

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

PAUL ALMEIDA,
Appellant

v.

CASE NO: G1-09-327

**NEW BEDFORD SCHOOL
COMMITTEE,**
Respondent

Appellant, Pro Se:

Paul A. Almeida


Appointing Authority's Attorney:

Jane Medeiros Friedman, Esq.
Solicitor's Office
City of New Bedford
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

The Appellant, Paul Almeida, brought this appeal to challenge the implementation of the Decision of the Civil Service Commission (Commission) in Case No. G1-08-234 [*Almeida I*] that established Mr. Almeida's "bumping rights" into certain labor service positions following the abolishment of his position as Bus Operator for the New Bedford School Department (New Bedford) due to a lack of funds, pursuant to G.L.c.31, §39.

The parties differ as to how bumping rights are applied under G.L.c.31, §39 in the circumstances of this case. The Appellant contends that he is entitled to elect the position into which he will be demoted, i.e., Laborer. New Bedford interprets the statute to mean that an employee with bumping rights, i.e. Mr. Almeida, is allowed to provide notice of

his consent to demotion but, if there is more than one position in the “next lower title or titles” occupied by an employee junior to the bumping employee, the appointing authority, i.e., New Bedford, may designate the position or positions into which the employee may be demoted. There is a parallel issue under Section 39 regarding New Bedford’s right to select which “similar positions” into which Mr. Almeida may be entitled to “reinstatement” prior to the hiring of any other applicants to fill such positions. The answers to these questions also may impact the possible Section 39 rights of other Bus Operators separated for lack of work along with Mr. Almeida.

The present appeal presents both legal and logistic issues concerning the implementation of the Commission’s Decision Almeida I. The Commission, by Interim Order dated September 15, 2009 invited the parties to consider whether the issues could be resolved by agreement, either directly or through collective bargaining. By letter dated November 12, 2009, New Bedford reported that it had met with the applicable collective bargaining unit representatives and advised that a contractual resolution was not possible. Accordingly, New Bedford requests that the Commission issue a decision to clarify the rights and obligations of the parties in implementation of the Decision in Almeida I. By letter dated November 16, 2009, Mr. Almeida responded to New Bedford’s letter expressing the reasons that he believed his initial position should be sustained, i.e. he should be entitled to elect to “bump” into a Laborer position of his choice.

The Commission will treat the recent submissions of the parties as requests for entry of a summary decision based on the submissions and the documentation provided, which includes a copy of the applicable collective bargaining agreement between AFSCME

Local 641 and New Bedford submitted in Almeida I (herein the “Unit 641 CBA”) and a seniority roster of the personnel in Unit 641 as of 9/16/2009 (the “9/09 Seniority Roster”).

FINDINGS OF FACT

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

1. The Unit 641 CBA contains the following provisions:

ARTICLE VI.A. The employer and the Union shall recognize and adhere to all Civil Service laws, Rules and Regulations, relative to seniority, promotions, transfers, discharges, removals, and suspension.

ARTICLE XVI.1. POSTING.

A. Except in emergency . . . when a position covered by this agreement becomes vacant, such vacancy shall be posted . . . for seven (7) work days. Employees interested shall apply in writing within the seven day period. At the expiration of the posting period, the appointing authority will award the position in accordance with M.G.L.c. Chapter 31 and the Rules and Regulations of Civil Service. . . . Employees may bid on positions in lower classifications provided that, if appointed, they sign a statement accepting the demotion.

B. In all cases in which a vacancy exists in a department . . . the principle of seniority shall govern where ability, dependability and capacity (physical or otherwise) to perform the duties are adequate to meet such job requirements are equal, provided they do not conflict with the requirements and best interests of the Department.

ARTICLE XVII.E. MANAGEMENT RIGHTS. Except as specifically abridged, delegated, granted or modified by the Agreement, all the rights, powers and authority the School Committee and the Superintendent of Schools had prior to the signing of this Agreement are retained by the Committee and the Superintendent of Schools and remain exclusively and without limitation within the rights of the Committee and the Superintendent of Schools and are not subject to grievance procedure and/or negotiation during the term of this Agreement.

ARTICLE XIX. SENIORITY.

A. The term “seniority” as applied in this agreement, shall mean total service rendered to the School Department as a fulltime employee in a permanent, provisional or temporary position, except that employment in a temporary or provisional capacity must have lead to a permanent position in a continuous and unbroken period of service. When service has been interrupted, seniority shall be determined by the last date of employment, unless prior service is allowed under . . . Chapter 31, Section 33 of the General Laws. In the event of a tie . . . seniority shall be determined by the length of any parttime service with the School Department and if there was no prior parttime service . . . they by an employee’s standing on the Civil Service eligibility list when he/she was appointed.

B. REDUCTION IN FORCE

1. In the event employees in positions having the same title are to be separated from such positions, they shall be laid off according to seniority so that employees senior in length of service shall be retained the longest and reinstated in accordance with Civil Service rules first.
2. As provided by Civil Service rule, if a permanent and tenured employee is laid off, he/she may consent to be demoted (bump) to a position in the next lower title in succession in the official or labor service, as the case may be, if in such lower title there is an employee junior in length of service.
3. Nothing in this Article is intended to add or diminish the Civil Service rights of an employee concerning a reduction in force as provided by Civil Service law.

2. The Salary Schedule incorporated into the Unit 641 CBA provides the hourly base pay levels for the following positions:

Junior Custodian -	\$12.19 through \$17.00
Bus Driver -	\$11.75 through \$16.60
Cafeteria Helper -	\$10.54 through \$15.49
Laborer -	\$10.54 through \$15.49

3. When the Appellant, Mr. Almeida, and ten other New Bedford Bus Operators who were laid off as a result of a reduction in force in September 2008, prior to having the benefit of the decision in Almeida I, New Bedford offered all of the laid off Bus Operators the opportunity to be appointed as provisional junior custodians, which all other ten Bus Operators accepted. (Almeida I; 9/09 Seniority Report)
4. The Appellant, Mr. Almeida, has a New Bedford civil service seniority date of September 11, 2000. (Almeida I)
5. All ten of the other Bus Operators who were laid off in the September 2008 reduction in force have New Bedford civil service seniority dates of greater length of service than Mr. Almeida, ranging from 12/18/1989 to 3/21/2000. (*New Bedford Letter dated 11/12/2009; 9/09 Seniority Report*)

6. According to the 9/09 Seniority Report, full time positions of Cafeteria Helper Laborer and Motor Equipment Operator, which Almeida I determined were positions into which Bus Operators were entitled to “bump”, appear to be held by persons with less seniority than one or more laid off Bus Operators. One 7-Hour Cafeteria Helper and two Laborers have less seniority than Mr. Almeida.

7 Hour Cafeteria Helper

Paula B (6/28/1993)
Linda R (4/23/1996)
Roxanne C (11/3/1997)
Ludovina C (9/8/1998)
Betty L (9/8/1998)
Jeannie F (1/2/2001)

Laborer

Alan E (1/16/2007)
Manuel S (12/01/2008)
Andrew T (12/01/2008)

Motor Equipment Operator

Jerrold L (2/3/1993)
Arthur M (10/03/1994)
Normand B (12/01/1997)

(9/09 Seniority Report)

7. In addition, there appear to be seventeen (17) positions of 6½ Hour Cafeteria Helper, all of whom have seniority dates of lesser length of service than any of the laid off Bus Operators. Ten of the 6½ Hour Cafeteria Helpers have less seniority than Mr. Almeida. *(9/09 Seniority Report)*
8. According to the Unit 641 CBA, the “hours in a work week for full time cafeteria personnel . . . shall not exceed five (5) consecutive seven (7) hour days. . . .The hours of cafeteria positions established at seven (7) hours per day may be reduced to less than seven (7) hours per day when the position becomes vacant caused by the resignation, retirement, death, transfer, promotion or demotion of the incumbent employee. *(Unit 641 CBA, Article VII.B.)*

9. In the absence of any evidence to the contrary, insofar as it may be relevant, the Commission infers that New Bedford has complied with the Unit 641 CBA and, therefore, the six 7-Hour Cafeteria Helper and the seventeen 6½ Hour Cafeteria Helper positions all are permanent, full-time positions, per the Unit 641 CBA.

CONCLUSION

Summary of Conclusion

Full-time tenured civil service employees targeted for separation in a reduction in force due to lack of money have recourse to two distinct remedies under G.L.c.31,§39: (1) the pre-termination right to consent to demotion to a lower level job subject to restoration, in order of seniority, to the employee's former job; and (2) the post-termination right to be reinstated, in order of seniority, to the employee's former job or any "similar" job, prior to the appointment of any other applicants to fill such positions or similar positions.

Under Section 39, an employee's right to provide written "consent to his being demoted to a position in the next lower title or titles" as an alternative to separation from employment in a reduction in force, does not entitle the employee to pre-condition that consent on demotion to any specific position(s); if there are more than one "lower title or titles" to which the employee can be demoted, the choice of which positions to offer an employee rests with the appointing authority and, if there are more than one employee who consents to demotion, the appointing authority should offer demotions to employees in the order of their seniority.

When it comes to reinstatement, however, the appointing authority must offer every employee who has been separated from his position under Section 39, again in the order

of seniority if there are more than one employee, the opportunity to be reinstated to any and all applicable positions before they can be filled by other means, and cannot limit which such jobs it will make available for reinstatement.

Here, New Bedford may lawfully decide which labor service positions it will make available to the Appellant and other Bus Operators who consent to demotion. As a matter of demotion, the Appellant cannot force New Bedford to offer him a Laborer job over another available qualifying position. However, as a matter of reinstatement, it appears that the statute may not have been complied with, inasmuch as New Bedford made two appointments to the position of Laborer after it laid off the Appellant and other Bus Operators, when such “similar” positions should first have been offered to each of them.

Statutory Framework

Section 39 of G.L.c.31 prescribes the procedures to be followed by an appointing authority in selecting permanent employees for layoff in a reduction in force due to lack of funds, as well as the procedures by which those employees must be reinstated to permanent employment. The first two paragraphs of Section 39 provide, as relevant to the “labor service” positions involved in this appeal:

If permanent *employees in positions having the same title in a departmental unit* are to be separated from such positions because of . . . lack of money . . . they *shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service. . . shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions,* provided that the right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.

. . . *Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file* with his appointing authority, within seven days of receipt of such notice, a

written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed. (emphasis added)

As noted in Almeida I, Mr. Almeida provided his written consent to demotion and the Commission determined that the “lower title or titles in the labor service” which a Bus Operator may be demoted (i.e. “bump” another labor service employee with less seniority) include MEOs, Laborers and Cafeteria Helpers. In the present appeal, the parties dispute how the process for bumping should proceed. New Bedford asserts that it should be entitled to identify which qualifying positions will be offered for bumping and, here, proposes that all Bus Operators be offered Cafeteria Helper positions. Mr. Almeida asserts that he should be given the choice of qualifying positions, suggesting he prefers to be demoted to Laborer.

Bumping Under Section 39

The bumping remedy in Section 39 provides that, as an alternative to separation, an employee may give the appointing authority written “consent to his being demoted to a position in the next lower title or titles”. The Commission construes this remedy according to its plain meaning, which clearly prescribes that the employee’s written consent is a necessary pre-condition to demotion (as Section 41 would otherwise prohibit an appointing authority to demote a tenured employee without consent). Nothing in the statute, however, expressly gives the employee the right to designate which position will be offered, nor is the employee required to accept demotion to a position, in lieu of separation, once the appointing authority offers it, if the employee finds that position unacceptable.

In most cases, the qualifying position offered will be the next available full-time job in the next lower title in the employee's series or career ladder occupied by a junior labor service employee. Where there are, as here, more than one such labor service title or titles to which Bus Operators may be demoted, the decision as to which positions will be offered rests with New Bedford. Where there are several employees with bumping rights to such positions, the positions must be offered to them in order of seniority date, although that does not preclude coordinating such multiple bumping by negotiation or collective bargaining procedures to facilitate the logistics of the bumping process, so long as the overall result remains consistent with civil service law. Absent such agreements or understandings, however, the final decision as to the position(s) offered to an employee who consents to demotion rest with the appointing authority, and the final decision as to whether to accept that position in lieu of separation, remains with the employee.

Accordingly, under Section 39, Paragraph 2, New Bedford's proposed decision to offer "bumping" rights into Cafeteria Helper positions appears fully compliant with the terms of Almeida I and Section 39. So long as there are sufficient full-time, permanent labor service positions occupied by junior employees in the Cafeteria Helper title to accommodate all Bus Operators who consent to demotion (including Mr. Almeida), which there appear to be,¹ New Bedford need not open other job titles to bumping (although it would not be precluded from doing so either). Mr. Almeida, however, is entitled to be offered one position to bump into. Thus, if all other Bus Operators (more senior to Mr. Almeida), hypothetically, were to take all Cafeteria Helper positions

¹ As the Commission noted (Findings of Fact), both 7-Hour and 6½-Hour Cafeteria Helper jobs appear to be designated full-time, permanent positions under the applicable Unit 641 CBA. Such wages, hours and other terms employment are clearly matters for collective bargaining and/or grievance under Chapter 150E, §2. That issue is not for the Commission to determine.

occupied by employees with less seniority than Mr. Almeida, then, and only then, would New Bedford be obliged to offer him one of the Laborer positions (as that, then, would appear to be the only other qualifying full-time labor service position left occupied by an employee less senior to him whom he would be able to bump).

Reinstatement Rights Under Section 39

In addition to whatever position(s) Mr. Almeida (or other separated Bus Operators) may be permitted to “bump” into under G.L.c.31,§39,¶2, they also are entitled to be offered, post-separation, appointments to any of those (or “similar”) positions prior to original or promotional appointment of any other candidates, pursuant to G.L.c.31,§39, ¶1.

In this case, it appears that New Bedford made at least two problematic appointments to the position of Laborer in December 2008, two months after Mr. Almeida and the other ten Bus Operators were separated from their positions. Section 39, Paragraph 1 required that New Bedford offer reinstatement to its Bus Operators to such positions, prior to filling them with others, even if the positions were not ones into which the separated employees could have “bumped” initially. See Erricola v. Department of Env. Protection, 18 MSCR 103 (2005) (Word Processing Operator II allowed to be reinstated to “similar” out of series of EDP Entry Operator III)

Thus, while New Bedford may properly chose which of the various qualifying positions will be offered for “bumping” under Section 39, Paragraph 2, New Bedford also should have offered Section 39, Paragraph 1 reinstatement to ALL “similar” future vacancies to ALL Bus Operators (including Mr. Almeida) who had been separated from their positions under (again in order of seniority), which include the MEO and Laborer

jobs. However, after carefully consideration of the issue and balancing of the equities, and in the interest of bringing closure to the present appeal, the Commission concludes that the appropriate remedy for any violation of the rights of Mr. Almeida or any other Bus Operators can and should be fairly and fully resolved through the proposed demotion to Cafeteria Helper that New Bedford proposes, and, at this time, Mr. Almeida and the other Bus Operators need not be offered the additional benefit of a retroactive reinstatement to other “similar” positions that may have been filled prior to this Decision. The Commission will order, however, that, prospectively, New Bedford make such reinstatement rights fully available for all future openings as required by Chapter 31, Section 39, Paragraph 1.

Relief to Be Granted

The New Bedford School Department is authorized to proceed to offer full-time permanent Cafeteria Helper positions to all Bus Operators, in order of their seniority, who were separated in the September 2008 layoff and who consented to demotion to such positions. If, and only if, there are insufficient such full-time positions in the Cafeteria Helper title currently held by an employee with less seniority, as defined by Section 33 of Chapter 31, to appoint to such positions each Bus Operator (including the Appellant) who consent to such demotion to in lieu of separation, then such Bus Operators (including Mr. Almeida) shall be offered demotion to another qualifying full-time permanent labor service position, i.e., MEO or Laborer, so occupied by a less senior labor service employee to such Bus Operator, until all such Bus Operators are given at least one opportunity to “bump” into such a qualifying position. Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the appointment of any Bus Operator

(including Mr. Almeida) to such position(s) shall be made effective as of June 9, 2009, with no net loss of compensation from that date to present. In addition, if future vacancy(ies) or opening(s) arise in the positions of MEO, Laborer or Cafeteria Helper, the New Bedford School Department is directed to offer to any separated Bus Operator (including the Appellant, Paul Almeida) the opportunity to be reinstated, prospectively, to such position before filling the position with any other applicant. For the reasons and to the extent stated above, the appeal of the Appellant, Paul Almeida, is hereby *allowed, in part and denied in part*.

Civil Service Commission

Paul M. Stein
Commissioner

Dated: December 10, 2009

By vote of the Civil Service Commission (Chairman Bowman [BSTAIN]; Commissioners Henderson [YES], Marquis [ABSTAIN], Stein [YES] and Taylor [YES]) on December 10, 2009

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), 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. [for Respondent]

John Marra, Esq. [for HRD]