

Lowlights and Highlights of Agency Employment Decisions Reported in 2021

A Presentation to the Massachusetts Municipal Association Annual Meeting

Presented by Melissa R. Murray

Norris, Murray & Peloquin

February 9, 2022



AGENDA

Joint Labor Management Committee (JLMC)

Department of Labor Relations (DLR)

Civil Service Commission (CSC)

Joint Labor Management Committee (JLMC)

STATISTICS, AWARDS, TIPS AND TRENDS

STATISTICS

25 cases were closed via settlement, arbitration and withdrawal in 2021 as follows:

YEAR	Number of Cases Filed	Open on 12/31/2020	Open on 12/31/2021	Closed
2016	63	1	1	0
2017	67	0	0	0
2018	44	0	0	0
2019	55	8	3	5
2020	20	14	2	12
2021	34	0	26	8

Of the 34 cases filed in 2021, 17 were fire cases (16 cases filed by unions, 1 by management) and 17 were police cases (15 cases filed by police unions, 2 by management)

Source for Statistics: Daniel Morgado, Management Staff Representative, JLMC

AWARDS SUMMARY

	ARBITRATOR	AWARD YEARS	WAGES
Arlington Police (P)	Bruce Fraser	FY19-FY21	2%, 2%, 1% (plus new 1% steps at 7 and 10 years)
New Bedford Fire	Ira Lobel	FY20-FY22	2%, 2%, 2% (plus new 3% step at 28 years)
Worcester Police (S)	Lawrence Holden	FY18-FY20	2% (12/1/17), 2%, 2% (plus increase rank differential 3/1/2020)
Framingham Fire	Bonnie McSpiritt	FY21-FY23	2%, 2%, 2%

Prior arbitration decisions issued: 2016 (8); 2017 (6); 2018 (13); 2019 (12); 2020 (4)

TIPS AND TRENDS

How to Prepare For Or Avoid the JLMC



- ❑ Establish a strong “on the record” position; propose serious, well-thought-out proposals.
- ❑ Do your homework; know the landscape of settlements in comparable communities and don’t wait to put together comparability data (Internal and External).
- ❑ **COST OUT PROPOSALS!** Understand how close or far apart the parties’ proposals are. Analyze hidden costs and be clear on the long and short term impacts of the benefits being negotiated.
- ❑ Ask Union for their data or an explanation of what they are basing their proposals on
- ❑ Double check the Union’s “facts” and figures
- ❑ Understand the risks (your strengths and weaknesses) of going to arbitration
- ❑ Use the Mediation Process; communicate with the Management Reps and Panel Member
- ❑ Select your arbitrator wisely
- ❑ Don’t foreclose the possibility of settling

TIPS AND TRENDS

Trends: What To Avoid, What To Watch

- ❑ COLAs at 2% or 2.5% are still the norm, but some 3% are popping up (Newton, Revere)
- ❑ Adding steps – usually longevity steps – remains popular, practical (Arlington Award; New Bedford Award)
- ❑ Proposals/Demands for one-time ARPA payments; these vary wildly – some as high as \$25,000, but usually in the \$2,500 to \$5,000 range
- ❑ Some police unions asking for an annual “Certification Differential” for being certified AS REQUIRED BY LAW by the POST Commission.
- ❑ Many communities still interested in exiting civil service; communities are looking for relief as hiring challenges increase
- ❑ Unions are making outrageous initial proposals followed by minor or inconsequential concessions

JLMC STAFF

Joint Labor Management Committee

John Hanson, Chairman

Management Staff Members

George Driscoll
Daniel Morgado

Management Committee Members

Jill Goldsmith, Chatham Town Manager
Dean Mazarella, Leominster Mayor
Richard Tranfaglia, Natick Dir. of Human Resources (Ret.)
Kathleen Johnson, Worcester Assistant City Manager
Lisa Yanakakis, Weston Asst Town Manager/HR Director

Department of Labor Relations (DLR)

STATISTICS, COVID-19, AND DECISIONS

STATISTICS

DLR Statistics and Cases Calendar Year 2021

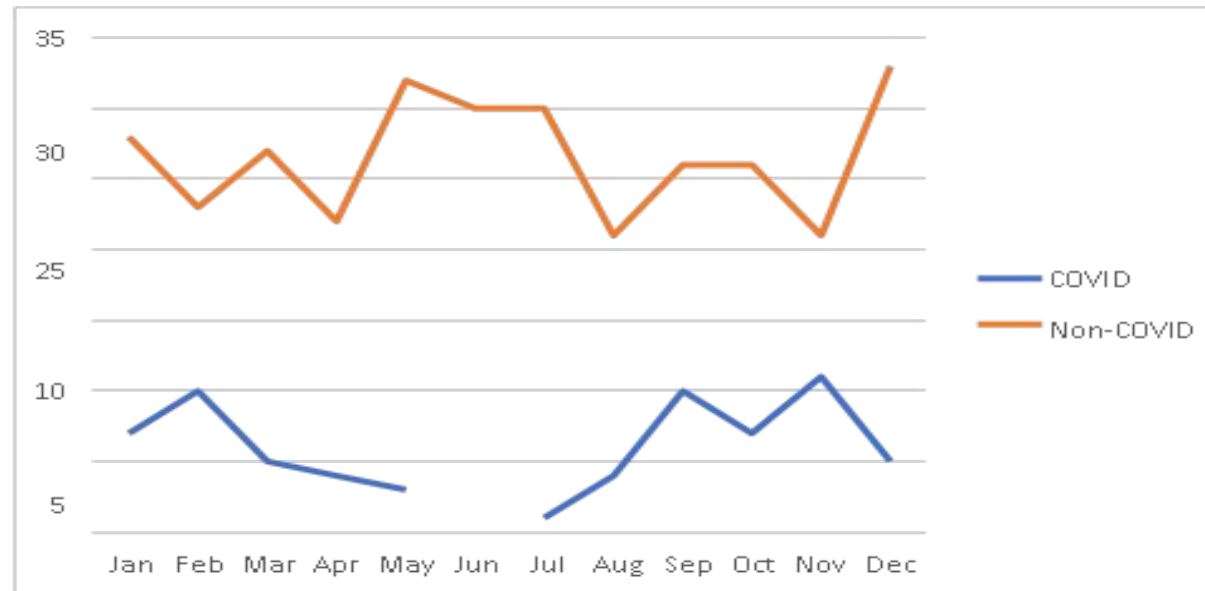
Case Processing and Statistics

Case Type	# Filed	# Closed
Unfair Labor Practice Charges	386	368
Representation Petitions	32	28
Written Majority Authorization Petitions	15	15
Unit Clarification Petitions	18	17
Contract Mediation/Fact-Finding Petitions	72	48
JLMC Contract Mediation/Arbitration Petitions (Police/Fire)	34	25
Grievance Mediation Petitions	3	1
Arbitration	41	38

Source for Statistics: Philip T. Roberts, Director, Department of Labor Relations

STATISTICS

Of the 386 ULP charges filed this year, 67, or 17%, involved COVID-related matters. The filing of these COVID-related charges seemed to reflect COVID rates and the implementation of vaccine or testing mandates.

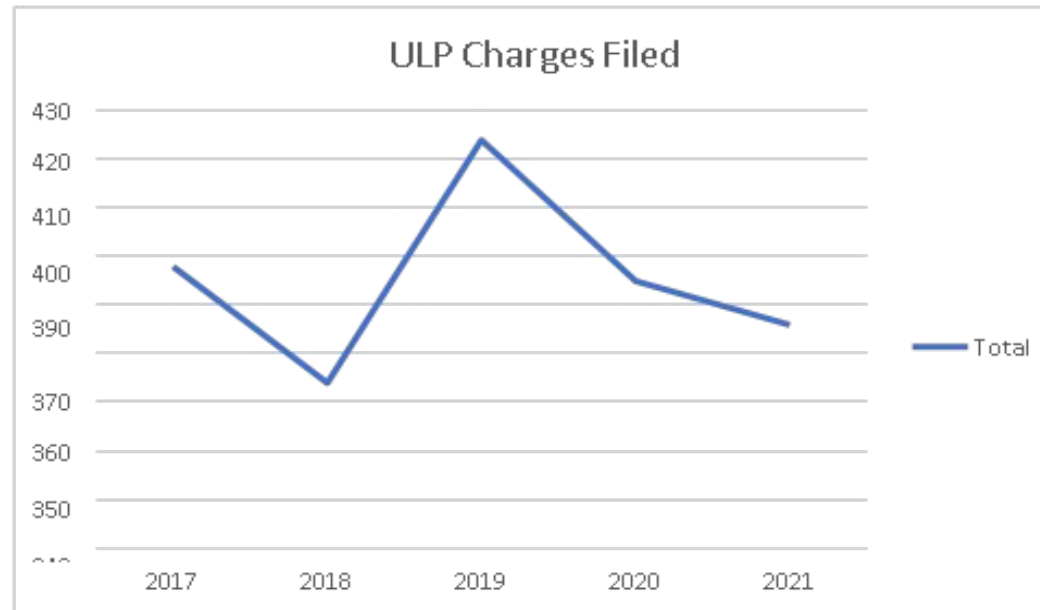


It has been the DLR’s policy to immediately assign mediators to all COVID-related cases, with the result that 56% of these cases were successfully settled.

STATISTICS

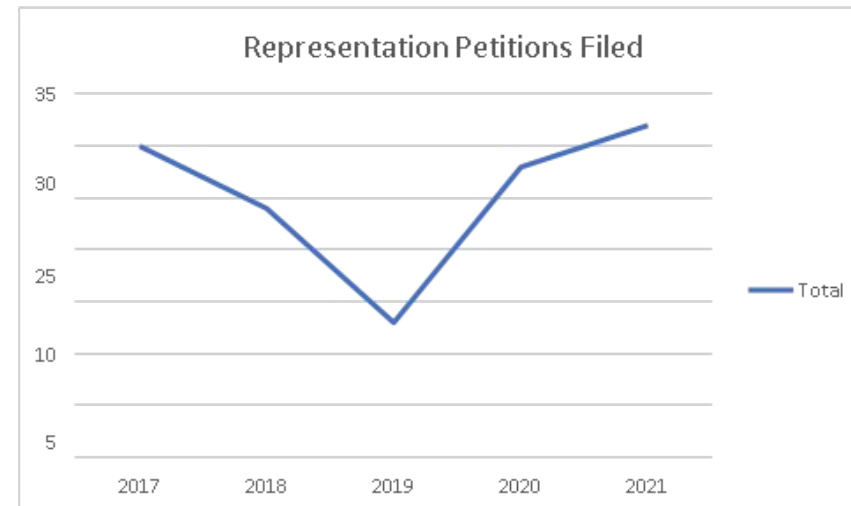
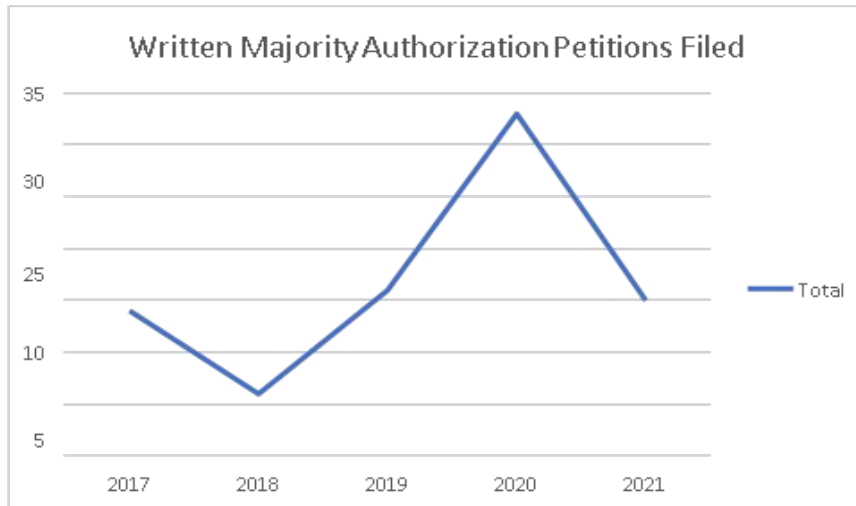
In comparing 2021 to prior years, it appears that the pandemic has impacted case filings in a number of ways.

ULP filings were higher immediately before the pandemic and have since moderated to levels comparable to prior years.



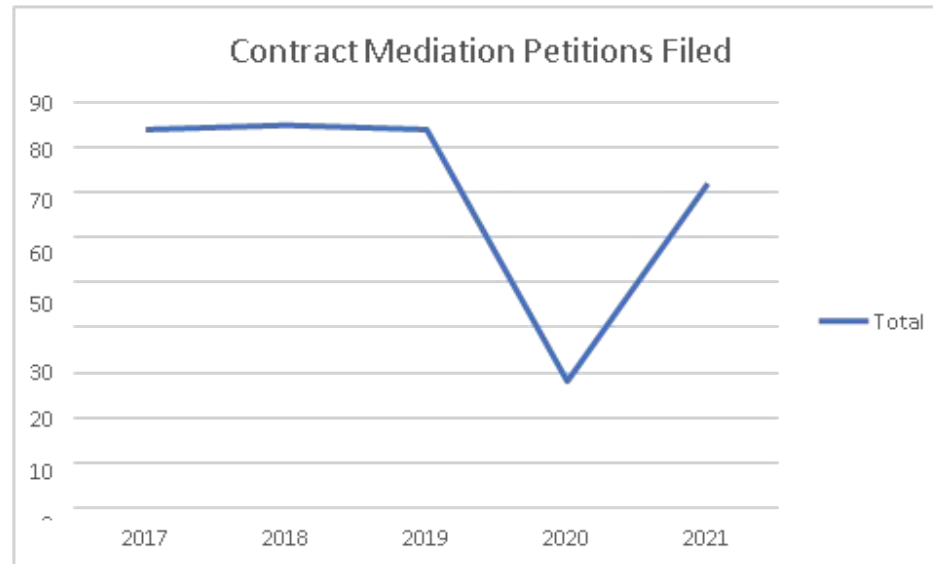
STATISTICS

Petitions for union representation, however, either through written majority authorization or election, significantly increased during the pandemic.



STATISTICS

Petitions for contract mediation dropped sharply during 2020 and returned to near pre-pandemic levels in 2021.



COVID-19

DLR Procedures During the Pandemic

With the onset of the pandemic, the DLR began conducting all proceedings remotely via videoconference. This included ULP investigations and hearings, as well as mediation. Since then, a limited number of mediations have been conducted in person, upon request of the parties and where the circumstances indicated that the in-person meetings could be conducted safely. The DLR had planned to resume in-person ULP hearings in late 2021, however, these plans have been paused in light of the recent surge in COVID cases due to the Omicron variant.

The DLR intends to revisit these plans in the coming months.

DECISIONS

Significant CERB decisions

Town of Hudson and International Association of Firefighters, Local 1713, MUPL-19-7565, CERB Decision, November 15, 2021

The CERB upheld the hearing officer's decision that the Union violated its duty to bargain in good faith when it sought to alter contractual staffing level by directly petitioning Town Meeting (placed an article on a warrant at Special Town meeting), instead of through collective Bargaining. **[NOT APPEALED]**

City of Everett and Everett Firefighters, IAFF, Local 143, MUP-19-7133, CERB Decision, August 27, 2021

The CERB reversed a hearing officer decision and held that the City violated Section 10(a)(5) and, derivatively, Section 10(a)(1) by failing to bargain in good faith with firefighters by implementing decision to use assessment center as sole basis for scoring and ranking candidates on an eligible list for promotion to Fire Chief. CERB held that the City could have bargained over issues such as timing of assessment center or training sessions and other issues affecting unit member's participation in process without impinging on City's managerial prerogatives. **[ON APPEAL]**

DECISIONS

COVID-Related Probable Cause Determinations

Commonwealth of Massachusetts/Secretary of Admin and Finance and Massachusetts Correction Officers Federated Union, SUP-21-8824, November 2021.

Correctional officers filed alleging Commonwealth violated Section 10(a)(5) and, derivatively 10(a)(1) by failing to bargain over the decision as well as the impact of the vaccine mandate. Investigator dismissed allegations concerning decisional bargaining but issued complaint concerning impact bargaining and decision to require booster shots in the future. **[Partial dismissal not appealed; scheduled for a hearing in March 2022].**

Commonwealth of Massachusetts and State Police Association of Massachusetts, SUP-21-8836, CERB Decision, December 6, 2021

State police alleged that the Commonwealth violated Section 10(a)(5) and, derivatively, Section 10(a)(1) when it implemented Governor Baker's Executive Order regarding vaccine mandates prior to fulfilling its bargaining obligation(s), and that communication from the Commonwealth indicated bargaining was a *fait accompli*. The Investigator dismissed the case in its entirety finding that exigent circumstances existed which justified the Commonwealth's implementation and that the communication regarding such not do render further bargaining futile.

DECISIONS

Decisions Involving FMLA leave

Boston School Committee and Boston Teachers Union, MUP-19-7322, Hearing Officer Decision, March 24, 2021.

Union alleged that the City failed to comply with two arbitration awards. The arbitrator found that the past practice was that bargaining unit employees need only submit a request for extended sick leave supported by a doctor's note and therefore the School Committee could not require that employees apply for FMLA leave or submit an FMLA form in order to be granted extended sick leave without first bargaining with the Union over this change. Thereafter, the School Committee directed certain employees seeking extended sick leave to apply for FMLA or complete an FMLA form. By these actions, the School Committee failed to abide by the arbitration awards.

Medford School Committee and Medford Teachers Association, MUP-19-7746, CERB Decision, August 24, 2021.

The CERB affirmed a hearing officer's decision that the School Committee violated Section 10(a)(5) and, derivatively, Section 10(a)(1) when it designated employees' leaves of absence as Family and Medical Leave Act (FMLA) leave to run concurrently with the employees' paid sick leave without bargaining to resolution or impasse with the Union over the decision and its impacts. City made change based on two opinion letters from US Department of Labor (DOL) issued in 2019 which interpreted the FMLA. The CERB disagreed, finding no clear statutory mandate for the action and conflicting DOL, state agency and judicial opinions regarding this issue. Given the FMLA's statutory policy allowing for "greater" and "more generous benefits to bargaining unit members", the CERB declined to construe the FMLA as a third-party authority or a narrow statutory mandate that diminished the amount of job-protected leave available to employees without first giving the employees' exclusive representative an opportunity to bargain over the decision and the impacts of the decision.

Civil Service Commission (CSC)

STATISTICS, COVID-19, AND DECISIONS

STATISTICS

2021 Calendar Year Statistics – Highlights

- The Civil Service Commission received 249 new appeals in 2021 and closed out 247
- The open case inventory of appeals as of December 31, 2021 is 158
- 33 appeals have been pending before the Commission for more than 12 months as of December 31, 2021
- Average age of a pending appeal is 35 weeks as of December 31, 2021.

Total Appeals Pending (2006 -2021) as of:

2006	2009	2012	2015	2018	2019	2020	2021
813	220	179	90	175	190	156	158

Total Appeals Pending for more than 12 months (2006 -2021) as of:

2006	2009	2012	2015	2018	2019	2020	2021
550	98	46	27	60	71	76	33

Source: <https://www.mass.gov/doc/2021-calendar-year-statistics/download>

COVID-19

On November 1, 2021, the CSC announced a return to in person hearings when appropriate and a permanent change allowing appeals to be filed by email. The option to file appeals in-hand at the offices of the Commission resumed on September 7, 2021.

Hearings conducted in person at the Commission's office in Boston, are subject to the following: anyone entering building needs to comply with state and local mandates, including a mask mandate; a limited number of folks will be allowed in a hearing room to encourage social distancing; rooms will have HEPA air purifiers; masks must be worn by all participants; and the hearing officer at his or her discretion

[Updates on how to file an appeal and in-person hearing protocols](#)

DECISIONS

In the Courts: Discipline – Racial/Personal Bias

Town of Brookline v. Alston, 487 Mass. 278 (2021).

In April the SJC upheld the determination of the CSC and superior court that the Town of Brookline lacked just cause to terminate a FF who was subjected to racial discrimination and retaliation.

Town of Rockland v. Civil Service Commission and Craig Erickson, Mass.Sup.Ct. 2084CV1354-B (Oct 1, 2021)

The superior court declined to disturb the CSC's ruling on the merits vacating a fire lieutenant's termination and instead imposing a 90-day suspension and a demotion, finding that the record sufficiently demonstrated the Town's decision to terminate Erikson was motivated by personal bias.

In the Courts: Discipline – Untruthfulness

Godere v. City of Chicopee and Civil Service Commission, Mass.Supt.Ct 2078CV00168 (Sept. 22. 2021)

Superior court upheld the CSC's finding that Godere engaged in substantial misconduct and its decision to modify the discipline from termination to a demotion, finding it would be unfair to terminate Godere 6 years after his misconduct and considering political considerations may have influenced his termination.

DECISIONS

Bypass-Gender Bias/Flawed Interview Process

Blanchette v. City of Methuen and Matthew Tully, 34 MCSR 431 (November 18, 2021)

In a scathing decision, Commissioner Cynthia Ittleman concluded that the City failed to establish reasonable justification for bypassing the Appellant, a female FF, for the position of Fire Captain. Instead, the Commission found that the City employed a “highly subjective and flawed interview process” to appoint a make candidate favored by the Fire Chief.

Discipline – Untruthfulness

Brian Coulombe v. Town of Ware, 34 MCSR 178 (May 21, 2021); Thomas Coulombe v. Town of Ware, 34 MCSR 313 (July 15, 2021)

CSC upheld the termination of a fire lieutenant (Brian C) who lied about his age prior to taking the 2004 civil service exam. And in a related appeal, the Commission found that the lieutenant’s father, the Ware Fire Chief at the time (Thomas C), engaged in substantial misconduct as he knew his son was ineligible for appointment. The Commission upheld his demotion to lieutenant and 30-day suspension as appropriate.

DECISIONS

Bypass – Untruthfulness

Damas v. Boston Police Department, 34 MCSR 9 (February 11, 2021)

The CSC dismissed the 3 consolidated bypass appeals from 2017, 2018 and 2019, in which BPD cited the same reasons for bypass including failure to include information regarding his expulsion from high school, providing inconsistent information about resisting arrest and a disorderly conduct event from several years ago.

Discipline – Poor Judgment / Criminal Conduct

Luis v. Town of Dartmouth, 34 MCSR 335 (July 15, 2021)

CSC dismissed the appeal of a Dartmouth Police Officer who was terminated for engaging in a pattern of on and off duty misconduct, including allegations that he engaged in sexual relations with his girlfriend while on duty, threatened her with his duty issued taser, kidnapped her and drove to the Cape Cod against her will, and used the Criminal Justice Information System (CJIS).



QUESTIONS

Melissa R. Murray

Norris, Murray & Peloquin

315 Norwood Park South

Norwood, MA 02062

mmurray@nmplabor.com

(781) 762-2229

www.nmplabor.com



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For more detail on DLR and CSC cases, please see our firm's Management Commentary in Landlaw's publication of these cases.

NOTICE: This presentation 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.