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Lowlights and Highlights of Agency Employment Decisions Reported in 2017

*A Presentation to the
Massachusetts Municipal Association
Annual Meeting*

January 19, 2018

**By
Philip Collins**

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*For more detail on DLR and Civil Service cases, please see our firm's Management Commentary in Landlaw's publication of their cases.

*NOTICE: This handout does not purport to give legal advice for any specific situation, or, come to think of it, even a general situation.

*To receive our monthly electronic Client Advisor: Email ssmith@collinslabor.com to be added to our distribution list.

JLMC: Process, Substance, Success

A. Process Issues: What Gets Certified for Arbitration

- On vs. Off The Record . . . Topics vs. Proposals

B. Substantive Issues: Keys To Success At Arbitration

- Settle Other Units
- Know The Landscape Of Settlements Within Comparable Communities
- External Comparability Data
- -- Do It Comprehensively, Including Overall Compensation Analysis
- -- Get It Right
- ‘Police’ The Union’s Data
- -- Especially In Fire Cases
- Make A Reasonable, Defensible Offer On Wages, Consistent With Other City/Town Settlements
- Complicated Management Proposals?
- Do We Need 5 Issues, Too?
- Be Careful What You Wish For
- Pay The Price For Defending Reasonable Settlements

C. Successful Results

- Worcester Fire
- Woburn Police (Patrol & Superiors)
- Haverhill Police (Patrol)

D. After the Arbitration

DLR: Superintending The Bargaining Process

The DLR: Abuse of Discretion In Superintending The Bargaining Process

1. Is A Beneficial Impact Subject to Impact Bargaining?

The City of Boston implemented a voluntary mediation program for citizen complaints against police officers, and its two police unions filed a Charge of Prohibited Practice at the Department of Labor Relations (DLR) for failing to bargain over the decision and the impacts. In a DLR hearing officer decision the City successfully argued that it had the right to decide to have a mediation program for citizen complaints against police officers, but the hearing officer found that the City had not fulfilled its duty to bargain to impasse about the impact.

And what is the impact? The City's mediation program impacts employee discipline because citizen complaints that are successfully resolved through the mediation process do not progress to an [Internal Affairs Division (IAD)] investigation and potential discipline. The DLR nevertheless ordered the rescission of the mediation program for any new citizen complaints against Union members until the City fulfills its bargaining obligation.

The hearing officer determined that no impasse was reached even though the mediation program was implemented over two years after it was proposed, and after nine meetings. She did so in part because the City did not make alternative proposals to respond to the Union's concerns that the selection of cases for voluntary mediation could be marred by favoritism. In short she required the City to bargain the impact of unsubstantiated imaginary concerns. In doing so, she ignored the fundamental doctrine, expressed in c. 150E and federal labor law, that the duty to bargain does not require an employer to make a proposal or a concession.

And the decision to order rescission of the program badly failed to balance the right of management to carry out its lawful decision.

Understandably, this case is on appeal to the Commonwealth Employment Relations Board.

2. When Impacts Are Certain, The Decision To Exercise A Core Managerial Decision Will Stand Even If The Impact Bargaining Obligation Was Not Fulfilled.

In *Town of Natick and Natick Patrol Officers Association*, 43 MLC 178 (2017), Hearing Officer Kathleen Goodberlet held that the Town did not have to bargain over the decision to implement a NARCAN policy because it was a core managerial decision, but did have to bargain over its impact.

The Town claimed that the administration of NARCAN was no different than a patrol officer administering CPR or any other first responder duties and involved minimal training. The Hearing Officer held that NARCAN impacted officers' workload including: administering medication, evaluating whether a victim should receive NARCAN, the amount they should receive, offering medical advice to those who refuse medical treatment and receiving specialized training. Administering NARCAN was a greater safety threat than performing CPR and defibrillation, according to the Hearing Officer, so the Town failed to satisfy its impacting bargaining obligations.¹

The Hearing Officer did not order that the NARCAN Policy be rescinded, only that the Town bargain over the impacts of the policy to resolution or impasse. While the Union did not demand a status quo ante order, the Hearing Officer noted: "This remedy is appropriate in cases such as this where the effects of an employer's decision are certain, and the union's efforts to impact bargain cannot substantially change, but only ameliorate, those effects."

This result is certainly an improvement from the LRC's decision in the *Town of Arlington* case, 21 MLC 1125,1132 (1994), where the remedy for the Town's failure to bargain to impasse about installation of defibrillators on fire engines was to order the Town to cease and desist using defibrillators pending fulfillment of the bargain obligation.

3. Can An Employer's Subcontracting Proposal, A Mandatory Subject of Bargaining, Itself Constitute Evidence Of Surface Bargaining Or Bad Faith?

A number of years ago the Newton School District contracted out its school cafeteria operations. Recently its proposal to contract out certain school custodian operations has been the subject of lengthy hearings claiming that its negotiators engaged in 'surface bargaining.' While the case has not been fully heard, the CERB has allowed a motion to amend the complaint to include the substance of the School Committee's proposal, in order to litigate the question whether the substance of the proposal, on a mandatory subject of bargaining, can support a conclusion of bad faith bargaining.

¹ In addition, the Hearing Officer held the employer had not reached impasse before implementing its NARCAN Policy. The Town ignored the Union's demand to bargain, and the "duration of time spent negotiating . . . is exceptionally short in comparison to the significance of the issues." In addition, the DLR found unreasonable the one year delay in responding to the Union's information request.

Discrimination Law Highlights

1. Reasonable Accommodation By Extended Leaves Under The ADA

The 12 week leave accorded under the FMLA is not by itself determinative of what a reasonable accommodation is under the ADA. In Echevarria v. AstraZeneca Pharmaceuticals, 856 F.3d 119 (1st Cir. 2017) an employee diagnosed with severe depression and anxiety sought 12 months additional leave, after 5 months of FMLA leave, because her psychiatrist estimated the period of incapacity to be 12 months. However, because the doctor didn't provide any documentation that the employee could return and perform the essential functions of her jobs, the requested accommodation was not "facially reasonable." While the Court cited other decisions that leaves of that duration, and even shorter leaves, have been deemed facially unreasonable, it left the door open for similar claims with variations in the fact pattern.

2. Reasonable Accommodation Under The ADA: Transfer To Another Position

In Audette v. Town of Plymouth, 858 F.2d 13 (1st Cir. 2017), a police officer injured on the job and unable to perform the essential duties of her position sued the Town for failure to transfer her to a data entry position, but that claim failed for lack of proof there was an available data entry position.

3. Medicalizing Bad Behavior: Timing Is Key

In Germanowski v. Harris, 854 F.3d 68 (1st Cir. 2017), the Court upheld the dismissal of an employee's claim that her discharge was motivated by her request for time off. At the time she was told not to return to work, she had not informed the employer (the Registry of Deeds) of her psychiatrist's advice to take time off. The discharge was precipitated by an altercation with her supervisor when he expressed concerns about whether she would carry a pistol, given as a gift by her husband, to work.

4. Sometimes Age Discrimination Cases Are Pretty Simple

In Massasoit Indus. Corp. v. MCAD, 91 Mass. App. Ct. 208 (2017), the employee was fired because he was an "on call/no show" for work. But he proved he did notify the employer of the reason for his absence -- a heart attack -- and thus the stated reason for discharge was shown to be a pretext. In such cases, the Appellate Court will not review findings based on credibility determinations. The Appeals Court also ruled that it is not necessary for the plaintiff to prove "a widespread pattern of hostile age animus"; it was enough for this 74-year-old custodian to show he was replaced by a younger employee.

5. In Sexual Harassment Cases Courts Continue To Bend Statutory Filing Deadlines When There Is A Continuing Course Of Conduct Which Extends Into The Filing Period

And rightly so. In Heyward v. Buckley, a Superior Court judge applied the “continuing violations doctrine” where the State Police sergeant’s complaint alleged sexual advances and continuous talk of a sexual nature, as well as adverse retaliatory action after she reported the harassment. . . transfer to the midnight shift, denial of training opportunities, and undermining her in front of subordinates.

6. Challenges To Civil Service Promotion Tests Continue

Twenty-three years after two minority police officers filed MCAD complaints challenging the validity of the 1992 Civil Service Sergeants promotion exam, their claims, as supported by the MCAD, have been dismissed. City of Worcester v. MCAD, Worcester Superior Court (January 11, 2018). The Court did so essentially because other federal court litigation, which these plaintiffs joined, had upheld the validity of another Civil Service test validated in the same way as the 1992 Sergeants’ test. Lopez v. City of Lawrence, et als., 823 F.3d 102 (1st Cir. 2016), a case the U.S. Supreme Court refused to review.

7. FMLA Double Damages: Calling Counsel Is A Sign Of Good Faith

Haste makes waste when discharging an employee for failing to give notice of illness, because if the illness itself is FMLA qualifying, the statute gives the employee leeway in complying with notice requirements. Having incurred a jury verdict of \$142,000 for lost wages and benefits, the employer in Goodic v. Center For Human Development, 2017 WL Y181347 (D. Mass. 2017) incurred liquidated damages in the same amount, for three reasons:

- (1) **It did not seek legal counsel or other advice about the FMLA’s notice requirements,**
- (2) Its decision-makers had no training about the FMLA; and
- (3) It did not reconsider the termination decision when it became abundantly clear the employee had given adequate information after being released from the hospital;

The Court contrasted Pagan-Colon v. Walgreens of San Patricio Inc., 697 F.3d 1 (1st Cir. 2012) where **good faith was shown by the employer consulting its attorney several times about its obligations under the FMLA before taking action.**

Civil Service Commission: The Tug Of War Continues

A. Hiring Bypass Cases: Must We Believe In Redemption?

- **No: Superior Court Overturns The Commission In Two Boston Police Cases**

-- In Daniel Zaiter v. Boston Police Department, the Superior Court overturned the Civil Service Commission's decision and held that the Boston Police Department had a reasonable justification to bypass Zaiter for a position as a Boston police officer, based on a guilty plea to an assault and battery and a fatal motor vehicle accident, both over 20 years earlier, while he was a student at Randolph High School. In the meantime Zaiter had served with distinction as a police officer, in Randolph, for eight years.

The Civil Service Commission overturned the bypass for several reasons, including that the background investigator misled the interview panel concerning the scope of Zaiter's involvement in the 1995 fight and motor vehicle accident.

The Superior Court reversed, finding that the Commission improperly substituted its "judgment of a candidate's respective strengths and weakness for the judgment of the Appointing Authority itself" by "reweighing" Zaiter's application. The Court ruled it "immaterial" whether the Commission or the Court would have arrived at the same conclusion as the BPD. This decision is an important reminder that employers may have grounds to bypass candidates for offenses that occurred long ago, provided it does a reasonably thorough and independent review of the information.

-- In Gannon v. Boston Police Department, Case No. 2015 CV03462-B (March 13, 2017), the Superior Court reversed the Civil Service Commission's decision that had allowed Gannon's appeal and had ordered the Boston Police Department to place his name at the top of the current or future certifications for permanent police officers.

Gannon's "indiscretion" was testing positive for cocaine (a result confirmed three times) in a prior pre-employment drug test. He filed a bypass appeal, but withdrew it, opting instead to take the next Civil Service exam. Though he passed the drug test on his second application, he was bypassed based on the prior positive drug test. The Superior Court chided the Commission for relying on cases involving tenured employees, ruling that a failed drug test can be the sole basis for bypassing a candidate.

-- In Owens v. Boston P.D. (January 5, 2018) the Commission upheld a 2016 bypass based on the Appellant's repeated bullying of a classmate, with homophobic slurs – while in middle school – and a bullying incident in high school (2001, 2005). Key to the decision was the background investigators' finding and interviewing the victims.

- Maybe, But It Is Only ‘Dicta’

In Dolbrus v. City of Everett, 30 MCSR 74 (2017), a bypass was upheld based on the failure of a fire fighter candidate to list in his application a discharge from prior employment (which he had listed in a prior application to be an Everett police officer). As an aside, what lawyers call “dicta,” Commissioner Stein opined that a failed drug test 8 years before was “of limited relevance.”

- Yes, if there’s a shortfall in process, but, the case is on appeal

The Mass Police Chief Reports, News Highlights, Issue 10, January, 2018, describes the decision in Strano v. Mansfield P.D. as follows:

Civil Service Commission Shows Odd Affection For Bypassed
Police Officer Candidate With Criminal Boyfriends And No
Interview Skills

In Strano v. Mansfield, P.D., 30 MCSR 419 (2017), a 3-2 majority granted a bypass appeal by a candidate shown to have had a history of associating with (boyfriending) known criminals and substance abusers. In addition, Strano’s interview, which was videotaped, was variously described by two police lieutenants as “painful,” “difficult to watch,” and “one of the worst ever.” But alas, the successful candidate’s interview was partially taped over. That fact, and the notion that the presence of two superior officers on the panel who had prior contact with the appellant during her ‘years of making bad choices’ may have made her “uncomfortable”, was enough for Commissioner Stein to allow the appeal.

This one is on appeal, and rightly so.

B. Hiring Bypass Cases After Civil Service Revocation

In Puopolo v. Town of Millis, 30 MCSR 463 (2017), the Commission heard this appeal and on the merits ruled against the Appellant, but because of the time taken to render a decision, the Commission also opined that the appeal was moot because the subsequent revocation of civil service by the Town meant there could be no eligibility list for the appellant’s placement if his appeal had merit. See also Miller v. Marlborough Fire Department (2017).

C. Promotion Bypass: Weighing The Assessment Center Component

In Connor v. Andover P.D., 30 MCSR 439 (2017), a slim Commission majority overturns a promotional bypass for two reasons: (1) the outside interview panel didn’t weigh the assessment center scores, and (2) the panel’s assessment of interview performance could not be considered because the interview was not recorded. The dissenting minority (Commissioners Bowman and Ittleman) would have sustained the bypass because there

was enough credible evidence about the interview performance and because the selected candidate had more varied experience.

D. Discipline Cases: The Beat Goes On

1. Can Post-Termination Conduct, Similar To The Conduct Causing A Discharge, Be Considered In Deciding An Appeal?

-and-

Does The Issuance Of A Domestic Violence Restraining Order (A 209A Order) Against A Fire Fighter Have A Nexus To His Employment?

In Lavery v. Town of North Attleborough, 30 MCSR 373 (2017), the Commission upheld the discharge of a fire fighter when it concluded from physical evidence of red marks on the neck of the employee's pregnant female friend that he had used an unreasonable degree of force, during a physical altercation, which put her at risk of serious harm.

Buttressing this conclusion, the hearing commissioner also considered an incident which occurred one month **after** the discharge decision. The incident resulted in the employee entering into an admission to sufficient facts of domestic violence against another woman, a CWO (continued without a finding), and probation.

However, in upholding the dismissal the hearing commissioner (Paul Stein) concluded that the existence of the 209A Order did not provide a nexus to the efficient performance of a fire fighters duties. In a concurring opinion, agreeing with the denial of the appeal, the other four commissioners expressed the view that the **domestic violence restraining order had an adequate nexus to the employment**, and that the later admission, while not acted on by the Board of Selectmen, further undermined the credibility of his commission testimony.

2. Can You Give Me Some Time To Get Back The License I Need To Do My Job?

In Trowbridge v. City of Fall River, 30 MCSR 267 (2017), the Commission upheld the discharge of a firefighter/paramedic whose Authorization To Practice was indefinitely suspended by the Medical Director of the Affiliated Hospital (with the concurrence of the Department's Medical Director). By the time of the Commission's decision, over a year had passed with no evidence that reinstatement of the authorization was imminent. The fact that the State Agency (OEMS) did not revoke his Paramedic Certification did not matter.

These cases call for immediate action, often by the department head in civil service communities, to respond without pay **as a status suspension**. Recall City of Cambridge v. Civil Service Commission and David Diamond, Superior Court (1997). The question becomes how long is too long to wait for an employee to get the license or certification restored. By analogy, the Commission has upheld a discharge of a police officer for psychological incapacity, with no prospect for return, after only seven months absence. Vinard v. Town of Canton, 29 MCSR 399 (2016).

3. The Limits of Last Chance Agreements

Imagine a situation where an employee with considerable service commits an offense which is clearly dischargeable, and seeks to avoid discharge by entering into a Last Chance Agreement. In Emma v. D.O.C., 30 MCSR 287 (2017), the Commission unanimously refused to enforce an LCA which waived appeal rights to the Commission, ruling that such waivers violate the public policy of having the Commission determine just cause.

The Commission endorsed the findings of the D.O.C. about Ms. Emma's many attendance issues, but nevertheless reduced her discharge to a 15 day suspension. It did so because another correction officer with an LCA for calling in sick -- to play golf -- repeated that same offense and was given only a 15 day suspension and second LCA. What about the statute?

Section 41: "Except for just cause . . . a tenured employee shall not be discharged without his written consent"

Why can't an employee, as a *quid pro quo* for saving his or her job, consent to a future discharge if the appointing authority finds that the same offense has been committed? Of course, short of that, a well-drafted LCA will always make it clear that the next process will be limited to the question whether the subsequent offense occurred, the penalty not being an issue.

Other Cases of Interest

1. Release Of Wage Act Claims In Several Agreements: How Specific Is Specific?

In Fratea v. Unitrends, the Suffolk Superior Court recently dismissed a claim for overtime under the Wage Act for non-payment of the minimum wage under the Fair Wages Act because the employee, who worked less than a year, received \$1,875 as a severance payment in exchange for a release of all claims. The release specifically mentioned the Wage Act but not the Minimum Wage Act. Since the agreement advised the plaintiff in **ALL CAPS** to consult an attorney, and he was given two weeks to accept the agreement as proposed, the release was enforced. The Court rejected the argument that the release had to specify key features of the Wage Act, like treble damages.

2. Public Statements About The Reasons For A Discharge Decision May Subject An Employer To Liability For Defamation

In Blanchard v. Steward Carney Hospital, 477 Mass. 141 (2017) the Supreme Judicial Court allowed a lawsuit by a group of nurses, terminated from the adolescent psychiatric unit of the hospital, to proceed based on an internal email sent to all employees by the hospital's president that the terminated employees "have not been acting in the best interest of their patients".

Statements made to the Boston Globe, however, in the context of an investigative report which threatened the licensure of the unit by state officials, constituted petitioning activity under G.L. c. 231, §59H which could therefore not form the basis of a defamation claim.

3. Firefighter Alleging First Amendment Retaliation Wins One Claim, Loses Another

In Davison. v. Town of Sandwich, WL 1115154 (2017), a Sandwich firefighter reprimanded in 2012 and fired 19 months later challenged the reprimand and termination as retaliation for posting a sign on his property urging Town residents to vote "no" on a new public safety complex. In a 38 page decision, a U.S. District Court judge kept the lawsuit alive, only against the Chief and Deputy Chief, and only concerning whether the enforcement of a rule violation leading to the reprimand was disparate treatment. The case against the Town about the **termination** was dismissed in its entirety, for lack of any evidence that the reason for the termination was related to the free speech as opposed to the plaintiff's ongoing and repeated violations of work rules about outside employment, and a threatening phone call made after receipt of a notice of contemplated termination.

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Appendix: The Peloquin Plan, Foundation of a Successful Bypass*

A. THE FOUNDATION OF A SUCCESSFUL BYPASS.

1. The Appointing Authority Burden and the Commission Standard of Review.

- a. Appointing Authority's Burden: Provide reasonable justification for bypassing an applicant, i.e., "...adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." City of Cambridge vs. Civil Service Commission, et al., 43 Mass. App. Ct. 300 (1997).*
- b. Commission Role: To guard against political considerations, favoritism, bias, objectives unrelated to merit, and illegality; to insure neutrally applied public policy. Commission may not substitute its judgment about a valid exercise of discretion based on merit or policy considerations.*

2. Tips To Avoid Having Your Hiring/Promotion Bypass Decision Reversed.

- a. Know The Reasons You Can't Use.*
 1. For new hires, avoid the obvious.
 2. For promotions, check any promotion policy/criteria established in writing, or by practice.

***This is an excerpt from the materials of a presentation Leo J. Peloquin made at the summer conference of the Mass. Municipal Lawyers Association in August, 2017**

3. *Statutory Hiring Bar?*

- a. *Police – Felony bar from working as a police officer, MGL c.41 Section 96A.*
- b. *Fire – Temporary bar (one year bar, but excluding certain crimes), MGL c.30 Section 50.*
- c. *Conviction or non-conviction: get the underlying documentation.*

4. *Residency.*

- a. *Did employee satisfy one year residency requirement?*

Proof of residency (e.g. lease agreement, utility bills, check with neighbors).

5. Employment References.

6. Driver's License.

7. Review complete personnel file for all candidates for promotion.

8. *More Is Usually Better: Don't Cut Corners When Reviewing Past Performance And/Or Making Background Checks (Assume An Appeal).*

- a. *Use specific and documented examples to distinguish between applicants.*
- b. *Seeing it in writing does not always prove it happened. Go to the live source(s) and get all sides---including the applicant's.*

9. *The "Informal" Interview Trap. Make The Interview A Legitimate Measuring Device And Preserve The Results (Don't Wing It!)*

- a. *Use standardized questions for all applicants.*
- b. *Use experienced interviewers (whether outside chiefs and/or HR or municipal officials).*
- c. *Use questions that allow the display of skills required by the job (Role playing, etc.).*
- d. *Use questions with answers that can be graded. Clearly, some answers are better than others.*

e. Preservation of evidence: Keep the questions, the answers and notes.

10. Make Sure The Answers To The Next Two Questions Are Clearly “No”.

- a. Do the positive reasons for selecting the applicant who placed lower on the civil service list apply equally to the applicant bypassed?
- b. Do the negative reasons for bypassing the higher placed employee apply equally to the applicant selected?

11. It’s Ok To Consider Experience Even Though It Is Built Into Civil Service Test Scores.

Although education, seniority, training and experience are already built into the test scores (G.L. c. 31, § 22), this should not preclude an Appointing Authority from considering these factors as part of its additional review as long as it can be shown that such consideration was reasonably justified and was not used as a subterfuge for stacking the deck in favor or against any particular candidate.” Valliere v. City of Westfield, 24 MCSR 424, 431 (2011), also cited in Carlson v. Town of Burlington, **25 MCSR 129 (2012)** (“The variety of the situations experienced by candidate...would not show up in a formula... [T]he Appointing Authority may simply give greater weight to the role of experience and/or education than the HRD’s formula...Just because the HRD score includes a component for education and experience does not mean that the appointing authority may not consider these factors in making their decision.” Condez v. Town of Dartmouth, 17 MCSR 40, 41 (2004); Lamothe v. West Springfield Fire Department, 7 MCSR 68, 70 (1994) (“...[L]ength of service might conceivably be relied upon to tip the balance between two candidates whose scores were only one or two points apart....”).

12. Treat The Actual Appointment Vote Like It Counts For Something.

- a. Avoid the pro-forma vote by BOS.
- b. Avoid reliance on informal input.

13. The Bypass Letter:

“Such [bypass]statement shall include all reasons for selection or bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates....No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission....”

- a. Include in the letter to HRD the deficiencies of the bypassed applicant and not just the positive attributes of the applicant selected.
- b. Characterize the behavior and deficiencies (if negative reasons).
- c. Include appeal rights in bypass letter:
 - I am obligated to advise you of your right to appeal the Appointing Authority's decision to bypass you based on my recommendation. You have a right to appeal this determination by filing your appeal, in writing, within sixty (60) calendar days of receipt of this notice, with the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108. You can visit the Commission's website at www.mass.gov/csc to download an appeal form and receive information regarding filing fees. If you appeal, you should file a copy of the Appointing Authority's letter and this letter with the appeal.



**PUBLIC
SPEAKING
ENGAGEMENT**

Phil Collins

will present the Labor Law Update at the 39th MMA Annual Meeting and Trade Show in Boston on Friday, January 19th. at 2:00 p.m.

Don't miss out on the synopsis of key legal points from 2017's most pertinent decisions of the JLMC, Civil Service, DLR and the MCAD cases.

**POLICIES CAN
BE CONTRACTS**

Can a personnel policy which accords preference for new positions, to employees whose positions have been eliminated, constitute a binding, enforceable contract, even if the employee was terminated for cause under applicable Civil Service statutes? In Adamson v. Civil Service, a superior court judge ruled that it could, depending on the facts and circumstances.



**Comparable Work Statute Poses Immediate
Challenges For Cities, Towns, And School Committees**

Should male school custodians and female cafeteria workers receive the same remuneration for their employment? Twenty years ago, a closely divided Supreme Judicial Court (Jancey v. School Committee of Everett) [421 Mass. 482 (1995) and 427 Mass. 603 (1998)] interpreted the Massachusetts Equal Pay Act not to require such equal pay because the substantive content of the jobs was so different. Now, under the Pay Equity Act, a statute becoming effective on July 1, 2018, the substantive content standard is gone and what remains is whether the two jobs are “substantially similar” in the following four aspects: skill, effort, responsibility, and working conditions. If those tests are met, there are six specific nondiscriminatory reasons for different compensation which avoid liability: (1) seniority; (2) merit; (3) commissions; (4) geographic location; (5) education, training and experience, if reasonably related to the job; and (6) travel (if a regular and necessary condition of the job).

Reasons for Concern About Liability.

1. The basis for the 1995 – 1998 decision in Jancey v. School Committee of Everett is no longer applicable. The trial court judge in that case had found the “skill/effort/responsibility/working conditions” of the two jobs comparable. Under the “substantially similar” standard, the two jobs would likely be deemed comparable in 2018.
2. Differences in pay and benefits due to decades of collective bargaining is not a defense.
3. In determining discrimination on the basis of gender in paying “wages,” all forms of remuneration count, not just hourly or annual wage rates. This broad definition will complicate analysis of the value of health insurance, vacation and other leaves, bonus and incentive payments and the like.
4. The definitions of “comparable work” and “working conditions” leave ample room for disputes. And no definition is supplied to define what percentage of a job’s occupants must be one gender to be considered predominantly one gender.
5. Extraordinary damages. Liability is doubled: Liquidated damages equal to the shortfall in “wages” are automatically granted. And, reasonable attorney’s fees and costs are automatically paid by the defendant if the plaintiff wins a judgment. . .not if the employer prevails.
6. No MCAD or administrative filing is required: One or more employees may initiate action in court, and class action status is easily achieved. Liability will be measured three years back; because each pay check creates a new cause of action, statutes of limitations defenses won’t prevail.

Safe Harbor For Avoiding Or Limiting Liability. Employers who complete a self-evaluation of its pay practices (within three years and prior to the filing of the lawsuit), and “demonstrate progress” toward eliminating wage differentials based on gender for comparable work, have a defense to liability if the self-evaluation is “reasonable in scope and detail”; but even incomplete self-evaluations can avoid liquidated damages, but not liability.

What To Do. Initiate the self-evaluation, starting with job descriptions, but always looking at actual duties and functions and the frequency of each essential task, as well as environmental circumstances and hazards.

Contact your CLP attorney with questions or for assistance with your self evaluation.



MA Council of School Attorneys Annual Meeting

Members of your CLP team will be in attendance at the 2017 "Emerging Issues in Education Law" program and luncheon presented by the Massachusetts Council of School Attorneys on Friday, December 8, 2017.

The annual program is open to school attorneys and school administrators, and features presentations on current education law issues, and legal/legislative updates.

We hope to see you there!



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Opioid Law and Verbal Screening Tools

On March 14, 2016, Governor Charlie Baker signed into law An Act Relative to Substance Use, Treatment, Education and Prevention. Known as the "Opioid Law," two sections of the law had a direct impact on public schools. The first amended MGL c. 71, s. 96, which, since 2014, has required public schools to have policies "regarding substance use prevention and the education of its students about the dangers of substance abuse." The 2016 amendment provided districts with some assistance in developing these policies by amending the statute to require the DESE and the Department of Health (DPH) to collaborate to "provide guidance and recommendations to assist schools with developing and implementing effective substance abuse prevention and abuse education policies." It also required districts to file these policies with DESE.

The other significant change involved the development and use of a verbal screening tool to screen students for substance misuse, annually, at two grade levels. M.G.L. c. 71, s. 97. Unlike the amendments to section 96, the substance abuse screenings were made subject to appropriation and implementation was delayed until the 2017-2018 school year. In its September, 2016 Guidance on School Policies Regarding Substance Use Prevention, DESE advised that schools districts were not required to implement the requirements of c. 71, s. 97, "unless and until funding is appropriated." It also indicated that it was working with DPH on guidance regarding the verbal screenings. A year later, the 2017-2018 school year is in full swing, and no further guidance has been issued. There is a draft guide titled: "SBIRT in Schools: Guidelines and Recommendations" available on the mass.gov website but no final or definitive guidance or materials have been issued by DESE or DPH. ("SBIRT" stands for Screening, Brief Intervention, and Referral to Treatment).

WHAT YOU NEED TO KNOW:

- DESE, in consultation with DPH, is responsible for approving a verbal screening tool and recommending the grade levels appropriate for screening.
- Once notified by DESE, screenings must occur annually at two different grade levels.
- Parent(s)/guardian(s) of a student to be screened must be notified prior to the start of the school year, and may opt out of the screening at any time prior to or during the screening.
- Screening results must be reported to DPH (without identifying information and in a manner to be determined by DPH) within 90 days of the screening.
- There are important confidentiality and consent considerations staff will need to be trained on.
- Districts with alternative substance use screening policies may opt out of using the verbal screening tool approved by DESE by filling out a form provided by DESE.

CLP will continue to monitor this issue, and provide additional updates as available.

Is A Beneficial Impact Subject To Impact Bargaining?

The City of Boston implemented a voluntary mediation program for citizen complaints against police officers, and its two police unions filed a Charge of Prohibited Practice at the Department of Labor Relations (DLR) for failing to bargain over the decision and the impacts. In a DLR hearing officer decision the City successfully argued that it had the right to decide to have a mediation program for citizen complaints against police officers, but the hearing officer found that the City had not fulfilled its duty to bargain to impasse about the impact.

And what is the impact? The City's mediation program impacts employee discipline because citizen complaints that are successfully resolved through the mediation process do not progress to an [Internal Affairs Division (IAD)] investigation and potential discipline. The DLR nevertheless ordered the rescission of the mediation program for any new citizen complaints against Union members until the City fulfills its bargaining obligation.



SPEAKING ENGAGEMENT

Attorney Leo Peloquin will be conducting a workshop on "Employer Rights And Limitations In Addressing Employee Use Of Marijuana" (medicinal and recreational) at the Massachusetts Municipal Personnel Association Annual Labor Relations Seminar on October 27 at the Boxboro Regency Hotel and Conference Center.

AGENCY FEE CHALLENGE TO BE DECIDED BY U.S. SUPREME COURT

The U.S. Supreme Court has agreed to hear Janus v. American Federation of State, County and Municipal Employees to decide whether public sector unions may require workers who are not members to help pay for collective bargaining. Mark Janus, an Illinois state government employee, is asking the court to overrule a 1977 decision in Abod v. Detroit Board of Education, where the court made a distinction between two kinds of compelled payments. The court said workers need not pay for the political activities of unions, like campaign spending, as that would violate their First Amendment rights, but it is constitutional to require nonmembers to help pay for the union's collective bargaining efforts.

OPEN MEETING LAW CHANGES IN EFFECT OCTOBER 6, 2017

The Attorney General's revisions to the Open Meeting Law (OML) regulations which took effect October 6 include the following:

- While notices must continue to be filed with the municipal clerk, the municipal website is the only alternative to posting the official notice on the bulletin board where the municipal clerk's office is located. Even though they will not be considered official notices, a municipality can still post notices in other locations. If the website is the official notice location and it becomes inaccessible to the public during the 48-hour window for posting, the website must be restored within 6 business hours of when the website deficiency is discovered. Otherwise, the 48-hour notice period starts anew.
- Remote participation still has to be adopted in the usual manner. But it will now be easier to justify remote participation. Previously, the chair had to determine that participation would be unreasonably difficult because of personal illness, personal disability, emergency, military service and/or geographic distance. Now, remote participation will be allowed, without any independent determination by the chair, if "physical attendance would be unreasonably difficult."
- There is no longer the requirement of an administrative law judge hearing before the Attorney General issues orders of nullification and reinstatement of an employee because of an OML violation. But a public body still has the right to appeal the Attorney General's order within 21 days.
- A public body that receives an order from the Attorney General must certify in writing to the Attorney General within 30 days that it has complied with the order. Typical orders requiring written certification include approval and release of meeting minutes and attendance at a training. No certification is required for orders of immediate and future compliance.
- A revision that mirrors the OML itself makes clear that while the Attorney General may fine a public body for an intentional violation of the OML, but a fine will not be imposed where the public body acted in good faith compliance with advice of counsel.
- Public bodies are obligated to approve both open and executive session meeting minutes in a "timely manner." Within thirty (30) days is considered timely although not a hard and fast requirement as there can be a showing of good cause for further delay.
- Complainants have been required to file complaints within 90 days of the alleged violation. Now, however, that time period has been extended "if the alleged violation could not reasonably have been known at the time it occurred..." to within 90 days of when of the date the alleged violation "should reasonably have been discovered."
- New members of the public body are now required to receive a copy of each Attorney General determination, over the prior five years, that the public body violated the Open Meeting Law.
- Although Attorney General's determinations have made it clear that public bodies must meet to review Open Meeting Law complaints, the revisions clarify this in the regulations.
- Public bodies can request mediation with a complainant who has filed five or more complaints within the prior 12 months. If the public body requests mediation and the complainant fails to participate, then the Attorney General may decline to review the complaint.





FLSA Update

On August 31, 2017, a Texas Federal Court judge struck down the new FLSA overtime rules that would have gone into effect on December 1, 2016 and impacted over 4 million workers. It is anticipated that the Department of Labor may revisit the rules proposed by the Obama administration and revise the proposed salary levels for overtime eligibility.

Massachusetts Educator License

On July 28, 2017, the Department of Elementary and Secondary Education issued new regulations impacting initial educator licenses and license renewal. See 603 CMR 7.00



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Massachusetts Law Expands Pregnancy Protections

Starting April, 2018, the Massachusetts Pregnant Workers Fairness Act (“PWFA”) will prohibit discrimination based on pregnancy, and medical related conditions, including “lactation or the need to express breast milk for a nursing child.” The Act prohibits an employer from taking any adverse action against a pregnant employee, including denying employment or dismissing an employee who requests a reasonable accommodation, provided they can otherwise perform the essential functions of their job.

The Act provides several examples of reasonable accommodations including: more frequent or longer paid or unpaid breaks; time off to attend to a pregnancy complication or recover from childbirth with or without pay; acquisition or modification of equipment or seating; temporary transfer to a less strenuous or hazardous position; job restructuring; light duty; private non-bathroom space for expressing breast milk; assistance with manual labor; or a modified work schedule. The Act prohibits requiring an employee to take a leave of absence if another reasonable accommodation may be provided. However, an employer does not need to dismiss or transfer another employee with more seniority in order to accommodate a pregnant employee.

An employer may request documentation from the employee’s “health care or rehabilitation professional” in reviewing an employee’s request for an accommodation. However, an employer cannot request documentation for the following accommodations: (i) more frequent restroom, food or water breaks; (ii) seating; (iii) limits on lifting over 20 pounds; and (iv) private non-bathroom space for expressing breast milk. Employers are not required to provide accommodations that would cause an undue hardship, which is defined as an “action requiring significant difficulty or expense.”

By April 1, 2018, employers are required to provide written notice to all employees of the protections afforded by the Pregnant Workers Fairness Act, including the right to be free from discrimination, the right to request a reasonable accommodation, and the right to a private place to express breast milk. In addition, the employer must provide this notice to a specific employee within 10 days of the date the employee advises the employer of a pregnancy or medical related condition. Clients are encouraged to consult CLP counsel with any questions about crafting notices to employees about this law.

Superior Court Upholds Police Bypass For 1995 Fight and Car Accident

In Daniel Zaiter v. Boston Police Department, the Superior Court overturned the Civil Service Commission’s decision and held that the Boston Police Department had a reasonable justification to bypass Daniel Zaiter for a position as a Boston police officer, based on a guilty plea to an assault for fighting with other Randolph High School students and a fatal motor vehicle accident, both over 20 years earlier, in 1995.

The Civil Service Commission overturned the bypass for several reasons, including that the background investigator misled the interview panel concerning the scope of Zaiter’s involvement in the 1995 fight and motor vehicle accident.

The Superior Court reversed, finding that the Commission improperly substituted its “judgment of a candidate’s respective strengths and weakness for the judgment of the Appointing Authority itself” by “reweighing” Zaiter’s application. The Court ruled it “immaterial” whether the Commission or the Court would have arrived at the same conclusion as the BPD. This decision is an important reminder that employers may have grounds to bypass candidates for offenses that occurred long ago, provided it does a reasonably thorough and independent review of the information.



SJC: Reinstate Officer Who Employed Chokehold

In *City of Boston v. Boston Police Patrolmen's Association*, 477 Mass. 434 (2017) the SJC refused to vacate an arbitrator's award reinstating Boston police officer David Williams. In March 2009, Williams applied a chokehold to arrest an unarmed intoxicated suspect. The Department determined that Williams had used excessive force and discharged him. The arbitrator found the City lacked just cause to dismiss Williams for excessive force and for making false statements during the Police Department investigation, finding the victim was not credible and the force used was reasonable. The SJC held its nose and sided with the arbitrator. *For more details and guidance on this case, please see our Employment Blog.*

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SJC: Medical Marijuana Leads to 151B Claim

In *Barbuto v. Advantage Sales and Marketing*, 477 Mass. 456 (2017), the Supreme Judicial Court (SJC) ruled that an employee terminated for using medical marijuana may have a viable claim of handicap discrimination under G.L. c. 151B. The Court refused to recognize an implied private right of action under the medical marijuana statute.

Barbuto accepted a position with Advantage Sales and Marketing (ASM), and disclosed that she would test positive for marijuana on the pre-employment drug test, because she used marijuana pursuant to a valid prescription to treat symptoms of Crohn's disease. Barbuto submitted to the drug test and was terminated on her first day of work for testing positive for marijuana. Barbuto filed a charge of discrimination with the MCAD, which she withdrew to Superior Court. The Court dismissed the employment related claims and the employee appealed.

The SJC ruled that the employer owed the employee an obligation "to participate in the interactive process to explore with her whether there was an alternative, equally effective medication which she could use that was not prohibited by the employer's drug policy" under G.L. c. 151B § 4(16). The SJC left open that the employer may still show at summary judgment or trial that the plaintiff's use of medical marijuana is not a reasonable accommodation, because it would impose an undue hardship on the defendant's business.

In public employment settings, employers may have enhanced bases for claiming that medical marijuana use is unreasonable; for example, if Employers are required to abide by federal drug free workplace or drug free school acts, if they have employees subject to federal DOT drug testing, or where there are contractual or other statutory requirements in play. In this case, ASM's reflexive action was a big factor in the decision against it. In many cases, providing an interactive process to explore the facts surrounding medical marijuana use will help the employer avoid liability. When faced with issues concerning medical marijuana, you should proceed with caution, and with the advice of experienced labor and employment counsel. *For more details on this case, please see our Employment Blog.*

CSC: Waiver of Future Civil Service Rights Unenforceable

In *Lizette Emma v. Department of Correction*, (DI-16-194), the Civil Service Commission refused to enforce a Last Chance Agreement (LCA) against Officer Emma as the LCA waived all rights of appeal for future offenses. Emma signed the LCA to resolve charges of smoking in violation of a mandatory dismissal statute and for being absent without leave for several shifts. After the LCA was signed, Emma continued to be absent, and failed to call in, resulting in discharge. The Commission found that waiver of a civil service appeal for a future offense was contrary to public policy and would not be enforced. The Commission allowed that if a LCA left an appeal to arbitration, then public policy would not be frustrated.

The Commission sympathized with Emma's reasons for being absent, and found disparate treatment because another employee was retained despite a LCA for missing work to play golf. The Commission matched Emma's discipline to the discipline in that case: 15 day suspension and extension of the LCA. The decision is worrisome because even though most LCAs leave open an appeal on whether the offense violates the LCA, the decision leaves open the question of whether the Commission will honor a waiver of appeal on even the limited issue of the quantum of discipline. One way to avoid the risk may be to limit an appeal of discipline imposed under a LCA to arbitration, where the Arbitrator is bound to honor the parties' agreement. *For more details on this case, please see our Employment Blog.*



COLLINS, LOUGHRAN & PELOQUIN, P.C.
Legal Counsel to Employers and Schools

PHILIP COLLINS



Mr. Collins has 43 years of experience in labor and employment law, only 41 of which have been representing public and private employers in all aspects of labor and employment practice. His experience includes substantial involvement in litigation, including practice before the state appellate courts in Massachusetts, administrative tribunals, and labor arbitrators. Mr. Collins has argued successfully on behalf of management in several groundbreaking cases in the areas of employee discipline and discharge, teacher tenure hearing rights, funding of collective bargaining agreements and the interplay between municipal contracts and civil service laws. His successful appellate advocacy has overturned an arbitrator's backpay award of over 12 million dollars.

On behalf of unionized employers, Mr. Collins has also negotiated hundreds of collective bargaining agreements including such diverse employee groups as police officers, firefighters, public works, clerical, library, healthcare workers, correctional officers, and professional administrators. Mr. Collins regularly speaks at seminars sponsored by the MMA and its affiliate groups on topics involving interest arbitration, civil service, labor relations, MCAD, discipline and health insurance.

FIRM DESCRIPTION

Collins, Loughran & Peloquin, P.C. consists of five attorneys engaged in the full-time practice of labor employment law on behalf of municipalities and other employers, and education law on behalf of schools. Collectively, we have over 120 years experience representing municipal employers in all facets of labor and employment law, including collective bargaining, litigation, counseling and training.

We believe in taking a proactive approach to problems and we encourage clients to consult us before taking action that has the potential to result in litigation. In this way, we hope to help our clients avoid litigation, or put them in the best position possible to succeed if litigation is inevitable.

Our clients' needs determine the level of service we provide. We are conscious of the financial pressures on our clients, and we try to map the most economical course in serving them. We do not believe in charging our clients for our overhead, like routine copying, faxing, telephone company charges, or secretarial services, as some firms do. We are also aggressive in adopting technological solutions to make our work more efficient, and more economical for our clients, and to make us more responsive to our clients.

Collins, Loughran & Peloquin provides the Management Side Commentary for the official Civil Service Reporter and the official Massachusetts Labor Relations Reporter published by Landlaw.

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