MASSACHUSETTS CIVIL SERVICE REPORTER

Massachusetts Civil Service Commission
Administrative Law Decisions

VOLUME 32
2019

Civil Service Commission

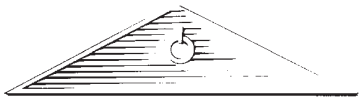
One Ashburton Place, Rm. 503
Boston, MA 02108
Telephone (617) 727-2293
Fax (617) 727-7590

CIVIL SERVICE COMMISSIONERS	YEAR APPOINTED
Christopher C. Bowman, Chairman	2006
Paul M. Stein	2008
Cynthia A. Ittleman	2012
Kevin M. Tivnan	2015
Paul A. Camuso	2015

COMMENTARY BY:

Norris, Murray & Peloquin, LLC
Philip Collins, Esq.
Melissa R. Murray, Esq.
Antoine Fares, Esq.

Reardon, Joyce & Akerson, P.C.
Andrew Gambaccini, Esq.



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Volume 32 **November-December 2019**

Massachusetts Civil Service Commission–Administrative Law Decisions

In This Issue

DISCIPLINARY ACTIONS

. . . . . *continued on next page*

CITE BY VOLUME AND PAGE OF THE Massachusetts Civil Service Reporter THUS:
Gibbons v. City of Woburn, 32 MCSR 14 (2019)

BYPASS APPEALS

RECLASSIFICATION APPEALS

MISCELLANEOUS APPEALS

INDICES

For January-June 2019 cumulative Civil Service Reporter Indices, please consult the Six-Month Supplement section in this volume.

For 2015-2018 Civil Service Reporter indices, please consult the Cumulative Indices section in this volume.

For 1993-2014 cumulative Civil Service Reporter indices, and CD of decisions published in MCSR, please consult the stand-alone soft-bound supplemental index.

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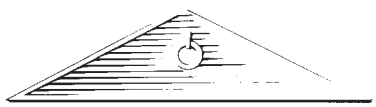

LANDLAW LEGAL PUBLISHERS

Cumulative Cases Reported–July-December 2019

Plaintiff v. Defendant

Cumulative Cases Reported–July-December 2019

Defendant; Plaintiff v.

Cumulative Subject Matter Index–July-December 2019

Cumulative Subject Matter Digest–July-December 2019

Appointments and Promotions

Bypass Appeals

– Background Check

The Commission unanimously voided the bypass by the Department of Correction of a documented Iranian refugee, passed over because of police incident reports that were filed after Quincy police came to his home at the request of his wife. DOC could not bypass him for the information in the police reports after having made him a conditional offer of employment given that these reports had already been considered and not found problematic. *Matoofi* v. *Department of Correction (Decision),* 32 MCSR 285 (2019).

– Certification List (see also Promotional List)

The City of Haverhill failed to show that the promotional appointment of a candidate to Deputy Fire Chief was made prior to the date that the eligibility list from which he was selected had expired. Chairman Christopher C. Bowman did not void the appointment but gave the parties 60 days to confer regarding the appropriate relief. The appointment was challenged by a fire lieutenant on the new list who had the highest score. *Link* v. *City of Haverhill (Interim Decision),* 32 MCSR 334 (2019).

– Criminal Record and Activity

The Commission affirmed the bypass of a candidate for original appointment as a Correction Officer based on a 2009 arrest for marijuana possession. The decision found that DOC's consideration of all criminal record information related to the Appellant was lawful and that its decision-making process was thoughtful and not unreasonable given the necessity of a zero-tolerance policy regarding illegal drugs in any DOC facility. *Kodhimaj* v. *Department of Correction (Decision),* 32 MCSR 377 (2019).

– Disciplinary Record

The Department of Correction was justified in bypassing a candidate for original appointment as a Correction Officer based on his employment history and military disciplinary record. In addition, DOC was not improperly concerned with his failure to de-escalate a recent potentially violent confrontation with a drunken acquaintance where he pulled out a weapon thereby dangerously escalating the event. *Antunez* v. *Department of Correction (Decision),* 32 MCSR 282 (2019).

The Town of Ipswich established by a preponderance of the evidence that it was justified in bypassing a candidate for promotion to Ipswich Fire Lieutenant in part because of his disciplinary record that included two suspensions and a written warning. The successful candidate had no disciplinary record. *McInnis* v. *Town of Ipswich (Decision),* 32 MCSR 272 (2019).

– Disparate Treatment

A candidate bypassed for original appointment to the Boston Police Department could not claim that he had been victimized by a disparately harsh consideration of incidents involving run-ins with the police since his comparators involved successful candidates with issues that had arisen many years earlier and who were never shown to have been untruthful to the police or verbally belligerent. *Marchionda* v. *Boston Police Department (Decision),* 32 MCSR 303 (2019).

– Driving Record

The Commission affirmed the bypass by the Massachusetts Parole Board of a strong candidate for appointment as a Field Parole Officer because of her two recent surchargeable and serious traffic accidents that occurred in 2018. The candidate otherwise had no record of driving infractions during her career in the military and Chair Christopher C. Bowman encouraged her to reapply at a future time when these accidents were more in the past. Field Parole Officers are designated as special police officers by the State Police, carry a firearm and have arrest powers, and are provided with an emergency-equipped state vehicle with domicile privileges to conduct investigations and transport parolees. *Rodriguez* v. *Massachusetts Parole Board (Decision),* 32 MCSR 311 (2019).

– Employment History

The Department of Correction was justified in bypassing a candidate for original appointment as a Correction Officer based on his employment history and military disciplinary record. His employment history included two negative incidents with former employers at a security concern and as a correctional officer in Indiana. *Antunez* v. *Department of Correction (Decision),* 32 MCSR 282 (2019).

– Interview

The Commission reversed the bypass of a candidate for original appointment as a Correction Officer in finding the process to be flawed where the candidate was bypassed for appointment without conducting any kind of background investigation and relying solely on the conclusions of the interview panel. In addition, the decision by Commission Chair Christopher C. Bowman takes fault with a flawed interview question that improperly necessitated a candidate's knowledge of DOC policies, and with the divergent testimony from DOC witnesses on why they rated the Appellant poorly on another question. *Gilot* v. *Department of Correction (Decision),* 32 MCSR 298 (2019).

The Town of Ipswich established by a preponderance of the evidence that it was justified in bypassing a candidate for promotion to Ipswich Fire Lieutenant because of his poor interview that reflected his inadequate communication skills and difficulty in expressing himself coherently. *McInnis* v. *Town of Ipswich (Decision),* 32 MCSR 272 (2019).

– Judgement

The appeal of his bypass by a candidate for original appointment to the Boston Police Department was dismissed by the Commission where Boston had legitimate concerns with this candidate's history of untruthfulness and belligerence toward the police. Specifically cited were three unfortunate encounters he had had with various law enforcement authorities and what his comportment during these incidents suggested about his judgment. *Marchionda* v. *Boston Police Department (Decision),* 32 MCSR 303 (2019).

The Department of Correction was justified in bypassing a candidate for original appointment as a Correction Officer based on his employment history and military disciplinary record. In addition, DOC was not improperly concerned with his failure to de-escalate a recent potentially violent confrontation with a drunken acquaintance where he pulled out a weapon thereby dangerously escalating the event. *Antunez* v. *Department of Correction (Decision),* 32 MCSR 282 (2019).

– Lying

The appeal of his bypass by a candidate for original appointment to the Boston Police Department was dismissed by the Commission where Boston had legitimate concerns with this candidate's history of untruthfulness and belligerence toward the police. Specifically cited were three unfortunate encounters he had had with various law enforcement authorities and what his comportment during these incidents suggested about his judgment. The Appellant's claim that he had been victimized by a disparately harsh consideration of these incidents was rejected since his comparators involved successful candidates with issues that had arisen many years earlier and who were never shown to have been untruthful to the police or verbally belligerent. *Marchionda* v. *Boston Police Department (Decision),* 32 MCSR 303 (2019).

The Commission unanimously adopted Chairman Christopher C. Bowman's decision that voided the bypass by the Department of Correction of a documented Iranian refugee, passed over for untruthfulness about his incarceration in Iran for religious reasons after the record showed he had not

been untruthful at all and had been incarcerated for his Christian religious beliefs. *Matoofi* v. *Department of Correction (Decision),* 32 MCSR 285 (2019).

– Nepotism

Commission Chair Christopher C. Bowman declined to initiate an investigation into the reduction in the number of Medford firefighters appointed from an eligibility list after two candidates claimed they had been disadvantaged because of nepotism. The two appellants claimed that the City's decision to only appoint 11 rather than 13 candidates from a 2018 list was to favor the candidacy of the Mayor's son, who had scored highly on a more recent eligibility list. Chairman Bowman found that the reason that Medford had appointed fewer candidates than anticipated was due to scheduling issues and incomplete background investigations rather than any favoritism for the Mayor's son. *Albano* v. *City of Medford (Response to Request for Investigation),* 32 MCSR 277 (2019).

– Physical Fitness

Citing the grounds of fundamental fairness, Chairman Christopher C. Bowman ordered HRD to annul the rescission of two Brockton candidates' acceptances to the Police Academy. The two candidates were accepted into the academy having passed the Physical Abilities Test but were unable to pass the revised test put in place after their acceptance. Both candidates had resigned from their jobs in anticipation of attending the academy. *Cartwright* v. *City of Brockton (Decision),* 32 MCSR 375 (2019).

– Professional Qualifications

The Commission dismissed an appeal from a bypassed candidate for original appointment as a West Springfield firefighter where he failed to produce his EMT certification despite multiple promises to do so. *Fernandes* v. *Town of West Springfield (Order of Dismissal),* 32 MCSR 268 (2019).

– Promotional List (see also Certification List)

The City of Haverhill failed to show that the promotional appointment of a candidate to Deputy Fire Chief was made prior to the date that the eligibility list from which he was selected had expired. Chairman Christopher C. Bowman did not void the appointment but gave the parties 60 days to confer regarding the appropriate relief. The appointment was challenged by a fire lieutenant on the new list who had the highest score. *Link* v. *City of Haverhill (Interim Decision),* 32 MCSR 334 (2019).

– Seniority/Length of Service

On remand from the Superior Court, the Commission voted to order the placement of the Appellant's name at the top of the promotional list for sergeant but declined to apply a retroactive seniority date, citing case law allowing retroactivity only for original appointments. *Otero* v. *City of Lowell (Decision on Remand),* 32 MCSR 289 (2019).

– Successful Candidates

The Town of Ipswich established by a preponderance of the evidence that it was justified in bypassing a candidate for promotion to Ipswich Fire Lieutenant in part because of his disciplinary record that included two suspensions and a written warning. The successful candidate had no disciplinary record. *McInnis* v. *Town of Ipswich (Decision),* 32 MCSR 272 (2019).

– Temporary Employees

Ruling on the second remand from the Superior Court of 10-year-old appeals from Boston fire lieutenants challenging temporary captain promotions, the Commission found that the appropriate relief for these now retired Appellants would be monetary based on pay differentials between lieutenant and captain. The awards ranged from $1,072 up to $9,208 before the calculation of what will be significant pre-judgment interest at 12% calculated from 2009. The Commission rejected the Boston Fire Department's argument that the 30-day default filing limitation in its rules should be applied, citing the BFD's ongoing failure to comply with civil service laws. *Kelley* v. *Boston Fire Department (Decision on Second Remand),* 32 MCSR 386 (2019).

Examination Appeals

– Fair Test Appeal

Hearing Commissioner Paul M. Stein ruled that two Department of Correction lieutenants had made a timely "fair test" appeal requiring a full evidentiary hearing on whether the use of a rescaled Technical Knowledge test prejudiced their civil service rights. The Appellants claimed that the rescaling had unfairly resulted in their failure to achieve a passing Overall Test Score, thereby preventing their names from being placed on the current Department of Correction Captain's eligible list. *Paiva* v. *Human Resources Division (Decision),* 32 MCSR 337 (2019).

– Scoring

Chief Christopher C. Bowman dismissed a promotional examination appeal from a Winthrop police officer unhappy with his grade on the sergeant's promotional exam, finding that HRD's review was reasonably thorough and impartial and that its decision to affirm the grade of the consultant assigned to the Appellant's essay was neither arbitrary or devoid of logic. *Romeo* v. *Human Resources Division (Decision),* 32 MCSR 348 (2019).

– Timeliness of Appeal

Hearing Commissioner Paul M. Stein found that although two Correction lieutenants had technically filed their "fair test" appeal after the seven-day deadline, he allowed an equitable tolling of the deadline because there would have been no possibility of the Appellants knowing the basis for their appeal until after the deadline lapsed. The basis of their appeal was the rescaling of their Technical Knowledge scores. *Paiva* v. *Human Resources Division (Decision),* 32 MCSR 337 (2019).

– Training and Experience Credits

HRD unfairly denied E&E credit to an applicant for original appointment as a municipal police officer for his two decades of experience as a Connecticut State Trooper. The Commission reversed the denial. *Naylor* v. *Human Resources Division (Decision),* 32 MCSR 351 (2019).

The Commission turned down an appeal from a Brockton firefighter seeking a ruling denying the inclusion of time as an "acting" lieutenant in the calculation of a competitor's score for promotion to Fire Lieutenant. The Commission recently rebuffed an attempt by HRD to deny E&E credit for time spent in an "acting" position since to do so went against 20 years of HRD practice and, more importantly, would contradict the compelling logic of awarding more points for previous experience in the sought-after position. *McDonald* v. *Human Resources Division (Decision on Cross Motions for Summary Decision),* 32 MCSR 269 (2019).

Icily noting that "[a]lmost every premise of Mr. Bonavita's appeal is wrong", Chairman Christopher C. Bowman dismissed his appeal from the denial of the two-point credit for 25 years of service on a police sergeant promotional exam as he had never submitted to HRD any documentation showing the number of days and shifts he worked as a reserve police officer and wrongly claimed that two other competing candidates had receive the credit. *Bonavita* v. *Human Resources Division (Order of Dismissal),* 32 MCSR 254 (2019).

Human Resources Division (Formerly DPA)

– Certification Lists

The City of Haverhill failed to show that the promotional appointment of a candidate to Deputy Fire Chief was made prior to the date that the eligibility list from which he was selected had expired. Chairman Christopher C. Bowman did not void the appointment but gave the parties 60 days to confer regarding the appropriate relief. The appointment was challenged by a fire lieutenant on the new list who had the highest score. *Link* v. *City of Haverhill (Interim Decision),* 32 MCSR 334 (2019).

Cumulative Cases Cited–July-December 2019

CORTLAND CARTWRIGHT and SAMANTHA ACKERSON

v.

CITY OF BROCKTON

G1-19-180 (Cartwright)
G1-19-183 (Ackerson)

November 7, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Municipal Police Officer-Failure to Pass Physical Abilities Test-Tougher Standards—Citing the grounds of fundamental fairness, Chairman Christopher C. Bowman ordered HRD to annul the rescission of two Brockton candidates' acceptances to the Police Academy. The two candidates were accepted into the academy having passed the Physical Abilities Test but were unable to pass the revised test put in place after their acceptance. Both candidates had resigned from their jobs in anticipation of attending the academy.

DECISION

The Civil Service Commission (Commission) received appeals from two (2) Appellants contesting their non-selection to the position of police officer by the City of Brockton (City). Cortland Cartwright (Mr. Cartwright) filed his appeal with the Commission on August 23, 2019 and Samantha Ackerson (Ms. Ackerson) filed her appeal with the Commission on August 28, 2019.

2. Pre-hearing conferences regarding both appeals were held at the offices of the Commission on September 17, 2019. The Appellants and counsel for the City attended each pre-hearing conference.

3. Based on the information provided at the pre-hearing conferences, the following appears to be undisputed:

A. The City granted conditional offers of employment to the position of police officer to both candidates.

B. Among the conditions were the following: 1) Successful completion of a medical examination; 2) Successful completion of a psychological examination; 3) successful completion of the Physical Abilities Test (PAT) conducted by the state's Human Resources Division (HRD); and 4) successful completion of a Police Academy.

C. Both Appellants successfully completed the medical examination, psychological examination and the PAT.

D. Both Appellants were notified that they were accepted into the Police Academy.

E. Both Appellants, upon being notified of their acceptance into the Police Academy, notified their employers at the time that they would be resigning to accept a police officer appointment in Brockton.

F. Entrance requirements into a Police Academy fall under the Massachusetts Municipal Police Training Committee (MPTC).

G. Shortly prior to the Police Academy start date, both Appellants were notified of a new physical fitness entrance requirement to enter the Police Academy, above and beyond the already-completed PAT.

H. Specifically, the Appellants, prior to entering the Police Academy, were required by the MPTC to undergo a physical fitness examination that included completion of a 1.5 mile run, push-ups, sit-ups and a 300 meter run.

I. Mr. Cartwright failed to complete the sit-up and 1.5 mile run portion of the examination within the time limits.

J. Ms. Ackerson failed to complete the 1.5 mile run portion of the examination within the time limit (by 19 seconds).

K. The MPTC rescinded both Appellants' acceptance into the Police Academy.

L. The City rescinded the Appellants' conditional offers of employment. Mr. Cartwright's non-selection was not considered a bypass, as nobody ranked below him was appointed. Ms. Ackerson's non-selection was a bypass.

M. Mr. Cartwright was able to rescind his resignation at his current employer and is still employed.

N. Ms. Ackerson was not able to rescind her resignation with her former employer and is now unemployed.

4. A review of the MPTC minutes in 2019 shows that the MPTC has been debating the issue of new physical fitness standards and when/how they should be implemented for several months.

5. According to the May 28, 2019 MPTC minutes:

"The Boston and Worcester Police Academies have concerns about the new fitness standards and asked that the Committee revisit the previously-implemented ROC entry-level fitness requirements. Superintendent Cox from the Boston Police Department told the Committee that the academy staff administered the entry-level standards to the recruits in its current academy to estimate the impact of the standards. The fitness standards were not in effect when the Boston and Worcester police academies collected data from the physical fitness tests. **However, the data demonstrated that the majority of student officers in both police academies would not have passed the new entry level standards**. As a result, the Boston Police Department is asking the Committee to revisit the entry level standards before its implementation. One proposal was to allow academies flexibility when administering the entry level standards.

Joe Vieira commented that the decision to front load the entry level standard will benefit the smaller departments. If a recruit was unable to pass the entry level standards, a smaller department could send multiple people and still be able to secure a spot within an academy. Chief O'Donnell added that the entry level fitness standard ensures that people entering an academy are in shape and less likely to get injured while performing PT.

Superintendent Cox explained that implementing an entry level fitness standard for an entrance into the academy can have significant impact on larger departments. **The Boston Police Department attracts people with a variety of backgrounds who may not have the resources to prepare for these standards.** The Committee discussed whether the standard is too high and whether it should consider an exit standard.

There is a disparity in the numbers for Worcester, Springfield and Boston. U/S Reidy said that the standard is having a significant

> impact on the larger departments. One solution considered was postponing the implementation of the entry level fitness standards to see if the standard should be adjusted.
>
> Chief Hicks suggested keeping the process for entry level standards in place but deferring the requirement until July 2020. Deferring the standards would allow additional data to be collected. Ed Zivkovich recommended another option. The Committee could contract with a person who has a physiology degree who could collect data and make recommendations on what are reasonable fitness standards. There was further discussion about offering a standard and lowering the percentage. **U/S Reidy said that the Committee should hold off on implementing the entry level fitness standards until more data is collected. The standards are impacting the three (3) largest cities in Massachusetts and therefore it may not be beneficial to rush implementation for July 2019**." (emphasis added)

6. Ultimately, the MPTC, on May 28, 2019, by a 7-3 vote, voted to implement a 6-month moratorium on the new fitness standards until January 1, 2020.

7. According to the June 21, 2019 MPTC minutes:

> "At last month's meeting, concerns of a few of the Commonwealth's largest departments over the entry-level fitness standards that had been recently voted on for implementation July 1, 2019, produced a six-month moratorium on its implementation, moving it to January 1, 2020. Chairman Hicks commented that he has been receiving feedback that this was not a welcome change. He stated that the Committee needs to be sensitive to all cities and towns in the Commonwealth. There was much discussion about a lower entry standard, giving time to build to a predetermined higher standard of fitness. It was suggested that MPTC might develop a training video on how to properly prepare for training, available to those who are considering pursuing this career. A lower entry level would allow more students entry and with an opportunity for coaching in Health and Wellness on how to build strength and stamina, with a reasonable goal. Those departments that have cadet programs could be mentoring these students and help prepare them for application. Several ideas were offered with regards to working with candidates during the hiring process. Ultimately, a new Motion was made to reconsider the Motion of last month's meeting regarding the moratorium on entry-level fitness testing to enter a police academy and instead revise the fitness standard to establish a 30th percentile entry level (based on the Cooper Institute norms) for any academy beginning after September 1, 2019. Students must also then attain the 40th percentile in all four events by week 8. Those who fail to do so will be retested by week 10. Failure to meet the standard by week 10 will result in dismissal for non-disciplinary reasons. Participation requirements remain in effect. The Motion was seconded and passed, one abstention (Vieira). Jason Shea, MPTC SWC will be asked to amend the daily PT regimen to reflect the new standards."

8. Both of the Appellants were scheduled to begin the Police Academy in Randolph on September 9, 2019, nine (9) days after the new effective date referenced above.

9. The City of Brockton is a "consent decree" community and, thus, is required to submit any reasons for bypassing police officer candidates to HRD for approval.

10. There was nothing in the record showing whether the City sent the reason for bypassing Ms. Ackerson to HRD and/or whether such reason was reviewed and accepted by HRD.

11. On September 19, 2019, I issued a Procedural Order, requesting relevant information from the City and HRD, which was subsequently provided to the Commission.

12. That information provided confirmed that the City did not provide HRD with the reason for bypassing Ms. Ackerson, but, rather, notified her directly of the reasons for bypass.[1]

ANALYSIS / RELIEF TO BE GRANTED

The undisputed facts here show that the Appellants are aggrieved persons. They were harmed through no fault of their own when the entrance requirements for police officer were effectively modified mid-way through the hiring process.

Both of the Appellants met all of the required conditions of the conditional offer of employment to be a Brockton Police Officer with the exception of completing the Police Academy. Upon being notified that they were accepted into the Police Academy, they both resigned from their employment at the time. Then, with little notice, they were abruptly informed of new entrance requirements for the Police Academy which were not in place at the time they signed the Certification as willing to accept employment or at any point in the process, including, but not limited to, the time at which they resigned from their employment.

This is fundamentally unfair. As both of the Appellants stated at the pre-hearing conference, had they been aware of the new Police Academy entrance requirements at the time, they would have geared their physical preparation around those standards, as opposed to the standards of the PAT, which both of them successfully passed. This is of particular concern when, as here, the candidates are seeking a position in a City still subject to a consent decree and it appears that no data was collected by the MPTC regarding the potential impact the new standards would have regarding the disqualification of current or new recruits.

For these reasons, relief is warranted to ensure that both Appellants, now aware of the new physical fitness requirements, have at least one additional opportunity to be considered for appointment as a Brockton Police Officer, a job for which the City already granted them a conditional offer of employment.

The Appellants' appeals are ***allowed***.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders that:

1. The correspondence provided by the City includes an email from the Brockton Police Department stating that Ms. Ackerson was not bypassed. This is incorrect. Since candidates ranked below Ms. Ackerson, who was willing to accept appointment, were appointed, a bypass occurred. The City, as a consent decree community, was required to provide HRD with the proposed reason for bypass.

1. HRD shall place the names of Cortland Cartwright and Samantha Ackerson at the top of any future Certification for permanent, full-time police officer in the City of Brockton until such time as they are appointed or bypassed.

* * *

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 7, 2019.

Notice to:

Cortland Cartwright
[Address redacted]

Samantha Ackerson
[Address redacted]

Brittany E. Blye, Esq.
Assistant City Solicitor
City of Brockton
Brockton City Hall
45 School Street
Brockton, MA 02301

Patrick Butler, Esq.
Regina Caggiano
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

* * * * * *

AUREL KODHIMAJ

v.

DEPARTMENT OF CORRECTION

G1-18-131

November 7, 2019
Christopher C. Bowman, Chairman

Bypass Appeal-Original Appointment as a Correctional Officer-Criminal Conviction for Marijuana Possession—The Commission affirmed the bypass of a candidate for original appointment as a Correction Officer based on a 2009 arrest for marijuana possession. The decision found that DOC's consideration of all criminal record information related to the Appellant was lawful and that its decision-making process was thoughtful and not unreasonable given the necessity of a zero-tolerance policy regarding illegal drugs in any DOC facility.

DECISION

On July 17, 2018, the Appellant, Aurel Kodhimaj (Appellant or Mr. Kodhimaj), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (Commission), contesting the decision of the Massachusetts Department of Correction (DOC) to bypass him for original appointment as a permanent, full-time Correction Officer I (CO I). I held a pre-hearing conference on August 14, 2018 at the offices of the Commission and I held a full hearing at the same location on November 5, 2018.[1] The hearing was digitally recorded.[2] DOC submitted a proposed decision on January 11, 2019. The Appellant, who appeared pro se, did not submit a proposed decision. FINDINGS OF FACT

Eleven (11) exhibits were entered into evidence at the hearing (Respondent Exhibits 1-9 (R1-R9)); Appellant Exhibit 1 (A1)); and Post Hearing Exhibit 1 (PH 1). I subsequently re-opened the record and requested that DOC submit additional documents which have all been marked as post-hearing exhibits. Based on the exhibits, the stipulated facts, the testimony of:

Called by DOC:

- Eugene T. Jalette, Supervising Identification Agent, DOC;
- Jonathan Thomas, Correction Officer I (CO I), Background Investigator, DOC;
- Paul Dietl, then-Deputy Commissioner, Administration, DOC;

Called by the Appellant:

- Aurel Kodhimaj, Appellant;

1. The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

2. The Commission subsequently had the recording transcribed into a written transcript.

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

1. The Appellant is thirty-two (32) years old. He was born in Albania. After his brother was kidnapped in 1997, his family moved to Greece. They eventually received asylum and moved to the United States in 2005, when the Appellant was eighteen (18) years old. The Appellant completed his senior year of high school and graduated from high school in Worcester. The Appellant became a United States citizen in 2011. (Testimony of Appellant)

2. The Appellant is fluent in English, Albanian and Greek and has a fair knowledge of Italian. (Testimony of Appellant)

3. While a senior in high school, the Appellant began working as a pizza delivery driver at a pizza shop in Worcester. Five (5) years later, the Appellant's family bought the pizza shop. The Appellant is a now a manager at the business and works there 55-60 hours per week. (Testimony of Appellant)

4. In March 2009, when the Appellant was twenty-one (21) years old, he was arrested and charged with possession of an illegal Class D substance (marijuana) with the intent to distribute. (Testimony of Appellant and Exhibit A1)

5. The charges were later amended to only include possession of an illegal Class D substance. (Testimony of Appellant and Exhibit A1)

6. The criminal docket sheet from Worcester District Court (provided by the Appellant), under Disposition Date, states "5/13/09". Under "Disposition Method" it states: "Decriminalized (277 §70c)". Under "Finding" it states: "Responsible" and under "Fine / Assessment" it states: 100. (Exhibit A1)[3]

7. The Appellant acknowledges that, for a two (2)-week period in 2009, he made "poor poor decisions" and sold marijuana illegally. (Testimony of Appellant)

8. Many correction officers patronize the pizza shop owned by the Appellant's family. Some of them encouraged the Appellant to consider a career as a correction officer. (Testimony of Appellant)

9. On March 19, 2016, the Appellant took and passed the civil service examination for Correction Officer I (CO I). (Stipulated Fact)

10. On January 19, 2018, the Appellant's name appeared on Certification No. 05164 ranked 67th among those willing to accept appointment as a CO I. (Stipulated Fact)

11. DOC appointed one-hundred fifty-six (156) candidates, sixteen (16) of whom were ranked below the Appellant, thus creating a "bypass" of the Appellant. (Stipulated Facts)

12. The one (1) reason for bypass stated on DOC's bypass letter to the Appellant was: "Failed background based on a 3/31/2009 Worcester Police Arrest Report where the applcaint (sic) was surveilled by Worcester Vice Detectives and then subsequently charged with Possession of an illegal Class D Substance with the Intent to Distribute." (Exhibit R2)

DOC'S REVIEW OF THE APPELLANT'S BACKGROUND

13. On February 23, 2018, the Appellant completed an "Application for Employment." The following two (2) questions appear on Page 16 of the application:

- "Has any member of your immediate family or a relative (including in-laws) ever been or is currently incarcerated in any Massachusetts State or County Correctional Institution?
- Are you aware of any acquaintance(s) or personal friend(s) who are or have been incarcerated?"

The Appellant truthfully answered "no" to both of these questions. (Exhibit R9)

14. DOC accessed and obtained Criminal Offender Record Information (CORI) regarding the Appellant from the state's Criminal Justice Information Services (CJIS). This information is accessed online by CJIS-authorized DOC employees. (Testimony of Jalette and Exhibit R4)

15. When requesting the information online, the DOC employee is prompted to indicate whether the purpose of the inquiry is: "Criminal", "Justice", or "Firearms". The DOC employee chose "Justice". (Testimony of Jalette)

16. Eugene T. Jalette is the Supervising Identification Agent at DOC responsible for overseeing the background investigations of DOC applicants. Based on his CJIS training, his understanding is that, by selecting the "Justice" category, you are indicating that you are a public safety agency seeking CORI information for the purpose of conducting an employment-related background investigation. (Testimony of Jalette)

3. G.L. c. 277, § 70C states: "Upon oral motion by the commonwealth or the defendant at arraignment or pretrial conference, or upon the court's own motion at any time, the court may, unless the commonwealth objects, in writing, stating the reasons for such objection, treat a violation of a municipal ordinance, or by-law or a misdemeanor offense as a civil infraction …. If a motion to proceed civilly is allowed, the court shall not appoint counsel. If counsel has already been appointed, the court shall revoke the appointment. A person complained of for such civil infraction shall be adjudicated responsible upon such finding by the court and shall not be sentenced to any term of incarceration. The commonwealth shall maintain a copy of all objections filed under this section and shall report the number of such objections, delineated by divisions of the district court, every 6 months to the house and senate committees on ways and means. When the court has treated a violation of a municipal ordinance or by-law or a misdemeanor offense as a civil infraction under this section and the ordinance, by-law or misdemeanor in question does not set forth a civil fine as a possible penalty, the court may impose a fine of not more than $5,000. An adjudication of responsibility shall neither be used in the calculation of second and subsequent offenses under any chapter, nor as the basis for the revocation of parole or of a probation surrender. An adjudication of responsibility under this section may include an order of restitution."

MCSR Appellant Commentary

September-December 2019

Andrew J. Gambaccini
Reardon, Joyce & Akerson, P.C.

2019 CALENDAR YEAR STATISTICS

At the conclusion of each calendar year, the Civil Service Commission issues a report containing sundry statistics related to the processing of appeals pending before the Commission. Although it is undeniable that every potential or perfected appeal to the Commission must be evaluated on its own merits, this yearly report is invaluable for anyone seeking generalized information concerning the prospects of ultimate success in a particular type of appeal as well as some notion as to when a result likely will be received from the Commission.

To begin, with respect to overall caseload, in 2019 the Commission received 277 new appeals while closing out 262 appeals and, as of December 31, 2019, the Commission had pending before it 190 total cases.

The yearly report separates appeals into a number of categories: bypass and related appeals; discipline and layoff appeals; reclassification appeals and examination appeals. For each category, the Commission provides the total number of cases decided, as well as the subset number of cases in which an appeal was allowed or in which an appeal was unsuccessful, along with the corresponding percentages for successful or unsuccessful appeals.

In 2019, there were a total of fifty-three decisions in bypass and related appeals. Of those decisions, 26% were resolved through relief granted by mutual agreement; for the remaining cases that were litigated to a conclusion, 23% of the appeals were allowed or some relief was granted while 51% of appeals were dismissed. Comparatively, those figures are in keeping with 2018 figures, in which there were fifty-eight Commission decisions with 27% resolved by mutual agreement, 15% of the appeals were allowed and 58% of the appeals were denied. Excising settlement agreements and focusing only on the thirty-nine 2019 cases that remained in dispute and were litigated to the point of Commission decision, appeals were allowed or some relief was granted in only 31% of those cases. So, for those cases in which no mutual agreement is achieved, bypass or bypass-related appellants stand only about a one in three chance of success before the Commission.

Turning to the other decisional categories, 2019 saw a total of thirty-two decisions in discipline and layoff appeals, with just eight (19%) of those appeals allowed in whole or in part. Demonstrating the time-tested reliability of that figure concerning an appellant's likelihood of success, the Commission's report indicates that, since January 1, 2006, of the hundreds of Commission decisions in discipline and layoff appeals, 589 (79%) of those appeals have been denied and 159 (21%) have been allowed. Based upon that a fairly large pool of data, the chance of success for an employee in a discipline or layoff case before the Commission is about one in five.

While the total number of adjudicated reclassification and examination appeals is much lower than the number of bypass and discipline cases decided, the results in those categories also tilt heavily in favor of an appellant's likely lack of success. In 2019, there were nine reclassification appeals and eight of those appeals were denied; similarly, in the eight examination appeals, seven were denied.

The 2019 statistical analyses, as was the case in predecessor yearly reports, demonstrate that, across all of the categories of Commission decision, those seeking Commission action to reverse or alter the status quo generally are much more likely to be denied relief than to receive it.

Beyond chances of success, another important factor for those either considering or engaged in a Commission appeal is the timetable within which a Commission decision can be expected. Stepping back to place the current Commission timetable in perspective, over the span of a decade, from 2006 through 2016, there was a stunning reduction in the Commission's backlog of cases. In 2006, the Commission had 813 cases pending, with 550 of those cases having lingered before the Commission for more than twelve months. By the end of 2016, the Commission had reduced its caseload to seventy-five open appeals, with just fifteen of those matters pending for more than a year.

While the decade from 2006 through 2016 was marked by a drastic reduction in caseload, the Commission docket as of the end of 2016 now seems to have marked a bit of a turning point in the other direction. Beginning in 2017 and through the present, there has been a yearly uptick in both the Commission's overall caseload and the number of cases older than a year that remain pending. As for total appeals pending, 2016's record low inventory of seventy-five appeals was followed by 164 pending cases as of the end of 2017, 175 as of the end of 2018 and now 190 at the close of 2019. For aged cases, 2016's fifteen cases then pending that were older than a year was followed by a total of sixteen such cases in 2017, sixty in 2018 and now seventy-one as of the end of 2019. In the same temporal window from 2017 through 2019, the Commission has received more new appeals than it has closed pending appeals in each year (meaning there has been an overall increase in the pending caseload), something that previously had not occurred since 2012 and, prior to 2012, had not happened since 2005.

This trend also is observable in the Commission's cycle time report, which contains additional figures as to the timeframes within which Commission appeals are resolved as well as various tar-

gets that the Commission strives to meet. Based upon a three-year rolling average, the figures through the end of 2019 indicate that the Commission has met its target rates of resolving 25% of all appeals within four months (it actually has resolved 58% of all appeals during that window), 50% of all appeals within six months (it has resolved 69% of appeals during that window) and 75% of all appeals within nine months (it has resolved 76% of appeals during that window), but the Commission has not reached its target rate of resolving 95% of all appeals within twelve months (it has resolved 83% of appeals during that window) and the Commission has not met its benchmark of a twenty-six week window for all appeals (the average cycle time is twenty-eight weeks) or its target rate of thirty-nine weeks for resolution of all appeals that require a full hearing or a motion hearing (the average cycle time is fifty-two weeks).

What these figures reveal is that, on the front end, for those appeals as to which the issues are simple, straightforward or easily resolvable (e.g., an untimely appeal subject to dismissal), the Commission is quite quick to close the case, leading to 58% of all Commission appeals being decided within four months, 69% within six months and 76% within nine months. It is no doubt a fairly rapid rate of disposition that three out of four Commission cases are concluded within nine months of the appeal being filed.

It would appear fairly obvious that the remaining 24% of Commission cases that are not concluded within nine months represent those matters in which the issues are more complex, including appeals in which there are multiple days of full hearing. Frankly, given the complexity of a good number of Commission cases, whether they present with difficult issues of law or fact or whether they present with a multiplicity of witnesses that carries a full hearing into multiple days, along with the time needed for the parties' proposed decision briefing that follows such cases, a target rate of 95% of all Commission cases being resolved within twelve months could be somewhat ambitious. In sum, for an adjudicative body with finite staffing and resources, that 83% of all Commission appeals are resolved within twelve months certainly represents a much more efficient and timely process than the appeal timeline that existed fifteen years ago and also is not terribly out-of-line with the timetable that generally accompanies a grievance and arbitration procedure pursuant to a union contract.

DISCIPLINE CASES

The Commission's Rejection Of Some Administrative Charges Does Not Necessarily Mean A Modified Penalty Will Be Received

In two Commission cases during this period; *DeBenedictis* v. *Boston Fire Department*, 32 MCSR 329 (2019) and *LaVallee* v. *Boston Fire Department*, 32 MCSR 396 (2019); the Commission reached a determination that differed from the appointing authority with regard to the charges that ought be sustained against a disciplined employee, but the Commission nevertheless affirmed the same level of discipline as imposed by the appointing authority based upon the other charges proven.

In *DeBenedictis*, a firefighter found himself, surprise of surprises, in a dispute that involved available parking in the City of Boston. A resident of the North End beginning in 2016, DeBenedictis experienced regular difficulties in finding parking near his residence. Contemporaneously, in connection with a construction project in the North End near DeBenedictis' residence, a general contracting company obtained a permit allowing it to occupy four parking spaces near the project during the daytime hours on weekdays.

For some reason, the construction project lingered for approximately two years and DeBenedictis found himself questioning whether the general contracting company was abiding by the terms of the parking permit received. In perhaps an attempt at some level of civil disobedience, DeBenedictis began occupying one of the four permitted spaces on a regular basis over the course of months, placing an unauthorized Boston Fire Department placard on his dashboard while so doing.

Thereafter, DeBenedictis worked a detail at the same construction project to monitor some welding that was being performed. During the course of that detail, DeBenedictis told the crew that he was shutting the project down for worksite violations and became engaged in a heated argument with a welding foreman, an individual DeBenedictis accused of being drunk. Although making a serious accusation of that sort, DeBenedictis never filed a report with the Boston Fire Department concerning the welding foreman. Three months later, presumably still angered by the parking situation, DeBenedictis began yelling into the general contracting company's office that the company was abusing the system and that he would fix the problem.

A complaint was filed regarding DeBenedictis' behavior and the Boston Fire Department investigated, ultimately suspending DeBenedictis for sixty days for conduct prejudicial to good order and conduct unbecoming a member.

On appeal, the Commission concluded that DeBenedictis had engaged in misconduct, but rejected one aspect of the Department's allegations, namely, that DeBenedictis' complaints to individuals associated with the general contracting company constituted actionable harassment. While the Commission finding as to what charges were sustained therefore differed from the appointing authority's determination on misconduct, Chairman Bowman wrote that the distinction was not significant and, based upon the findings adverse to DeBenedictis that were affirmed and his prior similar misconduct, the sixty day suspension remained justified.

In *LaVallee*, a firefighter was terminated based upon an incident in which LaVallee arrived at a fire station while off duty, stumbling and smelling of alcohol, and used a racial epithet toward a black firefighter while spitting on the floor in the same room as the black firefighter. Through the course of an internal investigation and in a related charge of discrimination filed with the Massachusetts Commission Against Discrimination, while the thrust of the complainant's story about what occurred remained the same, some details and allegations differed over time. Following its investigation, the Boston Fire Department fired LaVallee based upon a total of eight administrative charges arising out of the event.

At the Commission level, Chairman Bowman considered the shifting statements that detracted from the complainant's credibility but, overall, found credible the core allegation made that LaVallee entered the room in a drunken state, began spitting on the floor and used a racial epithet. However, the Commission rejected

as unproven two aspects of the Department's basis for discipline, including that LaVallee spat at the complainant (as distinguished from spitting on the floor) and that LaVallee had challenged the complainant to a physical altercation while repeatedly hurling the same racial epithet at the complainant. Although the factual findings therefore differed, Chairman Bowman "reached the same conclusion regarding the most serious allegation—that Mr. LaVallee used the n-word in the firehouse in a conversation with a black, on-duty Boston Firefighter."

Stating that prior Commission precedent clearly states that racist behavior is a basis for termination, in addition to consideration of LaVallee's prior discipline for use of the same racist term in reference to two other firefighters in 2011, the Commission concluded that no downward modification of the penalty was warranted despite the Commission's determination that some portions of the Department's case were unproven.

DeBenedictis and *LaVallee* both stand for a similar proposition: when an appointing authority's decision to discipline is based upon multiple administrative charges or allegations, Commission rejection of some of those charges or allegations does not *necessarily* mean that the discipline has to be modified. Most importantly, pursuant to the teaching of *Falmouth* v. *Civ. Serv. Comm'n*, 447 Mass. 814, 824 (2006), "[u]nless the commission's findings of fact differ *significantly* from those reported by the town or interpret the relevant law in a *substantially different* way, the absence of political considerations, favoritism or bias would warrant essentially the same penalty. The commission is not free to modify the penalty imposed by the town on the basis of *essentially similar* fact finding without an adequate explanation." (citation omitted; emphasis added). In this area, the use of the terms and phrases "significantly[,]" "substantially different" and "essentially similar" are of critical importance.

It is logical that modification of a disciplinary penalty is not *required* to follow when the Commission simply rejects some or all of the justification for an appointing authority's action. To use a ridiculous example, if an appointing authority found that an employee engaged in misconduct on a Tuesday but the Commission found that the misconduct actually occurred the following day, it could not be argued reasonably that the difference in dates was of consequential moment. Similarly, if an employee is terminated for an assault that the appointing authority concluded violated both a departmental rule prohibiting criminal conduct and a rule proscribing conduct unbecoming, even if the employee is able to deploy a procedural argument as to why the conduct unbecoming charge cannot be sustained, in and of itself that reduction in the number of rules at issue is not going to be a game-changer if the core allegation of assault is proven. In essence, while there may be utility in chipping away at the foundation of the case made by the appointing authority, that endeavor is unlikely to be successful unless it does damage to a core assertion that changes the litigation landscape in a significant or meaningful way. Whenever such an attack is made concerning the foundation for discipline, it must be made very clear to the Commission that the challenge significantly changes and weakens the crux of the case.

Removal Of Prior Discipline From A Personnel File Does Not Preclude Commission Consideration Of the Discipline

Blair v. *Quincy Housing Authority*, 32 MCSR 389 (2019) dealt with the termination of a laborer who was accused of insubordination, disrespect, engaging in a physical contact with a superior and lying. During a staff meeting, a supervisor was asked about potential changes to a vacation policy, to which the supervisor responded that the discussion was premature because the potential changes still were being discussed with the impacted unions. Blair, present for the meeting, asked the supervisor whether the issue was personal for the supervisor twice and, after each statement, the supervisor told Blair that the matter was not personal and was not to be discussed.

After the meeting, the supervisor observed Blair seemingly recording the supervisor's conversation with two other employees, at which point the supervisor told Blair to leave the building and go to work. Within a short time, the supervisor found himself at an exterior door with Blair behind him. As the supervisor held open the door, Blair made contact with the supervisor that either was deliberate and avoidable or, according to Blair, was accidental, minimal and the result of the supervisor not holding the door open widely enough for Blair to pass.

Finding Blair's testimony not to be credible, and the supervisor's version of events to be more believable, Chairman Bowman, writing for the Commission, concluded that Blair made deliberate and avoidable physical contact with his supervisor. Further determining that there was no basis on which to modify Blair's discipline, the Commission upheld the termination sanction.

Blair is most notable for the Commission's analysis of Blair's prior disciplinary record. More specifically, the Commission explicitly considered, over Blair's objection, two written warnings that had been issued to Blair in prior years. Chairman Bowman wrote:

> Mr. Blair objects to consideration of his prior discipline, arguing that written warnings issued in 2016 and 2017 were eventually removed from his QHA personnel file. That argument, however, fails. 'While time limitations contained in the reprimands or discipline may apply with regard to the CBA and the grievance process, the Commission is not barred from considering prior reprimands or discipline.' Paone v. City of Lynn, 26 MCSR 61 (2013). It is undisputed that written warnings were issued and that although Mr. Blair initially contested the warnings, he eventually agreed to accept the discipline. Moreover, there is no evidence indicating that the parties' agreements resolving Mr. Blair's grievances prohibited consideration of the circumstances underlying the discipline in future disciplinary proceedings involving Mr. Blair. Accordingly, the Commission's analysis of this matter includes the 2016 and 2017 written warnings.

The consideration was important in *Blair* because the prior incidents involved Blair being insubordinate and aggressive with his superiors, behavior that the Commission found had escalated to the point of physical contact in this instance and that, having been placed on notice regarding similar behavior, Blair's escalation of his misconduct warranted termination. In other words, that there had been similar misconduct by Blair in the past that had resulted in discipline was consequential because it helped to justify the severest of employment sanctions, termination, in this instance.

For a large swath of employees who face employment sanction for alleged misconduct, there exists prior discipline of varying types from serious to minor, recent to aged, relevant or arguably so to completely disconnected from the misconduct presently alleged. Further, given that the concept of just cause, whether as the standard has been developed and applied through Commission, judicial or arbitral precedent, is premised to a large degree on the notion of progressive discipline, questions as to how to assess the impact, if any, of prior discipline in a current disciplinary determination are commonplace.

Blair raises an important point when employees, for one reason or another, decide either not to contest or to reach agreement with an employer on discipline: that decision to leave discipline unchallenged or to reach an agreement to resolve a pending disciplinary dispute carries the potential for future consequences. Sometimes, as in *Blair*, those future consequences can arrive in the form of consideration in future disciplinary matters through a progressive discipline analysis. Sometimes those future consequences can arrive in the form of impact on promotional opportunities (e.g., a future bypass that is based upon prior disciplinary issues). Sometimes those future consequences can arrive in the form of impact on lateral opportunities or job prospects with other employers (e.g., failing to secure an employment opportunity on the basis of a past disciplinary record).

For those employees who reach a negotiated resolution of a disciplinary matter with an employer, such as when an employer seeks to suspend the employee for a day and the parties reach a compromise on a reprimand, those employees and their representatives should seek to negotiate terms regarding any future use of such disciplinary action. Too many employees think simply that an agreement to remove a writing from a file means that in the future it will be as though that writing never existed. *Blair* teaches that is not entirely accurate because, whether a writing is in a personnel file or not, unless there is a specific agreement governing future use of the event or discipline, the discipline could come into play down the road. Employees should seek to negotiate not only the removal of the reprimand from a personnel file, but also the specific agreement that the employer will not seek to use, and will be precluded from relying upon, the discipline in any future disciplinary or promotional decisions.

Another factor that can complicate matters is that there are instances in which discipline below the level of a suspension, whether labeled as a reprimand, warning or counseling, is not subject to formal challenge. The Commission does not have jurisdiction over challenges to reprimands, warnings or counseling records and, through some collective bargaining agreements, those matters also may not be subject to the grievance and arbitration process. In those situations in which an employee has no ability to mount a formal challenge to a reprimand, warning or counseling, the employee should consider, at a minimum, the submission of a written rebuttal pursuant to the personnel records statute, G.L. c. 149, § 52C. According to § 52C, if an employee and employer cannot agree on the removal of a negative document from a personnel file, the employee "may submit a written statement explaining the employee's position which shall thereupon be contained therein and shall become a part of such employee's personnel record. The statement shall be included when said information is transmitted to a third party as long as the original information is retained as part of the file."

Notably, § 52C does not require that a written rebuttal be submitted within a set period of time from the negative document being placed into the personnel file although, of course, the longer the time period that passes between reprimand and rebuttal, the more questions might be raised concerning the genuineness of the rebuttal or the reasons for its creation.

In the end, for those employees who face discipline and either decide not to mount a challenge or to reach a compromise concerning the discipline, the best practice is for that decision-making would be to include evaluation of both short-term and long-term considerations, including circumstances in which the discipline could arise in future disciplinary, promotional or employment opportunities in the future.

OTHER DECISIONS

Commission Undertakes Rare § 72 Review

During this period, the Commission took an uncommon step: the initiation of an inquiry pursuant to G.L. c. 31, § 72. Section 72 provides in part:

> [t]he commission or administrator, upon the request of an appointing authority, shall inquire into the efficiency and conduct of any employee in a civil service position who was appointed by such appointing authority. The commission or the administrator may also conduct such an inquiry at any time without such request by an appointing authority. After conducting an inquiry pursuant to this paragraph, the commission or administrator may recommend to the appointing authority that such employee be removed or may make other appropriate recommendations.

In *Rowe* v. *Boston Fire Department*, 32 MCSR 314 (2019), the Commission upheld the termination of a Boston firefighter for bigoted public comments, including in social media postings and on podcasts. Part of Rowe's defense in that case was a disparate treatment theory in which similar issues concerning another firefighter, who had not been disciplined, were raised. Apparently, Rowe's argument was that he should not be terminated if another firefighter engaged in similar conduct and did not face discipline.

The Boston Fire Department responded to the claim by commissioning an investigation into the matter. During that investigation, the firefighter admitted to having posted some inflammatory commentary, but denied responsibility for a particular racial posting. The Department concluded that it was unable to assign responsibility for the racial posting and imposed a written warning based upon the inflammatory posting that was admitted to by the firefighter.

In *G.L. c. 31, § 72 Inquiry Re: Boston Fire Department*, 32 MCSR 357 (2019), Chairman Bowman wrote that he was not satisfied that the Department had pursued the investigation into the other firefighter's postings sufficiently and the Commission opted to exercise its § 72 authority to open its own inquiry. Relying on the language of the statute that authorizes the Commission to undertake an inquiry without a request from an appointing authority, the Commission issued several orders relative to steps that were

to be performed by the Department and directed that report be made by the Department to the Commission, after which point the Commission would make whatever recommendations it deemed appropriate.

In Commission practice, investigations generally are sought and initiated pursuant to G.L. c. 31, § 2, which provides in part that: "[i]n addition to its other powers and duties, the commission shall have the following powers and duties: (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth." As previously stated by Commissioner Stein,

> [a]s a general rule, the Commission has chosen to exercise its discretion to initiate a Section 2(a) investigation sparingly, and only when there has been a threshold showing that there is a reasonable likelihood that a systemic violation of civil service law and rules has occurred that has prejudiced the civil service rights of other innocent parties. A mere possibility of a violation will ordinarily not be sufficient to trigger a full investigation.

See In Re: Request for Investigation (Boston Police Sergeant's Promotions), 29 MCSR 141 (2016).

Plainly, the language of § 2 (a) is broad and, consistent with that statutory scope, the Commission historically has exercised that investigatory authority in all manner of situations in which there was a plausible claim of the violation of civil service law, often in the context of questionable hiring practices. *See In Re: 2010/2011 Review and Selection of Firefighters in the City of Springfield*, 24 MCSR 627 (2011) (investigation into the bypass of several candidates in favor of a Deputy Chief's son).

The language of § 72, however, is far narrower in scope, authorizing Commission inquiry "into the efficiency and conduct of *any employee* in a civil service position who was appointed by such appointing authority." (emphasis added). By its terms, § 72 appears to envision a very concentrated review into a particular employee's actions, rather than, as the § 2 (a) cases have considered, a broader or more systemic claim. It is perhaps for that reason that the commencement of a § 72 investigation is unusual in Commission practice and, indeed, the Commission's § 72 authority appears never to have been discussed substantively in any published Massachusetts judicial decision.

Disparate treatment arguments are fairly common in disciplinary cases, whether taking the form of a claim that another employee engaged in similar misbehavior to the disciplined employee and that other individual either was not disciplined at all or was disciplined less severely, or taking the form of a claim that another employee engaged in qualitatively more serious misconduct and yet did not face the same sanction as the disciplined employee. Simply, the argument from the disciplined employee runs that it would be unfair to discipline her in a fashion that is inconsistently harsher than how another employee was treated in the face of similar or more serious misconduct.

In situations in which the disparate treatment theory is deployed successfully, the usual result is that there is a downward adjustment of the disciplined employee's sanction to bring it into line with how other employees have been treated. *See Falmouth* v. *Civ. Serv. Comm'n*, 447 Mass. 814, 824 (2006) (Commission "authority to review and amend the penalties of the many disparate appointing authorities subject to its jurisdiction inherently promotes the principle of uniformity and the 'equitable treatment of similarly situated individuals.'" (citations omitted)). For example, in *Monsalve* v. *City of Holyoke*, 31 MCSR 225 (2018), a police sergeant's two day suspension was adjusted to a reprimand because a lieutenant involved in the same incident had received a reprimand for his role.

Downward adjustment, however, is not how the Commission approached the use of the disparate treatment theory in *Rowe*. Rowe was not able to escape from a termination sanction simply by pointing an accusatory finger at another firefighter who may have engaged in similar misbehavior and, instead, the Commission not only upheld Rowe's termination but now has taken steps to order an inquiry, with the potential of disciplinary recommendations if appropriate, into the possible misconduct of the other firefighter.

The different Commission approach appears prompted by the nature of the misconduct at issue. It would be surprising if a public employee who was involved in sexually assaulting an individual could elude a termination not because of a vigorous defense on the merits demonstrating that the allegation was untrue, but on the basis of a claim that another employee also had raped someone and that employee had not been fired. In this area of racist misconduct, the Commission has held repeatedly, including during this period; *see LaVallee* v. *Boston Fire Department*, 32 MCSR 396 (2019); that "[p]rior Commission decisions have stated unequivocally that racist behavior by a public employee is grounds for termination . . . . (citations omitted). So, when Rowe's defense to charges of racist commentary was that another firefighter also may have engaged in the same behavior and faced no discipline, that defense did Rowe absolutely no good and his termination was upheld nonetheless.

What becomes clear from these authorities is that a disparate treatment theory must be thought through carefully. If the nature of the misconduct is egregious, simply pointing to another employee who engaged in similar misconduct likely will not be enough to escape discipline. ■

MCSR Management Commentary September-December 2019

Melissa R. Murray, Esq.
Antione Fares, Esq.
Norris, Murray & Peloquin, LLC

COURT DECISIONS

Superior Court Rejects Plaintiff's Claim That Commission Failed To Weigh Post-Incident Alcohol Treatment Records

In *Adams* v. *Civil Service Commission*, Civil Action No. 19-00684 (2020) the Plaintiff sought judicial review of the Civil Service Commission's ("Commission") decision to affirm his termination from the Department of Correction ("DOC"). The Plaintiff was under a last chance agreement for engaging in domestic violence. The last chance agreement made it clear that a "violation of any Department rule, policy, or regulation may lead to termination of your employment with the Department of Correction." Subsequently, the Appellant was arrested and charged once again with domestic violence. Available records reflected that the Plaintiff was intoxicated during this incident. The DOC terminated him.

At the Commission hearing, the Plaintiff made the absurd claim that the Department terminated him because of his alcoholism in violation of the law. The Commission rejected this argument and affirmed the termination based on his misconduct. The Plaintiff appealed to the superior court. The court rejected his arguments on the basis that his complaint was untimely, and on the merits, it declined to review his argument that the Commission failed to properly weigh his alcohol treatment as a mitigating factor because evidence of his alcohol treatment was not part of the record at the time he was terminated.

Even if the Plaintiff's alcohol treatment had been part of the record, it is doubtful that the court would have set aside the Commission's decision for failing to weigh this evidence. Generally, Massachusetts Courts have rejected an employee's attempt to introduce post-incident medical treatment after disciplinary proceedings have commenced, characterizing the attempt as being "too little, too late." *Jones* v. *Nationwide Life Ins. Co.*, 696 F.3d 78 (2012); *Reed* v. *LePage Bakeries, Inc.*, 244 F.3d 254 (2001). Furthermore, even if his post-incident alcohol treatment was part of the record, it would not excuse the Plaintiff's serious misconduct and violation of the terms of the last chance agreement. *Dion* v. *New Bedford School Department*, 23 MCSR 517 (2010) (taking personal responsibility for alcohol induced behavior and pursuing treatment were laudable actions but did not excuse the misconduct); *Mammone* v. *President and Fellows of Harvard College*, 446 Mass. 657 (2006) (holding that "a handicapped employee who engages in egregious misconduct, sufficiently inimical to the interests of his employer that it would result in the termination of a nonhandicapped employee, is not a qualified handicapped person..."). In sum, courts are more likely to hold employees accountable for engaging in serious misconduct and will not allow them to deflect blame on their medical condition.

DISCIPLINE

Section 72 Inquiry Opened After Disparate Treatment Allegations

In *G.L. c. 31, § 72 Inquiry Re: BOSTON FIRE DEPARTMENT*, 32 MCSR 357 (October 10, 2019), the Civil Service Commission opened a MGL c. 31 § 72 inquiry, ordering the Boston Fire Department ("BFD") to investigate racist social media postings by a Boston Firefighter ("MG"), after the postings were brought to the Commission's attention in a discharge appeal involving an allegation of disparate treatment. *See, Rowe* v. *Boston Fire Department*, 32 MCSR 314 (2019). The BFD investigated MG's racist postings and issued him a two-tour suspension for lying about making the postings. The investigation and resulting discipline were reported to the Commission. On January 20, 2020, the Commission issued a decision criticizing the BFD for imposing such a lenient disciplinary sanction on MG given the seriousness of his misconduct, and recommended the BFD consider implementing discipline beyond the two-tour suspension.

The good news is that the Commission upheld the discharge in Rowe despite its finding of disparate treatment. Rather than alter the discipline imposed on Rowe, the Commission's Section 72 inquiry was meant to ensure that the BFD pursued the same due diligence in investigating racist behavior by other members of the department, including MG. While the Commission ultimately disagreed with the light discipline imposed on MG, it had no statutory authority to overturn it.

Commission Reaffirms That Racist Behavior Is Grounds For Termination

In *LaVallee* v. *Boston Fire Department*, 32 MCSR 396 (December 5, 2019), the Civil Service Commission ("Commission") upheld the termination of a 14-year firefighter who used the n-word while hanging out in the station off-duty. LaVallee, a white firefighter with the BFD, walked into the firehouse in a drunken state and sat down in the station's TV room where on-duty Firefighter CB ("CB"), a black firefighter, was playing a game and talking to his girlfriend on PlayStation. CB heard LaVallee eating behind him and then heard LaVallee say "you fucking [n-word]" and then he cleared his throat and spat. CB's girlfriend heard the n-word through the PlayStation headset. CB was outraged and immediately left the room to inform his supervisor of the incident. The BFD investigated and LaVallee was terminated.

In its decision upholding the termination, the Commission affirmed its position reached in prior decisions that "racist behavior by a public employee is grounds for termination." According to the Commission, there is no place for such behavior in the

workplace and no modification of the discipline was warranted. LaVallee's claim that alcoholism was to blame was dismissed by the Commission, which noted that he had already received a second chance in 2011 after using the same language.

Police Officer Discharge Upheld for Tardiness, Abandoning A Detail, Threatening His Supervisor and Being Untruthful

In *Green* v. *City of Lawrence*, 32 MCSR 405 (December 19, 2019) the Civil Service Commission ("Commission") upheld the discharge of Police Officer William Green ("Appellant") for abandoning a detail, going on an unauthorized leave of absence, threatening a superior officer, and lying to the Chief. The Appellant arrived seventeen minutes late to a detail assignment where there had been recent shootings. His shift supervisor ordered him to provide a written explanation for his tardiness at which point the Appellant got upset and walked off the detail. In addition, later that month, the Appellant went on unauthorized leave of absence for five days. In another incident which involved a criminal complaint filed against him for assaulting another police officer, the Appellant sent an email to Lieutenant McCarthy, who was investigating the incident, stating he did not want him "to become collateral damage" as a result of his involvement in the investigation. Lt. McCarthy took this as a threat and reported it to the Police Chief. After an interview with the Chief regarding his statement, the Chief concluded that the Appellant lied to him when he denied making the statement to Lt. McCarthy. For all those reasons, the City terminated him.

On appeal, the Commission upheld the discharge, finding his conduct during the detail incident, his threat to the lieutenant and lying to the Chief to be intolerable. With respect to arriving late to his detail, the Commission agreed with the City that this warranted some discipline—it stated: "[i]t cannot be a defense to tardiness that an officer did not know of a policy to be on time when officers are scheduled for details for specific time periods." Mere commonsense would indicate that showing up on time is an inherent requirement of any job and an important one, especially for police officers.

BYPASS

Refresher On CORI Checks And Criminal Record-related Questions On Employment Applications

Criminal records checks can be a sensitive topic, with disastrous consequences for employers if they fail to comply with the law. Under civil service, unlawful access to CORIs may result in overturn of a bypass decision, especially if the basis of the bypass is based on records or information obtained illegally. The following list is a good refresher of the dos and don'ts for most Massachusetts employers when it comes to using Criminal Offender Information Record ("CORI") in hiring.

- "Have you ever been convicted of…" questions are prohibited and should not be on your employment application. This is the result of the "ban the box"/fair chance law enacted several years ago;
- CORI should not be considered until the end of the process when reviewing an applicant for employment—after there is a determination as to whether the applicant is otherwise qualified for the position;
- It is still legal to consider felony convictions with a disposition date within the last ten (10) years, misdemeanor convictions with a disposition date within the last three (3) years and pending criminal charges, which includes cases that have been continued without a finding and have not yet been dismissed;
- The above restrictions apply only to inquiries to the applicant, including a request to authorize a CORI check. An Employer still has the right to obtain and consider CORI, including an arrest, from other lawful sources.

See, G.L. c. 151B, § 4. Be advised, however, that CORI rules vary to some degree for criminal justice agencies. First, criminal justice agencies, such as police departments, departments of corrections and Massachusetts state police, are permitted to access an applicant's entire criminal offender record information from Criminal Justice Information Services ("CJIS"), including information that would generally not be provided to non-criminal justice employers, for the purposes of hiring. Also bear in mind that even a criminal record that an employer can obtain, ask about and consider in the hiring process, does not give the employer the right to automatically disqualify an applicant. An employer must be able to give specific reasons beyond the mere existence of the record, including the relevance of the record to the position sought, the nature of the work to be performed, the amount of time since the conviction, the age of the applicant at the time of the offense, the seriousness and specific circumstances of the offense, the number of the offense, any relevant evidence of rehabilitation or lack thereof, and whether the applicant has pending charges. This rule applies to all employers.

In addition, unlike the general prohibition that applies to most employers on "have you ever been convicted of…" questions on an initial employment application, criminal justice agencies can ask such questions in order to determine whether an applicant is statutorily disqualified from being appointed to the position. *See, e.g.*, General Laws c. 41, § 96A (convicted felons cannot become police officers); *see also*, MGL c. 125, § 9 (" ... no person who has been convicted of a felony or who has been convicted of a misdemeanor and has been confined in any jail or house of correction for said conviction, shall not be appointed to any position in the department of correction..."). Be mindful, though, that broad questions on an employment application which are designed to obtain information from the applicant beyond what is provided for under Chapter 151B are unlawful. *See Kerr* v. *Boston Police Dep't*, 31 MCSR 25 (2018).

For instance, in *Kodhimaj* v. *Department of Corrections*, 32 MCSR 377 (November 7, 2019) the Department bypassed the Appellant for original appointment as a Correction Officer based on a 2009 arrest for marijuana possession. During the background investigation, the Department obtained the Appellant's entire CORI which revealed that, in 2009 when he was twenty-one (21) years old, he was arrested and charged with possession of an illegal Class D substance (marijuana) with the intent to distribute. The background investigator met with him and gave him the opportunity to address his CORI record. The Appellant acknowledged to the investigator that he had sold marijuana illegally nine (9) years ago. After careful consideration by the Department of the Appellant's

positive and negative attributes, it decided to bypass him for his prior criminal conduct.

On appeal, the Commission found the Department's decision to bypass the Appellant was reasonable because it had a legitimate concern about the need to enforce a zero-tolerance policy regarding illegal drugs in its facilities. The Commission was pleased with the fact that the Department provided the Appellant with due process by giving him a chance to discuss the criminal record before making its decision to bypass him. With respect to the CORI background check, it found that the Department lawfully considered the Appellant's entire criminal record information during the hiring process which was consistent with its prior decisions involving the bypass of criminal justice candidates based on their entire criminal record. Lastly, the Commission rejected the Appellant's claim that the employment application unlawfully asked whether he had been convicted of a felony or a misdemeanor that resulted in imprisonment. Unlike in *Kerr*, *supra*, the questions in this case were limited to whether he was statutorily disqualified from being appointed to the position.

PROBATIONARY PERIOD

Probationary Officer's Injured Leave Did Not Count Toward Her Probationary Period

In our last round of commentary, we provided you with a summary of Commission decisions on the probationary period standard for police officers and firefighters. The Commission's decision in *Sanchez* v. *Springfield Police Department*, 32 MCSR 365 (October 10, 2019) adds to that line of cases and provides a good refresher of the standard. As you may recall in *Police Commissioner of Boston* v. *Cecil*, 431 Mass. 410 (2000), the SJC unequivocally stated that police officers must actually perform their duties for a period of twelve months or else would be required to make up any missed time from work. The Commission in *Andrade* v. *City of Cambridge*, 31 MCSR 90 (2018) reiterated the holding in *Cecil* and further held nothing in civil service law required the City to provide the employee with notice that placing him or her on administrative leave would toll the 12 months probationary period. Furthermore, in *Brandao* v. *Boston Police Department*, 32 MCSR 255 (July 18, 2019), the Commission held that the probationary officer's military leave did not count toward his probationary period.

In *Sanchez*, the Appellant started her probationary period on December 1, 2017, the date she was sworn in as a Springfield Police Officer. Due to her performance, the Department extended the probationary period by two (2) months, which meant she would be required to actually perform the duties of her position for fourteen (14) months in order to become tenured. During her probation period, the Appellant went on injured leave for approximately six (6) weeks but was never notified that her injured leave status would toll the twelve (12) months probationary period. On February 1, 2019, she was separated from her employment. The issue in this case was whether she had completed her probationary period, thereby entitling her to the due process rights afforded to tenured civil service employees. For the reasons already discussed in *Andrade* and *Brandao*, the Commission found that she was at least six (6) weeks short from completing her probationary period because her injured leave did not count toward this period. ■