

***COLLINS, LOUGHRAN & PELOQUIN, P.C.***

Attorneys at Law  
320 Norwood Park South  
Norwood, Massachusetts 02062

Tel. (781) 762-2229 • Fax (781) 762-1803

*www.collinslabor.com*

Philip Collins  
Michael C. Loughran  
Leo J. Peloquin  
Tim D. Norris  
Joshua R. Coleman  
Melissa R. Murray  
Stephanie M. Merabet

**BARGAINING OBLIGATION, GOALS AND STRATEGY  
FOR REVOKING AND REPLACING POLICE AND FIRE  
CIVIL SERVICE**

By

Leo J. Peloquin, Esq.

---

A presentation for:

Massachusetts Municipal Association Annual Meeting

Workshop: Options Outside of Civil Service

Boston, Massachusetts

January 24, 2014

## REVOKING AND REPLACING CIVIL SERVICE IN POLICE AND FIRE DEPARTMENTS

### I. WHY REVOKE

- A. **Hiring and promotion process:** Dependent on slow-moving state agency to schedule exams and administer selection lists; Limited selection criteria of exam scores, including preference points, and must select from top three exam scores; Failing to select the applicant topping the exam generally results in costly bypass litigation.
- B. **Discipline Appeals:** No role in selection of hearing officer for appeals; Hearing officers can be employee-friendly and interpret the statute accordingly; No timeline for decisions; Bad decisions costly to try and overturn.
- C. **Layoffs:** Seniority based.

### II. REVOKING ACCEPTANCE OF CIVIL SERVICE STATUTE

- A. **The Law on revocation:** “At any time after the expiration of three years from the date on which any optional provision of the General Laws has been accepted in any city or town, whether by official ballot, by by-law, by ordinance, or by vote of the legislative body of the city or town, or by vote of the board of selectmen or school committee of a town, the revocation of such acceptance of any optional provision of the General Laws may be effected in the same manner as was the original vote to accept the said provisions, but such revocation shall be subject to the following restrictions:...(e) This section shall not affect any contractual or civil service rights which have come into existence between the city or town and any officer or employee thereof as a result of the original acceptance of any optional provision of the General Laws provided, however, such revocation shall apply to the successor to the incumbent officer or employee. St. 1980, c. 580, § 5; M.G.L. c. 4, § 4B (emphasis added).

1. Revocation is done under the same procedure as acceptance or by special home rule legislation; Phrase revocation language to make it “subject to the [Employer] meeting any impact bargaining obligation under M.G.L. c. 150E.”

2. Must grandfather separate civil service rights existing civil service employees as much as is practicable.

**III. LIMITED BARGAINING OBLIGATION: CAN REVOKE WITHOUT BARGAINING BUT MUST BARGAIN OVER THE OVER THE IMPACT OF THE REVOCATION ON WORKING CONDITIONS**

A. **The Law:** M.G.L. c. 150E does not require bargaining over the decision to petition for revocation of the statute, but does require bargaining over the impact of the revocation on employee working conditions. NAGE Local R1-162 V. Labor Relations Commission, 17 Mass. App. Ct. 542 (1984); Weymouth School Committee and NAGE Local R1-162, 9 MLC 1091 (1982).

**B. Impact Bargaining Issues: Filling The Gaps Left By Revocation**

1. Seniority.
2. Layoff/Recall.
3. Discipline.
4. Promotions.
5. **SEE ATTACHMENTS:** Sample impact bargaining proposal and post-civil service promotion policy.

**C. Don't Let A Union Make You 'Buy' Revocation And Replacement Of Civil Service**

1. Why Unions resist.
2. Which comes first---revocation or bargaining?
  - a. Revocation changes hiring without bargaining
  - b. Disadvantages of revocation first
  - c. Holding off playing the revocation "card"
3. Revocation bargaining is impact bargaining and does not have to wait for successor contract bargaining

**TOWN'S IMPACT BARGAINING**  
**PROPOSAL REGARDING REVOCATION OF CIVIL SERVICE FOR POLICE**  
**DEPARTMENT**

1. The parties acknowledge the Town's right to revoke its acceptance of the Civil Service statutes under NAGE Local R1-162 v. Labor Relations Commission, 17 Mass. App. Ct. 542 (1984) and its duty to negotiate the impact of such revocation on terms and conditions of employment.

2. **Effect of Revocation.** As reflected in the provisions set below, the revocation of the Civil Service statute shall be implemented to preserve, as much as it is practicable, any civil service rights which have come into existence between the Town and any employee as a result of the original acceptance of such law.

3. **Seniority.**

a. For employees appointed before the removal of the Department from Civil Service, the Civil Service definition of seniority shall continue to apply for purposes of layoffs, demotions, and all other contractual purposes, except as may be provided otherwise in specific language in the parties current Collective Bargaining Agreement ("CBA").

b. For employees appointed after the effective date of removal from Civil Service, seniority shall be based on the employee's date of appointment in the Department.

4. **Layoff and Recall.**

a. Employees appointed prior to the Town's revocation of the Civil Service statute shall maintain all rights regarding layoffs, recall, inclusion on the re-employment list, and lateral transfers, and the procedures under M.G.L. c. 31 governing such matters and any appeal rights shall continue to apply.

b. For employees appointed after the removal of the department from Civil Service, the term "layoff" means a reduction in the number of employees due to a lack of work, lack of funds or abolition of position. In the event of a layoff, the least senior employee or employees shall be laid off first. In any such case a five (5) days' advance notice of the contemplated layoff shall be given to the employee in writing; a copy of such notice shall also be given to the Union. Student officers shall be laid off first, followed by probationary employees.

A laid-off employee shall have recall rights for a maximum period of five (5) years. Recall shall be in order of seniority with the employee with the highest level of seniority having first right of recall. Notice of recall shall be via certified mail to the employee's last known address. A recalled employee shall notify the Chief of Police within fourteen (14) calendar days of mailing of the recall notice of his or her intention to return to the Police Department. Any person refusing or failing to exercise such recall opportunity within such fourteen (14) day period shall be deemed to have waived his or her right of recall permanently and absolutely. Employees must be available to work within twenty-one (21) calendar days of receiving notice in order to be eligible for recall. This requirement may be waived with the agreement of the Chief of Police. Prior to returning to work a recalled employee may be required to undergo a physical examination, physical abilities test or such other examination or investigation as the Chief of Police deems necessary and appropriate. If, based on the results of such examination or investigation, the Chief of Police rescinds the offer of recall he shall provide the employee with a written statement of his reasons for the rescission. This rescission may be subject to the grievance and arbitration provisions of the contract.

Laid off employees will be responsible for maintaining any required licenses or certifications, provided that laid off employees are allowed to attend department training sessions, if available, at no cost to the employee or the Town. Laid off employees will be allowed to attend courses which involve a cost provided they pay their portion of the costs. Laid off employees who attend such Town-sponsored training sessions and/or courses, shall as a condition of attendance, sign a Release of All Claims on a form provided by the Town indicating that they are participating on a voluntary basis and not as employees of the Town and, except in instances involving gross negligence on the part of the Town, they accept all risks associated with participation in the program.

**5. Discipline.**

a. Employees appointed prior to the removal of the Town from Civil Service shall retain their right to appeal discipline imposed under M.G.L. c. 31, § 41 to the Civil Service Commission.

b. After the revocation of the Civil Service statute, the Town and the Union agree that the "just cause" standard under M.G.L. c. 31, § 41 and the procedures applicable under that section, as interpreted by the Civil Service Commission and the Commonwealth's appellate courts, shall continue in effect for employees who have completed a probationary period of one (1) year performing the full duties of a sworn police officer. After the appointing authority makes a decision on a disciplinary action under § 41 (whether it is his/her action, or a decision on appeal of a departmental suspension), the Union, but not an individual employee, will have thirty (30) days to invoke arbitration by notifying the Town Manager in writing and specifying in said notice the basis of the appeal. Within ten (10) days after receipt of said notice, the Union shall file a Demand for Arbitration with the American Arbitration Association. The Arbitrator

shall apply the same “just cause” standard set forth in M.G.L. c. 31, § 41 and remedial provisions under M.G.L. c. 31, § 44, consistent with appellate cases applying that standard and those provisions. Judicial review of arbitrator’s awards shall be pursuant to M.G.L. c. 31, § 44.

6. **Promotions.** The parties acknowledge that promotion procedures must be adopted to govern promotions to fill vacancies which occur after the effective date of the removal of the department from Civil Service and/or after pending promotions have been completed. The Town proposes the attached promotions policy.

## **PROMOTIONS**

This policy applies to promotions *for sworn personnel only*.

Our Department's commitment to developing employees to take on increasing levels of authority, responsibility and leadership is embodied in promotions. Eligible candidates have an opportunity to apply and participate in the promotion process as set forth in this policy.

Promotions are based upon the merits of the individuals and their personal performance in the promotion process, and never on favoritism or seniority alone. A promotion is an investment in the future, not only for the department, but also for the employees who will be supervised and guided by the promoted member.

### **POLICY:**

It is the policy of this Department to recommend promotions based upon an employee's training, experience and merit. The Town Manager is the Appointing Authority.

No employees will be denied promotion based upon any discriminatory criteria, including, but not limited to, their sex or sexual orientation, race, religion, nationality or union membership.

### **PROCEDURES:**

Promotions of sworn personnel to the rank of Police Sergeant, Lieutenant and Captain are processed under the direction of the Human Resources Director. His/her duties shall include:

Posting written announcements of any scheduled promotional opportunities;

1. Coordinating with any companies or consultants contracted to participate in the promotion process;
2. Protecting the integrity of the promotional process by ensuring that all promotional materials, documents, scores, and completed evaluations remain confidential and kept in a secure location; and
3. Maintaining copies of active promotion lists.

Testing and scoring materials shall not be left unattended for any period of time. Materials not under the immediate and direct control of a person authorized to possess them shall be kept in a secure area approved by the Human Resources Director.

Promotional materials shall be retained as required by law. These include:

1. Interview questions and score sheets; and



2. Assessment Center questions, exercises, evaluations and other related materials;

### **Notice of a Promotional Exam**

The Chief, or his/her designee, shall advise all affected personnel of an upcoming promotional exam no less than 180 days in advance of the test date by:

1. Immediately posting the notice in a prominent place; and
2. Forwarding the notice to supervisors to be read at roll call.

Officers out sick or injured, on administrative or other leave, or on active military duty, or otherwise not likely to receive notice shall be mailed a copy of the examination notice.

A reading list of text books will be maintained and available to all personnel. The reading list will not be changed less than 180 days prior to an exam. Questions on case law and statute law will not take into account law changes occurring less than 90 days prior to the exam.

### **Eligibility**

To be eligible for promotion to the rank of Sergeant the candidate must be a permanent member of this Department with a minimum of three years of completed service as a full-time Patrol Officer or Detective. To be eligible for promotion to the rank of Lieutenant the candidate must be a permanent member of this Department with a minimum of two years of service as a Sergeant. To be eligible for promotion to the rank of Captain, the candidate must be a permanent member of this Department with a minimum of two years of service as a Lieutenant.

For promotions taking place after 2013, an associate's degree will be required and the candidate must be enrolled in a bachelor's degree program prior to promotion.

### **Promotional Examination for the Rank of Sergeant**

An exam for Police Sergeant will be given every three years if five (5) police officers sign up to take the scheduled exam. The exam will be considered valid if three (3) police officers pass the exam with a score of seventy-five (75) or higher. In the event that fewer than three (3) police officers achieve a score of seventy-five (75) or higher, the passing grade of the exam shall be lowered to seventy (70) or higher. In the event that less than three (3) police officers, after lowering the passing grade of the exam to seventy (70), pass the exam, another exam will be given within one (1) year of the previous exam date.

If another exam is held because less than three (3) police officers achieved a grade of seventy (70) or above, those police officers who passed the original exam with a score of seventy-five (75) or higher shall have the option of "holding" their grade and will not be required to take the next exam. Their grade shall be counted and applied to the scores of the second exam. Police officers who choose to "hold" their grade shall make this known to the Human Resources Director by way of a written notice at least 14 days prior to the date of the new exam.

The exam will be pass/fail. Passing the exam will admit candidates to the next phase of the promotion process, where their scores may be considered as one of the factors in promotion.

### **Promotional Examination for the Rank of Lieutenant**

A promotional exam for the rank of Lieutenant will be given every three years if three (3) sergeants sign up to take the scheduled exam. The exam will be considered valid if two (2) sergeants pass the exam with a score of seventy-five (75) or higher. In the event that fewer than two (2) sergeants achieve a score of seventy-five (75) or higher, the passing grade of the exam shall be lowered to seventy (70) or higher. In the event that less than two (2) sergeants, after lowering the passing grade of the exam to seventy (70), pass the exam, another exam will be given within one (1) year of the previous exam date.

If another exam is held because fewer than two (2) sergeants achieved a grade of seventy (70) or above, any sergeant who passed the original exam with a score of seventy-five (75) or higher shall have the option of "holding" their grade and will not be required to take the next exam. Their grade shall be counted and applied to the scores of the second exam. Sergeants who choose to "hold" their grade shall make this known to the Human Resources Director by way of a written notice at least 14 days prior to the date of the new exam.

The exam will be pass/fail. Passing the exam will admit candidates to the next phase of the promotion process.

### **Promotional Examination for the Rank of Captain**

A promotional exam for the rank of Captain will be given every three years if three (3) sergeants sign up to take the scheduled exam. The exam will be considered valid if two (2) lieutenants pass the exam with a score of seventy-five (75) or higher. In the event that fewer than two (2) lieutenants achieve a score of seventy-five (75) or higher, the passing grade of the exam shall be lowered to seventy (70) or higher. In the event that less than two (2) lieutenants, after lowering the passing grade of the exam to seventy (70), pass the exam, another exam will be given within one (1) year of the previous exam date.

If another exam is held because fewer than two (2) lieutenants achieved a grade of seventy (70) or above, any lieutenant who passed the original exam with a score of seventy-five (75) or higher shall have the option of "holding" their grade and will not be required to take the next exam. Their grade shall be counted and applied to the scores of the second exam. Lieutenants who choose to "hold" their grade shall make this known to the Human Resources Director by way of a written notice at least 14 days prior to the date of the new exam.

The exam will be pass/fail. Passing the exam will admit candidates to the next phase of the promotion process.

### **Assessment Centers**

Assessment centers may be used as part of the promotional process to rank each candidate.

### **Candidate Interviews**

An oral board approved by the Human Resources Director will conduct candidate interviews. Interviews shall be conducted from a prepared list of questions and the board will rate responses.

### **Candidate Selection**

The Chief of Police shall make a recommendation for promotion from the list of eligible candidates based on the following criteria:

1. Job related experience;
2. Performance evaluation in his/her present position (including contributions to the department);
3. Results of Assessment Center;
4. Attendance record;
5. Supervisory evaluation of the employee's promotion potential;
6. Sick leave record;
7. Formal education;
8. Training and education through career development;
9. Disciplinary record of the employee;

10. Attitude toward the department and police work; and

11. Work ethic and initiative.

**Final Selection**

The Town Manager is the appointing authority and shall determine the final selection of a candidate for promotion. There will be a promotional probationary period of one year for all new appointments.