

**COMMONWEALTH OF MASSACHUSETTS**

**SUFFOLK, ss.**

**CIVIL SERVICE COMMISSION**

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

**SHAWN BRAZ,**

*Appellant*

v.

**Docket No. G2-14-165**

**NEW BEDFORD SCHOOL DEPARTMENT**

*Respondent*

Appearance for Appellant:

Philip Brown, Esq., Associate General Counsel  
AFSCME Council 93  
8 Beacon Street, 7<sup>th</sup> Floor  
Boston, MA 02108

Appearance for Respondent:

Jane Medeiros Friedman, Esq.,  
First Ass't City Solicitor, City of New Bedford  
133 William Street  
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Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Shawn Braz, acting pursuant to G.L.c.31, §2(b) and §39, appealed to the Civil Service Commission (Commission) to contest his failure to be reinstated after layoff to a position of Building Maintenance Craftsman with the New Bedford School Department (NBSD). A prehearing conference was held on July 25, 2014 and a full hearing was held on April 11, 2014, both at the UMass School of Law in North Dartmouth.<sup>1</sup> The witnesses were sequestered. Eighteen (18) exhibits (1 through 6, 7a-7b, 8a-8d, 9a-9e, 10a-10b & 11 through 18) were received in evidence and one additional e-mail with attachments was received after the hearing and marked as PH Exh. 19). The hearing was digitally recorded and copies were sent to the parties.<sup>2</sup> Both parties submitted proposed decisions to the Commission.

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<sup>1</sup> The Standard Adjudatory 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.

<sup>2</sup> 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.

## **FINDINGS OF FACT**

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

*Called by the Appointing Authority:*

- Angela Natho, City of New Bedford Personnel Administrator
- Al Oliveira, NBSD Director of Facilities
- Heather Emsley, NBSD Human Capital Services Director

*Called by the Appellant:*

- Shawn Braz

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes the following facts:

1. The Appellant, Shawn Braz, was hired in February 2005 as a Building Maintenance Person (BMP), also called a General Maintenance/Groundskeeper, with the NBSD. He is a graduate of New Bedford Vocational Technical High School. He holds a certificate in Facilities Management from Boston University. He has obtained certifications to work with hazardous chemicals and lead paint. He has had prior private sector employment as a laborer and truck driver. (*Exhs. 1 through 6, 11 & 16; Testimony of Appellant*)

2. A BMP is a Class II labor service position that performs “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.” The position requires one year prior paid experience. (*Exhs. 12 & 13*)

3. Mr. Braz performed the duties of a BMP, also known as a General Maintenance/Groundswoker, until August 12, 2010, when he was laid off as part of a reduction in force due to budget cuts that eliminated his position. (*Exh. 7a-7b & 11*)

4. While employed as a BMP, Mr. Braz was assigned to perform a wide variety of manual labor tasks, usually as a part of a team. The work included cutting grass and trees, spreading mulch, moving furniture, boarding up windows, transporting material to the dump and other “heavy grunt work”, as well as occasional repairs to walls, windows, doors, manual locks, furniture, lawnmowers and motors. He also assisted licensed plumbers and electricians, once worked with a painter, and filled in for supervisors on vacation. (*Testimony of Appellant & Oliviera*)

5. In accordance with the requirements of G.L.c.31,§39, Mr. Braz’s name was placed on an NBSD reinstatement list for BMP where he appeared fourth out of the six employees on the list, based on his seniority date of 02/05/2007. (*Exh. 18; Testimony of Natho*)

6. On December 24, 2012, Mr. Braz was appointed as a Hoisting Equipment Operator (HEO) with the Water Division of the New Bedford Department of Infrastructure (DPI). On September 16, 2013, his job title was changed to that of a Special Motor Equipment Operator (SMEO), which is the position he currently holds. (*Exhs 8a-8d, 9b-9e & 11; Testimony of Appellant*)

7. An SMEO is also a Class II labor service position. The duties include operating hoisting equipment such as backhoes, excavators, cranes, power shovels, pile drivers, front-end loaders, sweepers and other similar equipment requiring a Massachusetts Class B CDL driver’s license and a hoisting license issued by the Massachusetts Department of Public Safety. (*Exhs. 9a & 13*)

8. In December 2012, Al Oliveira became the Director of Facilities for the NBSD, responsible for overseeing the maintenance of the twenty-eight buildings within the NBSD system. He holds a Bachelor’s degree in Facilities Engineering, a certification in sustainable buildings from the University of Massachusetts, and certifications in public procurement for design and construction, project management, HVAC and architectural structural drafting. His prior experience includes facilities management positions for public libraries and the Diocese of Fall River as well as his most

recent experience as the municipal special projects manager for the City of Fall River. (*Testimony of Al Oliveira*)

9. Soon after assuming his duties, Mr. Oliveira concluded that he needed to upgrade the level of the maintenance staff to address the poor state of repair in the NBSD buildings, which he described as “the worst maintained in the Commonwealth.” There was one electrician, one-and-a-half plumbers and four BMPs whose duties were largely concentrated on routine maintenance.<sup>3</sup> At this level of staffing, Facilities Management personnel or the plant engineer were required to take time to handle personally many of the more complex maintenance tasks. On the recommendation of the NBSD personnel director, he decided to create a new position of Building Maintenance Craftsman (BMC), a Class III labor service position, envisioned as “one step below a plant engineer”. The BMC would be dedicated and available full-time to perform the more highly skilled labor required in a variety of areas, including carpentry, plumbing and electrical work, and to direct and supervise the BMPs in such work. (*Exhs. 12 & 13; Testimony of Oliveira*)

10. On July 9, 2014,<sup>4</sup> the NBSD posted a notice for the position of a BMC, to work under the direct supervision of Mr. Oliveira or his Assistant Facilities Manager. The essential duties and responsibilities of a BMC are to perform miscellaneous maintenance and repair tasks requiring “journeyman skill in at least two of the following areas: carpentry, painting, plumbing, plastering, and other trades.” The position requires two years of prior paid experience at the journeyman level. (*Exhs. 10, 12 & 13; Testimony of Oliviera*)

11. A “journeyman” is a skilled worker qualified in a building trade or craft, generally after completing a course of training and a period of supervised experience (apprenticeship) and, in some

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<sup>3</sup> Mr. Oliveira also oversees the staff of NBSD custodians, official service positions, responsible for routine manual labor associated with the “cleaning and maintaining” of school buildings. (*PH Exh. 19; Testimony of Oliveira*)

<sup>4</sup> An initial posting for the BMC position was made on May 16, 2014 but withdrawn and replaced by the July 9, 2014 posting after it was discovered that the first posting had been copied from the BMP job template by mistake, not the BMC job template. (*Exh. 15: Testimony of Oliveira*)

trades where a specific license is required (such as electrician, plumbing, construction supervision and HVAC), after examination. Mr. Oliveira explained that, unlike an apprentice, a journeyman is capable of working independently, without supervision. (*Testimony of Oliveira*)

12. In response to the posting, NBSD received only one application, submitted by a NBSD school custodian. The job of a custodian is an official service position, not a labor service position as is the BMC job. At the time of the Commission hearing, NBSD had not yet filled the position as it had not concluded that the one applicant met the qualifications. (*Exh. 10; Testimony of Oliveira & Emsley; Administrative Notice [HRD MuniClass Manual]*)

13. Prior to the posting of the BMC position, the NBSD had not established any “register” or “roster” for such a position. (*Testimony of Natho*)

14. Upon learning of the BMC posting, Mr. Braz brought this appeal. (*Claim of Appeal*)

#### **APPLICABLE CIVIL SERVICE LAW**

Massachusetts Civil Service Law, G.L.c.31, divides civil service positions into two broad categories, the “labor service” and the “official service.” The “labor service” include positions whose duties are such that suitable selection for permanent (tenured) appointment and promotion are filled from a “register” or “roster” pursuant to G.L.c.31, Sections 28 and 29, rather than by competitive examination; “official service” are those positions not in the labor service and which are filled by competitive examination pursuant to G.L.c.31,§6 through §11, or provisional appointment or promotion pursuant to G.L.c.31,§12 through §15. See G.L.c.31,§1 & §3(b). Pursuant to G.L.c.31,§3, the Massachusetts Human Resources Division (HRD) has promulgated a MuniClass Manual which categorizes civil service positions by occupational groups and identifies the titles that fall within the labor service and official service, respectively.

A civil service position may also be filled by transfer of a tenured civil service employee to a “similar position in the same or in another departmental unit” in accordance with the conditions and requirements set forth in G.L.c.31,§35. “A position shall not be considered similar if it has a title higher than that of the position from which the transfer to be made or if the requirements for appointment to such position are substantially different.” G.L.c.31,§35,¶1.

Civil service law also provides for “reinstatement” of a tenured employee to his/her former job after he/she was been laid off for lack of work or money or abolition of a position.<sup>5</sup>

“If permanent employees in positions having the same title in the departmental unit are to be separated from such positions because of lack of work “shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to [their] seniority . . . . Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill 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.” G.L.c.31,§39,¶1.

### **ANALYSIS**

This appeal presents the question as to whether NBSD violated the “reinstatement” rights of Mr. Braz by seeking to post the position of BMC without first offering him the job. Mr. Braz contends that the position of BMC is “similar” to the position of BMP from which he was laid off and, therefore, he should have been “reinstated” to that position before any other person was appointed to such a title. NBSD contends that the positions are not “similar” within the meaning of G.L.c.31, §39 and, therefore, did not require “reinstatement” of Mr. Braz to that job.

Based on the job descriptions of the two positions contained in the MuniClass Manual, as well as the NBSD’s own classification plan and job descriptions, the BMC position is a Class III labor service title which requires “journeyman level” skill level in two trades, whereas the BMP position is a Class II labor service title which requires “less than journeyman level”. Thus, BMC position is

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<sup>5</sup> Laid off employees are also entitled to be placed on a statewide “reemployment” list for appointment by other appointing authorities for a two-year period. G.L.c.31,§40. This appeal involves the right of “reinstatement” to the employee’s former departmental unit, and does not involve the issues of “reemployment” rights.

a “higher” title than a BMP position. See also PAR.19(1)(c) (defining labor service Class I [Laborers]; Class II [Skilled Laborers]; Class III [Mechanics and Craftsmen])

I found no Commission decision or judicial precedent that addressed the precise issue presented here, and neither party has pointed the Commission to any such decision. The NBSD relies upon Berrios v. City of Holyoke, 25 MCSR 308 (2012), which involved an official service employee and presented a different factual situation that is not directly analogous here. The Appellant relies on the Commission’s analysis of the term “similar” in Section 39 in Almeida v. New Bedford School Committee, 22 MCSR 739 (2009), but that appeal involved a question of “bumping” rights of an employee to be demoted, or reinstated to a “similar” lower title in the labor service. Neither Commission decision supports the proposition that the reinstatement law requires that the NBSD rehire Mr. Braz into a higher title than the one from which he was laid off. Indeed, in subsequent decisions involving Mr. Almeida, the Commission emphasized that a labor service employee “has neither ‘bumping’ nor ‘reinstatement’ rights to be promoted into a position in preference to other employees.” Almeida v. New Bedford School Dep’t, 25 MCSR 122 (2012). Equally persuasive is the language in G.L.c.31,§35 which expressly defines the term “similar” position to exclude one that is a higher title or whose duties are substantially different.” Under traditional principles of statutory interpretation, the same intent is logically applied to two analogous civil service statutes.

The Appellant also contended that, in fact, the purported elevated duties of the BMC job was a “sham” and the actual job requirements for the new position, although characterizes as a BPC, are, in fact, equivalent to the duties that Mr. Braz formerly performed as a BMP. The evidence, however, does not support this contention. Mr. Oliveira presented credible testimony that the NBSD faced serious maintenance issues within its physical plant and that it was his good faith intention to bring in a more highly skilled craftsman who had at least three years of journeyman

experience to take on the responsibility of performing hands-on repairs that had not been, and could not be handled, below the journeyman skill level. The Appellant offered little more than speculation that the position, when eventually filled, would merely amount to another BMP level position that Mr. Braz was fully capable of performing based on his past training and experience. I do not find that the evidence presented in this appeal warrants the conclusion that Mr. Braz meets the criteria for journeyman level performance.

That said, I do not construe the NBSD to rule out the possibility that, upon further scrutiny, Mr. Braz might well convince Mr. Oliveira that he has the requisite paid experience and training to perform at a journeyman level. Although at the time of the Commission hearing, based on his inquiries of Mr. Braz, Mr. Oliveira believed that Mr. Braz had not demonstrated proper journeyman level skill necessary to be qualified for a BMC level job, he did not rule it out. Thus, although Mr. Braz does not have “reinstatement” rights to such a position, nothing precludes him from applying for such a position and competing on an equal basis with all other candidates who apply.

Finally, although also outside the scope of this present appeal, it bears notice that a variety of procedures are available to NBSD to lawfully fill the BMC position, each of which involve somewhat different criteria, which, possibly, could affect Mr. Braz’s ability to apply or be appointed. If the position is posted through a “promotional bulletin” as a labor service promotion under Section 29, the NBSD would have the discretion to designate the qualifications and current job titles of employees eligible to apply for the position, and the appointment would need to be made under the “2n+1” formula based on seniority of the qualified applicants. See PAR.19(5). The position also could be filled by an original labor service appointment under Section 28, which would be made by requisition from a register or roster of candidates open to both internal and external candidates, with preference given to veterans and selection to be made under the “2n+1”

formula according to the date the applicant signed the register. See PAR.19(2). Although, theoretically, there would also be the possibility for filling the position by a transfer under Section 35, since there are no other BMC positions currently in the NBSD, that would seem less likely, as a transfer is available only to other such BMC personnel in another departmental unit. Absent evidence that an appointing authority has selected a particular method of filling a position as a subterfuge for excluding or preferring certain potential applicants over others, and the appointing authority follows the procedures applicable to that method, the appointing authority has reasonable discretion to determine how it chooses to fill a civil service position. See, e.g., Barry v. Boston Fire Dep't, 25 MSR 336 (2012) and cases cited.

**CONCLUSION**

For the reasons stated, the appeal of the Appellant, Shawn Braz, is hereby *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan and Stein, Commissioners) on September 1, 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:

Philip Brown, Esq. (for Appellant)

Jane Medeiros Friedman, Esq. (for Respondent)