

MUNICIPAL CIVIL SERVICE LAW

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1 WHAT POSITIONS DOES CIVIL SERVICE LAW COVER?

One of the few places in this book where there is a distinction between cities and towns is in civil service system coverage. Most city positions are subject to civil service, G.L. Ch. 31, §51. Most town positions are not, G.L. ch. 31, §52. A municipality that wants to bring an exempted position under civil service coverage can do so through municipal elections following carefully the statutory requirements, G.L., ch.31, §§53-55. More common is to resort to special acts of the Legislature either for special inclusion or exclusion, e.g. Ch. 156, Acts of 2000, (“An Act Placing The Members Of The Police Force And The Fire Department Of The Town Of Hopedale Under The Civil Service Law”) and Ch. 61, Acts Of 2000 (“An Act Exempting The Position Of Deputy Police Chief In The Police Department Of The City Of Lawrence From The Civil Service Law”). Under G.L. ch.31, §56 any long-term incumbents employed from before the time of coverage gain tenure upon inclusion, but last minute hires do not.

Why should a town elect to have civil service coverage for its personnel? One major reason would be that the state would give examinations and furnish lists of qualified candidates without any charge; this could be an enormous relief for elected officials, who would otherwise be exposed to patronage pressure. Unless the town spends a lot of effort screening and recruiting employees, the candidates on the civil service eligible list would probably be better employees than those hired with fewer formalities.

There are burdens also that come with civil service coverage. The tenure law allows only limited reasons for discharging employees. There is a classification manual, which limits the job titles that can be used, because of the difficulty of examining for obscure and unique local job titles. Written performance evaluations must be given to employees. Any serious discipline or layoff can be appealed to the state Civil Service Commission, as can performance evaluations.

Outside of public safety positions, civil service examinations for municipal positions are very rare. Provisional employment is the rule for most other positions, which leaves employees with almost no civil service rights. The civil service hiring procedure is very slow. From an applicant's point of view it can take several years from the first application to final appointment.

Most elections for inclusion are instigated by employees trying to enhance the protection for their tenure.

2 CIVIL SERVICE HIRING

The procedures are similar for hiring new employees and for promotions, for full time and temporary employees.

2.1 Examinations

For positions not in the Labor Service (see Section 2.5), the Human Resources Division holds examinations consisting of multiple choice questions, essay questions, proficiency tests (e.g. typing, swimming), and practical skills. The tests are then scored, with rankings of

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even numbers between one and one hundred. Those applicants with scores of seventy or above, PAR .06(2) have their names put on an eligible list.

2.2 Eligible Lists

Eligible lists contain the names of those who recently passed the examination, ranked by preferences and within each preference category, by scores. Eligible lists frequently change, as applicants are hired, new examinations are given, and questioned preferences and scores are adjudicated. Persons can also be removed from eligible lists for misconduct or infamy, PAR .09(2). Because of a scarcity of examinations, eligible lists do not exist for most positions. An applicant may inquire to HRD as to his or her standing once the list has been established.

2.3 Certifications

When an appointing authority has a vacancy to be filled, he files a requisition with the Personnel Administrator, who then sends a certified list of names, if there is an eligible list. The certification contains a number of names from the top of the current eligible list. Three names are given for one position, five for two positions, seven for three positions, etc.

2.4 Selection

After the certification is issued all the applicants whose names are on that list are notified by postcard to report and sign the certification to indicate their continued interest in employment. Then, based on investigations and interviews, the appointing authority must make a selection from among those who signed within thirty days. The selection must be from the top three applicants who sign the certification for the first opening, from among the first five for the second opening, among the first seven for the third opening, etc. Furthermore, if any name is skipped, reasons must be given to and approved by the state Personnel Administrator. After the selection is made, the certification must be returned and approved by the Personnel Administrator before the applicants can be hired.

2.5 Labor Service

Workers apply by registering their names, and from those registrations a list is kept with the names in the order that they registered. Registration takes place at city and town halls for municipal labor service positions. M.G.L. c. 31, §28; PAR .20. Once the name appears on the list the process is similar to that of any other Civil Service hiring, except that there is no examination. See above sections 2.2 through 2.4, G.L. ch.31, §§ 27 through 30.

2.6 Affirmative Action Special Certifications

Under certain circumstances appointing authorities may hire candidates possessing specific qualifications ahead of other candidates without those qualifications, even if those other candidates' names appear higher on the list than that of the selected applicant. PAR .10. These qualifications are based upon race, national origin and sex. The Personnel Administrator must make a written determination that the Appointing Authority or department had a previous practice of discrimination against that particular group. Procedures under this rule are typically used to facilitate the appointment of women or racial minorities, and it can

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be used for any job title in the civil service system. For urban police and fire departments the court ordered preference for racial minorities is mandatory, see Section 02.7.4 below.

2.7 Hiring Preferences

After an examination is given, the applicants are sorted by their preference categories. Then within each category, the examination score ranks the applicants. The result of these operations is the generation of an eligible list for the position. For example, a non-resident, disabled veteran with a score of 92 would be ahead of a regular veteran with a score of 94, and a resident disabled veteran with a score of 90 would be ahead of both.

2.7.1 Veterans G.L. ch.31, §26

There are three tiered veterans' preferences in examinations. A veteran is defined as an individual who served in the armed forces during wartime, G.L. 4, §7, cl.43. Such veterans, if disabled in such service, enjoy the top preferences in hiring, if they can show that they are healthy enough to work. If not, a disabled a veteran enjoys a second tier preference. Unmarried widows and unmarried widowed mothers of veterans killed in wartime, or dead from injuries incurred in wartime, have the third tier preference. Also a Medal of Honor holder and a holder of a Distinguished Service Cross or Navy Cross may be employed without examination.

2.7.2 Kinship

Hiring preference is given to an applicant whose parent died: 1.) If a police officer, as a result of an assault on his or her person, or as a result of injuries sustained in an assault, while in the performance of his or her duties; or 2.) If a firefighter, as the result of an accident while responding to a fire alarm or while at the scene of a fire, or from injuries sustained at the scene of a fire that resulted in his or her death. G.L. ch.31, §26 (seventh paragraph) and Ch. 402A, Acts of 1985. A slightly inferior preference is given to an applicant whose parent was injured: 1.) If a police officer, as a result of an assault on his/her person which resulted in his/her being permanently and totally disabled; 2.) If a firefighter, as a result of an accident while responding to a fire alarm or while at the scene of a fire that resulted in his or her being permanently and totally disabled. G.L. ch.31, §26 (eighth paragraph) and Chapter 402B of the Acts of 1985. Applicants whose parents received retirement or death benefits under the "heart and lung bill" G.L. ch.32, §94, are specifically exempted from the chapter 402 preference.

2.7.3 Residency G.L. ch. 31, §58

Municipalities can elect to have local residents certified ahead of non-residents in police or fire service examinations. Such residency is counted at, and one year prior to, the time of examination.

2.7.4 Racial Minorities

Under Federal court orders *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), Boston and the most of the other

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cities must give special preference to racial minorities who apply to become police officer or firefighters. For this preference, a separate eligible list is kept for racial minorities, with all the other preferences used only within this separate list. When a certification is issued, names are taken from the two lists, minority and non-minority, in alternation to make up that certification

2.8 Probationary Periods G.L. ch.31, §61, G.L. ch.31, §34

So that new employees can be evaluated, the law provides for probationary periods, *Younie v. Doyle*, 306 Mass. 567, 29 N.E.2d 137 (1940). Each new employee must serve a one year probationary period (sixty days for non-public safety employees), during which the employer can let him or her go without the formalities that attach afterward, *Gibney v. Mayor of Fall River*, 306 Mass. 561, 29 N.E.2d 133 (1940). An employee who has served a probationary period is referred to as being “tenured,” and only tenured employees have rights under G.L. ch.31, §§41-45 (hearings and appeals for adverse actions).

2.9 Auxiliary Hiring G.L. ch.31, §60

Many police and fire departments have reserve or intermittent forces. Applicants for these positions take the same examination as they would for full time positions, and the certification and selection proceeds in the same manner. The employees work irregular part time schedules, and there are special provisions for their probationary periods. Employees hired for this type of intermittent work have a right to equal work opportunities, G.L. ch.31, §34. When it comes time for full time appointments in the regular force, departments must pick only from their reservists. Just as in any other promotion, three names are certified for the one full time position, but there is no further examination; only seniority on the reserve force counts.

2.10 Transfers G.L. ch.31, §35

New employees can be recruited through transfers from another department. This can be done only with the assent of the old employer (to prevent raiding), the new employer (to prevent dumping), and the state Personnel Administrator (to prevent circumvention of promotional examinations). Transfers can only be between similar titles and similar ranks. The transferred employee may appeal to the Civil Service Commission if aggrieved by the transfer. If the Administrator refuses to approve a transfer, the appointing authority may appeal to the Civil Service Commission, *Cooper v. Civil Serv. Comm’n*, 314 Mass. 76, 49 N.E.2d 442 (1943). Rival applicants for a position have no remedy if someone transfers into the position they sought. There is no right of an employee to obtain a transfer, only protections against unjust transfers, *Cooper v. Civil Serv. Comm’n, supra*.

3 APPEALS OF HIRING

A disappointed civil service applicant has the right to appeal hiring decisions to the Human Resources Division or the Civil Service Commission. The most common issue is the “bypass”, where a person whose name appears on a certification to an appointing authority is not selected, and a person or persons lower on the certification is or are hired. There are many other hurdles in obtaining appointment that can foil an applicant and lead to an appeal. The Commis-

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sion expects such appeals to be filed within sixty days, but is not apparent what the authority would be for dismissing appeals filed later

3.1 Appeals of Preferences

There are situations that result in a person not being selected from a list or being placed in a disadvantageous position on the list. The candidate may have incorrectly or falsely claimed residency preference. The candidate may have incorrectly claimed an ethnic or racial preference for an entry-level police or fire examination. There are statutory preferences for sons and daughters of police officers or firefighters injured or killed in the line of duty. Veteran's preference involves close reading of definitions and comparison with military records. These types of situations are fact issues, which are routinely handled at the Civil Service Commission.

3.2 Eligibility, Training and Experience, Examinations

Candidates can be found ineligible for various reasons, stated in the examination poster, such as age, licensure, and experience in the field. Points are usually given for relevant vocational experience and education. Finally, an applicant may feel the questions in an examination were unfair, irrelevant, ambiguous, etc. or that they were improperly marked or graded. An applicant's failure to receive credit or to be eligible can be appealed first to the Personnel Administrator and then to the Civil Service Commission, G.L. ch.31, §§22-24.

It is also possible than an applicant would feel that his rival received undeserved credit, preferences, eligibility, etc. In that case he should first bring the allegations to the attention of the Personnel Administrator. If satisfaction were not forthcoming, he could then appeal to the Civil Service Commission.

3.3 Bypass

A bypass occurs when an appointing authority appoints a person whose name appears lower on a certification than that of a person who is not appointed. *Bielawski v. Personnel Administrator of the Division of Personnel Administration*, 422 Mass. 459, 460, 663 N.E.2d 821 (1996); *MacHenry v. Civil Serv. Comm'n*, 40 Mass. App. Ct. 632, 666 N.E.2d 1029 (1996). There is currently a question of whether a bypass also occurs when fewer than all of several tied candidates are appointed. In a recent federal case this was held to be a bypass of the not appointed candidate, *Cotter v. Boston*, 73 Fed. Supp. 2d 62 (E.D. Mass. 2000) (Young, C.J.) (pet. for cert. filed)

3.3.1. Reasons for Selection or Bypass

Pursuant to MGL c. 31, §27, an appointing authority is supposed to immediately file with the Personnel Administrator a written statement of reasons for the selection of a person whose name was lower on the certification. These would usually be positive reasons, i.e. "Candidate A has superlative training and ability, etc." An appointing authority may also submit reasons for bypassing pursuant to Personnel Administration Rule .08 (amended effective May 3, 1999). These would usually be negative reasons, i.e. "Candidate X was has been discharged for cause from his last two employments." Positive reasons for selection, when used, are usually much more likely to be sustained on appeal, as

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they are usually much harder to disprove. Personnel Administration Rule (PAR) .08 provides that the appointing authority shall file the reasons for selecting or bypassing a person upon which the appointing authority intends to rely to justify the bypass. Additional reasons that were either known or could have been reasonably discovered will not be admitted at any subsequent proceeding before the Personnel Administrator or Civil Service Commission.

Appointing authorities in communities subject to the provisions of the court orders in *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), concerning affirmative action for the hiring of minority police officers and firefighters, must supply reasons for every candidate bypassed. In other communities simple reason for selection, not specific to the disappointed candidates, can be used.

3.3.2. Review by the Personnel Administrator

The Personnel Administrator reviews the reasons for the bypass to determine whether they are sound and sufficient and related to the requirements for the position. Under its rules the Administrator has fifteen days to either approve or reject the reasons for selection or bypass. The appointing authority may request a hearing before the Personnel Administrator during a fifteen-day review period to explain, clarify, or justify the reasons for selection or bypass. Upon disapproval of the reasons for selection or bypass, the Personnel Administrator notifies the appointing authority. Upon approval of the reasons for selection or bypass, the Personnel Administrator notifies the appointing authority and the bypassed applicant. (PAR .08) Prior to this notice there is usually no participation by the bypassed applicant.

3.3.3. Appeal to the Civil Service Commission

Once the Personnel Administrator accepts the reasons for bypass, an applicant may appeal to the Civil Service Commission pursuant to MGL c. 31 §2(b). Section 2(b) grants the Civil Service Commission the power to:

hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator. . . provided that no decision or action of the administrator shall be reversed or modified nor shall any action be ordered in the case of a failure of the administrator to act, except by an affirmative vote of at least three members of the commission, and in each such case the commission shall state in the minutes of its proceedings the specific reasons for its decision.

The Civil Service Commission reviews the reasons for the bypass. Although the statute provides for a review of the record, rather than an evidentiary hearing, the Civil Service Commission will usually hold a full evidentiary hearing, at which the appellant has an opportunity to explain the circumstances concerning the evidence that the appointing authority relied upon in the bypass. The

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Commission will consider requests for subpoenas. If the appellant can show that the reasons offered for bypassing him or her are untrue, illegal, apply equally to other candidates, or are irrelevant, then the Commission will usually overturn the Administrator's acceptance of the reasons. However, if the appointing authority appeals an adverse Civil Service Commission decisions to court it can cite ". . . The commission must focus on the fundamental purposes of the civil service system --- to guard against political considerations, favoritism, and bias in governmental employment decisions." *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass. App. Ct. 300, 682 N.E.2d 912 (1997).

3.3.4. Parties

A person may not simply appeal the action of the appointing authority in a bypass situation. There is no appeal mechanism in Chapter 31 to do so. However, a person may appeal an action, inaction, or decision of the Personnel Administrator, which it is alleged was in violation of Chapter 31, the Rules, or the Basic Merit Principles, as set out in Section 1 of the civil service law, and which, further, causes "actual harm" to the person's employment status pursuant to G.L. Chapter 31, §2, subsection (b), usually referred to as a "2(b)" appeal. This Section has been utilized to appeal an action of the Personnel Administrator in accepting reasons for selection (or bypass) pursuant to G.L. Chapter 31, §27.

An appellant should also try to implead the employee who was selected instead. If the appellant wins his appeal he will want that employee to lose his job. Due Process would require a hearing before that can happen. The Appellant should ask the appointing authority's attorney whether he also represents the employee who was selected. If not, the appellant who does not want to have two hearings should try to implead. If the Commission does not allow a motion to implead, which unfortunately is usually the case, then the appellant should take it upon himself to notify his rival, so at least he can argue later that the displaced employee had ignored his rights to be heard.

In most bypass appeals, the Human Resources Division, although technically the respondent, is not required to defend itself. Usually, the dispute is between the aggrieved person and the appointing authority. An appointing authority can also be an aggrieved party under G.L. ch.31, §2(b), *Caulfield v. Fire Comm'r of Brookline*, 336 Mass. 569, 146 N.E.2d 896 (1958) (appointing authority could appeal decision of Administrator to order reinstatement of a retired employee.)

3.3.5. Standard of Review by the Civil Service Commission

While bypassed candidates have the opportunity to appeal the appointment of someone ranked lower on the certification, they do not have a vested right to a position on the list. The appointing authority does not have to make appointments based strictly on the order of the names on the list. *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991); *Lavash v. Kountze*, 473 F. Supp. 868 (D. Mass. 1979); *Callanan v. Personnel Administrator for the Commonwealth*, 400 Mass. 597, 511 N.E.2d 525 (1987).

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In reviewing, the Civil Service Commission generally respects the discretion of the appointing authority in bypassing the appellant. The Civil Service Commission does not substitute its judgment for that of the appointing authority but examines whether, based upon the evidence presented, the appointing authority has shown that there was reasonable justification for the bypass. *Mayor of Revere v. Civil Serv. Comm'n*, 31 Mass. App. Ct. 315, 577 N.E.2d 325 (1991). The Civil Service Commission is not permitted to substitute its judgment for that of the appointing authority in rejecting reasons for bypass. The Commission's major duty is to prevent political or other improper motives from entering into an employment decision, *City of Cambridge v. Civil Serv. Comm'n*, 43 Mass.App.Ct. 300, 682 N.E.2d 923 (1997)

The Commission must make findings of fact to support its conclusions and use clear reasoning in its decisions, *Mayor of Revere v. Civil Serv. Comm'n, supra*. Because most of the Commission's decisions are not reviewed in court, the Commission rarely meets this standard. A party expecting to defend a Commission's decision in court could file requests for finding of fact with the Commission.

3.3.6. Relief

An appellant who wins at the Civil Service Commission has now overturned the Administrator's acceptance of the appointing authorities reason for bypass. However, this is still a long way from being appointed. Typically the Personnel Administrator will ignore this decision, and allow the incumbent, who no longer has the benefit of an acceptable reason for bypass, to continue to serve, to the detriment of the appellant. Since the Civil Service Commission cannot order someone appointed, the only relief it will usually give will be to order that Administrator certify the appellant's name first on the next certification. In rare cases the Commission will order the position vacated and the appointment rescinded. In these cases the powers of the Commission derive from Chapter 310 of the Acts of 1996.

3.4 Medical Examination and Psychological Examination Appeals

Often, persons are not selected because they fail a medical or psychological examination. The Civil Service Commission treats these cases like a bypass, but the specialized character of such appeals generally results in a dispute between the appointing authority's medical expert and that of the appellant. Often, the Commission will order a that a third medical expert be consulted.

These kinds of appeals are subject to G.L. ch.31, §2(b) which requires proof of a shortcoming of the Personnel Administrator. This narrow question does not require evidence from a third medical expert. An appeal of the Personnel Administrator's acceptance of a presumptively honest and accurate medical or psychological opinion as a reason for non-selection is difficult to sustain. However, the informality of the Commission's hearings often does not bear close legal analysis. These cases are rarely appealed to court, and many are argued without the help of lawyers.

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3.5 Fitness Standards

Because police officers and firefighters have such demanding jobs, and because they have generous pension benefits if they are injured, the Legislature has enacted provisions to require high standards of health and fitness in applicants, G.L. ch.31, §61A. This statute provides for examination of applicants and re-examination for those who fail the first time. Applicants could appeal failures to fairly administer these examinations, such as inadequate notice of the time and place causing the applicant to miss the examination..

Firefighter applicants, since 1988, cannot be users of tobacco products, G.L. ch. 41, §101A. Of those employees that use tobacco, they must be discharged, *Town of Plymouth v. Civil Serv. Comm'n*, 426 Mass. 1, 686 N.E.2d 188 (1997).

3.6 Appeals of Labor Service Promotions

The Civil Service Commission has occasional appeals of “bypasses” in labor service promotional situations. Under the labor service system employees are allowed to bid for promotional opportunities. The appointing authority can pick from the top three according to seniority, G.L. ch.31, §29. Only violations of the civil service statute could be the subject of an appeal, such as the improper assignment of a seniority date, or the improper posting of the notices at the worksite. Any other kind of appeal, such as the suitability of the appointment would have to be based upon basic merit principles, G.L. ch.31, §1.

4 PROVISIONAL APPOINTMENTS

4.1 Introduction

In various circumstances an appointing authority may make a provisional appointment to fill a vacant civil service position. Because of a lack of civil service examinations, there is a large parallel system of employment in the public sector, composed of provisional employees.

4.2 Comparison with Permanent Employment

Provisional appointments differ from permanent and temporary appointments in that they can exist only when no eligible list of three or more names exists, G.L. ch.31, §§12-15. Persons appointed provisionally have no rights to appeal adverse actions to the Civil Service Commission and no rights to a hearing before they are discharged, demoted, etc., *Smith v. Commissioner Of Mental Retardation*, 409 Mass. 545, 567 N.E.2d 924 (1991), except that a post-termination hearing is required G.L. ch.31, §41 (third paragraph) if the employee so requests, if the employer has put reasons into its personnel records that reflect adversely upon the employee's reputation, *Fontana v. Commissioner of the Metro. Dist. Comm'n*, 34 Mass. App. Ct. 63, 606 N.E.2d 1343 (1993). Provisional employees may be included without distinction under labor relations law, *School Committee of Newton v. Labor Relations Comm'n*, 388 Mass. 557 447 N.E.2d 1201 (1983). An employee who has received a provisional appointment does not thereby gain civil service tenure, regardless of how long the employee holds that position provisionally, *Sullivan v. Commissioner of Commerce and Dev.*, 351 Mass. 462, 221 N.E.2d 761 (1966).

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4.3 Approvals

In order for a municipal appointing authority to make a provisional appointment to a position in the official service, it must first obtain the approval of the State Personnel Administrator. (Official service positions are those filled by competitive examination, G.L. ch.31, §1, as opposed to labor service where no examinations are given.) For an original provisional appointment (new hire) or for a provisional promotion skipping a rank, the appointing authority must give a sound and sufficient reason. For a provisional promotion advancing only one rank approval by the Administrator must be obtained but no reason need be given, *Kelleher v. Personnel Administrator & Somerville*, 421 Mass. 382, 657 N.E.2d 229 (1995).

The Administrator may grant approval of a provisional appointment only if: (a) There is no eligible list from which a certification could be made; or (b) although an eligible list exists, it contains fewer than three names of candidates willing to accept the appointment and the employer interviews all such candidates and submits reasons for not selecting among them. An authorization to make a provisional appointment pending the establishment of an eligible list is valid for two weeks, after which time the authorization expires if the appointment has not been made, G.L. ch.31, §12.

When seeking approval of a provisional appointment, an employer must submit to the Administrator a notice listing the requirements of the job, and suggesting the knowledge and skills to be tested in the examination. The notice should recommend the type of examination the Administrator should give. The appointing authority must also certify that the selected provisional appointee meets these minimum job qualifications. These qualifications are those that are established by the Administrator for people taking the examination, such as two years' service in lower rank in the same department, or a college degree. A provisional appointee must also meet those qualifications, whatever they are for that position. The appointing authority cannot set higher qualifications for provisional appointments, *Massachusetts Organization of State Engineers and Scientists v. Commissioner Of Admin.*, 29 Mass. App. Ct. 916, 557 N.E.2d 1170 (rescript opin.) (1999).

Where there is a choice between filling a promotional position from an open competitive examination list or from a provisional promotion, the appointing authority can do the latter, with permission from the Administrator.

4.4 Duration

Although the Administrator is supposed to schedule examinations whenever a provisional appointment is approved, this rarely happens. Most provisional employees are at-will employees without any predictable event that would end their employment, even though an ending by the creation of eligible lists is provided for by statute. In fact the creation of eligible lists is primarily in areas where there are few provisional appointments, so there is rarely a conflict.

Time served in a provisional promotion position counts toward the service time required to take a promotional examination for that position. An employee permanently appointed and then provisionally promoted is not protected by the civil service tenure statutes when demoted back to his permanent position, *Dallas v. Commissioner of Pub. Health*, 1

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Mass. App. Ct. 768, 307 N.E.2d 589 (1974). However, if that employee were to be discharged instead, he would have a right to a hearing under G.L. Ch.31, §41.

4.5 Veterans Preference

Veterans' preference applies to original provisional appointments. An appointing authority may provisionally appoint a non-veteran only if it: (1) He has obtained from the Administrator a list of all veterans who have applied for like positions within the prior year; (2) has mailed notice to each veteran on the list of the available position; and (3) has determined that none of the veterans on the list is qualified for the position or is willing to accept the provisional appointment, G.L. ch.31, §26. There is no veterans' preference for provisional promotions, *Aquino v. Civil Serv. Comm'n*, 34 Mass. App. Ct. 538, 613 N.E.2d 131 (1993)

5 CIVIL SERVICE DISCIPLINE

Discipline under the Civil Service system has a reputation of being slow and unpredictable; this reputation stems from an under appreciation of unionized labor relations. In the typical civil service appeal both sides wish to avoid a hearing and to exploit every opportunity for delay. It is the aim of this section to make Civil Service Commission hearings more predictable.

5.1 Types of Adverse Actions

For misconduct or poor performance, an employee can be suspended, demoted, or discharged. In police and fire departments the additional penalty of work without pay, called punishment duty, G.L. ch.31, §68, can be imposed. For reasons of economic distress employees may be laid off. For vocational obsolescence or bona fide reorganizations, an employee's position may be abolished. Collectively all of these actions will be referred to as adverse actions, after the federal system nomenclature.

5.2 Jurisdictional Issues

While civil service employees generally enjoy the right to appeal adverse actions to the Civil Service Commission, there are a number of exceptions. Where these exceptional situations arise, the Appointing Authority should promptly file a motion to dismiss.

5.2.1 Time of Appeal

Civil service time limits are very short and easy to miss. An appeal under Section 43 more than ten business days after receipt of the notice of decision can be dismissed. It is likewise for an appeal under Section 42, although there is latitude for the appellant where the appointing authority neglected to send any notice at all. An appeal filed too soon should also be dismissed, *Director of Civil Defense v. Civil Serv. Comm'n*, 373 Mass. 401, 367 N.E.2d 1168 (1977).

5.2.2 Prior Procedures

Where the appellant needs to ask for a hearing (i.e. suspension of five days or less or punishment duty) his failure to timely do so precludes an appeal the Civil Service

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Commission under Section 43, *Henderson v. Mayor of Medford*, 320 Mass. 663, 70 N.E.2d 712 (1947).

5.2.3 Demotions

Demotions cannot be appealed if they were elected by the employee under the threat of layoff under Section 39, *Worcester v. Civil Serv. Comm'n*, 18 Mass. App. Ct. 278, 465 N.E.2d 273 (1984). Demotions from a position attained because of a provisional promotion cannot be appealed, *Dallas v. Commissioner of Pub. Health*, 1 Mass. App. Ct. 768, 307 N.E.2d 589 (1974).

5.2.4 Appointments other than Permanent

An appointment that was provisional, *Sullivan v. Commissioner of Commerce & Dev.*, 351 Mass. 462, 221 N.E.2d 761 (1966); temporary, *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); seasonal; still probationary; *New Bedford v. Civil Serv. Comm'n*, 6 Mass. App. Ct. 549, 378 N.E.2d 1014 (1978); or exempt, *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) does not give rise to appeals.

5.2.5 Section 42 Appeal, Specificity

An appeal under Section 42 that does not specify the violation complained of can be dismissed.

5.2.6 Other Forum

Cases under these three jurisdictions cannot be appealed simultaneously, or if appealed must be stayed: Labor relations arbitration, under M.G.L. C.150E, §8; the Massachusetts Commission Against Discrimination adjudication; or where the appellant is being prosecuted for a crime arising out of the same incident and is suspended under the provisions of G.L. ch.268A, §25, which provides for suspension of municipal employees under criminal indictment for misconduct in office.

5.2.7 Conflicts with Prior Decisions

An action rescinded before it becomes effective is moot and cannot give rise to a Civil Service Commission appeal. An employee appointed to a position in which a prior employee is reinstated because of a Civil Service Commission or another adjudicatory or judicial order has no right to appeal his resulting discharge, *Nawn v. Board of Selectmen of Tewksbury*, 4 Mass. App. Ct. 715, 358 N.E.2d 454 (1976).

5.2.8 Unauthorized Absence

An employee absent without authority can be discharged without recourse to the Civil Service Commission under G.L. ch. 31, §38.

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5.3 Discharge

Discharges are the most serious actions an employer can take within the civil service system. To start, the appointing authority sends the employee a notice of charges with a notice of a hearing, and copies of the civil service tenure and appeal statutes. At the hearing, held by the Appointing Authority or a subordinate designated in writing, the evidence should be presented with an opportunity for cross examination. Shortly thereafter the employee should be sent a notice of decision, at which time the discharge is effective. The Employee has ten business days to appeal to the Civil Service Commission. The Commission will hold a hearing and render a decision.

If the parties want to, they may skip the Appointing Authority hearing and go straight to the Commission, G.L. ch.31, §41A. This delays the effective date of discipline, but avoids the risk of reversal. This is most appropriate in the continuing offence situation, such as a dispute over rules or authority, rather than an incident of misconduct..

5.4 Short Suspensions

An appointing authority can impose a suspension of five days or less or, in public safety agencies, punishment duty summarily, without any preliminary hearing. In this situation there must be a notice to the employee just as in a discharge, given within 24 hours of imposition. Thereafter the employee has 48 hours in which to request a hearing. Once requested, the Appointing Authority must hold a hearing, just as in the case of a discharge. The employee would have the same appeal rights as in a discharge. Where the employees commits an offense requiring immediate discharge, violent behavior for example, the Appointing Authority can combine a five day suspension and a discharge, by holding the discharge hearing and rendering a decision within the five days.

5.5 Layoffs

Once laid off, the employee has a right to reinstatement for up to five years if a position of the same job title becomes vacant, and is to be filled, G.L. ch.31, §39.

5.6 Civil Service Commission Hearings

Typically, the Civil Service Commission acknowledges receipt of an appeal and sends notice to the Appointing Authority within two weeks of receipt. In a few weeks the Commission will schedule a pre-hearing conference. If there are jurisdictional issues the Appointing Authority should file a motion to dismiss. For any motion the opposing party can file objections within seven days. There are opportunities for discovery, although the Commission does not employ any effective means to enforce discovery orders. Requests for Admissions cannot be enforced easily. Some cases settle at the Pre-Hearing Conference, particularly if the Commissioner presiding takes an aggressive stand. Otherwise, the case will be assigned for a hearing, often before a Magistrate from the Division of Administrative Law Appeals. Hearings are similar to arbitrations. Evidence is limited to that which was in the original charge notice, *Gardner v. Bisbee*, 34 Mass. App. Ct. 721, 615 N.E.2d 603 (1993). Unless a Magistrate is hearing the case it will be heard by one of the four part time Commissioners. In that case, it is very hard to keep evidentiary objectionable evidence out

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of the record. Also, if anyone wants a transcript he must bring blank audiotapes for the Commission to use. After the hearing memoranda may be requested. Thereafter the Commission renders a decision. From beginning to end the process takes about a year.

5.7 Claims of Violations of Procedures

If the employee claims that he did not receive a hearing before the appointing authority, or that the hearing lacked basic fairness, or other violations of G.L. ch.31, §.41, he may appeal under G.L. ch. 31, §.42. In that appeal he must state specifically in what manner his rights were violated. In such cases there is a harmless error standard, so for example, if an employees claims he did not receive the copies of the sections of the statutes, but nonetheless he was able to protect his rights and timely appeal, he would not prevail. Generally it is hard for employees to win these cases unless they can show the complete lack of a hearing. However, even in victory for the employee under this section, the Appointing Authority may reinstate the same charges again.

5.8 Decision, Enforcement, and Attorney's Fees

The Commission will receive a report from the person who held the hearing, containing findings of fact and a recommended decision. Usually the parties will not receive this report until after the final decision. The Commission can vote to uphold, reverse, or modify the adverse action. Thereafter the parties have thirty days to appeal to superior court, under G.L. ch.31, §44. If the Commission orders reinstatement, it is with back pay. If the reinstatement or back pay is not forthcoming the Commission or the Appellant can go to court under G.L. ch.249, §5 (mandamus). An appellant that prevails at the Commission is entitled to a very modest amount of attorney's fees and costs, G.L. ch.31, §45. The Commission can hold a hearing to settle the amount due under this statute.

6 JUDICIAL REVIEW OF CIVIL SERVICE

Any party to a Civil Service Commission appeal may appeal an adverse determination to the Superior Court pursuant to G.L. ch.31 §44, within thirty days. The grounds for such appeals are set out in G.L. ch.30A, §14. Superior Court Standing Order 1-98 governs pre-trial procedure.

Generally, appointing authorities do very well in the Courts when they sue the Civil Service Commission. This may be because of the volume of appeals to the Commission and the lack of staff to prepare the decisions. Although the Civil Service Commission is one of the most often sued state agencies, only a small percent of its decisions are ever appealed to court. Thus the decisions are not always carefully prepared, and they are often found to be lacking in formalities. They are good enough for the parties to understand the outcome, but they are not good enough for a judge to reconcile with the law. Also, the Commission tends to favor appellants, knowing that most of its decisions will never be challenged. Despite this favor, employers do win most of the appeals. Employee unions are the only political friends the Commission has. The loss of a few cases in court every year has very little effect on the way the Commission does its work. Only one of the Commissioners is a lawyer, and there is little evidence that the Commissioners read court decisions.

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7 FURTHER READING

For more information about state and municipal civil service law the reader is referred to:

- 7.1. Douglas A. Randall & Douglas E. Franklin, Municipal Law and Practice, _321, et seq. 4th ed. Massachusetts Practice, Vol.18, West Publ. Co. 1993).
- 7.2. Maria C. Walsh, Ed. A Judicial Guide to Labor and Employment Law (Boston, Mass. Lawyers Weekly Pub., 1993).
- 7.3. Isidore Silver, Public Employee Discharge and Discipline (N.Y., John Wiley & Sons, 1991) (also on CD-ROM from the publisher)
- 7.4. Civil Service vol. 5A, (American Jurisprudence, Pleading and Practice Forms, Lawyers Co-op Publ. Co.) Municipal Law & Practice has a good bibliography in this field.
- 7.5. At the Social Law Library, a one-page Research Guide, #20
- 7.6. Landlaw, Inc. publishes the Massachusetts Civil Service Reporter, three times a year, which contains the full text of Civil Service Commission decisions and indexes.
- 7.7. 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 there from.

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