

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MICHAEL ST. PIERRE,
Appellant

v.

CASE NO: D1-08-163

FALL RIVER SCHOOL COMMITTEE,
Respondent

Appellant's Attorney:

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Associate General Counsel
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appointing Authority's Attorney:

Bruce A. Assad, Esq.
16 Bedford Street
Fall River, MA 02720

Commissioner:

Paul M. Stein¹

DECISION

Acting pursuant to G.L. c.31, §43, Appellant, Michael St. Pierre, appealed to the Civil Service Commission (Commission) from a decision of the Fall River School Committee (FRSC), the Appointing Authority, laying off the Appellant from his tenured labor service position as Carpenter. The appeal was timely filed and a hearing was held by the Commission on January 9, 2009 at the Southern New England School of Law. The hearing was digitally recorded.

¹ The Commission acknowledges the assistance of Legal Intern Heather A. Sales in the preparation of this Decision.

FINDINGS OF FACT

Eleven (11) exhibits were entered into evidence at the hearing, and three (3) additional exhibits were submitted post hearing. Based on the documents submitted into evidence and the testimony of:

For the Appointing Authority:

- Timothy McCloskey, Director of Engineering and Maintenance Services
- Jack Alston, Maintenance Supervisor

For the Appellant:

- Michael St. Pierre, Appellant;
- Karen Hathaway, Staff Representative for AFSCME Council 93

I make the following findings of fact:

1. The FRSC hired three Carpenters on August 16, 1999: Paul Medeiros, Jay Jezak, and the Appellant. (Testimony of the Appellant; Exhibit 8)
2. The Appellant, Paul Medeiros, and Jay Jezak all had the same seniority date (i.e., August 16, 1999). (Exhibit 7 & 8)
3. The FRSC experienced a fiscal shortfall during FY 2009. (Testimony of Director McCloskey; Exhibit 1)
4. Due to a lack of money, FRSC was forced to layoff personnel, including an FRSC carpenter. (Testimony of Director McCloskey; Exhibit 1)
5. The Personnel Administration Rule 15(4) [PAR.15(4)] states in pertinent part:

When one or more persons among a larger group of civil service employees holding permanent positions in the same title and department 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. (*Emphasis added*). (Exhibit 5)

6. In compliance with the PAR.15(4), Jay Jazek and the Appellant (the two individuals who were then employed as carpenters with the same seniority date), were evaluated by the Director McCloskey to determine who would be laid off. (Testimony of Director McCloskey)
7. Director McCloskey had been employed by FRSC as Director of Engineering and Maintenance Services since November 2006. (Testimony of Director McCloskey)
8. Director McCloskey had not been involved in layoffs of Civil Service employees before the layoff of the Appellant. (Testimony of Director McCloskey)
9. The evaluation of the three FRSC Carpenters was derived from Director McCloskey's opinions as well as Alston, who upon request by Director McCloskey, evaluated the Appellant and made recommendations. (Testimony of Director McCloskey)
10. On June 1, 2008 Director McCloskey drafted an employee performance evaluation which included a summary of the three carpenters' performance, a rating scale, and application of that scale to each employee (hereinafter "tie-breaker evaluation"). (Exhibit 6)
11. Director McCloskey testified that he came up the rating scale "on his own" and did not get it from an outside source. (Testimony of Director McCloskey)
12. The Appellant received the lowest evaluation score, a "3." Jay Jezak scored a "4" on his evaluation. (Exhibit 6)
13. Director McCloskey was aware that Alston did not get along with the Appellant at the time he relied on Alston's recommendations. (Testimony of Director McCloskey)
14. The Appellant had received a verbal warning for an incident that occurred on July 20, 2007. (Exhibit 10)

15. This verbal warning was noted in a memorandum written by Alston to the Appellant and recorded in his personnel file. (Exhibit 10)
16. Prior to June 1, 2008, AFSME Staff Representative Karen Hathaway had discussions with the Director of Administrative and Environmental Services regarding the planned lay off Michael St. Pierre. (Testimony of Hathaway)
17. In the past when one or more persons had the same civil service seniority date, the FRSC would make the determination of who had the higher seniority usually by alphabetical order. In this instance, Appellant's name comes after Jay Jezak alphabetically. (Testimony of Hathaway)
18. On June 11, 2008 the Appellant received the letter from FRSC informing him that his appointment as Carpenter would expire on June 27, 2008. (Exhibit 1)
19. There is a written collective bargaining agreement (CBA) between the FRSC and AFSCME Council 93, Local 1118 (the Union) which incorporates a performance evaluation tool comprised of five different sections in which to apply a rating system to the employee's performance. (Exhibit 14)
20. The CBA indicates the identical rating definitions, with the exception of the rating of "0. Not applicable: not relevant to the job", as the one Director McCloskey utilized in the evaluation of the Appellant and the other two carpenters. (Exhibit 6 and 14)
21. On March 27, 2008 the Union ratified the CBA. (Exhibit 12)
22. On May 25, 2008 FRSC ratified the CBA at an executive session special meeting. (Exhibit 13)
23. The CBA was executed on June 16, 2008. (Exhibit 14)

24. The CBA indicates that the agreement shall become effective retroactively (i.e., July 1, 2006) and shall continue in effect to and including midnight June 30, 2009. (Exhibit 14)
25. When Director McCloskey conducted the performance evaluation on Appellant, the CBA had not yet been executed, but it had been ratified by the FRSC. (Exhibit 1, 13 and 14)
26. On July 7, 2008, Mr. St. Pierre filed a “just cause” appeal of his layoff with the Commission, pursuant to Section 43 of the Civil Service Law. (Claim of Appeal)

CONCLUSION

Section 39 of G.L.c.31 prescribes the procedures to be followed by an appointing authority in selecting permanent employees for layoff in a reduction in force due to lack of funds. In pertinent 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 money...they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit...

PAR.15(4) Layoff from Civil Service Positions, requires that basic merit principles must be applied when selecting for separation an individual when one or more person has the same seniority date. The term “Basic Merit Principles,” as relevant to the appeal at hand, is defined in G.L.c.31, §1 as:

...(d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). Further, the Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006) and cases cited.

Here, the Commission finds no evidence that Appellant's performance evaluation was not done in adherence with basic merit principles, or was made in an arbitrary and capricious manner. The FRSC utilized an objective one (1) through four (4) rating system and spoke with a supervisor in order to determine which of the two carpenters with identical seniority dates should be laid off. The FRSC's reliance on the opinions of a supervisor regarding an employee's performance is not uncommon or unreasonable. The supervisor, Mr. Alston, was in the best position to comment on Appellant's work product since he had direct personal knowledge of Appellant's performance as a carpenter.

The Appellant contends that Mr. Alston did not get along with the Appellant and thus his evaluation of the Appellant lacked impartiality and was based upon favoritism. However, not getting along with an employee does not automatically equate to favoritism

or bias. The Appellant looks to a prior verbal warning he received from Mr. Alston to illustrate that Mr. Alston may have had a personal vendetta against him when he made recommendations to Director McCloskey, but this allegation proves groundless. The testimony and evidence provided regarding what occurred during the 2007 incident showed the FRSC and Mr. Alston were justified in taking the disciplinary action they did at that time, and the validity of that discipline not called into question by any substantial evidence presented to the Commission. Without such substantial credible evidence to the contrary, the Commission infers that Mr. Alston was providing an objective evaluation of the Appellant's work performance as required by his job position as supervisor.

The Appellant also claims that the parties' CBA was in effect at the time the tie-breaker evaluation was conducted; that the FRSC was aware of the CBA agreement, but testified to the contrary; and the choice of an alternate tie-breaker evaluation was nonsensical when FRSC is obligated to apply the evaluation found in the CBA. These issues will be addressed separately.

First, the evidence proves that the FRSC ratified the CBA at an executive session special meeting on May 25, 2008. By doing so, FRSC was agreeing to adopt the CBA retroactively to June 1, 2008, including the performance evaluation found in the CBA. The final act of carrying out the completion of the CBA (i.e., signing the CBA) was not done until June 16, 2008, but this date is inconsequential as the CBA states it applies retroactively and once it was ratified FRSC knew or should have known that implementation of the CBA was imminent. Therefore, the layoff decisions taken by FRSC are deemed covered by the CBA.

The next issue is whether the FRSC supervisors responsible for the tie-breaker evaluation of the carpenters, but who were not directly involved in the collective bargaining, knew about the newly ratified CBA and the evaluation method it contained. If not, then the supervisors can not have been expected to follow the performance evaluation found in the CBA. Director McCloskey, who created the tie-breaker evaluation procedure, testified he was not aware of the performance evaluation that is in the CBA before prior to evaluating the carpenters, and that the one (1) through four (4) rating system he used came from his own mind and not copied from elsewhere. The Commission finds his testimony implausible. The ratings and definitions of the ratings used by Director McCloskey were verbatim those found in the performance evaluation in the CBA. Although Director McCloskey did not include the CBA's performance evaluation "zero" rating, the word for word duplication of the rating definitions one (1) through four (4) easily infers that Director McCloskey had received, either directly or indirectly, some general information or understanding about the performance evaluation found in the CBA.

Third, and finally, the question remains that even if the FRSC evaluators was aware of the CBA procedures, does the deviation from the performance evaluation found in the CBA warrant the inference that FRSC applied an unfair alternate tie-breaker evaluation? The Commission answers this question in the negative.

The FRSC's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding

any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36, 133 N.E.2d 489 (1956).

The greater amount of credible evidence must in the mind of the judge be to the effect that such action 'was justified,' in order that he may make the necessary finding. If the court is unable to make such affirmative finding, that is, if on all the evidence his mind is in an even balance or inclines to the view that such action was not justified, then the decision under review must be reversed. The review must be conducted with the underlying principle in mind that an executive action, presumably taken in the public interest, is being re-examined. The present statute is different in phrase and in meaning and effect from [other laws] where the court was and is required on review to affirm the decision of the removing officer or board, 'unless it shall appear that it was made without proper cause or in bad faith.'

Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427, 430 (1928). (*emphasis added*) The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 462 (2001)

The Commission concludes that the evidence shows no blatant disregard for the performance evaluation found in the CBA as a subterfuge, nor any evidence the tie-breaker evaluation applied was unfair in any way. Through the examination of the performance evaluation in the CBA (e.g., noting there are sections on quality and quantity of work, work habits, and employees relationships with others), it can be shown that the alternate tie-breaker evaluation the FRSC used was very similar in substance. Thus, it can be reasoned that even if the FRSC had applied the performance evaluation found in the CBA, the evidence does not warrant inference the outcome would have differed.

Moreover, if the Appellant was in fact, concerned that the CBA performance evaluation process be used, he could have been more proactive. For instance, his AFSME Staff Representative testified to having a conversation with the Director of Administrative and Environmental Services regarding the planned lay off Michael St. Pierre, during which time she could have made sure the layoffs would be done specifically according to CBA. Going forward, the Commission would hope both the FRSC and the Union will collaborate more closely in advance on issues such as the appropriate tie-breaker procedures to be used in any future layoff, and clearly document their respective understandings, so as to avoid the type of dispute generated here.

In sum, even if the tie-breaker evaluation did not conform exactly to the CBA method, the FRSC's tie-breaker evaluation was still in adherence with Chapter 31 and basic merit principles. Thus, the FRSC was fully justified to lay off the Appellant.

Accordingly, for the reasons stated above, the appeal of the Appellant, Michael St. Pierre, is hereby, *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on August 5, 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 to:

Karen E. Clemens, Esq. (for Appellant)

Bruce A. Assad, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)