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Lowlights and Highlights of Agency Employment Decisions Reported In 2016

A Presentation to the Massachusetts Municipal Association Annual Meeting

January 20, 2017

by
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Contents

*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.

Joint Labor Management Committee

A. What Has And Has Not Changed At The JLMC?

1. The August Procedural Changes
2. Other issues

B. Patterns of Settlements

1. Model Contracts Survive
2. COLAs Pattern Still Intact
3. "The Extras"
4. Management Gains: Are They Possible?
    a. "Arbitration is a conservative process"
        - No body worn cameras, in Somerville (yet)
        - Contrast early decisions on 24 hour shift
        - See Mayor Mazzarella's dissent
    b. Somerville's Other Issues, and, the State of Advocacy

C. Worcester Fire, the State of Advocacy

Department of Labor Relations

1. *Are Dress Codes A Mandatory Subject of Bargaining?*

   In City of Lawrence, 43 MLC 96, the answer is "yes."

2. *At What Level Of Detail Are "Hours Of Work" Negotiable Subjects Which Administrators Can Not Discuss With Their Staff?*

   A DLR hearing officer has concluded in Stoughton School Committee, 43 MLC 102 that an elementary school principal engaged in individual dealing, about a negotiable subject, when he asked teachers at a meeting to vote on what day of the week to hold an after school event. More details and commentary available in the presentation.

3. *Ground Rules Agreement Against "Negotiations Conducted In The Media" Restricts Even General Statements About Negotiation Issues.*

   That's the 'bad news' about a Mayor's public statement, as part of his 'State of the City' address, that contracts "must include concessions on health insurance," but the real issue was whether the statement "preconditioned bargaining" in violation of the law. This tactic collapsed when it was shown that the City/School Committee made wage concessions in conjunction with its health insurance proposals. Woburn School Committee, 43 MLC 84.

4. *Impasse: The Promised Land Can Be Reached.*

   But in truth it helps, in bargaining about layoffs related to contracting out, if the Union cooperates in making no alternative proposals to save the jobs. Everett School Committee. Affirmed on appeal, rejecting arguments that the decision to outsource was a *fait accompli*, 43 MLC 55.

5. *Conditions of Employment Imposed Upon Hiring But To Be Completed After A Probationary Period Are...*

   Conditions of employment which must be negotiated. City of Newton v. Newton Firefighters, 42 MLC 181 (2016).

6. *Delay Is The Deadliest Form of Denial, But Sometimes Straightforward Timely Denial Is The Best Course.*

   Can a Union insist on being provided documents relating to an **ongoing** investigation of misconduct? We think not, but in Com. of Mass., A&F the employer simply ignored information requests, then provided redacted documents the day before a DLR hearing, without explanation.

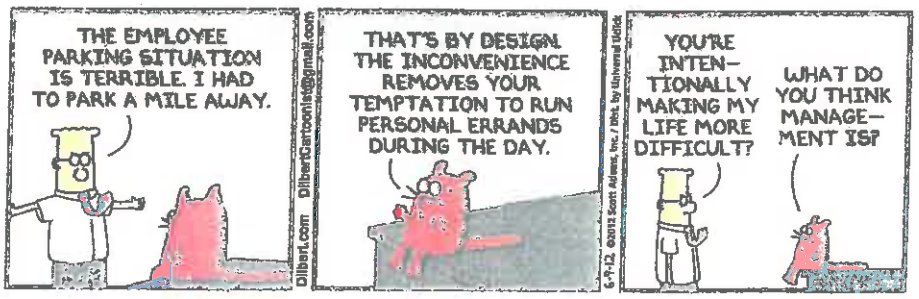
7. *Union Counsel Not Welcome At Fitness For Duty Physical Examination*.

Absent a past practice of allowing such attendance, there is no statutory right for Union counsel to attend a physical exam to determine fitness for duty. City of Boston and B.P.P.A., 43 MLC 14.

8. *'Pound of Flesh' Remedies Denied in Case Involving Failure To Furnish Issues In A Timely Fashion?*

If a very large school district in a case spanning 14 mega pages of the MLC reporter is found to have not provided some relevant information, will the DLR order a public reading of its order by the School Superintendent or School Committee chair? No, not unless the violations are egregious. Boston School Committee, 43 MLC 36 (2016).

9. *The Duty To Bargain About Employee Parking Has Its Limits*: Unilateral Decision of City of Somerville upheld. Details at 43 MLC 109.



MCAD/Superior Court

1. Employers Liable For Supervisor Sexual Harassment

This case serves as an important reminder that employers may be held liable for the sexual harassment that supervisors commit against other employees.

In MCAD and Picco v. Town of Reading, the Hearing Officer held a town vicariously liable for the emotional distress one of its employees endured at the hands of a supervisor. The Complainant alleged that he suffered discrimination, harassment, and a hostile work environment on the basis of perceived sexual orientation.

Specifically, Complainant alleged that a supervisor pervasively taunted him with homophobic slurs, and on one occasion, assaulted him. Finding that credible evidence supported the Complainant's allegations of discrimination, the MCAD substantiated the sexual harassment charges.

In addressing liability, the MCAD found both the Town and supervisor were liable for the sexual harassment that the Complainant endured. Where "an employer is strictly liable for sexual harassment committed by its supervisors," College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162 (1987), here the MCAD found the Town liable for the supervisor's conduct. Furthermore, they held the supervisor individually liable for harassment where he interfered with the Complainant's exercise and enjoyment of his right to be free from sexual harassment.

Remedy: $7,000 emotional distress damages at 12% per year interest, conduct workplace trainings on gender discrimination and sexually hostile work environments.

2. What Constitutes An Adverse Action?

In denying Defendant Boston Public Schools' ("BPS") Motion to Dismiss, the Superior Court permitted a broader scope of adverse actions that may be alleged in retaliation complaints filed under c. 151B, as well as survive a Motion to Dismiss.

In Youngblood v. City of Boston Public Schools, et al., Plaintiff, a former BPS teacher, filed a retaliation claim against the district after her principal withdrew his approval for her to participate in an alternative licensure program, and negatively evaluated her after she complained of harassment by a male student.

In their Motion to Dismiss, BPS argued that the plaintiff failed to allege any adverse treatment since she had not been fired, demoted, or transferred. Where the licensure program that Plaintiff sought approval for was optional and not required for employment, BPS opined it could not constitute an adverse action.

Unpersuaded by the district's argument, the Superior Court held that any "material disadvantage" to working conditions is sufficient to satisfy the adverse action requirement under 151B.

Applying the aforementioned findings to the instant case, the Superior Court found that the principal's decision to withdraw approval of Plaintiff's participation in the licensure program would materially disadvantage Plaintiff's employment. The negative evaluation, the Court held, fell within the realm of a material disadvantage as well. Consequently, they dismissed the Defendant's Motion to Dismiss and allowed the lawsuit to proceed.

3. Attendance Is An Essential Job Function

In MCAD, et al. v. Massachusetts Department of Correction, the MCAD dismissed the complaint of a former probationary corrections officer alleging termination due to disability, where the evidence showed he was not disabled and rather was terminated for excessive absenteeism.

During his tenure as a corrections officer, the Complainant either left or missed work for short periods of time due to a myriad of brief medical episodes of unknown etiology. Each time the Complainant missed work, he failed to produce medical documentation in a timely manner, and required prompting from Human Resources to return to work. Additionally, his medical documentation did not evidence any disability or need for accommodations. Given the substantial impact that Complainant's absences were having on the workplace, the DOC initiated proceedings to terminate Complainant's employment. Complainant unsuccessfully appealed his termination, and later filed to instant complaint with MCAD.

Even if the record established that the Complainant was indeed disabled, the Hearing Officer argued, it would be juxtaposed by his inability to attend work on a consistent basis. This absenteeism disqualified the Complainant from performing an essential function of his position: reporting to work.

While reliable attendance is an essential function for any employee, here the MCAD found it even more imperative more corrections officers who "work in a dangerous setting where attendance is critical in order to maintain safety and security of inmates and fellow employees."

Furthermore, the Hearing Officer opined, the DOC provided Complainant with significant accommodations and latitude despite his not having a disability. He received a modified schedule through the Department's Temporary Modified Duty Program, as well as numerous extensions in submitting medical documentation.

Finding the Complainant to be unreliable and lacking evidence of any disability, the MCAD accordingly dismissed his complaint where he could not fulfill the essential functions of the position.

Superior Court

Can Lunch Breaks Constitute Comparable Work Time?

In DeVito v. Longwood Security Services, a Superior Court judge decided (on December 23, 2016) to adopt the view, based on state regulations, that employees must be "completely relieved from duty" for a lunch break not to count as work time.

Civil Service Commission

A. Discipline Cases

1. *When Does What Conduct That Warrants A 21 Month Suspension But Not A Discharge?*

Time will tell. In New Bedford Airport Commission v. Civil Service Commission, the discharge of an employee with a terrible employment history was reduced to a 21 month suspension because one of the major grounds for the discharge -- that the employee harassed his supervisor -- was not proved. The Commission vote was 3-2. The Appeals Court, unable to decide whether the Commission was acting within its discretion to modify discipline, remanded the case to the Commission for more and clearer findings on a few issues. This saga reminds us not to rely solely or heavily on a particular ground in writing the appointing authority decision, and to articulate how a particular performance deficiency – in this maintaining backup generators at the airport – impairs public safety. See Commissioner Bowman's dissent, attached.

2. *But I Wasn't Even Criminally Charged!*

In Kraus v. Town of Falmouth, 29 MCSR 340 (2016) the Commission upheld the discharge of a police officer who had seized illegal fireworks and shot them off. The fact that the clerk-magistrate declined an application for criminal complaint did not matter. The Town proved the conduct, it was felonious (larceny from a building) and under the "DiScullo" case, discharge was for just cause.

3. *Can I Be Discharged For Not Being 'Of Soundmind'?*

In Marass v. City of Chelsea, the Commission upheld a discharge for psychological incapacity, based on a number of psych evaluations, and despite one evaluation procedure by the employee that he was fit for duty. The decision does not analyze why that evaluation was found wanting.

B. Miscellaneous Cases

1. *Does My Military Leave Time Count For Purposes Of Meeting Service Requirements To Be Eligible To Take A Promotion Exam?*

It does not. Nicholas v. HRD, 29 MCSR 358 (2016)

2. *Can A City Or Town Require Candidates On A Lay Off List To Undergo A Medical Exam, Physical Abilities Test and/or Psych. Exam As A Condition Precedent For Employment?*

No. Suneson v. City of Fall River, 29 MCSR 59, (2016)

C. **Bypass Cases**

1. Are All Process Errors In Bypass Cases Fatal?

Henderson v. Civil Service Commission, an unpublished 2016 Appeals Court decision, helpfully reinforces the right of employers to bypass, for employment as a fire fighter, a candidate with a recent history of using illicit drugs and for a skills-based discharge from a Boston EMS. However, in this case, the City failed to provide the appellant a copy of his CORI report before questioning him about it, as required by statute. The Commission chided the City for this omission, but did not view it as fatal. The Appeals Court concurred noting language expressing a legislative intent to restrict remedies for such omissions.

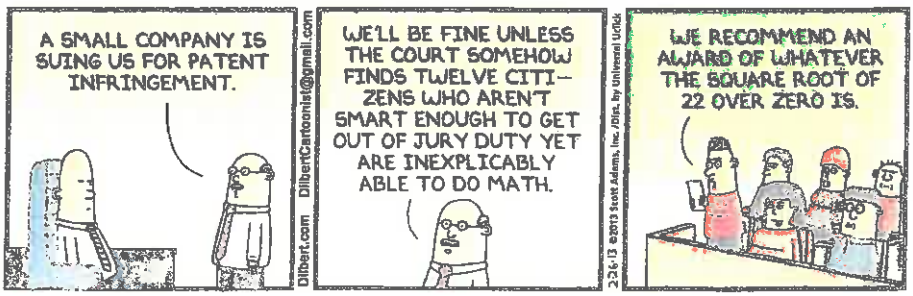
2. If A Former Employer Gives The Green Light For Hiring A Police Officer Who Resigned From His Force Under Duress, Is That Enough To Overturn A Hiring Bypass?

In Porter v. City of Peabody, 29 MCSR 297 the candidate for police officer had resigned from police employment five years earlier when found to have untruthfully denied responsibility for an on duty car accident, after having three accidents he had fessed up to.

Police lieutenants and the former chief told the background investigator that the candidate had made some "errors of judgment" due to his "immaturity." The background investigator also delved into whether the circumstances leading to the resignation involved bias. The bypass was upheld based on the unsuitability of a candidate with an admitted history of untruthfulness.

3. Are Selections Among Tied Candidates Ever Reviewable? Damas v.Boston P.D..

Selection of tied candidates is not a matter the Commission has jurisdiction over, because it is not a bypass applicable under Section 2(b) of the statute.... BUT...the Commission could conduct an investigation under §2(a), where some successful candidates had references from Boston police officers even up to the Commissioner's office. Interviewing tide candidates: What's the worst that could happen?



Mayor Mazzarella's Dissent
Body Worn Cameras
Somerville JLMC Case

Body Worn Cameras

The following is the reasoning for my dissent from the Chair's decision on the issue of body worn cameras. It is my opinion that the decision undercuts the agreement the Police Association already made to grant the City the management right to "exercise complete control and discretion over the technology of performing its work". Body worn cameras certainly fit within that authority.

The opinion of both the Chair and the Union's designee seems to be based on the fact that only one Massachusetts municipal police department (Methuen) has implemented a full body worn camera program and that this is sufficient reason to not have Somerville become the second. This opinion does not weigh the strong evidence presented by the City, much of which is stated in the Chair's description of the City's position. That evidence, which was not rebutted by the Union, includes the following:

- That these programs are working in a number of major cities across the United States and in Methuen.
- That the body worn camera will record the entirety of an incident, as opposed to a bystander's video of an officer's reaction to some provocation or threat not recorded.
- That the camera will also provide valuable evidence about criminal behavior as well as the interaction of our police officers with our citizens.
- That in communities with body worn cameras, use of force and civilian complaints have been significantly reduced.
- That the U.S. Department of Justice and Massachusetts Police Chiefs Association are both supporting these programs.

These are all strong reasons for using this technology as a tool to benefit law enforcement. The opinion and the award do not take into account the evidence presented that there should be such a program.

In my opinion, the Association has not engaged the City on this issue, but just repeatedly rejected the proposal without offering any questions or concerns about the City's proposed policy even at arbitration. Instead of sanctioning this approach, the Panel should be encouraging the parties to work together toward what will clearly be a beneficial tool for law enforcement and a program likely to increase transparency

and public confidence in our police. As Methuen Police Chief Solomon testified, those videos will also have the benefit of expeditiously clearing officers of alleged wrongdoing where a citizen's complaint is unfounded. We saw a good example of this in the recent DUI arrest in Scottsdale, Arizona of a newly acquired Patriot's player.

The program is currently working in Methuen with the support of its police officers and Boston is conducting a trial. In short, we need more trials of this promising technology, rather than simply ignoring the successful implementation in Methuen and elsewhere and/or waiting for the results of one trial with a rocky start in the Boston Police Department. I believe that the panel should have at least endorsed a trial period of one year, with a labor-management committee, including representatives from both police bargaining units.

The public in Somerville and its public representatives have supported this initiative for two years. This Panel should have moved the process forward rather than sending the parties back to their very divergent positions, as they start bargaining in 2017 for a multi-year agreement.

In explaining my dissent, I do so with the respect for the views of the Chairman, and for the admirable job he did in evaluating not just the economic issues but also the other significant issues presented in this case.

Civil Service Commission
Case No.: CASE NO: D1-11-296
Date:
Parties: ANTHONY MONIZ, Appellant v. CITY OF NEW BEDFORD, Respondent
Appearances:
Commissioner: Christopher C. Bowman

OPINION OF COMMISSIONERS BOWMAN AND MARQUIS

We concur with the majority's conclusion that there is just cause to discipline Mr. Moniz. We do not concur, however, with the decision to convert his termination to a long-term suspension.

Prior to being transferred to the City's airport, Mr. Moniz had a lengthy and eyebrow-raising disciplinary history that included verbal and written warnings, a 1-day suspension and a 17-day suspension. The seriousness of these prior offenses should not be understated. Mr. Moniz failed to show up for work and/or refused an assignment on three occasions. On another occasion, he was found, while on duty, using City-owned property to remove tree stumps from his private yard. As recently as 2011, he received two warnings for allegedly violating the City's harassment policies. While he denied those allegations, he nonetheless acknowledged to his supervisor that he wanted to "bash [a co-worker's] head in."

With this as a backdrop, we are hard-pressed to understand how anything less than termination is warranted for his most recent transgressions which include refusing to wear the proper uniform while on duty at the City's airport, failing to satisfactorily complete an

assignment; and failing to properly maintain generators at the airport. Further, while we defer to the findings that Mr. Moniz did not harass his supervisor, it is noteworthy that Mr. Moniz, at a minimum, boasted to at least one other airport employee about how he had "pissed off Chiefy."

The City's decision to terminate Mr. Moniz was justified and was consistent with the principles of progressive discipline. The Commission should not provide a safe harbor for Mr. Moniz or any other individuals who continuously engage in behavior that tarnishes the image of public service.

For the minority
Christopher C. Bowman
Chairman

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Mr. Collins has 42 years of experience in labor and employment law, only 40 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.

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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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