COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

CHARLES A PICARD, JR.
Appellant

v.

CITY OF QUINCY,
Respondent

CASE NOS: D-10-213

Appellant Charles Picard	Pro Se
Attorney for City of Quincy	Janet S. Petkun, Esq. Assistant City Solicitor Office of the City Solicitor Quincy City Hall 1305 Hancock Street Quincy, MA 02169
Commissioner:	Paul M. Stein

DECISION

The Appellant, Charles Picard, appealed to the Civil Service Commission (Commission), claiming that he was unlawfully demoted by the City of Quincy (Quincy) from his position as Special Heavy MEO in the Highway Division of the Quincy Department of Public Works (DPW). A full hearing was held before the Commission on December 6, 2010. Nine Exhibits were marked at the hearing and a package of additional documents were submitted after the hearing by Quincy and Mr. Picard, which were marked Post-Hearing (PH) Exhibits 11 and 12 respectively. The Commission received a post-hearing memorandum from Quincy on December 29, 2010.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits; to testimony of the Appellant, Quincy DPW Highway Division Operations Manager Joseph Newton and Quincy DPW Highway Department Highway Foreman Edward Leary, and to inferences reasonably drawn from the evidence I find credible, I make the findings of fact set forth below.

1. The Appellant, Charles Picard, is a 17-year tenured labor service employee of the Quincy DPW Highway Division. He held the job title called "Special Heavy Motor Equipment Operator/ Laborer/Painter" (Special Heavy MEO) from April 2001 until July 1, 2010, when his job title was changed to "Heavy MEO II/Laborer" (Heavy MEO). At all times relevant to the facts involved in this appeal, Mr. Piccard held a Massachusetts Class B Commercial Driver's License (CDL) and a Massachusetts Department of Public Safety Hoisting Engineer License. (*Undisputed Facts; Exhs. 3, 4 & 10; PH Exh. 11; Testimony of Appellant & Leary*)

2. Mr. Picard's change of job status was the result of a city-wide reduction in force implemented by Quincy for FY2011 due to lack of money, which resulted, among other things, in the elimination of four Foremen's positions and one clerical position in the DPW Highway Division, and a total reduction in DPW personnel from 49 to 44. As a consequence of the "bumping rights" exercised by these Foreman and others, Mr. Picard lost his position of Special Heavy MEO to a more senior employee. Mr. Picard does not dispute the budgetary shortfall that necessitated these cuts or the seniority status of the employees who serially exercised their "bumping rights" which lead to his demotion. (*Exhs. 3 &.4: Testimony of Appellant & Newton*)

3. The Quincy DPW accounting ledgers carry four basic levels of MEO: (a) MEO/Laborer; (b) Heavy MEO I/Laborer; (c) Heavy MEO II/Laborer; and (d) Special Heavy MEO. (*Exhs. 4*)[1]

[1] Quincy also employs several others who hold specialized titles called "Heavy MEO/Mason" and "Heavy MEO/High Pressure Media", but these positions do not appear germane to the issues in this appeal.

4. The essential differences in the qualifications for these positions involve the kind of licenses the employee must hold – an MEO/Laborer is only required to hold an ordinary driver's license necessary to operate smaller vehicles (less than three tons); a Heavy MEO I must possess a Class B CDL necessary to operate motor vehicles between three tons and nine tons; a Heavy MEO II must hold both a Class B CDL and a Hoisting License which allows operation of certain specialized hydraulic equipment, such as backhoes, cranes, shovels and front-end loaders; a Special Heavy MEO must possess a Class A (or Class 1) CDL, which authorized the operation of motor vehicles over 9 tons as well as a Hoisting License. (*Exhs. 1, 2 & 4; PH Exh. 12; Testimony of Leary*)

5. These distinctions appear to derive from a combination of the job title distinctions for MEO, Heavy MEO and Special MEO and Hoisting Equipment Operator as contained in the Massachusetts Municlass Manual Mobile Industrial Equipment Operations Group (5700), Motor Equipment Operating Series and Hoisting Equipment Operating Series. Although Quincy produced "Form 30" job descriptions for the Special MEO and Heavy MEO II titles, they are unsigned and undated and do not appear to be have been formally approved by the appropriate Quincy Labor Service Director or submitted to the Massachusetts Personnel Administrator [HRD] for inclusion in Quincy's classification plan. *(Exhs 1, 2, 4 & 9; PH Exh. 11; Testimony of Newton & Leary; Administrative Notice [www.mass.gov.csc (HRD Municlass Manual); Quincy (1979) Classification Plan on File with HRD; HRD Delegation of Municipal Labor Service Administrative Manual]*)

6. For a year or more, the Quincy DPW has not owned or used equipment that requires the operator to hold a Class 1 (or Class A) CDL. (*Testimony of Appellant, Newton & Leary*)

7. As of July 1, 2010, all Special Heavy MEOs currently employed in the Quincy DPW Highway Division hold Class 1 (Class A) CDLs. (*PH Exh. 12; Testimony of Leary*)

8. In practice, the distinction between job duties performed by Special Heavy MEOs and Heavy MEO IIs involved the types of equipment and jobs that the employees would customarily work. For example, it had been is customary for a Special Heavy MEO to operate street sweepers and backhoes, although neither piece of equipment is over 9 tons and, technically, also could be operated by a Heavy MEO with a Class B CDL as well. (*Exh 7; Testimony of Appellant*)

9. Mr. Picard asserts that, since his demotion from Special Heavy MEO to Heavy MEO II, his job duties have not materially changed. He says he still performs essentially the same work that he had performed as a Special Heavy MEO. Except for having received a "stipend" supplement to his pay for one such assignment, he says he has been doing the same work as Special Heavy MEO (e.g. ,operating sweepers, backhoes, etc.) at the lower rate of pay of a Heavy MEO II. (*Exhs. 7 & 10; PH Exh. 12; Testimony of Appellant; See also Exhs 8A-ID & 8B-ID*)

10. Mr. Picard also points to Article XXXIII of the Collective Bargaining Agreement (CBA) between Quincy and Laborers' Local Union 1139, which mandated that MEO's working "out of grade" must receive pay at the higher grade. (*Exh. 5*)

CONCLUSION

The process by which an appointing authority may execute a reduction in force for lack of money is prescribed by G.L.c.31, §39, which requires that layoffs must proceed in accordance with seniority – the most senior employees holding jobs that are eliminated to be retained – and sets up the process of "bumping rights" by which the least senior employee in a job title to be eliminated may elect to be demoted to a lower title held by an employee with less seniority (or a

provisional employee with no seniority). Violations of Section 39 may be appealed to the Commission and, if the employee can establish that "the rights of such person have been prejudiced thereby", the Commission "shall order the appointing authority to restore such person to his employment immediately without loss of compensation or other rights." Id.

In the present case, Mr. Picard does not dispute that Quincy was justified to execute the reduction in force which necessitated the elimination of the jobs of five DPW employees, including four Foreman, or that his seniority rights were violated by the process of bumping that ensued from this reduction. Rather, Mr. Picard asserts, in effect, that his demotion is a subterfuge that reduced his pay without changing his duties, that he was the only Special Heavy MEO singled out for this discriminatory treatment, and that budgetary constraints which lead to the overall reduction in the DPWs budget could, nevertheless have accommodated the pay differential that would have been required to keep him in his former title.

Mr. Picard carries a heavy burden to establish that Quincy could "afford" to keep him in his former position. The Commission has been clear that it has a very limited role in reviewing the cost-cutting choices made by an appointing authority faced with a serious budgetary shortfall. See Ameral v. City of Fall River, 22 MCSR 653 (2009); Bombara v. Department of Mental Health, 21 MCSR 255 (2008); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of 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 Committee, 8 MCSR 64 (1995) As stated in Gloucester v. Civil Service Comm'n, 408 Mass. 292, 299-300 (1990):

> "[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."

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); Commissioner of Health & Hospitals v. Civil Service Comm'n, 23 Mass.App.Ct. 410, 413 (1987); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995)

Here, there is insufficient evidence in the record to permit the Commission to infer any bad faith on Quincy's part. Mr. Picard was not singled out for demotion; rather, his reduction in rank was simply the consequence of an undisputedly proper reduction in force and the ensuing bumping rights of more senior personnel. cf. Denham v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap into reserve fund); City of 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).

Moreover, there is a more critical reason why Mr. Picard's appeal must fail. It is undisputed that he does not hold a Class 1 CDL, which is a stated prerequisite for appointment to a position of Special Heavy MEO. While it may be argued that Quincy has overlooked that requirement in elevating Mr. Picard originally, the Commission cannot be put in the position of ordering that an employee be put into a position for which he does not meet the minimum qualifications.

The fact that Quincy does not presently own and operate equipment for which a Class 1 CDL is necessary does not alter the result. The requirement that the highest grade of MEO hold a

Classs 1 CDL is not arbitrary or capricious. Indeed, the distinction is expressly authorized, in principle, by the job classifications established in HRD's Municlass Manual., although, apparently, using somewhat different job titles from those employed by Quincy. All of the Special Heavy MEOs currently employed by Quincy do appear to meet that job requirement.

Similarly, it would not matter that, Quincy applies an equipment-specific distinction in terms of whether an employee should be treated as a Special Heavy MEO or receive "out of grade" pay for acting in that capacity, as Mr. Picard argues. These matters are properly the subject for interpretation of the applicable provisions of the CBA or a "past practices" claim, for which a grievance may lie. Nothing under Civil Service Law, however, authorizes the Commission to rule on those issues.

That said, the Commission is troubled by the disconcerting state of the record of Quincy's compliance with its obligations under Civil Service Law to adhere to the rules that require a properly promulgated and approved classification plan and appropriate Form 30 job descriptions issued in conformity with its obligations prescribed by it Labor Services Delegation Agreement and HRD's Delegation of Municipal Services Administration Manual. As noted in a related Decision of this date involving Mr. Picard, among others, and the City of Quincy (CSC Case Nos G2-09-352, G2-09-353, D-10-28, D-10-29), Quincy appears to have overlooked or ignored its obligations in this regard for a considerable period of time. This shortcoming has been a material contributing factor to the many appeals that have emanated from the City of Quincy in recent years.

Accordingly, as expressed in the related Decision above, the Commission reiterates its belief that it would behoove HRD and the City Quincy to confer in the near future, sooner rather than

later, to review the state of their delegation agreement, as well as the labor service classification plans and official service titles

The Commission puts Quincy on notice that it Labor Service Director must take immediate steps to insure that Quincy is brought into full compliance with all of its labor service obligations under Civil Service Law. Should Quincy be unable to demonstrate such compliance on or before January 1, 2012, the Commission may exercise its authority to open an investigation pursuant to its authority under G.L.c.31,§2(a) and to take such action, including the granting of appropriate relief, as may be warranted.

Accordingly, for the reasons stated above, the appeals of the Appellants, Ms. Picard, is d***ismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis [Absent], McDowell, and Stein, Commissioners) on 11, 2011.

A True Record. Attest:

_____
Commissioner

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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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:
Charles A. Picard (Appellant)
Janet S. Petkun, Esq. (for Appointing Authority)
Martha Lipchitz O'Connor, Esq. (HRD)