

# NORRIS, MURRAY & PELOQUIN, LLC



Legal Counsel to Employers and Schools

## **Lowlights and Highlights of Agency Employment Decisions Reported in 2018**

*A Presentation to the  
Massachusetts Municipal Association  
Annual Meeting*

*January 18, 2019*

**Presented by**

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A SPECIAL THANKS TO ANTOINE FARES FOR HIS ASSISTANCE PUTTING THESE MATERIALS TOGETHER. ANTOINE GRADUATED FROM SUFFOLK LAW IN DECEMBER, 2018 AND IS TAKING THE BAR EXAM IN FEBRUARY 2019. HE WILL JOIN NMP AS AN ASSOCIATE IN MARCH, 2019.

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<sup>1</sup> NOTICE: This handout and the content herein does not purport to give legal advice for any specific situation, or, come to think of it, even a general situation.

<sup>2</sup> For more detail on DLR and CSC cases, please see our firm’s Management Commentary in Landlaw’s publication of these cases.

<sup>3</sup> To receive our monthly Client Advisor email Julie Pappas ([jpappas@nmplabor.com](mailto:jpappas@nmplabor.com)) to be added to our electronic distribution list.

**Joint Labor Management Committee (JLMC)**

**A. STATISTICS FOR 2018 (CALENDAR)**

67 cases were closed via settlement, arbitration and withdrawal in 2018 as follows:

Year	Number of Cases Filed	Open on 12/31/2017	Open on 12/31/2018	Closed 2018
2015	48	2	1	1
2016	63	22	7	15
2017	67	49	12	37
2018	44		30	14

Of the 44 cases filed, 19 were filed by Fire Unions; 24 filed by Police Unions; and 1 fire case was filed by Management. Jurisdiction (as of 12/31) was extended to 33 cases.

**B. AWARDS SUMMARY: 14 arbitration decisions were issued in 2018**

	ARBITRATOR	AWARD YEARS	WAGES
Amherst Police (P)	Nancy Peace	FY17 – FY19	2%, 2%, 2%
Burlington Police	Gary Altman	FY16 – FY18	2%, 2.5%, 2.5%
Chelsea Police (P)	Beth Anne Wolfson <sup>1</sup>	FY17 – FY20	2.5%, 3%, 3%, 3% (July)/1% (Jan)
Chelmsford Police (P)	Ira Lobel <sup>2</sup>	FY17 – FY19	0.5%, 0.5%, 0.5%
Chelmsford Fire	Bonnie McSpirtt	FY17 – FY19	2%, 2%, 2%
Duxbury Police (P)	Gary Altman	FY17 – FY19	2%, 2%, 2%
Fall River Police (P)	Richard Boulanger	FY16 – FY18	0%, 0%, 2%
Framingham Police (S)	Garry Wooters	FY16 – FY18	0%, 2%, 1%
Lawrence Fire	Gary Altman	FY16 – FY18	\$1,500 (flat, not in base), 2%, 2.5%
Natick Police (P)	Richard Boulanger	FY16 – FY18	2%, 2%, 2%
Seekonk Fire	Beth Anne Wolfson	FY17 – FY19	2%, 2.25%, 2.25%
Somerville Fire	Michael Ryan	FY16 – FY18	2%, 2.5%, 2.5%
Somerville Police (S)	Gary Altman	FY13 – FY18	2.5%, 2%, 2%, 2%, 2.5%, 2.5%
Woburn Fire	Ira Lobel <sup>3</sup>	FY15 – FY18	2%, 2%, 3%, 1.75% (July)/1.75% (Jan)

<sup>1</sup> Stipulated Award

<sup>2</sup> Union proposal to change workweek also awarded (“It must be understood that the increase from 37.5 to 40 hours represents a significant cost to the Town and a significant increase in pay to the police officer in the Union.”). Wages designed to have total overall package similar to the firefighters.

<sup>3</sup> City received health insurance premium change to 75/25 split

### C. STAFFING

John Hanson, Chairman	
<b><u>Management Staff</u></b>	<b><u>Management Committee Members</u></b>
George Driscoll Daniel Morgado	Jill Goldsmith Dean Mazarella* John Petrin Richard Tranfaglia* Kathleen Johnson Lisa Yanakakis  <i>* Awaiting reappointment</i>

### D. TIPS AND TRENDS

- Do your homework
  - Comparability Data
    - Internal – settle other unions; establish patterns
    - External - establish communities and review data early
  - Assess Trends
  - Know your Arbitrator
  - Double check the Union’s “facts” and figures
- Communicate with your Management Reps and Panel Member
- Minimal Bargaining/Race to Arbitration
- Insist on Equal Time; Don’t Sacrifice Your Case

## **Department of Labor Relations (DLR)**

### **BARGAINING OBLIGATIONS**

*CERB UPDATE FROM 2017 Materials: City Must Bargain Impacts of Mediation Program as an Alternative to Potential Discipline for Citizen Complaints*

The Commonwealth Employment Relations Board (CERB) affirmed a Hearing Officer's decision finding the City of Boston had to bargain over a mediation program that impacted disciplinary procedures and other conditions of employment. In City of Boston and Boston Police Patrolmen's Association and Boston Police Superior Officers Federation, 45 MLC 26 (August 30, 2018), the City implemented a voluntary mediation program for citizen complaints against police officers, and its two police unions each filed a Charge of Prohibited Practice for implementing the program without first bargaining to resolution or impasse over the decision and the impacts. The DLR hearing officer found the City had the right to decide to have a mediation program, however, the City had failed to fulfill its duty to bargain to impasse about the impact. The City appealed to the CERB.

As you may recall from last year, the City's mediation program impacted employee discipline because citizen complaints that were successfully resolved through the mediation process would not progress to an [Internal Affairs Division (IAD)] investigation and potential discipline. Therefore, the impact was arguably beneficial. However, the positive impact of the mediation program did not alter the obligation to impact bargain the change in working conditions.

*Compare Newton School Committee's Attempt to Pre-condition Bargaining on Acceptance Of A Proposal to Seekonk Firefighters' Hard Bargaining On 24-Hour Shift*

To bargain in good faith is to allow discussion on all proposals, to listen to each other's arguments, and to show a willingness to consider compromise. In Newton School Committee and Newton Public Schools Custodians Association, 44 MLC 178 (March 14, 2018) (Kerry Bonner, Hearing Officer), the School Committee sought a change in work jurisdiction that would allow the Committee to outsource custodial work at its discretion. Outsourcing the work would have resulted in up to 3 million dollars in savings. After several meetings and a change in counsel, the School Committee took the position that it would not withdraw any of its proposals or proceed on any other economic issues until the outsourcing proposal was resolved. The Union advanced multiple proposals to try to address the outsourcing issue, however the School Committee rejected them or responded that they were "to be discussed later." The School Committee responded only to the Union's counterproposals on the outsourcing issue and rejected the Union's concerns.

The Hearing Officer found that the School Committee failed to bargain in good faith by conditioning its willingness to make economic proposals on the Union's acceptance of an outsourcing proposal. While the School Committee was not required to compromise or concede its position on outsourcing, it was obligated, at minimum, to discuss other economic proposals and could not insist on resolving the outsourcing issue first. The Hearing Officer found the School Committee engaged in bad faith negotiations by failing to make wage proposals and rejecting or setting aside most of the Union's proposals without making a counterproposal.

In contrast, the Hearing Officer in Seekonk Firefighters Association, Local 1931, IAFF and Town of Seekonk, 45 MLC 51 (September 20, 2018) (Jennifer Malonado-Ong, Hearing Officer), found that the Seekonk Firefighters Association, Local 1931, IAFF (Association) had not engaged in surface bargaining when it refused to agree to any changes in its 24-hour shift proposal. Instead, the Hearing Officer found that the Association had bargained in good faith by making numerous concessions for the Town's benefit in order to try to secure an agreement on its proposal and continued to bargain and provide counteroffers even as it maintained a strong position on its 24-hour shift proposal. The fact that the Association failed to provide subsequent meeting dates and filed a JLMC petition after the seventh bargaining session on September 15, 2016, did not indicate a refusal to bargain given the totality of the circumstances.

During successor contract negotiations in Seekonk Fire, the Town and Association met several times to discuss their proposals. During these meetings, the parties were able to agree on some proposals, but could not agree on the 24-hour shift proposal made by the Association. From the start, the Association made the 24-hour shift proposal its top priority. The Town rejected the Association's proposal and expressed concern that it would result in increased costs. After nearly six months the Town presented a counteroffer which the Association rejected primarily on the basis that they wanted the same schedule as their peers. Given that there was no showing of progress in negotiations, the Association filed a petition with the JLMC. The Town filed with the DLR based on what it considered the Association's failure to bargain in good faith.

At the DLR, the Hearing Officer rejected the Town's argument that the Association failed to enter negotiations regarding its proposals with an open and fair mind. The mere fact that the Association did not agree with the Town's counterproposal on the 24-hour shift issue did not constitute bad faith surface bargaining in and of itself.

[T]he law does not require parties to make concessions during bargaining or to compromise strongly felt positions...Where a party is determined to maintain a set position, such as the case is here, it must approach the subject with an open mind by allowing the other side to explain reasons for a proposal and by fully articulating its own reasons for rejecting the proposal. City of Marlborough, 34 MLC 72, 77 (January 9, 2008).

**Practice Tip:** The Newton and Seekonk decisions provide a good contrast of what to do and not do during negotiations when you have an issue that you feel very strongly about. In Seekonk, the Association made compromises during negotiations but was unwilling to compromise on an issue that was important to it – 24-hour shifts with a 42-hour workweek. Contrast this with the behavior of the School Committee in Newton which was unwilling to negotiate on any other issue until its outsourcing proposal was accepted. A party is not required to make compromises or concessions, especially on an important issue, but you need to approach negotiations with an open mind and consider and discuss the other side's proposals; avoid being so rigid in your negotiations that attempts at bargaining become futile.

## **DOCUMENT, DOCUMENT, DOCUMENT**

Documenting negotiation discussions and reducing them to writing can be crucial when there is a dispute. In City of Boston and Boston Public Library Professional Staff, 44 MLC 238 (May 29, 2018) (Kerry Bonner, Hearing Officer), the Union alleged that the City repudiated an oral agreement. The parties were subject to a CBA that expired in September 2010. They bargained for several years before signing a MOA on January 17, 2014 establishing two new contracts for the periods October 1, 2010 to September 30, 2013 and October 1, 2013 to September 30, 2016. As part of this MOA, the parties agreed that unit members would begin to accrue 1.25 days of sick leave per month rather than 7.5 days two times a year (January 1 and July 1). The total number of days per year remained 15.

On January 1, 2015, the Library awarded 7.5 days of sick time to each bargaining member. The City realized the error and notified the Union. The Union took the position that its members were entitled to the new monthly accrual plus the 7.5 days for sick time earned from July 1, 2014 - December 31, 2014 and based on an oral agreement made during successor contract negotiations. The City disagreed and sent a letter to all bargaining unit members announcing its intention to remove 7.5 days of sick leave from each member's bank, which it eventually did (after several attempts to discuss with the Union). The Union filed at DLR claiming the City's removal of the 7.5 days was a breach of an oral agreement it made during previous bargaining sessions.

Prior to reaching agreement on a MOA, the parties had participated in factfinding. The City's last best offer on this issue granted members sick leave at the rate of one and a quarter (1.25) days for each month of service. The Union's last best offer stated: "The PSA is willing to modify this existing language so that sick leave accrues at the rate of one and a quarter (1.25) days for each month of actual service or paid time." The Hearing Officer found no additional language or evidence conditioning the Union's acceptance of the City's proposal on an additional one-time award of 7.5 days at the beginning of the year. Importantly, the Union offered no bargaining notes to bolster its position and had no explanation for why its members had no notes reflecting the alleged oral agreement or even reflecting discussions about the topic of a one-time award of 7.5 days. On the other hand, the City was able to provide detailed notes of the meetings, none of which reflected a discussion about the award of 7.5 sick days. Based on these findings, the Hearing Officer found in favor of the City.

### *Choosing Not To Issue Discipline for Misconduct Prevents An Employer From Using Incident As An Aggravating Factor For Later Misconduct*

In Town of Williamstown, 45 MLC 1 (July 20, 2018) (James Sunkenberg, Arbitrator), the Town attempted to use a prior incident – which they had not disciplined the employee for – as one of the three reasons supporting the employee's discharge. On April 28, 2017, while off duty, the Appellant, a DPW employee, responded to a work-related matter at a private residence. The police were called, and he was placed in custody after he was determined to be intoxicated. As a result of this incident, the Town placed the employee on administrative leave and required him to attend a substance abuse program. The Town chose not to discipline him for this incident and failed to document its leniency in any sort of last chance agreement or the like.

A few months later, on November 20, 2017, the Appellant – who was on duty – pulled up to Town Hall and negligently left his town vehicle in “drive” while exiting it. While he was inside the vehicle rolled down the street and crashed into a storage shed of a local motel. Appellant walked to the police station to report the incident, and a police officer administered a sobriety test to him which he passed. The officer also asked him to take a breathalyzer test. The officer claimed in his report that the Appellant tried to avoid taking the breathalyzer test, but no testimony was provided on this, and he did eventually take the test and pass it. The next day, the Town notified the Appellant of his termination, citing as reasons his failure to take reasonable care in operating a Town vehicle, his insubordination with the police officer, and also his prior incident of intoxication.

The Arbitrator found that the Appellant did violate the Town’s Personnel Policy by failing to take reasonable care when operating a Town vehicle, but he also found that because it was his first offense, it warranted no more than a written warning. The Arbitrator rejected the Town’s attempt to include the April incident as an earlier offense because no discipline had been issued for that event. He criticized the Town for trying to say it had “opted to defer” discipline and determined it would be unfair to allow the Town to unilaterally choose not to discipline the Appellant for the earlier behavior when it happened and then used it against him in a later, unrelated incident.



## Massachusetts Commission Against Discrimination (MCAD)

### A. SEXUAL HARASSMENT CLAIMS ON THE RISE

#### #METOO STATISTICS FOR 2018

In February 2018, MCAD Chair Sunila J. Thomas-George reported that the agency was starting to see a rise in sex-harassment complaints in the wake of #MeToo.

- The MCAD reported 29 sexual harassment complaints filed in January 2018, compared to 13 filed in January 2017.
- From 2014 to 2017, the agency averaged only 14 such filings in January.

(Source: <https://masslawyersweekly.com/2018/02/22/metoo-reshaping-landscape-for-sexual-harassment-claims/>)

Preliminary numbers for 2018 show this trend continuing:

- Preliminary numbers show 319 Sexual Harassment cases filed in 2018
- This is approximately a 20% increase over 2017
  - ❖ Caveat: MCAD reports that its preliminary reports have a 5% margin of error so this number could be as high as a 24% increase over last year. Final numbers will not be available until February/March when its Annual Report is published.

Compare with the numbers for disability discrimination:

- In 2016, the MCAD had 1,137 Disability Discrimination cases filed; that number decreased slightly to 1,082 in 2017.
- The preliminary reports for 2018 indicate the number is expected to be somewhere in that same ballpark.

(Source: Email from MCAD (H. Harrison, Assistant to Commissioners)(January 9, 2019)

#### *Protecting Employees May Require More Than Terminating Harassing Employee*

In Martins v. Isabel's Pizza, Inc., d/b/a Papa John's Pizza, 40 MDLR 33 (2018) (Judith Kaplan, Hearing Officer), the Complainant, Michaela Martins, a high school student who worked part-time at Isabel's Pizza, was sexually harassed and assaulted by her supervisor. She informed her parents, who notified the police and the General Manager, and the supervisor was terminated. Following his termination, however, his cousins showed up at the store and asked for her, causing the Complainant to fear for her life. She reported the incident to the General Manager, but he failed to offer protection or to transfer her to another location. Fearing for her safety, the Complainant felt she had no choice but to quit.

The Hearing Officer found the supervisor's conduct was severe and pervasive enough to alter the conditions of the Complainant's employment. In addition to finding sexual harassment, the Hearing Officer found constructive discharge due to the General Manager's failure to "more proactively" protect the Complainant against the threat of violence or retaliation from third parties.

The Hearing Officer awarded Complainant \$75,000 for emotional distress damages and \$2,600 in loss wages as a result of the constructive discharge.

### *Egregious Conduct Not Tolerated Post #MeToo Era*

In Quinones v. Faridoon Zamani, D.M.D & Faridoon Zamani, D.M.D, P.C., 40 MDLR 71 (2018) (Judith Kaplan, Hearing Officer), the Hearing Officer awarded the Complainant, Iris Quinones, \$135,000 in emotional distress damages and \$12,800 in backpay against her former employer, the sole owner of a dental office who engaged in two egregious and unwelcome sexual attacks over two days that included trying to kiss her and forcing her hand on his erect penis. Following the second attack, the Complainant left at the end of the work day and never returned. After discussing the incidents with her sister and her friend, she reported the attacks to the Brookline Police. The Respondent did not appear at the hearing (defaulted) and was found individually liable.

An interesting piece of this case involves on the impacts of the “MeToo” movement on sexual harassment cases, particularly when awarding emotional distress damages. For instance, the Hearing Officer credited the Complainant’s testimony that for two years following the incidents she suffered from insomnia, high blood pressure and anxiety, and that when she saw news reports of similar incidents it affected her even more because she identified with those victims. As the statistics demonstrate, the impacts of the “MeToo” movement are starting to make their way to the Commission, and potentially the courts.

### **B. CASHING IN ON “SINCERE TESTIMONY”**

Complainant’s entitlement to an award of monetary damages for emotional distress can be based on Complainant’s own testimony regarding the cause of the distress...Proof of physical injury or psychiatric consultation provides support for an award of emotional distress but is not necessary for such damages. See Stonehill College v. MCAD, 441 Mass. 549, 567 (2004). There was a string of cases this year where Complainant’s “sincere” or “compelling” testimony carried the day and resulted in significant emotional distress damages.

In Drigo v. City of Boston, 40 MDLR 36 (2018) (Eugenia M. Guastaferrri, Hearing Officer), the Commission awarded the Complainant \$50,000 in damages based solely on his testimony (no other corroborating evidence) that he suffered emotional distress, humiliation and embarrassment. In addition, the negative evaluations and unwarranted discipline was expunged from his record for the period March 2013 to February 2014.

For fifteen years the Complainant received positive reviews and experienced no major issues with supervisors or management. After a new supervisor and two new white employees started in the department, he began seeing a major difference in the way he was treated and an increase in criticism. He filed an internal grievance alleging race discrimination with the City’s Human Resource Department. Immediately thereafter, he became a target for unwanted and increased scrutiny which resulted in disparate treatment and retaliation. Ultimately, he was transferred to another department, where he has not experienced any problems and the positive assessments of his work have resumed. Later he applied for the department head position of his old department.

Although he was not selected for the position, the Hearing Officer found that there was insufficient evidence of pretext to find he was not selected for retaliatory reasons.

**Practice Tip:** Timing is everything. Proceed with extreme caution when evaluating an employee who has alleged discrimination to be sure that you are not scrutinizing the employee more closely, be specific, make sure it has nothing to do with the complaint and have documentation to support the poor evaluation.

In Dateo v. Springfield BBQ, LLC d/b/a Famous Dave's BBQ, 40 MDLR 7 (2018) (Betty E. Waxman, Hearing Officer), the Complainant, a male bartender, alleged that his employer discriminated against him based on his age and gender when his hours were reduced and given to younger female bartenders. The Complainant later added a claim for retaliation after he was terminated because the employer wanted to “put a new face to the bar.” The Hearing Officer found that the composition of personnel consisted mainly of newly hired young females, making it clear that the employer intended to replace all males with females. Upon finding discrimination and retaliation, the Commission awarded the Complainant \$75,000 in emotional distress damages solely on his highly sincere testimony and that of his wife.

**Practice Tip:** When assessing liability and potential damages, keep in mind that although not necessary, medical documentation can lead to a larger payout than sincere testimony alone. Compare Drigo and Dateo with Quinones (above) where the Complainant was awarded \$135,000 in damages based on a combination of her own sincere testimony and medical documentation supporting her distress.

### **C. THE IMPORTANCE OF A GOOD INVESTIGATION**

In Somaira v. Standhard Physical Therapy, et al., 40 MDLR 49 (2018) (Betty E. Waxman, Hearing Officer), the Hearing Officer found Respondent physical therapy firm and its two managers liable for \$50,000 in emotional distress damages and \$3,200 in lost wages after finding the Complainant had endured months of crude sexual harassment by one of the managers (Bulega) while the other (Tambi) turned a blind eye, and then conducted a wholly insufficient sham investigation the day before firing her. The Hearing Officer found it noteworthy that Respondents chose to terminate the Complainant 24-hours after she told Tambi that she would only continue to work for them if Bulega kept his hands to himself. This case is a good reminder that the alleged harasser is not the only person who faces possible liability in a sexual harassment claim, and that a shoddy investigation can be used as a measure of how seriously an employer takes an employee complaint.

In Yvrose v. Danvers Management Systems Inc., d/b/a Hunt Nursing and Rehabilitation Center, 40 MDLR 61 (2018) (Eugenia M. Guastaferrri, Hearing Officer), the Complainant filed charges for racial and national origin discrimination. Among her many allegations, she notified her employer that her co-workers had bullied and harassed her by calling her “monkey face” and ugly every time they saw her. The employer promptly investigated by asking employees whether they engaged in any harassing conduct. It was unable to corroborate the allegations. Although the Hearing Officer found this investigation to be “superficial and should have encompassed more than merely inquiring if employees had participated in or witnessed inappropriate conduct,” she ultimately concluded that the employer’s attempts to investigate employee misconduct were responsive and

prompt. In addition, the Hearing Officer found the employer properly handled the allegations despite not issuing any discipline because it was unable to substantiate the allegations of harassment as they mainly concerned non-specific content.

**Practice Tip:** Employers should consider employing an outside investigator especially if they lack a sufficiently trained inside investigator to do the investigation. In addition, investigations should be complete and not just mere inquiries about alleged misconduct.

#### **D. MCAD DECISIONS WHERE EMPLOYER PREVAILED**

The last few months of the year saw a short string of employer successes at the MCAD:

In Gude v. Jenalyn, Inc. and Alan Frerichs, 40 MDLR 117 (2018), Complainant was terminated and claimed that he was fired because of his race and gender. However, the Hearing Officer found the employer had a legitimate reason to terminate him due to his poor performance and his history of unreliable attendance. Hearing Officer's decision affirmed by the Commission.

In Murphy, III v. Town of Wilmington, 40 MDLR 119 (2018), Complainant was terminated from the Police Academy as a result of not following employer's procedures for reporting injuries. Complainant suffered from a knee injury during the academy and claimed the employer fired him due to his disability. However, the Hearing Officer did not find that his injury qualified as a disability because it did not impair his ability to perform major life activities. Rather, the Hearing Officer found the Town had specific guidelines that all cadets had to follow in reporting injuries sustained during physical training. Once the employer discovered the Complainant had not reported his injury, he was terminated for insubordination. Similarly situated cadets who got injured but reported their injury, managed to graduate from the Academy and remained employed by the Town. The Commission affirmed the Hearing Officer's findings.

In Connors v. Town of Stow & Mark Trefry, 40 MDLR 121 (2018), Complainant, a special police officer, brought a claim of age discrimination and retaliation based on the employer's decision to not promote him to a full-time police officer position. The Hearing Officer found that the Town articulated a legitimate reason for not promoting Complainant due to concerns about prior conduct including angry outbursts toward co-workers and supervisors, and a similar display of anger towards staff at a nursing home. In addition, during his interview for the full-time position, the Complainant gave a response to an interview question that alarmed the interview panel.

In Medina v. Baystate Health, 40 MDLR 129 (2018), Complainant claimed her employer failed to promote her to a full-time substance abuse counselor position due to her race, national origin, and disability. She argued that the employer had counted her FMLA leave against her in violation of the law. However, the Hearing Officer found that the employer had a legitimate nondiscriminatory reason for selecting a higher qualified candidate for the promotion. In addition, the Hearing Officer found no pretext because attendance was only one factor among many that was considered for the position and the employer had not counted the employee's FMLA leave against her. The Complainant had approximately 30 days of non-FLMA absences which the employer was permitted to take into consideration, given that attendance was essential to the counselor position. The Commission affirmed.

## Civil Service Commission (CSC)

### A. STATISTICS FOR 2018 (CALENDAR)

<b>2018 Calendar year Statistics</b> <b>Highlights</b> <ul style="list-style-type: none"><li>• The Civil Service Commission received 280 new appeals in 2018 and closed out 239.</li><li>• The open case inventory of appeals as of December 31, 2018 is 175.</li><li>• 60 appeals have been pending before the Commission for more than 12 months.</li><li>• Average cycle time of all appeals: 26 weeks.</li><li>• Average cycle time of those appeals requiring full or motion hearing: 51 weeks.</li><li>• In 2018, there was only one Commission decision appealed to and decided by Court; the decision was affirmed.</li></ul>								
<b>Total Appeals Pending (2010-2018) as of:</b>								
2010	2011	2012	2013	2014	2015	2016	2017	2018
181	16	179	148	123	90	75	164	175
<b>Total Appeals Pending for More Than 12 Months (2010-2018) as of:</b>								
2010	2011	2012	2013	2014	2015	2016	2017	2018
62	43	46	42	23	2	15	16	60

Source: [https://www.mass.gov/files/documents/2018/12/31/Commission\\_Stats\\_1218.pdf](https://www.mass.gov/files/documents/2018/12/31/Commission_Stats_1218.pdf)

### B. FIRING OF INJURED EMPLOYEE UPHOLD BY APPEALS COURT

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

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

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

### **C. REDEMPTION REMAINS AN OPEN QUESTION**

#### *Stale CWOFF Not Reasonable Justification For Bypass*

A continuance without a finding (CWOFF) received by a Boston Police candidate as a teenager, was not a reasonable justification for his bypass ten years later. Finklea v. Massachusetts Civil Service Commission, et al., Civil Action No. 1784CV00999 (February 9, 2018). The Superior Court decision affirms the Civil Service Commission's (CSC) determination that the "single, stale" CWOFF was not a "conviction" that would disqualify him from serving as a police officer, and that Finklea had not been given an opportunity to explain it.

This case is illustrative of a trend in CSC decisions which cautions appointing authorities not to rely on outdated information and to consider all the facts surrounding potentially disqualifying events. See also Stylien v. Boston Police Department, 31 MCSR 153.

#### *But Middle and High School Bullying Incidents May be Used to Bypass a Candidate*

The Commission's decision in Owens v. Boston Police Department, 31 MCSR 14, is unique given the recent trend in Commission decisions towards giving second chances (see Finklea, above). In this case, the Appellant was bypassed for two bullying incidents that occurred over twelve (12) years ago while he was in middle and high school. According to the BPD, his "violent, criminal misconduct and bullying history of others" calls into question his ability to de-escalate tense and violent situations and "renders him unfit to be a police officer." The Commission agreed.

As a middle school student, Appellant was involved in a fight with another student. The investigating officer reached out to the victim who verified the facts. The victim reported the damage to his teeth as a traumatic injury and further described Appellant as a violent person. The victim also stated that the Appellant had bullied him for years (fifth, sixth and seventh grade), continually calling him homophobic slurs to the point where he questioned his sexuality.

When he was seventeen, Appellant was charged with assault and battery for urinating on a high school hockey teammate in the locker room while he was toweling off. In the police report, the victim reported he was afraid of fighting back because Appellant was larger and stronger. He also stated that a similar incident had occurred a month before and that the Appellant pushed and hit him during hockey practice. After reporting the incident, the victim was harassed and called a "rat" and a "snitch." The background investigator interviewed the victim who confirmed the content of the report and added that the assault and resulting harassment had caused him to leave the school.

In upholding the bypass, the Commission found that the BPD had conducted a reasonably thorough review of the two (2) incidents, including interviewing the victims and one of the parents. BPD was justified in bypassing the Appellant because it had conducted a thorough review of Owens' past and present and determined that he did not fit the criteria to be a Boston Police Officer. In

this case, the Appellant's conduct was so egregious that the BPD was reasonably justified in bypassing the Appellant despite the fact that both events had happened several years ago.

#### **D. TENSION BETWEEN POLICE HIRING AND USE OF CRIMINAL HISTORY**

In Kerr v. Boston Police Department, 31 MCSR 25, the Civil Service Commission (CSC) in a 3-2 decision upheld the bypass of a candidate for police officer based on untruthful answers during a background investigation. In its January 18, 2018 decision, the CSC rejected or set aside 5 of 7 reasons for bypass proffered by the BPD, ultimately relying on untruthful statements to the background investigator about misconduct allegations from middle school, coupled with the appellant's selective memory of traffic warnings and citations, to uphold the bypass. The CSC indicated the traffic citations would not have been enough, standing alone, to uphold the bypass (others lower on the list were appointed with the same concern), however coupled with the other untruthfulness, the bypass was justified. Writing in a rare dissenting opinion, Commissioners Stein and Tivnan would have overturned the bypass.

Both the majority and dissenting opinions highlighted the tension between the need for police agencies to conduct thorough background checks, possibly including inquiring about CORI information, and the Chapter 151B proscription against asking about arrests that do not result in convictions, and seemingly prohibiting the kind of action taken here by holding the applicant accountable for inaccurate answers to prohibited questions. Commissioner Bowman, writing for the majority, found it unnecessary to resolve this tension, but the minority would have done so by finding the questions were illegal. The majority may have been swayed by the cumulative effect of several police interactions Appellant had "forgotten" or thought he did not have to disclose, but the net result was that the bypass finally rested on some police interactions connected to allegations of misconduct when the Appellant was in middle school, a result roundly criticized by the dissent.

The Commission revisited the question of whether an appointing authority may use criminal history questions during the hiring process in Man v. City of Quincy, 31 MCSR 37. One of the reasons the Appellant was bypassed was due to his failure to acknowledge alleged criminal conduct for which he was not charged or convicted. Citing to Kerr v. Boston Police Department, 31 MCSR 25, Commissioner Stein indicated that the Commission did not directly decide what criminal history questions an appointing authority could lawfully ask an applicant.

"The question remains unsettled, however, either by the Commission or in the jurisprudence of the Commonwealth, as to whether appointing authorities who are public safety agencies may be required to hew to the same laws that clearly restrict how other employers can use an applicant's prior criminal history during the hiring process, or whether (and to what extent) the special nature of the work of a public safety officer allows for taking a different path."

Like in the Kerr decision, however, the Hearing Officer found that there was no need to decide this issue and concluded there was another well-established ground on which to disregard criminal history as a basis for Mr. Man's bypass. In this case, Man's criminal history did not make it into the statement of reasons which he was bypassed for and therefore it cannot be relied on as a reason for bypass. Therefore, the question of whether and how far a public safety hiring authority can

properly dig into an applicant's criminal history remains unsettled, and as seen in these two cases, until the matter is settled, the analysis by the Commission is expected to be very fact specific (and will likely vary depending on who is hearing the case).

#### **E. COMMISSION WEIGHS IN ON ACTING TIME**

Earlier this year, the Commission issued a decision that impacted promotional list(s) and promotions of appointing authorities that had a promotion list resulting from the November 2017 Fire Lieutenant and Captain promotional examination. In Borjeson et al v. HRD, 31 MCSR 267 (August 30, 2018 (Interim Decision)) and (September 20, 2018 (Final Decision)) the Commission ordered HRD to include "acting" time in the scoring of Education and Experience (E/E) for all candidates who passed the November 2017 exam. A new online Experience Claim Application is available for candidates to submit evidence in support of a request for "acting" time. Candidates who do not submit a new experience claim will maintain their current score.

The following situations did not need to be rescored:

- Current eligible lists containing only one employee.
- Lists in departments that do not use "acting" time. Departments that do not use "acting" time may submit a letter to HRD signed by the Union and the Appointing Authority indicating that no member has served in an "acting" capacity and therefore their candidates do not need to be rescored. Upon receipt, HRD will release the department's eligibility lists.

The Commission's Final Decision provided that hiring could continue from the current lists until a new list is established incorporating the rescored E/E credit. HRD expected the new amended eligible list to be available January 1, 2019. Any promotions made prior to this date will not be affected by the Commission's decision.

#### **F. DISCIPLINE OF DEPUTY CHIEF FOR IMPROPER RELEASE OF PERSONNEL RECORD REDUCED FROM 10 DAYS TO WRITTEN REPRIMAND**

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

While there were several issues in this case, the one related to the Public Records law had to do with a "scathing and personal" letter written by the Deputy Chief to a Lieutenant Fleury who he had secretly investigated for working more than 16 hours in a 24-hour period in violation of



department policy. The Deputy kept the letter in his IA files and did not consider it disciplinary; he considered it a learning tool related to his investigation. As a result, it was released to The Lowell Sun as part of a request by the newspaper for all internal investigation reports from November 2011, 2014 to November 1, 2016. Lieutenant Fleury learned the letter had been released when portions of the letter were published. Until that time, he did not realize that there had been an IA investigation and believed that the letter should have been exempt from disclosure as a personnel record related to performance and discipline.

# NORRIS, MURRAY & PELOQUIN, LLC

Legal Counsel to Employers and Schools

Volume 7, Issue 1

Client Advisor

January, 2019

## Speaking Engagements

### MMA Annual Meeting January 18-19, 2019

Leo Peloquin and Melissa Murray will present Friday at 2:00 p.m. The topic: "Labor Law Update: New Laws, Recent Cases and Agency Decisions." Unable to attend? Call the office and request a copy of our materials.



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## WE MOVED

We are now across the park at 315 Norwood Park South.



[nmplabor.com](http://nmplabor.com)

## Tougher Than Ever To Use Criminal History To Reject Applicant For Employment

The already restrictive Massachusetts law limiting the use of criminal offender record information ("CORI") in the hiring process has become more restrictive. The "look back" for criminal misdemeanor convictions is now three (3) years instead of five (5), and Employers cannot ask about sealed or expunged records at all. Here is a refresher on Employer dos and don'ts when it comes to using CORI in hiring.

- "Have you ever been convicted of..." questions are prohibited and should not be on your employment application. This was a result of the "ban the box"/fair chance law enacted several years ago;
- CORI should not be considered until the end of the process for reviewing an applicant for employment---after there is a determination as to whether the applicant was otherwise qualified for the position;
- It is still legal to consider felony convictions with a disposition date within the last ten (10) years, misdemeanor convictions with a disposition date within the last three (3) years and pending criminal charges, which includes cases that have been continued without a finding and have not yet been dismissed;
- The above restrictions apply only to inquiries to the applicant, including a request to authorize a CORI check. An Employer still has the right to obtain and consider CORI, including an arrest, from other lawful sources.

Bear in mind that even a criminal record that an Employer can ask about, and consider, does not give the Employer the right to automatically disqualify an applicant. An Employer must be able to give specific reasons beyond the mere existence of the record, including the relevance of the record to the position sought, the nature of the work to be performed, the amount of time since the conviction, the age of the applicant at the time of the offense, the seriousness and specific circumstances of the offense, the number of the offense, any relevant evidence of rehabilitation or lack thereof, and whether the applicant has pending charges. No matter the source of the CORI, the Employer must also tell the applicant what specific information formed the basis for the adverse decision and its source and give the applicant an opportunity to dispute the accuracy of the information.

Any Employer who conducts five (5) or more criminal background investigations per year that include obtaining CORI must have a written CORI Policy that includes the above provisions and a copy of the policy must be provided to the affected applicant.

Contact your NMP attorney if you have any questions regarding the above or to discuss your current CORI Policy or hiring practices.

# NORRIS, MURRAY & PELOQUIN, LLC

Legal Counsel to Employers and Schools

Volume 6, Issue 8

Client Advisor

November, 2018

## Speaking Engagements

### MMA Annual Meeting

January 18-19, 2019

Leo Peloquin and Melissa Murray will join D. Moschos to present this year's "Labor Law Update: New Laws, Recent Cases and Agency Decisions" at the Massachusetts Municipal Association's Annual Meeting and Trade Show, January 18-19, 2019 at the Hynes Convention Center in Boston. Time TBD.



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## SJC Allows Reinstatement of Police Officer Who Made “Intentionally Misleading” But Not False Statements

A fired Pittsfield police officer who made statements in a report that were “intentionally misleading” but not false, was reinstated after the SJC ruled that an arbitrator’s ruling can only be overturned if an officer’s deception leads to false charges. *City of Pittsfield*, 2018 WL 4762406 (2018). In this case, the officer was fired for falsifying the police report and lying about his arrest of a shoplifter. In his report, he said that he moved the suspect from the back of the car for “safety reasons”, but the real reason was to allow supermarket security to photograph her.

The Court ruled that the arbitrator’s factual findings that the officer’s statement was made solely in an attempt to avoid discipline for moving the shoplifter, rather than to falsify criminal charges, was entitled to deference. The Court cited state law favoring the resolution of disputes by arbitrators, and said under the circumstances presented it could not substitute its judgment for that of the arbitrator.

The Court distinguished this decision from an earlier police misconduct case where the officer acted with “egregious dishonesty” by falsely accusing someone of assault and battery on a police officer. *City of Boston v. Boston Police Patrolman’s Assoc.*, 443 Mass. 813 (2005). In that case, the Court ruled that as a matter of public policy an officer who lies should not remain on the force, and overturned an arbitrator’s decision reinstating the officer. In reinstating the officer in this case, the Court made clear that police chiefs still have the authority to fire officers they believe lied, and that departments do not have to reinstate officers whose false words trigger a criminal case against an innocent person. The case does not establish a new standard of behavior for police officers, rather it reaffirms the policy of upholding arbitration awards even if they are wrong.

## DESE Releases New (and Improved) Physician’s Statement for Home or Hospital Placement

The Massachusetts DESE has reviewed and revised the “Home and Hospital” form, a physician’s order for the implementation of educational services in a home or hospital setting. The updates and changes to the form are intended to:

1. improve the physician’s authorization process by narrowing the scope of orders to comply with the regulation; and
2. provide additional clarity to districts by requiring that the authorizing physician provide clear and specific information.

School Districts should begin using the new form immediately. Contact DESE’s Problem Resolution System office with any questions or for further clarification. The form is available on our website and <http://www.doe.mass.edu/sped/28mr/>.

# NORRIS, MURRAY & PELOQUIN, LLC

Legal Counsel to Employers and Schools

Volume 6, Issue 7

Client Advisor

October, 2018

## Speaking Engagements

### October 17, 2018

Melissa Murray and Lisa Adams (MMA) will provide the personnel and labor law update at the Massachusetts Government Finance Officers Association (MGFOA) Fall 2018 Meeting being held at the Old Sturbridge Village.

### October 26, 2018

Tim Norris and Kristine Trierweiler (Assistant Town Administrator in Medfield) are presenting "7 Steps to Bulletproof Documentation" at the Mass Municipal Personnel Association 2018 Annual Labor Relations Seminar at the Devens Common Center.

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## Legislature Relaxes No Smoking Law For Firefighters and Police Officers

It was a windfall for Police Officers and Firefighters in the most recent session of the State Legislature and it came at the expense of Employers and consistency in the law. In our September Advisor, we told you about the law taking effect October 22 under which a Firefighter will get the benefit of the cancer presumption--something previously only available for a disability retirement--for 41-111F claims. In the very same session, the Legislature saw fit to amend M.G.L. c. 41, § 101A, the statute that, until now, called for automatic dismissal of a Firefighter or Police Officer appointed after January 1, 1988 caught smoking tobacco. Now, an offender "shall be provided with an opportunity to enter a smoking cessation program." And a second offense, "may be cause for dismissal." In contrast, the current statute makes it clear that "no person so appointed shall continue in such office" if caught smoking.

While there are some Employers who have decided to give offenders a second chance, now every Employer will have to. The inconsistency is even more pronounced because the original anti-smoking statute was enacted decades ago in the context of legislation that provided a presumption to Police and Firefighters for purposes of retirement for certain conditions--like heart disease--that can be caused by smoking.

## Civil Service Commission Weighs In On "Acting" Time

The Commission recently issued a decision that may impact promotional list(s) and upcoming promotions if you have a promotion list resulting from the November 2017 Fire Lieutenant and Captain promotional examination. In *Borjeson et al v. HRD*, the Commission ordered HRD to include "acting" time in the scoring of Education and Experience (E/E) for all candidates who passed the November 2017 exam. A new online Experience Claim Application is available for candidates to submit evidence in support of a request for "acting" time. Candidates who do not submit a new experience claim will maintain their current score.

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# NORRIS, MURRAY & PELOQUIN, LLC

Legal Counsel to Employers and Schools

Volume 6, Issue 6

Client Advisor

September, 2018

## New Name; Same Focus

Norris, Murray & Pelouquin, LLC (NMP) began August 1, 2018. This issue marks the end of our first full month and our first NMP Client Advisor.

Leo Pelouquin, Tim Norris and Melissa Murray remain in the full time practice and Phil Collins continues to work in an of counsel capacity. Our work is ably supported by our Legal Assistants Tina McCormick and Julie Pappas, and Law Clerk Antoine Fares.

Please update your contacts with our email addresses and check out our website at [nmplabor.com](http://nmplabor.com), or by using the QR code below with your mobile device. ♣

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## Revised Equal Pay Act Now in Effect

Massachusetts Equal Pay Act (“MEPA”) took effect on July 1, 2018. As we have reported in previous Advisors, the revised statute expands the concept of “equal pay for equal work” to a “comparable worth” model that requires equal pay for jobs that are deemed comparable because they require substantially similar skill, effort, and responsibility, and are performed under similar working conditions.

Different pay is allowed in comparable jobs only where the pay differences are related to seniority, merit, productivity, experience, job-related education and training, work location and required travel. The Attorney General has issued guidance and a spreadsheet to help employers perform a self-evaluation. The self-evaluation, if sufficiently comprehensive, acts as a safe harbor to liability as long as the employer is taking reasonable steps to remediate any gender related pay discrepancies revealed by the evaluation.

The statute also prohibits employers from asking candidates about pay history, and prohibits employers from restricting employee communications about their own wages. Massachusetts employers should consider conducting the evaluation every three years to avoid getting caught up in what is likely to become a popular area of the law among employee advocates. ♣

## Cancer Presumption Expands to 111F: Can the Employer Demand Bargaining?

Previously available only for disability retirements, starting October 22, firefighters will get the benefit of the cancer presumption to go on injured leave. Specifically, after five years on the job, a firefighter who contracts any of a long list of cancers is presumptively entitled to injured leave pay under MGL c. 41, §111F, and medical reimbursement (§100). To overcome the presumption, an employer will have to prove that risk factors, accidents, or hazards unconnected to firefighting caused the cancer. Since MGL c. 41, §111F is a statute that can be modified through bargaining, employers may be able to demand that the unions bargain about this costly change, which may not be covered by insurance available to help employers absorb §111F related costs. Can an employer bargain to eliminate the presumption? (Even if it is legal to do so, it would certainly be difficult). Can an employer demand impact bargaining about the administration of a cancer claim, including a specific policy/process? When the Legislature passes legislation favorable to employers, the unions often demand impact bargaining before implementation. We see no reason why, with this law, the shoe should not be on the other foot. ♣

# NORRIS, MURRAY & PELOQUIN, LLC



Legal Counsel to Employers and Schools

## **Leo J. Peloquin**



Leo J. Peloquin has 32 years of experience representing employers and educational institutions in all aspects of labor and employment practice. He appears before state and federal trial and appellate courts in Massachusetts, administrative tribunals, and labor arbitrators. He has represented and advised employers in all aspects of collective bargaining, (including contract negotiations, mediation, interest arbitration), unfair labor practices, disciplinary matters, Civil Service Commission and Department of Labor Relations hearings and court litigation.

Mr. Peloquin also defends public and private employers in discrimination and other employment litigation matters.

## **Melissa R. Murray**



Melissa R. Murray has over 8 years of experience representing public and private employers in all aspects of labor and employment practice. Her experience includes litigation before state and federal courts, administrative agencies, and labor arbitrators. She has experience in the field of education and school law, including special education, student discipline, labor relations and other personnel matters, and all other school-related matters. Melissa has conducted investigations into serious employee misconduct and other abuses, and regularly advises clients on conducting their own investigations. She works closely with employers and educational institutions to develop policies and identify practical problem solving solutions.

Melissa also has considerable experience with police and fire interest arbitrations before the state's Joint Labor Management Committee (JLMC). She works closely with and advises clients on trends, identifying comparable communities, and provides compensation analysis to help clients make data driven decisions.

Melissa is President of the Board of Directors of the Massachusetts Council of School Attorneys.

## **FIRM DESCRIPTION**

### **OUR FIRM**

Norris, Murray & Peloquin, LLC consists of four attorneys engaged in the practice of labor employment law on behalf of municipalities and other employers, and education law on behalf of schools. Collectively, we have over 110 years of 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, 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.

### **OUR PRACTICE**

#### **Advice**

Getting the right advice before you make important employment decisions can be crucial to sustaining those decisions against a challenge.

#### **Collective Bargaining**

Our attorneys have thousands of hours of experience at the bargaining table on behalf of unionized employers. We also support employers in bargaining even when we are not at the table. We have negotiated contracts involving teachers, police, firefighters, custodians, paraprofessionals, public works, administrators, department heads, clerical employees, and more.

#### **Education and Special Needs Law**

Our attorneys are experienced in dealing with the myriad of issues that school committees and educational institutions must face, including special education, student discipline, open meeting law, public records law, contracts and public bidding, civil rights, and more.

#### **Litigation**

We assist clients through all phases of litigation and regularly provide representation at all levels of state and federal courts and administrative agencies. We work with our clients to put them in the best possible position to succeed. We provide a wide range of experience, coupled with a common sense, results-driven approach to litigation and alternate dispute resolution that is both cost-effective and efficient.

#### **Training and Speaking**

As part of our commitment to proactive lawyering, we offer training to managers and client personnel about labor and employment law issues and school law developments that impact their work. Our attorneys have offered workshops in areas such as sexual harassment, conducting investigations, workplace violence, medical marijuana, Americans with Disabilities Act compliance, affirmative action, student discipline, wage and hour laws, special education related topics, and many others. We are also willing to customize training to meet the needs of our clients.





