MCSR Management Commentary September-December 2018

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2018 CALENDAR YEAR STATISTICS

Highlights

- The Civil Service Commission received 280 new appeals in 2018 and closed out 239.
- The open case inventory of appeals as of December 31, 2018 is 175.
- 60 appeals have been pending before the Commission for more than 12 months.
- Average cycle time of all appeals: 26 weeks.
- Average cycle time of those appeals requiring full or motion hearing: 51 weeks.
- In 2018, there was only one Commission decision appealed to and decided by Court; the decision was affirmed.

Total Appeals Pending (2010-2018) as of:

2010	2011	2012	2013	2014	2015	2016	2017	2018
181	16	179	148	123	90	75	164	175

Total Appeals Pending for More Than 12 Months (2010-2018) as of:

2010	2011	2012	2013	2014	2015	2016	2017	2018
62	43	46	42	23	2	15	16	60

IN THE COURTS

Firing Of Injured Employee Upheld By Appeals Court

In *McEachen* v. *Boston Housing Authority*, 93 Mass. App. Ct. 1122 (2018), the Appeals Court affirmed the CSC decision that BHA was within its rights to terminate a disabled man who could no longer perform job functions for which there were no accommodations available. The Court agreed that BHA did not need to "fashion a new position" or hold open indefinitely the position of an employee who is on medical leave and cannot perform the essential duties of his/her position. Employee was a carpenter who was injured and could no longer perform his job duties. He argued that he could return to work as a carpenter supervisor (not a position in the bargaining unit).

"[T]he BHA correctly points out that an employee is not deemed unfit to perform the duties of the 'position involved' if the employee can perform those duties 'with reasonable accommodation,' but this principle of reasonable accommodation does not require an employer to 'fashion a new position' for the employee nor does it require that the employee be allowed to remain on medical leave indefinitely."

He also argued that the decision was made due to anti-union animus and a desire to cheat him out of his retention bonus and life insurance policy. Neither the CSC or reviewing courts found any evidence of that.

DISCIPLINE

Commission Upholds Discharge Of Holden Police Lieutenant Despite Questionable Legitimacy Of Initial Complaint

Carey v. *Town of Holden*, 31 MCSR 311, the Commission determined that Holden was justified in discharging Carey, a 27-year veteran of the department who had worked his way up the ranks from dispatcher, for sexual harassment, accessing pornographic websites on his town-issued cell phone, failing to give the Chief his passcode to his town-issued phone, and filing an inaccurate police report (alleging identity theft), notwithstanding the fact that the initial complaint came from a female officer whose competency he had questioned and whose family he had significant history with.

The Commission's decision—which, due to the facts of the case—reads like a soap opera, upholds the discharge despite some questionable behavior by other members of the department, including the female officer (JC) making the initial claim. At first it appeared that Lieutenant Carey was the victim of revenge by a family (JC's family) he had history with—while the father was a Holden police officer, Carey accused him of not returning "drug-buy money" (which resulted in JC's father repaying the money), and JC and her brother, both police officers, were investigated by Carey several times for parking in restricted lots, driving under the influence, failing to conduct field sobriety checks and just before JC made her complaint—for JC driving drunk and her brother pulling her over and letting her go.

While the department was understandably skeptical when JC made her claims, it did the right thing by following its sexual harassment policy and opening an investigation. The investigation revealed some very real and very concerning behavior involving other department members which ultimately became the basis for Carey's discharge. It did not matter that some of the behavior happened several years ago when Carey was a patrol officer.

> The clear intent of merit principles is that a police officer's misconduct, no matter how long ago it may have occurred, may not be excused as too stale in circumstances such as those presented in this appeal. Indeed, once an officer has misbehaved in a manner such as shown here, the very problem that creates is that he or she remains vulnerable to compromise by those with ulterior motives long after the behavior occurred. Thus a municipality is entitled to demand that its public safety officers maintain the highest standard of conduct at all times, and that, when discipline is considered, it is quite often fair to examine the officer's behavior through his or her entire career, both positive and negative, in weighing the decision as to whether and what discipline is warranted.

Discipline Of Deputy Chief For Improper Release Of Personnel Record Reduced From 10 Days To Written Reprimand

Distinguishing between Internal Affairs Investigation materials subject to disclosure under the State's Public Records law and personnel records exempt from disclosure under exemption (c) can be a tricky exercise. This much the Commission agreed on in *Chartrand* v. *Town of Dracut*, 31 MCSR 322, where a 3-2 majority of the Commissioners voted to reduce a 10-day suspension to a written reprimand for failure to provide due process to the subject of an internal affairs investigation. Hearing Officer Cynthia Ittleman would have reduced the discipline to a 3-day suspension, finding that the Appellant Deputy Chief violated Department Policy and Procedure regarding Internal Affairs Investigations and Section 10 of the State's Public Records Law which required a response to request within 10 days, and Chairman Bowman would have allowed the appeal finding "there is sufficient ambiguity in the public records law related to this particular issue that could support an argument for or against producing the document in question."

While there were several issues in this case, the one related to the Public Records law had to do with a "scathing and personal" letter written by the Deputy Chief to a Lieutenant Fleury who he had secretly investigated for working more than 16 hours in a 24-hour period in violation of department policy. The Deputy kept the letter in his IA files and did not consider it disciplinary; he considered it a learning tool related to his investigation. As a result, it was released to The *Lowell Sun* as part of a request by the newspaper for all internal investigation reports from November 2011, 2014 to November 1, 2016. Lieutenant Fleury learned the letter had been released when portions of the letter were published. Until that time, he did not realize that there had been an IA investigation and believed that the letter should have been exempt from disclosure as a personnel record related to performance and discipline.

Weymouth's 5-Day Suspension Of Lieutenant Who Delayed And Withheld Information From Responding Officers Vacated In 3-2 Decision

Finding his behavior was not deliberate misconduct, a majority of the Commissioners (3-2 decision) voted to vacate the 5-day suspension of a Weymouth Lieutenant who delayed and effectively withheld information from officers responding to a call of a drunk and mentally unstable man. *Burke, Jr.* v. *Town of Weymouth*, 31 MCSR 367 (2018). As a result, the responding officers were unaware that the man was a "known combative towards police and first responders" and "tends to flee." They were also unaware of an outstanding warrant for assault on an ambulance technician a few months earlier during a similar call. The discipline was vacated despite the fact one of the responding officers was injured and another stated, "we probably would have handled it a lot differently" if they had known about the warrant ahead of time.

The Chief of Police issued a 5-day suspension based on what he determined was the officer's failure to comply with department Rules and Regulations, including: "failing to transmit all official communications promptly, accurately and completely to other officers in the department as required," and "failing to take suitable and appropriate police action when any crime, public disorder or other incident requires police attention or service."

The Commission disagreed with the Chief's determination and found that Lieutenant Burke's actions were based on his "good faith belief that he was acting within his discretion to keep information 'off the air' because of an honest judgment that such an approach was more likely to protect his officers than put their safety at risk." The majority also found he was acting in good faith when he had the subject sent to hospital first before arresting him. The hearing officer's decision (Commissioner Stein), concludes, "[n]othing that Lt. Burke did that night can fairly be construed to have 'impaired the efficiency of the public service' or to have 'called into question' his fitness to serve as a police officer sufficient to support imposing the remedial discipline of a suspension without pay." Based on the information provided, it is surprising that the Chief's decision finding otherwise and issuing discipline, was not entitled to deference.

Bowman and Ittleman voted against allowing the appeal, but there was no dissent.

BYPASS

Calling Bypass Reasons "Bizarre," CSC Remedy All But Orders Appellant Promoted

In an extraordinarily harsh decision, the Civil Service Commission not only lambasted the Appointing Authority, but practically ordered the promotion of the Appellant Fire Lieutenant to the next opening for Captain in *Smith* v. *Town of Billerica*, G2-18-079 (December 20, 2018). The Town is appealing the decision. The Commission called the Town Manager's bypass reasons "bizarre," based on "head scratching assumptions and conclusions," and said it appeared he had "let his imagination get the best of him."

The Appellant was bypassed for failing to report that he had been told that several firefighters, some married, were having sex with a female dispatcher on and off duty. An investigation resulted in discipline to several employees, including demotions. The Appellant was not a subject of the investigation and only had a platonic relationship with the dispatcher. At the time he learned of the sexual relations, the department did not have an anti-fraternization policy and there was no indication they were not consensual. The bypass decision stated: "It is simply not enough to be first on the list. You

must demonstrate an understanding of leadership positions and the accountability that goes with it."

The Commission ruled the Appellant had done nothing wrong, crediting the Appellant's testimony that he had not reported the situation because he was not certain the encounters had occurred, and he did not want to spread rumors. The Commission noted that the Town did not have an anti-fraternization policy when the scandal occurred and that the Lieutenant had no knowledge that the sexual encounters were adversely impacting the Department.

The Commission's tolerance of the failure to report arguably substitutes its judgment for that of the employer. (Since when is an anti-fraternization policy necessary to hold employees accountable for such sexual misconduct?) However, one of the Commission's reasons does make sense. The successful candidate for whom Appellant was bypassed also knew of the sexual encounters and failed to report them. Yet, the Town Manager wrote of the successful candidate that he had "continually demonstrated he understands the responsibilities and role of a commanding officer."

After asserting that vacating the promotion would have been warranted, the Commission imposed a multi-faceted and unusual remedy that essentially insured the future promotion of the Appellant. It ordered: (1) No new Captain's list can be established until Appellant is promoted; (2) Appellant remains at the top of any Captain certification until promoted; (3) Town cannot use any bypass reasons that it knew of at the time of the current bypass; (4) No Captain appointment bypassing Appellant can take effect until the Appellant has an opportunity to appeal and the Commission issues a ruling on the subsequent bypass.

Officer's Bypass Upheld Due To Discipline Even Though He Was Not Offered An Interview

This decision is refreshing, not because the Commission upheld the bypass of a police officer with significant discipline, including a 2015 incident resulting in a ten-year last chance agreement, but that the Commission did so notwithstanding the fact that the City did not provide the bypassed officer with an interview. *Vigliotti* v. *City of Worcester*, 31 MCSR 404 (2018). According to the Commission, "[g]iven the circumstances, and the evidence offered at hearing, the WPD would have [ ] been justified in reaching the same conclusion even if Officer Vigliotto had been granted an interview." While certainly not appropriate in all cases, it is good to know that when the situation presents itself an Appointing Authority is not required to waste its time interviewing an individual with no chance of being promoted.

OTHER DECISIONS

Firefighters' Union Lacks Standing To Challenge Town's Decision To Use Assessment Center Rather Than Traditional Written/Multiple Choice Exam

In *Sciara* v. *Town of Hull*, 31 MCSR 349 (2018), Hull obtained permission to conduct a "Sole Assessment Center" for the position of Fire Captain, pursuant to a Delegation Agreement signed with the Human Resources Division (HRD) in August 2018. The local firefighters' union opposed the Assessment Center and asked the Commission for an order allowing Hull firefighters to sit for the traditional written/multiple choice examination conducted through the HRD, to preserve the status quo while the parties awaited a decision from the Division of Labor Relations (DLR).

After reviewing brief by both parties, the hearing officer concluded that the Town's decision to hold an Assessment Center is not a violation of civil service law and that Sciara could not show that he was a person aggrieved by the decision. The Commission voted 4-1 to dismiss Sciara's appeal. ■

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2018 CALENDAR YEAR STATISTICS

The arrival of 2019 brings the Civil Service Commission's yearly report concerning the processing of its caseload, including statistics regarding the average length of time taken to decide appeals and the likelihood of success for appellants in various types of appeals. According to the Commission's statistics, through December 31, 2018, the average length of time that it takes to resolve all appeals before the Commission is twenty-six weeks, while the average period for those appeals that require a motion hearing or a full hearing is fifty-one weeks.

While individual cases and their merits may vary widely, the Commission's statistics relating to the dispositions of its cases always is informative. In 2018, the Commission issued a total of fifty-nine decisions in bypass and related appeals. Of that number, 27% resolved by means of relief through mutual agreement of the parties that then was accepted by the Commission. For those that were litigated to a conclusion before the Commission, 58% of the appeals were denied, while the remaining 15% of the appeals were allowed. So, for those who filed bypass or similar appeals to the Commission, less than half (42%) ultimately received some form of relief. However, those appellants who were not able to reach an agreement with the adverse party that was accepted by the Commission stood a relatively low 15% chance of success.

These 2018 bypass statistics are very similar to the bypass appeal statistics in prior years. In large measure, these figures are a function of the "substantial deference" that the Commission pays to appointing authorities in bypass situations. *See King* v. *Westfield Fire Commission*, 31 MCSR 280, 282 (2018). As the Commission often states, "[t]he Commission's role, while important, is relatively narrow in scope: reviewing the legitimacy and reasonableness of the appointing authority's actions . . . and ensuring that the appointing authority conducted an 'impartial and reasonably thorough review' of the applicant." *Id*. "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." *Town of Burlington* v. *McCarthy*, 60 Mass. App. Ct. 914, 915 (2004).

The Commission issued eighteen decisions in 2018 in discipline and layoff appeals. Of that number, 33% of the appeals were allowed in whole or in part, while the remaining 67% resulted in the challenges to discipline being rejected. While the pool of disciplinary and layoff decisions was relatively shallow in 2018, the 2018 statistics are in keeping with a longer term view of Commission discipline and layoff cases. Since January 1, 2006, the Commission has issued decisions in over 700 discipline or layoff appeals. The substantial majority, 79%, of those appeals have been denied, while 21% have been allowed in whole or in part. Again, the statistics are driven at least in part by the applicable standard, because while the Commission conducts a de novo hearing and finds its own facts on discipline appeals, "[a]fter making its de novo findings of fact, the [C]ommission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the [C]ommission to have existed when the appointing authority made its decision[.]'" *Carey* v. *Town of Holden*, 31 MCSR 311, 317 (2018) (some brackets in original).

Consequently, although the burden of proof in bypass and disciplinary cases rests with the appointing authorities, appellants challenging adverse determinations made at the local level in these cases statistically speaking have their work cut out for them in order to achieve relief before the Commission.

Another noteworthy area of analysis are the figures relating to judicial appeals of Commission decisions. Since 2006, there has been a marked decline in the number of parties who, aggrieved by a Commission decision, have challenged Commission action in court. In 2006, the Commission issued 191 substantive decisions, twenty-five of which later were challenged in, and decided by a, court. By 2015, of the 139 substantive Commission decisions, just ten were appealed further and decided in court. In 2017, there were eighty-eight substantive Commission decisions and five ended up being decided in court. In 2018, of the ninety-one substantive Commission decisions, just one was appealed further and decided in court as of December 31, 2018.

While it is likely that factors such as the investments of time and money necessary to prosecute a judicial appeal can explain the lack of challenges to Commission decisions, those considerations are much the same today as they were in years prior and those factors then do not necessarily explain the downtick in appeals from Commission decisions over the past several years. However, what can help to explain the paucity of judicial challenges in the most recent past is the manner in which Commission decisions are structured. Those who today examine Commission decisions with an eye toward the vulnerability of those decisions on further appeal will find that a very large portion of the Commissions' decisions are effectively bulletproof. Simple disagreement with a Commission result is not anywhere near adequate grounds for an appeal and, with a standard of judicial review that is deferential to Commission decision-making in mind, it seems to be the case that those parties who believe that the Commission "got it wrong" in their cases are not able to go still further and identify a legal ground upon which there exists a reasonable prospect of overturning the Commission decision in court. When the quality of the

Commission's work product is such that parties and their counsel are not able to envision a viable means of appellate attack, appeals are considered wastes of resources and judicial appeals never are commenced.

IN THE COURTS

Filing Of A Grievance Does Not Toll Deadline To File Appeal With Commission

Disciplined civil service employees who either are union members with an operative collective bargaining agreement permitting a grievance, and ultimately arbitration, as to a piece of discipline or who are employees with an individual employment contract with similar terms relating to the arbitrability of discipline have an important choice to make: whether the discipline ought be challenged through an appeal to the Commission or through contractual grievance and arbitration processes. There are a great many items to consider regarding that decision, including analysis of the different standards of review at arbitration and before the Commission.

The decision as to which forum is the best choice for a particular disciplinary dispute to be adjudicated often presents with a host of procedural landmines, given that the time standards both for grievance/arbitration processing and a Commission appeal are rigidly set and strictly enforced. On the contractual side, the challenge usually involves a multi-step grievance procedure that ultimately results in a demand for arbitration being filed. However, contractual terms are inherently localized and an exceedingly thorough review of the contract, informed also by past practices, is necessary in order to ensure that all of the necessary steps are taken timely and properly. A misstep at any stage of the progression can result in the challenge being lost procedurally with no opportunity for the merits regarding the disciplinary decision ever to be assessed.

Important particulars as to the processing of a disciplinary appeal with the Commission largely are imposed statutorily through G.L. c. 31, § 43. That provision states that such an appeal is to be filed with the Commission "within ten days after receiving written notice" of the appointing authority's decision to discipline, with Saturdays, Sundays and legal holidays not counting in the computation of time. A proper appeal, of course, requires the filing of the appropriate documentation with the Commission by the statutory deadline, along with the filing fee for a disciplinary appeal.

Although the Commission process to perfect a disciplinary appeal itself is straightforward, complications for disciplined employees can arise as a result of the interplay between that uniform Commission standard and local idiosyncrasies, including the existence of an equally applicable contract permitting disciplinary challenges pursuant to that contract and processes related to the handling of such grievances. In December, 2018, a Superior Court Judge was confronted with just such an issue involving complications from the dynamics of a Commission appeal route and a contractual grievance route in *Downer* v. *Civil Service Commission*, Hampshire Superior Court Docket No. 18-0079 (*Agostini, J.*), available at https://www.mass.gov/files/documents/2019/01/02/downer_dean_superior_122618.pdf, site last visited February 10, 2019. The procedural issue presented in *Downer*, which was an appeal to the Superior Court from a Commission decision, was exactly when the ten day clock begins to run for the filing of a Commission appeal, and whether that time period may be tolled as grievance steps are taken.

Prior to discussing the Superior Court decision, a brief review of the preceding Commission decision is necessary. In *Downer* v. *City of Northampton*, 31 MCSR 98 (2018), Dean Downer, a civil service employee working in the City's Department of Public Works, received notice of his demotion on May 4, 2017. Downer initially elected to challenge the sanction by invoking the grievance procedure set out in a collective bargaining agreement that applied to the dispute. Although the record does not reveal precisely what occurred through that contractual process, almost two months after receiving notice of his discipline, on June 29, 2017, Downer filed an appeal with the Commission concerning his demotion. Clearly, the initiation of the Commission appeal was well past the ten day window from initial receipt of the disciplinary determination. In a decision by Chairman Bowman, the Commission opened an investigation concerning the City's apparent failure to comply with civil service law as to labor service employees, but dismissed Downer's appeal because he failed to file his appeal timely and because he was not a permanent, tenured civil service employee in the position from which he was demoted.

Downer argued that his appeal filed with the Commission was timely because it occurred within ten days of a "final" decision by the City, which Downer identified as occurring when his challenge through the contractual grievance process was ended locally without relief. The Commission, relying upon *Graver* v. *Springfield Housing Authority*, 26 MCSR 16 (2013), rejected Downer's position and concluded that the ten day timeframe to file a Commission appeal "begins on the day the disciplined employee is notified by the appointing authority of the results of a local hearing regarding the discipline and is not tolled while the employee explores whether to pursue the matter through the grievance and arbitration process."

Downer then appealed the Commission decision to the Superior Court, which issued a decision on December 26, 2018 affirming the Commission decision. *See Downer* v. *Civil Service Commission*, Hampshire Superior Court Docket No. 18-0079.

On the issue of timing, the Superior Court Judge stated that "[t]here is no question that Downer had the option to proceed through the five-step grievance process culminating in arbitration and/or appeal to the State Civil Service Commission. The first is by contract, the second is by statute. Each route is independent of the other and entailed different deadline[s] for initiating and pursuing a claim." The question presented in *Downer* was "whether Downer's election to proceed with his union grievance procedure stayed the commencement of the statutory ten-day appeal period until the grievance was resolved. In other words, is the time for seeking review tolled by the timely filing of a union grievance."

Surveying the relevant authorities, the Superior Court turned away Downer's claim that the ten day filing deadline began only *after* the local contractual process was completed and he remained aggrieved following that contractual process. The Court concluded that the ten day statutory deadline to file an appeal with the

Commission challenging discipline begins with receipt of the written notice from the appointing authority as to the discipline imposed following a Section 41 hearing and, as the statutory deadline is jurisdictional and the Commission does not have the ability to entertain appeals filed outside the timetable, the deadline cannot be extended or tolled by operation of a contractual grievance filing.

While *Downer* did not break new legal ground on the issue of timely filing with the Commission; *see Kilson* v. *City of Fitchburg*, 80 Mass. App. Ct. 1103 (2016) (Commission appeal dismissed as untimely when police officer challenged his termination through grievance and arbitration processes, only filing a Commission appeal when an arbitrator concluded that the termination was not arbitrable and could not be challenged under the contract); it emphasizes the dangers of failing to appreciate and abide by all legal requirements in the processing of a disciplinary appeal.

In most instances, the decision on the appropriate forum should be made very quickly and, once determined, all applicable requirements to perfect the appeal, whether it is to be to the Commission or to arbitration, must be satisfied. If, for whatever reason, the decision cannot be made immediately, then the analysis must turn to whether, and how, at least the initial steps of both avenues can be taken. There will be a point at which the choice ultimately has to be made, as the law is quite clear that a challenge to the same piece of discipline cannot be launched in different fora simultaneously, but in some situations there at least is the potential to delay the decision and, functionally, keep both avenues of appeal open for a time. To keep Commission review alive is relatively simple, the appeal paperwork and filing fee just has to be presented to the Commission timely. However, particularized attention must be paid in such a scenario to local contractual requirements, because there are instances in which just the filing of a Commission appeal could waive the right to pursue a grievance on the same subject matter. There is no substitute for careful and considered review of all applicable requirements to ensure that a disciplined employee has at least one bite at the apple to challenge the sanction.

DISCIPLINE CASES

Termination On Fitness For Duty Grounds, Not Alleged Misconduct, Upheld By Commission

In the main, "discipline" cases before the Commission flow from allegations of misconduct by civil service employees that result in employment sanctions ranging from suspensions to terminations. There is, however, a subset of discipline cases that do not involve claims of wrongdoing, but instead regard the question as to whether an employee should be terminated because the employee is unfit for duty. *See, e.g., Marcus* v. *City of Chelsea*, 29 MCSR 279 (2016) (police officer's termination for non-disciplinary reasons upheld because medical evidence indicated that officer could not perform the essential functions of his position).

During this period, the Commission was presented with another such instance in *Dooner* v. *Boston Housing Authority*, 31 MCSR 351 (2018). In October, 2017, Dooner, a carpenter with the Boston Housing Authority, suffered a work-related injury to his hand that later required surgery and rehabilitation. Although Dooner indicated that he wished to return to work, his physician had not cleared him for an extended period of time following the injury and the Housing Authority terminated him based upon Dooner's inability to perform the essential functions of his position.

Dooner appealed and, at the prehearing conference, Chairman Bowman raised with the parties the August, 2018 decision of the Appeals Court in *McEachen* v. *Boston Housing Authority*, 93 Mass. App. Ct. 1122 (August 10, 2018) (Rule 1:28 Decision). In *McEachen*, the Appeals Court affirmed a Commission decision that determined the Boston Housing Authority had just cause to terminate McEachen because, following a work-related injury, McEachen could not dispute the notion that he was unable to perform his job duties and had to agree that his ability to perform those duties at any point in the future was uncertain; McEachen's only argument was that he then could return to work with modified duties that would have necessitated the creation of a new position in his bargaining unit. As the Commission held, and the Appeals Court noted, "an employee is not deemed unfit to perform the duties of the 'position involved' if the employee can perform those duties 'with reasonable accommodation,' [but] this principle of reasonable accommodation does not require an employer to 'fashion a new position' for the employee nor does it require that the employee be allowed to remain on medical leave indefinitely." The Appeals Court agreed with the Commission, stating that the "substantial undisputed evidence in the record, . . . showed that McEachen is unable to perform the essential job duties of a BHA carpenter, that such inability is indefinite, and that there is no reasonable accommodation available that would allow McEachen to return to the job in a limited capacity."

At the prehearing conference in *Dooner*, the Housing Authority indicated that it would be willing to return Dooner to work if he received medical clearance at an appointment scheduled for that week. In order to allow that process to play out, the Commission set up an extended briefing schedule for a potential motion for summary disposition. At the August, 2018 medical appointment, Dooner was not cleared and instead remained on restrictions, with Dooner's physician indicating that maximum medical improvement would be expected at six to twelve months after surgery, a period of time that had not yet expired.

The Commission, relying upon *McEachen*, dismissed Dooner's appeal following briefing, holding that Dooner had not recovered from his injury and his medical provider could not say when or whether he would be able to return. Since Dooner was unable to perform the essential functions of his job, his termination was justified.

The Commission did note that if Dooner in the future reaches a medical status that would permit him to perform the duties of a carpenter, he would be entitled to exercise certain rights, including to preferential rehiring, according to the workers' compensation statutory scheme. *See* G.L. c. 152, §§ 75A and 75B. Of note, while the preferential rehiring provisions of the workers' compensation laws do apply to employees like Dooner, a carpenter for the Boston Housing Authority, police officers and firefighters are not covered by the workers' compensation laws and instead have their injured on duty claims processed by different statutes; *see* G.L. c. 41, §§ 100 and 111F; so a different analysis on the question

of potential rehiring for police officers and firefighters would be required.

By their nature, these non-disciplinary termination cases are largely driven by the applicable medical opinions, which often can be varying as medical professionals can disagree with one another, including on questions of fitness for duty, medical end results and prognoses. On the legal end of things, there also are a host of potential issues, including debates about what truly are the essential functions of the position, whether a requested accommodation is to be considered reasonable or unreasonable as a matter of law, whether there exists a potential claim to be filed with the Massachusetts Commission Against Discrimination based upon handicap discrimination, as well as whether the particular circumstances demand consideration concerning a potential disability retirement. Many of these issues usually are hashed out in the so-called "interactive process" required by the Americans with Disabilities Act, a process during which the employee and the employer discuss medical status and prognosis, the essential functions of the position at issue and what accommodations the employee might need to request in order to perform those essential functions. When the dispute persists between the employee and employer, *Dooner* stands for the proposition that an employee who cannot perform the essential functions of a position with or without reasonable accommodation may be terminated.

BYPASS DECISIONS

Footnotes Can Be Important

Those with an affinity for constitutional or Supreme Court history likely will recall the decision of the United States Supreme Court in *United States* v. *Carolene Products Co.*, 304 U.S. 144 (1938). The case, which dealt with a federal law prohibiting skimmed milk from being shipped in interstate commerce, is best known for containing "the most famous footnote in constitutional law[,]" numbered and known as "Footnote Four." While the decision itself did no more than affirm the presumption of constitutionality and deferential review for most legislation, "Footnote Four" explained that a higher level of judicial scrutiny should apply in cases where legislation involved a specific constitutional prohibition, such as those found within the Bill of Rights, or involved restrictions on the political process or involved legislation directed at discrete and insular minorities. From that one footnote has grown an enormous body of consequential constitutional caselaw, including, for example, that the government must satisfy an exacting standard of strict scrutiny review whenever it enacts legislation that touches upon certain rights or impacts certain categories of individuals.

In other words, simple footnotes can carry more significance than their placement otherwise might suggest. While it is hard to imagine any other footnote ever carrying the significance of "Footnote Four," during this period the Commission issued a decision in *Jablonski* v. *Boston Fire Department*, 31 MCSR 353 (2018), that includes a footnote that bears watching. *Jablonski* was a bypass appeal filed by a candidate for original appointment to the position of firefighter for the Boston Fire Department. Jablonksi was bypassed for that appointment for reasons that included his employment, driving and criminal histories.

In the unanimous decision authored by Commissioner Cynthia Ittleman, the Commission determined that the bypass, which occurred in 2016, was justified. While the Commission therefore dismissed the appeal, the decision noted that not all of the bases upon which the bypass was predicated were appropriate. More specifically, the Commission stated that the reasons for bypass related Jablonski's employment history and those related to 2001 and 2008 criminal matters did not provide reasonable justification for the bypass. Focusing on the criminal history piece, the decision cited to Commission and judicial precedent directing that "the time period in which criminal matters may be considered in the hiring of public safety employees is not without end."

In footnote eleven of *Jablonski*, Commissioner Ittleman noted that she had "applied the Commission's caselaw with respect to firefighter candidates as it existed at the time the instant appeal was filed." The footnote then went on to discuss two 2018 Commission cases that involved bypass appeals for police officer candidates and stale criminal histories. The structure of the footnote suggests that the two 2018 Commission cases involving police officer candidates should be distinguished from *Jablonski*, which concerned a 2016 bypass of a firefighter candidate, both because the appointments sought were different (a firefighter appointment as compared to police officer appointments) and because of the timing of the filing of the bypass appeals (2016 for Jablonski and after 2016 for the police cases).

The significance of this footnote is not readily apparent and will have to be evaluated through future cases. The footnote appears in the body of the Commission decision discussing Jablonski's prior criminal matters, including one from 2001 and one from 2008. The two police cases decided by the Commission in 2018 also involved, in part, aged criminal matters, with one appeal discussing a fourteen year old criminal disposition and the other appeal a sixteen year old charge. In both of the police cases, the Commission determined that the criminal matters were too old and stale to justify a bypass for a police position.

Since the footnote distinguished those police cases explicitly, noting that the caselaw that was being applied was that related to *firefighter* bypass appeals as of 2016, it might be thought that there is some degree of substantive distinction that the Commission will be applying based on the type of appointment sought and the time of the bypass appeal. However, the Commission in *Jablonski* went on to determine that the 2001 and 2008 criminal matters, respectively fifteen and eight years old at the time of the Commission appeal filing, did not provide a reasonable justification for bypass, including for reasons of staleness. As a result, at the end of the day, the Commission rejected stale criminal matters in *Jablonski* along very similar lines to those used to reject stale criminal matters in the two 2018 police bypass cases. At this point, the *Jablonski* footnote is worthy of future monitoring to see whether or how the Commission might draw future distinctions in bypass appeals depending on the type of appointment sought or the state of the law as of the time of an appeal filing.

OTHER DECISIONS

Commission Elects Not To Weigh In On Issue Within Scope Of Superior Court Injunction

There always exists the potential for great mischief when different authorities are called upon to consider and decide related issues contemporaneously. During this period, the Commission decided that it would not become involved in three appeals by members of the Winthrop Police Department seeking promotion to the rank of sergeant and who sought Commission intervention on an issue that already was the subject of Superior Court litigation and an injunction.

Although not discussed in the Commission decision, a review of the Superior Court docket reveals that, in 2014, a female Winthrop police officer, Judy Racow, filed a Superior Court complaint alleging gender discrimination and retaliation. Racow's Superior Court litigation remained pending for several years thereafter.

In September, 2017, as the Superior Court case lingered, the Town of Winthrop made Racow a provisional sergeant. Such a provisional promotion is governed by G.L. c. 31, § 15, which provides that a provisional promotion can be made from one title in a departmental unit to the next higher title in the same departmental unit when: (1) there is no suitable eligible list; (2) the list contains the names of less than three persons eligible for and willing to accept employment; or, (3) if the eligible list has been established based upon the result of a competitive examination for an *original* appointment and the appointing authority requests that the position instead be filled by a departmental promotional examination or pursuant to G.L. c. 31, § 8, which also discusses promotional appointments. Very importantly, § 15 provides that "[n]o provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position."

In January, 2018, the Town of Winthrop announced that there would be an assessment center process to establish a list for a permanent promotion to the rank of police sergeant, the position that Racow at that time still occupied provisionally. The assessment center was scheduled to take place on April 3, 2018. Racow, whose trial on her discrimination and retaliation claims was scheduled to occur in March, 2018, asked the Town to postpone the assessment center, stating that her ability to prepare for and participate in the assessment center would be impaired by her trial occurring shortly before the assessment center. The Town declined to postpone the assessment center.

Racow's civil claims were tried to a jury in the Superior Court as scheduled in March, 2018. At the conclusion of that trial, the jury returned a verdict in favor of Racow and awarded Racow more than $2 million in damages.

As she apparently believed that the timing of her civil trial did not provide her with sufficient opportunity to prepare, Racow did not participate in the April assessment center. Several other officers did participate in the assessment center and received passing scores. As a result of the assessment center process, an eligible list of at least three persons eligible for and willing to accept the promotion was certified on May 2, 2018.

On May 14, 2018, as various other posttrial motions were pending or in the process fo being filed, Racow filed in the Superior Court action a request for injunctive relief relating to the promotional opportunity. Specifically, Racow requested that the Court issue an order barring the Town from making a permanent promotion from the existing list until such time as she was given an opportunity to take an equivalent promotional examination and be considered for the permanent post; Racow also asked for an order that the Town be required to retain her as a provisional sergeant until she took the subsequent examination and the permanent promotion process occurred.

In June, 2018, the Town and Racow came to an agreement on the issue and *jointly* requested a Superior Court order barring the Town from promoting off the existing eligible list until October 30, 2018, at which point Racow was to have taken a separate examination to be considered for the permanent promotion. The proposed order also indicated that, once her score was available, Racow's score would be added to the May, 2018 eligible list in ranked order for consideration. Lastly, the proposed order stated that Racow would be retained as a provisional sergeant until a permanent promotion was made from the contemplated consolidated list. Indicating that the Town and Racow agreed on the point, the Court entered the order requested in July, 2018.

Meanwhile, in June, 2018, the three individuals on the promotional list filed appeals with the Commission. *See Callinan, et al.* v. *Town of Winthrop*, 31 MCSR 297 (2018). They argued that a suitable promotional list had been certified at that point for more than one month, but the Town had not made a permanent promotion and had not discontinued the provisional appointment. Pursuant to § 15, the three appellants had a solid point, as the statutory provision states: "[n]o provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position."

At the prehearing conference, Chairman Bowman advised that the Commission was unlikely to take action contrary to a Superior Court order and suggested that the appellants may wish to consider taking action in the Superior Court if the order from that Court was to be contested. In September, 2018, the Commission dismissed the appeals, determining that "[t]he Superior Court, acting in the context of discrimination litigation, ordered additional relief that it deemed reasonable and proper to a victim of discrimination. Importantly, that relief is fairly limited and set to expire within weeks. In that context, relief by the Commission is not warranted here."

The three persons seeking promotion did as the Chairman suggested, and moved to intervene in the Superior Court case. Racow's counsel opposed the attempt, arguing that the Superior Court order was proper and should stand because the public policy against discrimination and retaliation as set forth in G.L. c. 151B overrides the statutory scheme governing civil service. In support of that proposition, Racow cited to G.L. c. 151B, § 9 which states, in part, that G.L. c. 151B "shall be construed liberally for the accomplishment of its purposes, and any law inconsistent with any provision of this chapter shall not apply . . . ." The Superior Court agreed with Racow and denied the proposed intervenors' request.

The Commission's decision to stay out of the dispute certainly was the wise choice. Had the Commission entered the fray and decided to take action inconsistent with a Superior Court order that already had been issued, the result would be competing directives from the Superior Court and the Commission. That situation could have meant that the Town, in order to comply with one set of directives, would have been in a position of having to disobey a contrary set of directives. Being placed in a position of choosing whether to disobey a Superior Court order or a Commission order is an untenable position that is best to be avoided if at all possible.

While the Commission's action was the best path forward, it is the case that the collateral consequence of the Commission's decision is a violation of § 15 went without correction or remedy. According to § 15, once the eligible list for promotion was certified in May, 2018, the provisional appointment of Racow could not be continued. As a function of the Superior Court order, however, that provisional appointment was to continue for a period of approximately six months, until October 30, 2018.

For her part, Racow *chose* to prepare for her civil trial rather than the assessment center. In that civil trial, Racow was represented by counsel, so she was not herself preparing the opening argument or witness examination outlines. The assessment center occurred *after* the trial had concluded, so there was no calendar issue that meant she would have to be in two places at once. It is questionable, at best, as to whether a discrimination plaintiff's election to prepare for trial rather than a promotional opportunity is one of the "purposes" that G.L. c. 151B was designed to advance and whether there actually was any conflict between G.L. c. 151B and the clear language of G.L. c. 31, § 15 such that § 15 must yield to c. 151B.

It also would appear that the Town's election to agree with Racow as to the issuance of the order concerning the promotional opportunity was, at least in part, an attempt to minimize the damage of a devastating jury award. After all, it would be a bad look, after getting hit for a $2 million verdict, to promote an officer permanently to the position that previously had been held provisionally by the female who just prevailed against the Town at trial and who argued that her trial impaired her ability to compete for the promotion. So, in that way, the Town agreeing to Racow's request for an order granting her relief as to the promotional opportunity can be seen, understandably so, as the Town trying to avoid future litigation with Racow over the permanent sergeant's post.

At the same time, however, this course of events did a disservice to the three individuals who appeared on the eligible list in May, 2018 as a result of the April, 2018 assessment center. Those individuals obviously did not make the decision as to when the assessment center would be scheduled, they merely participated when it was scheduled and were successful enough to appear on a list for permanent promotion. ■