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**Highlights and Lowlights
of Agency Employment Decisions
Reported In 2013**

*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..

I. JOINT LABOR-MANAGEMENT COMMITTEE

1. WHO'S ARBITRATING? Fire fighters much more than Police.
2. DURATION. All awards at least three years.
3. COLAS.

All but one fit between 1.5% and 2.65% average per year. Cities higher than towns, except one "outlier" award.

4. DOES THE BOSTON POLICE AWARD - - 24.5% OVER A 6-YEAR PERIOD - MATTER?
5. INTERNAL PATTERN.

If there is a pattern of internal settlements, it will usually be the most significant factor in the wage determination; but, if total compensation lags, other cash fringe increases may well be awarded.

6. EMT STIPENDS IN BASE.

It is happening more and more (Malden, Falmouth, this year), but is not unavoidable (Easthampton).

7. NO GOOD DEED GOES UNPUNISHED.

Not cutting Quinn bill pay and/or offering post-2009 police officers education incentive MIGHT increase an award for fire fighters (and it at least undercuts ability to pay argument).

8. "WE'RE WORKING HARDER, AND, WE PRODUCE REVENUE!"

These two tacks actually worked in one fire case as a rationale for an award somewhat higher than the Town's offer, but not an unreasonable bottom line.

9. CHOOSE WISELY.

Arbitrators with long track records are (somewhat) predictable, ones without long track records are sometimes, shall we say, malleable.

II. DEPARTMENT OF LABOR RELATIONS

A. The Duty to Bargain in the Age of Technology

The Town of Plymouth violated GL c. 150E by instituting a cell-phone policy for the Town's Department of Public Works employees without bargaining with the employees' union, notwithstanding the Town's managerial interest in the safety of its employees, because the policy was broad and reached beyond driving issues. Remedy: cease and desist implementing the policy, and rescind any discipline. Town of Plymouth and American Federation of State, County and Municipal Employees, Council 93, 40 MLC 65 (2013).

B. Past Practice in the Age of Technology

In City of Boston v. AFSCME, Council 93, AFL-CIO, Local 804, 40 MLC 121 (2013), the City did not violate the law when it used general computer knowledge and skills as a criteria for evaluating and selecting candidates for promotion to the position of Waste Reduction Supervisor. The Hearing Officer rejected the Union's claim that using computer knowledge and skills as a criteria constituted a change in past practice where there was no evidence as to what criteria had previously been used and where employees could reasonably expect that computer skills would be required based on the daily work in the department.

C. Does Management Have the Right To Decide Who's In Charge?

In City of Peabody v. Peabody Police Benevolent Association, 39 MLC 205 (2013), a case decided before Boston Superiors, the Hearing Officer found that the City's decision to change the practice of assigning senior sergeants to the position of Officer in Charge in the absence of a lieutenant impacted a mandatory subject of bargaining. She ordered the City to make OIC payments for a 13-month period, with interest at ...12%.

D. Eliminating Position/Assignment

In City of Boston v. Boston Police Superior Officers Federation, 40 MLC 126 (2013), a Hearing Officer determined that the City's decision to eliminate the position of Street Sweeping Initiative supervisor, and the scheduled overtime that accompanied it, did not violate the law, as it constituted a level of services decision that was a managerial prerogative. The City did, however, have an obligation to bargain over the impacts of that decision.

Because impact bargaining only would have ameliorated the situation, and would not have substantially changed the effect of the decision to eliminate the SSI position, the City was not required to retroactively "make whole." Instead, the Commission ordered the City to bargain about prospectively restoring the economic equivalent of status quo—from the date of decision until an agreement or impasse was reached with the union.

E. It's Concerted, But Is It Protected Activity?

In Andover School Committee v. Andover Education Association, 40 MLC 1 (2013), the Board found that the School Committee unlawfully terminated a teacher for sending an email urging high school faculty to vote to abstain from considering self-study reports required for a high school accreditation process, because the teacher's email qualified as protected concerted activity under Section 2. The case turned on the proposition that the "abstain" option offered to teachers was intended to allow teachers to express an opinion on the state of bargaining about the School Committee's proposal on high school scheduling.

III. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION

A. Employers May Terminate Based on Performance and Attendance Issues Resulting From Disability

In MCAD, et al., v. Affiliated Professional Services, the Commission held that an employer did not commit discrimination by terminating a diabetic employee. Due to frequent absences and medical issues in the workplace, the employer terminated the employee for attendance and safety reasons, noting that her condition “put employees in the ‘uncomfortable and unsafe position’ of making medical decisions on her behalf and that they should not be responsible for monitoring her wellbeing.” The Commission accepted the employer’s affirmative defense and held that sufficient risk of harm to the employee existed to justify the termination decision. The Commission noted that the employee often failed to recognize the severity of her condition or the dangerousness of her side effects, and that her inability to control her illness led to severe disruptions in the workplace. Further, the Commission held that the employer established that no other accommodation was reasonable, considering that it had already accommodated the employee’s excessive absenteeism and tardiness for over two years, changed her job to a position that did not require a replacement and on one occasion offered her FMLA leave.

B. Employers May Limit Emotional Distress Damages by Presenting Evidence of Pre-Existing Mental Health Issues or Other Non-Job Related Stressors

In Haywood v. Office of the Commissioner of Probation, 35 MDLR 66 (2013), an African-American complainant alleged that the Office of the Commissioner of Probation discriminated against him based on his race when it failed to promote him to a temporary or permanent probation officer position. The complainant established a prima facie case of discrimination by demonstrating that in 2001, 2007 and 2009, he applied to be a probation officer and was bypassed each time in favor of less senior, Caucasian applicants. The parties’ CBA required the employer to preference seniority when considering promotions and the Supreme Judicial Court’s investigative report on the employer’s hiring and promotion practices showed that the employer often failed to promote the most qualified candidates. While the employer attempted to rebut the discrimination by claiming it satisfied its affirmative action plan, the Hearing Officer found that the employer compared the number of minorities holding a wide variety of positions in the courts with statewide minority labor pools, instead of analyzing the specific courts where the complainant applied for a position. To remedy the discrimination, the Hearing Officer ordered the employer to appoint the complainant to the next probation officer vacancy in any Suffolk County Court where African-Americans are underrepresented as probation officers; awarded front pay from the period between the commencement of the public hearing, July 16, 2012, and the date of appointment; awarded \$30,017 in back pay; and awarded \$75,000 in emotional distress damages, after taking into

account other sources of the complainant's stress, including the murder of his aunt in 2010 and his history of depression that predated the discrimination.

C. Retaliation and Associational Discrimination

Scanlan v. Department of Corrections, 35 MDLR 52 (2013), reminds employers to carefully consider taking adverse action against employees who engage in protected activity or are closely associated to someone who engages in protected activity. (Retaliation in assignment of duties to female corrections officer -- pat-frisking inmates -- after her husband, a former employee, filed his own discrimination claim). Remedy: \$10,000 fine, and \$50,000 in emotional distress damages.

D. Employers must take an active role in the interactive process and seriously consider all requests for reasonable accommodations in order to avoid a finding of disability discrimination.

In Daly v. Codman & Shurtleff, Inc., 35 MDLR 85 (2013), the Full Commission affirmed the Hearing Officer's decision holding that the employer was guilty of disability discrimination after the employer failed to have a "meaningful discussion" with the employee regarding reasonable accommodations. The Commission found that the Hearing Officer's decision was supported by evidence that the employer failed to address the employee's repeated requests for accommodation for her heart condition, which was exacerbated by stress, and that "there was little meaningful discussion" about reducing her workload. The Commission further held that the employee was constructively discharged, as the stress of the work environment exacerbated her cardiac condition to the extent that she became anxious, nauseous and short of breath, and was forced to leave her employment. In addition to affirming a \$100,000 emotional distress disability discrimination award, the Commission awarded the employee reasonable attorney fees of \$77,355 and costs of \$3,680.97. To avoid steep liability, it is not enough to engage in the interactive process with disabled employees. Instead, employers must take an active, meaningful role in the interactive process and ensure that they consider all requests for reasonable accommodations.

E. Retaliation: Is Timing Everything?

In Vargas v. Saybolt LP, 35 MDLR 131 (2013), the Hearing Officer found that the employer, Saybolt LP (Saybolt) retaliated against the employee by terminating her employment after she filed a race discrimination claim with the Commission. The employee filed a race discrimination complaint in October 2008, just three months before her termination in January 2009. While the Commission found a lack of probable cause as to her discrimination complaint, the Hearing Officer held that the employee established a prima facie case for retaliation, as the three month period between her complaint and her termination constituted "a very short period of time," indicating a causal connection. Despite the legitimate business reasons Saybolt asserted justifying the employee's termination, including ongoing performance and attendance issues, the Hearing Officer concluded that Saybolt retaliated against the employee, because absent her

complaint, the employer would have been more likely to work with the employee to improve her performance and attendance. This case serves as a reminder to proceed with caution before taking an adverse employment action against an employee who has recently engaged in protected activity.

IV. CIVIL SERVICE COMMISSION

A. BYPASS CASES

1. Hiring Standards: How Much Tolerance of Past Indiscretions?
And, what is an indiscretion?
 - The Boston Police Department had two rather contrary results in hiring bypass cases including pre-employment indiscretions. In one case, Walker v. Boston P.D., a bypass infected by a very hostile background investigative interview was overturned – despite evidence of a prior OUI charge and discipline by a former employer – because the Department had hired other officers with similar records.
 - Yet, in Berkley v. Boston P.D., the Commission (Stein dissenting) upheld a department policy of rejecting any candidate with an OUI charge, in the past ten years, which had been “CWO’f’d,” i.e. an admission to sufficient facts, with conditions, leading to a “continued without a finding”... the typical disposition of virtually all OUI first offenses.
 - But past criminal charges alone are not sufficient. In Rodriguez v. Department of Correction, 26 MCSR 574, the Commission accepted the findings of the DALA Magistrate who heard the case, but rejected the Magistrate’s conclusion and voted to allow the Appellant’s appeal. In allowing the appeal, the Commission determined that the Department of Correction’s (“DOC”) standard practice of disqualifying **any** candidate who has **any** entry on his/her CORI report within the past five (5) years is flawed, and that the practice “lends itself to decisions that are both illogical and illegitimate.” In Rodriguez the DOC relied solely on a CORI report that showed that Ms. Rodriguez had been charged with Larceny Over \$250 by a single scheme in 2007, even though that charge was dismissed in 2008 at the request of the victim. The DOC failed to meet with the Appellant to provide her with an opportunity to address the charge and failed to obtain a copy of the criminal complaint. The Commission’s decision puts pressure on appointing authorities to conduct further investigation in order to meet the “reasonably thorough review” standard endorsed by *City of Beverly v. Civil Service Commission*, 78 Mass.App.Ct. 182, 190-91 (2010).
 - And mere involvement at the scene of crimes of violence and gang activity, even on 11 occasions, is not enough reason to bypass a police candidate, at least not without having conducted an interview to address issues in the background investigation.

Sostre v. Boston Police Department (2013). In Sostre the Commission also struggled with the fact that the applicant was “less than forthcoming” with police responding to a domestic violence call caused by her boyfriend striking her on the head with a beer bottle.

- Is it enough reason to bypass an employee who had negative assessments from a former supervisor, and admitted to poor judgment leading to a 90 day probation in a prior job? For the Commission, no, a 3-0 vote with Commissioner Henderson as hearing officer, Palmer v. Boston Police Department, 25 MCSR 9 (2011). For the Superior Court, yes, reversing the Commission decision. As an improper substitution of judgment. Palmer v. Boston Police Department (2013).

2. Psychological Bypass cases After Kavaleski Decision.

In Police Department of Boston v. Kavaleski, 463 Mass. 680 (2012), the Supreme Judicial Court concluded that evidence was, in fact, sufficient to allow the Commission to reject the Boston Police Department’s psychological bypass of a police officer candidate. The court affirmed the Commission’s decision that the subjective observations and determinations in the psychological reports were insufficient to support the inference that the applicant’s personality traits would interfere with her ability to conduct police work in an “objective, real-world context.” The court further chided Dr. Reade, the psychologist, by noting that she “did not provide a single ‘convincing situational example’ to support her conclusion” that the candidate was not psychologically fit to become a police officer.

Through the psychological bypass cases following Kavaleski, the Commission has alluded to what it is looking for when it assesses the sufficiency of a psychological bypass case. First, the appointing authority’s mental health professionals must determine whether the candidate was ever diagnosed with or treated for a Category A psychiatric condition or whether evidence of a current Category B condition exists.

If a condition exists, the professionals must next determine whether it is of “sufficient severity to prevent the candidate from performing the essential functions of a police officer without posing a significant risk to the safety and health of him/herself or others.” For the Commission to consider this requirement met, the evaluation must indicate specific, problematic behavioral issues and an explanation regarding why those qualities would render the candidate unfit as a police officer. For example, in Kaufman v. New Bedford Police Department, 26 MCSR 169, the first bypass decision following Kavaleski, the Commission affirmed a candidate’s bypass for original appointment based on the recommendations of a psychologist and a psychiatrist who found that the candidate’s Attention Deficit Disorder (ADD) would lead to difficulty in his

managing the challenges of police work. Unlike in Kavaleski, where the Commission found that “neither [the psychiatrist] nor the [Boston Police] Department asserted that Kavaleski would be unable to perform the essential functions of the job of a police officer,” in Kaufman, the clinicians who performed the first and second level of psychological review both specifically concluded that based on the way his ADD presents, the candidate would not be suitable as a police officer.

Finally, the appointing authority should make a showing that the mental-health evaluations were rendered impartially and without personal bias or animus towards the candidate. Additionally, careless errors and incomplete review and/or analysis should be avoided. For example, in Clark v. Boston Police Department, 26 MCSR 286, the Commission reversed the bypass of a candidate for original appointment after rejecting the psychologist’s conclusion that the candidate showed signs of a “Category B behavioral disorder,” because he never supported that conclusion by identifying any disorder or specific problematic behavioral responses. Further, a sloppy mistake indicated that, in preparing his evaluation for the candidate’s second bypass, he copied his evaluation report from the first bypass verbatim, including the same scrivener’s errors. By following these principles, appointing authorities may be able to avoid the unfortunate results the Boston Police Department bypass cases have produced.

3. Drug Testing Standards For Discipline Will Apply To Pre-Employment Drug Testing.

In Re: Boston Police Department Drug Testing Appeals (“D” Cases), 26 MCSR 73 (2013), a consolidation of ten Boston Police Department discipline cases based on failed drug tests, the Commission discussed the use of workplace hair testing for drugs, its history, reliability and the science behind it. In each appeal, a former Boston police officer was discharged after their hair samples tested positive for the presence of cocaine. Commissioner Stein noted a variety of factors that determined the hair test’s accuracy and levels of the drugs found in an individual’s system -- including, the type, length and location of the hair sampled for testing, the reliability of the testing process itself, and the standard used to determine the existence of illegal drugs. In the context of a discipline case, the Commission explained that positive drug test results were presumed accurate until the Appellant presented credible evidence to refute the positive result.

In the context of bypass decisions, however, where public employers have greater discretion in hiring decisions, employers have a greater burden in ensuring the validity of their drug testing. In Lecorps v. Department of Correction, 26 MCSR 519 (2013), the Commission held that an appointing authority needs to address the factors identified in the BPD Drug Test Appeals, and provide appropriate evidence in support of such factors, if the appointing authority bases bypass decisions on hair drug test results.

The Commission also took the time to point out several issues with the DOC's drug testing policy that need to be addressed in light of the Commission's ruling. While the DOC's written Selection and Hiring Policy states that a candidate's failure of the drug test will result in the candidate's bypass for appointment, the policy does not establish a standard for the amount of a drug detected in a drug test that constitutes a positive result. Further, the DOC does not re-test candidates who test positive. Finally, the DOC's use of "positive" and "negative" drug test results is not an adequate indicator of drug use because marijuana is not absorbed into hair in the same manner as cocaine, so the test for marijuana may be less effective at detection than a hair drug test for cocaine.

In light of these decisions, appointing authorities are encouraged to review their drug testing policies and procedures -- both for current employees and for prospective employees. Drug testing policies should reflect what results constitute a "positive" or "negative" test result, and a procedure for re-testing in the event that a test result is positive.

B. DISCIPLINE CASES

1. How Soon Can A Last Chance Warning Be Issued?

In Aime v. D.O.R., a veteran corrections officer with 18 years of service and some prior discipline (2 short suspensions, one still on appeal, and two reprimands) engaged in conducting warranting a 20 day suspension. Of interest is the fact that the decision upholds the issuance by the employer of a last chance warning as part of the discipline.

2. Are Serious But Stale Charges Against A Police Officer Actionable If Unreported By Other Officers, Including A Sergeant?

In Venuto v. Braintree a majority of the Commission upheld a discharge based on serious misconduct occurring 2-3 years before it was reported up the chain of command to the Police Chief. Commissioner Stein dissented, largely because of the staleness of the charges and failure to discipline other officers who failed to report the violations. The decision does not cite the Superintendent of Belchertown State School case, a 1980 Appeals Court decision noting, as to some charges which were three years old, that c. 31, § 41 does not contain a statute of limitations.

3. Which Violent Threats Constitute Dismissible Offenses?

If you guessed all of them...you're wrong. After all, if the threat does not involve the use of deadly force, but merely threatens serious bodily harm then the issue is...more complicated. Then there is always the question whether the threat is merely a joke or a manifestation of workplace banter. And of course if only one of two threats is proved, what happens to the discipline?

a. In a school setting, a threat by a cafeteria helper to "f-up" and "kill" a school nurse over a snafu with a student (the appellant's son) is abhorrent. The failure to prove another threat to a different employee did not warrant modifying the discharge decision. Jackson v. Worcester Public Schools. [In so ruling, the Commission cited our firm's two favorite Falmouth cases, the 2004 Appeals Court and the 2006 S.J.C. decision.]

b. Is This Just Workplace Banter?

Phone conversation between supervisor who had previously issued a reprimand to an employee and the employee:

Supervisor: It's Mike. What's up?

Employee: Mike who?

Supervisor: Mike Santangelo, Custodial Supervisor. You know, I'm the guy whose neck you'd like to put a rope around."

Employee response:

A. "How did you know? Was it something I said?"

B. "With all due respect Mike, I would never even think of doing that"

C. "Didn't they train you not to use violent metaphors in the workplace?"

D. (After several seconds) "Oh yeah, you. I'd rather put a bullet through your head. It would be quicker."

If you guessed D, which stands for discharge, you are...right. Fanion v. Worcester Public Schools.

c. Substitution of Judgment Disorder

The tendency of neutral parties, Civil Service commissioners and arbitrators -- to substitute their judgment for employers with substantiated concerns about an employee's fitness for employment -- continues unabated. Public employers have established legally binding precedent that employees who engage in substantial misconduct can be denied appointment, or if employed, can be disciplined or discharged. Still, the Commission continues in some cases to overreach. In Moniz v. D.O.C., a bare Commission majority converted a discharge into a 21 month suspension, even as it upheld a charge that Moniz had "threatened to bash a co-worker's head in."

4. 2013 Lame Excuse Award

An employee of the Boston Redevelopment Authority faced a daunting challenge in meeting its attendance requirements: An imminent sentence to serve one year in the house of correction. Taking a "first things first" approach, he asked his supervisor, on short notice, to take six weeks' vacation. When asked why, he responded: "It's just a vacation."