapter 31, Section 40 (sic) does not require the PAT for employees who are being reemployed after a lay off.”

### *Analysis*

Permanent civil service employees who are subject to a layoff have ten (10) years of *reinstatement* rights within the same departmental unit under G.L. c. 31, § 39. Applied here, laid off Fall River firefighters have a right to be reinstated as firefighters in the Fall River Fire Department before all others for a period of ten (10) years.

Permanent civil service employees who are subject to a layoff also have two (2) years of *statewide re-employment rights* under G.L. c. 31, § 40. Applied here, laid off Fall River firefighters are granted priority in hiring in all civil service fire departments in Massachusetts for two (2) years.

It is undisputed that the four (4) Petitioners here were *reinstated* to the Fall River Fire Department under G.L. c. 31, § 39.

Had these Petitioners been restored to their positions via the statewide *re-employment* list (under Section 40), HRD guidance on whether a medical examination can be required prior to re-employment is unambiguous stating: “A medical examination may be administered and the results considered within the normal rules of selection and the provisions of the Americans with Disabilities Act (ADA), Chapter 151B. Municipalities should follow the Medical Standards for policies regarding medical exams and psychological screenings for candidates. The Appointing Authority may also conduct a new background investigation on candidates from the

reemployment list. Under M.G.L. Chapter 31, Section 40 (sic) does not require the PAT for employees who are being reemployed after a lay off.”

Here, however, the Petitioners were *reinstated* to the same department under *Section 39*. The question presented to the Commission is whether the Appointing Authority can also require a medical examination (and drug screening) for those individuals being reinstated to the same department.

### *Arguments*

The Fire Department argues that there is nothing in the statute, regulations, rules or HRD guidance as to why a reinstatement under Section 39 should be considered any different than re-employment under Section 40 in regard to whether the Fire Department can require a medical (and drug screening) prior to reinstating a firefighter to his/her position. According to the Fire Department, the consideration for a community reinstating a public safety official is identical to a hiring community who is determining whether or not to appoint from the re-employment list: Is the prospective firefighter in the appropriate state of medical health to be placed in the role of a public safety officer – whether being reinstated or re-employed. According to the Fire Department, there is no reason why such an inquiry should not be deemed valid given the instant legal landscape, particularly given the inherently dangerous and physically demanding nature of a firefighter’s job.

The Petitioners argue that the Fire Department’s decision to require a medical test and drug screening, which they claim is the first time ever that this requirement has been imposed by the Fire Department, is both arbitrary and “unlawful and lack[s] any basis in fact or reason and contrary to basic merit principles.” The Petitioners point to the fact that the Fire Department does not require those on active military leave for time periods longer than these laid off

firefighters to undergo medical and drug screening prior to resuming their duties and there is no rational basis to do so here.

The Petitioners argue that appointment via a state-wide re-employment list, in which the individual never previously worked for the hiring Appointing Authority, is highly distinguishable from being reinstated to the same Department. Citing the same language from the HRD Question and Answer guidance, the Petitioners argue that “the clear (and only) implication from the Question and Answer is that such [medical] examinations are not permissible for employees on the reinstatement list.” If such examinations were permitted vis-à-vis the reinstatement list, as well as the re-employment list, then the Petitioners argue that “HRD would not have provided such a narrow response.” According to the Petitioners, an Appointing Authority’s concerns about fitness can be addressed “by its knowledge of the employee’s work history and acceptable colloquies.”

The Petitioners also argue that the Fire Department’s actions are a violation of the ADA, citing Franklin v. City of Slidell, 936 F. Supp. 2d 691 (E.D. La. 2013), in which the federal district court ruled “that the fact that an employee was a police officer returning to work from sick leave does not alone constitute a legitimate reason to require a fitness for duty examination.”

#### *Analysis*

The core disagreement here centers around interpreting guidance issued **by HRD**. The Fire Department argues that HRD’s guidance regarding the re-employment of firefighters should also be applied to individuals being reinstated to the same Department. The Petitioners argue the opposite, suggesting that HRD’s narrow response and use of the word “re-employment” suggests that HRD does not consider medical screening permissible when it comes to the *reinstatement* in the same Department.

For this reason, and in the interest of clarity and public policy, the Commission on October 29, 2015, asked HRD, which is responsible for administering the civil service law, to update its guidance to specifically address this question:

*If a community reinstates a Firefighter or Police Officer pursuant to G.L. c. 31, §39, may the hiring community require a new medical, physical abilities test, and/or psychological examination? May a new background investigation be performed?*

As an updated guidance from HRD could make the Petitioners' request here moot, the Commission deferred its decision on whether to open an investigation for ninety (90) days to provide HRD with sufficient time to respond to this order.

On December 7, 2015, HRD responded to the Commission's request, stating in relevant part: "HRD understands the focus of the Commission's inquiry to be whether Civil Service law permits a community to require medical, physical abilities testing and/or psychological examination as a condition precedent to reinstatement pursuant to Section 39 for an employee separated from employment for reasons other than disability retirement. Section 39 provides that employees:

**[S]hall** be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority ... 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 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. **(emphasis added by HRD)**

HRD's interpretation of the above-referenced language is that a municipality may not require a medical, physical ability test and/or psychological examination as a condition precedent to reinstatement pursuant to Section 39 for an employee separated from employment for reasons other than disability retirement."

*Commission Concurrence with HRD*

To the extent that it provides clarity on this issue on a going-forward basis, the Commission concurs with HRD's interpretation of Section 39 as stated above.<sup>2</sup> Since all of the Petitioners here have been reinstated, no further action and/or investigation is warranted by the Commission at this time.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Camuso, Ittleman, Stein and Tivnan, Commissioners [Bowman, Chairman – Absent]) on January 21, 2016.

Notice:

Patrick Bryant, Esq. (for Petitioners)  
Jaime Kenny, Esq. (for Fall River Fire Department)  
Melinda Willis, Esq. (for HRD)

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<sup>2</sup> Nothing in this response should be construed as impeding an Appointing Authority's ability to require fitness for duty evaluations of incumbent employees consistent with any applicable laws, rules and/or relevant language in collective bargaining agreements.