COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

DARARITH UNG,
Appellant
v.
LOWELL POLICE DEPARTMENT,
Respondent

CASE NO: D1-08-150

Appellant's Attorney:

Douglas I. Louison, Esq
Valerie McCormack, Esq.
Louison, Costello, Condon & Pfaff, LLP
67 Batterymarch Street
Boston, MA 02110

Appointing Authority's Attorney:

Maria Sheehy, Esq.
Assistant City Solicitor
City of Lowell – Law Department
375 Merrimack Street – 3rd Floor
Lowell, MA 01852-5909

Commissioner:

Paul M. Stein

DECISION ON MOTION TO REOPEN APPEAL

The Appellant, Dararith Ung, duly filed this appeal with the Civil Service Commission (Commission) in June 2008 against the City of Lowell (Lowell), as Appointing Authority for the Lowell Police Department (LPD), challenging the Appellant's termination as a LPD Police Officer. The appeal was subsequently withdrawn voluntarily by the Appellant and dismissed by Decision of the Commission dated July 17, 2008. In March 2009, the Appellant moved to reopen the appeal, which motion Lowell opposed. On May 4, 2009, the Commission heard oral argument on the Appellant's motion. The hearing was digitally recorded. The Commission received supplemental memoranda from the Appellant on June 3, 2009 and July 20, 2009, and from Lowell on July 2, 2009.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, and the argument presented by the Appellant and Lowell, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. On June 18, 2008, the Appellant, Dararith Ung, filed a timely appeal from Lowell's decision to terminate him for just cause from employment as a LPD Police Officer on June 12, 2008. (*Claim of Appeal*)

2. Among the charges upon which Lowell based the decision to terminate Officer Ung from employment, Lowell asserted that, on more than one occasion, Officer Ung filed false reports of a stolen motor vehicle knowing that the vehicle was, in fact, not stolen and that Officer Ung was untruthful to superior officers in the course of the investigation into these incidents. (*Claim of Appeal; Lowell's Opposition*)

3. At the time of his termination, Officer Ung was both a tenured civil service employee and a member of the Lowell Police Association (LPA). Lowell and the LPA are parties to a collective bargaining agreement (CBA). (*Appellant's Motion; Lowell's Opposition*)

4. On Tuesday, July 8, 2008, Officer Ung, through his counsel, mailed to the Commission a "Voluntary Dismissal of Appeal", which the Commission docketed on July 10, 2008. (*Administrative Notice of CSC Docket; Appellant's Motion, Exhibit B*)

5. The Appellant's Voluntary Dismissal of Appeal stated:

> Now comes the Appellant, Daraith [sic] Ung, and withdraws the above appeal.
>
> As grounds therefore, the Appellant has elected through his collective bargaining agreement to contest the just cause of his termination through arbitration.

(*Administrative Notice of CSC Docket; Appellant's Motion, Exhibit B*)

6. On Wednesday, July 9, 2008, acting through its attorney (who also represented Officer Ung before the Commission), the LPA filed a Demand for Arbitration with the American Arbitration Association (AAA). (*Appellant's Motion & Affidavit of Atty Louison; Lowell's Opposition, Appellant's Supplemental Memo, Exhibit C*)

7. On Thursday, July 10, 2008, Lowell Assistant City Solicitor Slagle appeared at the Commission for a previously scheduled Pre-Hearing Conference in this appeal. He was informed that the conference had been cancelled as Officer Ung had filed a voluntary withdrawal of his appeal. (*Administrative Notice of CSC Docket; Lowell's Opposition, Affidavit of Asst City Solicitor Slagle*)

8. On Monday, July 14, 2008 or Tuesday July 15, 2008, a conversation occurred between Assistant City Solicitor Slagle and counsel representing Officer Ung and the LPA. Assistant City Solicitor Slagle specifically recalls he stated Lowell's position was that Officer Ung's termination was not arbitrable under the CBA. (*Lowell's Opposition, Affidavit of Asst City Solicitor Slagle*)[1]

9. On July 17, 2008, the Commission, acting upon Officer Ung's voluntary withdrawal, voted unanimously to dismiss this appeal. (*Administrative Notice of CSC Docket; Appellant's Motion; Lowell's Opposition)*

10. On July 24, 2008, Lowell filed a Motion to Dismiss Arbitration, which the LPA opposed. The parties, acting through AAA, selected an arbitrator and a November 20, 2008 arbitration hearing date was set. (*Lowell Opposition; Appellant's Supplemental Brief, Exhibit C*).

[1] Lowell's contention that Officer Ung's termination was not arbitrable apparently turns on the meaning of the arbitration clause, Article XX of the CBA, which states, among other things: "Section 1. Matters Covered . . . .Any matter which is subject to the jurisdiction of the Civil Service Commission, or any Retirement Board established by law, shall not be a subject of grievance or arbitration hereunder." (*Lowell's Opposition, Affidavits of Asst City Solictors Sheehy and Slagle; Lowell's Supplementary Memo*)

11. According to Assistant City Solicitor Maria Sheehy, at some time in late July, 2008, shortly before Lowell filed its Motion to Dismiss Arbitration, she also told Appellant's counsel that Lowell was not bound to arbitrate Officer Ung's termination, a conversation which both counsel appear to acknowledge in a transcript of a motion hearing in subsequent proceedings in Middlesex Superior Court. (*Lowell's Opposition, Affidavit of Asst City Solicitor Sheehy; Lowell's Supplemental Memo, Exhibit C*)

12. On September 11, 2008, Lowell and the LPA were informed that the arbitrator would reserve rulings on the motion until the arbitration hearing scheduled for November 20, 2008. (*Appellant's Supplemental Brief, Exhibit C*)

13. On October 30, 2008, Lowell filed a civil action in Middlesex Superior Court entitled "City of Lowell v. Lowell Police Association, Inc." (MICV2008-04067), seeking to obtain a declaratory judgment that no lawfully binding agreement to arbitrate Officer Ung's termination existed and to stay the pending arbitration hearing scheduled for November 20, 2008. (*Lowell's Opposition; Appellant's Supplemental Brief; Administrative Notice of Middlesex Superior Court MICV2008-04067*)

14. On November 18, 2008, the Middlesex Superior Court (Haggerty, J.) granted Lowell's motion to stay the arbitration. *Lowell's Opposition; Administrative Notice of Middlesex Superior Court MICV2008-04067*)

15. In an affidavit dated December 1, 2008, filed in Middlesex Superior Court, LPA counsel stated: "At no time prior to filing its motion with the arbitrator did the City inform me either that it did not consider itself obligated to arbitrate Ung's termination or that it believed that the Collective Bargaining Agreement did not allow arbitration of its disciplinary decisions." (*Appellant's Supplemental Brief, Affidavit of Atty Louison*)

16. On March 26, 2009, after hearing cross-motions for summary judgment, Judge Haggerty ordered and adjudged:

> ". . . that declaratory judgment enter for the City of Lowell pursuant to M.G.L.c.150C as there exists no agreement to arbitrate the underlying dispute and/or that the claim sought to be arbitrated does not state a controversy covered by the provisions for arbitration and disputes concerning the interpretation or application of the arbitration provision are not themselves made subject to arbitration."

(*Appellant's Motion, Exhibit D; Lowell's Supplemental Memo, Administrative Notice of Middlesex Superior Court MICV2008-04067*)

17. On April 7, 2009, the LPA duly appealed to the Appeals Court from the declaratory judgment of the Superior Court, which appeal is pending. (*Appellant's Supplemental Brief, Exhibit E; Administrative Notice of Middlesex Superior Court MICV2008-04067 and Appeals Court 2008-P-1078*)

18. The Appellant filed the present motion to reopen his appeal before the Commission on March 26, 2009. (*Appellant's Motion*)

19. In the affidavit submitted in support of the present motion, counsel now states: "At no time did the City respond to Ung's motion to withdraw his Civil Service appeal by asserting its claim that the Collective Bargaining Agreement did not permit arbitration of disciplinary actions." (*Appellant's Motion, Affidavit of Atty Louison*)

CONCLUSION

The Commission's Authority to Reopen Proceedings

Neither the civil service law (Chapter 31) nor the Commission's rules of procedure (801 CMR 8.01 et. seq.) make provision for the relief sought by the Appellant under the circumstances presented here. Under current rules, a party may move to reopen the record only prior to Decision and solely for the purpose of proffering "new evidence" that "by due diligence could not have been discovered at the time of the hearing". 801 CMR

1.01(7)(k). After Decision has been rendered and before the time for filing a complaint for judicial review (i.e. 30 days), a party may move for reconsideration, which may be granted for "clerical or mechanical error in the decision or a significant factor that the [Commission] or the Presiding Officer has overlooked in deciding the case." 801 CMR 1.01(7)(l). Nothing else in the civil service law (G.L.c.31) or the Commission's current rules of practice expressly allow the Commission to reopen a previously dismissed proceeding at a later date, and the Commission has not been receptive to doing so in the absence of a joint request from all parties. Compare O'Brien v. Town of Norwood, G1-01-283 (2007) (reopened proceeding to enter order authorizing HRD to implement settlement) with Fredette v. MBTA Police Dep't, 19 MCSR 94 (2006) (denying motion to reopen filed ten months after decision). Under prior Commission rules of procedure, reopening of a case was permitted only if it had been decided without being heard on the merits, such as a case withdrawn or dismissed by agreement. See Adams v. Billerica Police Dep't, 10 MCSR 56 (1997) (denying motion to reopen, applying prior Commission Rule 4.3(o))

The Appellant contends that, despite the absence of express statutory or regulatory authority, the Commission has "inherent" power to reopen a closed proceeding in an appropriate case. While this proposition is true, such power to reopen "should be exercised by an agency with due circumspection – 'sparingly' as the cases say." E.g., Covell v. Department of Social Services, 42 Mass.App.Ct. 427, 433 (1997). See Malone v. Civil Service Comm'n, 38 Mass.App.Ct. 147, 153-54 (1995) (affirming Commission's refusal to reopen appeal absent "undue haste" in granting the Personnel Administrator's motion to dismiss or any "general equities of the problem . . .upon which to rest the

extraordinary decision to reopen the administrative proceeding") citing Aronson v. Brookline Rent Control Bd., 19 MassApp.Ct. 700, 706, rev.den., 395 Mass. 1102 (1985) and Davis, ADMINISTRATIVE LAW TEXT §18.09, at 370 (3rd ed. 1972).[2] See also Moe v. Sex Offender Registry Bd., 444 Mass. 1009 (2005) (rescript) ("in absence of statutory limitations, agencies generally retain inherent authority to reconsider their decisions")

Accordingly, the Commission evaluates the Appellant's motion according to the mandate of the line of authority described above.

The Relevant Civil Service and Collective Bargaining Laws

Public employees with civil service status who are also members of a collective bargaining unit derive their rights to contest adverse employment decisions under the panoply of several intersecting statutes as well as under contractual rights provided in negotiated collective bargaining agreements. See, e.g., G.L.c.31 (civil service law), M. G.L.c.32 (public retirement and pensions); G.L.c.71 (public schools); and G.L.c.150E (public employee collective bargaining) These laws, however, do not provide public employees with an unlimited smorgasbord of remedies. As the parties have agreed, a public employee gets only "one bite at the apple" and must chose whether to proceed to a public hearing of a civil service appeal or to litigate the grievance before an arbitrator under a collective bargaining agreement. He or she cannot do both.

[2] Professor Davis counseled: ". . . [T]he search for a basic principle to guide reopening is futile; the results usually must reflect the needs that are unique to each administrative task. When statutes are silent and legislative intent unclear, agencies and reviewing courts must work out the practices and the limits of reopening. . . . Factors to be weighed are the advantages of repose, the desire for stability, the importance of administrative freedom to reformulate policy, the extent of party reliance upon the first decision, the degree of care or haste in making the earlier decision, and the general equities of each problem." The treatise cautions that an "agency can readily find by experience that too much liberality in reconsidering cases may deprive decisions of dignity and force and may contribute to carelessness on account of undue reliance on reconsiderations"; "sometimes a specific limitation or reopening is desirable", but, "sometimes, the limitation should be indefinite and admit a wide margin of discretion" and "it would be a mistake to . . . harden the arteries of administrative procedure." Davis, ADMINISTRATIVE LAW TREATISE §18.09 at 605-609 (1958)

The applicable civil service law is contained in Section 43 of Chapter 31 and provides, in relevant part:

> "If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one [discharging, removing, suspending more than five days, laying off, or transferring without consent a tenured civil service employee] shall, within ten days after receiving written notice of such decision, appeal in writing to the commission, he shall be given a hearing . . . . *If the commission determines that such appeal has been previously resolved or litigated with respect to such person, in accordance with the provisions of section eight of chapter one hundred and fifty E, or is presently being resolved in accordance with such section, the commission shall forthwith dismiss such appeal*."

M.G.L.c.31, §43, ¶1, first & third sentences (*emphasis added*)[3]

The relevant collective bargaining statute, referred to in Section 43 above, is Section 8 of Chapter 150E, which states:

> **§8. Grievance procedure; arbitration.** *The parties may include in any written agreement a grievance procedure culminating in final and binding arbitration* to be invoked in the event of any dispute concerning the interpretation or application of such written agreement. *In the absence of such grievance procedure, binding arbitration may be ordered by the [labor relations] commission upon the request of either party*; provided that any such grievance procedure shall, wherever applicable, be exclusive and shall supercede any otherwise applicable grievance procedure provided by law; and further provided that *binding arbitration hereunder* shall be enforceable under the provisions of chapter one hundred and fifty C and *shall, where such arbitration is elected by the employee as the method of grievance resolution, be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination notwithstanding any contrary provisions of sections thirty-nine and forty-one to forty-five, inclusive, of chapter thirty-one*, section sixteen of chapter thirty-two, or sections forty-two through forty-three A, inclusive, of chapter seventy-one. Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall, or appointment and *where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance*, notwithstanding any contrary provisions of sections thirty-seven, thirty-eight, forty-two to forty-three A, inclusive, and section fifty-nine B of chapter seventy-one. (*emphasis added*)

[3] Similar language appears in M.G.L.c.31,§42,¶2, concerning complaints to the Commission alleging procedural violations of an employee's civil service rights.

The Commission has consistently interpreted these statutes, when read together, to mean that, for purposes of civil service law, a civil service employee may proceed to "grieve" an adverse employment decision internally through collective bargaining at the appointing authority level and, simultaneously, perfect a timely right of appeal to the Commission, if available.[4] However, once a grievance reached the arbitration stage and the employee "elects" arbitration, that becomes his or her exclusive remedy, and the Commission is obliged to dismiss any pending civil service appeal arising from the same subject.

In cases in which the collective bargaining grievance process eventually leads to an arbitration Award, there can be no doubt that the dispute was "resolved or litigated" in accordance with G.L.c.150E,§8, within the meaning of the first clause of the third sentence in G.L.c.31, §43,¶1. Thus, the Commission clearly cannot permit re-litigation of that same grievance in a Section 43 hearing. See, e.g., Canavan v. Civil Service Comm'n, 60 Mass.App.Ct. 910, rev.den., 441 Mass. 1107 (2004); Carmody et al v. City of Lynn, CSC Case Nos. G2-07-65/G2-07-66, 22 MCSR --- (2009); Roberge v. Westfield G & E, 18 MCSR 247 (2005); Bullock v. Springfield Bd of Fire Comm'rs, 7 MCSR 36 (1994)

The present case, however, does not involve the first clause, but, rather the second clause, which compels dismissal of an appeal if the same issues are "presently being resolved" in accordance with G.L.c.105E,§8. The Commission's prior decisions appear

[4] There are a variety of situations that might be subject of a collective bargaining grievance procedure, but which would not entitle a public employee to appeal to the Commission. For example, termination decisions involving an employee during the probationary period are "final" at the appointing authority level and cannot be appealed to the Commission. G.Lc.31, §41,¶3. Other recent examples where the Commission lacks jurisdiction include grievance of involuntary "transfers", non-selection for requested "demotion" to a lower title, lost detail pay, paid administrative leave and certain reduction in hours. See,.e.g., Sands v. City of Salem, 21 MCSR 502 (2008); McQueen v. Boston Public Schools, 21 MCSR 548 (2008); Troxell v. City of Brockton, 21 MCSR 376 (2008); Choiniere v. City of Worcester, 21 MCSR 129 (2008); Conway v. Division of Medical Assistance, 21 MCSR 30 (2008); Roach v. City of Boston, 20 MCSR 399 (2007); Oster v. Town of Watertown, 20 MCSR 1 (2007)

to assume that the triggering event for dismissal of an appeal that is "presently being resolved" in arbitration comes when the collective bargaining unit, acting on behalf of the grievant, files its Demand for Arbitration. See Cahill v. Department of Social Services, 11 MCSR 136 (1998); Campbell v. City of North Adams, 7 MCSR 143 (1994); cf. Bergeron v. Superintendent of Walter E. Fernald State School, 353 Mass. 331 (1967) (under prior civil service law, "invoking" proceedings before the Commission was a binding election of remedies and precluded later seeking alternative relief of mandamus)

In general, the Commission's approach seems logical and simple to apply. So long as the Demand for Arbitration ripens into an actual resolution of the grievance on the merits, the Commission should have no reason to perpetuate a parallel civil service appeal of no future consequence. The wrinkle, here, is the fact that the arbitrability of the grievance was, and continues to be, contested.[5]

The Appellant, contends that in such a case as this, the grievance is not "presently being resolved" on its merits, and the Commission is authorized to reopen the appeal to afford the Appellant a hearing on the merits under civil service law. (See Appellant's Motion, p.4) To follow the metaphor, what the Appellant seems to be saying is that, after he returned his civil service apple to the store and picked an arbitration apple instead, he discovered the arbitration apple was spoiled before he took his first "bite", and he is now entitled to exchange the uneatable arbitration apple for an unspoiled civil service one.

Taking a somewhat different view, Lowell agrees that the Appellant's Demand for Arbitration of a non-arbitrable dispute does not fit the definition of a matter "presently being resolved" under Chapter 150E, §8, but, therefore, the Commission was not obliged

[5] Whether the Appellant's termination is, in fact, non-arbitrable, is not an issue for the Commission. Pending an Appeals Court decision to the contrary, the Commission will treat the Middlesex Superior Court judgment in that regard as law of the case, binding on the parties, and, therefore, the Commission.

to dismiss the Appellant's civil service appeal; accordingly, Lowell argues, the Appellant is bound by his voluntary, elective withdrawal of his appeal with presumed knowledge of the consequences of that election under the law. (Lowell's Supplemental Memo, pp.1-5) Under Lowell's view, caveat emptor: the Appellant bought the arbitration apple "as is" and, having picked it, rotten or not, he has no right to exchange it later for a different one.

The Commission finds neither view entirely satisfactory. While, in general, Lowell's approach hews most consistently with past practice, none of the Commission's prior decisions actually faced the precise conundrum presented here, and there is some authority that recognizes the "anomalous and unfair consequences" of the Lowell view. See Fogarty v. School Comm., 15 Mass.App.Ct. 1008 (1983); cf. Old Rochester Reg. Teacher's Club v. Old Rochester R.S.Dist. Comm., 398 Mass. 695,700-701 (1986) (citing Fogarty); Thibodeau v. Town of Seekonk, 40 Mass.App.Ct.367,372n.6 (1996) (same)

The Commission has concern that, by construing civil service law to force an Appellant to pull the plug on a civil service appeal upon filing a Demand for Arbitration, as prior decisions appear to have implied, when arbitrability of the grievance is uncertain, the Commission may be facilitating a practice that will unwittingly chill the rights of public employers and employees to chose to resolve disputes through binding arbitration, which may not be appropriate as a matter of public policy. The Commission, however, is also sensitive to the prejudice that may result from a delayed adjudication of a civil service appeal put on hold until arbitrability issues were decided (which, as this case illustrates, can take years). In order to reconcile these competing public policy interests, the Commission has decided that a limited modification of its interpretation of the intersection of the arbitration statute and the civil service law is appropriate.

Accordingly, the Commission construes the term "presently being resolved" in the third sentence of G.L.c.31,§43, ¶1 to mean that a Demand for Arbitration has been filed on behalf of an appellant covering the same disputed matter as presented in a duly filed civil service appeal pending before the Commission and the merits of the dispute are "presently" on track to be "resolved" by an arbitrator, i.e., arbitrability is not contested.[6] When arbitrability of an issue covered by a parallel civil service appeal is contested, the Commission construes the subject statutory language to mean that the grievance should not be deemed "presently being resolved" unless that contest is definitively settled or decided in favor of arbitrability, in which case, the appellant will be bound to the election of such arbitration by the prior Demand for Arbitration. Unless the parties agree otherwise or for good cause shown, the Commission will continue to dismiss all appeals upon notice that a Demand for Arbitration has been filed.

Disposition of the Appellant's Motion to Reopen

As explained above, the Commission's power to reopen an appeal is a matter of discretion to be exercised sparingly. The Appellant offers several reasons to exercise discretion in this case, which, for the most part, Lowell has rationally opposed.[7]

[6] The Commission notes that G.Lc.150E, §8 provides several methods for parties to submit to binding arbitration, apart from a pre-negotiated contractual commitment in a CBA, including mutual agreement or an order of the Labor Relations Commission.

[7] Certain case law to which the parties refer involves rather distinct matters that do not appear to inform the reopening and reconsideration of this case, a dismissed, but previously duly, filed proceeding. See Falmouth v. Civil Service Comm'n, 64 Mass.App.Ct. 606 (2005), rev'd, 447 Mass. 814 (2006) (extending statutory time limit to file appeal); Curley v. City of Lynn, 408 Mass. 39 (1990) (statutorily prescribed limits for filing judicial petitions for review); Stowe v. Bologna, 32 Mass.App.Ct. 612, (1992), aff'd, 415 Mass. 20 (1993) (rent control board allowed new proceeding with only prospective effect, not a reopening of prior proceeding); Ramponi v. Board of Selectmen, 26 Mass.App.Ct. 826 (1989) (selectmen corrected "for the future" prior decision that town constable was "employee" entitled to health benefits, in a ruling that was prospective only and "involved no retroactive impairment of rights or property")

The Appellant misses the mark to claim that the Middlesex Superior Court adjudication, standing alone, warrants a reopening of the case. An unanticipated adverse judicial judgment does not fit the definition of what is commonly thought to be new "evidence", as opposed to a change in, or mistaken view of the law, that would warrant relief only in extraordinary circumstances. See generally, Mass.R.Civ.P. 60(b)(1)&(2); Compare Christian Book Distr., Inc. v. Wallace, 53 Mass.AppCt. 905 (2001), rev.den., 436 Mass. 1101 (2002) (mistaken of counsel about the law not an excusable neglect warranting relief from judgment) with Owens v. Mukendi, 448 Mass 66, 71-74 (2006) (erroneous advice to client tainted by attorney's conflict-of-interest with client would have warranted relief if it had been timely asserted)

Here, the Appellant's counsel should not be faulted for advising that pursuit of an arbitration claim required his client to dismiss the civil service appeal, as that is a fair reading of what the Commission's prior decisions appeared to require. However, it can hardly be suggested that counsel was blindsided by the Middlesex Superior Court declaratory judgment in March 2009, having received Lowell's Motion to Dismiss the arbitration on July 24, 2008 and a stay of the arbitration having been issued by the Middlesex Superior Court on November 18, 2008. The Commission concludes that, baring other extenuating circumstance, more diligence is ordinarily to be expected if an appellant seeks to invoke the Commission's exercise of our limited discretion to reopen and reconsider a prior dismissal.

Lowell also points out that, at this point, the issue of arbitrability of the Appellant's grievance remains *sub judice*. The Commission agrees that the pending judicial appeal of the Middlesex Superior Court is a factor that should be weighed, and favors a deferral of

any decision to reopen this case, at least until the parties have exhausted judicial review of the issue. If, for example, the Appeals Court reverses the Middlesex Superior Court judgment and orders the parties to arbitration, any decision of the Commission to reopen the civil service appeal would become moot.

But for the pending judicial appeal, however, the Commission would be inclined to allow former Officer Ung an opportunity for a plenary hearing before the Commission. While the Appellant's delay in bringing his motion to reopen is a strike against him, on balance, other relevant factors and extenuating circumstance presented in this particular case are sufficient to justify the Commission's reopening the appeal to provide an opportunity for full hearing before the Commission, if that should be the only forum for a consideration of the just cause for his termination on the merits. These factors include the fact that the Commission's decisions had not previously laid out any specific procedure to be followed when a Demand for Arbitration is contested on jurisdictional grounds, and guidance available to the Appellant as to his rights and obligations in the circumstances was, arguably, open to more than one reasonable interpretation. In addition, the Commission believes that the issue here is likely to arise rarely, and the relatively minor impact of reopening this one matter on the Commission's docket is outweighed by our abhorrence for any unfair forfeiture of a tenured civil servant's right to a hearing before the Commission that otherwise would be clearly required by law. The Commission also notes that Lowell must bear some share of the delay visited on it in this case. It was Lowell's choice to abort the scheduled arbitration scheduled for November 2008 (where both the jurisdictional issues and the merits were slated to be heard) and take the case off the fast track of arbitration and onto its present slower judicial path.

Moreover, the Commission believes that any hardship that Lowell may suffer from the Commission's delay in eventually reaching the appeal can be addressed through appropriate mitigation measures upon which any reopening will be conditioned in this case; namely: (1) to allow the Appellant a reasonable, but limited additional time certain to make a binding election to pursue his Demand for Arbitration or proceed to a full hearing at the Commission, and (2) to fairly protect Lowell from undue prejudice by conditioning reinstatement of the appeal on agreement to forego retroactive pay and benefits during the hiatus between the prior dismissal and any reopening.

Accordingly, it is hereby ORDERED:

1. The Appellant's motion to reopen the appeal is ***denied at this time, without prejudice, subject to the conditions of this Decision.***
2. The Commission will permit the Appellant to renew his motion to reopen not later than 180 days following the effective date of this "Decision on Motion to Reopen Appeal", if, and only if:

   a. The Appellant files with the renewed motion either (i) a certified copy of the entry of an Order dismissing, with prejudice, the Appellant's pending appeal in Appeals Court No. 2009-P-1078; or (ii) a certified copy of an appellate court rescript to the Middlesex Superior Court affirming the Declaratory Judgment in MICV2008-04067; and

   b. The Appellant represents in writing that, after consultation with counsel, as a condition to reopening the appeal and proceeding to a full hearing of the just cause for his termination as a Lowell Police Officer, he makes a knowing and voluntary waiver of benefits to which he otherwise may be entitled to be restored for the periods from July 24, 2008 to March 26, 2009 and from the effective date of this "Decision on Motion to Reopen Appeal" until the date on which his appeal is reopened, in such form as may be satisfactory to the appointing authority and the Commission.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on August 20, 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:
Douglas I. Louison, Esq. (for Appellant)
Maria Sheehy, Esq.. (for Appointing Authority)
John Marra, Esq. (HRD)