NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-938

DEAN DOWNER

vs.

CITY OF NORTHAMPTON & another.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Dean Downer appeals from a judgment of the Superior Court, affirming a decision of the Civil Service Commission (commission). He argues that the agency decision dismissing his appeal was based on two errors of law, see G. L. c. 30A, § 14 (7) (c), and that the commission's failure to take remedial action constituted an abrogation of its statutory duties. After careful review of all of the claims properly raised,[2] we see no

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[1] Civil Service Commission.

[2] Downer's third claim of error is raised for the first time on appeal. At the hearing in the Superior Court, the commission's attorney objected to a number of cursory arguments presented by Downer's attorney that had not been briefed or raised earlier in the proceedings. We deem all claims, issues, and arguments not raised before the commission or properly developed in the Superior Court waived. See Springfield v. Civil Serv. Comm'n, 469 Mass. 370, 382-383 (2014). See also Katz, Nannis & Solomon, P.C. v. Levine, 473 Mass. 784, 795 n.15 (2016) (new arguments may not be raised for first time in reply brief).

error of law in the commission's decision. For that reason, we see no basis to disturb the judgment and affirm.

Background. On September 24, 2007, the city of Northampton (city) hired Downer as a department of public works (DPW) seasonal laborer. Labor service positions in the city are civil service positions, and Downer is a member of the Northampton Municipal Association of Employees. On January 18, 2010, Downer was promoted to the position of water treatment plant operator (plant operator).[3] By memorandum dated April 28, 2017 (which Downer received on May 1, 2017), the DPW director notified Downer of the department's intent to terminate his employment as a plant operator "for poor work performance."

Negotiations between Downer's union representatives and the city followed. Presented with a choice of resignation, demotion, or termination, Downer opted to remain employed, though demoted. As Downer stipulated, on May 4, 2017, the city demoted him to a DPW laborer position in the cemetery division and gave him notice of the decision the same day. Effective May 5, 2017, the city transferred Downer to the laborer position

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[3] Before Downer assumed his duties, the plant operator position was an "official service position." Competitive examinations were discontinued in 2008 and have not been offered since that time. Thus, Downer has never taken a civil service examination to become eligible for a permanent appointment to that position. See Fall River v. AFSCME Council 93, Local 3177, AFL-CIO, 61 Mass. App. Ct. 404, 407 (2004).

under protest.[4] Downer then unsuccessfully pursued contractual remedies under the collective bargaining agreement. On June 29, 2017, Downer filed his appeal with the commission.[5]

Discussion. The scope of our review under G. L. c. 30A is circumscribed. A party seeking to overturn the commission's decision "bears a heavy burden because we give due weight to the experience, technical competence, and specialized knowledge of the commission" (quotation omitted). Spencer v. Civil Serv. Comm'n, 479 Mass. 210, 215 (2018). We accord substantial deference to the commission's reasonable interpretations of G. L. c. 31, the statute it administers and enforces. Id. at 216. Courts, however, retain the ultimate duty to interpret statutes. Upton's Case, 84 Mass. App. Ct. 411, 418 (2013).

The commission ruled that it had no jurisdiction to hear Downer's appeal for two reasons: his lack of a right to appeal and the appeal's untimeliness. We agree with both of those determinations.

First, we discern no error in the commission's conclusion that Downer had no right to appeal his demotion. Downer does

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[4] Even if Downer did not expressly sign the "Last Chance Agreement," he implicitly agreed to its terms by continuing his employment with the city, which was conditioned on his acceptance of the agreement.

[5] Downer's "discipline appeal form" stated that he received notice of the demotion on June 19, 2017, or June 29, 2017 (the date he "received denial of final step of grievance process, wherein the department head acquiesced to the dismissal").

not challenge the fact that his original appointment to the plant operator position was provisional. See Springfield v. Civil Serv. Comm'n, 469 Mass. 370, 371 n.3 (2014) (discussing statutory definitions); Fall River v. AFSCME Council 93, Local 3177, AFL-CIO, 61 Mass. App. Ct. 404, 407 (2004), quoting G. L. c. 31, § 12 ("civil service law provides for the provisional appointment to a civil service position if 'no suitable eligible list exists' from which to make a permanent appointment"). Relying primarily on several provisions of G. L. c. 31, Downer argued that, notwithstanding the absence of an examination, his provisional appointment somehow transformed into a permanent appointment. The commission rejected Downer's argument, concluding that Downer never achieved permanent civil service status in that position. Giving due weight to the commission's specialized knowledge, we conclude that the commission's interpretation is reasonable.[6] As a provisional employee, Downer had no "tenure, [and] no right of notice or hearing."[7] Sullivan

[6] The case of Kelleher v. Personnel Adm'r of the Dep't of Personnel Admin., 421 Mass. 382 (1995), does not assist Downer. As the Supreme Judicial Court indicated there, any flaw in the civil service statute arising from the lack of competitive examinations should be addressed by the Legislature, and not the courts. See id. at 389 ("If this is a defect, it is a defect for the Legislature to address").

[7] A provisional employee is entitled to a predeprivation, name-clearing hearing before the appointing authority; such a hearing is intended to protect future employability. See G. L. c. 31, § 41; Smith v. Commissioner of Mental Retardation, 409 Mass. 545, 548-551 (1991). However, a decision by the appointing

v. Commissioner of Commerce & Dev., 351 Mass. 462, 465 (1966). Accord Dallas v. Commissioner of Pub. Health, 1 Mass. App. Ct. 768, 770-771 (1974).

No right of appeal, moreover, flowed from Downer's tenured laborer position. The commission correctly applied Springfield, 469 Mass. 370, in this regard. In Springfield, a city employee holding tenure in his original position, like Downer, was provisionally promoted and then terminated from that position. See id. at 371-372. Interpreting several provisions of G. L. c. 31, the commission concluded that the employee did not lose his tenured status by his promotion to a provisional position, and thus it denied the city's motion to dismiss the employee's appeal. See id. at 372, 377. The Supreme Judicial Court accepted the commission's reading, which gave the employee the right to appeal his termination to the commission, as reasonable. See id. at 377. However, unlike the employee in

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authority regarding the justification for such a discharge is final and not subject to review by the commission. Fall River, 61 Mass. App. Ct. at 407. Here, Downer did not exercise his right to request such a hearing. To the extent that he argues that, as a tenured civil service employee in the labor service, he was entitled to the full procedural protections of G. L. c. 31, § 41, including an evidentiary hearing, he failed to raise that argument before the commission. In any event, if the city had in fact terminated or taken adverse action against Downer in the civil service labor title position, as opposed to the provisional position, he would have been entitled to those protections (and to appeal the decision to the commission). However, the city took no such action here.

Springfield, whose public employment was terminated, Downer was demoted back to the labor service. For that reason, the commission permissibly concluded here that the city effectively had taken no adverse action against Downer that could be appealed under G. L. c. 31.

The commission's dismissal of Downer's appeal due to the untimely notice of appeal was also sound. A party aggrieved by a decision of the appointing authority made pursuant to G. L. c. 31, § 41, is required to file his appeal "within ten [business] days after receiving written notice of such decision." Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 817 (2006), quoting G. L. c. 31, § 43. The ten-day period prescribed for pursuing the statutorily-created remedy is jurisdictional. See Falmouth, supra at 819 n.6 (commission lacked authority to extend statutory deadline for appeal); Cheney v. Assessors of Dover, 205 Mass. 501, 503 (1910). The appeal period here began running on May 4, 2017, the date Downer admittedly received notice of the demotion decision, and expired before he filed his appeal.[8] Further, the appeal period was not

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[8] Downer's actual knowledge of the demotion decision and the city's implementation of it distinguishes his case from Chartrand v. Registrar of Motor Vehicles, 347 Mass. 470, 475 (1964) (limitation period does not begin to run until employee "knew or should have known that his discharge was being treated as final and effective" [quotation omitted]).

tolled during the pendency of the grievance proceedings.[9] See United Steelworkers of Am. v. Commonwealth Employment Relations Bd., 74 Mass. App. Ct. 656, 663-665 (2009) (union breached duty of fair representation by incorrectly advising member that he could defer filing civil service appeal during grievance proceedings). See also Office & Professional Employees Int'l Union, Local 6, AFL-CIO v. Commonwealth Employment Relations Bd., 96 Mass. App. Ct. 764, 769-770 (2019) (union official's mistake of law about "easily-knowable" limitation period no defense to liability).

Finally, Downer claims in an "Emergency Motion for an Addendum to Reply Brief," filed four days before oral argument, that he recently learned that the city has been paying him less than he was entitled to in his laborer position since May 5, 2017. If that is the case, his remedy, if any, lies in the

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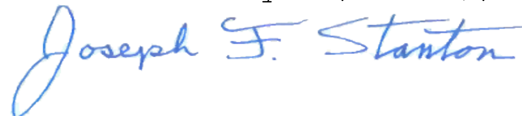
[9] The "two avenues of relief [stepped grievance process culminating in binding arbitration and appeal to commission under G. L. c. 31, § 43] could not both be pursued." United Steelworkers of Am. v. Commonwealth Employment Relations Bd., 74 Mass. App. Ct. 656, 657-658 & n.5 (2009). We note that Downer could have filed a timely notice of appeal at the commission and moved for a stay of proceedings during the grievance process.

investigatory proceedings before the commission, and not through this limited judicial review.

Judgment affirmed.

By the Court (Green, C.J.,
Hanlon & Neyman, JJ.[10]),



Clerk

Entered: May 21, 2020.

[10] The panelists are listed in order of seniority.