

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

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

BOSTON POLICE PATROLMEN'S
ASSOCIATION AND 10
INDIVIDUALS,
Appellants

Docket No. G-07-33

v.

CITY OF BOSTON,
HUMAN RESOURCES DIVISION,
Respondents

BOSTON MUNICIPAL POLICE
PATROLMEN'S ASSOCIATION,
Intervenor,
and
33 OFFICERS TRANSFERRED FROM
THE BOSTON MUNICIPAL POLICE
DEPARTMENT TO THE BOSTON
POLICE DEPARTMENT

Appellants' Attorneys:

Bryan Decker, Esq.
Patrick N. Bryant, Esq.
Sandulli Grace, P.C.
One State Street, Suite 200
Boston, MA 02109

Appointing Authority Attorneys:

Robert Boyle, Esq.
Office of Labor Relations
Boston City Hall, Room 624
Boston, MA 02201

Kay H. Hodge, Esq.
John M. Simon, Esq.
Stoneman, Chandler & Miller LLP
99 High Street
Boston, MA 02110

HRD Attorney:

Michele M. Heffernan, Esq.
Human Resources Division
One Ashburton Place, Room 301
Boston, MA 02108

Intervenor Attorney
and Attorney for 33 Transferred
Officers:

Joseph G. Donnellan, Esq.
Law Offices of Timothy M. Burke
Needham Corporate Center
160 Gould Street, Suite 111
Needham, MA 02494-2300

Hearing Officers:

Christopher C. Bowman, Commissioner
John J. Guerin, Commissioner
Cynthia Ittleman, Legal Counsel

DECISION
ON MOTIONS TO DISMISS

The Appellants, Boston Police Patrolmen’s Association (hereinafter “BPPA”) and 10 Individuals (collectively hereinafter “Appellants” or “petitioners”), filed an appeal¹, pursuant to G.L. c. 31, s. 2(b), at the Civil Service Commission (hereinafter “Commission”) on January 3, 2007, appealing the Human Resource Division’s (hereinafter “HRD”) December 28, 2006 decision, which provided “[a]pproval of transfer under G.L. c. 31, s. 35” of certain² officers from the Boston Municipal Police Department (hereinafter “BMPD”) to the Boston Police Department (hereinafter “BPD”). HRD’s approval of the transfer of 33 former BMPD officers to the BPD (hereinafter “transferees”). Motions to Dismiss the appeal have been filed at the Commission by the City of Boston (hereinafter “City”), the officers transferred in the wake of the HRD decision being appealed in this action, and the Boston Municipal Police Patrolmen’s Association (hereinafter “BMPPA”), which represents former BMPD officers. The Commission has received written responses and counter-responses to the motions and held two pre-hearings, at which the parties argued the motions. Here we address the appeal and Motions to Dismiss the appeal.

¹ The appeal form employed by the petitioners is labeled “Bypass/Section 2 Appeal Form.” The Human Resources Division Personnel Administration Rules (“PAR”), PAR.02, defines a bypass as “... the selection of a person or persons whose name or names, by reason of score, merit preference status, court decree, decision on appeal from a court or administrative agency, or legislative mandate appear lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification.” As the claim asserted here relates to the purported effects on incumbent BPD officers, this case does not involve a bypass.

² Roughly half (or 33) of the former Boston Municipal Police Department officers (including one Superior officer) were transferred as a result of the Human Resources Division decision on appeal here. They are: Christopher Adams, Anastasia Boyle, Timothy Brady, John Breen, Mark Brooks, Robert Casper, Daniel Ciccolo, Wilfredo Coriano, Vincent Cullen, John Devine, Michael Duggan, Kevin Egan, Mark Foley, John Horan, Don Keaton, James McDonnell, David O’Connor, Michael Phinney, Matthew Shea, Richard Spillane, Patrick Codogan, Timothy Coughlin, Timothy Duggan, Wilfredo Garcia, Christopher Keaney, Kenneth Kelly, Leon Manning, Elise Marrero, Mark McKeown, Stephen Morash, Carol Morse, David Pinciario, and Alexander Zahlaway. The transferees assert that 5 of them took voluntary demotions from the position of municipal police sergeants to be transferred to the BPD as police officers. Transferees’ Motion to Dismiss, p. 2, n.1, dated January 30, 2007.

Background

This case represents the third time since 1999 that the Commission has been called upon to address matters relating to the status of some or all BMPD officers.³ In addition to the historical antecedents of this case at the Commission, there are a number of current, related (directly or indirectly) legal proceedings being pursued concurrently with this proceeding, which provide a broader context for the present case. These include one court case in which the BPPA seeks declaratory relief enjoining the City from transferring certain former BMPD officers to the BPD. On March 6, 2007, while this Commission decision was pending, the Court (Neel, J.) allowed the Defendants' motions to dismiss the BPPA's claim for declaratory relief. In a second court case, the petitioners seek judicial review pursuant to G.L. c. 30A of a previous Commission decision (G-06-113) that determined that certain BMPD officers shall be deemed permanent employees in their positions at the BMPD.⁴ A hearing in the latter, surviving court case

³ 1) In 1999, in response to an appeal and subsequent request for investigation filed by the BPPA seeking the review of HRD action or inaction regarding work performed by, and the status of, BMPD officers, the Commission issued an "Investigative Report" (G-3563) to HRD directing that agency to identify an appropriate classification for the BMPD officers. The Report determined that the positions held by the BMPD officers were subject to civil service. We found that, "There is little doubt that [B]MPD officers perform a police function on B[oston] H[ousing] A[uthority] property. The major distinction between the two departments is jurisdictional. [B]MPD authority ends with BHA property. However, when on that property there exists an inconsequential difference between a BPD officer and a [B]MPD officer. A second distinction rests in the chain of command with BPD patrol officers having command control over all MPD officers on the scene. This clear chain of authority is necessary when such paramilitary organizations overlap. It does not, however, take away from the police duties performed and required of the [B]MPD officers." *Id.* at p. 5.

2) HRD did not establish a class for the BMPD officers ("municipal police officers") until 2003, at which time the Commission approved the classification. HRD has admitted that its delay prejudiced the petitioners.

3) In 2006, certain BMPD officers and Sergeants petitioned the Commission and obtained permanent civil service status in their positions as they were hired/promoted after state legislation (St. 1998, c. 282) was enacted giving their fellow officers who were hired previously permanent status. McKeown, et al v. City of Boston and HRD and BPPA as Intervenor, G-06-113 (decision issued Oct. 26, 2006). We noted therein that the officers were entitled to relief because they were "without fault," within the meaning of St. 1993, c. 310, and that they had been appropriately screened, tested, and trained for their positions.

⁴ These court actions are Suffolk Superior Court Civil Action Nos. SUCV2006-02939 and SUCV2006-4617. Prior to dismissing the former case on March 6, 2007 (per Neel, J.), the court (per Brassard, J.) had consolidated the two court cases and denied the BPPA's motion for preliminary injunction. However, in so doing, Judge Brassard commented that the BPPA had standing "under Chapter 231A to challenge the impending transfer." SUCV2006-02939 Decision Denying Preliminary Injunction, Dec. 20, 2006, at 15. Judge Brassard's decision urged the Commission to expedite consideration of this case. The Commission appreciates Judge Neel's affirmative comments about the Commission's expeditious treatment of the case and consideration of our limited resources; we understand the Court's continuing concern for expeditious treatment of this case.

is currently scheduled for May 7, 2007. In addition, some⁵ of the now former BMPD officers who were laid off⁶ effective December 31, 2006 and not transferred to the BPD have filed a separate appeal at the Commission (Commission Docket Nos. D1-07-05 through D1-07-31) seeking to be transferred to the BPD like 33 of their former fellow BMPD officers. The Commission recently held a full hearing in the matter of the non-transferred officers; a decision is pending.

Amid this context, the petitioners filed the instant appeal relating to the December 28, 2006 HRD decision approving the voluntary transfer of 33 then-BMPD officers to the Boston Police Department. In response thereto, the City, the BMPPA and transferees have filed Motions to Dismiss, which motions were argued at pre-hearing.⁷

HRD Decision Under Appeal

Late in 2006, HRD received individual requests from 33 officers then employed by the BMPD to be voluntarily transferred to the BPD.⁸ It appears from the HRD decision that the parties were able to submit position statements to HRD. On December 28, 2006, HRD issued its decision to approve the transfer requests to the BPD Human Resources office (with copies to all counsel of record).

The HRD decision approved the transfers as having satisfied the terms of G.L. c. 31, s. 35 and it found that: 1) it had received requests to transfer 33 BMPD officers with the assent of the “relevant appointing authorities,” which were Police Commissioner Edward F. Davis of the BPD and Mr. Michael J. Galvin, Commissioner of the Boston Property and Construction Management department; 2) the statute “permits any ‘permanent employee in a [civil service] departmental unit’ to request a lateral transfer to a different department unit ...” and that the 33 officers to be transferred are permanent civil service

⁵ The precise number of former BMPD officers who were not transferred and who are asking the Commission, in a separate concurrent case here, to order their transfer to the BPD is presently under review by the Commission.

⁶ The contentions in these matters are such that a clear understanding of the actual fate of the BMPD is unclear, e.g. whether that Department was eliminated and/or re-established as an unarmed ‘security force’ or as a ‘protective service.’ Not all former BMPD officers were laid off; the remaining officers were offered the opportunity (of which some availed themselves) to remain employed but as unarmed officers in a different capacity and at a reduced rate of compensation.

⁷ As noted, the Commission pre-hearing in this case was held on two different days, in light of issues raised at the first day of pre-hearing regarding the non-inclusion (at that time) of the transferees.

⁸ The HRD Decision, in a letter dated Dec. 28, 2006, notes that it had also received a transfer request filed by the City of Boston, presumably a request to involuntarily transfer, the same 33 officers. However, HRD stated that it was “not necessary” to act on that request “at this time.” HRD Decision, at 1, n.1, Dec. 28, 2006.

employees (20 of them pursuant to Chapter 282 of the Acts of 1998 and 13 of them pursuant to the Commission’s decision in Certain Boston Municipal Police Officers and Sergeants v. City of Boston, et. al., G-06-113, Oct. 26, 2006⁹); 3) “considerable documentation” over “several years” indicates that the requested transfers were “similar” positions from a variety of analytical standpoints, as supported by a previous Commission decision¹⁰ and the Appeals Court (citing Goncalves v. Boston, 66 Mass. App. Ct., 180, 185, n.11 (2006);¹¹ and 4) the city “provided sound and sufficient reasons” why the transfers are for the public good as they address the city’s “urgent need for scores of additional police officers,” the limitations of the pool of eligible police cadets, the few remaining residents on the open competitive list, the speed with which the 33 transferees could be further trained and on the streets, the benefits of a “unified command,” consolidation of forces and other efficiencies.

Moreover, HRD’s decision addresses the “primary concern raised by the Boston Police Patrolmen’s Association, Inc. (“BPPA”) and the Superior Court with respect to these transfers – namely that the transfers would somehow violate the basic merit principles underlying the civil service law.” HRD Decision, Dec. 28, 2006 at 4 (footnote omitted). In this context, HRD explicitly addressed the underlying purpose of the civil service system: to ‘avoid political considerations, favoritism and bias in government employment’ and to ‘foster the selection of public employees of skill and integrity.’” Id.

Turning to the difficult path leading to the approval of the transfer requests, HRD concluded that a proper process has been followed. To bolster its assessment, HRD searched its own records for evidence pertaining to the pending transfers and found, for example, that “... HRD is aware that each of the 33 transfer applicants has passed the state civil service examination for entry-level municipal police officer positions and, indeed, every potential transferee has scored as well as or better than some BPD incumbents.” Id. In further support of its conclusion, HRD pointed to the “years of policing experience” the transfer applicants possessed as well as the additional training, background investigation, criminal records check, neighbor and employer assessment, driving records check, attendance and employment checks, medical exams, a written exam, and a psychological interview the transferees had undergone or

⁹ The BPPA was allowed to intervene in that case before the Commission, pursuant to the Standard Adjudicatory Rules, and it is seeking G.L. c. 30A review of the Commission’s decision in that case, as indicated herein, *supra*, note 4.

¹⁰ HRD does not explicitly cite the pertinent Commission decision but in 1999 the Commission determined that the BMPD officer and BPD patrol officer positions are similar.

¹¹ See discussion of the Goncalves case herein at p. 17, *infra*.

would undergo. In light of this considerable review of the transfer applicants, HRD determined, “In short, they have undergone, over the past five months, the same rigorous screening and evaluation process applicable to any BPD recruit being processed from a civil service certification list.” Id. HRD also stated that it saw “no evidence” of political favoritism in the transfer requests, nor was there any evidence before HRD that

“the public safety (or the safety of incumbent BPD officers) will be jeopardized if these transfers are permitted to occur. The City and the 33 individuals involved appear to have made strictly merit-based employment decisions leading up to the filing of these transfer applications.” Id. at 4 – 5.

Before approving the transfers, HRD assessed the transfer applicants carefully and appropriately, with due consideration of their current abilities, experience, training and test results. We find the HRD’s assessment of the transferees’ current abilities, as opposed to assessing their qualifications when they were first hired years ago, to be the appropriate measurement of their transferability. To do otherwise would inappropriately ignore the transferees’ experience, their subsequent training, background checks, and exams. Consequently, HRD was able to establish, from its records and the comments submitted to the agency, by far more than a mere inference, that the transferees are qualified to be transferred, and the petitioners apparently failed to offer HRD admissible and credible evidence to the contrary.

Procedural History of the Present Appeal

On January 3, 2007, the Commission received an appeal of the HRD decision. It listed only HRD and the City as Respondents and did not include the 33 transferees as parties. In response to the request of the court (Brassard, J.) made during a hearing in two related court cases, the Commission expedited consideration of this matter. Notwithstanding the necessary time constraints, all interested persons were given multiple opportunities to provide appropriate input into these matters, as indicated by the following pertinent elements of the administrative record.

On January 9, 2007, the Commission sent the BPPA an Acknowledgement of the Appeal, sent the parties a Notice of Pre-Hearing to be held on January 19, 2007 and sent all interested persons a letter regarding the scheduled Pre-Hearing. On January 17, 2007, the petitioners submitted a Pre-Hearing memorandum regarding the appeal, noting issues to be addressed and indicating that they had “served

separate information requests upon the City and HRD.” On January 8, the petitioners also sent a public records request to the Respondents.¹²

On January 17, 2007 the BMPPA filed a Motion to Intervene and a Motion to Dismiss. On the same date, the Commission received the petitioners’ preliminary filings for the appeal and the City’s Motion to Dismiss. On January 19, 2007, the Pre-Hearing was held and the Commission allowed the BMPPA’s Motion to Intervene. As a result of concerns about the absence of the 33 transferees from the cases, the Commission ruled that each of the transferees shall be named parties in the appeal and that the Pre-Hearing shall be continued to January 30, 2007. On January 22, 2007, a Commissioner and the Commission’s Legal Counsel delivered notice to the 33 transferees, whom the Commission was advised were in training at the Boston Police Academy. The transferees were provided copies of all documents filed in the cases thus far, along with a written explanation of the Commission’s decision to include them in the cases and that the Pre-Hearing would continue on January 30, 2007 if they or their legal representative cared to attend. The Commission received a document containing the signatures of all of the transferees, indicating that they received these documents.

On January 30, 2007, the second day of Pre-Hearing, counsel for the BMPPA also filed a Motion to Dismiss on behalf of the 33 former BMPD officers who were being transferred to the BPD and whom the Commission had added as parties to the case.¹³ At the conclusion of the Pre-Hearing, it was agreed that the petitioners’ written opposition to the Motions to Dismiss would be due on February 2, 2007, that the City would file its reply brief by February 9, 2007, and the petitioners would file any sur-reply by February 13, 2007. The prospect of a Full Hearing was addressed in the event that the motions were not dispositive. The petitioners indicated that there was only one possible source of oral testimony (a representative of HRD) but that the need for that testimony might be obviated by HRD’s responses to the petitioners’ request for information pertaining to transfers reviewed by HRD over the last 5 years. The petitioners further asserted that it was awaiting a response to its request for information from the City. Counsel for the

¹² Subsequently, the petitioners also sent a public records request to the Commission regarding the tape recording of the private hearings recently held at the Commission in regard to a separate appeal filed by former members of the BMPD who were not transferred to the BPD.

¹³ All or nearly all of the 33 officers who transferred from the BPMD to the BPD, pursuant to HRD’s approval of their individual, voluntary requests, attended the Jan. 30, 2007 Pre-Hearing. The Commission extends its appreciation to the Administrative Office of the Trial Court for promptly granting the Commission’s request to conduct this second day of Pre-Hearing at the John Adams Courthouse in order to accommodate all those who wished to attend.

transferees and the BMPPA indicated that all of the 33 transferees wanted to testify at a Full Hearing. The Commission advised that, in light of the court's urging for timely consideration, the Commission would not be able to hear each of the 33 officers' testimony but that affidavits would be acceptable. Further, the Commission determined that if the motions were not dispositive, a date for a Full Hearing or briefs in lieu thereof, would be scheduled shortly after a ruling on the motions. The parties timely filed their Oppositions, Responses, Supplemental Motions/Responses and Sur-replies. On February 13, 2007, the petitioners wrote to the Commission, indicating that they "do not envision the need for an evidentiary hearing Therefore, we request that the Commission forgo a hearing and continue on an expedited briefing schedule to resolve this matter."

The BMPPA has submitted a motion to include as intervenors here those former officers of the BMPD who have transferred to other city or town police departments. No action has been taken thereon.

We address the Motions to Dismiss.

Discussion

The essential issue raised by the Motions is whether the petitioners have standing to appeal HRD's action approving the voluntary transfers.¹⁴ The petitioners assert that they have standing for a variety of reasons. One argument they advance is that the Commission has "multiple times deemed the Union to have standing to challenge the civil service treatment of Boston Municipal Police Officers." However, a review of the Commission's actions indicates otherwise. In 1999, the Commission was called upon (by the BPPA) to address the civil service status of the BMPD officers. Although it was apparently initiated as an appeal under section 2(b), it was addressed by the Commission as an investigation, complete with a report at the conclusion of the investigation requiring HRD to develop an appropriate classification for the BMPD officers as civil service employees. The Commission did not issue a decision based on the BPPA's prior appeal. An investigation does not require "a party aggrieved." In the 2006 case before the Commission, which related to the permanency of certain BMPD officers in their position within that

¹⁴ The movants initially asserted that the petitioners' appeal was fatally flawed because it did not name the very individuals whose employment as BPD officers it sought to terminate (the transferees here). This flaw was negated by the Commission's actions to include the transferees, *supra* at 7.

department, the BPPA participated as an intervenor. In none of these cases was it established that the BPPA was a “party aggrieved.”

The BPPA’s argument that its participation in cases before the Commission relating to the BMPD officers gives it standing here is without merit. The BPPA had been granted intervenor status pursuant to the Standard Adjudicatory Rules (801 CMR 1.00). When the Commission adopted the Standard Adjudicatory Rules as its rules of procedure on September 2, 1999, the Commission explicitly preserved the primacy of Chapter 31, stating that, “ . . . provisions of M.G.L. c. 31 take precedent over conflicting rules.” As chapter 31 clearly sets jurisdictional requirements, the Standard Adjudicatory Rules can not undermine them and the terms of the statute prevail. The Commission is not at liberty to ignore the requirements of the statute it is charged with enforcing. *See* Globe Newspaper Co. v. Beacon Hill Architectural Comm’n., 421 Mass. 570, 586 (1996), and Gifford v. Commissioner of Public Health, 328 Mass. 608, 616-17 (1952) (as both cited in the City’s Reply to BPPA’s Opposition to the Motion to Dismiss, Feb. 9, 2007).

The petitioners rely on the docketing letters and numbers of the various cases in which they have had some involvement at the Commission to establish their standing as persons “aggrieved.” However, their reliance is misplaced. The assignment of docketing letters and numbers at the Commission is an administrative function and not a jurisdictional determination.

The petitioners rely extensively on parts of the preliminary injunction ruling of Judge Brassard in the court case in which the BPPA was seeking declaratory relief under G.L. c. 231A (referring to its authority as a “gale force,” Petitioner’s Supplemental Opposition memorandum, at 3.) to prevent the transfers. Boston Police Patrolmen’s Association, Inc., et al v. Mayor Menino et al, Suffolk Superior Court, SUCV2006-02939, Denial of Preliminary Injunction, December 20, 2006. However, since Judge Brassard’s ruling denying the BPPA’s Motion for Preliminary Injunction, the court has also dismissed BPPA’s complaint. Id., Judgment of Dismissal, March 6, 2007. As a result, the wording of Judge Brassard’s preliminary ruling on which the petitioners have placed so much reliance and emphasis has no effect here.

Nonetheless, we address the petitioners' allegations in this regard as they assert it is a fundamental element of their argument and it is now fundamentally flawed. The petitioners quote the Judge in his preliminary ruling as stating that the BPPA

“... will be harmed by having to work alongside individuals who did not obtain their jobs through the statutory competitive scheme designed to advance basic merit principles, and who may not have adequate credential and abilities for the position of BPD officer. In addition, the individual plaintiffs will have to compete with such individuals for promotions, overtime, and detail opportunities. The BPPA also seeks to vindicate the public interest in enforcement of the civil service laws. **This is direct harm within the area of concern of Chapter 31 sufficient to give the plaintiffs standing** under Chapter 231A to challenge the impending transfer” (Petitioners' Opposition to Motions to Dismiss at the Commission, quoting Preliminary decision of Judge Brassard, denying motion for preliminary injunction, Dec. 20, 2006 at 15, *with petitioners' emphasis, not in the original*)

However, Judge Brassard's dicta arose in the context of denying the BPPA's motion for preliminary injunction under the declaratory relief statute, as indicated by the words immediately following the words highlighted by the petitioners. Importantly, Judge Brassard went on to deny the BPPA's request for an injunction. In so doing the Judge specifically concluded,

The BPPA argues that the transfer of BMPD officers into the ranks of the BPD will threaten the safety of both its members and the public because the BMPD officers have inferior credentials and training. Based on the evidence before this Court, however, it appears that the City has carefully screened the applicants for transfer and has instituted appropriate procedures to ensure that they are properly trained before the become BPD officers.” (Preliminary decision of Judge Brassard, denying motion for preliminary injunction, at 24, Dec. 20, 2006)

Judge Brassard's ruling also acknowledged that his decision was being issued prior to HRD's ruling on the appropriateness of the transfer by HRD and prior to the review of this Commission and he further acknowledged the primary jurisdiction of these agencies over these very issues in his memorandum. *Id.* at 17-20. With the ruling of the HRD now having been issued and with the Court having subsequently dismissed the BPPA's court suit on March 6, 2007, the petitioners' direct and repeated reliance on some of the wording (and not the actual conclusion) of the court's ruling on the motion for preliminary injunction is misguided.

Failing in its other arguments asserting that it has standing in the case before the Commission, the petitioners argue that they “will suffer substantial harm as a result of the transfer, including diminished employment and promotional opportunities, and that such harm is within Chapter 31's zone of interest” Petitioners' Supplemental Opposition memorandum, at 2. The “zone of interest” standard for standing is

not the standard applicable in regard to Chapter 31 proceedings at the Commission. Chapter 31, s. 2(b) explicitly requires that actual harm has occurred to one's employment status. The standard proposed by the petitioners is instead a broader standard applicable to cases outside the Commission's jurisdiction.

While the petitioners assert they *will* (acknowledging that they have *not yet* suffered) "suffer substantial harm as a result of the transfer, including diminished employment and promotional opportunities," they have not submitted admissible, credible evidence of this harm either here or, apparently, to HRD, as noted above. These and the related harms the petitioners project is speculative and, therefore, does not fall within the harm required by G.L. c. 31, s. 2(b). In this regard, it is important to note that as a matter of statute, the transferees are not entitled to any greater such opportunities as a matter law for a period of three years from the date the transferees began employment (January 1, 2007) in the BPD. Specifically, G.L. c. 31, s. 33 provides that they are not so entitled for a period of three years. The Commission can not speculate what positions the petitioners and transferees will be in in the year 2010 and thereby project what harm may arise. Further, there is no evidence that the effect of these transferees on the petitioners will be any different than the effect of any new hires.

The City argues that the petitioners have no standing because the HRD decision being appealed did not affect, "let alone harm," the employment status of any current BPD officers. It argues that section 35 gives rights to transferees, not "non-transferees," such as the BPPA petitioners; nor does section 35 provide the non-transferees with any remedy. Even if the statute did provide the rights and remedies to "non-transferees," the City argues, the petitioners would still be required to prove they were actually harmed. In this regard, the City argues, not only do the petitioners fail to describe a harm required by Chapter 31, it fails to meet even the broader definition of injury required to establish standing. Further, the City joins the transferees (in the transferees' Supplemental Motion to Dismiss) in arguing that the petitioners' reliance on its status in previous matters before the Commission as a cure for its lack of standing in this case is ill-fated.

Similarly, Intervenor BMPPA argues that the appeal should be dismissed because it fails to satisfy the statutory requirements of section 2(b) of G.L. c. 31. Specifically, the BMPPA asserts that, 1) as a union, the BPPA is not a "person aggrieved;" 2) the BPPA has no statutory "employment status;" and 3) it is not a "person aggrieved" by a decision of the [HRD] Administrator because it did not file the transfer

request, citing Cooper v. Civil Service Commissioners, 314 Mass. 76 (1943)(the statute heretofore appeared to authorize only involuntary transfers but was subsequently amended to allow for voluntary transfers and appeals).

The transferees, in their Motion to Dismiss, take great exception to the representations of the petitioners, which is now their bargaining unit, that their positions are the result of political cronyism, that they lack proper training, and that they are otherwise unfit to serve as BPD officers. Further, the transferees deny that the petitioners can exhibit the statutorily required “actual harm,” which harm must be “distinct from any harm to the general public that might result” from the challenged action and “must be legitimately within the scope of subject matter of the civil service statute.” Transferees’ Motion to Dismiss, pp. 3, 5, 6, dated January 30, 2007 (citations omitted). They argue that the BPPA has no “employment status” because the statute does not provide the union the right to challenge a decision of the administrator in this regard, “... even one that represents the employee whose transfer the action seeks to undue (sic).” Id. at 4. Moreover, with regard to the statutory requirement to show harm to one’s employment status, the transferees assert:

Any action the administrator takes (such as approving these transfers) cannot be viewed as an abridgement (sic) the union’s rights or as an action which has caused actual harm to the union’s employment status, both of which are required to establish standing under G.L. c. 31, s. 2. Id. at 5.

Finally, the transferees argue that the reference to “a person aggrieved” in s. 35, pertaining to transfers, mirrors the wording in G.L. c. 31, s. 2(b), and that references in section 35 to an appeal via section 41 indicate that the transfer provisions of the statute are to be construed to refer to employees, not labor organizations. Indeed, chapter 31 addresses actions that may be taken by or in reference to individual employees and their employers. The long list of definitions applicable in G.L. c. 31, s. 1 does not include a term pertaining to an employee organization. Nor does section 1 include a separate definition of a “person” that might be construed to refer to an employee organization. Thus we interpret the chapter’s terminology to refer to individual employees and not a labor organization. It is well established that the Commission’s statutory construction in this regard is owed due deference. (Town of Falmouth v Civil Service Commission et al, 447 Mass. 814, 821 (2006) (Commission’s interpretation of statutory filing deadline upheld as ‘state administrative agency ... has considerable leeway in interpreting a statute it is charged with

enforcing,’ though the Court found the Commission’s modification of the Town’s disciplinary actions not appropriate for other reasons).

The applicable jurisdictional requirements of Chapter 31 are clear. Section 2(b), under which the BPPA and individual petitioners have filed their appeal, requires that petitioners show that they are “persons” who have been “aggrieved” by a “decision, action, or failure to act by the administrator ...” and requires that they show that their rights “were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person’s employment status.” Further, the statute clearly and explicitly expounds,

“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 a manner as to cause **actual harm** to the person’s employment status Any person appealing a decision, action or failure to act of the administrator shall file a copy of the allegations ... with the administrator Said allegations shall clearly state the basis of the aggrieved person’s appeal, and make specific references to the provisions of this chapter or the rules of the department or basic merit principles promulgated thereunder **which are alleged to have been violated, together with an explanation of how the person has been harmed.**” (emphasis added)

As Chapter 31 addresses the interests of individual employees and employers (e.g., in the section 1 definitions there is no definition of a “person” but only of a “civil service employee”) we find that the BPPA is not a “person” pursuant to this statute. Further, since the BPPA can not be a “person” under the statute, it also has no “employment status.” Perhaps even more importantly, neither the BPPA nor the individual petitioners are persons “aggrieved” by the actions of the Personnel Administrator (in the decision of HRD on behalf of the Administrator) because the statute requires that aggrieved persons show that the person has already “been harmed.” Using the past tense, it is clear that the Legislature intended the statute to apply in cases where the harm has already occurred. Indeed, the Legislature appears to have determined that this principle is so important that it repeated and expanded upon it in the same section, stating that the appeal must show how the person’s rights had already been “abridged, denied, or prejudiced in such a manner as to cause actual harm.” It is not enough to speculate that they *may* be harmed at some undetermined time in an undetermined manner. While the BPPA and the individual petitioners speculate that they will be harmed by the HRD approval of the transfers, they do not appear to have demonstrated to

HRD, nor have they demonstrated to this Commission, that they have already suffered the requisite harm, much less that any give petitioner is a “person” whose “employment status” has been adversely affected.

The petitioners here do not satisfy the most elemental standing requirement, nor could they even if we were not restricted to the statute we are required to administer. First of all, “[t]o have standing in any capacity, a litigant must show that the challenged action has caused the litigant injury.” Slama v. Attorney General, 384 Mass. 620, 624 (1981). The petitioners allege that any transfer of a BMPD officer to the BPD would violate the requirement of G.L. c. 31, s. 35 that the transfer be for the public good. But “[v]iews on public policy, although held with strong conviction and moral fervor, are not bases for standing to sue.” Local 1445, United Food and Commercial Workers Union v. Police Chief of Natick, 29 Mass. App. Ct. 554, 559 (1990) (citations and footnote omitted). Rather, the Supreme Judicial Court requires a “legally cognizable” or “direct” injury. Massachusetts Association of Independent Insurance Agents, 373 Mass. 290, 293 (1977) (“legally cognizable injury”); Massachusetts Electric Co. v. Massachusetts Commission Against Discrimination, 375 Mass. 160, 178 (1987) (“direct injury”).

Under this more general standing analysis, the petitioners would need to show more than the stated injury. This is because “[i]n addition, for [a] plaintiff to have standing, the injury alleged must fall ‘within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.’” Ginther, et al v. Commissioner of Insurance, et al, 427 Mass. 319, 323 (1998)(emphasis added). As a result of this further “zone of interest” requirement, appellate courts have “often recognized that not every party who can claim an injury as a result of violations of a statute . . . has standing to bring an action thereunder.” Beard Motors, Inc. v. Toyota Motor Distributors, Inc., 395 Mass. 428, 431-32 (1985).¹⁵

Such is the case here. “The fundamental purpose of the civil service [laws] is to guard against political considerations, favoritism, and bias in governmental hiring and promotion.” Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001) (citing, *inter alia*, Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 304 (1997)). The civil service transfer statute, G.L. c. 31, s. 35, guards more particularly the manners in which an *employee* may be transferred. Id. That statute does

¹⁵ Rather, courts “have generally looked to whether the party claiming to have standing has alleged an injury ‘within the area of concern of the statute or regulatory scheme under which the injurious action has occurred.’” Beard, 395 Mass. at 432.

not show any intent or effect to put the petitioners “within a protected zone as to implicate a right of action in [the]m.” SDK Medical Computer Serv. Corp. v. Professional Operating Management Group, Inc., 371 Mass. 117, 124 (1976). Cf. Beard Motor, Inc. v. Toyota Motor Distributors, Inc., 395 Mass. 428, 432 (1985) (disappointed prospective automobile franchisee alleging loss of anticipated profits due to its inability to obtain the Toyota franchise failed to state an injury within the area of legislative concern underlying G.L. c. 93B).

The Supreme Judicial Court has enforced the “zone of interest” requirement rigorously. E.g., Ginther, 427 Mass. at 323-24; Enos v. Sec’y of Env’tl. Affairs, 432 Mass. 132, 138-41 (2000). In Enos, the Court reasoned that “[t]o grant standing based on [a statute that governs environmental impact assessments by the Secretary of Environmental Affairs and its] ultimate goal of the protection of the environment would allow suit in almost every project . . . , based on generalized claims by plaintiffs of injury such as loss of use and enjoyment of property.” Id. at 138.

Of critical relevance here, the more general principles of standing beyond Chapter 31 would be of no avail to the petitioners because neither the HRD nor the City owe any duty to the petitioners. “It is not enough that the plaintiff[s] be injured by some act or omission of the defendant; the defendant must additionally have violated some duty owed to the plaintiff[s].” Enos, 432 Mass. at 135 (quoting Penal Institutions Comm’r. for Suffolk County v. Comm’r. of Correction, 382 Mass. 527 at 532 (1980)); accord Ginther, 427 Mass. at 319. The petitioners have failed to provide any evidence or legal support establishing such a duty on the part of the employing authority or HRD.

Finally, the only “injury” that the petitioners have specified is a speculative one relating to various employment opportunities. Such an attenuated assertion, however, which is bereft of any evidentiary support, does not establish “actual harm” or “direct injury” any more than did the concerns of the plaintiff union in Local 1445 that the “erosion” of the Sunday Blue Laws might create pressure for its members to work more on Sundays. Local 1445 v. Police Chief of Natick, 29 Mass. App. at 559-60. To recognize standing under such speculative circumstances would enlarge beyond all proper bounds the range of those who could appeal from state agency decisions because of disagreements over public policy. See also

discussion in this regard, *supra*, at p. 11. In short, even under the broader definitions of standing, which are beyond the specific terms of standing in Chapter 31, the petitioners would lack standing.

The petitioners argue further that Judge Brassard relied on the Appeals Court's decision in Goncalves et al v. City of Boston et al, 66 Mass. App. Ct. 180 (2006) to determine that the BMPD officers are not 'similar' to BPD officers and that, for this reason, the transfer should not have been approved. We note that Judge Brassard's preliminary ruling is no longer the law of the case since the case was subsequently dismissed (Neel, J., March 6, 2007). The Goncalves case has limited direct application here. In that case, the court held that BMPD officers who were thirty-two years of age at the time they took the examination for an original appointment (not a transfer) to the BPD were rightly removed from the certification list compiled following the scoring of the exams as the City had adopted the statutory age limit previously. The wording of the decision reflects the court's understanding that the BMPD officers are, in fact, police officers. The court's comments about the 'comparability' yet 'distinction' between the BMPD and the BPD are made in the context of responding to the Appellants' argument that, in effect, the case should be treated as a promotional appointment. The Court noted that "Although the civil service law would permit the BPD to accept transfers of civil service police officers from other civil service departments, the BPD has chosen not to accept transfers." Id. at 185, n.8. Indeed, BMPD officers have transferred to other departments, as noted below.

As noted by the Appeals Court in Goncalves, the petitioners argue that the transfers should not be allowed because the BPD has not accepted transferring officers in many years – apparently not from any police department, not just the BMPD. While that may be true, it is a decision which the BPD, not the petitioners can make. In addition, it is worth noting that the BMPPA and the transferees report that twelve former BMPD officers have transferred to civil service police departments in Andover, Everett, Framingham, Lawrence, Newton, Sharon and Stoughton – suggesting more similarity in these positions than the petitioners are willing to acknowledge. Supplemental Motion to Dismiss of BMPPA and 33 Transferees, p. 4 (February 9, 2007).

Even though we dismiss the petitioners' appeal for lack of standing, the Commission takes this opportunity to review the substance of related Commission decisions to date. The petitioners assert here

that the transferees are not ‘similar’, for purposes of transfer under G.L. c. 31, s. 35. However, it was in response to the BPPA’s request for an investigation in 1999 regarding the civil service status of the BMPD officers that the Commission determined that the BMPD officers do perform a police function and that HRD needed to identify the appropriate civil service classification therefor. HRD, belatedly, developed a classification for the BMPD officers, which this Commission approved. In the 2006 case before the Commission, the Commission granted certain of the BMPD officers permanency in their positions. The transferees here subsequently sought to be transferred and HRD reviewed their applications to ensure that they met the requirements of s. 35. HRD found, based on the submissions of the BPPA and the City and the diligent research of its own records, that the requirements of s. 35 were met. We see no basis for disturbing that careful determination.

The parties involved have locked horns over these issues for so long that trust and good faith have dwindled and the civil service system has been undermined by statements filled with rancor and hyperbole and the lack of direct, productive and timely responses. The Commission has reviewed the relevant decisions and the statutes as they are, not as they are purported to be. Based on the precedent by which the transferees became permanent civil service employees, the fact that they have been put through a further, rigorous selection process, reviewed, trained, and tested by the City, that the individual officers sought their voluntary transfers, that the City and HRD approved the transfers, and that the transfers are in the public interest, it is not for a “non-transferee” to undo the transfers. The Commission takes this opportunity to encourage the professional implementation, by all who are involved, of a smooth and successful transfer of the 33 former BMPD officers to the BPD in the interest of all Boston police officers and the public at large.

We take no action on the BMPPA’s motion to add further parties as it is now moot.

In summary, the Commission hereby rules that the petitioners have no standing to pursue this appeal in that they are not “persons aggrieved” who have suffered “actual harm” to their “employment status” pursuant to G.L. c. 31, s. 2(b).

For all of the reasons stated herein, the Motions to Dismiss are *allowed* and the appeal on Docket No. G-07-33 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Commissioner

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Bowman, Commissioner, Guerin and Marquis, Commissioners [Taylor, Absent] on March 15, 2007.

A true record. Attest:

Cynthia Ittleman
Legal Counsel

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
Bryan C. Decker, Esq.
Patrick N. Bryant, Esq.
Robert Boyle, Esq.
Kay Hodge, Esq.
John Simon, Esq.
Joseph G. Donnellan, Esq.
Michelle M. Heffernan, Esq.