COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

ANDREW STACY,
Appellant

v.

CASE NO: D1-14-242

DEPARTMENT OF DEVELOPMENTAL SERVICES,
Respondent

Appearance for Appellant:

Philip Brown, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

Wendy Chu, Esq.
Human Resources Division – Legal Unit
One Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION

The Appellant, Andrew Stacy, acting pursuant to G.L.c.31, §39 & §43, duly appealed to the Civil Service Commission (Commission) from the decision of the Massachusetts Department of Developmental Services (DDS) to demote him from his position of Direct Services Worker III (DSW-III) to Direct Services Worker II (DSW-II) as part of a reduction in force at certain DDS institutional facilities. Following a pre-hearing conference on December 16, 2014, pursuant to the Commission's Procedural Order, DDS filed a Motion To Dismiss the appeal for lack of jurisdiction, which Mr. Stacy opposed. The parties agreed to submit the motion for decision on the papers and that a motion hearing was not required.[1]

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

Findings of Fact

Based on the submission of the parties and all reasonable inferences drawn in a light most favorable to the Appellant, I find the following material facts are not disputed::

1. The Appellant, Andrew Stacy, is a tenured DDS employee with a DDS seniority date of April 17, 1983. He held the civil service title of DSW-III from November 10, 1991 until the demotion that is the subject of the present appeal, and was assigned to the DDS Templeton Development Center (Templeton) within the DDS's Central/West Region. Mr. Stacy also served as the president of the local union, AFSCME Council 93, Local 554 (the Union) which represents DSWs and certain other direct care DDS employees in the DDS Central West Region. (*Procedural Order; DDS Motion [Tranghese Aff't]; Appellant's Opposition [Stacy Aff't]*)

2. DDS is a state agency within the Executive Office of Health & Human Services (EOHHS) which manages and oversees a system of specialized services to support individuals with intellectual disabilities. DDS provided these services through institutional facilities, as well as community-based programs, including community residences across the Commonwealth. Approximately ten years ago, DDS began to transition away from institutional facilities and to increase the number of community residences it operates. (*DDS Motion [Tranghese Aff't]*)

3. In December 2008, DDS announced plans for the closure of the three DDS institutional facilities within the Central/West Region, including Templeton, Monson Developmental Center and Glavin Regional Center. At the time of this appeal, Templeton was slated to be closed on or about January 31, 2015. (*Procedural Order; DDS Motion [Tranghese Aff't]; Appellant's Opposition [Stacy Aff't]*)[2]

[2] At the time of the Commission hearing, Mr. Stacy continued to hold his DSW-III position at Templeton. DDS counsel subsequently confirmed that Templeton closed on February 3, 2015 and I infer that Mr. Stacy was demoted to the position of DSW-II effective on or about that date. (*DDS Motion [Tranghese Aff't]; Administrative Notice [E-mail from Wendy Chu, Esq. dated 2/9/2016]*)

4. In order to lessen the impacts of the Templeton closure on both employees and institutional residents, DDS established six new community residences in nearby towns. In addition, three existing homes on the Templeton campus were identified to be converted into state-operated community homes. The facility closure plan also included the construction of three new duplexes on the Templeton property. (*DDS Motion [Tranghese Aff't]*)

5. The newly established community homes called for staffing at the DSW-II level or below. Between 2009 and 2014, DDS and the Union negotiated a number of agreements which provided a process for initial staffing of the new community residences which provided priority, according to seniority, to employees of the DDS facilities that were being closed. As Union President, Mr. Stacy participated personally in the negotiation of these agreements. (*Procedural Order; DDS Motion [Tranghese Aff't]; Appellant's Opposition [Stacy Aff't]*)

6. In early 2014, DDS and the Union reached a Memorandum of Agreement (MOA) on the bidding process for the newly created community homes located on the Templeton campus. The MOA gave Templeton employees holding certain titles (including DSW-II, DSW-III and DSW-IV) first priority, according to seniority, to bid on positions in the identified community homes. If a DSW-III or DSW-IV elected to bid on an available DSW-II position, the MOA provided that "the employee shall be voluntarily demoted to the respective title. Employees electing to voluntarily demote shall be paid at the appropriate rate in the selected title in accordance with the collective bargaining agreement." (DDS Motion [*Procedural Order; Tranghese Aff't & Exh. 1]; Appellant's Opposition [Stacy Aff't, Exh. 2]*)

7. The MOA was silent as to employees' civil service rights. Viewing the evidence in the light most favorable to Mr. Stacy, he had several conversations with DDS management which left him with the impression that nothing in the MOA meant that an employee who exercised the

right to bid on a lower title, prejudiced the employee's rights, if any, under civil service to claim the right to protest the demotion and be retained in their higher titles of DSW-III or DSW-IV. (*Procedural Order; DDS Motion [Exh. 6]; Appellant's Opposition, Stacy Aff't & Exhs 1 & 4]*)

8. On or about April 22, 2014, in accordance with the standard notice provided to all affected employees, Mr. Stacy appeared at the appointed time and selected a DSW-II position in Duplex 2B, first shift. (*Procedural Order; DDS Motion [Tranghese Aff't & Exhs 2 & 3; Appellant's Opposition, Stacy Aff't & Exh. 3]*)

9. On May 13, 2014, Mr. Stacy communicated by e-mail to Lisa Gallup, the EOHHS/Disability and Community Services Cluster's Director of Human Resources, informing her of Templeton's "lack of acknowledgment regarding my status, as not giving me written notification of their intention to involuntarily demote me, as well as my rights to have a hearing disputing this action under MGL 31 Section 41, prior to the Civil Service in Boston hearing this case." He cited DDS's agreement to allow DSW-III and DSW-IV employees to keep their higher titles and pay when they transitioned from Fernald Development Center in Waltham to community homes. He also alleged that, as a personal favor, the spouse of a high level DDS manager had a position created for him so that he could retain his higher title when Templeton closed. (*DDS Motion, Exh. 3; Appellant's Opposition [Stacy Aff't & Exh. 4]*)

10. By letter dated May 27, 2014, HR Director Gallup responded to Mr. Stacy. The letter states, in part:

> "It is my understanding that on behalf of yourself and your Local 554 union members, you entered into an agreement with the Department of Developmental Services over a method by which to fill the DSW I and II positions that would remain in the Templeton Community Program once that facility closed. Further, I understand that you participated in the bid process outlined in that agreement and chose, in writing, to occupy one of the available Templeton Community Program DSW II positions. By doing so, you have consented to being lowered in rank or compensation within the meaning of the law and no hearing is necessary. If you are not consenting to move to the DSWII position, you

> would need to relinquish the position on which you bid. You would be provided with a layoff notice and your civil service hearing and bumping rights at the time we conduct layoffs of any remaining Templeton staff. Please let Patty Lyons know if you want to pursue this."

The letter also addressed Mr. Stacy's assertions that DSWs at Fernald Development Center, another DDS facility in Waltham, MA (Fernald), had been allowed to retain their titles, indicating that, to her knowledge, only one employee, who was not tenured, had been allowed to do so, and all other DSW IIs and IVs at Fernald had been or were in the process of being laid off. As to the reassignment of another manager's spouse to a newly created position, that decision was within the purview of DSS which had decided that the duties he currently performed would be beneficial to the new Templeton Community Program. (*Procedural Order; DDS Motion, Exh. 5*)

11. By email dated May 30, 2014, Mr. Stacy stated his understanding:

> "The bid process/method was . . . DSW3/4'S would either be laid off (without a job), or could bid and INVOLUNTARILY demote themselves to maintain employment. . . . Management was fully aware that Civil Servants being forced to demote themselves including myself told them personally, with witnesses present, I fully intended to appeal to Civil Service! . . . . I did NOT bargain away any members rights to appeal Management actions to the Civil Service Commission. . . . . I request a hearing under my rights under Civil Service Law at the Facility so I can proceed forward for any members who may choose to appeal under the law! I also will advise the remaining Civil Servants of their rights after being INVOLUNTARILY Demoted. . . ."

(*DDS Motion, Exh. 6; Appellant's Motion, Exh. 4*)

12. By email dated July 11, 2014, in Lisa Gallup's absence, Mr. Stacy received a response to his May 30, 2014 message from Jonathan Platt, EOHHS/Disability and Community Services Cluster's Director of Labor Relations, who stated, in part:

> "As you know I was in receipt of Lisa's original response to you and I agree with all that she wrote. Our reading of M.G.L. Chapter 31 is that it gives a permanent employee, upon receipt of a layoff notice, the right to a hearing to challenge whether there was just cause for the action (section 41) or to request demotion as an alternative to separation (section 39). It does not give the employee the right to <u>both</u> the hearing and the demotion."

"I understand that you prefer not to lower in rank and in that way your selection of a DSW II position through the bid process was "involuntary", yet you chose to participate rather than be laid off from your position. Hence, the Department does not intend to issue you a layoff letter."

"As Lisa indicated, if you would prefer to relinquish the DSW II position and be laid off you should speak to Patty Lyons about that. Contrary to your statement . . . .this does not imply a threat of any kind. It is simply our interpretation of Chapter 31 with regard to when a civil service employee is entitled to a hearing. There may be some other basis on which you can appeal to the Civil Service Commission that I am not aware of. You would need to explore that with the Commission."

(*DDS Motion, Exh. 6; Appellant's Motion, Exh. 4*)

13. By email dated July 16, 2014, Mr. Stacy replied to Mr. Platt:

"Hi Jon, The Union will continue to bargain for the same agreement offered to Fernald Supervisors in regard to pay retention. In the end if we are unsuccessful we will bring the matter to the Commission for an appeal hearing, theres [sic] only a few of us left AND we are willing to discuss taking on extra duties in the houses in exchange for pay retention. I think those discussions could help in the transition of TDC to a large cluster of group homes. We are ready to bargain in good faith if the Department is a willing partner. Thanks. Andy."

(*Appellant's Motion, Stacy Aff't & Exh. 4*)

14. Mr. Stacy says he brought up the issue of "pay retention" at an October 14, 2014 Labor Management meeting. The notes of the meeting contain the following reference to that subject:

"AS Proposal #1: Add (1) Staff to the grounds wide minimum to provide 24/7 Supervision to coordinate staffing, in order to better respond to crisis,

Dave T Interrupts – Andy your're getting demoted, let it go.

AS Continues proposal #1 - That person can be a DSW2, But should be compensated for doing this job. They would be in charge of keeping a central schedule in order to coordinate floating/hiring of overtime.

Dave T on Proposal #1 – 24 hour supervision is a waste of money, its not going to happen.

(*Appellant's Motion, Stacy Aff't & Exh. 5*)

15. On October 18, 2015, Mr. Stacy appealed to the Commission, stating in the Claim of Appeal that he had received notice on October 15, 2014 of his "demotion without just cause and other" alleged violations of his civil service rights. (*Claim of Appeal; DDS Motion Exh. 7*)

Applicable Civil Service Law and Rules

The order in which civil service employees are to be laid off in the case of lack of work is prescribed by G.L.c.31, §39, which provides in relevant part:

> [*P]ermanent employees* . . . *having the same title in a departmental unit are to be separated* . . . *because of lack of work* or lack of money *or abolition of positions* . . . *according to their seniority* . . . so that *employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest* and reinstated first. . . .
>
> *Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work of lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted* to a position in the next lower title or titles in succession in the official service . . . (*emphasis added*)

G.Lc.31, §41 governs termination of civil service employees and states:

> "*Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be . . . laid off . . . nor shall his position be abolished. Before such action is taken,* such employee *shall be given a written notice* by the appointing authority . . . and *shall be given a full hearing*. . . before the appointing authority or a hearing officer designated by the appointing authority. The appointing authority shall *provide such employee a written notice* of the time and place of such hearing at least three days prior to the holding thereof, except *that if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty."* (*emphasis added*)

A tenured civil service employee aggrieved by the layoff decision of an appointing authority under Section 41 may appeal to the Commission within ten days following the decision. G.L.c.31, §43. An employee may also file a complaint with the Commission from action by an authority taken without following the statutory requirements for layoffs, which must be filed within ten days "after such person knew or had reason to know of said action". G.L.c.31, §42. If the employee can establish that "the rights of such person have been prejudiced thereby", the Commission "shall order the appointing authority to restore such person to his employment immediately without loss of compensation or other rights." Id.

Section 42 also provides:

> "*A person who files a complaint under this section may at the same time request a hearing as to whether there was just cause for the action of the appointing authority* in the same manner as if he were a person aggrieved by a decision of the appointing authority made pursuant to all the requirements of section forty-one. In the event the commission determines that the subject matter of such complaint has been previously resolved or litigated with respect to such employee, in accordance with [a collective bargaining grievance proceeding], the commission shall forthwith dismiss such complaint. If such complaint is denied, such hearing shall be conducted and a decision rendered as provided by section forty-three." (*emphasis added*)

Just Cause for Layoffs

The Commission decides appeals by person(s) aggrieved by an appointing authority's decision to layoff personnel for lack of work under G.L.c.31,§43, which provides, in relevant 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 . . . .(*emphasis added*)

Under Section 43, the Commission must "conduct a de novo hearing 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. 408, 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).

In a case involving a reduction in force due to alleged lack of work, the well-established rules permit the Commission a very limited role in reviewing cost-cutting choices made by an appointing authority. See 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) Once an appointing authority meets its burden of proof to articulate legitimate economic reasons for the layoffs, the burden then shifts to the employee to prove that the economic 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)

Thus, absent affirmative evidence demonstrating that a separation for lack of work is but a mere pretext for another improper motive for separation, the Commission cannot override a good faith determination by the appointing authority to separate employees for cost-cutting purposes. See, e.g., Denham v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap into reserve fund); City of Gardner v. Bisbee, 34 Mass.App.Ct. 721, 723 (1993) (pretext established when mayor improperly injected himself and dictated to appointing authority who should be laid-off); Cambridge Housing Auth..v. Civil Service Comm'n, 7 Mass.App.Ct. 586 (1979) (finding pretext when appellant's position was "abolished" so that another person could be appointed to perform the same duties).

Analysis

Applying these principles to the facts of the present appeal, Mr. Stacy's appeal must be dismissed. First, his appeal is untimely, having been asserted months after he "knew or should have known" of the facts that he now contends form the basis for his complaint. Second, even had the claim been asserted in a timely manner, the undisputed facts establish that DDS clearly had just cause to eliminate Mr. Stacy's position as a DSW III and Mr. Stacy has not been prejudiced by any alleged violation of his civil service rights which caused his demotion to his current position as a DSW II.

Timeliness

Civil service law imposes an obligation upon any employee who believes that his civil service rights have been infringed to take prompt action to redress the alleged violation. In the case of discipline including discharge and layoffs, the employee must act promptly upon notice of the appointing authority's decision and, in the absence of a formal decision, the employee must act just as soon as he or she "knows or has reason to know of the action" taken in violation of civil service law. G.L.c.31, §41 through §43. The expectation that the dispute may be resolved through collective bargaining grievance or other means does not excuse the failure to take a timely appeal to the Commission. Compare Kilson v. City of Fitchburg, 27 MCSR 106 (2014) (failure to appeal not excused by demand for arbitration of termination subsequently found not arbitrable); Allen v. Taunton Public Schools, 26 MCSR 376 (2013) (eight month delay in appeal of termination made without granting employee proper notice and hearing) with Lynch v. City of Boston, 28 MCSR 298 (2015) (timely appeal of layoff without proper notice); Cascino v. City of Boston, 28 MCSR 194 (2015 (same)

Mr. Stacy was well aware, by early 2014, that the closure of Templeton and the transfer of all residents to community homes was imminent. In fact, as the Union president, he was directly involved in negotiating the MOA that established the process by which the remaining Templeton staff, himself included, received the opportunity to bid on the new positions that would be created in the community homes upon that transition. The email exchange from May 2014 to July 2014 initiated by Mr. Stacy, clearly expresses his contention that the bidding process under the MOA was inconsistent with civil service law, and establishes that he "knew or should have known", no later than that point, that DDS was not going to provide the notice and hearing process under civil service law that Mr. Stacy was demanding. Mr. Stacy's appeal, brought in October 2014, falls months beyond the applicable ten-day window, which is akin to a statute of limitations, within which he should have acted. In the absence of a timely appeal, the Commission lacks jurisdiction to hear the dispute. See, e.g., Fiore v. Massachusetts State Police, 27 MCSR 136 (2014) (pro se appellant); Adams v. City of Newton, 24 MCSR 495 (2011) (same)

The duty to make a timely appeal, however, must be distinguished from DDS's argument, which I do not accept, that, merely by participating in the CBA bidding process, ipso facto, Mr. Stacy "waived" any right to contest the demotion as a violation of civil service law. To the contrary, such action was necessary to fulfil the obligation to mitigate any loss, something that should be encouraged, and should not be conditioned on forfeiture of civil service rights, provided they were timely asserted. See, e.g, Almeida v. New Bedford School Comm., 23 MCSR 608 (2010) (employee has duty to exercise due diligence to accept a position in order to protect his civil service claims to entitlement to "bump" into some other allegedly lawful, preferred position); Tomashpol v. Chelsea Soldiers Home, 23 MCSR 52 (2010) and cases cited (discussing potential for conflicts that can arise in layoffs between CBA and civil service law)

The case of Worcester v. Civil Service Comm'n, 18 Mass.App.Ct. 278, rev.den, 392 Mass. 1104 (1984) is clearly different from the present case, as the demotions in that case were taken pursuant to, not in absence of, the statutory process for electing between layoff or demotion.

Just Cause for Mr. Stacy's Demotion

Although this appeal must be dismissed for lack of jurisdiction, it bears notice that, on the merits, Mr. Stacy's also would fail. Civil service law does not "preclude abolition of positions or reorganization of departments." E.g., Herlihy v. Civil Service Comm'n, 44 Mass.AppCt. 835, rev. den. 428 Mass. 1104 (1998). Mr. Stacy does not assert that DDS does not have just cause to eliminate his position as a DSW III incident to the closure of the facility in which he worked. He does not dispute that, upon such closure, there would no longer be any DSW III positions in the Central/West Region to which he could be transferred and he was not interested in relocating to another Region, which required moving or undertaking a very lengthy commute. Thus, this is not a case in which Mr. Stacy asserts a claim that, by failing to follow the layoff notice process set forth in Section 39, DDS denied him the opportunity to "bump" another junior DSW III within the "departmental unit" which, by law, consists of all DDS facilities statewide. cf. Herlihy v. Civil Service Comm'n, supra.

The essence of Mr. Stacy's complaint is that DDS rejected the Union's position that an employee who accepts a job in the community homes in a civil service title below their current title (i.e. DSW III to DSW I or DSW II) should not be required to take a reduction in pay grade. He also contends that the work in the community homes are equivalent to the work of a DSW III and/or can be upgraded to such a level by assignment of additional duties (such as he had proposed at the October 15, 2014 labor management meeting). He contends that DDS granted other employees affected by closure of the DDS facility at Fernald similar "pay retention" rights

as he now asserts should have been allowed to him and other Templeton staff and that the DDS's refusal to agree to do the same with Templeton's union members is unethical. Nothing within the civil service law governing layoffs, however, empowers the Commission to fashion a "pay retention" remedy or order that the DDS continue to pay an employee demoted to a lower title in a layoff at a rate higher than or inconsistent with the pay grade assigned to the position under an applicable collective bargaining agreement. If DDS failed to bargain with the Union in good faith on the subject of "pay retention", that may be a matter for an unfair labor practice claim or a "class or group" reallocation claim, both matters controlled by collective bargaining law, not civil service law. Similarly, to the extent that Mr. Stacy claims that the particular job he now performs is misclassified, his remedy, if any, also lies elsewhere. See G.L.c.30, §49; G.L.c.150E, §1 et. seq. See generally, DeRosa v. Department of Revenue, 23 MCSR 686 (2010); Arvanitis v. Department of Correction, 19 MCSR 281 (2006)

Conclusion

For the reasons stated above, the appeal of the Appellant, Andrew Stacy, is hereby ***dismissed.***

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein, and Tivnan, Commissioners) on March 3, 2016.

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 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. 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:
Andrew Stacy (Appellant)
Wendy Chu, Esq. (for Respondent)
John Marra, Esq. (Human Resource Division)