

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

KATHLEEN HAWKS,
Appellant

v.

D1-09-368

DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondent

Appellant's Attorney:

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Lebanon, NH 03766

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Kathleen Hawks (hereinafter "Hawks" or "Appellant"), pursuant to G.L. c. 31, §§ 39 & 43, filed an appeal contesting: 1) the decision of the Department of Environmental Protection (hereinafter "DEP" or "Appointing Authority") to lay her off; and 2) DEP's failure to provide her with appropriate bumping rights. The Appellant, as part of her initial appeal, reserved her right to challenge whether there was a lack of funds that justified her layoff, but both parties agreed that the issue of whether DEP afforded her the appropriate bumping rights under Section 39 would need to be adjudicated first. The Commission issued a decision (hereinafter "Prior Decision") regarding that matter on

December 30, 2010, deciding that DEP did provide the Appellant with all applicable bumping rights. The Appellant then filed a motion for reconsideration which, in part, asked the Commission to rule on whether there was just cause for her termination. In her post hearing brief, the Appellant stated that she “does not contest the need for budget cuts in DEP, however, she believes this need was used as a pretext for terminating her employment with DEP.” A full hearing was held on July 12, 2011 regarding this issue. Twelve (12) exhibits were entered into evidence and I left the record open for DEP to provide documents referenced during the testimony of a DEP witness. Those documents were received and have been marked as Exhibit 13. On January 10, 2012, I re-opened the record and asked DEP to provide: 1) an un-redacted copy of Exhibit 11; and 2) the Form 30s for all individuals that were laid off during the first round of layoffs that included the Appellant. DEP provided the Commission with an un-redacted copy of Exhibit 11, but objected to and did not comply with the order to produce the requested Form 30s, stating that DEP did not review these Form 30s when determining who was to be laid off. Upon reviewing the un-redacted copy of Exhibit 11, I noticed that certain names listed on Exhibit 11 (individuals laid off) were not listed on Exhibit 13 (master list of candidates and their seniority dates). On February 27, 2012, I sent an email to counsel for DEP, with a copy to counsel for the Appellant, asking DEP to review the documents and address what appears to be an administrative oversight (i.e. – certain pages missing from Exhibit 13). As of the date of this decision, I did not receive a response from DEP.

FINDINGS OF FACT

Based on the documents submitted and the testimony of:

For the Appointing Authority:

- John Viola, Human Resources Director, DEP;
- Thomas Massimo, Acting Deputy Director, DEP Bureau of Administrative Services;

For the Appellant:

- Kathleen Hawks, Appellant;
- Bruce Philbrick, former DEP employee

I find the following:

1. DEP is the state agency responsible for ensuring clean air and water, the safe management of toxics and hazards, the recycling of solid and hazardous wastes, the timely cleanup of hazardous waste sites and spills, and the preservation of wetlands and coastal resources. (Administrative Notice: mass.gov/dep)
2. The Appellant was promoted to a permanent Accountant III position at DEP in 1995, retroactive to November 1990. The Appellant, by virtue of a settlement with DEP, was appointed as a provisional Accountant IV on June 8, 1998. The Appellant served in that capacity until she was laid off on April 13, 2010. Any civil service protections related to Section 39 “bumping rights” originate from the Appellant’s permanency in the position of Accountant III. (Prior Decision)
3. On September 10, 2008, DEP received notice from Leslie A. Kirwan, then-Secretary of Administration and Finance, regarding budget cuts stating “[i]n all probability FY10 and FY11 will require budget reductions by all agencies.” (Exhibit 5)

4. On October 10, 2008, DEP, along with all state agencies, received correspondence from the state's Human Resources Division (HRD) outlining the steps that must be taken to effectuate layoffs due to anticipated budget cuts. (Exhibits 6 & 6A)
5. Thomas Massimo, DEP's Acting Deputy Commissioner for Administrative Services, testified that DEP's funding was reduced by 8.9%, or approximately \$4 to \$5 million in FY09. (Testimony of Massimo)
6. Mr. Massimo testified that, before instituting layoffs, DEP first attempted to reduce budget costs by renegotiating leases, eliminating fleet cars, reducing the use of gas and electricity and postponing capital purchases. (Testimony of Massimo)
7. DEP also sought to achieve savings through voluntary layoffs and retirements. However, according to Mr. Massimo, this was not enough to meet the \$4 to \$5 million in reductions. (Testimony of Massimo)
8. Between March 28, 2009 and July 2, 2011, DEP would ultimately lay off 140 full-time employees, reducing its total headcount to approximately 800 FTEs. (Testimony of Massimo)
9. Layoffs were determined by a five-member team of Senior Staff members, which included Mr. Massimo and the Deputy Commissioner for Operations, the Deputy Commissioner for Policy and Planning, the Budget Director and the Chief of Staff at DEP. (Testimony of Massimo)
10. On June 24, 2009, the Clinical Director of Lynnfield Psychological Associates, PC., penned a letter stating that the Appellant suffered from Post Traumatic Stress Disorder. The letter stated in relevant part that, "If Ms. Hawks feels unjustly criticized by an authority figures (sic), she tends to become overwhelmed with fear

and panic. She may either become verbally defensive or retreat into self.” (Exhibit 2)

11. The Clinical Director recommended a series of workplace accommodations for the Appellant that included: keeping the door open while her supervisor was talking to her; terminating any meetings with her supervisor if she begins to feel overwhelmed; having a third person present whenever performance issues are being discussed. The final recommendation states: “If these accommodations are not sufficient to lower her anxieties; then I am requesting that Department of Environmental Protection transfer Ms. Hawks to a different section within the department. It would appear that the human dynamics that create the stress between Ms. Hawks and her present supervisor could be resolved if Ms. Hawks was transferred.” (Exhibit 2)
12. On July 8, 2009, the Appellant filed a grievance stating that she was being harassed by her then-supervisor and contesting her performance evaluation. (Exhibit 1)
13. On July 24, 2009, DEP issued a “Decision to Grant Partial Reasonable Accommodation” allowing the Appellant to :1) request to have the door open when meeting her supervisor; 2) terminate any meeting with her supervisor if she feels overwhelmed; and 3) use medical time for doctors’ appointments. DEP did not allow the Appellant’s request to have a third party present whenever her supervisor talked to her about her performance and took the issue of a transfer under advisement after assessing whether these partial steps were sufficient. (Exhibit 2A)
14. On August 28, 2009, Mr. Massimo penned a memo to the President and Vice President of NAGE stating that the Appellant (and another employee who also filed a grievance) shall receive a “meets” on their most recent performance evaluations and

that a manager by the name of Bruce Philbrick, an Accountant V, would now serve as the Appellant's supervisor. (Exhibit 1)

15. On September 9, 2009, the Appellant withdrew her grievance. (Testimony of Appellant)
16. On September 17, 2009¹, the first round of twenty-one (21) layoffs occurred at DEP, including managers, "03" contractors, and members of three (3) different unions. The Appellant was a member of this group. (Testimony of Massimo)
17. Mr. Massimo testified that the five-member team decided that layoffs, in addition to being in compliance with civil service law and rules and applicable collective bargaining agreements, should be implemented in a manner that: 1) preserved technical positions over administrative positions; and 2) caused the least amount of "bumping" into other positions. Mr. Massimo testified that a long bumping process usually results in more people being laid off in order to achieve the dollar figure necessary, which DEP wanted to avoid. Mr. Massimo testified that none of the layoffs instituted by DEP resulted in the displacement of other employees via bumping. (Testimony of Massimo)
18. Mr. Massimo testified that DEP also had its proposed layoffs reviewed by the state's Office of Diversity and Equal Opportunity (ODEO) to ensure that there were no indications of disparate impact upon any group of employees. (Testimony of Massimo)
19. Since the Appellant was laid off, there have been no Accountant IIIs employed by DEP. (Testimony of Massimo)

20. The work previously performed by the Appellant is now done by the Appellant's former supervisor, an Accountant V. (Testimony of Appellant)
21. DEP does still employ some former employees as "03" and "07", "960-hour" employees who have been retained due to their institutional knowledge and engineering skills. (Testimony of Massimo)
22. Ms. Massimo testified that the Appellant's request for accommodations and/or her grievance played no role in the decision to include her in the group of employees to be laid off. (Testimony of Massimo)
23. As referenced in footnote 1, the Appellant was initially laid off on September 17, 2009. Since DEP acknowledged that it did not provide the Appellant with the required hearing prior to her being laid off, DEP agreed to reinstate the Appellant, with back pay, for the sole purpose of curing that procedural defect. The Appellant was indeed reinstated on March 24, 2010. A hearing was then held and the Appellant was laid off on April 16, 2010. (Exhibit 7)
24. On April 10, 2010, while the Appellant was temporarily back on the DEP payroll, she filed a "Notice of Injury / Illness Report" regarding an alleged event (a conversation at lunch with her supervisor) that occurred on March 27, 2008 which, according to the Appellant resulted in an injury or illness. (Exhibit 3)
25. In the above-referenced report, the Appellant states that "supervisor treatment" caused panic attacks associated with PTSD. In response to a question on the form which asked, "was the event the result of a violent act?", the Appellant checked "yes" and hand-wrote "in my opinion." (Exhibit 3)

¹ The September 17, 2009 termination was ultimately rescinded after the Civil Service Commission informed DEP that they failed to provide the Appellant with a hearing required by G.L. c. 31, § 41. The

LEGAL STANDARD

The Commission's role in hearing cases under such a "just cause" standard is well-established. In adjudicating such matters, the Commission looks to see if "the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n., 43 Mass. App. Ct. 300, 304 (1997). A "reasonable justification" means that the appointing authority's actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

Where the Commission finds by a preponderance of the evidence that there was just cause for the action taken by the appointing authority, the Commission shall affirm the appointing authority. Falmouth v. Civil Service Comm'n., 61 Mass.App.Ct. 796, 800 (2004). While it is the role of the Commission to "guard against political considerations, favoritism, and bias in governmental employment decisions ... [i]t is not within the authority of the commission, however, to substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an appointing authority." Id. at 800, quoting City of Cambridge, 43 Mass.App.Ct. at 304.

The Supreme Judicial Court has cautioned the Commission that its proper role in applying the "just cause" standard in matters involving the abolition of a position for reasons of economics and efficiency are limited, and indeed more "narrow" than the

Appellant was reinstated, provided with a hearing and then terminated again.

scope of review to be applied in disciplinary actions. See School Comm. of Salem v. Civil Service Comm'n, 348 Mass. 696, 699 (1965). See also Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 925 (1994) (“terminations of these sorts are not subject to the statutory procedures customarily provided for cases where an appointing authority intends to terminate an employee for what amounts to job performance”).

It is well-settled that lack of money constitutes “just cause” for the elimination of a position. Debnam v. Belmont, 388 Mass. 632, 634-36 (1983). The SJC noted that: “a municipality may abolish a civil service position when, in the judgment of appropriate municipal officials, the position is no longer needed or economical.” Debnam, 388 Mass. at 635-36 citing, et. al., Commissioners of Civil Service v. Municipal Court of the City of Boston, 369 Mass. 84, 88 (1975). In reaching this determination, the Court noted century-old precedent establishing the fundamental premise that:

The abolition of an unnecessary position made in good faith plainly is the duty of an executive or administrative officer. One holding such a position, though efficient in the performance of his duties, may be removed simply because the position is no longer necessary, provided the removal is made in good faith, and the recital of that reason is not made the cover for some other unjustifiable motive.

Gardner v. Lowell, 221 Mass. 150, 154 (1915) citing Garvey v. Lowell, 199 Mass. 47, 49 (1908).

The Court further noted that a “lack of funds” exists where the appointing authority determines that its actual or anticipated revenues are or will be inadequate to pay the salary of the employee(s) in question, as well as to meet other, more pressing needs of the appointing authority. Gloucester, 408 Mass. at 301 citing Debnam v. Belmont, 388 Mass. at 636. Notably, evaluating the actions of the appointing authority under this

standard, the Commission will only consider whether the appointing authority exercised it “best judgment” in making such a determination. See School Comm. of Salem, supra, 348 Mass. 696. Whether the appellants or the Commission personally agree with the authority’s conclusion is not dispositive. Id. Similarly, the ultimate accuracy of this conclusion is also not at issue. Id. Stated simply, the 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 of Boston v. Civil Service Comm’n, 23 Mass.App.Ct. 410, 413 (1987) citing Gardner v. Lowell, 221 Mass. at 154; McNeil v. Mayor of Peabody, 297 Mass. 499, 504 (1937); Dooling v. Fire Commr. of Malden, 309 Mass. 156, 162 (1941).

The layoff of employees is not justified if the proffered reason for their dismissal was pretextual and their discharge was the product of improper motivations. City of Cambridge Housing Authority v. Civil Service Comm’n, 7 Mass.App.Ct. 586, 589 (1979); *see also*, Raymond v. Civil Service Commission and Athol Fire Department, Memorandum of Decision and Order in Suffolk Superior Court Civil Action 06-3871-C (12/9/08) hereinafter “the Athol case,” p. 11. Furthermore the Court in the City of Cambridge Housing Authority case reiterated the long established doctrine under the Civil Service Law dating back to the early 1900’s which provides that,

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. City of Cambridge Housing Authority, 7 Mass.App.Ct. at 590 – 591, *quoting*, Garvey v. Lowell, 199 Mass. 47, 50 (1908).

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. City of Cambridge Housing Authority, 7 Mass. App. Ct. at 590 – 591, *citing Mayor of Somerville v. District Court of Somerville*, 317 Mass. 106, 121 (1944).

CONCLUSION

Here, there is no dispute that there was a lack of funds that required DEP to implement layoffs. Rather, the Appellant argues that DEP’s decision to eliminate her particular position, as opposed to others, was not made in good faith. She argues that the decision to select her position for elimination was directly related to her grievance and request for accommodations.

All of the judicial decisions cited above reference the Commission’s authority – and duty - to determine whether the layoff was made in good faith.

DEP argues that their decision to eliminate the Appellant’s position as part of the reduction in force was indeed made in good faith and was guided by two factors: 1) a desire to minimize the exercise of bumping and the resulting disruption to the workforce; and 2) a desire to retain technical, as opposed to administrative, personnel.

Minimizing Bumping Rights and Disruption to Workforce

According to the un-redacted copy of Exhibit 11 (list of DEP “staff losses from June 2008 to July 2011), sixteen (16) individuals, including Ms. Hawks, were involuntarily laid off as part of a staff reduction in September or October 2009. I compared Exhibit 11 with Exhibit 13, which, according to DEP, was the master seniority list used to meet the purported goal of minimizing the process of bumping and disruption to the workforce.

Two (2) of the sixteen (16) individuals were administrators who, according to their date of hire, would appear to have no bumping rights under civil service law or rules. One (1) individual was the only Information Officer II (or below) employed by DEP, thus having no civil service bumping rights. Two (2) individuals were the least senior Administrative Assistant IIs working for DEP (and there were no Administrative Assistant Is), meaning they had no civil service bumping rights. One (1) individual was the only Accountant III included on the seniority list and two (2) individuals were the only paralegal specialists, resulting in no civil service bumping rights for any of them.

Seven (7) other individuals listed on Exhibit 11 had titles of Environmental Engineer, Environmental Analyst, Planner or Scientist, but their names were not included on Exhibit 13, making it impossible to do a comparison similar to that referenced above.

Although the Appellant is listed as an Accountant IV, she was, for reasons outlined in the prior decision, a permanent Accountant III and her bumping rights were limited to that position. Also for reasons contained in the prior decision, the Appellant had no bumping rights as an Accountant III since both Accountant IIIs were laid off and there were no individuals in a lower title that these two individuals could bump.

In summary, for those positions for which information was available, it is clear that DEP's decision to eliminate these positions did achieve the desired result of preventing a domino of other employees from being bumped, transferred and laid off. Rather, the individuals laid off, for the reasons cited above, had no ability to bump other individuals.

Retaining technical, as opposed to administrative, personnel

As referenced in the procedural background, I reopened the record after the close of the hearing for DEP to submit the job descriptions (Form 30s) of those individuals who

were laid off in September and October 2009, the same time as the Appellant. DEP objected to this request, did not send in the information, and indicated that these job descriptions were not reviewed as part of the layoff decision-making process.

Thus, the only information available to evaluate this claim is limited to inferences I may wish to draw from the title of the positions involved and the testimony of Mr. Massimo. Based on the titles of the sixteen (16) individuals laid off, I infer that at least nine (9) of the individuals, including the Appellant, held titles (Accountant, Administrator, Information Officer, Administrative Assistant) that were likely administrative in nature. Further, I found Mr. Massimo's testimony on this issue to be credible. His comments on this subject rang true to me and I credit his testimony in this regard.

In summary, DEP has shown, by a preponderance of the evidence, that its decision to layoff the Appellant was driven, in part, by the desire to target administrative titles, such as the Appellant's, more than technical titles.

Appellant's claim of bias and retaliation

Ms. Hawks argues that she was targeted for layoff after filing a grievance against her supervisor and requesting accommodations related to that grievance. Standing alone, her allegations are not beyond all reason. The timing of events as outlined in the findings does raise questions regarding whether DEP used the budget crisis as an opportunity to part ways with Ms. Hawks.

Weighed against the evidence that shows that the Appellant's layoff was consistent with the two predetermined factors used to make all layoffs and the credible testimony of Mr. Massimo, Ms. Hawks has not shown that her layoff was based on bias or retaliation.

Mr. Massimo adamantly denied that there was any link between the grievance and request for accommodations filed by Ms. Hawks and DEP's decision to include her in the layoffs. I credit his testimony. His denial appeared genuine, unrehearsed and truthful. Put simply, I believe DEP acted in good faith regarding the decision to layoff Ms. Hawks.

For all of the above reasons, the Appellant's appeal under Docket No. D1-09-368 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; McDowell & Stein, Commissioners [Marquis – Absent]) on March 22, 2012.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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 this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:
Nancy Tierney, Esq. (for Appellant)
Kenneth Langley, Esq. (for Appointing Authority)