COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

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

ALEXANDER ALLEN
Appellant

v.

G2-10-286

CITY OF BOSTON,
Respondent

Appellant's Attorney:

Karen E. Clemens, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Respondent's Attorney:

Paul Curran, Esq.
City of Boston
Office of Labor Relations
City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION ON CITY OF BOSTON' MOTION TO DISMISS AND APPELLANT'S MOTION FOR SUMMARY DECISION

Overview

The Appellant in this case is a permanent civil service employee who works for the City of Boston (City). He is appealing his non-selection to the position of Principal Administrative Assistant, a title in the "official service", arguing that the City violated civil service law and rules when they provisionally *promoted* an individual who does not have civil service permanency. The City argues that the selection was made as a provisional *appointment*, which does not require the selection of a permanent civil service employee and, even if it was a promotion, the employee in question should be considered permanent

since the Civil Service Commission has previously recognized labor service employees hired by the City after 1998 as such in the context of disciplinary appeals. A larger question regarding this appeal is whether all labor service employees hired by the City since 1998 are considered permanent or provisional employees. Central to answering that question is whether the process used by the City to make labor service appointments over the past twenty plus years violated civil service law and rules.

Procedural History

The Appellant filed this appeal with the Commission on October 26, 2010. A pre-hearing conference was held at the offices of the Commission on November 16, 2010. The state's Human Resources Division provided information relevant to this appeal as part of the pre-hearing. The parties subsequently filed cross motions and a motion hearing was held on February 7, 2011 at which time I heard oral argument from both parties.

Applicable Law, Rules and Policies

Civil service jobs are divided into two categories, official service and labor service. The categories are based on the systems used to select job applicants.

Labor Service Appointments and Promotions

So called "labor service" positions are those jobs for which applicants do not have to take a competitive examination, and appointments are made on the basis of priority of registration. (See G.L. c. 31, §§ 1, 28-29 and Everett at footnote 4.)

G.L. c. 31, § 28, which pertains to labor service *appointments,* states in relevant part:

> " … the names of persons who apply for employment in the labor service … of the cities and towns shall be registered and placed, in the order of the dates on which they file their applications, on the registers for the titles for which they apply and qualify. The name of any such person shall remain on such register for not more than five years … The names of veterans who apply for employment in the labor service shall be placed …

ahead of the names of all other persons."

Section 19 of the Personnel Administration Rules (PAR.19), promulgated by HRD and approved by the Commission, contains the rules that apply to all labor service employees in cities and towns covered by the civil service law.[1]

PAR.19(2), which pertains to labor service *appointments*, states in relevant part:

> "When positions are to be filled on a permanent or temporary basis in the labor service, the appointing authority shall make requisition to the administrator [HRD] … [HRD] shall establish and maintain rosters for each departmental unit and by appropriate class containing the names, position titles and effective dates of employment of persons appointed to … labor service positions … in the service of a … municipality after certification from labor service registers …"

PAR.19(2) also states that "selection and original appointments shall be made as provided in PAR.09." PAR.09 contains the so-called "2n + 1" formula which states that appointing authorities may appoint only from among the first 2n+1 persons named in the "certification" willing to accept appointment, where the number of appointments is "n". Applied to appointments in the labor service, appointing authorities can only appoint from among the first 2n+1 [qualified] persons on the labor service register.

G.L. c. 31, § 29, which pertains to labor service *promotions*, states in relevant part:

> "An appointing authority shall, prior to any request to [HRD] for approval of a promotional appointment of a permanent employee in the labor service to a higher title in such service; or for approval of a change in employment of a permanent employee within such service from one position to a temporary or permanent position which is not higher but which has requirements for appointment which are substantially dissimilar to those of the position from which the change is being made, post a promotional bulletin. Such bulletin shall be posted for a period of at least five working days where it can be seen by all employees eligible for such promotional appointment or change in employment. Any such request shall

[1] PAR.20 contains rules for those cities and towns that have been "delegated" labor service functions by HRD. It appears that the City of Boston is the only civil service city or town in Massachusetts that has not been designated by HRD as a delegated community in regard to labor service functions.

> contain a statement that the posting requirements have been satisfied, indicating the date and location of the posting."

PAR.19(5) pertains to labor service promotions and states in relevant part that"

> "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 appointment under PAR.09, provided that such persons possess the required qualifications and serve in eligible titles, as determined by [HRD]. "

Official Service Appointments and Promotions[2]

Openings in the so-called "official service" are filled on the basis of a competitive examination process. (See G.L. c. 31, §§ 1,6 inserted by St.1978, c. 393, § 11 and City of Everett v. Teamsters, Local 380, 18 Mass.App.Ct. 137,463 (1984).

In most circumstances, "*provisional* appointments or promotions" are used to fill non-public safety official service positions in Massachusetts, as there have been no examinations for such positions in many years.

In a series of recent decisions, the Commission has addressed the statutory requirements when making such provisional *appointments* or *promotions*. (See Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); Glazer v. Department of Revenue, 21 MCSR 51 (2007); Asiaf v. Department of Conservation and Recreation, 21 MCSR 23 (2008); Pollock and Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Pease v. Department of Revenue, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Foster v. Department of Transitional Assistance, 23 MCSR 528; Heath v. Department of Transitional Assistance, 23 MCSR 548.)

[2] It does not appear that Section 30 of Chapter 31, "promotional appointments from labor service to official service", applies to the instant appeals.

In summary, these recent decisions provide the following framework when making provisional appointments and promotions:

- G.L.c.31, §15, concerning provisional ***promotions***, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains less than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and "sound and sufficient" reasons are submitted and approved by the administrator for making such an appointment.
- Under Section 15 of Chapter 31, only a "civil service employee" with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for "sound and sufficient reasons" to another higher title for which she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title
- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional "appointment" process as a subterfuge for selection of provisional employee

candidates who would not be eligible for provisional "promotion" over other equally qualified permanent employee candidates.

- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Chapter 282 of the Acts of 1998

As a result of a special act of the legislature, the vast majority of civil service employees in the City were granted permanency, regardless of how they were hired (i.e. – official service v. labor service; permanent v. provisional). The Acts of 1998 states:

> "Notwithstanding the provisions of any general or special law to the contrary, the personnel administrator [HRD] shall certify any active employee who served in a civil service position in the city of Boston as a provisional or provisional promotion employee for a period of at least six months immediately prior to January 1, 1998, to permanent civil service status in that position.

Role and Responsibilities of HRD

HRD has delegated labor service functions to all civil service cities and towns, *except the City of Boston*. Thus, HRD still maintains a roster for labor service positions in the City of Boston. HRD's website contains the following instructions for individuals seeking to be appointed to labor service positions in the City of Boston:

City of Boston Labor Service Position Application Process

Applicants file a Boston Labor Service application at the Human Resources Division (HRD), or download a copy from the HRD website (Boston Labor Service Application).

Applicants are assigned a Labor Service eligible number by HRD.

Applicants receive written notification of their assigned eligible number.

Applicants' names are placed on the labor service register in order of their labor service eligible number for five years from receipt of application in HRD. The applicant may request in-writing that their name remain on the list for an additional five years only.

The names of veterans appear at the top of the list in order of their eligible number.

Applicants may add job titles, for which they qualify, to their eligible number by letter.

Applicants are notified when their name is reached for certification.

Applicants must remember that it is very important to update their address in-writing when a change in address has taken place.

HRD's website also contains an "Application for City of Boston Labor Service" that must be completed by applicants. Page 2 of the application lists various labor service job titles divided into three categories: 1) Labor Class (which do not require experience); 2) Skilled Labor Class (which require 1 year of experience in related work in the past 10 years); and 3) Mechanic and Craftsman Class (which require 2 years of experience in related work in the past 10 years.

Facts of the instant appeal

1. Appellant Alexander Allen is employed by the City as a Motor Equipment Operator, a labor service title. It appears that he was first employed by the City in 1995.
2. While there may be a dispute regarding how and when he obtained permanency (i.e. – was he considered permanent when first hired as a labor service employees or did he only become permanent as a result of the 1998 Special Act), there is no dispute that the Appellant is a permanent civil service employee.
3. In 2010, the City posted a job opening for a Principal Administrative Assistant, an official service title.
4. There is no existing eligible list for the official service title of Principal Administrative Assistant, as HRD has not administered an examination for this position for decades.

5. The City argues that the job opening was filled as a provisional appointment. The Appellant argue that it was filled as a provisional promotion.
6. The City's "Notice of Selection" signed and dated October 21, 2010, states "SUBJECT: NOTICE OF SELECTION FOR PROVISIONAL PROMOTION". I find that the job openings were filled by the City as provisional promotions.
7. The Appellant applied for the posted Principal Administrative Assistant position.
8. 88 Applicants, including the Appellant, applied for the position. The City interviewed 6 candidates and evaluated each candidate on his/her responses to questions which focused on the applicant's ability to perform the job requirement.
9. The City provisionally promoted Lawrence Pennucci.
10. Mr. Pennucci was first hired by the City in 2002. He was a Heavy Equipment Operator, a labor service title, at the time of the promotion.
11. Mr. Pennucci was not selected from a labor service roster maintained by HRD when he was first hired. Rather, the City does not dispute that, as of the February 7, 2011 motion hearing, it had not asked HRD for a certification of candidates from the labor service roster in many years.
12. Rather, the City has apparently been using its own (non-civil service) process to hire individuals for labor service positions for many years.

Appellant's Argument

The Appellant argues that since Mr. Pennucci was not appointed to his labor service position from a labor service roster, and since he was hired after 1988, he is not a permanent civil service employee. Therefore, he can not be provisionally promoted to the official service position of Principal Administrative Assistant.

City's Argument

First, the City argues that the position was posted and filled as a provisional appointment, not a promotion. I have found differently. The positions was filled as a provisional promotion.

Second, the City argues that, even though the individual was not hired from a labor service roster, the Commission has previously treated other labor service employees in the City as permanent in the context of disciplinary appeals.[3] Thus, the City argues that Pennucci should be considered a permanent employee in the context of a provisional promotion.

In support of this second argument, the City cites 10 prior discipline appeals where the Commission "treated employees as permanent for purposes of Civil Service even though they were not made permanent through Chapter 282 of Acts of 1998."

I have reviewed all 10 of these appeals:

- 3 of them were withdrawn by the Appellants and 2 were dismissed based on the Appellants' failure to prosecute the appeal;

In regard to the remaining 5 appeals:

- In Hampton v. City of Boston, CSC Case No. D-05-430 (2006), the Commission dismissed the appeal for lack of jurisdiction based on the fact that Mr. Hampton was a provisional employee. (I sought, but never received, information from the City, regarding whether Mr. Hampton was employed as an official or labor service employee at the time of his discipline.)

- In Williams v. City Boston, CSC Case Nos. D-05-145 and D-05-272 (2007) (2 consolidated appeals), the Appellant was discharged by the City from his position as a "Laborer / Motor Equipment Operator". The appeal was heard by a magistrate at the Division of Administrative Law Appeals (DALA). Finding 2 of that decision states that the Appellant "received a permanent appointment to position of laborer / motor equipment operator [labor service titles] on August 31, 2001." Apparently, the broader

[3] This argument was included as part of other appeals heard the same day that address identical issues. (See Mejias and 3 Others v. City of Boston.)

issue, now before the Commission, of whether any labor service employee hired after 1998 can be considered permanent, was not addressed. Rather, the issue was not contested and the decision focused on whether there was just cause for the termination. (The magistrate, and the Commission found that there was just cause for the termination and denied the appeal.)

- In Crowley v. City of Boston, CSC Case Nos. D1-08-260 and D-09-192 (2011) (2 consolidated appeals), the Appellant was discharged by the City from his position as a "Parking Meter Operations Person" (a labor service title). As in Williams, it appears the issue of permanency was not contested and/or substantively addressed. Rather, the decision focused on whether there was just cause for the termination.

CONCLUSION

For many years, the City has failed to comply with civil service law and rules when hiring individuals for labor service positions. Instead of selecting individuals from a labor service roster maintained by HRD, the City has made such appointments through a non-civil service process. As a result, many of the individuals whose names appear on the rosters, including veterans who appear before all others, have not been considered for labor service positions in the City of Boston. Further, the civil service status of those who were hired into these titles (since 1988) through a non-civil service process is in question.

The issue is now before the Commission in the context of a provisional promotion made by the City to the official service position of Principal Administrative Assistant. The Appellant, who is a permanent civil service employees, argues that Mr. Pennucci, who appears to have been appointed to a labor service position through a non-civil service process after 1988, is *not* a permanent civil service employees, and, therefore, is not eligible for the provisional promotion.

The City tried (unsuccessfully) to argue that the issue of permanency is moot as the vacancy was filled via a provisional appointment (which do not require the selection of permanent civil service employees.) Since the vacancy was filled as a provisional

promotion, the issue is not moot. Thus, in the context of this appeal, the Commission must decide whether the individual selected, who was hired as a labor service employees since 1988, was eligible for the provisional promotion.

Further, the Commission must now address the far broader issues of: 1) Why the City failed to comply with civil service law and rules regarding labor service appointments since at least 1988; and 2) whether any individual appointed to a labor service position since 1988 should be considered permanent. A decision on the latter has implications far beyond the instant appeals and will impact potentially hundreds of other City employees.

While the City argues that all appointments and promotions are made through a merit-based review and selection process, it has offered no explanation as to why it failed to comply with civil service and rules for many years regarding labor service appointments. Further, it appears that the City has not been subject to an audit by HRD during this time period, despite the fact that the City apparently went years without requisitioning names from the various labor service rosters maintained by HRD.

The issue of whether Pennucci was eligible for the provisional promotion is inextricable from the broader issue regarding the status of all City employees hired into labor service titles since 1988.

For all of the above reasons, the Commission hereby orders the following:

1. The City shall comply, forthwith, will all civil service law and rules regarding labor service appointments.

2. Within 180 days, but no sooner than 90 days, HRD shall conduct an audit to determine whether the City is complying with all civil service law and rules regarding labor service appointments, including the requisitioning of names from those labor service rosters maintained by HRD. The findings, conclusions and any recommendations from that audit shall be submitted to the Commission in a timely manner.

3. Within 180 days, the City shall submit to the Commission a proposed remedy to address the civil service status of any City employee appointed to a labor service position since July 1, 1997. The City shall consult with HRD and representatives of any appropriate bargaining units prior to submitting said proposed remedy to the Commission.

4. Upon submission of the proposed remedy, the Commission will conduct a public hearing and review the proposal prior to issuing any final decision regarding the status of these individuals.

5. The Commission's review of all of the above-referenced orders will be conducted pursuant to G.L. c. 31, § 2(a) under Docket No. I-11-267.

6. The Appellant's appeal under Docket No. G2-10-286 is ***dismissed with an effective date of June 1, 2012***. In the event that that Mr. Pennucci is not deemed a permanent civil service employee prior to May 1, 2012, the Commission will accept and allow a Motion to Revoke this Dismissal seeking to reinstate the Appellant's appeal for further consideration. No additional filing fee will be required. In the absence of a Motion to Revoke, the dismissal of this appeal shall become final for purposes of G.L.c.31, §44, on June 1, 2012,

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on September 8, 2011.

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 as stated below.

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 from the effective date specified in 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:

Karen E. Clemens, Esq. (for Appellants)
Paul Curran, Esq. (for City of Boston)
John Marra, Esq. (HRD)
Martha O'Connor, Esq. (HRD)