

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PAUL MORIN,
Appellant

v.

D1-09-176

BOSTON SCHOOL COMMITTEE,
Respondent

Appellant's Attorney:

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Boston, MA 02109

Respondent's Attorney:

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26 Court Street
Boston, MA 02108

Commissioner:

Daniel H. Henderson

DECISION

The Appellant, Paul Morin (hereafter "Morin" or "Appellant"), appeals the decision pursuant to G.L. c. 31 § 43, of the Boston Public Schools Committee (hereafter "BPS" or "Appointing Authority") lacked just cause for its action on March 18, 2009, to "layoff" the Appellant, as of July 1, 2009 from his position as Provisional Senior Supervisor School Buildings Roofs, in the BPS Facility Mgmt/A&R. The BPS's stated reasons for the layoff were due to significant budget reductions, an overall reduction in work force and reorganization. The appeal was timely filed. The Civil Service Commission (hereinafter "Commission") held a full hearing on August 10, 2009. Since no written

notice was received from either party, the hearing was declared private. The hearing was digitally recorded. Both parties submitted post-hearing briefs in the form of Proposed Decisions.

FINDINGS OF FACT

Thirty-nine (39) exhibits and a Stipulation of Facts were entered into evidence.

Based on the exhibits submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Robert Roy, BPS Director of Facilities Management;
- Robert Harrington, BPS Assistant Director of Construction and Maintenance

For the Appellant:

- Paul Morin, Appellant
- Robert Ridlon, Senior Supervisor, Buildings, Union Steward

I make the following findings of fact:

1. The Appellant, Paul Morin (hereafter “Morin” or “Appellant”), appeals the decision pursuant to G.L. c. 31 § 43, of the Boston Public Schools Committee (hereafter “BPS” or “Appointing Authority”) lacked just cause for its action on March 18, 2009, to “layoff” the Appellant, as of July 1, 2009 from his position as Provisional Senior Supervisor School Buildings Roofs, in the BPS Facility Mgmt/A&R Department. The BPS’s stated reasons for the layoff were due to significant budget reductions, an overall reduction in work force and reorganization. (case file, administrative notice)
2. The Appellant did not claim any procedural defect in the BPS determination of just cause for his layoff, in his appeal to the Commission, pursuant to G.L. c. 31 § 41-42. (case file, administrative notice)

3. During the 2009-2010 school year there was a significant budget reduction in the BPS, which was addressed by reorganization and elimination of positions throughout the various divisions of the BPS including the Facilities Management/A&R Department. (Exhibits and testimony of Harrington)
4. On May 16, 2001, the Appellant applied for a position as a Supervisor-Roofing with the BPS. (Exhibit 37). The Appellant's resume shows extensive work experience in roofing and construction from 1979-2001. (Exhibit 38) The Appellant had several technical training certificates and a Diploma all achieved prior to 1995. (Exhibits 34-36)
5. In June, 2001, the Appointing Authority hired the Appellant as a Provisional Supervisor, School Building Roofs. (Stipulated Fact) (Exhibit 3). This position falls within the Roofing Division, under the Construction and Maintenance division of Facilities Management Department at Boston Public Schools. Robert Roy is the Director of the Facilities Management Department. Robert Harrington is the Assistant Director or the person in charge of the Construction and Maintenance division. The two other divisions under Facilities Management are: Planning, Design & Development division, also Building Services division. It is noted that Custodial Services falls within the Building Services division. (Exhibits 29 and 30, Testimony of Robert Harrington).
6. The Appellant filed Personnel annual Action Request ("PAR") forms with the BPS Human Resources office for salary step increases and reclassification or reassignment to new position. His promotion to Senior Supervisor School Buildings Alt. & Rep. is documented in Exhibit 6. He filed these annual forms from the date of his initial hire

on June 4, 2001 up at least until June 4, 2006. These PAR requests were signed as authorized by Facilities Management Director Robert Roy. (Exhibits 3-10)

7. Effective September 1, 2003, the Boston School Committee and Local 888 and the Service Employees International Union, (“Union”) executed an agreement (“CBA”). That union was the exclusive bargaining agent representing the Appellant and all the other “professional employees” of the BPS’s “department of Planning and Engineering”¹. (Exhibit 1)
8. All of the trades: electrical, mechanical, plumbing and other specialties have been included in the CBA- collective bargaining negotiations since 1989. Harrington as Assistant Director oversees and evaluates personnel within each specialty unit of his division, The Construction & Maintenance division, of the Facilities Management Department for Director Robert Roy. (Exhibits 1, 29, 30, 31, Testimony of Robert Harrington)
9. The various positions within his Construction & Maintenance division are highly specialized in duties and qualifications. Many of the positions have specific City, State and Federal government certification, inspection and performance compliance requirements. This is especially true regarding the reduction of energy costs. (Exhibits 1, 29, 30, Testimony of Robert Harrington)
10. The CBA in a pertinent section of the agreement, Article 1, lists the descriptive title and salary grade, by letter (D-F) of the various positions. The title of Senior Supervisor, SB, Roofs is a salary grade F. (Exhibit 1)

¹ The term “department of Planning and Engineering” is used in the CBA yet, not consistently elsewhere. It is employed in only some of the older documents or exhibits admitted into evidence.

11. The CBA in a pertinent section of the agreement, Article 8 – Grievance Procedure “It is the declared objective of the parties to encourage prompt resolution of grievances. The parties recognize the importance of prompt and equitable disposition of any complaint at the lowest organizational level possible.” And further states that “Any person(s) or the Union shall have the right to present a grievance and have it promptly considered on its merit.” And also states under A. Definition “A ‘grievance’ shall mean a complaint, (1.) that there has been as to any employee, a violation, misinterpretation or inequitable application of any of the provisions of the Agreement, or (2) that an employee has been treated unfairly or inequitably by reason an act or condition which is contrary to established policy governing or affecting employees,” and further states B. Adjustment of Grievance 1. General Procedures – Step 1. “An employee and/or his Union Representative shall present a grievance, in writing, to the Senior Structural Engineer or his designated representative within seven (7) days after the act or condition which is the basis of his complaint occurred. (Exhibit 1)
12. The CBA, also in a pertinent section of the agreement, Article 18 – Vacancies and Promotions, states the following: Section 1. When a **vacancy** occurs in any **Civil Service Title** in the **bargaining unit**, the vacancy shall be first posted and then filled in accordance with current Civil Service Laws. If no Civil Service list exists, the employer will fill positions by Section 3. Section 3. When a **vacancy** occurs in a **non- Civil Service Title** in the **bargaining unit**, the vacancy shall be posted within the bargaining unit and applications/resumes will be evaluated and interviews conducted of the top three (3) qualified applicants. Rating shall be based on seniority, education, and experience . . .” (Exhibit 1)

Additionally, Article 24, Section 1 of the current collective bargaining agreement, CBA also addresses seniority. It states: Seniority shall be defined as time spent in the employment within the department of Planning and Engineering and positions will be bid on a seniority basis whenever a vacancy occurs. . . . Permanent Planning and Engineering personnel shall bid for their zone assignment on a seniority basis. Seniority shall be defined as in current Civil Service Law.” (Exhibit 1)

13. The CBA, in a pertinent section of the agreement, Article 22 – Handling Of New Issues, states that the parties to the CBA may also handle matters of collective bargaining import not covered by the CBA. (Exhibit 1)
14. The CBA, in a pertinent section of the agreement, Article 24 – Seniority Section 1. “Seniority shall be defined as time spent in the employment within the department of Planning and Engineering and positions will be bid on a seniority basis whenever a vacancy occurs.” And further states that:
“Permanent Planning and Engineering personnel shall bid for their zone assignment on a seniority basis. Seniority shall be defined as in current Civil Service Law. And states Section 3. Zone is defined as a group of school buildings put together for administrative purposes.” (Exhibit 1)
15. The CBA, in a pertinent section of the agreement, Article 26 – Resolution of Differences By Peaceful Means The parties agree that differences between the parties shall be settled by peaceful means as provided within this Agreement, in consideration of the terms and conditions of the Agreement by its legislative purpose. (Exhibit 1)

16. The CBA, in a pertinent section of the agreement Article 31 –

Labor/Management Relations Committee Section B, states that the Committee shall meet upon request of either party and at least monthly to discuss labor/management issues. (Exhibit 1)

17. The CBA also contains at the end (pages 30-31) a “Side Letter of Agreement on Upgrades” which specifically addressed individual step and title upgrades, position duties, proficiency standards and location assignment, with reference to being “based upon current seniority”. In the implementation of these matters the standard is clearly stated: “The decision of the Director of Facilities Management shall be final but shall not be arbitrary or capricious.” A separate “Side Letter of Agreement (pages 32-33) states specific title upgrades so long as specific license/certification is met and numbered years of experience in the Department of Planning & Engineering is also met. A reference to Certificate of Professional Achievement - “Five (5) years of verifiable experience in an employee’s professional field may be submitted to the Director for his approval to be considered equivalent to “Certificate of Professional achievement.” Section 5. Reorganization of the Electrical Fire Alarm Division memorializes the bargained for resolution of this issue, its impact on the unit members of the Division and specifically names the new titles either “converted or created” in addition to the establishment of “new responsibilities” for the night shift team in the Electrical I&M Division. (all to occur by March 1, 1995) (Exhibit 1)

18. The Appellant passed the Civil Service exam before July 1, 2004, and thus earned the title of Permanent Junior Custodian on July 1, 2004. However, He served in this position for only one (1) day. The appellant failed to complete the statutorily required six month probationary period of full time employment in that position. (Exhibits 2 and 6).

19. Under G.L. c. 31 § 1- Definitions: "Tenured employee", a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2), a promotional appointment on a permanent basis." And Defines "Permanent employee", a person who is employed in a civil service position (1) following an original appointment, subject to the serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment; or (2) following a promotional appointment, without restriction as to the duration of his employment.

20. Under G.L. c. 31 § 39, permanent employees who have the same title in a departmental unit are separated from their 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." (Administrative notice)

21. G.L. c. 31 § 39 further states: "Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with

the provisions of section forty-one. 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.” (Administrative notice)

22. On July 2, 2004, after serving only one day as a permanent Junior Custodian the Appellant returned to his position as provisional Senior Supervisor of School Buildings. (Exhibit 6, Testimony of Harrington).
23. G.L. c. 31 §33 states in pertinent part: “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, *including the required probationary period*, in the departmental unit, regardless of title, unless such service has been interrupted by an absence from the payroll of more than six months, ...” (Emphasis added) (administrative notice)
24. G.L. c. 31 §34 states in pertinent part: “Following his original appointment to a civil service position as a permanent full-time employee, a person shall

actually perform the duties of such position on a full-time basis for a probationary period of six months before he shall be considered a full-time tenured employee, except as otherwise provided by sections sixty-one and sixty-five, by other law, or by civil service rule.”

25. The Appellant is **neither** a civil service “tenured employee” nor is he a civil service “permanent employee” in any position including the position Junior Custodian, an official service position, in which he served only one (1) day. He failed to be employed full time in that position for the statutorily required six month probationary period. (Exhibits and testimony, administrative notice)
26. On August 9, 2004, the Appointing Authority placed the Appellant as a Provisional Senior Supervisor, School Buildings, in the Alterations and Repairs division on a temporary basis to replace someone on a military leave of absence. (Stipulated Fact, Exhibit 7A, Testimony of Harrington and Appellant).
27. On April 11, 2005, the BPS reclassified the Appellant’s position to Provisional Senior Supervisor, Roofing Division. (Stipulated Fact).
28. On March 18, 2009, the Appointing Authority notified the Appellant he would be laid off effective July 1, 2009 because of an overall reduction in force due to significant budget reductions for the 2009-2010 school year. (Exhibit 19).
29. The BPS did produce sufficient evidence to show that it had suffered budgetary restrictions which forced it reorganize various departments, eliminate positions and lay off employees to meet budget reductions. (Exhibits and testimony)

30. On July 1, 2009, the Appointing Authority laid off the Appellant from his position of provisional Senior Supervisor School Buildings Roofs. (Stipulated Fact).
31. The position then held by the Appellant, of Senior Supervisor School Buildings Roofs has been eliminated. There is no such position now in the BPS Facilities Management Department. (Testimony of Harrington).
32. At this time, many of the school roofs had recently been repaired and the Appointing Authority had entered into a contract with a repairing company for maintenance. (Testimony of Harrington)
33. After notifying the Appellant of his termination, the Appointing Authority offered the Appellant a job as a permanent Junior Custodian. (Testimony of Appellant and Harrington). All of the other employees who suffered layoff or position elimination were offered Junior Custodian positions and some of them accepted. (Testimony of Harrington) The Appellant refused to take the position. (Testimony of Appellant and Harrington). The Appellant was also offered the permanent position of Junior Custodian at several junctures during the Commission hearing and also several times after the conclusion of this full hearing, at status conferences, yet the Appellant refused each time. (administrative notice)
34. Robert Harrington testified that The Appellant had qualified for the title as a provisional Senior Supervisor-School Buildings-Roofs by meeting the qualification requirements outlined in the CBA, of working for five (5) years as a Supervisor in that specific specialty-Roofs, according to his Form 30. (Exhibit 12). He could also have qualified by means of specialized education and certification and outside Department- roof experience. (Testimony of Harrington)

35. The Appellant filed a Motion to Amend his Appeal on July 23, 2009. The Amendment to the appeal sought was to insert a claim that the BPS failed to comply with the procedural requirements of holding a timely hearing on the layoff and failed to provide the Appellant with a copy of §§ 41-45 of G.L. c. 31 in violation of G. L. c. 31§ 41-42. On July 24, 2009, the Commission notified the parties that oral argument on the Motion would be heard on the date of the full Hearing. The parties were directed to incorporate written argument in their post hearing proposed decisions or file separately. The Appointing Authority filed an Opposition thereto on August 14, 2009. The Appellant's Motion to Amend is denied as the Commission lacks jurisdiction to hear the Appellant's appeal.(administrative notice)
36. The Appellant presented no evidence that he had ever notified either the Union or the BPS regarding his claim of an issue or a difference in the application of the CBA to his layoff, other than filing his appeal at the Civil Service Commission.(Exhibits and testimony)
37. The various positions only become available for posting and bidding on a well practiced CBA seniority basis, when the position becomes **vacant**. The BPS and the Union or individual Union members jointly monitor and/or post these vacant positions along with a roster of qualified employees. The process of application, qualification and evaluation of employees for these vacant positions is clearly stated in the CBA. See the CBA pertinent section of the agreement, Article 18 – Vacancies and Promotions. The CBA also provides a timely process for the resolution of any differences or new issues that may arise, such as interpretation or application of the CBA to particular circumstances, such as layoffs. See the CBA Article 8 – Grievance

Procedure, Article 9 – Arbitration, Article 22 – Handling of New Issues, Article 24 – Seniority, Article 26 – Resolution Of Differences By Peaceful Means, and Article 31 – Labor/Management Relations Committee (Exhibit 1, Exhibits, testimony, testimony of Harrington)

38. The Appellant is not seeking a return to his previous and claimed civil service position of Junior Custodian. He was repeatedly offered this permanent position by the BPS but repeatedly refused this position. The Appellant is seeking some other position, dissimilar from the positions of both Junior Custodian and his previous provisional position of Senior Supervisor-Roofing. He is seeking some other highly specialized and qualified position, whether that of a permanent or provisional status. However, the Appellant is not qualified by the BPS criteria, as referenced in the CBA and monitored by the Union, for any of those specialized positions which he identified and previously referenced here. None of the positions he sought were vacant. He appears to have less appropriate, relevant seniority than any of the persons holding those various, identified, dissimilar and specialized positions. (Exhibits and testimony of Harrington, reasonable inferences)

CONCLUSION

Pursuant to G.L. c. 31, § 41, an employer may not impose certain types of discipline, including discharge, upon a “tenured employee” without “just cause”. In addition, the employer may not take such action without providing the employee with written notice and an opportunity for a hearing. After such hearing, if the Appointing Authority determines that there is just cause to impose the discipline, the employee is entitled to appeal such decision to the Commission pursuant to G.L. c. 31, § 43. These

provisions provide tenured civil service employees with greater due process protections than they would otherwise have.

By the terms of the civil service statute, a “tenured employee” is defined as one “who is employed following ... an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law.” G.L. c. 31, § 1.

Pursuant to G.L. c. 31, § 34, “a person shall actually perform the duties of such position on a full-time basis for a probationary period of six months before he shall be considered a full-time tenured employee.”

In the present case, the Appellant was not employed for the six month probationary period following an original appointment to a position on a permanent basis. Rather, he held only a one (1) day appointment in that permanent position and then returned to a provisional appointment. Even if the Appellant had been appointed from a certification to a permanent position, he had not served in his position for six months at the time of his termination. As such, he was neither a “tenured employee” nor a “permanent employee” for purposes of G.L. c. 31, § 41 and BPS was not obligated to follow the procedures of that section in carrying out its decision to terminate him. For the same reason, the Appellant has no standing to appeal BPS’s decision to the Civil Service Commission. See Bayyat v Department of Correction, D1-09-234, Dismissed July 10, 2009, 22MCSR 394. See also Sullivan v Town of Sandwich 21 MCSR 150 (2006); Fitzpatrick v Department of Correction, 20 MCSR 618, 2007, and Ware v City of Holyoke, 20 MCSR 272 (2007)

I briefly address the issue raised in the Appellant’s Motion to Amend the Appeal. .
As discussed above, the requirements of G.L. c. 31 § 42 do not apply to the Appellant in

his provisional position as Senior Supervisor, Roofing Division. Because the Appellant was terminated as a provisional (non-civil service) employee, the Appointing Authority's actions are not subject to the statutory requirements of G.L. c. 31 § 42. As a provisional employee (provisional position), he is not entitled to the statutory protections in the form of a hearing or being provided with copies of G.L. Chapter 31 §§ 41-45.

The discourse in this decision on the Appellant's CBA rights is meant solely to show that he had a remedy available to him other than a Commission appeal. The Appellant, a Union member had the opportunity to raise any matter of concern covered under the Union's comprehensive CBA with the Union and or directly with the appointing authority. He failed to do so. The Commission believes that, whenever possible, redress for an alleged violation by an appointing authority ought to first be brought to the attention of his Union and/or the appointing authority, so that they may have the opportunity to inquire and, if possible, resolve the CBA matter at the administrative level.

The Commission believes that this case is an example for the application of that principle. In this case, the Appellant knew on March 18, 2009, that he would be layed off from his provisional position effective July 1, 2009 for budgetary reasons. This three and one-half month period before the layoffs, was the critical one for addressing and attempting to resolve any of the Appellant's differences. He reasonably knew that other Union members would also be layed off from similar positions. Yet he failed to make any effort to raise an issue or claim relative to his status, pursuant to the CBA, with either the Union or the BPS. Time was of the essence then regarding his comparative status, seniority or bumping rights; since other employees or Union members and the BPS would also be affected by any mistake made in the interpretation or application of the

CBA to the layoffs. The Appellant ignored any administrative or CBA process for resolution and instead filed an appeal directly with the Commission.

The BPS would be prejudiced if it now were forced to retrospectively review and its budgetary layoff and reorganization decisions. The extra administrative time, expense and effort involved in addition to the consequential effect or displacement on other employees would be disruptive and disorderly for all parties. That extra burden on the BPS would tend to negate the cost saving purpose of the original lay-offs. Both the BPS and the Union acted as if the CBA had been appropriately applied to all of the layoffs, including the Appellant's. The Appellant clearly failed to properly raise his concerns in a timely fashion.

Employment per se was not the Appellant's motivation since he has repeatedly refused the BPS's offer of a permanent Junior Custodian's position.

The Appellant was not a "tenured employee" for purposes of G.L. c. 31, § 41 and BPS was not obligated to follow the procedures of that section in carrying out its decision to terminate him.

For all the above stated reasons, the Commission determines that the Appellant is not a "tenured" civil service employee. Therefore, the Commission lacks jurisdiction to hear the Appellant's appeal.

For all of the above reasons the Appellant's Motion to Amend his Appeal is *denied* and the Appellant's appeal under Docket No. D1-09-176 is hereby *dismissed*.

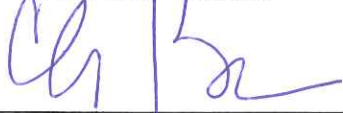
Civil Service Commission,



Daniel M. Henderson
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman,; Henderson, Marquis, and Stein, Commissioners) [McDowell absent] on December 16, 2010.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:

Paul Kelley, Atty.

Virginia Casey Gosciniak, Atty.