

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JAMES ESTRELLA,
Appellant

v.

CITY OF NEW BEDFORD,
Respondent

CASE NO: G2-06-10

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION ON MOTIONS FOR SUMMARY DECISION

The Appellant, James Estrella, acting pursuant to G.L.c.31, §43, appealed to the Civil Service Commission (the Commission) from a decision of the City of New Bedford (City), the Appointing Authority, based on a purportedly mistaken calculation by the Massachusetts Human Resources Division ("HRD") as to Appellant's seniority as a City Police Officer for purposes of layoff for lack of money pursuant to G.L.c.31, §39. The Commission granted the parties' Joint Request for Expedited Hearing and Preliminary Ruling and received Motions for Summary Decision from the Appellant and HRD. A

motion hearing was conducted by the Commission on March 5, 2009. One audiocassette recording was made of the hearing.

FINDINGS OF FACT

Based on the submissions of the parties and the argument at the motion hearing, the following facts appear to be undisputed:

1. On October 29, 1995, the Appellant, James Estrella, was appointed to the position of permanent full time Police Officer for the City. (Stipulated Fact)

2. On August 28, 2004, Officer Estrellan resigned from his position as a full time Police Officer for the City. (Stipulated Fact)

3. When Officer Estrella resigned his position as a City Police Officer, he intended to accept a job as a City Firefighter. Officer Estrella did not expect or intend at the time of his resignation that he would return to his position as a Police Officer. (Statement of Appellant)

4. On August 29, 2004, the Appellant was appointed to the position of permanent full-time Firefighter for the City. (Stipulated Fact)

5. In or about April 2006, the Appellant was invited to rejoin the City Police Department as a Police Officer. (Statement of Appellant)

6. On April 22, 2006, the Appellant resigned from his position as full time Firefighter for the city. (Stipulated Fact)

7. The Appellant resigned from the City Fire Department with the intention of accepting a position as a City Police Officer. (Statement of Appellant)

8. On May 24, 2006, HRD approved the City's request to reinstate the Appellant to the position of permanent full time Police Officer for the City, effective April 23, 2006. (Stipulated Fact; Appellant's Motion, Exhibit C)

9. The City's Request for Reinstatement filed with HRD stated that the "Reason for requested reinstatement" was a "Transfer from Fire. Dept." and that the "Position Formerly Occupied by Employee Whose Reinstatement is Proposed" as "Police Officer", with a last date of paid employment as a Police Officer of 8/28/04 and the reason for termination of service as "Resigned to transfer to Fire Dept." (Appellant's Motion, Exhibit C)

10. On February 12, 2009, the City informed Officer Estrella that he would be laid off from the Police Department as part of a departmental reduction in force due to lack of money pursuant to Chapter 31, Section 39. (Appellant's Motion, Exhibit B)

11. In contemplation of the reduction in force, the City made inquiry of HRD as to the method of calculating Officer Estrella's seniority. (Appellant's Motion)

12. In reliance on the information provided by the City, as set forth in Finding Nos. 1 through 10 above, HRD calculated Officer Estrella's seniority date in the City Police Department to be April 23, 2006. (Stipulated Fact; Appellant's Motion, Exhibit A)

13. Officer Estrella calculates his seniority date in the City Police Department to be October 29, 1995. (Stipulated Fact)

14. A seniority date of October 29, 1995 would provide Officer Estrella with a length of service that would place him senior to a sufficient number of other police officers as to protect him from layoff in the current reduction in force. (Statement of City HR Director)

CONCLUSION

Officer Estrella's appeal presents the Commission with Hobson's choice: depending on how the Civil Service Law requires the City to calculate his seniority, either he, or one of his colleagues likely will lose their job as a Police Officer in New Bedford. There is no result here that can possibly be considered a good one, either for the officers involved or for the City of New Bedford or its citizens.

That said, the Commission is obliged to apply the Civil Service Law according to the intention of the General Court as set forth in the statutes that apply. Here, three sections of the Civil Service Law appear applicable.

The order in which civil service employees are to be laid off in the case of lack of money is prescribed by Section 39 of Chapter 31, which provides in relevant part:

If permanent employees . . . having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall . . . 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, computed in accordance with section thirty-three, 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. (emphasis added)

Seniority as defined in Section 33 provides:

For the purposes of this chapter, seniority of a civil service employee shall mean his ranking based on length of service, computed as provided in this section. Length of service shall be computed from the first date of full-time employment as a permanent employee. . . in the departmental unit. . . unless such service has been interrupted by an absence from the payroll of more than six months, in which case length of service shall be computed from the date of restoration to the payroll; but upon continuous service following such an absence for a period of twice the length of the absence, length of service shall be computed from the date obtained by adding the period of such absence from the payroll to the date of original employment; provided, however, that the continuity of service of such employee shall be deemed not to have been interrupted if such absence was the result of (1) military service, illness, educational leave, abolition of position or lay-off because of lack of work or money, or (2) injuries received in the performance of duty . . .

If, as a result of a reinstatement made pursuant to section forty-six, a person is restored to employment in a departmental unit other than that in which he formerly held full-time employment as a permanent employee, his length of service shall be computed from the date of his first employment under such reinstatement, but upon continuous service in such unit for three years or twice the length of his absence from the payroll, whichever is greater, his length of service shall be computed as though such earlier employment had been in the departmental unit to which he has been reinstated.

If the employment of such full-time employee is changed through an original or promotional appointment or transfer from . . . one department unit to another within the same department in a city or town. . . . the length of service of such employee in the unit to which the appointment or transfer is made shall be computed from the date which was used to compute his length of service immediately prior to such appointment or transfer. If the employment of such full-time employee is changed through an original or promotional appointment from one departmental unit to another not within the same department in a city or town . . . the length of service of such employee shall be computed from the date of such change of employment, but if the employee completes one year of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the change of employment.

If the employment of such full-time employee is changed by transfer from. . . one departmental unit to another not within the same department in a city or town . . . the length of service of such employee shall be computed in the following manner: (1) if the transfer was made upon the request of the employee, the length of service shall be computed from the date of such transfer, but if the employee completes three years of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the transfer; (2) if the transfer was not upon the request of the employee, the length of service shall be computed from the date which was used to compute the employee's length of service immediately prior to the transfer.

Any person in such service who has received an appointment from a reinstatement list, as set forth in section forty, shall carry forward their seniority as prescribed herein . . . (emphasis added)

The question presented in this appeal is which of the paragraphs of Section 33 should be applied to calculate Officer Estrella's seniority with the City Police Department.

HRD asserts that the first paragraph is applicable to an employee's "reinstatement" in a department in which he had previously been employee, which HRD argues is what Officer Estrella did in April 2006. As the Appellant was "absent from the payroll" of the Police Department for more than six months, i.e., for 86 weeks, therefore, under the first paragraph of Section 33, Officer Estrella would need to have served 172 weeks with the Police Department (twice the length of his "absence") before his seniority date reverted

back to his original employment with the Police Department in 1995. Since Officer Estrella had served less than 172 weeks since returning to the Police Department at the time of his February 2009 layoff, his seniority date had not yet reverted and remained at the April 2006 date of his return to that department.

The Appellant is less specific as to which paragraph of Section 33 he contends that his seniority should be calculated, but it appears that he relies principally on the fourth paragraph, claiming he was “transferred” from the Fire Department to the Police Department.¹ Under this theory, the Appellant would need to serve only three years after “transferring” to the Police Department, i.e. until April 23, 2009, before his seniority date would revert back to his original date of employment in 1995. It is unclear how this position would prevent the City from using the April 23, 2006 date of “transfer” for purposes of the February 2009 layoff decision, as Officer Estrella had not served the three years as the fourth paragraph of Section 33 required to entitle him to any earlier seniority date.

The Commission agrees with HRD that the Appellant’s return to employment as a Police Officer after resigning from the Police Department to accept appointment as a full-time Firefighter in the Fire Department cannot be termed a “transfer” within the meaning of the Civil Service Law. Section 35 of the Civil Service Law, providing for the transfer of civil service employees, states:

¹ As HRD points out, and the Appellant does not appear to dispute, none of the scenarios in the other paragraphs of Section 33 arguably apply to him, i.e. the second paragraph covers “reinstatement” to a department other than one in which he had been previously worked and, in any event, the same “twice the absence standard would apply to the Appellant even under that paragraph; the third paragraph covers appointments or transfers within a department; the fifth paragraph covers employment off a “reemployment list”.

[A] tenured employee may be transferred to a similar position in the same or in another departmental unit after request in writing for approval of such transfer made to the administrator [HRD] by the appointing authority or authorities. . .

Any permanent employee in a departmental unit may apply in writing to his appointing authority for transfer to a similar position within such unit, or may apply in writing to the appointing authorities for such unit and for any other departmental unit for transfer to a similar position in such other departmental unit. With the written consent of such appointing authority or authorities, as the case may be, and with the written consent of the administrator. . . (*emphasis added*)

HRD Regulations define a “transfer” to mean “the change in title of an employee to a title for which specifications show essentially identical qualifications and duties; a change from a position in a title in one departmental unit to a position in the same title in a different departmental unit.” PAR.01.

The Appellant correctly asserts that both police and fire officers are “public safety” civil service positions which share some statutory parameters in common. See, e.g., G.L.c.31, §§58-63. However, all civil service positions are regulated by the same general statutory framework of Chapter 31, so regulatory similarities clearly do not mean that two positions are “similar”. Clearly it is the qualifications and duties of the positions that matter and the Commission is not persuaded that it is appropriate to call the qualifications and duties of a police officer and a fire officer “similar”. There are completely separate civil service examinations required for the two jobs; the equipment used in each job is dramatically different as is the technical training and personnel skills required. Police officers are armed and have broad law enforcement authority which fire officers do not. These two jobs, while both part of a community’s public safety team, are as different as the pitcher and the catcher on a baseball team.

The Appellant has misplaced reliance on Boston Police Patrolman’s Ass’n Inc. v. Menino, 2006 WL 4119714 (Sup.Ct.2006) and the other associated cases concerning the

transfer of police officers from the Boston Municipal Police Department (BMPD) to the Boston Police Department (BPD). While the Appellant is correct that the “transfer” statute (G.L. c.31, §35) provides that positions are not “similar” if “the requirements for appointment . . . are substantially different”, and the BMPD and BPD historically had different appointing procedures, there is nothing inconsistent with the unique circumstances that resulted in permitting the transfers in the BMPD cases and the Commission’s decision here. Without delving deeply into the specifics of that protracted litigation, the BPMD and the BPD were both police departments with far more similarities than distinctions and the differences in how those officers were appointed was only a part of the equation and, for purposes of the relief in those cases, the Commission found that the police officers in the two armed forces were “functionally indistinguishable”. See Investigative Report of the Civil Service Commission, Case No. G-3563 (Aug. 26, 1999); Twenty-Seven Former Boston Municipal Police Officers, Sergeants and Lieutenants v. City of Boston, 20 MCSR 235, 239 (2007); cf. Goncalves v. Boston, 66 Mass. 180, 185n11 (2006) (BMPD and BPD “comparable in many respects”)

In sum, HRD correctly advised the City and the City correctly used a seniority date of April 23, 2006 in calculating Mr. Estrella’s length of service for purposes of determining the order of layoffs on February 12, 2009. Mr. Estrella’s seniority date will not revert to his original hire with the City’s Police Department until August 2009.

Finally, the Commission notes that Section 33 provides that “continuity of service . . . shall be deemed not to have been interrupted if such absence was the result of . . . layoff because of lack of work or money”. Thus, it appears that any period of unemployment after such layoff will not change the foregoing applicable date, i.e. August 2009, on

which Officer Estrella's seniority date reverts. As the matter is not presently before it, however, the Commission expresses no opinion on whether such reversion occurs only if and when Officer Estrella were reinstated or whether Officer Estrella's seniority date would revert back to 1995 in August 2009, whether is had been reinstated by that date or not, and, thus, change his seniority while on layoff for purposes of calculating the rank order of any future reinstatement.

For the reasons stated above, the Motion for Summary Decision of the Appellant, James Esterella is denied, the Motion for Summary Decision of HRD is allowed, and the appeal of the Appellant, James Estrella, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on March 12, 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:

Shelia McCrevy, Esq. (for Appellant)

Jane Medeiros Friedman, Esq. (for Appointing Authority)

Martha Lipchitz O'Connor, Esq. (for HRD)