COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

CHARLES DAVIS,
Appellant

v.

D1-10-322

CITY OF BOSTON,
Respondent

Appellant's Representative:

Tina Hardy
SEIU Local 888
529 Main Street
Charlestown, MA 02129

Respondent's Representative:

Maria Paola Marotta, Esq.
City of Boston
Office of Labor Relations
City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION ON CITY OF BOSTON'S MOTION TO DIMISS

The Appellant, Charles Davis (hereinafter "Davis" or "Appellant") filed an appeal with the Civil Service Commission (hereinafter "Commission"), claiming that the City of Boston (hereinafter, "City" or "Appointing Authority") failed to provide him with proper "bumping rights" pursuant to G.L. c. 31 § 39.

The Appellant filed his appeal on November 22, 2010. The parties attended a pre-hearing conference on December 13, 2010 at which time I heard oral argument. The City subsequently filed a Motion to Dismiss and the Appellant filed a reply.

The following do not appear to be in dispute:

1. The Appellant was a "Recreation Instructor" at the Johnson Community Center in the City of Boston's Center for Youth & Families (BCYF). Recreation Instructor is an "official service" civil service position.

2. BCYF is the largest human service agency in Boston. It provides educational, recreational, social and cultural programs at facilities across the city. Each center offers a variety of activities including after-school tutoring, computer lessons, recreational programs and leagues such as fitness program, art classes, senior programs, daycare and more. Before June 30, 2010, BCYF operated 46 sites.

3. The "Recreation Series" includes, from lowest to highest: Recreation Coordinator, **Recreation Instructor**, Recreation Leader, Recreation Program Specialist, **Recreation Supervisor I**, Recreation Supervisor and Recreation Supervisor for Handicapped Children.

4. The only "active" titles in the recreation series in the City of Boston are Recreation Instructor and Recreation Supervisor I.

5. In addition to being a permanent civil service employee, the Appellant has been a member of SEIU Local 888's Clerical & Technical Bargaining Unit for 25 years. His title is covered by a collective bargaining agreement between the City and the SEIU Clerical and Technical employees Bargaining Unit.

6. In 2010, reductions in Local Aid funds from the Commonwealth contributed to the City's severe budgetary and fiscal situation.

7. As a result of reductions to BCYF's fiscal 2010 budget, the department evaluated performance/site usage, geography, partnerships, hours of operations, programming, neighborhood demographics, other qualitative factors, and community input. Based on this evaluation, the department decided to consolidate eight sites including the Johnson Community Center.

8. The site consolidation resulted in the elimination of 22 positions: 4 non-union, 1 SENA, 16 SEIU BCYF and 1 SEIU Clerks and Techs positions. All the positions were eliminated effective June 30, 2010, except for the one position which fell under the SEIU Clerks and Techs contract.

9. The City and the SEIU Clerks and Techs agreed to a no layoff provision in exchange for a wage delay for the 2010 contract year.

10. Dianne Belfast is a Principal Personnel Officer at BCYF. On April 14, 2010, Belfast began a "bumping" analysis of the Appellant. Ms. Belfast determined that the Appellant is the only person employed as a Recreation Instructor at BCYF. The City has also confirmed that there are no other Recreation Instructor positions in any other City department.

11. Nick Cesso serves in the title of Recreation Supervisor, a grade above Recreation Instructor. Thus, the Appellant has no bumping rights in relation to Mr. Cesso.

12. The next lower title or titles in succession to Recreation Instructor was Recreation Coordinator. However, there are no individuals serving as Recreation Coordinators at BCYF or in any other City department.

13. On June 10, 2010, BCYF notified the Appellant that the Recreation Instructor position with BCYF would be relocated from the Johnson to the Tobin Community Center (hereinafter "Tobin"), effective July 1, 2010, as the result of the City's decision to discontinue BCYF operations at the Johnson Community Center. Griffin advised Appellant that his work schedule would be Monday through Friday, 12 p.m. to 8 p.m.

14. On June 30, 2010, BCYF notified the Appellant that his Recreation Instructor position was being reassigned from the Johnson to the Tobin effective September 1, 2010.

15. On August 27, 2010, BCYF notified the Appellant that his reassignment would be delayed.

16. On September 29, 2010, BCYF informed the Appellant that he will be laid off from employment with BCYF stating:

> "As you were notified before, your Recreation Instructor position with the City of Boston, [BCYF] was to be eliminated on June 30, 2010 following the Department's decision to consolidate the Johnson Community Center. There was no available position into which you were eligible to bump. However, in consideration of the no layoff provision in your Union's wage delay agreement with the City, your position was temporarily extended for the period July 1, 2010 through September 20, 2010. This letter is to inform you that your temporary extension will be terminated at the close of business on October 20, 2010 and you will be laid off from employment with the [BCYF] at that time."

17. On October 1, 2010, the City eliminated the Recreation Instructor position.

18. On November 8, 2010, BCYF conducted a hearing regarding whether there was just cause to abolish the Appellant's position.

19. At the hearing, the Appellant informed the hearing officer that he was leaving and would not answer any questions.

20. On November 17, 2010, BCYF notified the Appellant that his lay off was effective November 30, 2010, based on the findings and conclusion of Marotta.

21. On November 19, 2010, the BCYF offered the Appellant a position as "Athletic Assistant" which he accepted.

Conclusion

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" has presented substantial and credible evidence that the opponent has "no reasonable expectation" of prevailing on at least one "essential element of the case"; the opponent of summary disposition 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).

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 "official 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." G.L. c. 31 § 1 defines a "series" as "a vertical grouping of related titles so that they form a career ladder."

Here, the Appellant was laid off from his position as Recreation Instructor. Any references to reassignments or transfers that may have occurred prior to this layoff are misplaced and not relevant to the instant appeal. Further, the Appellant has made no argument that there was not a lack of funds which necessitated the layoffs. Thus, the issue for the Commission is whether the Appellant was given all of his "bumping rights" under Section 39.

There is no dispute that the Appellant was the only Recreation Instructor and that there was no available next lower title or titles in succession in the Recreation series.

The language of Section 39 expressly limits the "bumping" rights of official service employees to the "lower title or titles in succession." This language expresses a clear legislative intent to constrain "bumping" to official service titles within the same job "series." Thus, the Appellant had no further bumping rights under civil service law.

This does not, however, prevent the City and the employee's bargaining agent from entering into a collective bargaining agreement to allow employees to bump into other lower-graded titles that are outside the Recreation Series but within the bargaining unit, as long as those provisions do not conflict with the civil service rights of any permanent civil service employees.

Although that issue is beyond the Commission's jurisdiction, it appears that no such additional bumping rights were available within the applicable bargaining unit. Although the Appellant had no bumping rights, either under civil service or the applicable collective bargaining agreement, BCYF still offered the Appellant a position as an Athletic Assistant, which he accepted.

Although the Appellant has no bumping rights available to him, he retains his "reinstatement rights" to the position of Recreation Instructor under Section 39 and shall be added to the statewide reemployment list under Section 40 for two years.

For all of the above reasons, the Appellant's appeal under Docket No. D1-10-322 is hereby ***dismissed.***

Civil Service Commission

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Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, and McDowell, Commissioners [Stein, Marquis – Absent]) on August 25, 2011.

A true record. Attest:

_____
Commissioner

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.

Notice:
Charles Davis (Pro Se)
Maria Paola Marotta, Esq., (for City of Boston)