COMMONWEALTH OF MASSACHSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

Edward Rolinson, Appellant,	D-02-95
v.	
Department of Revenue, Respondent.	
Appellant's Representative	Pro Se
Respondent's Attorney	Elizabeth Herriott, Esquire Labor Counsel Department of Revenue P.O. Box 9557 Boston, MA 02114-9557
Commissioner	Christopher C. Bowman

DECISION

Pursuant to the provisions of Massachusetts General Laws, Chapter 31, section 43, Appellant Mr. Edward Rolinson (hereinafter "Rolinson" or "Appellant"), is appealing the action of the Department of Revenue (hereinafter "DOR" or "Respondent"), in laying him off from his position as a Special Investigator A/B (hereinafter "SI-A/B") in DOR's Bureau of Special Investigations (hereinafter "BSI"). The appeal was timely filed.

A similar appeal was also filed by Mr. Richard E. Kenney pertaining to his layoff (D-02-106). The Full Hearing for Mr. Kenney was scheduled to occur at the same time as Mr. Rolinson's Full Hearing. However, Mr. Kenney did not appear, did not respond to

a subsequent Notice to Show Cause and his appeal was dismissed on September 7, 2006.

In regard to Mr. Rolinson's appeal, a Full Hearing was held at the Civil Service Commission (hereinafter "CSC" or "Commission") before Commissioner Henderson on June 10, 2005. The Appellant appeared pro se and Attorney Elizabeth Herriott appeared on behalf of the Respondent. As no written notice was received from either party, the Hearing was declared private. One audiotape was made of the Hearing.

At the conclusion of the Hearing, Commissioner Henderson indicated that there were "insufficient facts on the record, on which to properly support a decision." *See* Commissioner's Order, dated June 10, 2005. Therefore, the Commissioner ordered the parties to produce pertinent information within thirty days. By letter dated July 8, 2005, DOR requested an extension to August 23, 2005. The record does not indicate what action was taken by the Commission on DOR's request but by letter dated August 23, 2005, DOR submitted certain information in response to the Order and stated that the Commission had approved the time extension.

On August 4, 2005, the Commission had received a letter from Mr. Rolinson asking the Commission to default DOR for its failure to respond to Commissioner Henderson's order within thirty days and because DOR "did not show up to First Hearing." It does not appear that the Commission acted on the Appellant's request and, in any event it appears that the Commission had, by that time, allowed DOR's requested extension.

Commissioner Henderson's term on the Commission lapsed before the Commission was able to enter a decision on this case. Pursuant to 801 CMR 1.01(11)(e)

of the Standard Adjudicatory Rules of Practice and Procedure, Commissioner Bowman was assigned to listen to the tape of the hearing, review Commissioner Henderson's detailed notes taken during the hearing, as well as the exhibits, and draft a decision for the Commission's consideration.

FINDINGS OF FACT

Mr. Rolinson did not submit any exhibits during the Pre-Hearing or the Full Hearing. DOR submitted 11 exhibits in its undated Pre-Trial Memorandum and 29 exhibits in its Post-Trial Memorandum in Response to the Commissioner's Order (dated August 23, 2005). Based upon the submitted exhibits and the Appellant's testimony, I make the following findings of fact:

1. The Appellant is a disabled veteran. (Testimony of the Appellant).
2. The Appellant was appointed to his position as SI-A/B in the BSI within the Respondent's Department on December 12, 1993. (Testimony of the Appellant).
3. On February 14, 2002, the Respondent notified Appellant that its BSI would be initiating a reduction in workforce for economic reasons. (Respondent's Pre-Trial Memorandum Exhibit 1).
4. On February 22, 2002, a hearing was conducted before the Respondent regarding the contemplated termination of the Appellant. (Respondent's Pre-Trial Memorandum Exhibit 2).
5. On February 25, 2002, the Respondent notified the Appellant that because there was a lack of funding, the Appellant would be terminated effective

March 1, 2002. (Respondent's Pre-Trial Memorandum Exhibit 2, Respondent's Pre-Trial Memorandum Exhibit 11).

6. There were not any employees in a same or lower title still employed as the Appellant because the Respondent terminated all the SI-A/B's at the same time, and thus the Appellant was not offered any bumping options. (Respondent's Pre-Trial Memorandum Exhibit 9).

7. Appellant had neither filed a reclassification appeal at the Civil Service Commission nor a grievance in order to establish bumping rights. (Respondent's argument in Pre-Trial Memorandum and at the Full Hearing).

8. Job descriptions existed for both the title of SI-A/B and SI-C, and these descriptions were different, the "C" level requiring "exceptional mastery of technical job content" and limited to those in supervisory roles or those in non-supervisory who were "performing the most complex assignments." (Post-Trial Memorandum in Response to the Commissioner's Order Exhibits 1 and 4)

9. After February 25, 2002, Respondent retained five employees (Burke, Dobbins, Hemenway, Moro and Panorese) who held permanent civil service status (in the A/B title), but also held provisional titles as SI-C. The Respondent terminated all employees, including Appellant, that were in the A/B title. (Respondent's Pre-Trial Memorandum Exhibit 9).

10. On June 30, 2002, the BSI within the Respondent ceased to exist, and a new entity within the office of the State Auditor was created on July 1, 2002, by an action of the Legislature. At this time, the remaining five employees in A/B positions were terminated from the BSI within the

Respondent. (Respondent's Pre-Trial Memorandum Exhibits 8, 10 and 11).

11. "A permanent employee is a person who is employed in a civil service position (1) following an original appointment, subject to the serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment; or (2) following a promotional appointment, without restriction as to the duration of his employment." G. L. c. 31, § 1.

12. "An Appointing Authority may make a provisional appointment to fill a vacant civil service position." G. L. c. 31, § 12.

DISCUSSION

The Civil Service Commission, when presented with an appeal pursuant to G.L. c. 31, §43, 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*).* Mclsaac 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. G.L. c. 31, §39 provides, "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). Commissioner 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. 924, 926 (1994). Sheriff of Plymouth County v. Plymouth County Personnel Board, 440 Mass. 711, 713 (2004).

The SJC recently upheld the Civil Service Commission's decision upholding the lay-off of a disabled veteran at the Department of Revenue in a case similar to the appeal in this case in Andrews v. Civil Service Commission, 446 Mass. 611, 868 (April 28, 2006). In the present case before the Commission, the Appellant attempted to articulate similar arguments forwarded in Andrews (*see also* Anderson v. Department of Revenue,

Case No. G-02-224) suggesting that the lay-offs were made in bad faith because the Respondent failed to take his disabled veteran status into consideration and retain his employment status in preference to all other departmental unit employees pursuant to G.L. c. 31, §26 and §39.

> G.L. c. 31, §26 states, "[a] disabled veteran shall be retained in employment in preference to all other persons, including veterans."
>
> G.L. c. 31, §39 states, "If permanent employees in positions 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, 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."

In Andrews, the Commission found SI-C and SI-A/B were two jobs with different titles and significantly different job functions, leaving Andrews without the "same title in a particular departmental unit" statutory option.

In Andrews, the SJC affirmed the Commission's decision, adopting a plain language interpretation of G.L. c. 31, emphasizing "that the disabled veteran's preference does not apply to promotion." Andrews v. Civil Service Commission, 446 Mass. 611, 617 (2006). The SJC found titles SI-A/B and SI-C sounded similar, however supporting evidence demonstrated SI-C positions were "more complex" requiring a higher degree of difficulty than SI-A/B positions. Id. at 615. Therefore, a disabled veteran moving to the position of SI-A/B to the position SI-C would be promotional under G.L. c. 31 and does not give preference to a disabled veteran for promotion. Id.

The Appellant attempted to argue that he should retain "bumping rights" as protected by statute. "Bumping rights" is when "[a]n employee may elect to be demoted

to a position in a lower title in lieu of discharge, provided that there is a less-senior employee in the lower title for the demoted employee to replace." Id. at 619. In Andrews, the Commission said the scope of "bumping rights" were limited within the BSI unit, because the BSI was a subdivision of DOR, restricting Andrews from "bumping" down to other DOR divisions. Furthermore, the BSI had no positions within the unit for the Appellant to "bump" down because SI-A/B positions were entry-level. Thus, the Appellant is not able assert "bumping rights" within BSI or DOR.

CONCLUSION

The Appellant has not satisfactorily shown that the Respondent had anything less than a good faith belief when it terminated the Appellant, a disabled veteran, while retaining five other employees in a different title because of lack of funding pursuant to G.L. c. 31, §43. The Appellant did not present any additional facts or suggest any different issues at stake that would warrant the Commission to decide the current matter any differently than in Andrews. The appeal is therefore dismissed.

Civil Service Commission

Commissioner Bowman

By vote of the Civil Service Commission (Bowman, Guerin, and Marquis (Taylor absent); Commissioners) on November 2, 2006.

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. 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 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 sent to:
Edward Rolinson
Elizabeth Herriott, Esquire