Decision mailed: 12/17/10
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

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

ALFRED PAMPLONA,
Appellant

v.

CASE NO: D1-10-207

NEW BEDFORD SCHOOL DEPARTMENT,
Respondent

Appellant (Pro Se):	Jaime DiPaola-Kenney, Esq. Associate General Counsel AFSCME Council 93 8 Beacon Street Boston, MA 02108
Appointing Authority Attorney:	Jane Medeiros Friedman, Esq. First Assistant City Solicitor Office of the City Solicitor City of New Bedford 133 William Street – Room 203 New Bedford, MA 02740-6163
Commissioner:	Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Alfred Pamplona, acting pursuant to M.G.L.c.31, §§39 & 41-43, appealed to the Civil Service Commission (Commission) from the decision of the New Bedford Public Schools Department aka New Bedford School Committee (NBSC), Appointing Authority, to lay off the Appellant from his labor service position as Groundsworker for lack of funds. On October 21, 2010 and November 15, 2010, respectively, the Appellant and the NBSC filed cross-motions for summary disposition and have waived oral argument on the motions.

FINDINGS OF FACT

Giving appropriate weight to the documents and argument submitted by the parties, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Alfred Pamplona, holds a permanent labor service appointment in the position of Groundsworker with the NBSC, with a civil service seniority date of July 6, 1998. (*Claim of Appeal; NBSC Motion, Exh.A*)

2. Wayne Johnson holds a permanent labor service appointment in the position of Groundsworker, with the NBSC with a civil service seniority date of October 23, 2000. (*NBSC Motion, Exh. B*)

3. In July 2010, due to budget constraints caused by a reduction in local aid, the NBSC initiated a process for a reduction in force due to lack of funds. The parties do not dispute that such a reduction in force was necessary. (*NBSC Motion, Exhs. C,E,G,K; Appellant's Motion*)

4. Messrs. Pamplona and Johnson, among other labor service employees, received letters notifying them of a hearing on August 5, 2010 regarding their contemplated layoff due to the reduction in force. Each was offered the opportunity to consent to demotion to the lower job title of Laborer in the labor service. Mr. Johnson indicated his consent to be demoted; Mr. Pamplona did not. (*NBSC Motion, Exhs. D & G*) [1]

5. At or shortly prior to the August 5, 2010 hearing, the NBSC came to learn that Mr. Johnson claimed the status of a disabled veteran under Massachusetts civil service

[1] Initially, Mr. Pamplona was offered, and he accepted, demotion to a position of "Maintenance/Groundsworker, which was apparently a scrivener's error. A revised letter was issued to the Appellant correcting the mistake and offering the demotion to the position of Laborer, to which he did not respond. (*NBSCD Motion, Exhs. E & G*)

law and rules. He presented documentation to that effect at the hearing and retracted his consent to demotion. His status as the only qualified disabled veteran in the labor service positions affected by the reduction in force is not disputed. Based on this status, NBSC determined that it was obliged under civil service law and rules to give Mr. Johnson a preference, in effect, treating him as if he was the employee with the greatest seniority of all affected employees, regardless of their actual civil service seniority dates. (*NBSC Motion, Exhs. H & K*)

6. Following the August 5, 2010 hearing, the NBSC implemented the reduction in force which included abolishing three Painters positions and three Maintenance/Groundsworkers positions (held by the least senior employees in those respective positions). (*NBSC Motion; Stipulated Fact Sheet presented at Pre-Hearing Conference*)

7. Based on the seniority of the affected employees in positions that were being abolished, two of the Painters whose jobs were eliminated consented to "bump" to a Maintenance/Groundsworker position, displacing two Groundsworkers with less seniority than them. Mr. Pamplona was the second least senior Groundsworker bumped. (*NBSC Motion; Stipulated Fact Sheet presented at Pre-Hearing Conference*)

8. But for the preferred status granted him as a disabled veteran, Mr. Johnson (seniority date 10/23/00) would have been the second Groundsworker who would have been bumped by the second least senior Painter (seniority date 1/2/96), and Mr. Pamplona having more seniority (seniority date 7/6/98), would not have been laid off. Rather, Mr. Johnson would have been the person bumped by the second Painter. (*NBSC Motion; Stipulated Fact Sheet presented at Pre-Hearing Conference*)

9. Had Mr. Johnson (seniority date 10/23/00) been the employee bumped, he would have been entitled to elect to be demoted and, presumably, as there was a Laborer with less seniority (1/16/07 seniority date), he would have bumped into that position, and the Laborer, not Mr. Johnson, would have been laid off. (*NBSC Motion; Stipulated Fact Sheet presented at Pre-Hearing Conference*)

10. On August 6, 2010, New Bedford Superintendent of Schools Dr. Mary Louise Francis issued a written determination that found just cause to layoff Mr. Pamplona due to lack of funds and his refusal to accept a demotion to a lower title, i.e., Laborer. Mr. Johnson was retained in his position of Groundskeeper. *(NBSC Motion, Exh. I)*

11. This Appeal duly ensued. (*Claim of Appeal*)

CONCLUSION

A party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, e.g., here, "viewing the evidence in the light most favorable to the non-moving party", the moving party presented substantial and credible evidence that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and that the non-moving party has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

Specifically, a motion to dismiss must be allowed unless the Appellant raises "above the speculative level" sufficient facts "plausibly suggesting" that the alleged layoff was

erroneous and that the error was due to a mistaken interpretation of civil service law and rules and not through any "fault of his own." See generally Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss. cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Section 39 of G.L.c.31 prescribes the procedures to be followed by an appointing authority in selecting permanent employees for layoff in a reduction in force due to lack of funds, as well as the procedures by which those employees must be reinstated to permanent employment. The first two paragraphs of Section 39 provide, as relevant to the labor service positions involved in this appeal:

> If permanent *employees in positions having the same title in a departmental unit are to be separated from such positions because of . . . lack of money . . . they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit* and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, *so that employees senior in length of service. . .shall be retained the longest and reinstated first.* Employees 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 lapse at the end of the ten-year period following the date of such separation.
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> . . . *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.* (*emphasis added*)
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> . . .
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> *Nothing in this section shall impair the preference provided for disabled veterns by section 26.*

Id. (*emphasis added*)

Under this statute, full-time tenured civil service employees targeted for separation in a reduction in force due to lack of money have recourse to two distinct remedies under G.L.c.31,§39: (1) the pre-termination right to consent to demotion to a lower level job subject to restoration, in order of seniority, to the employee's former job; and (2) the post-termination right to be reinstated, in order of seniority, to the employee's former job or any "similar" job, prior to the appointment of any other applicants to fill such positions or similar positions. The Commission construes the bumping remedy according to its plain meaning, which clearly prescribes that the employee's written consent is a necessary pre-condition to demotion in the absence of a just cause hearing (Section 41 otherwise requires an appointing authority to demote a tenured employee without consent only after a just cause hearing), but entitles the appointing authority to designate the specific title or titles to which the displaced employee may elect to be bumped, and allows the appointing authority some degree of latitude in the process used to implement a reduction in force in a rational manner that is consistent with both civil service law and any applicable collective bargaining agreements. See generally Almeida v. New Bedford School Comm., 22 MCSR 269 (2009) [*Almeida I*]; Almeida v. New Bedford School Comm, 22 MCSR 739 (2009); [*Almeida II*]; Almeida v. New Bedford School Comm, CSC Case No. E-10-10, 23 MCSR --- (2010) [*Almeida III*][2]

The current disabled veteran's preference to which Section 39 refers is stated in G.L.c.31,§26:

> "A disabled veteran shall be retained in employment in preference to all other persons, including veterans."

[2] Commissioners Bowman and Marquis dissented on Almeida I, arguing that the majority erred by allowing more bumping rights than the statute allows. See *Almeida I.*

In Provencal v. Police Dep't of Worcester, 423 Mass. 626 (1966), the SJC had occasion to interpret these statutes in a case that bears close resemblance to the facts presented here. In Provencal, twenty-nine police sergeants, including Sgt. Provencal, were informed that the Worcester Police Department (WPD) was contemplating their layoff due to lack of funds, that they were entitled to hearing to determine whether there was just cause for that decision and offered that they were entitled to be demoted (presumably back to patrol officer) if there were employees junior to them in seniority in the lower title. Sgt. Provencal rejected the offer of demotion, and notified the WPD of his status as a disabled veteran. Thereafter, the WPD issued a revised letter to Sgt. Provencal informing him that it would conduct a Section 41 hearing to determine whether there was just cause to demote him due to lack of funds and, after such hearing, demoted him to patrol officer, while retaining other non-disabled-veterans with more seniority than Sgt. Provencal had in the position of Police Sergeant. Id., 423 Mass. at 627.

This Commission, in a 4-1 decision upheld the WPD's action in demoting Sgt. Provencal and the SJC affirmed, in an opinion which states:

> *[T]he issue on appeal is whether the language in G.L.c.31,§26, stating that "[a] disabled veteran shall be retained in employment in preference to all other persons, including veterans" provides preferential treatment to disabled veterans in reference to demotion as well as to layoff. We conclude* . . .as did the commission, *that the statutory words "retained in employment" refer to a continuing employer-employee relationship* . . . *and does not refer to an employee's continuation in a particular job or position.*
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> . . .
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> Chapter 31, §39, does not directly deal with disabled veteran preferences, but it does strongly suggest that *in c.31 the Legislature did not use the words 'position' and 'employment' interchangeably, but attributed distinct meanings to them*. . . . The legislative scheme is that, if a permanent employee is to be separated from his position because there is not enough work or money to justify his continuance therein, he or she shall be separated, not just from the position, but from his other employment relationship with, in this case, the department, unless, as provided in the second paragraph [of S39] he or she accepts demotion as an alternative.

> Whenever the alternative is accepted, the employee is 'retained in employment' but not in his or her position. We conclude that in the Legislature's collective mind, for purposes of G.L.c.31, including §26, 'retained in employment' does not mean or include retention in a specific position. *The provision at issue in §26 refers to disabled veterans being kept on the payroll in preference to others. It does not refer to a preference with respect to demotions*."

Id., 423 Mass. at 628-30. (emphasis added) See also Greaney v. Department of State Police, 52 Mass.App.Ct. 789 (2001), aff'd, 446 Mass. 611 (2002) (distinguishing disabled veteran's preference in G.L.c.31,§26 from preference to certain veteran managers in G.L.c.30,§9A which expressly covers involuntary separation from an "office or position").

The Appellant argues that the Provencal case stands on all fours with the present appeal and is controlling. The NBSC argues that Sgt. Provencal was involuntarily demoted under Section 41, not laid off under Section 39, which distinguishes the NBSC action taken in this case (under Section 39) from the action of the WPD.

It is true that, upon learning of Sgt. Provencal's status as a disabled veteran and his refusal to consent to demotion, WPD exercised its right to involuntarily demote Sgt. Provencal, after due notice and hearing, for just cause, i.e., a lack of funds (which it did under the broad compass of G.L.c.31,§41), in order to retain more senior non-disabled veterans as Sergeants (after the reduction in force. This involuntary demotion is what the SJC held was not protected by the Section 26 disabled veteran's preference. The Commission reads Provencal to allow the use of a Section 41 for this purpose, but the Commission does not read Provencal as deciding that civil service law necessarily mandates that an appointing authority must take such action to demote every less senior disabled veteran who refuses to consent to voluntary demotion in every layoff situation.

In the present case, Mr. Johnson, is clearly entitled to civil service status as a disabled veteran and cannot be separated from employment in a layoff prior to other non-disabled veterans. He may voluntarily elect to be demoted, but, if he declines, as he did in this case, the appointing authority cannot terminate his employment as it could another non-disabled veteran but it may, as the WPD did in Provencal, on its own initiative, choose to involuntarily demote him. For reasons that are not apparent on the record, unlike the WPD, the NBSC either did not consider the option of proceeding with an involuntary demotion of Mr. Johnson, affirmatively chose not to do so, or acted on the assumption that it had no choice but to retain Mr. Johnson in his position solely because of his claim of disabled veteran's status.

The Legislative preferences for veterans built into the civil service law must be respected, almost reverently, but so, too, must the other civil service provisions for job security provided to career public employees based on length of tenure in public service. See G.L.c.31, §§1,26, 28, 33, 39, 40, 59 These two sets of rights each represent equally important core objectives of the civil service law that must be read in harmony. In Younie v. Doyle, 306 Mass. 567(1967), the SJC held the disabled veteran's preference did not supersede all provisions of civil service law and that a disabled veteran may be required to complete a statutory probationary period (during which he or she may be terminated for any reason, or no reason, just as any other employee, and with no right of appeal to the Commission). In its opinion, the Court states this important principle:

> "The civil service law as a whole (and the rules made under the direction [of the Personnel Administrator] under direction of section 3 have the force of law) 'ought, if possible, to be so construed as to make it an effectual piece of legislation in harmony with common sense and sound reason' "

Id. 306 Mass.at 572

After careful consideration and common sense harmonization of the core objectives in play here, the Commission concludes, when faced with a disabled veteran with less seniority than his or her peers who refuses (as would be his prerogative) to voluntarily accept a demotion as part of a Section 39 layoff, an appointing authority may – but is not compelled to – take the next step and proceed with an involuntary demotion under Section 41, as did the WPD in the Provencal case. The Commission can envision reasonable justification for either action – it may be the disabled employee or the non-disabled employee who possesses many years more experience in grade, or other special skills that the appointing authority needs in the higher ranking position; conversely, if all things are otherwise equal, an appointing authority either may see fit to honor the disabled veteran's preference claim based on his service to his country, over a modest difference in tenure with the appointing authority, or vice-versa. Absent evidence of ulterior motive or improper bias or other violation of civil service law and rules, the Commission believes that the statute, and common sense, dictates that the decision whether to take the steps necessary to involuntarily demote a junior disabled veteran in order to retain a senior non-disabled veteran is best left to the sound discretion of the appointing authority on a case by case basis.

The Commission finds nothing in Chapter 31 as presently enacted, or in the Provencal opinion or other relevant judicial precedent, that proscribes this result. See generally, Andrews v. Civil Service Comm'n, 446 Mass. 611 (2006) (disabled veteran not entitled to be retained over departmental employees in a higher title); Hutcheson v. Director of Civil Service, 361 Mass. 480 (1972) (invalidated applicability of disabled veteran's preference to facts of that case); Commissioner of Metropolitan Dist. Comm'n v. Director

of Civl Service, 348 Mass. 184 (1964) (disabled veteran's preference in hiring did not override civil service law prohibiting hiring persons convicted of a felony); Younie v. Doyle, 306 Mass. 567 (1967) (disabled veteran may be required to complete probationary period during which the employee may be terminated for any reason) See also, Op.Att'y Gen., P.D. No. 12, p. 69-70 (March 29, 1930) (narrowly construing similar language in prior version of disabled veteran's preference statute to apply only to placement of "classified" (i.e. official service) employees on a certification, but not in their selection, and not to labor service employees), *cited in* Andrews v. Civil Service Comm'n, *supra*, 446 Mass. at 617n.14.

That said, there are two further complications that must be addressed. First, as noted above, the record is not clear whether the decision of the NBSC in this case was taken as a matter of its sound discretion, or because it believed (erroneously) that it had no discretion to act otherwise. Second, it appears that Mr. Pamplona refused to elect to take a demotion because he believed (also erroneously) he was absolutely entitled to be retained in his position and NBSC had no authority under civil service law to order his layoff under any circumstances. Although the Commission finds neither position to be completely on the mark, each of the parties certainly has a rational basis for the actions that were taken, based on the somewhat inconclusive state of the law in the premises.

In view of these complications, the Commission believes that all the affected parties are entitled to have NBSC reconsider its layoff decision based on the principles set forth in this Decision and to determine, in retrospect, whether the NBSC would exercise discretion to order Mr. Johnson demoted in favor of Mr. Pamplona or not. If the NBSC does believe there is good reason to exercise discretion and chose to retain Mr. Pamplona,

the Commission believes it is appropriate to order limited relief under Chapter 310 to enable Mr. Pamplona to be restored to his position and to authorize, to the extent necessary to accomplish that purpose, an involuntary Section 41 demotion of Mr. Johnson. On the other hand, if the NBSC prefers to retain Mr. Johnson, the Commission will grant limited relief to enable Mr. Pamplona to be restored to employment in the position of Laborer to which he presumably would have elected to bump.

This relief will be prospective only. As the Commission stated in *Almeida III*:

> It is also a well–established principle of common law that an injured party is obliged use reasonable, honest and good faith efforts to mitigate any loss suffered by another party's wrongful actions; although the level of effort that meets the duty to mitigate is not "onerous and does not require success", it does require "reasonable diligence". See, e.g., Assad v. Berlin-Boylston Reg. Sch. Comm., 406 Mass. 649, 656-57 (1990); Conway v. Electro Switch Corp, 402 Mass. 385, 389 (1998); Tosti v. Avik, 400 Mass. 224, 227-28, cert.den., 484 U.S. 964 (1987). See also Rasimas v. Michigan Dep't of Mental Health, 714 F.2d 614, 624 (6th Cir.1983), cert.den., 466 U.S. 950 (1984); Denton v. Boilermakers Local 29, 673 F.Supp. 37, 46-47 (D.Mass. 1987), citing Nat'l Labor Rel. Bd. v. Cashman, 223 F.2d 832 (1st Cir. 1955).
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> This duty of mitigation is also consistent with the principles of civil service law that an employee seeking equitable relief for a violation of his civil service rights is expected to act reasonably whenever possible to minimize the consequences of the alleged violation of those rights pending a determination of the claim. See, e.g., Act of 1993, c.310 (equitable relief available when appellant's civil service rights are infringed provided appellant establishes that his injury has be caused "through no fault of his own"); Leary v. Town of South Hadley, 22 MCSR 366 (2009) (the proper response to a disputed order is to "obey and grieve"); Ouellette v. City of Cambridge, 19 MCSR 299 (2006) (same).

Id., 23 MCSR at ---.

Although NBSC may have erroneously chosen to layoff Mr. Pamplona (when it would have preferred to retain him) because it believed there was no other alternative, by his refusal to accept the demotion he was offered, Mr. Pamplona failed to mitigate his loss and cannot be said to have suffered a loss of his employment "through no fault of his own." For this reason, to be consistent with the intent and purposes of Chapter 310, relief

is appropriate prospectively only and is subject to the result of the NBSC's due reconsideration, in retrospect and in the exercise of sound discretion, whether or not to restore Mr. Pamplona to his position in place of Mr. Johnson.

RELIEF TO BE GRANTED

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the NBSC, within 30 days of the effective date of this Decision, and after such further hearing as it may decide is appropriate, is ordered to reconsider the decision to layoff the Appellant, Alfred Pamplona, and to retain Wayne Johnson, under the principles set forth in this Decision. If after such reconsideration, the NBSC determines that, in its discretion, it chooses to employ Mr. Pamplona in the position of Groundskeeper, it shall forthwith take such action as required, including without limitation, initiating a Section 41 just cause hearing to demote Mr. Johnson to the position of Laborer, so as to restore Mr. Pamplona prospectively to his position as Groundskeeper and to enable Mr. Johnson to bump any incumbent Laborer with less seniority that him.

If, after such reconsideration, the NBSC determines that, in its discretion, it prefers to employ Mr. Johnson in the position of Groundskeeper, it shall forthwith take such action as required to enable Mr. Pamplona to elect demotion to the position of Laborer prospectively and to bump any incumbent Laborer with less seniority than him.

In keeping with the scope of the authority provided in Chapter 310, the Appellant shall be restored to his position as Groundskeeper or allowed to elect demotion to the position of Laborer solely on a prospective basis. This relief is not intended to provide the Appellant with any additional and/or retroactive compensation.

For the reasons and to the extent stated above, the appeal of the Appellant, Alfred

Pamplona, is hereby ***allowed in part***.

Civil Service Commission

Paul M. Stein,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on. December 16, 2010.

A True Record. Attest:

Commissioner

Commissioner McDowell was absent on December 16, 2010.

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 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:
Jaime DiPaola-Kenney, Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Appointing Authority)