COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

PAUL F. BAKER,
Appellant

v.

CASE NO: D1-14-42

DEPARTMENT OF DEVELOPMENTAL SERVICES,
Respondent

Appearance for Appellant: Paul F. Baker, Pro Se

Appearance for Respondent: Wendy Chu, Esq.
Human Resources Division – Legal Unit
One Ashburton Place
Boston, MA 02108

Commissioner: Paul M. Stein

DECISION

The Appellant, Paul F. Baker, acting pursuant to G.L.c.31, §39 & §43, duly appealed to the Civil Service Commission (Commission) from the decision of the Massachusetts Department of Developmental Services (DDS) to lay him off in February 2014 from his position of Vocational Instructor C as part of a reduction in force at the Fernald Development Center (Fernald). The Commission held a pre-hearing conference on March 11, 2014 and a full evidentiary hearing on April 22, 2014.[1] The hearing was declared private as no party requested a public hearing. Eighteen (18) exhibits were received in evidence and one exhibit was marked for identification. The hearing was digitally recorded.[2] Both parties subsequently submitted proposed decisions.

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

[2] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

Findings of Fact

Based on the Exhibits in evidence and the testimony of the witnesses (Susanne Kingston, Acting Facilities Director, Fernald Development Center; Donald Stevens, Employment Services Manager for the DDS Metro Region; and Mr. Baker), and all reasonable inferences therefrom, I make the following findings of fact:

1. The Appellant, Paul F. Baker, served as a tenured civil service employee of the DDS from August 1972 until his layoff, effective February 8, 2014. Since 1997 and as of the time of his layoff, he had been assigned to Fernald, a residential DDS facility for individuals with developmental (among other) disabilities located in Waltham, MA, where he held the position of Vocational Instructor C. (*Exh. 10; Stipulated Facts; Exh. 12*)

2. Mr. Baker was laid off along with fifteen (15) other Fernald staff as one of the final reductions in force attributable to the lack of work due to the impending closure of Fernald and the transition of the residents to other facilities, which began in 2003. At the time of the Commission hearing, the number of Fernald residents, once approximately 1,200 in number, had declined to a census of six (6) individuals. (*Exh. 7; Testimony of. Kingston & Stevens*)[3]

3. Fernald had made approximately seven (7) other layoffs prior to February 2014. Mr. Baker was the last (most senior) Vocational Instructor C still assigned to Fernald, the six (6) other more junior employees in the title of Vocational Instructor C having been laid off in 2010. (*Exh. 14; Testimony of Kingston & Stevens*).

4. Mr. Baker was one of two remaining Fernald clinical staff whose primary duties involved supporting the "Site 7 program", which provided educational and work activities to the residents,

[3] Fernald finally ceased operations in December 2014 and the facility was transferred from the Commonwealth to the City of Waltham. (*http://www.mass.gov/anf/property-mgmt-and-construction/sale-and-lease-of-state-assets/comprehensive-real-estate-serv/real-estate-projects/waltham-former-walter-e-fernald-development-center.html]*)

akin to employment. In February 2014, the principal workshop activities included a paper-shredding project and an "AIDS kit" assembly project. The other clinical staff member with workshop-related responsibility was the Habilitation Coordinator (HABCO). (*Exhs. 4, 5, 5A & 6; Testimony of Appellant & Kingston*)

5. Every resident of Fernald had an Individual Service Plan (ISP) developed and reviewed annually jointly by Fernald's clinical staff, including the Vocational Instructors and the HABCO, as well as medical staff. The ISPs contain personalized goals and objectives across a number of areas, of which workshop goals are a part. The workshop goals are akin to employment and are the responsibility of the HABCO to develop and monitor progress on a daily and weekly basis.(*Exhs. 6, 9 & 10; Testimony of Kingston*)

6. The HABCO is a separate and distinct job in a different job series from a Vocational Instructor. A Habilitation Coordinator is a Grade 18 position (whereas the Vocational Instructor C is rated as a grade 14A). The duties of the HABCO include the responsibility to "design, implement and monitor educational programs" and "[i]mplement individuals' programs through hands on direct service for a minimum of 50 percent of the Habilitation Coordinator's work week." The Vocational Instructor C is responsible to work under the supervision of the Day Program Director or Program Manager to "assist with the Site 7 individuals in work related activities" and "provide support to the HABCO and clinical team." (*Exhs. 4 5, 5A & 6: Testimony of Appellant & Kingston*)

7. By letter dated January 27, 2014, DDS informed Mr. Baker that "[a]s the census at Fernald continues to decrease, commensurate reductions in staffing levels are required" and, as a result, he would be laid off effective February 8, 2014. He was informed of his right to a hearing pursuant to G.L.c.31, §41 (which was scheduled for February 3, 2014) and his right to be

reassigned or "bump" to a another vacant position or one held by an employee with less seniority as prescribed by G.L.c.31, §39 and the applicable provisions of the Collective Bargaining Agreement (CBA) between DDS and his union. (*Exhs. 7 & 8*)

8. Specifically, DDS offered Mr. Baker the option to be reassigned to one of six other Vocational Instructor C positions, including one position in Waltham, at Metro Employment Services, within the same region (and city) as Fernald. (*Exh. 12; Testimony of Stevens*)

9. Mr. Baker elected not to attend the February 3, 2014 hearing. The hearing proceeded in his absence before Donald Stevens, Hearing Officer, who heard testimony from Susanne Kingston, Facility Director, and concluded that "there is just cause for the layoff" of Mr. Baker to proceed.(*Exhs 9 through 11:Testimony of Appellant, Kingston & Stevens*)

10. By letter dated February 4, 2014, DDS Regional Director Gail Gillespie informed Mr. Baker that his lay off would become effective as planned on February 8, 2014. The letter stated, in part:

> "On February 3rd, you indicated just prior to the scheduled hearing that you would not attend and did indeed fail to attend. As a result the hearing was held without you and management presented the following reason(s) for taking the action indicated . . . . The current census at the Fernald Center is only nine (9) individuals. It will be seven (7) by February 18th and will continue to decline from there. There are currently two workshop instructor positions – a Habilitation Coordinator and a Vocational Instructor (Mr. Baker). Mr. Baker does not carry any ISP objectives for the remaining residents and only works with three of them, one of whom will be gone by February 18th. The Fernald Center only needs one of these two positions for the remaining residents and that is the Habilitation Coordinator as this is the position that carries the objectives and is essential to program development."
>
> "As a result of your decision not to exercise any right under Collective Bargaining or Civil Service regarding reassignment or bumping options and the conduct of the hearing cited above, it is my determination that there is just cause for the layoff to proceed."

(*Exh. 10*)

11. At the Commission hearing, Mr. Baker pointed to a history of alleged animosity and workplace harassment by DDS management and staff in the 2010-2011 time frame, which he

claimed contributed to the decision to select him for layoff rather than layoff the Habilitation Coordinator. He also complained about apparent changes in his work conditions in April 2013 and an incident in May 2013 that appeared to involve a complaint of workplace violence committed against Mr. Baker. He also proffered some post-termination communications in February and March 2014 regarding his right to return to Fernald to visit staff and residents. (*Exhs. 15, 17 & 18*)[4]

Applicable Civil Service Law

Applicable Civil Service Law and Rules

The order in which civil service employees are to be laid off in the case of lack of work is prescribed by G.L.c.31, §39, which provides in relevant part:

> [*P]ermanent employees* . . . *having the same title in a departmental unit are to be separated* . . . *because of lack of work* or lack of money *or abolition of positions* . . . *according to their seniority* . . . so that *employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest* and reinstated first. . . .
>
> *Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work of lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one*. Any 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 . . . (*emphasis added*)

G.Lc.31, §41 governs the termination of a civil service employee and states:

> "*Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be . . . laid off . . . nor shall his position be abolished. Before such action is taken*, such employee *shall be given a written notice* by the appointing authority . . . and *shall be given a full hearing*. . . before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall *provide such employee a written notice* of the time and place of such hearing at least three days prior to the holding thereof, except that *if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or*

[4] Mr. Baker also proffered other evidence consisting of a brief filed on his behalf in a collective bargaining grievance proceeding in 2013, which I excluded. (*Exh. 16ID*)

abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty." (*emphasis added*)

A tenured civil service employee who is terminated by an appointing authority which has failed to follow the requirements of Section 41 may appeal to the Commission. G.L.c.31,§42. If the employee can establish that "the rights of such person have been prejudiced thereby", the Commission "shall order the appointing authority to restore such person to his employment immediately without loss of compensation or other rights." Id.

Just Cause for Layoffs

The Commission decides appeals by person(s) aggrieved by an appointing authority's decision to lay off personnel for lack of work under G.L.c.31,§43, which states, in relevant part:

"*If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action* and the person concerned shall be returned to his position without loss of compensation or other rights . . . .(*emphasis added*)

Under Section 43, the Commission must "conduct a de novo hearing for the purpose of finding the facts anew." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 408, 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

In a case involving a reduction in force due to alleged lack of work, the well-established rules permit the Commission a very limited role in reviewing cost-cutting choices made by an appointing authority. See Amaral v. City of Fall River, 22 MCSR 653 (2009); Bombara v. Department of Mental Health, 21 MCSR 255 (2008); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995); Snidman v. Department of Mental Health, 8 MCSR 128 (1993); Soucy v. Salem School Committee, 8 MCSR 64 (1995) Once an appointing authority meets its burden of proof to articulate legitimate economic reasons for the layoffs, the burden then shifts to the employee to prove that the economic reasons were pretextual and that the layoff(s) were made in bad faith. See, e.g., Commissioner of Health & Hospitals v. Civil Service Comm'n, 23 Mass.App.Ct. 410, 413 (1987); Carroll v. Worcester Housing Auth., 21 MCSR 309 (2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995)

In sum, civil service law does not "preclude abolition of positions or reorganization of departments." E.g., Herlihy v. Civil Service Comm'n, 44 Mass.App.Ct,. 835, rev. den. 428 Mass. 1104 (1998) Absent affirmative evidence demonstrating that a separation for lack of work is but a mere pretext for another improper motive for separation, the Commission cannot override a good faith determination by the appointing authority to separate employees for cost-cutting purposes. See, e.g., Denham v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap into reserve fund); City of Gardner v. Bisbee, 34 Mass.App.Ct. 721, 723 (1993) (pretext established when mayor improperly injected himself and dictated to appointing authority who should be laid-off); Cambridge Housing Auth..v. Civil Service

Comm'n, 7 Mass.App.Ct. 586 (1979) (finding pretext when appellant's position was "abolished" so that another person could be appointed to perform the same duties).

Analysis

Applying these principles to the facts of the present appeal, DDS has met its burden to establish just cause to lay off Mr. Baker and the evidence fails to proove that his selection was motivated by pretext or unlawful motive.

First, the need to reduce the Fernald clinical staff, and in particular, to eliminate one of the two remaining personnel assigned to the Site 7 workshop program, is beyond question. It remains within the purview of the DDS to determine how to accomplish this goal. As stated in Gloucester v. Civil Service Comm'n, 408 Mass. 292, 299-300 (1990):

> "[I]n the absence of pretext or device designed to defeat the civil service law's objective of protecting efficient public employees from partisan political control . . . or to accomplish a similar unlawful purpose, the judgment of municipal officials in setting the municipality's priorities in identifying the goods and services that are affordable and those that are not cannot be subject to the [C]ommission's veto."

See also School Comm. of Salem v. Civil Service Comm'n, 348 Mass. 696, 698-699 (1965); Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 926, rev.den., 417 Mass. 1105 (1994).

Second, DDS made a compelling case that justified its choice to eliminate the Vocational Instructor position and retain the Habilitation Coordinator for the short-term transitional period until Fernald was closed for good. The Habilitation Coordinator was a higher job grade, with both hands-on and managerial-level duties, and who had direct ISP responsibility for all residents. Mr. Baker worked with a dwindling number of the residents and his job was a lower rated grade. The DDS's professional judgment that the Habilitation Coordinator was best suited to carry on the work of ramping down the Site 7 workshop program and ensuring transition of all

remaining residents to their new environment is clearly prima facie reasonable. The Commission is not expected to micro-manage that type of operational decision. See generally, Katz v. Town of Lynnfield, 28 MCSR 391 (2015) (elimination of inspector's position in consolidation of inspectional services with adjoining town); Furey v. Town of Lynnfield, 28 MCSR 383 (2015) (same); Hawks v. Department of Environmental Protection, 25 MCSR 95 (2012) (decision to retain technical rather than administrative personnel); Gil v. Massachusetts Highway Dep't, 17 MCSR 134 (2004) (layoff of functionally obsolete typists); Holman v. Town of Arlington, 17 MCSR 108 (2004) (duties of position delegated to others or privatized)

Third, Mr. Baker has failed to make any credible case that his selection for layoff was pretextual or driven by personal bias. He was retained in his job for four years longer than all six of his peers whose positions were eliminated in 2010. If there truly had been such animus against him, it would have been a simple matter to have let him go along with all the others. Moreover, I was persuaded by the credible testimony from Ms. Kingston and Mr. Stevens that the decision makers were, indeed, motivated by what was best for the residents of Fernald, and not by any predisposition to terminate Mr. Baker. Nothing contained in any of the materials proffered by Mr. Baker regarding his prior grievances provide credible evidence of the truth of the underlying disputes that he referenced or establishes a nexus between these earlier incidents and any of the DDS's layoff decisions. See Hawks v. Department of Environmental Protection, 25 MCSR 95 (2012) (no bias despite unusual timing of layoff); St. Pierre v. Fall River School Comm, 22 MCSR 445 (2009) (no compelling evidence of bias despite failure to conform exactly to collective bargaining requirements in layoff selection process)

Fourth, it is significant to this appeal that Mr. Baker was offered another Vocational Coordinator C position in the same Region 6 (and same city, Waltham) in which he then worked,

so any inference that the Regional Director (who made the final layoff decision) was biased against him is clearly unwarranted. Indeed, Mr. Baker failed to attend the layoff hearing (as to which he received the proper statutory notice) and declined to accept reassignment to another substantially identical job by bumping a more junior employee without being required to take a demotion. Thus, he has failed to demonstrate the necessary degree of due diligence that could have mitigated his loss. See Falmouth v. Civil Service Comm'n, 447 Mass. 614 (2006) (adverse inference may be drawn by employee's failure to testify at appointing authority hearing); Almeida v. New Bedford School Comm., 23 MCSR 608 (2010) (employee has duty to exercise due diligence to accept a position in order to protect his civil service claims to entitlement to "bump" into some other allegedly lawful, preferred position). See also, Almeida v. New Bedford School Comm, 22 MCSR 739 (2009) (appointing authority has discretion to designate which of several allowable positions into which employee could chose to bump); Leondike v. Randolph Public Schools, 13 MCSR 16 (2000) (same)

In this regard, it is important to recognize that this appeal does not present any question of a potentially problematic conflict between more restrictive CBA "bumping" rights and the layoff rights under G.L.c.31, §39 which must take precedence over the CBA. See, e.g., Tomashpol v. Chelsea Soldiers Home, 23 MCSR 52 (2010) and cases cited. As there is no conflict between the options that Mr. Baker was afforded under the CBA and what civil service law required – both procedures ultimately afforded him the opportunity to retain his employment in a nearby facility without demotion – there was no such potential conflict here.

Conclusion

For the reasons stated above, the appeal of the Appellant, Paul F. Baker, is hereby ***dismissed.***

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein, and Tivnan, Commissioners) on March 3, 2016.

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:
Paul F. Baker (Appellant)
Wendy Chu, Esq. (for Respondent)
John Marra, Esq. (HRD)