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I. JUDICIAL REVIEW OF CIVIL SERVICE

By Galen Gilbert

I. THE CIVIL SERVICE SYSTEM

The Massachusetts Civil Service Commission is one of the oldest state agencies, exercising its historic purview over merit system hiring in both state and municipal work forces. Since the Commission is also concerned with the discipline and removal of unfit or unneeded employees, and since such employees may value their employment highly, litigation frequently arises from Commission adjudications, more often than from almost any other state agency. Reading the annotations in the Code, one can see the rich spectrum of litigation the civil service tenure statutes have engendered. In every case the public good has to be balanced against private rights, and so elusive is the balance of these goals that the facts in these cases often support a wide range of opinions. "The design of the civil service law is to free competent and upright public servants from arbitrary removal, but not by the requirement of insubstantial formalities to shield the inefficient or unworthy from being separated from the public service." *Whitney v. Judge of Dist. Court*, 271 Mass. 448, 171 N.E. 648 (1930).

A. External Protections

Public sector employees enjoy special protections to their tenure other than civil service laws, in particular the First and Fourteenth Amendments to the U.S. Constitution, *Branti v. Frankel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980), which protects them from politically motivated discharges. Furthermore, protection against politically motivated adverse promotion, transfer, recall from layoff, and hiring decisions is found in the First Amendment, *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L. Ed. 2d 52 (1990). Violations of this protection may be proved by circumstantial evidence, rather than direct evidence, *Anthony v. Sundlun*, 952 F.2d 603 (1st Cir. 1992) (13 Republican jai alai workers fired in one day by new Democratic governor and replaced with Democrats). The Constitution requires fair procedures for discharge of tenured employees, *City of Leominster v. International Broth. of Police Officers, Local 338*, 33 Mass. App. Ct. 121, 338 NE2d 1032 (1992).

Collective bargaining rights under M.G.L. C.150E provide additional protection for unionized public employees. There are also statutory wage and hour laws, requiring payment of wages, with enforcement agents in the state Department of the Attorney General. The state retirement system also protects the right of retired employees who recover from their disabilities to recover their old jobs, *White v. Boston*, 428 Mass. 250, 700 N.E.2d 526 (1998); *O'Neill v. City Manager of Cambridge*, 428 Mass. 257, 700 N.E.2d 530 (1998). While these external constitutional and statutory rights are beyond the scope of this treatise, sometimes they are raised in the same cases that civil service rights are. E.g. *Boston Fire Dept. v. Waxman*, Suffolk Superior Ct., 91-0985 (1992) (An employee had a right to speak on public broadcast media about the department under the First and Fourteenth Amendments, even though his statements were misleading and partially untrue, and even though a department rule proscribed such public statements by employees without permission).

There is also a separate tenure system for county employees, involving the county personnel board, which holds discharge hearings, M.G.L. C.35, §51. In Suffolk County, the Boston City Council performs the duties of the county personnel board, M.G.L. C.35, §56. M.G.L. C.71, §§ 42-42A, protects professional public school employees, teachers and administrators. However, blue-collar employees in public schools are typically covered by civil service laws.

The Americans with Disabilities Act, 42 U.S. C. §12102(2) and its state counterpart, M.G.L. C.151B, §4(18), give powerful remedies for employees who are absent from work because of a disability, even though civil service law does not reach such situations.

Finally, there is a growing field of employment tenure litigation for private sector employees, involving money damages for tort or breach of contract, but almost never involving reinstatement. These causes of action in some instances would be applicable to public sector employees; however, in most instances where an administrative remedy exists, it will be much less expensive and more expeditious to use it. And most public sector employees who are fired want their jobs back.

B. Codification

The hundred-year-old civil service chapter of the General Laws was completely recodified in 1978, Acts of 1978, C.393, §11. Although no substantive changes were made,

rearrangement of the section numbering makes reading old decisions and statutory citations confusing. Cross-reference tables between the old and new chapter 31 are found in M.G.L.A. and A.L.M. The citations to Sections 41 through 45 refer to the civil service tenure and appeal statutes, Massachusetts General Laws, Chapter 31. Citations to Chapter 31 that follow are cited thus, "Section" followed by number.

There are two sources of regulations that are useful in civil service adjudications. The Human Resources Division, Office of Legal Counsel has rules called Personnel Administrator Rules, 9 MCSR 5-1, dealing mainly with appointment situations. In 1999 the Civil Service Commission adopted the Standard Adjudicatory Rules Practice and Procedure, 801 CMR 1.00. Except for the procedure for judicial appeals, neither of these agencies is subject to the state Administrative Procedure Act, M.G.L. C.30A.

C. Further Reading

For more information about litigation aspects of state civil service law the reader is referred to:

1. Douglas A. Randall & Douglas E. Franklin, Municipal Law and Practice, §321, et seq. 4th ed. Massachusetts Practice, Vol.18, West Publ. Co. 1993).
2. Alexander J. Cella, Administrative Law and Practice §1009, et seq., (Massachusetts Practice, Vol.39, West Publ. Co. 1986).
3. Maria C. Walsh, Ed. A Judicial Guide to Labor and Employment Law (Boston, Mass. Lawyers Weekly Pub., 1993).
4. Isidore Silver, Public Employee Discharge and Discipline (N.Y., John Wiley & Sons, 1991) (also on CD-ROM from the publisher)
5. Civil Service vol. 5A, (American Jurisprudence, Pleading and Practice Forms, Lawyers Co-op Publ. Co.)
6. Galen Gilbert, Massachusetts Municipalities and Civil Service, p.61 et seq. (Mass. Cont. Legal Ed., in Municipal Law—Selected Issues, 1980);
7. At the Social Law Library, a one-page Research Guide, #20 Municipal Law & Practice, has a good bibliography in this field.
8. Landlaw, Inc. publishes the Massachusetts Civil Service Reporter, three times a year, which contains the full text of Civil Service Commission decisions and indexes.
9. John E. Sanchez, State & Local Government Employment Liability (West Group, 1998) has a good summary of civil service law, and well as a treatise on civil liability arising therefrom.

D. Federal Civil Service

The federal government also uses a civil service system to protect the tenure of its employees. However, the federal civil service does not cover hiring. The tenure jurisdiction of the Merit System Protection Board is similar to the Massachusetts Civil Service Commission. There are two reasons why Massachusetts students of civil service should examine the federal system: Their jurisprudence is much more highly documented, reported and commented upon, and detailed questions not answered in Massachusetts jurisprudence are likely to be answered in the Federal system because the case load is many times greater. There is a special West Reporter of M.S.P.B. decisions, and one publishing company devoted entirely to the federal system. The best single resource for federal civil service procedure is Dewey Publications (see Web site below). All of this federal material is available on WestLaw.

E. Useful Internet Sites

1. Federal Civil Service

www.deweypub.com For Dewey Publications bulletin board, which contains information about publications such as "A Guide to Merit Systems Protection Board and Practice by Peter Broida" and other useful Internet links.

www.gpo.gov/mspb/index.html For the Merit System Protection Board's bulletin board containing lists of publication, personnel, maps, etc. which can be downloaded in word processor formats.

2. Massachusetts Civil Service

www.landlaw.com/Pages/Mcsr.html The Web site of the Massachusetts Civil Service Report has subscription information, and a searchable data base of Civil Service Commission decisions, for a fee.

www.state.ma.us/hrd For the Human Resources Division bulletin board, job listing, contains examination, schedules, and Rules.

www.state.ma.us/csc For the Massachusetts Civil Service Commission; containing forms, decisions, and personnel descriptions.

http://www.state.ma.us/dala/DALAHomePage.htm The Division of Administrative Law Appeals, containing lists of personnel, decisions, rules, and the office address.

II. THE BASICS OF CIVIL SERVICE COVERAGE

Of all public employees, only some are covered by civil service statutes in their appointment and removal from office. In this section we will review the distinctions on which this coverage is based. Of the adverse actions that can be taken against an employee, only some can be appealed to the Civil Service Commission. These are listed in Section 41 and described below. There are many employees not appointed under the civil service system, but who have civil service commission protection. There are also employees appointed through civil service examination and certification who enjoy no civil service protection.

A. Employee Status

Determining civil service rights can be confusing unless the proper nomenclature is understood. Every civil service employee can be described four ways in terms that affect status:

1. Positions

Every worker has a position, which can be: Permanent, temporary, seasonal, exempt, or consultant. Unless the worker is a veteran, or subject to some other special

inclusion, e.g., M.G.L. C.121B, §29 (fifth paragraph, housing authority employees) only workers appointed to permanent positions have civil service tenure. This is because a permanent appointment can be made only to a permanent position, and only employees permanently appointed can acquire civil service tenure.

a) Permanent Positions

A permanent position is an employment position of indefinite duration for which no termination is contemplated, to be filled by a succession of employees. e.g., M.G.L. C.31 §6 (fourth paragraph) (appointing authorities to notify Personnel Administrator whether a vacant position is permanent when they requisition eligible applicants). In state service a position is designated "permanent" by the House Committee on Ways and Means in the state budget; these positions were formerly designated by the line prefix "01".

b) Temporary Positions

The duration of a temporary position is assumed to be limited. In state service a position is designated "temporary" by the House Committee on Ways and Means in the state budget; these positions were formerly designated by the line prefix "02". Temporary positions cannot be filled with a permanent appointment.

c) Seasonal Positions

Summer positions, such as lifeguard, and other positions effective for only a short part of the year, are seasonal, M.G.L. C.31, §1, and not subject to the provisions of chapter 31.

d) Exempt Positions

Counsels, town managers, and other positions listed in M.G.L. C.31, §48, are exempt from civil service protections and procedures.

e) Consultants

Consultants are defined as "[A]ny person who, as a non-employee of the commonwealth, gives advice or service regarding matters in the field of his knowledge or training and whose compensation is payable from a subsidiary account coded under '03' in the expenditure code manual." M.G.L. C.29, §29.

2. Appointment Status

Every employee has an appointment, which can be permanent, temporary, provisional, or emergency provisional. These distinctions depend respectively on how the position came to be vacant, the future need for the work of the employee, whether the appointment is pending an examination, and whether the employee meets the minimum qualifications for the job, such as years of experience. Only permanently appointed employees can have civil service tenure. Appointments are also classified as original or promotional, but this is a different distinction, which has little effect on civil service tenure.

Formerly the status "temporary after certification" was widely used in state service for appointments. This meant that an applicant had taken an examination for a permanent appointment, and instead accepted a temporary appointment. However, the temporary appointment could go on for years, and there came to be thousands of employees of long tenure still serving under "temporary" appointments. In 1997 the Personnel Administrator abolished all "temporary after certification" appointments, converting such positions to permanent, retroactively. This gave such employees earlier seniority dates.

The Personnel Administrator limited the retroactivity to the first date in the present position of each such employee, so that regardless of long tenure, an employee recently promoted received a seniority date as of his or her date of promotion only. One case challenged this limitation and the Superior Court ordered full back seniority to the earliest of several "temporary after certification" appointments for an employee, and not limited to her most recent promotion date. *Dever v. Civil Serv. Comm'n*, Suffolk Superior Court, #98-22, (Hinkle, J., 1998). The Civil Service Commission acquiesced to this judgment.

3. Probation

Permanently appointed employees must serve a probationary period, usually six months (but twelve months for police officers) before they gain "tenure" for purposes of civil service law, and they are referred to as either probationary or tenured, M.G.L. C.31, §34. (For purposes other than civil service, employees may also be considered "probationary," e.g., under union contracts, but such status has no effect on civil service rights.) Section 34 allows appointing authorities to discharge probationary employees for unsatisfactory work, notwithstanding a contrary collective bargaining agreement that imposes a just cause standard and arbitration. *Leominster v. International Bhd. of Police Officers, Local 338*, 33 Mass. App. Ct. 121, 596 N.E.2d 1032 (1992).

4. Full or Part Time

Finally, every position has a work schedule, which may be full time, part time, seasonal, recurrent, intermittent, or reserve. Work schedule is a factor in the rules for calculating probationary periods, layoff priority, and promotional preference. These work schedule distinctions should not be confused with shift assignment, which is not controlled by civil service law; that is, an appointing authority can recruit and have a certification for part time workers, who cannot be hired as full time workers without another certification from the Human Resources Division, but moving a worker from day to night shift can be done without re-hiring. (See Section VII, *infra*.)

Intermittent police officers or fire fighters can become full time after they are certified and selected. The eligible list consists of all the intermittent employees in the order of their seniority so that the most senior intermittent employees are certified for full time position vacancies. Section 60.

So, for example, an employee can be described as a probationary full time firefighter, permanently appointed to a permanent position.

In difficult cases it is helpful to understand that civil service rights attach to positions, not the individual holding it. In a case where a civil service employee was transferred to a newly created agency by statute without any impairment of his civil service status, he lost that protection when he was later promoted to a non-civil service position, all positions in the agency being exempt from civil service, *McCarthy v. Civil Serv. Comm'n*, 32 Mass. App. Ct. 166, 587 N.E.2d 791 (1992).

B. The Appointment Process

1. Examination

Applicants can take examinations administered by the Human Resources Division, Section 16. Scores in even numbers up to 100 rank those who pass. Then the names are rearranged to give effect to statutory preferences for war time veterans, survivors of Police Officers and Fire Fighters who died as a result of injuries received in the course of their duties, racial minorities in some job titles, and residency in some municipalities, Section 26. The list so arranged is called an eligible list, Section 25.

2. Requisitions and Certification

When a vacancy occurs the employer must request a list of names from the Personnel Administrator, Section 6, who will then certify the names in the number of two for each vacancy plus one extra (2N+1, where N is the number of vacancies to be filled). Unless the certification has fewer names than 2 N+1, the employer must either appoint from that certification or forego making any appointment.

3. Appointments and Bypass

If the employer is to make appointments, the employer must appoint from the certification in order from the top of list, so that the first appointment is from the first three, the second appointment is from the top five, the third appointment is from the top seven, and so on. If anyone is skipped over in this the employer must immediately give reasons in writing for this bypass to the Administrator, Section 6. The bypass appointment is not effective until the Administrator has approved the reasons offered, *MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 666 N.E.2d 1029 (1997). A recent court decision held that the appointment of less than all of the candidates who had tied scores was a bypass under Section 27 and requires the approval by the Administrator of the reasons given by the employer, *Cotter v. Boston*, 73 Fed. Supp. 2d 62 (E.D. Mass. 2000) (Young, C.J.). In any large test there are hundreds of ties, and this will vastly increase the number of bypass requests, and impede the discretion of appointing authorities. This decision has not been acquiesced to by HRD, so there is likely to future litigation on this issue.

4. Short Lists

If the certification of candidates does not have the complete 2N+1 number of names, the employer may appoint outside of the list and make a provisional appointment. This frequently happens in promotions, where there are few candidates, particularly in small municipal departments. The Administrator is then supposed to

give another examination open to a larger poll of eligible candidates. For example if only two Police Lieutenants take the examination for Police Captain, when eligibility is limited to Police Lieutenants, the chief could provisionally promote a sergeant to the position. Then the Administrator should give a new test opening up the pool of applicants to both Lieutenants and Sergeants, Section 12.

5. Intermittent Employees

Where the employer has a reserve or intermittent force to supplement the full time force, then all appointments to full time are made from the ranks of the intermittent workers. Their names are certified in the order of seniority, so if such an employer has two full time vacancies the certification would contain the names of the five employees with the longest intermittent service, Section 60. Intermittent employees are originally hired from certifications as a result of examination, and in these departments that is the only entry-level position.

6. Transfers

An employer may hire someone of the same job title from another employer, Section 35. When this is done the certified candidates have no remedy for their disappointment.

C. Adverse Actions

The most common and serious adverse personnel actions are covered by Section 41, which requires that notice be given and an opportunity for hearing be offered, and in most cases be actually given.

1. Discharge

"The permanent, involuntary separation of a person from his civil service employment by his appointing authority." M.G.L. C.31, §1.

2. Suspension

A suspension is defined as a temporary involuntary separation, M.G.L. C.31, §1, to which should be added that it is imposed for disciplinary reasons, to distinguish it from a layoff. A suspension can be either definite, as for ten days, or indefinite *Board of Selectmen of Framingham v. Civil Serv. Comm'n*, 7 Mass. App. Ct. 547, 321 N.E.2d 649 (1979) (indefinite suspension ordered until an employee gets a haircut to conform to department standards of grooming).

a) More than Five Days

If the suspension is to be for more than five days a hearing before the appointing authority, M.G.L. C.31, §41, must precede it.

b) Five Days or Less

Shorter suspensions can be imposed summarily with notice to follow quickly and a hearing given only if requested in a timely manner, M.G.L. C.31, §41.

3. Layoffs and Abolition of Position

"A temporary discontinuance of employment for lack of work or lack of money" is a layoff, M.G.L. C.31, §1. If such discontinuance is to be permanent, the position can be abolished. Employees who are laid off or whose positions are abolished have special rights to reinstatement, employment in a lower position, M.G.L. C.31, §38, and to reemployment elsewhere, M.G.L. C.31, §39. See Section III, G, infra for special considerations in these cases.

Promotional employees facing layoff can elect to bump down to a lower position, but if they do they cannot appeal to the Civil Service Commission that they were laid off, Worcester v. Civil Serv. Comm'n*, 18 Mass. App. Ct. 278, 465 N.E.2d 273 (1984)*.

4. Transfers

"Transfers" in actual cases almost always turn out to be reassignment. This distinction is treated in Section II, C, 6, *infra*. A real transfer under M.G.L. C.31, §35 is usually voluntary, but if not voluntary it must be conducted in accordance with Section 41, but only if the employee was tenured prior to October 14, 1968. For employees hired after that date, they can appeal under Section 43 to the Commission, without any preliminaries under Section 41.

5. Demotion

A demotion, or "reduction in rank or compensation" as it is referred to in Section 41, is very rare, since presumably persons promoted were deemed fit only after careful consideration, and it usually would involve bumping someone else. Thus discipline of employees of rank, when it occurs, usually is in the form of suspensions and discharges.

6. Punishment Duty

For municipal police officers and fire-fighters, punishment duty may be imposed; that is, mandatory work without pay, *Ahern v. DiGrazia*, 412 F. Supp.2d. 638 (D. Mass.), *aff'd*, 429 U.S. 876, 50 L. Ed. 2d 160, 97 S. Ct. 225 (1976) (punishment duty held not to violate the Constitution), and the procedures for appeal and judicial review are almost the same as under Sections 41-45, M.G.L. Ch.31, §62.

D. Discipline Outside Of Commission Review

There are also various personnel actions not covered by Section 41 for which there is either no, or a very limited, right of appeal to the Civil Service Commission.

1. Paid Suspensions

There seems to be no authority to which a suspension with pay can be appealed under Section 43. Conceptually, there seems to be no difference between an employee being assigned to wait at home on call and a paid suspension.

2. Resignation

Disputes over resignations occur, such as when an employee attempts to revoke a valid resignation or claims fraud in inducing a resignation. This is another class of cases for which there is no Chapter 31 appeal, although sometimes an issue as to whether the actions of an employee actually amounted to a resignation will be considered if an appointing authority brings a motion to dismiss after an employee has sought a relief under Section 42 (*see* Section II, B, *supra*).

1. Punitive Work Assignment

Being assigned to demeaning work designated as punishment is not "punishment duty" within the meaning of Section 62 as long as regular wages are paid, *MacDonald v. Budd*, B.M.C. # 469585 (1980).

3. Wage Adjustments

The withholding of pay from an employee, who does not work, even if the reasons for the refusal to work are disputed, or even if the employee is injured or ill, is not a suspension according to Commission decisions, but this issue has not been the subject of reported decisions. In these situations an employee might find a remedy under M.G.L. C.149, §148, which requires the payment of wages to workers and which the state Attorney General is empowered to enforce.

4. Reprimands

Whether written or oral, justified or not, a reprimand cannot be appealed under Chapter 31, unless it is actually used as part of an employee evaluation under M.G.L. C.31, §6A, in which case it may be reviewed under Section 6C.

5. Reassignments and Transfers

Changes in duties, work location, supervision, job title, and work conditions can be great or small, but only those great enough to be called a "transfer" as the use of that term has developed, can appeal to the Civil Service Commission. Minor changes of this type are considered to be reassignments, without remedy under Sections 41 through 45.

a) Title and Position

The definition of "transfer" is found in the Personnel Administrator Rules, PAR.02, 265 Mass. Reg. 49, "The change in title of an employee to a title for which specifications show essentially identical qualifications and duties; a change from a position in a title in one departmental unit to a position in the same title in a different departmental unit." However, this area is unclear, and it should be noted that the definition of "department" has been fluid, Op. Att'y Gen'l, Jan. 19, 1971. "Departmental Unit" is defined in M.G.L. C.31, §1 as "a board, commission, department, or any division, institutional component, or other component of a department established by law, ordinance, or by-law."

b) Commuting Mileage

The Civil Service Commission has also considered commuting distance in distinguishing reassignments from transfers, so that a reassignment to a place no

farther from the residence of the appellant cannot be appealed while a transfer to a place substantially more distant could be. Thus, the greater burden on the particular employee acts to create a transfer. A state employee hired to travel or serve at locations across the state cannot appeal a reassignment to a new location, and such hiring conditions can be easily determined from the Certification (see M.G.L. C.31, §1 for definition) which would designate the location for the position as "statewide". In effect, this commuting distinction eliminated municipal employees from being transferred and having a right to appeal.

6. Loss of Extra Pay

Loss of extra paid details is not an action covered by Sections 41-45, *Board of Selectmen v. Municipal Court of Boston*, 11 Mass. App. Ct. 659, 418 N.E.2d 640 (1981). Loss of shift differentials has not been decided in a reported case, but it would probably be treated the same way.

III. DISCHARGES AND OTHER ADVERSE ACTIONS

Discharges, the most serious action taken before the Civil Service Commission, are also the actions most often appealed. More often than not, among the cases that go to Court, the appellant was a police officer. In the following sections we will explain briefly some of the procedures in such a case, which are typical of other disciplinary cases such as suspensions. Then the distinction between discharges and non-disciplinary personnel actions, particularly layoffs, will be discussed. Thereafter, in the next section, more detailed treatment is given to some important issues in this area.

The parties in a typical discharge case will be the employee, represented by either union or private counsel, and the appointing authority, represented by the Town Counsel, Corporation Counsel, City Solicitor, etc. The Civil Service Commission itself would be a party in the litigation stages, represented by an Assistant Attorney General, who may join forces with one of the previous two parties. Where the positions are the same, the Attorney General will usually leave the prosecution of the case entirely up to its co-party, a procedure known as devolution.

A. Appointing Authority Action and Hearing

After investigating misconduct of an employee the appointing authority will give proper notice and the appointing authority or its designee will hold a hearing. The person designated to hold this hearing need not be disinterested, unless both parties so agree under Section 41A, McIsaac *v. Civil Serv. Comm'n*, 38 Mass. App. Ct. 473, 648 N.E.2d 1312 (1995). At this hearing the employee is usually present with counsel, and he is allowed to question witnesses and call his own witnesses. The notice, time limits, and other procedures for this action are all prescribed in M.G.L. C.31, §41. The accuracy of the notices is less precise than would be found in a criminal court, *Powers v. District Court*, 2 Mass. App. Ct. 816, 309 N.E.2d 889

(1974). However, the appointing authority must limit its decision to the charges that were in the notice to the employee. *Gardner v. Bisbee*, 34 Mass. App. Ct. 721, 615 N.E.2d 603 (1993).

B. Appeal Regarding Procedural Defects

If the employee (now called an "appellant") claims that the procedures of Section 41, (see section II, B, *supra*, were not followed, e.g., he did not receive copies of the appeal statutes, he may within ten days appeal to the Civil Service Commission.

1. Decision Under Section 42

The appellant will have an opportunity to prove that his procedural rights under Section 41 were violated, while the Town (now called an "appointing authority") can try to show that the mistake, if there was one, was harmless error.

2. Proof of Prejudice

Since the statute requires the appellant to show that his rights were prejudiced by the error, the error must be serious, such as lack of a hearing before the appointing authority, or lack of opportunity to cross-examine witnesses at that hearing. If the appellant only proves that a notice of decision was received a day late, for example, he would probably lose unless perhaps the appellant was disabled by a heart attack caused by anxiety waiting for the decision that extra day.

Where a copy of an irrelevant statute was not given to the appellants, although by law it should have been, and where the notice of charges lacked sufficient specificity, but the appellant was nonetheless well aware of the nature of the charges against him, his complaint was denied because his right were not prejudiced, *Huntoon v. Quincy*, 349 Mass. 9, 206 N.E.2d 63 (1965).

3. Prejudice Per Se

Traditionally the Commission has considered an Appellant who can prove that no Section 41 hearing at all was given by the appointing authority to have met the prejudice standard. Thus the Commission has found lack of a hearing being so serious a violation of an employees right to be prejudice *per se*. Whether this doctrine will be adopted by the Courts is questionable now in light of *Mello v. Mayor of Fall River*, 22 Mass. App. Ct. 974, 495 N.E.2d 876 (1986) (employee fired for non-residency without any hearing). The Court, affirming a summary judgment, held that she could not have prevailed at a hearing, so none was necessary. The Civil Service Commission was not a party in that case.

4. Repeat Attempts

If the appellant wins his complaint under M.G.L. C.31, §42 he is ordered reinstated without loss of back pay or other rights, but it is usually possible for the appointing authority to re-initiate the adverse action and hear the same charges. "The

authority could properly proceed anew after a previous effort had been invalidated as procedurally defective." *Camerlengo v. Civil Serv. Comm'n*, 382 Mass. 689, 414 N.E.2d 350 (1980); *Hill v. Trustees of Glenwood Cemetery*, 323 Mass. 388, 82 N.E.2d 238 (1948). The new hearing does not retroactively remedy the old one, and the employee is entitled to compensation until properly discharged.

5. Mandamus Under Section 42

Under the third paragraph of Section 42 the Courts have concurrent jurisdiction with the Civil Service Commission in cases where employees allege an illegal adverse action under Section 41, e.g., discharge, suspension, etc., particularly discipline that did not follow the proper procedures. Employees must elect to either go to the Civil Service Commission or to Court, *Bergeron v. Superintendent*, 353 Mass. 331, 231 N.E.2d 379 (1967). They cannot go to Court after losing at the Civil Service Commission, *Beaumont v. Boston City Hosp.*, 338 Mass. 25, 153 N.E.2d 656 (1958), nor after having an untimely filed appeal dismissed by the Civil Service Commission, *Iannelle v. Fire Comm'r of Boston*, 331 Mass. 250, 118 N.E.2d 757 (1954).

C. Just Cause Hearing Before the Commission

The most important hearing a discharged employee will have is the hearing under section M.G.L. C.31, §43 at the Civil Service Commission. He is more likely to win his job back at this level than either before at the appointing authority or after in the Courts.

Post termination hearings under Section 43 with the possibility of reinstatement with back pay have been held to satisfy the Constitutional requirement of the Due Process Clause. This is true even where the Civil Service Commission decision is delayed almost three years, *Cronin v. Town of Amesbury*, 895 F. Supp. 75 (D. Mass. 1995), *aff'd*, 81 F.2d 257 (1st cir. 1996)(per curiam).

1. Hearing Under Section 43

The Civil Service Commission assigns a lawyer as a hearing officer who is disinterested, which may not be the case with the appointing authority, *Dwyer v. Commissioner of Ins.*, 375 Mass. 227, 376 N.E.2d 826 (1978). The Civil Service Commission hearing is de novo, *Sullivan v. Municipal Court of Roxbury Dist.*, 322 Mass. 566, 78 N.E.2d 618 (1948), with a fuller opportunity to develop evidence than at the appointing authority's hearing. The Commission's hearings currently take about nine months from first filing to final decision. Under the statute a special nomenclature is used: Section 42 procedures are called "complaints", while Section 43 procedures are called "appeals". The appeal hearings under section 43 are tape recorded, and the decisions consist of a hearing officer's report that includes numbered findings of fact, and a decision of the Commission. There is no statutory requirement that Commission decisions contain a statement of reason, *Commissioner of Revenue v. Lawrence*, 379 Mass. 205, 396 N.E.2d 992, 996 (1979).

2. Just Cause

In considering evidence the statute requires that the Commission affirm the action of the appointing authority if the action has been proven justified. "Justified" means "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law." *Sullivan*, *supra*. The same case held that hearings under Section 43 are de novo, so evidence is heard without reference to the previous Section 41 hearing. A consolidated appointing authority and Civil Service Commission hearing can be held to simplify the process, M.G.L. C.31, §41A, although this is rarely done.

At least in police departments, the Commission must respect discipline imposed unless there are "'overtones of political control or objectives unrelated to merit standards of neutrally applied public policy'" *Boston Police Dep't v. Collins*, 48 Mass. App. Ct. 408, 721 N.E.2d 928 (2000).

3. Retroactive Cures

If the appointing authority proves facts that reasonably justify its action at the time the action was taken, then that action cannot be later overruled by the Commission based on later occurring conduct or events. In *Watertown v. Arria*, 16 Mass. App. Ct. 331, 451 N.E.2d 443 (1983), the appellant was discharged for drug dependence, alcoholism, and excessive use of sick leave. The Commission's decision to reinstate the Appellant after a suspension, based on evidence that since his discharge the appellant was cured of these problems, was overruled. This case casts doubt on the Commission's ability to modify alcoholism discharges to suspensions to give the appellant time to obtain medical treatment, and a discharge based on a failure to pay a union service fee to a suspension until that fee is paid. In considering evidence of misconduct and mitigation, the clock stops when the appointing authority has acted. However, if discharge is deemed too harsh for a continuing offense and if reform is probable, an indefinite suspension may be a more appropriate punishment, *Board of Selectmen of Framingham v. Civil Serv. Comm'n*, 7 Mass. App. Ct. 547, 321 N.E.2d 649 (1979) (employee refuses to have a haircut). See section IV, C, "Modification of Penalties," infra.

A recently reported case from Somerville District Court threw some doubt into this area, where the Court ordered additional findings to be reported where the evidence showed a firefighter discharged for intoxication while on duty, had been sober for two and a half years thereafter. The Court did not order reinstatement, only that the Commission has a chance to consider this issue, which had not been reported in the hearing officer's findings, consistent with *Watertown v. Arria*. The case was *McSweeney v. Civil Serv. Comm'n*, Somerville Dist. Ct., 9010-CV-519, M.L.W. Dec. 2, 1991, p.20 (M.L.W. #16-034-91)

4. Standard of Proof

The standard of proof for the appointing authority is the civil—preponderance of evidence—standard. Therefore, a criminal conviction for the same act charged in a

disciplinary procedure would support a finding consistent with the conviction. However, acquittal of criminal charges under the same circumstances does not preclude the appointing authority from finding that a preponderance of the evidence supports the adverse action, because the acquittal involved the higher criminal standard of proof, *Commissioners of Civil Serv. v. Municipal Court*, 359 Mass. 211, 268 N.E.2d 349 (1971); *Albert v. Municipal Court of Boston*, 388 Mass. 491, 446 N.E.2d 1385 (1983). "It is settled that the just cause required by G.L. C.31, §§41, encompasses conduct beyond that falling within the prohibition of the criminal law." *Faria v. Third Bristol Div.*, 14 Mass. App. Ct. 985, 439 N.E.2d 842 (1982). Further evidence of the civil nature of the hearings is the lack of error when appellants proceed without counsel, or are counseled only by laymen, *Powers v. District Court of S. Essex*, 2 Mass. App. Ct. 816, 309 N.E.2d 889 (1974).

5. Illegally Seized Evidence is Admissible

Evidence suppressed in a criminal trial because it was illegally seized was properly admitted in a Civil Service Commission hearing, *Kelly v. Civil Serv. Comm'n*, 427 Mass. 75, 691 N.E.2d 557 (1998).

6. Off-Duty Misconduct

While employees can be disciplined for off duty misconduct there must be a nexus to their employment. This depends partially on the position held by the employee, Police Officers being the most sensitive. In *School Comm. of Brockton v. Civil Serv. Comm'n & Wise*, 43 Mass. App. Ct. 486, 684 N.E.2d 620 (1997), the Court upheld the reinstatement of a school custodian, who had been arrested and then discharged for a homosexual act with a consenting adult in a public park, remote from the school while not on duty. In *Fire Chief of East Bridgewater vs. Plymouth County Retirement Bd.*, 47 Mass. App. Ct. 66, 710 N.E.2d 644 (1999), the Court upheld the reinstatement of a firefighter charged with indecent assault while off duty, and where the victim was the wife of a co-worker. In *City Of Cambridge vs. Baldasaro,* an off-duty, male Heavy Equipment Operator who had used vulgar disparaging language as he yelled at a female traffic enforcement officer who was ticketing his car, was vindicated, 50 Mass. App. Ct. 1 (2000). It was apparent that Mr. Baldasaro was punished because he was a city employee, as opposed to anyone else who might have yelled at the Meter Maid.

D. Judicial Review in Superior Court

Decisions of the Civil Service Commission can be appealed by any party thereto to the Superior Court, M.G.L. C.31, §44. Such cases must be brought within thirty days from receipt of the Civil Service Commission decision. The Court will hear argument on the record from the appellant and the appointing authority, although argument can be waived. The procedures at this stage are described later in detail, see "The Decision Under Section 44", section V, B, *infra*.

E. Remedy and Disposition

At this stage the appellant can be ordered reinstated without loss of compensation or other rights, with back pay subject to normal contract rules of mitigation, *Police Comm'r of Boston v. Ciccolo*, 356 Mass. 555, 254 N.E.2d 429 (1969).

1. Remand

The Court can also remand the case to the Civil Service Commission for further hearing and consideration. Such a remand does not end the case, so no further appeal to

a higher court can be taken, *Kelly v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 908, 682 N.E.2d 922 (1997). Also, if the plaintiff wants to appeal the new decision of the Commission, he need not file a new complaint, or pay a new filing fee in Superior Court. Instead the Commission must certify the new record, and start the Rule 12© procedure again.

2. Attorneys Fees and Costs

Limited attorneys fees and expenses may be awarded a successful appellant, M.G.L. C.31, §45. The expenses of preparing the transcript can be assessed against an unsuccessful appellant, M.G.L. C.30A, §§14(4).

3. Back Pay

In calculating back pay, only straight salary is considered without enhancements based on overtime or outside duty details, *Board of Selectmen of Framingham v. Municipal Court of Boston*, 11 Mass. App. Ct. 659, 418 N.E.2d 640 (1981). The same case held that the appointing authority must pay interest on the back pay.

Normally back pay is worked out between the appointing authority and the appellant. Only occasionally does a Court have to get involved in computing the amount, and if a dispute arises, the case can be referred to the Civil Service Commission for a hearing on the amount of back pay.

F. Layoffs and Non-Disciplinary Actions

In addition to the disciplinary matters covered by the civil service tenure statutes, non-disciplinary removals, layoffs, abolition of positions, transfers, and reductions in rank and compensation are covered. These cases are distinguished by the lack of fault on the part of the employee, who can be laid off for lack of money, *Debnam v. Belmont*, 388 Mass. 632, 447 N.E.2d 1237 (1983) (municipal budget deficit), and their positions can be abolished in reorganizations, *Camerlengo v. Civil Serv. Comm'n*, 382 Mass. 689, 414 N.E.2d 350 (1981) (steam fitter who worked mainly at a particular public housing project was no longer needed after that property was sold). In these cases good faith on the part of the appointing authority is a critical issue, and if it is lacking, there are grounds for reversal, as where a reorganization or abolition of jobs is a pretext for firing someone, *Cambridge Hous. Auth. v. Civil Serv. Comm'n*, 7 Mass. App. Ct. 586, 389 N.E.2d 432 (1979). Employers will not be second guessed if a shortfall of funds is anticipated, when they select a position to eliminate, *Gloucester v. Civil Serv. Comm'n & D'Antonio*, 408 Mass. 292, 557 N.E.2d 1141 (1990). In the subsections that follow the procedures described for layoffs, the same procedures also apply to abolition of position for lack of work or lack of money.

1. Burden of Proof Shifted.

The proof required in abolition cases does not concern the conduct of the appellant, which usually requires the appointing authority to produce less evidence than in disciplinary cases, *School Comm. of Salem v. Civil Serv. Comm'n*, 348 Mass. 696, 204 N.E.2d 707 (1965). In these cases the burden of proof is on the employee to prove

bad faith, *Commissioner of Health & Hosps. v. Civil Serv. Comm'n*, 23 Mass. App. Ct. 410, 502 N.E.2d 956 (1987).

2. Layoff and Bumping

Under Section 39 employees can be laid off only if they are the least senior in their job title in their departmental unit. An employee notified of his intended layoff and right to a hearing can within seven days elect instead to be demoted to a lower rank if there are employees in such positions of less seniority. Those employees in turn could be laid off instead, starting the bumping process over again. An employee who elects to bump has no right to appeal to the Civil Service Commission under Section 41 or 42. See section IV.A.16, *infra*.

a) Layoff Selection Priority

Provisional employees must be laid off before any temporarily appointed employees, and temporarily appointed employees must be laid off before any permanently appointed employee, Personnel Administration Rules, PAR.15(2). Large state departments have often negotiated special layoff selection procedures with their labor unions. These deal principally with reassignments of employees to new locations, which they refer to as "bumping" when someone else will be displaced. The employees to be reassigned are almost always told that they will be laid off if they do not accept the offered reassignment. Even if such an employee enjoys civil service tenure, the question of whether of not they can be laid off because of their seniority is often ignored. Once they accept the reassignment, which is deemed voluntary, they have no recourse under civil service law. Technically, civil service bumping only refers to the least senior person displacing someone of a lower rank.

Within each category, provisional, temporary, or permanent, layoff selection of employees is by reverse seniority, except veterans having super seniority. Qualified wartime veterans do not have any preference however, if they are involuntarily demoted instead of being laid off. *Provencal v. Police Dep't of Worcester*, 423 Mass. 626, 670 N.E.2d 171 (1996). In deciding which employees have to compete for retention on seniority lists, employers cannot use artificial divisions, so that, for example, if layoffs are needed at one hospital, the Department owning that hospital must look for the most junior employee in the whole system of hospitals and then move people around to fulfill staffing needs, *Herlihy v. Civil Serv. Comm'n*, 44 Mass. App. Ct. 835, 694 N.E.2d 369 (1998).

b) Seniority

Civil service seniority is determined by calculating the elapsed time from the first date of permanent appointment, regardless of dates of changes in positions. Civil service seniority is used to determine layoff selection and retirement dates. An employee with interrupted service counts seniority,

subtracting the time of the interruption if he has worked twice as long as the interruption since his return. Until he has worked that long he counts his seniority only from the date of his return. The service is not considered to have been interrupted if the interruption was for less than six months, if it was because of a lay off, compassable injury, illness, educational leave, or military service. M.G.L. C.31, §§33. There are other seniority systems, such as departmental seniority, on time in grade, which are used for other purposes such as shift bidding or promotional eligibility.

There are special rules for employees who transfer between appointing authorities. See Section 33, third and fourth paragraphs. For purposes of layoff, disabled veterans have super-seniority, that is their seniority is more than everyone else's, M.G.L. C.31, §26. However, this super-seniority does not protect anyone from demotion to a lower position, *Provencal v. Police Dep't of Worcester*, 423 Mass. 626, 670 N.E.2d 171 (1996). Part time employees have less seniority less than everyone else, M.G.L. C.31, §33.

c) Departmental Units

An employee can bump someone only within his departmental unit. Such a unit is defined in Section 1 as any subdivision created by ordinance, bylaw, or statute. It is possible for one appointing authority to have several departmental units. For example, the Commissioner of the state Department of Mental Health is the appointing authority for most of his subordinates, M.G.L. C.19, §2, but the department is divided into regional service areas, M.G.L. C.19, §12, and employees can be laid off within one area without regard to the seniority of other employees of the same job titles in other areas.

3. Reinstatement Rights

For five years after layoff an employee has a right to be reinstated into his departmental unit in the same or similar position before anyone new is appointed, M.G.L. C.31, §39. Reinstatement selection is by seniority.

4. Reemployment Rights

The Personnel Administrator is required to certify (send out to employers) the names of laid off employees before all others when certifying names to fill vacancies for which he considers the laid off employee qualified, which may be in other departments or involve demonstration of skills not previously used. Op. Att'y Genl. April 25, 1975, p.134. Such employees are listed in order of seniority, and their names remain on eligible lists for two years. M.G.L. C.31, §40.

IV. SPECIAL ISSUES IN ADVERSE ACTIONS

Before a case reaches the Courts several issues may arise separate from just cause that require careful adjudication. The principal jurisdictional, evidentiary, and dispositional problems are described here.

A. Special Jurisdiction Issues

If an adverse action covered by Section 41 occurs, e.g., suspension, there may be factors in a particular case that would preclude Civil Service Commission jurisdiction. Only holders of certain types of positions can appeal, and special legislation is frequently used to both expand, e.g., Acts of 1960, Ch.135 (Certain listed Suffolk County Jail employees, discharged after seven years service can appeal to Civil Service Commission) and contract the rights of certain classes of employees. Probationary periods, provisional status, and administrative law considerations further filter the flow of appeals. One major class of non civil service appointed employees who enjoy rights to appeal separations from service are veterans of three years' service, M.G.L. C.30, §9A.

1. Unauthorized Absence Discharges

Prominent among this class are separation for unauthorized absence, covered by M.G.L. C.31, §38, the fifth paragraph of which explicitly removes these cases from the jurisdiction of the Civil Service Commission and the judicial branch, under Sections 41 through 45, "rather an anomaly in the civil service laws", *Canney v. Municipal Court of Boston*, 368 Mass. 648, 335 N.E.2d 651 (1975). (There is a very limited right to appeal in these cases under M.G.L. C.31, §38, fourth paragraph and M.G.L. C.31, §2(b).) The *Canney* case did hold that where malingering and feigned illness is suspected the employee can try to clear himself through an action for declaratory judgment. However, there have been cases of employees unable to attend their job because of undisputed illness, and there seems to be no remedy to preserve their positions if the Appointing Authority uses Section 38.

2. Too Late

Appeals at the Civil Service Commission must be filed within ten business days from receipt of notice of the action of the appointing authority. Commission, *Iannelle v. Fire Comm'r of Boston*, 331 Mass. 250, 118 N.E.2d 757 (1954) (the time limit was five days in 1954). Not even the parties agreement can extend this jurisdictional deadline, *Katz v. Civil Serv. Comm'n*, Norfolk Superior Court, #84524, Dec. 14, 1987.

3. Too Soon

An appeal filed before the receipt of notice of action of the appointing authority is premature. *Director of Civil Defense v. Civil Serv. Comm'n*, 373 Mass. 401, 367 N.E.2d 1168 (1977).

4. Provisional Appointment

An employee holding only a provisional appointment cannot appeal *Sullivan v. Commissioner of Commerce & Dev.*, 351 Mass. 462, 221 N.E.2d 761 (1966).

5. Provisional Promotion

A permanently appointed employee who was provisionally promoted to another position and has been demoted back to his permanent position cannot appeal that demotion, *Dallas v. Commissioner of Pub. Health*, 1 Mass. App. Ct. 768, 307 N.E.2d 589 (1974). Of course he could appeal a suspension, discharge, or other action adversely affecting his enjoyment of the position in which he has civil service tenure.

6. Untimely Request for Prior Hearing

Failure to timely request a Section 41 hearing before the appointing authority in the case of punishment duty or suspensions of five days or less, bars a later appeal, *Henderson v. Mayor of Medford*, 320 Mass. 663, 70 N.E.2d 712 (1947).

7. Exempt Position

The employee's position is not classified under Chapter 31 and therefore exempt from civil service, e.g., agency counsels, M.G.L. C.31, §48. See also *City Council of Boston v. Mayor of Boston*, 383 Mass. 716, 421 N.E.2d 1202 (1981) (Mayor's clerical staff exempt under city charter).

8. Temporary Position

If the employee holds a temporary position he cannot appeal, since a permanent appointment cannot be made to a temporary position and only permanently appointed persons can gain tenure under Section 39, *Cox v. Civil Serv. Comm'n*, 3 Mass. App. Ct. 793, 338 N.E.2d 354 (1975). See also *Durgin v. Director of Civil Serv.*, 312 Mass. 310, 44 N.E.2d 781 (1942) (definition of temporary appointment, distinguished from permanent recurrent). However, if an employee is improperly classified as temporary, the Commission has granted relief.

9. Seasonal Position

Seasonal employees are exempt from the provisions of Chapter 31, M.G.L. C.31, §1.

10. Probation Period

An employee who has not yet completed a probationary period cannot appeal, M.G.L. C.31, §34, *New Bedford v. Civil Serv. Comm'n*, 6 Mass. App. Ct. 549, 378 N.E.2d 1014 (1978). Since an employer's last chance to discharge someone without having to worry about appeals is on the last day of a probationary period, this is the time when many discharges occur, and there are many adjudications of the exact minute when the work first started or last ended.

11. Specificity of Sec. 42 Complaint

A complaint under Section 42 fails to state "... specifically in what manner the appointing authority has filed to follow [the requirements of Section 41]." M.G.L. C.31, §42. A dismissal for this reason does not affect the standing of the appellant's appeal under Section 43.

12. Criminal Indictment

If an employee was suspended under M.G.L. C.268A, §25, which provides for suspension of municipal employees under criminal indictment for misconduct in office, or under M.G.L. C.30, §59 which provides for the suspension of state employees under similar circumstances, then he cannot appeal to the Civil Service Commission, *Bessette v. Commissioner of Pub. Works*, 348 Mass. 605, 204 N.E.2d 909 (1965). See "Indefinite Suspension Pending Trial," section IV, B, 5, *supra*.

13. Mootness

Where a disciplinary action is rescinded before it can be appealed and heard no administrative review is available.

14. Arbitration

Where binding arbitration has been ordered by the state Labor Relations Commission under M.G.L. C.150E, §8 the Civil Service Commission must dismiss a complaint of the same employee under Section 42, M.G.L. C.31, §42.

15. Appointment Rescinded

Person removed from a position because another person was reinstated to the same position a result of an order of the Civil Service Commission under Section 43, *Nawn v. Board of Selectmen of Tewksbury*, 4 Mass. App. Ct. 715, 358 N.E.2d 454 (1976).

16. Demotion Election under Sec. 39

Laid off employees who accept demotion under M.G.L. C.31, §39 cannot contest the layoff under Sections 41-45, *Worcester v. Civil Serv. Comm'n*, 18 Mass. App. Ct. 278, 465 N.E.2d 273 (1984).

B. Self Incrimination

Every person enjoys constitutional rights not to be compelled to testify in administrative hearings in a manner that would tend to be incriminating for himself, Fifth Amendment and Massachusetts Declaration of Rights, Article XII. However, this restriction only extends to criminal offenses, and most civil service disciplinary hearings involve lesser infractions.

1. Information, Non-Criminal Matters.

Where no crime is charged, or the involvement with the criminal justice system is over and past, an employer can question his employee about job related matters, and discharge the employee if not answered satisfactorily, *Silverio v. Municipal Court of Boston*, 375 Mass. 623, 274 N.E.2d 379 (1969). There is no privilege to protect an employee from embarrassment.

2. Employees Privilege to be Silent

An employee can claim Constitutional privilege and refuse to answer questions of his employer that would tend to incriminate him unless granted immunity from prosecution, *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967). An employee cannot be discharged merely for asserting this privilege, *Carney v. Springfield*, 403 Mass. 604, 532 N.E.2d 631 (1998). An employee granted such immunity can use it to have his indictment dismissed, *Commonwealth v. Dormaday*, 423 Mass. 190, 671 N.E.2d 832 (1996). Before an employee can be disciplined for refusing to answer, he must be given transactional immunity, and he must be warned of the specific disciplinary consequences of refusing to answer. "Moreover, an employee's awareness that other employees have been punished in similar circumstances does not render recitation of the warning unnecessary." *Carney v. Springfield*, op cit.

3. Employee Claiming Privilege

The privilege against self-incrimination offers no protection against administrative sanctions which are not criminal or penal in nature, such as loss of a job, *United States v. Indorato*, 628 F.2d 711 (1st Cir. 1980) (State Police Lieutenant discharged while asserting privilege), as long the charges are proven with evidence not from the appellant's mouth. If there are other witnesses and evidence the hearings can be held. As in other civil matters, the appellant's silence can be used as evidence for adverse inferences, and the appellant's choice to refrain from offering defenses does not violate his Fifth Amendment right. At such a hearing the appellant is free to call other witnesses and cross-examine without waiving his privilege.

While holding a hearing with an Appellant asserting privilege may not violate his Fifth Amendment right there may be a Fourteenth Amendment problem of due process. "... due process is not observed if an accused person is subjected, without his consent, to an administrative hearing on a serious criminal charge that is pending against him. His necessary defense in the administrative hearing may disclose his evidence long in advance of his criminal trial and prejudice his defense in that trial." *Silver v. McCamey*, 221 F.2d 873, 874-75 (D.C. Cir. 1955).

However, this does not cover every situation. There may be assent, where the Appellant waives his privilege by trying to clear himself with direct testimony. The crime may be minor and not of such seriousness that civil service hearings would violate due process. The disciplinary charges may be and usually are different from the criminal offense. Finally, there may be an overriding public concern with removing the employee, e.g., a school custodian, caught raping a child, but not prosecuted because of refusal of the victim to testify, could doubtless claim his privilege not to testify, but it is unlikely that he could use a due process claim to prevent his permanent and immediate removal from his job.

4. Indefinite Suspension Pending Trial

The statutes do permit indefinite suspension of an employee who has been indicted, M.G.L. C.31, §59 (state employees) and M.G.L. C.268A, §25 (municipal, regional, and county employees). However, it does mean a long wait until the criminal trial and its appeals are over, and if the employee is not convicted he must be reinstated with full back pay.

5. Indictment as Just Cause

While proceeding under Section 41 may be faster and the civil standard of proof more certain, in that event the appointing authority will need to have evidence of the underlying offense, which is unnecessary under the suspension during indictment statutes. Thus the civil service hearings will turn into preliminary criminal trials unless the charges are different. There is an argument that the fact of indictment alone, of a person in a position of public trust, could bring such infamy and disrepute to his employer that it could be just cause to suspend under Section 41 without any evidence of the underlying offense, but there is no authority for this position.

6. Postponing Civil Service Hearings

Having timely claimed his right to a hearing before the Civil Service Commission the appellant may want to postpone the hearing until after a criminal trial if one is expected. The appointing authority may join in this request if the public prosecutor does not want his evidence disclosed. If the Commission does postpone the hearing and the appellant does not object, he cannot later complain that he was not accorded due process, *Huntoon v. Quincy*, 349 Mass. 9, 206 N.E.2d 63 (1965). The Fifth Amendment does not require delay when an employee is facing criminal charges arising from the same events, *Diebold v. Civil Serv. Comm'n of St. Louis County*, 611 F.2d 697 (8th Cir. 1979) (injunction to delay civil service discharge hearing denied alleged child molester).

7. Admission to Sufficient Facts

When a criminal defendant admits to sufficient facts and the case is continued without a finding, this is not equivalent to a conviction. If the same charges are to be considered in a disciplinary hearing, then the Commission can weigh the admission against any contrary evidence the appellant introduces without giving preclusive effect to the admission, *Burns v. Commonwealth*, 430 Mass. 444, 720 N.E.2d 798 (1999).

C. Modification of Penalties

Sometimes it happens that an employee's misconduct merits a different punishment than was given. In addition to affirming or reversing, "The Commission may also modify any penalty imposed by the appointing authority." M.G.L. C.31, §43, *School Comm. of Brockton v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 486, 684 N.E.2d 620 (1997); *Trustees of State Library v. Civil Serv. Comm'n*, 3 Mass. App. Ct. 724, 325 N.E.2d 302 (1975). The Court, in reviewing decisions under Section 44 can also modify penalties, *Building Inspector of Quincy*

v. Justice of the Boston Municipal Court, 22 M.L.W. 1370, Suffolk Superior Ct. #93-1720-G Borenstein, J. (1994) (discharge of employee upheld by Civil Service Commission, reduced to 15 day suspension by Boston Municipal Court, and that modification and reinstatement upheld by the Superior Court). However, the Commission's decision to modify must be justified by reasons stated in the record, *Police Comm'r of Boston v. Civil Serv. Comm'n & Clark*, 39 Mass. App. Ct. 594, 659 N.E.2d 1190 (1997).

"Modification" is not limited to mitigation, for a suspension can be changed to a discharge, for example, to avoid punishment disparities. *Campbell v. Boston Municipal Court*, 20 M.L.W. 363, Middlesex Superior Ct. #91-1733 O'Toole, J. Of all the decisions the Commission makes modifications are the most likely to be litigated, and they are the most difficult to decide. They always involve proven misconduct or unfitness, along with mitigating or enhancement factors viewed variously by different people.

1. Degree of Responsibility

An important factor in the decisions in these cases is the type of position held by the appellant. Where a police officer had sexual intercourse with a drunken woman whom he had taken into protective custody, the Commission, viewing the evidence as indicating consent and seduction by the woman, modified his discharge to an eighteen-month suspension. The Court describing carefully the high standard of conduct required of Police Officers reversed the decision of the Civil Service Commission and affirmed the discharge. *Police Comm'r of Boston v. Civil Serv. Comm'n*, 22 Mass. App. Ct. 364, 494 N.E.2d 27 (1985).

However, where an illiterate, mentally retarded cemetery worker was disruptive, violent, and insubordinate, the modification of a discharge to an eighteen month suspension was upheld, since his duties involved no discretion, *Dedham v. Civil Serv. Comm'n*, 21 Mass. App. Ct. 904, 483 N.E.2d 836 (1985).

2. Substantial Evidence

As should be said for the other elements of a decision, the modification aspect must be supported in the record by substantial evidence. Where the Commission concluded that poor management contributed substantially to the poor performance in the operation of an institutional stock room for which the appellant was discharged, and therefore modified the discharge to a suspension, it was overruled when the Court found the conclusions about poor management unsupported in the findings of fact, *Metropolitan Dist. Comm'n v. Civil Serv. Comm'n*, 13 Mass. App. Ct. 20, 429 N.E.2d 1026 (1982).

3. Multiple Offenses

When there are several charges against an employee and only some of them are proven there are often grounds for modification. But not always: In *Daley v. District Court of W. Massachusetts*, 304 Mass. 86, 97-98, 23 N.E.2d 1 (1939), the Court upheld the discharge of a police chief despite the district court having thrown out thirty-four of the thirty-five charges against him, the remaining charge being drunk driving. "It

cannot be said as a matter of law that [sustaining the single charge] is not an adequate ground for ... removal."

D. Off Duty Misconduct

A regulation describing "conduct unbecoming an officer" as "[T]he commission of any specific act or acts of immoral, improper, disorderly or intemperate personal conduct which reflects discredit upon the officer himself, upon his fellow officers or upon the Police Department." was held constitutional when applied to a drunken police officer who fought and threatened other officers and shot someone at his own family cookout. *McIsaac v. Civil Serv. Comm'n*, 38 Mass. App. Ct. 1312, 648 N.E.2d 1312 (1995).

E. Reconsideration and Timeliness of Appeal

The time (twenty days) for filing a petition under Section 44 is counted from the date of the substantive decision of the Commission under Section 43, and subsequent motions to reconsider or rehear do not extend this date. *Curley v. Lynn*, 408 Mass. 39, 556 N.E.2d 96 (1990). Thus it is possible that there could be a case pending in Court while the Commission is reconsidering the same facts. It is also possible that Section 42 decisions (procedural violations alleged) will be reviewed judicially while Section 43 (just cause) issues will still be pending before the Commission, since the Commission often bifurcates these issues.

V. JUDICIAL REVIEW ISSUES

The occasion of judicial review arises when either an appellant or an appointing authority or both timely file petitions under M.G.L. C.30A, §14, alleging error in a Civil Service Commission decision. Under M.G.L. C.31, _44 timely is thirty days after a Civil Service Commission decision in any case involving a hearing by the Civil Service Commission.

A. Grounds for Review under the Administrative Procedure Act

In M.G.L. C.30A, §14 are listed the seven grounds that a party may seek judicial review of a Civil Service Commission decision and which the Court may use to over rule the Commission. Most plaintiffs, in a surplus of enthusiasm, list all seven grounds in their complaint. The grounds, briefly considered are:

1. Unconstitutionality

A decision of the Civil Service Commission should be reversed if it violates someone's constitutional rights, e.g., *Mayor of Somerville v. District Court of Somerville*, 317 Mass. 106, 57 N.E.2d 1 (1944) (a married woman discharged pursuant to a municipal ordinance barring the employment of married women); or if it is based upon evidence seized in violation of the appellant's constitutional rights, e.g., *Board of Selectmen of Framingham v. Municipal Court of Boston*, 373 Mass. 783, 369 N.E.2d 1145 (1977) (warrantless search of appellant's home). M.G.L. C.30A, §14(7)(a).

2. Ultra Vires

If the decision of the Civil Service Commission is beyond its jurisdiction statutes to consider, based on an error of law, or made pursuant to unlawful procedure, it must be reversed. M.G.L. C.30A, §14(7)(b), (c), & (d).

Most of the attention under Section 44 is given to the claims that a decision is unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law, which gives the Court some latitude in considering the appellant's arguments. M.G.L. C.30A, §14(e) and (f)

3. Arbitrary or Capricious

Personnel decisions often seem arbitrary to employees, particularly when they compare themselves with other employees whom they think more disserving of punishment than themselves. This provides fertile ground for litigation, but the arguments are hard to prove or win. M.G.L. C.30A, §14(g).

B. The Decision of Superior Court

"If the court finds that the action of the appointing authority in discharging, suspending, [etc.], . . . or action of the commission confirming the action taken by the appointing authority, was not justified, the employee shall be reinstated in his office or position without loss of compensation and the Court shall assess reasonable costs against the employer." M.G.L. C.30A, §14. If an employer was appealing an adverse decision it could obtain complementary relief.

1. Pleadings

Within twenty days of the filing of the complaint in the Superior Court, the Commission is required to file an answer, Mass. R. Civ. P. Rule 12(a), consisting of the administrative record, M.G.L. C.30A, §14(4).

2. The Certified Record, Transcripts

In fact it will usually take the Civil Service Commission several months after the appeal is filed to file the certified record. If there are magnetic audio tapes of the hearings, the Commission will typically offer the appellant copies to buy and leave it to the appellant to have them transcribed at his own expense. Since a complicated discharge hearing may involve six to twenty hours of hearing, the expense can be considerable. There are provisions for shifting this expense to the losing party, M.G.L. C.30A, §14(4).

It is possible in some cases for the a discharged employee to file an affidavit of indigency and asking the Committee for Public Service Counsel to pay for the transcription. However, when this request is granted, the Committee will probably refuse to pay for more of the transcript than is needed by the appellant for his arguments. The appointing authority may want more of the transcript for its own argument, and it may have no choice but to pay for partial transcription itself. If the

appointing authority were the plaintiff, then it would have to pay for the entire transcript, unless a stipulated record is available, under M.G.L. C.30A, §§14(4)(b).

In some cases there will be no transcript due to the difficulty of preparing it or the lack of a tape recording of the hearing, particularly in the cases not under Section 43, see "Other Commission Litigation," section VI, *infra*. In such cases an affidavit of the hearing officer or Commissioner reciting the evidence and summarizing the testimony heard can be used if agreed to by the parties, M.G.L. C.30A, §14(4)©.

The record cannot include materials received by the Commission after the close of its hearing. *Police Comm'r of Boston v. Civil Serv. Comm'n & Clark*, 39 Mass. App. Ct. 594, 659 N.E.2d 1190 (1997).

3. Motion for Judgment on the Pleading

Under Superior Court Standing Order 1-96, the Plaintiff must file a motion for judgment on the pleadings, Mass. R. Civ. P. 12© in accordance with Superior Court Rule 9A. There are special time limits and procedures for preliminary motions in the Standing Order.

4. Findings of Fact

In these cases usually a hearing officer called an Administrative Law Magistrate, from the Division of Administrative Law Appeals, has heard witnesses and evaluated their credibility. When a Magistrate makes a finding of fact, which is supported by the evidence, unless another hearing is held, neither the Civil Service Commissioners nor the Court reviewing the decision can change that fact. The only remedy for questioned facts that have been found is to have the case reheard, in whole or in part. However, if a finding of fact is really a conclusion then the Commission and the Court can ignore it and substitute a proper conclusion for the purported finding of fact, *Commissioner of Revenue v. Lawrence*, 379 Mass. 205, 396 N.E.2d 992 (1979).

5. The Standard of Review

"A decision of the Civil Service Commission that an action of the appointing authority is not justified must be upheld if legally tenable and supported by substantial evidence on the record as a whole." *Commission of Health & Hosps. v. Civil Serv. Comm'n*, 23 Mass. App. Ct. 410, 502 N.E.2d 956, 958 (1987). To overrule a Civil Service Commission decision the Court must write subsidiary findings to support his conclusion and there must be a sound basis for such conclusions in the record, *Commissioners of Civil Serv. v. Third Dist. Court*, 2 Mass. App. Ct. 89, 308 N.E.2d 788 (1974).

A reviewing Court may not substitute its judgment for the Commission's when the evidence supports the Commission's decision, *Commissioners of Civil Serv. v. Municipal Court of Boston*, 369 Mass. 84, 337 N.E.2d 682 (1975). If a decision is totally unsupported by substantial evidence the Court can reverse it, but the judge cannot reevaluate testimony, *Commissioners of Civil Serv. v. Municipal Court of Brighton Dist.*, 369 Mass. 166, 338 N.E.2d 829 (1975). "'Review' indicates 'a re-examination of a proceeding... for the purpose of preventing a result which appears not

to be based upon the exercise of unbiased and reasonable judgment. It does not import a reversal of the earlier decision honestly made upon evidence which appears to an unprejudiced mind sufficient to warrant the decision made although of a character respecting the weight of which two impartial minds might well reach different conclusions, and upon with the reviewing magistrate, if trying the whole issue afresh, might make a different finding.'" *Commissioners of Civil Serv. v. Municipal Court of Boston*, 359 Mass. 211, 214, 268 N.E.2d 346 (1971), citing "a series of decisions" which have held the same. No where is this standard of review, including the issue of assessing credibility of witnesses, described more clearly than in the decision of White, J. in the case *Civil Serv. Comm'n v. Boston Municipal Court*, Suffolk Superior Court, #82512 (Nov. 18, 1987), *aff'd* 27 Mass. App. Ct. 343, 538 N.E.2d 49 (1989).

6. New Evidence

The Court can remand a case under M.G.L. C.30A, §14(7) if it finds the Commission's decision not justified or some evidence was not given due consideration.

C. Enforcement of Commission Orders

Occasionally a recalcitrant appointing authority will refuse to reinstate an employee when so ordered by the Civil Service Commission. In that event the employee may go to Superior Court under M.G.L. C.249, §5 to seek enforcement, this being known as a civil action in the nature of mandamus. (This action should not be confused with the Section 42 mandamus, which goes by the same name. See section III, B, 5, *supra*.) If this action is brought after the thirty-day statute of limitations, Section 44, then the appointing authority will have no right to review the substance of the decision, and enforcement should follow. The Commission itself has a right to go to Superior Court under Section 44 to enforce its decisions.

VI. OTHER COMMISSION LITIGATION

While most of the cases that reach the courts are appeals involving decisions under Section 43, there are many other situations that cause people to come to the Civil Service Commission, and if still aggrieved, they can seek judicial review.

A. Selection of Applicants

In most positions in civil service there are more applicants than there are openings, and the number of eligible applicants is reduced by merit tests, the grading, construction, content, and administration of which can give rise to appeals to the Civil Service Commission, M.G.L. C.31, §24. For most positions there are entrance requirements, such as age, education, physical condition, and the holding of licenses. Disputes over an applicant's qualifications can be resolved under the same statute, *Clooney v. Civil Serv. Comm'n*, 349 Mass. 589, 211 N.E.2d 349 (1965). See also "The Appointment Process" *supra*.

The heart of the system is examinations, which "shall fairly test the knowledge, skills and abilities which can be practically and reliably measured and which are actually required to perform the primary or dominant duties of the position...." M.G.L. C.31, §16. Examinations which are biased or irrelevant can be overturned, *Castro v. Beecher*, 334 F. Supp. 930 (D. Mass. 1971), *aff'd*, 459 F.2d 725 (1st Cir. 1972); *Boston Chapter NAACP v. Beecher*, 371 F.

Supp.507 (D. Mass.1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974). Improperly administered examinations can be appealed, *DiRado v. Civil Serv. Comm'n*, 352 Mass. 130, 224 N.E.2d 193 (1967). Unfair examinations can be reformed, *Boston Police Superior Officers Fed'n v. Civil Serv. Comm'n*, 35 Mass. App. Ct. 688, 624 N.E.2d 617 (1994) (examination must have a performance component, even though that portion of the examination had been compromised by examiner who also coached applicants).

There are several types of examinations used, each called a "subject" and several such subjects can be used to make up an examination: Multiple choice questions, training and experience scoring, essay questions, performance evaluation from past positions, oral questioning, assessment center skills test, practical tests (e.g., swimming, raising a ladder), and seniority. In competitive examinations each applicant's answers are converted to number scores for comparison. There are also "unassembled" examinations used when there is only one applicant, usually an incumbent. The statute does not provide for appeal to the Civil Service Commission on the accuracy of answers on any subjects other than essay questions, M.G.L. C.31, §24.

B. Hiring and Promotion

After an appointing authority receives a list of eligible candidates to fill a civil service position (called a certification, M.G.L. C.31, §1) the appointing authority usually has some discretion to choose among several qualified applicants for each position. In exercising that discretion some applicants can be removed from eligible lists altogether to preclude them from all present and future consideration (e.g., users of tobacco, M.G.L. C.31, §64). A less drastic action is to simply by-pass an applicant, that is, to appoint someone lower in numerical standing before someone higher. When a person is by-passed (also called "non-selection") a statement of reasons must be immediately filed and approved by the state Personnel Administrator, M.G.L. C.31, §27. *MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 666 N.E.2d 1029 (1997). The sufficiency and accuracy of those reasons can be the subject of administrative and judicial review, under M.G.L. C.31, §2(b). In considering the reasons for bypass the Personnel Administrator must apply Basic Merit Principles as set forth in M.G.L. §1, *MacHenry*, id.

A question remains under the *MacHenry* decision about the effect of disapproval by the Commission of reasons for bypass. When the Personnel Administrator disapproves reasons the bypass appointment is void, and the person appointed loses his job. However, if the Commission on appeal overrules the Administrator's decision upholding the employer's reasons, nothing happens to the bypass employee, unless the Commission specifically makes an order to vacate the position. The Commission rarely does this and the Administrator ignores the effect of *MacHenry* in such cases. Although the Supreme Judicial Court held that it would not overrule the Commission, in a case where the Commission's refusal to order someone to be promoted who was improperly bypassed, the *MacHenry* case and its implication for the Personnel Administrator was not considered, *Bielawski v. Personnel Adm'r*, 422 Mass. 459, 663 N.E.2d 821 (1996).

Veterans preferences, are found in Section 26, but they apply only to entry level positions, and not to promotions, *Aquino v. Civil Serv. Comm'n*, 34 Mass. App. Ct. 538, 613 N.E.2d 131 (1993).

In reviewing the decision of the Personnel Administrator, the Commission must give deference to the reasons submitted by the employer under Section 27, unless those reasons violate some statute or regulation. *Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 682 N.E.2d 912 (1997). In that case the Commission held that ten year old criminal convictions were stale and that the applicant had led a good life ever since. The Appeals court overruled the Commission and said that was for the City of Cambridge to decide, at least if the Personnel Administrator had approved the reasons under Section 27. In reviewing the claims of appellants the Commission must also apply Basic Merit Principles as set forth in M.G.L. §1, *Revere v. Civil Serv. Comm'n & Ryan*, 31 Mass. App. Ct. 315, 577 N.E.2d 325 (1991).

C. Provisional Promotions

When there are too few (less than three) people who pass an examination, the employer can provisionally promote anyone it deems fit, that is, make an appointment without any regard to the names on the list. *Kelleher v. Personnel Adm'r & Somerville*, 421 Mass. 382, 657 N.E.2d 229 (1995). The appointment will expire automatically, when an new eligible is made and three or more names are certified, Section 15.

D. Performance Evaluations

Employers are required to make written evaluations of the quality of the work of all civil service employees, M.G.L. C.31, §6A. Employees dissatisfied with the accuracy or honesty of such reports can appeal to the Civil Service Commission M.G.L. C.31, §6C©, after several preliminary steps. The decisions of the Civil Service Commission could be appealed to Court under the certiorari statute, *supra*.

E. Classification

State employees are classified according to their duties into a system of job groups that describes their reporting relationships and determines their compensation. An employee who thinks she is misclassified, e.g., a secretary who thinks that her duties more closely resemble those of an administrative assistant, can appeal her classification to her employer, and then if dissatisfied to the state Personnel Administrator and then to the Civil Service Commission, M.G.L. C.30, §49.

Municipal employers are required to submit there classification plans to the state HRD. The Personnel Administrator has a general duty to enforce civil service law, including basic fairness. If an employee were to argue that the classification submitting is inaccurate or unfair, he might be able to force the Administrator to act to correct the plan., but this type of complaint has not been tried.

F. Violations of Civil Service Rights

Employees have many rights under civil service statutes, e.g., seniority calculations, M.G.L. C.31, §33; recall and reemployment rights for laid off employees, M.G.L. C.31, §40; and leaves of absence, M.G.L. C.31, §37. Any violation of civil service law can be investigated and remedied by the state Personnel Administrator, and his alleged dereliction and errors in such cases can be appealed to the Civil Service Commission, M.G.L. C.31, §2(b).

O'Connor v. Civil Serv. Comm'n, 38 Mass. App. Ct. 979, 651 N.E.2d 863 (1995) (§37 Leaves of absence must be confirmed in writing by the employer to be effective).

G. Grievances

State employees not included within a collective bargaining unit can grieve matters relating to hours, vacations, sick leave, and other conditions of employment, and after several steps, these can come to the Civil Service Commission, M.G.L. C.30, §57. Usually these would be based on the employment regulations of the Commonwealth, which are found at www.state.ma.us/hrd/redbook.html.

H. Equity Powers

Under its equity powers the Civil Service Commission can restore employment rights to individuals usually to correct errors in certifications, Chapter 310 of the Acts of 1993. This Act could be raised as a defense in litigation where the Plaintiff sought injunctive relief within the scope of this statute. A recent example of the use of this statute was in the case *Thomas v. Civil Serv. Comm'n*, 48 Mass. App. Ct. 446, 722 NE.2d 483 (2000), a case in which the Commission ordered an old eligible list revived, which deprived the plaintiff of an opportunity to be considered, his name being only on the newer list.

VII. HUMAN RESOURCES DIVISION LITIGATION

In general the administration of civil service law is entrusted to the state Personnel Administrator who heads the Human Resources Division, formerly the Personnel Administration, an agency much larger than the Civil Service Commission. Where most of the actions of H.R.D. are subject to appeal to the Civil Service Commission, there is little call for anyone to sue H.R.D. directly, *Kern v. Department of Personnel Admin.*, 28 Mass. App. Ct. 938, 550 N.E.2d 150 (1990 rescript). However, there are exceptions as follows.

A. Appointment Injunctions

The most common lawsuits that involve H.R.D. directly are employees seeking injunctions to block appointments of persons other than themselves while they try to establish their own eligibility. Qualifications, seniority, and entry requirements are often the underlying problems. Although plaintiffs may claim irreparable loss based on their assumption that they would be appointed but for the alleged error of H.R.D., no one has a right to a civil service appointment, and fair consideration of all candidates is all that is required, *Callanan v. Department of Personnel Admin.*, 400 Mass. 597, 511 N.E.2d 525 (1987); *Lavash v. Kountz*, 473 F. Supp. 868, 871 (D. Mass. 1979) (candidates who score highest on civil service examinations are not statutorily guaranteed appointment or promotion)

B. Physical Fitness Examinations

New physical fitness standards for public safety positions are being promulgated by H.R.D., M.G.L. C.31, §61A. For employees hired after 1987 the Pension Reform Act requires that they stay fit and healthy, refrain from using tobacco, and that they be examined periodically. Anyone failing the standards gets fired. This law is an attempt to reduce pension

costs by decreasing the number of early disability retirements. The application to new employees only, was a compromise with employees unions, which were allowed to retain the "Heart Law," M.G.L. C.32, §94A, under which there is a presumption for disability retirement purposes that a firefighters heart or lung disease is job related.

1. Physical Fitness Standards

The standards for physical fitness and medical examinations are to be job related so as not to unreasonably exclude any handicapped person who could be appointed with reasonable accommodations made for their disability M.G.L. C.151B, §1 (paragraph 16).

2. Unfitness Discharges

Under the new law, after several chances to improve, an unfit, unhealthy, or nicotine using public safety employee must be discharged so they do not become a pension liability to the employer. Such employees are likely to sue, and if the physical fitness and medical standards are upheld, see section VII, A, *supra*, then the employee is likely to make several claims such as lack of due process in distinctions between old and new employees, faulty administration of medical tests, evidence issues where use of nicotine is charged, post discharge cures, and novel ways of determining overweight. The Civil Service Commission has no power under Section 43 to modify discharges for using tobacco, *Plymouth v. Civil Serv. Comm'n & Rossborough*, 426 Mass. 1, 686 N.E.2d 188 (1997).

C. Arbitration Award Conflicts

Under many collective bargaining agreements arbitration is used to resolve disputes. If a grievance arises that involves civil service rights an arbitrator may be asked to decide such rights, such as seniority or promotional consideration, but H.R.D. will not enforce the decision if it violates civil service law. This situation can arise when the parties do not tell the arbitrator about civil service law, which they may not understand. For example, if an arbitrator rules that credit be given for time served in a provisional appointment prior to a permanent appointment, a violation of civil service law, H.R.D. cannot change the seniority date. Arbitrators with the exceptions noted below, are held to civil service laws, which are beyond their authority. *Local 589 Amalgamated Transit Union v. M.B.T.A.*, 392 Mass. 407, 467 N.E.2d 87 (1984) (arbitrator's award exceed authority regarding part-time employment).

Arbitrators do have limited authority to remove employees from the coverage of some specified state personnel statutes, e.g., employee classification, which H.R.D. does under M.G.L. C.30, §§45-50. This authority does not extend to any civil service statutes, i.e. Chapter 31, and this authority, clearly set out in the statute, is unlikely to ever engender litigation, M.G.L. C.150E, §7(d).

D. Unauthorized Absence Discharges

"Section 38 creates a truncated termination procedure for civil service employees who have unauthorized absences of fourteen or more days. A person aggrieved by their termination

pursuant to this section may seek review by the personnel administrator. Such review, however, is 'limited to a determination of whether such person failed to give proper notice of the absence to the appointing authority and whether the failure to give such notice was reasonable under the circumstances.'" There is no appeal to the Civil Service Commission in such cases. *Police Comm'r of Boston v. Personnel Adm'r & Figueroa*, 39 Mass. App. Ct. 360, 656 N.E.2d 910 (1995), aff'd 423 Mass. 1017, 671 N.E.2d 1231 (1996).

VIII. EMPLOYMENT LIABILITY AND CIVIL SERVICE RIGHTS

There are a few other situations in which parties may litigate under Chapter 31, without recourse to the Civil Service Commission or any other state agency. Tort law claims can arise from drug testing, AIDS testing, privacy violation, negligent hire, training and retention, sexual harassment, illegal discrimination, and wrongful discharge. There are also private rights of action under various federal statues such as the Fair Labor Standards Act, the Equal Pay Act, the Family and Medical Leave Act, state Workers Compensation Act, Occupational Safety and Health Act, COBRA (dealing with health insurance continuity for former employees), Employee Retirement Income Security Act, National Labor Relations Act, Age Discrimination Act, and the Americans with Disability Act. See Sanchez, State & Local Government Employment Liability, *supra*, Sec. I.C.9.

A. Defamation.

Defamation consists of untrue statements that tend to damage the plaintiff's reputation that are revealed or broadcast to a third person. There have been two recent cases in Massachusetts.

1. Bypass Reasons

The reasons given for bypass a candidate cannot form the basis of a claim for defamation, where the only publication is the disappointed applicant's obtaining a copy thereof from the state Personnel Administrator, *Dellorusso v. Monteiro*, 47 Mass. App. Ct. 475, 714 N.E.2d 362 (1999). This decision did not address the possibility of publication under Section 38, where the Personnel Administrator obtains and releases the reasons to the public without any action or request by the applicant, as the Administrator is required to do. However, common law privileges for employers probably would protect an employer even if publication were found.

2. Witness Immunity against Defamation Lawsuits

Where at a Civil Service Commission hearing the employer's witnesses testify against the employee and their testimony is found to be untrue, the employee cannot sue them for defamation unless he can also show that their conduct against him also took place before and outside of the Civil Service Commission hearing, such as tampering with evidence, *Cignetti v. Cambridge*, 967 F. Supp. 10 (Mass. 1997).

B. Wrongful Discharge

A provisional employee sued unsuccessfully for wrongful discharge and infliction of emotional distress. Although he won a judgment, it was overturned on appeal. *Rafferty v. Commissioner of Pub. Welfare*, 20 Mass. App. Ct. 718, 482 N.E.2d 481 (1985) (public employee discharge not outrageous). A similar decision involved a transfer, *Doyle v. Dukakis*, 634 F. Supp. 1441 (D. Mass. 1986).

IX. CONCLUSION

The Commonwealth of Massachusetts is the largest and oldest employer in the state. Its personnel problems, I submit, are no worse or better than other organizations of like size, age, and complexity. Its litigation often presents glimpses of important social problems, the balance of private and public good, and the preserving of political accountability of elected officials with high performance of public service by a non-patronage work force. These workers and those they serve are fortunate to have one of the finest judiciaries in the country to consider these problems.

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