

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

STANLEY RYSZ,
Appellant

v.

D-03-498

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, § 43, the Appellant, Stanley Rysz (hereinafter "Rysz" or "Appellant"), is appealing the decision of the City of New Bedford (hereinafter "City" or "Appointing Authority") to lay him off from his position as a Junior Civil Engineer, effective June 27, 2003, due to a lack of funds.

The appeal was timely filed with the Civil Service Commission (hereinafter "Commission") and the Appellant subsequently amended his appeal seeking relief from the Commission pursuant to Chapter 310 of the Acts of 1993.

A full hearing was conducted over two days on February 9, 2007 and November 20, 2007 at the offices of the Commission. As the City's Personnel Director, Angela Natho, was not available on November 20th, the Commission allowed the Appellant to depose Ms. Natho on January 29, 2008 at the New Bedford City Hall. A transcript of her testimony is part of the record. All witnesses, with the exception of the Appellant, were sequestered. Both parties submitted post-hearing briefs in the form of proposed decisions on July 7, 2008.

FINDINGS OF FACT:

The following exhibits were entered into evidence: "A" Exhibits 1-28; "B" Exhibits 1-11; "C" Exhibits 1-9; and the transcript of Ms. Natho's deposition was marked as Exhibit D1. Based upon these exhibits and the testimony of the following witnesses:

For the Appointing Authority:

- Peter Schmidt, Auditor, City of New Bedford;
- Duarte Andrade, Acting City Engineer, City of New Bedford;
- Ronald Labelle, Commissioner of Public Infrastructure, City of New Bedford;
- Lawrence Worden, Commissioner of Public Facilities, City of New Bedford;
- Angela Natho, Personnel Director, City of New Bedford; (by deposition)

For the Appellant:

- Stanley Rysz, Appellant;

I make the following findings of facts:

Issue of Layoff / Lack of Funds

1. The Appellant, a Vietnam veteran, was appointed by the City as a provisional Junior Civil Engineer on January 3, 1989 and was permanently appointed to that position on October 14, 1991. The Appellant served in that capacity until June 27, 2003, when the City laid him off citing a lack of funds. (Testimony of Appellant; Exhibits A4 and A5)

2. The Appellant has subsequently been hired to work in the City's cemetery department in a position that is of a lower grade and pay. (Testimony of Appellant)
3. In February 2003, the City received notice from the state regarding "9C" cuts which resulted in a reduction of \$2.3M in local aid to the City. (Testimony of Schmidt; Exhibits C4 and C5)
4. City Auditor Peter Schmidt described the 9C cuts, which occurred more than half way through Fiscal Year 2003 (FY03) as "staggering". More than thirty (30) City employees were laid off in FY03 as a result of the mid-year cuts. (Testimony of Schmidt)
5. Mr. Schmidt testified that the FY03 9C cuts carried over into FY04, with a total reduction in FY04 of \$2.9M, as compared to the initial FY03 local aid estimate. (Testimony of Schmidt)
As a result, approximately 70 permanent civil service employees and 40 provisional employees were laid off by the City. (Exhibit A7)
6. Sometime in calendar year 2002, prior to becoming aware of the 9C cuts, the City's Mayor at the time appointed several City officials to a task force to review all positions and develop a plan to save money and improve efficiency by consolidating related operations and duplicative positions. Among the officials serving on the task force were: the Mayor's Chief of Staff; the City Solicitor; the Personnel Director; and some department heads. The recommendations from this task force were used to make some of the cost-cutting recommendations necessary to respond to the 9C cuts. (Testimony of Labelle and Natho)
7. The above-referenced task force recommended eliminating most of the engineering positions and creating a separate Engineering Department with several new positions that would require an educational background and experience in engineering in order to bring several projects "in-house" that were typically done by outside consultants. These new hires would need to have the necessary educational and engineering experience. Mr. Labelle, the

Commissioner of Public Infrastructure and a member of the task force, recommended against this proposal, but it was ultimately adopted by the Mayor and City Council, effective July 1, 2003, as part of the previous decision to reorganize the Engineering Department as well as the overall effort to reduce expenditures due to the subsequent FY03 / FY04 reductions in local aid. (Testimony of Labelle)

8. Eight (8) junior engineers, including the Appellant, were laid off effective July 1, 2003, the first day of FY04. (Testimony of Labelle) Overall, the City laid off a total of 70 permanent civil service employees and 40 provisional civil service employees as a result of the FY03 9C cuts and the subsequent FY04 cut in local aid including: 1 employee from the Assessors Office; 3 employees from the Building Department; 2 employees from the Community Development Department; 5 employees from the Council on Aging; 48 employees from the DPW; 1 employee from the Emergency Management Department; 17 employees from the Fire Department, including 15 firefighters; 4 employees from the Health Department; 17 employees from the City's libraries; 1 employee from the Park Department; 1 employee from the Personnel Department; 2 employees from the Police Department; 1 employee from the Traffic Department; 3 employees from the Water Department; and 1 employee from the Wiring Department. (Exhibit A7)
9. Based on a careful review of the testimony and evidence presented, I find that all of the above-referenced layoffs were attributable to an unforeseen reduction in local aid caused by the state's fiscal crisis at the time. Further, I find that the layoffs were not a pretext for another improper motive for separation.

Issue of Reinstatement

10. G.L. c. 31, § 39 states in relevant part:

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, so that employees senior in length of service, computed in accordance with section thirty-three, 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. (emphasis added)

11. One permanent Junior Civil Engineer position was included in the FY07 budget. That position was filled by the reinstatement of Mary Neves, who, at the time of the layoffs in FY03 and FY04, was a permanent Junior Civil Engineer with more seniority than the Appellant. (Testimony of Labelle; Exhibit A26)
12. Since the Appellant was laid off, the City has not hired or reinstated any Junior Civil Engineers other than Ms. Neves. (Testimony of Labelle; Exhibits C3A through C3F)
13. There are currently two provisional Assistant Civil Engineers: Manual Silva and Ana Rosa. It appears that Mr. Silva has served in this position since 1999¹ (well before the Appellant was laid off) and that Ms. Rosa was appointed to the position sometime in 2007 (well after the Appellant was laid off) . The position of Assistant Civil Engineer (Grade 12) is one

¹ The Appellant, as part of his amended complaint, argues that there was a discrepancy in this 1999 job posting regarding minimum entrance requirements, which caused him not to apply for the position of Assistant Civil Engineer. As part of the instant appeal, he now asks the Commission to review the facts surrounding that posting discrepancy and determine whether it was in violation of Section 14 of Chapter 31 regarding provisional appointments. Given that this purported discrepancy occurred more than 4 years before the filing of the instant appeal, far beyond any statutory deadline or other deadline established by rule regarding the filing of appeals, it would be inappropriate for the Commission to act on that request. Moreover, even if the Commission were to rule on this issue, the record in the instant appeal has sufficiently established that the Appellant lacks the necessary qualifications for the position of Assistant Civil Engineer, thus making any argument by the Appellant that he did not receive the preference granted to veterans in provisional appointments moot. I will, however, address as part of this decision, whether the City was permitted to retain a civil service employee serving provisionally in a higher title (Assistant Civil Engineer) while laying off a civil service employee, such as the Appellant, who was permanent in a lower title (Junior Civil Engineer).

grade higher than a Junior Civil Engineer (Grade 11). (Testimony of Labelle; Exhibits B1, B5, B6 and B9)

14. The state's "MuniClass Manual", which contains job descriptions for the two-above referenced positions, states that the primary function of a Junior Civil Engineer (Grade 11) is to: "provide qualified engineering support, management and oversight on various public works projects to ensure that established procedures and constructions standards are adhered to." The primary function of an Assistant Civil Engineer is to: "interpret complex engineering data by applying knowledge of engineering principles in or to meet project objectives." (Exhibits B5 and B6)
15. Lawrence Worden, former Commissioner of Public Works (and current Commissioner of Public Facilities) testified as to the difference between a Junior Civil Engineer and an Assistant Civil Engineer. Commissioner Worden testified that the Junior Civil Engineer worked on the survey crew, performed inspections and researched insurance claims while the Assistant Civil Engineer performed inspections, inspected the construction of new subdivisions, performed design work and served as resident engineer on construction projects. (Testimony of Worden)
16. Mr. Labelle testified that the hiring of more qualified Assistant Civil Engineers was required because of the reorganization of the Engineering Department referenced above. According to Mr. Labelle, the City has taken over much of the design, oversight and construction work that was previously performed by consultant engineers and private contractors. This work is now performed in-house and the design work, which includes the design of water, sewer and drainage systems, using an "AutoCAD" system, is performed by the Assistant Civil Engineers. (Testimony of Labelle)

17. The Appellant testified before the Commission that he does not know how to use “AutoCAD” nor does he possess experience in designing water, sewer and drainage systems. While the Appellant stated that he has some experience designing corrections to existing drainage problems, he does not have experience overseeing construction projects.

(Testimony of Appellant)

18. Based on a careful review of the testimony and evidence, I conclude that the positions of Junior Civil Engineer and Assistant Civil Engineer are not the same or similar positions. I find that they are two different positions, with different pay grades and with differing levels of responsibility. While the Junior Civil Engineer is primarily, both according to the MuniClass Manual and in practice, responsible for engineering *support* functions, the Assistant Civil Engineer is required to perform more complex duties such as designing water, sewer and drainage systems with an AutoCAD system, something the Appellant admittedly can not do.

19. In January 2005, the City sought to hire a Municipal Surveyor, a position one grade higher (Grade 12) than that previously held by the Appellant, Junior Civil Engineer (Grade 11). The Appellant applied for the position. In a letter to the City dated December 28, 2005, the Appellant stated: “As you are aware, for approximately 10 years prior to my layoff in 2003, one of my responsibilities as a Junior Civil Engineer was to act as Survey Party Chief.”

(Exhibit A13)

20. The Appellant was selected for appointment by the City to the above-referenced position of Municipal Surveyor, despite a poor interview in which, according to Mr. Labelle, the Appellant acted more like the *interviewer* as opposed to the *interviewee*. (Testimony of Labelle)

21. In a letter to the City dated February 16, 2006, the Appellant, in addition to raising concerns about the starting salary of the Municipal Surveyor position, argued that the position in question required that he be a "Registered Land Surveyor", which he was not, and concluded the letter by stating he would be a better fit as a "Supervising Civil Engineer", a Grade 16 position. (Exhibit A18)

22. After apparently having a follow-up conversation with both Mr. Labelle and Angela Natho, the City's HR Director, regarding his concerns, the Appellant, in a February 21, 2006 letter to Natho, effectively declining the appointment², stated in part:

"Regarding our conversation of February 17, concerning the licensing requirements in the State of Massachusetts for persons involved in the practice of land surveying...Apparently you are as ignorant of the laws that govern professional positions as you are of those of Civil Service... I look forward to the day when you are held accountable under M.G.L. Chapter 31, Section 74 and are facing fines and/or imprisonment."

(Exhibit A20)

CONCLUSION:

G.L. c. 31, § 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." While any abolition must be undertaken in good faith and may not be done without proper cause, or as a pretext for depriving a particular person of his job, it must be emphasized that the civil service provisions are not intended to, and do not on their face, preclude abolition of positions or reorganizations of departments or the

² The Appellant testified during the hearing that he did not withdraw his application, but, rather, that the City rescinded the offer of employment after he raised issues regarding the licensing requirements of the position. Regardless of which version is more accurate, it was not a determining factor one way or the other regarding my conclusions in this case. It did, however, shed some light on whether the City had, at the time of the layoff, or during the pendency of the Appellant's ongoing reinstatement rights period, any personal or political animus toward the Appellant. The fact that, as late as 2006, they were willing to offer the Appellant a position in a higher grade

contracting out of work. See Gloucester v. Civil Service Comm'n, 408 Mass. 292 (1990).
Debnam v. Belmont, 338 Mass. 632 (1983).

"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 v. Arlington, 17 MSCR 108 (2004), citing School Comm. of Salem v. Civil Service Comm'n, 348 Mass. 696, 698-699 (1965). Therefore, absent evidence demonstrating that a separation for lack of funds is but a mere pretext for another improper motive for separation, the Commission can not override a good faith determination by the appointing authority that such separation is made for cost-saving purposes. Gloucester at 299-300 (1990), Shaw v. Bd. of Selectmen of Marshfield, 36 Mass. App. Ct. 924, 926 (1994), Sheriff of Plymouth Cty. v. Personnel Bd., 440 Mass. 711, 713 (2004).

For all of the reasons cited in the findings, I have concluded that the decision to lay off the Appellant, along with 109 other permanent and/or provisional civil service employees in FY 2003 and 2004, was attributable to an unforeseen reduction in local aid caused by the state's fiscal crisis at the time. Further, I find that the layoffs, including that of the Appellant, were not a pretext for another improper motive for separation.

In this case, all of the employees holding the title of Junior Civil Engineer, including provisional and permanent employees in that title were laid off and provided with "bumping rights" allowed under Section 39. Although the Appellant has raised the issue of his veteran status, G.L. c. 31, § 26 only requires that an Appointing Authority ensure that disabled veterans

despite what appears to have been an abysmal interview performance by the Appellant, lends credibility to the

be the last to be laid off in that title. As there is no evidence that the Appellant is a disabled veteran and it is undisputed that all of the employees holding that title were laid off, the Appointing Authority complied with the provisions of Section 26 when making these layoffs.

Next, again for all the reasons stated in the findings, I conclude that the Appointing Authority has not violated the provisions of Section 39 in regard to the Appellant's reinstatement rights. Section 39 requires that 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.

The Appellant states that the City violated his reinstatement rights when it hired someone other than him to the position of provisional Assistant Civil Engineer in 2007, a position that the Appellant argues is "similar" to the position from which he was laid off, Junior Civil Engineer. The evidence and credible testimony has shown that the two positions are not similar. These are two different positions, at different pay grades, with differing levels of responsibility. While the Junior Civil Engineer is primarily, both according to the state's "MuniClass Manual" and in practice, responsible for engineering *support* functions, the Assistant Civil Engineer is required to perform more complex duties such as designing water, sewer and drainage systems with an AutoCAD system. Therefore, the City was not required to "reinststate" the Appellant to this Assistant Civil Engineer position which I have concluded is not the same or similar to Junior Civil Engineer.

Finally, the Appellant argues that Chapter 31 is "replete with preferences expressly reserved for veterans" and that public policy and basic merit principles obligated the City to retain and advance the Appellant under these circumstances. Also, the Appellant argues that the City

City's argument that did not at the time and do not now.

violated the Vietnam Veteran Readjustment Act. For the reasons cited above, I conclude that the City did not violate any provisions of the civil service law related to veteran preferences. In regard to compliance with the Vietnam Veteran Readjustment Act, the Appellant has failed to state either the requirements of this Act or specifically how the City may have violated them. Moreover, any such argument likely belongs in a forum other than the Civil Service Commission.

For all of the reasons cited above, the Appellant's appeal under Docket No. D-03-498 is *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 15, 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:

Rebecca Lee Mitchell, Esq. (for Appellant)

Fernand Dupere, Esq. (for Appointing Authority)