MCSR Management Commentary

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Philip Collins, Esq.
Melissa R. Murray, Esq.
Collins, Loughran & Peloquin, P.C.

In The Courts

Appeals court affirms Commission's decision that BPD's bypass reasons were pretextual

In *Boston Police Department* v. *Brian Walker*, No. 11-P-2032 (January 16, 2013) the Massachusetts Appeals Court reversed the judgment of the Superior Court and affirmed the Commission's decision allowing Walker's bypass appeal. Walker was bypassed by the BPD and another individual—300 positions lower on the list—was ultimately hired to fill a position for which Walker was eligible. According to the BPD, Walker was bypassed due to: (a) an arrest for operating a motor vehicle under the influence of alcohol (OUI) seven years prior to his bypass (a charge that was ultimately dismissed for want of prosecution); (b) prior discipline by an employer for reporting to a shift under the influence of alcohol; and (c) concerns regarding his use of sick leave while a UMass police officer.

On appeal to the Civil Service Commission, the Commission found that the reasons given for his bypass were pretextual and that the discretionary interview was biased against Walker. As support for this determination, the Commission noted that the BPD has hired individuals with similar OUI charges and employment discipline. Additionally, the Commission referenced the discretionary interview which it found to be incredibly hostile to Walker and that the panelists made unreasonable demands of him.

The Department emphasized Walker's arrest for OUI, but the Court clarified that the question on review was not whether certain conduct had occurred or needed to be proven, but whether the Commission had adequately supported its conclusion that Walker had been bypassed for reasons other than misconduct. "Contrary to the department's argument, the Commission neither has required the department to prove that Walker engaged in this misconduct, nor has the commission concluded that, assuming that the misconduct occurred, it could not have been relied on to bypass Walker. Rather, the Commission found that the misconduct was not the reason Walker had been bypassed. In reversing the Superior Court's decision, the Appeals Court held that "the Commission's findings of fact are adequately supported, and we are bound to accept them."

Superior Court chides CSC once again for substituting its own judgment for that of the Appointing Authority

In *Boston Police Department* v. *Renee Palmer*, Suffolk Superior Court No. 12-00437-E, the court affirmed that the Boston Police Department ("BPD") is charged with ensuring the safety and protection of its community members and that in order to do that, the Department has the discretion "to bypass potential employees with a history of poor judgment, especially when the circumstances involve behavior that amounted to harassment and contributed to the escalation of a volatile situation." The plaintiff's Motion for Judgment on the Pleadings was allowed and a Judgment was entered reversing the decision of the Civil Service Commission.

In determining that the Commission had impermissibly substituted its judgment for that of the appointing authority, the court states that the "Commission exposes its error when it concedes the relevance of both the extremely negative assessments given by Palmer's former supervisor and Palmer's own admission of poor judgment concerning the 90-day probation, but criticizes the BPD appointing authority with having given those incidents undue weight in light of the positive assessments given by co-workers and different former supervisors." Despite the Commission's own feelings on the matter, the Superior Court confirmed that the Department has the discretion not to take "the risk inherent in hiring someone who has, in its view, shown poor judgment in former employment settings."

Superior Court grants HRD's motion for judgment on the pleadings with respect to the review of CSC's decision on definition of "veteran" for purposes of disabled veteran status

In a decision dated March 21, 2013, the Superior Court has ruled that the Massachusetts Human Resources Division's ("HRD") interpretation of who qualifies as a "veteran" for purposes of preferential treatment on eligibility lists for civil service employment "is the correct one, based upon principles of statutory construction" and promotion of a more internally harmonious reading of the various portions of the statute. This decision is consistent with the November, 2012 ruling on HRD's application for a stay of the Civil Service Commission's decision in the portion of that ruling that dealt with HRD's likelihood of success on the merits. See *Commonwealth of Massachusetts Human Resource Division* v. *Massachusetts Civil Service Commission & Shea*, Suffolk Superior Court No. SUCV2012-2882 A (March 21, 2013).

In November, 2012, the court allowed HRD's application for stay after undergoing its own examination of the statute at issue and concluding that "the interpretation advanced by HRD—one with which two of the five members of the CSC also subscribed—is likely correct." In its most recent decision, the court reviewed the parties' additional submissions and after determining that none of those submissions relied on any new information

or changes in the law, the court confirmed its earlier analysis and, "for the same reasons expressed in that earlier ruling, the court determines that the decision of the CSC on Shea's appeal of the HRD determination in seeking to qualify as a veteran under the provisions of c. 4, § 7, Forty-third was legally erroneous and that HRD is entitled to judgment on the pleadings in its pleadings in its petition under c. 30A."

As you may recall from the last two commentaries, HRD denied Shea's request to amend his preference to "Disabled Veteran" based on its belief that Massachusetts law required an individual to satisfy two elements to be considered a veteran under MGL c. 4, §7, cl. 43rd: first, that the individual be honorably discharged, and second, that s/he satisfy a length of service requirement. The appellant received an "uncharacterized" discharge due to his injury during basic training. Receiving veteran status would have enhanced Shea's position on the civil service eligibility lists from which municipalities select employees for hire.

HRD never disputed that Shea's service occurred during wartime. Instead, HRD concluded Shea did not qualify as a "veteran" because although he was discharged for an injury, and subsequently received service-connected disability, he only served a total of fifty-six days. Shea appealed HRD's determination to the Civil Service Commission, who disagreed with HRD's determination, and concluded Shea qualified for "veteran" status.

Not so fast: Superior Court overturns Commission's summary decisions

We all yearn for summary process on really weak appeals. But when there is competing evidence about whether a Lunenburg fire fighter lived with his auntie in Boston, in the critical one year period before taking the Civil Service exam, it is not enough for the Commission to believe and weigh the appellant's documentary evidence as more convincing than the contrary evidence of the Boston Fire Department. What was particularly strange about this case was that the competing documentary submissions occurred *after* the appellant inexplicably failed to appear for the evidentiary hearing. *Gould* v. *Boston Fire Department*, Suffolk Superior Court, 2012-1752-A.

In a related development, the Town of Billerica prevailed in getting the Superior Court to remand to the Commission the interesting issue of whether HRD's stated policy of having eligibility lists expire at the end of three years, even if there is no new list, was uniformly enforced and consistent with the "effective maintenance of the Civil Service system", *Town of Billerica* v. *Civil Service Commission*, Middlesex C.A. 12-02357. Again, the Town was not afforded an evidentiary hearing. This appeal may constitute a "Be careful what you wish for" situation, because most muncipalities would prefer to make provisional promotions pending the establishment of a new list rather than appoint what may be the lowest passing candidates on an old list.

Discipline Decisions

Boston Police Department and hair testing for drugs

On March 1, 2013, the Commission released the long awaited decision in *In Re: Boston Police Department Drug Testing Appeals ("D" Cases)*, 26 MCSR 73, a series of appeals brought by ten (10) former Boston Police Officers who had been discharged from employment with the Boston Police Department (BPD) after their hair samples tested positive for the presence of cocaine. The Decision "affirms the BPD's undisputed right to ensure a drug-free workplace" and to "employ all lawful means, consistent with the terms of any collective bargaining agreement, to identify and terminate police officers who use illegal drugs." Authored by Commissioner Paul Stein, the lengthy decision goes into great detail regarding the use of workplace hair testing for drugs, its history, reliability and the science behind it. Ultimately, the Commission finds that the BPD's "annual hair testing plan is an appropriate tool to enforce such a policy, although a positive hair test does not provide the 100% irrefutable evidence of drug injection that the BPD (and the police union) believed it did when the policy permitting such testing was negotiated and implemented." The Commission allowed in part the appeals of six (6) of the appellants, but dismissed the remaining four (4) appeals after determining that the BPD had met its burden to establish just cause for the appellants' discharge.

Of significance in deciding each of these cases was whether the test being appealed was the appellant's first positive drug test, whether the appellant had sought independent testing to refute the positive test obtained by the employer, the results of any independent testing, and the credibility of the appellant. The Decision also looked at the effect changes in the Department's standard operating protocol may have had on each appellant's test results and the follow-up or "safety-net" testing done by the BPD.

In terms of remedy, the Commission took a novel approach. It determined that although it had found that there was no just cause for discharge in six of the ten appeals, neither had it found any evidence that BPD's decisions were made in bad faith or were politically or improperly motivated. "Standing alone, good faith will not justify tempering a dismissal for lack of just cause, but, in the unique circumstances presented here, the commission finds that it is a factor that should be taken into account in assessing the appropriate relief that should be ordered." The officers whose appeals were allowed in part were ordered restored to their positions as BPD officers only back to October 21, 2010, without further loss of compensation from and after that date or loss of other benefits which they are entitled.[1] This reinstatement was conditioned on the officer being able to meet present requirements for fitness for duty.

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1. The Appellants were discharged in 2001, 2002, 2003 and 2007. These appeals were postponed for an extended period of time to allow the parties to focus on a related federal civil rights lawsuit. After nearly five years, when the federal law suit was still in the discovery phase, the Commission declined to further postpone these matters and scheduled them for consolidated hearings. October 21, 2010 was the first of the eighteen hearing days held in this matter between October, 2010 and February, 2011.

In awarding the modified relief, the Commission noted that this was a unique situation and that it "expects this form of modified relief will be appropriate in very few, if any, future appeals."

Train now, bargain later

If one fire fighter gets it into his head that completing basic training on Fire Prevention could lead to the elimination of the Fire Prevention Officer position, can he refuse to undergo the training, take a two day suspension, and delay the training 8 months? In *Finn* v. *Town of Bourne*, 26 MCSR 14, the answer is yes, but the suspension was upheld. The better approach in such cases of blatant refusal to carry out an order is to suspend the employee pending compliance with the order or at least some kind of escalating punishment for continued non-compliance.

Can a last chance agreement be forever?

A fire fighter under a Last Chance Agreement without an expiration date claimed that it should not be enforced because it was "too onerous." In *Garside* v. *Fall River Fire Department*, 26 MCSR 31, the Commission deemed the agreement valid, but the agreement was less than one year old at the time of review.

NOTE: For additional discussion on the Commission's view of Last Chance Agreements, refer to the Commentary covering decisions issued in the final months of 2012 [25 MCSR C-17].

Can tainted brownies consumed at a New Year's eve party cause a positive urine test for marijuana 20 days later?

Yes, for habitual users the metabolites are detectable for about 21-30 days; but for others, it would only be detectable for 2-3 days. So, unless the employee admits habitual use, the tainted brownie excuse fails. *Garside* v. *Fall River Fire Department*, 26 MCSR 31.

Does an officer's failure to follow the chief's orders while out on injured in the line of duty status amount to just cause sufficient to support her termination?

In *Bistany* v. *City of Lawrence*, 26 MCSR 136, the City demonstrated by a preponderance of the evidence that it had just cause to terminate the appellant from her position as a police officer for her failure to follow orders from the Chief of Police. In this case, the Chief issued several orders to the appellant during the more than four years she was out on Injured in the Line of Duty (ILD) status including orders to submit to an MRI or to provide medical documentation indicating why she was unable to do so. Orders were also given to provide information regarding her pregnancy status and contact information for her gynecologist. The Commission determined that the Chief's orders were "not meant to dictate her medical treatment," and were instead based on information the Chief had received from Ms. Bistany's own doctor that the MRI was a necessary diagnostic tool the doctor required to provide the Chief with the information he needed to ascertain the appellant's ability to return to duty.

In refusing to comply with the Chief's orders, the Commission found that the appellant's actions "frustrated Chief Romero's ability to manage the LPD in the manner to which he was reasonably entitled. Chief Romero had good reason to expect Ms. Bistany's compliance with his lawful orders, Chief Romero made numerous attempts to accommodate Ms. Bistany and secure compliance; however, he was not required to accommodate her indefinitely, and discipline was clearly appropriate."

Bypass Decisions

Prior employment as a basis for bypass: How far back? how fragile is the memory?

In *Machnik* v. *Department Of Correction*, 26 MCSR 21, the Department refused to hire a former employee, who 12-13 years before had resigned from the Department after receiving two written reprimands and four suspensions. Tempting fate, the appellant didn't list that discipline on his application, and then testified he had "forgotten" it. While the Commission might well have disbelieved that malarkey, it chose instead to view it as "indicative of someone who had not seriously reflected on his prior issues." The Commission also noted that there is no time restriction on considering adverse employment history in a government or public safety related agency.

In a related development, an employee discharged by the Department only three years before failed to list that on his 2011 application, thinking that he should only list the "positives". *Sousa* v. *Department of Correction*, 26 MCSR 26. Bypass upheld.

In a hiring bypass case, can an employee preclude consideration of discharge by a prior employer if the employee won unemployment because the employer's policy was not uniformly enforced?

In *Sousa* v. *Department of Correction*, 26 MCSR 26 the Commission rightly rejects the view that a Department of Unemployment Assistance ("DUA") decision is binding under the doctrine of issue preclusion; the issues are different. But, there is an even better reason: Proceedings before the DUA are not admissible in other cases, under a strict statute with few exceptions, none of which were pertinent.

Information collected under the unemployment insurance statute is not a public record, not admissible in any other proceeding, and is absolutely privileged. MGL c. 151A, §46(a); see *Tuper* v. *North Adams Ambulance Service, Inc.*, 428 Mass. 132, 137 (1998) (affirming that the confidentiality provisions of §46 provided additional support for judge's allowance of defendant's motion to preclude any reference to unemployment insurance decision and proceedings in a subsequent civil action). Under MGL, c. 151A, §46(e), unlawful disclosures of this information may be punished with a maximum fine of $100 and no more than six months in jail.

Prior employment history in hiring bypass cases

Some prior acts are sufficient to uphold a bypass even if other parts of the hiring process were incomplete. In *Blais* v. *Methuen*, 26 MCSR 4, a 2009 OUI conviction of a fire fighter on the reserve list made the appointing authority's failure to contact the appellant's references immaterial.

Can a candidate for full-time police officer be bypassed for reasons relating to conduct as an intermittent officer, even if no discipline was issued for those past incidents?

In *Brigham* v. *Town of Scituate*, 26 MCSR 45, the Commission upheld a bypass based on four incidents, 1-5 years before the selection, which all involved anger management issues and three of which raised concerns about the male appellant's interactions with female officers.[2] While the hearing commissioner felt that the way the Town conveyed its concerns, by springing them on the appellant during his interview, was not the best course, the fact that the Town produced the percipient witnesses for the Commission hearing validated its concerns under the reasonable justification standard.

Overseeing promotion interview processes: What is enough to bypass?

In *Malloch* v. *Town of Hanover*, 26 MCSR 56, the Commission endorsed the use of *outside* police superiors on the first interview panel, and the judgment of the second interview panel that the appellant was stumped by a question about the difference between management and leadership. The Commission did express concern, however, about what appeared to be rehearsed testimony by town witnesses. Additionally, the Commission expressed concern regarding signs of potential gender discrimination in the Chief's dismissive response to the female appellant's choice of reading material (an allegorical novel), while *not* being concerned about a selected male candidate's statement that he "reads training manuals, not books." Despite these concerns, the bypass was upheld based on the Appellant's anxious and marginal interview performance.

Decisions to let a list expire, even for arguably questionable reasons, are not appealable as bypasses

In *Mackie* v. *City of Lawrence*, 26 MCSR 55, the Commission correctly concludes that the Mayor's decision to let a list expire gave the Commission no jurisdiction over an appeal by one of the candidates on the list. The Mayor's decision, considered arbitrary by Chairman Bowman, was that four of the fire candidates were not residents. Lacking jurisdiction, the Commission settled for a warning that it might investigate, under §2(a), "*any* alleged irregularities that may arise in the upcoming process for (hiring) fire fighters".

In a case not presenting any claim of irregularity, the Commission decided that the appellant was not a "person aggrieved" under §2(b) despite the fact that the eligible list expired while a grievance about a transfer into a Deputy Chief position was pending in arbitration.

Marginal concerns about prior employment won't trump biased process

In a case imbued with a tenor of favoritism, the Commission upheld a bypass appeal where the employer relied on one negative employment reference, ignored other favorable ones from the same employer, and didn't bother to check some other references. One considerable issue of concern the City hoped would support its decision was a discharge from a town fire department; however, that town refused to comment on the reasons for the discharge so the Respondent was unable to rebut the appellant's own explanation for this discharge. From the details provided in the Commission's decision, it seems that the City's attempt to contact the town and its refusal to comment were verbal (by counsel for the town) and therefore insufficient to support its bypass decision. *Hardnett* v. *City of Springfield*, 26 MCSR 38.

It is unclear why the Respondent wouldn't have its candidates sign a written release for all employment records from prior employers. Given the outcome of this appeal, appointing authorities are encouraged employ this practice in the future.

Dim bulb defense of the term

A candidate can be bypassed for being fired at a prior job, where his departure, after only six weeks, was preceded by five written warning reports. The Appellant's defense - "I didn't know I was fired" - fell on deaf ears, though the Commission also noted that the appellant declined its invitation to subpoena his former employer. *Bourgery* v. *Department of Correction*, 26 MCSR 36.

Other

Deadline for discipline appeals is not tolled by pending grievance

An employee who appeals a discharge under a union grievance procedure, but doesn't file a Commission appeal within ten days under §43, is out of luck. *Graver* v. *Springfield Housing Authority*, 26 MCSR 16. The statutory and regulatory scheme under G.L. c. 31 is not like that under c. 151B, where grievances on discrimination claims will toll the filing period.

For review, pursuant to the Massachusetts Commission Against Discrimination's Regulations at 804 CMR §1.10(2), the limitations period will not bar the filing in instances where the facts of a charge allege that the unlawful conduct was of a continuing nature or "when pursuant to an employment contract, an aggrieved person enters into a grievance proceeding concerning the alleged discriminatory act(s) within six months (or 300 days depending on the applicable period) of the conduct complained of and subsequently files a complaint within six months (or 300 days) of the outcome of such proceeding(s)." The regulation further provides that the statutory requirement is not a bar where the aggrieved person enters into an agreement to mediate a dispute under MGL c. 151B and files the complaint within twenty-one days after the conclusion of mediation.

A can of worms: Is a police officer or fire fighter who lives outside the 10 mile limit of c. 31, §58 disqualified for promotion?

The short answer is that the Commission will conduct an investigation of such claims under §2(a), but it appears to be concerned only with residency compliance **on the date of the hearing**, not

2. Tim D. Norris, a partner in Collins, Loughran and Peloquin P.C., represented the Town of Scituate.

prior compliance. *Erickson* v. *Rockland Fire Dept.*, 26 MCSR 29. The Commission does warn, however, that it could use its Section 2(a) investigative powers to enforce compliance with the residency statute.

Some communities have collective bargaining agreements which purport to expand the residency limit beyond 10 or 15 miles (15 miles under c. 41, § 99A), but such agreements may not be enforceable since these residency statutes are not listed in c.150E, §7(d) as being supersedable by a union contract. However, according to a recent Appeals Court decision, "any municipal employer who wants to require residency for police officers or firefighters *more stringent than the 15 mile requirement of MGL c. 41 §99A must bargain with the Union*." The case is *City of Lynn* v. *Lynn Police Association*, 12-P-1122, issued March 27, 2013 pursuant to Rule 1:28.

USERRA violation remedied by retroactive seniority

In a well-reasoned decision, *Martin* v. *Woburn Fire Dept.*, 26 MCSR 23, the Commission granted three years of retroactive seniority to a fire fighter who was non-selected because he was called to active military duty, citing *McLain* v. *City of Somerville*, 424 F. Supp. 329 (D. Mass. 2006). The seniority granted was only for Civil Service purposes… no pay, benefits, or creditable service for retirement.

Follow-up to Commission's investigation into Quincy's appointment of candidate ranked 234th

In the last commentary, we reported that the Commission had decided to launch an investigation into the City of Quincy's hiring practices after the City, at the Commission's request, produced records showing that it had appointed an individual ranked 234th on the labor service register used to make an appointment to a labor service position. (*Civil Service Commission* v. *City of Quincy*, 25 MCSR 407 (2012)). In conjunction with the investigation, the City asked the Commission that any labor services employees, appointed or promoted prior the City's new procedures (adopted as a result of this process), be granted permanency. The Commission agreed "[s]ince any defects in the appointment or promotion process prior to the newly adopted procedures were through no fault of the individuals appointed and promoted and because the City's new procedures are in compliance with civil service law and rules..." *Investigation Re: City of Quincy Labor Service Appointments*, 26 MCSR 125.

Practice pointer: Follow through on verbal orders given at commission's pre-hearing conferences

In *Peck* v. *Department of Correction*, 26 MCSR 148, the Commission sent a message that failure to follow through on verbal orders given at pre-hearing conferences and/or administrative efficiency will not be excused. The Commission voted to accept the hearing officer's findings of fact, but declined to adopt his recommended decision dismissing the appeal based on the Department of Correction's failure to comply with the Commission's verbal orders given at the pre-hearing conference. According to the decision, the "verbal orders at the pre-hearing conference were meant to avoid the precise conundrum cited by the magistrate in his decision in which he opines about the potential injustice of an individual who is bypassed based on a pending investigation that may ultimately result in no findings and/or discipline against the individual."

The Commission chided the Department for failing to complete its investigation of the appellant prior to proceeding to hearing. The Commission allowed the appellant's appeal and ordered him placed at the top of the next certification for the position of Correction Officer III. The DOC was instructed to complete its investigation by June 3, 2013, and told that it could file to have the Commission's order revoked if the hearing results in findings of misconduct and/or discipline against the appellant. In order to be considered, a motion to revoke must be filed on or before July 1, 2013, otherwise the Commission's decision shall become effective July 1, 2013. ■

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