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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

STANLEY ~~★RYSZ★~~ vs. CIVIL SERVICE COMMISSION & another. [FN1]

10-P-1565

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Effective June 27, 2003, the city of New Bedford (city) separated Stanley Rysz from his employment as a tenured junior civil engineer (JCE), allegedly for lack of funds. He appealed to the Civil Service Commission (commission), which, following two days of hearings, found just cause for the layoff. See G. L. c. 31, § 41. Claiming numerous violations of his retention, veterans preference, and reinstatement rights, he has appealed from a Superior Court judgment upholding that decision. We affirm.

Judicial review of the commission's decision under G. L.

c. 30A, § 14, requires consideration of the entire administrative record. See *Andrews v. Civil Serv. Commn.*, 446 Mass. 611, 616 (2006). Here, Rysz provided us with an incomplete record.

Even giving Rysz the benefit of the doubt that nothing of substance was omitted, applying the appropriate deferential standard of review to the commission's factual findings, we conclude, as did the judge, that the commission's decision was legally sound and supported by substantial evidence.

On judicial review, the commission's credibility determinations are not amenable to substitution. See *id.* at 617. We must accept the commission's factual findings unless they were unsupported by substantial evidence. See *Beverly v. Civil Serv. Commn.*, 78 Mass. App. Ct. 182, 188 (2010). A finding may be deemed insubstantial only if 'the evidence points to no felt or appreciable probability of the conclusion or points to an overwhelming probability of the contrary.' *New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (internal citation omitted).

Here, strong, appreciable evidence supported the commission's finding that the real reason for Rysz's layoff was lack of funds. It was undisputed that in early 2003, the city was informed that \$2.3 million in State aid would not be arriving as expected. As a result of these cuts, described by the city auditor as 'staggering,' swift, emergency measures were required to make up the revenue shortfall. [FN2] The mayor initially instructed each department head to find ways to cut expenses. When these measures proved inadequate, cuts in personnel (a large percentage of the city's budget) were required. The city laid off thirty permanent and provisional civil service employees by the end of fiscal year 2003. Local aid from the State decreased again the following year. By the end of fiscal year 2004, a total of 110 city employees had lost their jobs. In engineering, eight of the thirteen employees, including *all* eight JCEs, were laid off at the same time as Rysz.

Contrary to Rysz's argument, the record established a savings from the reduction in force. Salary appropriations for engineering personnel decreased significantly from fiscal year 2003 to fiscal year 2004, and decreased again in fiscal year 2005.

The fact that the city created four new positions in the engineering department in fiscal year 2004 did not compel a finding of an absence of any bona fide lack of money. This was a time of great change for the city as all departments were dismantled and reconstituted and staffing needs assessed. [FN3] While the two *associate* engineer positions were in fact substantially similar to Rysz's JCE position, they were never filled and were removed from subsequent budgets. The promotion of Duarte Andrade to the acting city engineer position, a much different position than Rysz's, was consistent with the city's goal of attracting and keeping more qualified staff capable of performing in-house design and construction work. [FN4] Finally, by Rysz's account, while the fourth position (municipal surveyor) was included in the 2004 engineering budget, the city did not begin actively recruiting for the position until 2005.

Nor was a finding of improper political motive for Rysz's separation required. Even if the two engineers retained in 2003 were the only engineers to have contributed to the mayor's campaign (in the amounts of between \$50 and \$100 each), any suspicion raised must be balanced against the fact that there was no evidence that any member of the reorganization task force either was aware of these contributions or discussed any of the individual engineers. Moreover, the two retained held the highest engineering positions at the time, consistent with the city's objectives for its engineering personnel. Whatever the force of this evidence, it did not point to an overwhelming probability that political motivations were the real reason for Rysz's layoff.

Where, as here, particular budgetary reductions and a reorganization plan were undertaken in response to a severe and unanticipated shortfall of money, the city's prioritization of its needs, absent any showing of pretext or unlawful motive, was not subject to override by the commission or the courts. See *Gloucester v. Civil Service Commn.*, 408 Mass. 292, 299-301 (1990); *Shaw v. Board of Selectmen of Marshfield*, 36 Mass. App. Ct. 924, 926 (1994).

Turning to Rysz's retention and reinstatement rights, substantial evidence supported the commission's finding that the JCE and assistant civil engineer (ACE) positions were not in the same title. See G. L. c. 31, § 1. Although there was certainly an overlap in some duties, substantial evidence, including the city's written job descriptions, the State's MuniClass Manual, and the testimony of Worden and LaBelle, established material differences in the positions. [FN5] Thus, the city did not violate G. L. c. 31, § 39, by laying off Rysz prior to Silva, a provisional employee hired as an ACE in 1999. See *Andrews v. Civil Serv. Commn.*, *supra* at 616. Nor did the city violate

§ 39 by failing to reinstate Rysz to the ACE position in 2007.

There was no error in the commission's conclusion that the city did not violate his veteran preferences. See G. L. c. 31,

§ 26. To the extent that Rysz argued that the city impermissibly bypassed him for an ACE position in 1999 and 2007, veteran preferences do not apply to promotions. See *Andrews v. Civil Serv. Commn.*, *supra* at 618; *Aquino v. Civil Serv. Commn.*, 34 Mass. App. Ct. 538, 540-542 (1993). Where, as here, the ACE position was in a higher title, the city did not violate Rysz's veteran preferences by refusing to terminate Silva, pursuant to G. L. c. 31, § 14, in 2003 for lack of qualification (i.e., P.E. registration). See *Andrews v. Civil Serv. Commn.*, 446 Mass. at 616-617. In any event, as the commission noted, even if the city had terminated Silva, Rysz would not have been entitled to fill the position. [FN6] See *id.* at 618.

We do not reach the merits of Rysz's remaining contentions because (1) they were beyond the scope of the issues framed by the parties and decided by the commission, or were premised on facts that were unsupported by substantial evidence; or (2) they failed to rise to the level of adequate appellate argument. See *Howe v. Tarvezian*, 73 Mass. App. Ct. 10, 12 (2008).

The judgment upholding the commission's decision is affirmed. [FN7]

So ordered.

By the Court (Rapoza, C.J., Mills & Graham, JJ.),

Entered: March 12, 2012.

FN1. City of New Bedford.

FN2. According to the auditor, only half of the city's budget was subject to possible cuts, increasing the difficulty of the task.

FN3. As of July 1, 2003, engineering was changed from a division of the Department of Public Works to an independent department. After a second reorganization in 2005, engineering

became a division of the Department of Public Infrastructure.

FN4. Andrade had thirty-three years of private sector experience. Rysz has never claimed that his JCE position was the same as or similar to the city engineer position, or that he was qualified for that position.

FN5. During his thirty-two years of city service, Worden held both the JCE and ACE positions and supervised other employees holding these positions. Worden testified that an ACE performs design work on large projects that a JCE, including Rysz, could not do. He also testified that the JCE did not have the same decision-making authority as an ACE. Worden's testimony was consistent with the State MuniClass Manual's definitions of the modifiers 'junior' and 'assistant.' LaBelle testified that a JCE could not perform the design of water, sewer, and drainage

systems using AutoCAD, work required of an ACE. Rysz admitted he had no knowledge of AutoCAD and no experience in designing these systems. Based on these admissions, the commission also concluded Rysz was unable to perform the more complex duties of the ACE position. To the extent that Rysz claimed that the commission mischaracterized his testimony about his resident engineer experience, the commission was entitled to reject that evidence. The finding that Rysz lacked this experience was supported by the testimony of Worden

FN6. At the hearing, Rysz's attorney failed to object to the commission's ruling that G. L. c. 31, § 40, was inapplicable because the JCE position had not been abolished. Even if the commission erred, nothing in § 40 assisted Rysz's case here.

FN7. Rysz pursues a number of issues here that were not raised before the commission. While the question of proper licensing was raised in the context of the 2006 offer of the municipal surveyor position to Rysz, and the 1999 job offer to Manuel Silva, Rysz has expanded the scope of the licensing arguments on appeal.

The judge did not address a few issues in the last paragraph on page ten. We conclude that the judge meant to write 'supported' instead of unsupported by substantial evidence.

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