COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 979-1900

THOMAS L. WALSH, JR.,
Appellant

v.

TOWN OF WATERTOWN,
Respondent

CASE NO: D1-20-138

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION ON APPELLANT'S MOTION TO DISMISS NISI

The Appellant, Thomas L. Walsh, Jr., appealed to the Civil Service Commission (Commission) from the decision of the Town of Watertown (Watertown) terminating his employment as a Fire Captain with the Watertown Fire Department (WFD). On December 23, 2020, the Appellant filed the "Appellant's Motion to Issue Dismissal Nisi". Watertown opposed the motion and seeks an order dismissing the appeal with prejudice. On January 12, 2021, I conducted a hearing on the Motion via remote videoconference (Webex). After carefully reviewing the submission of the parties and hearing oral argument, I conclude that the Appellant's Motion should be granted, with conditions. The appeal shall be dismissed nisi, to become effective on March 15, 2021, with the proviso that, if the issue of arbitrability in American Arbitration Association (AAA) Case No. 01-20-0015-4650 now pending before Eileen A. Cenci, Arbitrator, has not been finally determined

before that time, the Appellant may move to further extend the future effective date of the dismissal of this appeal for such additional time and on such conditions as the Commission may determine.

FINDINGS OF FACT

Based on the submissions of the parties and argument of counsel, the following relevant facts are not in material dispute:

1. By letter dated September 3, 2020, Watertown terminated Capt. Walsh from his position of Fire Captain in the WFD. (*Stipulated Facts; Respondent's Opposition*)

2. On September 9, 2020, the Appellant's counsel, acting on behalf of the Watertown Firefighters Association, Local 1347 (the "Union"), inquired by email whether Watertown would waive the normal grievance procedures and "go to direct arbitration" over the Appellant's termination. (*Respondent's Opposition*).

3. On September 11, 2020, Watertown replied by email to the Union's request by stating "it is our understanding that the practice between the parties relative to discipline cases has been that discipline is appealed to the Civil Service Commission pursuant to Article XIV of the collective bargaining agreement." (*Respondent's Opposition*)

4. On September 14, 2020, the Union filed a grievance with the WFD Fire Chief alleging that the Appellant's termination violated the collective bargaining agreement entered into by the Union with Watertown. (*Respondent's Opposition*)

5. On September 15, 2020, the Appellant duly appealed his termination to the Commission. (*Stipulated Facts; Claim of Appeal*)

6. On September 22, 2020, the WFD Fire Chief denied the grievance on the grounds that he "did not have the authority to rule on the grievance." (*Respondent's Opposition*)

7. On September 22, 2020, the Union filed the grievance for a Step III meeting which was held on October 7, 2020 before the Watertown Town Manager. (*Respondent's Opposition*)

8. By letter dated October 9, 2020, the Watertown Town Manager denied the grievance on the grounds that; (1) "The grievance is not arbitrable as the collective bargaining agreement contemplates, and the past practices between the parties confirms, that disciplinary appeals are to be filed at the Civil Service Commission" and (2) "[E]ven if the grievance were arbitrable, the Town had ample just cause to terminate Captain Walsh's employment . . ." (*Respondent's Opposition*)

9. On October 13, 2020, the parties appeared before the Commission for a duly scheduled pre-hearing conference (conducted remotely via videoconference). At the time of this conference, the Appellant stated that it was the intention of the Union to arbitrate the termination decision, but Watertown asserted that the matter was not arbitrable. Accordingly, the Commissioner presiding at the pre-hearing conference scheduled a Status Conference for December 17, 2020 to obtain an update on the status of the arbitration proceeding. Also, a date of January 12, 2020 was established for a full evidentiary hearing of the Appellant's appeal. (*Respondent's Opposition; Administrative Notice*; *Notice of Pre-Hearing Conference; Notice of Status Conference; Notice of Full Hearing*)

10. On October 27, 2020, the Union filed a Demand for Arbitration of the Grievance related to the Appellant's termination. (*Respondent's Opposition*)

11. On November 20, 2020, the AAA issued a Notice of Hearing on the Union's Demand For Arbitration on January 28, 2021 before an arbitrator selected by the parties. (*Appellant's Motion; Respondent's Opposition*)

12. At the December 17, 2020 Status Conference, I was informed of the scheduled arbitration hearing on January 28, 2021 and was further advised that Watertown intended to raise, as one of

the issues to be decided by the arbitrator, whether the Union's grievance was arbitrable. The Appellant requested that the Commission appeal be "held in abeyance" pending a decision of the arbitrator on the issue of arbitrability. Watertown contended that the Appellant's election to arbitrate was binding and, whether the Union prevailed on the issue of arbitrability or not, his he has, in effect, the Commission is now divested of jurisdiction and this appeal must be dismissed with prejudice. (*Administrative Notice Procedural Order dated 12/13/2020*)

13. In view the dispute between the parties as to whether or not the current status of the arbitration proceeding precluded the Commission from retaining or exercising jurisdiction over the Appellant's appeal, I converted the scheduled full hearing into this Motion Hearing, and invited the parties to submit written motions to set forth their respective views, which they have done. I also encouraged the parties to collaborate and determine if the decision on the issue of arbitrability could be expedited in some fashion. (*Procedural Order dated 12/13/2020: Appellant's Motion; Respondent's Opposition*)

14. At the Motion Hearing, I was informed that the parties had met with the arbitrator and an agreement was reached providing that the January 28, 2021 hearing would address the issue of arbitrability, the parties would brief that issue on or before February 15, 2021, the arbitrator would endeavor to issue a decision on arbitrability within thirty (30) days thereafter, and that a hearing on the merits would be scheduled, if necessary, at a later time. (*Colloquy at Motion Hearing*)

APPLICABLE CIVIL SERVICE LAW

Public employees with civil service status who are also members of a collective bargaining unit derive their rights to contest adverse employment decisions under the panoply of several

intersecting statutes as well as under contractual rights provided in negotiated collective bargaining agreements. See, e.g., G.L. c. 31 (civil service law), and G.L. c. 150E (public employee collective bargaining)

G.L.c.31,§41-45 provides that a tenured civil servant may be "discharged, removed, suspended . . . laid off [or] transferred from his position without his written consent" only for "just cause" after due notice, hearing (which must occur prior to discipline other than a suspension from the payroll for five days or less) and a written notice of decision that states "fully and specifically the reasons therefore." G.L.c.31, §41. An employee aggrieved by such disciplinary action may appeal, within ten (10) days, to the Commission, pursuant to G.L.c.31, §42 and/or §43, for de novo hearing by the Commission "for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited;

Volpicelli v. City of Woburn, 22 MCSR 448 (2009); Williamson v. Department of Transitional Assistance, 22 MCSR 436 (2009) [1] G.L.c.31, §43 also provides, in relevant part:

> If the commission determines that such appeal *has been previously resolved or litigated with respect to such person, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with such section*, the commission shall forthwith dismiss such appeal.

G.L. c.31, §43, ¶1, third sentences *(emphasis added)*

The relevant collective bargaining statute, referred to in Section 43 above, states:

> **Grievance procedure; arbitration.** *The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration* to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. *In the absence of such grievance procedure, binding arbitration may be ordered by the [labor relations] commission upon the request of either party;* provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supersede any otherwise applicable grievance procedure provided by law; and further provided that *binding arbitration hereunder* shall be enforceable under the provisions

[1] The ten-day filing deadline is jurisdictional and must be 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);

> of chapter one hundred and fifty C and *shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one,* section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and *where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance,* notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and and section fifty-nine B of chapter seventy-one.

G.L.c.150E, §8 (*emphasis added*)

ANALYSIS

The essential question presented by the present Motion turns on whether the Appellant, who had duly and timely filed an appeal with the Commission that challenged the just cause for his termination from the WFD, forfeits his right to pursue that claim under Civil Service Law, once his union made a Demand for Arbitration based on a grievance of that same termination as a violation of an applicable collective bargaining agreement, even when he knows that his appointing authority intends to challenge the arbitrability of such a grievance.

Watertown contends that once the Union filed its Demand for Arbitration, it triggered the application of the requirement of G.L. c.31, §43 which divested the Commission of jurisdiction because the same claim is "presently being resolved" in arbitration, as well as the provision of G.l.c.150E, §8 that "where such arbitration is elected by the employee as the method of grievance resolution" it becomes "the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination", notwithstanding any rights provided under Civil Service Law. Watertown asserts that it does not matter whether or not the grievance is arbitrable for purposes of divesting the Commission of jurisdiction because the "election" of arbitration was

made at the time the Demand for Arbitration of the grievance was filed, knowing that arbitrability was an issue, and the Appellant thereby "elected" to "resolve" the dispute in arbitration, including its arbitrability, whether favorable to the Union or not. Thus, Watertown argues, there is no reason to abide the decision on arbitrability, because whatever the outcome, as a matter of law, the Commission now has been divested of jurisdiction to proceed to adjudicate the Appellant's civil service claim. Alternatively, Watertown argues that the Appellant must decide, before the January 28th hearing on arbitrability is held, whether he will proceed with that hearing or have the Union withdraw the Demand for Arbitration and proceed with a civil service hearing instead.

The Appellant contends that the Union's pursuit of an arbitration claim, in which arbitrability is contested, is distinguishable from a case in which arbitrability is not contested. He agrees that, if the arbitration proceeds to be litigated and decided on the merits, he would be bound by the outcome and the Commission could not retain jurisdiction. He disputes, however, that an arbitration in which the issue of arbitrability is asserted and is not yet decided, cannot be construed as an arbitration in which the just cause of his termination can be characterized as "presently being resolved" within the meaning of Chapter 31. He asserts that he cannot be required to forfeit his duly asserted civil service rights until it has been determined that the process affords him an equivalent opportunity for his Union to seek redress of his complaint. He asks that the appeal be dismissed nisi, to become final only if the arbitrator decides the grievance is arbitrable, but with the opportunity to reopen the appeal if the arbitrator decides the Union grievance is not arbitrable.

In Ung v. Lowell Police Dep't, 22 MCSR 471 (2009), the Commission addressed a similar issue to that presented here. In Ung, after duly filing a Section 43 disciplinary appeal, the Appellant withdrew the appeal after his Union filed a Demand for Arbitration. When the employer then challenged the Demand for Arbitration on the grounds that the grievance was not arbitrable,

Ung moved to reopen his appeal. The Commission revisited its interpretation of Section 43 and concluded:

> "The Commission has concern that, by construing civil service law to force an Appellant to pull the plug on a civil service appeal upon filing a Demand for Arbitration, as prior decisions appear to have implied, when arbitrability of the grievance is uncertain, the Commission may be facilitating a practice that will unwittingly chill the rights of public employers and employees to chose to resolve disputes through binding arbitration, which may not be appropriate as a matter of public policy. . . . [T]he Commission has decided that a limited modification of its interpretation of the intersection of the arbitration statute and the civil service law is appropriate."
>
> "Accordingly, the Commission construes the term "presently being resolved" in the third sentence of G.L. c. 31, §43, ¶1 to mean that a Demand for Arbitration has been filed on behalf of an appellant covering the same disputed matter as presented in a duly filed civil service appeal pending before the Commission and the merits of the dispute are "presently" on track to be "resolved" by an arbitrator, *i.e.*, arbitrability is not contested.[footnote omitted] When arbitrability of an issue covered by a parallel civil service appeal is contested, the Commission construes the subject statutory language to mean that the grievance should not be deemed "presently being resolved" . . . ." [2]

The Commission continues to apply the decision it reached in Ung. See Kilson v. City of Fitchburg, 27 MCSR 106 (2014).

Watertown seeks to distinguish this appeal from Ung on the grounds that Ung withdrew his appeal and, thereafter filed for arbitration, not knowing that Lowell would challenge the arbitrability of his grievance and that that it was many months later, when the issue of arbitrability had reached the courts, that Ung moved to reopen his civil service appeal. Here, Watertown notes that the Appellant was on notice that the arbitrability of his grievance would be an issue before his Union filed the Demand for Arbitration. I find that these distinctions actually reinforce the Appellant's claim that he had acted diligently and should not be required to forego his pending civil service rights solely because of an issue of arbitrability initiated by the Respondent which is

[2] In Ung, at the time of his motion to reopen, the issue of arbitrability was pending ***sub judice*** before the Appeals Court, and the Commission denied reopening pending a final decision on arbitrability and then, given the lengthy passage of time, conditioned any future reopening on an agreement to waive a claim to certain amounts of back pay. 22 MCSR at 476.

wholly out of his control. He is entitled to know whether or not the subsequently filed arbitration proceeding will lead to a resolution of his grievance on the merits before his "election" to arbitrate is deemed "being resolved" for purposed of Section 43 of Chapter 31.

This is not a question of giving the Appellant more than "one bite at the apple" and is distinguishable from the cases on which Watertown relies. See, e.g., Canavan v. Civil Service Commission, 60 Mass.App.Ct. 910, rev.den., 441 Mass. 1107 (2004) (appellant lost arbitration case and then sought review by the Commission); DiNicola v. City of Methuen, 22 MCSR 504 (2009) (grievance had not reached the "arbitration stage"). I agree (and the Appellant does not dispute) that the law entitles the Appellant to only one hearing on the merits and that this this appeal must be dismissed once his arbitration finally proceeds to "being resolved" on the merits. To be sure, there is some ambiguity in the applicable statutory language. I conclude, however, as the Commission held in Ung, , when Chapter 31 and Chapter 150E are read harmoniously and consistent with the accepted rules of statutory construction, they do not support an interpretation of legislative intent to mandate that the Commission divest itself of jurisdiction over a duly filed claim pending before us and defer to a Demand for Arbitration in which it was known that the employer intended to dispute, or was disputing, the issue of arbitrability before that issue was actually decided. Such an outcome is neither rational nor necessary and it potentially could deprive the Appellant of ever receiving a hearing on the merits.

The Appellant devotes considerable argument to his contention that Watertown's claim that his union's grievance is not arbitrable is wholly without merit, a point that Watertown vigorously disputes. That issue turns on the interpretation of the applicable collective bargaining agreement, which is a matter for decision by the arbitrator, not this Commission. The Commission's interest is not whether this dispute is resolved through arbitration or by adjudication in this forum. The

Commission, however, is committed to ensure that civil service rights of tenured employees are fully protected as the legislature intended, i.e., that employees are not disciplined except upon proof of just cause after receiving a hearing on the merits. I conclude that the Appellant's Motion to Dismiss Nisi is the appropriate vehicle to preserves the Appellant's civil service rights without intruding on the collective bargaining rights of the parties or requiring the parties to endure duplicative proceedings or undue delay.[3]

CONCLUSION

Accordingly, the Appellant's Motion to Dismiss Nisi is granted, on the conditions set forth below:

1. The Appellant's appeal in Docket No. D1-20-0138 is dismissed nisi, to become final and effective on March 15, 2021.
2. If the issue of arbitrability in American Arbitration Association (AAA) Case No. 01-20-0015-4650 has not been finally determined before March 15, 2021, the Appellant may file a Motion to Extend the future effective date of the dismissal of this appeal for such additional reasonable time as the Commission may determine.
3. The Appellant may file a Motion to Revoke this Dismissal prior to March 15, 2021 or such further date as the Commission may prescribe as provided herein, together with notice of a final determination that the grievance asserted in the American Arbitration Association (AAA) Case No. 01-20-0015-4650 is not arbitrable. No additional filing fee shall be required.

[3] The Commission could reach the same result by dismissing the appeal and exercising its inherent authority to reopen an appeal in its discretion. See, e.g., Ung v. Lowell Police Dep't, 22 MCSR 471 (2009). The Commission generally prefers the use of a dismissal nisi as a matter of administrative efficiency when the trigger for reopening can be defined, because it gives the parties greater certitude about the future course of the matter and, if the trigger does not occur, the decision becomes final without any further action on the part of the Commission or the parties.

4. In the absence of a Motion to Extend or Motion to Revoke, as provided herein, the dismissal of this appeal shall become final for purposes of G.L.c.31, §44, on March 15, 2021.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan & Stein, Commissioners) on January 14, 2021.

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:
Patrick N. Bryant, Esq. (Appellant)
Brian M. Maser, Esq. (for Respondent)