

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

KAREN WALSH,
Appellant,

v.

D1-13-9

CITY OF WORCESTER,
Respondent,

Appearance for Appellant:

Gary S. Brackett, Esq.
Brackett & Lucas
19 Cedar Street
Worcester, MA 01609

Appearance for Respondent:

William F. Bagley, Jr., Esq.
City of Worcester
455 Main Street
Worcester, MA 01608

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to the provisions of G.L. c. 31, §§ 42 and 43, the Appellant, Karen Walsh (Ms. Walsh) filed the instant appeal with the Civil Service Commission (Commission) on January 16, 2013, claiming that the City of Worcester (City) did not comply with the procedural requirements of providing her with notice of her proposed layoff, retroactive to April 17, 2009 (Section 42 Appeal); and, further, that the City did not have just cause to layoff Ms. Walsh from her position as a Senior Sanitary Inspector in the Health and Human Services Department effective April 17, 2009 (Section 43 Appeal) and did not provide her with the required retention, bumping, reemployment and/or reinstatement rights at the time of an after her layoff. A pre-hearing conference was held at the offices of the Commission on February 5, 2013. A full

hearing was conducted on April 10, 2013 and July 18, 2013 at Worcester City Hall. The hearing was digitally recorded and both parties were provided with a CD of the proceeding.¹ Post-hearing briefs were submitted on September 6, 2013 (City) and September 23, 2013 (Ms. Walsh).²

FINDINGS OF FACT:

Based upon the thirty-one (31) exhibits entered into evidence at the hearing, the additional documents submitted at my request after the hearing (marked as Exhibits 32 – 35) and the testimony of the following witnesses:

Called by the Appointing Authority:

- Jarrett Conner, Budget Director/Assistant Treasurer;
- Nina Galica, Coordinator of Employment for the Human Resources Department

Called by the Appellant:

- Derek Brindisi, Director of Public Health;
- Sean Maher, President, Local 495, NAGE;
- Karen Walsh, Appellant;

and taking administrative notice of a prior Commission decision issued in 2011 (Walsh v. City of Worcester, 24 MCSR 234 (2011)) (Prior Commission Decision) and all court decisions related to the judicial appeals of that decision,

I make the following findings of fact:

¹ 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.

² At the conclusion of the second day of hearing, I implored both parties, given some of the unique circumstances in this case, along with the fact that Ms. Walsh's age and years of creditable service now make her eligible for retirement, to pursue active settlement discussions. I provided a framework for those discussions. Unfortunately, that gentle persuasion was apparently not successful.

1. In 1987, Ms. Walsh was hired by the City as a provisional “Sanitary Inspector”, a civil service title. (Stipulated Fact)
2. In 1990, Ms. Walsh became a permanent “Sanitary Inspector”. (Stipulated Fact)
3. In 2000, Ms. Walsh was provisionally promoted to the position of “Senior Sanitary Inspector”, the next higher civil service title in the Sanitary Inspector series. (Stipulated Fact)
4. In 2004, as a result of a Special Act of the Legislature, Ms. Walsh (and many others) was deemed permanent in her current civil service title. Thus, Ms. Walsh became a permanent Senior Sanitary Inspector. (Stipulated Fact and Exhibit 22)
5. During her tenure, Ms. Walsh had numerous assignments. From 1987 to 1988, she worked as an inspector in the Lead Poisoning Prevention Program. From 1988 to 1996, she was a coordinator in the grant-funded HIV/AIDS Infectious Disease program. From 1996 to 2002, she was an inspector in the Tobacco Control program. From 2002 to 2005, she was an inspector in the Air / Water / Hazardous Waste division. From 2006 to 2008, she was, once again an Inspector in the Tobacco Control program. (Testimony of Ms. Walsh)
6. In August 2007 and January 2008, Ms. Walsh filed two (2) union grievances regarding what she considered a dramatic increase in her workload. (Exhibits 31A and 31B)
7. In July 2008, the City re-organized their Health and Human Services (HHS) Department into two (2) separate departments: the newly-created Department of Inspectional Services; and a reconstituted Department of Health and Human Services.³ This reorganization was accomplished through a City Council ordinance, approved by the

³ Effective July 1, 2009, the City effected another reorganization which moved the public health division from HHS to the Executive Office of the City Manager. (Exhibit 35)

Worcester City Council by a 11-0 vote on March 11, 2008, with an effective date of July 1, 2008. (Exhibit 27)

8. Under the reorganization, the City re-aligned the Division of Code Enforcement and Public Health Inspections into a Cabinet-level Department of Inspectional Services; and reconstituted the Department of Health and Human Services, with a focus on issues of community health, disparity and homelessness. (Exhibit 18)
9. The reorganization put the following divisions of the public health division into the new Department of Inspectional Services: Animal Control; Food Unit; Lead Unit; Weights and Measures; Air, Water and Hazardous Materials; and Lab. The following divisions of the public health division remained in the Department of Health and Human Services: Bio-terrorism; Medical Bureau; and Tobacco Unit (where Ms. Walsh was employed). (Exhibit 18)
10. All of the Senior Sanitary Inspectors and Sanitary Inspectors (with the exception of Ms. Walsh), who previously worked in HHS, began working in the Department of Inspectional Services. Under the reorganization, Ms. Walsh was the only Senior Sanitary Inspector (or Sanitary Inspector) working in the reconstituted Department of Health and Human Services. (Testimony of Ms. Walsh and Mr. Conner)
11. Ms. Walsh's civil service seniority date was senior to all but one of the senior sanitary inspectors and sanitary inspectors working in the new Department of Inspectional Services. (Testimony of Ms. Walsh)
12. The Appointing Authority for both of these Departments was and is the City Manager. (Stipulated Fact)

13. In August 2008, the City removed Ms. Walsh from the City's payroll based on what they deemed to be her voluntary resignation. (Prior Commission Decision)
14. In October 2008, Ms. Walsh filed an appeal with the Commission, contesting the City's decision to remove her from the payroll, arguing that she did not resign. (Prior Commission Decision)
15. While Ms. Walsh's appeal was pending before the Commission, Massachusetts Governor Deval Patrick announced a series of mid-year "9C" local aid budget reductions in response to an anticipated state budget shortfall in FY09, which began on July 1, 2008 and ended on June 30, 2009. The 9C cuts would also carry forward to FY10, beginning July 1, 2009. (Testimony of Mr. Conner and Exhibit 3)
16. Local aid from the state represents approximately 25% of the City's non-school operating expenses. (Testimony of Mr. Conner)
17. The 9C cuts resulted in a \$5M reduction in local aid to the City in FY09 and a \$16M reduction in FY10. (Testimony of Mr. Conner and Exhibit 3)
18. During this same time period, the City lost approximately \$1.1M in motor vehicle excise taxes, \$1.2M in interest earnings; and reduced "new growth" of approximately \$1M. Further, the City also faced a \$3.3M deficit in its snow and ice account as a result of a large ice storm in December 2008. (Testimony of Mr. Conner and Exhibit 3) The amount of "tobacco funds" received from the state also decreased from \$214,928 in FY09 to \$134,000 in FY10. (Testimony of Mr. Conner and Exhibits 8 and 9)
19. In order to resolve this deficit, the City determined that it would be necessary to lay off a portion of its workforce. Prior to implementing layoffs, the City took steps to reduce the shortfall by reducing services and transferring funds. Even after taking these steps, the

City faced a significant budgetary shortfall, which required a significant reduction in the City's workforce. (Testimony of Mr. Conner)

20. A total of 208 positions (12.8% of the City's workforce) were eliminated as a result of the 9C cuts in FY09 and FY10 across all City departments as follows:

A&F	20
Fire	25
Police	66
Communications	2
Law	2
Inspectional Services	12
DPW & Parks	37
Clerk	4
Auditing	4
City Manager	3
Human Resources	2
HHS	24
Economic Dev.	5

(Testimony of Mr. Conner and Exhibit 3, Page 6)

21. The Department in which Ms. Walsh worked lost 13 out of 18 positions, including the Commissioner of Health and Human Services, the office of Substance Abuse Project Director (who was Ms. Walsh's direct supervisor) and Senior Sanitary Inspector (which was Ms. Walsh's position). (Testimony of Mr. Conner and Exhibits 3, 6 and 7)
22. The City's FY10 budget narrative explicitly stated that that Senior Sanitary Inspector position in HHS was abolished. (Exhibit 13B, Pages 66 - 68) An itemized "Reduction List" produced at the time shows that the Senior Sanitary Inspector in HHS would no longer be funded in FY10. (Exhibit 14)
23. Ms. Walsh's responsibilities were redistributed to a number of other individuals. Some of her responsibilities were assigned to independent contractors. (Testimony of Mr. Conner and Exhibits 30A-C)

24. As of April 2009, when the layoffs and position eliminations occurred, Ms. Walsh was the only Senior Sanitary Inspector (or Sanitary Inspector) in the reconstituted Department of Health and Human Services. (Testimony of Ms. Galica and Exhibit 3, Page 9)
25. Since she was not on the payroll, and the City no longer considered her an employee, Ms. Walsh was not notified in April 2009 that her position was eliminated. (Undisputed Fact)
26. In April 2011, the Commission issued a decision allowing Ms. Walsh's appeal and ordered her reinstated to the position of Senior Sanitary Inspector, retroactive to August 2008. (Prior Commission Decision)
27. The City appealed the Commission's decision to Superior Court. In January 2012, the Superior Court denied the City's motion for judgment on the pleadings and affirmed the Commission's decision, stating, "The decision of the Civil Service Commission that Karen Walsh was improperly removed from her employment and that she was entitled to a restoration of her employment with all back pay and benefits is affirmed." (Worcester v. Civ. Serv. Comm'n and Walsh, Worcester Sup. Ct. No. 11-00978 (2012)). The City filed an appeal with the Appeals Court.
28. On January 27, 2012, the City scheduled a termination hearing for February 17, 2012 for Ms. Walsh, as, according to the City, her position had been abolished due to a lack of funds in April 2009. The hearing date was continued to February 24, 2012. (Exhibits 33 and 34)
29. Prior to the February 24, 2012 hearing, Ms. Walsh filed a complaint for contempt in Superior Court, arguing that the City's actions violated the above-referenced January 2012 Superior Court decision. Pending the outcome of this motion, the Superior Court stayed all action in regard to Ms. Walsh's layoff proceedings. (Stipulated Facts)

30. In April 2012, the Superior Court dismissed Ms. Walsh's contempt complaint, stating that the City was not in contempt of the court order of January 2012; and removed the prior stay, thus allowing the layoff proceedings to go forward. (Worcester v. Civ. Serv. Comm'n and Walsh, Worcester Sup. Ct. No. WOCV2011-00978-B (2012).
31. By letter dated September 12, 2012, the City notified Ms. Walsh that a hearing would be held on October 4, 2012, regarding her layoff, effective April 17, 2009. The applicable civil service laws were attached to the letter. (Exhibit 1)
32. On October 4, 2012, the local appointing authority hearing required under civil service law was held by the City. (Exhibit 35) Ms. Walsh did not testify at the hearing. Further, Ms. Walsh never filed a written consent to her being demoted to position in the next lower title or titles in the official service. (Stipulated Facts)
33. On January 14, 2013, the City notified Ms. Walsh that she was laid off, retroactive to April 17, 2009, adopting a hearing officer's report that "the undisputed evidence establishes that there is a lack of funds and that Walsh was laid off as a result."
(Stipulated Fact)
34. On January 16, 2013, Ms. Walsh filed the instant appeal with the Commission.
(Stipulated Fact)
35. On February 6, 2013, the Appeals Court affirmed the Superior Court's decision to uphold the Commission's decision. (Worcester v. Civ. Serv. Comm'n and Walsh, Mass. App. Ct. 12-P-451 (2013)).
36. The City has appointed three (3) provisional Senior Sanitary Inspectors and two (2) Sanitary Inspectors since April 17, 2009 as follows:

Position	Department	Req. Date	Appt. Eff. Date
Senior Sanitary Inspector	DPW & Parks	8/1/11	8/6/12
Senior Sanitary Inspector	DPW & Parks	2/8/12	2/20/12
Senior Sanitary Inspector	Inspectional Serv.	8/15/12	9/10/12
Sanitary Inspector	Inspectional Serv.	10/1/12	12/3/12
Sanitary Inspector	Inspectional Serv.	10/29/12	1/2/13

(Exhibits 15B – 15F)

Legal Standard Regarding Layoff Appeals

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 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 its “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)

Analysis

In addition to the traditional questions including whether there was a lack of funds to justify Ms. Walsh's layoff and/or whether the reasons for layoff were pretextual, several other related issues have arisen, most of which are related to the rather unique procedural history of this case.

First, Ms. Walsh argues that the notice she received regarding the contemplated layoff and the actual termination notice violated those provisions of G.L. c. 31, § 41 which require the appointing authority to provide the "specific reason or reasons" for the contemplated and actual layoff. The January 27, 2012 letter to Ms. Walsh states in relevant part that "The reason for your proposed layoff is a lack of funding for your position due to dramatic reductions in local aid. Please be advised that your position was one of the many positions eliminated by the City of Worcester in fiscal 2009 due to budget constraints." The actual termination notice, dated January 4, 2013, explicitly states that the layoff was due to a "lack of funds" and adopts the detailed findings and conclusion of a hearing officer, which were attached. The City's correspondence to Ms. Walsh, along with the six (6)-page report from the hearing officer, satisfy those provisions of Section 41 that require the employee to receive specific reasons for the contemplated and actual layoff.

Second, Ms. Walsh argues that there is no legal authority to terminate her *retroactively*, citing in part G.L. c. 31, § 41, which states in relevant part that, "*before such action [in this case a layoff] is taken*, such employee shall be given a written notice by the appointing authority...." (*emphasis added*) As referenced in the findings, this issue was already litigated in Superior Court when Ms. Walsh sought to find the City in contempt for moving forward with her termination, retroactive to 2009, after receiving the Commission's decision to reinstate her, effective 2008. After hearing arguments from both Ms. Walsh and the City, the Court concluded

that the City was not in contempt and that the local civil service hearing regarding her contemplated retroactive termination could go forward. I am not inclined to second-guess the Superior Court's logical conclusion on this subject. To do so would result in the illogical result of prohibiting a city or town from abolishing a position, under *any* circumstances, because a related matter regarding that employee was pending before the Civil Service Commission for close to three (3) years. Further, the retroactive nature of the termination does not prevent Ms. Walsh, as she has done here, from filing an appeal with the Commission and seeking retroactive relief should she believe that there was not just cause for her termination.

Third, almost five (5) years after it occurred, Ms. Walsh effectively seeks to undo a local ordinance, adopted unanimously by the Worcester City Council during a public meeting, that reorganized various City departments. That City ordinance resulted in a reconstituted Department of Health and Human Services (where Ms. Walsh, a Senior Sanitary Inspector, remained) and a newly-created Department of Inspectional Services (where all of the other Senior Sanitary Inspectors and Sanitary Inspectors) began working. According to Ms. Walsh, that reorganization resulted in a "transfer" of other employees *and herself*, as defined by G.L. c. 31, § 35. Ms. Walsh argues that Section 35 states that such a transfer of civil service employees requires the approval of the state's Human Resources Division (HRD). Since no approval was received at the time, Ms. Walsh now argues that no legal transfer occurred, an important issue given other provisions related to retention and "bumping rights" within a "departmental unit" contained in Section 39.

The City argues that Ms. Walsh was not transferred. Rather, according to the City, she remained working in the same, albeit reconstituted, Department of Health and Human Services after the reorganization in the same civil service title. Further, the City argues that, even if Ms.

Walsh was transferred, the City was delegated responsibility for approving such transfers by HRD in 1978.

The term “transfer” is not defined in G.L. c. 31, § 1. The Personnel Administration Rules (PARs) define a transfer as “the *change in title* of an employee to a title for which specifications show essentially identical qualifications and duties; a change from a position in a title in one departmental unit to a position in the same title *in a different departmental unit.*” Ms. Walsh’s title did not change as a result of the reorganization. While it is clear that all Senior Sanitary Inspectors and Sanitary Inspectors other than Ms. Walsh were transferred to a newly-created Inspectional Services Department, the question here is whether the *reconstituted* Department of Health and Human Services, where Ms. Walsh remained working, meets the definition of a “different departmental unit” in the context of a transfer. A “departmental unit” is defined under G.L. c. 31, § 1 as: “a board, commission, department or any division, institutional component of a department established by law, ordinance or bylaw.”

Prior to the reorganization, the Department of Health and Human Services included the following divisions:

- Disabilities Division
- Code / Housing Enforcement Division
- Elder Services Division
- Human Rights Commission
- Public Health Division
- Veterans Affairs Division
- Worcester Public Library

After the reorganization, the Department of Health and Human Services included the following divisions:

- Disabilities Division
- ~~Code / Housing Enforcement Division (moved)~~
- Elder Services Division
- Human Rights Commission
- Public Health Division
- Transitional Housing Services Division (NEW)
- Veterans Affairs Division
- Worcester Public Library

In summary, the Department of Health and Human Services lost one division and gained another. Before and after the reorganization, Ms. Walsh's job duties were within the Public Health Division of the Department of Health and Human Services, working on tobacco control-related duties. This does not constitute a transfer. Even if it did, however, I have concluded that the City was delegated the responsibility of approving such transfers. The 1978 delegation agreement between HRD and the City references an "attachment" outlining the duties and responsibilities that were delegated to the City. Unfortunately, the City either misplaced and/or was unable to locate the attachment. However, on or about the same time, HRD entered into a delegation agreement with the City of New Bedford. The memorandum of agreement with New Bedford is almost identical to the one related to the City of Worcester including a reference to an attachment. HRD was able to locate the attachment from the New Bedford agreement which outlines the specific responsibilities that were delegated, including the ability to authorize transfers.⁴ Finally, Ms. Walsh's decision to wait five (5) years to contest what she deemed a transfer represents an undue delay and prohibits her from contesting the action at this time.

⁴ That delegation agreement also delegates the process for termination notifications, for which I have reached the same conclusion in regard to Ms. Walsh's argument that the termination was not valid due to a failure to notify HRD at the time.

Fourth, Ms. Walsh argues that the City lacked just cause for her layoff, arguing that the City had sufficient tobacco grant funds to fund her position and that the reason for her layoff was pretextual and motivated by improper reasons. After reviewing the entire record, including the sworn testimony of all witnesses and each of the documents submitted, I have concluded otherwise. Worcester, like many other cities and towns in Massachusetts, faced devastating budget cuts in FY09 and FY10 as a result of a sudden reduction in local aid and other local receipts, all tied to a slowdown in the global economy. For Worcester, the budget cuts resulted in the elimination of 208 positions, representing approximately 13% of its entire workforce. No department, including police and fire, were spared from the cuts. Ms. Walsh argues that any financial analysis should: a) be limited to the amount of grant funds received for the tobacco control initiative for which she was involved; and b) only look at whether there were sufficient funds to fund her position. She is mistaken – on both counts.

Budget cuts of the magnitude experienced here require a wholesale review of the *entire* organization – and no department or division can be exempt, regardless of the funding mechanism for the various positions in those department or divisions. In such circumstances, City leaders need to explore *all* options, including, as they did here, ensuring that all appropriate employees' salaries were being properly charged to these grant funds. Further, years of precedent-setting cases, including those referenced above, have clearly established that a layoff can be justified if the decision to eliminate the position was economical or based on the conclusion that the position was not necessary. Here, the City found the services of an outside consultant to be more economical in performing the duties previously performed by Ms. Walsh, who was a permanent, full-time employee. Finally, in regard to the lack of funds, it is undisputed that there was indeed a large percentage decrease in the amount of tobacco grants funds received by the City during this time period. For the same reasons cited above, the City was not required to use any unused “carryover” funds to continue funding Ms. Walsh’s permanent, full-time position.

In regard to the related issue of whether the reasons proffered by the City were merely a pretext and/or based on impermissible reasons, the preponderance of the evidence does not support such a conclusion. As referenced above, Ms. Walsh's position was one of 208 eliminated by the City in the midst of dramatic reductions in local aid and other local receipts. While it is true that Ms. Walsh had previously filed grievances related to her concern that she was overworked, the credible testimony of the City's current Budget Director, who was intimately involved with devising and implementing the cuts at the time in a different capacity, convinced me that there was no ulterior motive involved here. The City saw a vacant position, within a department facing dramatic reductions in personnel, whose duties could be performed more economically by an outside contractor.

Fifth, Ms. Walsh argues that, as of the effective date of her layoff (April 2009), other Senior Sanitary Inspectors with less civil service seniority, *within her department*, were retained in violation of G. L. c. 31, § 39. Section 39, ¶ 1 states:

“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.” (emphasis added)

The parties agree that Ms. Walsh's seniority-based retention rights, as of the effective date of her layoff, are restricted to the *departmental unit* in which she worked at the time. (See Herlihy v. Civ. Serv. Comm'n, 44 Mass. App. Ct. 835 (1998)). As discussed above, however, they disagree on what constituted the “departmental unit” as of the date of the layoff. Ms. Walsh argues that the transfer of other Senior Sanitary Inspectors to the newly-created Inspectional Services Department and her transfer to the reconstituted Department of Health of Human Services were illegal. Thus, according

to Ms. Walsh, any seniority-based retention decisions should have been made based on the *pre-reorganization* departmental unit. Under this scenario, it is undisputed that Ms. Walsh would have had more civil service seniority than other Senior Sanitary Inspectors who were retained by the City. As discussed above, the City argues that, prior to the layoff, the other Senior Sanitary Inspectors were legally transferred to another departmental unit (Inspectional Services) and that Ms. Walsh was not transferred, but, rather remained in the reconstituted Department of Health and Human Services. For all of the reasons cited earlier, I have concluded that the City's position regarding the transfers is correct. Thus, Ms. Walsh's seniority-based retention rights in her position as Senior Sanitary Inspector were limited to the Department of Health and Human Services, a departmental unit, established by local ordinance, that is separate and distinct from the Department of Inspectional Services. Since Ms. Walsh was the only Senior Sanitary Inspector in the Department of Health and Human Services, she had no seniority-based retention rights in her position as of April 2009.

Sixth, even if the City had justification to lay her off, and even if Ms. Walsh had no seniority-based retention rights vis-à-vis the other Senior Sanitary Inspectors in the Inspectional Services Department, Ms. Walsh argues that she was not afforded her statutorily-required *re-employment* or *reinstatement* rights since her layoff, effective in April 2009.

G.L. c. 31, § 40 provides laid off employees with certain *state-wide re-employment* rights stating in relevant part:

If a permanent employee shall become separated from his position because of lack of work or lack of money or abolition of his position, his name shall be placed by the administrator [state's Human Resources Division] on a reemployment list ...

... The names of persons shall be set forth on the reemployment list in the order of their seniority, so that the names of persons senior in length of service at the time of their separation from employment, computed in accordance with section thirty-three, shall be highest. The name of a person placed on such reemployment list shall remain thereon until such person is appointed as a permanent employee after certification from such list or is reinstated, but in no event for more than two years. The administrator, upon receipt

of a requisition, shall certify names from such reemployment list prior to certifying names from any other list or register if, in his judgment, he determines that the position which is the subject of the requisition may be filled from such reemployment list.”

As applied here, Section 40’s statewide re-employment rights required that Ms. Walsh be considered, at a minimum, for any Senior Sanitary Inspector position posted by any appointing authority in Massachusetts (i.e. - state agency or civil service city or town) before appointing another individual (with the exception of those on a *reinstatement* list discussed below) to that position, either provisionally or permanently. Since no examinations have been given for Senior Sanitary Inspector in almost two decades, the practical effect is that no *provisional* Senior Sanitary Inspectors can be appointed before considering Ms. Walsh (or any other laid off Senior Sanitary Inspector). A laid off employee’s statewide reemployment rights last for *two years*. Given the unique circumstances of this case, there is no agreement on when those statewide-reemployment rights commenced (i.e. – April 2009, the effective date of the layoff; or January 2013, the date Ms. Walsh was notified that her position was abolished.) However, it is undisputed that the City never requested that HRD add Ms. Walsh’s name to a statewide reemployment list at any time. Further, it is unknown if any Senior Sanitary Inspector positions were filled by any Appointing Authority other than the City of Worcester. As referenced in the findings, however, it is undisputed that various departments in the City of Worcester requested a certification for, and ultimately appointed provisional Senior Sanitary Inspectors (and Sanitary Inspectors) as follows:

Position	Department	Req. Date	Appt. Eff. Date
Senior Sanitary Inspector	DPW & Parks	8/1/11	8/6/12
Senior Sanitary Inspector	DPW & Parks	2/8/12	2/20/12
Senior Sanitary Inspector	Inspectional Serv.	8/15/12	9/10/12

Sanitary Inspector	Inspectional Serv.	10/1/12	12/3/12
Sanitary Inspector	Inspectional Serv.	10/29/12	1/2/13

Since the departmental unit in which the laid off employee worked has no bearing on the employee's statewide reemployment rights, Ms. Walsh, at a minimum, would have the right to be considered (before all others) for, at a minimum, any Senior Sanitary Inspector position in Worcester for the applicable statutory two-year period. Using a start date of April 2009 (the effective date of the layoff), Ms. Walsh's statewide reemployment rights would be limited to April 2009 to April 2011. Using a start date of January 14, 2013 (the date Ms. Walsh was notified that her position was abolished retroactively), Ms. Walsh's statewide reemployment rights would run from January 14, 2013 to January 14, 2015. Even when considering the date upon which the City first sought a requisition for the vacancy and when the appointment became effective, none of these appointments were requested or took place during the first or second (still open) statutory reemployment windows.

That leads to the *reinstatement* rights of Ms. Walsh, provided under Section 39, ¶ 1 which states in relevant part:

... 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 ...”

Applied here, Section 39 requires that Ms. Walsh, for a period of ten (10) years following her separation, to be reinstated to any Senior Sanitary Inspector position or similar position in the Department of Health of Human Services. Neither party argues that the laid off employee's reinstatement rights go beyond the departmental unit in which he/she was employed. Given, however, that ¶ 1 specifically references layoffs in the departmental unit, I don't think the

reinstatement language in the same paragraph could be read to extend beyond the Department of Health and Human Services.

While the applicable start date for Ms. Walsh's reinstatement is subject to interpretation, the City has not appointed *any* Senior Sanitary Inspectors or Sanitary Inspectors (which I would deem to be similar) in the Department of Health and Human Services. Rather, all such appointments have been made within the separate Department of Inspectional Services.

For all of the above reasons, I have concluded:

1. The City had just cause to abolish Ms. Walsh's position due to a lack of funds at the time.
2. The reasons proffered for abolishing said position were not a pretext or the result of impermissible reasons.
3. The City had the right to abolish Ms. Walsh's position retroactive to April 2009.
4. Ms. Walsh was not entitled to any additional seniority-based retention rights under the first paragraph of Section 39.
5. Ms. Walsh was not entitled to be considered for reemployment to any of the Senior Sanitary Inspector appointments made by the City as they fall outside of the statutory two-year window, even when considering either of the two possible start dates for said window.
6. Since the City has made no appointments to Senior Sanitary Inspector or Sanitary Inspector in the Department of Health and Human Services, they have not violated any of Ms. Walsh's reinstatement rights.

Given the unique circumstances of this particular case and to ensure that Ms. Walsh receives all statutory protections afforded to her, some "clarifying" relief is warranted, pursuant to the Commission's authority under Chapter 310 of the Acts of 1993. Said relief will grant Ms. Walsh

two (2) years of statewide reemployment rights, effective as of the date of this decision, and ten (10) years of reinstatement rights, also effective as of the date of this decision.

Conclusion

The City's decision to terminate Ms. Walsh, retroactive to April 2009, is affirmed and her appeal, both in regard to the termination and any claim regarding reemployment and reinstatement rights to appointments already made, is *denied*.

Pursuant to Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1. Effective as of the date of this decision, HRD shall place Ms. Walsh's name on a statewide reemployment list for the position of Senior Sanitary Inspector. Ms. Walsh's name shall remain on said list for a period of two (2) years from the date of this decision. Ms. Walsh shall be entitled to all reemployment rights provided by Section 40 during this two (2)-year time period.
2. Effective as of the date of this decision, the City shall place Ms. Walsh's name on a reinstatement list for the position of Senior Sanitary Inspector. Ms. Walsh's name shall remain on said list for a period of ten (10) years from the date of this decision. Ms. Walsh shall be entitled to all reinstatement rights provided by Section 39 during this ten (10)-year period.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis and Stein, Commissioners [McDowell – Absent]) on January 23, 2014.

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)(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 to:

Gary Brackett, Esq. (for Appellant)

William Bagley, Esq. (for Respondent)

John Marra, Esq. (HRD)