Decision mailed: 2/19/10
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

Raymond Guimont,
Appellant

v.

Case No. G-06-37

City of New Bedford
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Daniel M. Henderson

DECISION

This appeal was initiated by letters to the Civil Service Commission (Commission) dated November 18, 2004 and January 31, 2005 from AFSCME Council 93 General Counsel, acting on behalf of the Appellant, Raymond Guimont, claiming relief under G.L. c.31, §§2(a) & (b), §72 and §73 for alleged violations of the Appellant's recall and re-employment rights by the Respondent, City of New Bedford (City or Respondent) and claiming was unlawfully being denied recall and re-employment rights to any Grade 4 position in any City department. For administrative reasons, including an unpaid filing fee, the appeal was not docketed and acknowledged by the Commission until February 28, 2006. A hearing was held on April 14, 2008 at the offices of the Commission. Two

(2) audio tapes were made of the hearing. Post-Hearing Briefs were filed thereafter.

FINDINGS OF FACT:

Based on the documents entered into evidence, Exhibits 1 through 20, and the testimony of Angela Natho, Ronald Labelle and Raymond Guimont,

I find the Following:

1. The Appellant was a tenured civil service employee in the position of Pumping Station Attendant, a Class I position in the Labor Service, at the time of his discharge from employment, April 9, 2003. He was appointed "permanent after certification" in that position. However, he had taken a temporary position of Sewage Plant Maintenance Person a Class II position in the Labor Service on April 30, 2001. The Appellant was notified that he was being terminated from this temporary position but had the right to demote to his permanent position of Pumping Station Attendant. Apparently, the Appellant did demote to his permanent position and was immediately terminated from that permanent position. He was terminated in quick succession from the temporary position then from his permanent position. He received notice that he had been terminated due to lack of funds effective April 11, 2003. (Joint Exhibits 1 through 5, 9; Testimony of Ronald Labelle and Angela Natho)

2. The Appellant, an "employee" is a member of AFSCME Council 93, a "Union" which is the recognized bargaining unit representing him with the "Employer", City. The Union as the exclusive representative of the Appellant and all other employees, pursuant to G.L. c. 150E did establish by "Agreement", "...an equitable and peaceful procedure for the resolution of differences; ..." with the City. This Agreement between the parties is known as a "Collective Bargaining Agreement" or CBA. (Administrative Notice case file, Exhibit 15, Testimony of Appellant and Natho)

3. The Collective Bargaining Agreement or CBA between the City and the Union covers all non-public safety employees of the City regardless of their status, (permanent, part-time, temporary or provisional). "Any grievance or dispute which may arise between the parties with regard to the application, meaning or interpretation of this Agreement shall be settled in the following manner:.." It then describes the "Grievance and Arbitration Procedure", a three (3) step process being initiated by a timely filing of a written "notice of the violation or dispute to the union steward within two (2) working days of the date of the occurrence of said violation or dispute or the date the employee knew or should have known of the alleged violation or dispute.". **Step 1:** of the procedure then requires the Union representative to take up the grievance in writing with the employee's Department Head within three (3) working days of the date of the grievance. The Department Head is then required to respond to the Union representative within three (3) working days of the presentation of the grievance. **Step 2:** of the procedure requires that any unresolved grievance be taken up in writing with the Director of Labor Relations and Personnel, within three (3) working days after the response of the Department Head is due. The Director is required to respond in writing, within thirty (30) days of the presentation of the grievance. Failure by the Director to reply within this period shall be construed as a decision favorable to the employee. **Step 3:** If the grievance still remains unsettled, either party may, within thirty (30) working days after the Director's reply is due, by written notice to the other, request arbitration. Grievances involving disciplinary action shall be processed beginning at the second step. Once a demand for arbitration has been made, the employee waives all rights to resolve the dispute under statutory procedures set forth in Chapter 31. The American Arbitration Association is the

mandated arbitrator. The decision of the arbitrator is final and binding. If both parties agree they may submit a grievance to mediation before arbitration. (Administrative Notice, Exhibit 15)

4. The Collective Bargaining Agreement or CBA between the City and the Union, as exclusive bargaining agent, addresses much of the same subject matter covered in Chapter 31. That subject matter includes: Job series/title/grade/classification, permanent and provisional appointments and promotions, eligible lists, management rights, seniority, opportunity to bump/bid or be considered by seniority, emergency appointments, discharge, removal, suspension, transfer or abolition of position, departmental unit, posting of rosters and notice of position opening by Department, (Bulletin Boards) etc. (Administrative Notice; Exhibit 15)

5. The Human Resources Division (HRD) for the Commonwealth, pursuant to G.L. Chapter 31, Section 5(*l*) allows for the delegation of authority to a City or Town to administer Civil Service functions in place of HRD. HRD has published on its web site the NON-PUBLIC SAFETY DELEGATION GUIDELINES FOR MUNICIPALITIES AND STATE AGENCIES. These guidelines allow for the delegation of the extensive array of duties and responsibilities usually performed by HRD. These duties and responsibilities relate to "all delegated personnel transactions" including but are not limited to the following: Recruitment and promotion by open competitive examination and other testing processes, maintenance of eligibility lists, certifications and reasons for selection and the maintenance of records pertaining to these duties and responsibilities. The City or Town's "delegated personnel transactions" and the record keeping related to them are to be performed in conformity with Chapter 31 and HRD's Personnel

Administrator Rules (PAR). The delegated City or Town is subject to "periodic or random audits" by HRD to insure compliance. The City or Town must take corrective action on any problems or errors found in that audit by HRD within thirty (30) days from receipt of the audit report. (Administrative Notice)

6. The City of New Bedford is a non-public safety delegated municipality, for both its official service and its labor service. See Santos v. City of New Bedford, Docket No. G2-06-10, Decision January 15, 2009 [Santos Decision]. *(Administrative Notice, Santos Decision, Exhibits 14A, 14B, 14C; Testimony of Natho)*

7. Since September 1, 1978, acting pursuant to a document marked Exhibit 14A in the Santos Decision, the City has operated as a "delegated" municipality for purpose of certain official service civil service functions and, since April 1, 1979, acting pursuant to a document marked Exhibit 14B, the City has operated as a "delegated" municipality for purpose of labor service civil service positions. Since September 29, 1986, the City's Labor Relations Director, Angela M. Natho has served as the City's designee responsible for the delegated duties covering the City's official service and labor service employees. *(Administrative Notice, Santos Decision, Exhibits 14A, 14B, 14C; Testimony of Natho)*

8. The City of New Bedford's "*delegation agreement*" with HRD allows it to approve all of its own "personnel transactions" in the non-public safety **Official Service**: appointments- "permanent, temporary, provisional, emergency and extensions of temporary and provisional employment in all official service classifications", promotions- permanent, temporary, provisional and extensions of temporary and provisional promotions" reinstatements- "permanent and temporary positions", transfers- in "either permanent or temporary positions", absences- "all authorized absences

including layoffs,... abolition of position...or any approved leave of absence" and terminations - for permanent, provisional, temporary and temporary transfers. The *"delegation agreement"* also delegates "personnel transactions" in the **Labor Service** "which include administration of all registration and application procedures, appointments, promotions, maintenance of Labor Service lists, postings and records and all related personnel functions for employees and applicants for the City of New Bedford's Labor Service, such administration and maintenance to be effected in compliance with Civil Service Law and Rule." *(Administrative Notice, Santos Decision Exhibits 14A, 14B, 14C)*

9. In the City's Labor Service a Class I position is an unskilled and no prior experience position. A Class II position is a semi-skilled position requiring 1 year prior paid experience and a CDL license. Class III positions are skilled positions. (Testimony of Angela Natho)

10. Sewage Plant Repairman is the **next higher title,** and a Grade 10 to the Sewerage Plaint Maintenance Man position, a Grade 7, which was held by Appellant three days before his lay off. (Exhibits 1-4, 9, 15)

11. The Appellant argued that he should have been called by the City for re-employment in the Sewerage Plaint Maintenance Man position. The Appellant claims that he was never contacted or called off of the reinstatement list or reemployment list for the April 27, 2004 Sewage Plant Repair Person Position. However, the Sewage Plant Repairman position is a Labor Service Class III skilled position, not similar by Class to the Appellant's prior position. (Testimony of Natho, Labelle and Exhibits 9, 11)

12. The Appellant also argued that he should have been called by the City for re-

employment in the position of MEO in various City Departments since his lay-off. The Appellant argues that he should have been called and re-employed ahead of identified named individuals with supposed less seniority than him who were re-employed in these various MEO temporary or provisional or possibly permanent positions subsequent to his initial lay-off, during the two plus year period of approximately April 10, 2003 up to June 29, 2005. It is assumed that those named re-employed individuals were also members of the same union, AFSCME Council 93, as the Appellant. (Reasonable inference, Exhibits 14, 15, 16)

13. The Appellant argues that after the City recalled and re-employed three layed-off employees, some with less seniority, to fill five (5) temporary MEO positions in May 5, 2004. The Appellant claims that he was not offered either of the two remaining May 5, 2004 MEO positions. The Appellant further claims that the City then hired off an open competitive list without contacting the Appellant, or offering the Appellant the position. (Exhibits 11, 14)

14. Mr. Labelle testified that according to him, the position of MEO requires more technical capabilities than that of Pump Station Attendant or Sewage Plant Maintenance Man, and therefore the Appellant was not considered for the positions. (Testimony of R. Labelle).

15. Prior to his layoff, the Appellant had been employed by the City since November 1, 1993. (Joint Exhibit 4 and Testimony of Angela Natho)

16. The Appellant was appointed a temporary Sewage Maintenance person on April 30, 2001 and was serving in that temporary position in April 2003, when he was layed-off. Sewage Maintenance person is a Class II position in the Labor Service.(Joint

Exhibits 4, 9; Testimony of Ronald Labelle and Angela Natho)

17. Early in 2003, the Respondent received notice of Governor Romney's 9C cuts, which resulted in $2,308,794.00 of State Aid being cut from the Respondent's 2003 fiscal year budget, leaving the Respondent with only a few months remaining in the fiscal year to implement the necessary budget cuts. (Joint Exhibit 16; Testimony of Angela Natho and Ronald Labelle)

18. The 9C cuts resulted in an initial layoff of more than thirty employees, including the Appellant, and the loss of several vacant positions. The initial layoff included the loss of a fire company and major cuts to the Respondent's Library system. (Joint Exhibit 16; Testimony of Angela Natho.)

19. In addition to the 9C cuts, the Respondent was advised that it should anticipate less State Aid for the 2004 fiscal year and, in fact, the State Aid available to the Respondent's general fund for the 2004 fiscal year was decreased by $2,928,131.90 from the amount that had been provided to the Respondent at the beginning of the 2003 fiscal year. An additional sixty-six employees were laid off at the beginning of the 2004 fiscal year. (Joint Exhibits 16 and 17; Testimony of Angela Natho)

20. On April 1, 2003, the Appellant was notified that his temporary position was being eliminated effective April 11, 2003, due to cuts in local aid by the state, which mandated a reduction in expenditures for the 2003 fiscal year. (Joint Exhibit 1; testimony of Ronald Labelle.)

21. On April 4, 2003, the Appellant was notified that his permanent position of Pump Station Attendant was being eliminated due to lack of funds and that he was entitled to a hearing on the contemplated termination in accordance with Chapter 31, section 43.

(Joint Exhibit 2; Testimony of Ronald Labelle.)

22. On April 9, 2003, the Appellant was notified that as a result of a hearing on April 8, 2003 there was found to be just cause to terminate the Appellant from his permanent Civil Service position as Pump Station Attendant, effective April 11, 2003 *due to lack of funds*. The Appellant was also informed at that time that his right to demote to a position in a lower grade did not exist due to him holding an entry level position. He was further informed that he had a right to be restored to the same or similar position, according to seniority, if sufficient money became available. (Joint Exhibit 3; Testimony of Ronald Labelle.)

23. A major function of the Pump Station Attendants has become obsolete. Pump Stations are now monitored by an alarm system rather than Pump Station Attendants, who were required to physically visit each of the stations to ensure they remained online. (Testimony of Ronald Labelle.)

24. Although the Appellant alleges that he should have had re-employment rights to the position of Motor Equipment Operator because Motor Equipment Operator and Pump Station Attendant are both Grade 4 positions, the two positions do not have the same job duties, nor are they in the same job series. The City apparently determined that they were not similar positions. (Joint Exhibits 5, 6, 9,10 and 15; and testimony of Angela Natho and Ronald Labelle)

25. In addition, a number of permanent MEO's were laid off at the same time as the Appellant and they had rights of reemployment and recall to the position of MEO. (Joint Exhibit 16)

26. A Grade 4 position is a pay classification that has been negotiated into the Union

contract, (CBA) for a number of City positions, including but not limited to MEO and Pump Station Attendant. Although the position of MEO and Pump Station Attendant share the same pay grade, they are not the same or similar positions. The Pump Station Attendant had a presence in the pump stations. Pump Station Attendants were responsible for clock readings, making sure the stations were on-line, cleaning the screens, and assisted higher level employees with maintenance and repair projects in the pump stations. The Respondent spent 130 million dollars in technological improvements to its pump stations, which included the installation of an alarm system in the late 1990's that eliminated the need for manual monitoring of the pump stations, which was a primary function of the Pump Station Attendant. A number of the tasks formerly performed by Pump Station Attendants are now performed by Sewage Plant Maintenance Men. Pump Station Attendants worked only in the pump stations while MEO's are assigned to various locations or Departments and tasks such as cutting grass at a pump station or as assisting a dig up crew. (Exhibits 5, 6 15; Testimony of Ronald Labelle.)

27. Since the Appellant was laid off by the Respondent, no Pump Station Attendants have been hired by the Respondent. (Joint Exhibit 14 and testimony of Ronald Labelle.)

28. The Appellant's name appeared on a Reemployment List for the position of Pumping Station attendant from his layoff date (April 11, 2003) until April 11, 2005. (Joint Exhibit 12; Testimony of Angela Natho)

29. The Appellant's name currently appears on a Reinstatement List for the Position of Pumping Station Attendant, which shall be valid until April 11, 2013. (Joint Exhibit 13 and testimony of Angela Natho)

30. On January 4, 2005, the Appellant notified the City of his new address. (Joint

Exhibit 11 and testimony of Angela Natho)

31. City records indicate that the Appellant's name had appeared on the Civil Service List for Motor Equipment Operator but was removed after the Appellant failed to respond to notice for 3 Temporary Full Time MEO's with the Department of Public Facilities on or before April 28, 2005 and failed to respond to notice for a Permanent Full Time MEO with the Department of Public Infrastructure on or before July 14, 2005. (Joint Exhibit 11 and testimony of Angela Natho)

32. City records indicate that the Appellant also failed to respond to an August 2007 notice for Permanent Full Time Sewage Plant Maintenance Man with the Department of Public Infrastructure. (Joint Exhibit 11 and testimony of Angela Natho.)

33. The Appellant's testimony displayed a poor memory. He admitted that he was bad with dates. He was not entirely sure whether he had signed the MEO reinstatement or re-employment list for a job opening, but he was sure that he had not been interviewed by Ronald LaBelle for any position. An interview with Mr. LaBelle and others is required to be hired for any position. Later, under cross-examination he stated that he had never received a notice from the City for any job opening and had not gone in to sign any list. He was shown a copy of a letter addressed to him (Exhibit 18) dated November 12, 2003, from Angela Natho informing him that his name had been placed on the eligible list for Public Works Maintenance Person and Sewage Plant Maintenance Person. The letter also informed him that his name had been placed on the reinstatement and re-employment lists for Pumping Station Attendant. The Appellant was slow and took his time reading this very short letter but could not remember having received it. He asked several times for questions to be repeated. Some of those questions should have prompted a

spontaneous emphatic response- e.g.-Q.-Why did you fail to respond to that [November 12, 2003] letter? He described events which bothered him e.g. Seeing MEO's at the High School but never gave a date or a part of a year or a year in reference to his observation or the event. However, it is assumed here that his observation of MEO's at the High School occurred sometime after his layoff. The Appellant is a regular well-meaning person saddled with a poor memory. I find his testimony to be unreliable. I find his actions or inactions since his lay-off regarding the City's re-employment lists and subsequent job openings indicates a lack of sufficient or reasonable interest or commitment to securing re-employment with the City, during the relevant time period. (Exhibits 18-20; Testimony [including demeanor] of Appellant)

CONCLUSION:

Summary

The Commission concludes that this appeal is untimely and must be dismissed. Even if it were not untimely, the Commission would dismiss the appeal on the grounds that the Appellant has failed to establish that he is aggrieved by an action or failure to act that has resulted in actual harm to his civil service rights through no fault of his own. For essentially the same reasons, the Commission declines to exercise its discretion to open an investigation under Section 2(a) at this time. [1]

Applicable Civil Service Law

G.L. Chapter 31, the "civil service statute" provides the procedural and substantive requirements, including administrative review and Commission review for the

[1] The Appellant's initial layoff s in 2003 are not before the Commission. Appeals from demotion or layoff under Section 39 are governed by the 10-day appeal period set forth in Section 43, which had long expired when this matter was first brought before Commission in November 2004. cf. Tomashpol v. Chelsea Soldier's Home, 22 MCSR xxx (2009) (timely protest of alleged violation of bumping rights in a layoff); Almeida v. New Bedford, 22 MCSR xxx (2009) (same)

appointment, transfer, promotion, discharge and layoff of qualified public employees.

Two specific provisions of the civil service statute set forth the substantive rights of reinstatement and reemployment involved here. G.L.c.31,§39, is entitled, "Separation from employment; lack of work or money; abolition of position; disability" and contains the so-called "Reinstatement" rights of employees who are laid off in a reduction in force. Section provides in relevant part:

> *If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money* or abolition of positions, *they shall,* except as hereinafter provided, be separated from employment according to their seniority in such unit and shall *be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority,* so that employees senior in length of service, computed in accordance with section thirty-three shall be retained the longest and reinstated first. *Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.*(*emphasis added*)

G.L.c.31,§ 40 entitled "Reemployment list", provides, in relevant part:

> *If a permanent employee shall become separated from his position because of lack of work or lack of money or abolition of his position, his name shall be placed by the administrator on a reemployment list*... The names of persons shall be set forth on the reemployment list in the order of their seniority, so that the names of persons senior in length of service at the time of their separation from employment, computed in accordance with section thirty-three, shall be highest. The name of a person placed on such reemployment list shall remain thereon until such person is appointed as a permanent employee after certification from such list or is reinstated, but in no event for more than two years. *The administrator, upon receipt of a requisition, shall certify names from such reemployment list prior to certifying names from any other list or register if,* ***in his judgment,*** *he determines that the position which is the subject of the requisition may be filled from such reemployment list.*
>
> *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, 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*)

In addition, when defining the boundaries for reinstatement AND reemployment in the case of labor service positions, the Commission must also recognize the statutory scheme provided for the appointment and promotion within the labor service. G.L.c.31,§§28 thru 30. There are three broad "classes" in the labor service – Class I (Laborers), Class II (Skilled Laborers), and Class III (Mechanics and Craftsmen). PAR.19. Labor service positions, unlike positions within the official service are those jobs for which the applicants do not have to take a title-specific competitive examination; rather, appointments are made exclusively on the basis of the priority of registration, i.e., "in the order of the dates on which they file their applications" for placement on a labor service register. Id. A person may be placed on as the registers for as many different labor service titles for which the person is qualified, and may add to the list of titles at any time. Id.

The general procedures for filling labor service positions is set forth in G.L.c.31,§29, which provides:

> An appointing authority shall, prior to any request to the administrator for approval of a promotional appointment of a permanent employee in the labor service to a higher title in such service; or for approval of a change in employment of a permanent employee within such service from one position to a temporary or permanent position which is not higher but which has requirements for appointment which are substantially dissimilar to those of the position from which the change is being made, post a promotional bulletin. Such bulletin shall be posted for a period of at least five working days where it can be seen by all employees eligible for such promotional appointment or change in employment. Any such request shall contain a statement that the posting requirements have been satisfied, indicating the date and location of the posting.
>
> The promotional bulletin shall contain the following information about the position which is to be filled: the salary and location, any special qualifications or licenses which are required for performing the duties of the position, whether the

position is permanent or temporary, if the position is temporary, the probable duration of the employment therein, and the last date to apply for the position. Such promotional bulletin shall be mailed to any employee who, during the entire period of posting, is on sick or military leave, on vacation or off the payroll.

Within fourteen days after approval by the administrator of a promotional appointment in the labor service, the appointing authority shall post in all areas under its control where five or more civil service employees start their tour of duty, the following information about the person who has been promoted: name, permanent title, position to which the promotional appointment has been made and the date from which length of service was measured for purposes of determining seniority."

Finally, the Commission applies the civil service law as a "harmonious whole" and gives due respect to the judicial mandate that rights of public employees in a reduction in force should not be construed narrowly. In Herlihy v. Civil Service Comm'n, 44 Mass.App.Ct. 728, 694 N.E.23d 369, rev.den., 428 Mass. 1104, 705 N.E.2d 276 (1998), the Appeals Court struck down the Commission's statutory interpretation of the term "a departmental unit" in G.L.c.31, §39. The commission had construed the term "unit" narrowly, to mean a particular facility or departmental region of the agency (following a clearly recognized prior administrative practice of the Department of Mental Health), but the Appeals Court found that narrow interpretation, albeit logical from an administrative point of view, an unreasonable restriction on bumping rights that did not comport with the intent of the statute. The Appeals Court stated:

To be sure, the department [DMH] has offered strong policy reasons why all bumping rights should be confined to the individual facilities under its regulatory control. . . . [No statute] authorizes the department to limit eligible employees from obtaining similar permanent positions within other facilities if they otherwise qualify. . . .*[T]he department may not . . . deprive its employees of the protections afforded by the civil service law. To say that the department has designated the center as an administrative unit does not, therefore, answer the question . . . whether G.L.c.31, s. 39, permits permanent employees* separated from their positions because of the abolition of those positions *to replace less senior employees situated in other mental health facilities throughout the department*. We conclude that the answer is yes.

General Laws c.31,s.39, creates a safety net for civil service employees who are separated from their jobs because of "lack of work or lack of money or abolition of [their] positions." [Citation] Generally, length of service determines the order of separation. . . . *[B]y adopting a restrictive definition of the bumping area, the department contravenes the intent of G.L.c.31, s.39*. . . . So long as the employee is governed by the same organizational statue, rules, and regulations, transfer from one geographical area to another should not cause the loss of a seniority rating.

. . .

Granting a more expansive reading to the term "departmental unit" is consistent with the legislative intent. The civil service system was established to create a pool of non-political appointees to provide continuous administration of governmental services and who are not always compensated at salary levels commensurate with the private sector. Hence, *one benefit that flows from the statutory scheme is that employees, like Herlihy, receive the protection of a seniority system with respect to reemployment rights.* [Citations] *By confining Herlihy's bumping rights to a single administrative entity within the department, the department, in effect, affords Herlihy none of the protections earned as a result of his years of service. We do not think the Legislature had that intent*.

Id., 44 Mass.App.Ct. at 442-43, 694 N.E.2d at 840-41 (*emphasis added*)

Section 2(b) Appeal

Section 2(b) of the Civil Service Law authorizes the Commission:

> To hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator, except as limited by [certain provisions concerning the grading of examinations] . . . .
>
> No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied or prejudiced in such manner as to cause actual harm to the person's employment status."

Sections 2(b) of the Civil Service Law contain no specific period of limitations for appeal to the Commission. By Administrative Order effective October 1, 2000, the Commission established a 60-day limitations period to appeal cases under Section 2(b) involving "bypass" for promotion or original appointment only. This appeal does not

involve a "bypass' and, therefore, is not covered by the 60-day period of limitations.[2]

The Standard Adjudicatory Rules of Practice and Procedure, as adopted by the Commission, 801 C.M.R. 1.01(6)(b) et seq., states: "[I]n the absence of a prescribed time the notice of claim [i.e., appeal to the Commission] must be filed within 30 days from the date that the Agency notice of action is sent to a Party." 801 C.M.R. 1.01(6)(b). This time may not be extended by the Commission or the parties. 801 C.M.R 1.01(4)(e).

The personal administrator (HRD) is normally the party charged with the duties and responsibilities of implementation or enforcement of the civil service laws and rules. However, here, most if not all of those duties and responsibilities have been delegated to the City by a long standing "Delegation Agreement". HRD is left by agreement with mere oversight responsibility. The City is subject to "periodic or random audits" by HRD to insure compliance and must take corrective action on any problems or errors found in that audit by HRD within thirty (30) days from receipt of the audit report. The Commission would also expect that HRD would take appropriate action if a specific violation of some alleged error or omission by the City in the performance of its duties as HRD's delegate were brought to its attention. The Commission has determined that, when civil service administrative functions have been delegated, that creates, in effect, two levels of authority that have responsibility under the Civil Service Law. The delegated municipality assumes primary responsibility to carry out the civil service functions delegated to it, while the HRD Personnel Administrator retains general authority of oversight to ensure that the delegated functions are carried out properly. See Seariac v. City of Marlborough, 7 MCSR 254 (1994).

[2] By Administrative Order effective October 1, 2000, the Commission established a 60-day limitations period to appeal cases under Section 2(b) involving "bypass" for promotion or original appointment only. This appeal is not covered by the 60-day rule.

While it would appear optional for a party who is aggrieved by an action or failure to act of a delegated municipality to seek redress directly to the Commission, the Commission believes that, whenever possible, redress for an alleged violation by a delegated municipality ought first be brought to the attention of the municipality, and, then, to the attention of the Personnel Administrator, so that HRD may have the opportunity to inquire and, if possible, resolve the issue of any delegated functions at the administrative level. Accordingly, the Commission has ruled that it will entertain a Section 2(b) appeal directly from a delegated community's alleged violation, but in order to facilitate the option for recourse by HRD, the Commission will not deem a Section 2(b) appeal filed with the Commission as untimely solely because the Appellant also elected to seek HRD's intervention before invoking the jurisdiction of the Commission. See Santos v. New Bedford, 22 MCSR 47 (2009)

The Commission expects that the administrator, whether it is HRD or a delegate, or both, ought to be given a reasonable period to "act" on any request before a Section 2(b) appeal would be appropriate. Thus, in most cases, the Commission will be inclined to accept appeals as timely if brought within a reasonable window (i.e., at least 15 days after a written request is made to the administrator to act, and not later than six weeks plus the 30-day limit prescribed by 801 C.M.R. 1.01(6)(b) after such request). Outside that time frame, appellants have been advised that the Commission will be likely to consider an appeal untimely, absent emergencies on the one hand, or evidence that the administrator is, in fact, aware of the request and asked for additional time to make a decision, on the other hand. Id.

The Commission believes that this case is an example for the application of that

principle. In this case, the Appellant knew, or should have known, in April 2003, of the nature of the purported reinstatement and reemployment rights he now asserts have been denied to him. Yet the Appellant delayed eighteen months, until November 2004, before to file the present appeal with the Commission. The Commission finds no reasonable justification for such a delay, particularly in the case of violations, such as here, which involves: (1) highly technical issues that should have been immediately addressed at the City level, and thence to HRD, and (2) requests for retroactive relief which would be likely to affect the City and many other City employees who had filled the positions in question long before the Appellant took steps to bring this matter before the Commission.

The accuracy, reliability, predictability and expediency of the various lists and the exercise of associated rights should have been the common goal of all involved parties. The City acted during the relevant period as if its employment decisions were legal and proper. Neither the Appellant nor the Union notified the City or HRD otherwise. The Appellant claims that the City failed to notify him pursuant to the statutory requisites of the re-employment list, of numerous openings and thereby failed to give him an opportunity to apply. The Appellant claims that he was qualified for many of these positions which were filled by the City over a two plus year period, April 10, 2003 to June 29, 2005. Apparently, neither the Appellant nor the Union ever notified the City or HRD regarding these continuing alleged errors at the time. It is further noted that the Appellant displayed a very poor memory and that his testimony is found to be unreliable and insufficient to support his claim of non-notice from the City regarding the various positions and hiring's he testified about.

The first notice claiming City errors regarding the Appellant's recall or re-employment rights was in a letter from the Union to the Commission, dated November 18, 2004, followed by a subsequent letter dated January 31, 2005. Neither of these two letters made any reference to a prior attempt to notify the City of the situation.

Furthermore, the Appellant in this case has elected to forego several potential opportunities for reemployment with the Respondent during the pendency of his appeal. The Appellant was notified of at least two of the openings for which he now claims he should have been selected, but the City removed his name from future lists because he never responded to either of those postings or notices. In 2005, just months after notifying the Respondent of his new address, the Appellant failed on two occasions to respond to notices from the Respondent for the positions of Temporary Full Time Motor Equipment Operator and Permanent Full Time Motor Equipment Operator. In 2007, the Appellant failed to respond to a notice for a Permanent Full Time Sewage Plant Maintenance Man.

The City would be prejudiced if it now were forced to subsequently review and redefine its reinstatement policies and reemployment lists made years before a complaint was asserted. The extra administrative time, expense and effort involved in addition to the consequential effect or displacement on other employees would be disruptive and disorderly for all parties. That extra burden on the City would tend to negate the cost saving purpose of the original lay-offs. The City, being a delegated municipality, should have made it simpler and more convenient for the Appellant or his Union to raise and address any of the issues presented here with the City in a timely manner.

This decision does not in any way mean to construe the terms of any applicable collective bargaining agreements that may contractually regulate the assignment of duties to bargaining unit members, which is a subject beyond the scope of the Commission's jurisdiction. The Commission has encouraged Appointing Authorities and collective bargaining units affected by a layoff of their personnel to collaborate on the creation of appropriate bumping procedures, consistent with Civil Service Law, and would make the same observation about the establishment of clear and uniform rules for establishing the scope of job classifications covered by any particular employee's reinstatement rights and/or placement on appropriate reemployment lists. See Tomashpol v. Chelsea Soldier's Home, CSC Case No. D1-09-188, 22 MCSR xxx (2010); Almeida v. New Bedford, 22 MCSR 269 (2009).

The City establishes the labor rosters, re-employment lists and promotional or other job openings in the normal course of its business and had the right to rely on the completeness and accuracy of those various lists unless timely notified otherwise. It seems that the City's employees, either individually or through their Union, as "sole and exclusive bargaining agent", would be in a position to coordinate and carry out inquiry and verification of the completeness and accuracy of these various lists. At a minimum, the Union would seem to be in the best position to be able to timely and formally to notify the City of any errors or omissions and, if there were an impasse, to be in a position to grieve the matter or bring it to HRD then to the Commission in a timely manner.[3] "Purpose of the civil service law and rules is to facilitate orderly and systematic

[3] For instance, the CBA applicable to the Appellant provides for a "means of continuing communications" between the parties, for "the purpose of conducting negotiations on any subject" which includes "... other matters of mutual concern," by the

administration of government, and to achieve this purpose civil service provisions must be read as harmonious whole without giving unmerited emphasis to any one section." Op.Atty.Gen., Feb. 13, 1964, p. 187.

The second jurisdictional issue in a Section 2(b) appeal is the requirement that that appellant be "aggrieved", which means that Mr. Guimont must allege that his civil service rights "were abridged, denied or prejudiced in such manner as to cause actual harm to the person's employment status" and he must show he "has been harmed." In addition, in order to be granted relief, the Appellant must demonstrate that the harm resulting from the violation of the civil service law has been caused "through no fault of his own." Chapter 31 of the Acts of 1993.

Here, the Commission concludes that the Appellant cannot meet these criteria for relief. His eighteen-month delay in asserting his rights, coupled with his failure to respond to at least two opportunities for reinstatement or reemployment put much of his present predicament on his own shoulders. While he may not have been the sole cause of misunderstandings, his lack of proactive attention is a clearly contributing clause which precludes a finding that he has been "harmed" and "through no fault of his own."

Finally, although the Commission does not need to decide the merits of the

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establishment of a City-wide Labor-Management Committee. This language provides a vehicle and a sweeping opportunity for the Union to raise and inquire into the City's proposed and occurring actions. See Article XXXI Labor-Management Committee (Exhibit 15). The CBA also addresses the essential issues of seniority and establishing lists, including Civil Service lists accordingly, for "promotional advancement", lateral transfers and hiring for vacant positions or openings, (permanent, temporary, provisional). There is also a requirement of posting vacant positions for five (5) working days by the City prior to filling such positions to give employees an "opportunity to bid by seniority". See Article IV Seniority (Exhibit 15). The CBA also facilitates posting and Union activity, by providing for mandatory bulletin boards for notices and Union access to them at virtually every City location where employees begin and end shifts. See Article XXII Bulletin Boards. (Exhibit 15).

Appellant's claim, there was plainly substantial evidence presented by the Respondent that the Appellant's former position and the position of MEO to which he claimed he should have been reemployed are not "similar" positions. Based upon the job descriptions and the testimony of Mr. Labelle, although it has been determined through the collective bargaining process that the positions of Pump Station Attendant and Motor Equipment Operator are equivalent in pay (Grade 4), the Respondent has demonstrated that the duties of the two positions are not the same or similar. Pursuant to M.G.L. c. 31, sec. 39, the Appellant has no right to be reinstated to a different position simply because a different position has been assigned the same pay grade in the collective bargaining agreement as the position from which the Appellant was laid off.

The Respondent has not hired any Pumping Station Attendants since the Appellant was laid off and the Appellant's name currently appears on a Reinstatement List for the Position of Pumping Station Attendant, which is valid until April 11, 2013, ten years from the date the Appellant was laid off. The Appellant has not established any basis on which the Commission is warranted to grant him any further relief.

Section 2(a)

The Appellant also couched his claim, in part, as a request under G.L.c.31, §2(a), which authorizes the Commission to conduct an investigation into any alleged violations of the civil service laws. It is well-established that the Commission has broad discretion to decide whether to open a Section 2(a) investigation, and, if so, to what extent it will devote resources to it. See O'Neill v. Lowell, 21 MCSR 683 (2008), affirmed sub non,

O'Neill v. Civil Service Commission, SUCV2009-00391 (2009)[4]; Petition for Investigation by Boston Police Patrolmen's Ass'n, CSC Case I-07-0734 (2007) The Commission has been clear that a request for a Section 2(a) investigation is rarely, if ever, appropriate as a alternative when a Appellant's other statutory remedies fail. Id.

The Commission finds no reason to open an investigation into the layoff and re-employment practices of the City dating back as far as 2003. Even if there were some possible prospective value to such an inquiry, the Commission's priority must be to allocate its limited resources to the more pressing number of currently pending cases on its docket, whose appellants have a statutory right of appeal. The Commission simply does not have the resources to address the voluminous and myriad of interpretative or application issues under civil service law and rules that arise in attempting to categorize all the positions for which particular employees would be qualified to be reinstated or re-employed. This should have been a coordinated administrative approach addressing all the lists and positions, due to the consequential effects on others. As the Commission noted above, if systemic problems still exist in New Bedford, the bargaining table may be the best place to address them prospectively and globally, rather than belatedly and on a case-by-case basis by appeals to the Commission.

The Appellant and his Union had every incentive to routinely inquire and review the applicable City's rosters, re-employment lists and promotional or other job openings, postings and appointments made, especially after any 9(C) cuts and lay-offs, to assure an orderly process of layoffs and rehire that complies with both the CBA and civil service law. The Union is in a unique position as the Appellant's exclusive collective bargaining

[4] The Superior Court's decision affirming the Commission in the O'Neill case is pending appeal to the Appeals Court.

representative and the exclusive representative of all employees who might aspire to be reinstated or re-employed by the City in their previous or other jobs to equitably resolve these issues. In general, the Commission should be the final step in the process, not the first step. The administrative functions of the Civil Service Commission were cut away decades ago and assigned to the then newly created personnel administrator of the Commonwealth or the Human Resources Division, "HRD". The Commission was left primarily as an adjudicatory body. HRD has the administrative resources and expertise to accompany its broad statutory authority to administer the civil service system as contained in Chapter 31.

For all the above stated findings of fact and conclusion, the Commission determines that, by a preponderance of the credible evidence in the record that the City and/or HRD has not violated the Appellant's rights for reemployment or reinstatement. The Appellant's was not aggrieved by a decision, action or failure to act of either the City or HRD.

For all of the above stated reasons, the appeal on Docket No. G-06-37 is hereby ***dismissed.***

Civil Service Commission,

Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission: (Bowman, Chairman, Henderson, Taylor, Marquis and Stein, Commissioners) on February 18, 2010

A true record. Attest:

Commissioner

Commissioner Marquis was absent.

Either party may file a motion for reconsideration within ten (10) days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:
Jaime DiPaola-Kenny, Atty.
Jane Medeiros Friedman, Atty.
John Marra, Atty. HRD