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JP

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL NO. 2017-1489

GERALD ALSTON

v.

CIVIL SERVICE COMMISSION AND
TOWN OF BROOKLINE



**MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, Gerald Alston ("Alston" or "Plaintiff") brought this administrative appeal under G.L. c. 31, § 44 from a decision dated April 13, 2017 ("Decision") by the Massachusetts Civil Service Commission ("Commission"). Without benefit of an evidentiary hearing, the Decision upheld the defendant, Town of Brookline's ("Town" or "Brookline") action terminating Alston's employment with the Brookline Fire Department, where he had been a firefighter since 2002. After the Commission filed the Administrative Record ("AR") and a Supplemental Record, the Plaintiff filed "Gerald Alston's Motion for Judgment on the Pleadings" ("Plaintiff's Motion") pursuant to Superior Court Standing Order 1-96. The Town opposed that motion and filed "Defendant Brookline Fire Department's Cross-Motion for Judgment on the Pleadings." ("Defendant's Motion"). After hearing on February 15, 2018, the Plaintiff's Motion is ALLOWED and the Defendant's Motion is DENIED.

**BACKGROUND**

The undisputed facts of record, and inferences favorable to Alston, as party opposing summary decision, would support (and might compel) a finding that Alston was the victim of overt racism and official tolerance of a racially hostile environment in the Brookline Fire Department. The evidence warrants the following additional factual conclusions: Alston would

not have been terminated but for that discrimination, which caused him serious psychic damage. In addition, the Town ordered him to prove not only (1) his fitness as a firefighter, but also (2) his ability to return to and endure an unlawful, racially hostile environment. It fired him for declining to make those showings. Alston reasonably viewed the Town's second requirement as unwarranted (and unlawful).

The evidence supported the following additional subsidiary findings of fact. Brookline Fire Lieutenant Paul Pender left a racial slur ("fucking nigger"[1]) on Alston's voice mail in May 2010. Lt. Pender later apologized and, adding insult to injury, said his statement was not about Alston but a black "gangbanger" who cut him off in traffic. Alston is African-American.

After Alston complained about these two racial slurs, the Brookline Fire Department disciplined Lt. Pender for two tours (four days) in August 2010. But it promoted Lt. Pender to Acting Captain in September 2010. In July, 2016, Brookline appointed then-Captain Pender as the Brookline Fire Department's Acting Deputy Fire Chief. It might turn out that Acting Deputy Pender has grown beyond the stage he was at in May 2010, but where the Commission did not even hold a hearing, the court has no choice at this point but to draw the inference that the Town willingly appointed a known racist, particularly where other evidence tended to show a racially hostile working environment. The Hearing Officer himself acknowledged that Brookline's conduct "raised an eyebrow" and offered the following footnote:

> In particular I note the elevation of a fire officer to the position of Deputy Fire Chief after having been disciplined for his racially-insensitive behavior, the allegedly cavalier approach to the "Leave incident" [discussed below] which resulted in disciplining Firefighter Alston for his outburst but deeming the anonymous note that prompted his outburst not "inherently" discriminatory in nature and worthy of no further investigation, and the suggestion by the Brookline DICR Commission [Diversity, Inclusion and Community Relations Commission] that a "culture of institutional racism" existed in Brookline and needed to be addressed with "extreme urgency . . with actions not words.

[1] The court appreciates why the Hearing Officer sanitized the racial slurs by using only the first and last letter of each word, but sanitizing these words only blunts the force of the overtly malicious racism they express.

AR. 503 n. 12. The record also supports the inference – which must be taken as true at this point – that Brookline's racially hostile environment has caused the very same problems upon which Brookline relies to prove Alston's alleged "unfitness:"

> As a direct result of the racial slur, subsequent experiences of bias, retaliation and a hostile work environment, Mr. Alston is no longer able to trust his co-workers in [the] performance of life threatening duties.

Report of Dr. Cynthia Carter (AR 503).

This may be enough to warrant reversal, but the record shows additional background facts as well, many of which further support a conclusion of a racially hostile environment. On December 19, 2013, Mr. Alston "saw the word 'Leave' drawn in the dust accumulated on a piece of BFD apparatus" ("leave incident"), which he took as "a highly offensive attack on him personally." A.R. 486. "[A]t some point during the discussion, he mentioned the phrase 'going postal,'" although the content and intent of that remark is unclear enough that the court must assume, on summary decision, that this did not refer to actions by Alston himself. Id. Following the leave incident, Mr. Alston was placed on administrative leave pending fitness for duty determination. Id.

Dr. Andrew Brown evaluated Mr. Alston. Dr. Brown concluded "that Firefighter Alston was not fit for duty due to his difficulty in controlling his behavioral outbursts in the workplace, and Firefighter Alston's insistence that he be insulated from any risk of job termination if such outbursts should occur in the future." Id. at 199. Subsequently, Dr. Marilyn Price evaluated Mr. Alston on February 12, 2015. In a report dated March 18, 2015, she concluded that "Firefighter Alston would be able to return to work full time if a return plan can be arranged with sufficient accommodations to reduce his stress and if Firefighter Alston commits to appropriate treatment [she] would recommend." Id. at 225. Her recommendations were: (1) "treatment with a

psychiatrist and a therapist . . . to be better able to handle stressors he is likely to encounter upon returning to work," id.; (2) modification of the work environment "so that Firefighter Alston's level of stress is decreased," id. at 227; and (3) "random toxic screens for a period of at least 2 years to ensure that he does not rely on alcohol, cocaine or marijuana to deal with his symptoms," id.

Following Dr. Price's evaluation, Fire Chief Paul D. Ford sent a letter dated March 25, 2015 to Mr. Alston along with a copy of Dr. Price's report. A.R. 177. In his letter, Fire Chief Ford noted Dr. Price's specific recommendations for Mr. Alston's return to work and requested a meeting to be held on April 2, 2015. Id. On February 5, 2016, the Town Counsel noted that it anticipated Mr. Alston's return to work and listed three conditions. Id. at 229-230. Specifically, the Town requested that Mr. Alston (1) return medical releases so that it "may confirm his treatment in compliance with" Dr. Price's first condition; (2) schedule a meeting with Fire Chief Ford to discuss "reasonable accommodations"; and (3) attend pre-return toxic drug screen. Id. at 230. On February 17, 2016, the Town Counsel noted that Mr. Alston failed to meet the conditions. Supp. A.R. 66. On May 11, 2016, Fire Chief Ford requested a meeting to be held on May 18, id. 235, which Mr. Alston appears to not have attended, see id. at 236.

On June 8, 2016, Mr. Alston met with Acting Fire Chief Ward. See id. at 239. On June 14, 2016, Town Counsel requested a medical release and a copy of Mr. Alston's medical evaluation. Id. On July 21, 2016, the Town requested that Mr. Alston submit his medical evaluation and toxic screen as part of fitness to duty evaluation. Id. at 241. On August 17, 2016, Town notified its intent to terminate Mr. Alston citing his alleged failure to provide medical documentation indicating that he has complied with conditions previously set by the Town or that he has work capacity. Supp. A.R. 16.

On October 5, 2016, The Town officially discharged him from his employment as a firefighter, effective October 5, 2016 "on the ground of incapacity to perform the essential functions of [his] firefighter position." A.R. 83-84. The Town based its decision on Mr. Alston's failure "to participate in the interactive dialogue or otherwise return to work or produce sound and sufficient evidence as to why he cannot return to work." Id. at 112. The Town communicated the decision to Mr. Alston by a letter dated October 6, 2016. See id. at 83-84.

In a report dated October 18, 2016, Dr. Carter concluded that "Mr. Alston is not able to return to work as Brookline Fire Fighter under any circumstance, either on full or restricted duty. I cannot identify any policy, training, or other educational tool that would alter this" A.R. 296.

The Commission concluded that there was just cause for terminating Mr. Alston. It determined that "[d]espite numerous requests, he never provided any documentation necessary to establish his compliance with the counseling he required as a condition to return to work; he repeatedly failed to appear for drug screens and return to work evaluations scheduled for him; he repeatedly failed to participate in meetings with Fire Chief Ford and his successor Acting Fire Chief Ward, to develop the accommodations that would facilitate his return to work." A.R. 500. It further determined that "[a]t no time after he left work in 2014 did he express a specific intent or ability to return to work as BFD Firefighter, with or without accommodations." Id.

The Commission did not consider the medical report prepared by Dr. Cynthia Carter. Id. at 500-501.[2] Neither party argues whether the Commission committed an error in not considering Dr. Carter's report. See Pl.'s Mem.; Def.'s Opp'n; Pl.'s Reply.

The court considers additional facts below, in the course of the Discussion.

[2] The Commission, however, noted that it adds support to the Town's argument. See id. at 501 n.11.

## DISCUSSION

Under G.L. c. 31, § 44, the Court may set aside the Decision if it determines "that the substantial rights of any party may have been prejudiced because the agency decision is in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the agency; based on an error of law; made on unlawful procedure; unsupported by substantial evidence; unwarranted by the facts found by the court on the record as submitted or as amplified; or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." Malloch v. Town of Hanover, 472 Mass. 783, 795 (2015) (internal quotation marks omitted), quoting Rivas v. Chelsea Housing Authority, 464 Mass. 329, 334 (2013). When reviewing an agency decision, the court must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). The appealing party's burden to demonstrate the invalidity of the agency decision "is heavy.'" Springfield v. Dep't of Telecomms. & Cable, 457 Mass. 562, 568 (2010) (citation omitted).

### I. Summary Decision

#### A.

The Commission's jurisdiction derives from G.L. c. 31, § 43, which provides in relevant part:

> If the commission by a preponderance of the evidence determines that there was **just cause** for an action taken against such person it shall affirm the action of the appointing authority, **otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights**; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based **upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position**, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. . . .. [emphasis added].

The Commission thus has the statutory duty is to "determine[] . . . just cause" whenever an employee files a timely appeal. By imposing that duty, § 43 "protects persons employed by the Commonwealth and its subdivisions against removal or the abolition of their positions 'except for just cause.'" Cambridge Housing Authority v. Civil Service Com'n, 7 Mass. App. Ct. 586, 588 (1979).

G. L. c. 31, §§ 1, 43 do not define "Just cause," but § 1 does define the cognate phrase, "basic merit principles" to include, among other things: "(e) assuring fair treatment of all applicants and employees in all aspects of personnel administration **without regard to . . . race, color**, . . . basic rights outlined in this chapter and constitutional rights as citizens . . .." [Emphasis added]. The Decision acknowledged other aspects of basic merit principles, but not subparagraph (e). AR 496.[3] It recited "the principle of uniformity and the 'equitable treatment of similarly situated individuals' . . . as well as the 'underlying purpose of the civil service system "to guard against political considerations, favoritism **and bias** in governmental employment decisions."'" Id., quoting Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) (emphasis added).

Alternatively, the employee may show that his termination was "based . . . upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position . . .." Race may easily qualify as a "factor." The phrase "based . . . upon" looks to motivation and intent, which are extremely difficult concepts to address in a summary decision. Terminating an employee because he does not fit into a racially

[3] The Decision does not expressly state that consideration of racial fairness is for another forum, although it does allude to Alston's ability to litigate that issue in the federal court. Such a statement would have been error. The Court reads the Decision as preserving the Commission's duty and authority to consider racial fairness under the "just cause" test.

hostile environment falls within this language. A termination for failure to prove ability to work in a racially hostile environment is also "not reasonably related to the fitness of the employee to perform in his position." The court construes this language to refer to "fitness to perform" job duties without enduring such a violation of basic merit principles as racial hostility.

Perhaps most basically, the paragraph of § 43 quoted above looks not only to the fitness of the employee, but also the fitness of the workplace. Wisely, the Legislature has recognized that the Commission cannot sensibly ask whether an employee is "fit" without also asking whether the employer has maintained an environment where merit principles prevail. An employee cannot be unfit simply because leadership think that he does not "belong" in an unfit and racially hostile workplace. In that instance, to comply with basic merit principles, the workplace must change.

Two basic and highly relevant principles follow from this statute. First, an employer lacks "just cause" if a termination would not have occurred but for the employer's racially hostile environment, maintained in violation of basic merit principles. Second, under those principles, an employer has no right to demand proof that an otherwise fit employee can perform job duties in a racially hostile environment.

**B.**

Having identified the core issues for agency decision, the court turns to the question whether the record in this case warranted decision without an evidentiary hearing. The Commission may dispose of an appeal summarily "as to all or part of the matter" upon a party's motion for summary decision. 801 C.M.R. 1.01(7). Summary decision is proper when "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Cargill, Inc. v.

Beaver Coal & Oil Co., 424 Mass. 356, 358 (1997). In a motion for summary decision, the moving party may carry its burden "by demonstrating that the opposing party has no reasonable expectation of proving an essential element of the case at trial." Matthews v. Ocean Spray Cranberries, Inc., 426 Mass. 122, 127 (1997). If a moving party meets these requirements, an agency may dispose of an adjudicatory proceeding by summary decision, rather than an unnecessary evidentiary proceeding. See Pepin v. Division of Fisheries & Wildlife, 467 Mass. 210, 227-228 (2014) ("not all claims that are entitled to an adjudicatory proceeding necessarily reach the hearing stage") and cases cited. See also Charles E. Gilman & Sons, Inc. v. Alcoholic Beverages Control Commission, 61 Mass. App. Ct. 916, 917 (2004).

Summary decision was appropriate only if, on the facts and inferences most favorable to Alston, there was "reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.'" Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006), quoting Cambridge v. Civil Service Comm'n, 43 Mass. App. Ct. 300, 303 (1997).

The uncontested facts do not compel a finding or just cause or fair treatment under §1(e) and might not even support one. Here, an evidentiary hearing might lead to the conclusion that Brookline Fire Department failed to create a racially fair environment and to eradicate the ongoing effects of racism within its ranks. If so, then it could follow that there was no "just cause" or that Alston's termination for "unfitness" was based upon the racially hostile environment, which was the main reason why this African American firefighter allegedly did not "fit" in.

It is, of course, also possible that the Town might have provided some evidence supporting its position and showing fair treatment of Alston with regard to his race, color and

basic statutory and constitutional rights. The Commission might have been in a position to resolve disputed facts. The summary decision posture of this case, however, compels the Court to assume that Brookline maintained racially hostile environment, took no serious steps to address the problem, and allowed racial hostility at work to cause harm to Alston's psyche. It also compels the court to infer, as Dr. Carter's report says, that, through these racially discriminatory actions, the Town itself caused Alston's alleged "unfitness for duty." On this record, failure to hold an evidentiary hearing and apply the full statutory criteria was error.

Traditional principles of civil service and employment discrimination law compel this conclusion. If the Town's actions, including its alleged accommodation efforts, were mere a pretext for discrimination, then there cannot be "just cause" for Alston's termination. Cf. Cambridge Housing Authority, 7 Mass. App. Ct. at 589-591 (affirming Civil Service's Commission's order of reinstatement when municipal housing authority's reorganization was found to be a mere pretext for removal of an employee). The Commission, however, reasoned that just cause automatically existed because Alston was not fit for duty. In support of that approach, the Town cites the evidence that Mr. Alston failed to cooperate with Town's various efforts to provide accommodation to him. Town Mem. at 11-12. It asserts that the Commission was correct in concluding that "an employee's inability to perform the essential functions of the job in itself constitutes 'just cause' for termination." Id. at 13. The Town also argues that the Commission correctly determined that it lacked authority to issue the relief sought by the Mr. Alston. Id.

Objective measures of "unfitness" may prove "just cause" straightforwardly in the vast majority of instances, some of which the Decision cites. A public employer has authority to determine its employee's fitness for duty. The Supreme Judicial Court has recognized "a public

duty" of a Police Commissioner "to oversee the performance of police officers." Nolan v. Police Comm'r of Boston, 383 Mass. 625, 630 (1981). The Commission "has the authority and duty to determine a police officer's fitness to perform his duties or to return to full working status." Id.; Bistany v. Civil Service Com'n, 88 Mass. App. Ct. 1105 (Rule 1:28) (2015) (recognizing that determination of police officer's fitness to return to active duty is "both reasonable and lawful"). When an officer violates reasonable orders given to determine her fitness for duty, then that officer may be subject to "discipline and, ultimately, termination." Id. (Rule 1:28). Given that both police officers and firefighters are public employees, similar principles apply to firefighters.

While the Town may enjoy "some scope for the exercise of discretion," that decision must be grounded in just cause, reasonable and made in good faith. Mayor of Somerville v. District Court of Somerville, 317 Mass. 106, 120 (1944). The good faith requirement in removal decisions "adds something to the requirement of proper cause therefor." Id. Thus, "even if the evidence would have warranted a finding by the reviewing officer that the removal was for 'proper cause' the removal should be reversed if it appeared affirmatively that it was made 'in bad faith' as would be the case if this cause was a 'mere pretext or device to get rid of' the employee for some other and improper cause." Id.; Cambridge Housing Authority v. Civil Service Com'n, 7 Mass. App. Ct. 586, 591 (1979) (quoting Mayor of Somerville, 317 Mass. at 120). Moreover, the Town's order must be "reasonable" before non-compliance provides just cause.

The issues of good faith and reasonableness present a difficult factual inquiry, involving questions of intent which are rarely appropriate for resolution in a summary manner. See Bulwer v. Mount Auburn Hospital, 473 Mass. 672, 689 (2016) (citations omitted) ("'[S]ummary judgment remains "a disfavored remedy in the context of discrimination cases based on disparate

treatment . . . because the ultimate issue of discriminatory intent is a factual question" . . . . A defendant's motive "is elusive and rarely is established by other than circumstantial evidence," therefore "requir[ing] [a] jury to weigh the credibility of conflicting explanations of the adverse hiring decision." ....'"). The arguments here mirror the classic factual dispute in many discrimination cases. According to Alston "[t]he Commission could not legally find 'just cause' to terminate Firefighter Alston if the real reason for his termination was discrimination." Pl. Mem. at 5. Arguing that the "inability to perform essential functions of the job in itself constitutes 'just cause' for termination," the Town points to Alston's alleged failure to cooperate with Town's efforts to implement treatment plan or to provide accommodation. Id. at 11-13.

After hearing, a fact-finder might determine that Brookline acted honestly and fairly upon a failure to submit to necessary testing. He or she might also find that, given the existence of discrimination and a hostile environment, Brookline's stated reason was a pretext, reflected discrimination or failed to establish just cause or compliance with basic merit principles as defined in § 1(e). The Commission could not decide these issues lawfully in a summary decision.

**C.**

The Decision sets forth three reasons for rejecting Alston's claim that he is fit for duty as a firefighter even though he cannot fit into Brookline's racially hostile environment. First, it effectively holds that inability to perform the duties of a position – even if the employer caused that inability – is automatically "just cause." See AR 501-502. The Commission's citations for this proposition (AR 502) address mere "misinformation" and "bureaucratic mistakes" by the employer. Those are a far cry from the natural consequences of a persistent, racially hostile environment, maintained in violation of basic merit principles. G.L. c. 31, § 1(e). For all that

appears, this would be the first case to absolve an employer who, the court must assume, violated basic merit principles by engaging in racial discrimination.

The key distinguishing factor in this case is that the Town not only required Alston to prove (1) his fitness as a firefighter, but also (2) his ability to return to what (we must assume on summary decision) was a racially hostile environment. The Town may do the first, as the Commission's prior decisions make clear. It cannot lawfully do the second under the "just cause" standard and basic merit principles for the reasons set forth in part I.A. The necessary premise of the Commission's "just cause" determination in this case was that the Town's right to require Alston to prove not only his fitness for duty, but also his "fitness" to return to active duty in Brookline. But that premise presupposes that it was legitimate in the first place for the Town to request that Alston engage in certain meetings, evaluations and other actions. Neither the Commission nor the court can assume that the Town's demands were legitimate and worthy of compliance, where it arguably required proof of a willingness to tolerate a racially hostile environment and uncured violations of basic merit principles. Mr. Alston is entitled to the inference, at the summary decision stage, that the Town's order unlawfully sought to compel proof not only of his abilities as a firefighter, but also of his ability to return to an illegally discriminatory environment.[4]

The Decision (and the Town's memorandum in this court) cite no cases holding that a public employer may cause an employee's alleged psychological unfitness by maintaining a persistent racially hostile environment and then claim that the damage resulting from that same racially hostile environment provided "just cause" for discharge. Nor do they cite a case holding that, under basic merit principles, a Town need not change its own racially hostile environment

[4] Alston may even have had a right, as a matter of law, to decline to comply with the request, given the undisputed facts. That issue, however, need not be reached at this time.

before firing a victim of that environment due to the injury he suffered from that very environment. And, of course, none of the cited authorities involved an employee's refusal to comply with an unreasonable order, let alone an order to prove his fitness to work in a racially hostile environment. To the extent that the Commission cites its prior decisions, and those of courts, regarding fitness for duty and just cause, it grossly misses the point, given the unique and troubling situation before it in this case.

Second, the Decision states that, in the absence of a direct order to comply with the Town's conditions, "Brookline is entitled to construe his non-responsive attitude to constitute non-compliance, and this conclusion does not turn on the form of words used to direct him to take these actions." Id. This conclusion may turn out to be correct, but it requires drawing inferences. On summary decision, the Commission must draw the inference, favorable to Alston, that the Town's claimed "entitle[ment]" and conclusion were pretextual, given the evidence of discrimination.

Third, and perhaps most important, the Decision says (AR 502-503):

> There is simply no precedent or authority for the Commission to order an appointing authority to administratively reinstate a firefighter to the payroll, although he is not functionally fit to report to work, simply to facilitate the employee's desire to be hired by someone else. Thus, **even if the appellant were able to prove his premise that his inability to work in Brookline, but not elsewhere, is the product of discrimination, he is still left without any remedy** (i.e., reinstatement to his position) that the Commission would be empowered to provide. Thus, it would be futile for the Commission to conduct a plenary hearing on Mr. Alston's discrimination claims when, even were they proved, would lead to no relief that the Commission could order. [Emphasis added].

This rationale is legally wrong. The Legislature never deprived the Commission of the power and duty to address racial discrimination; it specifically provided that power in § 1(e), among other provisions. Even less did it deny the agency this power whenever a racially hostile environment so successfully and pervasively destroys the victim's psyche that he or she cannot

reenter that same employer's unreformed workplace. The Commission cannot just "raise[] an eyebrow" and move on.

It is not up to the Commission to decline to make its statutorily required "determin[ations]" or to decide that the statute's remedy will not work. G.L. c. 31, § 43 expressly requires the Commission to determine just cause and to decide whether the employer based a decision upon factors other than fitness, all the while applying basic merit principles. That determination has value in itself, because it removes a negative finding from the employee's job history. Section 43 does not allow the Commission to decline to make that determination if it has concern about the remedy.

The question of remedy is also not up to the Commission, because the statute itself prescribes the remedy: "the person concerned shall be returned to his position without loss of compensation or other rights." G. L. c. 31, § 43. If the Legislature wanted the Commission to withhold decision upon "just cause" whenever the agency was concerned about remedy, it would certainly have chosen different language. Failure to follow the statutory command is a particularly serious error or law if, as the Commission had to assume, Alston's "inability to work in Brookline, but not elsewhere, is the product of discrimination . . .." AR 503.

In any event, a mandatory reinstatement remedy creates, at most, a cost or an inconvenience in this case, but no real inconsistency with law. If the Commission found a lack of just cause and ordered reinstatement to Alston's position, with pay, that would not necessarily require a return to duty in Brookline – which both sides agree is not appropriate at present. The status of firefighter on leave with pay would not be unfair to a Town that violates the "just cause" and "basic merit principles" requirements. Such a status arguably would treat fairly an employee who is a victim of racial bias in violation of the civil service laws. Even if the

Commission had the power to question the legislative remedy, therefore, the answer in this case is not so clear that the Commission could proceed without an evidentiary hearing.

In short, this case does not fall within an exception to the general rule favoring evidentiary hearings in discrimination cases. The court cannot simply assume, on summary decision, that this termination was "just" or complied with basic merit principles. Nor can it assume that the Commission would actually find that Brookline assured fair treatment to Alston without regard to race, color, his basic right to be free from bias under the civil service laws and his constitutional right as a citizen. Where the Civil Service law expressly incorporates these concepts into the statute -- particularly the basic merit principles defined in § 1(c) -- it is an abdication to say that some other forum, such as the MCAD or the Federal Court, is the only forum that may adjudicate such claims.

**II. Jurisdiction over Back Pay Claim.**

Alston also challenges the Town's action in placing him on unpaid leave on two occasions: October 23, 2014 and on May 25, 2016. He seeks back pay to restore the compensation he lost on those two occasions.

Brookline claims that Alston's back pay claims are untimely under G.L. c. 31, § 42, which provides:

> Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days . . . after said action has been taken, or after such person first knew or had reason to know of said action.

G.L. c. 31, § 42. Likewise, "if a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission.." G.L.

c. 31, § 43. This ten-day deadline is jurisdictional. See Town of Falmouth v. Civil Service Com'n, 64 Mass. App. Ct. 606, 608-609 (2005), reversed on other grounds, 447 Mass. 814 (2006). "The determination of the commission's jurisdiction is left exclusively to the statute." Id. at 610. The Commission therefore dismissed Alston's back pay claims as untimely.

The factual background is as follows: On both occasions where Alston lost back pay, he was first transferred from administrative leave and then placed on "no pay" after exhaustion of sick leave accrual. A.R. 497. Mr. Alston was notified of Town's decision in a series of letters. On May 14, 2014, Fire Chief Paul D. Ford notified Mr. Alston that effective May 15, 2014, Mr. Alston's "leave status will be changed from paid administrative leave to sick leave, until such time as [he is] able to return to full duty." Supp. A.R. 59-60. Then a letter from Ms. Georges Haley, Benefits Administrator, dated October 23, 2014, noted that Mr. Alston "ha[s] exhausted all available leave and [is] currently not receiving a pay check." Id. at 62. Later on February 13, 2015, Ms. Joslin Murphy, Town Counsel, informed Mr. Alston's attorney "that based upon Mr. Alston's participation in yesterday's Fitness for Duty evaluation with Dr. Price, he has been restored to Paid Administrative Leave status. This status shall be subject to reevaluation at the conclusion of thirty (30) days, and is expressly conditioned upon Mr. Alston's participation in the return to work process and his demonstrated commitment to complying with any condition that may be imposed during the course of such return to work process." Id. at 64.

On February 17, 2016, Ms. Joslin Murphy informed Mr. Alston's attorney that "Mr. Alston's conditional paid administrative leave has been terminated, effective at 8:00 AM today. Mr. Alston currently has accrued sick leave in his leave bank. If he wishes to use this leave, he should contact Chief Ford . . . on or before Monday, February 22, 2016 at 10:00 AM in order to avoid any disruption in compensation. If he does not contact Chief Ford by this date, he will be

considered to be on unauthorized leave." Id. at 66. Then on May 25, 2016, Ms. Sandra DeBow, Director of Human Resources Office, noted that Mr. Alston was "entering an unpaid leave status." Id. at 68. None of these letters included "a copy of sections forty-one through forty-five" as required by G.L. c. 31, § 41.

The Commission determined that "Mr. Alston knew of each of these 'actions' by Brookline on or about the date(s) they occurred, two years prior to his present appeal and ten months prior to his present appeal, respectively." A.R. 497-498. It held that neither Mr. Alston's "mistaken belief, if any, in relying on an assumption that Brookline would rectify the error" nor his lack of knowledge about "right of appeal to the Commission until a much later date" sufficed to toll the ten-day deadline to appeal to the Commission. Id. 498.

While conceding that he knew of the actions taken by Brookline on or about the dates they occurred, Alston argues that the Town's failure to provide notice of the ten-day deadline to file an appeal before terminating his pay "estops the Town from relying on the deadline to dismiss his claims." Pl.'s Mem. 8. He asserts that allowing the Town to rely on the deadline to dismiss his claims would render the statutory requirement superfluous and "fly in the face of the overall goals of the statute." Id.

The Town was not estopped from relying on the deadline to dismiss Alston's claims. "Only with hesitation is the doctrine of estoppel invoked against the government in the exercise of its public duties." Corea v. Board of Assessors of Bedford, 384 Mass. 809, 809 (1981). Doctrine of estoppel applies only "when to refuse it would be inequitable." Id. (quoting Boston & Albany R.R. v. Reardon, 226 Mass. 286, 291 (1917)). Furthermore, for the doctrine of estoppel to apply, "it must appear that one has been induced by the conduct of another to do something different from what otherwise would have been done and which has resulted to his

harm and that the other knew or had reasonable cause to know that such consequence might follow." Id. (quoting Boston & Albany R.R., 226 Mass. at 291).

Mr. Alston was represented by a union when he was notified of the first unpaid leave decision on October 23, 2014.[5] He was represented by an attorney when he was notified of the second unpaid leave decision on May 25, 2016. In fact, the email notifying Mr. Alston of the second unpaid leave decision was addressed to Mr. Ames. Supp. A.R. 66. Given the representation by the union and attorneys, it is unlikely that the Town knew or had reasonable cause to know that by its failure to attach a copy of sections forty-one through forty-five it would induce Mr. Alston to not file an appeal at the Commission. Furthermore, it is unclear whether the Town's action indeed induced Mr. Alston, along with his union representative and private attorney, not to file a timely appeal. The facts do not support a claim of estoppel.

The Town fail to provide the statutory notice of a right to appeal within ten days. That does not, in itself, excuse compliance with the jurisdictional deadline. Cases from other contexts show that non-compliance with notice requirements excuses the appealing party from meeting the appeal deadline only in the rarest of situations -- where complete failure to provide notice of the proceeding makes it impossible to become aware of the appealable action, does the. See, e.g. Kramer v. Board of Appeals of Somerville, 65 Mass. App. Ct. 186, 194 (2006) and cases cited.

[5] The Town seems to claim that Mr. Alston was a member of union at the time of both the first and second unpaid leave decisions. Def.'s Opp'n 17. However, Mr. Alston alleges that the "Union terminated Mr. Alston's membership" before the second unpaid leave decision. Pl.'s Mem. 2 n.1. There is some evidence suggesting that Mr. Alston's union membership was indeed terminated before the second leave decision. See Pl.'s Mem. Ex. A. However, Mr. Alston's union membership during the second unpaid leave decision does not affect the analysis given that Mr. Alston was represented by an attorney at the time of second unpaid leave decision. See Supp. A.R. 66.

## CONCLUSION

For the above reasons,

1. Gerald Alston's Motion for Judgment on the Pleadings is ALLOWED.
2. Defendant Brookline Fire Department's Cross-Motion for Judgment on the Pleadings is DENIED.
3. The Decision of the Civil Service Commission, dated April 13, 2017 is VACATED AND REMANDED for an evidentiary hearing and further proceedings consistent with this Memorandum and Order.
4. Final Judgment shall enter accordingly, but the Court retains jurisdiction in the event of an appeal after remand.[6]

Dated: April 11, 2018

Douglas H. Wilkins
Associate Justice of the Superior Court

[6] See 311 West Broadway v. Zoning Board of Appeal of Boston, 90 Mass. App. Ct. 68, 73 (2016).