**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**
One Ashburton Place: Room 503
Boston, MA 02108

BRIAN MARTIN,
Appellant

v.

D-17-030

DRACUT HOUSING AUTHORITY,
Respondent

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

On February 16, 2017, the Appellant, Brian Martin (Mr. Martin), pursuant to G.L. c. 31, § 43 and G.L. c. 121B, § 29, filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Dracut Housing Authority (Housing Authority) to demote him from the position of Maintenance Supervisor to the position of Maintenance Laborer.

On March 13, 2017, I held a pre-hearing conference at the Armand Mercier Community Center in Lowell, MA, which was attended by Mr. Martin, his counsel and counsel for the Housing Authority. Prior to the pre-hearing, the Housing Authority

submitted a Motion to Dismiss the Appellant's appeal, arguing that the Commission does not have jurisdiction to hear an appeal from a Housing Authority employee who has been demoted. On March 31, 2017, counsel for the Appellant submitted an opposition, arguing that the Commission does have jurisdiction to hear appeals from housing authority employees who have been demoted. Further, based on a review of the record, I asked counsel for the Appellant to address, as part of his reply brief, whether the Appellant's appeal was timely.

*Commission's Jurisdiction to Hear Appeals from Housing Authority Employees*

The following relevant facts appear to be undisputed:

1. Mr. Martin is a Housing Authority employee.
2. He does not occupy the position of executive director.
3. He has at least five years of uninterrupted service as an employee with the Housing Authority.
4. In 1997, Mr. Martin was hired as a Maintenance Laborer by the Housing Authority.
5. In 2011, Mr. Martin was promoted to the position of Maintenance Supervisor.
6. Effective January 23, 2017, Mr. Martin was demoted to the position of Maintenance Laborer.
7. Mr. Martin never received notice or otherwise informed of the right to appeal his demotion to the Commission.
8. Mr. Martin did not retain counsel until February 6, 2017.
9. This appeal was filed with the Commission on Feburary 16, 2017.

*Argument of the Housing Authority*

Although the Commission has not previously issued a decision regarding an appeal from a housing authority employee who has been demoted, it has, in prior decisions, ruled that the Commission does not have jurisdiction to hear appeals by housing authority employees who were suspended. See Jerauld v. Waltham Housing Authority, 21 MCSR 573 (2008); Johnson v. Worcester Housing Authority, 23 MCSR 555 (2010). In other decisions, also involving the suspension of housing authority employees, the Commission has specifically construed the words "involuntarily separated" to mean a housing employee who has been terminated, discharged or laid off. See Santiago v. Worcester Housing Authority, 28 MCSR 323 (2015) and Prokop v. Boston Housing Authority, 29 MCSR 40 (2016). The Housing Authority argues that, based on this authority, the instant appeal should be dismissed as Mr. Martin was not terminated or laid off, but, rather, demoted.

*Argument of Mr. Martin*

By its clear and unambiguous language, G.L.c.121B, §29 'expanded' the civil service definition of "tenured employee", G.L.c.31, §1 to include housing authority personnel who had been employed for five or more years. "By virtue of these provisions, a housing authority employee can be involuntarily separated from employment only for 'just cause', following a hearing and decision at the housing authority level, with right to appeal the termination decision for a 'de novo' review by the Commission[]." McEachen v. Boston Housing Authority (MCSR cite (2016).

There is nothing in G.L.c.121B, §29 that states, indicates or implies that "involuntarily separation" is limited to discharges or layoffs. In fact, the clear and

unambiguous language of G.L.c.121B, §29 states it applies "to the same extent as if said office or position" was a civil service position (office, position, appointment). The civil service laws define "Civil Service position" as "an office or position, appointment to which is subject to the requirements of the civil service laws and rules." G.L.c.31, §1. Further, the words office, position and appointment are commonly used synonyms for a classified job title throughout G.L.c31.Had the Legislature intended to limit it to only discharges or layoffs, it would have simply used the words discharge and/or layoff. Instead it chose the phrase "involuntarily separated" - a civil service 'term of art' including other types of permanent and temporary separations. [1]

Alternatively, Mr. Martin seeks to distinguish the Commission's prior decisions involving involuntary "suspensions" under "permanency" argument. Mr. Martin is not serving a suspension where his involuntary separation is temporary and then reverts back to his position as a Maintenance Supervisor. In every case cited by the Housing Authority, the involuntary separation was temporary and all employees reverted back to their respective office or position. Because Mr. Martin has been permanently and involuntarily separated from his position (lowered in rank) of Maintenance Supervisor, Mr. Martin can bring his appeal. Under the laws of civil service, unless an employee consents to a demotion, all of the civil service requirements must be followed before the employee is separated from his office or

[1] The term "involuntarily separation" is not specifically defined in G.L.c.31, but is referenced in other defintions. "Discharge" is defined as "the pe1manent, involuntary separation of a person from his civil service employment by his appointing authority." G.L.c.31, §1. "Suspension" is defined as "a temporary, involuntary separation of a person from his civil service employment by the appointing authority." Id. See also, Burgo v. City of Taunton, MCSR cite (2009).

position.

*Applicable Law*

The dispute here regards the parties' divergent interpretation of G.L. c. 121B, § 29 which states in relevant part:

> "No employee of any housing authority, except an employee occupying the position of executive director, who has held his office or position, including any promotion or reallocation therefrom within the authority for a total period of five years of uninterrupted service, shall be **involuntarily separated therefrom** except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one to the same extent as if said office or position were classified under said chapter."

(**emphasis added**)

G.L. c. 31, s. 41 states in relevant part:

> "Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be **discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished.** Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty. If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. Any employee suspended pursuant to this paragraph shall automatically be reinstated at the end of the first period for which he was suspended. In the case of a second or subsequent suspension of such employee for a period of more than five days,

> reinstatement shall be subject to the approval of the administrator, and the notice of contemplated action given to such employee shall so state. If such approval is withheld or denied, such employee may appeal to the commission as provided in paragraph (b) of section two."

*Analysis*

The relevant language in G.L. c. 121B, § 29 is not clear and unambiguous. Specifically, it is not clear that the phrase "involuntarily separated" was meant to include all of the adverse actions which a tenured civil service employee can appeal under G.L. c. 31, § 41.

In 1969, the Legislature, via Chapter 751 of the Acts of 1969, recodified and revised the housing and urban renewal laws. As part of Chapter 751, the Legislature included certain civil service protections for housing authority employees (now c. 121B, § 29) *and* redevelopment authority employees (now c. 121B, § 52).

In contrast to the civil service protections for *housing authority* employees "involuntarily separated" from their positions, as set forth in Section 29 quoted above, the civil service protections for *redevelopment authority* employees, contained in Section 52 (paragraph 2) of the same legislation is different:

> No person permanently employed by a redevelopment authority, who is not classified under chapter thirty-one, shall, after having actually performed the duties of his office or position for a period of six months, be **discharged, removed, suspended, laid off, transferred from the latest office or employment held by him without his consent, lowered in rank or compensation, nor shall his office or position be abolished,** except for just cause and in the manner provided by sections forty-one to forty-five, inclusive, of chapter thirty-one." (**emphasis added**)

By expressly incorporating all of the same adverse employment actions contained in Section 41 of the civil service law, unambiguously shows the intention that *redevelopment authority* employees could appeal all of these same adverse actions to the Civil Service Commission under G.L. c. 31, ss. 41-45. In contrast, the Legislature, when

referring to *housing authority* employees, chose not to cover all of the same adverse actions contained in Section 41, but, rather, chose to provide protections only to certain housing authority employees who have been "involuntarily separated." In addition, other contrasting language (between Sections 29 and 52 of c. 121B) manifests a clear legislative intent, in other respects, to expressly provide housing authority employees with *less* civil service protections than redevelopment authority employees. For example, the Legislature chose to provide civil service protections to *all* redevelopment authority employees who have been employed for six months with civil service protections. In contrast, the Legislature *limited* the number of housing authority employees entitled to civil service protection by excluding the position of executive director and only covering those employees with *five years of uninterrupted service*, as opposed to a redevelopment authority employee who only has to perform his duties for six months prior to receiving civil service protections. These distinctions raise further ambiguity and doubt that the Legislature intended that its use of the phrase "involuntarily separated" (regarding housing authority employees) was meant to provide the same protections that were afforded to redevelopment authority employees, under the express language of Section 52.

The conclusion that the Legislature had a specific intent in choosing the term "involuntary separation" in Section 29 is further informed by the appearance of that same language in the immediately preceding paragraph of Section 52 (Paragraph 1),regarding the civil service rights of certain veterans who are employed by redevelopment authorities, which states:

> "A veteran, as defined in section one of chapter thirty-one, who holds an office or position in the service of a redevelopment authority not classified under said chapter thirty-one, and has held such office or position for not less than three years, shall not be **involuntarily separated** from such office or position except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. **If the separation in the case of such unclassified offices or positions results from lack of work or lack of money, such a veteran shall not be separated from his office or position while similar offices or positions in the same group or grade, as defined in section forty-five of chapter thirty, exist unless all such offices or positions are held by such veterans, in which case such separation *shall occur in the inverse order of* their respective original appointments**." (**emphasis added**)

This language providing redevelopment authority employees who are veterans with certain civil service protections *appears to be based on G.L. c. 30, § 9A*, which extends certain civil protections to employees "of the Commonwealth" (which redevelopment authorities are not) who occupy positions not classified under the civil service law. G.L. c. 30, § 9A states:

> "A veteran, as defined in section one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office, an appointive office for a fixed term or an office or position under section seven of this chapter, and has held such office or position for not less than three years, shall not be **involuntarily separated** from such office or position except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. **If the separation in the case of such unclassified offices or positions results from lack of work or lack of money, such a veteran shall not be separated from his office or position while similar offices or positions in the same group or grade, as defined in section forty-five of this chapter, exist unless all such offices or positions are held by such veterans, in which case such separation shall occur in the inverse order of their respective original appointments**." (**emphasis added**)

Thus, the protections that the Legislature intended to give veterans (under G.L. c. 30, §9A) occupying **state positions** not classified under civil service who are *involuntarily*

*separated* is potentially instructive when determining what protections the Legislature intended for certain housing authority employees.

In regard to whether the protection in Section 9A extends to employees who have been *demoted*, with the exception of those explicitly excluded by the language in Section 9A as well as mid and senior-level managers (MV through MXII) excluded by G.L. c. 30, § 46F, the Appeals Court in Greaney v. Colonel, Department of State Police (and companion case), 52 Mass.App.Ct. 789 (2001) stated in FN5: "Although the defendant in Greaney contends that the VTA [Section 9A] applies only to separations from employment and not demotions, both judges of the Superior Court rejected that reading, as do we. As the judge in Cronin noted, citing to Provencal v. Police Dept. of Worcester, 423 Mass. 626, 630 (1996), the statute refers to separation from an office or position, not from employment."

I conclude that the legislature intended the phrase "involuntarily separated" to have the same meaning in G.L. c. 121B, § 29 as it does in G.L. c. 30, § 9A. In other words, I read the word "therefrom" in Section 29 as referring to being involuntarily separated from "his office or position" as opposed to being involuntarily separated from "any housing authority".

Applied here, any housing authority employee, except the executive director, who has held his office or position for five or more years cannot be *demoted* except subject to the provisions of the civil service law under G.L. c. 31, §§ 41-45. For clarity, to the extent necessary, the Commission's prior interpretations of G.L.c. 121B, in Santiago and Prokop, stating that the phrase "involuntarily separated" was limited to those housing

authority employees who have been terminated, discharged or laid off are now modified to include demotions.

Although not currently before us, there is the question of whether other adverse employment decisions (i.e. – temporary suspensions) explicitly listed by the legislature regarding redevelopment authority employees, but not housing authority employees, fall under the category of employees who have been "involuntarily separated" from their office or position.

I am not aware of any Massachusetts court decision that has squarely addressed the question of whether the term "involuntarily separated", as used here, covers those employees who have been suspended, either under G.L. c. 30, § 9A or G.L. c. 121B, § 29. The vast majority of court decisions involving Section 9A relate to employees who have been terminated or laid off, in addition to Greaney which involved a demotion. There are court decisions, however, regarding whether a state employee, who is a veteran with three or more years of service, suspended under G.L. c. 30, § 59 (regarding state employees indicted for alleged misconduct in such office) has civil service protections under Sections 41-45 of the civil service law. (See Reynolds v. Commissioner of Commerce and Development, 350 Mass. 193 (1966); See also Letteney v. Commissioner of Commerce and Development, 359 Mass. 10 (1970). In both Reynolds and Letteney, the Court concluded that these indicted employees could be suspended, under G.L. c. 30, § 59, without first being afforded the civil service protections granted to veterans under G.L. c. 30, § 9A. Although it would appear that the Court was operating under the assumption that Section 9A did, generally, include protections for veterans who are suspended, neither of these decisions explicitly state this. Similarly, the Commission has,

in the past, heard appeals from Housing Authority employees who have been suspended, but it appears that the issue of jurisdiction was neither raised or addressed.

I also reviewed multiple Opinions of the Attorney General related to questions posed regarding the applicability of Section 9A. None of these Opinions squarely address whether the phrase "involuntarily separated" in Section 9A covers those veterans who have been suspended from their office or position. Those Opinions, however, often equate "involuntary separation" with "removal", "dismissal" and "involuntary dismissal" (e.g. – Op.Atty.Gen., May 25, 1950, p. 71; Op.Atty.Gen., December 18, 1954, p. 61.).

Given the above-referenced ambiguity, and because the instant matter does not require such a ruling, the Commission is not revisiting, at this time, its rulings that the phrase "involuntarily separated" was not meant to cover those housing authority employees who have been suspended from their office or position. Thus, the Commission does not need now to address Mr. Martin's alternative contention that the term "involuntary separation" should be read to include all permanent and temporary "separations" as defined by G.L.c.31, §1. However, to ensure transparency with the civil service community, including existing housing authority employees, we consider this an unsettled issue subject to further review. Should an appeal be filed, on a going forward basis, from a housing authority employee who has been suspended, the Commission may opt to revisit, and potentially reverse, its position on this particular issue.

*Timeliness*

I also asked counsel for Mr. Martin to address whether the appeal filed with the Commission met the statutory filing deadline contained in G.L. c. 31, s. 41. After reviewing all of the relevant undisputed facts, including: 1) that Mr. Martin was never

informed of his rights under the civil service law, including his right to contest a demotion, and 2) Mr. Martin was not represented by counsel until February 6, 2017, the appeal filed with the Commission on February 16, 2017 was timely.

*Conclusion*

The Housing Authority's Motion to Dismiss is denied. Under separate cover, a notice will issue scheduling a full hearing at which time the Commission will conduct a hearing under G.L. c. 31, s. 43 to determine whether there was just cause to demote Mr. Martin.

Civil Service Commission

*/s/ Christopher Bowman*
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan, Commissioners [Ittleman – Absent]) on June 22, 2017.

Notice to:
Brian W. Leahey, Esq. (for Appellant)
Thomas E. Horgan, Esq. (for Respondent)