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SUFFOLK, ss. TH OF MASS  
CIVIL SERVICE COMMISSION

SUPERIOR COURT  
SUCV2013-01250-A  
SUCV2013-01256-A

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MAR 15 2019

MA Off. of Attorney General  
Administrative Law Division

BOSTON POLICE DEPARTMENT

vs.

RONNIE C. JONES & others<sup>1</sup>

PRESTON THOMPSON & others<sup>2</sup>

vs.

CIVIL SERVICE COMMISSION & another<sup>3</sup>

Notified 03-13-19 (NS)  
- SG/A.H.S., J.M.B.  
- DBR/J.E.R.  
- OAG/A.S.  
- LOHGL/H.G.L.  
- DCJIS/P.M.G.  
- CLLD/K.S.  
- OLA/N.B.

**MEMORANDUM OF DECISION AND ORDER ON  
VERIFIED COMPLAINT FOR CIVIL CONTEMPT**

On June 8, 2018, six police officers, Richard Beckers, George Downing, Shawn Harris, Ronnie Jones, Jacqueline McGowan, and Walter Washington, filed a Verified Complaint for Civil Contempt pursuant to Mass. R. Civ. P. 65.3 against defendant Boston Police Department (BPD) seeking to recover unpaid back compensation and benefits related to their successful challenges to their discharge from employment as police officers for the City of Boston, Massachusetts. Between 2001 and 2007, the officers were discharged because samples of their hair tested positive for cocaine. However, the Civil Service Commission eventually determined that the evidence related to these officers did not support a finding of just cause for termination.

<sup>1</sup> Richard Beckers, Shawn Harris, Jacqueline McGowan, Walter Washington, George Downing, and the Civil Service Commission.  
<sup>2</sup> Richard Beckers, Ronnie Jones, Jacqueline McGowan, Oscar Bridgeman, Shawn Harris, Walter Washington, William Bridgeforth, George Downing, and Rudy Guity.  
<sup>3</sup> Boston Police Department.

Following a September 19, 2018 status conference and a hearing on January 9, 2019, the parties agreed that this Court should rule on the following pending issues to resolve the Verified

Complaint for Civil Contempt:

- (1) Whether Plaintiff officers are entitled to back pay for all periods since their BPD termination unless the Defendant BPD can show that the Plaintiffs failed to mitigate their damages.
- (2) Whether the Defendant is entitled to offset from any back pay awarded to Plaintiff officers any overtime earnings and wages the Plaintiff officers earned from second and/or third jobs following their BPD termination.
- (3) Whether the Plaintiffs' back pay award should include pay they believe they would have received from overtime and paid details.
- (4) Whether the Plaintiffs are entitled to interest at the statutory rate, both pre and post-judgment, on all unpaid sums from the Defendant BPD, since the date of each Plaintiff officer's discharge.
- (5) Whether the Plaintiffs are entitled to reimbursement from the Defendant BPD for their alleged additional tax burden through their receiving large lump sum payments, rather than the annual payments of much smaller sums, which they would have received absent their termination by the Defendant BPD.

Accordingly, this Court rules on each of these issues as follows.

#### **BACKGROUND**

The Boston Police Department (BPD), the Civil Service Commission (Commission), and Ronnie C. Jones, Richard Beckers, Shawn Harris, Jacqueline McGowan, Walter Washington and George Downing ("the six officers" or "Plaintiffs") filed and agreed to the following Joint Stipulated Facts.

**A. BACKGROUND AND PROCEDURAL FACTS**

1. The Commission proceeding below decided the consolidated appeals of ten Boston Police officers who were discharged between 2001 and 2007.
2. All ten officers had civil service tenure under Chapter 31 and could only be discharged for just cause. See G.L. c. 31, § 41.
3. In each of the ten cases, the sole reason for termination was the conclusion by Psychemedics, the hair testing company retained by the BPD, that the officer's hair tests proved he or she had ingested cocaine in violation of BPD drug policy.
4. All ten officers appealed their discharges to the Commission.
5. Between October 21, 2010 and February 4, 2011, Civil Service Commissioner Paul Stein ("Commissioner Stein") conducted 18 days of evidentiary hearings, accepted 202 exhibits and heard testimony from all ten discharged officers, five expert witnesses (two for the officers and three for the BPD), and others. (R.A. 1846.)
6. Commissioner Stein issued a 134-page decision on February 28, 2013 upholding four of the discharges and overturning the remaining six. (R.A. 1679-1812).
7. The Commission issued a corrected decision on April 18, 2013. (R.A. 1844-1977.)  
  
Based on his findings and conclusions, Commissioner Stein determined that a pre-2007 Psychemedics hair test that was positive for cocaine provided some evidence of cocaine use, but that more evidence was needed to meet the standard of just cause.<sup>4</sup>

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<sup>4</sup> "The present state of hair testing for drugs of abuse, while potentially useful in clinical assessment settings, and in the context of child custody, criminal probation and pre-employment hiring decisions, does not meet the standard of reliability necessary to be routinely used as the sole grounds to terminate a tenured public employee under just cause standards governing civil service employees under Massachusetts law." Commission Decision, p.107.

8. After a review of the evidence, Commissioner Stein determined that the BPD had shown just cause to discharge four officers, but not the remaining six. The Commission voted to allow the appeals of Beckers, Washington, Harris, Downing, Jones, and McGowan and to dismiss the appeals of the other four officers.
9. In its remedy, the Commission set the date of reinstatement and retroactive compensation and benefits as October 21, 2010, the date of the first hearing before the Commission.
10. The relevant portion of the Commission's decision on remedy stated:

In the case of those Appellants as to which the preponderance of evidence does not support a finding of just cause for termination, the Commission has determined that those Appellants should be permitted to be reinstated to their former positions with the BPD, retroactive to October 21 2010.... Although the Appellants were terminated prior to that date (some as far back as 2001), reinstatement to the date of original termination is not warranted in the unique circumstances presented here.

\* \* \*

The appeals of the Appellants Richard Beckers, Ronnie Jones, Jacqueline McGowan, Shawn Harris, Walter Washington and George Downing are allowed, in part, and they shall be restored to their positions as BPD officers, effective October 21, 2010, without further loss of compensation from and after that date or loss of other benefits to which they are entitled.

11. In its decision, the Commission recognized the officers' duty to mitigate and the fact that any interim earnings would require deduction from any back pay award. (Commission Decision at p. 130). The Commission stated that "the general rule in employment appeals requires that a wrongfully terminated employee must make reasonable and diligent efforts to mitigate his or her losses" and noted that "most of the Appellants soon found new employment which will factor into their recovery of lost compensation." *Id.*
12. All the parties appealed the Commission's decision:

- (a) The BPD appealed the Commission decision regarding the six officers who were ordered reinstated.
  - (b) The four officers whose discharges were upheld appealed that aspect of the decision.
  - (c) The six officers appealed the limited remedy imposed by the Commission.
13. The appeals were consolidated at the Superior Court.
14. By decision dated October 6, 2014, the Superior Court (Fabricant, J.) upheld the Commission's decisions regarding the terminations but rejected the Commission's limited remedy.
15. The Superior Court ordered that each of the six officers receive reinstatement and back pay from the date of his or her discharge.
16. In its judgment, the Superior Court stated:
- The Massachusetts Civil Service Commission's decision is AFFIRMED in all respects, except as to the remedy afforded to Officers Beckers, Jones, McGowan, Harris, Washington, and Downing, which is modified such that the Boston Police Department is ordered to reinstate those officers with full back-pay and benefits as of the date of each officer's discharge.
17. The BPD and the four officers appealed the Superior Court's decision to the Appeals Court.
18. The Appeals Court affirmed the judgment of this Court by decision issued October 7, 2016. In its opinion, the Appeals Court held that "the six officers are entitled to reinstatement with back pay and benefits retroactive to each officer's termination date."
19. The Supreme Judicial Court denied applications for further appellate review by the BPD and the four officers on November 20, 2016.
20. A rescript from the Appeals Court was entered in the docket of the Superior Court on December 7, 2016.

21. Following the issuance of the rescript, the Superior Court instructed the six officers to prepare a draft Proposed Order of Judgment and circulate it among the Parties pursuant to Superior Court Rule 9A.
22. The Parties could not reach an agreement on all of the issues addressed in the Plaintiffs' proposed form of judgment due to disputes over various legal issues regarding the remedy.
23. The Parties briefed these issues and the Superior Court (Campo, J.) held a hearing on the six officers' Motion for a Proposed Form of Judgment.
24. On September 1, 2017, the Superior Court issued a ruling, which stated in relevant part:

The parties now return to this Court seeking guidance on how to calculate the police officers' back pay and benefits. Pursuant to G.L. c. 30A, s. 14, this Court is vested with judicial review of agency decisions. However, the parties now file these motions without taking any action on the Court's order. Accordingly, the issues raised by the parties are not ripe for consideration. The police officers move for judgment on how to calculate the damages while the Boston Police Department moves to remand the issue of damages to the Commission for further factual findings. Given that Judge Fabricant's decision provided clear direction, and the Appeals Court affirmed the decision, this Court takes no action on the parties' cross-motions.

The parties are hereby **ORDERED** to follow this Court's Order dated October 6, 2014.

(Emphasis in original.)

25. Following the September 1, 2017 decision of the Superior Court, the Parties continued to meet in an attempt to resolve a number of issues relating to the calculation of back pay and benefits for four of the six officers.

26. As part of this resolution, the BPD provided a payment of some back pay monies to Officers Ronnie Jones, Walter Washington, George Downing and Shawn Harris. This amount exceeded one million dollars.
27. After being unable to resolve the remaining issues in dispute, the six officers filed a Complaint for Contempt on June 8, 2018.
28. On September 19, 2018, the Court held a status conference on the Plaintiffs' Complaint for Contempt and during the conference, the Parties identified the agreed-upon issues in dispute and agreed to provide the Court with a Joint Stipulation of Issues delineating the issues that require resolution.
29. On October 29, 2018, the Parties filed a Joint Stipulation with the Court ("October 29, 2018 Joint Stipulation") setting out the following outstanding issues in dispute:
- (1) Whether Plaintiff officers are entitled to back pay for all periods since their BPD termination unless the Defendant BPD can show that the Plaintiffs failed to mitigate their damages.
  - (2) Whether the Defendant is entitled to offset from any back pay awarded to Plaintiff officers any overtime earnings and wages the Plaintiff officers earned from second and/or third jobs following their BPD termination.
  - (3) Whether the Plaintiffs' back pay award should include pay they believe they would have received from overtime and paid details.
  - (4) Whether the Plaintiffs are entitled to interest at the statutory rate, both pre and post-judgment, on all unpaid sums from the Defendant BPD, since the date of each Plaintiff officer's discharge.
  - (5) Whether the Plaintiffs are entitled to reimbursement from the Defendant BPD for their alleged additional tax burden through their receiving large lump sum payments, rather than the annual payments of much smaller sums, which they would have received absent their termination by the Defendant BPD.

30. In this Stipulation, the Parties jointly proposed that they each submit legal memoranda addressing each of these issues and requested that after submission of these legal issues, the Court schedule oral argument and/or conduct an evidentiary hearing, if necessary.
31. Subsequently, on November 30, 2018, the Parties filed their briefs with the Court, including Plaintiffs' Motion for Contempt and supporting Memorandum of Law, BPD's Opposition to Plaintiffs' Motion for Contempt, and Plaintiffs' Reply Brief to BPD's Opposition to Plaintiffs' Motion for Contempt. The Court's hearing on this motion was rescheduled from December 5, 2018 to December 11, 2018.
32. At a hearing on December 11, 2018, the Parties reiterated their agreement to have the Superior Court decide the outstanding issues relating to the remedy in this matter.
33. The Superior Court (Tochka, J.) subsequently ordered the Parties to file with the Court a Joint Stipulation of Facts reflecting the facts in agreement among the Parties.
34. At the hearing, the BPD confirmed its agreement to have the Superior Court, rather than the Civil Service Commission, decide the outstanding issues identified in the Parties' October 29, 2018 Joint Stipulation.

**B. BACK PAY CALCULATIONS AND PAYMENTS**

35. On April 7, 2017, BPD provided Plaintiffs' counsel with the gross back pay calculations for all six Officers from their termination dates until March 31, 2017.
36. By letter dated September 20, 2017, the BPD calculated the back pay of Officers Harris, Downing, Washington, and Jones from their termination dates until various dates. Included in the back pay calculations were all of the elements of each Officer's regular compensation, including base pay, holiday pay, shift differential, and educational pay. In



addition, BPD applied certain contractual "buy backs" for unused vacation, sick leave, and personal days. The letter stated that BPD was "currently in the process of issuing checks" for these four Officers. In its calculation of gross back pay:

- a. BPD deducted an Officer's wages (including unemployment compensation) from other employment during the back pay period, including wages earned from second and third jobs and overtime;
- b. For periods when an Officer was not employed (or receiving unemployment compensation), the BPD provided no back pay compensation because the BPD contended that the respective officer had failed to mitigate his/her damages.

37. The Officers agree that unemployment compensation and interim earnings are properly deducted from their back pay, but dispute that income from second and/or third jobs and overtime should also be deducted from their back pay awards.


38. All of the Officers, except McGowan, withdrew their accumulated retirement deductions from the Boston Retirement Board following their discharges. In order for these Officers to receive service credit for their years of creditable service prior to reinstatement or retirement, these withdrawn deductions had to be repaid to the Retirement Board. As of October 17, 2017, and pursuant to the Officers' request, the BPD agreed to withhold from each Officer's back pay the amount due the Retirement Board and remit that amount directly to the Board.

39. Between September 20, 2017 and February 16, 2018, the Parties continued to collaborate to resolve the outstanding issues in dispute.

40. The back pay amounts specified in the BPD's September 20, 2017 letter were paid by the BPD to the four Officers (Harris, Washington, Jones, and Downing) on February 16, 2018. The amounts owed the Retirement Board for the four Officers' withdrawn contributions were withheld from the back pay and remitted to the Board.<sup>5</sup> The usual payroll deductions, including state and federal taxes and union dues, were withheld from the back pay.
41. BPD has made no payments to Officers Beckers and McGowan because it has contended that these officers failed to mitigate their damages.
42. BPD has made no payments to the Boston Retirement Board on behalf of Officers Beckers and McGowan.
43. Officers Harris, Downing, and Washington were returned to duty and restored on the active BPD payroll on September 11, 2017, when they began required training at the Boston Police Academy. In April, 2018, they completed the Academy and returned to full duty.
44. Officer Jones was also eligible for reinstatement as of September 2017, but opted to retire as of September 2017. His retirement became effective on March 13, 2018.
45. Officers McGowan and Beckers were also eligible for reinstatement as of September 2017, but have not returned to the BPD. Instead, they are seeking to retire from the BPD.

**C. INDIVIDUAL OFFICERS<sup>6</sup>**

**1. Richard Beckers**

Date of birth: 

<sup>5</sup> The amount due the Board for Officer Downing was inadvertently not withheld and remitted to the Board, but the parties are in the process of resolving this matter.

<sup>6</sup> The Officers also contend that they are entitled to back pay that includes overtime and detail pay. The BPD contends that current Massachusetts case law does not entitle them to such compensation.

Date of BPD hire: February, 1989

Date of BPD termination: August 9, 2002

Total Gross Back Pay BPD Compensation:

(1) regular compensation: \$1,179,450.51 through March 31, 2017, plus regular compensation to date. *[requires further BPD calculation]*

(2) buy backs (personal, vacation, sick leave): *[requires further BPD calculation]*

Total Back Compensation Paid By The BPD: \$0.00


Interim Earnings Earned By Beckers Post BPD Termination:

(1) Unemployment compensation: [TBD]

(2) Post-termination employment: No wage-earning employment. Mr. Beckers has received room and board since August 2009 at a bed and breakfast he owns and operates in Honduras with a cash value of approximately \$641 per month.

Richard Beckers has requested to retire from the BPD upon receipt of any back pay award when all necessary retirement contributions are made.

## 2. George Downing

Date of birth: 

Date of BPD hire: March 1996

Date of BPD termination: January 6, 2004.

Date of BPD Reinstatement: September 11, 2017

Total Gross Back Pay BPD Compensation:

(1) regular compensation: \$996,326.00 through 8/24/17,

	plus regular compensation 8/25/17 to 9/10/17
(2) buy backs (personal, vacation, sick leave):	\$77,799.22 <sup>7</sup>
Total Back Pay Compensation Paid By The BPD:	\$376,627.81, through 8/24/17 (paid on 2/16/18)


Interim Earnings Earned by Downing Post-BPD Termination:

Total:	\$645,642.11
Overtime earnings:	\$10,024.67
Second and third job earnings:	\$143,260.31

Periods for which BPD has paid no back pay compensation:

8/1/04 – 6/30/05	Unpaid earnings for this period: \$51,855.30
8/25/17 – 9/10/17	[requires further BPD calculation]

**3. Shawn Harris**

Date of birth:	
Date of BPD hire:	May 1999
Date of BPD termination:	April 22, 2003.
Date of Reinstatement:	September 11, 2017

Total Gross BPD Back Pay Compensation:

(1) regular compensation:	\$1,049,182.75 through 8/15/17, plus regular compensation 8/15/17 to
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<sup>7</sup> The parties have agreed to add additional amounts to this, which are not in dispute.

	9/11/17
(2) buy backs (personal, vacation, sick leave):	\$82,519.34 <sup>8</sup>
Total Back Compensation Paid By the BPD:	\$478,997.21, through 8/15/17 (paid on 2/16/18)
Interim Earnings earned by Harris Post-BPD Termination:	
Total:	\$462,868.58
Overtime Earnings:	\$8,391.78

Periods for which BPD has paid no back compensation:

11/1/03-12/31/06	Unpaid earnings for this period: \$182,813.79
9/16/17-9/10/18	[requires further BPD calculation]

**4. Ronnie Jones**

Date of birth:	
Date of BPD hire:	1983
Date of BPD termination:	August 2002
Date of Retirement:	March 13, 2018
Total Gross BPD Back Pay Compensation:	
(1) regular compensation:	\$1,138,678.29 through 8/24/17, plus regular compensation 8/25/17 to 3/12/18

<sup>8</sup> The Parties have agreed to add additional amounts to this, which are not in dispute.

(2) buy backs (personal, vacation, sick leave): \$114,973.46<sup>9</sup>  
Total Back Pay Compensation Paid By BPD: \$582,172.71, through 8/24/17  
(paid on 2/16/18)

Interim Earnings (through 3/15/18) Earned By Jones Post-BPD Termination:

Total: \$493,178.43

Periods for which BPD has paid no back pay compensation:

8/1/02-12/31/05 Unpaid earnings for this  
period: \$208,131.86

8/25/17-3/12/18 [*requires further BPD  
calculation*]

**5. Jacqueline McGowan**

Date of BPD hire: 1983 (cadet); 1987 (full-time)

Date of BPD termination: October 2002

Total Gross BPD Back Pay Compensation:

(1) regular compensation:  
\$1,071,626.60 through March  
31, 2017, plus regular  
compensation to date.  
[*requires BPD calculation*]

(2) buy backs (personal,  
vacation, sick leave):  
[*requires BPD calculation*]

Total Back Pay Compensation Paid By BPD: \$0.00

Interim Earnings Earned by McGowan Post-BPD Termination:

(1) Unemployment compensation: \$0.00

<sup>9</sup> The parties have agreed to add additional amounts to this, which are not in dispute.

(2) Post-termination employment:

No wage-earning employment. Ms. McGowan provided full-time care for her mother with whom she resided in Charlestown.

Ms. McGowan requests that she retire from the BPD upon receipt of a back pay award when all necessary retirement contributions are made.

**6. Walter Washington**

Date of BPD hire:	November 1989
Date of BPD termination:	April 2003
Date of BPD Reinstatement:	September 11, 2017
Total Gross BPD Back Pay Compensation:	
(1) regular compensation:	\$1,049,910.82 through 8/15/17, plus regular compensation 8/15/17 to 9/11/17
(2) buy backs (personal, vacation, sick leave):	\$99,043.17 <sup>10</sup>
Total Back Pay Compensation Paid By BPD:	\$294,857.51, through 8/15/17 (paid on 2/16/18)
Interim Earnings Earned by Washington Post-BPD Termination:	
Total:	\$857,745.09
Overtime Earnings:	\$154,314.06
Periods for which BPD has paid no back compensation:	
11/1/03-6/30/04	Unpaid earnings for this period: \$40,009.48
8/16/17-9/10/17	Unpaid earnings for this period: [ <i>requires further BPD</i> ]

<sup>10</sup> The parties have agreed to add additional amounts to this, which are not in dispute.

calculation]

**D. ADDITIONAL STIPULATED FACTS**

The parties also stipulate to the following additional facts.

- Plaintiffs Beckers and McGowan did not earn any income following their termination from the Department.
- Some Boston Police Officers, who were terminated at or around the same time as Plaintiffs Beckers and McGowan, found employment and earned income.

**BOSTON POLICE OFFICER [REDACTED]**

- The TSA is a federal agency of the U.S. Department of Homeland Security.
- Former Boston Police [REDACTED] resigned in 2003 after a positive Department hair test drug result. He obtained a full-time position as a TSA officer.
- As a TSA officer, [REDACTED] responsibilities included security screening of passengers, baggage and cargo at airports to prevent any deadly or dangerous objects from being transported onto an aircraft. *See* Exhibit D, TSA Job Description.
- After seven years working with TSA, [REDACTED] earned an annual income of \$79,000, as well as benefits including a savings plan and a pension from the federal government. *See id.*

**BOSTON POLICE OFFICER GEORGE DOWNING**

- Plaintiff George Downing was employed as a police officer until his termination in January 2004 following a cocaine positive hair test.



- After termination, Plaintiff Downing obtained employment working as a federal security guard for the Madsen Department of Public Safety.
- His job responsibilities included public safety, security and related tasks as an officer protecting the public safety in federal buildings.
- In that position, he obtained an annual salary of more than \$56,000.
- Additionally, Plaintiff Downing also obtained employment as a security guard for MVM, Inc. and Paragon Systems.
- Both MVM, Inc. and Paragon Systems were security guard services that obtained federal contracts from the Department of Homeland Security.

#### BOSTON POLICE OFFICER WALTER WASHINGTON

- Plaintiff Walter Washington was employed as a Boston Police Officer until he was terminated for a positive cocaine result in April 2003.
- Following his termination, he obtained a delivery driver position with the UPS in 2007.
- In this position, Washington earned a salary over \$73,000 and benefits, including a UPS pension following five years of service.

#### BOSTON POLICE CADET [REDACTED]

- Additionally, a cadet from the Boston Police Department Academy, [REDACTED] tested positive for cocaine on the Department hair drug test.
- As a result, she resigned from her cadet position in 2005.

- Following this positive Department drug test result, ██████ obtained various employment positions.
- She in fact obtained a position with the Middlesex County Sheriff's Office as a corrections officer.
- Her job responsibilities as a corrections officer included patrolling the prison, counseling inmates and supervising work crews in the community.
- As a corrections officer, she earned an annual salary of approximately \$61,000.00 and benefits.
- "McGowan did not work outside the home during the period after her discharge," but she also "made no effort to secure other employment."<sup>11</sup>
- "Instead, she remained home to care for her elderly mother." Pls. Mem. at p.8.<sup>12</sup>
- "In the case of McGowan and Beckers, neither individual earned any outside income during the back pay period . . . ." Pls. Mem. at p.7
- Beckers started his business in 2009, seven years following his termination from the BPD.
- For almost a ten year period, from approximately 2009 through 2018, his business has not earned a profit.

**PLAINTIFFS HARRIS, DOWNING, JONES, & WASHINGTON**

- Following his termination from BPD, from approximately 2003 through 2006, Plaintiff Harris was not employed.

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<sup>11</sup> "Pls. Mem." refers to Plaintiffs' Memorandum of Law In Support of Contempt Complaint, dated October 19, 2018.

<sup>12</sup> "Pls. Mem." refers to Plaintiffs' Memorandum of Law In Support of Contempt Complaint, dated October 19, 2018.

- During the period from approximately 11/1/03 through 12/31/03, Plaintiff Harris would have earned approximately \$5,196.04 from the Department in base wages.
- During 2004, he would have earned \$57,710.09 in base wages from the Department and for the 2005 time period, he would have earned \$62,022.26 from the Department in base wages.
- For the 2006 time period, he would have earned approximately \$59,309.90 from the Department in base wages.
- Plaintiff Downing did not earn income for the time period of 8/1/04 to approximately 6/30/05.
- During this time, he would have earned approximately \$51,855.30 from the Department in base wages.
- Plaintiff Jones did not earn income during the August, 2002 through December, 2005 time period.
- He would have earned approximately \$208,131.86 in Department income in base wages during that period. Similarly, Plaintiff Washington would have earned \$40,009.48 in Department income in base wages during the 11/1/03 to approximately 6/30/04 time period.
- No averages of overtime or detail pay have been agreed to by the Parties here.

## DISCUSSION

“To constitute civil contempt there must be a clear and undoubted disobedience of a clear and unequivocal command.” United Factory Outlet, Inc. v. Jay’s Stores, Inc., 361 Mass. 35, 36 (1972). See Birchall, petitioner, 454 Mass. 837, 852 (2009). “Where the order is ambiguous or the disobedience is doubtful, there cannot be a finding of contempt.” Judge Rotenberg Educ. Ctr., Inc. v. Commissioner of the Dep’t of Mental Retardation (No. 1), 424 Mass. 430, 443 (1997). Moreover, in a contempt action, the burden of proof is on the complainant to prove its case by clear and convincing evidence. Birchall, petitioner, 454 Mass. at 852.

At this point, the six officers do not request that this Court find BPD to be in contempt. Rather, the parties seek a ruling on the following five legal issues, which this Court will address in turn below.

**Whether Plaintiff officers are entitled to back pay for all periods since their BPD termination unless the Defendant BPD can show that the Plaintiffs failed to mitigate their damages.**

The parties have requested that this Court resolve the issue of whether the plaintiff officers are entitled to back pay for all periods since their BPD termination unless defendant BPD can show that the plaintiffs failed to mitigate their damages.

It is well-established that “[w]here one is under contract for personal service, and is discharged, it becomes his duty to dispose of his time in a reasonable way, so as to obtain as large compensation as possible, and to use honest, earnest and intelligent efforts to this end. He cannot voluntarily remain idle and expect to recover the compensation stipulated in the contract from the other party.” Maynard v. Royal Worcester Corset Co., 200 Mass. 1, 6 (1908). This general principle applies to public employees after they have been unlawfully discharged.

Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 465 Mass. 584, 589 (2013).

“The employer bears the burden of proof on the issue of mitigation of damages.” Id. at 592. “An employer meets this burden of proof by proving the following: ‘(a) one or more discoverable opportunities for comparable employment were available in a location as convenient as, or more convenient than, the place of former employment, (b) the improperly discharged employee unreasonably made no attempt to apply for any such job, and (c) it was reasonably likely that the former employee would obtain one of those comparable jobs.’” Id., quoting Black v. School Comm. of Malden, 369 Mass. 657, 661-662 (1976). “Additionally, the employer must show what the employee ‘could have earned in other similar work.’” Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 465 Mass. at 592, quoting McKenna v. Commissioner of Mental Health, 347 Mass. 674, 677 (1964). If an employee remains completely idle and does not seek another job following his or her discharge, the employer still has the burden to prove the existence of substantially comparable positions. See Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 465 Mass. at 594 (recognizing that jobs as a restaurant employee, carpenter, and bouncer were not comparable to position of correction officer).

**Officers Downing, Harris, Jones, and Washington**

Plaintiffs report that officers Downing, Harris, Jones, and Washington obtained interim employment for a portion of the time period since BPD terminated them, but argue that none of the jobs were comparable to the position of a Boston police officer. Despite that lack of comparability, these four officers agreed to allow BPD to deduct their earnings from these jobs

(excluding overtime and income from second and third jobs) from their back pay damages. This Court declines to disturb this compromise.

However, BPD has improperly refused to pay officers Downing, Harris, Jones, and Washington for back pay during time periods where they did not have interim employment. Upon review, this Court concludes that as to these four officers, BPD is legally required to provide back pay to each of them, even when they did not have interim employment, because BPD has not met its burden to show that "one or more discoverable opportunities for comparable employment were available" to them and that it was reasonably likely that each of these four officers would obtain one of those comparable jobs. Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 465 Mass. at 592. These four officers were terminated on the following dates: Downing (January 6, 2004); Harris (April 22, 2003); Jones (August, 2002); and Washington (April, 2003). BPD submits nothing to this Court to suggest that beginning on each of these termination dates, there were one or more discoverable opportunities for employment comparable to the position of a Boston police officer and that it is reasonably likely that each of these four officers could obtain one of those comparable jobs. Given that BPD terminated each of these four officers for essentially using cocaine while they were employed as Boston police officers, it is highly unlikely that the officers could obtain a comparable position even if BPD had produced evidence to suggest that such opportunities were available.

Moreover, contrary to BPD's arguments, this Court concludes that the positions of Transportation Security Administration (TSA) Agent, federal security guard, and United Parcel Service (UPS) delivery driver (positions that other fired officers obtained) are not comparable to the position of Boston police officer; each of those jobs do not offer "the same stability, benefits,

or potential for promotion.” *Id.* at 593. See Greenway v. Buffalo Hilton Hotel, 951 F. Supp. 1039, 1061 (W.D.N.Y. 1997), *aff’d as modified*, 143 F.3d 47 (2d Cir. 1998) (“In order for the work to be comparable or substantially similar, the new position must afford a plaintiff virtually identical promotional opportunities, compensation, job responsibilities, working condition[s], and status as the former position”). Notably, the position of Boston police officer offers substantial opportunities for promotion and numerous benefits, such as lucrative paid overtime details and numerous opportunities for further job training. As to the issue of job stability, this litigation illustrates the difficulties associated with terminating Boston police officers thereby demonstrating that the position is extremely stable. Thus, BPD has not met its burden of proving that officers Downing, Harris, Jones, and Washington did not mitigate damages. Accordingly, officers Downing, Harris, Jones, and Washington are entitled to back pay for all periods since their BPD termination, subject to the compromise these parties reached, discussed above.

#### **Officers McGowan and Beckers**

BPD terminated officer McGowan in October, 2002. She did not earn any outside income during the back pay period. Instead, she remained at home and cared for her elderly mother.

BPD terminated officer Beckers on August 9, 2002. In August of 2009, he started a bed and breakfast in Honduras that he owns and operates. He has not earned income from the business.

Citing the fact that several other fired officers obtained employment elsewhere (as a TSA agent, federal security guard, and as a UPS delivery driver), BPD argues that McGowan and Beckers are not entitled to back pay because they could have obtained “comparable employment

in private and government security or delivery services work.” BPD’s Memorandum in Opposition at 5. As discussed above, these positions are not comparable to the position of Boston police officer. Moreover, even though McGowan and Beckers generally remained “idle” in terms of earning income after they were terminated, BPD has not met its burden to show that it is reasonably likely that McGowan and Beckers, who were both fired for using cocaine, could subsequently obtain a comparable job. See Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 465 Mass. at 594. Therefore, officers McGowan and Beckers are entitled to back pay for all periods since their BPD termination.

**Whether the Defendant is entitled to offset from any back pay awarded to Plaintiff officers any overtime earnings and wages the Plaintiff officers earned from second and/or third jobs following their BPD termination.**

Next, the parties request that this Court resolve the issue of whether BPD is entitled to offset from any back pay awarded to the six officers, any overtime earnings and wages that they earned from second and/or third jobs after BPD terminated them. The six officers argue that such offsets are improper. BPD contends that such offsets are permissible because allowing them to retain these wages without offsetting them would make them “more than whole.” New York & Mass. Motor Serv., Inc. v. Massachusetts Comm’n Against Discrimination, 401 Mass. 566, 582 (1988).

This Court disagrees with BPD’s position on this issue and concludes that BPD is not entitled to offset from any back pay, any overtime earnings and wages that the six officers earned from second and/or third jobs after BPD terminated them. As a matter of fairness, such offsets are inappropriate. The back pay awards in this particular case only consist of regular wages and are offset only by the regular wages of the mitigating employment, as agreed to by the parties.



The officers who worked overtime and/or second and third jobs chose to sacrifice their own time outside of their regular working hours to obtain these additional earnings. Allowing BPD to offset from any back pay, any overtime earnings and wages that officers earned from second and third jobs would result in additional damages to the officers, and not a windfall. Accordingly, BPD is not entitled to offset from any back pay awarded to the six officers, any overtime earnings and wages that they earned from second and/or third jobs after BPD terminated them.

**Whether the Plaintiffs' back pay award should include pay they believe they would have received from overtime and paid details.**

The third issue is whether the six officers' back pay award should include pay they believe they would have received from overtime and paid details.

“[A] government employee who secures reinstatement to public employment, from which he or she was wrongly barred, may recover base salary, but not estimated amounts for overtime and paid details (a category that applies peculiarly to police officers).” White v. Boston, 57 Mass. App. Ct. 356, 360 (2003). Overtime pay and police detail pay are speculative because the need for extra services is likely to be uncertain. Id. at 358. Moreover, “[t]he willingness of the police officer to perform the extra services was similarly uncertain: family requirements might limit or compel availability for extra duty; other commitments and interests might limit availability for duty.” Id. Consistent with Massachusetts case law on this specific issue, the six officers' back pay award should not include pay they believe they would have received from overtime and paid details. See id. (“Compensation of a public employee for a period of unlawful separation from public employment does not require the government employer to presume that, based on averages, the employee would have earned a certain amount of extra duty pay”).

**Whether the Plaintiffs are entitled to interest at the statutory rate, both pre and post-judgment, on all unpaid sums from the Defendant BPD, since the date of each Plaintiff officer's discharge.**

The parties seek a ruling on whether the six officers are entitled to interest at the statutory rate, both prejudgment and postjudgment, on all unpaid sums from BPD, since the date of each officer's discharge.

As to postjudgment interest, the six officers assert that they are entitled to statutory postjudgment interest on their back pay award from the date of the final judgment under G.L. c. 31, §§ 43-44. Although the officers acknowledge that the doctrine of sovereign immunity would generally bar the payment of postjudgment interest, they argue that the Commonwealth has waived its sovereign immunity by necessary implication because of the Commonwealth's waiver of sovereign immunity on G.L. c. 151B claims for prejudgment interest. The officers further contend that G.L. c. 31, § 43 provides the Civil Service Commission with broad discretion to fashion remedies and note that the statute states that, "the person shall be returned to his position without loss of compensation or other rights." G.L. c. 31, § 43.

Postjudgment interest is not warranted here. "[T]he general rule is that 'the Commonwealth [and a municipality]. . . is not liable for postjudgment interest in the absence of a clear statutory waiver of sovereign immunity in that regard.'" Sheriff of Suffolk County v. Jail Officers & Employees of Suffolk County, 465 Mass. at 597, quoting Chapman v. University of Mass. Med. Ctr., 423 Mass. 584, 586 (1996). See Brown v. Office of the Commissioner of Probation, 475 Mass. 675, 677 (2016) (stating that "public employers are not liable for postjudgment interest unless some other statute clearly waives sovereign immunity with respect

to such interest”). “Sovereign immunity from liability for postjudgment interest by necessary implication requires ‘uncommonly forceful language’ indicating a legislative intent that the Commonwealth should compensate plaintiffs without any loss whatsoever, including loss of the time value of the money awarded.” See Brown v. Office of the Commissioner of Probation, 475 Mass. at 679. General Laws c. 31, § 43 provides that if the civil service commission reverses the action of the appointing authority, “the person shall be returned to his position without loss of compensation or other rights.” As currently enacted, however, no clear waiver of sovereign immunity is contained within G.L. c. 31, § 43 by “uncommonly forceful language” or otherwise to suggest that BPD should be liable for postjudgment interest. See Brown v. Office of the Commissioner of Probation, 475 Mass. at 679. Accordingly, the six officers are not entitled to postjudgment interest.

As to prejudgment interest, the six officers contend that they are entitled to statutory prejudgment interest on their back pay award under G.L. c. 231, § 6C from the date they were each terminated. BPD argues that an award of prejudgment interest is not appropriate because the Massachusetts Civil Service Statute contains no explicit waiver of sovereign immunity.

The six officers are entitled to prejudgment interest under G.L. c. 231, § 6C. The general rule of sovereign immunity does not bar BPD from liability for prejudgment interest. See Jamieson v. Department of Correction, 91 Mass. App. Ct. 1108, 2017 WL 780976, \*4 (Feb. 28, 2017) (Rule 1:28) (rejecting claim of sovereign immunity with respect to plaintiff correction officer’s entitlement to prejudgment interest on back wages award). See also Thibodeau v. Seekonk, 52 Mass. App. Ct. 69, 72-74 (2001) (determining that under G.L. c. 231, § 6C, interest on back pay award to firefighter should be calculated from date he was demoted). In order to

make them “whole,” the six officers are entitled to prejudgment interest on back wages from the date they were each terminated. See Jamieson v. Department of Correction, 91 Mass. App. Ct. 1108, 2017 WL 780976, \*5 (relying on Thibodeau and concluding that plaintiff correction officer entitled to prejudgment interest on back wages award). See also Loeffler v. Frank, 486 U.S. 549, 557-558 (1988) (recognizing that prejudgment interest, an element of complete compensation, is traditionally considered part of back pay remedy because it is necessary to make victim whole). Furthermore, this Court presumes that the Legislature is aware of existing Massachusetts appellate case law, specifically Thibodeau and Jamieson, and significantly, has not decided to overrule those Appeals Court decisions through new legislation. See Suliveres v. Commonwealth, 449 Mass. 112, 116 (2007) (assuming that when it enacts legislation, Legislature is not only aware of existing statutes, but is also aware of prior state of law as explicated by applicable appellate case law). See also G.L. c. 231, § 6C (providing for interest in actions against Commonwealth based on contractual obligations). Consequently, the six officers are entitled to prejudgment interest.

**Whether the Plaintiffs are entitled to reimbursement from the Defendant BPD for their alleged additional tax burden through their receiving large lump sum payments, rather than the annual payments of much smaller sums, which they would have received absent their termination by the Defendant BPD.**

The final issue is whether the six officers are entitled to reimbursement from BPD for their alleged additional tax burden after receiving large lump sum payments, rather than the annual payments of much smaller sums, which they would have received absent their termination.

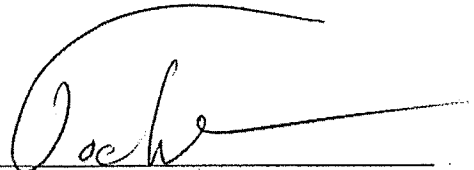
Upon review, this Court is satisfied that the six officers are not entitled to reimbursement from BPD for the additional tax burden created after receiving large lump sum payments. The

plaintiffs point to no Massachusetts law to suggest that such reimbursement would be appropriate, and in the exercise of discretion, this Court concludes that such reimbursement is not warranted.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that:

1. Plaintiffs Richard Beckers, George Downing, Shawn Harris, Ronnie Jones, Jacqueline McGowan, and Walter Washington (the six officers) are entitled to back pay for all periods since their Boston Police Department termination, consistent with this decision.
2. BPD is not entitled to offset from any back pay awarded to the six officers, any overtime earnings and wages that they earned from second and/or third jobs after BPD terminated them.
3. The six officers' back pay award should not include pay they believe they would have received from overtime and paid details.
4. The six officers are entitled to prejudgment interest on back wages from the date they were each terminated. The six officers are not entitled to postjudgment interest.
5. The six officers are not entitled to reimbursement from BPD for the additional tax burden created after receiving large lump sum payments.



Robert N. Tochka  
Justice of the Superior Court

Dated: March    /    , 2019