Term

NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

ATTLEBORO REDEVELOPMENT AUTHORITY *vs.* CIVIL SERVICE COMMISSION & others. [FN1]

12-P-1529

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Michael Milanoski and Meg Ross held the positions of executive director and chief financial officer, respectively, of the Attleboro Redevelopment Authority (ARA). [FN2] On November 13, 2009, the ARA abolished their positions. [FN3] The ARA cited purported financial shortfalls as the reason for the terminations. Milanoski and Ross appealed to the Civil Service Commission (commission) under G. L. c. 121B, § 52, and G. L. c. 31, § 43.

After a hearing, the commission ordered Milanoski and Ross reinstated with full back pay and applicable benefits. The ARA sought judicial review under G. L. c. 30A, § 14, and G. L. c. 31, § 44. [FN4] On cross motions for judgment on the pleadings, a Superior Court judge denied the ARA's motion, and affirmed the decision of the commission. The ARA appeals. [FN5] We affirm. 'The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion.' *Massachusetts Assn. of Minority Law Enforcement Officers v. Abban,* 434 Mass. 256, 259 (2001). Accordingly, 'just cause' must underlay employment actions such as termination. To that end, G. L. c. 121B, § 52, as amended by St. 1978, c. 393, § 37, provides as follows:

'No person permanently employed by a redevelopment authority, who is not classified under chapter thirty-one [governing civil service], shall, after having actually performed the duties of his office or position for a period of six months, be discharged, removed, suspended, laid off, transferred from the latest office or employment held by him without his consent, lowered in rank or compensation, *nor shall his office or position be abolished, except for just cause* and in the manner provided by sections forty-one to forty-five, inclusive, of chapter thirty-one' (emphasis added).

The key inquiry before the commission, then, was whether there was 'just cause' to abolish Milanoski's and Ross's positions. Lack of funding may constitute just cause for a layoff or abolition of a position. *Debnam v. Belmont,* 388 Mass. 632, 635-636 (1983). However, such financial issues will not justify termination of employment if the financial issues cited by the employer are pretextual. 'Lack of money is just cause for a layoff. The abolition of a position as part of an effort made in good faith to achieve economy and effectiveness does not run afoul of civil service protections. . . . *An economic reason may not justify an action, however, if it is a mere pretext for an improper motive for removing an employee*' (emphasis added).

Commissioner of Health & Hosps. of Boston v. Civil Serv. Commn ., 23 Mass. App. Ct. 410, 413 (1987) (citations omitted).

In this case, both the commission and the Superior Court, in affirming the findings of that agency, determined that the ARA's economic explanation was pretextual. [FN6] Specifically, the commission, after hearing evidence, rejected the ARA's contention that lack of funding was the actual basis of the termination. Rather than real economic shortfalls, the commission credited evidence that the mayor of Attleboro, for political reasons, orchestrated a longtime campaign to remove Milanoski and Ross from their positions, and that the ARA's board members acted in concert with the mayor to do so. On this aspect involving financial status, the Superior Court judge -- who engaged in appropriate judicial review of the record before, and decision by, the commission -- noted the following:

'The Authority's stated reason for abolishing its staff positions was lack of funding. However, the Commission was not required to accept that explanation in light of evidence to the contrary. The Commission found, based on conflicting evidence, that the Authority had funds available to pay salaries from three sources: (1) settlement of litigation with the Mantrose-Haeuser Co., Inc.; (2) a portion of a grant from the Massachusetts Opportunity Relocation and Expansion ('MORE') Jobs Program; and (3) urban renewal bonds.'

The Superior Court judge also rejected the ARA's contention that the commission impermissibly attributed the acts and motives of the mayor to the majority of the ARA's board, which voted to abolish the positions. The ARA emphasizes that the mayor and the city are legal entities distinct from the ARA. That is so. But the ARA characterization as 'attribution' is misplaced. Attribution is not what was done. Rather, the commission and the Superior Court judge properly considered the actions and the influence of the mayor, as well as the timing of the vote to abolish the positions, which vote came quickly on the heels of new members, who were allies of the mayor, being appointed to the ARA.

Concerning such influences and interconnections, the Superior Court judge, with careful scrutiny, distilled the following background from the commission record:

'Beginning in 2008, Mayor Kevin Dumas of Attleboro engaged in a public and private campaign to oust Milanoski from his position as Executive Director of the Authority. The campaign included lobbying Authority board members, making financial offers to Milanoski to induce him to resign and cutting off funding for the Authority until Milanoski resigned or was removed.

'Mayor Dumas' campaign was initially unsuccessful because Milanoski had the support of a majority of the Authority's board members. However, in 2009, the Mayor's appointees and allies gained a majority on the board. At the first meeting after gaining that majority, on October 13, 2009, a majority of the Authority's board of directors voted to terminate the employment of all four Authority staff members, effective November 13, 2009, ostensibly due to a lack of funds.'

The judge concluded that

'there was an abundance of evidence that the majority of the Authority's board members had an ulterior motive to abolish the positions. Mayor Dumas demonstrated his goal of terminating Milanoski through a persistent campaign to remove him. This included lobbying Authority board members, making financial offers to Milanoski to induce him to resign and cutting off funding for the Authority until Milanoski resigned or was removed. The board members who voted to abolish the staff positions were past or present appointees of the Mayor. They abolished the positions at the first meeting after they gained a majority on the board. They were assisted by the city's attorney, whose services were loaned to the Authority by the Mayor. From these facts, the Commission could reasonably draw the inference that they were acting in concert with him to achieve the goal of removing Milanoski, rather than from a sense of fiscal prudence.'

We find the judge's analysis of the commission's findings and decision under G. L. c. 30A, § 14, and G. L. c. 31, § 44, review to be persuasive, and we adopt the rationale of the judge, which, in pertinent part, is quoted above. [FN7]

Judgment affirmed.

By the Court (Berry, Green & Trainor, JJ.),

Entered: December 2, 2013.

FN1. Michael Milanoski and Meg Ross.

FN2. Milanoski was hired in 2002, and Ross was hired in 2005.

FN3. Two other employees were also terminated. This appeal does not involve the other two terminations.

FN4. General Laws c. 31, § 44, as amended through St. 1992, c. 133, § 351, provides as follows:

'Any party aggrieved by a final . . . decision of the commission . . . may institute proceedings for judicial review in the superior court . . . .'

Under § 44, judicial review tracks the standards of G. L. c. 30A, § 14. 'Review of conclusions of law is de novo, . . . [t]he commission's factual determinations must be supported by substantial evidence, . . . [and a] reviewing court . . . defer[s] . . . to the credibility determinations [of] the hearing officer.' *Andrews v. Civil Serv. Commn.,* 446 Mass. 611, 615-616 (2006).

FN5. We acknowledge the amicus brief filed by the Massachusetts City Solicitors and Town Counsel Association and the Massachusetts Municipal Association.

FN6. In considering whether the ARA's actions were pretextual, and whether the mayor exercised undue influence, issues of credibility and what the commission found as fact are implicated. 'Under the substantial evidence test, a reviewing court is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts found by the [agency].' *Pyramid Co. of Hadley v. Architectural Barriers Bd.,* 403 Mass. 126, 130 (1988).

FN7. Our decision in this case, which involves consideration of the mayor acting in concert with the ARA to fulfill what appears to have been a pre-ordained plan of action to fire these two employees, is not to be read as meaning that, in municipal law, there is not a separateness in the governance by a municipal leader and a municipal agency. Nor do we suggest that, as a general principle, the acts of one municipal entity may ordinarily be ascribed to another. However, the facts of this case clearly and convincingly show interweaving of acts by the mayor of Attleboro and the ARA. Simply put, the acts described herein take this case beyond the usual conduct of municipal business by separate governing entities and demonstrate a unified plan undertaken in tandem to abolish civil service positions without just cause.

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