COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108

GARY WOOD,
Appellant

v.

E-10-110

HUMAN RESOURCES DIVISION[1],
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION ON APPELLANT'S MOTION FOR SUMMARY DECISION
AND RESPONDENT'S OPPOSITION TO MOTION FOR SUMMARY DECISION

The Appellant, Gary Wood (hereinafter "Wood" or "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") on May 25, 2010 contesting his civil service seniority date as calculated by the state's Human Resources Division (hereinafter "HRD"). A pre-hearing conference was held on June 22, 2010. The Appellant filed a Motion for Summary Decision on August 3, 2010 and HRD filed a

[1] This appeal was initially docketed with the Town of Charlton as the Respondent. Based on the facts of the case, the state's Human Resources Division is the Respondent. On June 28, 2010, the Town sent correspondence to the Commission stating that it did not contest the Appellant's appeal and would abide by any decision the Commission may make as to the Appellant's correct seniority date.

reply on September 3, 2010. A motion hearing was held on September 13, 2010 at which time I heard oral argument from both parties. Based on the parties' motions, as well as the arguments presented at the motion hearing, it is evident that the parties are in agreement as to most of the facts of this case. They also agree that the issue to be decided is whether the Appellant's leaves of absence fall within the military service exception in G.L. c. 31, § 33. An ancillary issue related to this appeal is, if the military service exception does not apply, has HRD correctly applied the other provisions of Section 33 in calculating the Appellant's civil service seniority date.

The following facts appear to be undisputed:

1. On April 1, 1987, the Appellant was appointed as a permanent full-time police officer in the Town of Charlton. *(Appellant's Brief and HRD's Brief)*
2. On September 6, 2006, HRD received an "Absence and Termination Notice / Form 56" from the Town stating that the Appellant would be on a leave of absence from October 26, 2006 to September 1, 2007. There was no reason stated on the form for the leave of absence. *(Appellant's Brief, Attachment 2)*
3. On September 29, 2006, the Town's Police Chief sent HRD correspondence stating: "This letter is to inform you that Officer Gary E. Wood, granted (sic) leave of absence by the Charlton Board of Selectmen on 8/24/206. His reason for taking a leave of absence is personal." *(Appellant's Brief, Attachment 2)*
4. From October 26, 2006 to August 31, 2007, the Appellant was employed in Iraq by Harding Security Associates, LLC, which had a contract with the Department of Defense. *(HRD's Brief and Appellant's Brief)* The parties disagree on whether the

work performed by the Appellant is considered "military service" as referenced in G.L. c. 31, § 33.

5. On September 1, 2007, the Appellant was reinstated as a permanent full-time police officer in the Town of Charlton. *(HRD's Brief and Appellant's Brief)*
6. Upon his September 1, 2007 reinstatement, HRD determined that the Appellant's civil service seniority date was September 1, 2007. *(HRD's 6/29/10 email)*
7. On July 7, 2008, HRD received another "Absence and Termination Notice / Form 56" from the Town stating that the Appellant would be on a leave of absence from August 1, 2008 to July 31, 2009. The reason for the leave stated on the form was "personal." *(Appellant's Brief, Attachment 3)*
8. On August 1, 2008, the Appellant took his second leave of absence to work in Afghanistan for the same Department of Defense contractor, Harding Security Associates, LLC. *(HRD's Brief and Appellant's Brief)*
9. On August 24, 2009 the Appellant was reinstated as a permanent full-time police officer in the Town of Charlton. *(HRD's Brief)*
10. Upon his August 24, 2009 reinstatement, HRD determined that the Appellant's civil service seniority date was August 24, 2009. According to HRD, as of October 8, 2011, the Appellant's civil service seniority date, will be September 23, 2008 (computed by adding a year to his 2007 seniority date upon approximately two years of continuous service.) *(HRD's 6/29/10 Email)*

Relevant Statutes

G.L. c. 31, § 37, provides in relevant part, that:

> "An appointing authority may grant a permanent employee a leave of absence or an extension of a leave of absence; provided that any grant for a period longer than fourteen days shall be given only upon written request filed with the appointing authority by such person, or by another authorized to request such leave on his behalf, and shall be in writing. The written request shall include a detailed statement of the reason for the requested leave and, if the absence is caused by illness, shall be accompanied by substantiating proof of such illness. A copy of the written grant shall be kept on file by the appointing authority, who shall, upon request, forward a copy thereof to the commission or administrator. No leave of absence for a period longer than three months, except one granted because of illness as evidenced by the certificate of a physician approved by the administrator, shall be granted pursuant to this paragraph without the prior approval of the administrator." (emphasis added)

G.L. c. 31, § 33, provides in relevant part, that:

> "For the 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 department unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original employment; provided, however, that the **continuity of service of such employee shall be deemed not to have been interrupted if such absence was the result of (1) *military service***, illness, educational leave, abolition of position or lay-off because of lack of work or money …" (***emphasis added***)

Appellant's Argument

The Appellant argues that his leaves of absence fall under the "military service" exception in Section 33, that his service as a police officer in the Town of Charlton should be deemed not to have been interrupted, and that his correct civil service seniority date should be adjusted back to April 1, 1987, the date he first became a permanent full time police officer.

According to the Appellant, his work was of "military nature". He provided mission critical services in Iraq and Afghanistan identifying and neutralizing Improvised Explosive Devices (IEDs). He received training, housing, equipment, clothing, body armor and armament from the United States military and lived and worked with military personnel. He traveled with military personnel in military transport on his way into and out of the theater of operations and dressed in the same uniform and body armor worn by the military personnel and carried the same weapons.

The Appellant argues that the term "military service", which is not defined in the statute, is not limited to service as an enlisted member of one of the armed services or of the Massachusetts National Guard. In support of this argument, the Appellant states that Article I, Section 8, Clause 14 of the Constitution, which empowers Congress to make rules for the governance and regulation of the land and naval forces, applies to persons who have not been formally inducted into the armed forces and that the Uniform Code of Military Justice applied to the Appellant during his "deployments" to Iraq and Afghanistan.

The Appellant also cites two Massachusetts statutes that, according to him, provide evidence that the Legislature has recognized the military nature of deployments such as his. In G.L. c. 62C, § 81(a), the Legislature conferred the benefit of the armed forces extended tax deadlines to those individuals serving in a presidentially-designated combat zone in support of the armed forces in addition to granting it to the members of the armed forces. By another statute, it directed the Registrar of Motor Vehicles to develop a license plate retention program that would allow civilian employees of the Defense Department, as well as members of the military, who served in a theater of combat

operations, to retain one or motor vehicle plates at no charge for the duration of their deployment. G.L. c. 90, § 2.

More broadly, the Appellant argues that he put his personal life on hold for two separate years so that he could devote his energies to the services of his country's interest in combating the threat of global terror. He argues that designating this type of service as causing an interruption in service will discourage others from dedicating their particular knowledge, skills and abilities to the war against global terror.

HRD's Argument Regarding Military Service Exception

HRD argues that treating the Appellant's employment as a civilian contractor as military service contradicts the plain language of the civil service law as well as other Massachusetts and federal laws that provide protection to members of the United States military.

Although Chapter 31 does not define what constitutes "military service", HRD argues that it does define the term "veteran" as "any person … whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who … served in the army, navy, marine corps, coast guard, or air force of the United States, or on full time national guard duty under Titles 10 or 32 of the United States Code or under section 38, 40 and 41 of chapter 33 for not less than 90 days active service, at least 1 day of which was for wartime service …" G.L. c. 4, § 7.[2]

Additionally, Chapter 4 provides that, under certain circumstances, service in the Merchant Marines may qualify one as a veteran. On the other hand, Chapter 4 specifically excludes members of the coast guard auxiliary and temporary members of the

[2] G.L. c. 31, § 33 adopts the definition of "veteran" set forth in G.L. c. 4, § 7.

coast guard reserve from being considered as veterans. Chapter 4 also excludes service during active duty for training in the army national guard or air national guard.

HRD argues that the level of specificity in Chapter 31 and Chapter 4 illustrates that the Legislature did not contemplate conferring the protections accorded to veterans to persons other than those who served in the armed forces listed in the statute. According to HRD, if the Legislature had wished to include civilian contractors who provide services to the military in the definition of "veteran", it could have done so.

HRD argues that, however indispensable the Appellant's expertise was to the operation of the military, it nevertheless did not constitute military service for the purposes of the Massachusetts civil service law. Rather, the Appellant's employment with Harding Security Associates lacked many of the traditional hallmarks of military service. He never enlisted as a member of the military; he was free to return home at any time; and his employment was non compulsory, unlike an active member of the military who can not disobey orders calling him or her up to active duty.

HRD also cites Roberts v. Brown, 1994 U.S. Vet. App. Lexis 906 (1994) in support of its argument that the Appellant's work as a civilian contractor should not be deemed military service. In Roberts, the appellant argued to the U.S. Court of Appeals for Veterans Claims, that he had performed active military service when he was hired by a civilian contractor and was injured while working under Army supervision. Id. at *3. However, the court found that these events had not changed the appellant's civilian status into military status. Id., citing Maldonado v. Brown, 6 Vet. App. 48, 51 (1993) ("Military status is a legal status resulting, in the case of enlisted personnel, from enlistment or induction."). In the end, the court found that the appellant was not performing active

military duty because he was a civilian employee, and "in no sense a part of the army any more than any other class of clerks in the classified service of the government. Roberts, quoting Walker v. Chief Quarantine Officer. 69 F.Supp. 980, 986-8 (D.C.Z. 1943).

HRD argues that Mr. Wood's allegations in the present matter are identical to those in the Roberts case: he was a civilian employee who assisted the U.S. military during war on foreign soil. Although his service was commendable, it nevertheless did not constitute the type of military service contemplated in Massachusetts and federal laws protecting servicemen returning home from their tours of duty.

Conclusion Regarding Military Service Exception

Here, HRD's interpretation of the term "military service" in Section 33 and its determination that the Appellant's employment as a civilian contractor in Iraq and Aghanistan did not constitute such service, is not unreasonable and was well supported by the undisputed facts. Their interpretation is well supported by its reliance on other sections of the civil service law regarding veteran status and a U.S. Court of Appeals for Veterans Claims case that is strikingly on point. Moreover, the Commission must tread carefully in an area of statutory interpretation that lies on the periphery of its jurisdiction and may best be addressed by differing to other agencies which have more specific expertise in this area. For these reasons, the Appellant's request to have his employment during his leaves of absence deemed "military service" is denied.

Conclusion Regarding the Appellant's Correct Civil Service Seniority Date Assuming that the Military Service Exception is not applicable.

HRD's determination that, as of October 8, 2011, the Appellant's civil service seniority date will be September 23, 2008, computed by adding a year to his 2007 seniority date upon approximately two years of continuous service – and that he will

never be able to use his original permanency date as a starting point for recalculating his civil service seniority date, achieves an illogical result. It is a familiar canon of statutory construction that "statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result." Sullivan v. Brookline, 435 Mass. 353, 360 (2001).

As referenced in the findings, the Appellant became a permanent full time police officer in the Town of Charlton on April 1, 1987. He served continuously in that position for over nineteen (19) years, until October 26, 2006. He then took a leave of absence for approximately ten (10) months, until he was reinstated on September 1, 2007. Upon serving continuously for a period of twenty (20) months, the Appellant's civil service seniority date would be computed from the date obtained by adding the period of such absence from the payroll to the date of original employment. In this case, that would have retroactively adjusted the Appellant's civil service seniority date to approximately ten months after April 1, 1987, sometime in February 1988. However, since the Appellant took a subsequent leave of absence on August 1, 2008, prior to serving continuously for twenty months after his reinstatement on September 1, 2007, HRD argues that he is forever barred from using his initial permanency date as a starting point in calculating a retroactive date upon his return from the second leave. Under HRD's interpretation, the Appellant would have been able to use his initial permanency date as a starting point in calculating a retroactive date upon his return if, rather than returning to service as a police officer in Charlton for approximately eleven (11) months, he had simply taken a longer, but continuous, leave of absence (i.e. – from October 26, 2006 to

October 24, 2009). The result under HRD's interpretation is illogical and unfair - and could not possibly have been the intent of the Legislature.

A more logical and correct interpretation is as follows:

1. As of October 8, 2011, the Appellant's civil service seniority date will be September 23, 2008, computed by adding a year to his 2007 seniority date upon approximately two years of continuous service;
2. **Upon continuous service following his most recent absence for a period of twice the length of time during his two (2) leaves of absence [(11 months + 10 months) x 2 = 42 months], the Appellant will have his civil service seniority date recalculated by adding the period of such absences from the payroll (21 months) to the date of original employment [(April 1, 1987 + 21 months)].**

For all of the above reasons, the Appellant's appeal is hereby ***allowed in part***. The request to deem the Appellant's civilian employment for a defense contractor in Iraq and Afghanistan as military service as referenced in Section 33 is ***denied***. HRD, however, is ordered to recalculate the anticipated retroactive civil service seniority date consistent with this decision.

Civil Service Commission

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Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on September 23, 2010.

A true Copy. Attest:

_____
Commissioner
Civil Service Commission

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

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

Notice to:
Austin Joyce, Esq. (for Appellant)
Elizabeth Whitcher, Esq. (for HRD)