MCSR Appellant Commentary *September-December 2023*

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2023 CALENDAR YEAR STATISTICS

With the close of calendar year 2023 comes the yearly opportunity to review and to consider the Civil Service Commission's annual statistical report concerning its work.

There were 234 new appeals filed with the Commission in 2023. While that figure is a big uptick from the very low figure of 176 new appeals in 2022, it is one that is very much in keeping with the yearly average of 263 new appeals since calendar year 2005.

2023 was another banner year for the Commission with respect to closing cases, as the Commission again was able to close more cases than it received. Using a variety of means, including the deployment of four Commissioners, the Commission's General Counsel and Division of Administrative Law Magistrates to preside over full hearings, the Commission was able to close out 265 cases, thirty-one more than it accepted during 2023.

By the end of 2023, the Commission reported a total of just seventy-two pending cases, a world away from the 813 pending cases at the end of 2006 and a marked improvement even from the 103 that were pending at the close of 2022. Most interesting, of the seventy-two open cases as of December 31, 2023, sixty-six of those cases were filed with the Commission in 2023 and just six were filed in 2022. There are no older cases that are active before the Commission—a solid marker that cases are being processed promptly at the Commission.

That reality also is evident in the average age of a pending appeal before the Commission. In 2018, the average age for a pending appeal was forty-six weeks, which was reduced to thirty-five weeks in 2021, to thirty-four weeks in 2022 and now stands at eighteen weeks as of the end of 2023. While the Commission has not yet hit its target rate of fifty-two weeks to conclude those cases that require a full hearing or motion hearing, it is understood that those cases tend to be more complex, often involving multiple days of hearing and require more time to brief and to adjudicate generally. Overall, the Commission's extended work over the course of years to close out cases more promptly is a positive not only for it but also for the attorneys and the parties who appear before the Commission. The Commission should be applauded for these efforts.

Turning to the Commission's statistical analyses of its appeals categorized by subject matter, in 2023 there were a total of fifty-seven decisions in bypass or related appeals. Within those cases, relief was granted by mutual agreement of the parties in eight (14%) of the cases, appeals were allowed or some relief was granted to the appellant in nine (16%) of the cases and appeals were dismissed or denied in forty (70%) of the cases.

Such statistics continue to be representative year-over-year: (1) in 2022, the Commission decided sixty-five bypass or related cases, with sixteen (25%) disposed of by mutual agreement, seventeen (26%) resolved through the allowance of appeals or the granting of some relief to the appellant and thirty-two (49%) of the appeals dismissed or denied; (2) in 2021, the Commission decided sixty-five bypass or related cases, with twenty-three (35%) disposed of by mutual agreement, seven (11%) resulting in the allowance of an appeal or some relief being granted and thirty-five (54%) of the appeals denied or dismissed; (3) in 2020, the Commission decided sixty-seven bypass or related cases, with twenty-three (34%) concluded by mutual agreement between or among the parties, fifteen (23%) concluded with the appeal being allowed in whole or in part and twenty-nine (43%) concluded with the appeal being dismissed; (4) in 2019, of the fifty-three Commission decisions, 26% were concluded by settlements, 23% of the cases saw relief being granted in whole or in part and 51% of the appeals were dismissed; and, (5) in 2018, of the fifty-eight Commission decisions, 27% of the cases were settled, 15% of the appeals were allowed and 58% of the appeals were denied.

In bypass and like cases, there usually is a sizable landscape on which the parties can work out a resolution for themselves, most particularly with regard to entry-level appointments where hires regularly are made and where a usual resolution will involve an additional consideration for the bypassed candidate. That ability to work out agreements in these cases is reflected in the statistics, as most years see an average of one-quarter to one-third of bypass or like cases resolve by agreement.

However, where there is no agreement and the case is litigated to conclusion before the Commission, the odds continue not to favor appellants. Removing settled cases from the calculation and focusing on those cases litigated to conclusion before the Commission, in 2023 there were forty-nine such cases, with dismissal or denial of the appeal occurring in forty of them, for a dismissal rate of 82%. In 2022, the dismissal rate was 65%. In 2021, it was 83%. In 2020, it was 66%. That is a four-year average dismissal rate of 74%, giving appellants who litigate their cases to conclusion only about a one-in-four chance of achieving some relief.

In discipline and layoff appeals, the Commission issued twenty-one decisions in 2023, with six (29%) appellants having their appeals allowed in whole or in part and fifteen (71%) of the appeals denied. Considering those statistics against the backdrop of prior years: (1) in 2022, the Commission issued nineteen decisions, with eight (42%) appeals allowed in whole or in part and

eleven (58%) appeals denied; (2) in 2021, the Commission issued twenty decisions, with five (25%) appeals allowed in whole or in part and fifteen (75%) appeals denied; (3) in 2020, there were twenty-one discipline and layoff cases decided, with seven (33%) appeals allowed in whole or in part and fourteen (67%) appeals denied; (4) in 2019, the Commission decided thirty-two discipline and layoff cases, with 81% of those appeals dismissed and 19% ending with at least some relief being granted to the appellant.

Using prior years' analyses, since January 1, 2006, the Commission has decided 835 discipline and layoff cases, dismissing 647 (77%) of them and granting appeals in whole or in part in 188 (23%). This, obviously, is a large data set and, while the merits of each case may differ, parties and counsel bringing a discipline or layoff case to the Commission would do well to proceed with these figures in mind in order to manage expectations appropriately.

Lastly, 2023 was another year of a lack of success for appellants in classification and examination appeals. Of the twenty-three examination appeals, all were denied. Over the last five years, there have been seventy-one examination appeals and just three appellants have received some relief, a 4% rate of success. There were seven classification appeals in 2023 and all seven were denied. Over the past five years, there have been forty-five classification appeals decided and two appellants were successful—a 4% success rate.

DISCIPLINE DECISIONS

The Commission Explains That Unauthorized Leave Termination Cases Must Be Appealed According To Their Unique Statutory Requirements

Although so-called AWOL terminations historically do not arise regularly, during this period there actually were two appeals in which the Commission was presented with separations that were based upon unauthorized leaves of absence: *Colon* v. *Boston Police Department*, 36 MCSR 399 (2023) and *Browder* v. *Boston Fire Department*, 36 MCSR 466 (2023). As both appellants were denied relief owing to failures to abide by the strict statutory requirements that apply in such circumstances, the cases provide an opportunity to consider those requirements, as the process is much different than a traditional discipline case.

Section sixty-eight of chapter thirty-one of the General Laws creates a reporting requirement for civil service appointing authorities to notify the Human Resources Division when any number of triggering events, including name changes, suspensions or promotions, occur with respect to a civil service employee. Among the list of events that precipitate a report to the Human Resources Division is an instance in which an employee has been absent from employment without authorization. Within G.L. c. 31, § 38, an "unauthorized absence" is defined as "an absence from work for a period of more than fourteen days for which no notice has been given to the appointing authority by the employee or by a person authorized to do so, and which may not be charged to vacation or sick leave, or for which no leave was granted pursuant to the provisions of section thirty-seven."

When there is an authorized absence, G.L. c. 31, § 38 creates a very strict set of procedural steps that an appointing authority must take and that any employee wishing to challenge removal must abide by in perfecting the challenge. To begin, the appointing authority is to send to the employee, by registered mail, a written notice indicating that the employee is considered "to have permanently and voluntarily separated himself from the employ of such appointing authority . . . ." by virtue of the unauthorized absence. The employee then has ten days, a deadline which begins not with the receipt of the notice but instead with the mailing of the notice, to request a hearing in writing before the appointing authority.

The statutory provision permits an appointing authority to restore the employee to the position previously held or to grant an authorized leave of absence pursuant to G.L. c. 31, § 37; an authorized leave of absence only is allowed when, within fourteen days of the mailing of the notice of separation, the employee files a written request for authorized leave, including in the request an explanation for the absence that is satisfactory to the appointing authority. When the appointing authority either restores the employee or grants authorized leave, the Human Resources Division is to be notified in writing immediately.

If the appointing authority does not restore the employee after a request for a hearing has been made or does not grant an authorized leave of absence, the employee may file a request for a review of the situation with the Human Resources Division. In that review, the Human Resources Division is confined to considering whether the employee failed to give proper notice to the appointing authority or if the employee's failure to give proper notice was reasonable under the circumstances. Importantly, § 38 specifically provides that no employee who has been reported as absent without authorization may appeal to the Commission pursuant to G.L. c. 31, §§ 41-45 based upon the absence.

Both *Colon* and *Browder* involved similar fact patterns. In October, 2021, the City of Boston required its police and fire personnel either to obtain a COVID vaccination or to participate in a testing regimen every seven days. Both employees objected, arguing that sincerely-held religious beliefs prevented both the taking of the vaccination and participating in the testing. The employees were suspended and neither filed an appeal at the time contesting those suspensions.

When, months later, the vaccination/testing requirements were lifted, both employees were told to report to work but neither did, with Colon's counsel sending a letter identifying a series of grievances and asking for a discussion to be had concerning the items. When neither of the employees returned to work after the directives to return, both were served with § 38 notices that they were considered to be absent without authorization and to have permanently and voluntarily separated themselves from employment. Colon never filed a request for a hearing with the appointing authority and, instead, filed an appeal directly with the Commission. Browder sent a letter to the Boston Fire Commissioner thirteen days after the mailing of the unauthorized absence notice, then filing a Commission appeal the next day.

Before the Commission, Colon argued that a hearing before the appointing authority would have been pointless as the result at that level was a foregone conclusion. Both Colon and Browder argued that their procedural rights were violated when they were

suspended in 2021 and that they also should be permitted to contest their separations with the Commission.

The Commission made short work of both cases. While it was true enough that their suspensions in 2021 for violation of the City's vaccination/testing policy triggered rights to appeal to the Commission if Colon or Browder had procedural or substantive grievances, neither filed an appeal within the ten-day statutory window to pursue such claims and their 2023 appeals were much too late.

As to the § 38 separations, the Commission indicated that, based upon the clear statutory language of § 38, it had no jurisdiction to entertain the appeals. If the employees wished to challenge their separations, they needed to file written requests for hearings within ten days of the mailing of the § 38 notices, which neither of them did (with Colon never filing such a request and Browder sending one three days after the deadline passed). Had the written requests for hearings been sent, there then would have been a hearing before the appointing authority followed by, if necessary, a request for review with the Human Resources Division. As the Commission does not possess jurisdiction in § 38 separations, and given that the employees failed to follow the statutory requirements for review, both were left with no recourse with the Commission or, by that time, otherwise.

Through the decisions in *Colon* and *Browder*, the Commission has made plain that any employee wishing to challenge a § 38 separation based upon an unauthorized leave only may do so in conformity with the strict requirements of the statute, which do not permit Commission review pursuant to §§ 41-45.

OTHER CASES

The Commission Sets And Reinforces Jurisdictional Boundaries In Appeals With A Component Of Claimed Unlawful Discrimination

Consumers of these commentaries will recall some of the landmark decisions in recent years from the Commission and courts regarding the interplay between the just cause necessary to separate tenured civil service employees from their positions and the impact on that analysis when there exists unlawful discrimination in the work environment. For many years, a line of authority held that, even when an employee had committed no misconduct, if the employee was unfit for duty because the employee could not perform the essential functions of a position, that unfitness could constitute just cause to separate the employee. *Town of Brookline* v. *Alston*, 487 Mass. 278 (2021) changed that dynamic significantly. As announced in the final Commission decision in *Alston* and as confirmed by the Supreme Judicial Court in the subsequent judicial review, when it is an employer's own improper or illegal actions or omissions that led to an employee's unfitness for duty, the employer cannot use that inability to perform essential functions as grounds that would be sufficient to satisfy the just cause standard for separation.

On its face, *Alston* was a fitness for duty case and applied only within that space. However, in relatively short order, the Commission announced that it was prepared to take strong action to address employer-based harassment and retaliation in a completely different set of circumstances. In *Miltimore, et al.* v. *Westfield Fire Commission*, 34 MCSR 190 (2021), the Commission determined that the terminations of three members of the Westfield Fire Department were imposed without just cause, finding that two of the individuals committed no actionable misconduct at all and that the misconduct of the third warranted a thirty-day suspension rather than termination. In reaching that conclusion, the Commission's findings included determinations that there had been unaddressed improper and retaliatory misconduct by a high-ranking member of the Department who, by that time, had become the Fire Chief. Concerned that its remedy of returning the three members to the Department would expose the individuals to additional harm in a workplace that already had been shown to include instances of harassment and retaliation, the Commission took an extraordinary step of imposing on the Department a series of mandatory directives that the Commission believed were necessary to ensure a safe work environment, further ordering that the three employees were to remain on paid administrative leave in the interim.

Following *Miltimore*, it was apparent that, if and when a record of workplace harassment or retaliation was presented to the Commission, such a record could impact the Commission in the discharge of its statutory function, including in analyzing the existence of just cause (such as in *Alston*) or in the fashioning of an appropriate remedy for a successful appellant (as in *Miltimore*). In two additional cases decided during this period, the Commission sketched along the outer contours of whether or when it would act in instances in which employer-based discrimination or retaliation is alleged to be in play.

In *Blake* v. *Springfield Fire Department*, 36 MCSR 310 (2023), an African-American lieutenant in the Springfield Fire Department, with separate disciplinary and bypass appeals pending before the Commission and a discrimination lawsuit against the Department also proceeding to a jury trial in federal court, filed a separate non-bypass equity appeal with the Commission. In that appeal, Blake alleged that the Department subjected him over time to certain acts of retaliation that placed him in an "untenable, unfit, hostile, and toxic environment" and that also operated so as to violate the basic merit principles of G.L. c. 31.

In the stand-alone equity appeal, Blake did not point to any adverse employment action that was not already subject to Commission review, nor did he indicate that what he was asking was for the Commission to initiate a § 2 (a) investigation into the Springfield Fire Department's civil service processes, such as those relating to promotions. Instead, Blake requested that the Commission hold an evidentiary hearing, after which he believed the evidence would permit the Commission to make a determination that Blake had been exposed to a retaliatory and hostile work environment that substantially harmed his psychological health. To support the concept of Commission action, Blake pointed to *Alston* as a situation in which the Commission needed to address the aftermath of years-long discrimination and retaliation in the workplace; Blake argued that the Commission should not wait as long in his situation and instead should intervene earlier in the sequence of discrimination and retaliation in order to end it.

The Commission declined Blake's invitation to intervene. Indicating that Blake's claim of a hostile or otherwise improper

work environment could be advanced and adjudicated through the machinery of a charge of discrimination before the Massachusetts Commission Against Discrimination, the Commission noted that in the prior situations in which the Civil Service Commission had resolved to act in order to address workplace discrimination or retaliation, that Commission action occurred within the context of adjudicating a traditional civil service appeal, such as a contemplated termination. For instance, when the Commission fashioned its extraordinary remedy in *Miltimore*, it was in the setting of a determination that just cause did not exist to support the termination of the three members of the Fire Department and that those members should be reinstated to the Department, but that the workplace environment needed to be fixed in order for the reinstatements to be safe. According to the Commission, what Blake sought was something of an entirely different magnitude, namely, Commission intervention in a situation that was "untethered to any timely discipline or the issue of just cause for suspension or termination." Commission intervention entirely outside the context of what was necessary and appropriate to resolve a pending traditional appeal, the Commission said, was outside the scope of its charge.

While the result in *Blake* was pretty logical and unsurprising, at least for those who do not believe that the Commission should function as some kind of statewide human resources division responsible for evaluating claims of workplace harassment, discrimination and retaliation, the decision in *Maldonado* v. *Lowell Police Department*, 36 MCSR 355 (2023), also decided during this period, is a little more unexpected. Maldonado was promoted to the rank of sergeant in the Lowell Police Department in 2018. In April, 2022, Maldonado filed a charge of discrimination with the Massachusetts Commission Against Discrimination, alleging that his attempts to be assigned to various specialty positions had been rejected on the basis of his race. After his MCAD charge had been pending for almost a year-and-a-half, in August, 2023, Maldonado was notified that he was being bypassed for promotion to lieutenant. At that point, Maldonado did two things: first, he filed a bypass appeal with the Civil Service Commission; and, second, he filed a charge with the Massachusetts Commission Against Discrimination alleging that his bypass was further evidence of race-based discrimination and also was the product of retaliation for his earlier claim of discrimination.

At the prehearing conference on the bypass appeal, the City asked that the bypass appeal be deferred pending the resolution of the MCAD action. Maldonado opposed the request, arguing that such abstention "would result in an undue delay regarding whether there was reasonable justification to bypass [Maldonado] for promotion." The Commission concluded that it would be prudent to defer to the pending MCAD proceedings, allowing the MCAD to resolve the question of whether there was illegal discrimination or retaliation fully and finally and then, if necessary, resolving any remaining dispute relative to the bypass appeal. Accordingly, the Commission entered a dismissal nisi of the bypass appeal that is to become effective twenty-one days after the MCAD's final decision. Within twenty days of the MCAD's final decision, Maldonado may file a request to revoke the order of dismissal nisi, at which point the Commission can weigh the MCAD's final decision while conducting its review of the bypass.

On one hand, the Commission action in *Maldanado* might be considered to be an unnecessary punt on a matter that is squarely within the jurisdiction of the Civil Service Commission: the consideration of the claimed justification for a promotional bypass. Given the glacial pace at which the Massachusetts Commission Against Discrimination moves, it could be years before there is a final decision from that agency on Maldonado's claims. At the same time, it is not entirely clear what is to occur if, as often happens in MCAD claims, Maldonado elects to remove the matter from the MCAD in favor of pursuing his relief in court, in which case there never would be a final decision on the merits of his claim before the MCAD.

On the other hand, Commission abstention in *Maldonado* can be justified on grounds that include litigation efficiency and the need to avoid conflicting agency determinations. For example, it would be a litigation nightmare if, in a situation in which contemporaneous determinations are made, the Civil Service Commission determines the bypass to be justified but the MCAD finds that the bypass was premised on discriminatory or retaliatory motivations. Conflicting decisions made by different courts or agencies on the same subject matter is a strong justification to avoid contemporaneous proceedings.

While Maldonado argued against abstention, the dilemma was one of his own making. If he had not chosen to add the bypass decision to the mix at the MCAD, there would have been no basis on which the City could have requested that his Civil Service Commission appeal be deferred. For now, *Blake* instructs that an employee wishing to seek Civil Service Commission intervention in a workplace that is considered to be hostile or discriminatory needs to press the claim within the confines of a "traditional" Commission appeal and *Maldonado* teaches that an individual who does present with a grievance that falls within the jurisdiction of the Commission will need to consider whether the desire is to advance the claim in the first instance before the Civil Service Commission or before another administrative agency, because seeking the contemporaneous review of another agency could lead to abstention by the Civil Service Commission. ■

MCSR Management Commentary September-December 2023

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COURT DECISIONS

A firefighter's right to free speech is not violated by termination for racist and bigoted social media posts

In a summary decision, the Appeals Court affirmed a Superior Court decision upholding the Commission's decision that the Boston Fire Department ("BFD" or "Department") had just cause to terminate a firefighter for making vile, racist, homophobic, and misogynistic postings on social media that lowered the public's estimation of the Department and which were not constitutionally protected. *Rowe* v. *Civ. Serv. Comm'n*, 222 N.E.3d 506 (Mass. App. Ct. 2023).

The Department fired firefighter Octavious Rowe ("Rowe") for multiple hateful, discriminatory, and, in at least one instance, violent postings on social media that Rowe posted while off duty. Rowe made several arguments in front of the Commission and again at the District Court that the First Amendment should have protected him from termination. The issue in front of the Appeals Court was whether his right to free speech was violated because he was terminated for his social media posts.

Courts apply a two-part test when looking at potential free speech violations by public employees by their employers. First the Court considered whether the employee was speaking "as a citizen upon matters of public concern" when making the statements. In this case, it was not contested at the Commission or the District Court that Rowe was speaking as a citizen. The posts were made from his personal social media accounts and not while he was working.

The second part of the two-part test is a consideration or balance of the interests of the employee-citizen and the interests of the State, as an employer, in promoting the efficiency of the public services it provides through its employees. In other words, "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006).

In considering the second part of the two-part test, the Appeals Court affirmed the lower court's reasoning that firefighters hold trusted positions in the community and must serve all the residents in that community regardless of their religion, sexual orientation, or race. Rowe's numerous posts were detrimental to the reputation of the Department within the community it serves. The posts were hateful, discriminatory, and, in at least one instance, violent. Therefore, Rowe's detrimental effect on the Department's reputation provided just cause for his termination.

As a practice point, there are several factors to consider when a governmental employer considers discipline, including termination, based on an employee's inappropriate speech. One factor is whether the speech was made while the employee was working. Speech made while working would tend to indicate that the employee was speaking as an "employee" and not as a citizen. However, further analysis would be needed if the employee posted a comment on a personal social media account. Similarly, the employer should also consider how close the employee's social media account can be connected to the employer. Suppose the employee's social media account or profile contains pictures or references to the employer (i.e., a picture of the employee in a Boston Fire Department uniform). In that case, there is a stronger argument for reputational harm.

Finally, as in all discipline cases, the employer must consider how the subject employee's conduct compares to the past misconduct of other similarly situated employees. In this case, Rowe moved for reconsideration based on his claim that the judge and the Commission failed to consider the similar inappropriate posts of another firefighter who was only suspended for two tours rather than terminated. The Appeals Court rejected Rowe's argument, noting that both the District Court and the Commission considered the evidence and found that it did not have sufficient bearing on Rowe's conduct and subsequent termination.

CIVIL SERVICE DECISIONS

DISCIPLINE DECISIONS

15-day suspension of Hudson Police Lieutenant for multiple counts of neglect of duty held not excessive considering Lieutenant's extensive disciplinary history

The Commission adopted the findings of an Administrative Magistrate that affirmed a 15-day suspension of Hudson Police Lieutenant Michael Vroom ("Lt. Vroom"), a 21-year veteran officer with an extensive disciplinary history, for various counts of neglect of duty. *Michael Vroom* v. *Hudson Police Department,* 35 MCSR 297 (September 7, 2023). In affirming the 15-day suspension, the Magistrate took notice of Lt. Vroom's extensive disciplinary history, despite a 10-year gap from his last discipline. The Magistrate also considered Lt. Vroom's superior rank compared to the punishment of the officer who used excessive force.

The issues in this case stem from Lt. Vroom's conduct, or lack thereof, regarding the investigation and subsequent arrest and booking of a suspect for a restraining order violation. Specifically, upon observing a suspect's car parked near the victim's residence and suspecting a violation, Lt. Vroom neglected to investigate the suspect's whereabouts and failed to conduct a wellness check on

the victim. Instead, he contacted a subordinate officer using his personal cell phone and instructed the officer to conduct the investigation. Furthermore, Lt. Vroom failed to follow up with the officer, who arrived at the scene approximately an hour later.

Later that day, Lt. Vroom observed the same officer use unnecessary force when he grabbed the suspect by the throat and pushed him into a wall during the booking process. Lt. Vroom failed to intervene in the use of excessive force and failed to check the suspect's physical condition after the use of force incident. Additionally, in violation of Department rules, Lt. Vroom failed to file a use-of-force report in a timely manner detailing the use of force he witnessed.

In addition to contesting the facts laid out by the Department, Lt. Vroom argued that the 15-day suspension was excessive for two reasons. First, Lt. Vroom argued that he should not receive a harsher discipline than the 10-day suspension issued to the officer who used excessive force. The Commission rejected this argument and agreed with the Department's reasoning for issuing greater. First, the officer who used excessive force accepted responsibility for his actions and agreed to further training on managing stressful interactions. On the other hand, Lt. Vroom, a higher-ranking officer with supervisory responsibility, did not accept any responsibility for his actions. In addition, Lt. Vroom had a substantial disciplinary history that included multiple instances of failure to act or comply with Department rules and regulations compared to the subordinate officer, who had no disciplinary history. For example, in 2009, Lt. Vroom was issued a 10-day suspension for failing to obtain permission before engaging in a high-speed pursuit. Likewise, and similar to the subject offenses, he was also disciplined for failing to take an arrestee to the hospital after complaints of breathing and, on a separate occasion, for failing to supervise his subordinate in a call for service.

Finally, without any supporting legal authority, Lt. Vroom argued that a 15-day suspension was inconsistent with the purpose of progressive discipline, indicating that his lengthy disciplinary history was stale as his last discipline was over ten years before the charged conduct. The Commission did not find Lt. Vroom's argument compelling, holding that "[t]he fact that the rest of his misconduct happened ten plus years ago does not mean that the Department could not take it into account."

This case is a good reminder that time does not heal all wounds when contemplating discipline. The length of time between offenses can be a mitigating factor when considering the level of discipline. However, an appointing authority is allowed to consider prior misconduct, especially when the prior misconduct is similar to the charged conduct or tends to show a pattern of particular misconduct. Moreover, as in this case, as time progressed, Lt. Vroom became a superior officer and assumed greater expectations and responsibilities, the failings of which can also negatively factor into disciplinary decisions.

Boston Police Officer terminated for lying, perjury, failure to take drug test, and failure to update home address

The Commission affirmed the decision of the Boston Police Department to terminate a patrol officer for untruthfulness when the officer made false reports and gave false testimony regarding an incident with a superior officer. *Brenda James* v. *Boston Police Department*, 36 MCSR 329 (October 19, 2023). The Commission also found that the City had produced sufficient evidence that the officer violated Department rules when she failed to take an annual drug test and update her home address with the Department.

The Commission's final decision in *James* is the culmination of multiple appointing authority hearings, a hearing in front of a criminal clerk magistrate and a subsequent appellate hearing in front of a district judge, a full hearing in front of the Commission, and then a remand from Superior Court where the Commission assigned a DALA Magistrate to conduct a further evidentiary hearing. After hearing testimony from 14 witnesses and entering 71 exhibits into evidence, the DALA Magistrate made over 250 findings of fact, which the Commission adopted in their entirety, along with the Magistrate's conclusions.

The case arises from Boston Police Officer Brenda James's interaction with her supervisor, Captain Paul Russell ("Capt. Russell"), during which she was physically relieved of her weapon, badge, and identification card pursuant to a suspension for prior misconduct. According to Capt. Russell, whose testimony was consistent and corroborated by witnesses throughout the multiple proceedings, he met with James during her shift on June 7, 2012, specifically to issue a suspension. At the start of the meeting, Capt. Russell offered to have her union representative present. However, she declined and said it was unnecessary if she did not have to respond to the allegations.

The meeting took place in Capt. Russell's office, with Lt. Sweeney present as a witness. Capt. Russell testified that during the meeting, James became increasingly agitated to the point that when he asked her to turn in her gun, he insisted that he remove the gun from her holster himself. To remove the gun from the holster, Capt. Russell had to push down on the holster and pull the gun forward, causing James to move slightly. During the interaction, including while Russell was removing the firearm, James did not make any noises as if she was hurt, nor did she request medical attention immediately after.

James left the building after her interaction with Capt. Russell and drove to Beth Israel Deaconess Medical Center. While at the hospital, James reported to staff that an "individual pulled her gun and forcefully pulled up several times, twisting her torso in the process. She was not punched kicked, struck in any other way…she now complains mostly of pain in her low back from the forceful twisting motion as well as migraine headaches." She also reported feeling stressed out and overwhelmed.

On June 15, 2012, James filed an incident report with the Department regarding her interaction with Capt. Russell. Specifically, James alleged that Capt. Russell "lunged at her, brushed [up against her], and yanked her loaded firearm." Specifically, she indicated in the report:

> …I was in fear and scared for my life as the captain/suspect got up from his chair (while seated at his desk) and lunged at me. My heart began to palpitate very rapidly as the suspect violently pushed my hand away while I was attempting to safely remove my firearm from the holster. He then violently yanked at my gun as my body jerked back and forth several times until my gun

> came out of the holster. This action caused me to feel a sharp twinge in my lower back and right side. I also felt violated as the suspect came within inches of my personal space and brushed up against me with his body. He continued to remain within inches of my personal space, even after removing my firearm, and yelled, while hovering like an ogre…

Upon receiving a copy of James's incident report, Capt. Russell submitted a memorandum to Internal Affairs detailing his version of the events and denying the allegations and requested an investigation into the matter.

On July 10, 2012, James applied for a criminal complaint in West Roxbury District Court against Capt. Russell for assault and battery. After a hearing, the Clerk Magistrate found no probable cause to issue the complaint. James requested further judicial review and then complained that the West Roxbury District Court was conflicted in hearing the appeal because Capt. Russell allegedly had a business relationship with the Court and the Clerk Magistrate. Although the Court did not find that there was any conflict of interest, the case was transferred to Charlestown District Court, where, again, there was no finding of probable cause after an additional evidentiary hearing.

Internal affairs opened investigations into the complaints by James involving allegations of assault and battery against Capt. Russell and the complaints by Capt. Russell that James was lying and filed a false police report and application for criminal complaint. The investigations concluded that Capt. Russell did not violate department rules when he removed James's weapon, and his actions were reasonable. The investigation further concluded that James's complaints were unfounded, and that James intentionally made false statements and submitted a knowingly false police report. The Department held a disciplinary hearing charging James with 11 specifications related to the June 7, 2012 event and her subsequent court action. Ultimately, the hearing officer found that James was deliberately untruthful, and that she consciously engaged in misleading exaggeration, both in the written reports she submitted and the later statements she made later at the criminal complaint hearing.

In addition to the investigation into the events surrounding the June 7, 2012 interaction with Capt. Russell, Internal Affairs conducted a separate investigation into allegations that James had violated BPD rules by failing to submit to the Department's annual drug test and failing to update the Department of her new residential address in a timely manner. The investigation and subsequent appointing authority hearing concluded that the allegations were substantiated. The City terminated James based on the findings of both investigations.

In the Tentative Decision, adopted in full by the Commission, the Magistrate concluded that James was "… deliberately untruthful, and she consciously engaged in misleading exaggeration, both in the written reports she submitted and the later statements she made, regarding her interaction with Capt. Russell." Specifically, the Magistrate found that Capt. Russell never lunged at her; did not touch or make contact with her breasts; did not cause her body to twist, jerk, or contort in a manner that would cause injury; and he did not violently attempt to dislodge her firearm from its holster. The Magistrate reasoned that because James's version of events changed considerably over time, her evolving and contradictory statements could only be attributed to untruthfulness, as opposed to an honest recollection of what actually transpired.

Furthermore, the Magistrate found that although James was not convicted of any crimes, her conduct was in violation of the following criminal statutes: G.L. c. 268, § 1, for perjuring herself at the Clerk Magistrate's hearing; G.L. c. 269, § 13, for filing a false report of a crime; and G.L. c. 268, § 6A, for filing a false police report. Finally, the Magistrate found that the Department proved by a preponderance of evidence that James failed to submit to an annual drug test and to update her residential address as alleged. The Magistrate held that the false reports and allegations alone were sufficient to support just cause for termination; however, he concluded that the cumulative effect of the drug test and address violations, along with the false allegations, were enough to justify James' termination.

An important takeaway for practitioners when considering an employee's untruthfulness regarding discipline or termination is the damage done by the lie(s). Not only does lying affect an officer's credibility when taking the stand, but as in this case, James's lies substantially injured the Department. The Magistrate made the point to note that the Department spent a significant amount of its resources investigating James's claims and responding to her allegations. In addition, the Magistrate also noted that James' allegations adversely affected the public interest by impairing the efficiency of the Department's public service on top of the detrimental effect the lies had on the reputation of the Department—all good and sufficient reasons for termination. When disciplining employees for untruthfulness or defending disciplinary actions in front of the Commission, employers should focus on the negative impacts an employee's lies can have on the organization.

Commission reduces 10-day suspension of Chelsea Police Officer to 5-days to promote fairness and consistency with progressive discipline

The Commission upheld the suspension, in part, of a Chelsea Police Officer for conduct unbecoming for failing to follow the instructions of a state trooper. *Carlos Vega V. City Of Chelsea*, 36 MSCR 428 (November 30, 2023). However, the Commission reduced the suspension from 10 to 5-days to promote fairness and consistency compared to the discipline imposed on two other officers also involved in the misconduct.

The situation arose when Officer Carlos Vega ("Officer Vega") arrived at the Massachusetts State Police barracks in Revere to bail out Ms. A, a female dispatcher of the Chelsea Police Department who had been arrested. Earlier that day, Ms. A had been drinking at a restaurant with Officers B and N. While driving from the restaurant to a new location, she crashed her vehicle into a nearby car dealership. She was subsequently arrested for operating a motor vehicle while under the influence and possession of a firearm while intoxicated and then transported to the State Police barracks in Revere.

While in the barracks, Officer Vega met Mr. C, an acquaintance and the father of Ms. A's children. Mr. C objected to Officer Vega's presence and accused him of being in an inappropriate relationship with his children's mother, which Officer Vega denied.

Following the brief altercation, Officer Carlos Vega assured a concerned state trooper that everything was under control and that he would be departing. Shortly after that, Officers B and N arrived together, both displaying signs of intoxication, and met with Officer Vega outside of the barracks. Around 9:12 p.m., state troopers emerged from the barracks to notify the three police officers about Ms. A's arrest and informed them that Mr. C would be posting her bail. The trooper then directed Officers Vega, B, and N to vacate the premises. Instead of complying, the trio lingered outside the barracks, engaging in phone conversations audible to those inside.

A few minutes later, Mr. C overheard the officers mention his name in conversation. Mr. C and his father exited the barracks and requested the police officers to leave, resulting in a heated exchange that escalated to shouting and the use of obscenities. Officer Vega initially attempted to restrain his colleagues but eventually joined the rowdy exchange. Three state troopers intervened, physically separating the two groups, and issued a second instruction to Officers Vega, B, and N to depart. Officer Vega apologized to the state troopers and again agreed to leave.

However, instead of leaving as instructed, the three police officers crossed the street and lingered near the barracks for an additional 20 minutes. Only after a state trooper approached them, recorded their names and badge numbers, and issued a third directive did Officer Vega and his colleagues return to their vehicles and depart. A state trooper filed a complaint with the Chelsea Police Department against all three officers for their misconduct, including their refusal to leave the barracks.

Following an Internal Affairs investigation, all three officers were charged with conduct unbecoming of a police officer. Police Chief Keith Houghton informed Officers Vega, B, and N that he would request a 10-day suspension from the Appointing Authority for each of them but would only impose a 5-day suspension if they agreed they were wrong and assented to the penalty. Officers B and N accepted the Chief's offer. Officer Vega did not accept the 5-day suspension.

Shortly after, Chief Houghton issued a notice of disciplinary action informing Officer Vega that he would be suspended for 5-days without pay. The notice also recommended that the City Manager suspend Officer Vega for an additional 5 days without pay. Officer Vega requested an appointing authority hearing.

After the appointing authority hearing, the hearing officer found that Officer Vega's conduct at the police barracks amounted to conduct unbecoming of a police officer and issued a 10-day suspension. The hearing officer specifically noted that of the three officers involved in the incident, Officer Vega had not consumed alcohol.

On appeal, the Commission upheld the conduct unbecoming charge noting that the fact that a Sergeant from the State Police was dispatched to the Department to report their actions was an embarrassment to themselves and the Department. However, the Commission found that the 10-day suspension was excessive, given that Officer Vega had no prior disciplinary history (in his short 4 year career with the department) and that the conduct of Officers B and N was considerably worse. The Commission also found it inappropriate to assign more blame to Officer Vega solely because he was sober compared to the other two intoxicated officers. Finally, the Commission noted that Officer Vega was not afforded sufficient due process because it appeared he was penalized with a longer suspension for exercising his right to a hearing.

This case highlights a common practice of appointing authorities who settle disciplinary disputes by reducing the amount of discipline for employees who accept responsibility for their misconduct. Although this decision does not sufficiently address the due process issue, the Commission seemed concerned that the Chief appeared to threaten Officer Vega with a harsher punishment if he exercised his rights under G.L. c. 31, § 41. As stated in the decision, threatening or punishing an employee for exercising their rights under the civil service statute would violate the officer's right to due process. However, a more acceptable and common approach would be to put the maximum penalty in the notice of discipline and then allow for settlement discussions with the possibility of agreeing to a reduced penalty for officers who accept some responsibility for their actions. The Commission recognizes that accepting responsibility is a measure of rehabilitative potential and can be a mitigating factor when contemplating discipline. A best practice would be to avoid combining a settlement proposal with the notice of discipline.

Gloucester Police Chief claps back with a 5-day suspension (reduced to 3) for union president's snarky and unprofessional 1:47am reply-all email to Police Chief's directive to remove officer photo collage from non-union space in station

In a 4-1 vote, the Commission found there was just cause for the Gloucester Police Department (the "Department") to discipline a union president for sending an unprofessional and discourteous email to the Chief of Police, cc'ing the entire Department. *Alex Aiello V. City Of Gloucester*, 36 MCSR 454 (December 28, 2023).

The controversy began in August 2022, when Gloucester Police Chief Edward Conley sent a Department-wide email reminding officers and civilian staff that Department resources should not be used for non-work-related activities. In the email, the Chief specifically referred to a union photo collage hanging on the wall in the roll call room. The Chief stated further that he assumed it was done off-duty and with a personal color printer but added it was still a violation of Department rules to hang the collage anywhere on the premises other than on the union bulletin board.

On August 22, 2022, at 1:47 am, while off-duty, patrolmen's union president, Officer Alex Aiello used his Department email address to respond to the Chief's email. Because he hit "reply all" to respond, his email was transmitted Department-wide (including to civilian employees). Aiello's email stated the following:

> Thank you Chief for addressing the issues that really matter in the department. The issues with low morale (which these patrolmen were attempting to help with), Patrolmen being told not to do police work or punishing them when they do (which enabled them to have the time to create this work of art), and drastic increases in holdovers are not important when you have the misuse of paper and ink. It is also great that this was addressed in a timely manner and wasn't left to hang for several months where

> it would be almost impossible to miss for anyone who took any interest in the patrol function of the department.
>
> Since you appreciate the artistry and historical record so much you can have my picture as a gift."

Upon receiving the email, Chief Conley expressed that he was shocked and personally found the email to be "rude, inappropriate, insubordinate, and an attempt to publicly mock him and his authority." The Chief ordered an internal affairs investigation to determine whether Aiello's email violated any Department rules or policies or if his email should be treated as a legitimate exercise of free speech as a labor representative.

The investigation report noted that although union leaders are granted certain latitude with free speech concerning membership interests, this latitude is restricted, and certain speech violates Department rules and regulations when there is a marked negative effect on Department operations. The report concluded by sustaining the following charges against Aiello:

> 1. Insubordination - for publicly criticizing instructions or any order;
>
> 2. Discourtesy - for publicly using a disrespectful tone directed toward the Chief; and
>
> 3. Public Statements - for publicly undermining the legitimate authority of the Chief.

After reviewing the investigation report, the Chief forwarded the report to Aiello with a draft discipline memorandum. The memorandum proposed that if Aiello acknowledged his wrongdoing, the Chief would reduce a straight 5-day suspension to a 5-day suspension with 3 days to serve and 2 days to be suspended for 2 years. Officer Aiello rejected the Chief's proposal and elected to exercise his right to an appointing authority hearing. After the hearing, the City upheld the 5-day suspension, and Aiello filed a timely appeal with the Commission.

After a full evidentiary hearing, the Commission ruled that the Department had just cause to sustain the charges of Discourtesy and Public Statements as Aiello "engaged in substantial misconduct that adversely affected the public interest by impairing the efficiency of public service." In its decision, the Commission considered the fact that as a union president, "Officer Aiello is entitled to the free exercise of his authority to speak to the Chief on matters of concern to union members… [h]owever it could not have been in anyone's best interests for the Union President to antagonize the Chief on the eve of contract negotiations."

In regard to the discipline imposed, the Commission modified the discipline to a 3-day suspension because it did not find that Aiello's conduct amounted to insubordination. Although the Commission found the email discourteous and unnecessarily communicated to all Department personnel, the email, on its face, did relate to matters of legitimate concern for the union members. In fact, Commissioner Stein argued in a concurring opinion that any discipline greater than a 1-day suspension would be "more counterproductive and punitive rather than remedial."

An important key takeaway from this decision is language confirming that union representatives, including presidents, are held to the same standards of conduct as other sworn officers and personnel. The Commission noted multiple times the unprofessionalism in Aiello's email. Moreover, Commissioner Bowman made it a point in the decision to note that Aiello failed to acknowledge any responsibility for his conduct, stating:

> Even in hindsight, he does not consider his email as a lapse in judgement. I was struck by his lack of remorse, and his failure to be contemplative and consider the greater good while serving as a leader among other officers.

Another takeaway is the issue of working paid details or overtime when an officer is suspended for misconduct. The decision addressed this issue specifically, stating that "[o]ne may not wear the Department uniform and hold one's self out as a sworn police officer, with all of the attendant duties and responsibilities, while one is suspended from serving as such." The Commission also noted that practically speaking, when an officer is on suspension, that officer is removed of his gun and badge and, therefore, would not be able to perform the necessary duties required on a detail.

Finally, in contrast to the due process issue noted in *Carlos Vega* v. *City Of Chelsea*, 36 MSCR 428 (November 30, 2023), the Commission did not find a due process violation in the Chief's attempt to settle the matter by offering to reduce the 5-day suspension if Aiello acknowledged his wrongdoing. This is likely the case because the Chief framed the settlement proposal so that Aiello's acknowledgment of wrongdoing would be considered as a mitigating factor. In contrast, in *Vega*, the Commission was concerned that the appointing authority punished or threatened the Appellant for exercising his statutorily guaranteed right to a hearing.

BYPASS APPEALS

Somerville bypasses Police Officer for "lack of candor" regarding residency claim but falls short of "proving" untruthfulness

The Commission found that the City of Somerville had reasonable justification for bypassing a candidate for appointment as a police officer who provided "implausible, inconsistent, and incomplete responses about his residency and employment history during the application process." *Johnny Denis* v. *City of Somerville*, 36 MSCR 304 (May 5, 2022). Although Somerville noted in its bypass letter that the reason for the bypass was Denis's untruthful statements regarding his residency, the Commission did not find that Denis was untruthful, only that he lacked candor.

On March 23, 2019, Johnny Denis ("Denis") took and passed the civil service police officer examination. In December 2019, he applied for a police officer position with the Somerville Police Department, asserting his preference as a resident of Somerville. In his application, Denis stated that he had lived in Brockton from October 2017 until February 2018, moved to Somerville at the beginning of March 2018, and moved back to Brockton at the end of March 2019.

To claim a residency preference, a candidate must establish that he resided in the city or town he is applying to continuously for one year before taking the civil service examination. In Denis's case,

that would have required him to reside in Somerville from March 23, 2018 to March 23, 2019.

Denis asserted that, during the relevant period, he resided in a two-bedroom apartment within a Somerville Housing Authority ("SHA") complex along with his mother and nephew. Despite a 2018 Somerville driver's license and bank statements, the background investigation uncovered strong evidence that Denis resided in Brockton during the relevant timeframe.

Notably, Denis submitted tax returns and an unemployment application where he indicated that he lived in Brockton with his girlfriend and daughter throughout the entirety of 2018. In addition, he claimed a significant rental deduction of $9,000 for his Brockton apartment in 2018. Denis also stated that he never notified the SHA that he was residing within the complex. Denis further contended that he did not have a designated room in the apartment but instead slept on the couch. Finally, Denis failed to furnish proof of his voter registration for the years 2018 and 2019, details of his motor vehicle registration, or any evidence of payment for excise taxes.

The Commission agreed with Somerville that Denis's irreconcilable explanations about where he resided "apparently using a Somerville residence when it gained him an advantage for purposes of his civil service status while claiming a different residence to take advantage of other benefits." The Commission also found that Denis lacked candor in reporting his employment history, specifically regarding termination and eligibility for rehire as a parts delivery person in May 2018.

Although the Commission found that Somerville had a reasonable justification to bypass Denis for "lack of candor" concerning his residency and employment history it intentionally did not make a finding that Denis was untruthful, despite noting that his claims at times were "implausible." Reluctance to make a finding of untruthfulness is common practice for the Commission - especially these days. Indeed, when at all possible, the Commission routinely defers to the candidate and characterizes what is clearly a lie, as the candidate's "lack of candor" or the candidate simply "providing incorrect or incomplete information" with no intent to deceive. In many of its recent decisions, the same language and legal reasoning are used to justify a bypass but not make a finding of untruthfulness:

> Providing incorrect or incomplete information on an employment application does not always equate to untruthfulness. "[L]abeling a candidate as untruthful can be an inherently subjective determination that should be made only after a thorough, serious and [informed] review that is mindful of the potentially career-ending consequences that such a conclusion has on candidates seeking a career in public safety." *Kerr* v. *Boston Police Dep't*, 31 MCSR 25 (2018), citing *Morley* v. *Boston Police Department*, 29 MCSR 456 (2016). Moreover, a bypass letter is available for public inspection upon request, so the consequences to an applicant of charging him or her with untruthfulness can extend beyond the application process initially involved. See G.L. c. 31, § 27, ¶ 2. Thus, the serious consequences that flow from a finding that a law enforcement officer or applicant has violated the duty of truthfulness require that any such charges must be carefully scrutinized so that the officer or applicant is not unreasonably disparaged for honest mistakes or good faith mutual misunderstandings. *See, e.g., Boyd* v. *City of New Bedford*, 29 MCSR 471 (2016); *Morley* v. *Boston Police Dep't*, 29 MCSR 456 (2016); *Lucas* v. *Boston Police Dep't*, 25 MCSR 520 (2012) (mistake about appellant's characterization of past medical history).

Undeniably, a finding of untruthfulness can be detrimental to a candidate's future employment and would not be consistent with the principles of fairness if the untrue statements were innocent errors or mistakes. However, the Commission notes that the candidate's responses were not only implausible but that he was clearly claiming residency in Somerville for preference in his application, and at the same time he was claiming residency in Brockton for unemployment and tax benefits. As both claims cannot be true, it is unclear what more Somerville should have provided to demonstrate or prove untruthfulness. This practice by Commission, at the very least, seems to raise the burden of proof beyond that of a preponderance of the evidence when proving untruthfulness. See earlier commentary on *Natalie Lima* v. *City of Somerville*, 36 MCSR 155 (May 4, 2023).

Another takeaway from this decision is that appointing authorities should cite every good-faith justification in the bypass letter when bypassing a candidate. The Commission noted in a footnote that Somerville had a strong basis for concluding that Denis did not meet the residency requirement and, therefore, he should not have been placed high enough on the certification for him to be considered an eligible candidate, and therefore, would not have had any recourse to appeal to the Commission for his non-selection as he technically would not have been bypassed. However, because Somerville did not state a lack of residency in its bypass letter, the Commission did not make an explicit finding about the residency preference.

Prior misconduct while in a supervisory position should not be given less weight when evaluating a candidate for a non-supervisory position

The Commission dismissed the bypass appeal of a former correctional officer who was terminated from his previous position as a captain for sexually harassing two female employees under his chain of command. *Bobby R. Theriault* v. *Department Of Correction*, 36 MCSR 361 (October 19, 2023).

In 2002, Bobby Theriault ("Theriault") was appointed by the Department of Correction ("DOC") as a Correctional Officer I, ("CO I"), an entry level position. While serving as a CO I, he routinely received positive performance evaluations and commendations and was promoted to Captain in 2011. In or around 2017 and 2018, two female employees submitted separate reports regarding separate incidents where Theriault had sent them harassing and sexually explicit text messages and threats. One of the women ultimately obtained a harassment prevention order against him. After conducting an internal investigation, the DOC terminated Theriault in 2018 for his misconduct. His termination was upheld in arbitration.

Recently, in 2023, Theriault applied again for employment at the DOC as a CO I. The DOC bypassed his appointment, citing his misconduct that resulted in his termination in 2018. At the prehearing conference, it was determined that there were no factual disputes, and the parties agreed to file cross-motions for a sum-

mary decision. Theriault, a former captain, argued that he had received excellent reviews as a CO I and had only gotten into trouble when he was a Captain, a supervisory position. Therefore, he argued that his actions as a supervisor should have no bearing on his appointment as an entry level corrections officer with no supervisory responsibilities. The DOC argued that it was essential for the DOC to maintain a reputation of public trust and the trust and safety of its employees. The DOC further argued that Theriault's prior misconduct transcended the position of Captain and that regardless of his supervisor responsibilities, his prior misconduct precluded him from holding any position within the DOC.

The Commission agreed with the DOC and dismissed the appeal in a quick fashion. It found Theriault's prior misconduct remarkably egregious and unacceptable for "any employee at any level at the DOC, including CO I." Moreover, the Commission noted that Theriault could not show that his misconduct only occurred because he held the title of Captain at the time. Therefore, the Commission held that Theriault's prior misconduct was a reasonable justification for bypass.

NON-BYPASS EQUITY APPEALS

Commission upholds management rights, enshrining civil service employers right not to make appointments when positions are vacant

The Commission summarily dismissed two separate appeals requesting the Commission to order employers to make specific appointments. *Nicholas Bonaceto* v. *Boston Fire Department*, 36 MCSR 379 (November 16, 2023) and *Adam M. Siegel* v. *Malden Police Department*, 36 MCSR 426 (November 30, 2023).

In *Bonaceto*, the Commission dismissed an appeal by Boston Fire Department ("BFD") Lieutenant Nicholas Bonaceto who complained that the BFD failed to promote him to fill a vacant Fire Captain position before the expiration of the eligible list.

On July 20, 2023, Lt. Bonaceto was next on the eligible list for captain, which was set to expire on July 21, 2023. That same day, BFD promoted a fire captain to the rank of district chief, creating a vacant captain position. On July 22, 2023, while the captain position was still vacant, HRD established a new eligible list for captain and revoked the previous list. Bonaceto was ranked 35th on the new eligible list for captain. At the time of the appeal, BFD had not made any promotions to captain and instead filled the position with lieutenants acting "out of grade" or Temporary Service in Higher Rank (TSHR). Bonaceto argued that by failing to fill the captain position and allowing the eligible list, where he was next in line for promotion, to expire, BFD effectively bypassed him. In other words, he argued that the Department had an obligation to promote him to the vacant captain position prior to the expiration of the eligible list. The Commission disagreed.

For multiple reasons, the Commission held that Bonaceto was not aggrieved, and his civil service rights were not impaired by BFD's decision not to permanently fill the captain vacancy prior to the expiration of the list. First, there is no "vested right" to receive an appointment or promotion by maintaining the top position on an eligible list. Second, an appointing authority is granted considerable authority and "retains the sole power to decide whether to fill vacancies on either a permanent or temporary basis." Finally, Bonaceto failed to present sufficient evidence to establish that BFD's decision not to fill the vacancy was motivated by personal or political animus or any other evidence to indicate that the decision was not a "legitimate management call."

In *Siegel*, the Commission summarily dismissed an appeal by a Malden Police Sergeant who argued that he was aggrieved by the Malden Police Department's ("MPD") decision to revive an expired list to make a permanent promotion to the position of lieutenant. Sergeant Siegel had taken the October 2022 statewide police promotion examination, which HRD decided not to score in the wake of the decision in *Tatum* v. *Commonwealth,* Suffolk Sup. Ct. No. 0984CV00576 (10/27/2022). Siegel subsequently took the makeup exam administered in September 2023.

Prior to the establishment of the eligible list from the lieutenant's makeup examination in September 2023, MPD requested that HRD revive its expired 2021 eligible list in order to make permanent appointments while waiting for the new list. HRD granted MPD's request and revived the 2021 eligible list.

Seigal appealed to the Commission arguing that it was neither fair nor equitable for MPD to promote off the 2021 eligible list before the pending establishment of the new list from the September 2023 makeup exam. He argued further that MPD should be required to make only temporary appointments until HRD certifies the new list.

The Commission dismissed Siegel's appeal for reasons like those in the Bonaceto decision. First, the Commission found that any potential harm to Siegel was speculative. The new list had yet to be established, and Siegel's rank on the pending list was unknown, making it impossible to determine whether he would be next in line for a promotion. Second, no objection was made when MPD requested HRD to revive the list, and it would be inappropriate for the Commission to reconsider its decision under these circumstances. Third, Siegel provided no evidence of personal or political bias. Finally, there is no requirement for the MPD to make a promotion when there is a vacancy.

These decisions firmly uphold the principle that, beyond any rights specified in a collective bargaining agreement and free from political or personal bias, civil service employers maintain the prerogative to either proceed or abstain from making appointments—provisional or permanent—when faced with vacancies. Importantly, these rulings highlight that a mere position at the top of the eligible list does not automatically confer a vested interest in a vacant position to the employee. In practical terms, this signifies that, in the absence of a collective bargaining agreement or any form of bias, civil service employers have the authority to let eligible lists expire without filling vacancies. Furthermore, they may choose to make provisional appointments from a soon to be expired list until a new list is established.

EXAMINATION APPEALS

HRD's decision not to credit Fire Captain time served in another fire department in calculating E&E score for promotional exam was not arbitrary and capricious

The Commission dismissed an appeal by a Weymouth Fire Captain objecting to HRD's decision not to credit his time served in another fire department for the E&E component of the May 2022 pro-

motional examination for Deputy Fire Chief. *Brad T. Flannery* v. *Human Resources Division*, 36 MCSR 285 (September 7, 2023).

Brad Flannery is a Captain in the Weymouth Fire Department, which he joined as a firefighter in August 2007. Before joining the Weymouth Fire Department, Captain Flannery was a firefighter in the Rockland Fire Department from April 23, 2006, until June 30, 2007, when he was laid off for budgetary reasons.

On April 29, 2022, in preparation for the May 2022 promotional exam, HRD sent the following notice to all examinees:

> This is an Examination Component: In this examination component you will rate your own education, training, and work experience against a standard schedule. You will do so by filling out this Online E&E Claim. A standard schedule is a list of all types and levels of education, training, work experience, licensure, and other credentials which demonstrate your qualifications for the examination title and for which you may receive credit toward your overall final examination score. Everything that will receive credit is included in this Online E&E Claim. Each section of the standard schedule is preceded by specific instructions. The amount of credit that corresponds to each item on the schedule will receive has been determined in advance and is displayed in parentheses next to each response. E&E credit will be scored for all candidates.

Flannery claimed 1.8 points (48 to 59 months of experience) for Category 7A, which asked:

> Permanent Full-time Firefighter or higher 12 to 17 years prior to the examination date. This is the first of two categories which allow you to receive credit for experience in the specified department as a Firefighter, Fire Lieutenant, Fire Captain, or District Fire Chief which occurred prior to the timeframes credited in Categories 1 through 5.

Flannery's claim for 1.8 points (48-59 months of experience) included his time at the Rockland Fire Department.

On August 19, 2022, HRD notified the Appellant of his exam scores, consisting of the written score, E&E score, and final score. The notice informed the Appellant that his E&E claim for 1.8 points had been adjusted to 1.0 point (reflecting 24 to 35 months of experience), discounting his time at the Rockland Fire Department. Flannery sought to appeal this decision and incorrectly filed his appeal of the E&E score adjustment with the HRD, rather than the Commission. After several weeks - well outside the timeline to file an appeal, the appeal was eventually filed with the Commission.

In response to the appeal, HRD filed a Motion for a Summary Decision, laying out two arguments for dismissal. First, the appeal was untimely and therefore the Commission lacked jurisdiction. Second, limiting the E&E score to the years of service the examinee served ***in the same department*** was not arbitrary and capricious.

The Commission rejected the argument that Flannery's appeal was untimely, noting that HRD's instructions on how and where to appeal were vague and reasonably caused Flannery to file the appeal with HRD rather than with the Commission. The Commission noted that the appeal was filed with HRD within the statutory deadline of 17 days and therefore accepted the appeal as timely.

Regarding the substantive claim, the Commission found that the decision to exclude time spent with other departments when calculating the E&E score was not arbitrary and capricious. Unlike HRD's instructions on how to appeal, the E&E component contained detailed instructions on what type of service HRD credited in calculating the E&E score. HRD credited the Appellant for all of his firefighter experience in Weymouth, which was consistent with the instructions and with how HRD treated all examinees. "[I] t is not the Commission's role to fine-tune how many E&E points are awarded for each category on a promotional examination but, rather, to ensure that HRD's decision-making process was not arbitrary or capricious and that the awarding of E&E points was done uniformly." *Kenneally* v. *HRD*, 31 MCSR 108 (2018).

Flannery argued that his overall length of service, including previous employment with the Rockland Fire Department, should be considered under G.L. c. 31, § 33 (governing length of service), and G.L. c. 31, § 46, (governing reinstatement). However, the Commission found that these factors are distinct from the Human Resources Division's (HRD) determination of E&E (Education and Experience) points for examinations.

In support of his arguments, Flannery cited *Callahan* v. *HRD*, 34 MCSR 225 (June 3, 2021). In *Callahan*, the Commission reversed HRD's denial of E&E credit to a Lowell firefighter for 1,740 hours of time served as a temporary Fire Lieutenant. The Commission found that *Callahan* did not apply to the facts in this case because the E&E category at issue in *Callahan* specifically awarded points for time served as a *Temporary Fire Lieutenant* as opposed to time in the same department.

A related Civil Service decision issued a month later also upheld the notion that the Commission has no jurisdiction over HRD's grading of the multiple-choice questions. *Daniel R. Adjemian* v. *Human Resources Division*, 36 MCSR 308 (October 5, 2023). In *Adjemian*, Daniel Adjemian, a Boston Fire Fighter, appealed to HRD and then to the Commission contesting HRD's grading of three multiple choice questions on the Technical Knowledge and Situational components of the Boston Fire Lieutenant Promotional Exam, administered by HRD in March 2023, as well as the validity of the recommended study materials as they related to the three contested multiple-choice questions.

The Commission summarily dismissed the appeal on two grounds. First, the Commission lacked jurisdiction to hear the appeal as HRD's determination on the accuracy of the grading of the multiple-choice questions is final. See G.L. c. 31, § 24. Secondly, although the Commission could have interpreted the appeal of the study materials as a "fair test" challenge, any such challenge must be made within seven days after the examination date. See G.L. c. 31, §22-24. In this case, Adjemian appealed more than two weeks after receiving his exam scores in June 2023. Therefore, the Commission lacked jurisdiction as the appeal was untimely.

A key takeaway from these two decisions, other than to thoroughly read the instructions from HRD, is that HRD sets the criteria for grading the exams administered by HRD. The criteria are not

necessarily set forth by statute, i.e., G.L. c. 31, § 33 (governing length of service), and G.L. c. 31, § 46 (governing reinstatement). Outside of a "fair test" challenge,[1] as long as HRD's criteria are applied uniformly to the examinees and are not arbitrary and capricious, the Commission will defer to HRD. ■

1. A "fair test" appeal challenges the examination, in whole or in part, on the grounds that it did not constitute "a fair test of the applicant's fitness actually to perform the primary or dominant duties of the position for which the examination is held ...." G.L.c.31, § 22,¶4; G.L.c.31, § 24(b). A fair test appeal may involve, for example, claims that questions were erroneously framed, covered subjects as to which applicants did not have notice, or other irregularities in the test procedure that gave undue advantages or disadvantages to some applicants over others. *See, e.g., DiRado* v. *Civil Service Comm'n,* 352 Mass. 130 (1967) (applicants not given equal opportunity to use drawing aids); *Boston Police Super. Officers Federation* v. *Civil Service Comm'n*, 35 Mass. App. Ct. 688 (1993) (video performance component, an essential part of the examination, was tainted by test administrator's conflict of interest) *See also O'Neill* v. *Civil Service Comm'n*, MICV09-0391 (2009), aff'd, 78 Mass. App. Ct. 1127 (2011) (Rule 1:28) (time to bring "fair test" appeal); *Swan* v. *Human Resources Div.*, CSC No. B2-15-182 (2015)(same).

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