

**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: G1-08-234

**NEW BEDFORD SCHOOL
COMMITTEE,**
Respondent

Appellant, Pro Se:

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

Appointing Authority's Attorney:

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

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant brought this appeal claiming that he, along with other similarly situated employees who were laid off for budgetary reasons (pursuant to M.G.L.c.31,§39) from their permanent labor service positions as Bus Operators with the Respondent, the New Bedford School Department (School Department), were entitled to “bump” into other permanent labor service positions in the departmental unit held by labor service employees with less seniority, such as Motor Equipment Operator (MEO), Cafeteria Helper and Grounds Worker. The School Department filed a motion for summary decision arguing that bumping rights under Section 39 are limited to jobs that carry the same “title” and there is only one title of Bus Operator, so that Bus Operators, in effect, have no bumping rights under civil service law. After hearing of the motion on January 23, 2009, the Civil Service Commission requested further submissions from the parties, which the Appellant provided on February 19, 2009 and the School Department provided on March 13 and 20, 2009.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following fact 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. (*Respondent's Memorandum, Exhibit A*)

2. In July 2004, Mr. Almeida, along with others, was laid off from his position as Bus Operator in a reduction in force due to a lack of funds. (*Claim of Appeal, pp.10, 12; Respondent's Memorandum, Exhibit A*)

3. At the time of the July 2004 layoff, the School Department provided Mr. Almeida and other Bus Operators the option to consent to demotion to a lower job title in the labor service, i.e., to “bump” a junior employee in that job title. (*Claim of Appeal, pp. 11-13; Appellant's February 12, 2009 Response, ¶8*)

4. Mr. Almeida was one of approximately six Bus Operators who exercised his option and was assigned to the position of Cafeteria Helper, a position in which he served until his reinstatement to the position of Bus Operator on September 18, 2006. (*Claim of Appeal, pp. 13-23; Respondent's Memorandum, Exhibit A; Appellant's January 12, 2009 Response, ¶8*)

5. According to Mr. Almeida, one or more of the former Bus Operators demoted to Cafeteria Helper in the 2004 reduction in force are still employed in those positions. This fact is confirmed by the Civil Service List for the School Department, which shows a Cafeteria Helper named Laurie Pinto (Seniority Date 9/25/00) whose name also appears as one of the Bus Drivers on the Reinstatement List from the 2004 layoff. (*Claim of Appeal, Cover Sheet; Appellant's January 12, 2009 Response, ¶9; Respondent's Supplemental Memorandum, Exhibit 4*)

6. Pursuant to a letter dated August 8, 2008 from School Department Superintendent Portia Bonner, Mr. Almeida was notified that the School Department again was contemplating the termination of his services as Bus Operator due to lack of funds, effective September 1, 2008. The letter further stated:

“[Y]ou may consent to a demotion to a lower job title in the Labor service if there is an employee in that job title junior in length of service to you. Positions in Labor Service that you may elect are positions of Cafeteria Helper of seven hours per day or less who have less seniority than you.”

(Respondent’s Memorandum, Exhibit B; Claim of Appeal, pp. 7-8) (emphasis added)

7. The August 8, 2008 letter also offered Mr. Almeida the option of accepting a provisional appointment as a building custodian or a non-civil service position with a private bus company under contract with the School Department. *(Respondent’s Memorandum, Exhibit B; Claim of Appeal, pp. 7-8)*

8. On August 18, 2008, after hearing on August 15, 2008, Mr. Almeida was notified that his employment as a Bus Operator was being terminated effective September 1, 2008, and informed him that he could “choose to be demoted to a position in a lower title if the person in such position has less seniority to you.” *(Respondent’s Memorandum, Exhibit D; Claim of Appeal, p. 5)*

9. On August 11, 2008, and again on August 20, 2008, Mr. Almeida provided written notice to the School Department of his consent to demotion “to a position in the next lower title or titles in the labor service according to Civil Service Law.” *(Claim of Appeal, pp. 6,9; Respondent’s Memorandum, Exhibit B)*

10. When the New Bedford School Department issued the letters of August 8, 2009 and August 18, 2009, the School Department believed a Bus Operator could accept demotion to lower job class such as Cafeteria Helper and intended to offer such a position to Appellant and other Bus Operators as it had done in the past.

11. However, in a subsequent letter dated August 28, 2008, Superintendent Bonner informed Mr. Almeida that, based on new information received from the Civil Service Unit of the Massachusetts Human Resources Division (HRD) on or about August 27, 2008, a “demotion to a cafeteria position was not authorized under M.G.L.c31,§39 since these positions are in a lower class and are not within your title of bus operator. . . . [T]he title of bus operator is in a single title and there is no lesser title to bump to, e.g., MEO HMEO, etc.” Mr. Almeida was advised that his only option was to accept appointment as a provisional building custodian. (*Claim of Appeal*, pp. 1-3; *Respondent’s Memorandum, Exhibits F thru I*)

12. By letter dated September 2, 2008, Mr. Almeida requested appointment as a provisional building custodian and he was appointed to that position, effective October 15, 2008. (*Respondent’s Memorandum, Exhibits A, J; Claim of Appeal*, p. 4)

13. The labor service title of Bus Operator is a Class II labor service position in the Mobile Industrial Equipment Operations Group (5700), Motor Equipment Operating Series (Occupational Code 5703), Title 5703D.

14. The HRD MuniClass Manual describes the duties of this series as follows:

Motor Equipment Operating Series: Occupational Code 5703: This series includes all positions the duties of which are to operate and/or supervise the operation of a variety of motor equipment ranging from passenger cars and light pick-up trucks to truck-trailer combinations . . . and specialized motor equipment other than hoisting equipment. The title definitions include illustrative duties and are not all inclusive.

5703D Bus Operator (Class II) Operates a bus for the purpose of transporting children . . . inspects bus before use and sees that proper maintenance is performed on it. Bus drivers must possess a Class 2 driver’s license and a School Bus Operator’s License . . . and a current and valid Massachusetts Bus Operator’s License. . .

(*Respondent’s Supplemental Memorandum, Exhibit 3*)

15. The Appellant claims that he is entitled to “bump” a junior labor service employee in the following labor service titles: (a) Class I positions (requiring no experience) of Cafeteria Helper (Occupational Code 7408A), Garage Attendant (Occupational Code 5806D) and Laborer (Occupational Code 3502A); (b) Class II positions of Motor Equipment Operator I, II and III (Occupational Codes 5703A, B & C in the Motor Equipment Operating Series); and (c) Class II positions (requiring one year experience) of Building Maintenance Person (Occupational Code 4752B), Grounds Maintenance Person (Occupational Code 3504A), Grounds Worker (Occupational Code 3504B), Painter Helper (Occupational Code 4102B) and Stores Delivery Person (Occupational Code 6690A) (*Appellant’s February 19, 2009 Response, pp. 1-6; Respondent’s Supplementary Memorandum, Exhibit 3 [HRD Muni-Class Manual]*)

16. According to Nancy L. Angelini, the current Transportation Supervisor for the New Bedford Public Schools, and other documentation provided by the Appellant, it has been a common practice for Bus Operators employed for the School Department to perform “details” on a regular basis, which include delivery duties (e.g., pick-up and delivery of items, removing trash and surplus items, moving teachers’ transferred from one school to another). Bus drivers were also requested occasionally to perform, snow removal, grass-cutting, and assisting grounds workers and building custodians with routine duties such as painting, replacing light bulbs and maintaining and cleaning their buses. (*Respondent’s Supplementary Memorandum, Exhibits 1 & 2*)

17. According to the Respondent, and it does not appear disputed, the School Department employs no Garage Attendant, Grounds Maintenance Person, Painter Helper, or Store Delivery Person. In addition, the three Motor Equipment Operators employed by

the School Department appear to have earlier seniority dates (1993 to 1997) than Mr. Almeida. (*Respondent's Supplemental Memorandum, Exhibit 4*)

18. The School Department does employ labor service employees with the following seniority dates that appear junior to Mr. Almeida: (a) 3 Laborers (1/16/07-12/1/08); (b) 21 full time Cafeteria Helpers (9/25/00-12/1/08); (c) 18 part-time Cafeteria Helpers (2/26/01-2/2/09); (d) 36 intermittent Cafeteria Helpers (1/29/01-1/06/09); (e) 3 Grounds Workers (10/23/00-7/2/01); and (f) 3 Building Maintenance Men (10/1/01-3/5/07). (*Respondent's Supplemental Memorandum, Exhibit 4*)

19. The HRD MuniClass Manual describes these four positions with the following respective duties and responsibilities:

Cafeteria Helper (7408A) – Occupational Code 7408: This series includes positions the duties of which are to perform unskilled labor tasks in the operation of an institutional cafeteria. . . .[Cafeteria Helper] performs tasks requiring an ordinary degree of skill in the preparation and serving of food as well as other tasks required for the operation and sanitary maintenance of a food service facility or area.; prepares . . .foods for cooking; makes soups and other simple hot foods . . . sandwiches and salads; operates electrical equipment. . .sets up serving counters. . . serves food. . . waits no tables, collects and washes dishes . . .sweeps floors, cleans counters and tables . . .receives and checks deliveries . . . stores food. . .cashiering; keeps simple records.

Laborer (3502A) – Occupational Code 3502: This series includes all positions the duties of which are to perform . . . manual tasks requiring no specialized skill and which can be learned in a few days. . . and do not require prior experience. . . . [Laborer] performs . . . shoveling materials and leveling areas . . . loading and unloading supplies, moving furniture, cleaning litter and debris . . . mowing grass using hand or powered equipment; trimming shrubs and lower parts of trees. . . removing snow and ice using manual or small powered equipment; spreading sand on icy areas; performing laboring duties for skilled craftsman.

Grounds Worker (3504B) – Occupational Code 3504: This series includes positions the duties of which are to perform manual tasks in the general care of soil, plants, lawns, shrubbery, trees, flowers and grass. . . .[Grounds Worker] cuts grass with hand or power mowers; rakes, burns, or packs leaves; trims hedges, shrubs, bushes, and small trees; picks up trash . . .delivers supplies and may install equipment, ornaments, statues and other materials; shovels, plows, or otherwise removes snow . . . rough painting of fences, benches, and other objects. . .pick and shovel labor in landscaping and performs other tasks related to maintaining public grounds.

Building Maintenance Man (4752B) – Occupational Code 4752: This series includes positions the duties of which are to perform inspectional and maintenance repair of buildings and other structures [Building Maintenance Man] performs miscellaneous maintenance and repair tasks on municipal buildings and property requiring a variety of skills of less than journeyman level in carpentry, painting, plumbing, plastering, welding, sheet metal work, and other skilled trades. Performs other miscellaneous work such as repairing window screens and keeping grounds in order. Performs other manual duties such as receiving and storing supplies.

20. The hourly rates of pay under the schedule provided in the applicable collective bargaining agreement as of July 1, 2008 is as follows:

Cafeteria Helper	\$10.18 - \$14.97
Laborer	\$10.18 - \$14.97
Motor Equipment Operator	\$11.75 - \$16.36
Bus Operator	\$11.75 - \$16.60
Building Maintenance	\$12.67 – \$17.40
Grounds Worker	Job Title Not Separately Listed

(Respondent’s March 20, 2009 Submission)

CONCLUSION

Summary of Conclusion

The Appellant’s bumping (and future reinstatement) rights in a layoff situation are broader than the School Department asserts, but they are not as broad as the Appellant claims. A rule that would limit rights of labor service employees to bumping and reinstatement only to a lower job “title” of the same exact name (i.e., Bus Operator, for which, here, there only one “title” with that name), would give an unreasonably narrow interpretation to the relevant statutes, would be inconsistent with the basic tenets of the civil service law and, especially, would inequitably dilute the explicit protections that tenure (i.e., seniority) was meant to provide to permanent labor service employees under civil service law and rules. The Commission concludes that the bumping and reinstatement rights of a labor service employee in the position of Bus Driver extend to any “lower” titles of similar or lesser skill level for which the Appellant can demonstrate

he is qualified within the same occupational series (i.e., here, Motor Equipment Operating Series, Occupational Code 5703) or certain jobs in another labor service series that can be shown to have duties of a generally similar nature or lesser skill level than the duties and skill level of the position that has been eliminated.

Applicable Standard on Motion for Summary Disposition

A party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., whether or not “viewing the evidence in the light most favorable to the non-moving party”, i.e., the Respondent, New Bedford School Department, has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”; Mr. Almeida must produce sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Bd., 18 MCSR 216 (2005); cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008)

Discussion

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)

The term “title” is defined in G.L.c.31, §1 as “a descriptive name applied to a position or group of positions having similar duties and the same general level of responsibility”.

The boundaries of the “next lower title or titles in the labor service” and “similar positions” in the labor service that apply here are not plain. There does not appear to be any documented administrative practice or rule specifically on point. See PAR.15 (Layoff from Civil Service Positions). A review of prior Commission decisions indicates that bumping has been allowed to a lower graded position of a different “title” both within and outside of the bumping employee’s occupational series where a position is otherwise similar and the bumping employee is qualified for and senior to the employee being bumped. See Martin v. City of Boston Parks & Recreation Dep’t, 20 MCSR 234 (2007) (bumping from Head Clerk to Administrative Secretary in same series); Shea, et al. v. Department of Revenue, 18 MCSR 235 (2005) (bumping from Tax Examiner I to Administrative Assistant series); Erricola v. Department of Env’tl Protection, 18 MSCR 103 (2005) (bumping out of series from Word Processing Operator II to EDP Entry Operator III); Lee v. Springfield, 17 MCSR 157 (2004) (bumping from Zoo Attendant to

Laborer and various other grounds maintenance labor service positions); Price v. Department of Emplm't & Training, 10 MCSR 238 (1997) (bumping from Employment Security Supervisor II to Job Specialist II and Compliance Officer II)

In some of these cases, the boundaries of expanded “bumping corridors” that enable laid off senior employees to displace more junior employees holding different job titles has been the subject of collective bargaining agreements which define the limits of such bumping rights in specific situations. See, e.g., Shea, et al. v. Department of Revenue, 18 MCSR 235 (2005); Price v. Department of Emplm't. & Training, 10 MCSR 238 (1997). See also, Union Contracts, mass.gov/Ehrd/docs/emprel/cba (collective bargaining agreements containing negotiated layoff procedures for certain bargaining units’ civil service and/or non-civil service state agency employees, including, in some cases, provisions to bump into other job titles and series for which the employee is “deemed qualified”) Although not a definitive answer to the question, the use of collective bargaining agreements to implement a mutually acceptable bumping process seems wholly appropriate so long as it remains consistent with the rights and obligations contained in the civil service law.¹

Moreover, the Commission applies the civil service law as a “harmonious whole” and gives due respect to the judicial mandate that bumping rights of public employees in a reduction in force should not be construed narrowly. In Herlihy v. Civil Service Comm’n, 44 Mass.App.Ct. 728, 694 N.E.2d 369, rev.den., 428 Mass. 1104, 705 N.E.2d 276

¹ The Commission notes that more expansive bumping rights negotiated in some collective bargaining agreements could become problematic if the right of tenured employees under civil service were as limited as the Respondent espouses (i.e., allegedly to bump or to be protected from being bumped only within a narrowly defined category of one’s exact job “title”), lest it invite the anomalous result that non-civil service and provisional employees might be able to claim greater bumping rights than tenured employees holding the same jobs. See, e.g., City of Fall River v. AFSCME Council 93, Local 3177, 61 Mass.App.Ct. 404, 810 N.E.2d 1259 (2004)(discussing when provisions of collective bargaining are invalid as conflicting with civil service law); (City of Leominster v. International B’h’d of Police Officers, Local 338, 33 Mass.App.Ct. 121, 596 N.E.2d 1032, rev.den., 413 Mass. 1106, 600 N.E.2d 1000 (1992) (same).

(1998), the Appeals Court struck down the Commission's statutory interpretation of the term "a departmental unit" in G.L.c.31, §39. The commission had construed the term "unit" narrowly, to mean a particular facility or departmental region of the agency (following a clearly recognized prior administrative practice of the Department of Mental Health), but the Appeals Court found that narrow interpretation, albeit logical from an administrative point of view, an unreasonable restriction on bumping rights that did not comport with the intent of the statute. The Appeals Court stated:

To be sure, the department [DMH] has offered strong policy reasons why all bumping rights should be confined to the individual facilities under its regulatory control. . . . [No statute] authorizes the department to limit eligible employees from obtaining similar permanent positions within other facilities if they otherwise qualify. . . . [T]he department may not . . . deprive its employees of the protections afforded by the civil service law. To say that the department has designated the center as an administrative unit does not, therefore, answer the question . . . whether G.L.c.31, s. 39, permits permanent employees separated from their positions because of the abolition of those positions to replace less senior employees situated in other mental health facilities throughout the department. We conclude that the answer is yes.

General Laws c.31,s.39, creates a safety net for civil service employees who are separated from their jobs because of "lack of work or lack of money or abolition of [their] positions." [Citation] Generally, length of service determines the order of separation. . . . *[B]y adopting a restrictive definition of the bumping area, the department contravenes the intent of G.L.c.31, s.39. . . .* So long as the employee is governed by the same organizational statute, rules, and regulations, transfer from one geographical area to another should not cause the loss of a seniority rating.

...
Granting a more expansive reading to the term "departmental unit" is consistent with the legislative intent. The civil service system was established to create a pool of non-political appointees to provide continuous administration of governmental services and who are not always compensated at salary levels commensurate with the private sector. Hence, *one benefit that flows from the statutory scheme is that employees, like Herlihy, receive the protection of a seniority system with respect to reemployment rights.* [Citations] *By confining Herlihy's bumping rights to a single administrative entity within the department, the department, in effect, affords Herlihy none of the protections earned as a result of his years of service. We do not think the Legislature had that intent.*

Id., 44 Mass.App.Ct. at 442-43, 694 N.E.2d at 840-41 (*emphasis added*)

Finally, when defining the boundaries for bumping and reinstatement in the case of labor service positions, the Commission must also recognize the statutory scheme provided for the appointment and promotion within the labor service. G.L.c.31, §§28 thru 30. There are three broad “classes” in the labor service – Class I (Laborers), Class II (Skilled Laborers), and Class III (Mechanics and Craftsmen). PAR.19. Labor service positions, unlike positions within the official service are those jobs for which the applicants do not have to take a title-specific competitive examination; rather, appointments are made exclusively on the basis of the priority of registration, i.e., “in the order of the dates on which they file their applications” for placement on a labor service register. Id. A person may be placed on as the registers for as many different labor service titles for which the person is qualified, and may add to the list of titles at any time. Id.

In addition, in contrast to official service, the statutory scheme provides for considerably more freedom of movement between employment positions within the labor service, when job requirements are “not substantially dissimilar”. Compare G.L.c.31, §29 (transfers within labor service) with G.L.c.31, §§35,36 (transfers to and within official service). Also, unlike the official service, many labor service positions – particularly in Class I – involve wholly unskilled labor tasks that require no prior experience.

In sum, seniority, as opposed to the passing of a qualifying examination, plays an especially meaningful role in the rights of labor service employees. Indeed, in the labor service, especially, the most senior employees are likely also to be the oldest, for whom tenured status becomes peculiarly valuable in times of economic downturns, when older, unskilled or semi-skilled workers are often doubly vulnerable in a shrinking labor market.

Careful consideration of all these relevant factors leads the Commission to the conclusion that the Appellant’s Section 39 bumping and reinstatement rights are not

limited to the single job title of “Bus Operator” from which he was laid off. Rather, in order to be consistent with the legislative intent in establishing a tenured labor service and to give a reasonable interpretation to the language of the statutes, the Commission construes the terms “lower title or titles in the labor service” and “similar” positions, to include any other “similar” labor service position for which the Appellant can demonstrate he is qualified, meaning that the duties involve a substantially similar or lower skill level of labor service work as performed by the Appellant sufficient that the Appellant meets the criteria to be placed on the register for appointment to such position. This interpretation gives a logical meaning to the legislative intent under Section 39 that, when labor service positions are eliminated in a reduction in force, “employees senior in length of service . . . shall be retained the longest and reinstated first . . . to fill such positions or similar positions.” The Commission finds no good reason to believe the Legislature intended a tenured, senior labor service employee with the skill level required to perform the available work be discharged or not reinstated (with the loss of the benefits of employment that entails) while retaining a junior person (or appointing a brand-new employee with no tenure) in such a fungible positions.

Applying this interpretation of the statutory language to the present case, the Commission is satisfied that the undisputed evidence establishes the Appellant’s bumping rights extend to the position of Motor Equipment Operator (MEO) I, II and III, provided that the Appellant holds the necessary license to operate the motor vehicles required by the position. These job titles fall within the same occupational series and have the same basic occupational code (5303). Although the jobs are not identical, they clearly bear close resemblances and call for similar or lesser skill sets. For example, a MEO I is

authorized to operate a “mini-bus” but not a “bus”. In addition, the compensation package for MEOs is slightly below Bus Operator.

The Commission is also satisfied, for somewhat different reasons, that the undisputed evidence establishes the Appellant’s bumping rights extend to the positions of Laborer (Occupational Code 3502) and Cafeteria Helper (Occupational Code 7408). Both these positions are classified as Class I positions, which means they involve unskilled labor and require no experience. Bus Operators in the School Department, which are Class II “Skilled Labor” positions, actually were assigned to Class I positions of unskilled Cafeteria Helpers for more than two years (from 2004 to 2006) and one of these Bus Operators is still so employed. The undisputed evidence also establishes that Bus Operators were regularly “detailed” to perform duties that are essentially identical to those that fall within the job classification of Laborer (such as grass cutting, pick-up and delivery of materials and rubbish, and other simple unskilled labor). The compensation of Cafeteria Worker and Laborer is lower than that of Bus Operator, logically confirming the lower, unskilled level of the duties of these positions.

In contrast to the Class II position of MEO and the Class I unskilled positions of Laborer or Cafeteria Helper, the record does not sufficiently establish that the Appellant is entitled to bump labor service employees in the Class II positions of Grounds Worker or Building Maintenance Man.² Both these positions are “Skilled” labor jobs which require a minimum of one year prior experience and a skill set different from that of a Bus Operator, which distinguishes these positions from those of MEO (similar motor vehicle operator skills and experience) or Laborer and Cafeteria Helper (unskilled labor with no experience required). While a particular Bus Driver may possibly have the

² This Decision does not discuss positions, such as Grounds Maintenance Men, Painter Helper, Garage Attendant or Stores Delivery Person, which do not exist within the School Department.

necessary skills and experience for these positions, the Appellant's evidence showing mostly unskilled, routine grounds and maintenance work performed as a Bus Driver (grass-cutting, clearing snow, changing light bulbs, occasional painting) does not demonstrate that he possesses experience and skills necessary to perform all of the duties of these Class II positions. Compensation for Building Maintenance Man is significantly higher than Bus Operator and, while that fact is not determinative, it is consistent with the inference of the relatively higher, specialized skill and experience required in that job, especially.

Relief to Be Granted

The Commission recognizes that the current fiscal climate presents appointing authorities, including the School Department, with difficult and unpleasant choices, and that a reduction in force, by definition, means that the financial resources of the appointing authority have been stretched to the breaking point. Accordingly, while the Appellant is entitled to relief that will restore him to employment to which his civil service rights entitle him, the Commission is reluctant to impose further financial burdens on an appointing authority already in crisis. Thus, while the Commission will grant relief to the Appellant to require his reinstatement to an appropriate position, it will not require that reinstatement be retroactive.

Finally, in order to avoid incidents of future "mixed messages" such as New Bedford evidently received at different times in the past, which may not be an isolated incident and is partly responsible for giving rise to the present dispute, the Commission will suggest to HRD that a written rule or guideline consistent with this Decision might be promulgated, with the opportunity for input from both appointing authorities and labor, to give all municipal appointing authorities appropriate clarity so they may know how to

apply the terms “similar” and “lower titles” in Section 39, both as to the labor service and the official service, in future layoff situations.

Therefore, pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the School Department is directed to reinstate the Appellant, Paul Almeida, effective as of the date of this Decision, to the labor position of Bus Driver, or to the labor position of MEO, Cafeteria Helper or Laborer, if there are persons currently employed in such labor positions who have less seniority than the Appellant as defined by Section 33 of Chapter 31.

For the reasons and to the extent stated above, the appeal of the Appellant, Paul Almeida, is hereby *allowed*.

Civil Service Commission

Dated: April 16, 2009

Paul M. Stein
Commissioner

By 3-2 vote of the Civil Service Commission (Commissioners Henderson [Aye], Stein [Aye] and Taylor [Aye]; Chairman Bowman [No]; Commissioner Marquis [No] on April 16, 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]

Lidia G. Rincon, Esq. [for HRD]

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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PAUL ALMEIDA,
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v.

G1-08-234

CITY OF NEW BEDFORD,
Respondent

DISSENT OF CHRISTOPHER BOWMAN

I respectfully dissent.

In the instant appeal, the City relied on HRD's longstanding interpretation of G.L. c. 31, § 39 to determine the "bumping rights" of civil service employees being laid off due to a lack of funds, including the Appellant and five (5) similarly situated individuals.

The majority decision effectively overturns HRD's interpretation by expanding the definition of "next lower title" under Section 39 and makes sweeping changes to the layoff process that will impact all state agencies and more than 200 civil service communities across Massachusetts.

The following example illustrates the longstanding practice of HRD. Under Section 39, a permanent civil service employee in the title of "Tax Examiner IV" would have the right to "bump" all the way down to the lowest level of that job series, including less senior employees in the next lower title or titles of Tax Examiner III, Tax Examiner II and Tax Examiner I. Absent any additional rights provided for by a collective bargaining agreement, this permanent Tax Examiner IV, or for example, a permanent Tax Examiner

I, would not have the right, under Section 39, to “bump” a less senior employee holding a title in a different job series (e.g., Administrative Assistant).

Various collective bargaining agreements, including those covering most state employees, provide for additional bumping rights that do not conflict with the civil service law. For example, a NAGE contract allows an employee to bump to a title outside of the employee’s job series in the next lower salary grade to the employee’s current salary grade, for which the employee is qualified, within his/her region, provided that there are persons with less seniority in the lower title(s). This option is limited to the least senior employee in the affected title and to those titles within the same bargaining unit. Any disputes regarding whether an employee is “qualified” are handled via the grievance and/or arbitration process. As applied, these additional bumping rights do not conflict with the civil service law as they do not apply to civil service employees holding permanency in their title. For example, a Tax Examiner I could not bump a less senior permanent Administrative Assistant, but could bump a less senior provisional Administrative Assistant.

The above-referenced practice has provided a predictable road map regarding layoffs and bumping rights for state agencies and those cities and towns covered by the civil service law.

In the instant appeal, the majority’s more expansive interpretation of Section 39 “bumping rights” is erroneous. Further, the majority has unwittingly established an indecipherable set of standards at every point in the decision-making process to implement this expanded definition.

Specifically, the majority concludes that under Section 39, the bumping rights of the Appellant, who served in the labor service position of “bus operator” in the instant appeal

(and whose collective bargaining contract did not provide for any additional bumping rights) should have extended to “any lower title of similar or lesser skill level for which the Appellant can demonstrate within the same occupational series or certain jobs in another labor service series that can be shown to have duties of a generally similar nature *or lesser skill level* than the duties and skill level of the position that has been eliminated.” (emphasis added)

Within the same decision, the majority “construes the terms ‘lower title or titles in the labor service’ and ‘similar’ positions to include any other ‘similar’ labor service position for which the Appellant can demonstrate he is qualified, mean that the duties involve a substantially similar *or lower skill level of labor service work* as performed by the Appellant sufficient that the Appellant meets the criteria to be placed on the register for appointment to such position.”

The majority, absent an evidentiary hearing, then embarks on an attempt to apply these broader definitions to the instant appeal and reaches the following conclusions: (1) “the Appellant’s bumping rights extend to the position of Motor Equipment Operator (MEO) I, II and III, [same occupational codes as bus operator according to the hearing officer] provided that the Appellant holds the necessary license to operate the motor vehicles required by the position” because they “bear close resemblance and call for similar or lesser skill sets...”; (2) “the Appellant’s bumping rights extend to the positions of laborer and cafeteria helper [different occupational codes than bus operator but in the same ‘class’ according to the hearing officer]...; and (3) “the Appellant is [not] entitled to bump labor service employees in the ‘Class II’ positions of Grounds Worker or Building Maintenance Man” According to the majority, the Appellant can not bump into these positions because “these positions are ‘skilled’ labor jobs which require a minimum of

one year experience and a skill set different from that of a Bus Operator.” Even in this case, however, the majority appears to leave open the possibility that other bus operators in New Bedford may indeed be able to bump individuals holding these titles stating, “while a particular bus driver may possibly have the necessary skills and experience for these positions, the Appellant’s (emphasis added) evidence showing mostly unskilled, routine grounds and maintenance work performed as a Bus Driver (grass-cutting, clearing snow, changing light bulbs, occasional painting) does not demonstrate that he (emphasis added) possesses experience and skills necessary to perform all (emphasis in original) of the duties of these Class II positions”.

These new definitions, coupled with ambiguous new standards, are enough to confound even the most seasoned human resource managers and labor counsel across Massachusetts as they confront the imminent layoffs due to the economic downturn. Further, while the intent of the majority appears to be to limit these new definitions to labor service positions, Section 39 makes no such distinction in regard to bumping rights.

Finally, the reliance on prior Commission decisions appears in some cases to be misplaced. In Martin, contrary to the majority conclusion, the Appellant, a Principal Clerk Typist, was not permitted to bump to an Administrative Assistance series. Rather, her bumping rights under Section 39 were limited to the next lower title of Principal Clerk Typist. In Shea et al, the Appellant (Porio), consistent with the collective bargaining contract, was allowed to bump a provisional Administrative Assistant whose job title was within the same collective bargaining unit. In Erricola, the Commission opted not to address whether the Appellant, a Word Processing Operator II, was allowed to bump to a Clerk IV position under Section 39. In Price, the Commission’s analysis focused on the Appellant’s argument that she was entitled to additional protections,

because of affirmative action issues, than those provided by the civil service law and the collective bargaining agreement.

Directly on point with the instant appeal, however, is Moloney et al v. City of Lynn³, 17 MCSR 13, 14 (2004), a case involving seniority in which the Commission, concluded that “All the parties had the right to expect that the longstanding practice of HRD...would be followed. Predictability and precedent are fundamental aspects of any statutory scheme, so that all the parties would be able to make plans and projections in reliance on it.”

In conclusion, the longstanding and correct interpretation of the bumping rights afforded to civil service employees under Section 39, often complemented by language in collective bargaining contracts, has provided managers and civil service employees with a predictable road map regarding this issue. The majority replaces that definition with a more expansive definition and establishes a criterion for implementing this new definition that is unworkable.

For all of the above reasons, I respectfully dissent.

Christopher C. Bowman
Chairman
April 16, 2009

³ Two members of the majority in the instant appeal were Commissioners at the time of the Moloney et al decision and voted in favor of the decision.

