

Decision mailed: 4/8/11  
Civil Service Commission *JB*

THE COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

BRUCE OZELLA,  
Appellant

Docket No.: D1-10-167

v.

CITY OF BOSTON PARKS AND  
RECREATION DEPARTMENT,  
Respondent

Attorney for the Appellant:

Melinda T. Willis, Esq.  
AFSME Council 93.  
8 Beacon Street, 7<sup>th</sup> Floor  
Boston, MA 02108

Attorney for the Respondent:

Jordan N. Ablon, Esq.  
Office of Labor Relations  
Boston City Hall, Room 624  
Boston, MA 02201

Hearing Officer:

Angela C. McConney, Esq.

DECISION

The Appellant, Bruce Ozella (hereinafter "Appellant"), pursuant to G.L. c. 31 §§ 39 and 43, appeals the June 29, 2010 decision of the City of Boston to lay him off from his position of Graphic Artist Technician in the Respondent's Park and Recreation Department Marketing Unit (hereinafter "Department" or "Respondent") due to lack of funds. The appeal was timely filed

with the Civil Service Commission (hereinafter "Commission"). A full hearing was held on January 24, 2011 at the offices of the Commission. The hearing was digitally recorded. Copies of the hearing were forwarded to the parties, and a copy is retained by the Commission.

The Hearing Officer left the record open in order for the parties to submit additional evidence, to wit, (1) job descriptions for all employees in the Marketing Department; (2) the amount of sponsorship dollars brought in by said Marketing Department; (3) an organizational chart of the Marketing Department; and (4) the number of other graphic artist technicians working in Boston City Hall. The Respondent submitted part of the requested evidence on January 28, 2011, which was admitted as Exhibit 10.

The parties submitted their proposed decisions to the Commission on February 25, 2011.

The Hearing Officer renewed her request for an organization chart of the Marketing Unit on March 21, 2011. The Respondent submitted the organization chart on March 24, 2011, which was admitted as Exhibit 11. The Appellant then requested a status conference in order to discuss objections to the organization chart. The status conference took place via conference call on April 5, 2011, the Appellant had no objections. The record was then closed.

#### FINDINGS OF FACT

Eleven (11) exhibits and Stipulated Facts were entered into evidence. Based on these exhibits and the testimony of:

*For the Appointing Authority:*

- Jerry Carchedi, Assistant Commissioner, Administration and Finance, City of Boston Parks and Recreation Department;

*For the Appellant:*

- Appellant, Bruce Ozella;

I make the following findings of fact:

1. Appellant Bruce Ozella was hired on April 15, 1978 as a Recreation Supervisor for the Department. (Stipulated Facts; Testimony of Appellant)
2. The Department's core mission is the maintenance of clean, green, safe, accessible and well programmed park land for the residents of the City of Boston. (Exhibit 3)
3. The Appellant studied illustration at the New England School of Art and Design for three years, but did not graduate. (Testimony of Appellant)
4. The Appellant was a member of American Federation of State, County, and Municipal Employees (AFSME) AFL-CIO Council 93. (Exhibit 3)
5. When he was first hired as Recreation Supervisor, Appellant learned typesetting at the Respondent's printing plant. At the time he was hired, there was no title for artist in the Department. (Testimony of Appellant)
6. The Appellant was in charge of designing posters, magazine advertisements, newspaper advertisements, programs and invitations to advertise and promote Department events. These Department events included concert series, mayoral appearances, and programs for children. (Testimony of Appellant)
7. Although his duties did not materially change, Appellant subsequently held the title of Senior Engineer and later that of Graphic Arts Technician within the Department's Marketing Unit. (Testimony of Appellant)
8. At the time of his layoff, the Appellant was a permanent civil service employee with the title of Graphic Arts Technician. (Stipulated Facts; Testimony of Appellant; Exhibit 2)

9. According to Appellant's job description, he was supervised or received direction from the Commissioner, the Assistant Commissioner, and the Executive Secretary of the Department.

(Exhibit 10)

10. Under the heading of GENERAL STATEMENT OF DUTIES AND RESPONSIBILITIES in the job description, the Appellant's duties were:

[Preparing] ... both black-and-white and color sketches, drawings, and/or photographs and to process and layout film prints for reproduction in one or more types of printed media, and does related work as required.

Under the heading of DUTIES AND RESPONSIBILITIES, his duties were:

[Preparing] ... sketches and drawings in both black-and-white and color for reproduction in any form of graphic display such as brochures, charts, posters, pamphlets, and others; does layout and design work for printed media involving both graphic presentation and copy; photographs, processes, and develops filmprints in both black-and-white and color for reproduction in displays, offset printing plates, slides, and other forms of graphic presentation.

Formulation of advertising concepts and public relations materials; preparation of mechanicals, typesetting and layouts for printed media:

Operation of photostat equipment and typesetting machinery; design capabilities for brochures, charts, posters, news ads, and billboards.

Preparation of displays, banners and signs; produces art work such as renderings, air brushing, paintings and color illustrations for reproduction, and does related work as required.

(Exhibit 10)

11. As graphic design and the printing industry changed with the advent of technology, the Appellant trained himself on computers. He also updated his skills from his interaction with interns assigned to the Marketing Unit. (Testimony of Carchedi; Testimony of Appellant)

12. The Appellant was the only Graphic Arts Technician within the Marketing Unit. The five other titles in the unit are Principal Administrative Assistant, Senior Administrative Assistant, Senior Research Analyst, Administrative Assistant and Administrative Secretary.

The Appellant was one of two men in the unit; the other being the Research Analyst.

(Testimony of Carchedi; *see also* Exhibits 5, 9 and 10)

13. The Appellant was the only Graphic Arts Technician in the Marketing Unit. (Testimony of Carchedi; Testimony of Appellant)

14. Jerry Carchedi (hereinafter "Carchedi") has been employed by Respondent for ten (10) years, and has served as the Assistant Commissioner of Administration and Finance in the Department for four (4) years. (Testimony of Carchedi)
15. Among his responsibilities, he crafts, negotiates and monitors the Department's budget. (Testimony of Carchedi)
16. At some point, Carchedi asked the Appellant to deliver the Marketing Unit's mail to City Hall on a weekly basis. (Testimony of Appellant; Testimony of Carchedi)
17. Appellant objected, stating that such responsibility would not only interfere with his ability to produce graphic design, but that it was inappropriate for the person with the greatest seniority to do so. Carchedi declined to assign the duty to someone else. (Testimony of Appellant)
18. When Appellant suggested that the duty be shared among others in the Marketing Department, Carchedi again declined. (Testimony of Appellant)
19. Department Commissioner Antonia Pollak (hereinafter "Pollak") notified Appellant in a June 16, 2010 letter that she was "contemplating abolishing the Civil Service position of Graphic Arts Technician," due to lack of funds caused by the reduction in Local Aid from the Commonwealth of Massachusetts. (Exhibit 2)
20. Appellant's salary was \$69,000. (Testimony of Appellant)
21. Appellant was the last Graphic Arts Technician left on the Respondent's payroll. (Exhibit 10)
22. In the same letter, Appellant was offered the opportunity to accept a demotion, if such position were available in the next lower title or titles in the job series. At the time of his proposed layoff, Appellant was the only Graphic Arts Technician working for the Respondent; there were no lower titles in the job series. (Exhibit 2)

23. A hearing was scheduled for June 28, 2010 at the Respondent's Office of Labor Relations, in accordance with c. 31 §41, to determine if the Respondent had just cause to proceed with this action. (Exhibit 2)

*Appointing Authority June 28, 2010 Hearing*

24. Jordan Ablon, Esq. presided as hearing officer. Although Charlie Owen, the AFSCME president, and Mark Bernard, an AFSCME representative were present, the Appellant was represented by private counsel. Carchedi and Paul Parisi, the Respondent's Director of Personnel appeared on behalf of the Respondent. (Exhibit 3)

25. The Respondent argued that it had experienced significant budget cuts for FY '11, and anticipated even more in the next several years. (Exhibit 3)

26. The Respondent further argued that it had made a good faith determination that it could eliminate the Appellant's position, and still fulfill its core mission of maintaining clean, green, safe, accessible and well programmed park land for the City's residents. (Exhibit 3)

27. The Appellant argued that eliminating the Appellant's position would not save the Respondent money because his position generated revenue: i.e. his flyers and designs secure funding and sponsorships for events. (Exhibit 3)

28. The Appellant also requested that the Respondent consider his thirty-two (32) years of service. (Exhibit 3)

29. The Hearing Officer concluded that the Respondent had proven by a preponderance of the evidence that there was just cause for laying off the Appellant for lack of funds. He found that the Respondent has shown that its financial condition had significantly deteriorated from FY '08 to FY '11. He found that the Appellant could not produce evidence that the layoff was motivated by political bias or personal animus. (Exhibit 3)

30. Pollak accepted the Hearing Officer's recommendation. By letter dated June 29, 2010, she informed the Appellant that he would be separated from his position, effective June 30, 2010.

(Exhibit 4)

31. Prior to the layoff, the Respondent offered the Appellant a position as a clerk in the Cemetery, a division also under the Department, for less than half of his salary. The Appellant did not accept.<sup>1</sup> (Testimony of Appellant)

32. Appellant filed an appeal with the Commission on July 9, 2010. (Stipulation of Facts; Exhibit 1)

#### *Commission Hearing*

33. Carchedi testified before the Commission that there was a decrease of \$800,000-\$1,000,000 in the Department budget between FY '08 and FY '11, while fixed costs such as collective bargaining agreements and utilities remained in effect. He testified that 18%-20% or thirty-eight (38) positions in the Department were eliminated from FY 03- through FY 11.

(Testimony of Carchedi; Exhibit 3)

34. The Department's FY '11 budget proposed an elimination of four (4) positions. (Testimony of Carchedi)

35. Carchedi estimated a savings of about \$69,000 –the full amount of the Appellant's salary by abolishing his title. (Testimony of Carchedi)

36. The Appellant testified that his lay off was due to the fact that he was never political during the course of his employment. He believed that he worked for the City of Boston, not the Mayor. (Testimony of Appellant)

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<sup>1</sup> Under c. 31 §39, Appointing Authorities must provide permanent civil service employees the right to "bump" employees in the "lower title or titles in succession" in the official service. Since the position of Clerk is not within the Graphic Arts Technician series, the Department was not required to offer this position to the Appellant. *See Tomashpol v. Chelsea Soldiers Home*, 23MCSR 52 (2010)

37. Although he testified that he was treated differently at work, when pressed by this Hearing Officer to give testimony of such treatment, he could not name specific instance. (Testimony of Appellant)
38. The Appellant testified that his work fostered and nurtured partnerships with financial donors, such as Bank of America, who appreciated working with an artist of his caliber and professionalism. (Testimony of Appellant)
39. The Appellant testified that his high quality work product led to better advertisements and funding from the sponsors, which in turn led to well attended Department events. (Testimony of Appellant; Exhibits 8 and 10)
40. From 2008 to 2010, the Department received \$400,000 per year in funding from sponsors. (Exhibit 10)
41. The Appellant testified that his rapport with sponsors was directly responsible for most of the sponsorship funds. (Testimony of Appellant)
42. After the Appellant was laid off, his duties were divided among the five remaining members in the Marketing Department. These five employees advertised Department events via e-mail, fax, Facebook and Twitter. (Testimony of Carchedi)

## CONCLUSION

I find that the Respondent has established just cause to lay off the Appellant for lack of funds.

G.L. c.31 §41 governs the procedures required to effect the termination of a civil service employee and states:

“Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be ... laid off ... nor shall his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority . . . and shall be given a full hearing ... before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall provide such employee a written notice of



the time and place of such hearing at least three days prior to the holding thereof, except that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty.”

In this matter, the Appellant was given written notice via the June 16, 2010 letter and had his full hearing before the appointing authority on June 28, 2010.

Pursuant to G.L.c.31 §43, the Commission may take the following action if an Appellant is aggrieved by the appointing authority’s decision to layoff personnel for lack of funds:

“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 ...”

Under Section 43, the Commission must “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.

The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass.

1102 (1997). *See also* Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass.

1108 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 408, 411, rev.den., (2000);

McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477 (1995); Watertown v. Arria, 16

Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

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, rev.den., 426 Mass.

1102 (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). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission must take account of all credible evidence in the administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65 (2001) It is the function of the hearing officer to determine the credibility of evidence and to resolve conflicting testimony presented through witnesses who appear before the Commission. See Covell v. Department of Social Svcs, 439 Mass 766, 787 (2003); Doherty v. Retirement Bd., 425 Mass. 130, 141 (1997); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988).

"The commission's task, however, 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'". Falmouth at 823 (2006). See Watertown v. Arria at 331(1983) and cases cited.

The Commission's role is limited when reviewing cost-cutting choices made by an appointing authority faced with a serious budgetary shortfall. See Bombara v. Department of Mental Health, 21 MCSR 255 (2008); Carroll v. Worcester Housing Auth., 21 MCSR 309 (2008); Holman v. Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995); Snidman v.

Department of Mental Health, 8 MCSR 128 (1993); Soucy v. Salem School Comm., 8 MCSR 64 (1995).

“[I]n the absence of pretext or device designed to defeat the civil service law’s objective of protecting efficient public employees from partisan political control . . . or to accomplish a similar unlawful purpose, the judgment of municipal officials in setting the municipality’s priorities in identifying the goods and services that are affordable and those that are not cannot be subject to the [C]ommission’s veto.”  
Gloucester v. Civil Service Comm’n, 408 Mass. 292, 299-300 (1990).

*See also* School Comm. of Salem v. Civil Service Comm’n, 348 Mass. 696, 698-699 (1965);

Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 926, rev.den., 417 Mass. 1105 (1994).

Once an appointing authority meets its burden of proof to articulate legitimate economic reasons for the layoffs, the burden then shifts to the employee to prove that the economic reasons were pretextual and that the layoff(s) were made in bad faith. *See, e.g.,* Commissioner of Health and Hospitals v. Civil Service Comm’n at 413 (1987); Carroll v. Worcester Housing Auth., 21 MCSR 309 (2008); Holman v. Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995) Thus, absent affirmative evidence demonstrating that a separation for lack of funds is but a mere pretext for separation, the Commission cannot override a good faith determination by the appointing authority to separate employees for cost-cutting purposes. *See, e.g.,* Denham v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap into reserve fund); Gardner v. Bisbee, 34 Mass.App.Ct. 721, 723 (1993) (pretext established when mayor improperly injected himself and dictated to appointing authority who should be laid-off); Cambridge Housing Auth..v. Civil Service Comm’n, 7 Mass.App.Ct. 586 (1979) (finding pretext

when appellant's position was "abolished" so that another person could be appointed to perform the same duties).

In the present appeal, the Department met its burden to articulate a legitimate economic basis for deciding to layoff the Appellant. The undisputed fact is that the Respondent experienced budgetary shortfalls engendered by the reductions in Local Aid funds provided by the Commonwealth of Massachusetts, in addition to other financial constraints. The Respondent's financial condition had deteriorated significantly from FY '08 to the present, while fixed costs (e.g. collective bargaining agreements and utilities) remained in effect. Thirty (38) positions were eliminated from the Department from FY '03 to the present.

The Appellant did not prove any pretext or improper motive on the Respondent's part. Although he conjectured that his layoff was "because he did not play politics", he could not give an example. Although he testified that he was treated differently from other people, when pressed by this Hearing Officer to provide at least one instance of said disparate treatment, he could not do so. The Appellant appeared to be under the impression that he was above certain tasks, such as taking in the mail, simply due to his long tenure.

No one was hired to replace the Appellant in the Marketing Unit. Due to advanced technology, his responsibility for creating tangible posters, flyers, newspaper and magazine advertisements and tee-shirts for Department event promotion is now being handled electronically via email and social media such as Twitter and Facebook. These tasks are distributed among the remaining members of the Marketing Unit in the Department of Parks and Recreation.

The Respondent has met its burden of showing that Appellant's position was eliminated due to lack of funds. The Appellant has failed to show by a preponderance of the evidence that the Respondent had reasons other than lack of funds when he was terminated.

ORDER

The City of Boston is hereby ordered to present documentation to the Civil Service Commission within ten (10) days, showing that:

1. The name of the Appellant Bruce Ozella has been placed on the state list for reinstatement pursuant to c. 31 §39: "[E]mployees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall not lapse at the end of the ten-year period following the date of such separation"; and that
2. The name of the Appellant Bruce Ozella has been placed on the state reemployment list pursuant to c. 31 §40: "The name of such person placed on such reemployment list shall remain thereon until such person is appointed as a permanent employee after certification from such list or is reinstated, but in no event for more than two years."

WHEREFOR, the appeal filed under Docket No. D1-10-167 shall be *dismissed* upon the Respondent's compliance with the within ORDER.

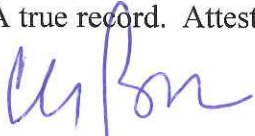
Civil Service Commission



Angela C. McConney, Esq.  
General Counsel

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein [McDowell – absent], Commissioners) on April 7, 2011.

A true record. Attest:



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Commissioner

**Commissioner Marquis was  
absent on April 7, 2011**

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:

Melinda T. Willis, Esq. (for the Appellant)

Jordan N. Ablon, Esq. (for the Appointing Authority)