

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place, Room 503

Boston, MA 02108

(617) 727-2293

SUSAN CASCINO,

Appellant

Docket No.: D1-14-275

v.

CITY OF BOSTON,

Respondent

Appearance for Appellant:

Joseph G. Donnellan, Esq.
100 River Ridge Drive, Suite 203
Norwood, MA 02062

Appearance for Respondent:

Maribeth A. Cusick, Esq.
Chief of Government Services
City of Boston Law Department
Boston City Hall, Room 615
Boston, MA 02210

Commissioner:

Cynthia A. Ittleman

RULING ON MOTION FOR SUMMARY DISPOSITION

Pursuant to G.L. c. 31, §§ 42 and 43, the Appellant, Susan Cascino (“Ms. Cascino” or “Appellant”), filed a timely appeal with the Civil Service Commission (“Commission”) on November 24, 2014, contesting the decision of the City of Boston (“City” or “Respondent”) to terminate her employment from the position of Director of Recycling at the Public Works Department (“PWD”). A pre-hearing conference was held at the offices of the Commission on December 9, 2014. The Appellant filed a Motion for Summary Disposition (“Motion”) pursuant to 801 CMR 1.01(7)(h)¹ on January 13, 2015. The Respondent filed an Opposition to the Motion (“Opposition”) on February 12, 2015.

¹ The Rules therein refer to this as a “Motion for Summary Decision”.

A hearing on the Motion was held at the Commission on February 19, 2015.² Neither party requested a public hearing, so the hearing was deemed private. The hearing was digitally recorded and the parties were provided with a CD of the hearing³.

I asked the Respondent to produce documentation in addition to that provided previously in the case. The Respondent produced the documentation on or about February 27, 2015. I also asked the state's Human Resources Division ("HRD") to provide any documents it may have regarding the Appellant's civil service status, which documents it provided to the Commission and the parties on February 23 and 26, 2015. On March 9, 2015, the Appellant filed a Supplemental Memorandum in Support of Her Motion ("Appellant's Supplemental Memo") addressing documents produced after the hearing on the Motion. For the reasons stated herein, the Motion is granted and the appeal is allowed.

FINDING OF FACTS

Based on Motion, Opposition, Appellant's Supplemental Memo, the documents produced by the parties and HRD, the stipulations of the parties, the arguments made at the hearing on the Motion, and taking administrative notice of all matters filed in the case and pertinent statutes, caselaw, regulations and policies, and reasonable inferences from the evidence, I make the following findings of fact:

² 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.

³ 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.

1. The position title of “Director of Recycling” is not contained in the state’s Human Resources Division (“HRD”) Munciclass Manual – A Municipal Classification Plan for Massachusetts (1974), nor is it in the 1998 list of municipal titles.⁴ (Administrative Notice)⁵
2. However, by Executive Order, the then-City Mayor ordered, “That the City of Boston Management Development and Compensation Plan effective January 1, 1974, be and hereby is amended to provide for creation of the title: Director of Recycling Programs (PWD) MM-08 effective March 28, 1995.” (Administrative Notice – documents produced by the City)
3. On August 24, 1995, Ms. Cascino applied for the position of Director of Recycling in the Boston Public Works Department. (Administrative Notice – documents produced by the City; Appellant’s Supplemental Memorandum in Support of Motion for Summary Disposition (“Appellant’s Supplemental Memo”) – Attachment)
4. A Commonwealth of Massachusetts Form 30 Position Description dated March 13, 1995 refers to the job title as “Recycling Coordinator (Director of Recycling – PWD)”. (Administrative Notice – documents produced by the City) The Form 30 provides a General Statement of Duties and Responsibilities as follows,

The Director of Recycling assumes a wide range of duties including administration of the Recycling Program (budget development and spending

⁴ Among the documents this Commissioner requested was the City’s Classification and Compensation Plan. The City produced Plan information, *inter alia*, but Ms. Cascino’s name does not appear on it. However, the City explained that the Plan can be amended when job titles are created by the personnel review committee and mayoral orders. In view of the size and fluctuations in the City workforce, there is no one comprehensive list of job titles. (Administrative Notice - March 2, 2015 email)

⁵ The 1998 list of municipal civil service titles includes a variety of Director titles, such as Director of Accounts, Director of Audits, Direct of Central Supply, Director of Civil Defense, Director of Parks and Recreation and Director of School Lunches.

tracking, some contract administration, personnel paperwork etc.); coordinates operations with other Public Works senior managers; and maintains working relationships with city and State agencies and environmental groups. The Director is also responsible for ensuring timely and accurate reporting of Boston's recycling results, as well as for maintaining a current working knowledge of developments in the recycling industry.

The Director of Recycling works directly with the Commissioner of Public Works negotiating contracts for recycling.

The Director represents the Commissioner regarding Labor Relations issue within this unit.

The Director of Recycling supervises the Central Recycling Program staff and coordinates operations with the superintendent of Sanitation and the Superintendent of Highway Maintenance, regarding the citywide, multi-material "blue box" curbside recycling collection program. Also directs the operations of the seasonal leaf and yard water collection for composting, as well as several drop-off recycling centers.

Manages the Recycling Program staff which coordinates its activities with the Public Works Department Sanitary Division (which supervised contractors which perform curbside collection) and the Highway Division (which provides manpower and equipment for compost site operations and drop-off centers).

The Director of Recycling reports directly to the Commission of Public Works and from time to time will assist the Mayor's Office and the cabinet-level Chief of Environmental Services with policy-related matters.

Required to work any emergency as directed by the Commissioner of Public Works.

(Id.)

The job Qualifications and Entrance Requirements are as follows,

At least five (5) years full-time work experience in recycling and solid water operations with progressive responsibility for supervision of staff and contractors. Demonstrated ability to manage budget and financial analysis utilizing spreadsheets such as Lotus 1-2 or Microsoft Excel. Strong written and verbal communication skills are also essential. A preferred candidate will have worked in a municipal government setting or in a job which provided extensive involvement with municipal government.

(Id.)⁶

5. In a City of Boston Personnel Action Report dated August 25, 1995, Mr. Joseph

Casazza, then Commissioner of the Boston Public Works Department, indicated

⁶ The text at the bottom of the first page of the Form 30 is partially visible. The part that is visible appears to state, "This form must be submitted to Personnel Civil Service for every new position title in your jurisdiction and for any". (Id.)

- that Ms. Cascino was being appointed to the position of Director of Recycling in the Central Office, Recycling unit, with a provisional appointment in the official service on a full-time basis effective September 20, 1995. In the box on this form marked “bargaining unit,” the word “exempt” was entered. (Administrative Notice – documents produced by the City)
6. On September 6, 1995, Mr. Casazza completed and signed an HRD (then known as the Division of Personnel Administration) form requesting an examination (an Open Examination) and appointment of Ms. Cascino provisionally to the position of Director of Recycling in the Central Office of the Boston Public Works Department effective September 20, 1995.⁷ On the same date, Mr. Casazza also completed and signed a Requisition to HRD seeking to provisionally appoint Ms. Cascino to the position of Director of Recycling and indicating that the “previous incumbent”, Mr. Richard Innes, resigned March 17, 1995.⁸ (Administrative Notice – documents produced by the City)
7. On September 12, 1995, the City posted notice, pursuant to a collective bargaining agreement regarding selection of Ms. Cascino for a “provisional promotion” to the position of Director of Recycling, grade MM (middle manager)-8, referring to the Director of Recycling as a “Temporary Position

⁷ A different version of the Requisition form appears to indicate that the Director of Recycling position was a permanent position. (Administrative Notice – documents produced by the City at the request of the Commission) However, in the context of the form referring to the position predecessor and since the appointment of Ms. Cascino is otherwise repeatedly referred to as a provisional appointment, I find that this single reference to a “permanent” position does not change Ms. Cascino’s status at her initial appointment as a provisional employee.

⁸ Although this suggests that Ms. Cascino was not the first employee to hold the title of Director, there is no indication of Mr. Innes’ exact title and his civil service status, if any.

- (Permanent after Certification from Civil Service List)”.⁹ (Administrative Notice – documents produced at prehearing conference)
8. Effective October 2, 1996, the City approved a salary step increase for Ms. Cascino, indicating that her title was “Director of Recycling (Provisional)”. (Appellant’s Supplemental Memo – Attachment; Administrative Notice – documents produced by the City)
9. Although Ms. Cascino’s title is Director of Recycling, it is undisputed that she is not the head of a department. (Motion; Opposition)
10. Prior to being the City Director of Recycling at the Department of Public Works, Ms. Cascino was the Grant Program Manager of the Massachusetts Department of Environmental Protection, Division of Solid Waste Management, where she began working in 1988. Prior to that, Ms. Cascino worked at various state agencies. She has a Master’s Degree in Business Administration. (Administrative Notice – documents produced by the City)
11. On August 10, 1998, while Ms. Cascino was serving as the provisional Director of Recycling, Chapter 282 of the Acts of 1998 was enacted. This statute provides in full,

Notwithstanding the provisions of any general or special law to the contrary, the personnel administrator 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.

(Administrative Notice – document produced by HRD in response to this Commissioner’s request)

⁹ While this appears to contradict evidence that Ms. Cascino was provisionally appointed to the position of Director of Recycling, all other information adduced here confirms that she was provisionally appointed. This document appears to indicate that Ms. Cascino’s salary was being increased.

12. A print-out from HRD's "Individual Municipal Employment History Record" pertaining to Ms. Cascino indicates that on September 9, 1998, Ms. Cascino's civil service status changed from provisional to permanent civil service employee. (Motion – Attachment; Administrative Notice – document produced by HRD)

13. By letter dated October 17, 2000, HRD wrote to Mr. Thomas Francis, Assistant Supervisor of the City's Office of Human Resources, stating, in full,

The attached is an update of the status of the implementation of Chapter 282 of the Acts and Resolves of 1998. The aforementioned legislation granted permanent civil service status to employees of the City of Boston who provisionally occupied positions for the six-month period preceding January 1, 1998. Attached is a report alphabetic by department, which lists employees whose employment records reflect permanent civil service status, effective September 9, 1998, pursuant to Chapter 282.

Some employees' records indicate that seniority date of an earlier permanent appointment in the seniority field rather than the effective date of September 9, 1998.

There are still approximately three hundred positions in the Department of Parks and Recreation and the Department of Public Works that remain to be entered. Our next update will reflect these additions.

(Administrative Notice – documents provided by HRD)

Ms. Cascino's name appears on the attachment to this letter, stating that her status was permanent under Chapter 282 effective September 9, 1998. (Id.)

14. By letter to Ms. Cascino dated November 14, 2014, the City informed her as follows,

Dear Ms. Cascino:

This letter confirms our discussion today that your employment as the Director of Recycling in the Department of Public Works is terminated effective immediately.

I am also enclosing information provided by the Commonwealth of Massachusetts on how to apply for unemployment insurance benefits. You will also receive information about COBRA benefit continuation coverage in the mail.

Sincerely,

(signature)

Michael Dennehy

Interim Commissioner of Public Works
Enclosed: M.G.L. c. 31, §§ 41 to 45; MA unemployment pamphlet
(Stipulation; Motion; Administrative Notice)¹⁰

15. On November 24, 2014, the Appellant filed the instant appeal. (Administrative Notice)

16. By letter to Ms. Cascino from HRD dated December 17, 2014, HRD wrote, in pertinent part,

In response to your written request concerning your employment in the City of Boston, this letter is to confirm that you received civil service status as a Permanent full time Director of Recycling in the Public Works Department effective September 9, 1998, in accordance with Chapter 282. As a permanent civil service employee, you may wish to review M.G.L. Chapter 31, section (sic) 41-45.
((Appellant's Motion – Attachment))

17. As of February 27, 2015, the position of Director of Recycling has not been posted, filled or eliminated. (Administrative Notice – Affidavit of Vivian Leonard, Director, City's Office of Human Resources)

DISCUSSION

Legal Standard for Motion for Summary Decision

Pursuant to the Standard Adjudicatory Rules of Practice and Procedure, adopted by the Commission in 1999, at 801 CMR 1.01(7)(h),

When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. ...
(801 CMR 1.01(7)(h))

¹⁰ Whether or not this letter included the noted enclosures, they are not attached to the copy of this letter provided with Ms. Cascino's appeal form at the Commission. Nonetheless, it is undisputed that Ms. Cascino was terminated and that the City did not afford her notice of a hearing and a hearing prior to her termination.

Applicable Civil Service Law

“Basic merit principles” is a tenet of civil service law. It is defined in G.L. c. 31, s. 1, in part, as,

... (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.”

(Id.)

G.L. c. 31, section 1 also defines a permanent employee as a “person who is employed in a civil service position (1) following an original appointment, subject to the serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment (Id.) It defines a tenured employee as 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” (Id.) By contrast, a provisional employee is “a person who is employed in a civil service position, pursuant to sections twelve, thirteen and fourteen.” (Id.) Under sections 12 – 14, an appointing authority may make a provisional appointment pending the establishment of an eligible list, requests an examination and “a substantiation that the person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties.” (G.L. c. 31, § 13) If these provisions are satisfied, the administrator “ ... may authorize a provisional appointment” (G.L. c. 31, s. 14) Section 14 also provides that “no

provisional employment in a position shall be authorized, approved, or continued for more than thirty days following a certification from an eligible list” (Id.)

Pursuant to G.L. c. 31, § 48, “Offices and positions in the service of cities and towns shall be subject to the civil service law and rules as provided by sections fifty-one, fifty-two, and fifty-three.” Sections 51 – 53 authorize cities and towns to vote on the applicability of civil service law and rules with regard to certain municipal positions. Section 48 also exempts certain municipal positions from civil service. Specifically, it provides, in pertinent part,

The following shall be exempt from the civil service law and rules, unless expressly made subject thereto by statute:

City and town managers and assistant city or town managers, and administrative assistants, secretaries, stenographers, clerks, telephone operators and messengers connected with the offices of city councils, town councils, mayors, city managers, town managers and selectmen. ...

... heads of municipal departments. ...

Such other officers and employees as are by law exempt from the civil service law and rules.”

(Id.)

G.L. c. 31, § 41 provides certain protections to tenured civil service employees who are disciplined, for example, by suspension, or when their employment is terminated. It provides, in pertinent part,

Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, 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. The appointing authority shall provide such employee a written notice of the time and place of such hearing at least three days prior to the holding thereof, ... If such hearing is

conducted by a hearing officer, his findings shall be reported forthwith to the appointing authority for action. Within seven days after the filing of the report of the hearing officer, or within two days after the completion of the hearing if the appointing authority presided, the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor. ...

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 of this section, such person may appeal to the commission as provided in section forty-three. ...

(Id.)

Section 42 of G.L. c. 31 provides a remedy when an appointing authority does not meet the terms of section 41, stating, in pertinent part,

Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements. If the commission finds that the appointing authority has failed to follow said requirements and that the rights of said person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights.

A person who files a complaint under this section may at the same time request a hearing as to whether there was just cause for the action of the appointing authority in the same manner as if he were a person aggrieved by a decision of an appointing authority made pursuant to all the requirements of section forty-one.

...

(Id.)

Where a tenured civil service employee files an appeal at the Commission, section 43 of chapter 31 of the General Laws states, in pertinent part,

... 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.... (Id.)

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, 268 N.E.2d 346 (1971); Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 11 923, *rev.den.*, 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, 684 N.E.2d 620, *rev.den.*, 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514, 451 N.E.2d 408 (1983)

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, 133 N.E.2d 489 (1956).

"The 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. Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, *rev.den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

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, 857 N.E.2d 1053, 1059 (2006) and cases cited. The role of the Commission is to determine “whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, *rev.den.*, 426 Mass. 1102, 687 N.E.2d 642 (1997). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, 792 N.E.2d 711, *rev.den.*, 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, *rev.den.*, 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass.App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, *rev.den.*, 390 Mass. 1102, 453 N.E.2d 1231 (1983).

Parties’ Arguments

In its Opposition to the Motion and argument at the hearing on the Motion, the City avers that the Appellant’s civil service status was achieved through means “antithetical” to civil service law since she was not hired based on the merit principles of civil service law but was hired without testing or other merit process and, therefore, it would be wrong to afford her the procedural protections of civil service law.

Specifically, while Chapter 282 of the Acts of 1998 was appropriately applied to some City employees making them permanent employees, the City now states that it was wrong to apply it to employees like the Appellant who had “significant supervisory, budget and policy making authority.” (Opposition) Having granted permanency to those hired prior to 1998, also gives the beneficiaries of Chapter 282 an unfair advantage over provisionals hired since then. Further, the City asserts that although the Appellant, as Director of Recycling, is not exempt from civil service pursuant to G.L. c. 31, § 48, the Appellant’s “policy-making position”¹¹ as Director of Recycling is not covered by civil service law. In addition, even if the Director of Recycling was a position in the 1974 Munclass Manual, the City argues that the job was changed over the following decades and now requires a “sophisticated leader who can manage the cross-departmental currents involved with an environmentally critical, logistically-complicated, fundamental City service. This is not the type of policy position that would lend itself to a civil service exam, even it (sic) exams were still given.” (Opposition) Moreover, the City argues that “[d]espite the noble purposes of civil service, the reality is that non-public safety official service civil service is completely broken. This situation certainly begs for a legislative solution.” (Id.) Finally, the City avers that a subsequent administration should not be “hamstrung” by the inappropriate actions of a previous administration. (Id.)

In her Motion, the Appellant’s Supplemental Memo and argument at the hearing on the Motion, the Appellant asserts that she is a tenured civil service employee under St. 1998, Chapter 282. It was the City who asked the Legislature to enact a law to provide permanent civil service status to provisional City employees and evidence adduced by the

¹¹ The City offers no legal authority in support of its contention that “policy-making” positions are exempt from civil service.

parties and HRD indicate that HRD applied the statute to certain provisional employees. Therefore, the Appellant states that she is entitled to all of the due process and protections of a permanent, tenured civil service employee under civil service law. The City has stipulated that Ms. Cascino is a permanent civil service employee and that, notwithstanding her permanent civil service status, the City did not provide a hearing prior to discharging her. Further, the Appellant argues that basic merit principles, as defined in G.L. c. 31, § 1, require the City to retain employees on the basis of adequacy of their performance, “assuring fair treatment of all employees without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap or religion”. By failing to provide the Appellant with notice of a hearing and a hearing prior to her discharge, the City violated basic merit principles, the provisions of G.L. c. 31, §§ 41 – 44 and deprived her of constitutional due process. Regarding the possible exemption of the Appellant’s job from civil service under G.L. c. 31, § 48, the Appellant states that the statute exempts certain job titles from civil service, such as a head of department, but does not specifically exempt the Director of Recycling. Further, the Appellant states that section 48 allows for inclusion in civil service even for those it exempts if they are “made subject thereto by statute.” (Opposition) Therefore, even if the Appellant’s job title was exempt under section 48, St. 1998, Chapter 282 renders her covered by civil service law. Further, although section 48 exempts department heads, it does not affect the Appellant because she was not a department head. Rather, there is no Recycling Department in the City and, in fact, her job was within the City’s Department of Public Works. In addition, the Appellant continually performed the same duties throughout her tenure and has not been promoted out of civil service. As a result of the City’s actions, the Appellant avers

that the Commission should order Ms. Cascino's immediate reinstatement to her position without loss of rights or privileges and with full back pay.

Analysis

A preponderance of the evidence establishes that there is no genuine issue of material fact precluding a ruling in Ms. Cascino's favor. The parties stipulated that Ms. Cascino was a permanent, tenured¹² civil service employee as a result of St. 1998, Chapter 282, that she was not a department head exempt from civil service under G.L. c. 31, § 48, that the City did not abolish her position and that her employment was terminated pursuant to a November 14, 2014 letter stating that she was "terminated effective immediately" without notice of a hearing and a hearing pursuant to G.L. c. 31, §§ 41-43. Under these circumstances, the City was required to afford Ms. Cascino civil service protections pursuant to sections 41-43. The City failed to do so. It did not afford Ms. Cascino with Notice of a hearing or a hearing or establish just cause for termination of Ms. Cascino's employment. For this reason, the law requires that she be reinstated without loss of rights or privileges and compensation.

Ms. Cascino was first appointed to the position of Director of Recycling in 1995 as a provisional employee. She was made a permanent, tenured civil service employee effective in 1998 pursuant to St. 1998, chapter 282 supported by the City. HRD wrote to the City in 2000 to indicate that Ms. Cascino, among others, was granted permanent, tenured status in HRD's records based Chapter 282. Relying on its own records, HRD confirmed Ms. Cascino's permanent civil service status in a 2014 letter, shortly after her employment was terminated.

¹² The Motion and Opposition indicate that the effect of St. 1998, Chapter 282, was to render the Appellant a permanent, tenured civil service employee.

The title of Director of Recycling is not exempt from civil service under G.L. c. 31, § 48 as a department head since she is not a department head but an employee of the central office of the City Public works Department. The City argues that Ms. Cascino is exempt from civil service because of her policy making, management and budgetary responsibilities. There is no provision in section 48 exempting a job with those articulated responsibilities, although it may be that those are often the responsibilities of department heads, who are specifically exempt under the statute. However, again, the parties agree that Ms. Cascino is not a department head. Therefore, Ms. Cascino's position is not exempt from civil service laws. Further, there is no evidence that Ms. Cascino was reclassified or promoted out of the title Director of Recycling into a department head position, which arguably could have indicated that her functions had changed or evolved into those of a regular policy-making position.¹³

The City states that this case shows that the civil service system relating to non-public safety employment is broken and in need of Legislative redress. As the Commission has found repeatedly, the vast majority of non-public safety civil service positions in the official service have been filled provisionally for more than twenty years because there have been no examinations given from which to establish eligible lists to certify names of candidates who may be considered for appointment and appointed permanently. The Commission's repeated reminders of the shortcomings of this situation notwithstanding, provisional appointments remain the way that most official service jobs are filled. As long as the statutory requirements are followed in this regard, the

¹³ As noted above, documents produced by the City indicate that when Ms. Cascino was appointed provisionally, she was designated "exempt" not for civil service purposes but for purposes relating to a bargaining unit delegation, which would reflect a confidential employee, not a managerial position exempt from civil service.

Commission must follow the legislative intent to permit appointing authorities to make provisional appointments. “If there is a flaw here, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. 382, 389 (1995).” Green v. City of Brockton, 28 MCSR 39 (2015)(see cases cited therein regarding provisional appointments). In this case, the Legislature addressed the plight of the provisionals in Boston via Chapter 282 in 1998, making certain provisional employees, including Ms. Cascino, permanent, tenured civil service employees. After Chapter 282 was enacted, HRD followed up with the City by sending a letter in 2000 that specifically indicates that Ms. Cascino was one of the City employees who was granted permanency under Chapter 282. This, the City asserts, unfairly ties the hands of subsequent administrations by making permanent employees whom it alleges did not achieve their status based on merit. However, by the same token, employees who are not department heads or who are otherwise exempted from civil service are protected from dismissal not based on their performance, which is also a basic tenet of civil service law.

Conclusion

For all of the above reasons, Ms. Cascino’s Motion under Docket No. D1-14-275 is hereby ***granted*** such that the appeal is ***allowed*** and Ms. Cascino shall be reinstated without loss of rights, privileges or compensation retroactive to November 14, 2014.

Civil Service Commission

/s/ *Cynthia A. Ittleman*

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on April 30, 2015.

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:

Joseph G. Donnellan, Esq. (for Appellant)
Maribeth A. Cusick, Esq. (for Appointing Authority)
John Marra, General Counsel (HRD)