

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JEANNE STEWART,
Appellant

v.

D1-15-236

NEWTON HOUSING AUTHORITY,
Respondent

Appearance for Appellant:

Eric T. McKenna, Esq.
AFSCME Council 93
8 Beacon Street, 8th Floor
Boston, MA 02108

Appearance for Respondent:

James Pender, Esq.
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Commissioner:

Paul M. Stein

DECISION

The Appellant, Jeanne Stewart, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43 and G.L.c.121B,§29 contesting her employment termination as Resident Services Coordinator (RSC) with the Newton Housing Authority (NHA).¹ The Commission held a pre-hearing conference on January 5, 2016 and a full hearing on March 2, 2016 and April 4, 2016, both in Boston. No party requested a public hearing so the hearing was declared private. The full hearing was digitally recorded and the parties received copies of the CDs.² Twenty-nine exhibits (1 through 29) were received in evidence and two e-mails with documents were received after the conclusion of the hearing and marked in evidence. (PHExhs. 30A-30C, PHExhs.31A-31B) Each party submitted a proposed decision on June 6, 2016.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CDs to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Richard Kronish, Chair, NHA Board of Commissioners
- Amy Sutherland, NHA Executive Director
- Qui Chau, NHA Director of Finance

Called by the Appellant:

- Jeanne Stewart, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

Background Information

1. NHA is a municipal corporation established in 1959 pursuant to Mass. G.L.c.121B. The NHA serves approximately 1300 low- and moderate-income families and elderly individuals residing in Newton, MA by providing them with safe and affordable rental housing, including 55 units owned and managed by NHA itself, six properties containing 298 federally-subsidized units, state-subsidized elderly and family housing units in various properties scattered across the city, approximately 441 tenants placed in private rental units under the federal “Section 8” voucher program and approximately 30 additional tenants placed in private rental units receiving state-subsidized vouchers. (*Exh.11; PHExh.30B; Testimony of Sutherland; Administrative Notice [http://www.newtonhousing.org/Programs.aspx]*)

2. NHA operates under a five-member board of commissioners form of government. (Board). Richard Kronish was appointed to the Board in or about 2010 and became Chairman in or about December 2014. He serves as the “labor union” representative on the Board, having been associated with the labor movement for 50 years, including the New England Carpenters Union. He has held a position as a sociology professor at UMass Boston, with a focus on housing and public assistance, and he served on the board of First Trade Union Bank. He also

founded a non-profit organization for research of cancer treatment. (*Exhs. 6, 17, 19, 24 through 27; PHExh.30B; Testimony of Kronish*)

3. NHA employs approximately 19 full-time employees, all of whom belong to AFSCME Local 3092A, save for the Executive Director. NHA and Local 3092A (the Union) are parties to a collective bargaining agreement (CBA) effective January 1, 2015 through December 31, 2017. (*Exh.1; Testimony of Sutherland & Appellant*)

4. Among the fringe benefits available to NHA employees, NHA provides post-retirement medical and life insurance, together with a multiple-employer defined benefit pension plan regulated by the Public Employee Retirement Administration Commission (PERAC). An employee must have at least 10 years of longevity and attained 55 years of age to be eligible to receive retirement benefits. (*PHExh.30B*)

5. NHA employs an Executive Director, who is responsible for all day-to-day management of the NHA. The Executive Director's responsibilities, include, among other things, the duty to:

- Serve as Secretary for the Board
- Prepare and control annual budgets, and any revisions
- Prepare and receive bids and proposals, execute contracts and monitor the progress of work and compliance
- Serve as the authority procurement officer, and supervise procurement
- Supervise managerial and maintenance employees . . . monitor total activities and performance of all employees . . . and terminate authority through proper criteria

(*Exh. 7; Testimony of Sutherland & Kronish*)

6. In March 2013, following the retirement of the prior Executive Director, the Board promoted Amy Sutherland, who then served as Director of Administration, to become Interim Executive Director. She was appointed by the Board as the permanent Executive Director on July 1, 2014. (*Exhs. 6 & 13; Testimony of Sutherland & Kronish*)

7. Ms. Sutherland came to NHA in 2005 as a Program Assistant. She holds a B.A. in psychology from Boston University, an M.A. in public affairs from UMass-Boston and a public

housing manager certification from the National Association of Housing and Redevelopment Officials (NAHRO). (*Testimony of Sutherland*)

8. The Appellant, Jeanne Stewart, was hired as NHA's Resident Services Coordinator (RSC) in 2007 and held the job until terminated in December 2015. She has an Associate's Degree in Psychology and is a Certified Professional Trainer. (*Testimony of Appellant*)

9. The RSC reports directly to the Executive Director. The principal duties of the RSC focus on personal and social support to more than 500 residents of NHA public housing, with the mission to encourage community participation, promote self-sufficiency, connect residents through referrals to service providers, arrange for transportation for personal and social needs, counsel on household budgeting and housekeeping, assist with obtaining and preparing documentation needed to take advantage of government and community agency programs, represent the NHA at tenant meetings, serve as informal mediator for tenant dispute resolution, coordinate emergency housing placements, social and recreational events and programs, and attend court as an NHA representative as needed. The RSC is on-call 24 hours a day and available by cell-phone in case of emergency and, typically, fields 40-60 calls daily from tenants, tenants' relatives and others. At times, Ms. Stewart was provided with a part-time assistant to help her with her duties. (*Exhs. 7 & 12; Testimony of Sutherland & Appellant*)

10. In addition to providing direct personal support to tenants, the RSC also performs certain administrative, recordkeeping and clerical duties as required, including, in particular:

- Supervises and directs volunteers
- Solicits donations for tenant programs and English language and citizenship classes
- Serves as NHA liaison to City of Newton Hoarding Task Force, Elderly Interagency Meetings and other outside agencies.
- Maintains records of activities and assists with grant preparation.³

(*Exhs. 7 & 12; Testimony of Appellant*)

³ This fourth duty appears in a 2013 Position Description, which Ms. Stewart first saw in September 2015. It is not a job duty mentioned in Ms. Stewart 2012 report to the NHA Board. (*Exhs 7 & 12; Testimony of Appellant*)

11. Qui Chau is the NHA Director of Finance, a position he assumed in March 2000. Prior to employment with NHA, he worked as a Senior Auditor in the State Auditor’s Office and as an auditor in private industry. (*Testimony of Chau*)

12. The Director of Finance reports to the Executive Director and is delegated with responsibility for “all financial-related matters”, including, in relevant part:

- Monitor and maintain internal controls for project account and investments . . .
- Maintain and review internal processes for required statistical data collection and required funding agency reporting
- Prepare and maintain written documentation and correspondence for authority insurance procurement
- Supervise all functions related to cash receipts and cash disbursement for authority programs
- Perform and prepare other program related reporting tasks as required
- Assist Executive Director in determining budget allocations and forecasts . . .

(*Exh. 7; Testimony of Chau*)

13. NHA operates on a calendar year fiscal year (January 1 – December 31). Its annual operating budget, which is prepared in or about October, is funded primarily through approximately \$7.5 million in federal public housing (HUD) subsidies and other government grants that supplement approximately \$2.5 million in rental income from tenants. (*Exh. 11; PHExh.30B; Testimony of Chau*)

14. As of the NHA’s most recent audit for the fiscal year ending December 31, 2014, the NHA held Assets valued at \$25,270,112 and Liabilities of \$3,982,752, for a Total Net Position (Equity) of \$21,287,358. This position included, in part, cash assets of \$5,325,064, restricted cash assets of \$1,083,494 and long-term debt of \$2,895,038. The audit reported the total amount of Unrestricted Net Position (defined as the total amount of the NHA’s “net available liquid (non-capital) assets, net of liabilities”) to be \$4,624,749, which represented an increase of more than \$650,000 from the NHA’s FY2013 Unrestricted Net Position of \$3,949,961. (*PHExh.30A*)

15. The NHA's FY2015 budget, prepared in October 2014, projected Total Revenues of approximately \$11.2 million, Administrative Expenses (Including Salaries) of approximately \$1.1 million, other Expenses of approximately \$9.8 million, and a net surplus from operations of approximately \$350,000, which would bring the NHA's total Unrestricted Operating Reserve (i.e., net liquid assets) as of December 31, 2015, to more than \$4.8 million. (*Exhs 7 & 11; Testimony of Chau*)

Appellant's Medical Leave

16. Initially, Ms. Stewart worked out of an office located in the NHA's New Hyde development, a small development of thirteen units specifically designed for wheelchair accessibility. (*Exh. 12; Testimony of Appellant*)

17. As part of the renovation of the NHA's main offices, what had been a laundry room was converted into additional file storage space to accommodate the accumulated backlog of approximately four years' worth of housing applications. In or around the middle of 2014, as part of this renovation, Ms. Stewart was relocated to this renovated space which doubled as her office and as a "Service Center" to meet with tenants. (*Testimony of Appellant & Sutherland*)

18. Shortly after Ms. Stewart moved into the new office space, she began to experience respiratory symptoms, specifically chronic coughing. Although the construction workers continued to operate in the area, causing significant dust, and Ms. Sutherland had been bringing the backlog application files into the room, Ms. Stewart did not immediately equate her symptoms to anything in the workplace. She commented to Ms. Sutherland about the coughing, but did not take any other steps to lodge a formal complaint about the workplace environment. (*Testimony of Appellant & Sutherland*)

19. Also in 2014, the Union president asked Ms. Stewart to assume the position of a second Union Steward. The move was motivated by concerns that the current Union Steward, Juan Saez, was employed as Foreman of Maintenance, and some union members were uncomfortable with having a manager in the position of Union Steward. On or about July 20, 2014, Ms. Stewart accepted the position. Mr. Saez was replaced by Stephen Tocci, a non-management maintenance employee. *(Testimony of Appellant & Sutherland)*

20. Upon learning through Mr. Saez and other employees that Ms. Stewart had been offered the position of Union Steward, Ms. Sutherland immediately confronted Ms. Stewart and, in an angry tone, expressed her displeasure at the news. Ms. Stewart was offended by this confrontation, as Ms. Sutherland had been appointed as the permanent Executive Director effective July 1, 2014, and was no longer even a member of the Union. *(Testimony of Appellant & Sutherland)*

21. From that point, Ms. Stewart's relationship with Ms. Sutherland shifted from a friendly "mother-daughter" one (Ms. Stewart as mother) to one that was "antagonistic." *(Testimony of Appellant)*

22. On March 7, 2015, as a result of her respiratory symptoms, Ms. Stewart called in sick and sought medical advice. Her doctor attributed her illness to the presence of mold and construction activities at NHA. After exhausting sick time, Ms. Stewart retained an attorney who filed a workers' compensation claim on her behalf, asserting an environmental hazard in the workplace. Ms. Stewart also informed Ms. Sutherland directly that NHA would need to remediate the environmental hazard. *(Testimony of Appellant & Sutherland)*

23. Ms. Sutherland contracted with Oasis, an environmental firm, which conducted an independent air quality inspection (IAQ) of the NHA building. The IAQ disclosed mold in the

basement of the building, but did not find conclusive evidence that the contamination had permeated to the area in which Ms. Stewart worked. Nevertheless, in addition to contracting for remediation of the moldy basement, Ms. Sutherland also arranged to clean Ms. Stewart's office area and install an air purifier. (*Testimony of Sutherland*)

24. While out on medical leave, Ms. Stewart maintained contact with NHA tenants and personnel to ensure continuity for tenant events immediately upcoming, as well as early planning for events later in the year. She also maintained contact through her attorney and through the Clinical Director at Kadre Health Solutions, Inc., which served as the health care intermediary for the NHA. (*Exh.14; Testimony of Appellant*)

25. In April 2015, Ms. Sutherland contacted Ms. Stewart seeking access to the Tenant Services Account, which is a separate bank account maintained by the NHA for funds donated for use in defraying the costs of tenant parties and other activities were deposited. As RSC, Ms. Stewart was responsible for soliciting donations for the account, paid the bills for the activities, and kept the checkbook in her possession.⁴ Ms. Stewart had taken the checkbook with her, in the belief that she would not be returning to work before she needed to pay the bills for the St. Patrick's Day event, but left plenty of blank checks in her office. She was not willing to bring the checkbook to NHA (due to her illness) but agreed to turn over the checkbook to Mr. Chau if he came to her home, which he did. (*Testimony of Appellant & Sutherland*)

26. While the issue of retrieving the checkbook was being resolved, the NHA's attorney wrote to Ms. Stewart's attorney that Ms. Stewart "is holding property of the NHA and . . . I demand that she return the Housing Authority's property immediately. . . . If she refuses, I intend

⁴ The Tenant Services Account is not separately shown in the NHA's budget or financial statements, The evidence did not disclose specifically who was responsible for reconciling the account, but I infer that would fall within the general purview of the Finance Director, who has on-line access to that account along with all other NHA bank accounts as part of his overall responsibility over all cash receipts and disbursements. (*Exh. 7;Testimony of Chau*)

to take all action at law, including considering the filing of a criminal complaint for conversion to compel her to return the property she is holding hostage. I would ask you to inform your client of my intentions and what I believe is an absolutely outrageous response to the request from the Housing Authority that she return the requested item immediately.” (*Exh.10*)

27. Throughout May 2015 and into June 2015, Ms. Sutherland was receiving updates regarding Ms. Stewart’s status from the Clinical Director at Kadre Health Solutions, Inc.

- On May 4, 2015, Ms. Sutherland was informed that the Clinical Director had spoken to Ms. Stewart that day and had scheduled an appointment with a specialist for June but was trying to move it up sooner, and that she would be reviewing Ms. Stewart’s case with the firm’s Physician on May 11, 2015.
- On May 7, 2015, in response to when the appointment was and why it took so long for Ms. Stewart to see a specialist, the Clinical Director informed Ms. Sutherland that the appointment was set for June 11 and “[t]his is actually typical of waiting time as a new patient to a specialty group.”
- On May 27, 2015, the Clinical Director reported that, per the firm’s Physician, she was waiting for some test results from an allergist that Ms. Stewart was seeing on 6/3/2015, before discussing a return to work plan for her.
- On June 4, 2015, in response to an inquiry from Ms. Sutherland for feedback from the appointment with the allergist on June 3, 2015, the Clinical Director wrote: “I would imagine the narrative has to be dictated or documented” and that she would follow up that afternoon.

(*Exh. 14; Testimony of Appellant*)

28. Despite knowing about these pending medical issues, on May 22, 2014, Ms. Sutherland directed the NHA's attorney to send a letter to Ms. Stewart's attorney, in which the attorney stated:

"As Jeanne Stewart is represented by your office . . . it would be inappropriate for me to communicate with her directly."

"The Newton Housing Authority wishes to inform her that based on the total lack of communication between Ms. Stewart and the Housing Authority, and the lack of any medical evidence which would prevent her from working, the Housing Authority has determined that she has abandoned her job and that she no longer holds the position that she had with the Newton Housing Authority."

"The Newton Housing Authority intends to fill this job with a new candidate as soon as possible."

(*Exh. 8*)

29. The NHA attorney's letter made its way to Ms. Stewart on or about June 4, 2015, and she immediately e-mailed Ms. Sutherland that "I have not and will not abandon my job as resident services coordinator at the Newton Housing Authority." Ms. Sutherland also filed a grievance through her Union. (*Exhs. 15 & 22; Testimony of Appellant*)

30. On June 5, 2015, Ms. Sutherland responded to Ms. Stewart that the attorney's letter was "precipitated by a total lack of communications from you or your health care providers over a period of six weeks. . . . As a result of this lack of communication, the determination was made that you had abandoned your jobIn light of your e-mail last night . . . I have reversed our determination that you have abandoned your job. . . ." As a result, the Union grievance was withdrawn. (*Exh. 15 & 22; Testimony of Appellant*)

31. At the Commission hearing, Ms. Sutherland explained that she did not actually believe that Ms. Stewart had abandoned her job, but directed that the attorney's letter be sent in order to prompt a response from Ms. Stewart, with whom she had not had direct contact for some time. Ms. Sutherland analogized the action to what NHA does in sending an eviction notice to a tenant

who has been non-responsive, although the authority had no intention to go through with the threatened eviction. (*Testimony of Sutherland*)

32. The NHA did not formally oppose Ms. Sutherland's efforts to obtain workers' compensation benefits for her claim of illness due to workplace environmental contamination. It was not until October 15, 2015, however, after a hearing on her claim, that an Order of Payment issued from the Department of Industrial Accidents. The Order of Payment awarded:

- Temporary total incapacity compensation at the rate of \$523.93 under G.L.c.152,§34 from March 12, 2015 to November 12, 2015;
- Partial incapacity compensation at the rate of \$392.95 under G.L.c.152,§35 beginning on November 13, 2015 and continuing; and
- Medical benefits under G.L.c.152,§30.

Ms. Sutherland learned of this award on or about October 19, 2015. (*Exh. 9; Testimony of Ms. Sutherland*)

NHA's Interest in Hiring a Licensed Social Worker

33. When Mr. Kronish became a member of the NHA's board, he brought with him an interest in increasing the number of NHA's housing units and in enhancing the services provided to NHA's tenants. He continued his advocacy for these changes as Board Chairman. He was supported in this advocacy by Ms. Sutherland when she assumed the position of Executive Director. (*Exhs. 6 & 13; Testimony of Kronish & Sutherland*)

34. One of the areas for enhanced services was consideration of bringing a licensed social worker (LSW) "in house" to support a growing need for professional expertise to address the needs of the tenant population, which had become mostly elderly, mentally or physically disabled, or both. (*Testimony of Mr. Kronish & Ms. Sutherland*)

35. The existing practice of the NHA had been to refer tenants in need of a social worker, as well as other health care providers, to outside agencies. The RSC was responsible to identify when a tenant had a problem (tenant conflicts, hoarding issues, cognitive, emotional or medical issues, etc.) that could not be handled by the RSC and required referral to an appropriate professional. The RSC would contact the appropriate professional and it would be the professional's responsibility to seek to make contact with the tenant and arrange to meet with the tenant, establish a treatment plan and provide whatever services were needed. The RSC could not compel a tenant to follow-up with a provider and making the connection was not always seamless, due to complications on both ends. (*Testimony of Sutherland*)

36. At NHA's June 4, 2014, Board meeting, Ms. Sutherland said she was exploring the hiring of a LSW. The Board "expressed strong support for Ms. Sutherland's goals." (*Exh. 6*)

37. In February 2015, Ms. Sutherland and Chairman Kronish visited two housing projects in Newton operated by the Jewish Community Housing for the Elderly (a private non-profit) to explore the kind of tenant services provided there, which included on-site social worker services. They met with the Executive Director and Resident Services Administrator, and learned that there were significant differences in funding sources and clientele, with resident families and past resident families providing philanthropic support that NHA could not tap, as it was a municipal corporation, not organized as a non-profit. This meeting resulted in the Board deciding to initiate contact with tenants to "brainstorm" about desired/needed services. (*Exh. 17; Testimony of Kronish & Sutherland*)

38. At the NHA Board Meeting on April 10, 2015, Ms. Sutherland reported that many residents had expressed a need for a "qualified professional for mental health assessments and

case management services”. She stated that she was “beginning to look to hire such a qualified professional.” (*Exh.6; Testimony of Kronish & Sutherland*)

39. Ms. Sutherland indicated that she had been mulling several options regarding a LSW, including whether the NHA should contract out for such services, but ruled out that option early on as it did not seem as effective as having an LSW employee on site, full-time or part-time, who would have full access to all NHA tenants and would have the advantage of being able to meet with tenants in social, as well as in clinical settings. Ms. Sutherland believed that there was enough work for as many as five full-time LSWs. (*Testimony of Sutherland*)

40. On May 22, 2015, Ms. Sutherland reached out to the City of Newton’s LSW, stating that she was “looking for a temporary social worker as we work on budgeting and planning for a permanent hire” and solicited input on an “typical compensation” to help determine if the NHA should budget for full-time or part-time. As a result of this outreach, Ms. Sutherland learned that there were certain levels of LSW professionals and that only those with a higher level of certification would be able to work without supervision. (*Exh. 21; Testimony of Sutherland*)

41. At NHA’s Board Meeting of September 11, 2015, Chairman Kronish reported “process underway to supplement NHA staffing with a Licensed Social Worker” and that “in meetings with tenants it is clear residents have need for a licensed social services provider.” (*Exh. 6*)

42. As of the time of the Commission hearing, the salary and job description for the proposed LSW was still not clear. No hires or offers were made (or candidate interviews conducted). Ms. Sutherland then expected that the LSW position would be full-time, working under the NHA’s Director of Administration, and that, in addition to professional duties, the LSW would assume all duties of the RSC. Ms. Sutherland expected that, even with a full-time LSW on staff, there would still be a need to refer to outside providers. (*Testimony of Sutherland*)

43. After the Commission hearing, NHA did hire a social worker on staff. (Administrative Notice [NHA's Proposed Decision, p.7, note3; <http://www.newtonhousing.org/Staff.aspx>])

The Perpetual Benevolent Fund

44. NHA receives financial support in the form of a donation from a charitable trust known as the Perpetual Benevolent Fund, administered by the Bank of America, which funds are deposited into the Tenant Services Account and used to cover the cost of resident social activities such as barbeques, an annual bus trip for seniors and Holiday party gifts to the residents. (*Exhs. 12 & 20; Testimony of Sutherland, Chau & Appellant*)

45. As part of her duties as RSC, Ms. Stewart was responsible to solicit contributions from the Perpetual Benevolent Fund. The annual donations made by the Perpetual Benevolent Fund would vary from year to year, ranging from \$8,000 in 2010 to \$6,400 in 2011 through 2014. (*Exhs. 12 & 20; Testimony of Sutherland, Chau & Appellant*)

46. Applications to the Perpetual Benevolent Fund were permitted on an annual basis, and could be submitted either by March 1st or September 1st of any particular year. Ms. Stewart applied for a donation each year, usually by the September 1st deadline, as she generally needed the funds for the year-end holiday party season. (*Exh. 20; Testimony of Stewart*)

47. The one recent exception was in 2014. Because of an earlier snafu, which I infer related to the NHA's 2013 application, that application either was not received or not processed in the ordinary course. Accordingly, Ms. Stewart submitted her 2014 application at the next available date, March 1, 2014 and, after a tax identification issue was eventually resolved, the donation was received in July 2014. (*Exhs. 5 & 20; Testimony of Appellant*)⁵

⁵ It appears likely that NHA may not have received any donation from the Perpetual Benevolent Fund in 2013 although no one noticed that omission at any time until the Commission hearing and the non-receipt, if any, was not considered in connection with the NHA's decision as part of the reasons to terminate Ms. Stewart. (*Exhs. 3, 5 & 20; Testimony of Appellant, Sutherland & Chau*)

48. Ms. Stewart did not apply to the Perpetual Benevolent Fund prior to going out on medical leave on March 7, 2015. In her absence, in May 2015, Ms. Sutherland inquired about the status of the solicitation and learned that, although the March 2015 deadline had passed, NHA could submit a 2015 application in the fall (September 1), as NHA typically had done. Ms. Sutherland duly submitted the application and NHA received a \$10,000 donation sometime in late 2015 or early 2016 (prior to the Commission hearing). (*Exhs. 5 & 21; Testimony of Sutherland & Chau*)

49. Most of the events that were covered by the Perpetual Benevolent Fund donations occurred during the holidays at the end of the year. At no time did the hiatus in receipt of the Perpetual Benevolent Fund interfere with or impede the NHA's ability to hold these annual tenant events. (*Testimony of Appellant & Sutherland*)

50. One reference to disbursements for a tenant event appears in the August 14, 2015 Board meeting minutes. NHA's then Director of Administration, Stephen Fulton, reported that he had not yet met the minimum passenger requirement for the annual summer trip to Gloucester, due, in part, to the fact that many residents said they could not afford the registration fee (\$89). Mr. Fulton requested that the Board subsidize the cost so that residents would not have to pay more than \$35. Mr. Chau proposed that the subsidy be drawn from the 10% Ordinance Fund. As a result, the Board unanimously adopted Resolution #2166 "to approve allocation of subsidy for residents to attend the Summer Gloucester Lobster Cruise from the FY2015 Budget Line Item 10% Ordinance Fund in the amount up to and not to exceed \$3,000." (*PH.Exh.30C*)⁶

⁶ At the Commission hearing, Mr. Chau testified that he had brought up the request to transfer funds after discovering that the balance in the Tenant's Services Account seemed unusually low. I do not find this testimony credible, as it is not consistent with the Board minutes and, as noted above, Ms. Sutherland was then on notice, and presumably was about to apply for, the 2015 donation from the Perpetual Benevolent Fund, which would more than exceed the \$3,000 disbursement. Rather, the August Board Resolution was focused on an entirely different issue, i.e., a request to subsidize the cost of the summer cruise, not to replenish the Tenant's Services Account or make up for any shortfall in the funds received from the Perpetual Benevolent Fund, as to which there is no mention in the minutes. (*PHExh.31C; Testimony of Sutherland & Chau*)

City of Newton CDBG Grant

51. Another source of financial support to the NHA comes from the City of Newton (Newton) pursuant to a “Grant Agreement for Resident Services Coordinator” (RSC Grant Agreement) between NHA and Newton which is funded through disbursement of a portion of the annual discretionary Community Development Block Grant (CDBG) that Newton receives from HUD. The amount NHA receives varies from year to year, depending on what Newton received in CDBG monies from the federal government. Funds received by NHA through the RSC Grant Agreement must be used in strict accordance with its terms and conditions which specified that the funds must be dedicated to salary and benefits associated with the RSC position only. (*Exhs. 19, 23 through 27; Testimony of Sutherland & Chau*)

52. On or about June 30, 2010, NHA’s then Executive Director submitted a CDBG Grant Application for a five-year period covering (Newton’s) fiscal years from July 1, 2011 through June 30, 2015 (Newton’s fiscal year runs from July 1 to June 30). Although the total annual cost of the RSC’s salary and benefits was \$63,804, NHA requested only \$24,990 per year. (*Exhs. 19, 23-27*)

53. The 2011-2015 CDBG Grant Application specified that the NHA Executive Director was the “person responsible for the project”, and named Ms. Stewart as the NHA “Contact Person”. Ms. Stewart had no role in preparing this application other than providing her contact information, i.e., name and email. (*Exh. 23; Testimony of Appellant*)

54. On August 12, 2010, Newton forwarded to the NHA’s then Executive Director a fully executed RSC Grant Agreement (Contract #P1127), approved by the Mayor of Newton on July 26, 2010, awarding an amount of \$15,440 covering the one year period from July 1, 2010 through June 30, 2011. The RSC Grant Agreement bears the signature of NHA’s then Executive

Director (dated June 30, 2010) and various schedules (which I infer had been completed and submitted with the initial June 30, 2010 Grant Application), including a corporate vote authorizing his execution of the agreement as the duly authorized representative of the NHA, as well as a list of the members of the NHA's Board of Directors/Trustees. Ms. Stewart's name does not appear anywhere in the executed RSC Grant Agreement. (*Exh. 24*)

55. For the next four (Newton) fiscal years, the RSC Grant Agreement (Contract #P1127) was amended to extend the duration of the grant period one additional year, and to award the allocated amount for that period. Each year, Newton sent the NHA Executive Director the Amendment for his/her signature, along with schedules attesting to the Executive Director's continued authority and the current roster of Directors/Trustees. Ms. Stewart provided clerical assistance to the Executive Director in completing each Amendment package, tabbing where his/her signature was needed, obtaining a current Certificate of Insurance, and other clerical support, such as mailing the documents back to Newton. All work performed by Ms. Stewart on each Amendment was performed under the direction and instruction of the Executive Director. Ms. Sutherland also followed this practice. Ms. Stewart had no experience and received no training in grant-writing. (*Exhs. 19, 25 through 27: Testimony of Appellant & Sutherland*)⁷

56. For the four (Newton's) fiscal years 2012 through 2015, the Amendments were as follows:

<u>Amendment No.</u>	<u>Approval Date</u>	<u>FY</u>	<u>Award</u>	<u>NHA Executive Director</u>
12-1	8/15/11	2012	\$12,500	Harvey Epstein
13-1	10/19/12	2013	\$10,923	Harvey Epstein
14-1	10/24/13	2014	\$11,130	Amy Sutherland (Interim)
15-1	9/26/14	2015	\$12,500	Amy Sutherland

(*Exhs. 19, 25 through 27*)

⁷ I do infer that Ms. Stewart did provide similar clerical assistance in the preparation of several of the Schedules incorporated into the original RSC Grant Agreement in 2010, namely, inserting the name of NHA's Executive Director and its Board Members, and the NHA's Federal Identification Number, all entered in her handwriting and using a different pen than the one used by the Executive Director to affix his signature. (*Exh. 24*)

57. A condition of the RSC Grant Agreement required that NHA submit quarterly requisitions to document the actual hours and services provided by the RSC and the amount expended by NHA for the RSC's salary during the quarter, as well as certain demographic data about the tenant population served. These schedules required a supervisor's signature, which either Mr. Chau or Ms. Sutherland provided. Upon receipt of a properly prepared quarterly requisition, Newton mailed a check to NHA, which Mr. Chau received and deposited. As RSC, Ms. Stewart's responsibility was limited to preparing requisitions and keeping records necessary to properly complete them. (*Exhs. 19, 24 through 27; PHExs.31A-31B; Testimony of Chau*)

58. Ms. Stewart duly filed the quarterly requisitions under the RSC Grant Agreement (Contract #P1127) through Requisition #1 (January 6, 2015), for the first quarter (July '14, August '14, September '14) of (Newton's) FY2015 Amendment 15-1. (*PHExh.31A-31B*)

59. After Ms. Stewart went out on leave, Ms. Sutherland, herself, prepared and submitted Requisition #2 (June 25, 2015) for the second quarter (October '14, November '14, December '14) of Newton's FY2015 Amendment 15-2. As that requisition exhausted all funds awarded under Amendment 15-1, NHA submitted no further quarterly reports. (*PHExs.31A-31B*)

60. In May 2014, Ms. Stewart met with a representative from the Newton Planning Board to discuss the RCS Grant Agreement. At that meeting, Newton queried Ms. Stewart as to why NHA had only been receiving funding for a small part of the RSC's salary. When Ms. Stewart said she did not know, Newton asked to speak to someone who did know, and Ms. Stewart said that would be Mr. Chau. Mr. Chau was called down to the meeting to discuss with Newton the NHA's options for increasing its CDBG funding request. (*Testimony of Appellant*)

61. In August, 2015, Ms. Sutherland came to learn that Newton had issued an e-mail notice the previous December (2014) that announced approximately \$298,000 in CDBG grant funds

were anticipated for (Newton's) FY2016 (July 1, 2015 to July 1, 2016) and application forms were available and were due to be filed by January 12, 2015. (*Exh.5*)

62. The December 2014 notice was addressed to several hundred individuals, including to Ms. Stewart's correct NHA e-mail address, but, due to technical problems with her computer, NHA could not determine whether or not she actually received the e-mail. Ms. Stewart did not believe that she did. (*Exh. 5; Testimony of Appellant & Sutherland*)

63. Ms. Sutherland also was sent the CDBG application notice, but, by scrivener's error, the notice used the wrong address (asutherland@newtonhousing.gov), not her correct address (asutherland@newtonhousing.org). Another copy of the e-mail was sent (correctly addressed) to one of the NHA Board members, but not to Chairman Kronish or to Finance Director Chau. Also, the e-mail was sent to another NHA employee who handled CDBG grant funding for other NHA activities, such as architectural access projects. (*Exhs 3 &.5; Testimony of Sutherland*)

64. Due to the administrative snafus, NHA did not apply for a new CDBG grant for (Newton's) FY2016. The prior five-year RSC Grant Agreement (Contract #P1127) expired on June 30, 2015. Thus, NHA received no funding for the RSC position for the second half of NHA's FY2015 (July 1, 2015 to December 31, 2015) or the first half of NHA's FY2016 (through June 30, 2016). (*Testimony of Sutherland*)

65. Ms. Sutherland submitted a new CDBG grant application for (Newton's) FY2017, requesting \$20,000 to cover funding an LSW position, which application was pending at the time of the Commission hearing. (*Testimony of Sutherland*)

Termination of Appellant's Employment

66. By e-mail message dated September 18, 2015, Ms. Sutherland asked Ms. Stewart, who remained out of work, to come to an "investigatory interview" "regarding the CDBG Human

Services Grant” and invited her to “bring a representative of your choice.” (*Exh.28*)

67. By e-mail message dated September 23, 2015, Ms. Stewart’s attorney replied to Ms. Sutherland, with a copy to NHA’s counsel, advising that Ms. Stewart was available to attend the “investigatory interview”, but requested that the meeting take place “anywhere other than 82 Lincoln [NHA’s offices] for health reasons.” (*Exh. 29*)

68. On September 25, 2015, Ms. Stewart attended the “investigatory interview” alone, expecting that the main purpose of the meeting was to review the CDBG Grant with the Newton Planning Board. The NHA was represented by Ms. Sutherland, Mr. Chau and NHA counsel. (*Testimony of Appellant, Sutherland & Chau*)

69. At the September 25, 2015 meeting, Ms. Stewart was asked about both the CDBG grant and the Perpetual Benevolent Fund. Ms. Stewart knew the CDBG grant funds were important to cover a portion of her salary and she was certain she had never missed any CDBG filing deadlines. As to the Perpetual Benevolent Fund, she agreed that it was her responsibility to solicit a donation annually, which she typically did in September each year after a discussion with the funder to get a sense of how much to request. (*Testimony of Appellant & Sutherland*)

70. By letter dated October 22, 2015, Ms. Stewart was informed that Ms. Sutherland was contemplating termination of Ms. Stewart’s employment and would hold a hearing to determine whether there was just cause for termination. The grounds stated for the contemplated termination:

1. Failure to Apply for Grants

[T]he Newton Housing Authority has determined that you failed to perform vital functions of your position. Specifically, in January of 2015, you failed to apply for the CDBG grant for fiscal year 2016, which is used to fund a portion of the annual salary for the Resident Services Coordinator Position. Applying for and managing this grant is an essential responsibility of your position. This grant is critical to the operation of NHA’s resident services program and its loss has greatly affected our ability to serve our residents.

Furthermore, the NHA has found that you also failed to apply for the annual resident services grant for 2015. Our investigation found that you failed to meet the September 1, 2014 application deadline for this fund, as well as the alternative March 1, 2015 application deadline. As you know, these funds are necessary to support the social services programs offered to our residents and the application for these and other funds are an essential duty of your position.

In total your failure to apply for these necessary funds resulted in a potential loss to the NHA and its residents of \$19,052.00.

2. Reorganization

In addition, in recognition of the increasing needs of our changing resident population, the Board of Commissioners has engaged in much discussion with residents, staff and stakeholders in the community about the provision of resident services. In order to better meet the needs of our residents and greatly enhance our resident services, the NHA has elected to add a qualified and licensed social worker to our staff. As a result the NHA can no longer support a full-time Resident Services Coordinator position.

(Exh.2)

71. Following a hearing before Ms. Sutherland on November 4, 2015, at which Ms. Stewart appeared and testified, Ms. Sutherland informed Ms. Stewart by letter dated November 5, 2015 that Ms. Sutherland intended to recommend to the NHA Board that Ms. Stewart's employment be terminated based on findings that (a) she failed to perform her duties as RSC that resulted in a potential loss of \$19,052.00 to the NSA, namely, she failed to duly apply for a grant from Newton's CDBG in January 2015 and failed to solicit a donation from the Perpetual Benevolent Fund for fiscal year 2015, and (b) the NHA intended to hire a licensed social worker and to eliminate the RSC position. *(Exh. 3)*

72. On December 11, 2015, the NSA Board, meeting in open session at Ms. Stewart's election, heard from Ms. Sutherland, who recommended Ms. Stewart's termination for the reasons set forth in Ms. Sutherland's November 5, 2015 letter. Ms. Sutherland stated that the duty to apply for both the CDBG grant and the funds from the Perpetual Benevolent Fund was an "essential function" of the RSC position. She also stated that, with the addition of a licensed

social worker to NHA's staff, the RSC position would be eliminated "as limited funding will not support the salary of both positions." Ms. Sutherland stated that the recommendation for dismissal was based solely on the two factors described above and not on any other basis. (*Exh. 18; Testimony of Sutherland*)

73. Following Ms. Sutherland's presentation, the NSA board heard from Ms. Stewart, who acknowledged that she did have responsibility to solicit funds for the tenant services account from the Perpetual Benevolent Fund, but was certain that she had done so each year, as required. She described her "limited knowledge" pertaining to CDBG grant applications, "a duty she stressed was never assigned to the RSC." The Board also learned that she had a "strong belief that today's hearing is not motivated by her job performance, rather it is personal in nature." (*Exh. 18: Testimony of Appellant*)

74. After a 4-1 vote on Resolution #2211, to exclude questions and comments from the public in attendance, the Board unanimously adopted Resolution #2212 "to accept and concur with the Executive Director's recommendation to involuntarily dismiss Ms. Jeanne Stewart from the position of Resident Services Coordinator of the Newton Housing Authority effective immediately." (*Exh. 18*)

75. By letter dated December 11, 2015, Ms. Sutherland provided formal notice to Ms. Stewart of the Board's decision. (*Exh.4*)

76. This appeal duly ensued. (*Claim of Appeal*)

APPLICABLE LAW

Commission's Jurisdiction Over Housing Authority Employee Terminations

Employees of a Massachusetts housing authority established under G.L.c.121B do not hold classified civil service status specifically covered by the provisions of the Massachusetts Civil

Service Law, G.L.c.31. G.L.c.121B,§29,¶9, however, creates limited protection against involuntary separation of certain housing authority employees (other than the executive director) that incorporates, and is equivalent to, the rights of tenured civil service employees. That statute provides, in relevant part:

“No employee of any housing authority . . . who has held his office or position . . . for a total period of five years of uninterrupted service, shall be involuntarily separated therefrom except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one to the same extent as if said office or position were classified under said chapter.”

Termination of Tenured Employees for Just Cause

A tenured civil service employee may be terminated for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefore.”

G.L.c.31,§41. A person aggrieved by a decision of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43, which provides, in part:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

Under Section 43, the Commission makes a de novo review “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726,

728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

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., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

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 (2006) and cases cited. It is also a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

G.L.c.31, Section 43 also vests the Commission with "considerable discretion" to affirm, vacate or modify discipline but that discretion is "not without bounds" and requires sound explanation for doing so. See, e.g., Police Comm'r v. Civil Service Comm'n, 39 Mass.App.Ct.

594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”)

“[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’ [Citations]”

Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

Layoff of Tenured Employees Due to Abolition of Position or Lack of Money

The well-established rules provide that, in applying the “just cause” standard in matters involving the abolition of a position for reasons of economics and efficiency the Commission’s role is more narrowly construed than the scope of review to be applied in disciplinary actions. See, e.g., School Comm. of Salem v. Civil Service Comm’n, 348 Mass. 696, 699 (1965); As stated in Gloucester v. Civil Service Comm’n, 408 Mass. 292, 299-300 (1990):

“[I]n 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 in identifying the goods and services that are affordable and those that are not cannot be subject to the [C]ommission’s veto.”

See also School Comm. of Salem v. Civil Service Comm’n, 348 Mass. 696, 698-699 (1965); Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 926, *rev.den.*, 417 Mass. 1105 (1994); Raymond v. Civil Service Comm’n, 25 Mass.L.Rptr. 322 (Sup.Ct. 2008); Adamson v. Northampton Housing Auth., 2016 WL 7666991, 29 MCSR 536 (2016); Amaral v. City of Fall River, 22 MCSR 653 (2009); Bombara v. Department of Mental Health, 21 MCSR 255 (2008); Carroll v. Worcester Housing Auth., 21 MCSR 2008; Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department

of Mental Health, 8 MCSR 217 (1995); Snidman v. Department of Mental Health, 8 MCSR 128 (1993); Soucy v. Salem School Committee, 8 MCSR 64 (1995)

Lack of money may constitute just cause to eliminate a position. Debnam v. Belmont, 388 Mass. 632, 634-36 (1983). Similarly, elimination of a position as part of a good faith effort to achieve economy and effectiveness of operations does not violate civil service protections. Commissioner of Health and Hospitals v. Civil Service Comm'n, 23 Mass.App.Ct. 410, 413 (1987) citing Gardner v. Lowell, 221 Mass. 150, 154 (1915); McNeil v. Mayor of Peabody, 297 Mass. 499, 504 (1937); Dooling v. Fire Commr. of Malden, 309 Mass. 156, 162 (1941); cf. McNeil v. Mayor and City Council of Peabody, 297 Mass. 499 (1937 (employee's position abolished and replaced by another person "having duties differing in substantial respects" from those formerly performed by the former employee)

Once an appointing authority meets its burden of proof to articulate legitimate reasons for the layoffs, the burden then shifts to the employee to prove that the reasons were pretextual and that the layoff(s) were made in bad faith. See, e.g., Commissioner of Health & Hospitals v. Civil Service Comm'n, 23 Mass.App.Ct. 410, 413 (1987); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995) The layoff of an employee is not justified if the employee establishes that reason for the dismissal was pretextual and/or was the product of improper motivations.

In City of Cambridge Housing Auth. v. Civil Service Comm'n, 7 Mass.App.Ct. 586 (1979), the Appeals Court upheld the Commission's determination that "abolition" of an appellant's position was a pretext to hire someone else to perform essentially the same job, stating, in part:

“ There is a real and fundamental distinction between the laudable abolition of an unnecessary position and the discharge of a faithful employee in violation of

the rights secured to him by statute; and the latter can neither be concealed nor protected by a pretense that it was an exercise of the former right.’ [Citation]. ‘And even if the evidence would have warranted a finding by the [hearing] officer that the removal was for “proper cause” the removal should be reversed if it appeared affirmatively that it was made “in bad faith” as would be the case if this case was a ‘mere pretext or device to get rid of’ the employee for some other and improper cause.’ [Citations].”

Id. 7 Mass.App.Ct. at 590-91. See also, City of Gardner v. Bisbee, 34 Mass.App.Ct. 721, 723 (1993) (mayor impermissibly dictated to appointing authority who should be laid-off); Raymond v. Civil Service Comm’n, 25 Mass.L.Rptr. (Sup.Ct. 2008) (layoff tainted by animus and lack of disclosure to Town Manager and Board of Selectmen of relevant facts by Fire Chief); Owens v. Northampton Housing Auth., 2016 WL 4138022, 29 MCSR 252 (2016) (true reorganization did not exist where the motivating factor was nothing less than an effort to purge certain employees)

ANALYSIS

The NHA failed to establish just cause for its termination of Ms. Stewart. The preponderance of the evidence established that, as to the first reason for her termination, Ms. Stewart’s performance in respect to the CDBG grant and the Perpetual Benevolent Fund did not warrant significant discipline, let alone discharge from employment. The second reason, an anticipated reorganization at some unspecified time in the future, cannot support a termination of her employment when there had been no such reorganization at the time of her discharge. Rather, the two alleged (and substantially inconsistent) reasons proffered by the NSA Executive Director to the NSA Board for terminating Ms. Stewart were mere pretexts for the Executive Director’s actual motivation, which was based on the personal animus that she held against Ms. Stewart and self-interest to avoid having to answer questions about her own accountability, which impermissibly tainted the NSA Board’s decision. Ms. Stewart is entitled to reinstatement to her position forthwith, without loss of compensation or other benefits.

Failure to Perform the Essential Duties of RSC – CDBG Grant

The undisputed evidence established that NHA did not receive any CDBG funds from Newton's FY2016 allocation, spanning the period from July 1, 2015 to June 30, 2016. This lost opportunity, however, does not justify Ms. Stewart's termination because the responsibility for this omission does not rest with Ms. Stewart and the impact, if any, had no material impact on NHA's operations or finances.

First, Ms. Stewart's RSC job description, as well as her past practices, indicates that she had been assigned a very limited role with respect to the CDBG grant and, specifically, never had the responsibility to initiate and prepare applications for CDBG grants. She was tasked solely with "assisting" others. This work comprised performing clerical tasks as needed to process paperwork that her supervisors provided to her. This involved reviewing the documents sent by Newton to the Executive Director, filling in names in the blanks on the required corporate vote and attestation pages, tabbing where the Executive Director was required to sign, attaching a current Certificate of Insurance and, mailing the package back to Newton. The Executive Director, however, remained the "person responsible for the project" designated in the 2011-2015 RSC Grant Application, and the person designated under the RSC Grant Agreement, and all Amendments, as NHA's designated "Authorized Official".

Second, NHA's contention that Ms. Stewart was the NHA employee responsible to prepare the FY2016 CDBG grant application confuses the process for initiating an application for a grant award, and responding to the paperwork as received from Newton each year as part of the grant administration exercise of post-award amendment of the Grant Agreement to establish the maximum amount of CDBG funds that Newton, in its discretion, would allocate to NHA for that year. Ms. Stewart's duties involved clerical functions concerning the latter. Ms. Stewart has no

training or expertise in initiating or preparing grant applications. Her only involvement in the 2011-2015 Grant Application that resulted in the RSC Grant Agreement was to type in her name and e-mail as the contact person.⁸ She knew nothing about the application process and had no involvement in determining how much funds to request. She honestly and reasonably believed that the responsibility for those matters rested with the Finance Director and/or the Executive Director. By asserting that Ms. Stewart alone was responsible for the entire grant application process, at a minimum, NHA misunderstood her role or, at worst, mischaracterized it.

Third, Ms. Stewart did have responsibility to track the hours and tasks she performed, which she then used to prepare Quarterly Reports required to requisition payment under the Grant Agreement. As the total amount of funds allocated to NHA under the Grant Agreement each year was usually exhausted in the first six months, Quarterly Reports typically were submitted only for the first two quarters of Newton's fiscal year, or the last half of NSA's fiscal year (which would be July through December.) Even these reports had to be co-signed by the Executive Director. Moreover, the sole purpose of the forms was to requisition funds awarded under the CDBG Grant Agreement and all Amendments, not to request a grant award.

Fourth, although Ms. Stewart had no control over the amount of CDBG funds to be requested, senior NHA management did.⁹ It bears notice that, when the initial 2010-2015 Grant Application was submitted, the NHA's then Executive Director asked for \$24,990, but NHA never received that much. When Ms. Sutherland submitted the NHA's application for (Newton's) FY2017 funds, she decided to request \$20,000 to fund the licensed social worker position, more than NHA had been allocated in the past but less than her predecessor initially

⁸ As noted above, despite this designation, Newton always sent contractual documents, e.g., annual Grant Agreement Amendments, directly to the Executive Director.

⁹ Ultimately, the NHA Board bears responsibility for all financial decisions of the authority, whose members are, by statute, fiduciaries of the authority. See G.L.c.121B,§5,¶1, The Executive Director serves as the ex-officio Secretary of the authority. G.L.c.121B,§7,¶1.

requested. It was not known at the time of the Commission hearing what NHA's CDBG allocation, if any, would be for FY2017. There was no evidence that Ms. Stewart had any input, authority or responsibility over NHA's financial management as did these other senior officials.

Fifth, the missed January 2015 deadline for submitting a grant application to fund the RSC position in (Newton's) FY2016 was not due to Ms. Stewart's neglect. The evidence showed that she typically addressed the grant amendment process in the summer or fall of the year. In January 2015 she had no reason to know (and it was not her duty to know) that the existing RSC Grant Agreement (Contract #P1127) would expire in July 2015 and would not be automatically extended as it had been in the past. She typically received the paperwork for each annual amendment in the summer or fall, so she had no reason to expect that any action was necessary until then. I also credit her testimony that, due to computer issues, she never actually received notice of the January 2015 application deadline prior to September 2015.

Sixth, had Newton not used an erroneous e-mail address for Ms. Sutherland, whom I find equally, if not more responsible (along with the Finance Director) to keep track of the status of the CDBG grant, I infer Ms. Sutherland would have taken the appropriate steps to ensure that the application deadline was met. In addition, the evidence established that notice of the CDBG application deadline was sent to at least one NHA board member, as well as another NHA employee who worked in a different area that also made use of CDBG funds for architectural access projects. The evidence did not establish that either of those individuals received the notice, but, if they did, it would raise further doubt as to why, despite the snafu that prevented Ms. Sutherland and Ms. Stewart from receiving notice directly, nevertheless, NHA was on constructive notice and should have filed an application for CDBG funds, at least, for those other

needs. If none of the four NHA personnel received the notice, it further reinforces the fact that the error lies with Newton, and not with Ms. Stewart.

Seventh, I do not credit the NHA's evidence that a failure to apply for CDBG funds for the period from July 1, 2015 through June 30, 2016 had a material impact on NHA's operations or financial condition. Even if a CDBG application had been submitted, it then would have requested funding for the RSC only. By July 2015, however, Ms. Stewart was still incapacitated and not working; ultimately, she received workers' compensation payments for the period from March 12, 2015 through November 12, 2015 and partial incapacity benefits thereafter. She never returned to work prior to her termination in December 2015 and was not replaced. Thus, even if a CDBG allocation had been requested and approved, NHA would not have been able fully to use the funds, if at all. Moreover, as the amount of the allocation that NHA might have received for (Newton's) FY2016 was discretionary, the actual "loss" to NHA is wholly speculative. Finally, the fact that neither Ms. Sutherland nor NHA's finance director took any note of the lack of CDBG funds until August 2015 further reinforces the fact that the NHA suffered no harm to its operations from the absence of those funds, something that follows logically from the substantial balances that NHA carried on its books, i.e., nearly \$4 million in unrestricted liquid assets and a FY2015 budget that anticipated a further operating surplus of more than \$350,000.

In sum, the fact that NHA did not receive any CDBG funds for the period from July 1, 2015 to June 30, 2016 does not support a finding of "just cause" to discipline Ms. Stewart and, especially, cannot justify her termination from employment.

Failure to Perform the Essential Duties of RSC – Perpetual Benevolent Fund

The NHA also failed in its proof of any deficiencies in Ms. Stewart's performance concerning the solicitation of a donation from the Perpetual Benevolent Fund in 2015. In fact,

Ms. Sutherland was informed on or before May 29, 2015, that the 2015 application could be filed by September 1, 2015. The NHA's contention that Ms. Stewart was derelict in her duty by not applying for the donation sooner, or holding her responsible for Ms. Sutherland's own oversight in failing to apply in time after she assumed Ms. Stewart's duties as RSC in her absence, is wholly without merit.

First, the undisputed evidence established that Ms. Stewart had solicited and the NHA did receive a donation from the Perpetual Benevolent Fund in 2014 and that the deadline to apply for a 2015 donation was either March 1, 2015 or September 1, 2015. I credit Ms. Stewart's testimony that she anticipated submitting the 2015 request to the Perpetual Benevolent Fund in September, as she customarily had done, to be used by Ms. Stewart to cover expenses toward the end of the year, and, but for her medical absence, that is what she would have done. Ms. Stewart cannot be faulted for relying on a schedule she followed for many years.

Second, the Perpetual Benevolent Fund had already made a donation to the NHA in July 2014, and only one donation had ever been solicited and approved each year. Ms. Stewart reasonably assumed that it would not be appropriate to ask for a second 2014 donation. The NHA failed to introduce any credible evidence to establish any reason to infer otherwise.

Third, I am not persuaded by the NHA's argument that Ms. Stewart was derelict in some way two years earlier, in connection with soliciting a donation from the Perpetual Benevolent Fund in 2013, which may have resulted in the NHA missing the receipt of a donation for that year. Although the record of donations compiled by the Finance Director and proffered by NHA appears to indicate that a donation was missed for 2013, the compilation was not supported by copies of the financial records from which the compilation was derived, and, therefore, I discount that evidence as less than authoritative. I also credit the evidence, both documentary

and through Ms. Stewart, that there was a change in the solicitation process in 2013 and, as a result, although Ms. Stewart did endeavor to request a donation, that request went astray for reasons that were not fully explained. However, any misstep over the 2013 solicitation two years earlier, even if true, was not part of the charges against Ms. Stewart that resulted in her dismissal, which charges were expressly limited to her alleged deficiencies in performance in 2015.

Third, I find it significant that neither Ms. Sutherland nor the Finance Director took note of any non-receipt of a donation from the Perpetual Benevolent Fund or any shortage in the Tenant Services Account until August 2015, at the earliest. Even after Ms. Sutherland had actual knowledge that a payment from the Perpetual Benevolent Fund may have been missed, she never mentioned it to Ms. Stewart until September 2015 and took no specific action until October 2015, by which time the deadline to submit a request for funds had lapsed. Thus, I infer that any lapse or delay in receipt of a donation from the Perpetual Benevolent Fund, either in 2013, 2014 or 2015, was not perceived by Ms. Sutherland as material to the NHA's operations or financial condition, generally, and had no noticable impact on tenant services, in particular.

Fourth, I do not credit the testimony of the Finance Director that, soon after Ms. Stewart went out on medical leave, he noticed that the balance in the Tenant Services Account seemed unusually low and, as a result, it was necessary for the NHA Board to transfer funds from another NHA account to cover the tenant services expenses ordinarily paid from that account. This transfer did not take place until August 2015 (shortly before the date on which an application to the Perpetual Benevolent Fund could have been submitted) and the testimony is inconsistent with minutes of the NHA Board meeting at which the alleged transfer was addressed. In fact, that transfer was not requested by the Finance Director, but by another employee, it was limited to \$3,000 (far less than the typical annual Perpetual Benevolent Fund

donation), and was authorized to subsidize the cost of the summer cruise because many tenants were unable to pay the full passenger fee and there was a concern that not enough tenants would register to meet the minimum number required to hold the event. Nowhere in these minutes is there any mention of the Perpetual Benevolent Fund.

In sum, as with the CDBG grant, the NHA's attempt to charge Ms. Stewart with failing to perform her duties concerning the 2015 Perpetual Benevolent Fund solicitation, are without merit. If any such funds were lost in 2015, it had no noticeable impact on the NHA's tenant services and the responsibility for that loss lies elsewhere, not with Ms. Stewart.

Elimination of the RSC Position in a Reorganization

I reject the NHA's second reason asserted as "just cause" to terminate Ms. Stewart from employment – a reorganization in which her job was eliminated and her job duties transferred to a new position of licensed social worker – as complete fiction.

First, while it is true that both Ms. Sutherland and NHA Board Chairman had been exploring the possibility of enhancing tenant services for several years, at the time Ms. Stewart was terminated, those plans were still inchoate. When the NHA Board voted to terminate Ms. Stewart, the Board had not approved any plan to hire a social worker, let alone deliberated on the proposition that that position would make the RSC position unnecessary. In fact, Ms. Sutherland had only recently determined that the social worker position would be a full-time staff position, not part-time or contracted out, or part-time. No job description had been produced. In short, when Ms. Stewart was terminated, no reorganization had occurred. I found no example, and neither party cited any, in which prematurely terminating a tenured employee was justified as incident to a future "anticipatory reorganization", as opposed to part of a bona fide reorganization, duly implemented after approval of the appointing authority.

Second, other than some passing rhetoric found in Ms. Sutherland's notice of proposed termination, NHA proffered no proof that hiring of a social worker made the RSC position redundant or unaffordable. No analysis was provided to explain how, with enough work for "five full-time social workers", even one such person could do that job together with what has been another full-time job of RSC. To the extent that the NHA expected to rely on CDBG funds to cover part of the salary of a social worker's position, that would require submission of a brand new CDBG application, which, as of the date of Ms. Stewart's termination, could not have been submitted, as the details of the position (required as part of the application) had not been determined. Moreover, CDBG funds for such a position could not have been received until July 2016 at the earliest, given the CDBG process. To the extent that the NHA contends that it could proceed with hiring a social worker without the benefit of CDBG funds, that contention undermines the claim that it did not have the funds to cover both jobs. As noted above, at the time of Ms. Stewart's termination, the NHA was carrying a \$4 million balance in liquid assets and was anticipating a \$350,000 operating surplus for 2015.

In sum, the NHA's contention that it was anticipating hiring a social worker that would, in the future, lead to the possible elimination of the RSC position, was a pretext to find a further reason to prematurely fire Ms. Stewart. I infer that this second reason was concocted because Ms. Sutherland knew how flimsy the charges of misconduct against Ms. Stewart were. I further infer that neither the misconduct charges nor the alleged reorganization would have passed muster with any reasonable and objective appointing authority. Here, however, the proffered reasons used to terminate Ms. Stewart, as noted above, were without merit, as Ms. Sutherland knew or should have known. They were clearly a pretext for the pre-determined decision by Ms. Sutherland, tainted by her own personal animus toward Ms. Stewart. I do not need to speculate

on whether the basis of that personal animus was Ms. Stewart's union advocacy, her age, her complaint about environmental contamination, the assertion of workers' compensation benefits, her desire to deflect blame for her own misfeasance, or something else. The fact that the reasons provided for Ms. Stewart's termination were patently false, together with the credible evidence of personal animus, warrants the inference that they were proffered by Ms. Sutherland to camouflage at least one, and probably more than one, of those ulterior motives.¹⁰

Accordingly, Ms. Stewart was terminated without just cause. Pursuant to G.L.c.31, she must be restored to her position without loss of compensation or other rights. I have not overlooked the fact that Ms. Stewart received, and may still be receiving partial disability benefits awarded under workers' compensation and, apparently, the NHA now has hired a social worker and may or may not now have the continuing need for a staff member to perform the duties of an RSC. These facts may enter into the amount of back pay and benefits to which Ms. Stewart may be entitled, as well as whether or not, after her reinstatement as ordered in this Decision, the NHA would have just cause to take further prospective action regarding her continued employment thereafter, but they are not germane to the issue of just cause for her 2015 termination or entitlement to retroactive relief now before the Commission. See generally, Memorandum and Order, Walsh v. Civil Service Comm'n, WOCV2014-00237 (Sup.Ct. 2014), aff'd sub nom, Walsh v. City of Worcester, 89 Mass.App.Ct. 1128 (Rule 1:28), rev.den., 475 Mass. 1105 (2016), Commission Decision after remand, 29 MCSR 590 (2016).

¹⁰ The record is replete with indicia of this animus. It includes Ms. Sutherland's authorizing an attorney to accuse Ms. Stewart of criminal behavior, sending her a job abandonment notice which the facts clearly did not support, meddling into Ms. Stewart's selection as union steward, and her testimony and demeanor at the Commission hearing that I found overly self-serving and largely not credible.

CONCLUSION

For the reasons stated, the appeal of the Appellant, Jeanne Stewart, under Docket No. D-15-236 is *allowed*. The Appellant shall be reinstated forthwith to her position of RSC with the NHA from which she was terminated without just cause on December 11, 2015, without loss of any compensation or other rights as provided under G.L.c.31,§43.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on March 16, 2017.

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 this order or 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 this Commission order or 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Eric T. McKenna, Esq. (for Appellant)
James Pender, Esq. (for Respondent)