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**Commonwealth of Massachusetts
County of Essex
The Superior Court**

CIVIL DOCKET# ESCV2007-01604

Dennis Carmody
Plaintiff

vs.

City of Lynn and Civil Service Commission of the Commonwealth of Massachusetts
Defendants

JUDGMENT

This action came on before the Court, Timothy Feeley, Justice, presiding upon cross-motions for judgment on the pleadings. The Court having allowed plaintiff's motion for judgment on the pleadings, and having denied the City of Lynn's cross-motion for judgment on the pleadings, and upon consideration thereof,

It is **ORDERED** and **ADJUDGED**:

That judgment shall enter for the plaintiff, Dennis Carmody. The Civil Service Commission of Massachusetts is directed to reinstate the plaintiff's appeal of the City's promotion appointment. The Commission may thereafter take whatever action it deems appropriate with respect to the timing and scheduling of its proceedings, while preserving the right of plaintiffs to have the merits of the promotion appointment reviewed, subject to such a review being mooted by the arbitrator's decision on the pending grievances.

Dated at Salem, Massachusetts this 16th day of January, 2009.

Thomas H. Driscoll Jr.,
Clerk of the Courts

By:.....
Assistant Clerk

CMP Aiken

Copies mailed 01/16/2009

Commonwealth of Massachusetts
County of Essex
The Superior Court

CIVIL DOCKET# ESCV2007-01613

James McDonald
Plaintiff

vs.

City of Lynn and Civil Service Commission of the Commonwealth of Massachusetts
Defendants

JUDGMENT


This action came on before the Court, Timothy Feeley, Justice, presiding, upon cross-motions for judgment on the pleadings. The Court having allowed plaintiff's motion for judgment on the pleadings, and having denied the City of Lynn's cross-motion for judgment on the pleadings, and upon consideration thereof,

It is **ORDERED** and **ADJUDGED**:

That judgment shall enter for the plaintiff, James McDonald. The Civil Service Commission of Massachusetts is directed to reinstate the plaintiff's appeal of the City of Lynn's promotion appointment. The Commission may thereafter take whatever action it deems appropriate with respect to the timing and scheduling of its proceedings, while preserving the right of plaintiffs to have the merits of the promotion appointment reviewed, subject to such a review being mooted by the arbitrator's decision on the pending grievances.

Dated at Salem, Massachusetts this 16th day of January, 2009.

Thomas H. Driscoll Jr.,
Clerk of the Courts

By: 
Assistant Clerk

Copies mailed 01/16/2009

COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

**SUPERIOR COURT
CIVIL ACTION
NO. 07-1604 — #15
NO. 07-1613 — #15**

**DENNIS CARMODY,
Plaintiff**

vs.

**CITY OF LYNN and CIVIL SERVICE
COMMISSION OF MASSACHUSETTS,
Defendants**

* * * * *

**JAMES MCDONALD,
Plaintiff**

vs.

**CITY OF LYNN and CIVIL SERVICE
COMMISSION OF MASSACHUSETTS
Defendants**

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

Plaintiff Dennis Carmody (“Carmody”) and plaintiff James McDonald (“McDonald”) are captains in the Lynn Fire Department and employed by the defendant City of Lynn (the “City”). They are also members of Local #739, I.A.F.F.

(the "Union"). Plaintiffs and a third captain sought promotion and appointment to the position of Deputy Fire Chief. Carmody was ranked number one and McDonald was ranked number two on the certification list for promotion to the Deputy Fire Chief position. The City "by-passed" Carmody and McDonald and appointed the third candidate on the certification list for the open position.

The Union filed three grievances under its collective bargaining agreement with the City concerning the procedures followed in the promotion appointment process. One of the grievances contends that the City was required to promote the number one candidate on the certification list, that is, Carmody. The grievances do not request or require the arbitrator to evaluate the merits of each candidate's qualifications and review the merits of the promotion appointment. According to the City, three days of evidence have been heard by the arbitrator, and a fourth and final day is scheduled for February 2, 2009. Given the time necessary for the preparation of a transcript of the fourth day, submissions of briefs by the parties, and thirty days or so for issuance of the arbitrator's decision, it is reasonable to assume that a decision will be forthcoming within three to four months.

Carmody and McDonald also appealed the promotion appointment to the Civil Service Commission of the Commonwealth of Massachusetts (the "Commission"). Each contended that the City erred in evaluating the qualifications of the candidates

and determining that the third candidate was more qualified than him. In essence, plaintiffs asked the Commission to review, under the applicable standard of review, the merits of the promotion appointment made by the City. The City asked the Commission to dismiss plaintiffs' appeals, contending that they had elected to challenge the promotion decision under the collective bargaining agreement and were precluded from maintaining a parallel action before the Commission. See G. L. c. 150E, § 8. The Commission agreed with the City and dismissed plaintiffs' appeals.

In identical complaints before this court, plaintiffs seek an order setting aside the Commission's dismissal of their appeals of the promotion appointment and directing the Commission to hold a hearing on the merits of plaintiffs' appeals of the promotion appointment. Plaintiffs have moved for judgment on the pleadings. The City has opposed plaintiffs' motions and has filed a cross-motion for judgment on the pleadings. The Commission has filed an opposition to plaintiffs' motions. The court agrees with plaintiffs that their appeals should not have been dismissed.

Although both the arbitration and the Commission appeals concern the promotion appointment decision of the City, each raise and address different issues. The arbitrator is being asked to decide, regardless of the relative merits of the candidates qualifications, whether the City can by-pass the number one candidate on the certification list. The Commission was being asked, assuming the City's right to

select any candidate from the certification list, to review the merits of the City's decision to appoint the third candidate over Carmody and McDonald. If the arbitrator was going to decide the merits/qualifications issue, then G. L. c. 150E, § 8, might well preclude an appeal to the Commission.¹ But that is not the case here. Plaintiffs sought to have the Commission decide an issue that will not be reached by the arbitrator, and the court views § 8 as establishing an exclusive procedure only for those issues that will be subject to binding arbitration. This is not a case where adjudicative resources are being needlessly duplicated, or where plaintiffs will obtain two bites of the same apple. Accordingly, § 8 does not require the dismissal of plaintiffs' appeals to the Commission, and the Commission erred in so deciding.

That being said, it is possible that the arbitrator's decision could moot plaintiffs' appeal to the Commission. Subject to judicial review, a decision in favor of the union, requiring the City to appoint the number one person on the certification list, would seem to preclude the need for the Commission to review the relative qualifications of the candidates and the merits of promotion appointment. But, on the other hand, a decision by the arbitrator that the City was free to appoint any candidate

¹McDonald argues that c. 150E, § 8 is not applicable to Commission proceedings. The court need not decide that issue, as, even assuming its applicability to Commission proceedings, the court finds that it does not preclude plaintiffs from presenting an issue to the Commission that is not subject to the pending binding arbitration.

on the certification list would warrant further proceedings by the Commission to hear plaintiffs' appeals. Without the reinstatement of the appeals, plaintiffs could lose the only opportunity they have for review of the merits of the promotion appointment in the event that the arbitrator's decision is not conclusive on the appointment decision.

It is the intention of this court to reinstate plaintiffs' appeals before the Commission, but to provide the Commission the flexibility and discretion to consider options such as staying part or all of its proceedings pending the arbitrator's decision. By reinstating plaintiffs' appeal, the court wishes to preserve the right of plaintiffs to have the merits of the promotion appointment reviewed if that appointment decision survives the arbitrator's decision. Beyond that, the court defers to the discretion of the Commission on how best to effect the purpose of this court's decision.

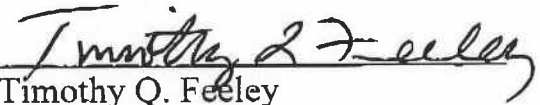
ORDER

1. The motions of plaintiffs Dennis Carmody and James McDonald for judgment on the pleadings is **ALLOWED**, and the Civil Service Commission of Massachusetts is directed to reinstate plaintiffs' appeals of the City's promotion appointment. The Commission may thereafter take whatever action it deems appropriate with respect to the timing and scheduling of its proceedings, while preserving the right of plaintiffs to have the merits of the promotion appointment reviewed, subject to such

a review being mooted by the arbitrator's decision on the pending grievances.

2. The cross-motion of the City of Lynn for judgment on the pleadings is

DENIED.


Timothy Q. Feeley
Associate Justice of the Superior Court

January 16, 2009