

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293**

**SHERI SARMENTO and
MARK R. DUPHILY,**
Petitioners

**CASE NOS: E-15-39 (Sarmento)
E-15-40 (Duphily)**

v.

TOWN OF CARVER
Respondent

Appearances for Petitioners:

Pro Se

Appearance for Respondent:

Mark R. Duphily, Police Chief
Town of Carver
112B Main Street
Carver, MA 02330

Appearance for HRD:

Melissa A. Thompson, Esq.
Human Resource Division
1 Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION ON PETITION FOR CHAPTER 310 RELIEF

The Petitioners, Sheri Sarmento and Mark R. Duphily, currently a police sergeant and police chief, respectively, with the Town of Carver (Carver), filed petitions with the Civil Service Commission (Commission), seeking relief, pursuant to the Commission's equitable authority inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, relative to a decision of the Massachusetts Commission Against Discrimination (MCAD), MCAD Docket Nos. 06-BEM-00672/00674/00690/02404/02406 (the MCAD Proceeding) .

The Commission held a pre-hearing conference on March 27, 2015 at which time the Petitioners pointed out that the MCAD Proceeding had determined that Carver had retaliated against the Petitioners for supporting the employment discrimination claims brought by certain other Carver police officers and that, as a result of the retaliation, the Petitioners, who were then serving as Temporary Sergeants, had their permanent promotion to Sergeant delayed. The decision in the MCAD Proceeding ordered, among other things, that this petition be filed with the Commission to make an amendment to the Petitioner's "seniority dates or permanent appointment dates" retroactive to the dates on which the MCAD Proceeding determined they had been wrongfully denied those promotions. This relief presumably was intended to provide them with a promotional seniority date as Permanent Sergeant equivalent to the date on which they would have been promoted but for the retaliatory action taken against them.

The Commission supports the intent of the decision in the MCAD Proceeding to assure that Petitioners are made whole for damages suffered due to unlawful and discriminatory retaliatory acts against them, including loss, if any, of civil service rights. A promotional "seniority date" to a civil service title currently carries no known benefits to the civil service employee and entry of such an order would be futile and misleading and, potentially, harmful to other innocent employees. In particular, in the case of layoffs, G.L.c.31, §39, incorporates seniority as defined in G.L.c.31, §33 and provides, in relevant part, that seniority in the unit, not in the position, governs the order of layoff:

If permanent employees in positions having the same title in a department unit are to be separated from such positions because of lack of work or lack of money or abolition of position, they shall . . . be separated from employment according to their seniority in such unit and shall be reinstated in such unit . . . 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. (emphasis added)

G.L.c.31, §33 defines seniority as follows:

For purposes of this chapter, seniority of a civil service employee shall mean his ranking based on length of service, computed as provided in this section. Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the departmental unit, regardless of title . . . (emphasis added)

Put simply, by statute, a person's "civil service seniority" date is determined, for all purposes, solely by the original date of hire, not their date of promotion to a particular position. Put another way, there is no legally cognizable "civil service" seniority date for purposes of promotions and no matter what "permanent appointment dates" may be recorded on an employee's official HRD civil service personnel record, that date is not a "seniority date" for civil service status purposes.

Also, while it may once have been believed that the "date of promotion" would be relevant to computing the time required to serve in a position for purposes of defining eligibility to sit for the next higher title's promotional examination, that potential has been eliminated by the paradigm established by the judicial decision in Weinberg v. Civil Service Comm'n, 72 Mass.App.Ct. 535, rev.den., 452 Mass. 1110 (2008), See generally, Dickenson et al v. Human Resources Div., 24 MCSR 200 (2011) (date name appears on a certification is now what measures time required to be eligible to sit for promotional exam)

Further, as the Petitioners acknowledge, when a collective bargaining agreement provides for certain non-civil service related benefits (e.g., allocation of vacation and shift bid assignments), the Commission has no role in the interpretation or determination of those non-civil service benefits. See Town of Dedham v. Dedham

Police Ass'n, 46 Mass.App.Ct. 418, rev.den., 429 Mass. 1106 (1999). Conversely, anything contained in a collective bargaining agreement that is inconsistent with statutory provisions of civil service law – i.e. prescribing that layoffs would be made in order of seniority *other* than as prescribed by Section 33 and 39 -- would be unenforceable, as it is well-settled that, pursuant to G.L.c.150E, §7(d), when a material conflict arises between civil service law and a collective bargaining agreement, the civil service law will take precedence. See, e.g., Local 1652, Int'l Ass'n of Firefighters v. Framingham, 442 Mass. 463, 477n.15 (2004); City of Fall River v. AFSCME Council 93, Local 3117, 61 Mass.App.Ct. 404, 411 (2004); Leominster v. Int'l Bhd of Police Officers, Local 338, 33 Mass.App.Ct. 121, 124-125, rev.den., 413 Mass. 1106 (1992)

Finally, the Commission understands from the information provided by the Petitioners at the pre-hearing conference that Carver already has made all appropriate adjustments to the Petitioners' pay and benefit status ordered by the MCAD that makes them whole from a monetary perspective. Thus, it appears that the Petitioners have been restored all loss of pay and other injury that the MCAD Proceeding found they had suffered. Additional relief from the Commission does not appear necessary or available as they have lost no other civil service rights

Prior to taking final action on these petitions, the Commission invited HRD and MCAD to comment on the analysis described above. On April 27, 2015, the Commission received comments from HRD which confirmed that the Petitioners "civil service seniority dates" were reflected in HRD's records as their dates of original appointment to the Carver Police Department in 1995 and that HRD was not

aware of any impact that the proposed relief would have “on any civil service rights or benefits based on the factual circumstances present in this case.” The Commission received no comments from MCAD.

Accordingly, inasmuch as the Petitioners have already been made whole as a result of the decision in the MCAD Proceeding, there is no basis upon which to conclude that their civil service rights have been harmed or that the proposed additional relief would remediate any loss of civil service rights or benefits that they have suffered, which is a prerequisite to granting relief pursuant to Chapter 310, the Petition is hereby *denied*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on May 14, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

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

Notice to:

Sergeant Sherri Sarmiento (Petitioner)

Mark Duphily (Petitioner & Chief of Police)

Melissa A. Thompson, Esq. (for HRD)

cc: Constance McGrane, General Counsel, MCAD