

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

**CHRISTOPHER
HOMAN,**

Appellant

v.

**MARBLEHEAD
HOUSING AUTHORITY,**

Respondent

Case No.: D1-12-309

DECISION

Pursuant to G.L. c. 31, § 2(b) and/or G.L. c. 7, § 4H, a Magistrate from the Division of Administrative Law Appeals (DALA), was assigned to conduct a full evidentiary hearing regarding this matter on behalf of the Civil Service Commission (Commission).

Pursuant to 801 CMR 1.01 (11) (c), the Magistrate issued the attached Tentative Decision to the Commission. The parties had thirty (30) days to provide written objections to the Commission. No objections were received.

After careful review and consideration, the Commission voted to affirm and adopt the Tentative Decision of the Magistrate in whole, thus making this the Final Decision of the Commission.

The decision of the Marblehead Housing Authority to abolish Mr. Homan's position and lay him off is affirmed and Mr. Homan's appeal under Docket No.D1-12-309 is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on June 26, 2014.

A true record. Attest.

Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:

Christopher Homan (Appellant)

Martin J. Rooney, Esq. (for Respondent)

Richard C. Heidlage, Esq. (Chief Administrative Magistrate, DALA)

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.
Appeals

Division of Administrative Law

Christopher D. Homan,

Appellant

v.

Docket No. D1-12-309
DALA No. CS-13-53

Marblehead Housing Authority,

Respondent

Appearance for Appellant:

Christopher D. Homan, *pro se*

Appearance for Respondent:

Martin J. Rooney, Esq.
Curley and Curley P.C.
27 School Street
Boston, MA 02108

Administrative Magistrate:

James Rooney, Esq.

Summary of Recommended Decision

The Marblehead Housing Authority has shown just cause to abolish a maintenance mechanic position due to lack of work caused by a need to reassign certain mechanical work to others who have qualifications required by the State Building Code. As an employee of a housing authority, a maintenance mechanic is not eligible to exercise bumping rights. The Authority has also shown just cause to retain another maintenance mechanic in the remaining position because he possesses computer skills now needed to perform the job.

RECOMMENDED DECISION

Introduction

Christopher D. Homan appeals, under M.G.L. c. 31, § 43, the decision of the Marblehead Housing Authority to abolish his maintenance mechanic position and terminate his employment. The Authority asserted that it did so for budgetary reasons – the cost of complying with the Town’s contractor licensing and building repair permitting requirements – and the resulting lack of work for Authority maintenance staff lacking qualifications required by the State Building Code. Mr. Homan claimed that the Authority abolished his position in bad faith or as a pretext for retaining another employee.

I held a hearing at the Division of Administrative Law Appeals on February 11, 2013, conducted under the Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01, *et seq.* I recorded the hearing digitally. The Authority offered testimony by three witnesses - Robert Ives, Jr., the Building Commissioner for the Town of Marblehead; Nancy Marcoux, the Executive Director of the Authority; and Richard Whitehill, chairperson of the Board of Commissioners of the Authority. Mr. Homan testified for himself.

I admitted one exhibit into evidence at the hearing. I left the record open until March 8, 2013 to allow the parties to submit post-hearing briefs. I now mark Mr. Homan’s discipline appeal form and attachments as Exhibit 2. Mr. Homan attached additional documents to his post-hearing brief, comprised of work orders, work schedules, his job description, job procedures, a Maintenance Labor Report showing the results of a study on the tasks that the Authority’s maintenance employees actually performed, and his certificate for the completion of housing inspection-related training from the Department of Housing and Community Development. I now mark the attachments to Mr. Homan’s post-hearing brief as Exhibit 3.

Findings of Fact

Based on the testimony and evidence presented and reasonable inferences drawn from them, I make the following findings of fact:

1. Christopher D. Homan was hired by the Marblehead Housing Authority on December 5, 1999 as a maintenance mechanic. (Ex. 2.)
2. The Authority is a local housing authority that owns and operates 307 units of family, elderly, and low income housing in the Town of Marblehead. *See* M.G.L. c. 121B. Nancy Marcoux is the Authority's Executive Director. (Exs. 1, 3; Marcoux Testimony.)
3. Mr. Homan worked for the Authority for thirteen years as a maintenance mechanic. The Authority terminated his employment in October 2012. (Ex. 1; Homan Testimony.)
4. Maintenance mechanic duties at the Authority were split into two major categories; mechanical work and custodial work. Custodial work included manual labor. Mechanical work involved basic plumbing, electrical, carpentry, painting and flooring work. Tasks considered "mechanical work" included replacement of bathroom shower tiles, sinks and faucets, kitchen countertops and hanging cabinets. Custodial and manual labor included general cleaning and landscaping. (Exs. 1, 3; Marcoux Testimony.)
5. Maintenance mechanic staff were supposed to spend 60% of their time performing mechanical work, 30% on custodial work, and 10% performing manual labor. (Ex. 3; Marcoux Testimony.)
6. Maintenance mechanics were assigned tasks daily by Ms. Marcoux, who spoke with the maintenance foreman to determine each employee's workload. (Marcoux Testimony.)
7. The State Building Code requires that permits be obtained from the Building Commissioner for certain projects, including plumbing installations and electrical work. Depending upon the size of the building and work to be performed, either a person holding a Construction Supervisor License, a licensed plumber, a registered

professional engineer, or a licensed architect must request the permit and be on-site to supervise the project. Mr. Homan was not qualified to obtain building permits. (Ex. 1; Ives and Marcoux Testimony.)

8. For many years, maintenance mechanics performed plumbing and electrical work for the Authority without obtaining building permits. In the spring of 2011, the Building Commissioner for the Town of Marblehead became aware that the Authority was undertaking building projects without obtaining the required building permits. (Ives, Marcoux, and Whitehill Testimony.)
9. The Town's building inspectors began making unplanned visits to several vacant units where maintenance work was being done by maintenance mechanics working for the Authority. When the inspectors determined that a building permit was needed for the work, the Building Commissioner would inform Ms. Marcoux. The Authority would then stop work and hire a licensed contractor and architect to obtain the necessary permits and oversee the work in compliance with the Building Code. (Ives and Marcoux Testimony.)
10. Hiring licensed contractors and architects had an unanticipated, negative impact on the Authority's budget. At the Board's request, Ms. Marcoux verified with the Department of Housing and Community Development that the Town was within its legal rights to insist on full compliance with the Building Code. Also at the request of the Board, Ms. Marcoux contacted the Town Administrator to attempt to negotiate an alternative permitting procedure for the Authority. This effort was unsuccessful. (Marcoux and Whitehill Testimony.)
11. In the summer of 2011, the Authority laid off one maintenance mechanic and hired a licensed plumber because the Town was requiring that all plumbing work, including the basic plumbing work that maintenance mechanics had been performing, be performed by a licensed plumber. (Marcoux Testimony.)

12. At the same time, the Authority began to track and compile data on the major categories of work (mechanical and custodial work) performed by Authority maintenance staff. The data was compiled into a report covering 18 months of work performed by the Authority's maintenance staff from 2010 to 2012. (Ex. 3; Marcoux Testimony.)
13. According to the Maintenance Labor Report, during the work study period from August 5, 2011 to August 3, 2012, Mr. Homan's work was 28% mechanical work and 72% custodial/laborer work. The work performed by the two other maintenance mechanics was, respectively, 29% and 36% mechanical. (Ex. 3.)
14. On August 8, 2012, the Building Commissioner informed Ms. Marcoux that work on buildings larger than 35,000 cubic feet would require supervision by a licensed engineer or architect. (Ex. 1; Marcoux Testimony.)
15. The Building Code also required that mechanical work performed previously by maintenance mechanics, including changing tiles in a bathroom shower and kitchen renovations, be performed or overseen in the future by contractors, engineers, or architects. (Marcoux and Ives Testimony.)
16. Due to the increased use of contractors, engineers, and architects, the Authority expected that its maintenance expenses would increase. (Marcoux and Whitehill Testimony.)
17. At the Board's direction, Ms. Marcoux developed a reorganization plan for the Authority. Prior to submitting the draft reorganization plan to the Board, the Authority's outside accountants reviewed it and determined that the Authority's current budget was insufficient to meet the additional expenses associated with hiring contractors, engineers, and architects. (Marcoux and Whitehill Testimony.)
18. The reorganization plan therefore recommended the elimination of two maintenance mechanic positions, leaving the Authority with one maintenance mechanic, one

plumber, and one maintenance foreman. The plan also called for the addition of one part-time position, without benefits, for the performance of custodial work. The plan estimated that these measures would generate annual savings of \$92,550. (Ex. 1; Marcoux Testimony.)

19. On August 13, 2012, Ms. Marcoux proposed the reorganization plan to the Board at its open meeting. The Board unanimously approved the reorganization plan. At the same meeting, Ms. Marcoux informed the Board that Mr. Homan's position would be eliminated, as would a vacant maintenance mechanic position. (Marcoux and Whitehill Testimony.)
20. When Mr. Homan's position was eliminated, the Authority retained another maintenance mechanic who had worked fewer years for the Authority. The Authority retained this employee because of his education, experience, job performance, Department of Housing and Community Development (DHCD) certification for home inspections, and DHCD certification to use a web-based Capital Planning System and Capital Improvement Management System. (Ex. 1; Marcoux and Whitehill Testimony.)
21. The Authority is required to submit reports to DHCD through its web-based system. The amount of reporting that the Authority is required to submit to DHCD through its web-based system has increased in recent years. (Whitehill Testimony.)
22. The Authority has met or exceeded the estimated financial savings identified in the reorganization plan. (Marcoux and Whitehill Testimony.)
23. Mr. Homan did not have unfavorable relationships with Ms. Marcoux or any members of the Authority's Board of Commissioners. (Homan, Marcoux, and Whitehill Testimony.)
24. In accordance with the Board-approved reorganization plan, Ms. Marcoux issued a letter to Mr. Homan, dated September 17, 2012, informing him that his position had

been eliminated due to a “restructure of the Maintenance Department of the Authority for budgeting and other reasons.” (Ex. 1.)

25. The letter further stated that, in accordance with M.G.L. c. 31, § 41, a hearing by the Authority was scheduled on October 16, 2012. The Authority conducted a hearing on October 16, 2012, and then issued a decision confirming the elimination of Mr. Homan’s position. (Ex. 1.)

26. Mr. Homan filed a timely appeal with the Civil Service Commission on November 5, 2012. (Ex. 2.)

Discussion

The Marblehead Housing Authority had just cause to abolish Mr. Homan’s position due to lack of work and lack of money. The Authority did not offer these reasons in bad faith or as a pretext for retaining another employee. Mr. Homan is ineligible to exercise bumping rights in his capacity as a housing authority employee.

A. Legal Standard

Under M.G.L. c. 31, § 43¹, the Civil Service Commission determines whether the appointing authority has proven, by a preponderance of the evidence, that there was “just cause” or “reasonable justification” for the action it took. *City of Cambridge v. Civil Serv. Comm’n*, 43 Mass. App. Ct. 300, 304, 682 N.E.2d. 923, 925 (1997). Reasonable justification means that the appointing authority’s actions were based on “adequate reasons sufficiently

¹ M.G.L. c. 31, § 43 states: “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.” (emphasis added).

supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and by correct rules of law.” *City of Cambridge*, 43 Mass. App. Ct. at 304, 682 N.E.2d at 926, quoting *Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex*, 262 Mass. 477, 482, 160 N.E. 427, 430 (1928). When analyzing whether reasonable justification exists:

the commission must focus on the fundamental purposes of the civil service system-to guard against political considerations, favoritism, and bias in governmental employment decisions...When there are, in connection with personnel decisions, overtones of political control or objectives unrelated to merit standards or neutrally applied public policy, then the occasion is appropriate for intervention by the commission. It 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.

The Civil Service Commission may modify an appointing authority’s action, but in deciding whether to do so it must resolve “not whether it would have acted as the appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” *Watertown v. Arria*, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, 445 (1983).

B. Removal of Appellant – Abolition of Position

The Authority stated in its letter to Mr. Homan that it terminated his employment as a maintenance mechanic due to a “restructure of the Maintenance Department of the Authority for budgeting and other reasons.” The Authority asserted that the restructuring of the Maintenance Department was necessitated by a reduction in mechanical work performed by maintenance mechanics employed by the Authority. The mechanical work itself had not been reduced. Instead, much of it was now being performed by contractors, engineers, and architects that the Authority needed to hire to comply with the State Building Code. As a consequence, the Authority’s maintenance mechanics were performing less mechanical work. The study the Authority performed tabulated the amount of mechanical and custodial work performed by maintenance mechanics in recent years. It found that the amount of mechanical

work performed by all maintenance employees had decreased well below the expected 60% of the workload of maintenance mechanics. With less mechanical work being performed by maintenance employees, and an increased use and expense of contractors, engineers and architects, the Authority reallocated funds from paying maintenance employees to paying contractors. The reorganization plan that called for the abolition of Mr. Homan's position was reviewed by the Authority's outside accountants, who agreed that it was financially necessary.

Anticipated lack of money and lack of work are "just causes" for the abolition of a position. "In the absence of pretext or bad faith, lack of funds and lack of work are both considered 'just cause' under M.G.L. c. 31, § 41." *Gloucester v. Civil Serv. Comm'n.*, 408 Mass. 292, 297, 557 N.E.2d 1141, 1144 (1990); *see also Debnam v. Belmont*, 388 Mass. 632, 634, 447 N.E.2d 1237, 1239 (1983); *Raymond v. Civil Serv. Comm'n.*, C.A. 06-3871-C, 2008 WL 5787711 (Mass. Super. Ct. Sept. 9, 2008). Consequently, "[t]he abolition of a position as part of an effort made in good faith to achieve economy and effectiveness does not run afoul of civil service protections." *Comm'r of Health & Hospitals of Boston v. Civil Serv. Comm'n.*, 23 Mass. App. Ct. 410, 413, 502 N.E.2d 956, 958-59 (1987).

When an appointing authority eliminates an employee's position alleging lack of money or lack of work, "the burden of proof is on the employee to demonstrate that he is being removed in bad faith and for a reason advanced as a mere pretext." *Comm'r of Health & Hospitals of Boston*, 23 Mass. App. Ct. at 413, 502 N.E.2d at 959 (1987).

Mr. Homan does not challenge the Authority's contention that it needed to eliminate a maintenance employee position for lack of funds. He claims, instead, that the position it eliminated should not have been his. Mr. Homan asserts that during the period the Authority studied, he was given fewer mechanical work assignments than at least one other maintenance mechanic at the Authority, and that the study was designed specifically to deprive him of the opportunity to satisfy his obligation to spend 60% of his time performing mechanical work.

Mr. Homan also contends that the study results were the product of favoritism, with the Authority unfairly assigning mechanical work to a more favored employee instead of to him.

I find no support for Mr. Homan's claim that the Authority acted in bad faith when it assigned mechanical work to maintenance mechanics during the study. The Maintenance Labor Report showed only a small difference between the percentages of mechanical work assigned and performed by each of the maintenance mechanics. Between August 5, 2011 and August 3, 2012, Mr. Homan's percentage of mechanical work performed was 28%, while the mechanical work performed by other maintenance mechanics was 29% and 36%, respectively. According to the study, Mr. Homan's mechanical work percentage was only 8% lower than that of his colleague with the highest percentage of mechanical work performed, and that employee was not assigned anywhere near the 60% mechanical work expected of maintenance mechanics.

Mr. Homan also contends that the Authority acted in error when it retained another employee as part of its reorganization plan. He claims that the retained employee has served for fewer years, has the same certification from the Department of Housing and Community Development that he has, and has similar experience and knowledge. The retained employee, however, has an additional ability to operate the web-based DHCD Capital Planning System and Capital Improvement System, a task, Mr. Homan points out, that is not found in the job description of a maintenance mechanic. The Authority claims that the decision to retain the less senior employee was based on his specific skills, additional computer certification and training, job performance, knowledge and abilities.

The Authority's decision to retain the employee they chose is supported by reasonable justification. Ms. Marcoux and Mr. Whitehall testified that the retained employee's computer skills, which are superior to Mr. Homan's, are important due to DHCD's reporting requirements and the need to file reports using the Agency's web-based system. Even though

computer usage is not mentioned in the job description, it is not disputed that this task is now part of the Authority's required work.

I find no evidence of pretext or bad faith by the Authority in performing its study or implementing its reorganization plan. The Authority's decision to eliminate a maintenance mechanic position was justified by a lack of work. The Authority has shown that its decision to retain another employee in the remaining maintenance mechanic position is supported by reasonable justification. Mr. Homan has not shown that he was removed in bad faith or that the Authority's claim of lack of work was advanced as a pretext to eliminate his position and to keep the retained employee.

C. Appellant's Bumping Rights

Mr. Homan's objection to the Authority's retention of another employee junior to him is, essentially, a claim that his seniority at the Authority entitles him an employment preference over the retained employee. The Authority responds that housing authority employees in Mr. Homan's position are not entitled to "bumping rights."

Bumping rights for most civil service employees are codified at M.G.L. c. 31, § 39, which provides generally that civil service employees whose positions are abolished enjoy protection that includes the right to be demoted to the next lower title occupied by an employee junior in length of service, as well as the right to be placed on a reemployment list, in order of seniority, for a period of two years. However, the statute governing housing authorities provides that:

No employee of any housing authority, except an employee occupying the position of executive director, who has held his office or position, including any promotion or reallocation therefrom within the authority for a total period of five years of uninterrupted service, shall be involuntarily separated therefrom *except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one* to the same extent as if said office or position were classified under said chapter.

M.G.L. c. 121b, § 29. (emphasis added). This means that housing authority employees are not granted bumping rights found at M.G.L. c. 31, § 39 because civil service rights for

housing authority employees in Mr. Homan's position are limited to those found at M.G.L. c. 31, §§ 41-45. *Courchesne v. Dennis Housing Auth.*, 11 MCSR 40 at 3 (Jan. 28, 1998). Sections 41 through 45 do not provide bumping rights.

Because bumping rights do not apply to housing authority employees in Mr. Homan's position, Mr. Homan's claim for protection against the abolition of his position due to his seniority in years of service at the Authority must be denied.

Conclusion

The Authority presented sufficient facts to establish reasonable justification for abolishing Mr. Homan's position – a lack of work caused by the need to reassign tasks to licensed professionals to comply with State Building Code standards. Mr. Homan did not show that his position was abolished in bad faith or as a pretext for retaining another position. Mr. Homan is not entitled to bumping rights, and he has not shown bias in the Authority's decision to retain another junior employee who possesses a needed computer skill that he lacks. I therefore recommend that the Marblehead Housing Authority's decision to abolish Mr. Homan's position be affirmed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

James P. Rooney
First Administrative Magistrate

Dated: April 24, 2014