

Town of Brookline
Advisory Committee Minutes

June 24, 2020

Present Remotely: Vice-Chair Carla Benka, Ben Birnbaum, Harry Bohrs, Clifford Brown, John Doggett, Dennis Doughty, Harry Friedman, Janet Gelbart, David-Marc Goldstein, Neil Gordon, Susan Granoff, Amy Hummel, Alisa Jonas, Janice Kahn, Steve Kanes, Bobbie Knable, David Lescohier, Carol Levin, Fred Levitan, Pam Lodish, Donelle O’Neal, Carlos Ridruejo, Chair Michael Sandman, Lee Selwyn, Kim Smith, Claire Stampfer, Charles Swartz, Paul Warren, Christine Westphal, Neil Wishinsky

Also present: First Assistant Town Counsel Patty Corea, Outside Counsel Joseph Padolsky, Human Resources Director Ann Braga, Fire Chief John Sullivan, Kate Silbaugh, K Sennott, Kristine Knauf, Mike McLean, Kea van der Ziel, Meggan Levene, Rachel Staff, C. Scott Ananian, Mark Levy, Mark Gray Jr. and possibly other members of the public.

Absent:

Announcements: Pursuant to this Board’s Authority under 940 CMR 29.10 (8), all Advisory Committee Members will be participating remotely via telephone or video conferencing due to emergency regulations regarding the Corona virus. The Chair has reviewed the requirements of the regulations. There is a quorum physically present and all votes taken will be recorded by roll call so all above listed Advisory Committee members will be allowed to vote.

AGENDA

1. Possible reconsideration of warrant articles

Melissa Goff shared current Select Board positions on amendments related to Police Department budgets:

Police – Reduce from TA recommended budget \$116,440 New total is \$17,386,626

DICR – Add \$66,440 to personnel for Community Engagement position. New total is \$327,515

Select Board – Add \$50,000 to services to support the Select Board Task Force on Reimagining Policing in Brookline. New total is \$841,662

SB voted no action on Bastien/Brown amendment 4-1

SB voted no action on Ananian/O’Neal amendment 4-1

Police Department Budget

Do we want to reconsider our position or go with the Select Board option or any of the other amendments?

Carol raised her recommendation about having unexpended funds revert to the Police Department.

Neil recommends revisiting the vote taken last night. Try to budget the right way and do the right thing.

A **MOTION** was made and seconded for reconsideration. By a unanimous **VOTE**, the motion was reconsideration.

Suggest we reconcile with the Select Board’s amendment and important we go in with one voice.

I got positive comments from my precinct about what I thought we were going to present.

I wrestled with my decision. The Select Board had a unanimous vote on their amendment. Many compelling arguments and they should not be deciding where the funds should go and made a case for a robust transparent public process.

Agree it would be good for us to support Select Board. Highlight that if we get the Task Force up and running, we can make amendments to budgets at November meeting.

Good to come in with a united front and address issues that appeared on the Town Meeting list serv.

Last night's discussion was what happens if we put aside the money and in second part of the year the PD would have to make further cuts discussion. Better situation to present Town Meeting with stark choices – a smart organized thoughtful approach what if anything the community feels should be taken away from the PD, or take a hatchet. Fully support and commend the Select Board on their decision.

If the Town Meeting gets clarity that the Select Board offered in their meeting tonight feel confident that this is the best option.

A **MOTION** was made and seconded that the Advisory Committee adopt the Select Board Amendment. By a roll call **VOTE** of 27-1-1 the motion carries.

A **MOTION** was made to refer the Ananian and Brown Amendments to the Task Force. Do you want to give this to a Task Force that is to reimagine policing and not fund BEEP?

A **MOTION** was made and seconded for NO ACTION on the Ananian Amendment. By a roll call **VOTE** of 26-1-2 the motion carries for no action.

A **MOTION** was made and seconded for NO ACTION on the Brown Amendment. By a roll call **VOTE** of 27-1-1 the motion carries for no action.

A **MOTION** was made and seconded for NO ACTION on the Gilman Amendment to the Police Department budget. By a roll call **VOTE** of 26-1-1, the motion carries for no action.

Special Appropriation

A **MOTION** was made and seconded for FAVORABLE ACTION to fund Special Appropriation for Traffic Calming/Public Safety in the amount of \$81,500. By a roll call **VOTE** of 27-1-1, the motion carries.

Gordon Rosenthal amendment regarding riot gear

Neil Gordon gave an overview the Gordon Rosenthal amendment motion regarding the Condition of Appropriation for purchase riot gear and the version in question is the one that appeared in the supplement.

Not about defunding anything or preventing using any types of equipment or equipment with multiple uses.

It is about transparency and the Select Board responsibility as police commissioners.

Questions and Comments

Q: You say it isn't tactical but you use the term "deploy" – A: There is language in the amendment "Except for a seeming emergency"

My issue is with this as a condition of appropriation. Say you can't purchase this unless the Select Board authorizes it. Problem with term "riot gear" because it includes normal police items and feel they are mislabeled.

Moderator has said this is within scope and like or it or not the Select Board are police commissioners, like it or not.

Getting back to “except for seeming emergency” later on it says “use of that item” then you must contact the Select Board chair. Oversight versus micromanagement.

I have concerns about “special clothes and equipment that the police use when dealing with a large violent group of people” why wouldn’t we want the police to protect themselves from violent people. Not ready for prime time.

According to Melissa Goff, the Select Board voted to refer the motion back to the Select Board with the intent to work on the subject matter of the article and mutual aid agreements.

Support this. Great opportunity and awareness is raised. It doesn’t keep them from using gear they currently have to do what they need to do. It gives us time to put together better policy around these issues and I hope we can at some point add surveillance technologies.

Worried this would limit action by officers in the field wondering if they can use a piece of equipment or not.

This raises timely questions but this is not the time to ask them and that is why we are putting together the Task Force – training for active shooter situations, lock down schools.

A **MOTION** was made and seconded for referral to the Select Board Task Force. By a roll call VOTE of 25-3-1, the motion for referral carries.

2. Other business

Patty Corea offered some background and strategy regarding Alston litigation and motion to prohibit any further expenditure on the Alston case to pursue either of these cases.

The financial consequences if we don’t litigate civil service case and federal case were discussed.

Cost of carrying him on the payroll and benefits and overtime paid to the department because person not coming to work.

Ann Braga gave a ball park figure on the financial consequences, “The estimated Town total cost for Alston salary, 20% OT coverage, Health Insurance, Life Insurance from FY20 to retirement in the early part of FY34 at the age of 65 is \$1.9M.”

No staff time, no outside counsel time can be used for any purpose related to the Appeals Court case.

We could default on that case if we cannot respond.

Questions, Comments, Discussion

Q: Will this set a precedent and have greater consequences? A: Yes. Not only for the Town but it creates a state-wide precedent. Civil Service judged in the Town’s favor, Mr. Alston appealed and the judge created a new rule and this creates a safe harbor for employees who raise a civil rights claim and the employer cannot argue about their fitness to the job. This creates an exception to the usual rules.

Outside counsel gave a brief overview of what the Civil Service Law was originally.

Q: Does the Town have exposure if it keeps someone on who is psychologically unfit – could the Town be sued by other employees who may not have a safe working environment? A: Yes it increases the Town’s exposure.

Q: Opinion from Sandy Gadsby that this is essentially illegal because it usurps the executive power of the Select Board?
A: The AG has disapproved bylaws where Town Meeting passed bylaws that infringed on Select Board powers. It had to do with a bylaw requiring public comment at SB meetings. The Select Board controls litigation and the bylaw (3.1.3) is not vague at all, but very clear. Looked at whether the Warrant Article usurps that power so the motion would be essentially void.

Q: Does the AG have to approve this? A: No, the AG Office only has bylaw review powers.

Q: Have you seen the opinions that have come from attorneys in Town Meeting about your opinion? A: Yes, had it read to him. The opinions of those that disagree with his office are looking at “statute” too narrowly that the Mass Legislature has to grant the power to the Executive.

Q: Payroll totals dependent on the court case – the Appeal? A: If we drop the Appeal or default, the Civil Service goes back in force so he is reinstated and he would stay on the payroll.

Q: The amendment would be used in the Federal case? A: Yes, he would stay on the payroll, then retire and collect a pension, and then be used further to request enhanced remedies in the Federal case.

Q: How different scenarios will affect the Federal case? If we settle the state or we default? Have we at all thought about getting a case evaluation about the strength of both cases and is it worthwhile? A: We tried to open a settlement discussion and have a global settlement. Attorney Ames rejected us and would not go to mediation.

Q: \$1.9 million is it inclusive of overtime and if reversed is there an impact on the dollars? A: If reversed you stop paying forward so it cuts the payments. Then what is your remedy if you want to claw back some of the money. It is forward we have paid \$250K in back salary and overtime coverage as well as life insurance and health insurance except pension.

Q: With respect to the Federal case if we as a consequence of not pursuing the civil case, lose the Federal case, can you give us as sense of the Town’s exposure in terms of dollars? A: Three buckets - attorney fees, emotional stress, punitive damages.

Q: Are we presently paying Mr. Alston? A: Yes.

A **MOTION** was made and seconded for NO ACTION on a motion to prohibit any further expenditure on the Alston case to pursue either of these cases. By a roll call VOTE of 25-0-4 the motion for no action carries.

A **MOTION** was made and seconded and voted unanimously to adjourn and the meeting was adjourned at 6:45 pm.

Documents Presented/Reviewed:

- Alston budget motion - legal opinion regarding separation of powers question
- Alston Massachusetts Appeals Court Opening Brief TOB without appendix
- Appellant’s Reply Brief - filed
- Brief for Appellee Gerald Alston without appendix

VOTES:

	Attendance	Vote 1	Vote 2	Vote 3	Vote 4	Vote 5	Vote 6
# Votes Yes	30	25	25	27	26	27	27
# Votes No		0	3	1	1	1	1
# Votes Abstain		4	1	1	2	1	1

Vote Description:	Attendance	No Action on Amendment for Alston	"Riot Gear" Amendment - Referral to Task Force	Adopt the SB Motion	No Action on Ananian	No Action on Brown	BUDGET APPROPRIATION
	<i>Enter P for Present</i>	<i>Enter Y, N or A</i>	<i>Enter Y, N or A</i>	<i>Enter Y, N or A</i>	<i>Enter Y, N or A</i>	<i>Enter Y, N or A</i>	<i>Enter Y, N or A</i>
Carla Benka	P	Y	Y	Y	Y	Y	Y
Ben Birnbaum	P	Y	Y	Y	Y	Y	Y
Harry Bohrs	P	Y	Y	Y	Y	Y	Y
Cliff Brown	P	Y	Y	Y	Y	Y	Y
John Doggett	P	Y	Y	Y	Y	Y	Y
Dennis Doughty	P	Y	Y	Y	Y	Y	Y
Harry Friedman	P	Y	Y	Y	Y	Y	N
Janet Gelbart	P	Y	Y	Y	Y	Y	Y
David-Marc Goldstein	P	Y	Y	Y	Y	Y	A
Neil Gordon	P	Y	N	Y	Y	Y	Y
Susan Granoff	P	Y	Y	Y	Y	Y	Y
Amy Hummel	P	Y	N	N	Y	Y	Y
Alisa Jonas	P	A	Y	Y	Y	Y	Y
Janice Kahn	P	Y	Y	Y	Y	Y	Y
Steve Kanes	P	Y	Y	Y	Y	Y	Y
Bobbie Knable	P	Y	Y	Y	Y	Y	Y
David Lescohier	P	Y	Y	Y	N	N	Y
Carol Levin	P	Y	Y	Y	Y	Y	Y
Fred Levitan	P	Y	Y	Y	Y	Y	Y
Pam Lodish	P	Y	Y	Y	Y	Y	Y
Donnelle O'Neal	P	Y	A	A	A	A	Y
Carlos Ridruejo	P	Y	Y	Y	Y	Y	Y
Lee Selwyn	P	Y	Y	Y	Y	Y	Y
Kim Smith	P	A	N	Y	A	Y	Y
Claire Stampfer	P	Y	Y	Y	Y	Y	Y
Charles Swartz	P	Y	Y	Y	Y	Y	Y
Paul Warren	P	A	Y	Y	Y	Y	Y
Christine Westphal	P	Y	Y	Y	Y	Y	Y
Neil Wishinsky	P	A	Y	Y	Y	Y	Y
Mike Sandman	P						

To: Select Board
Advisory Committee
Cc: Mel Kleckner, Town Administrator
Joslin Murphy, Town Counsel
From: Patty Correa, First Assistant Town Counsel
Date: June 22, 2020
Re: Gerald Alston Litigation – Summary

Below is a summary of the Gerald Alston litigation and a chronology of key events, with citation to (1) the Civil Service Commission (CSC) findings (“CSC Dec.”), (2) undisputed Town (“Respondent”) exhibits before the CSC (“CSC Resp. [*exhibit number*]”), (3) the undisputed record evidence presented to the federal court in connection with the Town’s summary judgment motion (in the form of citations to the Town’s Local Rule 56.1 Statement (“LR 56.1 St.”) and Alston’s response to it (“Resp.”), and (4) the record appendix of the CSC proceeding now before the Massachusetts Appeals Court. All information below is public record.

As reflected in the (previously circulated) briefs before the Appeals Court, the Town’s position includes the following points:

- (1) The CSC (and the Superior Court, in its affirmance) erred in departing from well-established precedent stating that an employee’s unfitness provides just cause for termination.
- (2) The CSC (and the Superior Court, in its affirmance) erred in recognizing a novel theory of a “hostile work environment” in violation of the Civil Service law, reaching back many years (to 2010) beyond the law’s 10-day statute of limitations (which is jurisdictional) to find a basis to reinstate Alston.
- (3) The CSC (and the Superior Court, in its affirmance) erred in reinstating Alston despite the finding of a well-qualified psychiatrist the CSC credited that he was unfit for duty; despite the CSC’s own findings that he had made repeated shooting statements to coworkers (including the Fire Chief) while agitated (see ***bold, italicized*** text below); despite the CSC’s own findings that Alston would not cooperate with Dr. Price’s return-to-work conditions that included drug-testing (despite Alston’s documented, repeated drug use through 2016 that the Town presented to the CSC, as detailed below, see ***bold, italicized*** text); and despite the CSC’s findings that Alston and his attorney, Brooks Ames, repeatedly rebuffed the Town’s efforts to engage with Town staff regarding steps to preserve Alston’s Town employment.

A. Town Litigation with Firefighter Gerald Alston:

1. 11/19/12 MCAD race discrimination and retaliation charge. The Human Resources Department promptly initiated an investigation into the allegations of it. Alston, through his then-attorney, declined an investigatory interview that would have assisted the Town with identifying alleged perpetrators of alleged shunning, etc.,

stating: “[T]he Town has no authority to force him to consent to an interview.” Town asked the MCAD to permit it to conduct formal discovery of Alston to learn the basis for his claims. Within days of that request, Alston filed a notice of removal, ending the MCAD case. (CSC Dec. ¶ 88-89, 92-95, 99) The Town’s investigatory report could not corroborate his allegations. (CSC Dec. ¶ 88-89, 92-95, 99)

2. 6/17/13 Norfolk Superior Court lawsuit under state antidiscrimination law for race discrimination and retaliation. Multiple motions to compel by Town seeking complete discovery responses identifying perpetrators of alleged shunning and other details of claims. Judgment entered for Town on 7/8/14 for failure to respond to an interrogatory request. The Court denied Alston’s motion to lift the judgment where the filings on the court docket showed “egregious inattention of counselor client”. (CSC Dec. ¶ 106, 146, 190; CSC Resp. 84)
3. 12/1/15 Federal Court: Civil Rights Claims for Race Discrimination and First Amendment Retaliation against the Town, certain present and former Town officials, the union, and TMM Stanley Spiegel (TMM Spiegel was dismissed fairly early on in the case with monetary Federal Rule of Civil Procedure Rule 11 sanctions entered against Alston’s attorney, Brooks Ames). Alston’s response to the Town’s Local Rule 56.1 factual statement and attached record evidence was, with some exceptions, to say that he did **not** dispute the Town’s factual recitation and evidence presentation. On April 2, 2020, the federal court granted summary judgment for the Town and all other remaining defendants. Alston filed a notice of appeal as to all. **STILL PENDING: BRIEFS TO BE FILED, AND ORAL ARGUMENT TO BE HELD.**
4. 10/21/16 Civil Service Commission (CSC) Appeal from the Select Board’s 10/5/16 termination (Select Board adopted outside hearing officer’s report recommending termination based on the psychiatric report of Massachusetts General Hospital board-certified occupational health psychiatrist Marilyn Price, together with Alston’s non-cooperation with her return to work conditions and failure to present independent evidence to the Town that he was fit). The Town won summary decision 2017 in part based on a long, uninterrupted (to my knowledge) line of cases stating that unfitness is just cause for termination. The Superior Court reversed that decision and remanded it for hearing (describing a heretofore unrecognized “hostile work environment”-type theory), which occurred over 10 days in July and August 2018. On February 14, 2019, the CSC granted Alston’s appeal and ordered him reinstated. The Town reinstated Alston, paid him close to \$200,000 in back pay, and continues to pay him pensionable salary and benefits. Alston remains out of work.¹ The Superior Court

¹The following is a colloquy between the Superior Court and Attorney Ames at the July 2019 oral argument:

affirmed the CSC decision, which the Town appealed to the Massachusetts Appeals Court. **STILL PENDING: THE CSC’S OPPOSITION BRIEF (LIKELY TO BE FILED AROUND 8/10/20) AND THE TOWN’S REPLY TO IT, AS WELL AS ORAL ARGUMENT.**

B. December 2013 Shooting Statements

On December 19, 2013, at the end of his shift, Alston found the word “leave” written in the dust on the firetruck he had been assigned to during that shift, pulled over two coworkers, and “*said something to the effect of shooting up the place*”. (CSC Dec. ¶ 118)

At the beginning of his next shift on Sunday December 22, 2013, Alston pulled his group together, and, while “very agitated”, said “*“people go postal over matters like this.”*” (CSC Dec. ¶ 119)

When Fire Chief Paul Ford drove to the station that Sunday night from his home, Alston was “extremely agitated”, pointed to the Chief and the Deputy Chief and said, “*Look, he’s my friend, and you’re my friend, and even you could get caught in a cross-fire.*” (CSC Dec. ¶ 121)

Chief Ford sent Appellee home, feeling that he “could pose a danger to himself or coworkers”. (CSC Dec. ¶ 121) Alston never returned.

C. Psychiatrist Andrew Brown Evaluations and Chief Ford’s Return to Work Conditions

January 2014: Board-certified occupational psychiatrist Andrew Brown reported to the Town that Alston needed mental health treatment in order to work safely as a firefighter (CSC Dec. ¶ 127)

March 2014: Town received medical records subpoenaed in then-pending Norfolk Superior Court litigation showing Alston’s *cocaine use/marijuana use in 2010 and 2011*. (CSC Dec. ¶ 134; Price Report at 17 (CSC Resp. 73))

April 2014: Dr. Brown reported to the Town that Alston was unfit for duty and recommended that he receive random drug testing in connection with a return to work. (CSC Dec. ¶ 136; Brown Report at 17-18 (CSC Resp. 38))

May 2014: Chief Ford informed Alston of return-to-work conditions, including obtaining mental health treatment and mental health clearance, and submitting to random drug testing. (CSC Dec. ¶¶ 140-141)

“THE COURT: But you're saying ... if, in fact, some day the Town were to ... remedy the situation..., that the Town would be free, under this order, to say, okay, now it's time to come back to work.

MR. AMES: ...[T]he finding the Commission made seems to foreclose that, because they said ‘permanently’;... So at some point, you can't unring the bell...” (RA 22:193).

D. Non-Cooperation With Return-To-Work Efforts and Dr. Price's Retention

November 2014 (app.): Alston retained attorney Brooks Ames. (CSC Dec. ¶ 151)

November/December 2014: Alston/Ames insisted on bringing members of the public to a work meeting with Chief Ford re: Alston's work status and return; the Town canceled the meeting. Alston requested review of certain "findings", racial climate review, and paid leave. (CSC Dec. ¶ 154)

December 2014: Attorney Ames informed Human Resources that Alston would not appear for next day's scheduled re-evaluation with Dr. Brown. (Town's LR 56.1 St. and Alston's Resp. ¶ 98)

- *December 2014: Medical record re: social work consult request relating to patient/family coping pertaining to possible drug use. (Mass. App. Ct. Record App. of CSC proceeding, 13:129)*

February 2015: Town agreed to Alston's request for a new psychiatric evaluator. It retained Dr. Price. Alston and Attorney Ames met with Chief Ford immediately after Dr. Price's evaluation; Chief Ford told them that he agreed to Alston's request to address the firefighters about courtesy and respect. Attorney Ames said he feels that Alston's matter is best handled at Chief's, and not "Town Hall", level. (Town's LR 56.1 St. and Alston's Resp., ¶ 133)

E. Dr. Price's Report and Aftermath

March 2015: Dr. Price issued report recommending that Alston receive mental health treatment, discuss possible work modifications with Town, and receive drug testing as return-to-work conditions (the latter in light of Alston's then-known documented drug use in 2010 and 2011 and the potential that drug use could escalate Alston's risk for "violent impulsive behavior". (CSC Dec. ¶¶ 178-181; Price Resp. at 49 (CSC Resp. 73)) The Town provided Dr. Price's report to Alston and Attorney Ames. (CSC Dec. ¶ 182; CSC Resp. 74)

April 2015: Alston and Attorney Ames met with Chief Ford. Attorney Ames said, among other things, that Alston would not agree to Dr. Price's conditions, and Alston told Chief Ford that under no circumstances would he agree to drug testing. (CSC Dec. ¶ 183)

May/June 2015: Town enlisted help of NAACP New England Chapter President and a MAMLEO representative to conduct "shuttle diplomacy" between the Town and Alston and Attorney Ames. Alston told these go-betweens that he would not comply with the Price conditions (which included drug testing). The NAACP representative concluded that impasse was reached when "Alston and Attorney Ames unreasonably insisted on negotiating directly with the Select Board". (CSC Dec. ¶ 187)

- *July 2015 medical record: Alston tested positive for cocaine and marijuana. (Mass. App. Ct. Record App. of CSC proceeding, 12:360-361, RA 18:164-165)*

September/October 2015: Town conducted racial climate survey. Alston declined to participate. (CSC Dec. ¶ 193)

December 2015: Alston filed his original federal court complaint stating that a psychiatrist he retained found him fit. (Town's LR 56.1 St. and Alston Resp. ¶ 199)

December 2015: Chief Ford retained a trainer who conducted MCAD refresher training of the Fire Department. (CSC Dec. ¶ 197)

January & June 2016: The Town asked Attorney Ames to provide information about the evaluations and reports of the psychiatrist Alston had retained (e.g., as referenced in the original federal court complaint). Attorney Ames did not respond. (Town's LR 56.1 St. and Alston Resp. ¶¶ 203, 239)

February 2016: Attorney Ames did not respond to the Town's communication regarding needed steps in light of Dr. Price's conditions, and Alston did not appear for a scheduled drug screen. (CSC Dec. ¶¶ 199-201) The Town discontinued paid leave but agreed to Alston's request for permission to use accrued sick leave. (CSC Dec. ¶ 203)

- ***January 6, 2016: Physician letter to Alston notifying him of a positive cocaine test. (Mass. App. Ct. Record App. of CSC proceeding, 14:9, 60 and 18:175-176)***

March/April 2016: Town retained former MCAD Chair Charles Walker to preside over a hearing to review appealable discrimination "findings" Alston raised in November 2014, and informed Attorney Ames that the Select Board will take them up after receiving Walker's report. Attorney Ames called this a "kangaroo court" and said Alston will not participate. (CSC Dec. ¶ 208)

May-August 2016: Repeated communications to Attorney Alston with no response. Alston did not appear for a scheduled drug screen. (CSC Dec. ¶¶ 209-211, 213, 216, 232, 233)

August 2016: Pre-termination hearing before an outside hearing officer. Alston did not testify. During the hearing, the Town made an offer to suspend the hearing to permit Alston to undergo reevaluation to determine his fitness. Alston did not accept the offer. (CSC Dec. ¶ 234; Town's LR 56.1 St. and Alston Resp. ¶ 249-251)

October 2016: Select Board accepted hearing officer's report and recommendation stating that there was just cause to terminate Alston based on Dr. Price's report and conditions, Alston's non-cooperation with them, and Alston's and Attorney Ames's rebuffing of Town efforts and communications regarding Dr. Price's recommendations, without presenting any other medical evidence disputing Dr. Price. Select Board voted to terminate Alston. (CSC Dec. ¶ 236, 237; CSC Resp. 112 & 114)

- ***2017 medical record re: Alston's admission to drug use within the past year (RA 13:337)***

Lisa Portscher

From: Patty Correa
Sent: Tuesday, June 23, 2020 3:52 PM
To: Michael Sandman; Mike Sandman; Lisa Portscher
Cc: Joslin Murphy
Subject: Alston budget motion - legal opinion regarding separation of powers question

Dear Mike and Lisa - Just received. Possible to forward it to AC members at your earliest convenience, so they may review and digest it in advance of tomorrow evening?

Patty

Patricia Correa
First Assistant Town Counsel
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From: Lisa Maki
Sent: Tuesday, June 23, 2020 2:14 PM
Subject: Brookline Town Meeting - Motion to Limit Expenditures

Can Town Meeting condition the appropriation of funds to limit the expenditure of such funds to withdrawing the appeal and settling the matter of Town of Brookline v. Gerald Alston and the Civil Service Commission?

No. Article 30 of the Declaration of Rights is the constitutional provision for the separation of powers between the three branches of government forbidding the exercise of one branch of powers conferred exclusively upon another branch. The attempted exercise by one branch of power granted solely to another has been uniformly struck down. *Supervisors of Election*, 114 Mass. 247; *Boston v. Chelsea*, 212 Mass. 127; *Dianan v. Swig*, 223 Mass. 516; *Opinion of the Justices*, 315 Mass. 761, 767-768.

Pursuant to Section 3.1.3 of the Town of Brookline's By-Laws, the power to initiate, prosecute, defend and settle claims rests solely with the Select Board. Section 3.1.3 specifically states, "Litigation and Claims: The Select Board may institute, prosecute, defend, compromise and settle claims, actions, suits or other proceedings brought by, on behalf of, or against the town, provided however, that they shall act upon advice of counsel when the amount to be paid in any settlement exceeds one thousand dollars (\$1,000). They may employ special counsel in suits by or against the town and whenever they deem it necessary."

The role of the Select Board in instituting, prosecuting and settling claims is an executive function pursuant to the Town's By-Laws. When a Board of Selectmen is acting in furtherance of its executive duty as set forth by the Town By-Laws, the Town Meeting may not command or control the Board in the exercise of that duty. See *Russell v. Canton*, 361 Mass. 727 (1972); *Breault v. Auburn*, 303 Mass. 424 (1939). There is a general principal that "[a] municipality can exercise no direction or control over one whose duties have been defined the Legislature." *Breault v. Auburn*, *supra* at 428. Here, the Town's By-Laws place exclusive control of the discretion in pursuing and settling claims within the authority of the Select Board.

The conditions set forth in Motion to Limitation on Expenditures directly interferes with the Select Board's discretion pursuant to Section 3.1.3 of the Town's By-Laws to determine which cases to initiate, prosecute, and settle. As such, the motion is not valid under the Town's By-Laws.

While the Legislative branch may attach "conditions" to items in an appropriation measure, prescribing the exact purpose for which the money may be spent, *Opinion of the Justices*, 294 Mass. 616, 621 (1936), that power is limited where the legislature has specifically conferred the authority for such actions to the executive branch.

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COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2020-P-0105

Suffolk, ss.

TOWN OF BROOKLINE, Appellant

v.

GERALD ALSTON and
MASSACHUSETTS CIVIL SERVICE COMMISSION, Appellees

On Appeal From A Judgment Of The Superior Court

APPELLANT'S BRIEF FOR THE TOWN OF BROOKLINE

Date: 03/26/2020

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STATEMENT OF THE ISSUES FOR REVIEW

Whether the decision of the Civil Service Commission ("Commission") granting the G.L. c. 31, § 43 appeal of Town of Brookline ("Town") firefighter Gerald Alston ("Alston"), and reinstating him to the Town payroll, was based on errors of law, was unsupported by substantial evidence, and was an abuse of discretion in violation of G.L. c. 30A, § 14.

STATEMENT OF THE CASE

This case has been litigated in four separate forums in the Commonwealth, three prior to the Civil Service matter underlying this appeal.

First, in May 2012, Gerald Alston filed a claim for discrimination, retaliation and hostile work environment with the Massachusetts Commission Against Discrimination (MCAD) that he removed to the Norfolk County Superior Court. (RA 9:115-141, 179). Judgment entered against him on July 8, 2014. (RA 1:635-636). On July 10, 2015, the Superior Court denied Alston's motion for relief from judgment. (RA 11:35-39; 11:47-48).

Alston thereupon filed the same claims for discrimination, retaliation and hostile work environment in the United States District Court for the District of Massachusetts on December 1, 2015. (RA 11:121-180). The federal court ordered Alston to be precluded by the July 8, 2014 Superior Court judgment

from relitigating the claims that were brought, or that should have been brought, in that case. (RA 2:354-357). Motions for summary judgment on his remaining claims are pending before the federal court.

Alston filed the above cases prior to his discharge and the Civil Service Commission appeal from it. The Town discharged Mr. Alston's employment for the following reasons:

On December 23, 2013 the Fire Chief ordered Alston to cease reporting to work after Alston made threats to shoot up or "go postal" in the workplace.¹ Alston had observed the word "leave" written on the fire engine, believed the word was directed at him, and made the threatening statements to his coworkers. (RA 4:312-314). The Fire Chief placed Alston on leave pending clearance from a psychiatrist after a psychological fitness for duty evaluation. (Id.). For the next 2½ years, Fire Department and Town officials repeatedly communicated with Alston in an attempt to effectuate his safe return to work.

In the early stages of the process, Alston was trying to return to work. Alston told Dr. Andrew Brown and Dr. Marilyn Price, both of whom performed separate psychological fitness for duty evaluations in this case, that he wanted to return to work. (RA 9:354-376;

¹ December 22, 2013 was the last day that Alston worked as a firefighter for the Town. (RA 4:312-314).

Dr. Brown FFDE Reports) (RA 10:381-431; Dr. Price FFDE Report). Alston performed steps outlined by the Chief for his return, but he did not gain psychiatric clearance from his own psychiatrist. Then, after Dr. Price's evaluation and report conditioning his return on mental health treatment, drug testing, and input into reasonable accommodations, Alston changed his position to refusing to cooperate with return-to work conditions and demanding to be paid nonetheless.²

The record contains dozens of communications from the Town to Alston in that time frame attempting to coordinate his return to work. The record shows that he was initially cooperative with the process but could not gain medical clearance. The record also shows that at some point after Dr. Price's evaluation, he refused to engage with Town staff and refused to cooperate with Dr. Price's conditional fitness opinion, principally by refusing to submit to random toxicology screens. Alston was never psychiatrically cleared to return.

On August 30, 2016, after over 2½ years of unsuccessfully attempting to safely return Alston to active duty, the Town held a statutory hearing pursuant to G.L. c. 31, § 41 regarding whether there was just cause to discharge his employment. (RA 1:134-204).

² The Commission's and Judge Wilkins's decisions below, in effect, ratified Alston's position that the Fire Department should indefinitely hold a firefighter position for him through his retirement, and he need not actually work. (RA 2:203-205, 2:221-222).

Outside hearing officer James Lampke presided. (Id.). Based on the medical and other records, Hearing Officer Lampke found that Alston failed to establish his capacity to return to work with or without reasonable accommodations, and that he was incapacitated from work or otherwise refused to return. (RA 1:154-155). On October 6, 2016, after further notice and hearing, the Town's Select Board adopted the findings and recommendations of Hearing Officer Lampke and discharged Alston. (RA 1:121-122).

Alston appealed his termination to the Civil Service Commission. (RA 1:39-40). The Town filed a Motion for Summary Decision (RA 1:337-347), which Alston opposed. (RA 1:390-400). Commissioner Paul M. Stein held a hearing on the motion. (RA 1:483-515).

On April 13, 2017, by unanimous vote of Chairman Bowman and Commissioners Camuso, Ittleman, Stein & Tivnan, the Civil Service Commission granted the Town's Motion for Summary Decision and dismissed Alston's Civil Service Commission appeal. (RA 1:518-542). The Commission found that Alston was out of work for a period of years on various forms of leave. (RA 1:537). The Commission specifically found:

Brookline repeatedly sought to work with Firefighter Alston to implement the treatment plan recommended by Dr. Price and to identify the conditions necessary for his return to work, but Mr. Alston was either unable or unwilling to engage with Brookline to implement the treatment plan or meet to discuss how to accommodate his

return to duty, either on a full-time or limited duty basis. Despite 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.

...[V]iewing the evidence most favorably to Mr. Alston, there was just cause to separate him from his employment for his failure to demonstrate, after nearly two years of absence, that there was any reasonable basis upon which to expect he could meet, or would agree to the conditions for his return to duty (either on a full-time or limited duty basis) at any time in the near future, with or without accommodations.

(RA 1:538). The Commission considered and rejected Alston's position that the Town cannot terminate him because his incapacity was caused by discrimination and a hostile work environment. (RA 1:539).

The Commission also considered and rejected Alston's argument that he is entitled to reinstatement to the payroll without being required to work.

(RA1:540). On this point, the Commission stated:

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.

(RA 1:540-541) (emphasis added). The Commission also held that Alston's race discrimination claims are "best deferred for adjudication in the federal court, where they were and still are currently pending." (RA 1:535).

Alston filed a petition for review of this first Commission decision in Suffolk Superior Court pursuant to G.L. c. 30A, § 14. (RA 1:9-31). Superior Court Judge Douglas H. Wilkins reversed the Commission's unanimous decision. (RA 2:3-22). Judge Wilkins did not show deference to the Commission's interpretations of G.L. c. 31, §§ 41-45. (Id.). To the contrary, Judge Wilkins ordered the Commission to conduct a plenary hearing that applied the following interpretation of civil service law:

Two basic and highly relevant principles follow from [G.L. c. 31, § 43]. 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.³ 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.⁴

...

³ The lower court cited no authority for this statement of law. This is the first time a statement of law such as this has appeared in any reported Civil Service decision.

⁴ This too is a statement of law appearing in the first instance in Judge Wilkins' *Memorandum and Order on Cross-Motions for Judgment on the Pleadings* dated April 11, 2018. (RA 2:10).

...[A]n evidentiary hearing might lend 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.

(RA 2:10-11). Judge Wilkins indicated that he viewed the case as a "classic" discrimination claim and further stated:

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.

(RA 2:14, 2:17). Judge Wilkins also opined that the Commission was statutorily authorized to issue an order reinstating Alston to paid leave without requiring Alston to actually work as a Town firefighter.⁵

(RA 2:17).

Thus, beginning on July 12, 2018 and continuing over ten separate days, the Commission conducted an unprecedented hearing, the first of its kind in the history of the Commission. (RA 18:62-22:194).

⁵ Alston was on unpaid leave by the time of his termination. (RA 1:527-528). He had exhausted his sick leave accrual as of February 2016 and was placed on "no pay" status until the time of his termination. (RA 1:535). Alston appealed this decision to the Commission as well but missed the statutory deadline. (RA 1:534). Thus, the Commission dismissed this aspect of his appeal as untimely. (RA 1:535).

The Commission expressly disregarded the final and binding Judgment of the Norfolk Superior Court on Alston's discrimination, retaliation and hostile work environment claims. (RA 4:320). The Commission did not issue any rulings like those of the federal court, barring Alston from relitigating claims that could have and should have been brought in his Norfolk Superior Court action. (RA 4:282-5:46). The Commission allowed Alston to relitigate the claims of his MCAD/Norfolk Superior Court case pre-dating the July 8, 2014 Final Judgment by years (to the 2010 slur by former supervisor Paul Pender). (Id.).

On February 14, 2019, the Commission issued its second decision. The second decision contained the following three-pronged conclusions, as purported justification for Town liability and reinstatement:

- A. Failing to comprehend the seriousness of Mr. Pender's use of the racial epithet and failing to take the necessary steps to repair the damage Mr. Pender had done that would have enabled Firefighter Alston to return to the workplace.
- B. Enabling retaliatory behavior against Firefighter Alston by Mr. Pender and others and enabling Mr. Pender to paint himself as the victim.
- C. Attacking Firefighter Alston's credibility and taking other actions that appeared to lack bona fides and proper regard for fundamental fairness and good faith.

(RA 5:36). Based on these core findings, the Commission concluded that the Town acted in bad faith and in a

manner prohibited by basic merit principles. (RA 5:44).

The Commission further stated:

When a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for discharging the employee from his tenured position.⁶

(RA 5:45). The Commission ordered Alston reinstated as a Firefighter without loss of pay and did not require him to return to duty. (RA 5:45-46). The same five Commissioners voted to issue this second decision.

Prior to Judge Wilkins's April 11, 2018 decision, and based on its "experience, technical competence, and specialized knowledge ... as well as the discretionary authority conferred upon it" as an administrative agency,⁷ the Commission unanimously held that the Civil Service Commission was not the appropriate forum for Alston's discrimination claims. It held that there was no authority for holding that a municipality that "caused" an employee's unfitness was prohibited from terminating that employee. It cited to a long list of precedent to the contrary. It held that it was not statutorily authorized to order reinstatement of an employee who could not work.

After Judge Wilkins' April 11, 2018 decision, the Commission took the opposite view. Now, the Commission

⁶ The Commission also cites no authority for this statement of law.

⁷ See G.L. c. 30A, § 14(7).

is empowered to determine whether a hostile work environment exists, whether such environment was the "cause" of an employee's incapacity, and whether it is even appropriate for a public employer to inquire into the fitness of its employees. The Commission is now empowered to order a public safety employee reinstated to the roster with full benefits until the date of retirement without having to work a single day. This was clear error.

Thus, the Town filed a petition in the lower court for review of the Commission's second decision. (RA 2:27-29). Judge Wilkins retained jurisdiction for this second appeal. The parties filed cross motions for judgment on the pleadings.⁸ (RA 22:208-224). Judge Wilkins affirmed the Commission's second decision, this time showing deference to the Commission which now had administered the case according to his earlier, April 11, 2018 decision. (Id.). A final and appealable Judgment⁹ entered in the case which is now before this

⁸ The Town's brief was forty pages. With the assent of Alston, the Town filed a motion for leave to file an oversized brief. After oral argument and at the same time as the decision, Judge Wilkins denied the Town's assented-to motion and issued a decision on the merits. It is unclear whether the lower court considered the Town's Memorandum of Law. (RA 22:208).

⁹ "[A]n order of remand to an administrative agency is interlocutory and may not be appealed from by the parties to the underlying action." Chief Justice for Admin. & Mgmt. of the Trial Ct. v. Massachusetts Commn. Against Discrimination, 439 Mass. 729, 730 n.5, 791 N.E.2d 316 (2003).

Court in the first instance on the Town of Brookline's appeal.

SUMMARY OF THE ARGUMENT

The standard of review the Civil Service Commission used in its second decision was an entirely new standard applied in the first instance in this case and is error. (Pgs. 29-34). The Commission unlawfully substituted its judgment for that of the Town. (Pgs. 34-38). The Commission's determination that Alston was "prevented" from returning to work was unsupported by substantial evidence and based on an error of law. (Pgs. 38-42). The Commission's findings that Dr. Price was not aware of all of the facts, a central finding to the Commission's holding, was wrong. (Pgs. 42-45). The Commission's "unfair" workplace standard was wholly subjective and untethered from any existing legal standard. G.L. c.151B also applies to bar the Commission from applying such a standard. (Pgs. 45-50). The Commission did not make any findings of disparate treatment to support its conclusion. (Pgs. 50-52). Finally, the Commission had no authority to reinstate an unfit firefighter to the payroll to an indefinite paid leave. (Pgs. 52-53). These arguments are supported by the following:

On December 19, 2013, Alston showed two of his fellow firefighters the word "Leave" written on the engine to which he was assigned. (RA 4:312-313). He

said he found the word after removing his jacket from the truck at the end of his tour. (Id.). He then "made statements to the effect that he was not going to put up with this anymore, he had kept quiet for a long time, and he said something to the effect of shooting up the place." (Id.). It was the end of the shift and Alston went home after the statement. (Id.).

Despite what occurred on the 19th, Alston came to work for his next tour on Sunday, December 22, 2013. (Id.). At the station, he addressed the entire group. (Id.). He started with a 2010 voicemail that he had received from Lt. Pender off duty containing a racial slur. (Id.). In the process of addressing his colleagues, he became very agitated and said to the group: "[P]eople go postal over matters like this." (Id.). His group mates then reported to the shift Lieutenant that he had made shooting comments on the prior shift as well. (RA 10:186-206). The shift lieutenant reported to Fire Chief Paul Ford Alton's comments from that morning and the reports he received about the prior shift. (Id.).

Upon receiving these reports, Chief Ford drove to the station and met with Alston, the Deputy Chief, and the lieutenant on shift. In the meeting, Alston was still agitated and pointed to the Deputy Chief and Chief and said: "Look, he's my friend, and you're my friend, and even you could get caught in the cross-

fire." (Id.). Chief Ford immediately sent him home and told him to report to his office the next day. (Id.).

On Monday, December 23, 2013, Alston met with the Fire Chief as planned. (Id.). He told the Chief that he was not in good mental shape and was receptive to evaluation by the Town's psychiatrist, Dr. Andrew Brown, which the Chief said would need to occur before he returned to work. (RA 4:314-315). Dr. Brown evaluated Alston on January 6, 2014 and issued a report to the Town on January 21, 2014. (RA 4:315-316). Dr. Brown found that Alston was psychiatrically unfit for duty. (Id.).

The Town opened investigations into the incident under the Town's Anti-Discrimination Policy and Workplace Safety Policy. (RA 4:315-316). Alston was notified by letter dated January 13, 2014. (Id.).

In mid-March 2014, in connection with discovery in Plaintiff's Norfolk Superior Court case, the Town obtained Alston's Beth Israel Deaconess Medical Center (BIDMC) records, which contained specific entries documenting that Alston had used cocaine and marijuana in 2010 and 2011.¹⁰ (RA 4:299-300). The Town provided the BIDMC records to Dr. Brown. (RA 4:318).

¹⁰ Alston was treating privately with a social worker and psychiatrist at BIDMC and was diagnosed and treated for Adjustment Disorder, anger and thoughts of hurting co-workers. (Id.). The BIDMC records documented a positive cocaine test on November 24, 2010, Alston's marijuana use in July 2010 through then, and Alston's report to a physician on December 2, 2011 that he had

At the same time, in furtherance of his efforts to return to work, Alston met with Dr. Brown for reevaluation on March 19, 2014. (RA 10:147-168). Dr. Brown issued another report to the Town on April 5, 2014, which still found Alston unfit for duty. (Id.). In the period between the two evaluations, Dr. Brown communicated with Dr. Kahn, Alston's personal psychiatrist, to discuss Alston's return to work. (RA 9:373-376). Dr. Brown told Dr. Kahn that he hoped to implement a risk reduction plan that would allow Alston to return to work. (Id.). However, as of April 5, 2014, he could not clear him to return. (Id.).

On May 14, 2014, Fire Chief Ford and other Town officials met with Alston and his counsel and provided them with the Town's investigation reports under the anti-discrimination and workplace safety policies. (RA 4:318). The anti-discrimination policy report could not determine who wrote the word "leave" or why. (Id.). The workplace safety policy report concluded that Alston's "shooting" and "going postal" statements violated the policy. (Id.). The Chief explained the results to Alston and his counsel and issued discipline to Alston in the form of a 2-tour suspension for the Workplace Safety Policy violations. (Id.). Chief Ford

been using cocaine in the past several months and had been experiencing insomnia and hyperactivity, which he (Alston) related to the cocaine use. (Id.).

also detailed steps for Alston to return to work.

(Id.). The listed steps were:

- (1) treatment to address the functional impairment described by Dr. Brown,
- (2) execute a release authorizing the Town's occupational health nurse to discuss treatment and progress with Alston's providers;
- (3) completion of an anger management course;
- (4) satisfactory reevaluation of fitness for duty; and
- (5) random drug testing for at least 24 months or longer as recommended by Alston's treatment providers.

(RA 4:319-320). The Chief did not discipline Alston for the positive drug findings but did order random testing. (Id.). Alston did not appeal this discipline to the Civil Service Commission or otherwise. He completed the anger management course and executed the medical release. (RA 18:154). The Commission made no findings about the fact that Alston did not appeal the 2-day suspension or the other components of the Chief's May 14, 2014 disciplinary order.

On July 8, 2014, the Norfolk Superior Court granted judgment to the Town on Alston's G.L. c. 151B discrimination, retaliation and hostile work environment lawsuit. On July 10, 2015, the Court denied Alston's motion for relief from judgment. The Commission wholly disregarded the Judgment at paragraph 146 of its findings.

As of November 2014, Alston's private psychiatrist, Dr. Michael Kahn, still expressed a lack of confidence that Alston was psychiatrically fit to return to work. (RA 4:320-322). By this time, Alston had been out of work for eleven months. (RA 4:321). The Town's HR Director sent Alston a letter notifying him that the Town had scheduled a reasonable accommodations meeting for November 10, 2014. (Id.). Alston did not appear. (Id.). Chief Ford followed up, ordering Alston to appear for a meeting with him and HR Director DeBow on November 24, 2014 to discuss possible reasonable accommodations for his return. (RA 4:321-323). Alston appeared with his new attorney, Brooks Ames, and several members of the public, and he insisted that the public be present as a condition for the meeting; therefore, the Chief and HR Director canceled it. (Id.). Attorney Ames handed the Chief and HR Director a letter to Select Board Chair Ken Goldstein requesting further appeals under the Town's Anti-Discrimination Policy, an outside attorney review, a racial climate review of the Fire Department, and paid leave. (Id.).

HR Director DeBow wrote to Alston telling him to appear for a follow up return-to-work evaluation with Dr. Brown on December 5, 2014. (RA 5:3-4). Attorney Ames appeared on December 5th and informed HR Director DeBow that Alston would not appear for the evaluation. (RA 18:156-159). The Town accommodated Alston's request

for a new doctor and retained Dr. Marilyn Price of the Massachusetts General Hospital to perform the evaluation. (RA 5:4-5). Dr. Price had never worked for the Town of Brookline before this matter. (RA 5:6). The Town also retained two outside attorneys to conduct reviews of certain items identified in Alston's November 24 letter and committed to performing a racial climate review of all Town Departments. (RA 5:3-4).

The Town provided Dr. Price¹¹ with a copy of the medical records from the Norfolk Superior Court case and a list of Town firefighters' essential duties and responsibilities. (RA 5:7). Dr. Price met with Alston for three-hours as part of her evaluation. (Id.). Based on her professional expertise and experience, Dr. Price identified four (4) "stressors" that she enumerated in her report and discussed in her testimony. (RA 10:381-383).

Immediately following Dr. Price's evaluation, Alston and Attorney Ames met with Chief Ford and told him that the only step they wanted the Town to take to ready the workplace for Alston's return was for Chief

¹¹ Dr. Marilyn Price is board-certified in psychiatry and forensic psychiatry. She is an assistant professor at Harvard Medical School, where she is the associate director of the forensic training programs. Dr. Price has published articles on various topics in forensic psychiatry. She was the corroborator to the American Academy of Psychiatry and Law Guidelines on disability and was the co-author of the section addressing fitness for duty of police officers. Dr. Price has written numerous chapters on fitness for duty evaluations in various publications. (RA 5:5).

Ford to address firefighters about treating each other with respect and courtesy. Chief Ford told them that he would do so. (RA 6:256-257, 17:212, 21:48, 21:56).

Dr. Price delivered her report to the Town on March 19, 2015. In it, she provided her professional opinion that Alston could return to work with: (1) specified treatment, (2) reasonable accommodations with Alston's input, and (3) random drug screens¹² for two (2) years. (RA 5:8-9).

On April 2, 2015, Alston and Attorney Ames appeared for a meeting with Chief Ford, as ordered, to discuss Dr. Price's report and Alston's return to work, accompanied by two other individuals. (RA 5:10). They told the Chief that Alston had no intention of fulfilling Dr. Price's conditions and that they would only meet with the Select Board directly. (RA 18:163-64).

The Town enlisted the New England NAACP chapter and the Massachusetts Association of Minority Law Enforcement Officers ("MAMLEO") to facilitate Alston's return, but the efforts were unsuccessful. (RA 5:11).

Over the next year and a half, the Fire Chief, Town Counsel and other Town officials attempted to communicate with Alston or Attorney Ames about

¹² As of July 23, 2015, a record of emergency room treatment at Holy Family Hospital in Haverhill documents positive drug tests for cocaine and marijuana. (RA 12:360).

returning to work, as found by the Commission

(RA 4:284-5:46):

- **April 2, 2015** - Alston and Attorney Ames appeared for a meeting with the Fire Chief, but the meeting did not occur. Attorney Ames stated that the Chief was not the person with the authority to meet Alston's demands. (Id. at ¶183) Alston met with the Chief alone and stated that under no terms would he agree to drug testing or to therapy. (Id.).
- **May and June 2015** - Town enlisted the assistance of Juan Cofield, President of the New England NAACP and Kim Gaddy of MAMLEO to serve as intermediaries between the Town and Alston. Mr. Cofield determined that impasse was reached, as Alston and Attorney Ames "unreasonably insisted on negotiating directly with the Select Board." (Id. at ¶¶185-187).
- **June 24, 2015** - Alston wrote to the Select Board's Chair requesting a one-on-one meeting. (Id. at ¶189).
- **July 2015** - Alston appeared unannounced in Chief Ford's office and told Chief Ford that he would undergo drug testing, he may agree to keep seeing his own psychiatrist, and he would allow his psychiatrist to update the Town.

Chief Ford told Alston that the Town would implement any recommendations from the racial climate review and that there would be Department-wide training on appropriate workplace behavior. (Id. at ¶191).

- **August 7, 2015** - Chief Ford emailed Alston following up on the meeting, but Alston did not respond. (Id. at ¶192).
- **September 4, 2015** - Chief Ford emailed Alston again specifically asking for the name and contact information of Alston's doctor. Alston responded sending a blank email attaching the CV of Dr. Cynthia Carter, his forensic expert (not his treater). (Id.).
- **December 1, 2015** - Alston filed his federal lawsuit. (Id. at ¶195).
- **January 8, 2016** - Town asked Attorney Ames to provide the psychiatric opinion referenced in the federal complaint. Attorney Ames did not reply. (Id. at ¶198).
- **February 5, 2016** - Town wrote to Attorney Ames regarding lack of any progress reports or further communications from Alston or Attorney Ames. The Town identified a return-to-work date of March 7, 2016, and it requested the

following: (i) By February 10, 2016, Alston's execution of a release from his treating physician; (ii) By February 10, 2016, provision of a date certain for a reasonable accommodation meeting with the Chief; and (iii) On February 10, 2016, appearance for a "pre-return toxic drug screen." (Id. at ¶¶199-200).

- **February 10, 2016** - Alston did not appear for the drug test. (Id. at ¶201).
- **February 16, 2016** - Town discontinued Alston's administrative leave effective February 17, 2016, and it placed him on sick leave. (Id. at ¶202).
- **March 2016** - Chief Ford wrote to Alston regarding the racial climate review results, and informed Alston that an outside trainer had provided MCAD training to the entire Fire Department. (Id. at ¶205).
- **March 22, 2016** - Alston called Chief Ford, stating that "the Town had done nothing to return him to a safe working environment" and demanding to meet with the full Select Board. (Id. at ¶206).
- **May 5, 2016** - Chief informed Alston that Department policy does not permit outside employment while on sick leave, and he

suggested a meeting to discuss a possible return on modified duty. Alston did not respond. (Id. at ¶209).

- **May 11, 2016** - Chief Ford wrote to Alston requesting a meeting on May 18, 2016. Alston did not respond or appear. (Id. at ¶210).
- **May 19, 2016** - Chief Ford called Alston and left him a voicemail asking Alston to return his call. Alston did not call back. (Id. at ¶211).
- **May 20, 2016** - Chief Ford retired. (Id. at ¶212).
- **May 25, 2016** - Acting Fire Chief Robert Ward wrote to Alston notifying him of a meeting June 1, 2016. Alston did not appear for the meeting. (Id. at ¶¶212-213).
- **June 9, 2016** - Alston met with Acting Chief Ward and discussed possible accommodations and options. The meeting ended with Alston stating that he would get back to the Chief about modified duty. (Id. at ¶215).
- **June 14, 2016** - Town emailed Attorney Ames requesting the psychiatric evaluation report that Alston had mentioned to Acting Chief Ward. Attorney Ames did not respond. (Id. at ¶216).

- **July 21, 2016** - Town wrote to Alston saying that, given his stated ability to perform outside work, the Town scheduled a return-to-work evaluation and fitness-for-duty examination for August 2, 2016. Alston did not appear for it. (Id. at ¶233).

On August 30, 2016, after over 2½ years, the Town held a statutory hearing pursuant to G.L. c. 31, § 41 regarding whether or not there was just cause to terminate Alston. (RA 1:134-205). James B. Lampke served as the outside hearing officer. (Id.). In light of the medical and other records, Hearing Officer Lampke found that Alston was incapacitated. (RA 1:155). On October 6, 2016, after further notice and hearing, the Town's Select Board adopted the findings and recommendations of Hearing Officer Lampke and terminated Alston's employment. (RA 1:121-122).

ARGUMENT

- I. **The Standard Of Review Applicable To Civil Service Commission Decisions Has Been Developed Over Decades Of Commission Precedent and The Commission Correctly Stated it in its First Decision; Judge Wilkins's Decisions Erred in Ignoring that Precedent and in Creating An Entirely New Standard; the Commission Erred in Applying the New Standard in its Second Decision.**

The Commission's interpretation of its role in reviewing personnel decisions of Civil Service appointing authorities has been developed over many

decades of Commission precedent. Indeed, the Commission's statement of its role has appeared in nearly every Commission decision under G.L. c. 31, § 43. This *stare decisis* recitation of the Commission's role appeared in the Commission's April 13, 2017 decision. It was as follows:

A tenured civil service employee may be disciplined or discharged for "just cause" after due notice and hearing upon written decision "which shall state fully and specifically the reasons therefore." G.L.c.31,§41. An employee aggrieved by a disciplinary decision of an appointing authority made pursuant to G.L.c.31, §41, may appeal to the Commission within ten day[s] after receiving written notice of the appointing authority's decision. G.L.c.31,§43.

Under Section 43, the Commission's role is to hold "a de novo hearing for the purpose of finding the facts anew" and to determine "whether the appointing authority has sustained its burden of proving [by a preponderance of evidence] that there was reasonable justification for the action taken by the appointing authority." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited; City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); Selectmen of Wakefield v. Judge of First Dist Ct., 262 Mass. 477, 482 (1928); City of Leominster v. Stratton, 58 Mass. App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass. App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488 rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The

Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of the "merit principles" which governs Civil Service Law that discipline be remedial, not punitive, and designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L.c.31, §1.

(RA 1:533-534).

Judge Wilkins's April 11, 2018 decision announced an entirely new standard. Judge Wilkins's new standard was explained as follows:

Two basic and highly relevant principles follow from [G.L. c. 31, §43]. 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.

(RA 2:10). Judge Wilkins opined that the definitions section of the Civil Service statute (§ 1) defined "basic merit principles" to include "race," which is where the above statement of § 43 law¹³ "follows from." (Id.). These, in the lower court's view, were the "core

¹³ Neither G.L. c. 31, §41 nor §43 include the phrase "basic merit principles." Sections 41 and 43 include the phrase "just cause," which is the standard that appointing authorities must satisfy to take employment action under §41, and which is the standard the Commission uses to review such action under §43.

issues for agency decision." (Id.). Judge Wilkins remanded the case to the Commission stating:

...an evidentiary hearing might lend 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.

(RA 2:11). Judge Wilkins's April 11, 2018 decision does not cite a single Civil Service case that has applied this standard. There is no case prior to Alston's where the Civil Service Commission engaged in such a review of the work "environment" and whether or not that environment was a cause of an employee's unfitness. To the contrary, the Commission's standard of review under G.L. c. 31, §43 prior to Judge Wilkins' 2018 decision was well circumscribed, as block-quoted above.

In Alston's case, the standard the Commission applied in the decision it issued after Judge Wilkins' remand order was substantially different from the standard it applied in its first decision, or in any prior G.L. c. 31, §43 case. The Commission adopted Judge Wilkins' unprecedented statement of Civil Service law, citing no other legal precedent for it. Decades of decisions interpreting its role in personnel administration have been abrogated and replaced by a new uncircumscribed hostile work environment-type

standard. The new standard significantly expands the authority of the Commission far beyond the jurisdictional grant of authority conferred on it by the Legislature and the Commission's own prior interpretations of its role. The G.L. c. 151B caselaw cited within the second decision makes this very clear.

Indeed, the very first line of the Commission's analysis stated: "[T]he state's anti-discrimination law does not preclude the Civil Service Commission¹⁴ from determining whether there was just cause to terminate Firefighter Alston..." (RA 5:31). The Commission's focus on the state's anti-discrimination law pervades the Commission's analysis. Indeed, the Commission "took notice of" the framework of G.L. c. 151B in framing the standard in Alston's appeal:

However, when a civil service appointing authority commits acts which are fundamentally unfair and fall within the penumbra of the prohibited conduct of those laws [referring to the state's anti-discrimination laws], it is appropriate for the Commission to take notice of that misconduct in order to fulfill the statutory mandate to assure "fair treatment" of civil service employees, free from "arbitrary and capricious" acts, "without regard" for an employee's "race" or other protected status, and "with proper regard" for civil service law and an employee's "constitutional rights, as citizens." G.L. c. 31, § 1. It is with this framework in mind that I turn to the merits of Mr. Alston's appeal.

¹⁴ This statement is simply incorrect. The MCAD is the exclusive agency in the Commonwealth, and G.L. c. 151B provides the exclusive remedy for employment discrimination "not based on preexisting tort law or constitutional protections". Charland v. Muzi Motors, Inc., 417 Mass. 580, 586 (1994). See n.20 infra.

(Id. at Pg. 68). The Commission thereafter proceeded to analyze Mr. Alton's appeal using only citations to G.L. c. 151B cases. The Commission cited Green v. Harvard Vanguard Medical Associates, Inc., 79 Mass. App. Ct. 1 (2011), August Corp. v. MCAD, 75 Mass. App. Ct. 398, rev. den., 455 Mass. 1105 (2009), and Thomas O'Connor Constructors, Inc. v. MCAD, 72 Mass. App. Ct. 459 (2008).

The only G.L. c. 31, §43 case the Commission used in its analysis was Duquette v. Department of Correction, 19 MCSR 337, 341 (2006), to state that racist behavior by a public employee is grounds for termination. However, Alston was not terminated for racist behavior. Alston was terminated because he was found psychiatrically unfit for duty following his "shooting" statements, and because over the course of 2½ years while the Town held his job, he refused to comply with an expert's return-to-work requirements such as treatment and drug testing intended to assure he could safely perform his firefighting duties. The Commission's failure to apply the legal framework it applied in its first decision was a clear error of law.

II. The Commission Unlawfully Substituted Its Judgment For That Of The Town of Brookline.

The Select Board's termination of a public safety employee - who, after 2½ years, still had not been cleared as safe to return to work -- was justified

under applicable Civil Service and anti-discrimination law. ADD. [2017 Commission decision (RA 1:517-543) (citing cases)]; McEachen v. Boston Housing Auth'y, 93 Mass. App. Ct. 1122 [Rule 1:28 disposition] (2018); Bistany v. Civil Serv. Comm'n, 88 Mass. App. Ct. 1105 [Rule 1:28 disposition] (2015) (upholding termination for non-cooperation with fitness-for-duty evaluation); Dalrymple v. Civil Serv. Comm'n, 82 Mass. App. Ct. 1107 at *2 (July 16, 2012) [Rule 1:28 disposition] (holding that suspension of employee was legal where employee refused to waive confidentiality pertaining to medical examination related to leave use); Town of Watertown, 16 Mass. App. Ct. at 331 (police officer's medical history of substance abuse was reasonable justification for termination even in the absence of current use); cf. Kelly v. Civil Serv. Comm'n, 427 Mass. 75 (1998) (upholding termination of firefighter; "the interests of ... the city and the public generally in ensuring that its public safety officers are fit for duty [] are substantial"); O'Connor v. Police Comm'r of Boston, 408 Mass. 324, 328-29 (1990) (drug use by police officers is inimical to public safety); see also Godfrey v. Globe Newspaper Co., 457 Mass. 113 (2010) (upholding termination of employee who could not perform essential functions of the job with or without accommodation due to workplace injury as consistent with anti-

discrimination laws); Feliciano v. State of Rhode Island, 160 F.3d 780 (1st Cir. 1998) (same).

Indeed, the Commission's April 13, 2017 decision states this "well-established" principle:

The principle is well-established that an appointing authority has just cause to terminate the employment of a tenured civil service employee who has been absent from duty for an extended period of time with no reasonable expectation that the employee will be able or willing to come to work in the foreseeable future. See, e.g. Vinard v. Town of Canton, 29 MCSR 399 (2016) and cases cited (inability to perform due to psychological stress after being denied a promotion). See also Marcus v. City of Chelsea, 29 MCSR 279 (2016) (psychological incapacity); Morgan v. Town of Billerica, 28 MCSR 503 (2015) (work-related physical incapacity of undetermined duration); Puza v. Westfield Police Dep't, 27 MCSR 623 (2104) (depression, anxiety & substance abuse); Rivera v. Department of Correction, 26 MCSR 502 (2013) (medical disability due to workplace injury); Melchionno v. Somerville Police Dep't, 20 MCSR 443 (2007) (tendency to disruptive workplace behavior and diminished capacity for appropriate interpersonal relationships); Freeman v. City of Cambridge, 6 MCSR 157 (1993) (physical limitations and inability to cope with stress).

...

...the ability of an appointing authority to terminate an employee who is unable to perform the duties of his or her position does not turn on whether the cause of the disability is attributable to the employer, the employee or a third party. The well-established precedent upon which just cause to terminate such employees, cited earlier, includes cases in which all of these situations were presented.

(RA 1:537, 1:540-51).

Under such Civil Service caselaw, it is well-established that an appointing authority may remove an unfit employee even where the workplace caused the

employee's unfitness. This does not mean that Alston could not seek the remedy of reinstatement through the state's anti-discrimination law, at the MCAD or in State or Federal court. Fernandes v. Attleboro Hous. Authority, 470 Mass. 117, 128 (2014) (reinstatement is a remedy for employment discrimination per G. L. c. 151B, § 5). It does not mean that Alston could not seek to prove that the workplace rendered him medically disabled from working as a firefighter for the Town. See, e.g., G.L. c. 32, §§ 6, 7, 8 & 840 CMR 10 (accidental and ordinary disability retirements based on regional medical panel evaluations). However, the Commission's enabling act does not supersede and encompass these laws, as is evident from the string cites in the Commission's first decision.

Judge Wilkins' April 11, 2018 remand order abrogates this principle without citation to any legal authority whatsoever:

... an employer has no right to demand proof that an otherwise fit employee can perform job duties in a racially hostile environment.

(April 11, 2018 decision at Pg. 9; RA 2:3-22). The Commission's second decision adopted this abrogation. In the second decision, without any citations of law, the Commission stated:

When a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for

discharging the employee from his tenured position.

(RA 5:45). This statement of Civil Service law did not exist before this case.¹⁵ It is in stark contrast to the well-established Civil Service law cited in the first decision, and it is error.

III. The Commission's Determination That Alston Was Somehow "Prevented" From Returning To Work Was Unsupported By Substantial Evidence And Based On An Error Of Law.

At a May 2012 meeting (post-dating the February 2011 Pender conversation), Alston told Chief Ford that that there was nothing preventing him from working with Pender in the future, and he stated no concerns otherwise. (RA 4:304). Alston consistently said that he had a good relationship with the firefighters in his station. (RA 4:310). He was reporting to work until the **Town** placed him on leave following his repeated workplace "shooting" statements. (RA 4:313). Indeed, Alston reported to work on December 22, 2013 for the next shift that followed seeing the word "leave" on the truck (on December 19) and making his first shooting statements. It was his renewed threatening language on December 22 that forced Chief Ford to take immediate action.

Alston told the Chief that he was not in good mental shape and was receptive to evaluation by the

¹⁵ Alston testified that he did not view the fact that he had to go for a fitness for duty evaluation as retaliation or harassment. (RA 18:152).

Town's psychiatrist. (RA 4:314). Alston appeared for two evaluations by Dr. Brown. (RA 4:316-318). Alston stopped trusting Dr. Brown and he requested a different doctor. (RA 5:4). He appeared for evaluation by Dr. Price. (Id.). The point of these evaluations was to return to work, which is what Alston said he wanted to do.

Alston appeared at and successfully completed the anger management course required by Chief Ford as a result of his Workplace Safety Policy violations. (RA 4:320). He executed a release authorizing the Town's occupational health nurse to speak to his personal psychiatrist. (Id.). These were conditions precedent to his return to work; he completed them because he wanted to return.

The evidence shows that Alston wanted to return to work as a firefighter for the Town of Brookline. Beyond this evidence, however, was Alston's direct testimony before Commissioner Bowman:

Q. August [2014], specifically. You still intended to return to work; right?

A. Of course.

(RA 18:145). He testified that he personally informed the Town's psychiatric evaluators that he wanted to return to work. (RA 18:152). In February 2015, Alston was adamant to Dr. Price that he wanted to return to

work, irrespective of his work experiences to date. The Commission made these findings. (RA 4:284-5:46 at ¶128 (Dr. Brown), ¶176 (Dr. Price), ¶191 (Chief Ford), ¶215 (Acting Chief Ward)). Indeed, following Dr. Price's evaluation, but prior to Dr. Price's report stating return-to-work conditions that included drug testing,¹⁶ Alston told Chief Ford that the only thing he wanted the Town to do prior to his return to work was for Chief Ford to address firefighters about treating each other with respect and courtesy. (RA 6:256-257, 17:212, 18:166, 18:178).

After Dr. Price's report stating her return-to-work conditions, Alston changed his position from wanting to return to work to being unable to return, while still demanding to be paid.

Alston admits that he changed his position after hiring Attorney Ames. (RA 18:148, 18:158-159). He admits that he started demanding meetings with the Select Board Chairman and with the Select Board (Id.), refused to even sit with the Fire Chief to talk

¹⁶ Alston was documented to have used cocaine and marijuana repeatedly from 2010 through at least 2016. He admitted, in testimony before Commissioner Bowman, that he used these illegal drugs. (RA 18:104, 18:167). Alston admitted in his testimony before Commissioner Bowman that he refused to submit to toxicology screenings. (RA 18:149, 18:154-155). This was the sole condition that he outright refused to cooperate with as part of his return to duty. (Id. at ¶¶200, 201, 232, 233).

(RA 18:160, 18:162), demanded a racial climate review¹⁷ (RA 19:67), refused the Chief's direct orders to meet to discuss accommodations that would make him happy in the workplace (RA 18:163), refused to participate in investigations headed by former MCAD Chair Charles Walker (RA 18:169), refused to appear for scheduled return-to-work evaluations and toxicology screens (RA 18:154-156, 18:170-171, 18:176), and repeatedly refused to have reasonable accommodation meetings (Id.), amongst other refusals by him and Attorney Ames to meet or speak with Town personnel. His admittedly new demand was to be put on paid leave without being required to work. (RA 18:168-169).

In December 2015, the Fire Department conducted refresher antidiscrimination training of the whole department. The Town otherwise met all of Alston's and Attorney Ames's demands prior to termination. (RA 18:156-158, 18:160-161, 18:169, 18:172). Any conclusion that Alston was "prevented" from returning by the work environment is contrary to the Commission's factual findings. The evidence before the Commission was that for the better part of a year and a half, while he was still reporting to work prior to being placed on leave and thereafter, Alston wanted to return to work in the Brookline Fire Department.

¹⁷ He also admitted he did not participate in the review conducted by the Town. (RA 18:172).

Any conclusion that the Select Board was "aware" that Alston was "prevented" from returning to work as of the date of termination was contrary to the Commission's findings and evidence before it. The Select Board's decision to discharge Alston after 2½ years of absence was not "arbitrary and capricious" within the meaning of the law. City of Cambridge, 43 Mass. App. Ct. at 303 (defined as lacking "any rational explanation that reasonable persons might support"). It was based upon reasonable justification.

IV. Dr. Price Was Aware Of All Of The Facts And Found That Alston Could Conditionally Return To Work; The Commission's Findings To The Contrary Are Incorrect, And The Commission Unlawfully Substituted Its Opinion For That of Dr. Price.

The Commission infringed on the Town's substantial rights under G.L. c. 30A, § 14 by substituting its opinion that "additional stressors" rendered Alston "permanently unable" to return to work (RA 5:45-46) for Dr. Price's medical opinion that Alston was conditionally able to return to work. See G.L. c. 30A, § 11(5) (permitting agencies only to "take notice of general, technical or scientific facts within their specialized knowledge"). The Commission reasoned that it was authorized to do so, and that Dr. Price was "unaware" of so-called "additional stressors."

The Commission's jurisdiction under G.L. c. 31 was to determine whether an improper purpose underlay the

termination decision, not to make determinations of medical incapacity and orders of reinstatement to indefinite, uncircumscribed injured-on-duty benefits. The legislature has enabled other state agencies and decision-makers to perform that role, and then only when based on specific medical processes. See, e.g., G.L. c. 32, §§ 6, 7, 8 & 840 CMR 10 (accidental and ordinary disability retirements based on regional medical panel evaluations). Moreover, the legislature included a provision within G.L. c. 31 that permits the Commission to reinstate an employee who "has become separated from his position because of disability" only after a determination of fitness in accordance with the Chapter 32 medical evaluation procedures. See G.L. c. 31, § 39.

Yet, in the Commission's second decision, it discredited every medical opinion in evidence and came to its own unqualified medical conclusions.

The Commission's decision is largely premised upon additional diagnostic "stressors" that it opined existed, which the Commission claims Dr. Price was unaware of at the time of her report. (RA 5:35-36). The Commission discredited Dr. Price with these findings, stating "the entirety of the record shows multiple other actions and inactions of Town officials and employees that served as 'stressors' which Dr. Price was not aware of and which resulted in Firefighter

Alston being permanently unable to serve as a Brookline firefighter." (Id.). However, Dr. Price was aware of these facts at the time of her evaluation; they are discussed in her report.

Alston told Dr. Price about Pender's comments to him in June or July 2010 after he verbally reported the voice mail (Price Report at RA 10:381-431 [p.6]) feeling shunned in 2011 when assigned to work in other stations [p. 8]; and feeling hurt that the Town had taken no action against the firefighter who had posted a comment on the union website in September 2010 [p. 8]. Dr. Price's report even says that Alston verbally reported his 2011 and/or 2013 conversations with Pender (stating a rough time frame of 2012)[p. 8].

As stated, on February 12, 2015, Alston was adamant to Dr. Price that he wanted to return. Dr. Price also testified that Alston had made it very clear to her that he was not telling her absolutely everything he had experienced, and that he wanted to return as a Brookline firefighter **notwithstanding** whatever he had experienced. (RA 21:155). Dr. Price testified: "If he [Alston] said he couldn't come back then I would have looked at whether or not he was permanently unfit to come back and what would be the ... factors in ... whether or not he could come back ... That's not what he said to me." (RA 21:148).

The Commission violated Chapter 30A by substituting its judgment for Dr. Price's and every other medical doctor in these circumstances. The Commission does not have that authority to do so, particularly where there is no medical evidence to support its conclusion.

V. The Commission's "Unfair" Workplace Standard Was Wholly Subjective And Untethered From Any Existing Legal Standard. If The Commission "Took Notice Of" And Applied G.L. c. 151B, It Was Barred From Doing So By The Exclusivity Provisions Of G.L. c. 151B And By The Norfolk Superior Court Judgment.

The Commission's determination that the Town lacked "just cause" for termination due to the purported existence of a racially hostile or unfair work environment was based upon errors of law, unsupported by substantial evidence, and an abuse of discretion. As detailed above, the Commission "took notice" of the state's anti-discrimination law and cited G.L. c. 151B decisions in its discussion of the framework it applied to Alston's appeal. However, the Commission departed even from that legal framework and instead relied on its own subjective view of "unfairness."¹⁸

¹⁸ The Commission did not apply the McDonnell-Douglas burden shifting framework to Alston's termination? Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 97 (2009) citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The framework is not discussed, yet the Commission based its order on discrimination-type findings. The Commission did not require Alston to

It is clear that the Commission took notice of the state's anti-discrimination law and based its decision upon findings of discrimination, but the Commission does not articulate the standard it utilized to review Alston's appeal, or the proof it required of the Town or of Alston. Further confusing the issue, the lower court's second decision affirmed the Commission's second decision because, it said, the Commission found that a "racially hostile work environment" was supported by substantial evidence. (RA 22:208-222; Pg.12). Indeed, Judge Wilkins stated repeatedly that the Commission's decision was to overturn the termination of an employee who "does not fit into a racially hostile environment." (Id. at Pgs. 8, 9, 10, 12, 13, 14). However, the lower court's second decision does not cite to any Commission findings of a racially hostile work environment. There are none, as a simple word search confirms. In any event, most of the key Commission "findings" of "unfairness" would not have

prove a hostile work environment that was subjectively offensive and sufficiently severe and pervasive to interfere with a reasonable person's work performance. Gyulakian v. Lexus of Watertown, Inc., 475 Mass. 290 (2016) (discussing burden of proof of hostile work environment claim). The Commission did not require Alston to prove that he was constructively discharged. Suarez v. Pueblo Int'l, Inc., 229 F.3d 49 (1st Cir. 2000) (working conditions must be so onerous, abusive or unpleasant that a reasonable person would resign).

sufficed to state a claim for relief under the anti-discrimination laws, either singly or together.¹⁹

If the Commission's decision is premised upon a finding that Alston's work environment was racially hostile, as Judge Wilkins opined, the MCAD provides the exclusive remedy for redressing such a violation. Guzman v. Lowinger, 422 Mass. 570 (1996). Indeed, as long as it is determined that G.L. c. 151B is or was available to Alston, it is the exclusive remedy²⁰ for making such a claim. Charland v. Muzi Motors, Inc., 417 Mass. 580, 586 (1994); Agin v. Federal White Cement, Inc., 417 Mass. 669, 672 (1994).

General Laws Ch. 151B was a remedy available to Alston, and he had availed himself of that remedy at

¹⁹ See e.g. Espinal v. National Grid NE Holdings 2 LLC, 693 F.3d 31, 36-37 (1st Cir. 2012); Wilson v. Moulison N. Corp., 639 F.3d 1, 8-9 (1st Cir. 2011) (affirming summary judgment on Title VII claim premised on racial slurs and purported inadequate discipline; employer's obligations are to impose discipline reasonably calculated to stop the conduct; discipline is not to be viewed with the benefit of hindsight; stern warning sufficed); Forrest v. Brinker Intern. Payroll Co., LP, 511 F.3d 225, 230-32 (1st Cir. 2007) (same; progressive discipline); see also Green v. Franklin Nat'l Bank of Minneapolis, 459 F.3d 903, 912 (8th Cir. 2006).

²⁰ It is only claims based on statutes **predating** Chapter 151B that may be maintained without satisfying Chapter 151B's procedural requirements. See Jancey v. School Comm. of Everett, 421 Mass. 482 (1995); Green v. Wyman-Gordon Co., 422 Mass. 551 (1996); Butner v. Department of State Police, 60 Mass. App. Ct. 461 (2004). The statutory definition of "basic merit principles" **postdates** Chapter 151B. G.L. c. 31, §1. The 2019 Superior Court decision erred in stating the reverse. (RA 22:197-211)

the MCAD and Norfolk Superior Court. The Commission made this finding but then altogether disregarded Alston's prior case. Apparently, it is the view of the Commission and Judge Wilkins that Alston is permitted to file those claims anew with the Civil Service Commission and to have the Commission grant him relief from the Norfolk Superior Court's Judgment, even though that Court had denied him such relief.

The law of claim preclusion bars such a result. Three elements are essential for claim preclusion: (1) the identity or privity of the parties, (2) identity of the cause of action, and (3) prior final judgment on the merits. DaLuz v. Department of Correction, 434 Mass. 40, 45 (2001). Claim preclusion applies even though a party presents, in a second action, different evidence or legal theories, or seeks different remedies. Charlette v. Charlette Bros. Foundry, Inc., 59 Mass. App. Ct. 34, 44 (2003).

Alston's MCAD/Norfolk Superior Court complaint alleged that in 2010, Lt. Pender subjected him to a slur, and he then suffered retaliation for reporting it, all as he maintained before the Commission. (RA 9:115-141, 9:145-310). He complained in it of Lt. Pender's promotion and of being shunned, isolated, and mocked by his fellow firefighters, amongst other allegations supporting his G.L. c. 151B claims, again, as he claimed before the Commission. (Id.).

The Commission's decision disregarding the legal effect of the Norfolk Superior Court judgment on the ground that the dismissal was "procedural" was plain error. Under Mass. R. Civ. P. 41(b)(3), such a dismissal "operates as an adjudication upon the merits." Dawe v. Capital One Bank, 456 F. Supp. 2d 236, 241 (D. Mass. 2006) (finding that state court dismissal for discovery sanction satisfied the requirement of "final judgment on the merits" for claim preclusion, as under Massachusetts law, an involuntary dismissal constitutes an "adjudication on the merits" under Rule (41)(b)(3)); see Jarosz v. Palmer, 436 Mass. 526, 536 (2002) (finding that dismissal with prejudice constitutes a valid and final judgment for purposes of claim preclusion). The Norfolk Superior Court judgment satisfied all three elements for claim preclusion.

Any finding by the Commission or the lower court that collaterally attacks the validity of that judgment is in error. Kobrin v. Board of Registration in Med., 444 Mass. 837, 843 (2005). Nearly all of the Commission's findings collaterally attack the prior judgment. The Commission's conclusion is an example:

After reviewing all of the evidence, including the testimony of Firefighter Alston, I have concluded that Mr. Pender's use of the racial epithet "fucking [n-word]", coupled with subsequent actions and inactions by Town officials at all levels, which compounded the racist comment into an avalanche of unfair, arbitrary, capricious and retaliatory behavior that infringed on Firefighter Alston's civil service rights, made it impossible

for him to perform his job as a Brookline firefighter.

(RA 5:33). The Commission's "stressors" findings provide other examples. This is clear error in the application of law.

VI. The Commission Did Not Make Any Factual Findings That The Select Board's Decision Singled Out Alston For Differential Treatment Relative To Similarly Situated Comparator Employees.

The Commission's reinstatement order, and the lower court's affirmance of it, were a violation of the Town's substantial rights under G.L. c. 30A, § 14, in the absence of any findings that the Select Board's adoption of Hearing Officer Lampke's report was a pretext for a termination decision based on Alston's race, protected conduct, or other improper motive. See G.L. c. 30A, § 11(8) (administrative agency decision must include a "determination of each issue of fact or law necessary to the decision"); Town of Falmouth, 447 Mass. at 824-26 (Commission modification of discipline was reversed where there was no finding or evidence of pretext underlying municipal decision); Collins, 48 Mass. App. Ct. at 412-13 (same); Town of Watertown, 16 Mass. App. Ct. at 334-35 (same); City of Cambridge, 43 Mass. App. Ct. at 303-06 (same); City of Gloucester v. Civil Serv. Comm'n, 408 Mass. 292 (1990) (vacating Commission's reinstatement where evidence of improper purpose was overcome by evidence of the employer's good

faith, in light of employer's unsuccessful efforts to preserve the individual's employment).

The Commission made no findings that any of the five Select Board members harbored an improper purpose in terminating Alston, and that the Select Board's stated reasons for termination - as stated in Hearing Officer Lampke's report that they adopted - were pretextual.

Moreover, the standard for reviewing claims of disparate treatment was not new or novel at the time of Alston's appeal. See Town of Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 824 (2006). The Commission's authority to review and amend the penalties of the many appointing authorities subject to its jurisdiction was designed to promote the principle of uniformity and the "equitable treatment of similarly situated individuals." Police Comm'r of Boston v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1996). The Commission has always performed the disparate treatment analysis by reviewing evidence of discipline imposed upon similarly situated individuals for the same infraction that the appellant is charged with committing. Town of Falmouth v. Civil Serv. Comm'n, 61 Mass. App. Ct. 796, 801 (2004); Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412 (2000); Police Comm'r v. Civil Serv. Comm'n, 39 Mass. App. Ct. 594, 600 (1995).

Here, there were no findings that the Select Board's termination decision on the basis of unfitness singled out Alston for differential treatment relative to similarly situated comparator employees. Collins, 48 Mass. App. Ct. at 412 (affirming discipline in absence of evidence of differential treatment). Only one example was offered by Alston in the record before the Commission. Another firefighter who had a substance abuse issue was suspended, required to sign a last chance agreement, and submit to random toxicology screenings. He did so and was permitted to continue his employment with the Town. Alston received favorable treatment compared to that firefighter: He was not required to sign a last chance agreement, and the Town held his position for two years after discovering his substance abuse issues, despite his refusal to undergo drug testing. Thus, there was no basis for the Commission to find, and it did not find, that Alston was treated differently than other comparative employees.

VII. The Commission Had No Authority to Reinstate An Unfit Firefighter to the Payroll and, in Effect, Order Indefinite Paid Leave.

The order to reinstate an unfit firefighter to the payroll and roster without a requirement that he actually work was beyond the Commission's jurisdiction. The order is particularly egregious here, involving a public safety worker with documented repeated cocaine

use who steadfastly refused to undergo drug testing. As stated in Section II supra, the Civil Service and other State statutory schemes include specific mechanisms for addressing the work status of unfit employees. The statutory schemes speak to the Legislature's intent that public employee fitness concerns be addressed by medical doctors. G.L. c. 32, §§ 6, 7 and 8; G.L. c. 41, § 111F.

Here, the Commission's decision forces the Town to place Alston on paid leave as pensionable time for the indefinite future, as Attorney Ames has publicly stated.²¹ Attorney Ames repeated this position in the oral arguments before Judge Wilkins in the proceedings before the lower court. It is clear from all of the foregoing that the Commission's order to the Town to indefinitely pay Alston more than \$200,000 in back pay and to pay him a weekly paycheck for not coming to work was beyond the Commission's jurisdiction.

CONCLUSION

For the reasons set forth above, this Honorable Court should reverse the Superior Court judgment dated August 2, 2019, reverse the Civil Service Commission's decision dated February 14, 2019, reinstate the Civil

²¹ See Abbey Niezgoda, "'This Proves It All': Brookline Firefighter Reinstated Two Years After Being Fired'" at <https://www.nbcboston.com/news/local/brookline-firefighter-reinstated/1515/> (Attorney Ames's press statement stating that Alston "will likely be placed on leave with pay indefinitely unless they are able to work out something else with the town").

Service Commission's decision dated April 13, 2017, and remand the case to the Superior Court with instructions to enter judgment for the Town.

REQUEST FOR ORAL ARGUMENT

The Plaintiff-Appellant Town of Brookline respectfully requests an Oral Argument in this matter.

Respectfully submitted,

/s/ Joseph A. Padolsky

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Date: 03/26/2020

COMMONWEALTH OF MASSACHUSETTS
THE APPEALS COURT

SUFFOLK, SS.

NO. 2020-P-0105

TOWN OF BROOKLINE,
PLAINTIFF-APPELLANT,

v.

GERALD ALSTON,
DEFENDANT-APPELLEE.

ON APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT

REPLY BRIEF OF THE PLAINTIFF-APPELLANT
TOWN OF BROOKLINE

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Dated: May 18, 2020

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ARGUMENT

I. THE PROPOSED NEW DOCTRINE THAT A CIVIL SERVICE EMPLOYER MAY NOT TERMINATE A PUBLIC SAFETY WORKER WHOSE UNFITNESS AROSE FROM WORKPLACE VIOLENCE THREATS AND CONTINUING COCAINE USE IS CONTRARY TO PRECEDENT, IS IN VIOLATION OF AN EMPLOYER'S SUBSTANTIAL RIGHTS, AND IS AGAINST WELL-RECOGNIZED PUBLIC AND LEGAL POLICY.

The Opposition does not dispute that Appellee was psychiatrically unfit to perform the essential functions of a firefighter. Rather, the Opposition relies on the lower court's creation of an extraordinary new doctrine that an employer cannot terminate an employee for incapacity where the employer's purported misconduct "caused it" (Brief for Appellee Gerald Alston ("Opposition", or "Opp.") at 38-41). Besides being contrary to well-established precedent¹, the proposed new doctrine rests on a misstatement of the found facts. (RA 22:199-200; see also Opp. at 19-20).

This is what the Commission found: At the end of his shift on December 19, 2013, Appellee found the word "leave" on a firetruck, pulled over two coworkers, and "said something to the effect of

¹ See Appellant's Brief for the Town of Brookline ("Opening Brief") at 34-36 (citing numerous G.L. c. 31 and G.L. c. 151B cases).

shooting up the place". (RA 4:313, ¶ 118 & n.10 (noting Appellee's admission on cross-examination)). At the beginning of his next shift on Sunday December 22, 2013, Appellee pulled his group together, and, while "very agitated", said "'people go postal over matters like this.'" (*Id.*, ¶ 119). When Chief Ford learned of the threats that day, he notified the Police Chief and Town Administrator and drove to the fire station. (RA 4:313-14, ¶ 120). When they met, Appellee was "extremely agitated", pointed to the Chief and the Deputy Chief and said, "Look, he's my friend, and you're my friend, and even you could get caught in a cross-fire." (RA 4:314, ¶ 121). Chief Ford sent Appellee home, feeling that he "could pose a danger to himself or coworkers". (*Id.*²). Two psychiatrists who evaluated Appellee in the aftermath found him psychiatrically unfit pending his receipt of treatment and other conditions. (RA 4:316 at ¶¶ 128, 129, 4:318 at ¶ 136, 5:7 at ¶ 173 through 5:7 ¶ 181).

² The Opposition does not contend, and the Commission did not find, that Chief Ford's initial response to the shooting statements that set the course for all subsequent events was discriminatory, retaliatory, or even "unfair" or made in "bad faith".

With regard to Appellee's drug use, as recently as 2019, the Supreme Judicial reaffirmed a Civil Service employer's weighty interest in the sobriety of its public safety workers. Boston Police Dep't v. Civil Service Comm'n, 483 Mass. 461, 462 (2019) (citing O'Connor v. Police Comm'r of Boston, 408 Mass. 324, 328 (1990)). Yet the lower court ignored Appellee's drug use altogether, and the Commission limited its mention to cocaine and marijuana use documented during a November 2010 emergency room visit. (RA 4:299, ¶¶ 59, 61).

This is the undisputed drug use evidence ignored by both the Commission and the lower court: During the November 2010 visit, Appellee was determined to be an imminent threat of harm to himself or others, a condition that Dr. Price related to cocaine use. (RA 9:396, 10:406, 476³). Appellee developed insomnia in late 2011 that he related to his cocaine use over the preceding few months. (RA 10:397). Multiple record entries through 2017 document continuing drug use. (RA 18:164-65 (cross-examination concerning Resp. 116 at

³ The Commission found that Appellee had become agitated that day due to a driving assignment that was a "routine scheduling decision". (RA 4:298, ¶56 & n.9).

9, 10 (found at RA 12:360-61(July 2015 positive cocaine and marijuana tests)); RA 18:175-76 (cross-examination concerning Resp. 117 at 507, 558 (found at RA 14:9 and 60 (1/5/16 physician letter and lab result re: positive cocaine screen)); RA 4:263, ¶ 165 (Appellant's Proposed Decision, citing RA 13:129 (December 2014 record) and RA 13:337 (2017 record admitting drug use)).⁴ While the Commission mentioned Dr. Price's third condition of toxic screening (RA 5:9, ¶ 181), it omitted her rationale for it: Given Appellee's documented drug use, testing was needed to assure that it did not escalate, endanger Appellee and others, and increase Appellee's risk for impulsivity and violence. (RA 10:429, 19:133-36, 138-40, 152, 157, 167).

The effect of the new doctrine is to create a new class of employees whose workplace complaints insulate

⁴ Some of the documented cocaine use was contemporaneous with Appellee's refusals to drug testing and no shows for scheduled tests. (RA 5:10, ¶ 183 (4/2/15 meeting with Chief Ford); RA 11:44-45 (7/1/15 Attorney Ames rejection of Price conditions); RA 5:16, ¶ 201 (no show for early 2016 drug test); RA 5:27, ¶ 233 (no show for 8/2/16 drug test).

them from fitness determinations, no matter how concerning their conduct may be.⁵

Suppose Appellee had not only rattled the Fire Chief with his "workplace shooting" and "cross-fire" statements but had actually brought a gun to work or worse. The Town still could not address the question of Appellee's fitness. The proposed doctrine contains no self-limiting principle and creates a dangerous new precedent that this Court should reverse.

Moreover, the procedural history here shows the difficulty the new doctrine poses for employers who must act quickly to remove an unsafe employee but are faced with claims that may not be finally adjudicated for many years. It was not until February 2019, two-

⁵ This is particularly problematic here, where the found facts reveal obstruction by Appellee and Attorney Ames of the Town's inquiries into the merit of the hostile work environment claim and of what, if any, additional steps they wanted the Town to take. (See infra). Appellee had blocked the Town's efforts to assure that he was not subject to retaliation. (See Section II infra). Then, following Attorney Ames's retention, both he and Attorney Ames checked the Town's efforts to understand their concerns by consistently refusing to engage with Town staff about them. (*Id*). At Appellee's August 30, 2016 pre-termination hearing, Appellee did not testify, and the two were silent about what additional steps they wanted the Town to take beyond their demands the Town had already met. (RA 12:126-152; see also Section II infra).

and-a-half years after the Select Board's termination decision and more than five years after Chief Ford placed Appellee on leave, that the Commission said the workplace was "unlawfully hostile" and the termination because of incapacity was illegal.⁶ Then, three-and-a-half years after termination and more than six years after Chief Ford's decision, the federal court held that the termination was lawful, finding that it was because of his incapacity. (Alston v. Town of Brookline, et al., Civil Action No. 1:15-cv-13987-GAO, Dkt # 433 (Addendum at 39)).

⁶ The Town has paid hundreds of thousands of dollars in back pay, interest and continuing pensionable, benefitted salary to hold Appellee's place on the Firefighter roster while he is not psychiatrically cleared to come to work, even though Appellee could have obtained back pay and front pay through meritorious discrimination and retaliation claims. (RA 2:26; RA 22:161). The Commission's decision apparently prohibits the Town from taking further steps to enquire into Appellee's fitness. Attorney Ames's position at the Superior Court oral argument was that the workplace is "permanently" hostile and the Town must keep him on permanent, paid leave: "THE COURT: But you're saying ... if, in fact, some day the Town were to ... remedy the situation..., that the Town would be free, under this order, to say, okay, now it's time to come back to work. MR. AMES: ...[T]he finding the Commission made seems to foreclose that, because they said 'permanently';... So at some point, you can't unring the bell..." (RA 22:193).

As explained in the Town's Opening Brief, the Commission's practice until now had been to uphold a termination based on incapacity and defer to the MCAD or court with regard to any related complaint about an alleged discriminatory work environment. Appellee's discrimination and retaliation claims in the Norfolk Superior Court and the federal district court were resolved with judgments against Appellee. Here, the Commission applied a new and amorphous standard in a decision that contradicts those judgments. This case well illustrates the good policy reasons underlying the Commission's historical practice in light of the facts and procedural history. For these additional reasons, the Court should uphold the long line of cases based on sound public and legal policy affirming that incapacity provides just cause for termination.

II. THE COMMISSION'S REINSTATEMENT OF PLAINTIFF ON THE BASIS OF AN "UNFAIR" WORK ENVIRONMENT WAS BEYOND ITS JURISDICTION.

At issue - and the sole issue - in Appellee's termination appeal was whether the Select Board had "reasonable justification" for termination and whether its decision was free of "political considerations, favoritism and bias". Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 824 (2006). Chapter 31

itself constrained the Commission from looking beyond the termination decision by virtue of Section 43's ten-day statute of limitations (which is jurisdictional), except to the extent that events pre-dating the statute of limitations elucidate the five (5) Select Board members' state of mind on October 5, 2016. See Opening Brief at 50 (citing numerous cases). Even if a Chapter 31 "hostile work environment" theory could exist (it cannot, for the reasons explained in Section III), an employee must timely challenge it before the Commission. Appellee did not.⁷ (See Section III infra).

In light of the foregoing, it was imperative that the Commission support its reinstatement order with findings that the members of the Select Board who terminated Appellee had an improper purpose for doing so. G.L. c. 30A, § 11(8). As stated in the Opening Brief and above, the Commission found facts and entertained undisputed evidence that Appellee made

⁷ It is telling that the Opposition relies on "hostile work environment" evidence consisting of Appellee's exhaustion of benefitted time and the Town's discontinuance of paid leave, when the lower court explicitly said his appeal on those bases was time-barred. Opp. at 24, 26; RA 2:18-21. A review of the Commission's findings shows that all other events were no less time-barred.

repeated shooting statements; was placed on leave; was thereafter discovered to have repeatedly used cocaine; was repeatedly found unfit by independent psychiatric evaluators and required to undergo drug testing and comply with other conditions; did not do so, and did not present independent evidence of his fitness; and repeatedly rebuffed Town staff's efforts to engage with him and his attorney. These were facts found by the Hearing Officer, who relied heavily on the opinion of Dr. Price that Appellee credited at the termination hearing. (RA 12:126-52). The Select Board adopted the Hearing Officer's decision based on Dr. Price's expert opinion Appellee had not impeached or contracted, and it terminated Appellee. (RA 12:179-80). There was no finding that the Select Board did so pretextually. The federal court found that Appellee's claims that the termination was discriminatory or retaliatory was "long on rhetoric but devoid of record evidentiary support". (Addendum at 46).

Both the Commission's decision and the lower court affirmance relied heavily on the purportedly inadequate 2010 Pender discipline and subsequent promotions. But the 2010 two-week Pender suspension (one week withheld) was negotiated progressive

discipline by a previous Board of an otherwise highly-regarded firefighter who, in return, waived rights of appeal and agreed to permanent transfer from Appellee's station, mediation⁸ and training. (RA 9:23-24 (2010 Select Board minutes involving DeWitt, Benka Mermell), 25-26 (2010 disciplinary agreement))⁹.

Regarding the 2013 Pender promotion, one of the two Select Board members (Wishinsky) who was on the Board both in 2013 and 2016 testified that he voted for promotion in 2013 based on Chief Ford's recommendation (which, in turn, was based on Pender's completion of the 2010 discipline and his illustrious record otherwise). (RA 4:288 at ¶¶ 9-11, 4:295 at ¶ 42, RA 6:261-62, RA 15:108, 110, RA 22:108, 114).

There was no finding that the prior Select Board based its 2010 and 2013 decisions on Appellee's race or protected conduct. Purportedly inadequate

⁸ On or about September 2, 2010, Appellee reported to Chief Skerry that the mediator was "great" and the mediation was "worthwhile". (RA 17:15).

⁹ Like Pender, Appellee benefitted from the Town's application of progressive discipline principles. In response to the March 2014 discovery of his 2010 and 2011 drug use, Chief Ford issued a written warning only. (RA 10:252). A White firefighter with an OUI received harsher discipline than Appellee (and, unlike Appellee, he cooperated with required drug and alcohol testing). (RA 7:438-42, RA 17:162-66).

discipline or promotion of a third party perpetrator does not constitute discrimination or retaliation against the victim, under established precedent.¹⁰ These were lawful (if controversial)¹¹ policy decisions made by a prior Board and do not elucidate any improper termination purpose harbored by a subsequent Board as of the October 6, 2016 termination.

In addition, there was no evidence that the 2016 Select Board was aware of any ongoing infringement of Appellee's civil right to be free from an unlawful

¹⁰ See Opening Brief at 47 n.19 (*citing* cases affirming adequacy of use of warnings to address explicit racial slurs); see also RA 18:182. The Commission harshly criticized the 2010 Board for not negotiating a last chance agreement and other very specific measures the Commission detailed in its decision of six years later. (RA 5:37) The Commission's substitution of its own judgment was contrary to settled appellate case law limiting the Commission's jurisdiction to review discipline decisions even pertaining to challenges brought by that disciplined individual. Town of Falmouth v. Civil Service Comm'n, 61 Mass. App. Ct. 796, 800-02 (2004); Boston Police Dep't v. Collins, 48 Mass. App. Ct. 408, 412-13 (2000). Nor did the Pender promotions constitute discriminatory treatment of Appellee, where they did not adversely affect the terms of Appellee's own employment.

¹¹ On June 21, 2016, a number of former and present African-American Town firefighters appeared before the Select Board during public comment strongly disagreeing with Appellee's portrayal of Pender and the Fire Department as racially hostile and unwelcoming. (RA 5:24 and Resp. 108 (video submitted to the Court)).

racially-discriminatory or retaliatory hostile work environment.¹² Besides disciplining Pender in 2010, the Town had instituted anti-discrimination training in the Fall of 2010 and a new anti-discrimination policy in early 2011. (RA 4:300). In the Fall 2010, Human Resources ("HR") Director DeBow and Chief Skerry tried to engage with Appellee to assure there was no retaliation, but he complained this "harassed" him. (RA 9:86-103). In May 2012, **after** one of his encounters with Pender, Appellee told Chief Ford that things were fine with Pender aside from Pender not shaking his hand once, and that Chief Ford should not worry about the two working together in the future. (RA 6:241-42, 8:159-60, 21:36). In November 2012, Appellee filed an MCAD complaint alleging non-specific

¹² The gauge was, and always has been, standards under anti-discrimination laws that the Commission ignored. See Gyulkian v. Lexus of Watertown, Inc., 475 Mass. 290 (2016) (subjectively offensive and sufficiently severe and pervasive to interfere with reasonable person's work performance); Cuddy v. Stop and Shop Supermarket, Co., 434 Mass. 521, 532 (2001) ("A hostile work environment is one that is 'pervaded by harassment or abuse, with the resulting intimidation, humiliation, and stigmatization, [and that] poses a formidable barrier to the full participation of an individual in the workplace.'") (quoting College-Town, Div. of Interco, Inc. v. Massachusetts Comm'n Against Discrimination, 400 Mass. 156, 162, 508 N.E.2d 587 (1987)).

shunning allegations by unnamed firefighters and other non-specific allegations, and then refused to provide names and other details through an investigatory interview.¹³ (RA 4:307 at ¶ 93 & 308 at ¶ 99; RA 9:180-310). He filed the same complaint as a Superior Court action in June 2013, but he did not respond to the HR Department's June 2010 letter asking to speak with him. (RA 4:309-310, ¶¶ 106-07; RA 9:311). In September 2013 after Appellee's Superior Court complaint was publicized, Town Counsel reminded Pender that retaliation is prohibited. (RA 8:176). In October 2013, Appellee complained to a superior about allegedly discriminatory work assignments, the HR Department again investigated, and it found the assignments to have been bona fide. (RA 9:312-14). His December 2013 interrogatory answers did not identify

¹³ Appellee testified at the Commission that there were only a "few instances" of shunning and named just one firefighter who engaged in it. (RA 18:89) Both state and federal courts have repeatedly dismissed discrimination cases based on shunning. See, e.g., Gomez-Perez v. Potter, 452 Fed. Appx. 3 at **5 (1st Cir. 2011); Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005); Bain v. Springfield, 424 Mass. 758, 766 (1997); Goguen v. Quality Plan Adm'rs, 11 Mass. L. Rptr. 288 at *6 (Feb. 11, 2000). It is highly unlikely that a refusal to shake a hand once, or a few instances of "shunning", would satisfy the "hostile work environment standard. See n.12 supra.

who said or did what when (RA 9:315-28), precipitating litigation over a period of months (including efforts to compel complete interrogatory answers) that was mooted by the Court's judgment against him and the Court's refusal to lift it (in part based on his non-compliance with discovery obligations reflected on the docket). (RA 11:47-48).¹⁴ He declined to provide all photographs he had taken of the "leave" writing to assist the Town's handwriting expert with identifying the person who wrote it. (RA 10:221-52, 16:319). In April 2015, he again refused an interview by an outside investigator the Town retained in response to his complaint about a Town Meeting member. (RA 11:27-34).

Notwithstanding the foregoing, Town staff made repeated but unsuccessful attempts to engage with

¹⁴ Chief Ford placed Appellee on leave shortly after he served the interrogatory answers. In September 2013, Appellee's counsel said that the Town could interview Appellee if it provided the questions in advance and satisfied other conditions. The Town responded that it would instead await Appellee's interrogatory answers, then due. (RA 16:516-18). Appellee did not serve answers until after the Court's November 5, 2013 order on the Town's motion to compel, as reflected in the Norfolk Superior Court's on-line docket in *Gerald Alston v. Town of Brookline*, Civil Action No. 1382-CV-00898.

Appellee and Attorney Ames about any concerns they had and undertook anti-discrimination retraining of the Fire Department in December 2015. (RA 5:15, ¶ 197). In addition, the Town had met every other demand Appellee had made as of his termination. (RA 10:345-46, 11:4-23, 5:18 at ¶208, RA 11:57-120¹⁵, RA 6:256-57, 17:212).

On February 12, 2015 immediately following Dr. Price's evaluation, Appellee and Attorney Ames told the Fire Chief that all they wanted the Chief to do to prepare the workplace for Appellee's return was to talk to the firefighters about the need to treat each other with civility, and Chief Ford agreed to do so. (RA 6:256-57, 17:212). Once Dr. Price issued her report with her conditions that included drug testing, Appellee and Attorney Ames refused to cooperate with them. By repeatedly refusing to engage with staff, the two frustrated the Town's ongoing efforts through the date of termination to learn the basis for Appellee's contention that the workplace was racially hostile. (RA 5:9, ¶ 180; 5:12, ¶ 187¹⁶; 5:15, ¶ 198;

¹⁵ Appellee declined to participate in the racial climate review the Town contracted for at his request. (RA 16:16, 18:166, 168).

¹⁶ The Opposition grossly mischaracterizes the parties' course of dealing by saying that the parties were "unable to agree on a return to work plan", when the

5:16, ¶¶ 199-201; 5:18-19, ¶ 209; 5:19, ¶¶ 210-213; 5:20, ¶ 216; 5:26-27. Even at the August 30, 2016 pre-termination due process hearing, Appellee declined to testify and he relied solely on a written statement that provided no specifics. He refused the Town's eleventh hour offer made at the hearing to cooperate with the return to work process. (RA 12:126-52). This meant that the Select Board was left with the recommendations of Dr. Price and the outside Hearing Officer who found the Appellee to be an unfit or unwilling employee who had been on leave for almost three years.

Town's efforts were met with obstruction. The Opposition also says that the Board would not schedule a meeting for Appellee. Opp. at 26. In fact, on January 13, 2015, then-Select Board Chair Goldstein and the Town Counsel met with Appellee and Attorney Ames. Appellee became enraged by the Town's refusal to place him on paid leave absent his cooperation with a fitness-for-duty re-examination, made a statement the Chair construed as threatening, and then followed the Chair out of the room and into the elevator while yelling and gesticulating at him, as Attorney Ames attempted to restrain Appellee with his arm. The incident was captured on a video (Resp. 63) that has been provided to this Court. (See also RA 21:172-73, 22:84-95, 92-93, 101). Moreover, the Town retained former MCAD Chair Charles Walker to hear Appellee's concerns and told Attorney Ames that it would hear Appellee after receiving Walker's report, but Ames called the procedure a "kangaroo court" and said Appellee would not cooperate. (RA 5:18, ¶ 208).

The time-barred findings do not impeach the veracity of the 2016 Select Board's stated termination reasons.

III. EVEN A TIMELY HOSTILE WORK ENVIRONMENT CLAIM IS NOT COGNIZABLE IN A CHAPTER 31, SECTION 43 APPEAL.

The Opposition does not contest that the 2016 Select Board terminated Appellee because of his incapacity; indeed, it concedes it. Opp. at 29 (Board "voted to terminate Alston for failing to demonstrate his ability to return to work"). The main thrust of the Opposition is that there is - or should be (no case the Opposition cites supports the proposition) - a stand-alone Chapter 31 appeal for a racially hostile work environment. Even setting aside Appellee's failure to timely appeal any such environment to the

Commission,¹⁷ there is no such claim. General Laws Chapter 151B and the MCAD offer the exclusive remedy.¹⁸

Appellee concedes that Chapter 151B preempts statutes that post-date it. Opp. at 35-36. He argues that the addition of the statutory definition of "basic merit principles" in G.L. c. 31, § 1(e), by 1981 Mass. Acts c. 767, § 10, was a "refinement" of a statutory scheme that predates Chapter 151B. Id. It is true that G.L. c. 31, § 43 predates the 1946 promulgation of Chapter 151B. See Carey v. Carey, 245 Mass. 12 (1923); Gardener v. City of Lowell, 221 Mass. 150 (1915). But Section 43 has always provided an appeal for a **termination based on an improper purpose**

¹⁷ As stated herein and in the Opening Brief, the Commission's reinstatement order was based on a novel, subjective, standard-less analysis. But even a quick read of the Commission's findings show that nothing happened within the 10 days preceding the October 5, 2010 termination hearing. Applying a standard from discrimination law, there was no hostile work environment "anchoring event" within that limitations period. Cuddyer, 434 Mass. at 521 (discussing federal and state standards). The termination itself could not have constituted such an event because it was a "discrete act". See National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 122 S. Ct. 2061 (2002).

¹⁸ The Town does not dispute that there is a viable Section 43 appeal for a discriminatory termination, as discrimination is an improper purpose for that decision. Appellee's contention focuses on the question of a hostile work environment-type discrimination claim.

"not reasonably related to the fitness of the employee to perform his position". Opp. at 40. The Opposition proposes a construction of Section 1(e) that circumvents Section 43's requirements and creates a new cause of action unrelated to a termination. This is not a "refinement".

In any event, that position should be rejected here. The Commission reinstated an unfit employee based on a purportedly "hostile work environment" without applying any of the limiting constructions that case law has developed under the antidiscrimination laws. It was untethered from existing law and was entirely subjective. Doctrines the Commission could have but did not apply include the standard for actionable hostile work environment (severe, pervasive, subjectively and objectively unreasonable); a statute of limitations standard such as the continuing violation doctrine that shapes the extent to which a party may reach back in time from an "anchoring event"; rules on employer liability where the harassment is by a supervisor versus a non-supervisor (the rules vary depending on the jurisdiction); and a constructive discharge standard (particularly lacking here, given the claim that

Appellee was "prevented" from returning to work). See nn. 12, 13 and 17 supra and Opening Brief, at 46 n.18.

Finally, to the extent the Commission's decision can be read as finding a racially hostile work environment that is prohibited by existing standards under discrimination laws, its decision was precluded by the 2014 Norfolk Superior Court judgment. Further, since Appellee was no longer in the work force effective December 2013, there was no post-judgment racially hostile work environment to which he was subjected after the 2014 judgment. See Opening Brief at 47-50.

CONCLUSION

For the foregoing reasons and the reasons stated in Appellee's opening brief, this Honorable Court should reverse the Superior Court judgment dated August 2, 2019, reverse the Civil Service Commission's decision dated February 14, 2019, reinstate the Civil Service Commission's decision dated April 13, 2017, and remand the case to the Superior Court with instructions to enter judgment for the Town.

Respectfully submitted,

 /s/ Joseph A. Padolsky

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Certificate of Compliance with Rule 16(k)

I, Patricia Correa, hereby certify that this brief complies with the rules of court pertaining to the filing of briefs, including, but not limited to: Mass. R. App. P. 16(a)(13) (addendum); Mass. R. App. P. 16(e)(references to the record); Mass. R. App. P. 18 (appendix to briefs); Mass. R. App. P. 20 (form and length of briefs, appendices and other documents).

/s/ Patricia Correa

Dated: May 18, 2020

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT
DOCKET NO. 2020-P-0105

CERTIFICATE OF SERVICE

I, Patricia Correa, hereby certify that on the below date, I served a copy of the foregoing Brief of the Plaintiff-Appellant Town of Brookline by e-filing service, and to non-registered counsel by first class mail, postage prepaid, to the following counsel of record:

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ADDENDUM

ADDENDUM
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§ 11. Adjudicatory proceedings; additional requirements, MA ST 30A § 11

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)

Title III. Laws Relating to State Officers(Ch. 29-30b)

Chapter 30A. State Administrative Procedure (Refs & Annos)

M.G.L.A. 30A § 11

§ 11. Adjudicatory proceedings; additional requirements

Currentness

In addition to other requirements imposed by law and subject to the provisions of [section ten](#), agencies shall conduct adjudicatory proceedings in compliance with the following requirements:--

- (1) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.
- (2) Unless otherwise provided by any law, agencies need not observe the rules of evidence observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.
- (3) Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence.
- (4) All evidence, including any records, investigation reports, and documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered, except as provided in paragraph (5) of this section. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.
- (5) Agencies may take notice of any fact which may be judicially noticed by the courts, and in addition, may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

§ 11. Adjudicatory proceedings; additional requirements, MA ST 30A § 11

(6) Agencies shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.

(7) If a majority of the officials of the agency who are to render the final decision have neither heard nor read the evidence, such decision, if adverse to any party other than the agency, shall be made only after (a) a tentative or proposed decision is delivered or mailed to the parties containing a statement of reasons and including determination of each issue of fact or law necessary to the tentative or proposed decision; and (b) an opportunity is afforded each party adversely affected to file objections and to present argument, either orally or in writing as the agency may order, to a majority of the officials who are to render the final decision. The agency may by regulation provide that, unless parties make written request in advance for the tentative or proposed decision, the agency shall not be bound to comply with the procedures of this paragraph.

(8) Every agency decision shall be in writing or stated in the record. The decision shall be accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the decision, unless the General Laws provide that the agency need not prepare such statement in the absence of a timely request to do so. Parties to the proceeding shall be notified in person or by mail of the decision; of their rights to review or appeal the decision within the agency or before the courts, as the case may be; and of the time limits on their rights to review or appeal. A copy of the decision and of the statement of reasons, if prepared, shall be delivered or mailed upon request to each party and to his attorney of record.

Credits

Added by St.1954, c. 681, § 1.

[Notes of Decisions \(203\)](#)

M.G.L.A. 30A § 11, MA ST 30A § 11
Current through Chapter 44 of the 2020 2nd Annual Session

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§ 1. Definitions, MA ST 31 § 1

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

Massachusetts General Laws Annotated
Part I. Administration of the Government (Ch. 1-182)
Title IV. Civil Service, Retirements and Pensions (Ch. 31-32b)
Chapter 31. Civil Service (Refs & Annos)

M.G.L.A. 31 § 1

§ 1. Definitions

Effective: November 2, 2010

Currentness

In this chapter, the following words and phrases shall have the following meanings, unless the context requires otherwise:--

“Administrator”, the personnel administrator of the human resources division within the executive office for administration and finance.

“Appointing authority”, any person, board or commission with power to appoint or employ personnel in civil service positions.

“Basic merit principles”, shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (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.

“Career management service positions”, those managerial and confidential positions so designated in accordance with the provisions of [section forty-eight A](#).

“Certification”, the designation to an appointing authority by the administrator of sufficient names from an eligible list or register for consideration of the applicants’ qualifications for appointment pursuant to the personnel administration rules.

“Civil service appointment”, an original appointment or a promotional appointment made pursuant to the provisions of the civil service law and rules.

§ 1. Definitions, MA ST 31 § 1

“Civil service employee”, a person holding a civil service appointment.

“Civil service law”, this chapter.

“Civil service law and rules”, this chapter and the rules promulgated pursuant to this chapter.

“Civil service position”, an office or position, appointment to which is subject to the requirements of the civil service law and rules.

“Commission”, the civil service commission of the commonwealth.

“Department” or “division”, the human resources division within the executive office for administration and finance.

“Departmental unit”, a board, commission, department, or any division, institutional component, or other component of a department established by law, ordinance, or by-law.

“Disabled veteran”, any veteran, as defined in this section, who (1) has a continuing service-incurred disability of not less than ten per cent based on wartime service for which he is receiving or entitled to receive compensation from the veterans administration or, provided that such disability is a permanent physical disability, for which he has been retired from any branch of the armed forces and is receiving or is entitled to receive a retirement allowance, or (2) has a continuing service-incurred disability based on wartime service for which he is receiving or is entitled to receive a statutory award from the veterans administration.

“Discharge”, the permanent, involuntary separation of a person from his civil service employment by his appointing authority.

“Eligible list”, a list established by the administrator, pursuant to the civil service law and rules, of persons who have passed an examination; or a re-employment list established pursuant to [section forty](#); or a list of intermittent or reserve fire or police officers as authorized under the provisions of [section sixty](#); or any other list established pursuant to the civil service rules from which certifications are made to appointing authorities to fill positions in the official service.

“Entrance requirements”, the experience and educational prerequisites which an applicant must satisfy in addition to passing a civil service examination to be qualified for appointment to a civil service position.

“Entry level”, a position having a title which is the lowest in a series of titles in a municipal or in the state classification plan, whether or not higher titles in same job series exist in the same department.

“Essay question”, a question in an examination requiring an applicant to compose a written response of one or more sentences or requiring other than a limited response or short answer.

“Executive office”, an office established pursuant to chapter six A or chapter seven.

§ 1. Definitions, MA ST 31 § 1

“Handicap”, any condition or characteristic, physical or mental, which substantially limits one or more major life activities; or a record of such impairment; or the external manifestations of such impairment.

“Labor service”, the composite of all civil service positions whose duties are such that a suitable selection for such positions may be made based upon registration pursuant to [section twenty-eight](#), rather than by competitive examination.

“Layoff”, a temporary discontinuance of employment for lack of work or lack of money.

“Official service”, the composite of all civil service positions not in the labor service.

“Original appointment”, an appointment pursuant to [section six](#) or [section twenty-eight](#).

“Performance evaluation”, an evaluation of an employee’s performance in accordance with the standards outlined in [section six A](#) to [section six C](#), inclusive.

“Permanent employee”, a person who is employed in a civil service position (1) following an original appointment, subject to the serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment; or (2) following a promotional appointment, without restriction as to the duration of his employment.

“Person with an intellectual disability”, a person certified as having an intellectual disability by the Massachusetts rehabilitation commission.

“Promotional appointment”, an appointment pursuant to [section seven](#) or in the labor service, pursuant to the civil service rules, of a person employed in one title to a higher title in the same or a different series, or to another title which is not higher but where substantially dissimilar requirements prevent a transfer pursuant to [section thirty-five](#).

“Provisional employee”, a person who is employed in a civil service position, pursuant to and in accordance with [sections twelve](#), [thirteen](#) and [fourteen](#).

“Register”, a list established by the administrator pursuant to the civil service law and rules, from which certifications are made to appointing authorities to fill civil service positions in the labor service.

“Reinstatement”, the restoration of an employee to a position pursuant to the civil service law and rules.

“Requisition”, a request by an appointing authority to the administrator to certify names of persons for appointment to civil service positions.

“Resignation”, a permanent voluntary separation from service.

§ 1. Definitions, MA ST 31 § 1

“Roster”, a list of permanent employees in a departmental unit, arranged according to seniority, and of employees appointed pursuant to temporary or provisional appointments.

“Rules”, the rules promulgated by the personnel administrator pursuant to civil service law.

“Seasonal position”, a position requiring the services of an incumbent, on either a full-time or less than full-time basis, beginning no earlier than May first and ending no later than September thirtieth or beginning no earlier than November first and ending no later than April first in any twelve month period; provided, however, that the following position shall not be deemed to be seasonal: (1) a position in the police force or fire force of a city or town, (2) a permanent position for which funds have been appropriated or are available on a permanent basis. Notwithstanding any provision of this chapter to the contrary, a position of a police officer in a police department within the counties of Barnstable, Bristol, Dukes, Essex, Middlesex, Nantucket, Norfolk, Plymouth and Suffolk employed on either a full-time or less than full-time basis, beginning not earlier than May first and ending no later than September thirteenth shall be deemed to be a seasonal position and shall be exempt from the provisions of this chapter.

“Series”, a vertical grouping of related titles so that they form a career ladder.

“Suspension”, a temporary, involuntary separation of a person from his civil service employment by the appointing authority.

“Temporary employee”, a person who is employed in a civil service position, after a civil service appointment, for a specified period of time or for the duration of a temporary vacancy.

“Tenured employee”, a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2), a promotional appointment on a permanent basis.

“Title”, a descriptive name applied to a position or to a group of positions having similar duties and the same general level of responsibility.

“Veteran”, any person who:

(1) comes within the definition of a veteran appearing in the forty-third clause of [section seven of chapter four](#); or,

(2) comes within such definition except that instead of having performed “wartime service” as defined therein, he has been awarded the Congressional Medal of Honor or one of the following campaign badges: Second Nicaraguan Campaign, Yangtze Service, Navy Occupation Service, Army of Occupation or Medal for Humane Action; or,

(3) is a person eligible to receive the Congressional Medal of Honor or one of the campaign badges enumerated in clause (2) of this paragraph and who presents proof of such eligibility which is satisfactory to the administrator.

§ 1. Definitions, MA ST 31 § 1

A veteran shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

“Wartime service”, the same meaning as specified in the forty-third clause of [section seven of chapter four](#), or active service in the armed forces of the United States in any campaign for which an award was made of any of the campaign badges enumerated in the definition of “veteran” in this section.

Credits

Added by St.1978, c. 393, § 11. Amended by St.1979, c. 77, § 1; St.1979, c. 577, § 1; St.1981, c. 767, § 10; St.1985, c. 527, §§ 1, 2; St.1986, c. 557, § 41; [St.1991, c. 412, § 23](#); [St.1998, c. 161, §§ 234, 235](#); [St.2010, c. 239, §§ 20, 21, eff. Nov. 2, 2010](#).

[Notes of Decisions \(27\)](#)

M.G.L.A. 31 § 1, MA ST 31 § 1
[Current through Chapter 44 of the 2020 2nd Annual Session](#)

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§ 43. Hearings before commission, MA ST 31 § 43

Massachusetts General Laws Annotated

Part I. Administration of the Government (Ch. 1-182)
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Title IV. Civil Service, Retirements and Pensions (Ch. 31-32b)
--

Chapter 31. Civil Service (Refs & Annos)
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M.G.L.A. 31 § 43

§ 43. Hearings before commission

Currentness

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. Said hearing shall be commenced in not less than three nor more than ten days after filing of such appeal and shall be completed within thirty days after such filing unless, in either case, both parties shall otherwise agree in a writing filed with the commission, or unless the member or hearing officer determines, in his discretion, that a continuance is necessary or advisable. If the commission determines that such appeal has been previously resolved or litigated with respect to such person, in accordance with the provisions of [section eight of chapter one hundred and fifty E](#), or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal. If the decision of the appointing authority is based on a performance evaluation conducted in accordance with the provisions of [section six A](#) and all rights to appeal such evaluation pursuant to [section six C](#) have been exhausted or have expired, the substantive matter involved in the evaluation shall not be open to redetermination by the commission. Upon completion of the hearing, the member or hearing officer shall file forthwith a report of his findings with the commission. Within thirty days after the filing of such report, the commission shall render a written decision and send notice thereof to all parties concerned.

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. The commission may also modify any penalty imposed by the appointing authority.

Any hearing pursuant to this section shall be public if either party so requests in writing. The person who requested the hearing shall be allowed to answer, personally or by counsel, any of the charges which have been made against him.

The decision of the commission made pursuant to this section shall be subject to judicial review as provided in [section forty-four](#).

Saturdays, Sundays and legal holidays shall not be counted in the computation of any period of time specified in this section.

§ 43. Hearings before commission, MA ST 31 § 43

Credits

Added by St.1978, c. 393, § 11. Amended by St.1981, c. 767, § 20.

[Notes of Decisions \(62\)](#)

M.G.L.A. 31 § 43, MA ST 31 § 43
Current through Chapter 44 of the 2020 2nd Annual Session

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 15-13987-GAO

GERALD ALSTON,
Plaintiff,

v.

TOWN OF BROOKLINE, MASSACHUSETTS, BROOKLINE BOARD OF SELECTMEN,
BETSY DEWITT, KENNETH GOLDSTEIN, NANCY DALY, NEIL WISHINSKY,
BERNARD GREENE, BEN FRANCO, NANCY HELLER, SANDRA DEBOW, JOSLIN
MURPHY, each of them in his or her individual and official capacity, and LOCAL 950,
INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,
Defendants.OPINION AND ORDER

April 2, 2020

O'TOOLE, S.D.J.

This is a civil rights action brought by the plaintiff, Gerald Alston, a former firefighter for the Town of Brookline, asserting claims of racial discrimination and retaliation against the Town, various Town officials, and the firefighter's union. All defendants have moved for summary judgment in their favor. This Opinion and Order addresses the motions by the Town and the individual defendants. A separate Opinion and Order addresses the motion by the union.

I. Brief Factual Background

The record in this case is voluminous. The operative fourth amended complaint is the plaintiff's fifth iteration of his claims. Discovery has been extensive. The Town's motion is supported by over two hundred exhibits; Alston's opposition is supported by two dozen exhibits.

The following facts gleaned from the record are not subject to genuine dispute and are sufficient for present purposes:

Alston is an African American. He was employed by the Town as a firefighter beginning in 2002. In 2010 a white superior officer in the fire department left a message on Alston's telephone that referred to him using an ugly racial epithet. Alston was greatly upset by that message and demanded that the Town take disciplinary action against the employee who left the message. The Town suspended the offender for a brief period, but Alston was not satisfied. It is this incident, and Alston's vigorous disagreement with it, that hangs over this entire controversy.

In 2013 Alston brought suit against the Town in the Massachusetts Superior Court alleging racial discrimination and retaliation under the State's anti-discrimination statute, Massachusetts General Laws Chapter 151B, Section 4. The complaint summarized his grievance this way: "In short, complaining about being called a 'f***ing n****r' by a white superior has resulted in the [fire] [d]epartment, down to nearly every last officer, joining together to make life as miserable as possible for Mr. Alston." (App. to Town's Mot. for Summ. J., Ex. 3 at ¶ 19 (dkt. no. 367-3).) The case was eventually dismissed with prejudice in July 2014 as a sanction for Alston's failure to comply with discovery obligations.

After the telephone incident, in the summer and fall of 2010 Alston was out of work because of a back problem, and he was seen in a number of medical encounters as a result. Medical notes from that period indicate that Alston was very angry about the way he felt he was being treated by the Brookline fire department. He was seeing a social worker for anger and anxiety. After he returned to work, he had some difficulty with co-workers. On November 24, 2010, he became so emotionally agitated at his fire station that EMTs took him, apparently with his consent, to the emergency department at the Beth Israel Deaconess Medical Center for evaluation. He was deemed after examination by attending psychiatrists to be fit for discharge home, but it was recommended that he not immediately return to work. He attended outpatient counseling with a

clinical social worker to deal with his persistent feelings of anger at how he perceived he had been treated by the Brookline fire department. As a result of the November 24 episode, Alston began an outpatient treating relationship with a psychiatrist, Dr. Michael Kahn. (See generally id. Ex. 6 (dkt. no. 373-6) (under seal).)

Alston returned to work in late January 2011. Workplace tension may have eased for a while for Alston, but on December 19, 2013, he noticed that someone had written the word “Leave” in accumulated dust on the side of one of the fire trucks in the station. He understood that to have been directed at him, and he reacted angrily. He showed it to two other firefighters and made some remarks about shooting people and “going postal” that could reasonably have been understood as threats of violent reaction. As a result, Alston was placed on leave pending an investigation into the incident. The investigation included obtaining an evaluation of Alston’s “fitness for duty” by a psychiatrist retained by the department, Dr. Andrew Brown. After interviewing Alston and consulting with Dr. Kahn, Dr. Brown in substance recommended that Alston not be returned to duty until a stable plan for addressing his anger and potential for outbursts was put in place.

On May 14, 2014, fire department Chief Paul Ford wrote to Alston outlining the conditions suggested by Dr. Brown to be satisfied before Alston would be deemed fit for duty: (1) receiving ongoing psychiatric treatment, (2) permitting Brookline’s occupational health nurse to monitor treatment progress, (3) completing an anger management course, (4) passing a fitness for duty evaluation, and (5) submitting to random drug testing for twenty-four months.¹ (Id. Ex. 3 at 2 (dkt. no. 367-10).)

¹ Some medical records indicated that Alston had at least occasionally used marijuana and cocaine.

A second fitness for duty evaluation by Dr. Brown was scheduled in the fall of 2014, but Alston's lawyer objected to examination by Dr. Brown. At the lawyer's request, the Town arranged for Alston to be evaluated by a psychiatrist not affiliated with the Town. In February 2015, Dr. Marilyn Price, a psychiatrist practicing at the Massachusetts General Hospital, interviewed Alston and submitted a detailed written assessment in mid-March. Dr. Price concluded that Alston should be returned to duty only if there could be "workplace accommodations" that would relieve the stress he had felt about what he perceived as unfair treatment by department personnel. Her suggested conditions were similar to Dr. Brown's.

Time went by with no progress in getting Alston back to work. In a letter to Alston's attorney dated February 5, 2016, Brookline's Town Counsel noted that Alston had been on paid leave for almost a year, an arrangement made to encourage his cooperation with Dr. Price's evaluation. The letter proposed March 7, 2016, as a return-to-work date and scheduled a February 10, 2016, drug screening, one of Dr. Price's conditions. Neither Alston nor his counsel responded to the letter, and Alston did not appear for the drug screening. Alston's paid leave was subsequently terminated because the Town had conditioned it on his cooperation; he was instead placed on sick leave.

A subsequent second proposed return-to-work date (and related drug screen) was similarly ignored by Alston. On August 17, 2016, the Town Administrator wrote to Alston notifying him that his termination was contemplated and that a hearing would be held before an outside hearing officer on August 30, 2016. The reason given for Alston's contemplated discharge was his inability to show that he could perform the essential functions of his job as a firefighter without accommodations or with accommodations to which he would agree. (Id. Ex. 77 (dkt. no. 367-77).)

At the pre-termination hearing, Alston did not testify and his attorney did not submit exhibits other than an unsworn written statement that Alston read into the record. Town Counsel offered to suspend the hearing if Alston contended that he had the capacity to return to work, provided that he participate in a fitness for duty evaluation. Alston declined the offer. The hearing officer's final report recommended Alston's termination. On October 5, 2016, the Select Board considered the hearing officer's report at a meeting and voted to terminate Alston's employment. This suit was about ten months old when he was terminated.

II. Discussion

“Summary judgment is appropriate where ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.’” Audette v. Town of Plymouth, MA, 858 F.3d 13, 19 (1st Cir. 2017) (quoting Mulloy v. Acushnet Co., 460 F.3d 141, 145 (1st Cir. 2006)). Although the record is construed in a light most favorable to the non-moving party, the Court need not consider “conclusory allegations, improbable inferences, [or] unsupported speculation.” Mulloy, 460 F.3d at 145 (quotation omitted). Alston fails to cite competent, non-conclusory evidence in support of his objections to the defendants' cited factual evidence.²

² In February 2019, the Massachusetts Civil Service Commission (“CSC”) concluded that the Town did not have just cause to terminate Alston under the state civil service law. See Mass. Gen. Laws ch. 31, § 1. Alston argues that the CSC's findings and conclusions are binding on this Court, and his opposition to summary judgment relies heavily on the CSC decision. However, federal courts are not required to give deference to the findings of state administrative agencies unless they satisfy the necessary elements of issue preclusion: (1) the issues raised in the two actions are the same; (2) the issue was actually litigated in the earlier action; (3) the issue was resolved by a valid and binding final judgment; and (4) the determination of the issue was necessary to that judgment. See Jones v. City of Bos., 845 F.3d 28, 33 (1st Cir. 2016); Manganella v. Evanston Ins. Co., 700 F.3d 585, 591 (1st Cir. 2012). Here, the CSC decision does not require deference because it does not satisfy these requirements. Alston makes no developed argument to the contrary.

Count I of the Fourth Amended Complaint is asserted against the Town, its Board of Selectmen,³ Town Counsel, and Human Resources Director. It alleges that the Town had “a policy, practice, and custom of opposing racial equality, enforcing racial subordination, engaging in affirmative action and favoritism towards white residents and employees, and retaliating against persons who protest racial discrimination.” (Fourth Am. Compl. at ¶ 128 (dkt. no. 230).) In particular, “the Town Defendants sought through the execution of the policy to deter Plaintiff and others in Brookline from enjoying his First Amendment rights to freedom of speech and to petition the government for redress of grievances,” entitling him to recover damages under 42 U.S.C. §§ 1981⁴ and 1983. (*Id.* at ¶¶ 129–131.)

Count II is asserted against individual defendants Betsy DeWitt, Kenneth Goldstein, Neil Wishinsky, Nancy Daly, Sandra DeBow, and Joslin Murphy, all of whom are alleged to have “sought through the execution of the policy to deter the Plaintiff and others in Brookline from enjoying their First Amendment rights to freedom of speech and to petition the government for redress of grievances.” (*Id.* at ¶ 135.) The individual defendants are alleged therefore to have “violated 42 U.S.C. § 1981, § 1983, and § 1985 by retaliating against Plaintiffs [sic] for opposing the Town’s unconstitutional and racist policy” and “by discriminating against Plaintiff on the basis of race.” (*Id.* at ¶¶ 136–137.)

Alston’s factual claims appear to be that the Town and individual defendants took adverse employment action against him in retaliation for his persistent claims of official racial

³ The complaint refers to the “Board of Selectmen.” The official title used by the Town is “Select Board.”

⁴ The First Circuit has held that there is no private right of action against governmental defendants under § 1981. The sole remedy for claims against governmental actors for deprivation of civil rights is suit under § 1983. *Buntin v. City of Bos.*, 857 F.3d 69, 70–71 (1st Cir. 2017) (recognizing the continued validity of *Jett v. Dallas Indep. School Dist.*, 491 U.S. 701 (1989)).

discrimination against him and other minority persons. They are thus a mix of claims of employment discrimination and viewpoint discrimination. Since he and his lawyer were quite persistent about expressing Alston's point of view so that he was not "silenced," the present claims are best analyzed under the rubric of employment discrimination.

For claims under §§ 1981 and 1983, when employment discrimination is at issue, a court will analyze the claims using the standards applicable to suits brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Powell v. City of Pittsfield, 143 F. Supp. 2d 94, 114 (D. Mass. 2001) (citing T & S Serv. Assocs., Inc. v. Crenson, 666 F.2d 722, 724 n.2 (1st Cir. 1981)).

There is no direct evidence of racial discrimination here; Alston's claims are that the defendants, while ostensibly acting without discriminatory intent, were actually purposefully punishing him for his complaints about their racially discriminatory practices or omissions. His discrimination claims are thus properly analyzed under the familiar McDonnell Douglas burden-shifting framework. See Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 33 (1st Cir. 2001). Alston "must carry the initial burden . . . of establishing a prima facie case of racial discrimination." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The defendants then have the burden of articulating a legitimate, nondiscriminatory reason for any adverse employment action. Cherkaoui v. City of Quincy, 877 F.3d 14, 24 (1st Cir. 2017) (quotation omitted). If the defendants carry that burden the plaintiff must then show that the proffered reason is a pretext and that the true reason for their acts or omissions was discriminatory. See id. (quotation omitted).

Let it be assumed, as it often is, that Alston has satisfied the first step of the analysis and has established a prima facie case. The Town defendants and individual defendants, in turn, have

articulated legitimate non-discriminatory and non-retaliatory reasons for any adverse employment actions, and they have supported that showing by evidence not subject to genuine dispute.⁵

Alston was evaluated both by a psychiatrist chosen by the Town⁶ and, after his request for evaluation by a different doctor, an evaluation by a psychiatrist from the Massachusetts General Hospital was arranged. Both psychiatrists recommended essentially the same return-to-work conditions for Alston, and it is undisputed that Alston never complied with those conditions. Nor did he provide any conflicting opinion from another psychiatrist. The Town allowed Alston an extended time on paid leave to entice his cooperation with a psychiatric evaluation. The paid leave was ended only after Alston's continued refusals to cooperate with the return-to-work process, and his ultimate termination was only sought after months of his (and his lawyer's) refusals to comply with conditions for return to work suggested by both examining psychiatrists. The Town also afforded Alston a hearing on his proposed termination before a third-party hearing officer, who recommended his termination.

Against this, Alston has not produced evidence that would raise a triable dispute. His arguments are long on rhetoric but devoid of record evidentiary support. He has not presented

⁵ A brief aside about Alston's prior state court suit is necessary. He commenced his Superior Court suit in June 2013, and it was dismissed with prejudice a little over a year later. His claims of discrimination and retaliation in that case were rooted in his dissatisfaction with the Town's response to the incident in 2010 in which a superior officer referred to him by using an offensive epithet. This Court previously ruled that Alston was foreclosed from asserting in this case claims that were or were available to be asserted in the prior case. That ruling applied to any claim that was available to be asserted prior to July 8, 2014, the date of the dismissal of the state case with prejudice. The "Leave" incident that led to his being suspended occurred in December 2013, while the state action was pending, and it was available to him to assert any claim arising from that incident in that suit. But even if the claim-splitting foreclosure ruling had not been made or was erroneous, there is no basis in the events between late December 2013 and mid-July 2014 for a conclusion other than the one discussed in the text for the reasons discussed therein.

⁶ For purposes of this discussion, the term "Town" serves as a proxy for all the defendants except the union.

evidence on the basis of which a trier of fact could conclude that the reasons asserted by the Town were a pretextual excuse for an actually discriminatory intent and action.

Nor has Alston pointed to admissible evidence that would support a factfinder's conclusion that the Town was punishing him in retaliation for his expressions of criticism. To the contrary, the record reflects that he repeatedly declined to attend meetings he was invited to or present evidence of his own about his ability to return to work on the conditions recommended by the psychiatrists. Even in the middle of his termination hearing, the Town offered to consider his return to work if he was willing to abide by the recommended conditions, but *he* declined.

III. Conclusion

For the foregoing reasons, the motions of the Town and Town defendants (dkt. no. 365) and of the individual defendants (dkt. no. 363) are both GRANTED. Judgment shall be entered in their favor.

It is SO ORDERED.

/s/ George A. O'Toole, Jr.
Senior United States District Judge

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

NO. 2020-P-0105

TOWN OF BROOKLINE,
Appellant

v.

GERALD ALSTON and MASSACHUSETTS
CIVIL SERVICE COMMISSION,
Appellees

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT

BRIEF FOR APPELLEE GERALD ALSTON

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OTHER REFERENCES

*Webster's Third New International Dictionary
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STATEMENT OF THE ISSUES

1. Whether the Civil Service Commission violated stare decisis by taking racial discrimination into account in its decision to reinstate Gerald Alston to the Brookline fire department?

2. Whether the Civil Service Commission acted within its statutory authority by taking racial discrimination into account in determining Brookline lacked just cause to terminate Gerald Alston from the Brookline fire department?

3. Whether claim preclusion barred the Civil Service Commission from considering Gerald Alston's appeal of his termination from the Brookline fire department?

4. Whether the Civil Service Commission committed reversible legal error by:

(a) ruling as a matter of law that a civil service employer does not have just cause to terminate a tenured employee for being unable to return to work when that inability is caused by the employer's own violation of the employee's civil service rights, and

(b) ordering Brookline to return Gerald Alston to his position without loss of compensation or

other rights notwithstanding its determination that Brookline had made the workplace intolerable for him?

5. Whether substantial evidence supported the Civil Service Commission's determination that Brookline, through misconduct prohibited by the civil service law, prevented Gerald Alston from returning to duty by making the workplace intolerable for him?

STATEMENT OF THE CASE

In October 2016, after Brookline terminated Alston, he appealed to the Civil Service Commission (Commission). (RA 1:39-40). The Commission denied his appeal in a summary decision, declining to address the issue of racial discrimination. (RA 1:518-542). Alston appealed to the superior court, which vacated the Commission's decision and remanded the case to the Commission for an evidentiary hearing to determine, among other things, whether Brookline had violated Alston's right to fair treatment without regard to race. (RA 2:3-22).

In February 2019, on remand, and after a ten-day hearing in which 14 witnesses testified and 280 exhibits were admitted, the Commission determined that Brookline had acted in bad faith and had violated Alston's right to fair treatment without regard to

race by terminating him. (RA 4:284-5:46). The Commission ordered Alston reinstated to his position without loss of compensation. (Id.) Brookline filed a motion to stay Alston's reinstatement, which the superior court denied. Brookline declined to appeal the denial of the stay, but appealed the Commission's underlying decision to the superior court. The superior court denied Brookline's appeal, and this appeal followed. (RA 22:197-211).

STATEMENT OF THE FACTS

Firefighter Alston, an African-American man, was born in 1968 in Boston. He has four children. (RA 4:286-287).¹ Alston attended Natick High School as part of METCO, the voluntary desegregation program. (RA 4:287). He was an active participant in school activities, and formed lifelong bonds with several of his classmates. (Id.)

Following a tradition of public service in his family Alston, became a Brookline firefighter in

¹ The 22 volume record appendix filed by Brookline does not include a detailed listing of the documents contained within it, with reference to the pages of the appendix at which each begins. See Mass. R.A.P. 18(a)(1)(A)(ii). This omission made it difficult to identify certain exhibits and witness testimony cited in the Commission's decision.

August 2002 and served on a full duty basis for 11 years. (RA 4:286-287). Alston was regarded as a very good firefighter within the department. (RA 4:287; 20:7).

During the spring of 2010, Alston suffered an on-duty injury (a fractured tailbone) that put him out of work temporarily. (RA 4:287). On May 30, 2010, his lieutenant, Paul Pender, left a voicemail message on Alston's cell phone that concluded with the phrase, "fucking nigger." (RA 4:289). Alston was shocked and hurt by the racist comment. (RA 4:290; 9:123).

Brookline's psychiatrist, Dr. Marilyn Price, concluded that "hearing a racial slur from a Lieutenant he trusted was especially troubling to Firefighter Alston because it called into question how he was really perceived by his fellow firefighters and raised concern about whether others would have his back in dangerous situations." (RA 5:7; 10:473-474). She opined "that Firefighter Alston developed psychological symptoms in response to hearing the racial slur from his Lieutenant ...". (Id.) In an internal memo, Brookline acknowledged that Pender's racial slur had damaged Alston's trust in Pender and the department. (RA 9:18-19). The memo underscored

that firefighters must maintain trust and confidence in each other to perform the life threatening duties of their jobs. (Id.).

When Pender first spoke to Alston after leaving the racist message, he added insult to injury by claiming the message was intended for "some young black gangbanger." (RA 4:291; 5:40; 9:13). He attacked his subordinate's decision to report the racist comment, telling Alston words to the effect that it was "the stupidest thing [Alston] had ever done." (Id.) Pender asked Alston, "do you want me to lose my job?" (Id.)

Brookline did not act on Alston's report of the racist comment for four to five weeks and did not treat Pender's subsequent verbal attack on Alston as retaliation. (RA 4:291-294; 5:36). In her first communication with Alston about the matter, Brookline's HR director, Sandra DeBow, engaged in a heated and profane exchange with Alston concerning the town's investigation. (RA 4:293; 22:77).

Brookline did not conduct a bona fide disciplinary hearing in front of the select board, the fire department's appointing authority, regarding Pender's conduct. (RA 5:37). At Pender's August 17,

2010 hearing, town officials did not call Alston as a witness, and instead engaged in an informal discussion with Pender and his attorney.² (RA 4:294; 5:37; 8:96-130). A member of the board commented that Alston had saved Pender by not going public with the incident. (RA 8:122). The board rejected the fire chief's recommendation for a relatively short-term suspension of four tours of duty. (RA 4:294; 5:37; 8:96-97).

The failure to issue discipline commensurate with the seriousness of the offense caused Alston to question if the board understood the impact the racist comments had on him and his family. (RA 5:37). Alston's only input on Pender's discipline was to tell the fire chief, Peter Skerry, that he did not want Pender to be terminated after Chief Skerry told him Pender had committed a fireable offense. (RA 4:292; 5:37; 20:18).

Although Brookline ordered Pender to engage in mediation with Alston, Pender remained angry, stating during the mediation that Alston was trying to take his job. (RA 4:294; 18:82). On August 27, 2010, the day after the mediation, Chief Skerry issued a special

² Pender was represented by a former chair of the select board. (RA 20:24, 63).

order stating that Pender had committed "conduct prejudicial to good order," and suspended him for two tours between August 30, 2010 and September 6, 2010, resulting in a loss of 42 hours of pay. (RA 4:295). Brookline would later place 42 hours in Pender's vacation bank pursuant to a settlement agreement.³ (Id.)

On September 10, 2010, less than two weeks after the effective date of Pender's suspension for making the racist comment, Brookline promoted Pender to temporary fire captain. (RA 4:295). Alston was shocked by the promotion, as was the Commission. (Id.) Chief Skerry had assured Alston that Pender would be ineligible for promotion as a result of his conduct. (RA: 4:292; 8:78; 18:81-82).

Prior to Alston's return to work in mid-September 2010, Chief Skerry conducted a meeting with the fire department's officers to address backlash against Alston for reporting Pender's slur. (RA 4:295; 20:20). He reminded the officers that Brookline had zero tolerance for discrimination and retaliation. (Id.) A

³ The hearing officer was unable to substantiate Brookline's contention that it restored Pender's 42 hours of pay in connection with longstanding issues related to vacation accrual. (RA 4:294).

week after the meeting, Pender was given a medal at the White House for his heroism in a 2008 fire. (Id.)

On September 23, 2010, two days after Alston returned to work, his fellow firefighter Joseph Canney posted a derogatory message on the fire Union's blog referring to Alston as a "FACELESS COWARD" and accusing him of making personal and meritless attacks against a brother firefighter. (RA 4:296). Although Alston reported the blog post to Chief Skerry, Brookline did not investigate whether it constituted retaliation. (RA 8:276).

In October 2010, after Alston told Chief Skerry he felt let down by Brookline's short suspension and subsequent promotion of Pender, Chief Skerry wrote Alston a letter recommending that he seek mental health counseling. (RA 4:297; 8:64). The same month, Chief Skerry informed his deputy chiefs that Pender was not to supervise Alston under any circumstances. (RA 4:296; 8:134). On October 14, 2010, Alston began seeing a counselor who documented that Alston was extremely upset by the response of his supervisors and colleagues to Pender's voicemail. (RA 4:297; 9:501-508).

Between October 2010 and January 2011, Alston was intermittently excused from work for multiple days at a time for evaluation and treatment for workplace stress. (RA 4:298-300; 8:148-151; 9:500). He struggled with whether to resign or continue to work while trying to cope with being singled out on the job for reporting Pender. (RA 4:300).

In February 2011, Pender again verbally attacked Alston for reporting his racist slur, telling Alston, "you destroyed my life and ruined my career" (RA 4:301-302; 6:206-207; 19:178) Instead of recognizing his conduct could be construed as retaliatory, Pender documented his exchange with Alston in a transcript-like summary. (Id.) Six days later, Alston reported being very depressed and anxious to his treatment provider. (RA 4:303).

In early 2012, following Chief Skerry's retirement, his successor Paul Ford met with Alston to determine whether Pender could resume supervising Alston. (RA 4:304; 8:165; 9:115). Alston reported he wanted to move on from the 2010 incident, but that Pender refused to even shake his hand. (Id.). In the same time period, Alston reported to his treatment

provider being intensely distressed by shunning from other firefighters. (RA 4:305).

In May and November 2012 complaints to the MCAD, Alston memorialized the discrimination and retaliation against him.⁴ (RA 4:305-306; 9:115, 136-141). In response to the November complaint, HR Director DeBow informed the Union president that Alston was accusing his fellow-firefighters of retaliation. (RA 4:306; 8:162).

In January 2013, based on Alston's reports that he did not feel safe, Alston's supervising lieutenant requested the department's permission to assign Alston to work directly under his supervision at street level to ensure his safety. (RA 4:307; 6:337). Brookline rejected the request. (RA 4:307; 6:263-266). Later in the year, Alston's supervising lieutenant reported to HR that he safety concerns about Alston. (RA 4:310).

On May 7, 2013, Brookline's select board permanently promoted Pender to captain. (RA 22:87, 94-96, 108). The promotion was another sign to Alston that Brookline did not take racism seriously. (RA

⁴ Alston later removed these complaints to the Norfolk Superior Court, where they were dismissed on procedural grounds and without addressing the merits. (RA 4:309, 320).

5:38). After being promoted, Pender used his position as captain of training to tell his "side of the story" regarding the voicemail incident to *all new recruits*, telling them that what they read in the local paper about this matter was "a bunch of lies." (RA 4:310-311; 5:42; 6:208). Pender recounted talking to five new recruits from Fall River, "who were all minorities." Pender stated, "they were pretty shocked that it had turned into, you know ... that something so benign is going on seven and half years later ..." (RA 4:309; 5:42; 6:185).

Both at the time of the voicemail incident, and years later, Pender and other engaged in retaliation towards Alston that lead him to reasonably question whether he could ever return to the department. (RA 5:39). Pender repeatedly made comments suggesting that his racist comment was overblown and, in turn, that Alston had overreacted to the racist comment. (RA 5:42). Over a period of years, Pender would reinforce that message to every new recruit of the Brookline fire department. Pender was effectively telling every new recruit that if and when a supervisor is heard making a racist comment, it should be considered benign, it should not be reported, and it should be

settled in-house with a handshake. (RA 5:42-43). By labeling reports of the incident as "a bunch of lies," Pender was leaving the impression with every new recruit that Alston was a liar who could not be trusted. (RA 4:310-311; 5:42; 6:208).

Alston was shunned by fellow firefighters when assigned to other stations, including firefighters excluding him from dinner or leaving the room when he entered to eat breakfast. (RA 4:311-312; 5:42-43; 9:315-328). He was no longer invited to sing the national anthem at firefighter-sponsored events, something he had had been proud and privileged to do for many years prior to reporting the comment to Brookline officials. (Id.)

In late August 2013, the local paper published a story detailing Alston's allegations of discrimination. A couple of months later, just prior to a training session, Pender once again verbally attacked Alston, this time for filing a lawsuit that, according to Pender, "was full of lies." (RA 19:184). Pender discounted his use of the racist comment years earlier, chalking it up to "road rage" and "a side effect of PTSD." (RA 4:310-311; 19:162). The same day, Alston felt the need to reach out to his treating

psychiatrist with regards to workplace stress. (RA 4:311; 5:41).

In November 2013, Pender submitted the summaries he had prepared of his February 2011 and October 2013 conversations with Alston to HR Director DeBow, stating words to the effect, "Here is the kind of people you are dealing with." (RA 4:311; 6:176-177). In early December 2013, Brookline received sworn interrogatory answers from Alston naming Pender as one of the firefighters who had retaliated against him for reporting his racial slur. (RA 4:312; 9:315-328).⁵

On December 19, 2013, after telling a lieutenant he planned to put in for a transfer to another station, Alston found the word "Leave" written on the door to his seat on the fire engine. (RA 4:311-312). Alston photographed the message and informed the officer at the watch desk, Lt. Patrick Canney, about the writing. (Id.) Alston asked firefighter Ryan Monahan and another firefighter on the floor, Probationary Firefighter Cormac Dowling, to come over and see the writing. Both Monahan and Dowling saw the

⁵ The Commission determined Pender's continued retaliation against Alston was a firing offense. (RA 4:40-41).

word "Leave" written on the door to Alston's seat.

(Id.)

Three days later, during Alston's next shift, Chief Ford interviewed him about allegations that had surfaced in the morning to the effect that Alston had made threatening statements in response to finding the "Leave" message. (RA 4:314; 21:39). Alston denied making threatening remarks, but conceded that he had told firefighters in his station words to effect of, "people go postal over matters like this" in reference to the "Leave" message and his treatment since the Pender voicemail. (RA 4:314; 18:93). Chief Ford told Alston to go home (with pay) and report to his office the next afternoon. (RA 4:314; 6:245; 18:95; 21:39-40).

At a meeting of top Brookline officials, including HR Director DeBow and the town counsel, the next morning, Chief Ford indicated that Alston was not a threat and opposed a recommendation that a stay away order issue against him. (RA 6:359). Chief Ford met with Alston later in the afternoon, and Alston agreed to be evaluated by Brookline's psychiatrist, Dr. Andrew Brown. (Id.) Since Alston returned to work in 2010, his treatment providers had been regularly

documenting the negative impact the work environment was having on his mental health. (RA 297-300, 302-303, 305-307, 309, 311).

On December 27, 2013, eight days after Alston reported the "Leave" message, Chief Ford, at the direction of his superiors, relayed to Alston that he was not to be on the town's property pending Dr. Brown's evaluation. (RA 4:315; 18:95-96; 21:45). After the order issued, Brookline circulated a flyer to its police officers. (RA 4:315, 6:352-353). The flyer included a color photograph of Alston and the type of car he drove and listed his name, address, date of birth, and height. (RA 8:290). The flyer claimed Alston had made statements referring to "going postal," obtaining a firearm and returning to a firehouse to cause harm. (Id.) It scared Alston to think that the flyer might have been circulating while he was unknowingly driving his daughter through Brookline on her way back from school in Needham. (RA 18:96-97).

On January 6, 2014, Dr. Brown met with Alston at fire headquarters in Brookline and evaluated him. (RA 4:315; 6:356). The same day, Dr. Brown told Chief Ford

and HR Director DeBow that Alston did not pose any threat to himself or others. (Id.).

In February 2014, HR Director DeBow and department leaders spoke with Dr. Brown again. Based on what he heard from those officials about Alston, Dr. Brown opined that "high levels of paranoia exist." (RA 4:317). Brookline had settled on a subtle, ongoing narrative in which Alston's concerns about being shunned and ostracized were a figment of his imagination. (RA 5:80). The evidence did not support Brookline's suggestion that Alston was suffering from paranoia. (Id.)

At a May 2014 meeting with Chief Ford, HR Director DeBow, and town counsel, Brookline suspended Alston for two days for violating its workplace safety policy and removed him from administrative leave. (RA 4:319; 21:186; 10:256-257). In a related investigatory report, HR Director DeBow, implausibly suggested that the "Leave" writing could have been left by a member of an MIT fraternity, causing Alston to question whether Brookline was seeking to find an acceptable, alternative explanation to what appeared to be a clear message that Alston was not welcome in the Brookline fire department. (RA 4:318, 5:41; 20:45; 10:232).

At the meeting, Alston was directed to complete an anger management class, execute a release for his medical records, and see a psychiatrist.⁶ (RA 4:319-320; 10:253-255). His request to transfer to another station was deferred. (Id.) Alston completed the anger management course a few months later, executed the medical release, and continued counseling sessions with the psychiatrist he had begun seeing after his return to work in 2010. (RA 4:320; 18:99).

When asked at the hearing why Alston was not returned to work, Chief Ford testified it was only because he did not have doctor that would certify his fitness. (RA 21:65). Chief Ford testified Alston had done nothing wrong.⁷ (Id.)

⁶ The letter memorializing these requirements stated: "*Upon your return to work, undergo random urine drug testing for a period of 24 months or longer as recommended by your treatment providers.*" (RA 9:254) (emphasis added). The department's regulations prohibited being "intoxicated or under the influence of liquor or drugs while on duty or in uniform," but Brookline not require random-drug testing other than as part of a negotiated rehabilitation agreement. Brookline did not present evidence of discipline for off-duty drug use, although the department's chief operating officer was aware a former officer had used illicit drugs off-duty. (RA 20:6).

⁷ Given innuendo in Brookline's brief to the effect that it terminated Alston because of safety concerns relating to substance use, it is worth noting that Brookline did not terminate a white firefighter who

In October 2014, sixteen days after HR Director DeBow learned from Alston's psychiatrist that Alston "had a decline ... did not refill medication..." and was "in desperate financial straits...living out of his car...", Brookline notified Alston that he was effectively being removed from the town's payroll as he had exhausted all of his available leave. (RA 4:320-321; 5:43-44; 10:291-292).

In December 2014, after Alston sought relief from the select board, the board's chair responded in a letter, stating in part, "We are also informed that the supervisor who uttered those words to you and was formally disciplined for the incident offered his apology to you, *and has since repeatedly expressed remorse and regret for his conduct.*" (RA 5:41; 10:351-352). This narrative, which was not consistent with what actually occurred, was now enshrined as Brookline's official version of events. (RA 5:44). Rather than "repeatedly expressing remorse and

was arrested twice for driving under the influence of alcohol, notwithstanding an outside hearing officer's finding of just cause for his termination based in part on G.L. c. 31, § 50, which provides, "No person habitually using intoxicating liquors to excess shall be appointed to or employed or retained in any civil service position...." (RA 7:449-467).

regret," as claimed by Brookline, Pender had repeatedly subjected Alston to verbal attacks for reporting the matter to town officials and "ruining his career" over making "benign" comments that, according to Pender, were likely attributable to PTSD and should have been settled with a handshake. (RA 5:21-22; 5:44; 6:209-212).⁸

On February 12, 2015, in exchange for being placed back on administrative leave, Alston sat for a fitness for duty examination with Dr. Price. (RA 5:4-5; 10:379). Brookline did not inform Dr. Price that there had been ongoing retaliation against Alston. Dr. Price was not aware that Pender had documented his 2011 and 2013 verbal attacks on Alston and had provided the documentation to HR Director DeBow. (RA 5:6; 21:146). Nor was Dr. Price aware that Alston's lieutenant had asked that Alston be assigned to ride with him based on safety concerns. (RA 21:149). Dr. Price did not know that Pender had been leading new recruits to believe that Alston had overreacted to the 2010 voicemail and was not to be trusted. (RA 5:6).

⁸ The Commission found no evidence to support Pender's claim that his conduct was attributable to PTSD. (RA 5:32).

Dr. Price concluded that Alston could return to work if a plan could be arranged to modify the work environment so that he felt safe to return and if he committed to appropriate treatment. (RA 5:8; 10:427).

Alston and Brookline were unable to agree on a return to work plan and reached an impasse over Alston's request to be heard by the select board.⁹ (RA 11:44-45). At one point, Alston wrote the board's chair that he would comply with conditions but the town was not making changes necessary to ensure his safety. (RA 5:12-13; 11:40-41). The select board did not schedule a meeting with Alston. (RA 6:487). In a February 2016 closed-door session to which Alston was not invited, the board terminated his administrative leave. (RA 5:16-17; 6:366). In late May 2016, after his accrued leave credits were exhausted, Brookline again removed Alston from the payroll. (RA 5:19; 11:271).

A number of additional events following Dr. Price's evaluation supported Alston's reasonable fear that he would not be supported by his fellow

⁹ The Union did not participate in any return to work meetings, which Chief Ford contrasted to his experience in other cases where a firefighter was in jeopardy of losing their job. (RA 5:11; 21:68).

firefighters upon returning to work.¹⁰ (RA 18:91-92). In March 2015, the Union voted to remove Alston from the Union for not paying dues, even after he had come back on the payroll and was, in fact, a dues-paying member. (RA 5:5; 8:223). In an email recounting the Union's action, HR Director DeBow told Select Board member Nancy Daly, "[w]e have a lot of work to do in preparing the workplace for [Alston's] return, if it occurs." (Id.) In December 2015, firefighter Joseph Canney, who had previously attacked Alston on the Union blog in 2010, wrote HR Director DeBow, in an email he copied to the Union president, "Despite the fact that Mr. Alston threatened to shoot his co-workers, he continued to be payed (sic) for longer than most can even remember." (RA 5:15; 8:228).

In July 2016, Brookline elevated Pender to temporary deputy fire chief. (RA 5:25-26, 38). At the point of this promotion, Brookline had information showing that--in addition to making the racist

¹⁰ In June 2015, the town's counsel acknowledged "Mr. Alston's concern about returning to work in an environment that might be hostile to him, and his view that this concern is supported by the fact that the promised racial climate review of the Town's workforce has not yet been completed." (RA 11:42).

comment--Pender had, on multiple occasions, verbally attacked Alston for reporting the incident and repeatedly minimized his conduct to fellow firefighters, including all new recruits. (RA 5:39). Brookline had never taken any action against Pender for attacking Alston's decision to report him, and had never acknowledged that Pender's conduct towards Alston was retaliatory. (Id.)

Brookline used the process of promoting Pender to temporary deputy chief to orchestrate a public rebuke of Alston condoned and sometimes led by town officials that served as a final message to Alston that he was not welcome in the fire department. (RA 5:38) At public meetings to discuss Pender's promotion, town officials and employees repeatedly referenced the remorse and apologies of Pender and appeared to explicitly call out Alston for his inability to "move on." (RA 5:24-25).

Select Board member Ben Franco stated, "Brookline needs to move on and cease debating past rights and wrongs. A better future is not possible if we remain trapped in conversations about *perceived* past misdeed or mistakes." (RA 5:25-26; 8:410). Select Board member Bernard Greene stated, "the use of a racist slur, six

years ago, *without more*, cannot be justification to permanently preclude" Pender from being promoted.

(Id.). Select Board member Nancy Daly stated, "We have heard from *almost every minority of the department with the exception of Gerald Alston . . .*" stating their support for Pender. (Id.). Members of the department spoke about the "narrative fabricated," with Brookline's Deputy Fire Chief stating that "we should have all moved on" and lamenting the "smear campaign" against Brookline. (RA 5:24; 11:275-278). 108). The collective message from the select board and the fire department was clear: Gerald Alston stood alone. (RA 5:39).

On October 5, 2016, three months after Pender's promotion, the select board voted to terminate Alston for failing to demonstrate his ability to return to work. (RA 5:28). In a final blow, Brookline lobbied the *Boston Globe* to include pejorative information about Alston in a story about the termination. (RA 5:28; 22:6-8; 6:491).

ARGUMENT

I. THE COMMISSION DID NOT VIOLATE STARE DECISIS BY TAKING RACIAL DISCRIMINATION INTO ACCOUNT IN ITS DECISION TO REINSTATE ALSTON.

Brookline incorrectly argues that stare decisis prohibited the Commission from taking racial discrimination into account in determining whether Brookline had just cause to terminate Alston. According to Brookline, the Commission followed stare decisis in its summary decision and violated it in its decision on remand. Although Brookline does not provide a definition, stare decisis has been defined as, "A doctrine or policy of following rules or principles laid down in previous judicial decisions, unless they contravene the ordinary principles of justice." *Webster's Third New International Dictionary of the English Language, Unabridged*, Philip Babcock Gove, Editor in Chief, Merriam Webster, 1981; Windust v. Dep't of Labor & Indus., 52 Wash.2d 33, 35-36 (1958).

By definition, stare decisis applies to *judicial decisions*. It does not prohibit an *administrative agency* like the Commission from reconsidering its precedents. Nor does it prohibit a court, such as the lower court in this case, from reversing an

administrative agency's construction of its own statute. See Cleary v. Cardullo's, Inc., 347 Mass. 337, 343-344 (1964) ("the duty of statutory interpretation rests in the courts"); Kszepka's Case, 408 Mass. 843, 847 (1990) ("An incorrect interpretation of a statute [by an administrative agency]... is not entitled to deference.") But even if stare decisis applied to administrative decisions, it would not help Brookline in this case because the Commission's remand decision did not violate any settled Commission precedents.

Before hearing Alston's appeal, the Commission took up a Canton firefighter's claim that she had been subjected to a hostile work environment on the basis of her gender. See Vinard v. Town of Canton, 29 MCSR 399 (2016). The Commission not only asserted jurisdiction over the claim, it explicitly rejected Canton's argument that G.L. c. 151B provided the exclusive remedy for discrimination claims, stating:

Canton erroneously argues that Ms. Vinard's assertion of a Chapter 151B claim of gender discrimination provides her the exclusive remedy for such violations and divests the Commission of jurisdiction to adjudicate such claims, as the Commission has concurrent authority to address such matters as violations of "basic merit

principles" of civil service law. See, G.L. c. 31, § 1.

Id. After a full hearing, the Commission ruled that there was insufficient evidence of a hostile work environment based on gender to justify reversing Vinard's termination and reinstating her to duty. The only thing distinguishing the Commission's decision in Alston's case was the quantum of evidence supporting a hostile work environment.

In Massachusetts Association of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264 (2001), the Supreme Judicial Court upheld the Commission's determination that white police officers had been improperly bypassed for the purpose of promoting African-American officers. In upholding the Commission's determination, Abban cited the Legislature's decision, in G.L. c. 31, § 1(e), St. 1981, c. 767, § 11, to prohibit unfair considerations of race in personnel decisions.

Even before the 1981 amendment to G.L. c. 31 explicitly mentioned race, the Commission had taken up claims of racial discrimination in civil service appeals. In 1979 an unsuccessful black applicant to the Salem police department pursued racial

discrimination complaints in both the MCAD and the Commission. See Salem v. Massachusetts Comm'n Against Discrimination, 404 Mass. 170, 172 (1989). The Commission concluded after a full hearing that "the appointing authority's reasons for bypassing...[Brown] were sound and sufficient and *were not discriminatory* but were job-related." Id. (emphasis added).

The Supreme Judicial Court later cited Salem for the proposition that a civil service employee could elect to pursue remedies for discrimination in the MCAD as well as the Commission. See Fernandes v. Attleboro Housing Authority, 470 Mass. 117, 124 (2014). The Supreme Judicial Court did not suggest in Abban, Salem, or Fernandes that the Commission lacked jurisdiction to adjudicate whether a personnel decision was discriminatory on the basis of race. Cf. Rental Property Mgmt. Servs. v. Hatcher, 479 Mass. 542, 547 (2018) (holding the courts have an obligation to resolve issues of subject matter jurisdiction regardless of whether they are raised by the parties).

More recently, in a Rule 1:28 decision, the Appeals Court determined the Commission even had an affirmative duty to adjudicate a civil service employee's discrimination and retaliation claims. See

Ogaldez v. Department of Correction, 94 Mass. App. Ct. 1116 (2019) (locating the Commission's duty to adjudicate discrimination in G.L. c. 31, § 43 and § 1).

In summary, a long line of precedent supports the Commission's decision to assert jurisdiction over discrimination claims, including racial discrimination claims. Under principles of stare decision, therefore, the Commission's precedent should be followed unless doing so would "contravene the ordinary principles of justice." Although Brookline has suggested the Commission's decision to reinstate Alston does it an injustice, the lower court had the better of the argument when it ruled, "the status of a firefighter on leave with pay is not unfair to a Town that violates 'just cause' and 'basic merit principles' requirements. It treats fairly an employee who is a victim of racial bias in violation of the civil service laws." (RA 22:211).

II. THE COMMISSION ACTED WITHIN ITS STATUTORY AUTHORITY BY TAKING RACIAL DISCRIMINATION INTO ACCOUNT IN DETERMINING THAT BROOKLINE LACKED JUST CAUSE TO TERMINATE ALSTON.

Brookline argues that G.L. c. 151B barred the Commission from taking racial discrimination into

account in determining whether Brookline had just cause to terminate Alston. As explained by the lower court, however, this construction of G.L. c. 151B would effectively repeal G.L. c. 31, § 1(e), which expressly grants the Commission the authority to address race. (RA 22:209). The lower court determined that the two statutes were not actually in conflict because the Commission was empowered by the Legislature to enforce civil service law and not the specific provisions of c. 151B.¹¹ (Id.) (citing George v. National Water Main Cleaning Company, 477 Mass. 371, 378 (2017) (holding courts faced with statutes covering the same subject matter should not mechanically repeal the earlier or more specific statute but “endeavor to harmonize the two statutes so that the policies underlying both may be honored.”))

Brookline nonetheless argues that the holding of Charland v. Muzi Motors, Inc., 417 Mass. 580 (1994) deprives the Commission of jurisdiction to hear Alston’s termination appeal. In Charland, the Supreme

¹¹ The Commission articulated its jurisdiction in modest terms: it confined itself to taking into account discrimination implicating its statutory mandate under c. 31, § 1 and declined to make determinations under c. 151B. (RA 5:31-32).

Judicial Court held that before an employee pursues discrimination claims under the equal rights act in court, they must first file with the MCAD. Charland reasoned that it was unlikely the Legislature had intended, in enacting the equal rights act, "to create a parallel and competing alternative to dealing with the problem of employment discrimination in the Commonwealth." In this case by contrast, the Legislature did not create a new and competing alternative to dealing with the problem of employment discrimination when it amended the civil service statute in 1981 to add § 1(e). It was refining a statutory scheme that predated the MCAD and that had long provided civil servants a remedy against discrimination in the civil service workplace. See Town of Falmouth v. Civil Service Commission, 447 Mass. 814, 822 n.10 (2006) ("The history of civil service in Massachusetts can be traced to just after the landmark Pendleton Act, passed by Congress in 1883.")

Moreover, unlike the equal rights act, the civil service statute provides an administrative rather than a judicial remedy. As stated in Charland, the purpose of c. 151B's scheme is to ensure "the election to

pursue a claim of discrimination *in court* applies only after the first step of filing with the MCAD.” *Id.* (emphasis added). Because Alston pursued his claim *administratively* in the Commission, the statutory scheme is not frustrated.

III. ALSTON’S APPEAL TO THE COMMISSION WAS NOT BARRED BY CLAIM PRECLUSION.

Brookline argues that a Norfolk superior court’s 2014 decision to dismiss, on procedural grounds, claims Alston had removed from the MCAD, precluded Alston from appealing his termination to the Commission in 2016. The argument is meritless. As the lower court explained, Alston could not have challenged his 2016 termination in the earlier action because it had not yet occurred. (RA 22:209).

The lower court correctly stated that because the superior court action did not determine any facts, it had no issue-preclusive effect. (*Id.*) (citing Heacock v. Heacock, 402 Mass. 21, 23 n.2 (1988)). Therefore, the Commission was within its authority to consider evidence of all the circumstances, including those prior to 2014, in determining whether Brookline had just cause to terminate Alston in 2016.

As the lower court explained, Brookline's approach would compel the Commission to uphold the termination of an employee for failure to fit in to a workplace in which racial hostility had played out over many years. (RA 22:209-210). The lower court correctly concluded that in resolving a timely termination appeal, "the Commission need not consider only the last straw." (Id.)

IV. THE COMMISSION CORRECTLY APPLIED CIVIL SERVICE LAW TO THE FACTS OF THE CASE.

A. The Commission Correctly Determined that a Civil Service Employer Cannot Justly Terminate an Employee whose Inability to Return to Work is Caused by the Employer's Violation of the Employee's Rights.

Brookline complains that the Commission committed reversible legal error by applying this rule in Alston's case:

When a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, as here, the Town cannot use that inability to work as just cause for discharging the employee from his tenured position.

According to Brookline, the opposite is true: when a municipality's own violation of a tenured employee's rights has prevented the employee from returning to work, the municipality has the *right* to use that

inability to work as just cause for discharging the employee from his tenured position.¹²

In support of this bloodless proposition, Brookline cites a string of civil service cases upholding the terminations of employees who were unable to return to work after suffering injuries on the job. In none of the cited cases, however, did the municipality's own violation of basic merit principles cause the employee to be unable to return to work. In this case by contrast, the Commission found that Brookline's violation of merit principles, particularly its unfair treatment of race, prevented Alston from returning to work.

The language and purpose of the civil service statute, not to mention basic principles of justice, provide firm ground for the rule applied by the Commission. See, e.g. Sullivan v. Brookline, 435 Mass. 353, 360 (2001) ("A fundamental tenet of statutory interpretation is that statutory language should be given effect consistent with its plain meaning and in

¹² In somewhat of a non-sequitur, Brookline argues that other statutes provide a remedy for employees who are disabled on the job. These statutes, of course, do not address the circumstances presented here, in which the employer's own misconduct creates the conditions preventing their employee's return to work.

light of the aim of the Legislature unless to do so would achieve an illogical result"). As the lower court explained in its remand decision, civil service law prohibits an employer from terminating an employee in circumstances that violate "basic merit principles," which include "assuring fair treatment of all ... employees in all aspects of personnel administration **without regards to...race, color....**basic rights outline in this chapter and constitutional rights as citizens...." (RA 22:203-204) (emphasis in original) (quoting G.L. c. 31, § 1(e).

As set forth by the lower court, the civil service statute likewise prohibits terminations "based...upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform his position...." (RA 22:204) (citing G.L. c. 31, § 43). The lower court correctly concluded, "[t]erminating an employee because he does not fit into a racially hostile environment," or because he fails to prove the ability to work in such an environment, qualifies as a "factor...not reasonably related to the fitness of the employee to perform his position," and, therefore, cannot not be used to justify a termination. (RA

22:204). Finally, citing Mayor of Somerville v. District Court of Somerville, 317 Mass. 106, 120 (1944), the lower court explained that civil service law requires reversing a termination made in bad faith even if the evidence would have warranted a finding by the reviewing officer that the removal was for a proper cause. (RA 22:206).

As shown by the above analysis, the Commission's rule did not come from nowhere, as Brookline suggests, it is the product of garden-variety statutory construction. Brookline does not even try to tether its alternative rule to the language or purpose of the civil service statute. This is understandable given the Brookline rule would make a mockery of the civil service system's charge "to guard against political considerations, favoritism and bias in governmental decisions" by allowing Brookline to terminate Alston based on its own bad-faith poisoning of the workplace against him.

B. The Commission Correctly Reinstated Alston without Loss of Compensation and Other Rights.

Brookline mischaracterizes the Commission's decision by arguing that the Commission ordered it to reinstate Alston to his position but prohibited it

from requiring him to appear for duty. As the lower court noted when Brookline made the identical argument below, Brookline has overstated its position. (RA 22:210). The Commission's order does nothing more than track the statute, which provides for mandatory reinstatement upon a determination that there was no just cause for termination. (Id.) The Commission ordered "that Firefighter Alston be returned to his position without loss of compensation or other rights," which is no more and no less than what the plain language of the statute requires. G.L. c. 31, § 43. As the lower court correctly stated, "while Brookline could not require Alston to return to a racially unfair employment environment, that flows from the law itself, not from any action or direction of the Commission...." (RA 22:210).

V. THE COMMISSION'S DECISION IS BASED ON SUBSTANTIAL EVIDENCE.

A. The Commission's Finding that Brookline Acted in Bad Faith and in Violation of Basic Merit Principles is Supported by Substantial Evidence.

The lower court took Brookline to task for conspicuously avoiding the facts supporting the Commission's finding that Brookline acted in bad faith and made the workplace intolerable for Alston by

violating basic merit principles. (RA 22:207). The lower court found the Commission had "detailed these facts, and their impact on Alston, in careful and compelling fashion," and that Brookline had failed to show they were unsupported by substantial evidence. (RA 22:207-208).

The Commission found that "Pender's use of the racial epithet 'fucking [n-word],' coupled with subsequent actions and inactions by [Brookline] officials *at all levels*, which compounded the racist comment into an avalanche of unfair, arbitrary, capricious and retaliatory behavior that infringed on Firefighter Alston's civil service rights, made it impossible for him to perform his job as a Brookline firefighter." (RA 5:33). The Commission found that Brookline "chose not to impose meaningful discipline on Mr. Pender for use of the racist comment (which the evidence demonstrated was clearly insufficient to remediate his behavior), chose to overlook the initial and ongoing retaliation against Firefighter Alston, and actively promoted a false narrative that painted Firefighter Alston as a paranoid employee who simply couldn't 'move on' from racist comments made by

purportedly remorseful supervisor years earlier.” (RA 5:44).

As the agency charged with adjudicating disputes in most fire departments in the Commonwealth, the Commission has special knowledge regarding the fire service, including the trust and confidence firefighters must maintain in each other to perform the life threatening duties of their jobs. Cf. Alamo v. Bliss, 864 F.3d 541, 555 (7th Cir. 2017) (noting significance of racial harassment “occurring in an atmosphere where firefighters live and serve together and in which mutual interdependence is an essential factor in effectiveness and, at times, survival.”) The Commission’s expertise must be given due weight. See Massachusetts Association of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 263 (2001).

B. Brookline’s Brief Ignores the Commission’s Fact-Finding and Improperly Attempts to Re-Litigate the Case.

The Supreme Judicial Court has recently stressed the deference owed to the Commission’s fact-finding on appeal. See Boston Police Department v. Civil Service Commission, 483 Mass. 461, 476 (2019) (“Our limited task is to determine whether there was substantial

evidence for the decision that the commission *actually made*, not the one that the dissent thinks the commission should have made.”). In Boston Police, the Court cautioned that a reviewing court’s job is to determine whether a decision by the Commission is supported by substantial evidence and not to weigh the evidence itself or engage in its own fact-finding. Id. The Court cited Labor Relations Comm’n v. University Hosp., Inc., 359 Mass. 516, 521 (1971) for the proposition that “[a] court may not displace [the administrative body’s] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo.” Id.

Despite this directive, Brookline spends thirteen pages of its brief attempting to paint itself as the victim of an unreasonable employee who refused to “move on” from the 2010 incident. Brookline ignores the fact that the Commission squarely rejected this narrative in its detailed and comprehensive 83-page decision. As the lower court correctly ruled, nothing compelled the Commission to agree with Brookline’s version of events. (RA 22:206).

To paraphrase Boston Police, Brookline has not made out a case that the Commission lacked substantial evidence to support the decision it *actually made*. It is instead asking the court to endorse a narrative that would support the decision Brookline *wishes* the Commission had made.

C. Brookline's Remaining Arguments Lack Merit.

Brookline argues that the Commission did not find that the *select board* acted with an improper purpose or that the basis for its decision to terminate Alston was pretextual. The effort to distinguish the *select board* from the *town of Brookline* does not get Brookline anywhere. The Commission found that Brookline acted in bad faith and that Alston's termination was rooted in a violation of basic merit principles, including the duty not to discriminate on the basis of race. The Commission found that Brookline, *including the select board*, acted in a discriminatory and retaliatory fashion towards Alston by turning a blind eye to discrimination and retaliation against him by Pender and others, by actively promoting a false narrative about him, and by using the impact of its own misconduct to justify Alston's termination. As the lower court correctly

determined, the Commission's finding that Brookline acted in bad faith in terminating Alston was the functional equivalent of finding that his termination was pretextual. (RA 22:208) (citing Bank of America, N.A. v. Prestige Imports, Inc., 75 Mass. App. Ct. 741, 754-755 (2009) and cases cited. By spelling out Brookline's violation of Alston's right to be treated fairly on the basis of race, the Commission made clear that his termination rested on an improper purpose.¹³

Brookline goes on to argue that the Commission's decision must be reversed because it did not identify a white firefighter who was treated better than Alston under similar circumstances. Under Massachusetts law, however, a person subjected to a racially hostile environment has not been required to prove that they were treated worse than a similarly situated white person to establish discriminatory treatment.¹⁴ See

¹³ A federal judge allowed summary judgment on Alston's discrimination claims only by ignoring the Commission's fact-finding, a decision that is unlikely to withstand appeal. See e.g. Davignon v. Hodgson, 524 F.3d 91, 112-113 (1st Cir. 2008) (holding administrative decisions are admissible under the federal rules of evidence).

¹⁴ Brookline had been advised by a consultant in 2015 that the use of a single racial epithet (e.g. "fucking nigger") was sufficiently severe to create a hostile work environment. (RA 11:15).

Green v. Harvard Vanguard Medical Associates, Inc., 79 Mass. App. Ct. 1 (2011); Augis Corp. v. MCAD, 75 Mass. App. Ct. 398 (2009); Thomas O'Connor Constructors, Inc. v. MCAD, 72 Mass. App. Ct. 459 (2008).

The Commission found that Brookline's continuous protection and promotion of Pender after he left a racist message on Alston's machine and lobbied others in the department against him, coupled with the Brookline's creation of a "false narrative" about Alston as an employee who could not "move on" from a "perceived" wrong, created a racially hostile environment for Alston that ultimately became intolerable. The Commission meticulously documented the negative impact Brookline's course of conduct had on Alston's mental health and ability to trust his fellow firefighters in dangerous situations. Given these findings, the Commission was more than justified in not attempting to identify a white firefighter who had been treated more favorably than Alston in similar circumstances.

Brookline argues that Alston was, in fact, capable of returning to work because Dr. Price had "conditionally cleared" him to return. Brookline claims that Alston's refusal to submit to certain

conditions recommended by Dr. Price was the real reason he could not return to work, not any misconduct by Brookline. This argument improperly attempts to re-litigate the case.

As the commission definitively ruled, Brookline's misconduct made it impossible for Alston to return to the department. Although Brookline quibbles that Dr. Price was aware, based on her interview with Alston, that Pender had verbally attacked him after leaving the voicemail, Brookline effectively concealed from her the full scope of the retaliation that Alston endured, not only from Pender, but at all levels of the Brookline government.

By not providing Dr. Price with access to the full picture of the retaliation against Alston, Brookline deprived her of critical information and encouraged her to buy in to the false portrait it had painted of Alston as a paranoid employee with imagined grievances. The Commission had no obligation to blind itself to the evidence that emerged over the course of the ten-day hearing and simply defer to Dr. Price's findings.

Although Brookline suggests that the Commission discredited all of Dr. Price's findings, that is not

the case. The Commission weighed her testimony appropriately against the other evidence in the case and adopted some of her findings and rejected others. (RA 5:33-34). As the lower court correctly held, this was well within its authority. (RA 22:207) (citing Police Department of Boston v. Kavaleski, 463 Mass. 680, 694 (2012) and Doe No. 68549 v. SORB, 470 Mass. 102, 112 (2014)).

CONCLUSION

The decision of the Commission should be upheld. The Commission followed its own precedent, stayed within its statutory authority, and did not violate principles of claim preclusion by taking into account Alston's claims of racial discrimination. The Commission properly ruled that civil service law prohibited Brookline from terminating Alston based on his inability to return to intolerable working conditions created by Brookline; the Commission followed G.L. c. 31, § 43 by ordering Alston reinstated to his position; and the Commission's decision is supported by substantial evidence.

Respectfully submitted,

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