COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

ROBERT MCEACHEN
Appellant

v.

BOSTON HOUSING AUTHORITY,
Respondent

CASE NO. D1-14-102

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION ON CROSS MOTIONS FOR SUMMARY DECISION

The Appellant, Robert McEachen, appealed to the Civil Service Commission (Commission) pursuant to Mass.G.L.c.121B, §29, to contest the termination of his employment as a carpenter with the Respondent, Boston Housing Authority (BHA). Following a pre-hearing conference on May 20, 2014, each party filed a Motion for Summary Decision. A hearing on the cross-motions was held on July 24, 2014 and each party thereafter made further submissions. After reviewing the submissions[1] and considering argument of counsel, I agree with the BHA that the undisputed facts establish that Mr. McEachen's termination is justified because the undisputed facts establish that he was incapable of performing the duties of his position as a BHA carpenter. Accordingly, this appeal must be dismissed.

[1] Both the Appellant and the BHA moved to strike certain parts of the submissions of the other. I deny those motions and consider all the materials submitted to the extent I find them informative.

FINDINGS OF FACT

I find the following facts to be undisputed:

1. The Appellant, Robert McEachen, was employed as a carpenter with the BHA from November 1973 until his termination in April 2014. (*Stipulated Facts; BHA Motion*)

2. On or about December 31, 2012, Mr. McEachen injured his shoulder in a work-related accident. He was diagnosed with a torn rotator cuff with AC joint complications which rendered him physically unable to work as a carpenter. (*BHA Motion; Appellant's Motion*)

3. On January 4, 2013, Mr. McEachen was placed on leave under the Family Medical Leave Act (FMLA), which was twice extended and expired on March 29, 2013. Thereafter, the BHA placed Mr. McEachen on unpaid medical leave status. (*BHA Motion; Appellant's Motion*)

4. Mr. McEachen also applied for workers' compensation benefits due to his injury. Initially, the claim was denied but subsequently, he was approved by order of the Massachusetts Department of Industrial Accidents (DIA) for temporary total incapacity compensation through October 16, 2013, and partial incapacity compensation thereafter. Mr. McEachen appealed the determination that he was no longer totally incapacitated, which appeal was pending at the time of the hearing on his termination (and also as of the date of the motion hearing before the Commission). (*BHA Motion; Representations of Counsel*)

5. On December 11, 2013, following extensive efforts at rehabilitation through physical therapy, Dr. Laurence D. Higgins, M.D., Chief, Sports Medicine at the Brigham & Women's Hospital, after an Independent Medical Examination, concluded that "we do feel that the patient has failed conservative treatment to his right shoulder. He has persistent pain in that shoulder." Dr. Higgin's noted that Mr. McEachen had a history of rotator cuff repair to both his right and left shoulders in the past and that "he is a surgical candidate at this point. . . . Based on his exam,

as well as his subjective complaints, we do feel that he would benefit from this. We do not feel at this point that continued physical therapy would benefit the patient. We do think that to return the patient to maximum medical improvement that he would benefit from an operation." (*Appellant's Motion*)

6. The BHA was informed that Mr. McEachen was seeking to have shoulder surgery and understood that the insurer was ready and willing to approve it. The surgery was needed to improve Mr. McEachen's medical indication but there was no indication from any source that the surgery would guarantee Mr. McEachen's return to work. (*Appellant's Motion; BHA Motion*)

7. On February 25, 2014, Mr. McEachen elected to proceed with the surgery, pending workers' compensation approval. (*Appellant's Motion*)

8. By letter dated March 12, 2014, the Traveler's Indemnity Co., acting as the Utilization Review Agent under authority of DIA, approved Mr. McEachen for surgery. (*Appellant's Motion*)

9. By letter dated March 19, 2014, the BHA informed Mr. McEachern that it was contemplating the termination of his employment based on the understanding that he remained unable to perform his duties as a carpenter and "will be absent from work indefinitely." The BHA scheduled a hearing on the proposed termination for March 31, 2014. The letter also informed Mr. McEachen that, if his medical provider could suggest any reasonable accommodation(s) that would allow him to return to work and perform his essential job functions, to so advise the BHA's Director of Human Resources. A copy of Mr. McEachen's job description was attached. (*BHA Motion; Appellant's Motion*)

10. The job description for a BHA carpenter includes, in part "Under general supervision, performing such work as: repairing buildings, such as cutting an opening for a window or door"

and "Installing window frames and sash and fitting and hanging doors; repairing floors; installing floor tile; installing interior trimwork; repairing stairways and railings; removing and installing partitions; making, repairing and installing all hardware such as, but not limited to, locks, knobs, hinges and door checks", "to assist other craftsmen in general building maintenance" and "may be requested to perform tack welding and cutting". (*Appellant's Motion, supplemented by letter dated July 24, 2014*)

11. By letter dated March 26, 2014, Mr. McEachen's physician wrote to the BHA: "In anticipation of his surgery, he may return to work full-time with restrictions. He may participate in desk or administrative work. He should do no lifting, pushing, pulling or carrying with his right arm greater than 5 pounds." (*Appellant's Motion*)

12. On April 11, 2014, the BHA held an appointing authority hearing on the proposed termination before a hearing officer designated by BHA Administrator, William McGonagle. At the hearing, the BHA presented evidence that Mr. McEachen was prevented from "working with his hands above shoulder height" and that he continued to claim that he was "totally disabled" in his pending workers' compensation appeal. Mr. McEachen did not expressly dispute this evidence that he remained unable to perform the duties of his position of carpenter, but contended that he should be allowed to return to work in a modified duty capacity, namely as a "carpenter's boss", supervising others and performing administrative duties. (*BHA Motion*)

13. Although Mr. McEachen does have administrative duties as a union official, his job description as carpenter does not encompass supervisory responsibility. The BHA personnel who supervise him and other craftsmen hold the position of Maintenance Supervisors, who are members of a separate bargaining unit. (*BHA Motion*)

14. By letter dated April 23, 2014, BHA informed Mr. McEachen that his employment with BHA was terminated for the reasons set forth in the written decision of the Hearing Officer enclosed with the letter. The Hearing Officer's Decision concluded:

> "Following a review of the testimony presented in this case as well as the documents entered into evidence I make the following findings:
>
> 1. I find that McEachen is unable to return to work and cannot perform the essential functions of his job. McEachen's request for a reasonable accommodation to be given a completely different job that would allow him to continue working is not reasonable. I find that McEachen did not dispute that he could not perform the duties of a carpenter.
> 2. I concur with the Authority's position that it is unreasonable to expect that it indefinitely keep McEachen's position open particularly in light of the Authority's current financial condition.
> 3. I find the Authority's decision to terminate McEachen's employment entirely consistent with its previous practice to act on health related employee absences on a case by case basis."

(*BHA Motion*)

15. Mr. McEachen initiated this appeal on April 27, 2014. (*Claim of Appeal*)

16. Mr. McEachen had his surgery on April 28, 2014. (*Appellant's Motion*)

17. By letter dated June 26, 2014, Travelers Indemnity Co. issued an approval for additional physical therapy sessions three time a week for eight additional weeks. This approval noted that medical reports established that, among other things, Mr. McEachen had "pain rated 6/10, noted difficulty with ADL's (dressing/household tasks), decreased ROM . . . ." (*Appellant's Motion*)

Applicable Legal Standard

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7)(h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is "no reasonable expectation" that a party can prevail on at least one "essential element of the case". See, e.g., Milliken & Co., v.

Duro Textiles LLC, 451 Mass. 547, 550n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

Applicable Civil Service Law

In general, BHA employees are exempted from the provisions of civil service law and rules by virtue of G.L.c.121B, §12, ¶3, which states:

> "Except as provided in section twenty-nine of this chapter, the provisions of chapter thirty-one and the rules made thereunder shall not apply to any officer, agent or employee of [a housing authority] or to any person employed on or in connection with any project of [a housing authority]."[2]

Section 29 of G.L.c.121B, ¶9 provides, however:

> "No employee of any housing authority, except an . . . executive director, who has held his office or position. . .for a total period of five years of uninterrupted service, shall be involuntarily separated therefrom except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive of said chapter thirty-one to the same extent as if said office or position were classified under said chapter."

By virtue of these provisions, a housing authority employee can be involuntarily separated from employment only for "just cause", following a hearing and decision at the housing authority level, with right to appeal the termination decision for a "de novo" review by the Commission under the standards for such review established for review of the discharge of tenured civil service employees. That standard is set forth in G.L.c.31, §43, ¶2:

> "If the commission by a preponderance of the evidence determines that there was just cause for an action taken . . . 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; provided, however, if the employee, by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained and the person shall be returned to his position without loss of compensation or other rights. The commission may modify any penalty imposed by the appointing authority."

[2] Thus, housing authorities are not subject to the provisions of civil service law that govern layoff and bumping rights of tenured civil service employees. See Homan v. Marblehead Housing Authority, 27 MCSR 386 (2014); Courchesne v. Dennis Housing Authority, 11 MCSR 40 (1998).

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited.

"The commission's task . . . is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the appointing authority", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited. The issue for the Commission is "not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification. . . .in the circumstances found by the commission to have existed when the appointing authority made its decision." Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

Analysis

The Commission has consistently found that an appointing authority has just cause to terminate a tenured civil service employee who cannot perform the essential duties of his or her position. See, e.g., Valente v. City of Newton, 23 MCSR 660 (2010); Hilton v. Department of Employment & Training, 10 MCSR 247 (1997); Crowley v. Boston Parks & Recreation Dep't, 7 MCSR 48 (1994); Perry v. Town of Plymouth, 6 MCSR 84 (1993). See also Bistany v. City of

Lawrence, 26 MCSR 117 (2013), aff'd, 88 Mass.App.Ct. 1105 (2015) (Rule 1;28 opinion) (appointing authority entitled to medical proof of fitness). The BHA correctly points out that an employee is not deemed unfit to perform the duties of the "position involved" if the employee can perform those duties "with reasonable accommodation", this principle of reasonable accommodation does not require an employer to "fashion a new position" for the employee nor does it require that the employee be allowed to remain on medical leave indefinitely. See, e.g., Godfrey v. Globe Newspaper Co., Inc., 457 Mass. 113 (2010); Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443 (2002); Valente v. City of Newton, 23 MCSR 660 (2010)

Mr. McEachen argues that his termination was an unjustified peremptory strike to be rid of a cantankerous employee on the cusp of his long-awaited surgery that he claims would have restored him to full capacity and required his reinstatement to duty as a carpenter. The problem with his argument is his utter failure to come forward with any facts to support this contention. He does not deny that, at the time of his termination, he had been allowed extended FMLA leave (well beyond the statutory twelve weeks) and extended unpaid medical leave thereafter, aggregating over a year. He had not improved through physical therapy and, even after surgery, there was no assurance that he would ever be fit to return to duty. In fact, at the time of the hearing of this motion, Mr. McEachen still was in the process of completing his post-operative physical therapy regimen and medically cleared only for very light duty administrative work. Mr. McEachen argues, with some merit, that his workers' compensation appeal asserting a continued "total disability" was a "strategy" and not inconsistent with his current claim to be able to work light duty with reasonable accommodation. See Russell v. Cooley Dickinson Hospital, Inc., 437 Mass. 443 (2002). The point, however, remains that BHA had no such position as a "light duty" carpenter and was not required to create one for him or keep him on indefinite leave on an

unsupported hypothesis that he would reach a point of improvement that allowed him to return to full duty at some unspecified future date.

It is noteworthy that the timing of the BHA's decision to initiate termination proceedings came after a year of extended leave and just as Mr. McEachen had decided to undergo surgery. Save for the timing, however, there is nothing to infer that the BHA was acting other than in honest belief that there was no discernable reason presented to it, even with surgery, to believe that Mr. McEachen's condition would improve to the point of returning him to duty in the near future (which, as it turned out, appears to be true). Whether, and for how long an appointing authority must tolerate a job vacancy beyond the limit required by law (FMLA) is a matter of its sound discretion and it is not for the Commission to try to second guess that judgment.

The Appellant's other arguments can be addressed summarily. He argues that the BHA's decision cited its "financial condition" as a factor in the decision to terminate him, but gave no prior notice that "lack of funds" was a reason for its proposed action, as he alleges was necessary under the civil service law governing layoffs set forth in G.L.c.31, §39, and reemployment rights under G.L.c.31, §40. As noted earlier, those statutes simply are inapplicable to housing authority employees. Moreover, the BHA's reference to its financial condition cannot be viewed as if it was treating the termination as a "layoff" but merely that it was going to proceed to fill the position with an employee who could actually begin to perform the job. Finally, it bears notice that, when and if Mr. McEachen ever does reach a level of maximum medical improvement to a level that enables him to perform the duties of a carpenter, his rights to reinstatement and protection from discrimination are covered under workers' compensation and anti-discrimination law. See G.L.c. 152, §75A & §75B.

Mr. McEachen claims that there was a "past practice" within the BHA to leave an injured employee's position open indefinitely and the BHA violated that practice because of its animus against him due to his official position in the union. A tenured civil service employee cannot be terminated through actions that are unlawfully biased, arbitrary or capricious. Here, however, it was mere speculation and there were no facts provided to substantiate such a claim. Moreover, if such a violation existed, that could most effectively be addressed as a collective bargaining grievance or unfair labor practice.[3]

Conclusion

For the reasons stated herein, the BHA's "Motion for Summary Disposition" is hereby ***granted*** and the Appellant's "Motion for Summary Disposition" is hereby ***denied***. The appeal of the Appellant, Robert McEachen, is ***dismissed.***

Civil Service Commission

/s/ *Paul M. Stein*
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on February 18, 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 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. 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).

[3] At the motion hearing, counsel alluded to another ulterior motive allegedly related to an impairment of Mr. McEachen's pension rights. These allegations were not supported by any facts or documentation and are even more speculative than the claim of union bias.

Notice to:
F. Robert Houlihan, Esq. (for Appellant)
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