

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

LUIS RIVERA,
Appellant

v.

Docket No. D-03-300

CITY OF BOSTON ELECTIONS DEPARTMENT,
Respondent

Appellant's Attorney:

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Boston, MA 02114

Respondent's Attorney:

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Office of Labor Relations
City of Boston
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Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Luis Rivera (hereafter "Appellant), is appealing the action of the Respondent, City of Boston Elections Department (hereafter "Department") as Appointing Authority, separating him from his position as Laborer in the Department for a lack of funds. The appeal was timely filed. The Respondent filed a Motion to Dismiss the Appellant's claim prior to the case being heard. The Respondent

argued that the Appellant's claim that others in the Department were doing his job was not an issue that the Civil Service Commission should decide and such an assertion fails to state a claim upon which relief may be granted. The Appellant did not file a brief to challenge the Respondent's motion and the Commission did not render a decision on the Motion prior to the hearing.

A full hearing was held on the section 43 appeal on February 14, 2006 at the offices of the Civil Service Commission. Two (2) tapes were made of the hearing. As no written request was received from either party, the hearing was declared to be private. The witnesses giving testimony were not sequestered.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Appointing Authority's (hereafter "City") Exhibits 1-7 and Appellant's Exhibit 1) and the testimony of the Appellant, the Appellant's father, Luis Rivera, Sr., Assistant Register of Voters Agnes Hurley, Department Chairperson and, as such, Appointing Authority Nancy Lo and City of Boston Budget Director Karen Conner, I make the following findings of fact:

1. The Appellant began working for the Department in June 1996.
(Testimony of the Appellant)
2. The Appellant received a notice letter dated July 7, 2003 informing him that a hearing would be held on July 16, 2003, in accordance with G.L. c.

- 31, § 41, to determine if he should be laid off for lack of funds. (City Exhibit 4)
3. After the hearing, the Appellant was separated from his position as a Laborer in the Elections Department for the City of Boston by way of letter dated July 23, 2003. (City Exhibit 5)
 4. The July 23, 2003 written notice from the Department stated that the Appellant would be laid off from his position on August 5, 2003 due to “the City’s budgetary and fiscal situation caused by reductions in Local Aid funds provided by the Commonwealth of Massachusetts to the City and other fiscal constraints including the impending purchase of optical scanners to replace the heavy lever machines.” (Id.)
 5. The Appellant’s job duties required him to provide laborer services to the Department. The Appellant emptied trash barrels, moved boxes and sorted mail. (Testimony of Lo and the Appellant)
 6. At the time of the layoff the Appellant was the only employee with a Laborer title in the Department budget. (Testimony of Lo and City Exhibit 3)
 7. There are no other job titles within the Appellant’s job series in the budget of the Department. (Testimony of Lo and City Exhibit 3)
 8. Nancy Lo, then-Commissioner for the Department, offered testimony which carried the type of detail and clarity that provided indicia of accuracy and reliability. She credibly explained the creation of a departmental budget after the City’s Budget Office required the

Department to cut its budget from the previous fiscal year because of a loss of State Aid. (Testimony of Lo)

9. The Department's fiscal year begins on July 1 and ends on June 30 of the following year. The Department begins generating a spending plan for any given fiscal year at the beginning of the preceding fiscal year. Work on the Fiscal Year 2004 (FY2004) budget thus began in 2003. (Testimony of Connor)
10. The FY2004 budget was completed prior to July 1, 2003. (Id.)
11. Figures contained in the spending plan are generated by figures agreed to by the Department and the Office of Budget Management. These figures indicate, among other things, the amount of personnel monies available for full-time employees. (Id.)
12. When spending plans are submitted to the Office of Budget Management, budget analysts from the Office confer with the Department to determine what impact proposed cuts would have on particular areas. (Id.)
13. The final budget consists of a series of appropriations for each of the Department's accounts. (Id.)
14. The City had received a \$22.1 million dollar reduction in State Aid straining the City's budget for all departments, including the Department. (City Exhibit 7 and Testimony of Connor)
15. Also in FY2004, the Department was required by the federal government to buy new voting equipment, causing additional strain on the Department's budget. (Testimony of Lo)

16. The Department lost \$623,382 dollars in personnel funds for permanent employees. (City Exhibit 2)
17. The Department may only pay for full-time employees out of the line-item earmarked for Permanent Employees. (Testimony of Connor)
18. Total Personnel Services faced a projected deficit of \$641,889 for FY2004. (City Exhibit 2)
19. Before addressing the possibility of layoffs, the Department implemented an early retirement program and other cost-cutting measures, including voluntary furloughs, consolidation of health insurance plans and a lump-sum retirement incentive for employees who had already reached their maximum retirement benefit. A total of 411 employees from non-public safety and non-school departments had to be laid off. (Testimony of Connor)
20. When the various cost cutting measures failed to satisfy the budget crisis, the Office of Budget Management forced Departments to identify positions where layoffs were possible. (Id.)
21. The Department's Commissioner developed a plan to staff the Department and still accomplish the major goals of the Department. In total, 9 members of the Elections Department had to be separated from the payroll. (Testimony of Lo)
22. The Laborer position was removed from the Department's budget for FY2004. (City Exhibit 3)

23. The Appellant was the only Laborer in the Department. (Testimony of Lo)
24. Then-Commissioner Lo gave a credible explanation as to why the Appellant's position was slated for layoff, i.e. because the duties of the Appellant were shared with other employees in the Department and an outside contractor was hired to clean the office every night. The Appellant's position was considered expendable in the eyes of the Appointing Authority because the City had an existing contract with an outside vendor for the disposal of trash and the Appointing Authority would not need to assign that duty to anyone after the Appellant was laid off. Additionally, other employees in the Department sorted mail and moved boxes. (Id.)
25. The position of Assistant Registrar of Voters is used by the Elections Department to register residents of the City to vote. (Exhibit 13 and Testimony of Lo)
26. The Appellant did not perform the same duties as those in the Assistant Registrar of Voters job series and did not have sufficient computer skills to do so. (Testimony Lo)
27. The only testimony offered by the Appellant that he did any Registrar of Voters work was of two occasions, in his eight-year tenure working in the Department, when he assisted an Assistant Registrar of Voters outside City Hall who was registering voters and when he accompanied an

Assistant Registrar of Voters who needed interpretive services.
(Testimony of the Appellant)

28. I find that the Appellant was a polite young man and his demeanor was gentlemanly and respectful. However, his statements and answers were hesitant, disjointed and somewhat incoherent at times. His testimony was not beneficial to supporting his appeal.
29. The Department advised the Appellant of his rights to accept a voluntary demotion in lieu of a layoff, pursuant to G.L. chapter 31, section 39. (City Exhibit 5)
30. When a laborer vacancy opened in another department, the Department of Parks and Recreation, in February 2005, the City offered the position to the Appellant. (Testimony of the Appellant, Rivera, Sr. and Lo)
31. The Appellant chose not to accept the position because he was under the mistaken impression that the position did not include benefits. (Testimony of the Appellant)
32. The Appellant's father thought the Appellant was wrong in his belief that the position did not include benefits. He recalled that the Parks and Recreation Laborer position offered to the Appellant did include benefits after a probationary period was served. (Testimony of Rivera, Sr.)
33. The Department employs temporary or "emergency" workers on a seasonal basis depending on the timing of various elections that need to be held. These positions include poll workers and other one-day positions and are paid minimally (approximately ten (10) dollars per hour) from

funds budgeted in the “Emergency Employee” account. (Testimony of Connor)

34. On at least two other occasions the Department had temporary positions open and offered them to the Appellant, but he refused the offers. (Testimony of Lo and the Appellant)

35. Since the Appellant was laid off, the Elections Department has hired no one into a Laborer position or any other title in the Appellant’s job series. (Testimony of Lo and City Exhibit 3)

CONCLUSION:

When presented with an appeal pursuant to G.L. chapter 31, section 43, the Civil Service Commission seeks to determine whether the Appointing Authority had reasonable justification for the action taken against the Appellant. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997), Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983), McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995), Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000), City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). The removal of a tenured civil service employee for a lack of funds is an action that the Appointing Authority may only make with requisite just cause, and that finding of just cause is subject to the Commission’s review. LePage v. Department of Mental Retardation, Civil Service Commission Case No. D-03-416 (June 2005). G.L. chapter 31, section 39 provides that, “Any action by an Appointing Authority to separate a tenured employee

from employment for the reasons of lack of work or lack of money...shall be taken in accordance with the provisions of section forty-one”.

An Appointing Authority is reasonably justified in separating an employee from his/her position for a lack of funds upon a demonstration of a good faith belief that such separation was reasonably necessary as a cost-saving function. Debnam v. Belmont, 388 Mass. 632,634 (1983), Commissioner of Health and Hospitals of Boston v. Civil Service Commission, 23 Mass. App. Ct. 410, 413 (1987), City of Gardner v. Bisbee, 34 Mass. App. Ct. 721, 723 (1993). If the employee can prove that the Appointing Authority’s explanation of a lack of funds is merely a pretext for an improper motive for separation, i.e. a motive not in accordance with the basic merit principles of the civil service law, then the Appointing Authority is not justified in making such separation. Mayor of Somerville v. District Court of Somerville, 317 Mass. 106, 109 (1944), Cambridge Housing Authority v. Civil Service Commission, 7 Mass. App. Ct. 586, 589 (1979), Commission of Health and Hospitals of Boston, 23 Mass. App. Ct. at 413. Absent such proof the Commission cannot override a good faith determination by the Appointing Authority that such separation is made for cost-saving purposes. School Committee of Salem v. Civil Service Commission, 348 Mass. 696, 698-699 (1965), City of Gloucester v. Civil Service Commission, 408 Mass. 292, 299-300 (1990), Shaw v. Board of Selectmen of Marshfield, 36 Mass. App. Ct. 944, 926 (1994), Sheriff of Plymouth County v. Plymouth County Personnel Board, 440 Mass. 711, 713 (2004).

In this instance the Department made a good faith decision to layoff a number of employees to combat the foreseen budgetary shortfalls for FY 2004. The City was facing a \$21 million dollar shortfall in State Aid. The Department faced deficits in many accounts and had to implement cost-saving measures. The Department implemented several alternate measures to prevent the need for involuntary layoffs, including offering incentives for early retirement and consolidation of health care plans and lump sum retirement incentives for people who would not have benefited by an early retirement incentive. The City reasonably believed that, after undergoing several cost-saving measures, layoffs would be necessary. Then-Commissioner Lo provided a reasonable explanation as to how the Appellant's duties had become redundant and that, therefore, the Laborer position was deemed to be additional and expendable.

Furthermore, the core function of the Department is to register citizens to vote and conduct elections. Most of the employees in the Department are directly involved in that process. The Appellant testified that on occasion he performed functions related to the Assistant Registrar of Voters job series. The Appellant argues that this makes him the functional equivalent of an Assistant Registrar of Voters and that he should not have been laid off. However, the Appellant could only cite two occurrences of any work he did registering voters. The Appellant agreed that, except on those two occasions since he was hired in 1996, his duties consisted of emptying trash barrels, filling water coolers, moving boxes and sorting mail.

The Appellant points to the use of temporary employees in the payroll budget as indicative of a lack of just cause for the decision to layoff the Appellant. If these temporary employees performed any function he performed, the Appellant argues, then the Department's assertion that it needed to lay the Appellant off is unsound. However, the City pays these temporary workers only ten dollars per hour on a seasonal basis dependent upon what elections are scheduled to take place. Moreover, these workers perform duties that directly relate to the department's primary function, the registration of voters. The Department's budget projection for temporary workers is based upon the election cycle for the coming fiscal year. The Department's conclusion that retaining funding in that account was reasonable, based upon the cyclical nature of the elections in the City and the work that the temporary workers performed. It is not within the power of the Commission to question the economic decisions of an Appointing Authority absent a demonstration of unlawful motivation. City of Gloucester, 408 Mass. at 299-300 (Appellant's layoff for lack of funds upheld as a justified exercise of the city's discretion, even while new permanent appointments were made in other departments and a wage increase occurred in the Appellant's own department). The Appellant has not satisfactorily shown that the Department had anything less than a good faith belief that the use of a laborer was not a necessary operating expense.

In the Elections Department, budgeted positions were depleted from 37 in Fiscal Year 2003 to 20 in Fiscal Year 2004 because the Department suffered a loss of \$641,889 in its personnel budget during that period. Specifically, the number of Laborers in the

Department was reduced from one in Fiscal Year 2003 to zero in Fiscal Years 2004, 2005 and 2006.

Documentary evidence shows that the Department was faced with a legitimate lack of funding that necessitated the elimination of the Appellant's Laborer position. Holman, et al v. Arlington, 17 MCSR 108 (2004); and Anderson v. Dept. of Revenue, 17 MCSR 90 (2004). Economic reasons such as lack of funds may constitute just cause for termination and the abolishment of a position. G.L. c. 31, § 39; see Debnam v. Belmont, 388 Mass. 632, 634 (1983); Mayor of Somerville v. Dist. Ct. of Somerville, 317 Mass. 106 (1944). See also Joslow v. Dept. of Mental Health, 8 MCSR 217 (1995); Snidman v. Dept. of Mental Health, 8 MCSR 128 (1995). "The courts have ruled that the Appointing Authority is to have great discretion in making this determination", and the commission "may not, in the guise of protecting an aggrieved employee, substitute its judgment for that of an Appointing Authority as to the wisdom of a particular reorganization plan undertaken for reasons of economy." Holman, at 108-109 citing School Comm. of Salem v. Civil Svc. Comm'n., 348 Mass. 696, 698-699 (1965).

Therefore, the Department has met its burden of producing a preponderance of evidence to demonstrate that the Appellant's separation in July 2003 for lack of funds was reasonably necessary and justified as a cost-saving function. Concurrently, the Appellant has not produced any evidence to demonstrate that the Department's evidence on funding constraints was a mere pretext for an improper motive for his separation. For

all of the reasons stated herein, therefore, the appeal on Docket No. D-03-300 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Chairman Goldblatt, Guerin, Marquis and Bowman, Commissioners) [Taylor, Commissioner absent] on February 8, 2007.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c 30A s.14(1) for the purpose of tolling the time for appeal.

Under the provisions of M.G.L. c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Stephen B. Sutliff, Esq,
James F. Norton, Esq.