Decision mailed: 11/13/09
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

FAITH AMARAL, ET. AL.,
v.
Appellants

CASE NOS: D1-09-78 thru D1-09-117
(Fall River Police Dep't Section 39 Layoffs)

CITY OF FALL RIVER,
Respondent

Appellant's Attorney:	John M. Becker, Esq. Sandulli, Grace, P.C. 1 State Street, Suite 200 Boston, MA 02109
Appointing Authority Attorney:	Arthur D. Frank, Jr., Esq. Corporation Counsel City of Fall River 1 Government Center – 6th Floor Fall River, MA 02722
Commissioner:	Paul M. Stein

DECISION

The Appellants[1] held positions as Police Officers with the City of Fall River (Fall River) Police Department, the Appointing Authority. They bring these consolidated appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31, §§41-43, challenging the just cause for the Appointing Authority's decision, acting under G.L.c.31, §39, to select them for layoff, effective March 12, 2009, for lack of funds. The Commission held a full hearing on July 16 and 17, 2009 at the Southern New England School of Law in North Dartmouth, Massachusetts, which was declared private as no party requested a public hearing. Four witnesses were called to testify and thirteen exhibits were received in evidence. The hearing was digitally recorded. The Commission received post-hearing submissions on September 8, 2009.

[1] There are 40 Appellants in total.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, to the testimony of the witnesses (Fall River City Administrator, Adam Chapelaine; Fall River Police Department Detective Paul Mancini, Police Officer James Sahady, and Police Officer and Fall River Police Association (FRPA) President Michael Perreira) and to inferences reasonably drawn from the credible evidence, I make the following findings of fact:

1. The Appellants are civil service employees appointed by the Police Chief, the appointing authority, to positions of Police Officers in the Fall River Police Department (FRPD). (*Testimony of Officer Perriera; Claims of Appeal; Exhibit 10*)

2. In terms of seniority, the Appellants are ranked as follows:

Seniority Date	Appellant
01/14/2001	Anthony Pridgen
09/28/2003	Brian Cabral, Anthony Barbour
12/14.2003	Brian St. Pierre, Derrick Silva, Williams Falandys, Thomas Demello, Barden Castro, Jeffrey Autote, Brian Saurette, Gregory Wiley
01/23/2005	David Gouveia, Adam Talbot
10/07/2005	Michael Silvia, Jonathan Ferreira,Steve Valario,Frederick Mello, Brian Levitre, Jason Resendes, Jared Mooney, Kevin Lopes
09/25/2006	Chris Gibson, Luis Duarte, Jonathan Souza, Joshua Robillard, Janis Bubluski, Michael Tetrault, Matthew Mendes, Keith Strong, Matthew Silvia, Derek Beaulieu, Joseph Galvao
09/10/2007	Faith Amaral, Edmond Desmarias, Michael Paveo, Joshua Carreiro, Decio Pacheco, David Calderon, Jordan Silva

(*Claims of Appeal; Exhibit 10*)[2]

3. The final approved Fall River municipal budget for FY 2009 appropriated a total of $208,357,711, including $19,998.375 in general government appropriations (excluding health care and retirement costs) to cover the operation of the FRPD, including officers salaries, expenses and debt payments. (*Testimony of Mr. Chapdelaine; Exhibits 2 & 12*)

[2] Exhibit 10, which purports to represent the seniority list used in the layoff, appears to rank four officers (Michael Silvia, Brian Cabral, Anthony Barbour & David Gouvia out-of-order from the seniority dates they claim in their respective Claims of Appeal. The Commission uses the seniority dates stated in the Claims of Appeal.

4. The Fall River FY2009 budget was balanced with $127,548,756 in local aid funds provided by the Commonwealth, of which amount $29,658,913 was appropriated for general government expenditures. (*Testimony of Mr. Chapdelaine; Exhibits 2 & 12*)

5. On January 13, 2009, the Secretary of the Commonwealth's Executive Office of Administration and Finance reported to the Governor, pursuant to G.L.c.29,§9C, that available revenues for FY2009 were insufficient to meet expenditures. The amount of the shortfall was expected to exceed $1.1 billion. (*Exhibit 3*)

6. In response, on January 28, 2009, the Governor exercised his legislatively enabled Section 9C authority and cut the State budget at mid-year including cuts to non-educational local aid. (*Exhibit 4*)

7. The Section 9C cuts made by the Governor included a 9.74% reduction, equally $2,890,146, in Fall River's previously appropriated sum ($29,658,913) of local aid for general governmental expenditures. (*Exhibits 5 & 6*)

8. After pursuing all available alternatives, including voluntary wage concessions (which most of the applicable collective bargaining units rejected), identifying one-time expense savings ($460,915.35) and savings due to vacant positions ($378,819.69), Fall River turned to evaluating possible savings from personnel reductions as the last resort. (*Testimony of Mr. Chapdelaine, Detective Mancini, Officer Perreira; Exhibits, 6 &t 12*)

9. Fall River's financial team (Daniel Patten, Treasurer; Raquel Pellerin, Office of Budget; Kevin Almeida, Auditor) in consultation with the FRPD (Chief Paul Souza and Detective Mancini) determined that, to close the budgetary shortfall, among additional cuts in other areas, the FRPD appropriation would have to be cut 5.3% or $1,055,619.06. Except for finding a one-time expense savings of $53,000, the FRPD determined that the

remainder of the cuts would be made by laying off police officers. (*Testimony of Mr. Chapdelaine, Detective Mancini, Officer Perreira; Exhibit 12*)

10. In late February and early March, 2009, the Fall River Police Association (FRPA) met with the FRPD to propose alternatives to patrol officer layoffs, including the deferral of an on-going accreditation process, eliminating "take-home" cars, and demoting superior officers. (*Testimony of Detective Mancini, Officer Perreira*)

11. Chief Souza determined that eliminating take home cars would save approximately $15,000. He also determined that demotion of senior officers would save 15% of the officer's salary, so that it would take seven demotions to equal the savings from the layoff of one patrol officer.[3] Eventually, Chief Souza rejected all of the FRPA suggestions. (*Testimony of Detective Mancini, Officer Perreira*)

12. Chief Souza directed Detective Mancini to prepare a reduction in force list of patrol officers based on seniority, i.e., a list of officers in inverse order of length of service with the FRPD. (*Testimony of Detective Mancini*)

13. On March 2, 2009, 48 patrol officers were notified that they were due to be laid off for lack of money and that hearings on the contemplated layoff was scheduled for March 11, 2009. Forty-eight of the notices were delivered in-hand on March 2, 2009, to the respective officers. The notices to Officers Silva and Tetrault, who were on vacation at the time, were mailed to them, certified mail return receipt, on March 2, 2009 and they received them on March 3, 2009. (*Testimony of Detective Mancini*; *Exhibits 7, 8 & 9*)

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[3] This scenario arises because a superior officer could not be laid off outright but has "bumping rights" to demotion to a lower ranking position, under G.L.c.31,§39, so that the demotion only would save the pay differential between senior officer's position and the junior officer's position assumed.. Using the ratio of 7-1, such a plan would mean demotion of up to 280 superior officers to save 40 patrol officer positions. The evidence did not address how many, if any, patrol officer jobs such a plan, as a practical matter, actually would save or the impact of a thinned out supervisory force on the operations of the FRPD.

14. The FRPD did not attempt to give layoff notice to Police Officer Aaron LePage or Police Officer Glen McDonald who were then on military leave. Officer LePage was undergoing medical treatment at Bethesda Naval Hospital in Maryland. Officer McDonald was on active duty in Iraq. Both officers continued to receive FRFD pay for the differential between their military and FRFD pay, as well as health insurance benefits. (*Testimony of Detective Mancini, Officer Perriera; Exhibit 10*)

15. Military personnel deployed to Iraq commonly communicate with individuals in the United States, generally, and with the FRPD, in particular. Police Officer James Sahady, a 12-year veteran of the FRPD who also hold the rank of Major in the Army National Guard, routinely had such communications while stationed in Iraq in 2004 and 2005 and since that time, including communication by e-mail, including attachments, and voice-over-internet satellite phone (VOIP). (*Testimony of Officer Sahady*)

16. On March 11, 2009, Chief Souza presided at the appointing authority hearings, held in two groups based on shift-schedule, one hearing in the morning and one at mid-day. Mr. Chapdelaine did not testify but a memorandum he prepared that summarized the financial picture was introduced. The Appellants' union representative and a union legal counsel appeared at the hearing. (*Testimony of Officer Perreira; Exhibits 11 & 12*)

17. On March 12, 2009, Fall River issued layoff notices to the 40 Appellants on a determination that the budget shortfall created by the Section 9C cuts created a lack of money sufficient to retain the Appellants in the employ of the FRPD. (*Exhibit 13*)

18. Officers Aaron LePage and Glen McDonald were not laid off. (*Exhibit 13*)

19. FRPD closed out FY2009 with a $4,000 surplus in the FRPD salary account and approximately $100,000 in unencumbered expenses. (*Testimony of Detective Mancini*)

CONCLUSION

Summary

The Commission finds that the FRPD has established just cause to layoff, for lack of money, the number of police officers selected in the March 2009 layoff. The Commission also finds that the FRPD failed to give the Appellants Silvia & Tetrault due notice of the layoff as required by Sections 39 and 41 of the Civil Service Law, but that, since there was just cause for the layoff, their employment rights were not violated, save, possibly, for an inconsequential error in the timing of their termination. The Commission also finds that the FRPD may have violated the seniority rights of the two most senior Appellants in length of service who were laid off instead of Officers LePage and McDonald, and will conduct further proceedings on that issue.

Applicable Civil Service Law and Rules

The order in which civil service employees are to be laid off in the case of lack of money is prescribed by G.L.c.31, §39, which provides in relevant part:

> [P]ermanent employees . . . having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions . . . *according to their seniority* in such unit and shall be reinstated . . . according to such seniority, so that *employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest* and reinstated first. . . .
>
> *Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work of lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one*. Any employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service . . . (*emphasis added*)

Seniority is defined in Section 33 and means:

> ". . .ranking based on length of service . . . computed from the first date of full-time employment. . .unless such service has been interrupted by an absence . . .of more than six months, in which case length of service shall be computed from the date of restoration . . . provided, however, that the continuity of service of such employee shall be deemed not to have been interrupted if such absence was the result of (1) military service, illness,

educational leave, abolition of position or lay-off because of lack of work or money, or (2) injuries received in the performance of duty . . .

Appointing authorities also must adhere to the requirements of G.L.c.31, §26, which provides: "A disabled veteran shall be retained in employment in preference to all other persons, including veterans." [4] Thus, disabled veterans with less seniority that other employees must be retained and are the last to be laid off in a reduction in force. See, e.g., Provencal v. Police Dep't of Worcester, 423 Mass. 626 (1995).

G.Lc.31, §41 governs the procedures required to effect the termination of a civil service employee and states:

> "*Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be . . . laid off . . . nor shall his position be abolished. Before such action is taken,* such employee *shall be given a written notice* by the appointing authority . . . and *shall be given a full hearing*. . . 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*." (*emphasis added*)

A tenured civil service employee who is terminated by an appointing authority which has failed to follow the requirements of Section 41 may appeal to the Commission. G.L.c.31,§42. If the employee can establish that "the rights of such person have been prejudiced thereby", the Commission "shall order the appointing authority to restore such person to his employment immediately without loss of compensation or other rights." Id.

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[4] G.L.c.31, §1, defines a "disabled veteran" to mean "any veteran , as defined in this section, who (1) has a continuing service-incurred disability of not less than ten percent based on wartime service for which he is receiving or is entitled to receive compensation from the veterans administration or, provided that such disability is a permanent physical disability, for which he has been retired from any branch of the armed forces and is receiving or is entitled to receive a retirement allowance, or (2) has a continuing service-incurred disability based on wartime service for which he is receiving or is entitled to receive a statutory award from the veterans administration."

Just Cause for Layoffs

The Commission decides appeals by person(s) aggrieved by an appointing authority's decision to layoff personnel for lack of funds under G.L.c.31,§43, which provides, in relevant part:

> "*If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action* and the person concerned shall be returned to his position without loss of compensation or other rights . . . .(*emphasis added*)

Under Section 43, the Commission must "conduct a de novo hearing for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 408, 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist.Ct., 262 Mass. 477, 482 (1928).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) (*emphasis added*) The Commission must take account of all credible evidence in the administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) It is the function of the hearing officer to determine the credibility of evidence and to resolve conflicting testimony presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs, 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988)

"The commission's task, however, is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'". Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334 rev.den., 390 Mass. 1102 (1983) and cases cited.

In a case involving a reduction in force due to alleged lack of money, the well-established rules permit the Commission a very limited role in reviewing cost-cutting choices made by an appointing authority faced with a serious budgetary shortfall. See Bombara v. Department of Mental Health, 21 MCSR 255 (2008); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995); Snidman v. Department of Mental Health, 8 MCSR 128 (1993); Soucy v. Salem School Committee, 8 MCSR 64 (1995)

As stated in Gloucester v. Civil Service Comm'n, 408 Mass. 292, 299-300 (1990):

> "[I]n the absence of pretext or device designed to defeat the civil service law's objective of protecting efficient public employees from partisan political control . . . or to accomplish a similar unlawful purpose, the judgment of municipal officials in setting the municipality's priorities in identifying the goods and services that are affordable and those that are not cannot be subject to the [C]ommission's veto."

See also School Comm. of Salem v. Civil Service Comm'n, 348 Mass. 696, 698-699 (1965); Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 926, rev.den., 417 Mass. 1105 (1994).

Once an appointing authority meets its burden of proof to articulate legitimate economic reasons for the layoffs, the burden then shifts to the employee to prove that the economic reasons were pretextual and that the layoff(s) were made in bad faith. See, e.g., Commissioner of Health & Hospitals v. Civil Service Comm'n, 23 Mass.App.Ct. 410, 413 (1987); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995) Thus, absent affirmative evidence demonstrating that a separation for lack of funds is but a mere

pretext for another improper motive for separation, the Commission cannot override a good faith determination by the appointing authority to separate employees for cost-cutting purposes. See, e.g., Denham v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap into reserve fund); City of Gardner v. Bisbee, 34 Mass.App.Ct. 721, 723 (1993) (pretext established when mayor improperly injected himself and dictated to appointing authority who should be laid-off); Cambridge Housing Auth..v. Civil Service Comm'n, 7 Mass.App.Ct. 586 (1979) (finding pretext when appellant's position was "abolished" so that another person could be appointed to perform the same duties).

In the present appeals, the FRPD met its burden to articulate a legitimate economic basis for deciding to layoff the Appellants. The undisputed fact is that Fall River suffered state-mandated Section 9C cuts in local aid appropriations in the amount of nearly $3 million. In addition, Fall River produced evidence of its good faith efforts, initially, to find means to close the budget gap other than through personnel layoffs.

The Appellants' did not prove any pretext or improper motive on Fall River's part. Even if additional savings could have been made by further cuts to expenses – such as take-home cars – or by laying off superior officers rather than patrol officers, absent evidence that those choices were made in bad faith or for other unlawful purposes, the Commission cannot disturb the exercise of an appointing authority's sound discretion to decide how best to manage its fiscal affairs. E.g., Denham v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap into reserve fund). Similarly, although it may have turned out that FRPD's cost-cutting measures may have overshot their target and, by the end of the fiscal year, yielded a surplus, that evidence

does not, necessarily, mean that FRPD knew, or should have known, that those targets were set in bad faith. In this case, the Commission draws no inference that the original cost-cutting measures were bad faith estimates from an alleged year-end surplus of $100,000 to $200,000 in the FRPD account (out of a $20 million police department appropriation and a $200 million overall municipal budget).

Appointing Authority Hearing Procedural Due Process

The Appellants complain that the appointing authority hearings were procedurally defective because Chief Souza served as the hearing officer. That argument, too, must fail.

First, G.L.c.31, §41 expressly authorizes pre-termination hearings "before the appointing authority". While an appointing authority may delegate its power to a hearing officer "designated by the appointing authority", that decision is wholly discretionary.

Second, the Appellants' point, that civil service employees hold something in the nature of a procedural "due process" right in their employment status, carries them only so far. See Cleveland Bd. Of Educ. v. Loudermill, 470 U.S. 532, 542- 46 (1985) (noting the "need for some form of pre-termination hearing" with "notice and opportunity to respond", but that process "need not be elaborate"); Bielawksi v. Personnel Admin'r, 422 Mass. 459, 466, 663 N.E.2d 821, 827 (1996) (rejecting due process challenge to bypass, stating that the statutory scheme for approval by HRD and appeal to the Commission "sufficient to satisfy due process")

Third, in order to be entitled to relief for a procedural violation of Section 41, the Appellants must establish that their employment rights were prejudiced. The Commission has set a high bar for appellants to meet this standard. See, e.g., Rizzo v. Lexington, 21

MCSR 70 (2008) (discharge; §42 appeal denied); Coronella v. Mashpee, 19 MSCR 67 (2006) (same); Gariepy v. Department of Correction, 19 MCSR 211 (2006) (same); Fopiano v. Scituate, 12 MCSR 154 (1999) (same); Dodge v. Athol Police Dep't, 11 MSCR 207 (1998) (same); Carey v. Nahant, 6 MCSR 149 (1993) (same). This standard is meant to prevent a windfall to appellants whose substantive rights were not materially affected, and to discourage appeals to the Commission in which the parties spend unproductive effort replaying alleged, disputed deficiencies in the appointing authority hearing before the Commission, rather than addressing the merits of the appeal.

Moreover, when the layoff is due to a budget shortfall, several factors are in play that might not apply in other discipline or discharge cases. Implicit in the process is the assumption that the appointing authority has reached a conclusion prior to the hearing for economic, not personal reasons, adverse to the employee(s), and the purpose of affording the employee(s) a hearing is to provide them an opportunity to hear the good faith economic reasons for the decision and to respond with evidence or argument to the appointing authority in an effort to persuade the appointing authority to change its mind. The appointing authority's burden in such a case, as noted above, is satisfied by articulating a legitimate economic reason for the layoff. The facts establishing the economic emergency, as here, are simple to state. The Commission will not impose any particular level of plenary examination at the appointing authority level in such a case. Finally, the Commission, after de novo review discussed above, determined that the FRPD did, in fact, act in good faith and established just cause to layoff the Appellants. Thus, even assuming procedural deficiencies in the process, the Appellants substantive employment rights have not been prejudiced within the meaning of G.l.c.31,§42.

Failure to Give Notice and Hearing (Appellants' Silvia & Tetrault)

Civil service law clearly requires that a tenured employee be "given" written prior notice and hearing before he or she may be discharged. G.L.c.31, §41. The Appellants correctly point out that case law has construed this language to mean the actual receipt of notice. See Board of Selectmen of North Attleboro v. Civil Service Comm'n, 16 Mass.App.Ct. 388, 390 (1983), citing Ianelle v. Fire Comm'r of Boston, 351 Mass. 250, 251 (1954). See also Board of Assessors of Marlborough v. Commissioner of Revenue, 383 Mass. 876 (1981) (absent statutory language that recognize mailing as receipt, date of appeal is the date a certified letter was received, not the date it was mailed). This interpretation is particularly apt in the context of Sections 39 and 41, which consistently refer to "receipt" as the trigger for taking action and the time frame for responses is short, in some cases, just three days.

Since the facts establish that the efforts to "give" Officers Silva & Tetrault went awry and did not "give" the required seven days actual notice in advance of the termination hearing, the FRPD did not comply with the requirements of Sections 39 and 41 of the civil service law in terminating Officers Silvia & Tetrault.

In this case, however, there is no evidence that supports a conclusion that the Appellants Silvia or Tetrault had any reasons to contest the just cause for their selection for layoff that that were unique and not adequately presented by any of the other Appellants or the Appellants' union representatives. No bona fides argument or substantial evidence was presented (either at the appointing authority level or at the hearing before the Commission) to suggest that Fall River lacked just cause to layoff the number of selected patrol officers that included the Appellants, Silvia and Tetrault. Thus,

they have not established that the lack of due notice and opportunity for hearing prejudiced their rights to show a lack of just cause for their layoff selection on the merits. Accordingly, while Officers Silvia and Tetrault have shown a procedural violation, they have not met the second prong of a Section 42 appeal that requires proof of prejudice to their employment rights that would entitled them to be reinstated fully to their positions.

Although the Commission does not decide that the FRPD's failure to give due notice to Officers Silvia and Tetrault demonstrates Section 42 prejudice, the Commission does agree with the Appellants that due notice and opportunity for hearing is a fundamental right provided to tenured civil service employees. Thus, the Commission also considered whether to exercise its discretion to grant limited equitable relief under Chapter 310 of the Acts of 1993 to cure any prejudice to the Appellants' procedural rights to the extent their layoffs were prematurely implemented by one day. The relief that seems appropriate would be to reinstate the Appellants for that one day period, i.e. through March 12, 2009, but the Appellants' have, in fact, been employed through March 12, 2009, the first day they properly could have been laid off, assuming the FRPD had followed proper procedure and deferred their hearing for one additional day. Thus, in this case, no further equitable relief is necessary or appropriate for Officers Silvia and Tetrault. cf. Pike v. City of New Bedford, CSC Case No. D1-09-77, 22 MCSR --- (2009) (Appellant never received any pre-termination notice granted limited reinstatement measured from the date he first received such notice)[5]

[5] The FRPD delayed the layoff until March 12, 2009, one day after the appointing authority hearings. The evidence does not indicate if this action was taken to account for the lag-time in notice by mail, or for other reasons. The Appellants through union counsel, brought the due notice issue to the attention of the FRPD and, the Commission will infer that they requested the layoff be delayed or their hearings rescheduled... If they did not do so, that fact would have some bearing on whether prejudice to them on account of the late notice was caused through "no fault of their own", as required by Chapter 310.

Failure to Adhere to Seniority Rules

The Appellants complain that the NBFD failed to follow the requirements of the civil service law when it chose to exempt Officers LePage and McDonald from layoff on the grounds that Officers LePage and McDonald were on military leave status and serving on active duty and, instead, to layoff other officers with more seniority, The Commission agrees with the Appellants that this decision (albeit not made in bad faith) was error and concludes that further proceedings will be required to determine what relief, if any, should be granted in the circumstances and to whom.

The Commission is mindful that, in the particular circumstance of a Section 39 layoff, although the lack of funds necessitating a layoff of personnel may be undisputable, individual-specific issues as to who is retained and who is selected for layoff are of great importance to the personnel involved. Thus, the Commission must ensure consistency (both within and across appointing authorities) when it comes to individual layoff decisions due to a reduction in force.

In this regard, the Commission concludes that the civil service law requires that an appointing authority must strictly follow both the notice requirements of Section 41, which, as discussed above, requires that employees targeted for layoff must be "given" due notice, as well as the stated seniority rules set forth in Sections 33 and 39, which requires layoff on the basis of length of service (save only for the disabled veterans' preference). Thus, an appointing authority must select and notify employees for layoff according to seniority and disabled veterans' status only; veteran's status, alone, does not justify retention of the employee over those with more seniority.

The Commission expects that, in the vast majority of situations, notice will be given (as it was in all but two cases here) "in hand" and proof of notice will not be an issue. Even in the rare instances where an employee cannot be notified in person, it should be unusual that an employee cannot be given due notice by some other means and be able to respond, either in person or through a representative in a reasonably timely manner. While a member of the armed services deployed oversees may be hard to reach, the evidence in this case demonstrates that there are reasonable means to give notice in most, if not all, cases. See also Pike v. City of New Bedford, CSC Case No.D1-09-77, 22 MCSR --- (2009) (discussing the various means of contacting active duty military personnel in the United States and in combat areas).[6] Thus, absent special circumstances, military service does not excuse the appointing authority from applying Sections 33 and 39 as written, and to layoff employees in inverse order of seniority, based on length of service and, if applicable, disabled veteran's status. Naturally, if it is established that the circumstances of any particular military deployment (or any other impediment) makes it impossible, in fact, to "give" the required notice, an appointing authority is precluded from layoff of that individual until such notice is effected.[7]

The Commission acknowledges the high level of ardor, focus and valor that military service requires, particularly in combat. For precisely those reasons, the civil service law

[6] No party has raised the applicability of the federal Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §4311 (USERRA) and regulations, 20 C.F.R. 1002.1 et seq., which prohibits, among other things, terminating the employment of any person "on the basis of their membership" in the armed forces of the United States. The Commission does not read the USERRA as a statute that is inconsistent with or preempts the application of the civil service law of the Commonwealth. Discrimination against military personnel would be prohibited by basic merit principles as well.

[7] Notice issues are not unique to military personnel. There may also be some occasions when an employee is absent and unreachable for other reasons – death in the family, hiking in the wilderness, for example – and cannot be given due notice for a brief period

appropriately rewards those who have worn the uniform of the United States by granting veteran's preferences in hiring and by protecting disabled veterans in case of layoffs. Yet it is equally true that every civil service police officer and firefighter is sworn into daily service of the citizens of the Commonwealth, and they also routinely enter harm's way to protect life and property at the risk of his or her own safety. They, too, deserve recognition for the civil service rights they have earned, in particular, the right of those who put their safety on the line the longest to retain their jobs based on that length of service in the event of a reduction in force.

The Commission recognizes that these rules may mean that appointing authorities must be flexible to make necessary adjustments during the layoff process – greater lead time, individually scheduled hearings and/or "deferred" layoffs, for example. The guiding principle remains that civil service law and equity prevent layoff of any person unless and until they have received due notice and opportunity for hearing in advance. While the desire is laudable to make further across-the-board allowances for members serving in the armed forces, especially overseas, it is not within the purview of an appointing authority or the Commission to do so. Whether a different approach to deployed veterans should be implemented is a question more properly addressed to the Legislature.

In the present appeal, the evidence presented to the Commission indicates that the decision of the FRPD to exempt Officers LePage and McDonald from layoff may have prejudiced the employment rights of other patrol officers, presumably the two officers with the least seniority of the 40 officers laid off, provided that certain other conditions are met. According to the record, it would appear the affected officers probably would be Officers Anthony Pridgen, Brian Cabral and/or, Anthony Barbour, but that is not entirely

clear.[8] The seniority dates of the adversely affected officers, in fact, must be senior to Officers LePage and McDonald, which although alleged, was not supported by any specific evidence. Other factual issues need to be answered, such as whether either Officer LePage or Officer McDonald claimed disabled veteran's status, whether "giving" notice to either of them would have been impossible, and if so, for how long would that have been true? Accordingly, the Commission will allow any potentially prejudiced Appellants to move for reconsideration or reopening of their appeals solely for the purpose of addressing the military service issue, and will conduct further proceedings, if necessary, to establish the facts necessary to determine what relief, if any, is appropriate in those cases.

Accordingly, for the reasons stated above, the Commission takes the following Decision in these consolidated appeals:

1. The Appeals of all the Appellants are hereby ***dismissed.***

2. If any Appellant believes that he or she has standing to assert that his or her employment rights were prejudiced by the exemption of Officers LePage and McDonald from layoff, i.e., they are senior in length of service to them, the Commission will entertain a motion to reconsider and/or reopen the appeals of those particular appellants and will schedule a status conference with the parties to determine what further proceedings are appropriate to decide the issue of possible prejudice to those Appellants' rights as a result of the failure of the FRPD to notify and separate Officers LePage and McDonald and what relief, if any, should be granted. The Commission contemplates that

[8] The evidence indicated that some of the patrol officers originally laid off have been reinstated by FRPD following the receipt of unanticipated grant funding. (*Testimony of Mr. Chapdelaine*) The evidence does not indicate,, however, whether the reinstated officers include any of the Appellants, or which ones, and whether these reinstatements, or any other subsequent reinstatement may moot the issues concerning Officers LePage or McDonald.

notice of these further proceedings will be served on Officers LePage and McDonald and that they will be allowed the opportunity to move to participate and/or intervene.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein, Commissioners; Taylor, Commissioner [absent]) on. November 12, 2009

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
John M. Becker, Esq. (for Appellant)
Arthur D. Frank, Jr., Esq. (for Appointing Authority)