

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

PAUL A. ALMEIDA,
Appellant

v.

CASE NO: E-10-10

NEW BEDFORD SCHOOL DEPT,
Respondent

Appellant, Pro Se:

Paul A. Almeida
56 Morgan Street
New Bedford, MA 02740

Appointing Authority's Attorney:

Jane Medeiros Friedman, Esq.
City of New Bedford
Solicitors Office
133 William Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION ON MOTION FOR SUMMARY DISPOSITION

The Appellant, Paul A. Almeida, brought this appeal seeking to enforce his rights under prior Decisions of the Civil Service Commission (Commission) concerning his bumping rights under Section 39 of the Civil Service Law. On March 9, 2010, the Appellant filed a Motion for Summary Disposition. The City of New Bedford School Department, Appointing Authority (NBSD) submitted an opposition to the motion on April 9, 2010. The Commission held a hearing on the motion on May 28, 2010, which was digitally recorded.

PROCEDURAL HISTORY

Mr. Almeida was one of a number of NBSD bus operators whose permanent labor service positions were abolished in August 2008 due to lack of funds. In two prior decisions, the Commission established: (1) Mr. Almeida was entitled to exercise his

“bumping rights” to be demoted to certain other full-time unskilled labor service positions held by other employees with less seniority, including the position of Cafeteria Helper (Case No. G1-08-234; 22 MSCR 269, 22 MSCR 348) [*Almeida I*] and (2) the Appellant did not have a right to “bump” into any full-time labor service position of his choice; rather NBSD was entitled to designate the lower job title(s) into which the employee may elect to be demoted (Case No. G1-09-327; 22 MCSR) [*Almeida II*].

Mr. Almeida brings the present appeal because he contests that NBSD has placed him into a labor service position of Cafeteria Helper that is not full-time, that there was one or more other full-time Cafeteria Helper positions that were vacant and awarded to employees with less seniority than he, and, therefore, the NBSD has failed to comply with the letter and intent of the Commission’s prior decisions.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following facts to be undisputed:

1. The Appellant, Paul A. Almeida, was appointed to the labor service position of full-time Bus Operator in the School Department, with a seniority date of September 11, 2000. (*Almeida I*)

2. The NBSD is a party to a collective bargaining agreement through AFSCME Council 93, Local 641, effective from July 1, 2007 through June 30, 2010 (the CBA), which provides, in part, that vacant positions are to be posted and employees entitled to “bid” on any such position, which are to be awarded to the bidding employees in order of seniority. (*Almeida I; Almeida II; Appellant’s Motion; Respondent’s Opposition*)

3. As a result of the Commission’s decision in *Almeida I*, NBSD placed Mr. Almeida temporarily in a vacant position of 6½-hour Cafeteria Helper; following the Commission’s decision in *Almeida II*, NBSD posted that position, as well as one other

6½ hour and two other 4-hour Cafeteria Helper positions, seeking bids from eligible employees for permanent appointments to those vacant positions in accordance with the procedures of Article XVI of the CBA. (*Respondent's Opposition, Exh. A*)

4. NBSD received bids from fifteen employees for the posted vacancies. None of the employees who bid on the 6½-hour position then temporarily occupied by Mr. Almeida has a civil service seniority date earlier than Mr. Almeida's seniority date. (*Respondent's Opposition*)

5. Mr. Almeida did not bid on any of the posted positions. In a letter to the NBSD, Mr. Almeida explained the reason for this action was that he "will not be 'bidding' for any open positions until I receive written notice as to where I am being permanently placed in accordance with . . . Almeida II" (*Appellant's Motion; Respondent's Opposition, Exh. C*)

6. Upon receipt and review of all of the bids, NBSD proceeded to fill the open Cafeteria Helper positions with employees who bid on those positions in order of their seniority, as NBSD construed it was obligated to comply with the applicable collective bargaining agreement. Mr. Almeida was assigned to one of the unfilled open 4-hour position of Cafeteria Helper at New Bedford High School. (*Respondent's Opposition, Exh. D*)

CONCLUSION

Mr. Almeida's present appeal asserts that assignment to a 4-hour Cafeteria Helper position violates his "bumping rights" under Section 39 of the Civil Service Law and the prior decision of the Commission in Almeida I and II. The Appellant argues that he was entitled to be permanently appointed to the 6½-hour position to which he had been temporarily assigned and that he was not required to "bid" for the position under Article

XVI of the CBA. He also argues that his assignment to a 4-hour Cafeteria Helper position violates the Commission's decision that he must be bumped to a "full time" labor service position and that the 4-hour position is "part time". The NBSD argues that it is obligated to submit all vacancies for bidding under the CBA, and that nothing in civil service law or the Commission's decisions is necessarily inconsistent with, or overrides the CBA bidding process. NBSD also argues that Mr. Almeida would have been awarded the 6½-hour Cafeteria Helper position if he had bid for it, since he would have been the most senior employee bidding; thus, his failure to secure that position is due to his own inaction and lack of due diligence to follow the steps required of him under the CBA.

The Commission concurs that NBSD has acted appropriately and in full compliance with the letter and the intent of the Commission's decisions in Almeida I and II.

The Appellant's correctly cites the provision of the CBA (Article XIX) to the effect that the CBA is not intended to "add or diminish the Civil Service rights of an employee concerning a reduction in force as provided by Civil Service law." That point, however, does not win the day for the Appellant.

It is well-settled that, in the event of a material conflict between civil service law and a collective bargaining agreement, the civil service law will take precedence. See, e.g., Local 1652, Int'l Ass'n of Firefighters v. Framingham, 442 Mass. 463, 477n.15 (2004); City of Fall River v. AFSCME Council 93, Local 3117, 61 Mass.App.Ct. 404, 411 (2004); Leominster v. Int'l Bhd of Police Officers, Local 338, 33 Mass.App.Ct. 121, 124-125, rev.den., 413 Mass. 1106 (1992) Here, however, bumping rights under Section 39 as interpreted by the Commission in Almeida I and II, and as the NBSD attempted to apply them, are fully consistent with the requirement that vacancies be filled through a bidding process that results in the positions being awarded in order of seniority. Clearly,

had Mr. Almeida elected to bid on the position he wanted, he would have been permanently appointed to it, as no employee junior to him bid on it. Moreover, the Commission appreciates NBSD's point that it acted with good faith intent to reconcile its "bumping" obligations to displaced employees under Section 39 with its collective bargaining agreements to assign vacant positions in order of seniority, when both can be accommodated. This process, for which the parties bargained in good faith, among other things, provides an orderly means of filling open positions, and minimizes the inevitable "musical chairs" problems that might otherwise arise.

Common sense suggests that, since Section 39 allows an employee to bump only "an employee junior to him in length of service", a displaced employee with Section 39 bumping rights should always win the CBA bidding contest over any such junior employee. Only if there were no other employees "junior to him" holding the relevant position or bidding on a vacant position would the displaced employee lose the bid; but, since there were, then, no "junior" employees in the departmental unit that the displaced employee was entitled to bump under Section 39, his Section 39 rights would not be violated. Thus, it would seem likely that, in the case of vacancies, the right to bump junior employees under Section 39 is, in nearly every conceivable case, compatible, not inconsistent with, allowing the process for bidding on vacancies based on seniority under the CBA to play itself out.

It is also a well-established principle of common law that an injured party is obliged use reasonable, honest and good faith efforts to mitigate any loss suffered by another party's wrongful actions; although the level of effort that meets the duty to mitigate is not "onerous and does not require success", it does require "reasonable diligence". See, e.g., Assad v. Berlin-Boylston Reg. Sch. Comm., 406 Mass. 649, 656-57 (1990); Conway v.

Electro Switch Corp, 402 Mass. 385, 389 (1998); Tosti v. Avik, 400 Mass. 224, 227-28, cert.den., 484 U.S. 964 (1987). See also Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir.1983), cert.den., 466 U.S. 950 (1984); Denton v. Boilermakers Local 29, 673 F.Supp. 37, 46-47 (D.Mass. 1987), citing Nat'l Labor Rel. Bd. v. Cashman, 223 F.2d 832 (1st Cir. 1955).

This duty of mitigation is also consistent with the principles of civil service law that an employee seeking equitable relief for a violation of his civil service rights is expected to act reasonably whenever possible to minimize the consequences of the alleged violation of those rights pending a determination of the claim. See, e.g., Act of 1993, c.310 (equitable relief available when appellant's civil service rights are infringed provided appellant establishes that his injury has been caused "through no fault of his own"); Leary v. Town of South Hadley, 22 MCSR 366 (2009) (the proper response to a disputed order is to "obey and grieve"); Ouellette v. City of Cambridge, 19 MCSR 299 (2006) (same).

It might present a different case if, hypothetically, as a result of the bidding process, all Cafeteria Helper positions offered by the NBSD for bidding by the Appellant, in fact, went to more senior employees. In that event, the Appellant may well have an argument that his statutory bumping rights under Section 39 have not yet been satisfied and that the NBSD was obliged to find some other "full time" unskilled labor service job if there was any such position for which his seniority would qualify him (e.g., offering demotion to position in a different unskilled job classification occupied by a more junior employee).

The Commission, however, does not need to address that hypothetical, nor does it need to address the question as to whether the 4-hour Cafeteria Helper position is a "full time" or "part time" position. Here, the NBSD adopted a process in good faith that, in

theory and application, was intended to be consistent with both the Appellant's Section 39 bumping rights and the perceived CBA obligations it had to other employees. The Appellant's loss of the bumping opportunity he says he should have been given (and/or his landing in an allegedly "part-time" rather than "full time" position) is the proximate result of his own choice and lack of reasonable diligence, albeit misinformed, and cannot be said to be a result that arose "through no fault of his own." In this regard, the Commission certainly appreciates that, where an appellant acts pro se, as he does here, his ignorance of the well-established principles that led him astray may not have been apparent to him. That said, however, it does not change the conclusion that NBSD has acted appropriately in this case and that further relief to the Appellant is not now warranted.

Accordingly, for the reasons stated, the appeal of the Appellant, Paul A. Almeida, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By the Civil Service Commission (Chairman Bowman; Commissioners Henderson, McDowell, Marquis and Stein) on October 21, 2010.

A True Record. Attest:

Commissioner

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

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

Notice to:

Paul A. Almeida [Appellant]

Jane Medeiros Friedman, Esq. [Respondent]