COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

STEVEN SCHEFFEN, JAMES FITZPATRICK, and ROBERT MICHEAUD,
Appellants,

CASE NO: I-10-319 (Scheffen)
I-10-320 (Fitzpatrick)
I-10-321 (Micheaud)

JAMES RASO, SCOTT MCNAMARA, MARC CICCARELLI, DANIEL FLEMING, JOHN R. BERNARD and JOHN L. NICOLETTI,
Interveners**,**

v.

CITY OF LAWRENCE,
Respondent

Attorney for the Appellant:	James F. Lamond, Esq. McDonald, Lamond & Canzoneri 153 Cordaville Road, Suite 320 Southborough, MA 01772
Attorney for the Respondent:	Sean P. O'Connor Morgan, Brown & Joy, LLP 200 State Street Boston, MA 02109
Interveners:	Pro Se
Commissioner:	Paul M. Stein[1]

DECISION ON CROSS-MOTION FOR SUMMARY DECISION

The Appellants, Steven Scheffen, James Fitzpatrick, and Robert Micheaud, ("Appellants"), acting pursuant to G.L.c.31, §2(b), duly appealed to the Civil Service Commission (Commission) from a decision of the City of Lawrence ("Lawrence") that refused to restore them to their former positions with the Lawrence Police Department (LPD). The Commission heard oral argument on the parties' cross-motions for summary decision on July 11, 2011 and received post-hearing submissions on July 18, 2001, July 25, 2001 and August 30, 2001.

[1] The Commission acknowledges the assistance of Law Clerk William Davis in the drafting of this decision.

Findings of Fact

Giving appropriate weight to the documents submitted by the parties, the argument of counsel and the inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellants are sworn superior officers and permanent civil service employees with the LPD. As of June 2010, Appellant James Fitzpatrick held the position of LPD Police Captain, Appellant Steven Scheffen held the position of LPD Police Lieutenant and Appellant Robert Micheaud held the position of Police Sergeant. (*Claim of Appeal; Appellants' Motion; Lawrence's Cross Motion*)

2. The Interveners are also sworn police officers and superior officers holding permanent civil service positions with the LPD who support the Appellants' position, in general, that demoted superior officers should have been restored to their former positions, but assert a different view from the Appellants as to the order in which the demoted superior officers should have been restored. (*Interveners' Letters*)

3. In June 2010, William Lantigua, the Mayor of Lawrence, and Appointing Authority over the LPD, submitted for review a budget for the 2011 fiscal year to the Lawrence City Council, which subsequently approved it. Among the budget was a statement that the budget "reflects drastic cuts in personnel city-wide, including significant reductions in public safety; Police and Fire; along with DPW and the Lawrence School Department." (*Appellants' Motion; Lawrence's Cross-Motion)*

4. The Mayor sent notice of his decision to lay off, for lack of funds, the Appellants and the Interveners, among other LPD officers and other civil service employees in other Lawrence departments, pursuant to G.L. c. 31, §39. Overall, the City sent Section3 9 notices to 89

employees including 24 police patrol officers and 11 superior officers in the LPD. All of the eleven higher ranking police officers chose demotion, pursuant to Section 39, in lieu of separation. All 24 patrol officers were separated. The patrol officers were laid off effective July 10, 2010. (*Appellants' Motion; Lawrence's Cross-Motion*)

5. The justification for the June 2010 layoff due to a lack of money, and the validity of the demotion, "bumping" and layoff of LPD officers that ensued, is not challenged. (*Appellants' Motion; Lawrence's Cross-Motion*)

6. In or around September 2010, Lawrence reinstated 18 laid-off employees to their former positions, including 6 LPD patrol officers, and 9 firefighters in the Lawrence Fire Department (LFD). None of Appellants or Interveners, or any other of the demoted superior officers have been restored to their prior positions of Captain, Lieutenant, or Sergeant. No person has been hired, promoted, or reinstated to any of the LPD superior officer positions formerly held by an Appellant or an Intervener prior to the June 2010 layoffs. ((*Appellants' Motion; Lawrence's Cross-Motion; Joint Stipulation*)

7. On September 22, 2010, the Lawrence Eagle Tribune reported that "City revenue has been higher than expected over the past several month [sic] . . .". and that the LFD firefighters' union had made $241,000 in contract concessions which included each firefighter working 24 hours overtime for free and giving up a weeks' vacation. The report stated that the additional revenue together with the union's concessions had resulted in the reinstatement of 8 of the 24 LFD firefighters laid off in June 2010. (*Appellants' Motion [Lamond Aff't, Exh. F]*)

8. In or around October 2010, LPD superior officer Michael McGrath (the parties differ in whether he was a Police Captain or Police Lieutenant), retired from the LPD. No other officer

was promoted or reinstated to fill his position. His duties were reassigned to others. (*Appellants' Motion; Lawrence's Cross-Motion; Joint Stipulation*)

9. In or about May 2011, the Mayor of Lawrence submitted his proposed FY 2012 budget, The proposed budget included further reduction in the LPD budget from FY2011 levels, and specifically proposed an $84,880.00 reduction in the total appropriation for permanent police department employee salaries and wages. The budget proposed reducing the number of superior officers by two (one Lieutenant and one Sergeant), civilian employees by (1/2 FTE) and increasing the number of patrol officers by three (from 70 to 73, which was 23 patrol officers less than authorized by the FY2010 budget). Absent evidence to the contrary, I will infer that, in material respects to the public safety appropriations, the FY2012 budget was approved subsequently substantially as proposed. (*Lawrence's Cross-Motion; Appellant's July 18, 2011 Post-Hearing Submission; Lawrence's July 25, 2011 Post-Hearing Submission*)

Conclusion

Summary of Conclusion

These appeals present an issue of first impression that requires the Commission to interpret the requirements of the Civil Service Law, Chapter 31, specifically, Sections 39 and 40, concerning the rights of civil service employees who were laid off or demoted in a reduction in force due to lack of money to be reinstated or restored to their former positions. The Appellants claim that the law compels that demoted employees are granted priority to be returned to their positions, before any employees who were laid off can be rehired or their positions filled. Lawrence argues that the statutes do not provide for any such priority and that to interpret the law as the Appellants' argue intrudes on the discretion of a municipality to choose how best to appropriate the revenues it has available and would lead to absurd and unworkable results.

Lawrence's position is correct. Civil service laws did not enact limits on the broad authority over the public's money that appropriately rests with state and municipal officials duly elected or appointed to manage the public fisc. Absent evidence that an appointing authority's choices are motivated by bias, patronage or other unlawful subterfuge (which is not the case here), the Commission has no statutory authority to dictate that Lawrence is precluded from deciding to reinstate (or hire) any rank and file patrol officers until they first restore all demoted superior officers (Sergeants, Lieutenants & Captains) to their former positions. Since none of the Appellants are entitled to claim that their right of restoration has been unlawfully impaired at this point, the claims of the Interveners is moot and need not be addressed in this Decision.

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary decision of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h) when "there is no genuine issue of fact relating to all or part of a claim or defense" and the moving party is "entitled to prevail as a matter of law."

These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., after viewing the evidence in the light most favorable to the non-moving party, the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring evidentiary hearing. See, e.g., Pease v. Department of Revenue, 22 MCSR 754 (2009); Lydon v. Massachusetts

Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Relevant Civil Service Law

The statutes upon which the Appellants rely include Sections 39 and 40 of Chapter 31, and PAR.15 of the Personnel Administration Rules promulgated by the Massachusetts Human Resources Division, pursuant to Sections 3 & 4 of Chapter 31.

Section 39 provides:

> *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.*
>
> Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the [just cause] provisions of section forty-one. *Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority . . . 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. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.*

G.L.c.31§39 (*emphasis added*)

Section 40 provides:

If a permanent employee shall become separated from his position because of lack of work or lack of money or abolition of his position, his name shall be placed by the administrator on a reemployment list, or if a permanent employee resigns for reasons of illness his name shall be placed on such list upon his request made in writing to the administrator within two years from the date of such resignation.

The names of persons shall be set forth on the reemployment list in the order of their seniority, *so that the names of persons senior in length of service at the time of their separation from employment, computed in accordance with section thirty-three, shall be highest. The name of a person placed on such reemployment list shall remain thereon until such person is appointed as a permanent employee after certification from such list or is reinstated, but in no event for more than two years*. *The administrator, upon receipt of a requisition, shall certify names from such reemployment list prior to certifying names from any other list* or register if, in his judgment, he determines that the position which is the subject of the requisition may be filled from such reemployment list.

If the position of a permanent employee is abolished as the result of the transfer of the functions of such position to another department, division, board or commission, such employee may elect to have his name placed on the reemployment list or to be transferred, subject to the approval of the administrator, to a similar position in such department, division, board or commission without loss of seniority, retirement or other rights, notwithstanding the provisions of section thirty-three.

G.L.c.31§40 (*emphasis added*)

PAR.15 provides:

LAYOFF FROM CIVIL SERVICE POSITIONS

(1) All civil service rights of an employee rest in the position in which he holds tenure.
(2) When one or more employees must be separated from positions in the same title and departmental unit due to lack of work, lack of money or abolition of position, all persons filling positions provisionally in the designated title must be separated first, followed by all persons filling positions in temporary status in the designated title, before any civil service employees holding the designated positions in permanent status shall be separated from such positions.
(3) When one or more civil service employees holding permanent positions in the same title and departmental unit must be separated from their positions due to lack of work, lack of money, or abolition of position, the employee with the least civil service seniority computed pursuant to M.G.L. c. 31, §33 shall be separated first; provided that all disabled veterans are accorded the preference provided by M.G.L. c. 31, §26.
(4) When one or more persons among a larger group of civil service employees holding permanent positions in the same title and departmental unit are to be separated from their positions due to lack of work, lack of money or abolition of position, and the entire group has the same civil service seniority date, the appointing authority has the discretion to select for separation among those with equal retention rights, applying basic merit principles.

Both parties rightfully recognize the seminal rules of statutory construction which impel that inquiry into legislative intent must begin with the language of the statute and, if the plain and ordinary meaning of that language "provides a clear answer, it ends there as well." See, e.g., Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999); Camara v. Attorney General, 458 Mass. 756, 760n.10 (2011); Law v. Griffith, 457 Mass. 349, 352 (2010); Commonwealth v. Cory, 454 Mass. 59, 563 (2009); Commonwealth v. Brown, 431 Mass. 772, 775 (2000).

As aptly put by the Appeals Court, this Commission must "read and apply [civil service law] in a way which yields an effectual and harmonious piece of legislation compatible with the legislative goals that motivated its passage . . . To do this, we look first to the language of the statutes, and in the absence of uncertainty or ambiguity, we need go no further". Worcester v. Civil Service Comm'n, 18 Mass.App.Ct. 278, 280, rev.den., 392 Mass. 1104 (1984) and cases cited. See also City of Fall River v. AFSCME Council 93, 61 Mass.App.Ct. 404, 408, 411 (focusing on "fundamental purpose" and "policy choices" reflected in language of civil service law); McLean v. Town of Natick, 14 Mass.App.Ct. 187, 189, rev.den., 387 Mass.1103 (1982) (court is "mindful of the policy considerations behind the civil service law and the intention of the Legislature" in construing the statute)

As this dispute suggests, applying these principles is more complex than stating them. Both the Appellants and Lawrence agree with the principles, but see the statutory meaning through different lenses to reach different conclusions about the legislative purpose and intent. From the Appellants' perspective as demoted employees, they point to syntactic and linguistic distinctions to see the layoff paradigm as constructing two separate tracks – layoff or demotion – and, "[a]s soon as sufficient work or funds are available", to require preference be given to restoring employees who voluntarily agreed to be demoted ahead of filling any positions left vacant in a

layoff by an employee who had been terminated. Lawrence interprets the statute from the perspective of a municipality, claiming that the statutory rights of reinstatement and restoration after layoff contain no indication that they were intended to be read any differently from how the civil service law has been construed in the context of implementing a layoff, in which a municipality is allowed wide discretion to set its own financial priorities in determining which services and employees should be supported and those that must be cut, excepting those cases of pretext or other unlawful purpose that conflict with basic merit principles of civil service law.

The key premise of the Appellant's argument is stated as follows: the General Court "intended employees who accepted demotion in lieu of separation in the face of lack of work or funds would be *treated differently* than employees who separated because of those reasons" and "assigned these two groups of persons materially different righst, and it assigned employers materially different responsibilities as to each." (Appellants' Motion, p.14)(*emphasis in original*) The Appellants fasten on the statutory structure in which the rights of reinstatement after layoff are treated separately from the rights of restoration after demotion. The Appellants note that, as to the latter, the law provide that the employee "shall" be restored "as soon as sufficient funds or work is available", whereas no such trigger to "guaranteed" reinstatement is provided in the portions of the statute dealing with that subject. Compare G.L.c.31,§39, ¶2 (demotion and restoration) with G.L.c.31, §39,¶2 & 40 (layoff and reinstatement) The Appellants point out that Lawrence had "sufficient funds" because it was able to reinstate 18 employees, including 6 LPD patrol officers.

Lawrence contends that there are only slight differences in language used by the statutory provisions regarding layoff and reinstatement on the one hand, and demotion and restoration on the other hand. Lawrence also points to the settled law that an appointing authority has

discretion to "prudently manage its affairs" and, when faced with competing demands for its limited funds, has the right to decide the nature and level of its services and to allocate its funds accordingly, and retains the sole discretion to decide when to fill vacant positions, either on a permanent or temporary basis. See, e.g., Town of Billerica v. International Ass'n of Firefighters, Local 1495, 415 Mass 692, 694 (1993); Newton School Comm. v. Labor Relations Comm'n, 388 Mass. 557, 563 (1983); Debnam v. Town of Belmont, 388 Mass. 632, 635-36 (1982); City of Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, 597 (1985). Thus:

> *"[I]n the absence of pretext or device* to defeat the civil service law's objective of protecting efficient public employees . . . . 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*."

City of Gloucester v. Civil Service Comm'n, 408 Mass. 292,299-301(1990)(*emphasis added*)

Although prior case law arose from municipal decisions made at the front-end of a reduction in force or initial hiring decision, nothing in the statutory language of Sections 39 or 40 leads to the conclusion that the legislature meant to apply the principles that afford municipalities considerable discretion to allocate municipal resources in a layoff any differently in the context of deciding when and who should be reinstated or restored to positions at some later date.

In Almeida v. New Bedford School Comm., 22 MCSR 739 (2009), further decision, 22 MCSR 739 (2009), further decision, 23 MCSR 608) (2010), the Commission addressed bumping and restoration rights of labor service employees. Although the precise question presented in this appeal was not addressed, the Almeida decisions clearly imply that the Commission views the layoff statutes to vest an appointing authority with broad discretion to determine which "similar" labor service positions a demoted employee could be restored into, and that those choices are given to the appointing authority's sound discretion, not to the employee. cf. Tomashpol v.

Chelsea Soldiers Home, 23 MCSR 52 (2010), appeal pending (distinguishing limited bumping rights in a layoff of "official service" personnel)

The authority cited by the Appellants is not persuasive of any different result. In Worcester v. Civil Service Comm'n, 18 Mass.App.Ct. 278 (1984), the court construed Section 39 to hold that it was "clear and unambiguous" that a police sergeant who elected to be demoted to patrol officer waived his Section 39 right to request a "just cause" appeal that the reduction in force was not justified for a lack of funds. The question of whether Worcester would have been required to restore the appellant to his sergeant's position before hiring or reinstating any more patrol officers was not considered. The Appellants correctly cite authority that the words "shall" and "may" usually carry different statutory meanings – the former being more commanding and the latter being more permissive. E.g., United States Gypsum Co. v. Executive Office of Environmental Affairs, 69 Mass.App.Ct. 243 (2007); Salem Hospital v. Rate Setting Comm'n, 26 Mass.App.Ct. 323 (1988). However, this principle is of little force here, where Section 39 provides that both laid off employees "shall" be reinstated (first paragraph) and demoted employees "shall be restored" (second paragraph) whenever it becomes appropriate to fill the positions.

Lawrence also makes a persuasive argument that the Appellants' argument would create scenarios that seem untenable as a matter of sound public policy. For example, Lawrence explained that, if all officers demoted from supervisory positions to patrol officer had to be restored before any more patrol officers could be hired, the LPD would be obliged to suffer a "top-heavy" force structure that, in the extreme, could result in a police force with more "restored" supervisory officers than patrol officers on duty. The Commission cannot interpret the civil service statutes to support such an absurd result.

In sum, there is no indication that the reinstatement decisions made by Lawrence were driven by any ulterior motive. It is not disputed that there are not "sufficient funds" to reinstate and restore ALL of the public safety officers affected by the reduction in force. Nor is there any evidence that Lawrence filled any position from which a superior officer had been demoted and to which he would be entitled to be "restored" before any other person was promoted to fill such a position. Rather, the evidence is compelling that the decision to reinstate rank and file officers was made in good faith and with the intentions of providing the level of public safety service to the citizens of Lawrence that city officials thought most appropriate with the funding available. It was possible to reinstate more firefighters than police officers only because the firefighters' union made financial concessions which, apparently, the police union did not. These decisions are fiscal and management choices that are properly within the purview of the municipality, not the Civil Service Commission.

Accordingly, for the reasons stated above, the Appellants' Motion for Summary Decision is DENIED and Lawrence's Cross-Motion for Summary Decision is GRANTED. The appeals of the Appellants are **dismissed** and the claims of the Interveners are **dismissed as moot.**

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell & Stein, Commissioners; Marquis [Absent]) on October 20, 2011.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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 to:
James F. Lamond, Esq. (for Appellants)
Sean P. O'Connor, Esq. (for Respondent)
James Rasso, Scott McNamara,
Marc Ciccarelli, Daniel Fleming
John R. Bernard, John L. Nicoletti (Interveners)
John Marra, Esq. (HRD)