COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
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PAUL SANTOS,
Appellant
v.

CASE NO: G2-06-10

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION

The Appellant, Paul Santos, acting pursuant to G.L.c.31, §2(b), appealed a decision of the City of New Bedford (City), the Appointing Authority, assigning certain custodial duties to the Appellant as a required part of his job duties of Water Services Inspector. A full hearing was held by the Civil Service Commission (the Commission) on August 15, 2008, recorded on one (1) audiocassette. The City called two witnesses. The Appellant testified on his own behalf. Thirteen (13) exhibits were received in evidence at the hearing and the record was left open for additional documentation from the City (now marked Exh.14 – Delegation Agreement; Exh.15 – MOA re: Labor Service; Exh.16 – DPA letter re: Labor Service; and Exh.17 – 2004 Grievance Letter).

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of Ms. Angela M. Natho, City Director of Labor Relations and Personnel; Mr. Ronald H. Labelle, City Department of Public Infrastructure Commissioner; and the Appellant, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

Appellant's Background

1. The Appellant. Paul Santos, is a civil service employee of the City of New Bedford (the City), employed in the official service title of permanent Water Services Inspector. (*Testimony of Santos*)

2. Mr. Santos was originally appointed as provisional Water Services Inspector on April 23, 1986. In September 1988, he passed the civil service examination for his position and became a permanent Water Services Inspector on January 1, 1989. He has held that position continuously to the present time, save for a brief temporary appointment to a supervisory position. (*Testimony of Santos*)

3. Mr. Santos works out of the offices of Department of Public Infrastructure, formerly the Water Treatment/Wastewater Department, at 1105 Shawmut Avenue in New Bedford. (*Testimony of Santos, Lablle*)

4. Mr. Santos is a member of AFSCME Council 93, which is the recognized bargaining unit representing him with the City. (Exhibits *3, 12; Testimony of Santos*)

The New Bedford Department of Public Infrastructure

5. The New Bedford Department Public Infrastructure (DPI) was formed in 2003 to consolidate the operations of the Water/Wastewater Department – potable water purification ("clean side") and wastewater treatment (dirty side") – as well as

responsibility for the City's highway and hurricane barrier infrastructure and engineering services. . (*Testimony of Labelle*)

6. As part of the 2003 reorganization, Ronald Labelle was appointed as Commissioner of Public Infrastructure. He served as the Superintendant of Wastewater from August 1998 until March 2000, when he became the Superintendent of the Water/Wastewater Department, a position he held until becoming Commissioner of Public Infrastructure in July 2003. (*Testimony of Labelle*)

7. The DPI operates and maintains the Quittacas Water Treatment Plant in Freetown and a wastewater treatment facility in the Fort Taber area of New Bedford, which is approximately three miles from the DPI's Shawmut Avenue offices, as well as approximately 30 pumping stations throughout the City. (*Testimony of Labelle*)

8. The Quittacas Water Treatment Plant is managed by an outside contractor as well as a contracted forester responsible for the several thousand acres of watershed surrounding that plant. The Wastewater Plant is staffed mainly with operators and some administrative personnel. The other administrative staff works out of 1105 Shawmut Avenue. The pumping stations are maintained by eight-man crews consisting of Mechanical Equipment Operators, Wastewater Maintenance Operators and Sewer Foremen. (*Testimony of Labelle*)

<u>The New Bedford Delegation Agreements</u>

9. Since September 1, 1978, acting pursuant to a document marked Exhibit 14A, 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. (*Exhibits 14A, 14B, 14C; Testimony of Natho*)

10. Pursuant to one of the two documents covering the delegation of official service functions, the City is "delegated the authority and responsibility for approval of specific personnel transactions for Official Service employees in the City of New Bedford. In this capacity [the City's designee] will have the authority to approve designated personnel transactions usually requiring the approval of the State Personnel Administrator . . . [and] be responsible for insuring that all authorized and approved personnel transactions are made in compliance with Civil Service laws, rules and procedures, and that appropriate records are maintained of all personnel transactions. . . .[and] will assume responsibility for approval of the following transactions with the Official Service: A. Appointments to the Official Service. . . .B. Promotions within the Official Service. . . . C . Reinstatements to the Official Service. . . .D Employment after retirement. . . E. Transfers. . . F. Absences. . . . [and] G. Terminations." A second document authorizes the City to "perform the functions of certification from existing eligibility lists for all positions in the Official Service with the exception of entry level positions in the Fire Fighter and Police." Neither of these documents bears any signatures, official stamps or seals. (*Exhibit 14A*)

11. Although the City considers the creation of a new official service job classification to be outside the scope of the delegation agreement, and, therefore, would require submission to the Massachusetts Human Resources Division (HRD) for approval

of the Personnel Administrator, the City has considered the revision of job descriptions and job postings to fall within the authority of the delegation agreement. Ms. Natho has never submitted a "Form 30" to the Personnel Administrator since 1986. (*Testimony of Natho*)

12. Ms. Natho has regularly asked appointing authorities in the City to update their job descriptions. The most recent updates appear to have been made in the early 1990s, primarily to establish the "essential functions" of positions for purposes of compliance with the obligations of the Americans With Disabilities Act (ADA). Most of the job descriptions in evidence are of this genre. (*Exhibits 5, 6, 9, 10. 11; Testimony of Natho*)

13. Ms. Natho believes the MuniClass Manual of occupational classifications and occupational titles complied by HRD is somewhat "out of date" and, generally, less relevant to her in defining the actual job duties currently performed than the City's own job descriptions. She also notes that, even the City's job descriptions warrant updating as well. For one obvious example, she notes that most of the descriptions in the MuniClass Manual, as well as the City's job descriptions and postings, pre-date the extensive computerization of many job functions. (*Exhibits 5, thru 12; Testimony of Natho*)

<u>The Job of Water Service Inspector</u>

14. There is no dispute that principal duties of a Water Service Inspector are to read and record customer usage from domestic and industrial water meters on a regular basis, following an assigned "walk route" that may vary from day to day but which, generally, calls for a goal of reading of 400-500 meters per day. In addition, the Water Service Inspector will take "final" readings on a change of property ownership, deliver notices for non-payment and shut off service for non-payment. (*Testimony of Santos; Labelle*)

15. Several documents that describe the particular duties of a Water Service Inspector were offered in evidence, including the MuniClass Occupational Code 1602D in the Meter Reading and Inspecting Series, an undated Water Services Inspector Position Description, and a 1993 job posting for the position of Water Services Inspector. (*Exhibits 5, 7, 8*)

16. The most relevant excerpts (*emphasis added)* from these documents include:

- MuniClass Manual:

  The following job titles are authorized for use in the Meter Reading and Inspecting Series. *The title definitions include illustrative duties and are not all inclusive.*

  1602D Water Services Inspector. Reads domestic and industrial meters and records readings. *Makes inspections of meters and adjacent water system including pipes and other plumbing fixtures* to determine the existence of and causes of variations in the consumption of water. *Makes inspections for leak*s, faulty registrations, damaged meters, irregular connections, and other irregularities relating to the water service installation. Prepares reports of findings. Performs incidental related work such as delivering water bills, receiving payments, and discontinuing service where necessary."

- Position Description:

  Function: Read domestic and industrial water meters and record readings. *Conduct inspection of system*
  Responsibilities: . . . *Make inspections of meters and adjacent water system, including pipes and other plumbing fixtures . . . . Inspect for leaks . . . irregular connections and other irregularities relating to the water service installation.*
  Tools and Equipment Used: Motor vehicle, City truck.
  Physical and Environmental Standards: . . . *may require the exercise of caution when operating equipment or handling chemicals or other toxic materials; utilization of proper sanitary precautions when handling trash, garbage and other potential hazards.*

  The duties listed above are intended only as illustrations of the various types of work than may be performed. The omission of specific statements of duties does not exclude them from the position if the work is similar, related or a logical assignment to the position.

Assignment of Custodial Duties in the DPI

17. The DPI has not regularly employed a custodial staff. Historically, except at the Quittaicas Water Treatment Plant, where the contractor used an outside custodial service, the custodial work at DPI facilities was performed by the security staff. Since there was 24-hour security coverage, and the night watchmen – who happen to be the same grade as Water Services Inspectors – were never fully occupied with their security functions, they were assigned the job of cleaning the facilities as part of their regular duties. (*Exhibit 9; Testimony of Labelle*)

18. Beginning in 2003 or 2004, as a result of fiscal tightening, the City was forced to restructure its workforce. The DPI lost 60 personnel through layoffs and attrition to meet a $2,000,000 cut in revenues. (*Testimony of Labelle*)

19. As part of the restructuring, Commissioner Labelle examined the night watch function in the DPI and discovered that, based on the very limited frequency with which the security staff was actually called to respond to an incident, it was costing the City about $600 per call to employ a 24-hour staff. As a result, Commissioner Labelle eliminated two of the security shifts, including the night staff that had been performing the custodial work. (*Testimony of Labelle*)

20. Commissioner Labelle determined to reassign the custodial duties that had been performed by the night security staff to other DPI personnel whom he determined were capable and available for such duties. The cleaning of the wastewater treatment plant was assumed by the operating and administrative staff and the cleaning of the pumping stations (about 18 of them had bathroom facilities) was performed by the maintenance

crews (MEOs and foremen), and the Water Services Inspectors were assigned the duty of cleaning the Shawmut Avenue facility. (*Exhibit 4; Testimony of Labelle*)

21. Commissioner Labelle testified that the cleaning duties were not specifically spelled out in the job description of the Water Services Inspectors, but he considered the duties reasonably related to their job, as employees who used the facilities and who had the time to perform the cleaning functions in the appropriate timeline and without impacting their ability to fulfill their primary job duties. Commissioner Labelle specifically noted that in the four years since he instituted this policy, it has not impacted the ability of the DPI staff to perform their other regular duties, and Water Services Inspectors in particular, have been able to maintain the average goal of meter reading that he set for them. (*Testimony of Labelle*)

22. While cleaning the bathrooms was one of the tasks, along with vacuuming rugs, washing floors, collecting trash, and other duties, Commissioner Labelle also testified that there was no intention to single out any one employee for any specific duty. He testified that many staff have pitched in by "multi-tasking" to complete the custodial work as needed. This has included not just other Meter Services Inspectors, but, also, technical, administrative and management personnel of equal or even higher rank or pay grade. Commissioner Labelle testified that he personally performed the custodial services sporadically, including bathroom cleaning. (*Testimony of Labelle*)

23. Commissioner Labelle testified that he could not afford to employ an outside service to perform the custodial work, although he has never priced out what it would cost to do so. In his opinion, there was no compelling reasons to hire outside custodial

services when there were available personnel who easily could perform these services. No evidence of the cost of an outside service was introduced. (*Testimony of Labelle*)

24. Both Ms. Nathos and Commissioner Labelle agreed that "cleaning duties" appear expressly nowhere in the job description for Water Services Inspector. They dipute, however, that such cleaning duties are not a "part" of the job description. Commissioner Labelle claimed that employees are expected to "multi-task", especially in a downsized work environment where everyone is expected to "pitch in", and he construes cleaning up facilities that an employee makes use of to be "related" to his or her job. Ms. Natho considers the work a "logical assignment" to the position, especially considering that the City doesn't "have the luxury" of any alternative. (*Testimony of Natho, Labelle*)

25. The City also points to other official service jobs in which cleaning is not a principal function, but is still required as an incidental part of the work, such as a Parking Lot Cashier, who is also responsible to keep the garage clean and free of debris, and a Zoo Watchperson, who, as the DPI Watchperson, is specifically assigned to cleaning duty. Although there is some point to this comparison, I do not see a compelling analogy in these other jobs to the issues presented and do not give any weight to them. (*Exhibits 6,10,11; Testimony of Natho*)

26. I do find that the City's job description for Building Custodian contains the exact same description of the "Physical and Environmental Standards" as found in the job description for Water Services Inspector quoted above in Finding No. 16, which implies some commonality to the degree of physical effort and exposure to environmental hazards in both jobs. (*Exhibits 5 & 6*)

The Appellant's Grievance

27. At some point in 2004, beginning with the implementation of Commissioner Labelle's cleaning duty directive and continuing to the present, Mr. Santos has been cleaning all of the bathroom facilities at the DPI's Shawmut Street offices on a daily basis. The evidence leaves some uncertainty as to exactly when Commissioner Labelle first assigned custodial duties to Mr. Santos and others. Although his written memo concerning the subject is dated September 9, 2004; Mr. Santos testified he began cleaning "in 2004". Since AFSCME Council 93 filed a grievance concerning the matter in May 2004, the Commission finds that the cleaning duties must have commenced at some point in May 2004 or sooner. (*Exhibits 4, 12, 13; Testimony of Santos, Natho, Labelle*)

28. The custodial duties at Shawmut Street include cleaning the toilets, wiping countertops and sinks in the men's room and two ladies' rooms. Mr. Santos uses a brush, cleaning fluids and paper towels provided by the City. The task takes about 30 minutes per day at the beginning of his work day. Mr. Santos could not say that the cleaning duties interfered with or prevented him from fulfilling his other daily duties as Water Services Inspector. Mr. Santos received no additional pay for these duties. (*Testimony of Santos, Labelle*)

29. Of the approximately six Water Services Inspectors employed by DSI, Mr. Santos has the greatest seniority. It appears that Mr. Santos has been the primary person who has cleaned the bathrooms at Shawmut Street, while other staff has been performing the other custodial duties, such as cleaning floors, collecting the trash and vacuuming. I find that this arrangement is more likely the result of an arrangement, formal or informal, to distribute the custodial work among the other Water Services Inspectors, than it is a

specific directive from Commissioner Labelle that singled out Mr. Santos for this duty. I find nothing about the orders from Commissioner Labelle that contemplated or precluded that the various custodial duties could not be rotated among the employees affected. (*Exhibit 4; Testimony of Santos, Labelle*)

30. On May 10, 2004, Mr. Santos received an Employee Warning Notice for "Substandard Work", specifically, "Failure to complete assigned task in an acceptable manner." Commissioner Labelle imposed discipline of a five-day suspension. (*Exhibits 12, 13; Testimony of Santos, Natho, Labelle*)

31. The gravamen of the charge involved Mr. Santos's alleged failure to properly clean one of the toilets at Shawmut Avenue on the morning of May 10, 2004. Commissioner Labelle testified that he found fecal matter left on the toilet that Mr. Santos' had failed to remove. Mr. Santos disputed the charge and said that any stains on the toilet were old and irremovable by routine cleaning. (*Exhibit 12; Testimony of Santos, Labelle*)

32. As a result of this discipline, AFSCME Council 93, on behalf of Mr. Santos, filed a grievance with the City. The grievance alleged a violation of the collective bargaining agreement and "civil service regulations", on the grounds that Mr. Santos's job duties did not include toilet cleaning, that the discipline should be rescinded, and the City ordered to cease and desist from assigning custodial duties to Water Service Inspectors. (*Exhibit 12*)

33. On June 21, 2004, following a Step 2 hearing, the City held that the collective bargaining agreement had not been violated but the discipline was reduced from a suspension to a written warning. (*Exhibits 12 & 14: Testimony of Natho*)

34. On October 4, 2004, AFSCME Council 93, on behalf of Mr. Santos, wrote to HRD to protest the assignment of custodial duties to Water Services Inspectors as a violation of the "classification system of civil service". A copy of the letter was sent to the New Bedford City Solicitor's Office. There is some uncertainty as to whether HRD or the City received the AFSCME Council 93 letter of October 4, 2004. The evidence reasonably infers that the letter was duly mailed in a manner reasonably calculated to provide actual notice to the intended recipients. Its actual receipt was not raised as an issue at the full hearing. (*Exhibit 1*)

35. Having no response to the October 4, 2004 letter, AFSCME Council 93, on behalf of Mr. Santos, filed an appeal with the Civil Service Commission, under Section 2(b) of the Civil Service Law, for the "failure of the administrator to act" on the October 4, 2004 request. (*Claim of Appeal*)

36. The City moved to dismiss the appeal. By 3-2 vote, the Commission denied the motion to dismiss on July 10, 2008 and scheduled the appeal for a full hearing. (*Decision on Motion to Dismiss*)

CONCLUSION

Summary of Conclusion

This appeal presented a number of procedural and jurisdictional questions that the majority of the Commission believed warranted the scrutiny of a full hearing, including the procedures for enforcement of the Civil Service Law applicable to "delegated" municipalities, the jurisdiction of the Commission to hear appeals regarding an alleged violation of the approved specifications for civil service positions, and the timeliness of a appeal for the administrator's "failure to act". The Commission now decides that this

appeal is duly authorized by the Civil Service Law but that the Appellant unreasonably delayed in bringing the appeal before the Commission. However, as there appears good reason to clarify, prospectively, the appropriate time within which a non-bypass appeal under Section 2(b) ought to be filed, the Commission does not dismiss the present appeal as untimely.

On the merits, the Commission finds that, while the recordkeeping does not appear to have been what is optimally desired, the City's assignment of custodial duties to the Appellant was justified and does not violate any applicable substantive provisions of the Civil Service Law.

Appeals Regarding Actions of a Delegated Municipality

Acting pursuant to agreements with the Department of Personal Administration (now HRD), the City has performed the administrative duties of the "personnel administrator" under the Civil Service Law for most official service civil service positions since 1978 and all labor service positions since 1979. Although no formally executed copies of these agreements have been produced, the Commission is reasonably satisfied that it may infer that the agreements are duly executed and currently effective. See Mass. G.L.c.31,§5(*l*); PAR.20 thru PAR.23.

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). The Commission has indicated that it would entertain an appeal under Section 2(b) of the Civil Service Law from "an action, or failure to act" of either the delegated municipality or the HRD Personnel Administrator. Id.

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, in the future, the Commission 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.

Delegation To Establish Job Classifications and Specifications

The second issue presented is whether the alleged violations in this appeal are functions that have been delegated to the City or retained by HRD.

The authority to establish job classifications and job specifications (i.e., job duties), is provided to the Personnel Administrator under Mass.G.L.c.31, §3(a) and §5(b) & (c):

Mass G.L.c.31,§3(a):

> "The administrator shall make and amend rules which shall . . . include provisions for the following: (a) Establishment of civil service series and titles . . . ."

Mass. G.L.c.31, ,§5

> "[T]he administrator shall have the following powers and duties:
>
> " . . . (b) Establish, with the approval of the commission, classification plans for positions in every city and town which are subject to any provisions of this chapter. Upon the establishment of each such classification plan, the administrator shall forthwith make such plan effective. He shall keep said classification plan current and, with like approval, may from time to time amend or change said classification plan. Failure of the commission to approve or reject said amendment or change within ninety days after the request by the administrator for approval thereof shall constitute an approval of said amendment or change;
>
> "(c) To approve or disapprove specifications and qualifications submitted by an appointing authority in a city or town or other political subdivision of the commonwealth for any civil service position; and, in the case of any disapproval, to establish such specifications and qualifications when, in his opinion, the appointing authority has failed to furnish satisfactory specifications and qualifications within thirty days after notice to the appointing authority of such disapproval."

The City has construed its delegated authority to distinguish the functions of establishing job classification plans from the duties of establishing job specifications. While the City understands that the former function had not been delegated, and any changes to the City's classification plans would be the responsibility of HRD to approve, the City has not sent a "Form 30" to HRD for review and approval for more than twenty years. Unfortunately, the express language in the delegation agreements does not appear to include the delegation of the authority to approve or amend job specifications. The appeal will not turn on whether the duty of establishing and amending job specifications is the initial responsibility of the City or HRD, since the ultimate issue remains the same. If the intent of the parties was to have delegated these functions to the City, however, a clarification of the delegation agreement would appear to be in order.

Jurisdiction Over of the 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."

Section 2(b) of the Civil Service Law contains 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.[1]

Section 1.01(6)(b) of the Standard Adjudicatory Rules of Practice and Procedure, as adopted by the Commission, 801 C.M.R. 1.01 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 issue, here, is what triggers the 30-day period of limitations for "inaction"? This situation is clearly different from those in which an appellant has been notified in writing of a decision and informed of the applicable right of appeal. Corsi v. Department of

[1] 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.

Conservation & Recreation, 18 MCSR 179 (2005); Smith v. Department of Mental Retardation, 18 MCSR 14 (2005). It would be disingenuous and inconsistent with the basic merit principles of the Civil Service Law dismiss a claim for "inaction" because, in effect, an appellant gave HRD (or the delegated municipality, in this case) too long to "act". Similarly, it does not make sense to apply the 30-day period from the date that a person makes a request upon the administrator "to act", as this would put, in many cases, a wholly impractical deadline on both the administrator and the applicant for relief, and require premature appeals that may turn out not to be necessary. It also does not seem appropriate to deem the failure to respond to a request for specific action to be a "continuing" violation that tolls the right of appeal indefinitely without limits.

Elsewhere in the Civil Service Law, the Legislature has specified time limits within which appointing authorities, the administrator and the Commission are required to take certain actions relating to the approval or disapproval of requests. These time period vary from six week granted to the administrator to conduct an examination review after request (Mass.G.L.c.31,§23), to ninety days for the Commission to approve or disapprove of the administrator's amendment of a classification plan (Mass.G..L.c.31,§5(b), and fifteen days within which the Commission may disapprove of any other rules adopted by the administrator (Mass.G.L.c.31, §3).

The Commission finds these other legislatively established timeframes to provide appropriate guidance. The Commission does not establish any absolute limit on what will constitute a timely "failure to act" appeal, but will address each situation on the particular facts as they are presented. The Commission expects that the administrator 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 should expect that the Commission will be likely to consider an appeal premature or untimely, as the case may be, 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.

In this case, the Appellant knew, or should have known, in June 2004, that the City disputed his contention that assignment of cleaning duties was a violation of his civil service rights. Yet the Appellant delayed until October 2004 before pursuing the matter further and waited until September 2005 to file the present appeal with the Commission. The Commission finds no reasonable justification for such a delay, particularly in the case of violation, such as here, which involves a "grieve and obey" order. The Commission believes that appellants must not sit on their rights (although this case does not involve any retroactive relief issues, other cases could). In the present case, however, as the parties did not have clear rules to follow on the proper procedures for appeal (and, frankly, after the Commission's delay in reaching the appeal for hearing due to its own backlog at the time), the Commission will not dismiss the appeal because it may have been untimely.

The second jurisdictional issue in a Section 2(b) appeal is the requirement that that appellant be "aggrieved", which means that Mr. Santos 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." The jurisdictional issue of standing, however, must not be conflated with the ultimate decision on the merits. Here, the Commission is satisfied that Mr. Santos had met the threshold test as an aggrieved party. The fact that he alleges a material and unjustified change to his duties would suffice, and, in addition, here, Mr. Santos has been the subject of actual discipline (including a temporary loss of pay) and remains obligated to continue to perform the allegedly unlawful duties to the City's satisfaction as a daily requirement of his satisfactory employment. Those circumstances are directly and sufficiently related to his "employment status" to allow the pursuit of an appeal to challenge the validity of the on-going conditions that have been imposed on his employment by the City.

Assignment of Custodial Duties to the Appellant

In order to allow an appeal brought pursuant to Section 2(b), the Commission must determine, by an affirmative vote of at least three members, that the action or inaction of the administrator violated Chapter 31 and/or the rules or basic merit principles promulgated thereunder. See Mass.G.L.c.31, §2(b). This determination requires a finding that, based on a preponderance of the evidence before the Commission, the administrator (or his delegated representative) failed to sustain the burden of proving a "reasonable justification" for the action taken or failure to act. E.g., City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 303-305, 682 N.E.2d 923, rev.den., 428 Mass. 1102, 687 N.E.2d 642 (1997). See also City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Department of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477,

648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983).

A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the reasons assigned for the [action or inaction] were more probable than not sound and sufficient." Mayor of Revere v. Civil Service Comm'n 31 Mass.App.Ct. 315 (1991). The burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

Reasonable justification means the actions taken (or not taken) were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214, 268 N.E.2d 346 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within

and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited.

The issue for the Commission is "not whether it would have acted as the [administrator] had acted, but whether, on the facts found by the commission, there was reasonable justification. . . .in the circumstances found by the commission to have existed when the {administrator] made its decision." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

The Appellant correctly asserts that the cleaning duties newly assigned to him (and other DPI personnel), are not expressly contained in the MuniClass description of his occupational series and job title, and are not included expressly within the written job specification created by the City for his position of Water Services Inspector. The evidence also established that the MuniClass Manual and the City's job specification for Water Services Inspector were both written many years ago and that the job has evolved since that time in many ways, subsequent computerization causing a number of changes, for example.

It is clear, however, from the credible testimony provided by the City's witnesses, Commissioner Labelle and Labor Relations Director Natho, that the written descriptions are, and never were, intended to be a complete catalogue of every single task that a person employed in a particular title may be called on to perform by implication or

special assignment. The MuniClass Manuel specifically states that the "title definitions include illustrative duties and are not all inclusive" and the job specification provides that "omission of specific statements of duties does not exclude them from the position if the work is similar, related or a logical assignment to the position." Indeed, while more frequent revision of the job specifications may be desirable, the Commission finds nothing within the applicable civil service law or rules that mandate a change to the written MuniClass Manual or job specification every time there is any change in the way the job is performed or the duties it encompasses evolve. If a change or addition of duties or task were so substantial as to alter the essential functions of the job, or to blur the level distinguishing duties among different titles or classifications, or to make the existing title and specification a misrepresentation of an essential function, the administrator (or his representative if that function has been delegated), in one of those circumstances might then become obliged to revise the written descriptions, but that is not the case here. [2]

Second, the City has sustained its burden of proof to establish that the addition of cleaning duties to the Water Services Inspector job were motivated by legitimate fiscal and management concerns. The City has established that the elimination of the night watchpersons required restructuring the custodial functions performed by those personnel, and that the Water Services Inspectors were a logical choice to assume those duties. There is no credible proof that the Appellant was singled out for these duties, or that the duties were assigned to anyone in DPI out of ill-will, political motives or other

[2] The Commission takes administrative notice that the City has announced it is in the process of transitioning to an "automatic" meter reading system, which, presumably, will make very substantial changes to the day-to-day duties of the Water Services Inspectors, among other staff. Depending on what evolves from this automation, that situation would, perhaps, be an example of the type of change that would call for new job specifications and perhaps MuniClass revisions. See www.ci.new-bedford.ma.us/dpi/water/water_meters.pdf (visited 1/5/2009)

improper factors. The cleaning tasks consume a small part of the Appellant's work and do not interfere with the performance of his other essential functions. While the Appellant may be correct that the City could have chosen other alternatives, the Commission is not authorized to micro-manage an appointing authority's choices so long as they have not acted in an arbitrary or capricious manner, with improper motive or in direct violation of an express provision of Chapter 31. The Commission finds none of those circumstances present here.

In sum, the Commission concludes that, whether the obligation to maintain current job titles and specifications in this case reposed with HRD or the City, there was no obligation on the part of either party to prepare and approve revisions of the Appellant's (or any other's) job specifications prior to transferring the incidental cleaning duties involved in this case to them; the transfer of those duties has been supported by sound and sufficient reasons that do not offend any of the provisions of the Civil Service Law and rules, or the basic merit principles promulgated therein. 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.

For the reasons stated above, the appeal of the Appellant, Paul Santos, is hereby ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

OPINION OF CHRISTOPHER BOWMAN AND DONALD MARQUIS

We agree with the decision to dismiss the instant appeal, but for different reasons. This appeal to the Civil Service Commission involves an Appellant's claim that he was "aggrieved", pursuant to G.L. c. 31, § 2(b), when the personnel administrator failed to act on his grievance that his job duties and responsibilities did not require him to assist with cleaning the office restrooms, as he was ordered to do.

The civil service law never contemplated the Commission having jurisdiction over such appeals and I can find nothing in the Commission's decisions that would open the door to such an appeal. The conclusion that the Appellant is an "aggrieved party" under Section 2(b) and that "a material and authorized change to his duties would suffice" in meeting that standard is an error of law and, if applied on a going forward basis, would open the door to thousands of "grievances" being filed with the Commission that are the sole purview of the grievance process laid out in respective collecting bargaining contracts, not the civil service law.

_____

Christopher C. Bowman
Chairman

_____

Donald R. Marquis
Commissioner
January 15, 2009

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 15, 2009.

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:
Jaime DiPaola-Kenney, Esq. (for Appellant)
Anthony A. Kamara, Esq. (for Appointing Authority)
John Marra, Esq. (for HRD)