

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, SS.**

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

**NICHOLAS O. SUNESON,**  
*Appellant*

**Docket No.: D1-14-172**

v.

**CITY OF FALL RIVER,**  
*Respondent*

Appearance for Appellant:

Pro Se

Appearance for Respondent:

Gary P. Howayeck, Esq.  
Office of Corporation Counsel  
City of Fall River  
One Government Center  
Fall River, MA 02722

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Nicholas O. Suneson, appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31, §41-§43, to contest his layoff by the City of Fall River (Fall River) from his position as Firefighter with the Fall River Fire Department (FRFD), claiming that Fall River retained other firefighters in the layoff with less seniority, which was a violation of his civil service rights under G.L.c.31, §39. On March 9, 2015, the Commission held a full hearing at the University of Massachusetts School of Law at Dartmouth, which was declared private as no request for a public hearing was requested.<sup>1</sup> The hearing was digitally recorded and a copy of the CD was provided to the parties.<sup>2</sup>

---

<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>2</sup> 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, these CDs should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

## **FINDINGS OF FACT:**

Sixteen (16) Exhibits were entered into evidence at the hearing (Exhibits 1-16). Based on the documents submitted and the testimony of the witnesses (FRFD Chief Robert Viveiros and the Appellant) and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

1. The Appellant, Nicholas O. Suneson is a tenured civil service employee of the FRFD, employed as an FRFD Firefighter with a civil service seniority date of October 12, 2010. (*Exhs. 1, 6, 9 & 15; Testimony of Appellant*)

2. Prior to his employment with the FRFD, the Appellant held a provisional appointment as a full-time social worker with the Department of Children and Families of the Commonwealth of Massachusetts from April 1, 2005 until January 24, 2009. As a “provisional” appointee, having not taken and passed any civil service examination (none were then being given), the Appellant had no civil service tenure in that job. (*Exhs. 12 through 15; Testimony of Appellant*)

3. The Appellant was one of 46 firefighters hired by the FRFD on the same date, October 12, 2010, from Certification No.209293 dated 7/12/2012. (*Exhs. 1, 6, 9, 15 & 16*)

4. The Appellant’s name appeared in fifth place on Certification No. 209293 by virtue of Chapter 324 of the Acts of 2008, a special act of the legislature enacted over the Governor’s veto, which ordered that his name, along with five other individuals, be placed ahead of all other candidates at the top of the next eligible list “from which the next 6 original appointments to the position of firefighter shall be made” by Fall River. (*Exhs. 6 & 16; Testimony of Appellant; Administrative Notice [St.2008,c.324; O’Brien v. City of Fall River, 26 MCSR 479 (2013); Burke v. Human Resources Div., 21 MCSR 177 (2008)]*)

5. Prior to their assignment to duty with a fire company, Firefighter Suneson and the other 45 newly hired firefighters completed training at a ten-week Fire Academy conducted by the FRFD. The training required completion of more than a dozen tests of knowledge and practical skills involved in the performance of the duties of a firefighter. (*Testimony of Chief Viveiros & Appellant*)

6. Upon completion of the Fire Academy, each new FRFD firefighter's average scores on the Fire Academy quizzes and exams was calculated. By General Order No. 1012-02 dated December 17, 2010, then FRFD Fire Chief Paul Ford, assigned an order of seniority to each of the firefighters with the same hire date of October 12, 2010 according to their average scores on the Fire Academy quizzes and exams described above. (*Exhs.6 & 8; Testimony of Chief Viveiros*)

7. Under Chief Ford's system using the Fire Academy average scores, Firefighter Suneson was ranked 37<sup>th</sup> out of the 46 firefighters in his class. (*Exhs. 6 & 8*)

8. Neither Firefighter Suneson nor any other firefighter in his class objected to the method of assigning seniority according to Fire Academy scores. Based on conversations with officials of his union, Firefighter Suneson was under the impression that the seniority assignments were for "internal purposes" only and that his "civil service" standing, i.e., his ranking on the Certification from which he was hired, would be used for layoff purposes. (*Exhs. 10 & 11; Testimony of Chief Viveiros & Appellant*)

9. By General Order No. 1107-01, dated July 25, 2011, Chief Ford used the same system for establishing seniority among the next class of FRFD firefighters hired on May 23, 2011. (*Exh. 7; Testimony of Chief Viveiros*)

10. Prior to Chief Ford's use of the Fire Academy scores to establish seniority among a class of FRFD firefighters hired on the same date, Chief Ford's predecessors had assigned seniority

randomly by drawing “straws” or numbers “out of a hat”. Chief Ford decided to change the system because he believed use of the Fire Academy scores was a more fair way to do so.

*(Testimony of Chief Viveiros & Appellant)*

11. On August 23, 2013, Firefighter Suneson was injured in the line of duty. In accordance with G.L.c.41, Section 111F, he was placed on IOD leave and he remained on IOD status as of the date of the hearing of this appeal. (Exh. 5;

12. In the Spring of 2014, in anticipation of the non-renewal of federal funding (a two-year SAFER grant of approximately \$14 million) that supported the previous increase in the manpower levels of the FRFD, Fall River began to plan for a layoff of FRFD personnel. In April 2014, a “Lay-Off List by Seniority” was prepared which listed the seventy-six firefighters with the least seniority (excluding disabled veterans who had preferred statutory retention rights without regard to seniority). This list used the seniority status of firefighters (including Firefighter Suneson) as determined by Chief Ford’s prior General Order Nos. 1012-02 (October 12, 2010 hires) and General Order No. 1107-07 (May 23, 2011 hires). *(Exhs. 1, 4, 6 through 9; Testimony of Chief Viveiros)*

13. By Executive Order No. 1405-01, dated May 22, 2014, Chief Viveiros informed the FRFD that a reduction in force was imminent, and provided all personnel with a list of thirty-four (34) personnel likely to be laid off, along with a packet of explanatory memoranda issued by the Commonwealth of Massachusetts Human Resources Division (HRD) explaining the applicable civil service rules for determining seniority for layoffs and other information regarding the process for layoffs, reinstatement and reemployment. Firefighter Suneson was listed in tenth (10<sup>th</sup>) most junior position. *(Exh. 3; Testimony of Chief Viveiros)*

14. Among the information in the packet that accompanied Executive Order No. 1405-01 was confirmation of HRD's rules that (a) disabled veterans were entitled by law to be retained ahead of all other personnel; (b) employees out on "injured on duty" leave were subject to layoff; and (c) when an entire group has the same civil service "seniority date" the appointing authority "has the discretion to select for separation among those with equal retention rights, applying basic merit principles." (*Exh. 3; Testimony of Chief Viveiros*)

15. Upon confirmation that Fall River's SAFER grant would not be renewed, Fall River executed the planned reduction in force of FRFD personnel. By letter dated June 19, 2014, Chief Viveiros informed Firefighter Suneson that, effective July 11, 2014, he would be one of the firefighters terminated from the FRFD for lack of funds, and informed him of his "bumping" rights and right to contest the layoff at a hearing on July 9, 2014. (*Exhs. 4 & 5; Testimony of Chief Viveiros*)

16. Firefighter Suneson appeared at the hearing and protested his layoff for three reasons: (a) he claimed seniority over other retained firefighters based on his understanding that layoff would be made according to the "civil service" rank of firefighters on the Certification from which they were hired, rather than the scores at the Fire Academy; (b) he claimed four years additional seniority based on his prior service with the Department of Children & Families; and (c) he claimed that he was assured he would be retained in active employment for the duration of his IOD leave. (*Exhs. 10 & 11; Testimony of Appellant*)

17. By letter dated July 9, 2011 Chief Viveiros informed Firefighter Suneson that, after hearing, he had found just cause to layoff Firefighter Suneson, effective July 11, 2014 for lack of funds, but that he would continue to receive IOD compensation for the duration of his injury. This appeal duly ensued. (*Exh. 5; Claim of Appeal*)

## CONCLUSION

### Applicable Civil Service Law and Rules

The order in which civil service employees are to be laid off in the case of lack of money is prescribed by G.L.c.31, §39, which provides in relevant part:

[P]ermanent employees . . . having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions . . . according to their seniority in such unit and shall be reinstated . . . according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. . . .

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. . . . (emphasis added)

Seniority is defined in Section 33 and means:

[R]anking based on length of service . . . computed from the first date of full-time employment. . . unless such service has been interrupted by an absence . . . 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 . . . (emphasis added)

The civil service rules promulgated by HRD make the following provision for determining the order of layoff among a group of tenured employees with the same civil service seniority date:

When one or more persons among a larger group of civil service employees holding permanent positions in the same title and department unit are to be separated from their positions due to lack of work, lack or money or abolition of position, and the entire group has the same civil service seniority date, the appointing authority has the discretion to select for separation among those with equal retention rights, applying basic merit principles. PAR.15 (4) (emphasis added)

The term “Basic Merit Principles,” as relevant to the appeal at hand, is defined in G.L.c.31, §1:

... (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions. (emphasis added)

Appointing authorities also must adhere to the requirements of G.L.c.31, §26, which provides: “A disabled veteran shall be retained in employment in preference to all other persons, including veterans.” Thus, disabled veterans with less seniority than other employees must be retained and are the last to be laid off in a reduction in force. See, e.g., Provencal v. Police Dep’t of Worcester, 423 Mass. 626 (1995).

### Analysis

The question presented by this appeal is whether or not “basic merit principles” allow the City of Fall River the discretion to use scores achieved by FRFD firefighters at the Fire Academy to determine the order of layoff of personnel with the same “civil service seniority date” in a Section 39 reduction in force due to lack of money or whether the order of layoff must be taken according to the original ranking of the affected personnel on the Certification from which they were hired. After careful consideration, it is clear that Fall River has such discretion and, therefore, acted properly in selecting Firefighter Suneson for layoff ahead of others in the October 2012 class of firefighters whose names appeared below his on the Certification from which they were hired but whose scores at the Fire Academy exceeded his.

First, civil service law and rules do not mandate that an appointing authority employ any specific method to break the tie among persons with the same civil service seniority date in establishing an order among such persons for layoff purposes. While a chosen method may not be arbitrary or politically motivated, there are a range of choices that would appear to meet the requirements of basic merit principles. See Reardon v. City of Lawrence, 25 MCSR 63 (2012 (birth date)); St. Pierre v. Fall River School Committee, 22 MCSR 445 (2009) (performance evaluations); cf. Ragucci v. Town of Saugus, 21 MCSR 667 (2008) (distinguishing improper use of staggered appointment dates to circumvent statutorily prescribed intermittent appointment seniority status)

In particular, a firefighter's performance during training at the FRFD Fire Academy falls squarely within the parameters of basic merit principles to provide for "retaining of employees on the basis of adequacy of their performance". G.L.c.31, §1. The Appellant's point is well-taken that a degree of subjectivity is inherent in the evaluation of firefighters at the Fire Academy, but there is no claim that the evaluators in this instance harbored any bias, political motivation or animus toward the Appellant or any other member of his class while attending the Fire Academy. The evidence presented is satisfactory to conclude that Chief Ford's opinion is well-founded, i.e., that the use of the aggregate, averaged scores of more than a dozen examinations over a ten-week training period was neither arbitrary nor unfair to the Appellant or any other members of his class.

To be sure, Chief Ford's General Orders might have been more transparent in how they presented the "order by seniority" of the members of the 2012 and 2013 classes, so that there was no ambiguity that the order specified applied to more than "internal" purposes (shift bids, etc.) and that the same seniority ranking would apply in a future layoff. But such advance notice, while it would have been helpful, does not preclude the use of such a method – otherwise fair and appropriate as noted above. What is more relevant here is the fact that the method was adopted long in advance of any actual layoffs, which further supports the conclusion that its use was not arbitrary or designed to favor or disfavor any particular individual.

That said, nothing in this decision should be construed to discourage an appointing authority from relying on the rank order on a Certification as one suitable means for establishing a tiebreaking method for layoff purposes. Whether or not to use such a method, however, or another acceptable one, generally, is the prerogative of the appointing authority, to be exercised with sound discretion (and due regard for applicable collective bargaining rights, if any).

Second, the Appellant's contention that, in his particular case, his name appeared at the top of the Certification from which he was hired by virtue of a special "home rule" act of the legislature that he contends was meant to rectify his non-selection for appointment from an earlier Certification. He argues that, had he been properly hired from that earlier Certification, his civil service seniority date would have been the earlier date on which the other candidates were hired from that prior Certification.

Indeed, when a wrongfully bypassed candidate appeals a bypass and is granted relief from the Commission pursuant to Chapter 310 of the Acts of 1993, the Commission may order that, should the candidate be hired in the future, the candidate is to receive a retroactive seniority date equivalent to the hire date of candidates from the earlier hiring cycle, so as to rectify the candidate's loss of his civil service rights through "no fault of his own."

Here, however, the same principle does not apply to the Appellant. He was not placed on the Certification pursuant to an order from the Commission. Indeed, his place on the list was the result of a Commission decision that denied relief to those who ultimately obtained such placement by a special act of the legislature. See O'Brien v. City of Fall River, 26 MCSR 479 (2013); Burke v. Human Resources Div., 21 MCSR 177 (2008) The legislation could have ordered that the Appellant and his colleagues receive a retroactive seniority date, but it did not do so. The Appellant is bound by the express terms of the legislation and has no special claim to a retroactive seniority date which that special law did not provide.

Third, the Appellant's claim to additional seniority based on his prior employment with the Department of Children & Families is without merit. There is no dispute that his employment with that agency was provisional and granted him no civil service tenure for purposes of seniority as defined by G.L.c.31, §33. Moreover, even if he had such tenure, the one year gap

between his departure from DCF and his appointment to the FRFD precludes any right to add the prior service to his FRFD tenure because his subsequent employment with FRFD does not qualify as a “transfer” from one tenured position to another as required by G.L.c.31, §33. See generally, Ponte v. City of Fall River, 22 MCSR 437 (2009) (discussing application of “firefighters” provision)

Fourth, the Appellant’s contention that he was promised retention so long as he was on IOD leave does not raise an issue involving a violation of his civil service rights. G.L.c.31, Section 39 clearly provides that a layoff for lack of funds must proceed strictly according to seniority (save for disabled veterans). The Appellant’s IOD status did not protect him from selection for layoff under civil service law. What statutory or collective bargaining rights, if any, he may have had to continued benefits as a result of his IOD status is not a matter that properly lies within the jurisdiction of the Commission to adjudicate.

For the reasons stated above, the appeal of the Appellant, Nicholas O. Suneson, under Docket No. D1-14-172, is hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein  
Paul M. Stein  
Commissioner

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

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:  
Nicholas O. Suneson (Appellant)  
Gary P. Howayeck, Esq. (for Respondent)