Decision mailed: 9/26/08
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
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JOHN O'TOOLE,
Appellant
v.

CASE NO: G1-07-405

HUMAN RESOURCES DIVISION,
Respondent

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Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, John O'Toole, filed this appeal with the Civil Service Commission, pursuant to G.L. c.31, § 2(b), from alleged actions or inactions of the Massachusetts Human Resources Division (HRD) in connection with his requests for reinstatement to his former position as a police officer in the Boston Municipal Police Department (BMPD) pursuant to G.L. c. 31, §46.[1] On March 29, 2008, HRD moved to dismiss the appeal on grounds that the appeal was untimely, the Appellant lacked Section 2(b) standing, and no Section 310 relief could be granted. The Appellant opposed this motion.

[1] The Appellant originally named the Boston Police Department (BPD) as a Respondent. By oral motion, the Appellant, with assent of HRD, moved to dismiss the BPD as it is not a necessary or appropriate party to this appeal. The Commission agreed and the motion to dismiss BPD as a Respondent was granted.

Prior to the scheduled hearing before the Commission on HRD's motion to dismiss, the Appellant and HRD submitted a Joint Petition for 310 Relief. The Commission denied the Joint Petition for 310 Relief. After further hearing, the Commission now allows HRD's pending Motion to Dismiss.

FINDINGS OF FACT

Based on the pleadings and other documents of record, I find there is no genuine dispute as to the following facts:

1. In 1979, the City of Boston established the Boston Municipal Security Force (BMSF) within its Public Facilities Department. (*HRD Motion; Appellant's Opposition; Administrative Notice*)

1. In 1994, the BMSF was renamed the Boston Municipal Police Department (BMPD) and the newly-named BMPD was transferred to the City of Boston's Property & Construction Management Department. (*HRD Motion; Appellant's Opposition; Administrative Notice*)

2. The principal function of the BMPD was to employ armed and unarmed officers with limited jurisdiction to provide security on properties owned and controlled by the City of Boston. (*HRD Motion; Appellant's Opposition; Administrative Notice*)

3. The Appellant, John O'Toole, served as armed police office in the Boston BMPD from July 1994 to October 1999. (*HRD Motion; Appellant's Opposition; Joint Petition for 310 Relief*)

4. In October 1999, Mr. O'Toole voluntarily resigned from the BMPD in order to take a non-civil service position with the Boston Housing Authority, where he remains today. (*HRD Motion; Appellant's Opposition*)

5. On September 9, 1999, approximately one month prior to Mr. O'Toole's departure from the BMPD, this Commission ordered HRD to establish civil service classifications for previously unclassified BMPD municipal police officers. (*Appellant's Opposition; Joint Petition for 310 Relief; Administrative Notice*)

6. Four years later, in June 2003, HRD recommended and this Commission established a civil service classification to cover BMPD police officers, including the title of "Boston Municipal Police Officer" and related superior officer titles. (*HRD Motion; Appellant's Opposition; Joint Petition for 310 Relief; Administrative Notice*)

7. On December 31, 2006, incident to the merger of the armed security functions of the BMPD with the BPD, the City of Boston's Property & Construction Management Department abolished the armed portion of the BMPD, which included all the civil service positions in the titles of "Boston Municipal Police Officer", "Boston Municipal Police Sergeant", and "Boston Municipal Police Lieutenant" within the Property & Construction Management Department. (*HRD Motion; Appellant's Opposition; Administrative Notice*)

8. In June, 2007, Mr. O'Toole contacted HRD about his civil service status and potential reinstatement rights under the provisions of G.L.c.31,§46. He was informed during this conversation that his civil service reinstatement rights had expired in October 2004, five years after he left BMPD's employ. (*HRD Motion; Appellant's Opposition*)[2]

9. Mr. O'Toole asserts that he explained to HRD that, when he left BMPD's employ in October 1999, he had not yet been classified in a permanent civil service title, which

[2] Mr. O'Toole apparently made prior inquiry of the BPD about a "lateral transfer" and was informed by BPD in June 2007 that his request was rejected. Mr. O'Toole also asserted that he also made prior inquiry about reinstatement directly with the BMPD at some unspecified time after June 2003 and before it was abolished, and BMPD denied reinstatement. (*Appellant's Opposition*) The City of Boston is not a party and neither earlier action of the BMPD nor the BPD are challenged in this appeal

HRD did not establish until June 2003. He asserted that his five-year window for reinstatement should run from June 2003, not October 1999. Mr. O'Toole asserts that HRD told him it was "aware of the woes of the BMPD", but that his reinstatement rights had expired and he had no right of appeal. According, to Mr. O'Toole, he relied on HRD's representation that he had no recourse to appeal the denial of his reinstatement rights, never received anything in writing from HRD and, therefore, took no further action at that time. (*Appellant's Opposition*)

10. In the fall of 2007, Mr. O'Toole asserts that he learned of this Commission's decision in Certain Boston Municipal Police Officers & Sergeants v. City of Boston, 19 MCSR 352 (2006) (the 2006 BMPD Case). The 2006 BMPD Case involved twenty-three BMPD officers, then still employed with BMPD, who sought "permanent" civil service status in their positions. HRD supported the appeal. By Decision dated October 26, 2006, the Commission granted these officers permanency in their respective positions, retroactive to their dates of hire. (*Appellant's Opposition; Administrative Notice*)[3]

[3] The appellants in the 2006 BMPD Case were motivated by a potential right to "transfer" from the soon-to-be-abolished armed BMPD police force to the BPD, which was only available to civil service employees in "permanent" status in their positions. See G.L.c.31,§35. Due to the complex circumstances surrounding the evolution of civil service status at the BMPD, as noted above, the twenty-three appellants fell through a crack in the civil service law because they had been hired between 1999 and 2003 and, technically, held only "provisional" status, which would not be sufficient to entitle them to request a "transfer" to the BPD. Finding these twenty-three BMPD officers similarly situated to the BMPD officers hired prior to 1999 (who had been granted "permanency" due to an unrelated special act of the legislature affecting all Boston civil service employees), and the officers hired after 2003 (who would be "permanently" appointed after civil service lists were officially created for their positions), the Commission determined that the twenty-three officers caught in the middle deserved the same opportunity as the rest of their peers to seek a transfer to BPD, and, therefore, exercised its equitable authority under Chapter 310 of the Acts of 1993 to grant them the same civil service status of permanency as all the other officers then employed at the BMPD. [Whether any particular BMPD officer would be successful in transferring to the BPD was not guaranteed, but required BPD approval. Ultimately, about half of the armed BPMP officers were accepted by the BPD and transferred; the other half were laid off. See generally Twenty-Seven Former Boston Municipal Police Officers, Sergeants and Lieutenants v. City of Boston, 20 MCSR 235 (2007); In Re Petition for Investigation Filed By Boston Police Patrolman's Ass'n, Case No. I-07-34 (2007), aff'd sub nom, Boston Police Patrolman's Ass'n v. Civil Service Comm'n, Suffolk Sup.Ct., Docket Nos. SUCV2006-4617, SUCV2007-1220 (2007)].

11. The Appellant provided testimony, through the affidavit of Edward Bagley, that Mr.Bagley was a former BMPD officer who left the BMPD in May 2001 to take a non-civil service position with the Chatham Police Department. (*Appellant's Opposition*)

12. Mr. Bagley testified that he subsequently sought "reinstatement" as a civil service police officer with the Hingham and Cohasset police departments. He states that on February 14, 2005, the Cohasset Police Department agreed to reinstate him where he is currently employed, with a civil service seniority date that includes his year of service with BMPD. Mr. Bagley states that he is aware of "many former BMPD officers seeking reinstatement as a civil service police officer to non-BMPD civil service police departments within the Commonwealth." (*Appellant's Opposition*)

13. Mr. O'Toole filed the present appeal on November 26, 2007.

CONCLUSION

This appeal arises from the "action or inaction" of HRD in preventing Mr. O'Toole from exercising civil service reinstatement rights under G.L.c.§46, which provides:

> *A permanent employee who becomes separated from his position may, with the approval of the administrator [HRD] be reinstated in the same or in another departmental unit in a position having the same title or a lower title in the same series*, provided that the appointing authority submits to administrator a written request for such approval which shall contain the reasons why such reinstatement would be in the public interest. *No such request shall be approved if the person whose reinstatement is sought has been separated from such position for over five years and there is an eligible list containing the names of two or more persons available for appointment or promotion to such position*. . . .If the administrator fails to approve the reinstatement of such person within thirty days after such request, *the appointing authority or such person may make a written request for a hearing before the administrator, who shall hold such hearing forthwith and render his decision.* Nothing herein shall affect the rights of persons to reinstatement under section thirty-nine [concerning certain layoffs, not applicable here]
>
> The administrator shall reinstate any employee of a city or town who has been separated from a civil service position through retirement . . . if such retirement is invalidated . . . without loss of compensation, in the same position or in a position with the same title as that formerly held by him.
>
> (*emphasis added*)

Timeliness

Section 46 of the Civil Service Law contains no specific period of limitations for appeal to the Commission. Nor does Section 2(b), concerning appeals from "action or inaction" by HRD, contain a specific time limitation on appeals.[4] Section 1.01(6)(b) of the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. 1.01 et seq., as adopted by the Commission (S.A.R.P.) 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." S.A.R.P. 1.01(6)(b). This time may not be extended by the Commission or the parties. S.A.R..P. 1.01(4)(e).

The issue, here, is what triggers the 30-day period of limitations and what possibly would toll the period for any reason thereafter? If the triggering event is HRD's verbal representation that Mr. O'Toole had lost his reinstatement rights three years earlier and had no right to appeal, the present appeal would appear untimely. However, the Commission finds that it would be disingenuous and inconsistent with the general merit principle of the Civil Service Law to hold that a right of appeal, especially a claim which involves, in part, an alleged misrepresentation of the right of appeal itself, necessarily runs from the date of some undocumented verbal exchange, most likely over the telephone. Even if that were the triggering event, unless an appellant's delay was inexcusable, the Commission would be inclined to find that, without written documentation demonstrating that an appellant was duly informed of a right of appeal, any alleged violation, if any, would be considered "continuing" and the time for appeal tolled. The Commission cases cited by HRD involving dismissal for untimely appeal

[4] By Administrative Order effective October 1, 2000, the Commission established a 60-day limitations period to appeal cases under Section 2(b) involving "by-pass" for promotion or original appointment only.

under S.A.R.P. 1.01(6)(b) are distinguishable as cases in which the appellant did receive written notice of HRD's decision which did include specific disclosure of a right of appeal to the Commission. Corsi v. Department of Conservation & Recreation, 18 MCSR 179 (2005); Smith v. Department of Mental Retardation, 18 MCSR 14 (2005). In other words, if HRD or an Appointing Authority wants the benefit of the finality of action (or choice not to act) that comes with a statute of limitations, as a general rule, it should document a decision in writing whenever possible. In the absence of such documentation, the factual issue inevitably will remain open for argument whether or not an appeal is timely for lack of a proper appeal disclosure or excused for tolling.

Similarly, if the triggering event is Mr. O'Toole's awareness in the "fall of 2007" of the Commission's Decision in the 2006 BMPD Case, issued a year earlier (on October 26, 2006, and which would have duly posted on the Commission's website soon thereafter), Mr. O'Toole's appeal is arguably, although not necessarily, filed within the required 30-day period.

Thus, determination the timeliness of the appeal in this particular case would seem to require additional factual inquiry as well as examination of certain public policy considerations. As noted below, however, the Commission chooses not to address these matters further because it finds that there are alternative grounds upon which to rest the decision of this appeal.

Section 2(b) Standing and Applicability of Chapter 310 Relief

Mr. O'Toole's right of reinstatement, if any, would entitle him to seek reinstatement "in the same or in another departmental unit in a position having the same title or lower title in the same series". G.L.c.31,§46. As the BMPD was abolished effective December

31, 2006, there are now no longer any positions of "Boston Municipal Police Officer", or any similar positions, anywhere within the "appointing authority" of the City of Boston. More importantly, no such positions existed in June 2007, when Mr. O'Toole inquired about reinstatement at HRD. Accordingly, as of June 2007, no position existed into which he could have been reinstated by the City of Boston.

The Appellant argues that Section 46 should be interpreted to allow "reinstatement" *either* by the City of Boston *or* by "any other civil service police department" in the Commonwealth. (*Appellant's Opposition, p. 10*) This argument hinges on whether "another departmental unit" in Section 46 should be read narrowly, as HRD poses, to mean "another departmental unit *under the department's appointing authority*" (i.e., the City of Boston, as the "appointing authority" for the former BMPD), or should be read more broadly to mean "another departmental unit *under the same or any other appointing authority*", as the Appellant argues, which, then, encompasses any city or town which has accepted the provisions of G.L.c.31,§58A, and subjected its police employees to the Civil Service Law.[5] The Commission agrees with HRD that reinstatement rights under Section 46 should be construed narrowly and confined to apply only within the same "appointing authority".

Massachusetts G.L.c.31,§1 defines departmental unit as "a board, commission, department, or any division, institutional component or other component of a department established by law, ordinance, or by-law." An "appointing authority" is "any person, board or commission with power to appoint or employ personnel in civil service

[5] As of July 30, 2008, there were 189 communities, including the City of Boston, who have accepted Section 58A and maintain a municipal police force subject to the Civil Service Law. See www.mass.gov/civilservice. The Commission notes that the City of Boston and the BPD (as a civil service police force) are separate "appointing authorities". See, e.g., Twenty-Seven Former Boston Municipal Police Officers, Sergeants and Lieutenants v. City of Boston, 20 MCSR 235, 239 (2007).

positions." G.L.c.31,§1. For the reasons expressed below, the Commission concludes that "reinstatement" of a separated employee under Section 46 of the Civil Service Law is limited to jobs within the unilateral control of the separated employee's appointing authority, unlike other provisions of the law which expressly *do* establish certain opportunities for employees to be "transferred" or "re-employed" (after layoff) to available jobs statewide. G.L.c.31, §§35 & 40. The Commission concludes that the interpretation of Section 46 proposed by the Appellant would amount to an unintended, and undesirable, end-run around the distinctions made throughout the Civil Service Law.

The Commission is vested with considerable leeway in construing the statute it is charged with enforcing. See, e.g., Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 821-22, 857 N.E.2d 1052, 1058 (2006); Gateley's Case, 415 Mass. 397, 399, 613 N.E.2d 918, 919 (1993). See also, Town of Hull v. Massachusetts Comn'n Against Discrimination, 72 Mass.App.Ct. 525, 529-30, --- N.E.2d. – (2008) (upholding long-standing "way in which the commission has been doing business"); Berrios v. Department of Public Welfare, 411 Mass. 587, 594-95, 583 N.E.2d 856, 861 (1992) (accepting agency definition of statutory term). In meeting the problem of fitting Section 46 into the law, the Commission in mindful of the various rules in the nature of axioms, expressed in judicial precedent. These axioms include: (1) giving meaning, if possible, to all statutory language, (2) construing all parts of the law, where capable, so as to constitute a harmonious whole consistent with the legislative purpose and (3) gleaning the legislative purpose from legislative history, where ascertainable, from the nature of the subject matter and from the objective sought to be achieved. See, e.g., Mathewson v. Contributory Retirem't. App. Bd., 335 Mass. 610, 614-15, 141 N.E.2d 522, 525 (1957)

The central goal of the Civil Service Law is to preserve a system of public employment that facilitates an orderly and systematic administration of government through appointment, promotion and retention of personnel on the basis of merit, efficiency and fairness, while enhancing the opportunity for employment security in public employment through appropriate application of principles of tenure and seniority when making personnel decisions affecting public employees. See, e.g., City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997) and cases cited.[6]

The core sections of the Civil Service Law bearing on the rights of employees who lose or change jobs: (1) Section 46, regarding reinstatement; (2) Section 35, regarding transfers, (3) Sections 39 & 40 regarding layoffs and reemployment, and (4) Section 33 regarding seniority rights. The Commission believes the intent within these statutes is clear: the circumstances and public policy concerns when civil service employees are moved from one position to another within the same appointing authority differ from those when employees leave one appointing authority to take a position with another, and the rights and obligations attendant to these situations that derive from these statutes are justifiably different for good reason. For example, the appropriate meaning of the term "title" and "departmental unit" must be read in the context of the impact that meaning has on statutory "bumping" rights in case of layoff, to assure that those rights are not unduly applied more broadly or more narrowly than logically intended. See, e.g., Andrews v. Civil Service Comm'n, 446 Mass. 611, 846 N.E.2d 1126 (2006) ("bumping" within

[6] These principles now co-exist with the rights of organized public sector union employees, although it must be noted that the Civil Service Law long pre-dated the right of employees to organize and an employee's individual civil service rights may be augmented, but cannot be forfeited, by a collective bargaining agreement. See generally, City of Fall River v. AFSCME Council 93, Local 3177, 61 Mass.App.Ct. 404, 810 N.E.2d 1259 (2004).

divisions of a department); Herlihy v. Civil Service Comm'n, 44 Mass.App.Ct. 835, 694 N.E.2d 369, rev.den., 428 Mass. 1104, 705 N.E.2d 276 (1998) ("bumping" from one department facility to another)

Similarly, the right of "reinstatement" must recognize the clear distinction between the rights and obligations of an appointing authority to make adjustments to the workforce within its complete control, and employment actions in which two different employers, i.e. two appointing authorities (and, therefore, two distinct employee organizations) are affected. Unlike an involuntary or voluntary "transfer" under Section 35, or "reemployment" under Sections 39 and 40, an employee "reinstated" under Section 46 restores the status he or she had prior to separation from employment, and returns the employee to the former job or another "lower" titled job, with essentially the same seniority rights (vis-à-vis others in the department) as he had prior to separation, *largely without regard to the reason for separation or the length of the "break in service."* See G.L.c.31,§33, 39, 46.

The Commission perceives a risk for unintended mischief if the Civil Service Law were interpreted to permit a former employee to be inserted by "reinstatement" into an entirely different municipality from which the employee was separated. For example, if the Appellant's interpretation of Section 46 were adopted, a civil service employee who briefly held a "permanent" position and left voluntarily or was discharged prior to the completion of the probationary period and before receiving "tenure" could be entitled, for up to five years (and, in some cases, longer), to be "reinstated" by any appointing authority in the Commonwealth ahead of persons who recently had taken and passed civil service examinations and were awaiting appointment or promotion, and even could trump

"tenured" employees who had been involuntarily separated by layoff and held the "super priority" of "reemployment" at the top of such civil service lists under Section 40. This is not a hypothetical; in fact, there are many former BMPD officers who lost their jobs when the BMPD was abolished and have been sitting on a "reemployment list" for appointment as municipal police officer and whom Mr. O'Toole (who has not had a civil service job since 1999) potentially could jump over if he found a municipality to hire him. The Commission does not believe the Civil Service Law intended, nor does it require, such inequitable outcomes.

Second, although the legislature could have provided greater clarity in drafting the law, the statutory language does offer some interpretive clue that Section 46 "reinstatement" was intended to apply to departmental units of a single appointing authority. Thus, Section 46 uses "the appointing authority" only in the singular. G.L.c.31,§46. By comparison, Section 35, which contemplates involuntary transfers (Section 35, ¶¶1-3) and voluntary transfers (Section 35, ¶6), expressly distinguishes when transfers are permitted within and between appointing authorities upon a request in writing "by the appointing authority *or authorities*" involved or, as for an emergency transfer under Section 35, ¶5, only by an "appointing *authority* for a departmental unit". G.L.c.31,§35 (*emphasis added*) The Commission reads the use of the singular in Section 46 to more closely mirror the same use of the singular ("authority") than it does the plural ("authorities") in Section 35.

The Commission is not persuaded by the Appellant's statutory construction argument that Section 33 (restricting seniority rights in cases of reinstatement "in a departmental unit other than that in which he formerly held full-time employment") implies otherwise.

G.L.c.31,§33¶2. The appearance in Section 33 of the same unmodified term "department unit" used in Section 46 adds no more to inform its plain meaning in either statute. If anything, the legislature's choice of a significantly longer deferral period (minimum of three years under Section 33¶2) that a separated employee must serve after reinstatement before regaining full seniority rights (compared, for example, to only a one year of service in other situations covered by Section 33¶3), tends to confirm the Commission's belief that the legislature saw the potential risk when an employee is "reinstated" to be more of a public policy concern than in cases of transfer or reemployment, which reinforces the Commission's conclusion that the scope of reinstatement rights is best confined and construed narrowly. Since a limited construction seems more in keeping with both the overall statutory scheme and purpose of the Civil Service Law, and the plain meaning of the terms of the statutes surely are not inconsistent with such an interpretation, it is the meaning adopted by the Commission.[7]

The Appellant's final argument asserts that other former BPMD officers have been "reinstated" to various municipal police force positions. The record here established only one possible reinstatement and the facts surrounding that are not clear. For example, the "reinstatement" of Mr. Bagley apparently took place prior to the abolishment of the BMPD and may stand on a different footing. In addition, proof of one such example does not establish a pattern and practice. Indeed, Mr. Bagley's case simply may be a clerical

[7] The Commission's decision does not depend on HRD's separate argument that the position of a municipal "Police Officer" and a "Boston Municipal Police Officer" are not the "same" Title for purposes of reinstatement under Section 46. A "Title" is "a descriptive name applied to a position or to a group of positions having similar duties and the same general level of responsibility." G.L.c.31,§1. The two positions are both entry level jobs in the "Police Officer Series" and are functionally indistinguishable. See Investigative Report of the Civil Service Commission, Case No. G-3563 (Aug. 26, 1999). The Commission takes administrative notice that HRD's practice has been to treat the two positions as "similar" for purposes of "reemployment" lists under G.L.c.31,§39. E.g., Twenty-Seven Former Boston Municipal Police Officers, Sergeants and Lieutenants v. City of Boston, 20 MCSR 235, 239 (2007).

oversight that failed to catch the attention of any policymaker until now. The Commission also suspects that what Mr. Bagley calls other cases of "reinstatement" may, in fact, have been lawfully approved "transfers" of existing BMPD officers initiated under Section 35 prior to the abolishment of the BMPD at the end of 2006.

In sum, Mr. O'Toole is limited to "reinstatement" by the City of Boston, the appointing authority over the departmental unit in which he was employed, either to the unit in which he had been employed or another unit under the authority of the City of Boston. As no such positions existed when he made inquiry of HRD, he had no reinstatement rights under Section 46 at that time. Misinformation or inaction by HRD, if any, has not injured him in his employment rights. Accordingly, he is not "aggrieved" within the meaning of Section 2(b), and is not a person entitled to bring this appeal or who could be granted Chapter 310 relief.

Accordingly, for the reasons stated above, the Commission allows HRD's Motion to Dismiss, and the appeal is hereby ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Marquis, Stein, Taylor and Henderson, Commissioners) on September 25, 2008.

A True Record. Attest:

Commissioner

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

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

Notice to:
Leah Barrault., Esq.. (Appellant)
Martha Lipchitz O'Connor, Esq. (HRD)