



Annual Labor Update: Selected Massachusetts Agency Decisions in 2019

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at the

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Joint Labor-Management Committee (JLMC)

Award Summary of the Six Decisions Issued in 2019

- The JLMC published its awards for six decisions issued in 2019.

	Arbitrator	Award Years	Wages
Beverly Firefighters	Richard Boulanger	FY 19-21	1%, 2%, 1%(Jan.), 2%(July), 1%(Jan)
Chelmsford Police (S)	Beth Anne Wolfson	FY 17-19	2%, 2%, 2%, 1.5%(Jan), 1.5%(June)
Newton Police (S)	Bonnie J. McSpiritt	FY 15-18	Not at issue before JLMC
Plymouth Police (S)*	Bonnie J. McSpiritt	FY 16-18	3.5% retroactive to July 1, 2017
Quincy Police (P)	Gary D. Altman	FY 16-18, 19-20	1%, 2%, 2%, 2%, 3%
Watertown Police	Mary Ellen Shea	FY 17-19	2.25%, 2%, 2%

Newton Superior Officers Decision

- The City of Newton obtained from the JLMC, the right to utilize non-police personnel to direct traffic.
- The arbitrator found:
 - Demonstrated problem of unfulfilled traffic details that would not be remedied simply by expanding the detail pool only to retired police officers, state troopers, and sheriffs.

Newton Superior Officers Decision (cont.)

- Therefore, the arbitrator permitted for the inclusion of individuals with “prior law enforcement experience or training acceptable to the Chief of Police” in the detail pool.
- However, these individuals were included last in the call-down order.

JLMC Takeaways

- Try to settle before going to arbitration.
 - Have a clear vision of where you want to go
 - Think strategically, not reactively
 - Preparation is critical
 - Be wary of any variations in patterns
 - Anticipate tactics, employee reactions
 - Pay attention to language: language IS money
- Sometimes this is beyond your control or would be too costly in language or money.

JLMC Takeaways

- How do you position yourself to win?
 - Again preparation is critical
 - Make sure you have the right issues teed up
 - Take advantage of mediation



Department of Labor Relations (DLR)

DLR Investigates the Dedham Teachers' Strike

- On October 25, 2019, the Dedham Education Association and its members participated in a one-day strike.
- Two days before the strike, the Dedham School Committee filed a petition with the Department of Labor Relations for a strike investigation.
 - Strikes as well as inducing, encouraging, or condoning strikes are prohibited for public employees and unions.

DLR Investigates the Dedham Teachers' Strike (cont.)

- Following the DLR's investigation, the CERB determined that a strike was about to occur before the strike vote had happened and that the Union and its president violated the law, pointing to an array of evidence:
 - A flyer which stated that a strike was to occur and where it would take place.
 - Statements by the Union such as “What options are left” and “Enough is enough”.

DLR Investigates the Dedham Teachers' Strike (cont.)

- Evidence continued:
 - The Union president told the School Committee that a strike could still be averted, yet when the School Committee moved on to issues important to the Union, the Union president rejected them without making any counterproposals.
 - The School Committee made contingency plans, including police details and scheduling an in service day to ensure student safety.

Key Takeaways

- The DLR's willingness to intervene prior to a strike vote being taken allows employers to accelerate the legal process necessary to stop a strike
- This plays an important role in giving the employer leverage during negotiations.
- Thus it is critical to keep DLR apprised of potential strike
- Be assiduous about collecting evidence and presenting it in an organized fashion.
- Be prepared to move fast.

Mandatory Subjects of Bargaining

- Fitness for duty procedures including: the selection of the evaluator, the information provided to the evaluator, the testing protocol, the results, and to whom the results may be communicated. (City of Newton and Newton Police Superior Officers Association)
- Prohibition on employees eating at their workstations (City of Boston and Boston Police Superior Officers Federation)
 - However, requiring employees to drink out of spill-proof containers did not require bargaining

DLR Issues Decision Regarding Observers in Negotiations

- The Union proposed allowing silent observers during negotiations which the employer rejected.
- The Union argued that the refusal to bargain conflicted with its right as an internal union matter to select a negotiating team.
- The School Committee argued that allowing observers obviates longstanding precedent establishing that bargaining sessions are closed unless the parties agree otherwise.

DLR Issues Decision Regarding Observers in Negotiations (cont.)

- The CERB found that the School Committee did not violate the law by refusing to bargain with the Union in the presence of the silent representatives.
 - The Union was not sufficiently clear that the silent representatives were members of the bargaining team and not simply observers from the bargaining unit.
 - The School Committee had rejected a proposal to open the bargaining sessions to bargaining unit members.

DLR Issues Decision Regarding Observers in Negotiations (cont.)

- This was a win for employers, but a very narrow one tied specifically to the facts of the case.
- The CERB suggested that the Union would have had a stronger case had the Union notified the School Committee that the silent representatives were indeed members of its bargaining team.
 - Suggestion was limited to 7 additional members. The CERB did not comment on a proposal to include significantly more members.

Representation Petitions

- 2019 did not bring significant developments in law regarding representation petitions
- One case of interest discussed the merger of multiple bargaining units and whether particular employees should be severed from this larger group.
 - Town of Braintree, New England Police Benevolent Association, and AFSCME Council 93, AFL-CIO



Civil Service Commission (CSC)

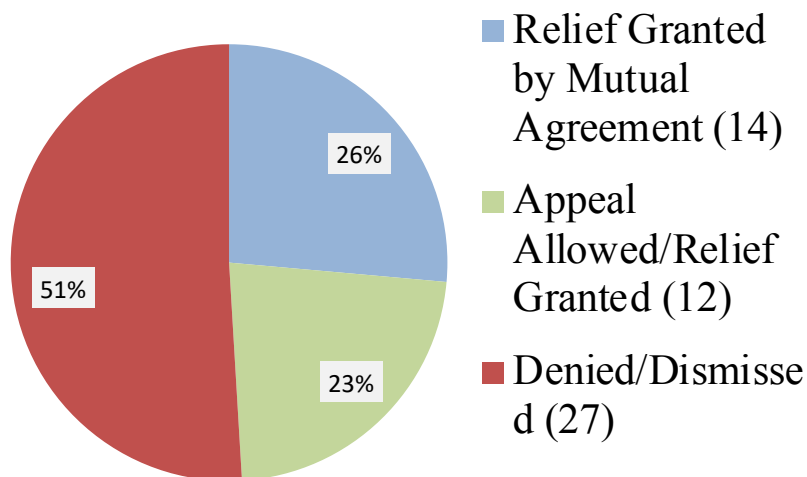
2019 Statistics

- The Civil Service Commission received 277 new appeals in 2019 and closed out 262 cases.
- The Commission's open case inventory of appeals as of December 31, 2019 was 190.
- The average cycle time for all appeals, based on a three-year rolling average, is 28 weeks. However, appeals that require a full hearing or a motion hearing average 52 weeks.
- In total, the Commission issued 88 substantive decisions, including 53 bypass and related appeals, 32 discipline and layoff appeals, 9 classification appeals, and 8 examination appeals.

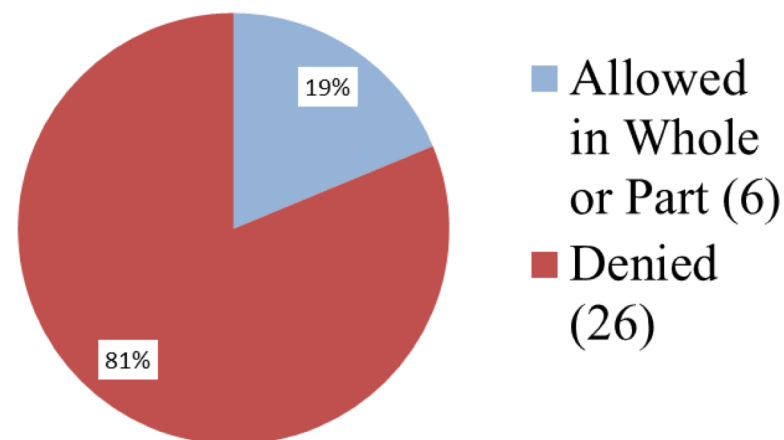
2019 Statistics (cont.)

- The results of the decisions, organized by the type of case, are as follows:

Bypass and Related Appeals

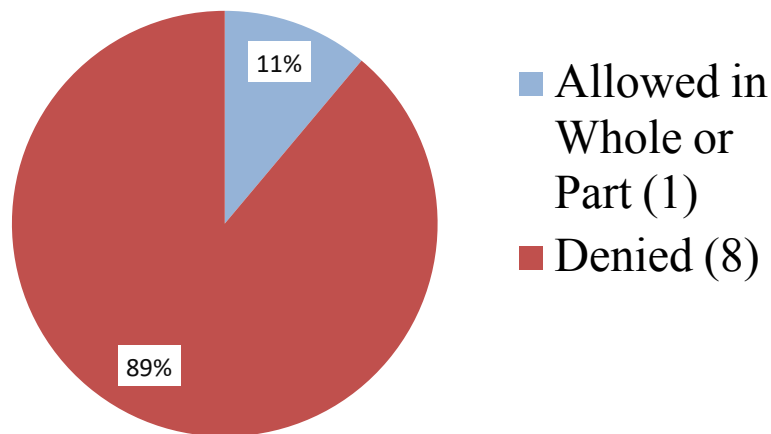


Discipline and Layoff Appeals

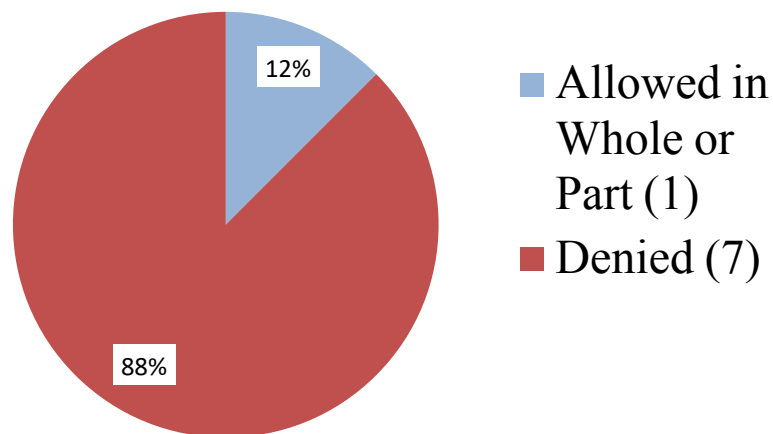


2019 Statistics (cont.)

Classification Appeals



Examination Appeals



Octavius Rowe v. Boston Fire Department

- Commission upheld the termination of an African-American Boston Firefighter who made racist and homophobic comments on his social media accounts.
- However, the Commission found that the fire department did not thoroughly investigate similar complaints regarding comments made by white firefighters.

Octavius Rowe v. Boston Fire Department (cont.)

- Commission opened a Section 72 inquiry essentially requiring that Boston Fire Department complete more thorough investigation
- **TAKEAWAY:**
 - Remember the rule of consistency
 - Take care to ensure uniformity in investigations and treatment of employees

Boston Police Department v. Civil Service Commission

- In 2013, Michael Gannon was bypassed for a position in the Boston Police Department after a drug test of his hair tested positive for cocaine.
- Mr. Gannon appealed the bypass to the Civil Service Commission arguing that the hair drug test was unreliable.
- The CSC heard from witnesses both supporting and challenging the accuracy of the drug hair tests.

Boston Police Department v. Civil Service Commission (cont.)

- The CSC found that the hair tests were unreliable and as a result, the Police Department had not demonstrated reasonable justification for bypass of Mr. Gannon.
- The Department appealed to the Superior Court which reversed the CSC's decision.
- The Supreme Judicial Court elected to hear the appeal, upheld the CSC's determination that the hair drug test was unreliable, and found for the applicant.

Boston Police Department v. Civil Service Commission (cont.)

■ KEY TAKEAWAYS

- Hair drug tests, alone, are not sufficient to bypass an applicant
- SJC rejected the standard set forth in Beverly. Court said need to prove prior misconduct by a preponderance of the evidence. **Beverly** had previously held that it was enough to show “a sufficient quantum of evidence to substantiate its legitimate concerns.”
- Consider alternatives to hair follicle testing and budgeting for same

Aurel Kodhimaj v. Department of Correction

- Aurel Kodhimaj was bypassed for a position as a correction officer after the Department of Correction (“DOC”) received his Criminal Offender Record Information (“CORI”).
- The DOC received more information than other employers because of its status as a criminal justice agency.
- CSC said this is allowed, because hiring correction officers is part of performing its criminal justice duties.

Aurel Kodhimaj v. Department of Correction (cont.)

- **KEY TAKEAWAYS:**
 - Though the DOC, as a criminal justice agency, could access more CORI information than other employers, this did not alleviate the DOC from its obligations to disclose the information to the applicant and provide the applicant with a chance to discuss it before making a hiring decision.
 - Understand proper uses of CORI and procedural processes for it.

Residency Requirements

- The Commission opened an investigation concerning whether certain appointed firefighters in the City of Pittsfield qualified for residency preference.
- **TAKEAWAY:**
 - If a residency requirement exists for a position, employers should exercise due diligence to ensure that applicants meet that requirement.

Stay Tuned...

- Doherty v. Civil Service Commission
- The SJC has taken up a case regarding the extent to which a hearing before the Civil Service Commission should be open to the public.
- The SJC will consider whether there are circumstances, such as the use of CORI evidence, that override the requirement of a public hearing.

Be on the lookout for SJC's decision in Doherty v. Civil Service!

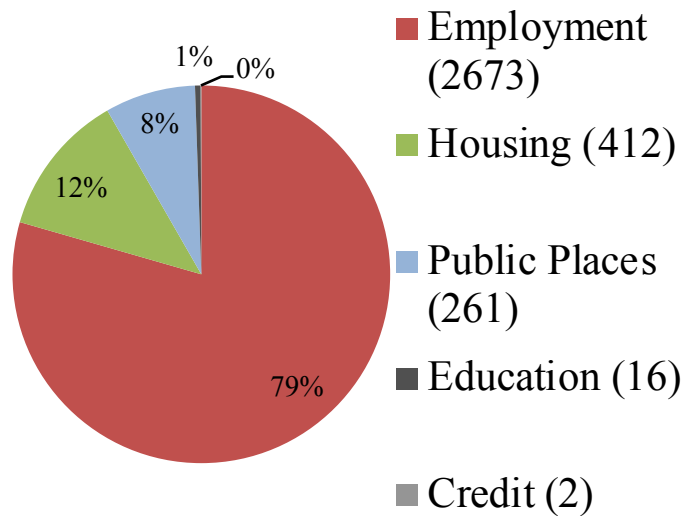


Massachusetts Commission Against Discrimination (MCAD)

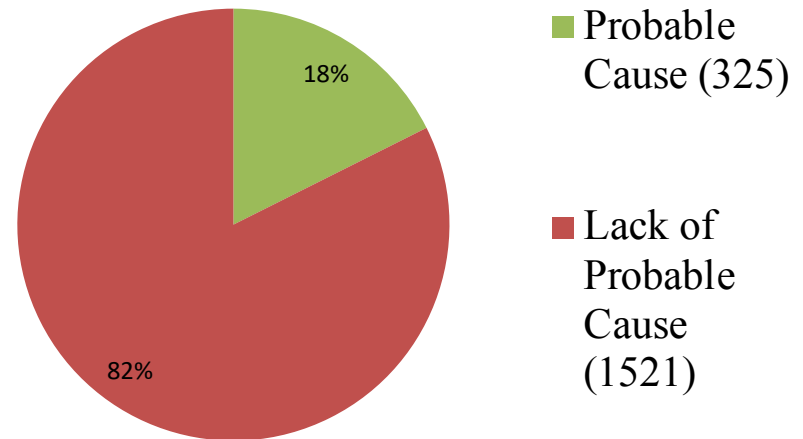
Statistics from Fiscal Year 2019

- The MCAD received 3,364 new complaints in FY 2019, a 15% increase from calendar year 2020.

New Complaints by Jurisdiction



Substantive Determinations



Statistics from Fiscal Year 2019 (cont.)

- The breakdown of new complaints filed based on the protected category of discrimination alleged was as follows:

Protected Category	Number of Complaints	Percentage of Complaints*
Disability	1,361	21%
Retaliation	1,342	21%
Race/Color	1,064	17%
Sex	950	15%
Age	598	9%
National Origin	483	8%
Religion/Creed	120	2%
Sexual Orientation	113	2%
Public Assistance	64	1%
Other	53	1%
Children	39	1%
Gender Identity	32	1%

*Any category which accounted for less than 1% of complaints is omitted from the chart.

Statistics from Fiscal Year 2019 (cont.)

- Despite receiving a large number of complaints, the Commission reduced its backlog of cases which are more than 18 months old down to 285 cases. This is the first time in a decade that the backlog has been lower than 300.

Coburn v. Cuca, Inc. d/b/a Bella Notte

- The Full Commission of the MCAD upheld a Hearing Officer's decision finding employer for discrimination when it subjected employee to a hostile work environment and failed to respond properly to her complaints of sexual harassment by a coworker.
- The employee had been repeatedly subjected to explicit comments by a coworker which she reported to her manager and the owner.
- Despite the employee's reports, the owner of the restaurant continued to place the employee in situations where she would run into the coworker and even rehired the coworker after placing him on leave indefinitely.

Coburn v. Cuca, Inc. d/b/a Bella Notte (cont.)

- **TAKEAWAYS:**
 - Employers have a duty to protect their employees from sexual harassment
 - Failure to take prompt and effective remedial action to correct a sexually hostile work environment constitutes a violation of c. 151B.
 - Take all complaints seriously
 - Do complete and fair investigations and do them as quickly as possible.

Coburn v. Cuca, Inc. d/b/a Bella Notte (cont.)

- **TAKEAWAYS, cont'd:**
 - Consider what actions to take during the course of the investigation
 - Take prompt and effective remedial action
 - Circle back and ensure no retaliation or reoccurrence
 - Update your training – note updated federal guidance on civility

Serrano v. Cataldo Ambulance Service, Inc.

- Madeline Serrano began suffering from pregnancy-related complications.
- As a result, she requested a short leave of absence based on her doctor's recommendation of bed rest.
- Cataldo Ambulance first accommodated this request but later terminated her when an emergency visit to the hospital required an extension of her leave.
- The Attorney General intervened in the case.
- The employer argued termination was based on her absence for almost three weeks immediately after being hired and because she failed to call in each day.

Serrano v. Cataldo Ambulance Service, Inc. (cont.)

- The MCAD found unlawful discrimination on the basis of sex and disability. The remedy included
 - Lost wages of \$43,560 (with no deduction for unemployment)
 - \$200,000 for emotional distress
 - Interest at 12% per year
 - A civil penalty of \$5,000 was imposed for the following reasons:
 - Employer disingenuously asserted it was not aware of Serrano's pregnancy despite the evidence otherwise
 - Employer's policies ignored existing law

Serrano v. Cataldo Ambulance Service, Inc. (cont.)

- **TAKEAWAYS:**
 - Review existing leave policies
 - To ensure compliance with law
 - To ensure compliance with your own policies!
 - Be truthful
 - Document your compliance contemporaneously.

Daye v. Rte. 2 Hyundai

- The Hearing Officer found that Daye was terminated due to his race and/or color.
- Evidence that the termination was impulsive and failed to abide by the progressive discipline policy in the employer's handbook was sufficient to determine that Rte. 2 Hyundai was liable for discrimination based on race and/or color.

Daye v. Rte. 2 Hyundai

- **TAKEAWAYS:**
 - Remember the rule of consistency
 - Follow your own policies!

Dubuis v. Gabriel Care, LLC

- Dupuis was fired after she was brought into a meeting as a witness for a coworker who complained of discrimination and then refused to leave.
- Gabriel Care argued that it fired Dupuis due to her insubordination in refusing to leave the meeting.
- Dupuis' refusal to leave the meeting was found to be protected activity, because she was standing up in support of a co-worker who she believed to be the victim of discrimination.

Dubuis v. Gabriel Care, LLC

- **TAKEAWAYS:**
 - Keep abreast of the law on protected concerted activity.
 - It protects the rights of employees to act in concert and to support one another
 - Your CBA may also provide such rights
 - Get advice before taking employment action against an individual for such a reason



Contributory Retirement Appeal Board (CRAB)

Timeframe for Appeals

- M.G.L. c. 32, §16(4) provides that an appeal of a retirement board decision must occur within 15 days.
- CRAB issued a number of decisions which enforced strict adherence to the 15 day appellate timeframe laid out by the statute.

Overearnings & Additional Compensation Post-Retirement

- CRAB decided two cases dealing with the rather frequently disputed issue of over earnings by public retirees who subsequently earn additional compensation post-retirement.
 - M.G.L. c. 32, §91(b), as referenced in Pomeroy, addresses those retirees who exceed statutory limits of compensation from service to public entities.
 - M.G.L. c. 32, §91A, as in Rome, deals with those retirees receiving disability benefits.
- While these cases both deal with different sections, they each deal with the question of what type of earnings may be considered in a §91(b) or §91A analysis in the context of corporation, specifically an S corporation.

Overearnings & Additional Compensation Post-Retirement (cont.)

- First in Rome and then followed in Pomeroy, CRAB overruled a 2008 decision (Frazier v. Barnstable County Retirement Board) and held that undistributed earnings of an S corporation must be considered as earnings in an overearnings analysis.

Stoneham Retirement Board v. PERAC

- The Stoneham Retirement Board attempted to create a creditable service regulation that would limit certain public elected officials' creditable service to the actual hours they worked rather than the time frame in which they served.
- PERAC denied this regulation and CRAB upheld PERAC's position as the regulation was in violation of M.G.L. c. 32, §4(I)(a).
- Because of this, elected officials must receive full credit for the time they served.

Case Processing at CRAB

- There has been a significant backlog at CRAB which has resulted in limited reported cases during the past year.
- As such, there are numerous significant issues outstanding.

Questions?

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