Decision mailed: 11/13/09
Civil Service Commission
CB

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

LEO PIKE,
Appellant
v.
CITY OF NEW BEDFORD,
Respondent

CASE NO: D1-09-77

Appellant's Attorney: William M. Strauss, Esq.
15 Hamilton Street
New Bedford, MA 02740

City of New Bedford Attorney: Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
City of New Bedford Law Department
133 William Street
New Bedford, MA 02740

Commissioner: Paul M. Stein

DECISION

The Appellant, Leo Pike, acting pursuant to G.L.c.31, §§41-43, appealed to the Civil Service Commission (Commission) from a decision of the City of New Bedford Fire Department (NBFD), the Appointing Authority, acting under G.L.c.31, §39, to select him for layoff from his position as Firefighter due to a lack of funds. The Appellant was on military leave status and deployed in Iraq on active duty at the time. He contends he was prejudiced by the failure of the NBFD to provide due notice of his layoff. A full hearing was held by the Commission on August 14, 2009 at the Southern New England School of Law in North Dartmouth, Massachusetts. The hearing was declared private as no party requested a public hearing. New Bedford called two witnesses and the Appellant called one witness and testified on his own behalf. Twenty-one exhibits were received in evidence. The hearing was digitally recorded. The Commission received post-hearing submissions from each of the parties on October 23, 2009.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, to the testimony of the witnesses (the Appellant; NBFD Chief Paul Leger, NBFD Lieutenant James Allen and NBFD Lieutenant Scott Almeida) and to inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Leo Pike, was appointed to the civil service position of Firefighter with the NBFD with a seniority date of July 3, 2005. (*Exhibit C-1*)

2. Article 18 of the collective bargaining agreement between the City of New Bedford and Firefighter Pike's bargaining unit (Local 841, International Association of Firefighters) specified that NBFD firefighters must reside in the City of New Bedford at the time of hire and for a minimum of four years thereafter. Firefighter Pike knew of this requirement. (*Testimony of Appellant; Exhibits C-3,C-19 & C-22 New Bedford Policies and Procedures[Post-hearing Exhibit]*)

3. At the time of hire, Firefighter Pike resided at 102 Frederick Street, New Bedford and so certified to the NBFD. (*Exhibits C-2 & C-4*)

4. During his tenure with the NBFP, Firefighter Pike moved his residence within the City of New Bedford three times. Each time he moved, he provided notice of the change of address to the NBFD. Pursuant to applicable procedure, documentation of the change of address was prepared by the NBFD, with one copy put "in the box" for transmission to the New Bedford Personnel Department, with one or two copies retained by the NBFD to be placed in the employee's file and/or provided to the employee. (*Testimony of Chief Leger, Lt. Almeida, Appellant; Exhibits C-5,C-6, C-7 & C-22[New Bedford Policies and Procedures-Post-hearing Exhibit]*)

5. On or about May 19, 2009, Firefighter Pike received orders activating him for military duty in his capacity as a member of the United States Navy Reserve. He was ordered to report on June 20, 2008 to temporary duty stations in Newport RI and Gulfport MS, and Brunswick ME, in preparation for deployment to Iraq. Firefighter Pike provided copies of his orders to Chief Leger on or about May 22, 2009 who initiated the paperwork required to authorize a military leave of absence. (*Testimony of Chief Leger; Appellant; Exhibit C-8*)

6. The May 19, 2008 military orders to Firefighter Pike were so-called "recall" orders, as Firefighter Pike had been mobilized earlier in the year and had served on active duty from March 25, 2008 until May 17, 2008, when he returned to duty with the NBFP, pending his recall for mobilization to Iraq. (*Testimony of Appellant; Exhibits C-1 & C-8*)

7. In anticipation of his deployment overseas, Firefighter Pike vacated the New Bedford apartment on Adams Street. He lived briefly with his girlfriend who resided in Lakeville while he was in the area pending his deployment overseas. Firefighter Pike and his girlfriend had maintained separate residences for some time prior to his activation to military duty. I find that Firefighter Pike had no intention of making his girlfriend's home his permanent residence, but solely intended it to be used as a temporary residence and mailing address while he was on active duty and military leave status from the NBFD. (*Testimony of Appellant; Lt. Almeida*)

8. Firefighter Pike informed his superior officer, Lt. Almeida, that he had vacated his Adams Street apartment and Lt. Almeida imitated the paperwork to change the mailing address to Lakeville. Lt. Almeida knew that Firefighter Pike's girlfriend lived in Lakeville and had been to her home on occasion. (*Testimony of Lt. Almeida, Appellant*)

9. Firefighter Pike's military orders referenced his girlfriend's Lakeville address, as well as the addresses, names and telephone numbers of a point-of-contact for each of Firefighter Pike's three assigned state-side duty stations. These contact persons, especially those at his "parent" unit stationed in Brunswick, ME, had means to locate members of the unit at any time, even when deployed in combat areas. In addition, the orders contained a section entitled "Contact Information" which referenced, among other things, contact information for the National Committee for Employer Support of the Guard and Reserve (NCESGR), www.esgr.org. (*Testimony of Appellant; Exhibit C-8*)

10. Command personnel at the NBFD were knowledgeable about the NCESGR and knew it to be a source for employers to seek assistance concerning employment matters concerning their employees deployed oversees on military assignment. Lt. Almeida said he "knew how to reach" Firefighter Pike and had communicated with him via e-mail and, possibly telephone, during his military leave. (*Testimony of Chief Leger; Lt. Almeida, Appellant*)

11. The NBFD had granted military leave of absences to at least four other NBFD fire officers prior to Firefighter Pike. (*Testimony of Appellant; Exhibit C-8 [NBFD Memo dated June 12, 2008]*).

12. While serving on active military duty, Firefighter Pike received differential pay from the NBFD of $282.62 per week. The evidence does not indicate how that pay was transmitted to Firefighter Pike, but the Commission infers that it was directly deposited in to a bank account and not mailed. (*Exhibit C-8 [NBFD Memo dated June 12, 2008]*)

13. In February 2009, the City of New Bedford was notified that, as a result of the implementation of so-called "9C cuts" in local aid ordered by the Governor, the city

would be facing a reduction in local aid funds for the remainder of FY2009 in the amount of $2,789, 923.00. (*Testimony of Chief Leger; Exhibits C-18 & C-20*)

14. As a result of this reduction in local aid funds, the City of New Bedford cut the NBFD account by $459,951.48, requiring that more than 30 NBFD firefighters must be laid off for lack of money. I find that the City of New Bedford had just cause to execute this number of layoffs from the NBFD. (*Testimony of Chief Leger; Exhibits C-18, C-20*)

15. Firefighter Pike's hire date of 7/5/2005 put him in 26th place in inverse order of seniority among firefighters in the NBFD.[1] Thus, he fell within the range of the firefighters whom the City of New Bedford selected for layoff based on the reverse order of their civil service seniority. (*Exhibits C-1, C-20*)

16. On February 12, 2009, Chief Leger mailed notices to the NBFD firefighters who had been selected for potential termination due to lack of money and informed them of their rights under civil service law, including a right to hearing, which was scheduled for February 24, 2009. The letter was sent to Firefighter Pike, certified mail, return receipt requested, directed to his Adams Street, New Bedford address. It is undisputed that this letter was never delivered to Firefighter Pike and was returned undelivered to the NBFD on or after March 5, 2009. (*Testimony of Chief Leger, Lt. Allen, Appellant; Exhibit C-10*)

17. At the time Chief Leger issued the layoff notice letters, he knew that Firefighter Pike was deployed in Iraq. Chief Leger unsuccessfully attempted to contact Firefighter Pike's father to find out if there was another way to reach his son. He also spoke to the

---

[1] Firefighter Pike shares the same hire date as 11 other firefighters. As was the practice at the time, a lottery was used to determine the order of their seniority and that was the order in which they were considered for layoff. The propriety of such a procedure to establish seniority among candidates hired from the same certification list was not questioned and would not appear to be germane to any issue raised in this appeal. (*Testimony of Chief Leger, Appellant*)

Local 841 President, Lt. James Allen, for assistance in locating Firefighter Pike but received no additional helpful information. (*Testimony of Chief Leger, Lt. Allen*)

18. By coincidence, on February 18, 2009, NBFD sent a letter by regular mail to Firefighter Pike forwarding correspondence addressed to him at the fire station. That mail was returned with Firefighter Pike's Lakeville forwarding address indicated, which the NBFD received on or about February 23, 2009. (*Testimony of Chief Leger; Exhibit C-11*)

19. On February 24, 2009, Chief Leger held the hearing on the contemplated layoffs. A representative of Local 841 was present and advocated on behalf of the union members. (*Testimony of Chief Leger*; *Exhibit C-13*)

20. By letter dated February 26, 2009, certified mail return receipt requested, Chief Leger notified the firefighters who had been selected for layoff, including Firefighter Pike. The February 26, 2009 letter was sent to the Lakeville address about which the NBFD had just learned. (*Testimony of Chief Leger; Exhibit C-13*)

21. A few days after Chief Leger's February 26, 2009 letter arrived in Lakeville, Firefighter Pike made one of his regular (weekly or so) calls from Iraq to his girlfriend and learned about his layoff for the first time. This appeal duly ensued. (*Testimony of Appellant; Claim of Appeal*)

22. Firefighter Daniel E. Coons is a NBFD firefighter with less seniority than some firefighters laid off in February 2009. He was not selected for layoff because of his status as a disabled veteran. (*Testimony of Chief Leger, Lt. Allen, Exhibit C-21*)

23. Firefighter Pike asserts he is qualified for disabled veteran's status. He testified at the hearing that, in April 2009, he started the "lengthy process" of obtaining the medical documentation to establish his disabled veteran's status. (*Testimony of Appellant*)

CONCLUSION

Summary

The Commission agrees that the NBFD failed to give the Appellant timely notice of his layoff as required by Sections 39 and 41 of the Civil Service Law, but he has failed to show how the violation prejudiced his selection for layoff, other than the timing of his termination, which should have been deferred until New Bedford had confirmation that he had received notice and was afforded an opportunity for hearing. The Commission will allow the appeal, in part, solely to provide the Appellant equitable relief for the limited period of continued employment that he would have enjoyed had New Bedford followed appropriate procedure. The parties are encouraged to stipulate to the applicable period, but in the absence of agreement, the Commission will order reinstatement from February 26 through March 23, 2009 (the date the Appellant turned-in his equipment to the NBFD), by which date it is undisputed that the Appellant's receipt of notice of layoff was confirmed and he and was available to participate in a hearing.

Applicable Civil Service Law and Rules

The order in which civil service employees are to be laid off in the case of lack of money is prescribed by G.L.c.31, §39, which provides in relevant part:

> [P]ermanent employees . . . having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions . . . *according to their seniority* in such unit and shall be reinstated . . . according to such seniority, so that *employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest* and reinstated first. . . .
>
> *Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work of lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one*. Any 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 . . . (*emphasis added*)

Seniority is defined in Section 33 and means:

> ". . .ranking based on length of service . . . computed from the first date of full-time employment. . .unless such service has been interrupted by an absence . . .of more than six months, in which case length of service shall be computed from the date of restoration . . . provided, however, that the continuity of service of such employee shall be deemed not to have been interrupted if such absence was the result of (1) military service, illness, educational leave, abolition of position or lay-off because of lack of work or money, or (2) injuries received in the performance of duty . . .

Appointing authorities also must adhere to the requirements of G.L.c.31, §26, which provides: "A disabled veteran shall be retained in employment in preference to all other persons, including veterans." [2] Thus, disabled veterans with less seniority that other employees must be retained and are the last to be laid off in a reduction in force. See, e.g., Provencal v. Police Dep't of Worcester, 423 Mass. 626 (1995).

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

> "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*." (*emphasis added*)

A tenured civil service employee who is terminated by an appointing authority which has failed to follow the requirements of Section 41 may appeal to the Commission.

[2] G.L.c.31, §1, defines a "disabled veteran" to mean "any veteran , as defined in this section, who (1) has a continuing service-incurred disability of not less than ten percent based on wartime service for which he is receiving or is entitled to receive compensation from the veterans administration or, provided that such disability is a permanent physical disability, for which he has been retired from any branch of the armed forces and is receiving or is entitled to receive a retirement allowance, or (2) has a continuing service-incurred disability based on wartime service for which he is receiving or is entitled to receive a statutory award from the veterans administration."

G.L.c.31,§42. 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.

Failure to Give Notice and Hearing

Civil service law clearly requires that a tenured employee be "given" written prior notice and hearing before he or she may be discharged. G.L.c.31, §41. The case law has construed this language to mean the actual receipt of notice. See Board of Selectmen of North Attleboro v. Civil Service Comm'n, 16 Mass.App.Ct. 388, 390 (1983), citing Ianelle v. Fire Comm'r of Boston, 351 Mass. 250, 251 (1954). See also Board of Assessors of Marlborough v. Commissioner of Revenue, 383 Mass. 876 (1981) (absent statutory language that recognize mailing as receipt, date of appeal is the date a certified letter was received, not the date it was mailed) This interpretation is particularly apt in the context of Sections 39 and 41, which consistently refer to "receipt" as the trigger for taking action and the time frame for responses is short, in some cases, just three days.

Since the facts establish that the efforts to "give" Firefighter Pike notice went awry and he never received any actual notice in advance of the termination hearing, New Bedford did not comply with the requirements of Sections 39 and 41 of the civil service law in terminating Firefighter Pike on February 26, 2009.

Prejudice to the Appellant

In order to be entitled to relief for a procedural violation of Section 41, Firefighter Pike must establish that his employment rights have been prejudiced. The Commission has set a high bar for appellants to meet this standard. See, e.g., Rizzo v. Lexington, 21 MCSR 70 (2008) (discharge; §42 appeal denied); Coronella v. Mashpee, 19 MSCR 67

(2006) (same); Gariepy v. Department of Correction, 19 MCSR 211 (2006) (same); Fopiano v. Scituate, 12 MCSR 154 (1999) (same); Dodge v. Athol Police Dep't, 11 MSCR 207 (1998) (same); Carey v. Nahant, 6 MCSR 149 (1993) (same).

The Appellant makes two arguments to show prejudice: he was denied the opportunity to claim disabled veteran's status and the opportunity to challenge the just cause for the layoff.

As to the first argument, the Appellant cannot show that his employment rights have been prejudiced because of his potential future status as a disabled veteran. The Commission finds that the layoff date is the applicable cut-off for claiming disabled veteran's status and that status must have been confirmed prior to the layoff decision.

Firefighter Pike did not hold disabled veteran's status at the time of the layoff. Even if he had been afforded notice and a proper hearing, he could not have claimed such status as a reason to prevent his layoff. Unlike Firefighter Coons, Firefighter Pike had not obtained the required documentation from the Veteran's Administration certifying that he was entitled to disabled veteran's status as required by the civil service law. Indeed, at the time of the hearing before the Commission, he had not yet obtained that documentation.

The procedure for obtaining a certification of disabled veteran's status is clearly spelled out on the Commonwealth's Human Resources Division website, www.mass.gov/hrd (Verifying Veteran's Status & Preferences). Without such documentation in hand, New Bedford was justified to apply the standard rules of seniority specified in Section 33 to the February 2009 layoff of employees and not to afford Firefighter Pike disabled veteran's status at the time of the layoff.

Second, in this case, there is no reasonable basis to believe that the Appellant could have contested just cause for his selection for layoff for any other reasons that were not adequately presented by the Appellant's union representative. No bona fides argument or substantial evidence was presented (either at the appointing authority level or at the hearing before the Commission) to suggest that the NBFD lacked just cause to layoff the number of selected firefighters that included the Appellant. Thus, Firefighter Pike cannot claim that the lack of notice and opportunity for hearing has prejudiced his rights on the grounds that he was not afforded the opportunity to challenge the just cause for the layoff generally.

The Timing of the Appellant's Layoff

Although the Commission does not go so far as to decide that NBFD's failure to give proper notice demonstrates Section 42 prejudice, as Firefighter Pike argues, the Commission does agree with him that notice and opportunity for hearing of layoff is a fundamental procedural right provided to tenured civil service employees. The Commission is also mindful that, in the particular circumstance of a Section 39 layoff, although the lack of funds necessitating a layoff of personnel may be undisputable, individual-specific issues as to who is retained and who is selected for layoff are of great importance to the personnel involved. Thus, the Commission must ensure consistency (both within and across appointing authorities) when it comes to individual layoff decisions due to a reduction in force.

In this regard, the Commission concludes that civil service law requires that an appointing authority must strictly follow both the notice requirements of Section 41, which require that a targeted employee "be given" actual notice, as well as the stated

seniority rules set forth in Sections 33 and 39, which require layoffs must be made on the basis of length of service (save for the disabled veteran's preference). Thus, on the one hand, in deciding the order of layoff in a reduction in force due to lack of money, the NBFD was correct to decide to: select and notify employees for layoff according to seniority and disabled veteran's status only; veteran's status (or deployment), alone, does not justify retention of an employee over more senior employees. On the other hand, when, as here, the appointing authority was unable to "give" actual and timely notice to a targeted employee, despite honest and good faith effort, the appointing authority may not terminate that employee until such time as due notice and opportunity to participate in a hearing can be "given" to him; in that case, the appointing authority may defer the layoff or select the next most senior employee to be laid off in the interim, until the less senior employee is given due notice and opportunity to respond and participate in a hearing.

The Commission expects that, in the vast majority of situations, notice will be given "in hand" and proof of notice will not be an issue. Even in the rare instances where an employee cannot be notified in person, it should be unusual that an employee cannot be given due notice by some other means and be able to respond, either in person or through a representative in a reasonably timely manner. While a member of the armed services deployed oversees may be hard to reach, the evidence in this case demonstrates that there are reasonable means to give notice even in those cases, if pursued diligently.[3]

The Commission recognizes that these rules may mean that appointing authorities must be flexible to make necessary adjustments during the layoff process – greater lead

[3] Notice issues are not unique to military personnel. There may also be some occasions when an employee is absent and unreachable for other reasons – death in the family, hiking in the wilderness, for example – and cannot be given due notice for a brief period. In the case of Firefighter Pike, the problem was not that he was unreachable, but that New Bedford failed to take the steps reasonably available that would likely have provide him due notice.

time, individually scheduled hearings and/or "deferred" layoffs, for example. The guiding principle remains that civil service law and equity prevent layoff of any person unless and until they have received due notice and opportunity for hearing in advance.

Thus, here, while Firefighter Pike's Section 42 employment rights were not prejudiced on the merits of his selection for layoff, and, therefore, he is not entitled to full reinstatement, the Commission does conclude that the lack of due notice did prejudice him through no fault of his own, within the meaning of Chapter 310 of the Acts of 1993, to the extent that his layoff was prematurely implemented when NBFD knew that he was deployed in Iraq and he had not received due notice. In the circumstances of this case, therefore, the Commission will exercise its discretion under Chapter 310 of the Acts of 1993 to grant the limited equitable relief described below.

RELIEF TO BE GRANTED TO THE APPELLANT

Pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the Commission directs that the Appellant, Leo Pike, be reinstated to his position Firefighter with the New Bedford Fire Department, effective February 26, 2009 through March 23, 2009 (the date Firefighter Pike reported to the NBFP to turn-in his equipment) or such other date as the parties may mutually agree to be the date on which the Appellant could have been terminated after receipt of due notice and hearing and afforded an opportunity to respond and participate in a hearing. In addition to the grounds generally available to reconsider a decision of the Commission, the Commission will entertain a motion to reconsider or re-hear this matter as to the forgoing relief if the parties believe there are further factual issues or legal arguments that need to be addressed by the Commission on that subject. In order to allow the parties time to fully review the Decision and/or

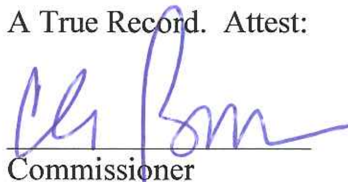
negotiate a suitable alternative termination date, the time for any such motion is extended to and including 30 days following the party's receipt of the Decision.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein, Commissioners; Taylor, Commissioner [absent]) on November 12, 2009

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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:
William M. Strauss, Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Appointing Authority)