

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

PAUL A. ALMEIDA,
Appellant

v.

CASE NO: G1-11-336

**NEW BEDFORD SCHOOL
DEPARTMENT,**
Respondent

Appearance for Appellant:

Jamie Kenny, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
133 William Street – Room 203
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

The Appellant, Paul A. Almeida, appealed to the Civil Service Commission (Commission) challenging the promotion by the City of New Bedford School Department (NBSD), of employees with less civil service seniority to positions of Assistant Cook at the Carney Academy and two other NBSD schools. NBSD moved for summary disposition on the grounds that all the successful candidates were authorized by Mass. G.L.c.71,§59B, the so-called “principle’s choice” statute. By Decision dated April 19, 2012, the Commission determined that Mr. Almeida had standing to contest only one of the three positions involved, and scheduled an evidentiary hearing to consider the impact of G.L.c.71,§59B on Mr. Almeida’s civil service rights and the relief, if any, to which he would be entitled with respect to that position. The hearing was held at the UMass School of Law at Dartmouth on June 22, 2012 and was digitally recorded. On August 10, 2012, both parties submitted proposed decisions.

PROCEDURAL HISTORY

Mr. Almeida was one of a number of NBSD bus operators whose permanent labor service positions were abolished in August 2008 due to lack of funds. Mr. Almeida's subsequent employment history at the NBSD has been the subject of various prior Commission decisions, which address various issues pertaining to alleged civil service "bumping rights" in the labor service (Case No. G1-08-234; 22 MSCR 269, 22 MSCR 348) [*Almeida I*]; Case No. G1-09-327; 22 MCSR 739) [*Almeida II*] and "reinstatement" rights and/or unlawful "bypass" concerning subsequent vacancies in other positions in the labor service (Case No. E-10-10; 23 MCSR 608 [*Almeida III*]; Case No. G-11-247 & 336, 25 MCSR 122 [*Almeida IV*]; Case No. G-12-59, 25 MCSR 127 [*Almeida V*]).

FINDINGS OF FACT

Based on the three Exhibits and the testimony of NBSD Carney Academy Principal Karen Treadup, NBSD Human Resources Manager Cheryl Costa and Mr. Almeida, I make the findings of fact set forth below. These findings are in addition to the findings of undisputed facts set forth in the Commission's prior Decision on Motions for Summary Disposition in *Almeida IV*, some of which are recited herein for convenience, but all of which are incorporated herein by reference.

1. The Appellant, Paul A. Almeida, was appointed to the labor service position of full-time Bus Operator in the School Department, with a seniority date of September 11, 2000. (*Almeida IV*)

2. Mr. Almeida was laid off from his position as a Bus Operator as part of a reduction in force in 2008 and has since worked in the labor service position of Cafeteria Helper. (*Almeida IV*)

3. The NBSD is a party to a collective bargaining agreement through AFSCME Council 93, Local 641, effective from July 1, 2007 through June 30, 2010 (the CBA), which provides, in part, that vacant positions are to be posted and employees entitled to “bid” on any such position, which are to be awarded to the bidding employees in order of seniority. (*Almeida IV*)

4. On September 9, 2011, Mr. Almeida bid on an opening for full time Cafeteria Helper at the Keith School. His bid was successful and he was placed into this position. (*Claim of Appeal; Almeida IV*)

5. On October 28, 2011, Mr. Almeida, along with several others, bid on a vacant position of Assistant Cook at the Carney Academy. His 2000 seniority date placed him first in seniority of all the candidates. (*Claim of Appeal; Hearing Exhs.. 1 & 2; Testimony of Appellant; Almeida IV*)

6. The position of Assistant Cook is a labor service position that requires “one year’s paid experience” and ability to perform “semi-skilled cooking and routine kitchen duties”. These duties involve assisting the Cook with preparation of meals, cleaning the kitchen and other related duties as assigned by the Cook Manager or Principal. No written job description for the position was produced. (*Testimony of Treadup & Appellant; Almeida IV*)

7. The top three candidates for the Carney Academy Assistant Cooks’ position met the job requirements for the positions. (*Testimony of Treadup*)

8. Mr. Almeida has food service experience in the private sector, having been employed with McDonalds, including 2 years as a Cook and 4 years as a Certified Shift Manager. The management position required specialized formal training and knowledge of food service preparation, food safety handling, among other things. He has filled in as

an Assistant Cook during absences of other Assistant Cooks. (*Testimony of Appellant; Almeida IV*)

9. Mr. Almeida was fully familiar with the machinery and procedures utilized in the kitchen at the Carney Academy, having previously worked there in 2005 as a Cafeteria Helper. (*Testimony of Appellant*)

10. In accordance with the practice in the NBSD dating back to enactment of the Massachusetts Education Reform Act (St.1993, c.71) in the early 1990s, the NBSD Human Resources Department submitted the names of the candidates for the Carney Academy Assistant Cooks' position to the Principal of the Carney Academy, Karen Treadup. (*Testimony of Treadup & Costa*)

11. Principal Treadup was provided no instructions regarding who could be selected from the list of candidates. (*Testimony of Treadup & Costa*)

12. Principal Treadup interviewed the candidates, including Mr. Almeida. The interview team also included Nancy Carvalho, NBSD Food Service Manager and Paula Grenier, Carney School Cafeteria Manager. The interviews were not scored. (*Testimony of Treadup & Appellant*)

13. On or about November 15, 2011, the Carney School position was awarded to Maria Reis, a part time Cafeteria Helper with a seniority date of November 1, 2010, which placed her fifth in seniority of all candidates who bid the position. (*Hearing Exhs. 2 & 3; Testimony of Treadup & Costa; Almeida IV*)

14. Principal Treadup's decision was made based on her decision as to whom she felt "best fit with the culture of the building". She considered how the applicants presented themselves and how they answered questions during the interview process. Ms. Reis responded that "kids come first" which indicated that she would step up and do what

needs to be done, that she was a team player that would do whatever was needed to be done. (*Testimony of Treadup*)

15. Principal Treadup also said it was helpful that the successful candidate, Ms. Reis, is bilingual, although, apparently, she did not make this a question asked of all candidates. (*Testimony of Treadup & Appellant*)

16. According to the NBSD, the appointment of Ms. Reis was made on the basis of the recommendation of the respective schools' principals, "per c.71 sec. 59B" without regard to seniority, which, as noted, had been the practice within the NBSD since the enactment of Education Reform Act. (*Testimony of Treadup & Costa; Almeida IV*)

17. Principal Treadup was provided with the civil service seniority dates for the candidates but gave no consideration to the seniority of any of the candidates. She was unfamiliar with the civil service term "2n+1" and had no experience or knowledge about the obligation to make civil service appointments according to a "2n+1 formula. (*Testimony of Treadup*)

CONCLUSION

The Personnel Administration Rules (PARs) promulgated, pursuant to Mass. G.L.c.31, §5(b) by the Massachusetts Human Resources Division (HRD), prescribe:

"Promotional appointments and changes of position under the provisions of M.G.L.c.31,§29 shall be made from among the same number of persons with the greatest length of service as the number specified in making appointments under PAR.09 [so-called "2n+1 formula"], provided that such persons possess the required qualifications and serve in eligible titles as determined by the administrator. If there are less than the required number of persons, selection may be made from the lesser number." PAR.19(5)(a).

The Commission construes these requirements to permit promotions and changes of position within the labor service of any qualified candidate(s) with the "2n+1" longest civil service seniority date(s), without any right of another non-selected candidate to

contest the non-selection, save that a candidate who was removed from the 2n+1 group on the grounds he or she was not qualified may contest the disqualification decision as arbitrary, the result of bias or favoritism or other violation of merit principles. See, e.g., Picard et al v. City of Quincy, 24 MCSR 416 (2011); Lusignan v. Holyoke G&E Dep't., 20 MCSR 401, further considered, 21 MCSR 287, after hearing, 22 MCSR 137 (2009)

Ms. Reis was the fifth most senior candidate who applied for the Carney School Assistant Cook's position and the evidence clearly established that there were three more senior candidates within the 2n+1 formula who were qualified for the position, of which Mr. Almeida was the most senior qualified candidate. Under applicable civil service law and rules, NBSD was obliged to select one of these more senior candidates.

The Commission understands NBSD to assert that, the "2n+1" rule notwithstanding, Ms. Reis was lawfully appointed under "principal's choice", as set forth in the Massachusetts Education Reform Law, G.Lc.71,59B. That statute provides:

The superintendent of a school district shall appoint principals for each public school within the district at levels of compensation determined in accordance with policies established by the school committee. Principals employed under this section shall be the educational administrators and managers of their schools and shall supervise the operation and management of their schools and school property, subject to the supervision and direction of the superintendent. Principals employed under this section shall be responsible, consistent with district personnel policies and budgetary restrictions and subject to the approval of the superintendent, for hiring all teachers, athletic coaches, instructional or administrative aides, and other personnel assigned to the school, and for terminating all such personnel, subject to review and prior approval by the superintendent and subject to the provisions of this chapter. The principal of any school which requires an examination for student admission shall be solely and exclusively responsible for hiring all teachers, instructional or administrative aides and other personnel, and for terminating all such personnel without the requirement of review or prior approval by the superintendent before said hiring or termination. This section shall not prevent one person from serving as the principal of two or more elementary schools or the use of teaching principals in such schools.

It shall be the responsibility of the principal in consultation with professional staff of the building to promote participatory decision making among all professional staff for the purpose of developing educational policy.

The school superintendent of a city or town or regional school district including vocational-technical schools, may also appoint administrators and other personnel not assigned to particular schools, at levels of compensation determined in accordance with policies established by the school committee

Id. (*emphasis added*)

As noted in Almeida IV, the Commission is not aware of, and neither party has drawn the Commission's attention to, any appellate case in which the right of "principal's choice" came into conflict with a provision of civil service law and rules. Similarly, the Commission is not aware of any disciplinary appeal that has come before it, pursuant to G.L.c.31, §§41 through 43, in which an appointing authority argued that a Section 59B "principal's choice" authority for "terminating" employees divested the Commission of jurisdiction to hear a school employee's termination appeal and to order reinstatement and restoration of benefits under civil service law if the Commission found the termination was not supported by "just cause" under civil service law and rules. Neither of the parties had directed the Commission to such authority. Thus, the Commission had not been presented with any reason to modify the conclusion reached in Almeida IV that, absent clear judicial guidance, the Commission is obliged to apply the "2n+1" rule to civil service positions in the labor service within a municipal school department service in the same manner as it has been applied in all other labor service hiring decisions.

The scope of a principal's discretion under Section 59B is broad, but it is not "unfettered." See School Committee of Pittsfield v. United Educators of Pittsfield, 438 Mass. 753 (2003) ("involuntary transfers" properly within scope of CBA and not precluded by §59B); School Committee of Newton v. Newton School Custodians Ass'n, Local 454, SEIU, 438 Mass. 739 (2003) (CBA requirement that seniority be considered

as a factor in hiring decision did not improperly encroach on principal's §59B "selection" authority); School Committee of Hull v. Hull Teachers Ass'n, MTA/NEA, 69 Mass.App.Ct. 860, rev.den., 450 Mass. 1104 (2007) (arbitrator's award reinstating teacher did not contravene §59B); School Committee of Westport v. AFSCME, Council 93, Local 2667, 61 Mass.App.Ct 910 (2004) (§59B did not trump employee's CBA bumping rights)

In sum, while G.L.c.71, §59B gives a school principal "choice" in a hiring decision, when it comes to a candidate for a civil service labor service position within a municipal school department covered by G.L.c.31, e.g., an Assistant Cook, that choice must be one of the three most senior candidates, as required by the civil service "2n+1" rule. Thus, The appointment of Ms. Reis, a candidate outside the 2n+1 formula of qualified candidates ranked by seniority was not authorized by civil service law and has prejudiced Mr. Almeida's civil service rights through no fault of his own.

That said, there is no question that the NBSD appointed Ms. Reis believing that the practice that it had followed for nearly twenty years was not unlawful. Clearly, both the NBSD and Ms. Reis relied on this practice in good faith. Thus, it would be inequitable to vacate the appointment of Ms. Reis as the Appellant requests. Rather, adequate relief to Mr. Almeida can and should be fashioned without prejudice to her. Specifically, the relief to be granted will be limited to providing Mr. Almeida with the status commensurate with what he would have received had he been selected for the Carney School Assistant Cook position in November 2011, encouraging his future promotion to such a position as soon as practicable, and leaving intact the status of other NBSD employees. The Commission will expect, however, that future appointments will hew to the requirements of civil

service law, and subsequent failures may be cause to invoke the Commission's authority to vacate such unlawful appointment in the future.

Relief to Be Granted

Accordingly, for the reasons stated, pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993 it is hereby ORDERED, that the NBSD and HRD shall take such action as required to offer to place Mr. Almeida into the next available vacancy for Assistant Cook that arises in a NBSD facility and, upon his promotion to such a position he shall be granted a retroactive civil service seniority date in the position of November 15, 2011. Nothing in this decision shall be construed to entitle Mr. Almeida to any compensation or other benefits for service as Assistant Cook prior to his actual promotion to such position.

Civil Service Commission

Paul M. Stein
Commissioner

By the Civil Service Commission (Chairman Bowman; Commissioners Ittleman, McDowell, Marquis and Stein) on October 18, 2012.

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:

Jamie Kenney, Esq. [for Appellant]

Jane Medeiros Friedman, Esq. [for Respondent]