

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

ADAM PAICOS,
Petitioner

v.

Tracking No.: I-15-10

TOWN OF MAYNARD &
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Petitioner:

Gary G. Nolan, Esq.
Nolan, Perroni, Harrington, LLP
133 Merrimack Street
Lowell, MA 01852

Appearance for Maynard:

Michael J. Kennefick, Esq.
Blatman, Bobrowski, Mead & Talerman,
LLC
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Appearance for HRD:

Michael Downey, Esq.
Human Resources Division
One Ashburton Place, 2d Floor
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman, Esq.

INVESTIGATION REPORT

Following an investigative hearing on July 15, 2015 at the offices of the Civil Service Commission (“Commission”) on this matter, I find the following:

1. On January 7, 2015, the Petitioner filed a request for the Commission to conduct an investigation pursuant to G.L. c. 31, s. 2(a) regarding the appointment of police officers in the Town of Maynard.
2. On March 20, 2014, the Civil Service Commission (Commission) allowed an appeal, Docket No. G1-13-132, of Adam Paicos (Mr. Paicos), who was bypassed for appointment

as a police officer by the Town of Maynard (Town). Pursuant to the Commission's authority under Chapter 310 of the Acts of 1993, the Commission ordered,

the state's Human Resources Division (HRD) and/or the Town of Maynard in its delegated [capacity] to:

Place the name of Adam Paicos at the top of any current or future certification for the position of police officer in the Town of Maynard until such time as he is appointed or bypassed.

In the event that Mr. Paicos is appointed as a police officer in Maynard, he shall receive a retroactive civil service seniority date for civil service purposes only the same as those appointed from Certification No. 00467.

3. The Commission has no record of the Town pursuing a judicial appeal of the Commission's decision under G1-13-132.
4. On May 19, 2014, the Town Board of Selectmen approved Article 21:

ARTICLE: 21 REVOKE CHAPTER 31 OF THE ACTS OF 1917, CIVIL SERVICE

To see if the Town will vote to petition the General Court to pass AN ACT EXEMPTING THE POSITIONS OF PATROLMAN, SEARGENT (sic) AND LIEUTENANT IN THE TOWN OF MAYNARD POLICE DEPARTMENT FROM THE PROVISIONS OF THE CIVIL SERVICE LAW

Section 1: The positions of patrolman, sergeant and lieutenant in the Town of Maynard Police Department shall be exempt from the provisions of Chapter 31 of the General Laws and related regulations applicable thereto.

Section 2: The provisions of Section 1 of this act shall not impair the civil service status of the present employees of the Town of Maynard Police Department except for the purpose of promotion.

Section 3: This act shall take effect upon its passage.

Section 4: The General Court may reasonably vary the form and substance of the requested legislation within the scope of the general public objectives of this petition;

To do or act thereon.

SPONSORED BY: Board of Selectmen

APPROPRIATION: None

FINCOM RECOMMENDATION: At Town Meeting

The following action was taken:

Voted: To accept the article as printed in the warrant except the words “To do or act thereon.”

The Finance Committee recommended.
(emphasis added)

5. Police Chief Dubois had “ ... many discussions with the Town Administrator in preparation of the Town Meeting in which the Town voted to remove its police department for (sic) civil service, regarding existing and possible future policies and procedures for hiring and promoting employees.” (Post-hearing Affidavit of Police Chief Dubois) Further, “ ... removing the Department from Civil Service had been first discussed prior to the time [the Chief] was hired.” (*Id.*)
6. “The hiring process started in June 2014. Following the Town Meeting vote, a ‘Hiring Process Announcement’ was sent to the Department of Criminal Justice Information System (‘CJIS’). The deadline for submitting a resume in response was July 18, 2014. The Town received 28 letters as a result of the posting. The resumes received were reviewed by the Department supervisors and ten applicants were sent an application with an attached request for written documents, such as college transcripts, military records, and copies of their drivers’ licenses, etc. The candidates were also instructed to complete an on-line personal history questionnaires (‘PHQ’) consisting of 900 questions concerning their backgrounds. The candidates had until August 15, 2014 to submit everything and complete the PHQ. Five candidates were then selected for interviews, which were conducted on September 18, 2014 by a panel of Lieutenant Dawson, Sergeant Noble, Sergeant Balzotti and [Chief Dubois]. Each panel member ranked the candidates, and we were unanimous in ranking Thomas Palermino as our first choice. Detective Seeley ran a background check on Mr. Palermino, which included personal interview with his references as well as family members, employers, co-workers and neighbors. Finally, Mr. Palermino underwent a physical examination. He started working on December 1, 2014 as a Patrolman.” (Post-hearing affidavit of Police Chief Dubois submitted at my request)¹
7. The Town Police Department website posted the following text, in full,

Welcome New Officers to the Maynard Police Department
Posted on June 19, 2014 by MPD

¹ The employment notice posted on the Department of Criminal Justice Information Service (“DCJIS”) by Police Chief Dubois, called a “POLICE OFFICER Hiring Process Announcement”, stated that the Town Police Department “is conducting a selection hiring process for the appointment of one (1) Police Officer...” and stating that “interested candidates should forward a Resume and Letter of Interest” to Chief Dubois “**NO LATER THAN JULY 18, 2014**” (Petitioner Exhibit P-4, emphasis in original; Town Response to Commission Procedural Order of February 2, 2015)

The Maynard Police Department would like to welcome our two newest officers; Lucien Comeau and Todd Fletcher. Both officers are graduates of the 22nd Recruit Officers Course at the Boylston Police Academy and have spent the past 23 weeks in training. They will both be starting at the Maynard Police Department on Monday, June 23rd.

If you see them, say hi and welcome them to Maynard.
(Petitioner's Exhibit 10)(emphasis in original)

8. On November 5, 2014, the Town Board of Selectmen voted (5 – 0) to appoint Thomas Palermino as a full time Police Officer to start December 1, 2014 (“with a term of indefinite”). (Petitioner's Exhibit 5)
9. “The [Maynard Police Department] promotion process for sergeants and lieutenants began with notices of the written exam on August 13, 2014.” (Post-hearing affidavit of Police Chief Dubois submitted at my request)
10. Sometime after November 2014, Chief Dubois sent a letter or memorandum to the Town Board of Selectmen stating, *inter alia*, that [t]he police department incident statistics for November 2014 are attached[.]” and the following,

Anticipating the retirement of Lt (sic) Dawson in January, we held a promotional process for Lieutenant and Sergeant. The process consisted of a written exam and the following week a full day assessment center. The assessment center was run by a company called Badgequest. The assessment center is a series of real life scenarios and written exercises graded by six assessors, who are all active or retired police chiefs. This process is very typical for non-civil service departments and quickly becoming a common part of civil service departments as well. ...

(Petitioner's Exhibit 7, as to both quotes)

The Five (5) selected for interview had all graduated from the police academy. (Town Response to Commission Procedural Order of February 2, 2015)

11. On the Town Police Department website, the following text was posted in full,

Representative Kate Hogan Stops by Maynard Police Department

Posted on March 25, 2015 by MPD

On Monday, March 23rd, Representative Kate Hogan stopped by the Maynard Police Department to deliver proclamations to our recently promoted officers.
(Petitioner's Exhibit 8)(emphasis in original)

12. Lucien Comeau and Todd Fletcher are each listed on the Town Police Department website, printed February 3, 2015, listing Police Officers in the Department as “Patrolman” and “Serving since June 2014”. (Petitioner's Exhibit 9) Mr. Comeau and Mr. Fletcher were hired from the Town reserve/intermittent roster. (Post-hearing HRD response to questions)

13. On the listing of Police Officers on the Department's website, printed February 3, 2015, the Police Department website listed William Duggan as "Acting Sergeant/Firearms/Juvenile", "Serving since September 2000"; Paul Maria as "Patrolman/Warrant Management", Serving since February 2002"; and Michael Noble as "Sergeant", Serving since September 1994". (Petitioner's Exhibit 9)
14. On the listing of Police Officers on the Department's website, printed July 14, 2015, the Department lists William Duggan as "Sergeant" (effective December 1, 2014), Paul Maria as "Sergeant" (effective December 14, 2014) and Michael Noble as "Lieutenant" (effective January 6, 2015). (Petitioner's Exhibit 11; Post-hearing Affidavit of Police Chief Dubois)
15. By notice dated January 22, 2015, the Commission issued an Order To Show Cause Regarding Petitioner's Request for the Civil Service Commission to Conduct an Investigation Under G.L. c. 31, s. 2(a) indicating that a conference would be held regarding the request for investigation on February 3, 2015.
16. On February 3, 2015, the Commission conducted a conference to allow the Petitioner to show why the Commission should conduct an investigation.
17. After the conference, on February 6, 2015, Commissioner Bowman issued a Procedural Order that finding, *inter alia*,

On January 7, 2015, Mr. Paicos filed a petition with the Commission in which he argues that the Town has failed to comply with the Commission's March 20, 2014 decision/order. Specifically, Mr. Paicos alleges that the Town has circumvented the civil service process by appointing multiple police officers since March 20, 2014 without requesting a Certification from the state's Human Resources Division (HRD) which would have included the name of Mr. Paicos ranked first.

The Town participated in the conference remotely by phone, asserting that the matter was moot since Maynard police appointments were no longer covered by civil service.

At the show cause conference, counsel for Mr. Paicos argued that although Town Meeting passed an Article in May 2014, that Article only referenced petitioning the Legislature to exempt certain police positions from civil service. It did not, standing alone, according to counsel for Mr. Paicos, exempt the positions from civil service. According to counsel for Mr. Paicos, a Special Act of the Legislature would be required to exempt certain positions from civil service and no such legislation has been enacted by the Legislature and/or signed into law by the Governor.

Counsel for the Town stated that a Special Act of the Legislature is not needed here and, since civil service was adopted by a Town Meeting vote in 1917, only a Town Meeting vote was required to exempt these positions from civil service.

Counsel for the Town stated that the Town has been working with James Baron at the state's HRD regarding the process for exempting these positions from civil service and that the Town has provided HRD with various documents regarding the exempting process although the Town failed to provide any such exemption documents at the show cause conference.

HRD was copied on the show cause conference notice but did not appear and/or provide any documentation to the Commission regarding this matter.²

18. Based on the findings in the February 6, 2015 Procedural Order, Chairman Bowman ordered:

HRD and the Town shall provide the Commission with any and all documentation, including, but not limited to, any correspondence between the Town and HRD related to the Town's request to exempt certain positions from civil service;

the Town shall provide the Commission with a brief, replying to the petition of Mr. Paicos, including, without limitation, the Town's position on the steps required to exempt the position of police officer from civil service, what steps actually have been taken by the Town in this regard and the Town's position on whether those steps have resulted in the position of police officer being exempt from civil service in the town;

the Town's brief shall include a list of all police officer appointments that have been made by the Town since the Commission's decision was issued on March 20, 2014 granting Mr. Paicos' bypass appeal and the process used to make those appointments; and

all such information was to be submitted to the Commission within thirty (30) days of the Procedural Order.

19. On February 6, 2015, Mr. Paicos' name appeared first on the Maynard Police Officer Eligible List on HRD's website.
(http://www.csexam.hrd.state.ma.us/eligiblelist/eligiblelist.aspx?ListId=1&Location_Id=185)
(Administrative Notice)
20. In response to the February 6, 2015 Procedural Order, on February 19, 2015 HRD produced to the Commission copies of email exchanges between it and the Town and HRD between November 20, 2014 and February 19, 2015.

² HRD's counsel was unable to attend because the conference took place between repeated snowstorms, which produced record snowfalls.

The first email message in the exchange is from Mr. Barron, a Compliance Officer at the HRD Civil Service Unit, to Chief Dubois stating, “We received an inquiry from a candidate about a job posting for a position within your department. We don’t seem to have any open requisitions from your department, so I just wanted to follow up with you. Any insight that you could provide would be appreciated.”

On November 20, 2014, Chief Dubois replied to Mr. Barron stating, “Maynard removed the PD from civil service in the May 2014 town meeting. Not sure what the person is referring to.”

Later on November 20, 2014, Mr. Barron wrote to Town Administrator Sweet stating, “It has come to our attention that the Town of Maynard wants to be removed from Civil Service. Could you please provide us with the documentation enabling you to opt out of Civil Service as well as the documentation for how you originally entered Civil Service? Please let me know if you have any questions.”

On November 21, 2014, Mr. Sweet wrote to Mr. Barron stating, “Attached is a copy of Article 21, which is the revocation of Chapter 31 of the Acts of 1917, Civil Service. This article was voted on and accepted at the ATM, 5/19/2014 and became in effect upon its passage. The original adoption of Civil Service passed at Town Meeting in 1917.”

Later on November 21, 2014, Mr. Sweet wrote to Mr. Sweet stating, “Attached is the copy of Article accepting Chapter 31 in 1925.” The attachment, an attested copy of a Maynard record, states, in pertinent part, that in or about 1925, there was a town vote on the question, “shall the town accept the provision of General Laws, Chapter 31 known as the Civil Service Act, and acts in amendment thereof, and addition thereto, whereby the chief of police and the regular or permanent police force shall be subject to said chapter and the rules made thereunder”? Following this question, a town voting record states,

“Yes	791
No	640
Blanks	328”

Later on November 21, 2014, Mr. Barron replied to Mr. Sweet stating, “thank you for getting back to me so quickly. Could you please provide the results of the vote that took place on 05/19/2014. The way that your town entered into Civil Service must be the same way it leaves Civil Service. It looks like there was a town vote in 1925, so we just need proof that the same process was followed to decide to leave Civil Service.”

Mr. Sweet responded on November 21, 2014 stating, “I will get you the certified vote count form the Town clerk on Monday.”

On December 2, 2014, Mr. Barron wrote to Mr. Sweet stating, “Just following up to see if you have the certified vote count from the Town Clerk yet.”

The next email message in this exchange is from Mr. Barron to Attorney Michael Downey at HRD on February 19, 2015 stating, “Attached is my initial email with Chief Dubois of the Maynard Police Department followed by my correspondence with Maynard Town Administrator Kevin Sweet. Please let me know if you have any questions.” An HRD letter to the Commission from Attorney Downey, dated February 19, 2015 added that, “As of the date of this letter, the town has yet to provide HRD with a certified vote count to verify the result of the vote that was held on May 19, 2014.”

21. On February 20, 2015, Chairman Bowman sent an email message to HRD Attorney Downey asking, “What is HRD’s position on whether passage of this Town Meeting article [Article 21 on May 19, 2014] exempted the positions referenced from civil service?” Attorney Downey replied, in full, “HRD’s position is that the passage of the Town Meeting warrant article simply provided the Town of Maynard with the authority to ‘petition the General Court to pass AN ACT EXEMPTING THE POSITIONS OF PATROLMAN, SERGEANT AND LIEUTENANT IN THE TOWN OF MAYNARD POLICE DEPARTMENT FROM THE PROVISIONS OF THE CIVIL SERVICE LAW.’ Following the explicit language of the warrant article referenced above, HRD takes the position that legislative action is necessary before the listed positions are effectively exempt from Civil Service.” (HRD Exhibit 1)
22. Pursuant to a Commission vote on April 2, 2015, the Commission issued a Response to Request for Investigation finding, *inter alia*,

On February 20, 2015, in response to an inquiry from the Commission, counsel for HRD stated: ‘HRD’s position is that the passage of the Town Meeting warrant article simply provided the Town of Maynard with the authority to ‘petition the General Court to pass AN ACT EXEMPTING THE POSITIONS OF PATROLMAN, SERGEANT AND LIEUTENANT IN THE TOWN OF MAYNARD POLICE DEPARTMENT FROM THE PROVISIONS OF THE CIVIL SERVICE LAW.’ Following the explicit language of the warrant article referenced above, HRD takes the position that legislative action is necessary before the listed positions are effectively exempt from Civil Service.’

On March 6, 2015, the Town filed its response with the Commission. In its response, the Town stated that only one (1) police officer appointment has been made in Maynard since May 2014, an appointment that was made on November 5, 2014. The appointment was not made through the civil service process, which requires appointment from a list of names on a Certification drawn from an eligible list of candidates who took and passed a civil service examination.

In its response, the Town argues that, a Town can rescind or revoke its prior acceptance of a General Law in the same manner as it accepted and that the revocation here of the 1925 Town Meeting vote on civil service became effective as of the Town Meeting vote in May 2014.

Further, the Town argues that, even if the Town Meeting vote did not result in revocation of these civil service positions, the Commission should take no action because “it is expected that the special legislation that was filed pursuant to that vote will be passed by the legislature and signed into law before these proceedings are concluded or shortly thereafter, thereby rendering all matters relating to the Commission’s investigation moot.”

The Town has requested that the Commission “enter a finding that the Town lawfully filled the position of patrolman when it hired [the police officer] on November 5, 2014.”

Passage of Article 21 at Maynard’s Annual Town Meeting in May 2014 did not result in the positions of patrolman, sergeant and lieutenant being revoked from civil service. As correctly stated by HRD, the explicit language of that Article was limited to an authorization to petition the legislature to seek such revocation.

In short, absent a Special Act of the Legislature, those positions remain in civil service and the Town is required to abide by the civil service law and rules when making appointments to those positions.

When the Town hired a police officer in November 2014, there was an active (civil service) eligible list of candidates. Consistent with the civil service law and rules, the Town was required to requisition a Certification of names (from HRD) and choose from among the first three (3) candidates on that Certification. They did not. Further, as of the date of this Order, no Special Act has been enacted to revoke these positions from civil service.

For this reason, the Petitioner’s request for the Commission to initiate an investigation is allowed and an investigatory hearing will be held at the offices of the Commission on July 15, 2015 at 9:30 A.M. Said hearing is being scheduled to provide sufficient time to determine what, if any, action will be taken on the Town’s petition to the Legislature.

In the interim, the Town shall comply with all civil service law and rules, including, but not limited to, matters related to original and promotional appointments to the positions of patrol officer, sergeant and lieutenant.
(Emphasis added)

Further, the Town shall post this Response in the Police Department Headquarters and/or any other location(s) to ensure that all members of the Police Department, including the individual hired on November 14th, are aware of these proceedings which may impact their rights.

23. On March 17, 2015, Representative Kate Hogan, of Stow, filed House Bill 3331, An Act exempting the positions of patrolman, sergeant and the lieutenant in the police

department of the town of Maynard from the civil service law. The bill history and status as of September 1, 2015 is as follows:

Actions for Bill H.3331

Date	Branch	Action
3/30/2015	House	Referred to the committee on Public Service
3/31/2015	Senate	Senate concurred
5/29/2015	Joint	Hearing scheduled for 06/02/2015 from 11:00 AM-01:00 PM in B-2
7/29/2015	House	Bill reported favorably by committee and referred to the committee on House Steering, Policy and Scheduling
8/3/2015	House	Committee reported that the matter be placed in the Orders of the Day for the next sitting
8/3/2015	House	Rules suspended
8/3/2015	House	Read second and ordered to a third reading

(Petitioner’s Exhibit 10; Administrative Notice)

24. On April 3, 2015, the Commission sent a notice to Mr. Paicos, the Town and HRD indicating that a hearing would be held on July 15, 2015.
25. On July 8, 2015, I received an email inquiry from counsel for HRD asking if HRD was expected to provide witnesses for testimony at the July 15 investigatory hearing. On July 13, 2015, I responded to this inquiry indicating that any and all persons at HRD who were involved with assessing whether Maynard effectively exempted police from civil service laws recently and with whom in Maynard they communicated in this regard, the applicable HRD policies, processes and/or decision-making involved generally in determining whether a municipality has effectively exempted civil service positions from civil service laws and whether HRD’s policies, processes and/or decision making regarding such municipal requests for exemption have changed in the past five (5) years.
26. On July 9, 2015, the Town filed a motion seeking a continuance of the July 15, 2015 hearing stating that it was not needed because the Town had already removed certain police positions from civil service via a Town vote and/or legislation would soon be enacted by the state Legislature removing those positions from civil service. Mr. Paicos’ attorney submitted an opposition to the Motion and it was denied on July 10, 2015.
27. On July 13, 2015, in response to my email inquiry, the Town reported that it had posted the Commission’s April 2, 2015 response allowing Mr. Paicos’ request for an investigation.

28. An investigatory hearing was held at the Commission offices on July 15, 2015. The hearing was recorded and copies of the recording were sent to Mr. Paicos, the Town and HRD. Mr. Paicos and his attorney attended; Mr. Paicos did not testify. Counsel for HRD attended and presented one witness who testified. The Town's attorney attended and brought no witnesses. The Petitioner offered twelve (12) exhibits that were entered into the record. The Town offered one (1) exhibit that was entered into the record. HRD offered two (2) exhibits that were entered into the record.

29. At the July 15, 2015 investigatory hearing, HRD produced an affidavit of Mr. James Barron, who was unavailable that day. Mr. Barron is an HRD Compliance Officer within the Certifications and Appointment team. In that capacity, Mr. Barron is responsible for "... ensuring that the hiring practices of the communities to which [he is] assigned are in compliance with the civil service laws, rules and regulations." Mr. Barron attested,

From November 20, 2014 to December 2, 2014, I exchanged a series of emails with the town of Maynard's Chief of Police, Mark Dubois, and Town Administrator, Kevin Sweet, regarding the Town's efforts to exempt certain police department positions from the civil service laws. The email exchange, which I have attached hereto, represents the only communication that I had with the Town of Maynard on the aforementioned subject matter. (HRD Ex. 2)

On November 21, 2014, Mr. Barron wrote to Mr. Sweet, "... Could you please provide the results of the vote that took place on 05.19.2014. The way that your town entered into Civil Service must be the same way it leaves Civil Service. It looks like there was a town vote in 1925, so we just need proof that the same process was followed to decide to leave Civil Service." (Id.)

30. Ms. Veronica Gross, the Supervisor of Certification and Appointments Team of the HRD Civil Service Unit since April 2012, testified at the investigatory hearing about the HRD process for determining whether a municipality has effectively exempted position from civil service laws. She supervises Mr. Barron. Although she was appointed to this position in April 2012, Ms. Gross has worked for HRD since 1980. Her team fills requisitions for entry level jobs, notifies candidates when lists have been issued, issues Certificates in response to requests from agencies and municipalities, conducts exams, sends information to hiring departments and trains agencies and municipalities to use the online hiring system (MAC). Ms. Gross is responsible for municipalities beginning with the H to O, including Maynard.

31. A majority of the time, if a municipality wants to remove itself from civil service law, it contacts Ms. Gross' team. Such communication is typically a letter stating that the municipality voted to remove itself from civil service law and, as appropriate, the municipality will enclose a copy of the signed legislation approving the removal. When a municipality sends a letter indicating that it voted to remove itself from civil service law but it does not include a copy of the applicable signed legislation, Ms. Gross contacts the HRD Legal Department to inquire about the municipality's letter and copies Mr. Bruce

Howard, the Director of Operations. Any questions that arise are addressed informally – such as by phoning the pertinent municipal authority. The process appears to end with Mr. Howard. Upon receipt of information indicating that the municipality has been removed from civil service, Ms. Gross updates the HRD website, notifies any appropriate candidates, takes the municipality’s name off of the website and no longer issues Certifications to the municipality. Ms. Gross has experienced 5 or 10 instances in the last few years in which a municipality has removed itself from civil service law.

32. Ms. Gross learned that Maynard was working on removing itself from civil service law for certain police positions in November or December 2014 when Mr. Paicos contacted her. (Testimony of Ms. Gross)

33. “Since January 6, 2014, HRD has not received any requisitions from MPD for **original appointments** to the position of police officer. However, [HRD] records indicate requisition/certification number 01423, which was generated on November 18, 2013, for 2 Permanent Full-time Police Officer positions resulted in 2 appointments – Lucien Comeau & Todd Fletcher – from their reserve/intermittent roster. Those appointments were effective January 13, 2014. ...
Also, MPD promoted two employees – Brian Cushing & Gregory Balzotti – to the position of Sergeant effective April 25, 2014. However, pursuant to the certification delegation in 2009, communities no longer submit requisitions for promotions; thus HRD is no longer responsible for issuing certifications. For public safety (police & fire) promotions, what happens is as follows: After promotional examination scores are released, HRD issues eligible lists to communities. The eligible list ordinarily is in effect for two years – Here, the eligible list was created on February 24, 2014 and is set to expire on April 25, 2016. The community uses that eligible list to make any promotions that are necessary during the two-year period. When a vacancy arises, the community is responsible for creating its own certification, off of the existing eligible list, and hiring from that certification. MPD promoted the two employees named above off of their own certification. ...” (HRD email July 30, 2015 response to my request at investigative hearing)(emphasis in original)

34. Michael Sutherland, originally appointed as a Reserve Officer in the Department, was “hired/promoted to Patrolman” in August 2014 or January 2015. (Post-hearing Affidavit of Police Chief Dubois) There is no indication what process, if any, was involved in hiring/promoting Mr. Sutherland. (Administrative Notice)³

35. “Seven Officers had taken the Sergeants (sic) exam and two passed.” (Affidavit of Police Chief Dubois) There is no indication whether the two candidates who passed the Sergeant exam received an interview. Police Chief Dubois’ Post-hearing Affidavit refers to the promotions of Mr. Cushing and Mr. Balzotti as “Civil Service Promotions”. (Administrative Notice)

³ I take Administrative Notice that as of September 8, 2015, Mr. Sutherland’s name does not appear on the Town Police Department website list of staff.

36. HRD did not know about the 2014 promotions of Brian Cushing and Gregory Balzotti until the July 15, 2015 investigative hearing. (HRD Argument)⁴ There is no indication that HRD knew about the promotion to Lieutenant of Sergeant Noble, which promotion appears to have occurred between February and July 2015. (Administrative Notice)
37. HRD cannot recall an instance in which a municipality effectively revoked the application of civil service law after a candidate successfully appealed a bypass and was placed at the top of the next Certification and states that it has insufficient resources to research this matter. (Id.)
38. A template of the letter HRD sends to appropriate candidates when a municipality is removed from civil service states,

Dear Police Officer Candidate:

This e-mail is to inform you that the Massachusetts Human Resources Division's Civil Service Unit has recently been notified that the [Town] Police Department has opted out of civil service. As such, [Town] Police is no longer subject to the Commonwealth's civil service rules and regulations in the appointment of police officers. The Civil Service Unit will not be certifying or maintaining the Department's eligible lists.

According to our records, you have selected [Town] as your residence preference community on the [] Police Officer exam. Due to the Department's exemption from civil service, a list will no longer exist however your name will remain on the statewide eligible list for Police Officer and the MBTA Transit Police.

With regard to how the Department intends to select candidates to fill vacancies in the future, you will need to direct your inquiries to [Town] directly.

Thank you for your time.

Sincerely,
Civil Service Unit

39. At least until Mr. Paicos filed the request for the instant investigation, HRD did not send him a letter indicating that Maynard had revoked its application of civil service law because it did not know that Maynard believed that it had removed itself from civil service law until Mr. Paicos contacted HRD and HRD contacted Maynard. (Administrative Notice)Applicable Law

⁴ Police Chief Dubois' affidavit was submitted at post-hearing, with a copy to HRD. However, I have not received any comments from HRD indicating whether they were aware of any other hirings/appointments referenced by Police Chief Dubois.

Civil Service and Related Law

Pursuant to G.L. c. 31, s. 2, “In addition to its other powers and duties, the commission shall have the following powers and duties: (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth.” *Id.* Pursuant to Erickson v Civil Service Commission and Town of Rockland (Defendants) and Heaney (Intervener), SUCV2013-00639-D (Sup. Ct. 2014), the Commission has “broad discretionary authority” with regard to investigations. This discretion includes the discretion to decide whether or not to conduct an investigation as well as the parameters of any such investigation. *Id.* at 6 (*citing*, e.g., Whitehouse v Town of Wareham, 25 MCSR 438 (2012); Richards v. Dept. of Transitional Assistance, 24 MCSR 315 (2011); O’Neill v. City of Lowell, 21 MCSR 683 (2008, *aff’d sub nom O’Neill v. Civil Service Comm’n*, MICV2009-00391 (Sup. Ct. 2009)(*aff’d*, 78 Mass.App.Ct. 1127 (2011)(1:28 Decision)). In addition, G.L. c. 31, s. 72 authorizes the Commission to initiate investigations and conduct investigations at the request of an appointing authority.

G.L. c. 31, s. 60 provides for the appointment of intermittent or reserve police or fire forces to their respective regular forces. Specifically, it provides, in pertinent part,

In any city or town having an intermittent or reserve police or fire force to which the civil service law and rules are applicable, original appointments to the lowest title in the regular police or fire force shall be made from among the permanent members of such intermittent or reserve police or fire force, as the case may be, whose names are certified by the administrator to the appointing authority. Names of such members shall be listed on the certification in the order of their civil service appointments to such intermittent or reserve police or fire force, or, if such order is not ascertainable, in the order provided by the appointing authority at the time of their appointments to such intermittent or reserve police or fire force; provided, however, that in a city or town having both an intermittent police force and a reserve police force, or an intermittent fire force and a reserve fire force, permanent members of such intermittent police force or such intermittent fire force shall, for the purposes of certification and appointment to the regular police force or the regular fire force pursuant to this section, be deemed to be members of the reserve police force or the reserve fire force of such city or town. ...

(*Id.*)

Under G.L. c. 31, s. 74, certain actions taken in violation of civil service law may be subject to various penalties. This statute states, in pertinent part,

... No person, by himself or in cooperation with one or more persons, shall willfully or corruptly defeat, deceive or obstruct any person with respect to his right, pursuant to the civil service law and rules, of examination, registration, certification, appointment, promotion or reinstatement; or willfully or corruptly make a false mark, grade, estimate or report on the examination or proper standing of any person examined pursuant to the civil service law and rules; or willfully or corruptly make any false representation concerning the same or concerning the person examined; or willfully or corruptly furnish

to anyone special or secret information for the purpose of either improving or injuring the prospects or chances of appointment, employment or promotion of any person examined, registered or certified or to be examined, registered or certified. ...

Any person who willfully or negligently violates or conspires to violate any of the provisions of the civil service law and rules, or who knowingly makes an appointment or employs any person in violation of such law and rules, or who refuses or neglects to comply with any provisions of such civil service law and rules, shall be punished by a fine of not more than one thousand dollars or imprisonment for not more than one year, or both, unless a different penalty is specifically provided in this chapter.

(Id.)

G.L. c. 4, s. 4B authorizes municipalities, under certain circumstances, to revoke their acceptance of a state statute. It provides, in relevant part,

At any time after the expiration of three years from the date on which a law to take effect upon its acceptance by a city or town or a municipality as defined in section four, or is to be effective in such cities, towns or municipalities accepting its provisions, has been accepted in any such city, town or municipality such statute may be revoked in the same manner as it was accepted by such city, town or municipality, but such revocation shall be subject to the following restrictions:

... (e) This section shall not affect any contractual or civil service rights which have come into existence between the city, town or municipality and any officer or employee thereof as a result of the original acceptance of any such law or the provisions thereof; provided, however, that such revocation shall apply to the successor to the incumbent officer or employee, which application shall prevent such contractual or civil service right from automatically continuing with respect to such successor officer or employee.

If a petition signed by five per cent or more of the registered voters of a city or town is filed in the office of the city or town clerk within sixty days following a vote other than a vote taken by voters on an official ballot to revoke the acceptance of any optional provision of the General Laws, requesting that the revoking of such acceptance be submitted as a question to the voters of such city or town, said vote to revoke shall be suspended from taking effect until such question is determined by vote of the registered voters voting thereon at the next regular city or town election, or if the city council or board of selectmen or other authority charged with calling elections shall so direct, at a special election called for that purpose. ...

(Id.)⁵

⁵ The statute also addresses circumstances in which the municipality's method of acceptance has been changed, stating, "If at the time a city, town, municipality or district is authorized to revoke its acceptance of a law under the provisions of this section and such city, town, municipality or district has adopted a change in charter or otherwise is required to adopt a different procedure for acceptance of such law other than that procedure used for its original acceptance, then the procedure for acceptance in effect at the time of revocation shall be the manner for revoking such original acceptance." G.L. c. 4, s. 4B.

Arguments at Investigative Hearing

Petitioner Paicos averred that the Town hired a police officer in violation of civil service law and the remedy afforded him in the March 20, 2014 decision in Paicos v Maynard, G1-13-132, putting him at the top of the existing or future Certification, as well as Chairman Bowman's Procedural Order here requiring the Town to ensure that any and all such hiring appointments are made according to civil service law. Further, the Petitioner argued that the Town did not remove itself from civil service law because the Article on which the Town voted on May 19, 2014 only authorizes the Town to ask the State Legislature to adopt legislation effectuating the Town's removal from civil service and the Legislation to secure the Town's removal from civil service was not even filed until nine (9) months after the May 19, 2014 vote, let alone adopted. Moreover, the Petitioner argued that the Town did not remove itself from civil service law because G.L. 4, s. 4B requires a municipality seeking to remove itself from the effect of a statute, where permissible, to remove itself therefrom in the manner in which it adopted the statute; since there was a town-wide vote in 1925 adopting civil service law and only the Selectmen voted in 2014 (not the whole town) to remove the Town from civil service, the Town's effort to remove itself from civil service failed. Having failed to remove the Town from civil service, the Petitioner asserted that the Commission can and should, pursuant to G.L. c. 31, s. 74, find that any and all appointments to the Town Police Department made outside of the civil service system since he was to be put at the top of the current or future Certification are void and that the Commission should order the Town to hire him.

HRD argued that the Town failed to remove itself from the civil service system when the Selectmen voted in May 2014. Rather, the Board of Selectmen's vote sought legislation removing it from the civil service system and yet no legislation has been enacted to remove the Town from civil service. HRD avers that there is no further action for HRD to take in this regard. Instead, the issue is before this Commission, HRD asserts, to decide what action should be taken with regard to the Town's police hiring actions since May 2014. Further, HRD states, even if the Town's proposed legislation (*see* H. 3331, *supra*) had been enacted, it would still raise the question regarding Paicos' remedy because section 3 of the draft legislation approved by the Selectmen states, "This act shall take effect upon its passage." Therefore, HRD averred, the Commission would still need to address appointments made in violation of civil service law prior to enactment of legislation effectuating the Town's revocation of civil service law relating to Patrolmen, Sergeants and Lieutenants.

The Town argued that it revoked civil service law for the listed police positions on May 19, 2014 when it approved Article 21. In addition, it is the Town's position that no further action is needed to effectuate the Town's vote because the Town voted to adopt civil service in 1925 in the same manner that it voted in 2014 to remove the Town from civil service. That legislation approving the Town's vote to remove itself from the provisions of civil service regarding the listed police positions has yet to be enacted is of no concern, the Town argues, as passage of the legislation is imminent, rendering any actions by the Commission "moot". In any event, enactment of such legislation is not needed to secure the Town's removal of Patrolmen,

Sergeants and Lieutenants from civil service. Rather, the Town asserted that it pursued the pertinent legislation as a matter of “belts and suspenders.”

Conclusion

The Commission’s decision to adopt the decision of the Division of Administrative Law Appeals Magistrate regarding Mr. Paicos 2013 appeal was issued on March 20, 2014. In adopting the Magistrate’s Tentative Decision, the Commission found that the Town failed to establish, by a preponderance of the evidence, that it had reasonable justification to bypass Mr. Paicos for appointment to the position of police officer. The decision states,

The issue in the instant case is ‘whether the city put forward a sufficient quantum of evidence to substantiate its legitimate concerns’ about the Appellant’s alleged misconduct. (Citation omitted) I conclude that it has not.

The Police Chief, who was new to Civil Service, performed virtually no investigation of the Appellant, other than accessing three internet articles. He relied on the Handbook to conclude that ‘termination for cause’ was a valid reason for by-pass. A careful reading of the section of the Handbook on which the Chief relied demonstrates that the section contemplates obtaining information ‘from the background investigation indicating the references from pervious employers were poor[.]’ Here, there was no background investigation. The State Police were not contacted to determine why the Appellant was terminated. The Appellant was not interviewed and given an opportunity to address the Chief’s concerns about the information he gleaned from the newspaper articles. Although the Chief had found information indicating that the Appellant was terminated for allegedly engaging in serious misconduct, he failed to conduct ‘an impartial and reasonably thorough review that confirmed that there appeared to be a credible basis for the allegations.’ *Id.* at 189.

(*Id.*)(citing *City of Beverly v. Civil Service Commission*, 78 Mass.App.Ct. 182 (2010)⁶

For these reasons, the Commission granted Mr. Paicos the only relief available in a bypass, to put him at the top of the existing or future Certification so that he could be *considered* again and, *if* the Town chose to hire Mr. Paicos at that future time, he would receive a retroactive civil service seniority date for civil service purposes only “the same as those appointed from Certification No. 00467.” *Paicos v. Maynard*, G1-13-132. The decision could not, and did not, require the Town to appoint Mr. Paicos. Only two months later, the Town adopted Article 21, which the Town has argued meant that civil service law no longer applied to certain Patrolmen, Sergeants and Lieutenants. Prior to adopting Article 21, Police Chief Dubois attested he had communications with the Town Administrator about removing the listed police positions from civil service. In other words, at least time wise, it is clear that the Town was aware of the Commission’s decision in *Paicos v. Maynard*, G1-13-132, putting Mr. Paicos at the top of the current or future Certification at the time the Town adopted Article 21. However, Police Chief Dubois also attested that Town discussions about revoking civil service law preceded his appointment in 2012. Therefore, it cannot be said that the Town revoked the civil service law as

⁶ The Handbook referenced appears to be the HRD Delegation Handbook given to municipalities regarding appointment of police officers and firefighters.

applied to the listed police positions for the purpose of denying Mr. Paicos' opportunity to be considered for appointment to one of them.⁷

The Town's May 19, 2014 vote to adopt Article 21 did not revoke its adoption of civil service law. In 1925, the Town adopted civil service law via a Town vote that states, "shall the town accept the provision of General Laws, Chapter 31 known as the Civil Service Act, and acts in amendment thereof, and addition thereto, whereby the chief of police and the regular or permanent police force shall be subject to said chapter and the rules made thereunder"? The vote on adoption was 791 in favor, 640 against and 328 "blanks". Pursuant to G.L. c. 4, s. 4B, the Town was required to revoke its acceptance of civil service law in the same manner in which it was adopted. On May 19, 2014, the Town Board of Selectmen voted, by a vote of 5 – 0, to adopt Article 21; that vote was not a Town vote of the electorate as the adoption of civil service law was in 1925. Furthermore, Article 21, by its own terms, did not remove the Town from civil service as to the cited police department positions. Rather, the opening paragraph of Article 21 explicitly states, "To see if the town will vote to petition the General Court to pass AN ACT EXEMPTING THE POSITIONS OF PATROLMAN, SEARGENT (sic) AND LIEUTENANT IN THE TOWN OF MAYNARD POLICE DEPARTMENT FROM THE PROVISIONS OF THE CIVIL SERVICE LAW". (emphasis in original) Curiously, legislation (H.3331) to effectuate the desired end was not filed until nine months later in March 2015 and has not yet been enacted. Absent enactment of this legislation, the Town has not revoked the listed police positions from civil service law. It should be noted that H.3331 provides that the legislation "shall take effect upon its passage." Thus, if and when H.3331 is enacted and it retains this effective provision, it would leave Mr. Palermino's status vis a vis civil service in limbo, not having been appointed according to civil service law and appointed prior to revocation of civil service law. However, I also note that section 4 of H.3331 also provides that the Legislature "may reasonably vary the form and substance of the requested legislation within the scope of the general public objectives of this petition", possibly affording the opportunity to address the date that the legislation would be effective.

In addition to hiring Mr. Palermino since the Commission's decision in Paicos v. Maynard, G1-13-132, in March 2014, the Town has promoted three (3) reserve officers to the position of regular police officers (Comeau, Fletcher and Sutherland). The appointment of reserve officers to the position of regular members of the police Department appears to be in line with the provisions of G.L. c. 31, s. 60, providing that "...original appointments to the lowest title in the regular police force ... shall be made from among the permanent members of such intermittent or reserve police or fire force, as the case may be whose names are certified by the administrator to the appointing authority. Names of such members shall be listed on the certification in the order of their civil service appointments to such intermittent or reserve police or fire force, or, if such order is not ascertainable, in the order provided by the appointing authority at the time of their appointments to such intermittent or reserve police or fire force...."

⁷ Among my questions to be answered via the affidavit of Police Chief Dubois, who did not attend the investigative hearing, was the following, "Have you, at any time, discussed with any Maynard officials and/or employees the effect that revocation may or may not have on Mr. Paicos in view of the CSC's decision putting him at the top of the list?" Chief Dubois answered, "Objection. The information sought is irrelevant. Furthermore, all such communications were between the Chief, the Town Administrator and town Counsel and are therefore protected from disclosure under the attorney-client privilege."

Id. To ensure that the Town has acted in accordance with G.L. c. 31, s. 60 in appointing the three (3) reserve police officers to be members of the regular Department, the Town, as a delegated municipality, shall produce the Certification it created regarding the appointment of Officers Comeau, Fletcher and Sutherland by October 15, 2015.

Also after the Commission's March 20, 2014 decision in Paicos v Maynard, G1-13-132, the Town promoted two (2) sergeants (Duggan and Maria), who were the only two (2) of the seven (7) who took the promotional exam. Given HRD's statements indicating that, under delegation, municipalities are not required to submit a requisition to HRD for a Certification for public safety promotions but create their own Certifications based on HRD's eligible list, and to ensure that the Town has acted accordingly, the Town shall produce the Certification it created regarding the sergeant promotions of Mr. Duggan and Mr. Maria by October 15, 2015.

The Town also promoted Sergeant Noble to Lieutenant after March 20, 2014. Although Chief Dubois' post-hearing affidavit states that there was a written exam⁸ and assessment center run by Badgequest to make sergeant and lieutenant promotions, there is no indication how many candidates there were for the lieutenant position and Mr. Noble's rank on the list of candidates. By October 15, 2015, HRD and the Town shall provide this information. Upon the Commission's receipt of appropriate documentation from the Town in response to the specific requirements herein, this investigation will be closed.

In view of the Town's hiring/promotions after March 20, 2014, the date of the Commission decision granting his appeal, Mr. Paicos asks the Commission to require the Town to appoint him. The Commission is not authorized to do so. The Commission has addressed each of the hirings and/or appointments by the Town since it bypassed Mr. Paicos and addressed each such hiring and/or appointments as appropriate herein. In May 2014, the Town Board of Selectman voted (5 – 0) to adopt Article 21 authorizing the Town to ask the legislature to promulgate a law revoking applicability of civil service law to Patrolmen, Sergeants and Lieutenants. The Town expected the legislation to be filed in a timely manner but it was not. Since the legislation was not filed and acted upon in a timely manner and the Town's May 2014 vote was not the same manner in which the Town adopted civil service law in 1925, the May 2014 Board of Selectman vote did not remove the listed police positions from civil service law. Legislation was belatedly filed and is making its way through the legislative process.

I take administrative notice that formal voting sessions in the Legislature conclude on November 18, 2015, resume on January 27, the 189th General Court ends on July 31, 2016, and that certain legislation can be addressed in informal sessions on other dates. If the pertinent legislation is enacted by March 15, 2016, with an effective date addressing Mr. Palermino's status, the positions of Patrolmen, Sergeants and Lieutenants in the Town will be revoked from civil service. The Town shall make appointments to such police positions in full compliance with civil service law until the pertinent legislation is enacted but if such legislation is not enacted by March 15, 2016, the Petitioner, the Town or HRD may request in writing received by the Commission not later than March 30, 2016 that the Commission re-open this investigation.

⁸ Although Chief Dubois's affidavit does not state which promotion exam for lieutenant Mr. Noble took, I assume that it was an exam offered by HRD. However, it is the obligation of HRD and the Town to inform the Commission by October 15, 2015 if this assumption is incorrect.

Finally, I note that hiring and promotion in the field of law enforcement is an on-going, somewhat fluid and lengthy process, beginning with the plans of would-be candidates to begin studying for an exam to seek appointment or promotion. Therefore, there is no point in the process at which revoking the application of civil service law is necessarily better or more convenient than another. That said, the Commission may investigate any such revocation to ensure that it has, in fact, been completed and to preserve the civil service rights of those involved.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners [McDowell – Absent]) on September 18, 2015.

Notice to:

Gary G. Nolan, Esq. (for Petitioner)
Michael J. Kenefick, Esq. (for Maynard)
Michael Downey, Esq. (for HRD)
John Marra, Esq. (HRD)