

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

RAYMOND BRIENZO,
Appellant

v.

TOWN OF ACUSHNET¹,
Respondent

Docket No. G-01-464

DECISION ON RESPONDENT’S MOTION TO DISMISS

Pursuant to G.L. c. 31, § 2(b), the Appellant, Raymond Brienzo (hereinafter “Appellant”), filed this appeal on April 2, 2001 with the Civil Service Commission (hereinafter “Commission”) claiming that an action taken by the Respondent, Town of Acushnet (hereinafter “Town”) as Appointing Authority, on March 26, 2001 bypassed him for promotion to the position of full-time Working Foreman in the Town’s Department of Public Works (hereinafter “DPW”). The position of Working Foreman is a Labor Service position in accordance with Civil Service laws. The appeal was timely filed. A Pre-Hearing Conference was held at the Commission on July 5, 2001. On October 16, 2001, the Town and the Human Resources Division (hereinafter “HRD”) jointly filed a Motion to Dismiss the appeal. Precedent to a Full Hearing scheduled in this matter for July 12, 2002, the parties jointly filed a Pre-Hearing Memorandum, including a Stipulation of Facts, on July 5, 2002. The Appellant filed an Opposition to

¹ The Board of Public Works for the Town of Acushnet serves as the actual Appointing Authority. The Board is incorporated by reference herein as the Town.

the Town's Motion to Dismiss on July 8, 2002. After several attempts by the parties to settle this appeal and after several continuances, the Commission issued an Order to the parties on April 27, 2007 to forge a settlement agreement or prepare for Full Hearing. In the responses to this Order, it was pointed out by the Town's Counsel that the Motion to Dismiss and the Opposition to that motion were still awaiting a ruling by the Commission. The Commission takes this opportunity to consider the Motion and issue this decision.

Factual Background

The Appellant was employed by the Town as a Special Heavy Equipment Operator and his appointment date as a full-time employee was January 1988. Paul Fortin was also employed by the Town as a Special Heavy Equipment Operator with an appointment date as a full-time employee of March 1989. In accordance with G.L. c. 31, § 29, the Town posted a Promotion Notice bulletin on March 5, 2001 for the appointment of a full-time Working Foreman in the DPW. Two persons applied for the promotion by signing the bulletin, the Appellant and Mr. Fortin. On March 26, 2001, the Town appointed Mr. Fortin to the position of full-time Working Foreman, pursuant to § 29. The Appellant filed this appeal with the Commission on April 2, 2001 claiming a violation of G.L. c. 31 in that he should have been appointed to the position as he was more senior in service to Mr. Fortin. The Town and the HRD filed a Motion to Dismiss the appeal in accordance with 801 CMR 1.01 7 (g) (3) asserting that the Commission lacks jurisdiction to decide the appeal. The Appellant subsequently filed a Motion in Opposition to the Motion to Dismiss the appeal.

Respondent's Grounds for Dismissal

The Town and the HRD maintain that Civil Service laws do not provide a mechanism for the Appellant to appeal his non-selection for promotion to the position of Working Foreman, a labor service position.

The procedures an Appointing Authority must employ when making promotional appointments in labor service positions are set forth in G.L. c. 31, § 29 and Personnel Administration Rule ("PAR") 19(5). Under § 29, the position must be posted prior to an appointment being made. PAR 19(5) requires that the Appointing Authority may make an appointment only from among the first $2n + 1$ persons with the greatest length of service that possess the required qualifications and serve in eligible titles when the number of promotional appointments actually to be made is n . PAR 19(5) further provides that, if there is less than the requisite number of persons, the Appointing Authority may select from the lesser number. It is not disputed that only the Appellant and Mr. Fortin signed the bulletin as willing to accept the position and both met the position's minimum qualifications.

The Respondent and the HRD also assert that the procedure for making promotional appointments in labor service positions differs substantially from the procedure for making the same kinds of promotions in the official service, in accordance with the provisions of G.L. c. 31, § 27. Under c. 31, the Personnel Administrator ("PA") establishes "eligible lists" of persons eligible for appointment to positions in the official service. G.L. c. 31, § 1. Once an eligible list is established, the PA issues a

“certification” containing sufficient names from an eligible list for consideration of the applicants’ qualifications for appointment. Id. In accordance with § 27, an Appointing Authority must select from a certification when making a promotional appointment and provide a written statement to the PA submitting reasons for appointing the person whose name was not highest on the certification, if the person whose name is highest is willing to accept such appointment.

Unlike § 27, however, § 29 does not require the employer to provide written reasons for selecting an applicant whose name is not the highest. Rather, the employer is only required to show that the selected candidate was selected from within the $2n + 1$ formula and that the selected candidate was qualified for the position, both of which are undisputed in this matter. The Respondent and the HRD further contend that, because the employer is not required to provide reasons for non-selection in this case, there is nothing for the PA to approve or disapprove. As a result of the PA not exercising discretion or not taking part in the process, the Commission has no jurisdiction for a bypass appeal because G.L. c. 31, § 2(b), governing the power of the Commission to hear and decide appeals, requires an action, failure to act or a decision of the PA that violates c. 31, the PAR’s or basic merit principles, none of which are present here.

Conclusion

PAR 19(5)(a) states:

“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, provided that such persons possess

the required qualifications and serve in eligible titles, as determined by the administrator. If there are less than the requisite number of persons, selection may be made from the lesser number.”

It is clear that the statute allows the Appointing Authority to make promotional selections “from among the same number of persons with the greatest length of service as the number specified in making appointments under PAR .09 (2n + 1).” There exists no requirement or provision by which an Appointing Authority must select the *most* senior of that number of persons. Here, seniority is only employed in order to create the pool of candidates from among whom selection may be made. The Appointing Authority is not required to provide written reasons for a selection. Rather, the Town, in this instance, needed only to have reported the promotional appointment to the PA or local labor service director, certifying that the promotion was made in accordance with the Civil Service laws and PAR’s.

We find that the Town met the Civil Service requirements when it promoted Mr. Fortin to the labor service position of Working Foreman. The Town posted a promotional bulletin, collected signatures of interested candidates, selected Mr. Fortin from between two qualified applicants and reported the promotional appointment to the PA, all in accordance with PAR 19(5) and c. 31, § 29. This was all the Town was required to do in order to make this promotional appointment. The Commission knows of no other instances where it has heard and decided an appeal of a person claiming to be aggrieved by a labor service promotional process.

The Appellant has failed to state a claim upon which a remedy can be given and the Commission, therefore, lacks jurisdiction to hear and decide this appeal. For all of the reasons stated herein, the Commission allows the Respondent's Motion to Dismiss and the appeal on Docket No. G-01-464 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By a 4-1 vote of the Civil Service Commission (Bowman, Chairman; Taylor, Guerin and Marquis, Commissioners) [Henderson, Commissioner voting nay] on August 23, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with GL c. 30A, s. 14(1) for the purpose of tolling the time for appeal.

Pursuant to GL c. 31, s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under GL c. 30A, s. 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:
Raymond Brienzo
Mr. Anthony Pini
Darren Klein, Esq.

