

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**MARTIN KATZ,**  
*Appellant*

v.

**TOWN OF LYNNFIELD,**  
*Respondent*

**CASE NO. D1-14-29**

Appearance for Appellant:

Michael C. Walsh, Esq.  
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Appearance for Respondent:

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Commissioner:

Paul M. Stein

**DECISION ON RESPONDENT’S MOTION TO DISMISS**

The Appellant, Martin Katz, appeals to the Civil Service Commission (Commission) seeking reinstatement and other relief following his layoff as a plumbing inspector/gas inspector for the Town of Lynnfield (Lynnfield). Lynnfield moved to dismiss the appeal for lack of jurisdiction, asserting that Mr. Katz was not a tenured civil service employee at the time of his layoff and was not entitled to the layoff rights afforded to such employees under G.L.c.31. Mr. Katz opposed the motion. A motion hearing was held at the Commission offices in Boston on July 17, 2014, which was digitally recorded with copies provided to the parties.<sup>1</sup> The Commission thereafter, received two supplemental submissions from Mr. Katz, which included a substantial addendum of additional documents, and a further submission from Lynnfield.

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, the CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

Findings of Fact

Based on the arguments and submissions of the parties, including the documents and affidavits contained therein, and taking applicable administrative notice, including all relevant statutes, rules and regulations, I find the following facts are not in material dispute:

1. Martin Katz is a long-time Lynnfield resident duly licensed by the Commonwealth of Massachusetts as a plumber (Journeyman No. 12667; Master License 6900). Mr. Katz is not currently listed as a licensed gas fitter. (*Appellant's Opposition [Katz Aff't]*; *Administrative Notice*[<http://license.reg.state.ma.us/loca/locaRange.asp?profession=Plumber&city=Lynnfield>; <http://license.reg.state.ma.us/loca/locaRange.asp?profession=Gasfitter&city=Lynnfield>])

2. Lynnfield is a town within the Commonwealth, established in 1782 and incorporated in 1814, which currently operates under Home Rule Charter adopted in 1971 and Bylaws adopted pursuant thereto. In 1950, Lynnfield's population was 3,927, which grew to 10,826 in 1970 and, in 2010, it had a population of 11,596. (*Appellant's Addendum [Town Charter & Bylaws]*; *Administrative Notice* [[https://en.wikipedia.org/wiki/Lynnfield\\_Massachusetts](https://en.wikipedia.org/wiki/Lynnfield_Massachusetts)])

3. The Bylaws of the Town of Lynnfield provide for the annual appointment by the Board of Selectmen of an "Inspector of Gas Piping and Gas Appliances in Buildings" whose duties shall be the enforcement of the rules and regulations adopted by the State Board established under General Laws, Chapter 25, Section 12H", to be paid such compensation "as the Board of Selectmen shall determine." (*Claim of Appeal; Appellant's Supplemental Briefing Addendum [Town Charter & Bylaws]*)

4. The Bylaws make no specific provision for the appointment of a Plumbing Inspector or prescribe the duties of such a position. (*Claim of Appeal; Appellant's Supplemental Briefing Addendum [Town Charter & Bylaws]*)

5. Mr. Katz became the Lynnfield Gas Inspector soon after moving to town in or about 1968. The exact date of his original appointment, and who hired him, is not clear, but, based on his own statement in a census form he completed in 1998 contained in his personnel file, I infer the date of initial appointment to be what he then reported: 7-10-70. (*Appellant's Opposition [Personnel File]*)

6. At the time of Mr. Katz's initial appointment as the Gas Inspector, Forrest "Forrey" Howard, now deceased, served as the Lynnfield Plumbing Inspector, a position he is believed to have held from the mid-1950s until he retired in 1993. (*Appellant's Supplemental Briefing [Lynnfield Annual Reports]; Undisputed Facts [Walsh Aff't]*)

7. Upon Mr. Howard's retirement, Mr. Katz assumed the duties previously performed by Mr. Howard as the Plumbing Inspector. (*Appellant's Opposition [Personnel File]; Appellant's Supplemental Briefing [Lynnfield Annual Reports]*)

8. The positions of Gas Inspector and Plumbing Inspector fall under the Lynnfield Division of Zoning Enforcement and Inspections, which was directed by John Glennon, now deceased, who also served as the Lynnfield Building Inspector. Mr. Glennon held this position until the mid-1980s, when he was replaced by Wilfred C. Rogers. (*Appellant's Supplemental Briefing [Lynnfield Annual Reports]; Undisputed Facts [Walsh Aff't]*)

9. At some point thereafter, Lynnfield entered into an agreement with the Town of Wakefield to share the services of a Building Inspector who assumed the duties of supervising the Lynnfield Zoning Department. John Roberto has held this position since at least 2001. (*Appellant's Supplemental Briefing [Lynnfield Annual Reports]; Appellant's Opposition [Katz Personnel File]; Undisputed Facts [Claim of Appeal]*)

10. For some period prior to 1979, Mr. Glennon also served as the Lynnfield Sealer of Weights and Measures. He was replaced in 1979 in that position by Edward J. Michalski. (*Appellant's Supplemental Briefing [Lynnfield Annual Reports]*)

11. The earliest record of Mr. Katz's employment appears in the 1974 Lynnfield Town Report, where he is listed as having an appointment as Gas Inspector for a term expiring 6/30/75, and is reported to have issued 104 permits in 1974. The 1974 Annual Report provided no indication of the civil service status of the personnel listed in the report. (*Appellant's Supplemental Briefing [Lynnfield Annual Reports]*)<sup>2</sup>

12. The Lynnfield Annual Reports for 1975 through 1987 also list Mr. Katz holding a one-year appointment as Gas Inspector. The Annual Reports for these years list both the Plumbing Inspector (Mr. Howard) and the Sealer of Weights & Measures (Mr. Glennon and, then, Mr. Michalski) as "Civil Service" employees. They do not list Mr. Katz as a civil service employee. (*Appellant's Supplemental Briefing [Lynnfield Annual Reports]*)

13. The 1993 Lynnfield Annual Report lists Mr. Howard as Plumbing Inspector, with "Civil Service" status. It lists Mr. Katz appointed as the Gas Inspector for one-year with no reference to civil service status. It also lists Mr. Katz as holding a one-year appointment as Assistant Plumbing Inspector, also without reference to civil service status. This is consistent with the undisputed facts that Mr. Katz served in this dual capacity for about 25 years. (*Claim of Appeal; Lynnfield's Motion to Dismiss; Appellant's Supplemental Briefing [Lynnfield Annual Reports]*)

14. The 1994 Lynnfield Annual Town Report lists Mr. Katz as Plumbing Inspector, appointed by the Board of Selectmen for a one-year term. It also lists Edwin Holmes as Assistant

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<sup>2</sup> The 1974 Annual Report also indicates that one of the members of the Lynnfield Board of Selectmen at this time was the late John F. Donegan. I take administrative notice that Mr. Donegan also served as a member of this Commission for a term that expired in 1983.

Plumbing Inspector. Neither position is described as “Civil Service”. (*Appellant’s Supplemental Briefing [Lynnfield Annual Reports]*)

15. The 1995 through 1998 Lynnfield Annual Town Reports list the position of Plumbing Inspector as an open “Civil Service” position. Mr. Katz and Mr. Holmes are listed as Assistant Plumbing Inspectors, appointed by the Board of Selectmen for a one year term. *Appellant’s Supplemental Briefing [Lynnfield Annual Reports]*

16. On February 23, 1998, Mr. Katz completed an Employee Census in which he listed his title as “Plumbing/Gas Inspector”, working part-time six (6) hours per week. (*Appellant’s Opposition [Katz Personnel File]*)

17. Beginning with the 1999 Lynnfield Annual Report, Mr. Katz was listed as Plumbing Inspector, appointed by the Board of Selectmen for a one-year term. The reports also list an Assistant Plumbing Inspector, also appointed by the Board of Selectmen for a one-year term. (*Appellant’s Supplemental Briefing [Lynnfield Annual Reports]*)

18. Lynnfield has very limited personnel records pertaining to Mr. Katz’s employment for the period from 1970 through 2000. Beginning in 2001, his personnel records include annual Personnel Status Forms, prepared by John Roberto, most of which reflect Mr. Katz in a part-time status, working 15 hours per week. His pay was a combination of 75% of the inspectional fees collected, except for larger projects where he received an hourly rate of pay. (*Appellant’s Opposition [Katz Personnel File]*)

19. Mr. Katz admitted that he has neither applied to take nor has taken and passed any civil service examination for Gas Inspector or Plumbing Inspector. Neither Mr. Katz’s initial appointment as Gas Inspector, Assistant Plumbing Inspector or Plumbing Inspector, nor his

subsequent annual reappointments were made from a certification issued from any eligible list established for any such examination. (*Motion Hearing [Representation of Counsel]*)

20. On June 17, 2013, at a regularly scheduled public meeting, the Lynnfield Board of Selectmen voted to pursue an agreement with the Town of Wakefield to regionalize its electrical, plumbing and gas inspectional services. The proponents of the regionalization plan did not question the technical ability of the current Lynnfield inspectors or the quality of their work, but believed the plan would provide Lynnfield cost savings to the town as well as enhanced services through shared availability. Others, including Mr. Katz, disputed these alleged benefits. (*Claim of Appeal [BOS Minutes]; Lynnfield's Motion to Dismiss [Gustus Aff't]*)

21. As a result of the pendency of the regionalization plan, Mr. Katz was not reappointed to another one year term in his position as Gas Inspector/Plumbing Inspector. (*Claim of Appeal [BOS Minutes]; Lynnfield's Motion to Dismiss [Gustus Aff't]*)

22. On and after June 30, 2013, Mr. Katz, along with the other affected inspectors, were employed on a “hold over” basis pending negotiation of the regionalization plan. The regionalization plan was consummated on or about August, 19, 2013. The positions held by Mr. Katz and the other Lynnfield inspectors then were abolished and they were terminated from employment, effective September 6, 2013. In accordance with the regionalization plan, all of their duties were assumed by full-time inspectors employed by the Town of Wakefield, with Lynnfield paying 40% of the total costs. (*Claim of Appeal [Memo of Law]; Lynnfield's Motion to Dismiss [Gustus Aff't]*)

23. Mr. Katz was not provided with prior written notice of the reasons for his termination and the opportunity to request a hearing to contest those reasons, or notice of “bumping” or

reinstatement rights afforded to tenured civil service employees under G.L.c.31,§39 through §41. (*Claim of Appeal; Lynnfield's Motion to Dismiss [Undisputed Facts]*)

24. On February 3, 2014, Mr. Katz filed this appeal with the Commission. (*Claim of Appeal*)

Applicable Legal Standard

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(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 undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

Analysis

G.L.c.31,§41 prescribes that an appointing authority may abolish the position of a tenured civil service employee who holds permanency in a civil service position only for “just cause” and after prior notice of the reasons for the decision and opportunity for a hearing before the appointing authority, with further right of appeal to the Commission, to contest the reasons as unjustified. In addition, pursuant to G.L.c.31,§39, a tenured civil service employee whose official service position has been abolished must be given notice of, and afforded the opportunity to accept, a demotion (also known as “bumping”) to a position in the next lower title or titles in the official service held by another employee junior in length of service, and to be reinstated, according to his seniority, to his former position “as soon as sufficient work or funds are available”. Finally, if such an employee is laid off, his name is to be placed on a statewide

“reemployment list” for two years, and must be considered for employment ahead of candidates on any certification issued for civil service positions for which he is deemed qualified.

Lynnfield argues that the Commission lacks jurisdiction to hear this appeal because Mr. Katz was not a tenured civil service employee with permanency in his position and, therefore, Lynnfield could abolish his position as part of its regionalization plan and to terminate his employment without affording Mr. Katz with rights accorded solely to tenured civil service employees under civil service law. Mr. Katz disputes this contention, claiming that he did have permanent civil service status or, alternatively, should be deemed to have had that status under a variety of theories. After carefully considering all of Mr. Katz’s contentions, I conclude that, as a matter of law, Mr. Katz is not a tenured civil service employee entitled to assert a violation of his rights under civil service law. Thus, this appeal must be dismissed for lack of jurisdiction.

Lynnfield places its primary reliance on G.L.c.31, §48, ¶3, cl. 20, enacted by St. 1978, c.393, §11,<sup>3</sup> as amended by St. 1981, c.767, §21,<sup>4</sup> which added, to a list of several dozen previously enumerated exceptions to the definition of offices covered by civil service law, the following additional exemption:

“Part-time municipal employees serving in the position of electrical inspectors, wiring inspectors, plumbing inspectors, gas inspectors, sealer of weights and measures and assistant sealer of weights and measures.”

Lynnfield argues that, since there is no material dispute that Mr. Katz never worked other than in a part-time capacity, at most 15 hours a week, his position clearly is not a civil service position.

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<sup>3</sup> The 1978 Act, entitled “An Act Recodifying the Civil Service Law”, was omnibus legislation that reorganized Chapter 31 into what is its present form, and conformed other related laws to the newly renumbered chapter.

<sup>4</sup> The 1981 Act, entitled “An Act Providing for Certain Improvements of the Personnel Administration in the Commonwealth and its Political Subdivisions”, made further sundry changes to the civil service, mainly focused on improved administration and management of the system, following the recommendations of a blue-ribbon commission. See The Special Commission on Civil Service Reform, “A Review of Operational Policies and Procedures of the Massachusetts Civil Service System” (May 1980) [copy attached to Appellant’s Supplemental Briefing]

Mr. Katz strenuously disputes that 1981 amendment adding the part-time inspector exclusion applies to him. He construes the exclusion to cover only part-time employees “serving as” inspectors who hold some actual title other than that of “inspector”, but does not cover part-time employees, such as himself, who hold the title of “inspector”. He also cites the introductory proviso to G.L.c.31, §48, ¶3 which states: “The following shall be exempt from the civil service law and rules, *unless expressly made subject thereto by statute*” (*emphasis added*). In that regard, he relies on the provisions of G.L.c.31, §52, also enacted as part of St. 1978, c.393, §11, which states: “The following offices and positions in towns shall be subject to the civil service law and rules: (1) Inspectors of plumbing. . . . [and] (6) Any office or position to which the civil service law and rules were applicable immediately preceding the effective date of this chapter.” See also G.L.c.31, §51, added by St. 1978, c.393, §11 (civil service positions in cities) Finally, Mr. Katz cites G.L.c.142, §11, which, in its present form, prescribes:

The . . . inspector of buildings, if any, otherwise the board of health, of each city or town, shall . . . appoint from the classified civil service list one or more inspectors of plumbing and one or more inspectors of gas fitting, who shall, in the case of the inspector of plumbing, be practical plumbers and shall have had practical experience either as master or journeymen plumbers, continuously, during five years next preceding their appointment and in the case of inspectors of gas fitting, be practical gas fitters and shall have had practical experience either as master or journeyman gas fitters, continuously, during five years next preceding their appointment; provided, however, that any such city or town may appoint plumbing inspectors who shall also be gas fitting inspectors. Such inspector of building or board may remove them subject to chapter thirty-one [civil service law], and shall . . . subject to approval of the . . . board of selectmen . . . fix their compensation . . . . Such inspectors . . . shall inspect all plumbing or gas fittings . . . for which permits are granted . . . . The approval of plumbing or gas fitting by any inspectors other than those provided for by this chapter shall not be a compliance therewith.

In a town having a population of less than five thousand persons the appointment of a plumbing inspector shall be exempt from the provisions of chapter thirty-one.<sup>5</sup>

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<sup>5</sup> Plumbers and plumbing inspectors were long regulated through a Board of State Examiners of Plumbers and expressly covered by civil service law. See, e.g., St.1909,c.536,§7; St.1923,c.194; St.1941,c.49; 1941 Op.Atty.Gen. 127 [copy attached to Claim of Appeal]. Not so, however, for gas fitters, once separately regulated by the Department of Public Utilities until December 1997, when regulation of both trades was placed with a combined “Board of State Examiners of Plumbers and Gas Fitters” and, as part of this change, G.L.c.142,§11 was amended to add gas fitting inspector to that statute. See G.L.c.13,§36, as amended by St. 1977,c.843, §9; St.1962,c.623.

Neither party has identified judicial precedent, and the Commission is not aware of any, that construes the specific, dispositive, issue of statutory interpretation presented here. I am persuaded, however, that the statutory scheme most plausibly lends itself to the conclusion that the exception for part-time inspectors in G.L.c.31,§48, added to the Civil Service Law in 1981, was intended by the legislature to be applied according to its plain meaning – i.e., notwithstanding any previously enacted law that might arguably have suggested otherwise, a town may choose to appoint part-time inspectors of plumbing and/or gas fitting through a process that does not require selection from the “classified civil service list” and such a part-time inspector’s positions are expressly exempt from the provisions of civil service law.

First, I am not persuaded by Mr. Katz’s argument that such a construction would read out of the exception, as surplus, the words “serving in the position of”, and that the only meaning that can rationally be given to the part-time inspector exception is to apply it only to “faux” inspectors, who were assigned incidental inspection duties, but actually held other primary jobs, in order to give meaning to all of the words in the exception. Rather, it is Mr. Katz’s contention that speculates about legislative intent and does violence to the plain meaning of the statutory language. There is simply no rational basis to construe the plain meaning of the part-time inspector exception as meant by the legislature to solve such implied and implausible concerns.

Second, Mr. Katz’s argument flies in the face of the maxim that related statutory provisions must be construed “so that they will accomplish harmoniously the legislative purpose so far as that can be ascertained.” See, e.g., In re Adoption of Marlene, 443 Mass. 494, 498 (2005); Doliner v. Planning Board of Millis, 343 Mass. 1, 5 (1961). In particular, when the legislature chooses to enact a statute that addresses a subject with specificity, that statutory change must yield to any general statute on the subject, particularly when the specific statute was enacted after

the general statute. See, e.g., Pereira v. New England LNG Co., Inc., 364 Mass. 109, 118-19 (1973). Thus, the specific language of the part-time inspector exception added to G.L.c.31,§48 is clearly paramount over any alleged conflict with the more general provisions found in G.L.c.31,§52 and the general reference to Chapter 31 in the plumbing law, G.L.c.142,§11.

Third, even assuming Lynnfield's interpretation was mistaken and Mr. Katz's interpretation plausible that, despite the plain language, only some part-time inspector's positions were expressly removed from civil service in 1981, he faces specific impediments that preclude him from establishing his own civil service tenure (permanency). Most significantly, he admittedly never took and passed any type of civil service examination, and was never appointed from a "classified civil service list", either before 1981 or thereafter, a statutory prerequisite to be granted tenured civil service status under Chapter 31 or Chapter 142. Thus, at best, Mr. Katz could claim only "provisional" civil service status which provides no tenure or a statutory right to seek redress through appeal to the Commission for a layoff or disciplinary action. See, e.g., Mendonca v. Civil Service Comm'n, 86 Mass.App.Ct. 757, 762-63 (2014); Cordio v. Department of Correction, 59 Mass.App.Ct. 1110 (2004) (unpublished), affirming, 14 MCSR 361 (2001); Dallas v. Commissioner of Public Health, 1 Mass.App.Ct. 768, 771 (1974) citing Sullivan v. Commissioner of Commerce & Dev., 351 Mass, 462, 465 (1966) See also, Phillips v. Department of Public Health, 24 MCSR 25 (2012) and cases cited; Braz v. New Bedford School Dep't, 23 MCSR 757 (2010); Morin v. Boston School Comm., 23 MCSR 768 (2010); Burns v. City of Holyoke, 22 MCSR 637 (2009); Bayyat v. Department of Correction, 22 MCSR 394 (2009); Pearson v. City of Brockton, 22 MCSR 375 (2009); Maloof v. Town of Randolph, 21 MCSR 217 (2008); Rose v. EOHHS, 20 MCSR 266 (2007); DeMatteo v. Town of Saugus, 14

MCSR 15 (2001); Soloman v. City of Fall River, 13 MCSR 161 (2000); Varone v. Human Resources Div., 13 MCSR 24 (2000); Cronin v. City of Brockton, 7 MCSR 13 (1994)

Fourth, Mr. Katz seeks to be “deemed” to have earned tenure on various theories, but the undisputed facts establish that none of those theoretical possibilities are meritorious. He mainly points to G.L.c.31,§16, and other related legislation that, from time to time, authorized the Personnel Administrator (HRD) and his predecessors, to implement a system of “unassembled” examinations by which certain professionally licensed personnel could demonstrate their qualifications based on passing the professional examination from which they, then, could be placed on a civil service list and subsequently earn tenure through an original appointment or promotion from such a list. See G.L.c.31,§16. See also St.1967.c.780; St.1969.c.298; St.1978,c.393,§11; St.1981,c.767. These alternative exam provisions, however, are not self-executing but still required that HRD implement the examination program and that the employee take the prescribed exams and complete the other necessary steps to be placed on an appropriate civil service list from which he then could be appointed or promoted. For example, for a limited period of time (between 1998 and 2008), HRD offered a (now-defunct) program (called ConTest) which provided an alternative exam process for creating civil service lists that could be used making certain permanent appointments and promotions. See, e.g., Dinicola v. City of Methuen, 22 MCSR 504 (2010) (appellant had applied through ConTest exam process); Hantman v. Department of Mental Retardation, 19 MCSR 226 (2006) (appellant had, in fact, taken and passed unassembled examination); Kogut v. Department of Mental Retardation, 14 MCSR 153 (2001) (same); cf. In re Civil Service Status of Seven Employees of the City of Springfield, 27 MCSR 230 (2014) (ConTest had expired); DeFavero v. Department of Correction, 25 MCSR 172 (2012) (ConTest did not apply to position)

Here, it is undisputed that Mr. Katz never sought to take advantage of ConTest or other allegedly applicable “unassembled examination” program, if any, or that he ever was appointed to any position “after examination” from any kind of eligible list at any time during his forty-five years of employment. Mr. Katz’s hypothesis, which is based entirely on speculation, simply asks the Commission to assume it “must” have been done “somewhere” in the past forty-five years, and is woefully short of stating any viable claim. See, e.g., Hester v. Civil Service Comm’n, 78 Mass.App.Ct. 1109 (2010) (unpublished) (rejecting provisional building inspector’s request to make him a tenured employee), citing Thomas v. Civil Service Comm’n, 48 Mass.App.Ct. 446, 452-53, rev.den., 726 N.E.2d 414 (2000); cf. Bedinotti v. City of Springfield, 23 MCSR 239 (2010) (appellant granted limited prospective relief based on his established permanency stemming from an original appointment from 1986 eligible list); Ottomaniello v. City of Springfield, 25 MCSR 207 (2012) (appellant granted relief when HRD had specifically delegated to City duty to administer ConTest exams and City erroneously failed to follow procedure and revoked appellant’s permanency by mistake) Moreover, Mr. Katz’s claim to be “deemed” or “grandfathered” as a permanent civil service Gas Inspector is particularly problematic as he proffered no evidence that he ever held a professional gasfitter’s license and had the five-years prior necessary experience as a master or journeyman gas fitter required by G.L.c.142, §11, and he was appointed to that position in 1970, long before gas fitters were expressly included in that statute. Similarly, as to Plumbing Inspector, Mr. Katz first achieved that status in the mid-1990s, long after the position of a part-time inspector was removed from civil service and, despite the fact that, for twenty years thereafter, Lynnfield made clear, by appointing him only year-to-year that it was not treating him as a tenured civil service employee.

Mr. Katz's other contentions can be addressed summarily. The fact that, by special acts, the legislature has granted particular municipalities exemptions from civil service for the positions of plumbing inspector and gas inspector, is of little value to the interpretation of the part-time exception contained within the general laws and does not inform the issue presented here. Similarly, the fact that Mr. Katz's predecessor, Mr. Howard, may have been treated as a civil service employee (correctly or not), that does not estop Lynnfield from claiming that, by the time Mr. Katz assumed those duties, he was not given such status, in reliance on the part-time inspector provision then in effect, which, for the reasons expressed above, clearly enabled that result. Neither is the allegation that Lynnfield's agreement with Wakefield failed to comply with municipal law requirements for establishing such a cost-sharing agreement germane to whether or not Mr. Katz was appointed to a tenured civil service position and his termination violated civil service law.<sup>6</sup>

Mr. Katz also argues that Lynnfield has not complied with his repeated requests for a complete copy of his personnel files that he asserts potentially could show that he had civil service status. He claims, therefore, under the doctrine of "spoliation", that the town is precluded from contesting that he is a tenured civil service employee. This argument is unpersuasive. Although a question might be raised as to why Mr. Katz's employment file contains little information prior to 2001 (coincidentally, when the current incumbent supervisor assumed responsibility), there is nothing that plausibly infers information prior to 2001, if any, that should have been kept by prior supervisors but went missing was the result of any negligent or

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<sup>6</sup> Although not relevant, and not considered, in reaching the decision on this motion, it bears notice that, on the substance of Mr. Katz's alleged claim to be reinstated, he would also bear a heavy burden to prevail on the merits that Lynnfield's decision to consolidate inspectional services with full-time Wakefield inspectors on a 40/60 cost sharing basis, was not a bona-fide municipal judgment but a pretext to layoff Mr. Katz. See, e.g., Amaral v. City of Fall River, 22 MCSR 653 (2009) and cases cited. It probably would require more than what Mr. Katz presented so far, namely, that cost-savings were not as large as represented, and there was more inspectional work in Lynnfield than 40 percent of a full-time gas/plumbing inspector could be expected to handle as efficiently as he could.

intentional action after Lynnfield had been put on notice of Mr. Katz's claims to tenure in 2014. Thus, such information, if any, could not possibly constitute "evidence" that Lynnfield "lost or destroyed . . . known to be relevant for an upcoming legal proceeding", which is the predicate to invoking a doctrine of spoliation. cf. Weidemann v. The Bradford Group, Inc., 444 Mass. 697, 705-706 (2005) (employer on notice of wage claim "within weeks" of employee's termination); Keene v. Brigham & Women's Hospital, 439 Mass. 223, 234 (2003) (hospital claimed it had no medical records for critical 18 hour period of treatment in malpractice claim involving severely brain damaged newborn). Moreover, there can be no basis to infer, whatever and whenever documents, if any, went missing, that the missing documents were material to show tenure, i.e., that Mr. Katz had, in fact, taken a civil service examination, that his name had been placed on any "classified civil service list", or refute his own admission (in 1998) that he was employed solely on a "part-time" basis. Indeed, it would be highly unusual to apply the equitable doctrine of spoliation to Lynnfield for not keeping copies of these records which, if they ever did exist, Mr. Katz, apparently, did not keep as well.<sup>7</sup>

Finally, Mr. Katz's claim that he should be deemed a tenured civil service employee under the "de facto officer doctrine" is also unpersuasive. In general, that doctrine applies to validate, vis-à-vis third parties, actions taken by an official, appointed unlawfully, but who presents the appearance of being lawfully appointed. See Commonwealth v. Vaidulas, 433 Mass. 247, 263 (2001). Despite Mr. Katz's novel contention, the Commission has found no instances in which it has applied this doctrine to convert a state or municipal worker into a tenured civil service

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<sup>7</sup> Mr. Katz also seeks to support his claims, in part, by reference to excerpts from the Annual Reports of the Massachusetts Civil Service Director [now HRD] dating back to 1953, and affidavits from various former Lynnfield town officials, that purport to show that Mr. Katz must have been hired as a civil service employee. Neither the civil service statistics, nor the speculative hearsay affidavits, add material facts upon which the Commission need rely, and fails to provide a plausible basis to support his argument, which is inconsistent with the express treatment given to Mr. Katz in all of the Lynnfield's Annual Town Reports during the same period and the other undisputed facts in the record that contain no suggestion of civil services status.

employee. Forbes v. Kane, 316 Mass. 207 (1944), did not involve a question of civil service status but an issue of municipal finance, and is not to the contrary. Moreover, at least insofar as the actions of plumbing and gas inspectors are concerned, any application of such a judicial doctrine would seem to be contrary to statute. See G.L.c.142, §11.

Conclusion

In sum, for the reasons stated herein, the Commission lacks jurisdiction to hear this appeal. Therefore, Lynnfield's Motion to Dismiss is hereby **granted** and the appeal of the Appellant, Martin Katz, is **dismissed**.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on August 6, 2015.

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.

Notice:

Michael C. Walsh, Esq. (for Appellant)

Thomas A. Mullin, Esq. (for Respondent)

John Marra, Esq. (HRD)