

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503

Boston, MA 02108

(617) 727-2293

MICHAEL OWENS,
Appellant

v.

D1-15-168

NORTHAMPTON HOUSING
AUTHORITY,
Respondent

Appearance for Appellant:

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Egan, Flanagan and Cohen, PC
67 Market Street – P.O. Box 9035
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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43 and G.L. c. 121B, § 29, the Appellant, Michael Owens (Mr. Owens), is appealing the September 24, 2015 decision of the Northampton Housing Authority (NHA) to terminate his employment. Mr. Owens filed a timely appeal with the Civil Service Commission (Commission)¹. A pre-hearing conference was held on September 23, 2015 at the Springfield State Building and a full

¹ The Appellant prematurely filed a civil service appeal on August 25, 2015, while he was on paid administrative leave. Following the pre-hearing conference before the Commission on September 23, 2015, the Appellant was allowed to amend his appeal following his termination on September 24, 2015.. The amended appeal was timely filed on September 30, 2015.

hearing was held at the same location on December 9, 2015.² By agreement of the parties, and for purposes of judicial economy, this hearing was held concurrently with the appeal of David Adamson, the former Maintenance Director who was terminated at the same time. (See CSC Case No. D1-15-167) For reasons unique to the Adamson appeal, I determined, after the submission of post-hearing briefs, that an additional day of hearing was needed to hear additional testimony. To ensure that this delay does not prejudice Mr. Owens, this decision is being issued separately. CDs were made of the digitally-recording hearing. A copy was retained by the Commission and both parties were provided with copies as well.³ Both parties submitted post-hearing briefs to the Commission on January 22, 2016.

FINDINGS OF FACT:

Fifty-two (52) exhibits (A – PP) were entered into evidence.⁴ Based upon these exhibits and the testimony of the following witnesses:

For the NHA:

- Cara Clifford, Executive Director;

For Mr. Owens:

- David Adamson, former Maintenance Director⁵;
- Michael Owens, Appellant;

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

⁴ Some of these exhibits pertain only to the Adamson appeal.

⁵ While most of Mr. Adamson's testimony related to his own appeal, he remains listed here as a witness to the limited extent that any of his testimony might be relevant to the Owens appeal.

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

The Northampton Housing Authority

1. The NHA is a quasi-public agency that provides affordable housing to residents of the City of Northampton (City). (Testimony of Ms. Clifford and Exhibit CC)
2. The NHA manages approximately six hundred eighteen (618) subsidized apartments for low-income residents and oversees the Housing Choice Voucher (Section 8) program for over twelve hundred (1200) individuals living in privately-owned properties in Northampton and surrounding communities. The NHA is also responsible for distributing housing vouchers to homeless veterans. (Testimony of Ms. Clifford and Exhibit CC)
3. As of the date of the hearing before the Commission, the NHA had twenty-three (23) employees. Ten (10) of these employees belong to a union and thirteen (13) do not. (Testimony of Ms. Clifford)
4. As of Fiscal Year 2014, the NHA had total expenses of approximately \$9.5M, although approximately half of that represents pass-through payments for housing vouchers. Approximately \$1.4M is available for the “administration” of the NHA on an annual basis. (Exhibit NN)
5. In accordance with G.L. c. 121B, § 5, every housing authority in Massachusetts is “managed, controlled and governed” by five (5) members. “Every member of a housing ... authority shall be a fiduciary of the housing ... authority.” (G.L. c. 121B, § 5)

6. Four (4) members of the NHA are appointed by the City's Mayor and one (1) member is appointed by the state's Department of Housing and Community Development (DHCD). One (1) of the Mayor's appointees must be a bona fide representative of labor; and one (1) must be a tenant of a unit owned or operated by the NHA. (G.L. c. 121B, § 5)
7. The five (5) current members of the NHA are: Jeffrey Jones (Chair); Toni Hochstadt (Vice Chair / DHCD appointee); Joseph DeFazio (Labor representative); Lynn Wallace and Ronald Hebert (tenant representative). (Exhibit CC and Testimony of Ms. Clifford)
8. A housing authority may "employ counsel, an executive director who shall be ex officio secretary of the authority, a treasurer who may be a member of the authority and such other officers, agents and employees as it deems necessary or proper, and shall determine their qualifications, duties and compensation, and may delegate to one or more of its members, agents or employees such powers and duties as it deems necessary or proper for the carrying out of any action determined upon by it." (G.L. c. 121B, § 7)
9. The NHA board has delegated responsibility for the day-to-day operation of the housing authority to the Executive Director. (Testimony of Ms. Clifford)
10. Until his retirement in July 2015, Jonathan Hite served as the Executive Director of the NHA for twenty-five (25) years. (Testimony of Ms. Clifford)

Appellant Michael Owens

11. Mr. Owens is fifty-one (51) years old. He received a bachelor's degree in urban studies from Worcester State College in 1988. He is certified as a public housing manager and public purchasing official. (Testimony of Mr. Owens and Exhibit LL)
12. Mr. Owens worked for the City of Chicopee in various capacities from 1988 to 1995 including: Program Director, Contract Compliance Officer, Environmental Clearance Officer and Project Manager. (Testimony of Mr. Owens and Exhibit LL)
13. Mr. Owens served as the Assistant Executive Director of the Chicopee Housing Authority from 1995 to 1997. (Testimony of Mr. Owens and Exhibit LL)
14. In 1997, Mr. Owens began working for the City of Northampton as the Community Development Block Grant (CDBG) Administrator. (Testimony of Mr. Owens and Exhibit LL)
15. In 2008, Mr. Owens was recruited by former NHA Executive Director Jonathan Hite to work for the NHA. (Testimony of Mr. Owens) Effective September 15, 2008, Mr. Owens began serving as the NHA's Director of Administration and Finance.⁶ (Exhibit AA)
16. As Director of Administration and Finance, Mr. Owens: was the primary person for all online banking functions; supervised the three (3)-person finance office; was responsible for "drawing down" federal and state funds on a monthly basis; served as assistant contract officer; was the primary contact person with auditors; provided

⁶ There was a dispute regarding Mr. Owens's title. He believes it was Assistant Director / Director of Administration and Finance. The new Executive Director believes it was Director of Administration and Finance. The documents entered into evidence cite both titles, but, based on the "new hire report" from 2008 and Mr. Owens's own description of his duties, I have concluded that he was appointed as the Director of Administration and Finance in 2008. This is consistent with the notes of the former Executive Director, referenced later, encouraging the new Executive Director to hire an Assistant Executive Director, leading me to infer that there was no Assistant Executive Director at the time.

information to the outside fee accountant to assist with budget preparation; provided information regarding the impact of collectively-bargained pay raises; was responsible for collecting all coins from laundry machines (with one other person per the recommendation of a prior audit); and assisted with the preparation of year-end financials. His annual salary was \$71,000. (Testimony of Mr. Owens)

17. Mr. Owens was an unsuccessful candidate to replace the former Executive Director (Testimony of Mr. Owens)

18. Mr. Owens supervised two (2) people: Finance Director [Sharon] and Accounts Payable Clerk [Arlene].⁷ (Testimony of Mr. Owens) Sharon was also an unsuccessful candidate to replace the former Executive Director. (Testimony of Ms. Clifford)

19. Sharon began working for the NHA in 2012 after an interview with former Executive Director Hite and Mr. Owens. She has a bachelor's degree in business administration with a major in accounting and, at the time of hire, had "nine years experience with extensive accounting with four of it being in non-profit." (Exhibit JJ)

20. Prior to Mr. Owen's termination, Sharon was primarily responsible for accounts payable, inputting data into the computer system and cutting checks. She also performed human-resource-related functions for the NHA, with responsibility for such things as employee health insurance, life insurance, etc. She also "traded off" doing the payroll with Arlene. (Testimony of Mr. Owens)

21. Sharon was not authorized to draw down federal funds and only performed cash management functions in Mr. Owens's absence and with his permission. (Testimony of Mr. Owens)

⁷ I have included only the first names of the two (2) finance department employees.

New Executive Director Cara Clifford

22. On February 4, 2015, Ms. Clifford applied for the NHA Executive Director position to replace Jonathan Hite, who had announced his intention to retire. (Exhibit BB)
23. At the time, Ms. Clifford had been employed by a private property management company for nineteen (19) years. She “worked her way up” from leasing consultant to property manager to senior property manager to regional manager. (Testimony of Clifford and Exhibit BB)
24. As a senior property manager, Ms. Clifford helped turn around a “drug-infested” property by working with the State Police over a five-year period. She received a national award for her accomplishment. (Testimony of Ms. Clifford)
25. As the regional manager, Ms. Clifford oversaw the take-over of various properties and helped them run more smoothly. She has various licenses and certificates related to real estate and property management. (Testimony of Ms. Clifford)
26. Ms. Clifford describes herself as someone who is a “micro-manager” coming from the private sector “where you work for your money.” (Testimony of Ms. Clifford)
27. In June 2015, the NHA Board of Directors appointed Ms. Clifford as Executive Director after a lengthy vetting process that included an interview by a large interview panel which included Mr. Adamson. As part of this review process, Ms. Clifford toured the NHA facilities. (Testimony of Ms. Clifford)
28. Prior to assuming her role as Executive Director, Ms. Clifford met with NHA Board Chairman Jeff Jones to negotiate her contract. During these negotiations, Ms. Clifford told Mr. Jones that she thought the common areas of the various housing complexes were in poor condition and that the administrative offices were disorganized, looking

as if they had been “paper bomb”[ed]. Ms. Clifford did not, however, tell Mr. Jones or any member of the NHA Board of Directors that she planned on proposing a re-organization prior to assuming her role as Executive Director. (Testimony of Ms. Clifford)

29. With her contract negotiations concluded, Ms. Clifford began serving as the NHA Executive Director on July 7, 2015 at an annual salary of \$105,000. (Testimony of Ms. Clifford)

30. Ms. Clifford met with Mr. Hite for a few hours on July 7th and 8th, 2015 to discuss the responsibilities of the Executive Director position and existing operational issues and concerns. (Testimony of Ms. Clifford)

31. At this time, Ms. Clifford was given the “Personnel Policy of the Northampton Housing Authority.” That policy states, in part:

“STATUS AND CHANGES IN STATUS OF EMPLOYMENT

No employee of the Authority, except the Executive Director, who has been employed for five years of uninterrupted service, shall be involuntarily separated from their position, or from the Authority, without the protection of a hearing, as afforded by Chapter 31, Sections 41 to 45 inclusive, of the Massachusetts General Laws.” (Exhibit M, Page 4, numbered paragraph 8)

32. Notwithstanding this provision in the Personnel Policy, Ms. Clifford erroneously believed, at the time, that all non-union personnel, including Mr. Owens, were at-will employees. (Testimony of Ms. Clifford)

33. During their discussions, Mr. Hite told Ms. Clifford that he had a “good staff”. He also told Ms. Clifford that the budget was “in good shape”, including the “federal reserves.” (Testimony of Ms. Clifford)

34. Mr. Hite provided Ms. Clifford with a written list of outstanding issues to be addressed at the NHA. Included on that list were his following recommendations regarding personnel:

“C. Staff

1. Need to reorganize so you aren’t trapped in the weeds:
 - a. You might think about (and there is money available) getting:
 - (1) A Deputy Director or top flight Secretary
 - (2) A Modernization Coordinator
 - (3) Create Divisional Unit with Michelle [], John [], and Tom[] (in part), and Eliz. [], all reporting to Sharon⁸ with distinct and measurable goals.
 - (4) Blow up the Organizational Chart and start again.”

(Testimony of Ms. Clifford and Exhibit V)

35. Mr. Hite also told Ms. Clifford that “Ann” [last name omitted here], whom Mr. Owens replaced, had retired, but recently returned on a part-time basis. (Testimony of Ms. Clifford)

Ms. Clifford’s Initial Observations of NHA Operations

36. During her first thirty (30) days, Ms. Clifford met with various employees and residents and made observations. (Testimony of Ms. Clifford)

37. Ms. Clifford observed that the morale of employees was “in the dirt”; that employees had “no energy” and were “lethargic”; that the attitude of employees was “I, I, I” and that one could “cut the tension with a knife.” Overall, Ms. Clifford concluded that customer service was lacking, responsiveness to tenant needs was slow and that there was a general lack of communication among employees. (Testimony of Ms. Clifford)

⁸ There is no last name for “Sharon” listed on the original document (Mr. Hite’s notes), but it appears clear that the “Sharon” referenced here is not the Sharon who was working for Mr. Owens in the finance department.

Ms. Clifford's first interactions with Mr. Owens and the Finance Department

38. During her first meeting with Mr. Owens, Ms. Clifford told Mr. Owens that she wanted to hire a Deputy Director; that she already had a person in mind; and that she needed to move quickly because that person was also seeking other employment.

(Testimony of Mr. Owens)

39. Mr. Owens told Ms. Clifford that, prior to hiring a Deputy Director, she would need approval from the NHA Board of Directors and would need to contact DHCD.

(Testimony of Mr. Owens)

40. An Assistant Executive Director position was subsequently posted on July 20th and filled on August 15th by a person that previously worked for several years for the same employer as Ms. Clifford. Her salary is roughly equivalent to what Mr. Owens was receiving prior to his termination. (Testimony of Ms. Clifford and Exhibit U)

41. At the time Mr. Owens first met with Ms. Clifford, he was gathering information for the year-end financials to give to the fee accountant. (Testimony of Mr. Owens)

42. During their initial discussions, Ms. Clifford directed Mr. Owens to compile a list of all NHA contracts. She subsequently asked for the list to be put in a different format and then asked for a copy of the actual contracts. (Testimony of Mr. Owens)

43. Also during these initial discussions, Mr. Owens was told by Ms. Clifford to transfer his duties to other staff in the financial office and to only perform tasks assigned by Ms. Clifford. (Testimony of Mr. Owens)

44. Ms. Clifford told Mr. Owens that he was no longer authorized to collect quarters from the laundry vending machines and that he was prohibited from leaving the building without her permission. (Testimony of Mr. Owens)

45. Ms. Clifford also told Mr. Owens that it was no longer necessary for him to attend NHA Board meetings and that he should no longer serve as the alternate contact person on contracts. (Testimony of Mr. Owens)

August 10, 2015 NHA Executive Session

46. On August 10, 2015, the NHA Board of Directors, after meeting in public session, voted to go in to Executive Session. The posted agenda [of the public session] failed to include a statement that the board would be asked to go into Executive Session regarding the Board's interest in reorganizing the current organizational chart. (Administrative Notice: Mass. Attorney General; Complaint Against NHA; ML 2015-198 (December 28, 2015, re: G.L. c. 30A, §§ 18-25 and related regulations (AG Letter)))⁹

47. At the August 10th executive session, thirty-four (34) days after her appointment, Ms. Clifford presented an eleven (11)-page document titled "Proposed Reorganization of the Northampton Housing Authority." Ms. Clifford had only one paper copy of the presentation which she passed among board members. (Testimony of Ms. Clifford and Exhibit N) Later, at an August 31st open session, two (2) NHA Board members stated that they had not seen the presentation before. (Testimony of Mr. Adamson and Mr. Owens)

48. The Board minutes of the August 10th executive session provide as follows:

"In support of the Board's directive to seek further cost savings, Executive Director Cara Clifford presented to the Board her proposed restructuring of the Organizational Chart following her initial review of the configuration of the Authority.

⁹ Subsequent to the hearing, but prior to the issuance of this decision, I notified counsel for both parties that I would be taking administrative notice of the AG's letter.

Discussion during Executive Session in support of the restructuring discussions centered around:

1. Budgetary concerns & cost savings;
2. Reevaluations of positions & new job descriptions;
3. Cross training with the purpose of functioning as a team with fewer staff;
4. Job descriptions reviewed need to be updated. There appears to be duplications of duties upon review of some of the positions; AND
5. This restructuring will result in the elimination of some of the positions currently held by staff. At this time, the discussion then turned to specifically who could be potentially impacted by the elimination of some of the positions currently held by staff.
6. Any newly created positions would be first offered to the above and would be so for the coming 12 months.” (Exhibit C)

49. The August 10th NHA Board meeting included a discussion regarding which individuals would lose their jobs as a result of Ms. Clifford’s proposed reorganization. (Testimony of Ms. Clifford)

50. Although the NHA Board of Directors discussed this re-organization proposal that would result in the elimination of positions and the termination of employees, they failed to provide the effected employees (including Mr. Owens) with the notice and procedural rights guaranteed by the state’s Open Meeting Law. (Administrative Notice: AG Letter)

51. The “Proposed Organizational Chart” included the following changes which are relevant to this appeal:

- a. A new Assistant Executive Director job title;
 - b. A new Chief Accounting Officer job title. No Director of Administration and Finance (previously occupied by Mr. Owens) and Finance Director (previously occupied by Sharon) job titles;
 - c. A new “Controller” job title;
 - d. No Maintenance Director (previously occupied by Mr. Adamson) job title. Maintenance employees (with new job titles) reporting directly to the Executive Director (Ms. Clifford)
- (Exhibit N)
52. The newly-created job titles were not posted. (Testimony of Ms. Clifford)
53. Subsequent to the August 10th Board meeting, Ms. Clifford told Sharon (then-Finance Director) that she would receive a new job title of Chief Accounting Officer and an increase in salary from “60 (thousand) something” to \$71,000, approximately the same salary of Mr. Owens. (Testimony of Ms. Clifford)
54. Subsequent to the August 10th Board meeting, Ms. Clifford told Anne (then-Special Project Coordinator) that she would receive a new job title of Controller. (Testimony of Ms. Clifford)
55. On August 12, 2015, Ms. Clifford called Mr. Owens to a meeting and, together with outside counsel, was told that his position was eliminated and that he should turn over his keys and passwords. He was then escorted from the building. He was told that this was a reorganization started by Mr. Hite. He was told he would be paid for two weeks and be eligible for unemployment. He was not told that he was “on leave”. (Testimony of Mr. Owens)

56. On August 21, 2015, Mr. Owens was sent a letter from Ms. Clifford which stated the following:

“I am writing to correct and clarify your employment status.

You are currently on paid administrative leave while the organizational and personnel needs of the Northampton Housing Authority are being assessed. Your compensation and benefits are unchanged during this period of administrative leave. This determination is not disciplinary in nature.

Please note that this notice supersedes any prior verbal or written notice with regard to your employment status.

You will be informed in writing upon any change to this status. In the meantime, please remain available for communications and/or assignments during regular business hours.”

(Exhibits E and H)

57. On August 25, 2015, counsel for Mr. Owens sent a letter to Ms. Clifford (Exh. 00) informing her that NHA employees were protected under G.L. c. 121B, §29 and that the August 10, 2015 meeting violated the open meeting law G.L. c. 93A §§18-25. (Exh. 00)

58. On August 31, 2015, the NHA Board held another meeting regarding the reorganization, conceding by now, that the actions in August were illegal. The Board voted to rescind the August 10th Executive Session. (Exhibit Y)

59. At the August 31st meeting, Ms. Clifford again presented her reorganization plan. The plan listed as “open positions based on proposed organizational chart,” the following:

Administrative:

Administrative Support

Receptionist

HR/Payroll Benefits

Accounts Payable

Maintenance:

Porter

Service Technician

60. As of the August 31st presentation, Chief Accounting Officer and Controller were not treated as open positions. (Exhibit N)

61. The final page of the presentation to the Board stated as follows:

“Evaluation

Once Approved:

Employees in positions to be eliminated will be considered for all newly-created positions for which they are qualified.

Any positions remaining will be posted in house.

Should there be a need, once all avenues above exhausted, outside search to begin.

(Exhibit N)

62. By letter dated September 3, 2015, Ms. Clifford informed Mr. Owens that she had proposed the elimination of his position pursuant to a reorganization of the NHA.

(Exhibit F; Exhibit I).

63. The letter explained, “The purpose of the reorganization is to make the Authority more organizationally effective and efficient, and responsive to tenants.” (Exhibit F;

Exhibit I). The letter informed Mr. Owens that a due process hearing was scheduled for September 17, 2015 at 3:00 p.m. and enclosed copies of G.L. c. 31, §§39-45 (while noting that only §§41-45 apply to housing authority employees). (Exhibit F; Exhibit I). The letter concluded, “Please note that your current position and employment status [paid administrative leave] remains unchanged pending the result of this hearing.” (Exhibit F; Exhibit I).

64. On September 17, 2015, the Civil Service due process hearing before Ms. Clifford, as hearing officer for the Appointing Authority, took place as scheduled. (Testimony of Ms. Clifford). Mr. Owens was represented by counsel at the hearing. (Testimony of Ms. Clifford)

65. By letter dated September 24, 2015, Ms. Clifford informed Mr. Owens that his position had been eliminated effective on that date. (Exhibit G; Exhibit J) The letter also informed Mr. Owens: “For the next 12 months, you will be provided with notice of all open positions for your consideration to apply for.” (Exhibit G; Exhibit J)

66. In November 2015, the NHA posted several new positions created as a result of the reorganization, including a Resident Services Coordinator, Accounts Payable position, Administrative Assistant, and Receptionist. (Exhibits O, P, Q, R). Subsequent to the termination of his employment, Mr. Owens has been informed of open positions at the NHA that he may wish to apply for. (Exhibit L; Testimony of Clifford, Adamson, and Owens).¹⁰ Mr. Owens has not applied for any position, citing the lower rate of pay of the available positions compared to his prior position.

¹⁰ At hearing, Ms. Clifford testified that the reference to the employee handbook in the letter was in error because Appellants’ positions were eliminated pursuant to a reorganization, which is not covered by the Personnel Policy; they were not “laid off.” (Testimony of Clifford).

(Testimony of Owens).

Legal Standard

The Commission's authority in this matter is drawn from G.L. c. 121B, § 29 which provides, in relevant part, that:

“No employee of any housing authority, except an employee occupying the position of executive director, who has held his office or position, including any promotion or reallocation therefrom within the authority 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.”

G.L. c. 31, § 43 provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person 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 also modify any penalty imposed by the appointing authority.”

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law,” Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied “if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal

notwithstanding any doubts that may still linger there,” Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required “to conduct a de novo hearing for the purpose of finding the facts anew,” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. However, “[t]he 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], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’,” which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. *Id.*, 823-24, quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

The Supreme Judicial Court has cautioned the Commission that its proper role in applying the “just cause” standard in matters involving the abolition of a position for reasons of economics and efficiency are limited, and indeed more “narrow” than the scope of review to be applied in disciplinary actions. See School Comm. of Salem v. Civil Service Comm’n, 348 Mass. 696, 699 (1965). See also Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 925 (1994) (“terminations of these sorts are not subject to the statutory procedures customarily provided for cases where an appointing authority intends to terminate an employee for what amounts to job performance”).

The SJC noted that: “a municipality may abolish a civil service position when, in the judgment of appropriate municipal officials, the position is no longer needed or economical.” Debnam, 388 Mass. at 635-36 citing, et. al., Commissioners of Civil Service v. Municipal Court of the City of Boston, 369 Mass. 84, 88 (1975). In reaching this determination, the Court noted century-old precedent establishing the fundamental premise that:

The abolition of an unnecessary position made in good faith plainly is the duty of an executive or administrative officer. One holding such a position, though efficient in the performance of his duties, may be removed simply because the position is no longer necessary, provided the removal is made in good faith, and the recital of that reason is not made the cover for some other unjustifiable motive.

Gardner v. Lowell, 221 Mass. 150, 154 (1915) citing Garvey v. Lowell, 199 Mass. 47, 49 (1908).

Whether the appellant or the Commission personally agrees with the authority’s conclusion is not dispositive. Id. Similarly, the ultimate accuracy of this conclusion is also not at issue. Id. Stated simply, the elimination of a position as part of a good faith effort to achieve economy and effectiveness of operations does not violate civil service protections. Commissioner of Health and Hospitals of Boston v. Civil Service Comm’n, 23 Mass.App.Ct. 410, 413 (1987) citing Gardner v. Lowell, 221 Mass. at 154; McNeil v. Mayor of Peabody, 297 Mass. 499, 504 (1937); Dooling v. Fire Commr. of Malden, 309 Mass. 156, 162 (1941).

The layoff of employees is not justified if the proffered reason for their dismissal was pretextual and their discharge was the product of improper motivations. City of Cambridge Housing Authority v. Civil Service Comm’n, 7 Mass.App.Ct. 586, 589 (1979); *see also*, Raymond v. Civil Service Commission and Athol Fire Department,

(12/9/08) hereinafter “the Athol case,” p. 11. Furthermore the Court in the City of Cambridge Housing Authority case reiterated the long established doctrine under the Civil Service Law dating back to the early 1900’s which provides that,

There is a real and fundamental distinction between the laudable abolition of an unnecessary position and the discharge of a faithful employee in violation of the rights secured to him by statute; and the latter can neither be concealed nor protected by a pretense that it was an exercise of the former right. City of Cambridge Housing Authority, 7 Mass.App.Ct. at 590 – 591, *quoting*, Garvey v. Lowell, 199 Mass. 47, 50 (1908).

And even if the evidence would have warranted a finding by the [hearing] officer that the removal was for ‘proper cause’ the removal should be reversed if it appeared affirmatively that it was made ‘in bad faith’ as would be the case if this case was a ‘mere pretext or device to get rid of’ the employee for some other and improper cause. City of Cambridge Housing Authority, 7 Mass. App. Ct. at 590 – 591, *citing* Mayor of Somerville v. District Court of Somerville, 317 Mass. 106, 121 (1944).

Analysis

The statute requires that housing authorities show just cause prior to terminating an employee with five (5) or more years of service. Put another way, these individuals cannot be treated as at-will employees.

Here, it is undisputed that Ms. Clifford, upon becoming Executive Director of the Housing Authority, was unaware of these protections and erroneously assumed that Mr. Mr. Owens was an at-will employee. Operating under this mistaken impression, Ms. Clifford, without prior notification to Mr. Owens, proposed a “re-organization” plan during an Executive Session of the NHA Board of Directors that resulted in the termination of Mr. Owens. Shortly thereafter, Ms. Clifford told Mr. Owens that he was

terminated, effective two (2) weeks later, and had him escorted off housing authority premises. Besides being unseemly, these actions, as now acknowledged by the NHA, were carried out in violation of the just cause protections outlined above – as well as the state’s open meeting law.

Upon discovering, after the fact, that various state laws had been violated, Ms. Clifford forwarded Mr. Owens a “clarification letter” stating that he had not been terminated. Shortly thereafter, the NHA Board rescinded their illegal vote and then posted a public meeting at which time they adopted the same re-organization plan previously presented to them during Executive Session. Both Mr. Adamson and Mr. Owens were in attendance at that public meeting. According to the credible testimony of Mr. Adamson and Mr. Owens, at least one (1) of the NHA Board members stated that he had not seen Ms. Clifford’s re-organization plan prior to the meeting and another member asked for more time to review it. That notwithstanding, the NHA Board, after only a few minutes of discussion, adopted the re-organization plan by a 4-0-1 vote.

It is difficult to square the above-referenced sequence of events with the NHA Board’s responsibility to “manage, control and govern” the Northampton Housing Authority. Delegating all or part of that responsibility to an Executive Director does not absolve NHA Board members from their fiduciary responsibility, explicitly referenced in G.L. c. 121B, § 5. At a minimum, that responsibility requires a thoughtful, deliberate and meaningful review of re-organization proposals, particularly those that will result in the termination of long-term employees with civil service-related just cause rights. There is scant evidence to show that those fiduciary responsibilities were met here.

Although belatedly, Mr. Owens was eventually given written notice of his possible termination and given a “hearing” that lasted less than sixty (60) minutes. While, unlike the hearing before the Commission, there is no requirement that this local hearing be conducted by an impartial hearing officer, the fact that Ms. Clifford chose to serve as the hearing officer only confirms that the outcome of this local “due process” hearing was never in doubt. In fact, even prior to these hearings, Ms. Clifford had already informed key personnel, including Sharon, of their new job titles. Shortly after the hearing, Mr. Owens was promptly notified in writing that he had been told verbally weeks ago: he was terminated.

The issue now before the Commission, as part of its de novo proceedings, is whether, applying the well-established standards regarding layoffs that occur due to purported lack of funds or reorganizations, there was just cause for the action taken here. Specifically, was the action taken here part of an effort made in good faith to achieve economy and effectiveness in the organization; or, was the act a mere pretext for an improper motive for removing Mr. Owens?

After a careful review of the record, including listening (and re-listening) to all of the testimony provided and reviewing all documents submitted during and after the hearing, I have concluded that there was not just cause to terminate Mr. Owens. In summary, what occurred here was more akin to a purge of certain long-term employees, including Mr. Owens, that Ms. Clifford did not want on her team, as opposed to a bona fide re-organization.

The NHA attempts to justify the termination of Mr. Owens based largely on the conclusion of Ms. Clifford that Mr. Owens was performing many of the same functions

as his subordinate. Put simply, that is not true. Rather, I credit Mr. Owens's testimony that he was the primary person responsible for all online banking functions; supervised the three (3)-person finance office; was responsible for "drawing down" federal and state funds on a monthly basis; served as assistant contract officer; was the primary contact person with auditors; provided information to the outside fee accountant to assist with budget preparation; provided information regarding the impact of collectively-bargained pay raises; was responsible for collecting all coins from laundry machines (with one other person per the recommendation of a prior audit); and assisted with the preparation of year-end financials.

I also credit the testimony of Mr. Owens that his subordinate, Sharon, was primarily responsible for accounts payable, inputting data into the computer system and cutting checks; that she also performed human-resource-related functions for the NHA, with responsibility for such things as employee health insurance, life insurance; and that she also "traded off" doing the payroll with another employee. Finally, I credit Mr. Owens's testimony that Sharon was not authorized to draw down federal funds and only performed cash management functions in Mr. Owens's absence and with his permission.

On all of the above-referenced issues, Mr. Owens was a good witness. He had a good recollection of what his duties were and he was careful not to overstate them. He seemed to take his sworn testimony seriously, carefully listening to the questions posed and responding in a thoughtful, consistent manner, both during direct testimony and cross-examination. Generally, his version of events seemed plausible and had a ring of truth to them.

Ms. Clifford's conclusion that Mr. Owens was performing duties that were duplicative of his subordinate is based, at best, on a superficial review during her first days as Executive Director. Assuming, *arguendo*, that Mr. Owens's subordinate did, at some point during Ms. Clifford's first thirty days, start performing the duties and responsibilities of Mr. Owens, that was due to a directive given *by Ms. Clifford*. Shortly after his first meeting with Ms. Clifford, Mr. Owens was ordered to only perform duties that she assigned to him; to have other personnel perform his normal duties -- and to not leave the building without her permission. In short, a veteran employees of the NHA was being put in a no-win situation. On the one hand, Mr. Owens would be labeled as insubordinate if he didn't transfer his normal job duties to another employee. On the other hand, by following Ms. Clifford's directive, it is then concluded that his position is not needed because others were performing his duties, thus justifying a purported re-organization.

These series of events, the inferences I drew from Ms. Clifford's testimony, and commonsense, paint a fairly clear picture that Ms. Clifford, during her first days as Executive Director, simply identified Mr. Owens as someone she did not want on her team. Believing, erroneously, that Mr. Owens had no due process protections, she moved forward with a re-organization plan that would result in his termination. That is nothing more than a bad faith effort to discharge a faithful employee, which is contrary to the letter and spirit of the statute.

Various aspects of Ms. Clifford's testimony contributed to my conclusion that the motivating factor here was nothing less than an effort to purge certain employees from the NHA. First, Ms. Clifford effectively acknowledged having a pre-disposition against

certain long-term public employees, stating that she comes from the private sector “where you work for your money.” Thus, it was not surprising that, within weeks, Ms. Clifford installed a new Assistant Executive Director who had worked for the same private sector as her for fourteen (14) years. Although I did consider that this position was posted, and interviews were conducted, I ultimately concluded that Ms. Clifford was pre-disposed to bringing in an external candidate, as opposed to giving serious consideration to internal candidates, as was represented in the re-organization plan that was submitted to the NHA Board.

I also considered Ms. Clifford’s argument that the decision to terminate Mr. Owens was based on the fact that he did not have an accounting degree, which, to her, was a preferred qualification for the “new” position of “Chief Accounting Officer”. That argument seemed contrived and disingenuous to me, particularly considering that Mr. Owens has many years of public finance experience and, prior to her employment with the NHA, Sharon did not have public finance experience. When asked why she appointed another person, who also did not have an accounting degree to the position of “Controller”, Ms. Clifford, in contradictory testimony, cited that person’s years of public finance experience at the NHA as being more important than a degree in accounting. Put simply, the fact that Sharon had long ago obtained an undergraduate degree in accounting appeared to be more of an ex post facto attempt to justify Mr. Owens’s termination, as opposed to a bona fide reorganization.

Further calling into question whether this was a bona fide reorganization, as opposed to a purge of certain long-term employees that Ms. Clifford did not prefer to have on her team, was Ms. Clifford’s contradictory testimony regarding whether a “new” Chief

Accounting Officer position was actually created. If so, the reorganization plan clearly states that impacted employees, such as Mr. Owens, would be able to apply for the position. When asked to explain why this “new” position wasn’t posted, giving Mr. Owens the opportunity to apply for it, Ms. Clifford appeared to change her testimony and state that Sharon was simply given new job responsibilities and that no new position was actually created. This reinforced my conclusion that, early on, Ms. Clifford simply decided that she did not want Mr. Owens as part of her management team and the “reorganization” was the mechanism to facilitate his termination. That is not consistent with the just cause protections that the Legislature has afforded to long-term housing authority employees, even when considering the broader discretion that is permitted regarding layoffs (as opposed to discipline-related terminations).

Conclusion

The Northampton Housing Authority did not have just cause to terminate Mr. Owens. Mr. Owens’s appeal under Docket No. D1-15-168 is hereby ***allowed***. His termination is rescinded and he shall be returned to his position with full back pay and a restoration of all benefits to which he is entitled.

Further, pursuant to G.L. c. 31, § 45, the NHA shall reimburse Mr. Owens: \$200 toward attorney fees associated with the hearing before the NHA; \$200 toward attorney fees associated with the hearing before the Commission; \$100 toward the cost of summoning witnesses; and \$100 for any other necessary expenses incurred in such defense.

Civil Service Commission

Christopher Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan) on April 28, 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 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. 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).

Notice to:

Maurice Cahillane, Esq. (for Appellant)

James Pender, Esq. (for Respondent)