

RECEIVED

2015 JAN -5- AM 8 32

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

Worcester, ss.

SUPERIOR COURT
Civil ACTION
No. WOCV2014-00327D

KAREN WALSH

vs.

CIVIL SERVICE COMMISSION and CITY OF WORCESTER

Memorandum and Order on Plaintiff's Motion For Judgment On The Pleadings

The Court heard argument on the plaintiff's Motion For Judgment On The Pleadings on November 25, 2014 at the Worcester Superior Court. This matter is distilled into one question – whether or not the City of Worcester (“City”) can retroactively terminate an employee after the Civil Service Commission (“Commission”) has ordered that employee reinstated to her former position. For the reasons stated below, the motion is ALLOWED.

Plaintiff's Employment Timeline.

- November 9, 1987 – Plaintiff began working for the City of Worcester as a provisional Sanitary Inspector.
- 1987-1988 – Plaintiff worked as an inspector for the Lead Poisoning Prevention Program.
- 1988-1996 – Plaintiff worked as a coordinator for the HIV/AIDS Infectious Disease Program.
- 1996-2002 – Plaintiff worked as an inspector in the Tobacco Control Program. During this time, she was promoted to Senior Sanitary Inspector.
- 2002-2005 – Plaintiff worked as an inspector in the Air/Water/Hazardous Waste division. During that time, she became a permanent Senior Sanitary Inspector.

- 2006-2008 – Plaintiff again worked as an inspector in the Tobacco Control Program.

Factual Background

From 1987 to 2008, the plaintiff worked for the City of Worcester in various capacities up to and including Senior Sanitary Inspector. She was a tenured Civil Service employee. On August 20, 2007, the plaintiff filed a grievance letter with her union claiming that her supervisors had dramatically and unreasonably increased her job responsibilities. She was told that the City's tobacco grant for Fiscal Year 2008 had been reduced, resulting in less money to pay consultants who assisted in compliance and inspection work. On January 10, 2008, the plaintiff filed a second grievance letter with her union claiming also that her supervisors were treating her in an offensive and harassing manner.

Beginning in 2008, the City experienced severe financial difficulties. The Commonwealth cut state aid to the City by approximately \$5 million. On March 11, 2008 the City enacted "An Ordinance Reorganizing The Departments, Boards & Commission of the City of Worcester." In August of 2008, the City removed the plaintiff from its payroll because the Acting Commissioner of the Department of Health & Human Services mistakenly thought that she had resigned from her position. On October 14, 2008, the plaintiff appealed her removal to the Civil Service Commission, arguing that she did not resign. In 2009, the City eliminated more than 200 positions. The City's Department of Health & Human Services, in which the plaintiff worked, lost 13 out of 18 positions. The plaintiff's position was eliminated during this reduction in workforce. The City did not provide the plaintiff written notice of the elimination of her position at that time. Nor did the City hold a hearing prior to eliminating the position and terminating the plaintiff's employment.

Although it held hearings on December 4, 2008 and January 22, 2009, the Commission did not issue a decision on the plaintiff's appeal until April 21, 2011. The Commission found that the plaintiff did not resign, that the City failed to comply with procedural requirements, and that the City did not properly remove the plaintiff from her position. The Commission also found that the City lacked just cause to terminate the plaintiff. The Commission ordered that the plaintiff be reinstated to her position without any loss of pay or other benefits retroactive to August 8, 2008.

On May 20, 2011, the City appealed the Commission decision to Superior Court. On January 11, 2012 the Superior Court, Tucker, J., denied the City's motion for judgment on the pleadings. On January 12, 2012, the Court affirmed the Commission decision that the plaintiff was improperly removed from her employment and entitled to reinstatement. On January 27, 2012, the City (1) appealed the Superior Court decision, and (2) sent the plaintiff a letter scheduling a layoff hearing for February 17, 2012.

On February 9, 2012 the plaintiff filed a motion for preliminary injunction and a complaint for contempt in Superior Court. On March 1, 2012, the Court, Wrenn, J., enjoined the City from moving forward with the layoff proceedings until further order of the Court. And on April 13, 2012, the Court found that the City was not in contempt of the Court's January 12, 2012 order and dismissed the complaint. The Court found that (1) the City had since the January 12, 2012 decision restored the plaintiff to her prior employment retroactive to August 8, 2008; (2) the city had timely filed a legally valid appeal of the decision, which appeal was then pending in the Appeals Court; and (3) the City's obligation to pay all back pay and benefits to the plaintiff was stayed pending the appeal to the appeals court. The Court also dissolved the stay of the City's layoff hearing it had entered on the plaintiff's motion for preliminary injunction and

that the hearing could go forward. The hearing was rescheduled several times and finally took place on October 4, 2012.

On December 31, 2012 the hearing officer issued a report concluding that the plaintiff was laid off as a result of a lack of funds, and that a lack of funds establishes just cause. As such, the hearing officer decided that just cause existed to lay off the plaintiff. The plaintiff appealed that decision to the Civil Service Commission.

On February 6, 2013 the Appeals Court issued a 1:28 ruling affirming the decision of the Superior Court.

On January 23, 2014 the Commission issued its decision affirming the City's decision to terminate the plaintiff retroactive to April 2009 and denying her appeal both in regard to the termination itself and her claims regarding reinstatement rights. On February 21, 2014 the plaintiff filed a complaint Superior Court appealing the Commission's decision again.

Discussion

Any party aggrieved by the decision of the Commission may seek judicial review in Superior Court. G.L. c. 31, §44. *City of Leominster v. Warden L. Stratton et al.*, 58 Mass. App. Ct. 726, 728 (2003). Section 44 provides that the judicial review be conducted conformably as prescribed in G.L. c. 30A, §14. The Court shall uphold an agency's decision unless it is based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law. G.L. c. 30A, 14(7). Judicial review is "confined to the record and is for the purpose of correcting legal error . . . [This court] need only inquire whether the [hearing officer's] decision was legally tenable and supported by substantial evidence on the record as a whole." Gloucester v. Civil Service Commission, 408 Mass. 292, 297 (1990) (citations omitted).

"A court will correct only a substantial error of law, evidenced by the record, which adversely affects a material right of the Plaintiff." Carney v. City of Springfield, 403 Mass. 604, 605 (1988).

The overall standard of judicial review gives deference to the administrative agency, which "is to have the benefit of any genuine doubt as to its conformance to the constraints laid upon it." Wightman v. Superintendent, MCI-Walpole, 19 Mass. App. Ct. 442, 445-46 (1985). Although a different decision maker might have drawn different inferences from the facts, "[a] court may not displace... [the] board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Cepulonis v. Commissioner of Correction, 15 Mass. App. Ct. 292, 295 (1983).

M.G.L. c. 31, §41 provides in pertinent part as follows:

Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be...laid off...from his position without written consent if he has served as a tenured place and prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank and compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections 41 through 45, and shall be given the full hearing concerning such reason or reasons before the appointing authority or hearing officer designated by the appointing authority.

Here, the issue of whether or not the City may lawfully terminate a tenured employee retroactively has not yet been decided. There is no dispute that the plaintiff is a tenured employee. And there is no dispute that the stated reason for the proposed, and subsequently imposed, termination was a lack of funds. Hence, before the plaintiff could lawfully be discharged, removed, or laid off or her position abolished, she is entitled to a written notice by the City Manager, as appointing authority, of the contemplated action, the specific reason or reasons for the action contemplated, and a full hearing concerning such reasons or reasons before

the City Manager or a hearing officer. That did not happen in 2009. The City merely eliminated her position without notice at that time because, as it argues, it did not consider her an employee at the time. However, the Court and Appeals Court have already decided that the plaintiff *was* a City employee at the time because it had wrongfully determined she had resigned. If the plaintiff never resigned, and the City was therefore never able to accept such resignation – then the plaintiff rated all of the procedural protections afforded by the Civil Service Commission and Massachusetts General Laws. This includes written notice to her and a hearing prior to eliminating the position.

The City notified the plaintiff by letter dated January 27, 2012 that it proposed to lay her off effective April 17, 2009, a proposed action more than 33 months *before* the notification, and then proceeded after hearing to lay her off effective April 17, 2009. That action by the City is not within the letter or spirit of either the statute or the prior rulings made on this matter by this Court and the Appeals Court. The Appeals Court affirmed the Commission's decision that the plaintiff had not resigned. The issue of her employment as of August 9, 2008 is thus settled as a matter of law and should not be litigated again. Therefore, any proposed action (termination or position elimination) required advance notice and a hearing. There is no evidence that the plaintiff was terminated from employment between August 9, 2008 and April 17, 2009 (putative layoff date). Since the plaintiff was an employee at that time and did not receive the advance notice and hearing required by §41, the Commission decision is based upon an error of law and cannot stand.

Order

The Plaintiff's Motion For Judgment On The Pleadings is ALLOWED.

A handwritten signature in black ink, appearing to read 'S. Frison', is positioned above a horizontal line.

Honorable Shannon Frison
Justice of the Superior Court

Date: December 29, 2014