

Commonwealth of Massachusetts
Trial Court of the Commonwealth
Superior Court Department

Bristol, ss.

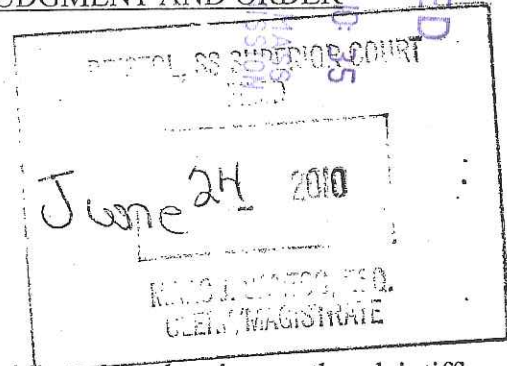
Civil Action #: BRCV2009-0437

Stanley Rysz,
Plaintiff

vs.

Christopher C. Bowman, Chairman,
Daniel M. Henderson, Donald R. Marquis,
Paul M. Stein, and John E. Taylor, as they
are Commissioners of the Massachusetts
Civil Service Commission and
City of New Bedford,
Defendants

JUDGMENT AND ORDER



This matter came on before the Court, Kane, J. presiding, for a hearing on the plaintiff's Motion for Judgment on the Pleadings. The Court having considered all relevant submissions and the arguments of counsel, and the Court having filed its Memorandum of Decision and Order on Plaintiff's Motion for Judgment on the Pleadings,

It is ORDERED and ADJUDGED that:

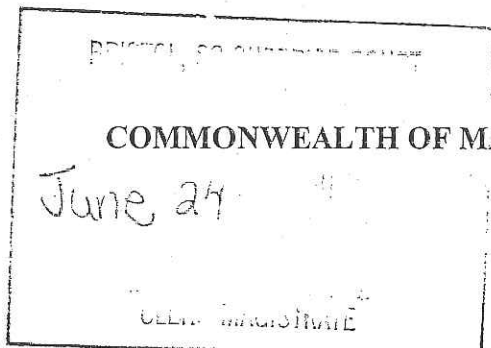
The decision by the Massachusetts Civil Service Commission upholding the plaintiff's termination from his position with the City of New Bedford be and hereby is AFFIRMED.

By the Court (Kane, J.)

Joseph T. Vincent, Jr.
Assistant Clerk Magistrate

Dated: June 24, 2010

BRISTOL, ss.



SUPERIOR COURT
CIVIL ACTION
NO. 2004-0437-A

STANLEY RYSZ

Plaintiff

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION & others¹
Defendants

**MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS**

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CIVIL SERVICE COMMISSION

INTRODUCTION

This is an appeal, pursuant to G. L. c. 30A, § 14, seeking judicial review of a decision by the Civil Service Commission (the "Commission") upholding plaintiff's termination from his position with the City of New Bedford (the "City") for lack of funds. The case is before the court on plaintiff's motion for judgment on the pleadings. For the reasons set forth below, plaintiff's motion is **DENIED** and the Commission's decision is **AFFIRMED**.

BACKGROUND

The Administrative Record before the court reveals the following facts. The City hired plaintiff Stanley Rysz ("Rysz"), a Vietnam veteran, to fill the position of Junior Civil Engineer on January 3, 1989. Rysz held the position on a provisional basis until October 14, 1991, when the City permanently appointed him to that position. Lawrence Worden ("Worden"), then Commissioner of the Department of Public Works ("DPW"), supervised Rysz. Worden testimony. Junior Civil Engineer is a Grade 11 position and individuals holding this title chiefly work on survey crews,

¹ The City of New Bedford; Christopher C. Bowman, Chairman; Daniel M. Henderson, Donald R. Marquis; Paul M. Stein and John E. Taylor as Commissioners of the Civil Service Commission.

perform inspections and research insurance claims.

In 1999, the City hired Manuel Silva ("Silva") to the position of provisional Assistant Civil Engineer, a Grade 12 position. Rysz had seen the position advertised, but had not applied for it because the job posting stated that it required a professional engineering license, which he did not possess. AR 113; Rysz testimony. However, this requirement was listed in error, as no professional engineering license was needed. Worden testimony.

Silva, a non-veteran, has a Bachelors of Science degree in Civil Engineering and is qualified to use AutoCAD computer drafting technology. AR 147-148. Silva is also capable of performing design work, including the design of water, sewer and drainage systems, which are expected skills of an Assistant Civil Engineer. Worden testimony.

In contrast, Junior Civil Engineers are not responsible for the type of design work performed by Assistant Civil Engineers² and although Junior Civil Engineers have some decision-making authority, that authority does not match that which an Assistant Civil Engineer has. Worden testimony. Rysz does not know how to use AutoCAD and he does not have experience designing water or sewer systems, though he believes that it is within his capabilities to perform these tasks. Rysz testimony.

In 2002, Mayor Kalisz appointed a team of officials tasked with reviewing all positions and departments within the City to determine how it could save money and improve efficiency ("task force"). This task force included, among other individuals, Mayor Kalisz's Chief Administrative

² Copies of job descriptions of the Assistant Civil Engineer (2) and Junior Civil Engineer (1) positions are included in the administrative record. AR 110, 111, 119, 122. Rysz pointed out a number of similarities between the duties required of each position; however, even with these similarities, the Assistant Civil Engineer descriptions both use the word "complex" to describe the functions of that position. The Junior Civil Engineer description does not include such a description.

Officer, the City Solicitor, Personnel Director Angela Natho ("Natho"), and several City department heads, including Ronald Labelle ("Labelle"), the Commissioner of Water/Wastewater. Labelle testimony; Natho deposition. Worden was not part of this task force. Worden testimony. In February 2003, the City received notice of Governor Romney's 9C cuts in local aid. These cuts resulted in a midyear shortfall in the City's FY2003 budget amounting to \$2.3 million. AR172. As a result of these cuts, the City laid off more than thirty employees. Schmidt testimony. The City was informed that it should anticipate additional cuts to its FY2004 budget, which ultimately amounted to \$2.9 million less than initial FY2003 funding. Schmidt testimony.

The task force recommended to Mayor Kalisz a plan that would eliminate a number of City departments and consolidate others into new departments. Mayor Kalisz approved the recommended plan, which went into effect on July 1, 2003. Throughout the course of the FY2003 and FY2004 budget cuts, an estimated seventy permanent and forty provisional civil service employees lost their jobs. The City dismantled departments, including the building department, the health department and the DPW, and combined them in different ways. Labelle testimony.

As part of this reorganization, the City moved engineering from its position within the DPW and made it an independent department. The rationale for this reorganization was to save costs by creating a department capable of developing "in-house" all of the designs for which the City had previously looked to outside contractors. Labelle testimony. Labelle did not agree that it would be practical for the City to reduce its reliance on outside contractors to the extent the task force sought to achieve. Id. Ultimately, the City eliminated most engineering positions, including all eight Junior Civil Engineers, and created new engineering positions requiring educational background and experience in engineering that would permit greater in-house design capability. Silva was not laid

off.

A letter dated June 5, 2003, informed Rysz that, "cuts in local aid by the State have mandated a reduction in expenditures for fiscal year 2004," and that his position could no longer be funded. The letter also informed Rysz of the opportunity to have a full hearing on his termination, which was held on June 17, 2003.

On June 18, 2003, Worden notified Rysz of his determination that there was just cause for Rysz's layoff due to lack of funds. Worden further informed Rysz that he was "entitled to be restored to the same position or one similar to that which you presently hold, according to seniority, as soon as sufficient money is available." Rysz's layoff was effective June 27, 2003.

Since Rysz's layoff, the Engineering Department is no longer an independent department. It is now within the Department of Public Infrastructure ("DPI"), of which Labelle is Commissioner. The DPI now operates as a medium-sized construction company. The DPI's operation permits the City to take over much of the work, including in-house design, that once had to be contracted out to private entities. Labelle testimony. The City has budgeted for only one Junior Civil Engineering position. That position was allocated in the FY2007 budget and went to Mary Neves ("Neves"), who had more seniority than Rysz. Rysz does not contest Neves' placement in this position. Engineering has also hired Ana Reyes ("Reyes") to fill a second Assistant Civil Engineer position in 2007. Like Silva, Reyes has a Bachelors of Science degree in Civil Engineering and is qualified to use AutoCAD computer drafting technology. AR 154-156.

In 2005, Rysz applied for and was appointed to a position as a Municipal Surveyor. The job description stated under "Special Requirements" that, "Licensed Surveyor or Licensed Surveyor in Training is preferred." AR 117. Rysz expressed his concern to Labelle and Natho that the job

description required him to be a registered land surveyor and thus he was not qualified for the position and could face fines or imprisonment. AR 97 - 101; Rysz testimony. The City treated Rysz's response as a decision to decline taking the position, reposted it and filled it internally.

Rysz appealed Worden's decision upholding his layoff to the Commission, which held a two-day hearing on the matter on February 9 and November 20, 2007. At the two-day hearing, the Commissioner received forty-seven exhibits and heard testimony from six individuals.³ At that hearing, Rysz challenged the City's lack of funds and argued that: (1) he should not have been laid off; (2) the City had an affirmative duty to retain and advance Vietnam veterans; and (3) the only engineers the City retained during the layoffs were kept for political reasons. Rysz supported the third argument with his testimony that he had consulted public records and noted that both Silva and Duarte Andrade, Acting City Engineer and Former Supervising City Engineer, contributed to Mayor Kalisz's campaign.

The Commission determined that Junior Civil Engineer and Assistant Civil Engineer are "two different positions, with different pay grades and with differing levels of responsibility." AR 336. The Commission concluded that Rysz was not qualified for the Assistant Civil Engineer position. Rysz was, therefore, not eligible for either reinstatement or bumping rights for one of the two Assistant Civil Engineer positions. The Commission also found that Rysz had declined the Municipal Surveyor position and that while it was not determinative of the issues before it, the offer evinced a lack of "any personal or political animus toward [Rysz]." AR 337.⁴ The Commission subsequently

³ Natho's testimony was introduced through her deposition as she was unable to attend either hearing date.

⁴ The court notes Rysz's argument that this conclusion is erroneous if he could not have accepted the position due to a lack of a surveyor's license. Rysz testified at the hearing before the Commission that someone working as a surveyor needed to have their own license or needed to be working under someone else's license. As it is possible for Rysz to have taken the position without having a license himself and as the position stated that such a license was preferred and not required, the court will not disturb the Commissioner's observation.

upheld the City's determination as to Rysz's layoff for lack of funds. In a later decision in response to Rysz's motion for reconsideration, the Commission noted that "the City did not violate any provisions of the civil service law related to veteran preferences." AR 340. The Commission did not explicitly address Rysz's contention regarding political considerations in engineering employee retention in either its original decision or its decision on reconsideration.

DISCUSSION

A party aggrieved by a final decision of the commission may seek judicial review pursuant to G. L. c. 31, § 44. Such review is governed by the provisions of G. L. c. 30A, § 14. Review of conclusions of law is de novo. Raytheon Co. v. Director of the Div. of Employment Sec., 364 Mass. 593, 595 (1974). The burden is on the plaintiff to demonstrate the invalidity of the agency's determination. Fisch v. Board of Registration in Med., 437 Mass. 128, 131 (2002). A court may set aside an administrative agency's final decision where it determines that the plaintiff's substantial rights have been prejudiced because the decision was based upon an error of law, was unsupported by substantial evidence, or was arbitrary and capricious or an abuse of discretion. See G. L. c. 30A, § 14(7); Connolly v. Suffolk County Sheriff's Dep't, 62 Mass. App. Ct. 187, 192-193 (2004).

Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion," G. L. c. 30A, 1 (6). See Trustees of Forbes Library v. Labor Relations Comm'n, 384 Mass. 559, 568 (1981). "A decision is not arbitrary and capricious unless there is no ground which 'reasonable men might deem proper' to support it." T.D.J. Dev. Corp. v. Conservation Comm'n of N. Andover, 36 Mass. App. Ct. 124, 128 (1994), quoting Cotter v. Chelsea, 329 Mass. 314, 318 (1952).

A reviewing court must consider the entire administrative record and take into account

whatever “fairly detracts from its weight.” New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981), quoting Cohen v. Board of Registration in Pharmacy, 350 Mass. 246, 253 (1966). The court defers, however, to the credibility determinations made by the hearing officer. See Guarino v. Director of the Div. of Employment Sec., 393 Mass. 89, 92 (1984).

Rysz argues that the Commission’s decision (1) violated constitutional provisions; (2) exceeded the Commission’s statutory authority or jurisdiction; (3) was based on an error of law; (4) was unsupported by substantial evidence; (5) was unwarranted by facts found on the record; (6) was arbitrary or capricious, an abuse of power or otherwise not in accordance with law. The court considers Rysz’s arguments to the extent that they implicate matters actually brought before the Commission for its consideration.

LACK OF FUNDS

Rysz first objects to the Commission’s determination that his layoff was for just cause due to lack of funds. Rysz contends that the appointing authority had no input in the reorganization effort and that the City presented no evidence of demonstrated savings achieved by the reorganization.⁵

A tenured civil service employee may only be discharged for “just cause.” G. L. c. 31, § 41. Absent pretext or bad faith, lack of funds is considered “just cause” under G. L. c. 31, § 41. Debnam v. Belmont, 388 Mass. 632, 634 (1983). In upholding the City’s decision to terminate Rysz for lack of funds, the Commissioner considered the extent of the budget cuts the City faced, amounting to nearly \$3 million for FY2004, as well as the steps it took to confront them. Furthermore, the

⁵ Rysz also alleges a violation of G. L. c. 112, § 81D- §81T in the creation of the new engineering department. The court will not address this alleged violation as this issue was not raised before the Commission.

Commission heard the testimony of Labelle and Natho, who were both present at Mayor Kalisz's cost cutting meetings. According to Labelle and Natho, the group recommended reorganizing Engineering to allow the City to reduce costs by taking on more in-house design work and reducing the use of outside consultants. That the City sought to hire new employees at the same time it laid off Rysz and the other Junior Civil Engineers does not alone indicate that the layoffs could not have been due to lack of funds. The record contains substantial evidence that the goal of the reorganization as a whole was to obtain cost reductions through more efficient staffing.

The Commissioner was not entitled to disturb the City's determination regarding its own finances. "[W]hen a municipality makes a good faith nonarbitrary determination that its revenues will be less than was anticipated when the tax rate was set, thereby jeopardizing [its] ability to meet its total appropriation, there is a lack of money within the meaning of G. L. c. 31, § 41." Debnam, 388 Mass. at 635 (existence of reserve fund legally insufficient to support conclusion that layoffs for lack of funds were unjustified).

Rysz contends that the reorganization proceeded without engineering input and the Commissioner made no findings to that effect. However, even if this were true, it would not impact the Commission's determination. While it may have been more prudent for the reorganization to proceed with Worden's input, the City was confronted with a substantial budgetary shortfall to address. "Surely, in the absence of pretext or device designed to defeat the civil service law's objective of protecting efficient public employees from partisan political control, or to accomplish a similar unlawful purpose, the judgment of municipal officials in setting the municipality's priorities and in identifying the goods and services that are affordable and those that are not cannot be subject to the commission's veto." Gloucester v. Civil Svc. Comm'n, 408 Mass. 292, 299-300

(1990) (and cases cited therein). The Commissioner's decision that the layoffs were due to a lack of funds was thus based on substantial evidence, not arbitrary or capricious or based on an error of law.

RETAIN AND ADVANCE VETERANS

Rysz also contends that the City had an affirmative duty to retain and advance Vietnam veterans like himself. Part of this argument deals with Silva's hiring and retention after the layoffs, as he is a provisional employee and a non-veteran. Rysz essentially disputes the Commissioner's determination that the positions of Junior Engineer and Assistant Civil Engineer are not the same or similar and asks whether the City violated the "order of separation" by laying off more senior employees first.

Same or Similar Positions

As to the positions of Junior Civil Engineer and Assistant Civil Engineer, the Commissioner considered written job descriptions of both positions, as well as the testimony of individuals who supervised and currently supervise employees in both positions. While the written job descriptions do bear striking similarities in explaining general duties, the description for the Assistant Civil Engineer position uses the word "complex" to describe the job. The Junior Civil Engineer description does not mention complex engineering functions.

Moreover, the testimony provided substantial evidence that the positions of Junior Civil Engineer and Assistant Civil Engineer are not the same or similar. Worden, who supervised Rysz prior to the 2003 layoffs, testified that Junior Civil Engineers are not responsible for the type of design work that is performed by Assistant Civil Engineers and that Junior Civil Engineers do not have the same scope of decision-making authority as Assistant Civil Engineers. While Rysz

testified that he could have done the work Assistant Civil Engineers perform, the Commissioner “was free to believe . . . testimony [of those familiar with the duties of employees in each position] and to disbelieve [the testimony] of the plaintiff.” Abramowitz v. Director of the Div. of Employment Sec., 390 Mass. 168, 173 (1983). “If the [Commissioner’s] findings are . . . supported [by evidence], it is not open to the [Superior] Court or to this court to substitute other views as to what should be the determination on the facts.” Id., quoting Martin v. Director of the Div. of Employment Sec., 347 Mass. 264, 268 (1964). The Commissioner’s decision was thus not arbitrary or capricious, unsupported by substantial evidence or based in an error of law.

Veterans’ Preference

General Laws c. 31, § 26 states in relevant part that, “[a]n appointing authority shall appoint a veteran in making a provisional appointment” This section establishes a “legislatively created mechanism under which veterans receive a preference over non-veterans in certain types of civil service employment.” Aquino v. Civil Svc. Comm’n, 34 Mass. App. Ct. 538, 539 (1993), citing Ransom v. Boston, 192 Mass. 299, 304 (1906). Rysz argues that the City acted contrary to this preference (1) when it hired Silva; and (2) when it terminated Rysz while it retained Silva in the position of provisional Assistant Civil Engineer.

Rysz first contends that the City violated the veterans’ preference in the civil service law when it hired Silva in 1999. As to this issue, the Commissioner noted that because Rysz lacked the necessary qualifications for the Assistant Civil Engineer position, the issue was moot. AR 334. Insofar as this statement reflects the Commissioner’s determination that Rysz could not have been promoted to the Assistant Civil Engineer position had he applied for it in 1999, it is unsupported by substantial evidence. The record contains evidence demonstrating chiefly that the duties performed

by Rysz in the position he occupied were not the same as those performed by Assistant Civil Engineers. In any event, whether Rysz was qualified for the Assistant Civil Engineer position is not dispositive of the issue because of the differences between that position and the Junior Civil Engineer position.

As discussed above, the Assistant Civil Engineer position is higher in grade and responsibility than that of Junior Civil Engineer and would have represented a promotion had Rysz obtained the position. Aquino, 34 Mass. App. Ct. at 541, citing The American Heritage Dictionary (3d ed. 1992) (“‘[Promotion]’ is commonly defined as an ‘advancement in rank or responsibility’”). The veterans’ preference expressed in section 26 is not a lifelong preference and applies only to original appointments and not to promotions. Id. at 540-541; see also MacCarthy v. Director of Civil Service, 319 Mass. 124, 127 (1946) (“All through the civil service law the words ‘appointment’ and ‘promotion’ are distinguished from each other.”). The Commissioner’s finding was thus correct as a matter of law as to the significance of the distinction between Junior Civil Engineer and Assistant Civil Engineer and Rysz was not entitled to veterans preference in obtaining a promotion in 1999.

As to Rysz’s veterans’ status and his layoff in 2003, the Commissioner concluded that G. L. c. 31, § 26 requires only “that an Appointing Authority ensure that disabled veterans be the last to be laid off in that title.” AR 338-339. The Commissioner noted there was no evidence that Rysz was a disabled veteran and that it was undisputed that the City laid off all employees with the same title.⁶ AR 339. The Commissioner concluded that the City complied with that section’s

⁶ While the Commissioner’s observation regarding section 26 and disabled veterans is not dispositive, the court notes that this interpretation is correct. See 1980-81 Op. Atty Gen. Mass. 97, (“it is clear that if employees are laid off due to lack of funds, all employees having the same title in a particular departmental unit who are not disabled veterans must be laid off first according to seniority, followed by such employees who are disabled veterans according to seniority.”).

requirements when it laid off Rysz. Id.

The veterans' preference in section 26 is informed by the retention provisions of G. L. c. 31, § 39, which states in relevant part that when an appointing authority lays off employees, it must do so in order of seniority and within a group of "permanent employees in positions having the same title" An employee who is terminated for lack of funds:

"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 or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service."

Id.

Rysz essentially contends that by virtue of his veterans' status, he was entitled to "bump" Silva from his position as an alternative to his layoff.

The facts in this case are similar to those in Andrews v. Civil Serv. Comm'n, 446 Mass. 611 (2006), in which the plaintiff, a disabled veteran, claimed that the retention of five employees who were provisionally promoted to positions that were functionally the same as his own violated the preference afforded to disabled veterans. Id. The Supreme Judicial Court concluded that the challenged positions and the position the plaintiff held were not the same. The Court noted that the positions the plaintiff challenged entailed "either more complex duties or a higher degree of responsibility" than did those in the plaintiff's position, id. at 617, and held that section 39 did not operate against employees in higher titles. Id. at 616. ("Section 39 makes clear that a retention preference, either by seniority or by status as a disabled veteran, does not operate against employees in higher titles."). Therefore, like the plaintiff in *Andrews*, Rysz was not entitled to bump Silva from

his higher position with more complex duties when Rysz was laid off in 2003. The Commissioner's decision that the City did not violate the veteran's preference in the civil service laws was not arbitrary or capricious or based on an error of law.

Rysz also objects to the Commissioner's statement that, "In regard to compliance with the Vietnam [Era] Veteran Readjustment [Assistance] Act, the Appellant has failed to either state the requirements of this Act or specifically how the City may have violated them." AR 340. Title 38 of the United States Code pertains to "Veteran's Benefits," and chapter 42 of that Title pertains to "Employment and Training of Veterans." The Vietnam Era Veteran Readjustment Assistance Act of 1974 ("VEVRAA") provides that

"Any contract in the amount of \$100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans."

38 U.S.C. § 4212 (a)(1); see also 38 U.S.C. § 101 (Short Title of 1974 Amendments).

A department or agency of the United States is defined as "any agency of the Federal Government or the District of Columbia, including any Executive agency as defined in section 105 of title 5 and the United States Postal Service and the Postal Regulatory Commission." 38 U.S.C. § 4211(5).

The record contains no indication of how this act applies to the City, and indeed, no mention of contractors or contracts between the City and any department or agency of the United States. Rysz bears the burden of demonstrating how the VEVRAA applies.⁷ Accordingly, the Commissioner's

⁷ Rysz also filed a Motion to Introduce Evidence (paper no. 14) that was denied without prejudice for failure to comply with Superior Court Rule 9A. This court cannot consider evidence that was not part of the administrative record, but may remand a matter to an agency so that it may consider such evidence when that evidence is "material to the issues in the case and that there was good reason for the failure to present it to the agency." She Enterprises, Inc. v. State Bldg. Code Appeals Bd., 20 Mass. App. Ct. 271, 273 (1985); G. L. c. 30A, § 14(6). Such a remand is not necessary here, however, as none of the evidence Rysz proffered addresses the issues raised above.

conclusion was correct as a matter of law.


Political Considerations

Rysz's final argument before the Commission was that the only engineers the City retained were those who had made political contributions to Mayor Kalisz, thus suggesting that politics somehow played a part in retaining Silva and Andrade. While the Commissioner made no explicit findings regarding these political contributions, there is no substantial evidence in the record that retaining these employees affected Rysz's layoff or reinstatement. This is particularly because the City laid off all employees with Rysz's title and retained those in higher grades, consistent with the City's goal of developing greater in-house design capabilities.

ORDER

For the foregoing reasons, it is **ORDERED** that the motion of the plaintiff, Stanley Rysz, for judgment on the pleadings be and hereby is **DENIED** and the Commission's decision is **AFFIRMED**.

By the Court


Robert J. Kane
Justice of the Superior Court

DATED: June 24, 2010