Decision mailed: 12/17/10
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

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ANTONIO BRAZ
Appellant
v.
NEW BEDFORD SCHOOL DEPARTMENT
Respondent

CASE NO: D1-10-57

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Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Antonio Braz, appeals to the Civil Service Commission (Commission) from the decision of the City of New Bedford Public Schools Department (NBSC), Appointing Authority, to demote him from his position of Supervisor of Maintenance to the labor service position of Painter. NBSC moved to dismiss the appeal, asserting that the Appellant was provisionally appointed to the position of Supervisor of Maintenance and, therefore, the Commission lacks jurisdiction to entertain his appeal. The Appellant opposed these motions. By joint motion on September 14, 2010, the parties waived oral argument and the matter was submitted to the Commission for decision on the papers.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Antonio Braz, became a permanent labor service employee with the NBSC in October 1979. From June 3, 1980 until April 4, 1987, he held the permanent labor service title of Painter, at which time he was provisionally promoted to the official service position of School Building Maintenance Foreman, the position he held until April 13, 2009, when he was returned to his permanent labor service position as Painter. (*NBSC Motion, Exh. A, Attach. 1; Appellant's Opposition; NBSC Reply, Exh. B*)

2. When Mr. Braz was provisionally promoted, there was no eligible list for the position. The NBSC duly requested that the Massachusetts Human Resources Division (HRD) conduct an open competitive departmental examination for the position but no such examination was ever held. (*NBSC Rely, Exhibit B)*

3. Prior to 2008, Mr. Braz was recognized for his satisfactory work performance. NBSC does not contend that his work was deficient or that he was disciplined for any reason during this time. (*NBSC Motion, Exh. A, Attch. 9; Appellant's Opposition, Aff't of Antonio Braz, Exhs. A & C*)

4. In March 2008, Mr. Braz was issued a 10-day suspension and, prior to returning to work from this discipline, he suffered a disabling illness that kept him out of work through March 2009. During his medical absence, Mr. Braz continued to receive pay for sick leave and administrative leave at the Supervisor of Maintenance pay rate. (*NBSC Motion, Exh. A, Attchs. 2 thru 6; Appellant's Opposition, Aff't of Antonio Braz, Exh. B*)

5. On April 13, 2009, Mr. Braz was notified that he was cleared to return to work, effective April 14, 2009, and was being returned to his permanent position of Painter. (*NBSC Motion, Exh.A, Attch. 7*)

6. Mr. Braz appealed this decision and, on May 9, 2009, NBSC conducted what it characterized as an "informal hearing" before NBSC Superintendent of Schools Dr. Portia Bonner and others. (*NBSC Motion, Exh.A, Attch. 8)*

7. Due to pending budgetary issues that had arisen in the meantime, which affected the staffing of the Maintenance Department, a decision of the appeal was held in abeyance until March 2010. By letter dated March 11, 2010 to Mr. Braz from Superintendent Bonner, Mr. Braz was advised that NBSC had finalized a consolidation of positions in the Maintenance Department that combined the Supervisor of Maintenance and Supervisor of Custodians positions into a single position of Facilities Manager, to which another person was appointed, and found the decision to return Mr. Braz to his permanent position of Painter was justified. Superintendent Bonner's letter stated:

> "It is important to note this decision does not reflect negatively upon your performance as Supervisor of Maintenance and there is nothing in your employment record to suggest that the decision to return you to your permanent title is based on your work performance. This action was based on a combination of your absence (for which you were not at fault) and budgetary considerations."

(*NBSC Motion, Exh.A, Attchs. 8 & 9*)

8. On March 18, 2010, Mr. Braz filed the present appeal with the Commission. (*NBSC Motion, Exh. A, Attch 10; Claim of Appeal*)

CONCLUSION

Summary of Conclusion

The Commission has consistently rejected the notion that a person provisionally appointed or promoted to a civil service position is entitled to bring a "just cause" appeal to the Commission under G.L.c.31,§41, the only exception to this rule being the discharge from employment of a provisional employee who holds permanency in another civil service position. In that case, the employee may be entitled to appeal the just cause for his or her termination and, if successful, may be granted relief that restores the employee to that permanent title. Except in that one circumstance, Section 41 provides that a provisional employee who is laid off, demoted, transferred or otherwise disciplined may be entitled to a "name clearing" hearing before his or her appointing authority, which is expressly not appealable to the Commission. Thus, in this case, despite the equities of the Appellant's situation Mr. Braz is victim to the "plight of the provisional" – he has served the NBSC with distinction for more than twenty years, but whether the NBSC's decision to demote him from his provisional position of Supervisor of Maintenance to his former permanent position of Painter was due to alleged attendance issues, budget constraints or a combination of those two reasons, he has no recourse to challenge that decision by appeal to the Commission.

Legal Standards

A party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, e.g., here, "viewing the evidence in the light most favorable to the non-moving party", the moving party

presented substantial and credible evidence that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and that the non-moving party has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

Specifically, a motion to dismiss must be allowed unless the Appellant raises "above the speculative level" sufficient facts "plausibly suggesting" that the alleged layoff was erroneous and that the error was due to a mistaken interpretation of civil service law and rules and not through any "fault of his own." See generally Iannacchino v. Ford Motor Co., 51 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss. cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

The Commission's Jurisdiction Over Provisional Employee Appeals

The Commission's jurisdiction to hear appeals from disciplinary actions is defined by G.L.c.31, §43, which authorizes an appeal for de novo hearing before the Commission to determine whether or not there was the "just cause" for an appointing authority's actions taken under G.L.c.31,§41. Section 41 provides, in relevant part:

> Except for just cause . . . *a tenured employee* shall not be discharged, removed, suspended for a period of more than five days, laid off . . . lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. . . . [T] the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor.
>
> *A civil service employee* may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. . . . [T]the person authorized to impose the

> suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority . . . [T]he appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing. . . .
>
> *If a person employed under a provisional appointment for not less than nine months is discharged as a result of allegations relative to his personal character or work performance and if the reason for such discharge is to become part of his employment record, he shall be entitled . . . to an informal hearing before his appointing authority* or a designee thereof within ten days of such request. If the appointing authority, after hearing, finds that the discharge was justified, the discharge shall be affirmed, and the appointing authority may direct that the reasons for such discharge become part of such person's employment record. Otherwise, the appointing authority shall reverse such discharge, and the allegations against such person shall be stricken from such record. *The decision of the appointing authority shall be final*, and notification thereof shall be made in writing to such person and other parties concerned within ten days following such hearing.[1]
>
> *If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first or second paragraphs [above], such person may appeal to the commission as provided in section forty-three.*

Id. (*emphasis added*)

The definition of a "tenured employee" is "a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2) a promotional appointment on a permanent basis. A "civil service employee" is a person holding a civil service "appointment", which, in turn is defined as a "original appointment or a promotional appointment" made pursuant to the provisions of civil service law and rules", i.e. through selection from an official service certification after passing the required civil service examination, or from a duly constituted roster of eligible labor service applicants. A "civil service employee" is different from a

[1] The informal hearing granted to a provisional employee is sometimes referred to as a "name-clearing" hearing, which is distinctly different from the "just cause" hearing to which a tenured employee is entitled, and which is expressly not appealable to the Commission. G.L.c.31, §41,¶3. There is some question whether this "name clearing" hearing applies to other types of actions as well, such as a demotion. See Smith v. Comm'r of Mental Retardation., 409 Mass. 545, (1991).

"provisional employee" who is appointed without having passed an examination. G.L.c.31, §§1, 6-8, 12-15, 25-30.

These statutes have been consistently construed to limit the Commission's jurisdiction to appeals contesting the "just cause" for discipline of permanent civil service employees only; persons employed in a provisional status have never been allowed the right of appeal to the Commission. See, e.g., LeFrancois v. Department of Revenue, CSC No. D-09-415, 23 MCSR --- (2010) ("The Commission was not, and is not, aware of any precedent in which a provisional civil service employee had ever been permitted to pursue a 'just cause' appeal to the Commission from discipline of any kind, and neither the Appellant, DOR or HRD have brought any such case to the Commission's attention"); Maloof v. Town of Randolph, 21 MCSR 217 (2008) ("It is well established that the Commission does not have jurisdiction to hear an appeal filed by an employee pursuant to G.L.c.31,§§42 or 43 when the employee was never a permanent or tenured employee . . . the Appellant was a provisional civil service employee at all times"). See also Sullivan v. Comm'r of Commerce & Devel., 351 Mass. 462 (1966) (provisional employee has "no tenure, no right of notice or hearing, no restriction of the power of discharge"); Knox v. Civil Service Comm'n, 63 Mass.App.Ct. 904 (2005) (Commission lacked jurisdiction to hear appeal of provisionally appointed employee, reclassified to management job group, and later discharged); Cordio v. Civil Service Comm'n, 59 Mass.App.Ct. 1110 (2003) (unpublished) (discharged employee had no right of appeal to the Commission due to his provisional status).

Similarly, the Commission consistently declined jurisdiction over appeals seeking to challenge the "just cause" for a demotion from a provisional position back to the civil

service title in which they held permanency. See Donahue v. Town of Weymouth, 20 MCSR 424 (2007) (demoted appellant was provisionally appointed to his former position and as provisional employee had no right to appeal his removal from that position); Ralph v. Town of Webster, 19 MCSR 10 (2006) (Commission lacked jurisdiction to hear discharge and demotion appeal from non-civil service position of Deputy Police Chief when appellant's leave of absence in former civil service position of Police Sergeant had expired at the time of his discharge) See also Cox v. Civil Service Comm'n, 3 Mass.App.Ct. 793 (1975) (Section 43 appeal by employee demoted from temporary position dismissed for lack of jurisdiction); Dallas v. Comm'r of Public Health, 1 Mass.App.Ct. 768 (1974) (tenured civil service employee provisionally promoted and later removed without hearing and returned to tenured position had no cognizable appeal under civil service law)

Even when an employee and/or appointing authority erroneously believed a provisionally appointed employee held a tenured position and/or treated them as if they had the rights of permanent employees to appeal, the Commission has never deemed those facts a sufficient basis to vest the Commission with jurisdiction over such cases on grounds of equity or waiver. See Pearson v. Brockton, 22 MSCR 375 (2009) (rejecting argument that because the appellant was granted a local level hearing, they "gave the impression that the proper forum to challenge the discharge was Civil Service"); Maloof v. Town of Randolph, 21 MCSR 217 (2008) (appellant treated as civil service employee for 33 years); Connelly v. Dep't of Soc. Svcs., 20 MCSR 366 (2007) (dismissed appeal of former permanent Social Worker III provisionally promoted to Program Manager, although DSS had notified appellant of her purported statutory right of appeal to the

Commission, because "Appellant's status is provisional and he is therefore not entitled to a hearing before the Commission"); Rose v. Executive Office of HHS, 20 MCSR 266 (2007) (lack of jurisdiction over terminated appellant whom appointing authority treated as a tenured employee during her 28 years of service) See also Torres v. Fall River School Dep't, 21 MSCR 613 (2008) (appellant lost his tenured civil service status when he resigned his labor service position and took a provisional appointment, despite appointing authority's representations to the contrary, he could not claim Section 39 "bumping rights" in a layoff from the provisional position he then held).

The Exception Provided By McDowell v. Springfield

On February 11, 2010, the Commission issued an interim decision in McDowell v. City of Springfield, CSC Case No. D-05-148; 23 MCSR 124 (2010) [*McDowell I*], in which the Commission took jurisdiction to hear a "just cause" appeal from the discharge of a provisionally appointed employee who alleged that: (1) he was tenured in another civil service position and (2) the discharge caused a "loss of any rights attributable to" the tenured position. The Commission subsequently decided that Mr. McDowell's discharge was not supported by "just cause", that the termination had unlawfully deprived him of his tenured civil service status in his permanent position, and that he was entitled to relief to restore him to that tenured position. McDowell v. City of Springfield, 23 MCSR 243 (2010) [*McDowell II*] (*Administrative Notice*)

The McDowell appeal involved facts that are close to those presented in this present appeal. A former labor service employee of the City of Springfield (with permanency in his labor service title) was subsequently promoted to an official service position. As a condition of the promotion, the City required him to execute a document waiving all of

his civil service rights. After serving in the new position for a number of years, McDowell was accused of fraud and fired. He appealed to the Commission, claiming that his termination was without "just cause". The City defended on the merits and on lack of jurisdiction. After a full evidentiary hearing of the appeal had been completed, the Commission determined that the employee's waiver of his civil service rights was an unenforceable contract that violated civil service law and public policy and did not oust the Commission of jurisdiction. The Commission, however, still questioned whether it could exercise jurisdiction to hear the appeal since McDowell was, at best, a tenured labor service employee with provisional status in the official service position from which he was terminated. See *McDowell I* & *II*

In *McDowell I*, the Commission was presented with a narrow question: whether or not, in the unique circumstances of that case, did G.L.c.31, Sections 41-43 allow Mr. McDowell to appeal his *discharge* (as opposed to demotion or other discipline) from a provisionally appointed position, because the *discharge* concurrently extinguished his civil service permanency in the former position as well, which tenure it was posited could not be forfeited without "just cause".

The Commission's conclusion in *McDowell I* carved out a narrow exception to the prevailing rule that provisional employees could not bring a Section 41 "just cause" appeal to the Commission. In *McDowell I*, former Commissioner Taylor reasoned:

> "[A] provisional employee such as the Appellant, who held a tenured position in the labor or official service, and who, while in such tenured position, is provisionally appointed to another official service position, does have the right of appeal to the Commission to contest the just cause for his discharge under Section 41. The Commission concludes that, although an Appointing Authority may remove an employee "from" his provisional position or discipline him without just cause, unless the Appointing Authority acts *with* just cause, the employee [may not be discharged but] is entitled to be restored to the tenured [former] position. . . ."

> "Thus, any provisional employee who can claim tenured status in a previously held civil service position may appeal to the Commission from a discharge or removal "from" that tenured position. If the Appointing Authority established just cause for the termination, the Appointing Authority's actions will be sustained and the appeal dismissed. If, however, the discharge was made without just cause, the Commission will deem the Appellant's civil service rights in the tenured position to have been affected through no fault of his own, and will allow the appeal and order the Appellant restored to his tenured position pursuant to the Commission's authority under Chapter 310 of the Acts of 1993."

Id. (*emphasis* in original)

In construing G.L.c.31, Section 41 to allow previously tenured, provisional employees who are *discharged* without "just cause" to bring Section 41 appeals and to seek the limited relief of reinstatement to their former tenured positions, the Commission expressly distinguished that singular exception to the general rule from all *other* provisional employee *discipline, short of discharge*, as to which the right of appeal under Section 41 did *not* extend:

> The right of a provisional employee to bring a just cause appeal relating to a discharge or removal from his position and seek reinstatement to his prior tenured position must be distinguished from an appeal by a provisional employee concerning discipline other than discharge or removal. The public policy that leads the Commission to permit a provisional employee to protect the tenured status he has earned from loss through no fault of his own, does not apply if the discipline is limited solely to his status in the provisional position, but does not purport to deprive the employee of his right to tenured status in the former position. Thus, for example, an employee who is suspended from a provisional position for one-day would not have a right of appeal to the Commission under Section 41, because he has not suffered the loss of any rights attributable to the tenured position."

In sum, the *McDowell I* exception to the general rule that the Commission lacks jurisdiction over disciplinary cases involving provisional employees did not change the pre-existing interpretation of Section 41 as applied to the facts of the present case, i.e., Mr. Braz's demotion from his provisional position to the position in which he formerly held tenure entitles him to a "name-clearing" hearing before the appointing authority, but

has no further recourse of appeal to the Commission. See, e.g., LeFrancois v. Department of Revenue, CSC No. D-09-415, 23 MCSR --- (2010)

The Commission is not blind to the equity of the Appellant's arguments. It has been long established that "[p]rovisional appointments or appointments through noncompetitive examinations are permitted only in what are supposed to be exceptional instances. . ." City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, as this case illustrates, the passage of decades without the personnel administrator holding competitive examinations for many civil service titles, and the professed lack of funding to do so any time in the near future, has meant that advancement of most civil service employees can be accomplished solely through the problematic means of provisional promotions under Section 15. Thus, as predicted, the exception has now swallowed the rule and "a promotion which is provisional in form may be permanent in fact." Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995) [2]

As much as the Commission regrets this state of affairs, and has repeatedly exhorted parties in the public arena to end the current practice of relying on provisional promotions (and appointments) to fill most civil service positions, the Commission must honor the clear legislative intent that allows for provisional appointments and promotions so long as the statutory requirements are followed. If there is a flaw in the statutory procedure, it is

[2] The Commission acknowledges that the General Court did appropriate some funds in the FY09 budget for the "Continuing Testing" program, and this line item (1750-0111) was zeroed out as part of the subsequent "9C" cuts required by the expected budget shortfall. No budget cuts are without consequences. The Commission remains concerned that so long as the Legislature declines to fund programs for civil service testing the "provisional" employee problem persists, it will continue to frustrate career advancement and engender disputes within the ranks of public employees such as presented in this appeal, and the conundrum will become more difficult to resolve every year that funding for the civil service system is sacrificed to other choices.

a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. at 389, 657 N.E.2d at 234. Meanwhile, public employees whose provisional status leaves them with fewer opportunities under the civil service law than their peers with permanency will be left to enforcement of their rights through other means, as members of the collective bargaining units to which they may belong, or through legislative and judicial remedies, which the Commission does not control.

In sum, for the reasons stated above, the NBSC's motion to dismiss for lack of subject matter jurisdiction is granted and the appeal of the Appellant, Antonio Braz is hereby ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on December 16, 2010.

A True Record. Attest:

Commissioner

Commissioner McDowell was absent on December 16, 2010.

Either party may file a motion for reconsideration within ten days of the receipt of the 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:
Richard E. Burke, Jr., Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Appointing Authority)