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COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION  
SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 2017-01968-H

EVERETT FIREFIGHTERS LOCAL 143, IAFF & another,<sup>1</sup>  
Plaintiff/Petitioners,  
vs.

MASSACHUSETTS HUMAN RESOURCES DIVISION & another,<sup>2</sup>  
Defendant/Respondents.

MEMORANDUM OF DECISION AND ORDER  
ON DEFENDANTS' MOTION TO DISMISS

The plaintiffs, Everett Fire Fighters Local 143, IAFF and Everett Fire Captain Stephen Merrill ("Merrill") (collectively, "Plaintiffs"), seek review of the Civil Service Commission's (the "Commission") ruling that declined to investigate Human Resources Division's ("HRD") decision not to conduct a fire chief examination in fiscal year 2017. Plaintiffs argue that the Commission's decision was arbitrary, unsupported by substantial evidence, and in violation of G. L. c. 30A, § 14 (Count 1). They also seek a declaratory judgment that HRD was required to conduct a fire chief examination in fiscal year 2017 (Count 2) and a writ of mandamus ordering HRD to conduct an examination (Count 3).

Defendants moved to dismiss all counts of the Complaint under Mass. R. Civ. P. 12(b)(1), arguing that this Court lacks jurisdiction to review the Commission's decision not to investigate, and that the doctrine of primary jurisdiction prevents this Court from considering the Plaintiffs' request for declaratory judgment or a writ of mandamus. The Court heard oral argument on February 15, 2018. For the below reasons, the Court rules that it lacks jurisdiction

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<sup>1</sup> Stephen Merrill.  
<sup>2</sup> Civil Service Commission.

to review a decision by the Commission not to conduct an investigation, and the Court declines to exercise its equitable powers to issue a declaratory judgment or writ of mandamus. Therefore, Defendants' motion will be **ALLOWED**.

### **RELEVANT FACTS AND PROCEEDINGS BELOW**

The relevant facts for purposes of this decision are undisputed and will be summarized only briefly. On January 24, 2017, Merrill and nine other registered voters mailed a letter to the Commission requesting that it conduct an investigation under G. L. c. 31, § 2(a) into HRD's decision not to administer a fire chief examination in fiscal year 2017. The Commission conducted a show-cause hearing on February 14, 2017. On February 17, 2017, HRD confirmed that it would not administer a fire chief examination in 2017.

On March 13, 2017, the Commission asked HRD to respond to 12 questions about fire chief examinations, including why it decided not to administer a fire chief examination in 2017. HRD explained that "there ha[d] been a lack of interest from Civil Service Communities in calling for these exams that, coupled with the increasing costs without the adequate generation of revenue, the decision was made not to offer the exam." Ruling on Request for Investigation at 4.

On May 25, 2017, the Commission decided by a 3-2 vote that it would not conduct an investigation of HRD. This appeal followed.

### **DISCUSSION**

#### **A. The Commission's Decision Not to Conduct an Investigation of HRD Cannot Be Appealed to the Superior Court**

Pursuant to G. L. c. 31, § 44, "[a]ny party aggrieved by a final order or decision of the commission following a hearing pursuant to any section of this chapter...may institute proceedings for judicial review in the superior court within 30 days after receipt of such order or decision." For the reasons set forth below, the Court rules that it lacks jurisdiction to review the

Commission's decision under G. L. c. 31, § 2(a) because it was not a "final order or decision of the commission following a hearing."

General Laws c. 31, § 2 grants the Commission a series of powers and duties. Under certain circumstances, § 2 explicitly empowers the Commission to "conduct hearings," G. L. c. 31, § 2(d), or to "hear and decide appeals." G. L. c. 31, §§ 2(b), 2(c), 2(e). If a party is aggrieved by the Commission's decision after such a hearing, then he or she may appeal to the Superior Court under G. L. c. 31, § 44.

In contrast to those provisions, under G. L. c. 31, § 2(a), the Commission has authority to "conduct investigations in its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator [of HRD], an aggrieved person, or by ten persons registered to vote in the Commonwealth." This subsection of G. L. c. 31, § 2 makes no mention of any hearing or appeal therefrom. Therefore, this Court should not and will not construe § 2(a) to provide such rights. See Dartt v. Browning-Ferris Indus., Inc., 427 Mass. 1, 8 (1998); Case of Benson, 47 Mass. App. Ct. 756, 758 (1999) ("We cannot add words to a statute that the Legislature 'did not see fit to put there.'").

To the extent there was a "decision" in this case from which an appeal conceivably could be taken, it was the Commission's decision not to investigate HRD. As to this decision, the Court agrees with at least two other Superior Court justices who ruled that G. L. c. 31, § 2(a) "can only be fairly read to confer significant discretion upon the Civil Service Commission in terms of what response and to what extent, *if at all*, an investigation is appropriate." See O'Neill v. Civil Serv. Comm'n, WOCV2009-00391, slip op. at 7-8 (Mass. Super. Ct. November 13, 2009) (Chernoff, J.), quoting Boston Police Patrolman's Ass'n v. Civil Serv. Comm'n, SUCV2007-01220 (Mass. Super. Ct. December 18, 2007) (Brassard, J.) (emphasis added).

Plaintiffs argue that the Commission's position in this case elevates form over substance. See Plt. Br. at 13-17. They note that the Commission posed 12 questions to HRD, including question eight, which specifically asked HRD, "On what basis did HRD conclude that a Fire Chief promotional exam would not be conducted in 2017?" See Ruling on Request for Investigation at 4. However, HRD's response to this question is a single sentence. See id.

In reviewing an agency decision, this Court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it" by statute. G. L. c. 30A, § 14(7); see Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988). Such review is not possible based on the brief questions and answers that formed the basis for the Commission's decision not to investigate HRD. This process was a far cry from the "hearing" contemplated in G. L. c. 31, § 44 and G. L. c. 30A, § 14.

In sum, because there was no "final order or decision of the commission following a hearing," the Commission's motion to dismiss Count 1 pursuant to Mass. R. Civ. P. 12(b)(1) must be allowed.

**B. A Declaratory Judgment Under G. L. c. 231A, § 1 Is Not Appropriate Under the Circumstances of this Case**

The Superior Court has jurisdiction under G. L. c. 231A, §1 to determine the rights of parties under Massachusetts statutes and regulations. See, e.g., Rate Setting Comm'n v. Baystate Med. Ctr., Inc., 30 Mass. App. Ct. 553, 554 (1991). However, except under special circumstances, a declaratory judgment action should not be used to bypass an agency's determination of a statute or regulation that it is responsible for administering. See, e.g., Malloch v. Hanover, 472 Mass. 783, 787 (2015); cf. Second Church in Dorchester v. Boston, 343 Mass.

477, 479 (1962) (no special circumstances were shown for declaratory relief). “Both the doctrine of primary jurisdiction and the doctrine of exhaustion of remedies serve the purpose of ‘promoting proper relationships between the courts and administrative agencies.’” Malden Police Patrolman’s Ass’n v. Malden, 92 Mass. App. Ct. 53, 57 (2017), quoting Lincoln v. Personnel Adm’r of the Dep’t of Pers. Admin., 432 Mass. 208, 211 n.4 (2000).

There are no special circumstances in this case that would warrant use of a declaratory judgment to assess the propriety of HRD’s decision not to conduct a fire chief examination in 2017. Therefore, the Commission’s motion to dismiss Count 2 must be allowed.

**C. Mandamus Under G. L. c. 249, § 5 Is Not Appropriate in this Case**


“A complaint in the nature of mandamus is ‘a call to a government official to perform a clear cut duty,’ and the remedy is limited to requiring action on the part of the government official.” Simmons v. Clerk-Magistrate of the Boston Div. of the Hous. Court Dep’t, 448 Mass. 57, 59-60 (2006), quoting Doe v. District Attorney for the Plymouth Dist., 29 Mass. App. Ct. 671, 675 (1991). Mandamus is an “extraordinary remedy” to be sparingly used. See Doe, 29 Mass. App. Ct. at 674-675, and cases cited therein.

Pursuant to G. L. c. 31, § 5(e), the administrator of HRD has the power and duty “[t]o conduct examinations for purposes of establishing eligible lists” of civil service employees, including promotional lists. The statute says nothing, however, about whether an annual examination is required. Under these circumstances, ordering HRD to conduct yearly examinations, especially without the full input of HRD and the Commission through an administrative process, would be a clear misuse of mandamus. The Commission’s motion to dismiss Count 3 must be allowed.

**CONCLUSION AND ORDER**

For the above reasons, Defendants' Motion to Dismiss for Lack of Jurisdiction Under Mass. R. Civ. P. 12(b)(1) (Docket # 7) is **ALLOWED**. The Complaint is **DISMISSED**, and the case file shall be closed.

Dated: March 20, 2018

  
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Robert L. Ullmann  
Justice of the Superior Court