

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

DAVID ADAMSON,  
Appellant

v.

D1-15-167

NORTHAMPTON HOUSING  
AUTHORITY,  
Respondent

Appearance for Appellant:

Maurice M. Cahillane, Esq.  
Egan, Flanagan and Cohen, PC  
67 Market Street – P.O. Box 9035  
Springfield, MA 01102-9035

Appearance for Respondent:

James M. Pender, Esq.  
Morgan, Brown & Joy, LLP  
200 State Street: 11<sup>th</sup> Floor  
Boston, MA 02109

Commissioner:

Christopher C. Bowman

**DECISION**

Pursuant to the provisions of G.L. c. 31, §§ 41-45 and G.L. c. 121B, § 29, the Appellant, David Adamson (Mr. Adamson), filed an appeal with the Civil Service Commission (Commission) after the Northampton Housing Authority (NHA) terminated his employment as the NHA's Director of Maintenance. A pre-hearing conference was held on September 23, 2015 at the Springfield State Building. As part of his appeal, Mr. Adamson did not initially challenge whether there was just cause for his termination, as he was not challenging the NHA's assertion that the NHA's new Executive Director had

assumed all of the duties and responsibilities of Director of Maintenance as part of a re-organization. Rather, Mr. Adamson was arguing that he was entitled to be considered for other vacant positions at the NHA, based on language contained in the NHA's re-organization plan as well as so-called "bumping rights" under the civil service law, an issue of law disputed by the NHA.

A full hearing was held at the Springfield State Building on December 9, 2015.<sup>1</sup> For purposes of judicial economy, this hearing was held concurrently with the appeal of Michael Owens, who was terminated at the same time. (See CSC Case No. D1-15-168)

Subsequent to the full hearing on December 9<sup>th</sup>, the NHA, per my request, submitted additional documents, including job descriptions that stated that certain supervisory responsibilities of the Maintenance Department had been assumed by individuals holding the new titles of "Senior Service Technician". Arguing that this was contrary to the testimony of the Executive Director at the full hearing, Mr. Adamson, as part of his post-hearing brief, effectively sought to amend his appeal – and now challenge whether there was just cause for his termination. After reviewing supplemental briefs submitted by the parties and holding a status conference via phone with counsel, I opted to re-open the hearing process and conduct a second day of hearing to hear additional testimony from the Executive Director, the Assistant Executive Director, the two (2) Senior Service Technicians and Mr. Adamson.

The second day of hearing was held at the Springfield State Building on June 15, 2016. In addition to the additional testimony, I accepted ten (10) additional exhibits into the record. The parties submitted their final supplemental briefs to the Commission on

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<sup>1</sup> 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.

July 14<sup>th</sup> (Appellant) and July 15<sup>th</sup> (NHA). CDs were made of the digitally-recording hearings. Copies were retained by the Commission and both parties were provided with copies as well.<sup>2</sup>

**FINDINGS OF FACT:**

Based on the Fifty-two (52) exhibits (A – PP) entered into evidence prior to the second day of hearing, the additional ten (10) exhibits submitted as part of the second day of hearing, the testimony of the following witnesses:

*For the NHA:*

- Cara Clifford, Executive Director (Day 1 and Day 2);
- Michael Harris, Senior Service Technician (Day 2);
- Peter Doppman, Senior Service Technician (Day 2);
- Maria Walton, Assistant Executive Director (Day 2);

*For the Appellant:*

- David Adamson, Appellant (Day 1 and Day 2);
- Michael Owens, Appellant in Case No. D1-15-168) (Day 1);

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations, policies, and reasonable inferences from the credible evidence, I make the following findings of fact:

*The Northampton Housing Authority*

1. The Northampton Housing Authority is a quasi-public agency that provides affordable housing to residents of the City of Northampton (City). (Testimony of Ms. Clifford and Exhibit CC)

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<sup>2</sup> 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. The NHA manages approximately six hundred eighteen (618) subsidized apartments for low-income residents and oversees the Housing Choice Voucher (Section 8) program for over twelve hundred (1200) individuals living in privately-owned properties in Northampton and surrounding communities. The NHA is also responsible for distributing housing vouchers to homeless veterans. (Testimony of Ms. Clifford and Exhibit CC)
3. As of the date of the first day of hearing before the Commission, the NHA had twenty-three (23) employees. Ten (10) of these employees belong to a union and thirteen (13) do not. (Testimony of Ms. Clifford)
4. As of Fiscal Year 2014, the NHA had total expenses of approximately \$9.5M, although approximately half of that represents pass-through payments for housing vouchers. Approximately \$1.4M is available for the “administration” of the NHA on an annual basis. (Exhibit NN)
5. In accordance with G.L. c. 121B, § 5, every housing authority in Massachusetts is “managed, controlled and governed” by five (5) members. “Every member of a housing ... authority shall be a fiduciary of the housing ... authority.” (G.L. c. 121B, § 5)
6. Four (4) members of the NHA are appointed by the City’s Mayor and one (1) member is appointed by the state’s Department of Housing and Community Development (DHCD). One (1) of the Mayor’s appointees must be a bona fide representative of labor; and one (1) must be a tenant of a unit owned or operated by the NHA. (G.L. c. 121B, § 5)

7. The five (5) members (at the time of these proceedings) of the NHA are: Jeffrey Jones (Chair); Toni Hochstadt (Vice Chair / DHCD appointee); Joseph DeFazio (Labor representative); Lynn Wallace and Ronald Hebert (tenant representative). (Exhibit CC and Testimony of Ms. Clifford)
8. A housing authority may “employ counsel, an executive director who shall be ex officio secretary of the authority, a treasurer who may be a member of the authority and such other officers, agents and employees as it deems necessary or proper, and shall determine their qualifications, duties and compensation, and may delegate to one or more of its members, agents or employees such powers and duties as it deems necessary or proper for the carrying out of any action determined upon by it.” (G.L. c. 121B, § 7)
9. The NHA board has delegated responsibility for the day-to-day operation of the housing authority to the Executive Director. (Testimony of Ms. Clifford)
10. Until his retirement in July 2015, Jonathan Hite served as the Executive Director of the NHA for twenty-five (25) years. (Testimony of Ms. Clifford)

*Appellant David Adamson*

11. Mr. Adamson is fifty-eight (58) years old. He graduated from South Hadley High School and served in the United States Army until he was honorably discharged in 1983. He has various job-related certificates related to the state’s procurement laws and maintenance management and supervision. (Testimony of Mr. Adamson and Exhibit KK)
12. In 1983, Mr. Adamson was appointed as a painter for the NHA. He served in that position for seventeen (17) years until he was appointed as Maintenance Director in

2000 by former Executive Director Jonathan Hite. He served as Maintenance Director for approximately sixteen (16) years until he was terminated from his position by the current Executive Director in September 2015. (Testimony of Mr. Adamson and Exhibit KK)

13. As Maintenance Director, Mr. Adamson oversaw the maintenance of all buildings and grounds and was responsible for ensuring compliance with all state and local requirements including local building codes, etc. He oversaw ten (10) full-time employees and two (2) part-time employees. His longtime administrative assistant, who worked for the NHA for twenty-eight (28) years, was a person by the name of Lynne Smith. (Testimony of Mr. Adamson)

14. Typical duties performed by Mr. Adamson included: overseeing the processing of work orders, the turnover of apartments and ensuring that work was properly completed by contractors. Mr. Adamson reported directly to the NHA Executive Director. (Testimony of Mr. Adamson)

*Executive Director Cara Clifford*

15. On February 4, 2015, Ms. Clifford applied for the NHA Executive Director position to replace Jonathan Hite, who had announced his intention to retire. (Exhibit BB)

16. At the time, Ms. Clifford had been employed by a property management company for nineteen (19) years. She “worked her way up” from leasing consultant to property manager to senior property manager to regional manager. (Testimony of Clifford and Exhibit BB)

17. As a senior property manager, Ms. Clifford helped turn around a “drug-infested” property by working with the State Police over a five-year period. She received a national award for her accomplishment. (Testimony of Ms. Clifford)
18. As the regional manager, Ms. Clifford oversaw the take-over of various properties and helped them run more smoothly. She has various licenses and certificates related to real estate and property management. (Testimony of Ms. Clifford)
19. Ms. Clifford describes herself as someone who is a “micro-manager” coming from the private sector “where you work for your money.” (Testimony of Ms. Clifford)
20. In June 2015, the NHA Board of Directors appointed Ms. Clifford as Executive Director after a lengthy vetting process that included an interview by a large interview panel which included Mr. Adamson. As part of this review process, Ms. Clifford toured the NHA facilities. (Testimony of Ms. Clifford)
21. Prior to assuming her role as Executive Director, Ms. Clifford met with NHA Board Chairman Jeff Jones to negotiate her contract. During these negotiations, Ms. Clifford told Mr. Jones that she thought the common areas of the various housing complexes were in poor condition and that the administrative offices were disorganized, looking as if they had been “paper bomb”[ed]. Ms. Clifford did not, however, tell Mr. Jones or any member of the NHA Board of Directors that she planned on proposing a re-organization prior to assuming her role as Executive Director. (Testimony of Ms. Clifford)
22. With her contract negotiations concluded, Ms. Clifford began serving as the NHA Executive Director on July 7, 2015 at an annual salary of \$105,000. (Testimony of Ms. Clifford)

23. Ms. Clifford met with Mr. Hite for a few hours on July 7<sup>th</sup> and 8<sup>th</sup>, 2015 to discuss the responsibilities of the Executive Director position and existing operational issues and concerns. (Testimony of Ms. Clifford)

24. At this time, Ms. Clifford was given the “Personnel Policy of the Northampton Housing Authority.” That policy states, in part:

“STATUS AND CHANGES IN STATUS OF EMPLOYMENT

No employee of the Authority, except the Executive Director, who has been employed for five years of uninterrupted service, shall be involuntarily separated from their position, or from the Authority, without the protection of a hearing, as afforded by Chapter 31, Sections 41 to 45 inclusive, of the Massachusetts General Laws.” (Exhibit M, Page 4, numbered paragraph 8)

25. Notwithstanding this provision in the Personnel Policy, Ms. Clifford erroneously believed, at the time, that all non-union personnel, including the Appellants, were at-will employees. (Testimony of Ms. Clifford)

26. During their discussions, Mr. Hite told Ms. Clifford that he had a “good staff” and that David Adamson “worked hard.” He also told Ms. Clifford that the budget was “in good shape”, including the “federal reserves.” (Testimony of Ms. Clifford)

27. Mr. Hite provided Ms. Clifford with a written list of outstanding issues to be addressed at the NHA. Included on that list were his following recommendations regarding personnel:

“C. Staff

1. Need to reorganize so you aren’t trapped in the weeds:
  - a. You might think about (and there is money available) getting:
    - (1) A Deputy Director or top flight Secretary
    - (2) A Modernization Coordinator
    - (3) Create Divisional Unit with Michelle [], John [], and Tom[] (in part),



and Eliz. [], all reporting to Sharon<sup>3</sup> with distinct and measurable goals.  
(4) Blow up the Organizational Chart and start again.”

(Testimony of Ms. Clifford and Exhibit V)

*Ms. Clifford's Initial Observations of NHA Operation*

28. During her first thirty (30) days, Ms. Clifford met with various employees and residents and made observations. (Testimony of Ms. Clifford)
29. Ms. Clifford was alarmed by her own observations and what she heard from residents. (Testimony of Ms. Clifford)
30. A resident told Ms. Clifford that Mr. Hite and Mr. Adamson had stolen quarters from the laundry vending machines. Ms. Clifford told that resident that “we’re not going to go there” and that, unless the resident “saw it with their own eyes” or the two men were “arrested and jailed”, she wasn’t going to pursue it. (Testimony of Ms. Clifford)
31. Another terminally-ill resident told Ms. Clifford that maintenance personnel had hung up on him when he called and asked for repairs to his unit. (Testimony of Ms. Clifford)
32. Ms. Clifford overheard a maintenance employee referring to a resident as a “fucking crazy asshole”. (Testimony of Ms. Clifford)
33. Ms. Clifford observed that the morale of employees was “in the dirt”; that employees had “no energy” and were “lethargic”; that the attitude of employees was “I, I, I” and that one could “cut the tension with a knife.” Overall, Ms. Clifford concluded that customer service was lacking, responsiveness to tenant needs was slow and that there was a general lack of communication among employees. (Testimony of Ms. Clifford)

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<sup>3</sup> There is no last name for “Sharon” listed on the original document (Mr. Hite’s notes), but it appears clear that the “Sharon” referenced here is not the Sharon who was working for Mr. Owens in the finance department.

*Ms. Clifford's first interactions with Mr. Adamson and the Maintenance Department*

34. As referenced above, Ms. Clifford, based on her general observations and feedback from residents, was concerned about the level of service and responsiveness provided by the Maintenance Department. Ms. Clifford found that there was a “backlog” of 1,000 pending “work orders” in the Maintenance Department. Based on her observations, she concluded that Mr. Adamson’s secretary was not following procedures. (Testimony of Ms. Clifford)
35. After Ms. Clifford was first appointed, Mr. Adamson had limited interaction with her as he had pre-scheduled vacation time; was required to attend a training seminar; and was dealing with an inspection being conducted by DHCD. (Testimony of Mr. Adamson)
36. During one of their initial discussions, Mr. Adamson told Ms. Clifford that he was going to be using 1.5 hours of accrued “comp time”. (Testimony of Mr. Adamson)
37. Ms. Clifford told Mr. Adamson that he was not to attend the NHA Board meetings going forward. She did, however, ask Mr. Adamson to stay by his phone during the meeting, which takes place at night. (Testimony of Mr. Adamson)
38. Mr. Adamson stayed near his phone for approximately one hour during the first NHA Board meeting after Ms. Clifford’s appointment. He then submitted a request to accrue 1.5 hours of compensatory time for being on-call. (Testimony of Mr. Adamson)
39. Ms. Clifford contacted state and federal offices regarding whether Mr. Adamson was entitled to compensatory time. Based on the information she received, she concluded that he and other salaried employees were not eligible for compensatory time. She

forwarded Mr. Adamson an email with the information she had received. (Testimony of Ms. Clifford)

40. Ms. Clifford agreed to let Mr. Adamson use the compensatory time he had already accrued and paid him a \$15.00 “stipend” for being on-call during the meeting, but informed him that compensatory time would not be allowed on a going-forward basis. (Testimony of Mr. Adamson)

41. During one of their initial discussions, Mr. Adamson told Ms. Clifford that he was not a “working Maintenance Director” as he did not complete work orders. Ms. Clifford found this unusual. (Testimony of Ms. Clifford)

42. Mr. Adamson is actually not permitted to complete work orders based on the language in the collective bargaining agreement with the maintenance employees. (Testimony of Mr. Adamson)

43. As referenced above, an on-site DHCD “10% inspection” of sixty (60) units was underway shortly after Ms. Clifford began her duties as Executive Director. Ms. Clifford was concerned about the inspection being completed by 2 DHCD staff members. Mr. Adamson assured her that the inspection “went fine” and said that the inspectors noted a few deficiencies which he had written down. (Testimony of Ms. Clifford)

44. Ms. Clifford did not receive the results of the state inspection until after she first proposed a re-organization to the NHA Board of Directors, referenced in more detail below. (Testimony of Ms. Clifford)

*August 10, 2015 NHA Executive Session*

45. On August 10, 2015, the NHA Board of Directors, after meeting in public session, voted to go in to Executive Session. The posted agenda [of the public session] failed to include a statement that the board would be asked to go into Executive Session regarding the Board's interest in reorganizing the current organizational chart. (Administrative Notice: Open Meeting Letter from Attorney General's Office dated December 28, 2015 (AG Letter))
46. At the August 10<sup>th</sup> executive session, thirty-four (34) days after her appointment, Ms. Clifford presented an eleven (11)-page document titled "Proposed Reorganization of the Northampton Housing Authority." Ms. Clifford had only one paper copy of the presentation which she passed among board members. (Testimony of Ms. Clifford and Exhibit N) Later, at an August 31<sup>st</sup> open session, two (2) NHA Board members stated that they had not seen the presentation before. (Testimony of Mr. Adamson and Mr. Owens)
47. The Board minutes of the August 10<sup>th</sup> executive session provide as follows:
- "In support of the Board's directive to seek further cost savings, Executive Director Cara Clifford presented to the Board her proposed restructuring of the Organizational Chart following her initial review of the configuration of the Authority.
- Discussion during Executive Session in support of the restructuring discussions centered around:
1. Budgetary concerns & cost savings;
  2. Reevaluations of positions & new job descriptions;
  3. Cross training with the purpose of functioning as a team with fewer staff;

4. Job descriptions reviewed need to be updated. There appears to be duplications of duties upon review of some of the positions; AND
  5. This restructuring will result in the elimination of some of the positions currently held by staff. At this time, the discussion then turned to specifically who could be potentially impacted by the elimination of some of the positions currently held by staff.
  6. Any newly created positions would be first offered to the above and would be so for the coming 12 months.” (Exhibit C)
48. The August 10<sup>th</sup> NHA Board meeting included a discussion regarding which individuals would lose their jobs as a result of Ms. Clifford’s proposed reorganization. (Testimony of Ms. Clifford)
49. Although the NHA Board of Directors discussed this re-organization proposal that would result in the elimination of positions and the termination of employees, they failed to provide the effected employees (including Mr. Adamson) with the notice and procedural rights guaranteed by the state’s Open Meeting Law. (Administrative Notice: AG Letter)
50. The “Proposed Organizational Chart” deleted the position of Maintenance Director (formerly occupied by Mr. Adamson) and created a solid-line reporting relationship between the Executive Director and two (2) positions with the new title of “Senior Service Technician”. The same proposed organization chart also showed a solid-line reporting relationship between the two (2) Senior Service Technicians, one (1) “Porter”; five (5) “Service Technician Twos”; and four (4) “Service Technicians”.

51. On August 12, 2015, Ms. Clifford called Mr. Adamson to a meeting and, together with outside counsel, informed him that he was to hand over his keys and phone, go home, and that “in two weeks, he would no longer have a job”. He was told that this was the result of a reorganization started by former director John Hite. (Testimony of Mr. Adamson)

52. On August 21, 2015, Mr. Adamson was sent a letter from Ms. Clifford which stated the following:

“I am writing to correct and clarify your employment status.

You are currently on paid administrative leave while the organizational and personnel needs of the Northampton Housing Authority are being assessed. Your compensation and benefits are unchanged during this period of administrative leave. This determination is not disciplinary in nature.

Please note that this notice supersedes any prior verbal or written notice with regard to your employment status.

You will be informed in writing upon any change to this status. In the meantime, please remain available for communications and/or assignments during regular business hours.”

(Exhibits E and H)

53. On August 25, 2015, counsel for Mr. Adamson sent a letter to Ms. Clifford (Exh. 00) informing her that NHA employees were protected under G.L. c. 121B, §29 and that the August 10, 2015 meeting violated the open meeting law G.L. c. 93A §§18-25. (Exh. 00)

54. On August 31, 2015, the NHA Board held another meeting regarding the reorganization, conceding by now, that the actions in August were illegal. The Board voted to rescind the August 10th Executive Session. (Exhibit Y)

55. At the August 31<sup>st</sup> meeting, Ms. Clifford again presented her reorganization plan. The plan listed as “open positions based on proposed organizational chart,” the following:

Administrative:

Administrative Support

Receptionist

HR/Payroll Benefits

Accounts Payable

Maintenance:

Porter

Service Technician

56. The final page of the presentation to the Board stated as follows:

**“Evaluation**

Once Approved:

Employees in positions to be eliminated will be considered for all newly-created positions for which they are qualified.

Any positions remaining will be posted in house.

Should there be a need, once all avenues above exhausted, outside search to begin.

(Exhibit N)

57. On September 1, 2015, DHCD issued its final report regarding the “10% Inspection”

that had been completed during Ms. Clifford's first days as Executive Director. The inspection cited numerous "failures" across all units inspected creating an additional 500 work orders to address the reported deficiencies. (Testimony of Ms. Clifford and Exhibit DD)

58. By separate letters dated September 3, 2015, Ms. Clifford informed Mr. Adamson she had proposed the elimination of his position pursuant to a reorganization of the NHA. (Exhibit F; Exhibit I).
59. The letter explained, "The purpose of the reorganization is to make the Authority more organizationally effective and efficient, and responsive to tenants." (Exhibit F; Exhibit I). The letters informed Mr. Adamson that a due process hearing was scheduled for September 17, 2015 at 2:00 p.m. and enclosed copies of G.L. c. 31, §§39-45 (while noting that only §§41-45 apply to housing authority employees). (Exhibit F; Exhibit I). The letter concluded, "Please note that your current position and employment status [paid administrative leave] remains unchanged pending the result of this hearing." (Exhibit F; Exhibit I).
60. On September 17, 2015, the Civil Service due process hearing before Ms. Clifford, as hearing officer for the Appointing Authority, took place as scheduled. (Testimony of Ms. Clifford). Mr. Adamson was represented by counsel at the hearing. (Testimony of Ms. Clifford)
61. By letter dated September 24, 2015, Ms. Clifford informed Mr. Adamson that his position had been eliminated effective on that date. (Exhibit G; Exhibit J) The letter also informed Mr. Adamson: "For the next 12 months, you will be provided with notice of all open positions for your consideration to apply for." (Exhibit G; Exhibit



J)

62. In November 2015, the NHA posted several new positions created as a result of the reorganization, including a Resident Services Coordinator, Accounts Payable position, Administrative Assistant, and Receptionist. (Exhibits O, P, Q, R).

Subsequent to the termination of their employment, Mr. Adamson has been informed of open positions at the NHA he may wish to apply for. (Exhibit L; Testimony of Clifford, Adamson, and Owens).<sup>4</sup> Mr. Adamson has applied for open positions, but not been appointed to any of these positions. (Testimony of Mr. Adamson)

63. On January 13, 2016, the NHA submitted to the Commission what has been marked as Exhibit HH, which included an unsigned “Senior Service Job Technician” job description which stated in part:

“SUPERVISORY RESPONSIBILITIES: May have minor supervisory responsibilities under the direction of the Executive Director / CEO or Assistant Executive Director in accordance with Northampton Housing Authority policies and applicable laws. Responsibilities may include training employees; planning, assigning, and addressing complaints and resolving problems.” (Exhibit HH)

64. On June 15, 2016, as part of the second day of hearing, the NHA submitted to the Commission what has been marked as Day 2, Exhibits 1 and 3, which included two (2) “Senior Service Job Technician” job descriptions which stated in part:

“SUPERVISORY RESPONSIBILITIES: This position has no supervisory responsibilities.” (Day 2, Exhibits 1 and 3)

65. The job descriptions submitted by the NHA at the second day of hearing contained the signatures of the two (2) incumbent Senior Service Technicians. The “date”

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<sup>4</sup> At hearing, Ms. Clifford testified that the reference to the employee handbook in the letter was in error because Appellants’ positions were eliminated pursuant to a reorganization, which is not covered by the Personnel Policy; they were not “laid off.” (Testimony of Clifford).

section next to their signatures is blanks. These job descriptions also have the signature of the Assistant Executive Director. Next to her signature is the handwritten date “9/24/15”, the same date of the NHA termination letter to Mr. Adamson.

(Day 2, Exhibits 1 and 3)

### *Applicable Law*

The Commission’s authority in this matter is drawn from G.L. c. 121B, § 29 which provides, in relevant part, 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.” (emphasis added)

G.L. c. 31, § 43 provides:

“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.”

An action is “justified” if it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law,” Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there," Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

Under section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew," Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. However, "[t]he commission's task.. is not to be accomplished on a wholly blank slate. After making its de novo findings of fact, the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether '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'," which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. *Id.*, 823-24, quoting internally from Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983) and cases cited.

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”).

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).

Whether the appellant or the Commission personally agree with the authority’s conclusion is not dispositive. Id. Similarly, the ultimate accuracy of this conclusion is also not at issue. Id. Stated simply, the elimination of a position as part of a good faith effort to achieve economy and effectiveness of operations does not violate civil service protections. Commissioner of Health and Hospitals of Boston v. Civil Service Comm’n, 23 Mass.App.Ct. 410, 413 (1987) citing Gardner v. Lowell, 221 Mass. at 154; McNeil v. Mayor of Peabody, 297 Mass. 499, 504 (1937); Dooling v. Fire Commr. of Malden, 309 Mass. 156, 162 (1941).

The layoff of employees is not justified if the proffered reason for their dismissal was pretextual and their discharge was the product of improper motivations. City of

Cambridge Housing Authority v. Civil Service Comm’n, 7 Mass.App.Ct. 586, 589 (1979); *see also*, Raymond v. Civil Service Commission and Athol Fire Department, Memorandum of Decision and Order in Suffolk Superior Court Civil Action 06-3871-C (12/9/08) hereinafter “the Athol case,” p. 11. Furthermore, the Court in the City of Cambridge Housing Authority case reiterated the long established doctrine under the Civil Service Law dating back to the early 1900’s which provides that,

There is a real and fundamental distinction between the laudable abolition of an unnecessary position and the discharge of a faithful employee in violation of the rights secured to him by statute; and the latter can neither be concealed nor protected by a pretense that it was an exercise of the former right. City of Cambridge Housing Authority, 7 Mass.App.Ct. at 590 – 591, *quoting*, Garvey v. Lowell, 199 Mass. 47, 50 (1908).

And even if the evidence would have warranted a finding by the [hearing] officer that the removal was for ‘proper cause’ the removal should be reversed if it appeared affirmatively that it was made ‘in bad faith’ as would be the case if this case was a ‘mere pretext or device to get rid of’ the employee for some other and improper cause. City of Cambridge Housing Authority, 7 Mass. App. Ct. at 590 – 591, *citing* Mayor of Somerville v. District Court of Somerville, 317 Mass. 106, 121 (1944).

### *Analysis*

As referenced above, this appeal was initially filed by Mr. Adamson to solely contest whether he was entitled to other vacant positions at the NHA, pursuant to language contained in the re-organization plan approved by the NHA Board of Directors and/or due to bumping rights afforded to civil service employees. The limited nature of the appeal was based on Mr. Adamson’s acceptance that Ms. Clifford had assumed all of the duties and responsibilities of Maintenance Director, including the supervisory responsibilities. In effect, Mr. Adamson was accepting that, in regards to the

Maintenance Department, the NHA had put forth a bonafide re-organization plan that eliminated the Maintenance Director position, as opposed to simply purging long-time employees at will, something that was found to have occurred in the Owens decision.

When the NHA, after the first day of hearing, submitted job descriptions of “Senior Service Technician” suggesting that the supervisory responsibilities of Maintenance Director had simply been transferred to two existing employees, who were given the new title of Senior Service Technician, Mr. Adamson amended his appeal, contesting whether there was actually a bonafide re-organization plan that provided just cause for his termination as Maintenance Director. I address that issue first.

I carefully listened (and re-listened) to the testimony of the Executive Director, the Assistant Executive Director, and the two (2) Senior Service Technicians. Even after considering the expected fading of memories and the normal anxieties that come with providing sworn testimony before a quasi-judicial agency, I do not find their testimony credible regarding the circumstances surrounding the review and signing of the Senior Service Technician job descriptions. In short, the Senior Service Technician job descriptions submitted as part of the second day of hearing were not reviewed and signed by the Senior Service Technicians on September 24, 2015, which is also the effective date of Mr. Adamson’s termination.

There are multiple instances of significant discrepancies and implausible statements in their testimony which paint a troubling picture of an agency creating and back-dating documents solely for the purpose of this litigation.

First, the NHA was on notice that the purpose of the second day of hearing, held on June 15, 2016, was to clarify the date of the revised job description. In short, the subject

matter, and the likely questions, was not a surprise to the Executive Director. Even with this knowledge, the Executive Director, as part of her testimony, stated – *twice* – that, as of December 2015, months after September 24, 2015, she was still revising the job descriptions prior to giving them to the senior service technicians to review and sign. After being reminded by her counsel that the revised job descriptions were purported to be signed on September 24<sup>th</sup>, the Executive Director then said they were prepared before September 24<sup>th</sup>. However, only moments later, the Executive Director then stated that it wasn't until after December 2015 that she completed the revised job descriptions. Further, the Executive Director went on to testify that the revised job descriptions were *not* signed as of the time that she sent them to counsel (in December or January). Only after prompting from counsel did the Executive Director seek to retract that statement by saying that the job descriptions were signed in September 2015.

Second, there was wildly divergent testimony regarding who was present when the job descriptions were signed. One of the senior service technicians referenced a meeting between him and the Executive Director to review and sign the job description. Asked why the *Assistant* Executive Director's signature was on the job descriptions, he stated that the Executive Director must have briefly stepped out of the meeting, while the Assistant Executive Director testified that the Executive Director may have been out of the office entirely the day the document was signed.

Third, the Assistant Executive Director offered hesitant and equivocal testimony regarding whether she actually witnessed the senior service technicians sign the job descriptions.

Fourth, both of the Senior Service Technicians left the date field blank on the job descriptions and, like the Assistant Executive Director, offered equivocal testimony on when they actually signed the form.

Fifth, while both of the Senior Service Technicians testified that they reviewed the job descriptions before signing them, both of them appeared surprised at the Commission hearing regarding the language in the job description designating them as “at-will” employees, which is contrary to G.L. c. 121B, § 29.

Unable to rely on the testimony of any of the NHA witnesses regarding these job descriptions, I have inferred that the Executive Director, sometime on or around September 24, 2015, created a Senior Service Technician job description that listed supervisory responsibilities.<sup>5</sup> She then submitted this job description to the Commission via counsel unaware that it would contradict her testimony from the first day of hearing. Once brought to her attention, a revised job description, which deleted the supervisory responsibilities, was created, back-dated and submitted to the Commission.

I also reviewed the testimony related to the actual day-to-day operations of the NHA since Mr. Adamson was terminated from his position as Maintenance Director. Even parts of this testimony stretched credulity. For example, since Mr. Adamson’s termination, the two Senior Service Technicians now come in one-half (1/2) hour early each day and meet with the Executive Director. I do not credit their testimony that the primary purpose of this meeting is to discuss ongoing modernization projects. Rather,

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<sup>5</sup> The Executive Director also insisted that the supervisory responsibility section was just copied and pasted from a job description from her prior employer, suggesting that it was simply a clerical oversight to leave the language in the NHA document. While the language in the two documents is similar, it is certainly not identical. Rather, it is revised language and customized for the NHA. The point here is that, rather than a clerical oversight, it is obvious that the Executive Director, at some point, decided that this was language she wanted to include in the NHA job description.



relying on language contained in *either* of the job descriptions submitted, commonsense and reasonable inferences, it appears that the purpose of the early meeting, prior to the remainder of the maintenance staff arriving, is to plan the day's maintenance activities, including, to some degree, determining which employees will be assigned to complete work orders and other tasks. This is consistent with the fact that both of the senior service technicians, unlike other members of the maintenance department, received a pay raise and extension of work hours upon receiving their new titles.<sup>6</sup>

Setting aside, to the extent possible, the troubling sequence of events regarding the submission of two different job descriptions and the lack of candor regarding what appears to be the expanded role of the two individuals now designated as Senior Service Technicians, the NHA did show, by a preponderance of the evidence, that the Executive Director does perform the majority of the duties previously completed by Mr. Adamson prior to his termination as Maintenance Director. Even if the two Senior Service Technicians have a limited advisory and/or coordination role, I have concluded that Ms. Clifford does indeed:

- Hire maintenance employees;
- Assign work orders to maintenance employees;
- Review completed work orders;
- Distribute and review tenant surveys regarding the performance of the maintenance department;

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<sup>6</sup> I considered the testimony that the increase in one of the senior service technician's pay rate did not result in an actual increase in total pay. First, the NHA did not produce the supplemental pay records I requested that would have shed more light on this. Second, even if this is true, it is undisputed that the other senior service technician did indeed receive an increase in his total pay upon being designated as a senior service technician. I do not credit the testimony that the pay raise was related to his participation in modernization projects.

- Conduct employee performance appraisals for maintenance employees;
- Discipline maintenance employees;
- Approve all overtime requests;
- Approve significant purchase orders of supplies and equipment;
- Resolve issues between residents and maintenance staff.

In short, I accept the testimony of Ms. Clifford that she has effectively assumed the role of both Executive Director and Maintenance Director, in part by working (very) long days, with her work week often exceeding 70 hours. It is not the Commission's role to determine whether this is the best organizational structure for the NHA. Rather, our role is simply to assess whether a bona fide reorganization occurred here. It did.

That leaves the remaining issue of whether Mr. Adamson is entitled to "bumping rights" afforded to civil service employees under G.L. c. 31, § 39. He is not. Bumping rights provided for in Section 39 do not apply to housing authority employees, whose civil service job protections are expressly limited to only Sections 41-45 of Chapter 31, which lack any bumping rights. See G.L. c. 121B, §29 and Homan v. Marblehead Housing Authority, 27 MCSR 386 (2014); Courchesne v. Dennis Housing Authority, 11 MCSR 40 (1998).

It would be illogical, if not impossible, to confer the bumping rights listed in Section 39 to non-civil service employees.

Section 39 states in relevant 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.

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. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.”

To determine the “bumping rights” of a civil service employee, various factors such as the employee’s “title”; “departmental unit” and civil service “seniority”, in addition to whether the title falls under the “official service” or “labor service” must be considered. Since Housing Authority positions are not otherwise covered by the civil service law, they cannot be in the official or labor service. Further, calculating an employee’s seniority depends on various factors, including whether the civil service employee had ever been laid off and reinstated in the past, etc. All of these factors are unique to civil service employees, making it impossible to confer these Section 39 rights to non-civil service employees. Indeed, the legislature clearly chose to limit the rights of certain Housing Authority employees to those contained in Sections 41-45.

In regard to whether the language contained in the reorganization plan, including references to allowing Mr. Adamson and others first consideration for new postings, that is not a matter for which the Commission has jurisdiction to enforce.

*Conclusion*

Despite some troubling issues related to the forthrightness of NHA witnesses, the NHA has shown, by a preponderance of the evidence, that it had just cause to eliminate the position of Maintenance Director as part of a bona fide reorganization plan that was designed to increase the efficiency of the NHA. Further, Mr. Adamson is not entitled to any “bumping rights” afforded to civil service employees under Section 39 of the civil service law.

Civil Service Commission

Christopher Bowman

Christopher C. Bowman

Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan) on December 8, 2016.

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

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Maurice Cahillane, Esq. (for Appellant)

James Pender, Esq. (for Respondent)