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**Lowlights and Highlights
of Agency Employment Decisions
Reported In 2014**

*A Presentation to the
Massachusetts Municipal Association
Annual Meeting*

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

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

I. JOINT LABOR-MANAGEMENT COMMITTEE

1. Police and Fire Internal Comparability: Whose Yard Has Greener Grass, Or The PFFM's "New Math"

A. Solve this equation, given these facts:

	<u>Police Officer</u>	<u>FF/Paramedic</u>
Base Pay	\$55,000	\$55,000
Scheduled Shifts/Year	244 (8 hours)	91 (24 hours)
Hours of Vacation/15 Years' Service	160	240
Shifts Worked/Year	224	71

Without regard to education or other fringe benefits, which employee group has the better deal, and why?

(1) According to several PFFM locals, the police officer does because the firefighter's basic work schedule requires 242 hours more work per year, meaning that the FF who gets the same weekly pay is actually underpaid . . . by 12.5%. The difference in vacation hours is only a partial makeup, and an insufficient one at that.

(2) Police and Fire have been working schedules with this "total hours" gap since the 1970s. This lag theory is so absurd on its face, no Union advocates even raised it, in bargaining or otherwise, for decades.

(3) Bonus Questions:

- a. In over 25 years since the revival of interest arbitration for firefighters, how many arbitrators have given any credence whatsoever to this theory of a 12.5% lag in pay?
- b. Did that arbitrator buy the 12.5% gap, "hook, line and sinker?"
- c. That arbitrator was a fan of what Major League baseball team?

Answers: (a) One (b) No (c) The New York Yankees.

B. Compute The Average

Some cities and towns pay a “night differential” to firefighters, but most do not. Some communities provide miscellaneous (unique) forms of compensation, and others do not.

The data for these two categories shows the following:

	<u>Night Differential</u>	<u>Other</u>
Town A	\$0	\$2,169
Town B1	\$2,738	\$0
Town B2	\$0	\$0
Town E	\$0	\$1,100
Town M1	\$1,625	\$0
Town M2	\$0	\$500
Town W	\$3,635	\$0
PFFM “<u>AVERAGE</u>”	\$2,666	\$1,256
PFFM Client Town	\$0	\$250
PFFM Client “<u>LAG</u>”	(\$2,666)	(\$1,006)

What is the average “miscellaneous compensation” for the 7 communities?

- A) Night Diff \$2,666; “Other” \$1,256; Total: \$3,922;¹ or
- B) Night Diff \$1,142; “Other” \$538; Total: \$1,680.

Answer: B.

¹ We’re Not Making This Up: This data and averaging is taken from an actual exhibit submitted by the expert-of-choice for PFFM locals, in a real case.

2. Loose Leaf Binder Expertise: What To Expect And Prepare For At The Arbitration Hearing.

Comments at seminar only.

3. Compensating Police for Job-Related Degrees: Cause To Increase Firefighter Pay?

After the 2009 legislative changes in the “Quinn Bill” and Adams v. Boston, 461 Mass. 602 (2012) most cities and towns were faced with two decisions:

- Whether to pay the Commonwealth’s 50% share for police officers who had achieved degrees under the Quinn Bill (10% associates, 20% bachelors, 25% masters); and
- What, if any, compensation to pay to those who hadn’t qualified under the Quinn Bill, and to new hires.

Surprisingly, this subject has not been addressed yet in police cases, but rather has been contested as an issue of internal comparability by PFFM locals. Their logic is: If you gave the police something you didn’t have to (full Quinn for those who had Quinn degrees, or any sum for new hires), that makes the police deal worth 6-8% more and, well, we want the same.

This logic has been soundly rejected in several cases—Haverhill, Scituate, Falmouth and most recently Watertown. In Watertown, the neutral arbitrator wrote:

The Union advocates this proposal on the ground that its cost represents only a fraction of the Town’s cost for replacing the State’s one-half share of Quinn Bill benefits. This contention is made throughout the Union’s case, *viz*, that its proposals are economically justified on the ground that the police benefited from the Town’s decision and the amount of that benefit. The flaw in this argument is that the Town’s decision to pay the full cost of Quinn Bill benefits for eligible police does not constitute a wage *increase*. It staved off what would otherwise have been a *decrease* in police pay. In doing so, the Town effectively preserved the historic police-fire wage relationship. If the Town had not picked up the State’s share of the cost of Quinn Bill benefits, and if police pay thereby had been sharply reduced, would not the Town be entitled to argue that firefighter wages should also be reduced proportionately in order to maintain the historic police/fire bargaining relationship?

4. Internal Comparability: Other Town Settlements. Quincy Police Superiors.

As a general matter, in determining the appropriate wage increases, arbitrators pay great attention to wage settlements that have occurred within the municipality. In particular, internal wage settlements demonstrate the so-called “going rate” and the municipal employer’s ability and willingness to pay, in the current economic times. City of Quincy v. Quincy Police Superior Officers Association, JLMC-13-2932 (Arb. Gary D. Altman) (November 21, 2014).

This view has been shared by many arbitrators in the past 20 years.

5. Stipends in the Base? In the Hull Fire case, the arbitration panel denied the union’s request to include a number of stipends into base pay.

II. DEPARTMENT OF LABOR RELATIONS

- (1) *SJC Overrules CERB: No Need To Bargain Retiree Health Insurance Contribution Rate.* City of Somerville v. Commonwealth Employment Relations Board, 470 Mass. 563 (2015).

It has been four years since the CERB took the view that municipal employers have a duty to bargain health insurance contribution rates of *certain retirees*, i.e. current employees who will retire in the future. Under CERB's logic, an employer could unilaterally alter the contribution rate of persons *already retired*, but not for persons *about to retire* or any other *future retiree*. In the 2011 City of Somerville case, CERB ordered the City to restore previous payments (80%, 90%, or 99%) towards health insurance for persons who retired after July, 2009. To its credit, the City appealed and the Supreme Judicial Court ("SJC") took jurisdiction.

The SJC decision issued on February 3, 2015, firmly concludes that the Legislature intended in M.G.L. c. 32B to leave the determination of retiree contribution rates to cities and towns. Since the local option statutes in c. 32B permitting contributions are not listed in c. 150E, §7(d) as statutes which can be superseded by a collective bargaining agreement, **retiree contribution rates are not a mandatory subject of bargaining**. The Court reasoned:

In our view, the Legislature conferred authority on municipalities to decide whether and how much to contribute to retirees' health insurance premiums in recognition of the fact that as public employers, they must balance the needs of their retired workers with the burden of safeguarding their own fiscal health, thereby ensuring their ability to provide services for all of their citizens.

In articulating that view, the Court cited two cases our firm handled: Twomey v. Middleborough, 468 Mass. 260 (2014), which affirmed the power of the Board of Selectmen, not Town Meeting, to set the contribution rate for retirees, and Yerestsky v. Attleboro, 424 Mass. 315 (1997), which overrode a Superior Court decision requiring a 90% contribution rate to retirees in HMOs, leaving the choice of employer contribution, between 50% and 90%, to the political process.

- (2) *Hearing Officer Rules That It Is Retaliation For Employer To Exercise An Economic Management Right After Union Refuses Economic Concession If Employer Waived The Right.* City of Northampton and International Brotherhood of Police Officers, Local 390, 40 MLC 409 (June 16, 2014).

Employers should shudder at the astonishing decision in City of Northampton and International Brotherhood of Police Officers, Local 390, 40 MLC 409 (June 16, 2014), which indicates that an Employer can be punished by using a clear contractual economic management right as a bargaining chip. More than two decades ago, the City negotiated with its Patrol Officers Union protective language in case the Commonwealth underfunded the Quinn Bill. The language was clear: "It is further agreed that, should state funding for the 'Quinn Bill' fall below the 50% reimbursement rate, the City of Northampton shall only be responsible for reimbursing eligible employees the City's share." The City had for some time declined to exercise the right, in recent years, after state funding for Quinn Bill benefits fell well below 50%.

Facing a \$6 million budget shortfall for FY 2010, due in part to a 21 percent increase in health insurance, the Mayor began to lay the groundwork for placing a Proposition 2½ override on the ballot. She announced to non-union employees that there would be a wage freeze for FY10. She asked unionized employees to forego the wage increase called for in their collective bargaining agreements, including asking the patrol officers to waive their negotiated 3% increase. The City Solicitor proposed that if the patrol officers would give up the 3% and steps for FY 2010, the City would agree not to layoff four employees and would continue to fully fund Quinn Bill benefits even without anything near the 50% reimbursement from the state. The patrol officers' union voted the proposal down, while other unions representing police officers accepted a similar offer.

Ultimately, there were no layoffs because the override passed. However, the City exercised its right under the protective language in the CBA and paid only its 50% share of Quinn Bill to the patrol officers in FY 2010. The Union learned that the City had paid other officers, including the Chief, 100%. When the Union inquired about the second half payment for patrol officers, the response from the City's Director of Labor Relations was, "The Mayor confirmed that her position remains unchanged; [the Union] understood that by taking 3% and their steps, the second half year Quinn payment was not going to be available"

Meanwhile, in negotiations for a July 1, 2010 - June 30, 2012 CBA, the City offered to pay 100% of Quinn Bill for the term of the Contract if the Union accepted two years with no percentage wage increase. Shortly after the email informing the Union that there would be no additional FY 2010 Quinn Bill payments, the Union accepted the City's 2010-2012 CBA proposal, including language which made it clear that the City's obligation to pay 100% Quinn Bill beyond June 30, 2012 "shall be the subject of future negotiations."

Then, in October 2010, the Union sent a letter to the City demanding that the City pay the second half (50%) of Quinn Bill that it did not pay in FY 2010.

The Hearing Officer viewed what the City did as retaliating against the Union for engaging in concerted protected activity - - i.e., refusing to agree to forego the 3% wage increase and steps in the last year of their 2007-2010 Contract. The Hearing Officer stated that "The City's divergence from its longstanding practice [of paying 100%] leads me to conclude that that the City's non-payment of [the Quinn payment] was motivated by animus." She agreed that the contract language gave the City a legitimate, non-discriminatory reason for doing what it did, but concluded that the City would not have taken the action but for the Union's protected concerted activity. She relied on the fact that other unionized police officers had been paid full Quinn in FY 2010 in return for wage concessions.

The Hearing Officer summarily dismissed the City's obvious defense that it did not pay full Quinn in FY 2010, because the express language in the CBA didn't require it to—even though she agreed that the language gave the City that very right. She acknowledged the SJC's Quinn Bill decision in Adams v. City of Boston, 461 Mass. 602 (2012), in which the Court ruled that the Quinn Bill statute only required a municipality to pay 50% plus whatever the Commonwealth provided for a reimbursement, but that a municipality could choose to pay more. She also made it clear that her decision was affected by her determination that the City had the money to pay because the override

had passed. In the end, she said that the City's failure to pay the patrol officers 100% was punitive and ordered the City pay the 50% Quinn Bill payment that it didn't pay in FY 2010, with interest.

This decision utterly confuses hard and smart bargaining with a labor law violation. No party can be compelled to agree to a proposal as part of the obligation to engage in good faith bargaining. It says so right in the statute. M.G.L.c.150E, §6.

- (3) *Cell phone policy which goes beyond safety considerations must be bargained.* Town of Plymouth and AFSCME Council 93, 40 MLC 65, aff'd 40 MLC 209 (January 30, 2014).

Does a Town have a managerial right, not subject to bargaining, to control personal and Town cell phone use during work hours? The answer is a resounding "no" when the policy goes beyond purely safety considerations. Town of Plymouth and AFSCME Council 93, 40 MLC 65, aff'd 40 MLC 209 (January 30, 2014). Citing a balancing test that the DLR previously endorsed for a cell phone policy that was unsuccessfully challenged in Suffolk County Sherriff's Department v. AFSCME, 29 MLC 63 (2002), the Town asserted that its core managerial interest in preventing deadly accidents caused by distracted employees greatly outweighed the union's right to bargain over implementation of the policy. CERB disagreed.

CERB distinguished Suffolk County Sherriff's Department on the basis that it involved specialized safety concerns inherent in prison work. Further, CERB noted that Plymouth's policy went well beyond addressing safety considerations. Besides prohibiting cell phone use while operating Town vehicles or equipment, it disallowed the possession or use of cameras and camera phones in the workplace without specific authorization, limited the use of Town-issued phones for personal business, and limited the making or taking of personal calls at work, with a violation of any part of the policy justifying discipline, up to and including discharge. CERB wrote, "Under these circumstances, the Board declines to parse portions of the Cell Phone Policy or to separately analyze fragments, such as the ban on use of Town-owned cell phones while operating Town-owned vehicles, to determine whether application of the balancing test would require a different result had the Town issued a policy more limited in scope and targeted to these safety considerations."

- (4) *Employer Required To Impact Bargain Over Elimination Of A Position When It Results In The Loss Of Regularly Scheduled Overtime.* City of Boston and Boston Police Superior Officers Federation, 41 MLC 31 (2014).

The City did not fare well in this case because it involved regularly scheduled overtime. In May 2010, the City of Boston eliminated the position of Street Sweeping Initiative Supervisor and discontinued the practice of assigning members of the Boston Police Superior Officers Federation overtime during Street Sweeping Initiative season. The Hearing Officer held that the City did not have to bargain over the decision to eliminate the position, citing the Supreme Judicial Court decision in City of Boston v. Boston Police Superior Officer Federation that "an assignment or deployment cannot be irrevocable or managers would have no ability to react to changing conditions in arranging the police force into necessary bureaus, units and divisions." 466 Mass. 2010 (2013).

However, the Hearing Officer found that the City failed to bargain over the *impacts* of the decision which resulted in the elimination of regularly scheduled overtime prior to implementation. *See Town of Tewksbury*, 19 MLC 1189 (1992).

With respect to remedy, CERB affirmed the Hearing Officer's decision, ordering the City to restore the economic equivalent of status quo from the date the Union prospectively demanded impact bargaining until the issue is resolved or impasse is reached. The City was required to "pay employees affected by the decision an amount equivalent to the additional overtime compensation they formerly received as SSI Supervisor." The CERB seemingly rejected the Union's argument for a make-whole remedy, stating that "impact bargaining could only ameliorate but not substantially change the effects of the City's decision to eliminate the SSI supervisor on overtime." But it is hard to discern any difference between the back pay order and this hypothetical make whole remedy.

(5) *Installation of GPS Tracking Devices in City Vehicles May Require Notice and an Opportunity to Bargain.* City of Springfield v. American Federation of State County and Municipal Employees, 41 MLC 130 (2014).

The DLR may be changing its course in regards to employer use of GPS tracking devices in town vehicles in City of Springfield v. American Federation of State County and Municipal Employees, 41 MLC 130 (2014). Hearing Officer Kendrah Davis held that the City of Springfield violated M.G.L. c. 150E, § 10(a) (5) by installing GPS tracking devices in vehicles driven by City employees and recording the employees' "real time" work location, idle time, distance driven, number of stops and speeding events in those vehicles without first providing AFSCME with notice and an opportunity to bargain. Prior to installing GPS tracking systems in 2012, if the City wanted a driver's vehicle data, either the driver would informally report the information through a radio communication or the supervisor would informally obtain that information through an in person visit. When the union demanded that the City cease and desist, the City refused citing City of Worcester and Local 495, National Association of Government Employees, 34 MLC 15 (2007), an analogous case where the DLR dismissed a union charge, holding a public employer could unilaterally adopt a GPS system to monitor employees because they were not altering standards of productivity and performance and did not change any terms and conditions of employment. Clearly, the same is true in City of Springfield. The City has always required DPW workers to report to work at their assigned location and perform their assigned job. Neither has the act of installing and monitoring a GPS device imposed a reporting requirement on its employees, as employees are not required to make a "report" regarding their daily tasks. Finally, even in cases where employees were unaware of the GPS device's presence, working conditions were not changed because in years prior to GPS, supervisors could randomly check on an employee's work without providing the employee with prior notice. The City of Springfield submitted its appeal to the DLR on December 4, 2014.

(6) *Union's Attempt to Narrowly Define Time Period for Purposes of Establishing a Past Practice Fails.* City of Boston and Police Superior Officers Federation (BPSOF), Boston Police Detectives Benevolent Society ("BPDBS") and Boston Police Patrolmen's Association ("BPPA"), 41 MLC 119 (November 7, 2014):

In this case the primary issue was whether the City had to bargain with its various police unions to re-introduce an assessment center component into the promotional process that had last been used in 2002 and, prior to that, in 1992. In 2005 and 2008, promotions were done with just a multiple-choice examination, counting for 80%, and education and experience, counting 20%. The assessment center that had last been used in 1992 and 2002 broke down as follows: 40 points for the written test, 40 points for the assessment center and 20 points for education and experience.

The City never acknowledged a bargaining obligation with respect to the new promotional process and it did not provide the Unions with notice and an opportunity to bargain about it.

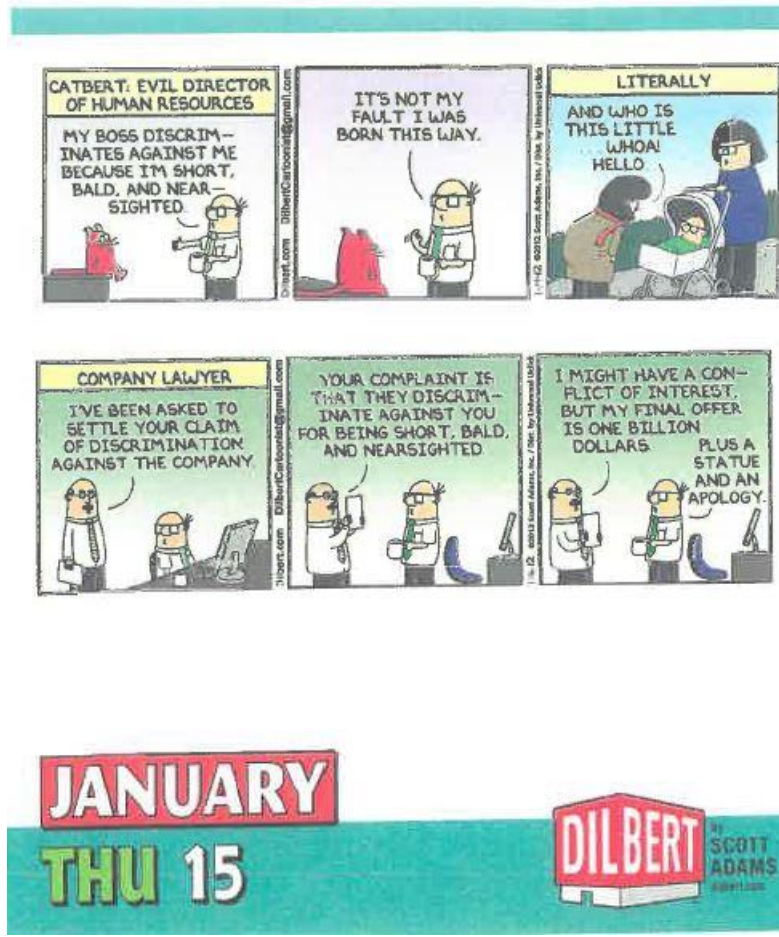
The Unions filed a complaint alleging that the City unilaterally changed the promotional process when it announced that HRD had approved the process recommended by the City's consultant. The Unions' argument was that the City had changed the practice, dating back to 2005, of basing promotions on a multiple-choice examination (80%) and education/experiences (20%), the so called "80/20" model. The Union cited DLR decisions that found a past practice to be binding

based on the 7 most recent years. CERB rejected the argument, pointing out that the cases cited did not involve infrequent or sporadic activity like promotions. The CERB also noted that neither the CERB nor the NLRB has ever endorsed the proposition of an artificial or arbitrary length of time for a practice to become a binding term or condition of employment but, rather, applied a case-by-case analysis:

Ignoring the exams prior to 2005 would impose an arbitrary time frame on our analysis and would require that relevant evidence regarding those earlier exams be ignored. Accordingly, we must consider the exams that occurred prior to 2005. Further, it is evident that in cases where there was a sporadic action, the action had to be consistently followed, and without any deviance, in order for it to be considered a binding past practice.... Given the consistent body of precedent...it would be inappropriate for us to only consider the years in which the City used the 80/20 practice and find that it constitutes a condition of employment.... Therefore, because the City used an assessment center, in addition to the written exam, in 2002 and 1992, the Unions have failed to establish a binding 80/20 practice.

The BPSOF also contended that the City had failed to participate in good faith in the mediation and fact finding procedures in sections 8 and 9 of c. 150E—a 10(a)(106) violation—because it implemented the new promotional procedure while the issue was pending at the JLMC after being certified for arbitration. CERB rejected the charge, citing Town of Stoughton, 19 MLC 1149, 1156-57 (1992), where the Town had implemented a light duty proposal while the parties were engaged in successor contract negotiations and a petition was pending at the JLMC. The CERB noted that the rules are different between the JLMC statute and Section 9 proceedings and that there was no evidence that the City had refused to participate in any mediation or arbitration sessions.

III. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION



(1) *1st Circuit – Employment – Drug Testing – Hair Samples. Jones, et al. v. City of Boston*, Docket No. 12-2280 (2014).

Where the City of Boston was awarded summary judgment in a suit challenging a municipal policy of using hair samples to test for illegal drug use, the judgment must be vacated as to the Title VII disparate impact claim. Ten (10) black plaintiffs, who were either employed as former or current police officers, or applicants to the City's Police Department, alleged that the Department's drug testing program, which used hair samples to test for illegal drug use, caused a disparate impact on the basis of race in violation of Title VII.

The data showed that during a period of eight years, black officers and cadets tested positive approximately 1.3% of the time, while white officers and cadets tested positive just under 0.3% of the time. The plaintiffs all denied the use of cocaine, and argued that the hair test used by the Department generates false-positive results in processing the type of hair common to black individuals. The First Circuit reversed the district court's grant of summary judgment in favor of the employer, held that the plaintiffs established a prima facie case, and remanded the case for further proceedings. *Jones, et al. v. City of Boston*, Docket No. 12-2280 (2014).

(2) *What Constitutes Adverse Action In A Retaliation Case? Leahy v. City of Boston, 36 MDLR 64 (2014).*

This case serves to remind employers that any perceived discrimination or retaliation can result in a substantial award of emotional distress damages.

In Leahy, the Complainant, a female firefighter, alleged that a Boston Fire Department Captain harassed her and that after she reported the harassment, her employer, the Boston Fire Department, retaliated against her by assigning her to a less desirable station.

While Leahy's harassment claim against the Captain failed because it was untimely, the Hearing Officer found that the Complainant established that the Department retaliated against her by transferring her to a station that she found less desirable after filing her complaint. A Deputy Fire Chief testified that the Complainant was not permitted to return to her original station because the accused Captain's brother-in-law worked there and he blamed the Complainant for the Captain's suspension. The Hearing Officer concluded that the Department's reassignment of the Complainant to a new station materially disadvantaged the Complainant and constituted retaliation because it deprived her from working with colleagues who were friends and would swap shifts with her.

The Complainant was awarded \$25,000 in emotional distress damages based on her testimony that during the period that she was reassigned to a new station, she experienced a turbulent period in her life marked by a divorce, changing employment, and a new living situation, and would have benefitted from the emotional support of her former colleagues.

This decision serves as a reminder to employers that an activity that materially disadvantages an employee's support system at work may be considered an adverse action. Employers should remain cautious when making employment decisions regarding employees who have engaged in protected activity to ensure that such decisions have a legitimate purpose unconnected to the protected activity.

(3) *Retaliation Can Include Failure To Promote. Dalrymple v. Town of Winthrop, 36 MDLR 10 (2014).*

The Town of Winthrop learned the hard way that employers need to use caution when making adverse employment decisions which impact employees who have previously filed complaints of discrimination. Prudent employers should analyze their hiring and promotional policies to ensure that employees engaged in protected activities are not disproportionately excluded from any positions.

In Dalrymple, the Complainant, a female police officer, alleged that the Town of Winthrop discriminated against her on the basis of gender and retaliated against her.

In 1999, the Complainant earned the highest score on the sergeant qualifying exam. While it was the Town's practice to promote the candidate with the highest exam score, the Town did not promote any of the candidates who took the 1999 sergeants exam. In 2003, the Town promoted a

male officer to an “acting sergeant” position, despite the fact that the Complainant achieved the same test score and had more seniority. Finally, in 2004, the Town once again promoted a male officer who had the same test score but less seniority.

When the Complainant challenged the Town’s hiring decision, the Town failed to explain why the Complainant, unlike her male counterparts, failed to secure a supervisory position after decades of employment and why there had been no female supervisors on the police force until 2012. The Hearing Officer rejected the Town’s proffered legitimate business reason for failing to promote the Complainant due to financial reasons. Based on the evidence, the Hearing Officer concluded that the Town discriminated against the Complainant based on her gender by failing to promote her to sergeant on multiple occasions.

The Hearing Officer further held that the Town retaliated against the Complainant. During her employment, the Complainant filed six charges with the MCAD for discrimination and retaliation, including one charge which was removed to Superior Court and resulted in a \$575,000 award. The Hearing Officer found that the Town harbored animus against the Complainant based on her protected activities, and that this animus motivated the Town to deny the Complainant the promotions that she deserved.

The Hearing Officer awarded the Complainant \$50,000 in emotional distress damages based on her testimony that she had feelings of anger, rage, despair and hopelessness, and suffered from other medical issues due to the discrimination and retaliation. This award likely would have been much higher had the Hearing Officer not taken into account several mitigating factors, including the Complainant’s failure to seek treatment from a mental health provider and outside sources of stress in the Complainant’s life, including the loss of her home to a fire. The Hearing Officer also issued the Town a \$50,000 civil penalty—the maximum permitted by law—after finding that in the last seven years, the Town committed multiple discriminatory practices, and its treatment of the Complainant for over thirty years was “egregious and intransigent.”

(4) *Reasonable Accommodation Has Its Limits.* Haynes v. General Electric Company, 36 MDLR 79 (2014)

In Haynes, the MCAD confirmed that employers are not required to reasonably accommodate an employee where the proposed accommodation would pose a safety risk to the employee or other employees. The Complainant alleged that his employer, General Electric (GE), failed to reasonably accommodate and thus discriminated against him based on his disability when it terminated his employment after he injured his wrist several times in work-related incidents.

In February, 2001, the Complainant, a technician who repaired home appliances, injured his left wrist on the job. In March, 2003, the Complainant again injured his left wrist, sought treatment and was scheduled for surgery in October, 2003. In the interim, the Complainant was restricted to “light duty,” meaning that he could lift no more than 25 pounds. Immediately before his surgery, in September, 2003, the Complainant again injured his left wrist.

After the Complainant’s surgery, his physician determined that he could return to work with a lifting restriction of 10 pounds, though GE’s insurer determined that he could return with a 20 pound

restriction, noting that he would never have full use of his wrist. When the Complainant contacted GE about returning to work, GE terminated his employment.

The Hearing Officer found that while the Complainant's injury constituted a disability, he was not a qualified individual, as the ability to lift a minimum of 75 pounds was an essential function of his job, which he was unable to perform. Even if the Complainant was capable of working light duty, such an accommodation would have required GE to significantly restructure the repair technician position, and was therefore unreasonable. Further, given the job's physical requirements and the Complainant's history of re-injury, any accommodation, including light duty, would have posed safety risks to the Complainant.

This case demonstrates that employers may consider safety risks to the disabled employee and to others when evaluating whether a disability can be reasonably accommodated. Such safety risks, however, must be more than speculative. Here, the employer's documentation of the Complainant's previous on-the-job injuries informed its decision that a light duty accommodation would be unreasonable.

IV. CIVIL SERVICE COMMISSION

- (1) Pending in the SJC: Is It Lawful for HRD To Delegate Its Review of Bypass Letters To Cities and Towns?

In February, 2014, a Superior Court judge issued a decision in which he found that it was “illogical” for the Human Resources Division (HRD) to delegate to cities and towns its authority to review and approve bypass reasons under G.L. c. 31, s.27. Malloch v. Town of Hanover, SUCV2013-01169 (2014). An appeal to the Appeals Court was fast-tracked by the Supreme Judicial Court (SJC) granting direct appellate review. Oral arguments were heard on January 5, 2015. The delegation in question – or was it abdication? – dates back to 2009.

- (2) When Does A Discharge Properly Become a 22 Month Suspension? Never.

The Civil Service Commission’s inclination to give veteran employees who engage in egregious misconduct “one more chance” by modifying discharge decisions to “time served”—often resulting in 1-2 year suspension—has been solidly rejected on appeal. Three Superior Court decisions this year have reversed such modifications:

Town of Maynard v. Civil Service Commission: Court overturned the Commission’s modification of a police officer’s termination to a 22 month suspension. This case is on appeal.

New Bedford Airport Commission v. Civil Service Commission: Court overturned Commission’s modification of an employee’s termination to a suspension of one year and nine months, despite the fact that the employer failed to prove one of the charges against the employee.

Boston Police Department v. Tinker: Court overturned Commission’s modification of a police sergeants’ five day suspension to a written reprimand.

The Civil Service Commission is not alone in this inclination. However, even arbitrators who reinstate such employees after upholding the crux of charges involving serious misconduct may have their awards vacated on public policy grounds:

City of Boston v. Boston Police Patrolmen’s Association, (the “DiSciullo” case) discharge of officer who arrested two double parkers on trumped up charges, a felony, upheld, overturning arbitrator’s reinstatement after long suspension; and more recently

Town of Swansea v. Swansea Coalition of Police, an Appeals Court panel concluded that the police officer’s misconduct, as found by the arbitrator, constituted obstruction of justice (also a felony), but allowed for the possibility that the public policy exception could be broad enough to cover non-felonious behavior.

(3) Do Weeks Spent Training To Fight Fires At The Fire Academy Count Towards Completion of The One Year Probationary Period?

A divided commission says yes, in DeJesus v. City of Lowell, 27 MCSR 562 (2014). The case involved not only the usual time at the academy, but extra time because the firefighter failed the academy final exam . . . three times. The Commission majority says this fire case is different from the appellate case law governing police, Police Commissioner of Boston v. Cecil, 431 Mass. 410 (2000), because under the police statute, recruits must complete the academy before being sworn in as officers.

In dissent, however, Commissioner Stein got it right when he opined that the statute, which covers both police and firefighters, requires performing the actual duties of the position. DeJesus had not done that for 12 months before being dismissed as a probationary employee.

(4) Bypasses for “Youthful Indiscretions,” i.e. Criminal Behavior.

Two decisions emphasize that the employer has considerable discretion to bypass for criminal conduct, even conduct many years before, provided it gives the applicant an opportunity to discuss and explain incidents leading to criminal charges. In Maillet v. City of Medford, 27 MCSR 397 (2014), the full Commission upheld the bypass, overruling Commissioner Stein’s view that the City undervalued the candidate’s many positive characteristics in the intervening 13 years since his criminal conduct as a teenager. It is important in these cases to “compare and contrast” the selected candidate(s) with the bypassed candidates. Relying solely on a 20 year old CORI report (about soliciting prostitution), without any interview, does not meet the reasonable justification standard. Teixera v. Department of Correction, 27 MCSR 471 (2014).

(5) The “We’re Not Making This Up” Award.

The nominees are: Lymon v. Department of Correction and Hadis v. Town of Oxford

(a) What Does It Take To Be Fired? Consider this conduct in Lymon:

Corrections officer Lymon took a nap after work without first securing his duty belt, which held his DOC-issued firearm, mace, handcuffs and handcuff keys. When he woke up, he discovered that a female companion, with whom he was involved romantically, had taken his car and several of his personal firearms. He borrowed a car and went searching for her, accompanied by his friend, who happened to be a known drug dealer. When Lymon finally spotted his car, he positioned the borrowed car he was driving to partially block his car. Lymon drew his DOC-issued gun out of its holster and pointed it towards the woman, who was in his car. Where the car was only partially blocked, the woman drove away, still in Lymon’s vehicle. The woman or her brother later used one of Lymons’ guns to shoot approximately six times at a man in New Bedford. Shortly after the shooting, the woman crashed Lymon’s car. As a result of his behavior, the appellant was charged with assault by means of a dangerous weapon.

Enough to discharge? Does it matter that Lymon beat the criminal charge? Can Lyman sue for the damage to his car?

(b) Compare that to the conduct in Hadis:

In Hadis, an officer on foot patrol loudly hit (or maybe just tapped) a car stopped at a traffic light which had made an illegal left turn, resulting in damage to the car. When the parents called the station to file a citizen complaint the dispatcher told them a supervisor would call them back to investigate their complaint. An officer promptly called the parents back, discussed the complaint and later met with them at the station to review and take pictures of the damage. In calling and meeting with the parents to investigate the matter the investigating officer left out one small detail, that he, Officer Hadis, was also the officer whose conduct was the subject of the complaint.

WHICH CASE WINS THE AWARD?

In Lymon the corrections officer was given a 30 day suspension, not fired, though the commission clearly felt that he could have been. In Hadis, the officer's discharge was upheld by the commission.