

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

ROBIN BORGESTEDT, PATRICIA NOONE
AND VINCENT MASSEY,
Appellants

v.

H-11-289 (BORGESTEDT)
H-11-290 (NOONE)
H-11-291 (MASSEY)

HUMAN RESOURCES DIVISION,
Respondent

Appellants' Attorney:

Pro Se
Robin Borgestedt, Esq.
Patricia Noone, Esq.
Vincent Massey, Esq.

Respondent's Attorney:

Michele Heffernan, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION

On September 23, 2011, the Appellants, all of whom are confidential employees working in the title of Counsel II at the Massachusetts Department of Correction (DOC), filed an appeal with the Civil Service Commission (Commission) pursuant to G.L. c. 30, §§ 53 and 57. They are contesting a recent change to the "Red Book" by the state's Human Resources Division (HRD) which they claim violates provisions of G.L. c. 30, § 46 requiring that confidential employees receive the same pay as incumbents of the

position who are covered by the collective bargaining agreement (employees whose positions are not deemed confidential).

On November 15, 2011, a pre-hearing conference was held and the parties submitted motions for summary disposition. I heard oral argument from the Appellants and counsel for HRD. On November 21, 2011, the Appellants submitted a written opposition to HRD's Motion to Dismiss.

Based on the briefs, the statements of the parties and reasonable inferences drawn by this Commissioner, I find the following:

1. G.L. c. 30, § 46 (1) states in relevant part that: “the salaries payable to such employees who are *incumbents of positions designated confidential* shall be determined by the personnel administrator [HRD] in accordance with the provisions of the collective bargaining agreement then in effect which would otherwise cover said positions.” (*emphasis added*)
2. G.L. c. 7, § 28 states in relevant part that: “ ... [HRD] shall make, and from time to time may amend, rules which shall regulate vacation leave, sick leave and other leave with pay ... In the event of a conflict between the terms of a collective bargaining agreement and any rule or regulation made pursuant to this paragraph, the terms of the collective bargaining agreement shall prevail.” (*emphasis added*)
3. Pursuant to G.L. c. 7, § 28, HRD developed the “Red Book”. The “Red Book” refers to the “Rules Governing Paid Leave and Other Benefits for Managers and Confidential Employees” in the Executive Branch of state government. (*emphasis added*) Among other things, these rules regulate vacation leave, sick leave, other leave with pay ...”

4. Prior to July 1, 2010, G.L. c. 4, § 7, clause eighteen, stated in relevant part that “legal holiday” shall also include “with respect to Suffolk county only, March seventeenth [Evacuation Day] and June seventeenth [Bunker Hill Day], or the day following when said days occur on Sunday ...”.
5. Outside Section 5 of the FY11 state budget (Chapter 131 of the Acts of 2010) amended the above-referenced statute by *adding* the words “provided, however, that all state and municipal agencies ... located in Suffolk county shall be open for business and appropriately staffed on Evacuation Day, on March seventeenth, and Bunker Hill Day, on June seventeenth ...”.
6. The statutory change did not eliminate the provisions included in the various collective bargaining agreements that allowed union employees the day [Evacuation Day and Bunker Hill Day] off, a compensatory day or additional pay nor did it make changes to the Red Book which also granted managers and confidential employees the day [Evacuation Day and Bunker Hill Day] off, a compensatory day or additional pay.
7. At the time that Chapter 131 of the Acts of 2010 was adopted, Red Book Section 11.01: Definition of Holidays, included Evacuation Day and Bunker Hill Day with an asterisk stating: “Suffolk County Only.” Section 11.04 of the Red Book states: “An employee required to work on a holiday shall receive a compensatory day off with pay within sixty days following the holiday ... If a compensatory day cannot be granted by the Appointing Authority due to a shortage of personnel or other reasons, then the employee shall be entitled to pay for one day at his/her regular rate of pay in addition to pay for the holiday worked.”

8. The above-referenced provisions of the Red Book largely mirrored language contained in collective bargaining agreements for unionized positions in the Executive Branch.
9. G.L. c. 7, § 28 requires HRD to post a notice at all agencies of any proposed changes to the Red Book, at least thirty days prior to the effective date of such changes, and to conduct a public hearing regarding the proposed changes no later than fifteen days prior the effective date.
10. On or about March 10, 2011, HRD penned an email indicating that any employee that worked on Evacuation Day (March 17, 2011) should receive a compensatory day off within 60 days. (emphasis added)
11. Approximately four (4) days later, on March 14, 2011, HRD forwarded a follow-up email stating in relevant part that, “consistent with legislation passed last summer, all state managers are expected to report to work as usual on March 17, 2011 and June 17, 2011 (the Suffolk County holidays). Managers will not be afforded a compensatory day for work on those days. This policy shall be the policy of the executive departments going forward.” (emphasis added) *Confidential employees*, also covered by the Red Book, *were* given a compensatory day for working on Evacuation Day (in 2011) for reasons never explained by HRD.¹
12. Employees covered by collective bargaining agreements, consistent with those agreements, received a compensatory day for working on Evacuation Day (and Bunker Hill Day (in 2011)).

¹ Seven DOC management employees previously filed an appeal with the Commission contesting the decision to eliminate the compensatory day for managers who worked Evacuation Day prior to a change in the Red Book. The Commission denied their appeal in a decision issued on June 16, 2011. (See Bolger and Six Others v. Human Resources Division, 24 MCSR 291 (2011)).

13. Until May 6, 2011, the three Appellants were members of NAGE, bargaining Unit 6.
They were not designated as Confidential Employees.
14. On May 6, 2011, the three Appellants were removed from the bargaining unit and designated Confidential Employees, without receiving any written notification of this change.
15. Although the Appellants object to the manner in which their positions were classified as confidential (which caused a disruption in at least one of the Appellants' dental insurance), they do not dispute that their positions should indeed be deemed confidential.
16. When they were converted to confidential employee status, the Appellants believed that they would continue to receive a compensatory day each year for working Evacuation Day and Bunker Hill Day, partly because confidential employees had just been granted a compensatory day for working Evacuation Day 2011, even though managers had not.
17. On May 6, 2011, notice went out to all Agency Heads and Directors of Human Resources that HRD was planning to hold a hearing the subject of which would be amendments to the Red Book. The proposed amendments would eliminate Evacuation Day and Bunker Hill Day under the definition of "Holidays" in Section 11.01 of the Red Book.
18. Section 11.04 of the Red Book, which was left unchanged under the amendments, states: "An employee required to work on a holiday as defined in Section 11.01 shall receive a compensatory day off with pay within sixty days following the holiday ..."
19. On May 27, 2011, the hearing was held and several employees of DOC attended.

20. On June 13, 2011, the change to the Red Book went into effect. The “Evacuation Day” and “Bunker Hill Day” holidays were eliminated from the Red Book.
21. On June 13, 2011, the Red Book was republished and posted on the HRD website with the effective date, June 13, 2011.
22. On June 14, 2011, the Appellants became aware, through word of mouth, that they would need to report to work or used paid leave on Bunker Hill Day, which fell on June 17, 2011 due to changes in the Red Book. Unlike their colleagues in the same title who were not deemed confidential (who were still covered by a collective bargaining agreement), the Appellants would not be receiving a compensatory day for working the fast-approaching Bunker Hill Day (or any Evacuation Day or Bunker Hill Day going forward).
23. The Appellants worked on June 17, 2011 and were not given a compensatory day.
24. As anticipated, changes, apparently effective January 1, 2012, were made to all applicable collective bargaining agreements, eliminating compensatory time for Evacuation Day and Bunker Hill Day and replacing them with two additional personal days (i.e. – increase from 3 personal days each year to 5 personal days each year) for incumbent employees (not new employees).
25. Confidential employees continue to receive 3 personal days each year.

Appellants’ Argument

The Appellants argue that, by not paying confidential employees a compensatory day for working Evacuation Day in 2011 and by granting non-confidential collective bargaining employees (including those in the same title of Counsel II) two additional

personal days in 2012 and beyond, HRD is violating G.L. c. 30, § 46 because collective bargaining employees “were paid the same salary as the Appellants but they worked one less day in 2011 [and will work two less days in 2012]”. The Appellants argue that confidential employees who work in the same job title cannot be asked to work more hours in order to be paid the same salary.”

HRD’s Argument

HRD argues that nothing in G.L. c. 30, § 46 requires the same paid holidays for confidential and bargaining unit employees. According to HRD, “salaries” in this section are discussed in reference to the salary schedule that serves as the basis for an employees’ compensation. Similar to the salary schedule in Section 46, the Collective Bargaining Agreements have salary schedules that dictate the payment of salaries for each class of employee. Those salary schedules, argues HRD, do not speak to the number or type of days off with pay an employee is entitled to over the course of a year.

Rather, according to HRD, time off with pay is established by the Red Book for Managers and Confidential employees pursuant to G.L. c. 7, § 28. Since the Red Book was amended to delete Bunker Hill Day and Evacuation Day as holidays, HRD argues that confidential employees, such as the Appellants, are not entitled to receive an additional compensatory day for working on those days.

Although not mentioned in their brief, HRD confirmed as part of the hearing that this same argument applies to the additional two personal days subsequently granted to collective bargaining employees (effectively in exchange for giving up the compensatory days.)

Conclusion

The 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., “viewing the evidence in the light most favorable to the non-moving party”, the movant has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that the non-moving party has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

Based on the parties’ motions, as well as their oral arguments, it is evident that the parties are in general agreement as to the facts of this case. They also agree that the issue to be decided is whether G.L. c. 30, § 46 requires the same paid holidays and same number of personal days for confidential and bargaining unit employees. It does not.

The intent of Section 46 is abundantly clear. As correctly stated by HRD, the reference to salaries in Section 46 specifically references the salary schedule and does not reference paid days off. Rather, G.L. c. 7, § 28 requires HRD to promulgate rules regarding vacation, sick and other paid time off for those employees not covered by a collective bargaining agreement, such as the Appellants and there is no requirement for paid days off to mirror the paid days off contained in the various collective bargaining agreements.

In fact, as argued by HRD during oral argument, there are other differences in the Red Book that actually provide a greater number of paid days off to confidential employees in comparison to collective bargaining employees. While managers and confidential employees receive 12 days of annual vacation time upon hire, collective bargaining employees typically only receive 10 days.

While there may be strong public policy arguments, including the maintenance of morale among confidential employees who work side-by-side with collective bargaining employees in the same title, to grant comparable compensatory and personal days to confidential employees, there is nothing in the civil service law or rules that requires it.

For these reasons, the Appellants' appeals under Docket Nos. H-11-289, H-11-290 and H-11-291 are hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By a vote of the Civil Service Commission (Bowman, Chairman, Ittleman, Marquis, McDowell and Stein, Commissioners) on April 5, 2012.

A true record. Attest:

Commissioner

Pursuant to G.L. c. 30, § 57, this decision is final and binding on all parties.

Notice to:

Robin G. Borgstedt, Esq. (Appellant)

Patricia G. Noone, Esq. (Appellant)

Vincent F. Massey, Esq. (Appellant)

Michele Hefferan, Esq. (for HRD)