

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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**TWENTY-SEVEN FORMER
BOSTON MUNICIPAL POLICE
OFFICERS, SERGEANTS AND
LIEUTENANTS,**

**Case Nos. D1-07-5 through
D1-07-31**

Appellants

CITY OF BOSTON

Respondent

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AMENDED DECISION AFTER REMAND

These appeals involve claims by former members of the City of Boston Municipal Police Department (BMPD) that their civil service rights to be transferred pursuant to G.L.c.31, §40 to positions with the City of Boston Police Department (BPD) have been infringed. The Commission dismissed these appeals by Decision dated March 28, 2007, which Decision was affirmed by the Massachusetts Superior Court, sub nom Karen Ahern-Stalcup et als v. Civil Service Comm'n, et al., Civil Action No. SUCV2007-2262. By opinion dated April 6, 2011, the Massachusetts Appeals Court vacated the judgment of the Superior Court and remanded these matters to the Commission for further proceedings consistent with the opinion of the Appeals Court.

After status conference held on July 19, 2011 and hearing counsel for the parties, as well as counsel for certain other former BMPD officers currently employed by the BPD who sought to intervene in these proceedings, the Commission granted those former officers the status of participants pursuant to 801 CMR 1.00(9) for the limited purpose of presenting oral and written argument stating their position, if and, as to the relief proposed by the Appellants' or the Commission, and/or the adverse impact that such relief may have on their current employment with the BPD, including their seniority, pay and residency status.

On August 18, 2011, the City of Boston filed a Motion to Reopen Record, to which the Appellants' filed a Memorandum in Opposition to the Motion to Reopen the Record on September 26, 2011 and the City of Boston submitted its Reply on October 7, 2011. The Commission also received memoranda from the City of Boston and the Appellants stating their positions on the appropriate standard to be used by HRD in approving the transfer of a civil service employee under G.L.c.31, §40.

The Commission has reviewed the evidentiary record of the two days of testimony and evidence presented by the parties during the full hearing conducted by the Commission in February 2007 and the Commission's Decision dated March 27, 2007 Decision, as well as the Massachusetts Appeals Court's April 7, 2011 opinion, and the submissions of the parties referenced above. The Commission also will take administrative notice of certain of the Commission's Decisions issued since March 27, 2007 involving some of the same Appellants.

The Commission has determined that, although the Appeals Court decision does not preclude the Commission from taking further evidence, it is neither necessary nor

appropriate to reopen the record in order to comply with the mandate of the Appeals Court. Accordingly, for the reasons more fully explained below, the City of Boston's Motion to Reopen the Record is denied. The Commission issues this Amended Decision, which modifies the Commission's March 28, 2007 Decision and makes the further findings of fact and conclusions stated below to implement the mandate of the Appeals Court's April 7, 2011 opinion.

SUPPLEMENTARY FINDINGS OF FACT

Facts Concerning the BPD and the BMPD

37. The process which resulted in the abolishment of the BMPD effective December 31, 2006 was a lengthy one, at least a year in the planning. The BMPD last hired new armed police officers in 2001. For several years prior to its abolishment, the BMPD had experienced difficulty retaining its armed police officers. In a one year period from March 2004 through October 2005, the BMPD lost 13 armed police officers who voluntarily left the BMPD to transfer to another police department. (*Exh. 23; Testimony of Crosby, Hamilton & Callahan*)

38. The FY2006 budget of the City of Boston's Property and Construction Management Department (PCMD) of \$13,213,419 covered 317 employees in total. The BMPD armed police force included four BMPD Lieutenants (\$212,876), 12 BMPD Sergeants (\$598,785) and 65 Police Officers (\$2,785,751). The BMPD unarmed security force included 42 security guards and security officers, also known as "site officers" (\$1,106,573) (*Exh. 23*)

39. Although unarmed site officers also had the power to arrest a person on city-owned property. For a number of years before the BMPD was abolished the BPD had

ordered that site officers were not to make arrests, but were required to call for an armed BMPD officer to do so. (*Testimony of Hamilton*)

40. The FY2007 budget of the City of Boston's Property and Construction Management Department (PCMD) of \$11,309,072 also covered 317 employees in total. Prior to the \$2,083,912 cost savings imputed from the abolishment of the BMPD during that fiscal year, the BMPD armed police force was budgeted for three BMPD Lieutenants (\$163,625), 12 BMPD Sergeants (\$612,833) and 54 Police Officers (\$2,467,221). The BMPD unarmed security force included 53 security guards and security officers (\$1,744,626) (*Exh. 23*)

41. As of December 31, 2006, 12 to 14 BMPD police officers transferred from the armed BMPD police force to assume positions of site security officers in the reorganized Protective Services Division of the PCMD. (*Testimony of Crosby*)

42. There was no evidence presented by either party to suggest that the number of city-owned properties changed materially from 2005 to 2007 or that there was any significant difference in the level of security services required at those properties before and after the abolishment of the BMPD. To the contrary, PCMD Deputy Commissioner Crosby credibly testified that his department "had been taking on more and more buildings, the City had been buying more property" (*Testimony of Crosby*)

43. Prior to abolishment of the BMPD, the structure of the relationship between the BMPD and the BPD, while generally a collaborative one, gave BPD officers considerable power of oversight and command-and-control authority over the day-to-day activities of the BMPD and its police officers. The commanding officer of the BPD's Special Police Division maintained an office at BMPD headquarters and had the authority to assign and

dispatch BMPD officers as to duty assignments, special operations and emergency response, as well as limited authority over disciplinary matters. The license to serve as a special police officer, as well as the license to carry a firearm, as required by law for a BMPD officer to perform his duties, fell within the exclusive purview of the BPD's Special Police Division. By express BPD rules, all BMPD officers, regardless of rank, were obliged to follow the lawful orders of any BPD officer, regardless of rank. (*Exhs. Testimony of Crosby, Callahan, Linsky & Hamilton*)

44. Prior to abolishment of the BMPD, its officers performed patrol duties on city-owned property, including the Boston Common, as well as other city parks and municipal buildings and courthouses. BMPD officers were also assigned to support the BPD bike unit and other BPD operations, such as extra patrols as required to target specific crime activities and gang problems in a particular area. These duties sometimes entailed pursuit and arrest of a suspect from the city-owned property and on public streets. BMPD officers were responsible for the custody and transport of persons they apprehended to a BPD district station where the BMPD officer would process the booking. BMPD officers also would testify as witnesses in court when the case came to trial. (*Exh. 39; Testimony of Crosby, Callahan, Linsky, Hamilton, Centeno & Doyle*)

45. As a general rule, while the BPD and BMPD shared jurisdiction over all city property, BMPD officers tended to handle most of the so-called "quality of life" issues on public property, such as "kids hanging out, drinking, small-level drug activity in the park [and] rowdiness", and "took the burden off the BPD to handle the more serious 911 calls", which came into a different dispatch center from the BMPD call center (617-635-

3500). The BPMD dispatchers were not 911 “state-certified”. (*Testimony of Crosby, Callahan, Linsky, Hamilton, & Sallale & Doyle*)

46. A certain degree of redundancy appears in the way the BPD and BPMD operated. Occasionally, both BPD and BPMD officers would be dispatched to respond to the same call for service. In one example, BPD Superintendent Linsky recalled an incident in which BPD and BPMD officers responded to a burglar alarm call, entered the building, from separate doorways without knowing the other officers were there, and met each other inside the building with guns drawn. (*Exh. 57; Testimony of Crosby, Linsky & Broderick*)

47. The Commission takes administrative notice that the BPD employs a total of nearly 3,000 sworn officers, including approximately 1,500 to 2,000 patrol officers and detectives, and hundreds of superior officers from sergeant to superintendent-in-chief. (*Exh. 23; www.cityofboston.gov/Images_Documents/02%20Summary%20Budget% 20A_tcm3-24767.pdf; www.cityofboston.gov/Images_Documents/05%20Public%20Safety% 20Cabinet%20A_tcm3-24783.pdf. See also Pugsley v. Boston Police Dep’t, CSC No .E-10-334, 25 MCSR --- (2011), www.mass.gov/anf/hearings-and-appeals/decisions/ civil-service-decisions/civil-service-appeals*)

Facts Concerning the Appellants

48. Pursuant to a collective bargaining agreement (CBA) duly made between the City of Boston and the International Brotherhood of Police Officers, Local 650 (patrol officers) and Local 539 (superior officers), the terms and conditions of the Appellants’ employment are subject to the applicable CBA. (*Exhs. 29, 30, 40, 46 through 53*)

49. BPD sworn patrol officers are represented by a different CBA made between the City of Boston and the Boston Police Patrolmen's Association (BPPA). BPD Sergeants, Lieutenants and Captains are represented by the Boston Police Superior Officers Federation (BPSOF). (*Exhs. 40 & 61*)

50. Among the terms common to these CBAs, the respective collective bargaining units had the exclusive authority to bargain with the City of Boston over the terms and conditions of employment covered by the CBA and to pursue grievances for violations of the CBA rights of the members of the bargaining unit. Among the subjects covered by the CBAs were residency issues, jurisdictional issues between the BPD and BMPD, and the process for BMPD officers to be eligible to work BPD paid details. (*Exhs. 29, 30, 40, 46 through 53 & 61*)

51. In the period leading up to the abolishment of the BMPD, the collective bargaining representatives for the BMPD officers met with City of Boston officials, including the Mayor. The BMPD's union representative took the position that all BMPD officers should be granted Section 40 transfers to the BPD under Chapter 31 of the Massachusetts Civil Service Law, citing to allegedly similar circumstances: merging of the Massachusetts State Police, Registry Police, Capitol Police & Metropolitan Police and merging the New York City Housing and Transit Police. The City of Boston clearly and emphatically rejected that approach. The City of Boston adopted the position that the BMPD would be abolished, but that any officer could request transfer to the position of site security officer in the newly reorganized PCMD Protective Services Division or request a transfer under Section 35 of the Massachusetts Civil Service Law to the BPD or

to another municipal civil service police force). (*Exh. 23; Testimony of Crosby & Hamilton*)

52. None of the BMPD officers sought approval from the Massachusetts Human Resources Division (HRD) for a transfer to the BPD under Section 40. Some accepted positions as site officers, some chose to retire. Most, however, applied for a Section 35 transfer to the BPD. (*Exhs. 23, 41 through 43*)

53. As previously noted in the Commission's 2007 Decision, the Appellants' requests for Section 35 transfers were rejected by the BPD with no reasons provided to HRD or to any of the Appellants at the time. The Appellants first learned the reasons behind the rejection of their Section 35 transfer requests from the introduction of Exhibit 42 at the February 2007 hearing before the Commission. Exhibit 42 contained which contained a brief description, such as "Failed PAT test", "Failed background check", "Failed psychological evaluation", "Withdrew from process", "Medical failure" and "No show for PAT." (*See Commission's 2007 Decision, Finding of Fact # 11*)

54. In the years following the Commission's February 2007 Decision, the names of several Appellants were certified for appointment as police officers from the re-employment list (on which their names were placed and which required their consideration ahead of all other candidates, pursuant to the first sentence of Section 40 of Chapter 31) to fill vacancies with the BPD and other municipal police forces. The Commission received subsequent appeals, brought pursuant to Chapter 31, Section 2(b), from certain of the Appellants in these appeals who had been bypassed for such appointments. The Commission takes administrative notice of these appeals and the subsequent judicial review of some of them, as follows: (a) Allen v. Boston Police Dep't,

21 MCSR 45 (2008) (upholding BPD's bypass as reasonably justified based on Appellant's prior criminal record and his admitted acts of poor judgment and insubordination); (b) Riva v. Boston Police Dep't, 21 MCSR 230 (2008), vacated by Boston Police Dep't v. Riva, C.A.No. 2008SUCV-02189 (Mass.Sup.Ct.2010) (Commission's decision to allow Appellant's appeal overturned by Superior Court which held BPD's decision to bypass Appellant was reasonably justified); (c) O'Loughlin v. City of Boston, 22 MCSR 327 (2009), pending appeal in Boston Police Dep't v. O'Loughlin, C.A.No. 2009-SUCV02759 (Mass. Sup.Ct.) (allowed bypass appeal on grounds that BPD had not provided reasonable justification for BPD's opinion that Appellant was psychologically unfit to be a police officer); (d) McGrail v. Marshfield, 23 MCSR 390 (2010) (Commission allowed Appellant's appeal from bypass that was not reasonably justified).

55. The Commission also takes administrative notice of its decision involving the Appellant Ulrich Alfred, whose appeal from a bypass for appointment as a BPD officer in 2004 was upheld based on the Appellant's history of domestic violence. Alfred v. Boston Police Dep't, 20 MCSR 281 (2007) (upheld bypass as reasonably justified based on Appellant's history of domestic violence)

CONCLUSION

Summary

As noted by the Appeals Court, the substantial credible evidence in the record warrants the conclusion that the abolishment of the BMPD resulted in a "transfer of the functions" of certain former BMPD officers to the BPD within the meaning of Mass.G.L.c.31,§40. The Commission concludes that, although this is an atypical case for the application of

Section 40, some, but not all, of the work performed by the BMPD was transferred to the BPD, and that such a transfer is sufficient to trigger the application of Section 40 as most recently construed by the Appeals Court. The City of Boston has made no persuasive argument that additional evidence is necessary to flesh out the relevant facts bearing on the Section 40 issues, which both parties clearly understood were the focus of the prior 2007 evidentiary hearing. Accordingly, the Commission denies the motion to reopen the record and modifies its prior Decision to allow the Appellants appeals, in part. The Commission orders HRD to accept transfer requests made by any of the Appellants within a 30 day period from the effective date of this Amended Decision After Remand. HRD shall evaluate and decide those requests in a manner consistent with civil service law and rules. If any person becomes aggrieved by HRD's action or failure to act on such a transfer in violation of civil service law and rules such person may appeal to the Commission from such action or inaction by HRD in accordance with G.L.c.31,§2(b).

Motion to Reopen the Record

The City of Boston moves to reopen the record to present additional evidence purportedly germane to the Commission's determination as to whether the facts establish that a Section 40 "transfer of the functions" occurred from the BMPD to the BPD. By prior procedural order, the Commission required that such a motion "shall contain a specific proffer of the evidence that the City of Boston seeks to introduce" and "state the complete grounds" supporting the taking of additional evidence. (¶4, Procedural Order dated July 21, 2011).

During the two-day evidentiary hearing before the Commission in February 2007, the Commission heard from three witnesses called by the City of Boston (including two

witnesses on rebuttal), seven witnesses called by the Appellants, and received 61 exhibits (covering nearly 400 pages). The City of Boston contends that the hearing “focused on [one] issue – whether [BMPD] and the [BPD] fell under separate appointing authorities” that the Commission decided the matter on that “overarching assumption”, and, therefore, the “record contains scant evidence on which the Commission can make a fair and informed decision” on the issue for which no finding was made, and for which the case was remanded, i.e., “whether and where the Appellants’ job functions were transferred.” The City of Boston described, in a general way, that it intended to proffer evidence that:

- Comprehensively describes the BMPD Officers’ duties as of December of 2006, and whether those duties continued to be performed after the elimination of the BMPD in January 2007, and, if so, by what entities and classifications.
- Comprehensively describes the duties of BMPD Lieutenants and Sergeants as of December of 2006, and whether those duties continued to be performed after the elimination of the BMPD in January 2007, and, if so, by what entities or classifications.
- Upon the elimination of BMPD Officers’ positions, many of the functions they previously performed, such as site security, were absorbed by the unarmed site security unit or other departments within the PCMD. Indeed, as a result of the elimination of their positions, all BMPD Officers were offered positions with the unarmed site security unit.
- Some BMPD job functions, such as designated patrols of City-owned property, were discontinued altogether.

- Because of the limited jurisdiction and authority of the BMPD, the functions the BMPD Officers performed were already being performed by the BPD. The additional work absorbed by the BPD, including response to alarms, calls and arrests resulting from the elimination of the BMPD was de minimus.
- BMPD Officers did not perform the same job functions as BPD Officers and therefore, even if some of their work transferred to the BPD, the BMPD Officers are not entitled to a transfer into the BPD Officer positions under §40.
- BMPD Lieutenants and Sergeants performed different job functions than BPD Lieutenants and Sergeants and therefore, their work as BMPD Lieutenants and Sergeants did not transfer to the BPD under §40.

The City of Boston argues that, since these appeals were remanded to the Commission for further findings on a specific question of whether there was a transfer of work that was “simply not central to the original hearing”, the Commission must hold a further plenary evidentiary hearing on that issue, lest it risk another reversal and remand, citing Boston Edison Co. v. Department of Public Utilities, 419 Mass. 738 (1995).

The Appellants strenuously oppose reopening the record. The Appellants contends that the question of whether there was a transfer of work from the BMPD to the BPD was not only litigated as part of the 2007 hearing, but that the Appeals Court opined that the record contained “substantial evidence” that such a transfer was made. The Appellants contend that such opinion forecloses further inquiry and compels the Commission to one, and only one, conclusion – namely, that such a transfer must have occurred.

The Commission reads the Appeals Court’s decision simply to mean that its review of the record suggested that there was sufficient evidence upon which the Commission

would be permitted to make the finding that there had been a “transfer of functions” from the BMPD to the BPD within the meaning of Section 40, i.e., “sufficient evidence upon which a reasonable mind might rely to support a conclusion”. The Commission does not read the Appeals Court’s opinion as a mandate to make such a finding or to preclude taking further evidence as the Commission may deem necessary or appropriate. Rather, the fact that the Appeals Court remanded this matter to the Commission, argues more persuasively that it is for this Commission, not the Appeals Court, to weigh all of the evidence in the record on this issue that it finds credible, and to make such findings as the Commission, not the Appeals Court, decides is warranted by that evidence.

The Commission agrees with the Appellants, however, that the record should not, and need not be reopened. A review of the extensive record of the 2007 evidentiary hearing shows clearly that both parties received a full hearing on the issues presented by these appeals, all of which focused on the rights of the Appellants, if any, to seek a transfer from the BMPD to the BPD under the last sentence of G.L.c.31, §40, which reads:

*“If the position of a permanent employee is abolished as the result of the transfer of the functions of such position to another department, division, board or commission, such employee may elect to have his name placed on the reemployment list or to be transferred, subject to the approval of the administrator [HRD], to a similar position in such department, division, board or commission without loss of seniority, retirement or other rights, notwithstanding the provisions of section thirty-three. (emphasis added)”*¹

The record demonstrates that both parties devoted little attention to what is, essentially, an undisputed fact that the BMPD and the BPD are different appointing authorities. The City of Boston’s proposed decision submitted after the evidentiary hearing cites to the relevant municipal ordinances (Exhs. 4 & 10) that establish these basic facts. *See*

¹ G.L.c.31, §33 provides that any employee who transfers under Section 40 carried all seniority rights from the former position to the new position, without the waiting period required for other types of transfers.

Respondent's Proposed Decision, p.3. The Appellants' proposed decision does not even mention the issue as a factual dispute or a legal issue. *See* Appellants' Proposed Decision. In Section III.A. of its' legal argument to the Commission concerning the applicability of Section 40, the City of Boston stated: "Property and Construction Management Did Not Transfer BMPD Work to the BPD." *See* Respondent's Proposed Decision, pp. 15-16. In sum, the principal focus of all of the evidence and the argument of both parties dwelled on whether BMPD and BPD officers performed substantially the same job, both before and after the BMPD was abolished.

The City of Boston had not made a persuasive case that the additional evidence it would proffer in another evidentiary hearing was evidence that was not available to the City of Boston at the time of the 2007 evidentiary hearing. In fact, the topics that the City of Boston proposes to address clearly do not fall into that category.² The Commission fully respects that, in hindsight, the City of Boston could be expected to identify many additional facts that could have been presented or presented differently at the original hearing. Such a request, however, is effectively, a request for a potentially lengthy "new trial" at the cost of considerable additional delay and expense in this already well-trod dispute. Whatever probative value that might be added to the body of evidence already in the record, all of which was available at the time of the original evidentiary hearing, does not outweigh the cost, delay and expense of a new hearing.

The situation here differs from Boston Edison Co. v Dep't of Public Utilities, 419 Mass. 738 (1995). In the Boston Edison cases, the DPU rejected a request for relief from its' rule that obliged the utility to enter into certain long-term supply contracts, under the

² The limited description of the proposed evidence is not the "specific proffer" that the Commission expected and barely informs the Commission about the actual evidence, a considerable portion of which presumably would be available in documentary or affidavit form.

DPU's "extraordinary circumstances" exception, a claim that turned on the utility's complex technical case that \$290 million in increased costs would have to be passed along to ratepayers if such contracts were made, and which could be avoided if the utility were granted an exception to the rule. On initial appeal, the SJC upheld the DPU's reasons for rejecting one of the utility's "extraordinary circumstances" exception claims, but remanded for further proceedings as to the second claim which relied on "data and assumptions behind the [avoided cost] calculation" which the DPU acknowledged it "had 'not had opportunity to explore. . . ." in the prior proceeding. *Id.*, 419 Mass. at 748 (*emphasis added*). On remand, the utility moved to reopen the record and made an offer of proof "indicating the type of *updated* information on avoided costs that it would submit" in evidence. *Id.*, 419 Mass. at 743 (*emphasis added*) The DPU denied the motion to reopen on the grounds that the proffered evidence was legally insufficient to establish a claim of "avoided costs" and, therefore, was immaterial to the decision. On further appeal, the SJC remanded with the specific mandate to reopen the record to accept the utility's proffered evidence, noting that "[t]hose data and assumptions remained unexplored" and, without the evidence and the DPU's analysis of it, the record was insufficient to provide an adequate basis for judicial review. *Id.*, 419 Mass. at 748-49.

Here, no party was denied the opportunity to present evidence on the "transfer of function" issue at the 2007 hearing and both parties did so. No "updated" data are proffered. The record already is sufficient – as the Appeals Court has held – to support a finding on the "transfer of function" issue and further judicial review, if needed. The flaw in the Commission's prior decision was not the dearth of evidence in the record to support a finding on the issue, as was the case in Boston Edison, but the fact that, the

evidence notwithstanding, the Commission did not reach the issue and made no finding. Nothing in the Boston Edison cases, nor in the Appeals Court opinion in this matter, impels the Commission to take further evidence here and it declines to do so. Accordingly, the City of Boston's Motion to Reopen the Record is denied.

The "Transfer of Functions" of the BMPD

The substantial and credible evidence presented to the Commission established that a significant and material portion, more than a "de minimus", but not all, of the functions of the BMPD were transferred to the BPD, as a result of the abolishment of the BMPD armed division as of December 31, 2006. The evidence also established that a significant and material portion, more than "de minimus", but not all, of the functions of the BMPD armed division were transferred to the newly restructured PCMD Security Services Division and performed by site security officers within that unit.

Mass. G.L.c.31, §40 does not appear to contemplate any clear standard on how much of a position's functions must be transferred to another position in order to trigger the applicability of the transfer request right. On its face, the statute does not appear to be limited only to situations in which "all" of the functions of a position are transferred to another civil service employer, or address what rights of election apply when the functions are split and transferred to more than one other civil service unit. Accordingly, the Commission does not construe Section 40 to be limited solely to a transfer of "all" functions of a position to a single new employer. If that were the case, however, the Commission would be compelled to find that Section 40 did not apply to the BMPD and dismiss these appeals on that basis, since, the substantial evidence established that only some of the functions of the armed BMPD officers were transferred to the BPD. The

Commission knows of no judicial interpretation on this question that suggests any different conclusion and the parties have not called any to the Commission's attention.

The City of Boston does correctly anticipate that Section 40 should not be construed, and the Commission does not construe it, to entitle a civil service employee to follow a position abolished by his employer to a position with another employer to which only a "de minimus" level of the essential job functions had been transferred. Such a result cannot possibly be what the legislature had in mind when it enacted Section 40 and the applications of the statute in such circumstances would be wholly impractical, inefficient and fiscally unwise from a public management perspective.

The Commission finds that the appropriate construction of Section 40 permits a transfer request whenever a substantial and material portion of a tenured civil service employees' job functions are transferred to another civil service unit. This construction balances the interest of a tenured employee to continued employment when his job functions remain needed, with the interest of a public employer to implement efficiencies, including cost efficiencies, which compel a reduction in force. Where less than all of a job's (or jobs') functions is transferred, the choice of who should be retained by transfer and who should be terminated ought to depend on basis merit principles, which include objective criteria for selection, the paramount criteria being seniority. Also, there is nothing within Section 40 that guarantees any such transferee a full time job, where the operational requirements of the new organization do not justify it.³

³ The availability of full time work does not need to be specifically addressed here, as the undisputed evidence indicates that in 2006 and 2007 the BPD was in the process of added approximately 280 new police officers to the force. Thus, if the Appellants had Section 40 transfer rights that gave them priority to such positions, there would clearly have been sufficient permanent full-time police officer positions to which all of them could have been appointed.

The substantial and credible evidence supports the conclusion that, after December 31, 2006, a significant and material portion of a BMPD police officer work was transferred to the BPD and performed by BPD sworn police officers. Whether or not the work of the BMPD officer force was performed on or off city property, or on their own initiative, or by BPD direct order for backup or support, is not entirely determinative. The facts clearly establish that, until December 31, 2006, the 65-person BMPD police force, while “underutilized”, maintained 24-hour coverage and handled numerous law enforcement activities, including cruiser and bike patrols, building surveillance, apprehension and arrests, bookings, and court appearances, as well as special assignments, on a daily basis. When these positions in the BMPD were abolished, all of these job functions still were required and, with the exception of certain building surveillance activities (and, possibly, certain armed escort services), became the responsibility of the BPD.

It is equally clear that a significant and material portion of the work of the BMPD armed police officer force was assumed by other personnel within the PCMD, particularly the site security officers. The complement of such officers increased about 20% (from 44 in FY2006 to 53 in FY2007 budgets; 12-14 BMPD officers transferred to those jobs after December 31, 2006), which alone, is sufficient evidence to infer significant and material transfer of work formerly performed by the BMPD armed police officer force. Although additional evidence might further inform what precise duties the former BMPD armed officers performed as site security officers, that evidence is not needed to reach the conclusion that the work assumed was significant and material.⁴

⁴ The Commission does not reach the question whether a BMPD officer’s Section 40 rights were extinguished by the City of Boston’s offer to transfer any former BMPD officer to the job of a site security officer, as the evidence indicated was offered to all BMPD officers and that approximately 12 to 14 officers accepted that transfer. Nor will the Commission address whether the City of Boston may properly contend

The evidence is not sufficient, however, to permit an inference that the supervisory functions of the superior officers (4 Lieutenants and 12 Sergeants) were transferred to the BPD. Except for some brief testimony about the conduct of roll call, the Appellants presented no evidence of what the specific functions of an BMPD superior officer were or evidence of whether the transfer of the functions of the BMPD describe above also resulted in the need to add any BPD officers at the supervisory level. There is no evidence that there were any such new supervisory positions created by the BPD leading up to, or in the aftermath of the December 31, 2006 abolishment of the BMPD. In the absence of such evidence, on the record before it, the Commission has no basis upon which to infer that the functions of the job of a BMPD Lieutenant or Sergeant was transferred to the BPD within the meaning of Section 40. The Commission concludes, therefore, that BMPD Lieutenants and Sergeants have not established any right of transfer under Section 40 to the position of BPD Lieutenant or Sergeant, although they would have the same rights, if any, to transfer to the “similar” position of BPD police officer as any other BMPD police officer.

HRD’s Approval of Section 40 Transfers

There is no dispute that none of the Appellants ever formally made any request to HRD for approval of a Section 40 transfer to the BPD. The Appeals Court noted that the Commission was presumptuous to assume it was “inconceivable” that HRD would approve such a request. Thus, the Commission must now consider whether the Appellants

that those BMPD officers who declined such a transfer may be charged with failing to mitigate their damages. There do appear sound public policy arguments for those conclusions. See generally, Almeida v. New Bedford School Comm., 22 MCSR 269 (2009), reconsideration, 22 MCSR 348 (2009), further decision, 22 MCSR 739 (2009), further decision, 23 MCSR 608 (2010)(construing reinstatement rights in labor service to permit bumping into more than one job, at the election of the municipality, and an employee who rejects a properly offered position, even less than full time, does so at his peril)

should be allowed to press a request for such approval at this late date. On the one hand, at least through the advocacy of their union representatives, the Appellants clearly knew of their purported right to Section 40 transfer when the BMPD was abolished and were repeatedly rebuffed by the City of Boston. On the other hand, the unusual delay in the vindication of their (ultimately successful) argument that such rights existed, is not entirely due to any fault of their own. In these circumstances, taking into account basic merit principles and the authority of the Commission to fashion appropriate relief pursuant to Chapter 310 of the Acts of 1993, the Commission concludes that it would not be appropriate to bar the Appellants from relief to which they may otherwise be entitled simply because they did not formally pursue their Section 40 claims with HRD previously. The Appellants are entitled to a determination by HRD as to whether or not to approve their request for a Section 40 transfer.

The question remains what standard HRD must apply to any such transfer requests, as to which the parties take substantially different positions. The Appellants contend that, under Section 40, HRD performs no more than the ministerial function of ascertaining whether the work has been transferred, in which case HRD has no discretion but to approve the transfer. The Appellants contend that HRD has no authority to seek input from the BPD.

The City of Boston contends that HRD acts as a gatekeeper in much the same way as it functions when it receives a request to approve the bypass of a candidate for appointment or promotion to any civil service position. In those cases, the law requires that an appointing authority provide “sound and sufficient reasons” or “reasonable justification” for the request, and that HRD must review, and simply “receive” such

reasons, prior to deciding whether they should be approved. See, e.g., Brckett v. Civil Service Comm'n, 447 Mass. 233, 241 (2006) (“reasonable justification” standard); MacHenry v. Civil Service Comm'n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] (and Commission oversight thereof) in bypass cases is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”) See also Bielawski 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”); 1976 Op.Att.Gen. 177-79 (confirming “substantial discretion” in personal administrator in determining whether a job is “similar” for purposes of certifying from a re-employment list)

This question appears to be one of first impression. The Commission offered HRD the opportunity to submit a memorandum commenting on the parties’ divergent views of HRD’s responsibility under Section 40, but HRD has not done so. Under the circumstances, the Commission will defer to HRD to fashion, in the first instance, the process that it deems appropriate to apply to Section 40 transfer requests, in general, as well as to the facts of these specific cases in particular. The Commission does take this occasion make two observations about Section 40.

First, neither the express language of Section 40, nor the statutory construct of Chapter 31, compels or precludes HRD from soliciting input from BPD on whether it should approve a Section 40 transfer request. Given the Appeals Court’s interpretation that Section 40 applies across, as well as within appointing authorities, however, the

Commission can understand that it could lead to the unintended consequences if the Section 40 approval process was merely ministerial and lacked any substantive standards. For example, under the Appellants' view, one appointing authority would be compelled to employ a person from another appointing authority, based on the employment standards applied by the employee's former employer, rather than the future employer, who will be required to hire the employee, in effect, sight unseen. As a general rule, the continued employment of a tenured civil service employee, who cannot be terminated except for "just cause" under Chapter 31, poses a somewhat different question from whether a civil service employer may decline to hire a person in the first instance, based on "reasonable justification" derived from a fair and impartial assessment of a questionable background. This issue becomes a heightened concern when public safety positions are involved, such as those of a police officer with a gun and a badge. See, e.g., City of Beverly v. Civil Service Comm'n, 78 Mass.App.Ct. 182,191 ("Simply put, a municipality should be able to employ more freedom in deciding whether to appoint someone as a new police officer than in disciplining an existing tenured one.") The Commission encourages HRD to consider these issues in framing the standard for its review of a Section 40 transfer request.

Second, given the hiatus between the time the Appellants contend that they should have been allowed to transfer and the present, there are clearly facts about the Appellants that have become known since December 31, 2006. The Commission has noted several cases involving bypasses of some of the Appellants since that time, some of whom were found properly bypassed and some of whom were not. In a perfect world, the assessment of any of the Appellants' Section 40 rights would have turned on the facts known or reasonably

discoverable as of the date of the request. On the other hand, to now give a public safety candidate a “free pass” for any misconduct he or she may have committed since 2006 also seems to be problematic. The Commission can perceive that no hard and fast rule can be applied. For example, should it be discovered that one of the Appellants was convicted of a felony, which is a statutory bar to employment as a sworn police officer, it would be hard pressed to require the BPD to accept the transfer of such a person. Similarly, there may be other circumstances that would make it incongruous to require the BPD to accept an involuntary transfer of an individual only to be immediately compelled to terminate the employment relationship for just cause. It may behoove HRD to consider these circumstances in arriving at an appropriate standard for processing the Appellants’ Section 40 transfer requests.

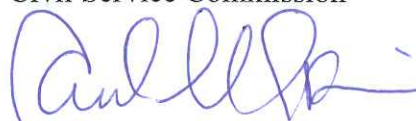
Relief To Be Granted

For the reasons stated above, and pursuant to the powers granted to the Commission under Chapter 31 of the General Laws and Chapter 310 of the Acts of 1993, HRD is ordered to accept and process, in a manner consistent with civil service law and rules, a request for transfer from the former BMPD to a position as a police officer (but not Lieutenant or Sergeant) in the BPD received from any of the Appellants in these appeals, provided such a request is received within 30 days of the effective date of this Amended Decision After Remand. Any person aggrieved by the action or inaction of HRD in accepting, processing, approving or rejecting such Section 40 transfer requests and whose rights under civil service law and rules have been violated, may appeal to the Commission from HRD’s action or inaction, in accordance with Section 2(b) of Chapter 31. Nothing in this Decision is intended or shall be construed to require that HRD

approve or disapprove any such Section 40 transfer requests, either conditionally or unconditionally, or to be deemed to grant the Appellants any other form of relief at this time.

Accordingly and to the extent stated above, the Appellants' appeals are hereby allowed, in part.

Civil Service Commission



Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell & Stein, Commissioners) on November 17, 2011.

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), 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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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.

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