COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

BERNARD P. LYNCH, JR.,
Appellant

v.

CITY OF BOSTON,
Respondent

Docket No.: D1-14-277

Appearance for Appellant:

Joseph G. Donnellan, Esq.
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Norwood, MA 02062

Appearance for Respondent:

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Commissioner:

Cynthia A. Ittleman

RULING ON MOTION FOR SUMMARY DISPOSITION

The Appellant, Bernard P. Lynch, Jr. ("Mr. Lynch" or "Appellant"), acting pursuant to G.L. c. 31, ss. 39 - 44, filed a timely appeal with the Civil Service Commission ("Commission") on November 24, 2014, contesting the action of City of Boston ("City" or "Respondent") when it terminated his employment from the position of Director of Parks in the Parks and Recreation Department ("Department") and alleging that the City failed to provide him with proper bumping and/or reinstatement rights.[1] A pre-hearing

[1] The Appellant filed an appeal using the Commission's Layoff Appeal Form stating the he received the City's notice of decision regarding his layoff on November 14, 2014 and alleges that the City failed to provide him with proper bumping and/or reinstatement rights. However, the City did not notify the Appellant of the provisions of G.L. c. 31, ss. 41 – 45 and the Layoff Appeal Form does not refer to those sections. However, the parties' pleadings otherwise make it clear that the Appellant alleges that the City failed to provide him notice and a hearing pursuant to sections 41-45 and the City alleges that sections 41-

conference was held at the offices of the Commission on December 9, 2014. The Appellant filed a Motion for Summary Disposition ("Motion") pursuant to 801 CMR 1.01(7)(h)[2] on January 13, 2015. The Respondent filed an Opposition to the Motion ("Opposition")[3] on February 12, 2015. A hearing on the Motion was held at the Commission on February 19, 2015.[4] Neither party requested a public hearing, so the hearing was deemed private. The hearing was digitally recorded and the parties were provided with a CD of the hearing[5].

I asked the City to provide documentation in addition to that provided previously in the case. The Respondent produced the documentation on or about February 27, 2015. On March 9, 2015, the Appellant filed a Supplemental Memorandum in Support of his Motion ("Appellant's Supplemental Memo") addressing the documents produced by the City after the hearing on the Motion. I also asked the state's Human Resources Division ("HRD") to provide any documents it may have regarding the Appellant's civil service status, which documents it provided to the Commission and the parties on April 29, 2015. For the reasons stated herein, the Motion for Summary Decision is allowed.

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45 are not applicable to the Appellant. In a recent similar appeal, the appellant filed an appeal using the Commission's Discipline Appeal form, which references section 41 – 45.

2 The Rules therein refer to such a motion as a "Motion for Summary Decision".

3 The City's Opposition begins, "Pursuant to 801 C.M.R. 1.00(sic)(7)(g) and (h) the City of Boston … offers the following in response to the motion of the Appellant to obtain a summary disposition on this matter." The Appellant's Motion is filed pursuant to (h), pertaining to summary decisions. Subsection (g) pertains to motions to dismiss. Consequently, this decision applies the standards under both subsections (g) and (h).

4 The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00 (formal rules) apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

5 If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDING OF FACTS

Based on Motion, Opposition, Appellant's Supplemental Memo, the documents produced by the parties and HRD, the stipulations of the parties, the parties' arguments, and taking administrative notice of all matters filed in the case and pertinent statutes, caselaw, regulations and policies, it is undisputed, unless otherwise noted, that the following is undisputed:

1. On July 25, 1995, the Appellant was appointed Executive Director of the City's Boston Youth Fund. (Stipulation; Documents produced by City)
2. On a "Request for Provisional Appointment, Form 40", the Appellant handwrote in his employment history and education and signed and dated it (October 12, 1996). The job title typed on to the Form 40 was "Executive Assistant, Director of Parks". (Documents produced by City)
3. Neither the title "Executive Assistant" nor the title "Director of Parks" appear in any of the jobs series in the 1974 "Municlass Manual" of civil service positions in the official service for municipalities prepared by HRD. (Administrative Notice)
4. The title "Executive Assistant" and the title "Director of Recreation" appear in a 1998[6] HRD list of municipal civil service official service titles. There are two (2) Executive Assistant positions in the 1998 list, one of which has no departmental reference and one that is listed as "Executive Assistant, Parks & Recreation." There are more than two dozen Director positions in the 1998 list in different

[6] Different pages of the 1998 list have different dates, only some of which are legible, indicating that the pages were generated in 1998 sometime after the August, 1998 enactment of St. 1998, Chapter 282 (see infra). However, there is no indication whether the 1998 list was generated in connection with Chapter 282.

departments, including "Director of Parks and Recreation" and "Director of Recreation." The 1998 list does not include job descriptions or indicate the job series for these titles, nor does it provide the dates that certain handwritten titles were added. (Administrative Notice)

5. The City has a Classification Plan from the 1970s, which provides the "salary grade" and "civil service class" (undefined) of listed employees. The Plan is amended by Mayoral Orders. The Plan is an alphabetical, typed list of job titles with some job titles added alphabetically by hand; few job titles have dates associated with them or dates that are legible. The Plan includes a typed job title "Director of Recreation" and a handwritten job title "Executive Assistant" (not indicating the Department in which this job title is employed). (Document produced by City)
6. On October 18, 1996, the Appellant filled in a City Application for Employment form by hand. The job title typed on to this form was "Executive Assistant, Director of Parks". (Documents produced by City)
7. On October 23, 1996, the City filled out a form entitled "City of Boston Personnel Act Report signed (with stamped signatures) by the Director of Administrative Services and Supervisor of Personnel, indicating that the document is notice that the Appellant was being appointed "Executive Assistant (Director of Parks)" in the "Grounds Maintenance PKO2 Division" of the City Parks and Recreation Department, a full time position, and that the position to which Mr. Lynch was being appointed did not have a bargaining unit, rather it was "exempt". [7]

[7] Although there is a line for the Appellant's signature and the date of his signature, it does not appear to be filled in.

(Documents provided by City) In the part of the form stating, "statement of appointing authority reasons justifying request" was typed in the following, "This request is for the public good in order to properly maintain efficiency in this department." (Id.)

8. On an HRD[8] Municipal Civil Service Requisition Form 13, the City submitted to HRD information about the Appellant's appointment. (Documents produced by City)
9. On October 30, 1996, a form titled "Residence Certificate on File"[9] states that the Appellant was provisionally appointed to the position of "Exec. Asst. (Director of Parks)" at salary grade MM-12, with a starting weekly salary of $1,279.92. (Documents produced by City; Stipulation; Documents produced by HRD)
10. On August 10, 1998, the Legislature enacted St. 1998 Chapter 282, which states in full,

> Notwithstanding the provisions of any general or special law to the contrary, the personnel administrator shall certify any active employee who served in a civil service position in the city of Boston as a provisional or provisional promotion employee for a period of at least six months immediately prior to January 1, 1998, to permanent civil service status in that position.
> (Administrative Notice (statute referred to by the parties))

11. Effective September 9, 1998, HRD indicated that the Appellant's civil service status was changed from provisional to permanent pursuant to St. 1998, Chapter 282. (Stipulation; Boston Residence Certificate on File; Documents produced by HRD)

[8] The Form 13 referenced the "Massachusetts Division of Personnel Administration," as HRD was then known.

[9] *See also* City of Boston Personnel Action Report dated October 23, 1996, also produced by the City.

12. The City sent HRD lists of city employees on divers dates in November and December of 1998 and January 1999, which lists includes a column marked "Civil Service Title on 7/1/97 and 1/1/98" and the date as of which each such employee was in a civil service title. The Appellant's name appeared on one of such lists, which is dated November 17, 1998, stating that his civil service title on 7/1/97 and 1/1/98 was Executive Assistant and his "date in title" was October 30, 1996. (Documents produced by City)

13. By memorandum dated March 29, 2006 from Parks and Recreation Department Commissioner Antonia Pollak to Mayor Menino, Commissioner Pollak wrote, in pertinent part,

> The enabling legislation for Parks includes the appointment of two Assistant Commissioners by the Mayor. Because the Chief of Staff position has been eliminated due to budget cuts, I do not have enough support. No one else has the authority required in decision making on a daily basis so everything must come through my office for approval.
> To assist the Department and me, I am asking you to appoint Bernie Lynch and Mr. X (redacted) to these positions. Although I would very much like to reward their outstanding work, I am not requesting salary increase as part of these promotions.
> Mr. X (redacted) is organized, in command of the Department's resources and a team builder. Bernie is also very organized and very adept at allocating field staff resources and time. …
> (Documents produced by City)

14. By letter dated April 26, 2006, Mayor Menino appointed the Appellant " … Assistant Commissioner of Regional Administration of the Parks and Recreation Department for a term expiring on the first Monday of January, 2010." (Document produced by City)[10]

15. City of Boston Ordinance 7-4.2 "Powers and Duties" provides,

[10] There is no indication that the Appellant's appointment to the position of Assistant Commissioner was extended beyond the first Monday of January 2010.

> The Commissioner of Parks and Recreation shall ***exclusively*** have the powers, and perform the duties, of a Department head with respect to the making of contracts and the appointment, suspension, discharge, compensation and indemnification of subordinates for the Department; but otherwise the Board shall have the powers and perform the duties from time to time conferred or imposed on Boards of Park Commissioners of cities in Massachusetts by general laws applicable to Boston and, except as aforesaid, shall also have the powers and perform the duties conferred or imposed by law on the Board of Park Commissioners and Board of Recreation in existence immediately prior to the taking effect of Chapter 2 of the Ordinances of 1954. The Board shall further have the powers and perform the duties from time to time conferred or imposed on it by law. The Deputy Commissioner and the Assistant Commissioners of the Parks and Recreation Department shall have such powers and perform such duties as are from time to time proposed upon them by law or delegated to them by the Commissioner.
> (Id.)(citations omitted)(emphasis added)

16. City of Boston Ordinance 7-4.2A "Deputy Commissioner and Assistant Commissioners to the Parks and Recreation Department" provides,

> There shall be one (1) Deputy Commissioner and two (2) Assistant Commissioners under the charge of the Commissioner of the Parks and Recreation Department, respectively known as the Deputy Commissioner of the Parks and Recreation Department and the Assistant Commissioner for Internal Operations and the Assistant Commissioner for Regional Administration. The Deputy Commissioner and the Assistant Commissioners of the Parks and Recreation Department shall be appointed by the Mayor for a term expiring on the first Monday of the Mayor for a term expiring on the first Monday of the January following the next biennial municipal election at which a Mayor is elected. Any vacancy in the office of Deputy Commissioner or Assistant Commissioner shall be filled by the Mayor for the unexpired term.
> (Id.)

17. At some point when the Appellant was referred to in an undated City document as an organization "Manager" in the Parks and Recreation Department, a list of Department personnel indicates that there are three (3) Executive Assistants) in the Department, two of whom are union exempt.[11] (Opposition – Exhibit B)

[11] Exhibit B of the Opposition is an excerpt of a larger City document. The personnel list indicates that the annual salaries for the two union exempt Executive Assistants in FY 2015 are $91,503 and $119,701. The

18. By letter dated November 2014 from Commissioner of Parks and Recreation Christopher Cook the Appellant was informed, in full,

> Effective immediately, the Department of Parks and Recreation is separating you from service due to the elimination of your position. Your check for all accrued but unused vacation time and any other pay to which you are entitled will follow in the next regular pay cycle.
> Information regarding your eligibility to continue Health and Life insurance will be forwarded to you from Health Benefits.
> Enclosed please find information provided by the Commonwealth of Massachusetts on how to apply for unemployment benefits.
> Thank you for your service.
> (Administrative Notice (filed with appeal form))

19. The City did not provide Mr. Lynch with a hearing or notice of hearing prior to his layoff. (Administrative Notice)

20. According to the City, the position of Director of Parks for the Parks and Recreation Department will not be posted or filled. (Affidavit of Vivian Leonard, Director of Boston's Office of Human Resources, February 7, 2015)

21. On November 24, 2014, the Appellant filed the instant appeal at the Commission. (Administrative Notice)

DISCUSSION

Legal Standard for Summary Disposition

A party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 1.01(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, e.g., here, "viewing the evidence in the light most favorable to the non-moving party", the moving party presented substantial and credible evidence that the non-moving party has "no reasonable

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Appellant's position was union exempt. His most recent salary, indicated on his Residency Certificate and Personnel Record, is dated July 3, 2010, at which time he earned $4,262.92 biweekly for an annual salary of approximately $110,000. (Documents produced by City)

expectation" of prevailing on at least one "essential element of the case", and that the non-moving party has not produced sufficient "specific facts" to rebut this conclusion. *See, e.g.*, Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008). Specifically, a motion to dismiss must be allowed unless the Appellant raises "above the speculative level" sufficient facts "plausibly suggesting" that the alleged layoff was erroneous and that the error was due to a mistaken interpretation of civil service law and rules and not through any "fault of his own." *See generally* Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss; *cf.* R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss). Under 801 CMR 1.0(7)(h), a party may file a motion analogous to a motion for summary judgment, urging that "that there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law …." (Id.)

Applicable Civil Service Law

"Basic merit principles" is a tenet of civil service law. It is defined in G.L. c. 31, s. 1, in part, as,

> … (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions."
> (Id.)

G.L. c. 31, section 1 also defines a permanent employee as a "person who is employed in a civil service position (1) following an original appointment, subject to the serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment …" or (2) following a promotion. (Id.) It defines a tenured employee as a "civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law …." (Id.) By contrast, a provisional employee is "a person who is employed in a civil service position, pursuant to sections twelve, thirteen and fourteen." (Id.) Under sections 12 – 14, an appointing authority may make a provisional appointment pending the establishment of an eligible list, requests an examination and "a substantiation that the person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties." (G.L. c. 31, § 13) If these provisions are satisfied, the administrator " … may authorize a provisional appointment …." (G.L. c. 31, s. 14) Section 14 also provides that "no provisional employment in a position shall be authorized, approved, or continued for more than thirty days following a certification from an eligible list …." (Id.)

Pursuant to G.L. c. 31, s. 51, "All positions in all cities shall be subject to the civil service law and rules except as provided by section forty-eight or other law …." (Id.) Section 48 provides that, "Offices and positions in the service of cities and towns shall be subject to the civil service law and rules as provided by sections fifty-one, fifty-two, and fifty-three[]" but it also lists specific exemptions to civil service "unless [they are] expressly made subject thereto by statute", as well as affirmatively stating that certain

positions shall be included civil service.[12] (Id.) Similar to section 51, section 48 provides, "Offices and positions in the service of cities and towns shall be subject to the civil service law and rules as provided by sections fifty-one, fifty-two, and fifty-three[]" while also exempting certain municipal positions from civil service. Specifically, it provides, in pertinent part,

> The following shall be exempt from the civil service law and rules, unless expressly made subject thereto by statute:
> City and town managers and assistant city or town managers, and administrative assistants, secretaries, stenographers, clerks, telephone operators and messengers connected with the offices of city councils, town councils, mayors, city managers, town manages and selectmen. …
> … **heads of municipal departments**. …
> Such other officers and employees as are by law exempt from the civil service law and rules."
> (Id.)

Section 39 of G.L. c. 31, addresses the separation of permanent employees. Specifically, it provides, in part,

> 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, except as hereinafter provided, 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. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.

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[12] Section 52 lists additional specific municipal positions that are subject to civil service law, including, " … Any municipal office to which the civil service law and rules are made applicable pursuant to section fifty-three." (Id.) Sections 53-55 allow certain cities and towns to vote on whether to include certain provisions in civil service. (Id.) Section 53 also provides, in part, that non-academic personnel in certain schools shall be included in civil service if the school board agrees.

> Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or **abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such 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** or to the next lower title or titles in the labor service, as the case may be, **if in such next lower title or titles there is an employee junior to him in length of service**. …. (Id.)(emphasis added)(*see also* G.L. c. 31, s. 46 re reinstatement))

Under section 40 of chapter 31, a permanent employee who is "separated from his position because of lack of work or lack of money or abolition of his position" shall have his name placed by the administrator on a reemployment list. (Id.)

G.L. c. 31, § 41 provides certain protections to tenured civil service employees, for example, whose employment is terminated. It provides, in pertinent part,

> **Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed,** suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or 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 forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons** 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, … If such hearing is conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. …
>
> If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first or second paragraphs of this section, such person may appeal to the commission as provided in section forty-three. …
>
> (Id.)

Section 42 of G.L. c. 31 provides, *inter alia*, that when an appointing authority does not meet the terms of section 41,

> Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights.
> 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 an appointing authority made pursuant to all the requirements of section forty-one.
> …
> (Id.)

Where a civil service employee files an appeal at the Commission, section 43 of chapter 31 of the General Laws states, in pertinent 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….
> (Id.)

The Commission's role in hearing cases involving a "just cause" standard, as here, 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 ruled that the Commission's 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 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). In Debnam, 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." Id. at 635-36 (citing, *et. al*., Commissioners of Civil Service v. Municipal Court of the City of Boston, 369 Mass. 84, 88 (1975). In so deciding, the Court noted it is well-established in civil service law 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 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). Furthermore, the Court, in City of Cambridge Housing Authority, reiterated the long-established principle of civil service law 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, 120 (1944).

Parties' Arguments

While the City stipulates that the Appellant was hired provisionally, that his position was made permanent pursuant to St. 1998, Chapter 282 and his employment was terminated on November 14, 2014 without notice and a hearing pursuant to G.L c. 31, ss. 41-45, it avers that the Appellant is not entitled to civil service protections. First, the City avers that the Appellant is not covered by civil service because he attained his position in a manner inconsistent with civil service law because he did not take an examination as required by civil service law and, thus, his appointment was not merit-based. Further, the City argues that the Appellant is not covered by civil service because, as the Director of Parks, he was head of a department and explicitly exempt from civil service pursuant to G.L. c. 31, s. 48. Next, the City asserts that the previous administration applied St. 1998 Chapter 282 to the Appellant when it should not have done so because he had "significant supervisory, budget and policy making authority", he was appointed Assistant Commissioner, he supervised "hundreds of employees", oversaw a "$10,000,000 budget" and earned a high salary, effectively avoiding the exemption for such positions under G.L. c. 31, s. 48. In a City the size of Boston and an agency the size of the Parks and Recreation Department, the City goes on to argue, a small management team is necessary, as envisioned by the Boston Code 7-4.2A, which management team is comprised of department heads. Moreover, if someone in the Appellant's position is determined to have civil service protection, the City avers, it would "allow one administration to essentially eliminate the right of a subsequent administration to make its own appointments and to effectuate its own policy agenda." (Opposition) In any event, the City argues, "Should it be determined that the Appellant has tenure rights, the only

rights that he would have is to the position of 'Executive Assistant' not as Director of Parks." (Opposition) Regardless, the City urges that this case indicates that non-public safety official service of the civil service system is "broken" and "begs for a legislative solution." (Opposition) Wherefore, the City asks the Commission to dismiss this appeal.

The Appellant avers, in summary, that his position is protected by civil service and the City must follow the procedures in the civil service law before laying him off or abolishing his position. First, the Appellant asserts that his civil service title is Executive Assistant, which the City did not abolish, and that the title Director of Parks is merely a functional title. He has continued to perform the same function since he was appointed to his position in the Parks and Recreation Department. Next, he notes that the City has stipulated to the essence of his appeal: that he was appointed provisionally, that he acquired permanency and tenure pursuant to St. 1998 Chapter 282 and his position was terminated without benefit of notice and a hearing. In addition, the Appellant asserts that his position is not exempt from civil service under G.L. c. 31, s. 48 because the pertinent part of that provision exempts department heads and he was not a department head. Rather, the head of the Department was the Commissioner of Parks and Recreation, the person to whom he answered. Further, the Appellant states that the City sought to make permanent employees like him who were provisionally appointed and, therefore, it cannot now take his away his permanence; to do so would violate basic merit principles of civil service. The Appellant further urges that the purpose of civil service law is to protect public employees from being removed for political purposes. Finally, the Appellant asserts he has a property interest in his public employment and he was deprived of his property interest without due process, including notice, a hearing and bumping rights.

Therefore, the Appellant states that the Commission should order his immediate reinstatement without loss of pay, rights or privileges.

Analysis

Chapter 31 of the General Laws is a statute with detailed provisions establishing the civil service system. On one hand, it establishes an employment system statewide while, on the other hand, it provides specific exceptions to the system, as reflected in G.L. c. 31, ss. 48 and 51. In addition, it provides a mechanism for certain cities and towns to include specific personnel in civil service. It also provides certain protections to permanent, tenured civil service employees and a detailed appeals process to ensure those protections are secured. Notwithstanding its stipulations, the City argues that the Appellant is exempt from civil service under section 48 because he was a "department head." Neither the title Executive Assistant nor the title Director of Parks appear in the HRD1974 Municlass Manual. The circa 1970s Boston Classification Plan includes the title Executive Assistant (handwritten in with no legible date of entry). The same Plan does not include a title Director of Parks but it includes a title Director of Recreation, which may or may not be the same as the Director of Parks title since there is no job description for the latter and there is no job series indicated. The 1998 HRD list of municipal official civil service titles includes the titles Executive Assistant; Executive Assistant, Parks & Recreation; Director of Parks and Recreation; and Director of Recreation appear but, like the 1970s Plan, there is no job description for these titles and there is no job series indicated. There does not appear to be a Parks Department or a Recreation Department separate from the Parks and Recreation Department of which the Appellant may have been in charge. The Appellant was supervised by, and answered to the Commissioner of Parks and Recreation Department. Neither his high salary nor his

responsibilities to assist in the management of the Parks and Recreation Department require that his position be exempt from civil service. Similarly, the Appellant's union exempt status is not necessarily indicative of a department head. Further, that the Appellant was appointed to the position of Assistant Commissioner for a fixed period of time under City Ordinance 7-4.2A did not remove him from his civil service title since Department Commissioner Pollak's 2006 memorandum on this matter indicates that the Appellant will continue to perform the work he has been performing in addition to any additional responsibilities that needed to be addressed due to a staff vacancy, albeit without the typically concomitant salary raise. Therefore, the Appellant was not exempted from civil service as a department head. With regard to the Appellant's tenure and permanence, as the City stipulates, the Appellant was hired provisionally. As the City further stipulates, in 1998 the Legislature made certain Boston provisional employees permanent. HRD subsequently recognized and recorded as permanent civil service employees a list of Boston employees, including the Appellant.

The City's argument that if someone in the Appellant's position is deemed to have civil service protection, it would "allow one administration to essentially eliminate the right of a subsequent administration to make its own appointments and to effectuate its own policy agenda[]" is inconsistent with the statutory definition of basic merit principles cited that requires that civil service employees shall be treated fairly and without regard to political affiliation. (G.L. c. 31, s. 1)

Here, the Legislature enacted legislation making permanent certain Boston provisional employees in St. 1998, Chapter 282. Explicitly pursuant to this statute, HRD

recorded a list of provisionally appointed employees, including the Appellant, as permanent employees.

It is undisputed that the Appellant was provisionally appointed to the position Executive Assistant and/or Director of Parks in 1996, he was made a permanent employee under St. 1998, Chapter 282 effective 1998, and the City eliminated his position as Director of Parks in 2014 without addressing his civil service status as an Executive Assistant or providing notice and a hearing to the Appellant to determine if there was just cause to eliminate the Appellant's position. Therefore, it has been established that the Appellant has a reasonable expectation of prevailing on at least one element of his appeal, his termination was error on the party of the City and not based on a fault of his own and the appeal is not subject to dismissal. Moreover, given the undisputed material facts, there is no genuine issue of material fact and the Appellant is entitled to judgment in his favor as a matter of law and, thus, his appeal is well beyond speculation and the City has not produced specific facts to rebut this conclusion.

When, as here, the Commission finds that the Appointing Authority failed to follow the section 41 procedural requirements to hold a hearing and provide appropriate notice thereof, and that the rights of said person have been prejudiced thereby, the Commission "shall order the Appointing Authority to restore said person to his employment immediately without loss of compensation or other rights." G.L. c. 31, § 42. G.L. c. 31, §42, however, requires that the Commission also find that the rights of the Appellant have been prejudiced by the City's failure to meet these procedural requirements before it orders the Appointing Authority to restore said person to his employment immediately without loss of compensation or other rights. *See, e.g.* Brooks

v. Civil Service Commission and Department of Correction, Worcester Superior Court #2001-0180B (April 9, 2004); Tavares v. Civil Service Commission and Mass. Highway Department, Bristol Superior Court #B98-1383 (November 3, 1999); Cascino v. City of Boston, 28 MCSR 194 (2015); Mason v. Department of Correction, 28 MCSR 202 (2015); DeJesus v. Lowell, 27 MCSR 562 (2014); Lacet v. Boston Police Department, 21MCSR 154 (2008); Pike v. New Bedford, 22 MCSR 683 (2009); and Doss v. Department of Environmental Protection, D1-09-369 (2010). The Appellant argues that, owing to the City's failure to provide him a hearing and appropriate notice, he was unable to assert his bumping rights and reinstatement. This is precisely the type of issue that should first be vetted at a local Appointing Authority. The City having failed to conduct the local hearing and provide appropriate notice in these regards, the Appellant was prejudiced by the City's failure to adhere to the noted requirements. Therefore, the Appellant is to be restored to his position forthwith, without any loss or pay or benefits.

Conclusion

Based on the foregoing established facts and applicable law, the Appellant's Motion is ***granted*** and the City's Opposition seeking summary disposition pursuant to 801 CMR 1.01(7)(g) and/or (h) is ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Ittleman, Commissioner – Yes; McDowell, Commissioner – Yes; and Stein- Commissioner - No*, on June 11, 2015.

*Commissioner Stein voted no as he believes there is a question as to whether the Appellant held a position that qualified him as an exempt "department head" under G.L.c.31, §48 at the time of his discharge; and, even if he was not in an exempt position, whether he has actually suffered any "harm" from the failure to grant him a hearing to protest the just cause for his layoff; both of which he believes could be addressed at a full hearing, as opposed to deciding this matter through summary disposition.

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.

Notice:
Joseph Donnellan, Esq. (for Appellant)
Maribeth Cusick, Esq. (for Respondent)
John Marra, Esq. (HRD)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

BERNARD P. LYNCH, JR.,
Appellant

Docket No.: D1-14-277

v.

CITY OF BOSTON,
Respondent

CONCURRING OPINION OF CHRISTOPHER BOWMAN

I concur with the well-reasoned analysis of Commissioner Ittleman and her conclusion that the City failed to comply with the civil service law when it laid off Mr. Lynch without providing him with any of the due process rights afforded to permanent civil service employees in Massachusetts. I do so, reluctantly, believing that Mr. Lynch probably never should have been designated as a civil service employee to begin with. It appears that the title of "Executive Assistant" was probably not the most appropriate title for this senior manager with a high level of responsibility for which he received a commensurate salary.

The record shows, however that Mr. Lynch was indeed appointed, provisionally, to the title of Executive Assistant, a title specifically listed in the City's civil service classification plan dating back to the 1970s. Further, the City, on multiple occasions over the years, in communication with the state's Human Resources Division, identified Mr. Lynch as a person holding that civil service title.

Like hundreds of other City employees who were appointed to civil service positions on a provisional basis, Mr. Lynch was granted civil service permanency via a Special Act

of the Legislature in 1998. Again, the City specifically identified Mr. Lynch as a person covered under the Special Act.

Now, years later, under a new Administration that is seeking to implement its own senior management team, the City argues that it was a mistake to have deemed Mr. Lynch a civil service employee and effectively argues that the Commission should retroactively revoke his civil service permanency and all the protections that go along with it. There is no legal basis to do so. The record clearly establishes that Mr. Lynch was *not* a person designated by the City as a "department head" which would have placed him in a position exempt from the civil service law.

In regard to whether Mr. Lynch was *prejudiced* by the City's failure to provide him with notice and a hearing, which he is required to show in order to prevail here, it is hard to argue otherwise. Had Mr. Lynch been given notice and the right to a hearing, he could have questioned whether the City had just cause for the layoff and/or whether he was entitled to any bumping, re-employment or reinstatement rights. While the law gives Appointing Authorities a wider degree of latitude when it comes to layoffs and abolishment of positions, they still have the burden of showing that such actions are justified. That didn't happen here -- and this decision ensures that it will.

While Mr. Lynch probably never should have been designated as a civil service employee to begin with, the record shows that he was and the City must provide him with the due process rights that he assumed upon passage of the 1998 Special Act of the Legislature giving him permanency.

For this reason, I concur with the decision here.

/s/ Christopher Bowman