COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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CHRISTIAN PONTE **CASE NOS: D1-09-155 (Ponte)**
MICHAEL FERRY **D1-09-156 (Ferry)**
MATTHEW CAMARA **D1-09-157 (Camara)**
DAVID BANVILLE **D1-09-158 (Banville)**
Appellants,

v.

CITY OF FALL RIVER,
Respondent

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Commissioner:
Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellants in these consolidated appeals held civil service positions as firefighters with the Respondent, City of Fall River Fire Department (FRFD), the Appointing Authority. As part of a challenge to the layoffs by the FRFD for lack of money pursuant to Chapter 31, Section 39 of the Massachusetts General Laws, the Appellants assert that their length of service with the FRFD places them ahead of four other FRFD firefighters (Retained Firefighters) in seniority as defined by Section 33 of

Chapter 31, and, therefore, the Retained Firefighters were required to be laid off before the named Appellants. On May 13, 2009, the Appellants filed a Motion for Summary Decision, which the FRFD opposed and argued, among other things, that the FRFD correctly calculated the seniority rights of all firefighters and that FRFD is entitled to judgment dismissing the appeals as a matter of law. The Retained Firefighters were joined as parties by the Commission and they also oppose the Motion for Summary Decision. Oral argument on the motion was heard by the Commission at the Southern New England School of Law on June 12, 2009. Reply Memoranda were received by the Commission from the Appellants and the Retained Firefighters on July 8, 2009.[1]

FINDINGS OF FACT

Giving appropriate weight to the documents received, and the argument presented by the Appellant, the FRFD and the Retained Firefighters, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

The Appellants and the Retained Firefighters

1. As of March 2, 2009, the Appellants, Christian Ponte, Michael Ferry, Matthew Camara and David Banville, held tenured civil service positions as firefighters with the FRFD and began working in that capacity as of that date. None of the Appellants had previously worked in any other civil service position. (*Appellants' Motion, pp. 9-10. & Exhibit E; FRFD Opposition, p. 2*)

2. Each of the Appellants has a civil service seniority date of September 14, 2004, which is the date on which they were originally appointed to the position of firefighter in the FRFD. (*Appellants' Motion, Exhibit E; FRFD Opposition, p. 2*)

[1] The Commission also received several documents after the oral argument directly from certain of the Retained Firefighters, but this Decision has neither considered nor given weight to any of those apparently ex parte communications.

3. On November 28, 2005, the Retained Firefighters, Kevin Medeiros, Michael Bergeron and Edmund Correia, Jr. were hired as firefighters by the FRFD, also, through original appointment and began working in that capacity as of that date. (*Appellants' Motion, Exhibit E; FRFD Opposition, p.3; Retained Firefighters' Opposition, p.2 & Affidavits of Edmund A. Correia, Jr., Michael Bergeron, Kevin Medeiros)*

4. On October 16, 2006 Retained Firefighter Robert Durette was hired by the FRFD as a firefighter by original appointment and began working in that capacity on that date. (*Appellants' Motion, Exhibit E; FRFD Opposition, p.3; Retained Firefighters' Opposition, p.2 & Affidavit of Robert M. Durette*)

5. Each of the Retained Firefighters had prior municipal employment in the City of Fall River in positions other than as a FRFD firefighter, specifically:

a. Firefighter Bergeron became a part-time emergency medical technician (EMT) in the EMS Division of the FRFD in May 2000. On December 16, 2001, he became a full-time EMT in the EMS Division of the FRFD, a civil service position he held until his appointment as firefighter until his appointment as firefighter in November 2005.

b. Firefighter Correia became a part-time EMT in the EMS Division of the FRFD in 2003. On July 26, 2004, he became a full-time EMT in the EMS Division of the FRFD a civil service position he held until his appointment as firefighter in November 2005.

c. Firefighter Medeiros became a full time civil service employee of the Fall River School Department on March 5, 2001, a civil service position he held until his appointment as firefighter in November 2005.

d. Firefighter Durette became a part-time EMT in the EMS Division of the FRFD on November 14, 2000. On July 26, 2004, he became a full-time EMT in the EMS Division of the FRFD. On March 12, 2006, he became a full-time firefighter in the Plainville, Massachusetts Fire Department, a civil service position he held until his appointment as firefighter in October 2006.

(Appellants' Motion, p.10, Exhibit E; FRFD Opposition, p.3; Retained Firefighters' Opposition, p.2 & Affidavits of Edmund A. Correia, Jr., Michael Bergeron, Kevin Medeiros; Robert M. Durette)

6. The seniority of the Retained Firefighters was determined to be the dates on which they each first became permanent civil service employees, namely:

a. Kevin Medeiros was given a seniority date of March 5, 2001 based on the original date that he began full-time civil service employment with the Fall River School Department.

b. Michael Bergeron was given a seniority date of December 16, 2001 based on the original date that he began full-time civil service employment as an EMT in the EMS Division of the FRFD.

c. Edmund Correia was given a seniority date of December 16, 2001 based on the original date that he began full-time civil service employment as an EMT in the EMS Division of the FRFD.

d. Robert Durette was given a seniority date of August 27, 2004 based on the original date that he began full-time civil service employment with the Fall River School Department.

(*FRFD Opposition, p. 4: Appellant's Motion, Exhibit E*)

7. EMTs within the FRFD are appointed by the same appointing authority (Fire Chief of the FRFD) but operate as a separate division, funded through a separate "enterprise fund" pursuant to G.L.c.44, §53½ which are available for healthcare services but not fire services. The qualifications for the position of Firefighter and EMT are materially different, call for different training and accredidations, and perform different job duties and work a different work schedule. FRFD Firefighters work 24-hour shifts but FRFD EMTs do not. Firefighters are classified as Group 4 public safety members for retirement purposes under G.L.c.32; EMTs are not. (*Appellants' Motion, Affidavits of Edmund A. Correia, Jr., Michael Bergeron, Kevin Medeiros; Robert M. Durette; FRFD Opposition, pp. 4-5; Appellant's Reply, Affidavit of Michael Coogan; Administrative Notice*)

8. The FRFD and the Fall River School Committee are different appointing authorities within the same municipality. (*Administrative Notice*)

The FRFD Layoff

9. In March 2009, the City of Fall River (Fall River) determined that it was forced to layoff certain civil service personnel, including over forty FRFD firefighters, pursuant to G.L.c.31, §39 because of a "lack of money". The Appellants (Firefighters Banville, Ferry, Camara and Ponte) were among those firefighters who lost their jobs. (*Appellants' Motion, Exhibits F & G; FRFD Opposition, p. 2*) [2]

10. In establishing the relative seniority of the Appellants and the Retained Firefighters for purposes of determining the order of layoff for purposes of G.L.c.31, §39,

[2] The Appellants, along with other FRFD firefighters, also appealed the merits of the March 2009 layoffs, and a hearing of those issues presently is scheduled for August 2009. The seniority issues involved in this Decision were bifurcated from the other appeals to be heard separately and this Decision does not decide the merits of the other issues pending a hearing.

the FRFD used the seniority dates stated above. Thus, the Appellants were laid off despite the fact that each of the Appellants had more actual time as a firefighter with the FRFD than any of the Retained Firefighters. (*FRFD Opposition, p. 6; Appellants Motion, pp.9-12; Retained Firefighters' Opposition. Pp. 2-3, Affidavits of Edmund A. Correia, Jr., Michael Bergeron, Kevin Medeiros; Robert M. Durette*)

11. If the FRFD had not counted the prior service of the Retained Firefighters as civil service employees in positions other than as firefighters in the FRFD, the Retained Firefighters would have less seniority that the Appellants and the FRFD would have selected the Retained Firefighters, not the Appellants, for layoff. (*Appellants' Motion, pp.1-2; Retained Firefighters' Opposition, p. 3*)

CONCLUSION

Summary

The Appellants' rely on a proviso found at the end of the fourth paragraph of G.L.c.31, §33 that states "the seniority of a firefighter for purposes of . . . reduction in force . . . shall be based on his length of service in the fire department in which such reduction is to take place." The Commission has previously decided, based on a 1991 formal opinion of the Attorney General to the Personnel Administrator, that this proviso only applies to firefighters who have transferred from one municipal fire department to another, and that the rules for calculating seniority of all other firefighters require that a firefighter be given credit for length of service in prior civil service positions for purposes of layoff in the same manner as all other civil service employees. The Appellants argue that the Attorney General's opinion is flawed and that the Commission should abandon it. The Commission declines to do so.

While the Appellants' argument carries some logic, the Commission is not persuaded that the plain meaning of the applicable civil service law and rules compels a reversal of the established interpretation given to the statute in the past and upon which FRFD (and other civil service employees and appointing authorities) have justifiably relied for decades in making layoff decisions. As the Commission has previously stated, the proper solution to the Appellants' grievance remains to convince the legislature to make a prospective change to the law if that is deemed appropriate.

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h).

These 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 established 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 evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing

cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Relevant Civil Service Law

When a public employer is required to layoff civil service personnel in a reduction in force, G.L.c.31,§39 prescribes:

> "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 their positions, they shall. . .be separated from employment according to their seniority in such unit . . .so that employees senior in length of service, computed in accordance with section thirty three, shall be retained the longest. . . ."

G.L.c.31, §33 sets forth the specific rules for determining seniority. As a general rule:

> "For the purposes of this chapter, seniority of a civil service employee shall mean his ranking based on length of service, computed as provided in this section. ***Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the department unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original employment;*** provided, however, that the continuity of service of such employee shall be deemed not to have been interrupted if such absence was the result of (1) military service, illness, educational leave, abolition of position or lay-off because of lack of work or money, or (2) injuries received in the performance of duty for which compensation was paid pursuant to chapter one hundred and fifty-two . . ."

G.L.c.31,§39, ¶1.

Section 39 also provides:

> **"**If, as a result of a ***reinstatement*** made pursuant to section forty-six, a person is restored to employment ***in a departmental unit other than that in which he formerly held full-time employment as a permanent employee, his length of service shall be computed from the date of his first employment under such reinstatement, but upon continuous service in such unit for three years*** *or twice the length of his absence from the payroll, whichever is greater,* ***his length of service shall be computed as though such earlier employment had been in the departmental unit to which he has been reinstated.***" (¶2)

"If the employment of such full-time employee is changed through ***an original or promotional appointment or transfer*** . . . ***from one departmental unit to another within the same department in a city or town, the length of service of such employee in the unit to which the appointment or transfer is made shall be computed from the date which was used to compute his length of service immediately prior to such appointment or transfer.*** If the employment of such full-time employee is changed through an ***original or promotional appointment*** . . . ***from one departmental unit to another not within the same department in a city or town, from one city or town to another*** . . . ***the length of service of such employee shall be computed from the date of such change of employment, but if the employee completes one year of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the change of employment.***" (¶3)

"If the employment of such full-time employee is changed by ***transfer*** . . . ***from one departmental unit to another not within the same department in a city or town, from one city or town to another*** . . . the length of service of such employee shall be computed in the following manner: (1) ***if the transfer was made upon the request of the employee, the length of service shall be computed from the date of such transfer, but if the employee completes three years of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the transfer***; (2) ***if the transfer was not upon the request of the employee, the length of service shall be computed from the date which was used to compute the employee's length of service immediately prior to the transfer. In determining the seniority of a firefighter for the purpose of reduction in rank or reduction in force, his ranking shall be based on his length of service in the fire department in which such reduction is to take place***." (¶4)

"The length of service of ***a permanent employee appointed on less than a full-time basis shall be computed from the date of such appointment***, without regard to absences from the payroll which were not voluntary on the part of such employee. ***Regardless of actual length of service, permanent municipal employees appointed on less than a full-time basis shall, for the purposes of determining seniority, rank below all full-time permanent municipal employees***. Permanent state employees appointed on less than a full-time basis shall accrue that portion of the seniority of full-time permanent state employees that their service bears to full-time service." (¶5)

Any person in such service who has received ***an appointment from a reemployment list***, as set forth in section forty, ***shall carry forward their seniority as prescribed herein***; ***provided, however, that any lay-offs occurring after a reemployment date shall have such reemployment date as the determining factor in lay-offs by seniority***." (¶6)

G.L.c.31,§33, ¶¶2-6 (***emphasis added***)

The appropriate statutory construction of Section 33 is the sole dispute to be decided here. The FRFD and the Retained Firefighters construe the last sentence of Paragraph 4 of Section 33 (inserted by amendment in 1987) to apply only to firefighters who had transferred, voluntarily or involuntarily, to the FRFD from another municipal department,

pointing to the placement of the provision within the fourth paragraph which is limited to such transfers and to the legislative history. Using that approach, as all of the Appellants or Retained Firefighters were hired through "original appointments", as opposed to "transfer" from another department or municipality, the FRFD applied the general rules of seniority found in other paragraphs of Section 33 applicable to original appointments in determining the relative seniority of the Appellants and the Retained Firefighters.

The Appellants' construe the last sentence of Paragraph 4 of Section 33 differently. They argue that the placement of the amendment in the fourth paragraph is not controlling. The Appellants also rely on the legislative history of the civil service statute, including an affidavit from the former Legislative Agent for the Professional Fire Fighters of Massachusetts (PFFM), one of the sponsors of the 1987 amendment. Based on the Appellants construction of the statute, they claim that the prior service of the Retained Firefighters in positions other than as a firefighter in the FRFD do not count in determining seniority in a Section 39 layoff. Therefore, the Appellants' greater length of service as FRFD firefighters places them ahead of the Retained Firefighters, all of whom had less service as a firefighter in the FRFD than any of the Appellants.

The Attorney General's Opinion

The precise issue presented here was addressed in a 1991 opinion of the Attorney General to the Secretary of Administration and Finance and the Massachusetts Personnel Administrator. In that opinion, the Attorney General opined:

> *You have asked my opinion as to the interpretation of a provision of G.L.c.31,§33(1988 ed.) that governs the calculation of seniority in connection with layoffs of firefighters.* This issue has arisen because fiscal emergencies are causing several Massachusetts cities and towns to lay off firefighters. The civil service laws require layoffs to be implemented according to seniority calculated under section 33. See G.L.c.31, §39. *Several cities and towns therefore have sought*

> *Administrator, who is charged with the administration and enforcement of the civil service law and rules. See G.L.c31, §§5(a), 77. No interpretation of section 33 can avert the layoffs of firefighters or limit their extent, but a proper interpretation is necessary in order to determine which firefighters must be laid off.*
>
> *Section 33 sets out numerous rules for calculating the seniority of civil service employees. Various paragraphs of that section apply differing rules for calculating seniority to different categories of employees.* These categories are primarily defined according to how the employee came to occupy his or her present civil service position. The third paragraph, for example, applies to (among others) those employees who obtained their positions through an original or promotional appointment, either within a city or town or from one city or town to another. The fourth paragraph applies to (among others) those employees who obtained their positions through a transfer from one city or town to another.
>
> *Section 33 also contains a sentence that specifically governs firefighter seniority. The Legislature inserted this provision in the fourth paragraph of section 33. You have asked whether that provision applies only to employees who transferred into their current firefighter positions as described in the forth paragraph, or whether the provision also applies to employees who obtained their positions as described in the third paragraph or other paragraphs of section 33. For the reasons discussed below, I conclude that the firefighter provision applies only to those firefighters who transferred in to their current positions as described in the fourth paragraph of section 33.*

Op. Atty Gen. No.5 (June 12, 1991), 1990-91 Mass.Op.Atty.Gen. 103, 1991 WL 527862 (*emphasis added*)

Finding that the "true purpose and meaning" of the "firefighter provision" was "unclear", the Attorney General resorted to application of rules of statutory construction to reach the conclusion stated. First, the Attorney General noted that, had the provision been set off in a separate paragraph, it would have implied that it was intended to except firefighters from any other conflicting rules in the statute; as the provision was inserted at the end of a specific paragraph rather than as a separate paragraph, that was a choice of "punctuation" that was entitled to some weight. Second, the Attorney General discerned that the firefighter provision created an exception to the general scheme of Section 33 in two respects: (1) the general rule was to make the choice of the applicable seniority rule

turn on how the employee came to occupy the position [original appointment, promotion, transfer, reinstatement, reemployment] rather than on what kind of duties the position involved; and (2) as a general rule, so long as certain conditions were met, an employee's periods of prior civil service employment typically are entitled to be counted in length of service, so that, the seniority date of most tenured employees normally coincides with the date they were first hired in any permanent civil service capacity. Noting that "exceptions to a general law, whether statutory or constitutional, should be strictly construed", the Attorney General concluded that "a strict construction of the firefighter provision requires applying it only to the paragraph in which it appears." Third, the Attorney General contrasted the Legislature's approach to an earlier amendment of Section 33 that inserting a special rule for layoffs after reemployment, in which the Legislature did chose to set the rule off in a new and separate paragraph (the sixth paragraph) at the end of Section 33, a past practice that reinforced the Attorney General's conclusion that the Legislature's approach to making the firefighter provision part of an existing paragraph was intentional. Fourth, the Attorney General discerned a reasonable interpretation to the statute as he construed it, namely, that by limiting the seniority of firefighters who have transferred from a fire department in one municipality to another, so that they would be junior for purposes of layoff to firefighters who had served longer for that municipality, the Legislature meant "to reward service with a particular employer" and that such a policy choice appeared "consistent with the policies embodied [elsewhere] in section 33."

The Commission's Prior Decisions

Two prior Decisions of the Commission have considered the meaning of the "firefighter provision" in Section 33, each of which reached a conclusion consistent with

the opinion of the Attorney General. In Maccarone et al v. Lawrence Fire Dep't, 4 MCSR 1105 (1991), the Commission adopted the recommendations of DALA Chief Administrative Magistrate Connolly, 4 MCSR 1108 (1991), namely, that the limitation of the firefighter provision applies solely to seniority of firefighters who have "transferred" from one municipal fire department to another. The Commission ordered four firefighters who had been laid off by application of the firefighter provision, rather than the other general rules that measured seniority based on their total length of service for the city, because none of the laid off firefighters had "transferred" into the department from another municipality. Id., 4 MCSR at 1110-12. In Smith v. Lawrence Fire Dep't, 6 MCSR 35 (1993), the Commission was asked to overrule the Macarrone Decision and declined, noting the 1991 opinion of the Attorney General, and finding that the Appellant firefighters in that case were entitled to have their prior service in the Lawrence DPH and Lawrence School Department counted in the calculation of their Section 33 seniority for layoff purposes. The Commission also noted that the Appointing Authority had relied on the Macarrone Decision in arriving at the layoff list for fiscal year 1992. Id.

The Legislative History and Other Statutory Construction Issues

All parties devote a considerable effort to persuade the Commission that the rules of statutory construction, including consideration of legislative history leading to the enactment of the 1987 amendment which inserted the firefighter provision into Section 33, supports their view of what the legislature intended. Although this appeal is the third time that the Commission has considered the question, we have taken a fresh look at the question of statutory intent in light of the thorough and exhaustive work of all of the parties who have addressed this issue here.

The Appellants argue that prior analysis by the Commission and the Attorney General that gave consideration to the placement of the firefighter provision, as "similar to the effect of punctuation" is a mistaken reliance on a "minor rules of statutory construction". Appellant argues that the placement of the firefighter provision at the end of the fourth paragraph "was likely intended to show that it would apply to all of the seniority provisions listed above it. Consequently, there is nothing about the physical placement of the exemption which should, on its own, be interpreted to practically nullify the exemption." (Appellants' Memorandum, pp 19-21)[3]

In the current version of the statute, the subject matter of the first sentence of the third paragraph (concerning appointments, promotions and transfers, within the same municipal department) does appear substantively different from the subject matter second sentence of the third paragraph (concerning appointments and promotions between different departments or municipalities) and substantively closer to the first sentence of the fourth paragraph (concerning transfers, also between different departments or municipalities.) This could imply that those three sentences, at least, belong together so that the paragraphing should not be considered significant and it would be equally reasonable to construe the firefighter provision as applicable to the preceding paragraph as well.

The Commission rejects the Appellants' argument for several reasons. The legislative history indicates that the subject matter of paragraph four (covering transfers) has always been set apart from the rest of the statutory provisions governing seniority. The origin of

[3] The Attorney General (and this Commission) did not consider the placement of the firefighter provision in a vacuum, but as a factor entitled to "some weight" as part of the overall task to "ascertain the intent of a statute from all of its parts and from the subject matter to which it relates." See, e.g., Cote. Whiteacre v. Department of Public Health, 446 Mass. 350, 358059 (2006); Polariod Corp.v. Commissioner of Revenue, 393 Mass. 490, 497 (1984)

the seniority rules now found in Section 33 is a 1945 amendment to the Chapter 31, inserting a new Section 15D, which read:

> "Section 15D. For purposes of this chapter, seniority of officers and employees in the official or labor service shall mean their ranking based on length of service, computed as provided in this section.
>
> 1. *The length of service of a permanent officer or employee shall be computed from the date of his original permanent appointment*, including the probationary period served for such appointment, other than an appointment on an intermittent or a part-time basis, to the official or labor service *in the department in which he serves, regardless of class or grade, unless the continuity of his service ahs been interrupted by an absence from the pay roll* of six months or longer, in which case the length of his service shall be computed from the date of his restoration to the pay roll; *but upon continuous service following such an absence for a period of twice the length of the absence, the length of his service hall be again computed from the date of his original appointment*.
>
> 2. *In the event of a transfer of such an officer or employee from one department of the commonwealth to another department thereof, from one department to another in the same or another municipality, or from a municipality to the commonwealth, or from the commonwealth to a municipality, the length of his service shall be computed from the date of said transfer until the completion of one year's service in the position to which he is transferred, upon the completion of which the length of his service shall be again computed from the same date from which computed immediately prior to such transfer*."

St. 1945, c.704, §5 (*emphasis added*)

In 1978, as part of a wholesale revision of Chapter 31 (St. 1978, c.393, §11), the seniority rules were placed in Section 33 to read substantially as found in the current Section 33, save for a 1982 amendment adding the sixth paragraph, concerning seniority of employees from statewide "reemployment" lists (St.1982, c.571); the insertion of the firefighter provision (St.1987, c.252); and another 1987 amendment to the fifth paragraph concerning part-time employees (St. 1987, c.517).

The Commission infers from this legislative history that initial division of the current Section 33 into five separate paragraphs was not inadvertent, but reflected a deliberate intention to replace the prior Section 15D with a distinct paradigm of different seniority rules that preserved the tenure of employees who changed jobs within their own

department, or who were transferred involuntarily (an option provided by Section 35), while creating a disincentive to moving around from one employer to another, thus, rewarding employees for loyalty to a career progression within a particular state agency or municipality.

Under the first paragraph of Section 33, an employee who is involuntarily laid off for lack of work and returns to the same unit carries forward all of his or her prior seniority upon reinstatement; a laid off employee who takes to a civil service job in a different departmental unit must wait three years to regain that seniority. Under the sixth paragraph, an employee who is "reemployed" from the statewide reemployment list is never entitled to carry over service from a different employer.[4] Under the fourth paragraph, an employee who is subject to an involuntary transfer from one appointing authority or municipality to another, cannot be penalized and always is allowed to carry forward all prior seniority into the new job. Similarly, when an employee voluntarily changes jobs by original appointment or promotion within the same municipality, the employee carries over continuity of seniority from the prior position; but, employees who voluntarily change jobs from one appointing authority or municipality to a different one must wait a year to regain seniority accrued in the prior job.

When this overall statutory paradigm is taken into account, the interpretation of the firefighter provision given by the Attorney General does tend to support his rational explanation for what the legislature intended, namely, to protect firefighters within a particular city or town from losing their seniority ranking to another person who transfers

[4] The "reemployment" list (governed by Section 40) is distinct from "reinstatement" (under Section 39). The reemployment list is generated by the Personnel Administrator (HRD) from personnel laid off statewide and personnel on the list are granted a priority in consideration for employment to fill similar positions in another agency or municipality if they become available. "Reinstatement" refers to the reemployment to the same or similar job within the same agency or municipality.

in from another department, which, surely, is a choice that the legislature is free to make.

The Appellants have a point that such a construction can lead to a seemingly odd result, such as here, that FRFD firefighters with more firefighting experience will have to be laid off before other FRFD firefighters with more overall civil service seniority but less actual firefighting experience. But the Appellants' construction also can be said to lead to potentially equally anomalous results, such as requiring a firefighter who transferred from another town with ten years experience and served the requisite three years in the new position, only to be laid off in favor of a newly appointed firefighter originally appointed to the department with far less total firefighting experience.

Neither of these of these potential outcomes is inherently any more or less "absurd" than the other.[5] By definition, layoff decisions require unpleasant choices that any Appointing Authority would prefer not to have to make and, whatever the rules may be, there are always going to be winners and losers. Thus, in this situation, the argument about "absurdity" does not materially inform the debate as to the statutory meaning. Those issues seem more appropriate for the legislature to address than the Commission.[6]

The Specific History of the Firefighter Provision

The Appellants point to the legislative history of the 1987 amendment that inserted the firefighter provision into Section 33 for the proposition that the history demonstrates that the intent of the amendment was to mandate the order of layoff of firefighters based

[5] All the Retained Firefighters (as are the Appellants) are well-qualified officers who have served the FRFD with distinction. (*See Retained Firefighters Opposition, pp. 15-17*) No party suggests that the choice of who must be laid off or retained by law puts Fall River at risk from those choices (as opposed to the risk from an overall reduction of the fire safety force which is not a matter for the Commission to decide here).

[6].The Commission is troubled that, under any party's construction, it appears that, read literally, the firefighter provision seems to eviscerate the accrued seniority of any firefighter who was involuntarily transferred from one town to another. While that case is not now before the Commission, we are inclined to think that such a conundrum is a much closer example of the type of "absurd" result that would lead us to intervene to avoid such an unfair, and certainly, unintended forfeiture of tenured civil service status.

on time on the job as a firefighter and that "time spent in other civil service jobs would no longer be factored in for purposes of layoffs", citing an affidavit to that effect from Kevin Donnelly, who was then the Legislative Agent for the Professional Firefighters of Massachusetts (PFFM), a sponsor of the amendment. (*Appellants' Memorandum, p.9, Exhibits C & D*) This argument fails to persuade the Commission.

The Commission doubts that a statement (whether by a member of the legislature or not) of the intent of a legislative body made more than twenty years after the enactment of the legislation, is entitled to any weight. Compare Thurdin v. SEI Boston, LLC, 452 Mass. 436, 449n.19 (2008) (taking note of "informal" legislative history in the form of contemporaneous statements, "interpretive memorandum" from bill sponsors and letter from Governor proposing legislation) with Green v. Wyman-Gordon Co., 422 Mass. 551, 556 (1996) ("The statements of a legislator made after the statute was enacted are not relevant in determining legislative intent"); General Electric Co. v. Commissioner of Revenue, 402 Mass. 523, 532 (1988) (rejecting informal legislative history "that was not contemporaneous with the original statutory enactment or any relevant amendments.")

Also, the Donnelley affidavit must be read together with all available contemporaneous legislative history. The Appellants correctly assert that the bill (H.4614) originated by petition of the PFFM, filed by Rep. Michael Flaherty. See Legislative Documents, House H. 4614, Senate Journal, January 12, 1987. Curiously, as originally proposed, the bill contained nothing about layoffs but only an amendment to be add the following to G.L.c.31,§33, ¶4.

> "In determining the seniority of a firefighter for the purpose of ***reduction in rank***, his ranking shall be based on his length of service in the department in which such reduction is to take place." Id. (***emphasis added***)

H.4614 was enacted and placed before the Governor without change and without debate. See Legislative Documents, House Journal (May 4, 1987), House Journal (May 20, 1987), Senate Journal (June 4, 1987), Senate Journal (June 4, 1987). However, on June 16, 1987, the Senate recalled the engrossed bill and amended to the form in which it became law. See Legislative Documents, Senate Journal (June 16, 1987), Senate Journal (July 1, 1987), House journal (July 2, 1987), Senate Journal (July 7, 1987); St. 1987, c. 252 (Approved July 14, 1987). As the FRFD has pointed out, a sponsor's purpose in petitioning for legislation is not always the same as the intent behind the legislative action taken on the petition, which is especially true when, as here, the law does not pass in the form proposed (or even as originally enacted). Accordingly, the Commission has given no weight to the Donnelly affidavit.

The legislative history of H.4614 also tends to confirm that the firefighter provision always was intentionally placed at the end of the fourth paragraph of Section 33. Id. This fact, together with the fact that, in 1982, the legislature did set off special seniority rules in a new paragraph, confirms that placement of the firefighter provision in an existing paragraph rather than in a separate one, cannot be interpreted to be a distinction without a difference. As the FRFD deftly notes, if the legislature wanted the firefighter provision to apply, generally, and to override all the other seniority rules in Section 33, surely, it could have stated that clearly, simply inserting, for example, the well-known prefatory language: "Notwithstanding anything to the contrary in this section . . . ."

Public Policy Concerns

The Commission must apply the civil service law it is obliged to enforce according to the legislative intent and, where that intent is not clear, we are obliged to apply our

best judgment to discern how the statute we are charged to enforce properly should be interpreted. See, e.g., Falmouth v. Civil Service Comm'n, 447 Mass. 814, 821-22 (2006).

The Commission would not hesitate to correct a prior erroneous interpretation, but we must be mindful that the Appellants seek to overturn a ruling that has guided FRFD and all other members of the civil service community since 1991, which covers virtually the entire time period that the firefighter provision has been in effect. Moreover, when the Commission last addressed this question in 1993, the Decision advised the civil service community that, if the plain meaning being given to the statute was problematic for firefighters or anyone else, the legislature was the place to seek a change. Smith v. Lawrence Fire Dep't, 6 MCSR 35 (1993). The Commission has not been apprised that any such steps have been taken. The record of such a long-standing interpretation, without challenge, while not conclusive, strongly suggests that any corrective measures would have to consider this factor before the Commission ordered retroactive displacement of employees with attendant possible retroactive pay adjustments and other potential department-wide consequences.

The Appellants already stand to be the first firefighters reinstated under Section 39 should the FRFD have an opening in the future. Even if the Appellants were correct on the merits of their arguments, that result would not necessarily guarantee that the Commission would order any further relief in this matter, above and beyond the statutory right the Appellants already have to priority in reinstatement to the FRFD (or reemployment in another fire department under Section 40).

The FRFD/Retained Firefighters' Alternative Argument

The FRFD and the Retained Firefighters posit that, even if the Commission were to adopt the Appellants' interpretation of Section 33 – i.e., if only a firefighter's service in the FRFD counts – three of the four Retained Firefighters (Bergeron, Correia and Durette) are still senior in length of service with the FRFD than any of the Appellants because of the prior service of those three firefighters as an EMT in the EMS Division of the FRFD. (*FRFD Opposition, pp.11-12; Retained Firefighters' Opposition, pp. 14-15*). The Appellants counter that the firefighter provision requires that only time spent as a firefighter in the FRFD counts toward the seniority calculation, not time spent in non-firefighter positions within the department, such as an EMT. (*Appellants' Reply, pp. 4-6*).

While the Commission had decided that the Appellants' statutory interpretation is not the correct one, the Commission expresses its views on this alternative argument for the sake of providing a complete record in the event of any further review of its Decision.

Therefore, were the Appellants' interpretation of Section 33 to prevail, on this record, the Commission would agree with the FRFD that the prior service of Retained Firefighters Bergeron, Correia and Durette as permanently appointed civil service EMTs in the EMS Division of the FRFD should be counted as part of their length of service in the FRFD for purposes of the firefighter provision. The Appellants have presented no persuasive argument that would permit the Commission to interpret the firefighter provision to exclude service as an EMT, as to which there is no genuine dispute in this record would qualify as "service in the fire department in which such

reduction is to take place." See G.L.c.31, §33, ¶4 (emphasis added) While the Appellants are correct that FRFD EMTs and FRFD firefighters do different jobs, they are both appointments in the same fire department. If the intent was to calculate firefighter seniority solely on the basis of service as a firefighter, and not other service in any other division or departmental unit, the statutory language could easily have been modified to express that distinction. cf. G.L.c.31, §33, ¶3 & ¶4. Absence such language, the Commission concludes that the plain meaning of the statute requires including the Retained Firefighters' service in any capacity with FRFD together with their most recent service as firefighters.

Accordingly, for the reasons stated above, the appeals of the Appellants, Christian Ponte, Michael Ferry, Matthew Camara and David Banville, are hereby ***dismissed, in part***, insofar as they assert that they were unlawfully laid off in violation of the civil service seniority rules set forth in Section 33 of Chapter 31.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on August 5, 2009.

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. 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 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 to:
Leah Marie Barrault, Esq. (for Appellants)
James W. Clarkin, Esq. (for Respondent Appointing Authority)
John M. Becker, Esq. (for Retained Firefighters)
John Marra, Esq. (HRD)