

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

ROY CHALLENGER,
Appellant

v.

BOSTON PUBLIC SCHOOLS,
Respondent

Docket Number: D1-24-072

Appearance for Appellant: *Pro Se*
Roy Challenger

Appearance for Respondent: Bader Abu-Eid, Esq.
Office of Labor Relations
Boston Public Schools
2300 Washington Street
Boston, MA 02119

Commissioner: Christopher C. Bowman

SUMMARY OF DECISION

The Commission dismissed the appeal of a senior custodian who was terminated as he never attained civil service permanency in any custodian position (junior or senior), thus divesting the Commission of jurisdiction regarding this termination.

DECISION ON RESPONDENT’S MOTION TO DISMISS

On May 23, 2024, the Appellant, Roy Challenger (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Public Schools (BPS) to terminate him from his position as a junior custodian. On July 16, 2024, I held a remote pre-

hearing conference which was attended by the Appellant and counsel for the BPS. On October 30, 2024, the BPS filed a motion to dismiss, and the Appellant did not file a reply.

UNDISPUTED FACTS

Based on the information submitted and the statements made at the pre-hearing, the following is not disputed, unless otherwise noted:

1. The state's Human Resources Division (HRD) last offered the custodian exams (junior and senior) in 2003 and the eligible lists created from those 2003 examinations were revoked in or around 2007.
2. On or around October 22, 2008, the BPS appointed the Appellant as a junior custodian.
3. Since there was no eligible list in place for junior custodian after 2007, the Appellant could not have been appointed as a *permanent* junior custodian in 2008. Rather, any appointment to junior custodian in 2008 would have been limited to a *provisional* appointment.
4. On or around January 19, 2016, the Appellant was appointed as a senior custodian. Again, since no civil service eligible list for senior custodian was in place at the time, the Appellant's appointment to this position would have been limited to a provisional appointment.
5. On May 1, 2024, the BPS terminated the Appellant's employment.

RULE REGARDING DISMISSAL FOR LACK OF JURISDICTION

The Presiding Officer may at any time, on his or her own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted, or because of the pendency of a prior, related action in any tribunal that should first be decided. 801 CMR 1.01 (7)(g)(3).

RELEVANT CIVIL SERVICE LAW

Section 41 of Chapter 31 states in relevant 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 ... 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 ...

ANALYSIS

The Appellant did not take an examination prior to be appointed as a junior custodian by the BPS in 2008, as the last examination for custodian (junior or senior) was administered by HRD in 2003 and the resulting eligible list was revoked in 2007. Therefore, the only way in which the Appellant could have been appointed to junior and then senior custodian is through the "provisional" appointment process, meaning that he was a provisional employee at the time she was laid off.

The third paragraph of G.L. c. 31, § 41 provides the following limited protections to provisional employees, such as the Appellant, who have been employed for at least nine months in the provisional position and are discharged for reasons related to their personal character or performance:

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, upon his request in writing, to an informal hearing before his appointing authority. 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.

Provisional employees do not enjoy the same protections that tenured civil service employees enjoy, including the right to appeal a termination decision to the Commission (see Rose v. Executive Officer of Health and Human Services, 21 MCSR 23 (2008) (provisional employee had no right to appeal her termination to the Commission even though she had been treated as a tenured civil service employee throughout her almost 30 year career); see also Hampton v. Boston, Case No. D-05-430 (2006) (provisional employee had no right to appeal his 3-month suspension to the Commission)).

The limited protections afforded to provisional employees under the civil service law have also been confirmed by numerous court decisions. See Dallas v. Commissioner of Public Health & others, 1 Mass. App. Ct. 768, 771 (1974), referring to Sullivan v. Commissioner of Commerce and Dev., 351 Mass. 462, 465 (1966) (in the case of provisional employees, there is "no tenure, no right of hearing, no restriction of the power to discharge"). See also Raffery v. Comm'r of Pub. Welfare, 20 Mass. App. Ct. 718, 482 (1985) (provisional employee has right to an informal hearing by the Appointing Authority, but no further right to appeal to the Civil Service Commission).

Based on a plain reading of the statute and the above-referenced Commission and court decisions, the Commission does not have jurisdiction to hear this appeal. Absent intervention by the legislature, in the form of funding to create and begin re-administering examinations for the custodian series, in addition to a global remedy regarding those custodians currently serving in a provisional capacity, the outcome here will continue to apply to all similarly situated individuals.

CONCLUSION

The BPS's motion to dismiss is allowed and the Appellant's appeal under Docket Number D1-24-072 is hereby *dismissed*.

CIVIL SERVICE COMMISSION

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney and Stein) on January 9, 2025.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Roy Challenger (Appellant)
Bader Abu-Eid, Esq. (for Respondent)