COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-541

KAREN WALSH

vs.

CITY OF WORCESTER.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The city of Worcester (city) appeals from a judgment entered in the Superior Court reinstating the plaintiff to her position as a senior sanitary inspector in the city's tobacco control program as of April 17, 2009. The judge recited the following uncontested facts: For over two decades the plaintiff worked for the city as a tenured civil service employee. She was a senior sanitary inspector in August of 2008, when the city removed her from its payroll because the acting commissioner of the department of health and human services (department) mistakenly thought that she had resigned. On October 14, 2008, the plaintiff appealed her removal to the Civil Service Commission (commission), arguing that she did not resign.[1]

[1] During the previous twelve months the plaintiff had filed two grievance letters with her union relating to an increase in

Almost three years later, on April 21, 2011, the commission issued its decision in which it found that the plaintiff did not resign, that the city failed to comply with procedural requirements, and that the city had improperly removed the plaintiff from her position. The commission also found that the city lacked any other independent just cause to have terminated the plaintiff. The commission ordered that the plaintiff be reinstated, retroactive to August 8, 2008, to her position without any loss of pay or other benefits.

Meanwhile, in 2009, after the plaintiff had appealed her removal but well before the commission reinstated her, the city eliminated more than 200 positions as part of a general reduction in force. The department in which the plaintiff worked lost thirteen out of eighteen positions, including the plaintiff's. The city eliminated the plaintiff's position and terminated her employment without providing written notice or holding a hearing.

In May of 2011 the city appealed the commission's reinstatement decision to the Superior Court. In January of 2012, the city sent the plaintiff a notice of hearing on her 2009 layoff. Prior to the hearing, the plaintiff filed a complaint for contempt in the Superior Court and sought an

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duties and treatment by her supervisors. Retaliation is not an issue in this appeal.

injunction prohibiting the layoff. After initially issuing a temporary stay, the judge dismissed the complaint, found that the city was in compliance with the order of reinstatement[2] and decreed that the layoff hearing could go forward.

The layoff hearing took place on October 4, 2012. On December 31, 2012, the hearing officer issued a report concluding that just cause, namely a lack of funds, supported the city's decision to lay off the plaintiff in 2009. The city adopted the findings of the hearing officer, and notified the plaintiff of its layoff decision on January 14, 2013. The plaintiff appealed the city's decision to the commission, which held hearings on April 10, 2013, and July 18, 2013.

A few months earlier on February 6, 2013, this court issued a decision pursuant to our rule 1:28 affirming the decision of the Superior Court judge that invalidated the plaintiff's 2008 termination and ordered her reinstatement. Worcester v. Civil Serv. Commn., 83 Mass. App. Ct. 1112 (2013). The city's application to the Supreme Judicial Court for further appellate review was denied on April 1, 2013.

On January 23, 2014, the commission issued its decision affirming the city's decision to terminate the plaintiff through

[2] The judge ruled that the failure to pay back pay and benefits to the plaintiff, albeit obligations included in the order of reinstatement, did not constitute contempt at the time because those requirements had been stayed pending appeal of the 2008 termination dispute to this court.

layoff retroactive to April 2009, and denying her appeal both with respect to the layoff procedure and her additional substantive arguments regarding seniority rights. On February 21, 2014, the plaintiff filed a complaint in the Superior Court appealing the commission's decision of January 23, 2014. A judge of the Superior Court allowed the plaintiff's motion for judgment on the pleadings on December 29, 2014, and judgment entered accordingly. This appeal by the city ensued.

The city makes numerous arguments on appeal; many of these address the substantive merits of the layoff determination made in 2009. The judge however determined that the city's termination of the plaintiff pursuant to the layoff of 2009 was deficient on procedural rather than substantive grounds. The judge did not address the city's underlying authority to conduct a reduction in force, if properly executed. Accordingly, the first issue before us is the manner in which the layoff of the plaintiff was carried out -- whether the city properly followed G. L. c. 31, § 41, which governs the notification and hearing procedures required when terminating civil service employees. Our review of any conclusions of law by the commission is de novo.[3] Andrews v. Civil Serv. Commn., 446 Mass. 611, 615 (2006).

[3] While the city is correct in asserting that we show deference to the commission's interpretation of the statutory scheme it is charged to enforce, that deference does not extend to an

We begin, as did the judge, with the law of the case: as decided by the commission on April 21, 2011, and ultimately affirmed by this court, the plaintiff's reinstatement rendered her a city employee in good standing at the time of the 2009 layoff.[4] There is no other evidence that would allow a finding, on some other independent basis, that she was not an employee at the time of the layoff.

Accordingly the plaintiff was entitled to all the substantive and procedural protections of Massachusetts law governing public employees in 2009. General Laws c. 31, § 41, requires that a civil service employee receive written notice and a hearing prior to the elimination of the employee's position. It is undisputed that neither of these requirements was met; the city did not provide the plaintiff with notice pursuant to the statute until January 27, 2012, and did not conduct a hearing until October 4, 2012.

We agree with the commission that a city is not precluded "from abolishing a position . . . [simply] because a related matter regarding that employee was pending" at the time. But that self-evident principle does not excuse the city from following the applicable statutory requirements; consequently

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unambiguous error of law. See Stow Mun. Elec. Dept. v Department of Pub. Util., 426 Mass. 341, 344 (1997).

[4] The remedy provided by the commission ordered the city to reinstate the plaintiff to her position retroactive to August 8, 2008, with full back pay and benefits.

the decision of the commission that the plaintiff's position was properly abolished on April 17, 2009, was incorrect.[5] The layoff could not take effect until after the October 4, 2012, hearing.

The plaintiff adduced additional claims before the commission that the layoff was invalid, arguing that she has never been laid off properly and is entitled to all unpaid compensation to the present time. Specifically, she asserts that no just cause supported the layoffs, that the city failed to follow other required procedures in executing her alleged transfer from the department, that the creation of two different departments and her transfer to a division of the newly reorganized department, where she was the sole inspector, was plainly pretextual and retaliatory, and that she was improperly denied her seniority rights.

A claim of pretext or retaliation is a fact intensive one. On the basis of the record before us, we are persuaded that the commission's factual findings are not clearly erroneous,[6] and

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[5] The city's argument that the 2012 notice and hearing operate to effect a valid layoff retroactive to 2009 flounders on the explicit language of the statute: "Before [a layoff] is taken, such employee shall be given a written notice by the appointing authority . . . and shall be given a full hearing . . ." (emphasis added). G. L. c. 31, § 41, inserted by St. 1978, c. 393, § 11.

[6] The plaintiff claims that she was prejudiced by the failure of the commission to issue a subpoena for the appearance of the city manager, who declined to appear voluntarily. The plaintiff issued a subpoena for the city manager for the first day of hearing pursuant to 801 Code Mass. Regs. § 1.01(10)(g)(1998),

that the commission did not err as a matter of law in rejecting these additional claims.

Just cause. The record supports the commission's factual determination that budget cuts in 2009 and 2010 resulted in a reduction of local aid to the city, which in turn resulted in a deficit. In light of its factual finding that the plaintiff was one of 208 people laid off and that there was no ulterior motive involved, we discern no error in the commission's determination that just cause existed for the 2009 layoffs. See Gloucester v. Civil Serv. Commn., 408 Mass. 292, 298 (1990) ("Lack of money can constitute just cause").

Transfer rights. The commission did not err as a matter of law when it concluded that a reorganization of the department did not effect a transfer of the plaintiff under the purview of G. L. c. 31, § 35.[7] As a result of the reorganization, the

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incorporating by reference G. L. c. 30A, § 12 (permitting issuance of a subpoena as a matter of right, but granting the agency the authority to revoke the subpoena upon objection). The city objected, but the commission authorized the plaintiff to issue a subpoena for the second day of hearing. Her counsel did not issue the subpoena. In the absence of a subpoena, the commission declined to draw an adverse inference and did not compel the city manager's testimony. The commission did not deny the plaintiff opportunity to present her case.

[7] Although the term "transfer" is not defined in G. L. c. 31, § 1, the Personnel Administration Rules, par. 02, define a transfer as "the change in title of an employee to a title for which specifications show essentially identical qualifications and duties; a change from a position in title in one departmental unit to a position in the same title in a different departmental unit." A "departmental unit" is defined under

department lost one division and gained another.[8] After the reorganization, the plaintiff was still employed within the same division of the department (the public health division), with the same title, performing the same duties, and subject to the same chain of command as previously. Furthermore, even assuming a transfer occurred without proper procedure, an aggrieved party under § 35 must appeal to the commission within ten days of receiving written notice of such decision. G. L. c. 31, § 43. As the reorganization the plaintiff attacks became effective in July of 2008, any claim she has with respect to an improper transfer has long been waived.

Seniority rights. Finally, the plaintiff claims that she was denied rights to which she was entitled by virtue of her seniority. With respect to seniority based retention rights, the plaintiff argues that other senior sanitary inspectors with

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G. L. c. 31, § 1, inserted by St. 1978, c. 393, § 11, as "a board, commission, department or any division, institutional component, or other component of a department established by law, ordinances or by-law." "Th[is] definition reveals that a 'department' is a major organizational unit often containing subunits." Ahern-Stalcup v. Civil Serv. Commn., 79 Mass. App. Ct. 210, 213 (2011). We defer to the commission's interpretation that the relevant department unit is the department of health and human services. Gateley's Case, 415 Mass. 397, 399 (1993).

[8] The code/housing enforcement division was removed and the transitional housing services division was created.

less seniority were retained in violation of G. L. c. 31, § 39.[9] However, the record supports the commission's finding that these other less senior employees were transferred to a newly-created departmental unit while the plaintiff remained in her reorganized department. The parties do not dispute that seniority-based retention rights are restricted to the departmental unit of the employee at the effective date of the layoff. See Herlihy v. Civil Serv. Commn., 44 Mass. App. Ct. 835, 840-841 (1998). As we have concluded that the scope of this right pertains only to employment within the department, we agree with the commission that there was no violation of the plaintiff's seniority right to be retained vis-à-vis the employees in the newly-created departmental unit.

General Laws c. 31, § 39, also grants reinstatement rights, supra note 9, which again only apply to openings of the same or similar positions in the plaintiff's former departmental unit.

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[9] The first paragraph of G. L. c. 31, § 39, inserted by St. 1978, c. 393, § 11, provides:

> "If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall . . . be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first."

As of the date of the commission's decision, the record does not indicate than any individuals have been appointed to the same or a similar position in the department. The commission did not err in concluding that the city did not violate the plaintiff's reinstatement rights.

The plaintiff's reemployment rights pursuant to G. L. c. 31, § 40, apply to any senior sanitary inspector position, regardless of departmental unit, for the relevant two-year period. The commission ordered that the plaintiff's two years of reemployment rights began to run from the date of its decision on January 23, 2014, which the city does not contest. Our reading of G. L. c. 31, § 41, alters the earliest date that the plaintiff can be laid off and the case must be remanded for further consideration of the timing and duration applicable to the plaintiff's posttermination rights including reemployment rights.

The commission was cognizant of the unique circumstances of the plaintiff's case, and awarded her two years of Statewide reemployment rights pursuant to G. L. c. 31, § 40, and ten years of reinstatement rights pursuant to G. L. c. 31, § 39, effective on the date of their decision; the city does not contest these rights. As of the date of this decision, only her reinstatement rights remain effective.

Conclusion. As stated, the city's decision of January 14, 2013, can only be applied retroactively to a point in time after the plaintiff had received both notice of the intended layoff and a hearing. We affirm so much of the judgment as provides that the plaintiff may not be laid off as of April, 2009. The balance of the judgment is modified to remand the case to the commission for a determination of the layoff date in light of G. L. c. 31, § 41, and consideration of the plaintiff's reemployment rights pursuant to G. L. c. 31, § 40.[10]

So ordered.

By the Court (Grainger, Sullivan & Henry, JJ.[11]),

Joseph F. Stanton

Clerk

Entered: June 21, 2016.

[10] Walsh's request for appellate attorney's fees is denied.

[11] The panelists are listed in order of seniority.