

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

John DelFavero,
Appellant

v.

Department of Correction,
Respondent

Case No.: D1-11-353

Appellant's Attorney:

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Respondent's Attorney:

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Commissioners:

Cynthia A. Ittelman
Paul M. Stein

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

This matter comes before the Civil Service Commission ("Commission") on the Motion to Dismiss Due to Appellant's Lack of Status ("Motion to Dismiss") filed by the Appointing Authority, Department of Correction ("DOC"), on or about January 17, 2012 at the pre-hearing conference held that date. On or about January 16, 2012, Mr. John DelFavero ("Appellant") filed a pre-hearing memorandum with a brief statement in opposition to the Motion to Dismiss as he had not yet received a copy of the Motion to Dismiss. On February 7, 2012, the Appellant filed a formal opposition ("Opposition") to the Motion to Dismiss. A hearing was held on the

Motion to Dismiss on March 26, 2012 and DOC filed The Department's Response to Appellant's Opposition to Department's Motion to Dismiss Due to Lack of Status ("DOC's Response"). On March 28, 2012, DOC filed Department's Production of Supplemental Documentation ("Supplemental Documentation").

Based on the hearing on the Motion to Dismiss and taking administrative notice of all matters filed in this case, we find the following to be established by a preponderance of the evidence:

The Appellant's Employment and Discharge

1. The Appellant, John DeFavero, began civil service employment in the Massachusetts state official service as a Sewage Treatment Plant Operator II at DOC, a state agency, on January 20, 2002. (*Claim of Appeal; DOC Motion to Dismiss; DOC Supplemental Documentation*)

2. A civil service eligible list did not exist prior to Mr. DeFavero's hire and he was not hired from a certification. (*Notice of Hire appended to Motion to Dismiss*)

3. On or about September 19, 2011, DOC held a hearing to determine whether Mr. DeFavero was medically fit for duty and, if not, to consider his separation of service from DOC. (*Claim of Appeal [DOC December 3, 2011 letter]*)

4. A letter from DOC Commissioner Spencer to the Appellant, dated December 3, 2011, states that the September 19, 2011 hearing was held pursuant to section 41 of the civil service statute (G.L. c. 31). (*Claim of Appeal [DOC December 3, 2011 letter]*)

5. By letter dated December 20 letter, DOC advised Mr. DeFavero's attorney that the reference to the September 19, 2011 hearing as a hearing pursuant to G.L. c. 31, § 41 was, "not appropriate" because, " ... the statute refers to the rights and responsibilities of employees who hold a permanent civil service position and does not apply to [the Appellant's] circumstance." (*December 20, 2011 letter from DOC to Appellant's Attorney filed with the Commission*)

6. In the December 3, 2011 letter from DOC to Mr. DeFavero, DOC stated that, based on the September 19, 2011 DOC hearing, Mr. DeFavero had not reported to work since on or about March 31, 2011, the hearing was held to determine if Mr. DeFavero was medically fit as required and, if not, to consider his separation of service. (*Claim of Appeal [DOC December 3, 2011 letter]*)

7. The December 3, 2011 letter from DOC to Mr. DeFavero also said that, “After reviewing the hearing officer’s report and the evidence submitted, I find that you are medically unfit to perform the essential functions of a Sewage Treatment Plant Operator II with or without a reasonable accommodation and that you are unable to comply with Rule 17(a) of the Rules and Regulations Governing All Employees of the Massachusetts Department of Correction” (*Claim of Appeal [DOC December 3, 2011 letter]*)

8. On December 13, 2011, Mr. DeFavero filed an appeal with the Commission from his termination of employment as a Sewage Treatment Plant Operator II at the DOC pursuant to G.L. c. 31, §§ 42 and 43. (*Claim of Appeal*)

The ConTest Program

9. The Massachusetts Human Resources Division (“HRD”), at the request of the 1997 Special Legislative Commission to study civil service reform and with funding provided by the Legislature in the FY 98 budget, “... developed the Continuous Testing (ConTest) Program in order to provide a method for individuals to become qualified on a daily basis for entry level non-public safety civil service positions in the municipal and state services.” (*Claim of Appeal; Appellant’s Opposition to Motion to Dismiss; Administrative Notice [HRD Memorandum to State Agencies and City and Town Clerks, August 19, 2008]*).

10. The initial ConTest program applied to eight municipal job titles including the job title, “Treatment Plant Operator (Municipal Service)”, also referred to as “Treatment Plant Operator (Municipal Service)” including the positions of Water Distribution System Operator, Water Treatment Plant Operator and Wastewater Treatment Plant Operator”, covering Grades 1 - 7. HRD subsequently added other position titles to the ConTest program before the program ceased operation not later than fiscal year 2009 owing to budget constraints. (*Claim of Appeal; Appellant’s Opposition to Motion to Dismiss; Administrative Notice [HRD Memorandum to State Agencies and City and Town Clerks, August 19, 2008]*).

11. The job title “Treatment Plant Operator”, has a title code “5409J,” which is a municipal title. (*DOC Response to Appellant’s Opposition [January 19, 2012 electronic mail message from HRD]*)

12. At no time did HRD include the state titles of Sewage Treatment Plant Operator I, II or III in the ConTest Program. (*Administrative Notice [HRD Memorandum to State Agencies and City and Town Clerks, August 19, 2008]; Claim of Appeal; DOC Motion to Dismiss; Appellant’s Opposition to DOC Motion; January 19, 2012 electronic mail message from HRD*)

13. HRD does not have record of John DelFavero being appointed via ConTest. HRD is unable to find any record of Mr. DelFavero receiving a civil service appointment. (*January 18, 2012 electronic mail message from HRD; DOC Motion to Dismiss*)

14. A document entitled, “Massachusetts Department of Personnel Administration Classification Specification; Sewage Treatment Plant Operator Series,” revised June, 1987, indicates that the office of Personnel Administrator (now HRD) created a separate official service Classification Specification for employees of state agencies in the job series entitled “Sewage Treatment Plant Operator Series, which included the state official service job titles of

Sewage Treatment Plant Operator I, II and III. These distinct job titles for state employees were not included in the ConTest Program. (*Claim of Appeal; DOC Motion to Dismiss; Appellant's Opposition to DOC Motion; January 19, 2012 electronic mail message from HRD; DOC's Supplemental Documentation*)

CONCLUSION

The Commission may, on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3). *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007) and *Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36, (2008) (standard for deciding a motion to dismiss requires complainant to plead factual allegations “plausibly suggesting” that, if true, are sufficient to raise a right to relief above the “speculative level”).

Under civil service law, G.L.c.31, §41-§43, only tenured civil service employees with “permanency” in a civil service position, but not “provisional” employees who have never held any tenured civil service position, have the right of appeal to the Commission from an alleged improper layoff or termination action of an appointing authority. As stated in *Dallas v. Commissioner of Public Health*, 1 Mass.App.Ct. 768, 771 (1974):

“While [G.L.c.31] s 43(a) confers tenure on certain public employees and imposes notice and hearing requirements. . .that section applies only to the removal of a ‘person holding office or employment under permanent appointment. . .from such office or employment without his consent. . . .’ [T]he petitioner’s appointment . . . was only a provisional one, defined by G.L.c.31 s1 . . . as ‘an appointment authorized on a requisition where there is no suitable eligible list.’ *In the case of a provisional employee, there is ‘no tenure, no right of notice or hearing, no restriction of the power to discharge’*” citing *Sullivan v. Commissioner of Commerce & Development*, 351 Mass. 462, 465, 221 N.E.2d 761 (1966)(*emphasis added*)

See, e.g., *Andrews v. Civil Service Comm’n*, 446 Mass. 611, 618-19 (2006) (employee provisionally promoted from tenured position is “in” the provisional position for purposes layoff

under G.L.c.31,§39 and has no bumping rights or appeal rights to the Commission); Smith v. Commissioner of Mental Retardation, 409 Mass. 545, 567 N.E.2d 924 (1991) (provisional employee has no right to a Section 41 appointing authority hearing to contest a demotion); Knox v. Civil Service Comm’n, 63 Mass.App.Ct. 904 (2005) (Commission lacked jurisdiction to hear appeal of provisionally appointed employee, reclassified to a management job group, and later discharged); Cordio v. Civil Service Comm’n, 59 Mass.App.Ct. 1110 (2003) (unpublished) (discharged provisional employee had no right of appeal to Commission despite claim that he “should have” been made a permanent employee); McCarthy v. Civil Service Comm’n, 32 Mass.App.Ct. 166, 172n.11 (1992) (citing PAR.15(1) which “regulate the civil service system, G.L.c.31, §3 and have the force of law.”); LeFrancois v. Department of Revenue, 23 MCSR 217 (2010) (“The Commission . . . is not aware of any precedent in which a provisional civil service employee has ever been permitted to pursue a ‘just cause’ appeal to the Commission”) (*emphasis in original*); 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 . . . a provisional civil service employee. . . .”)

Based on the undisputed facts, Mr. DeFavero was an employee of the DOC, a state agency, holding the official service position of Sewage Treatment Plant Operator II, which he held as a provisional employee, without tenure. Thus, he is not eligible for the protections afforded permanent civil service employees under G.L. c.31. Mr. DeFavero’s job title appears in civil service records for the state but he was not hired from a certification after taking and passing a complete civil service exam.

Mr. DeFavero does not dispute these essential facts, but asserts that he was erroneously denied permanency to which he was entitled under the ConTest Program. This argument does not carry the day for him.

Mr. DeFavero correctly points out that the ConTest program developed by HRD was designed to provide a path to permanency for certain groups of employees (before it was discontinued for lack of funding) and did enable certain individuals to become appointed as permanent civil service employees, as opposed to provisional employees, absent the traditional written examination process. The ConTest program, however, applied only to a narrowly designated group of state and municipal civil service job titles, as defined by HRD. Employees in the municipal title of Treatment Plant Operator in the MuniClass series (Job Code 5409J) were included in the ConTest Program, but employees of state agencies holding the job title of Sewage Treatment Plant Operator (I, II or III) were not. The explicit limitation in the ConTest program list to municipal Sewage Treatment Plant Operators clearly was not an error or an oversight. HRD's Classification Specifications, and the ConTest Program documentation, made clear distinctions between the Municipal and State job titles of Treatment Plant Operator (Municipal Service) and employees of state agencies under the job titles of Sewage Treatment Plant Operator I, II and III. The Commission cannot find any reason to question HRD's conscious choices in the design of the (now defunct) ConTest Program. Therefore, Mr. DeFavero did not hold an appointment as a permanent civil service employee and, therefore, the Commission lacks jurisdiction to hear this appeal.¹

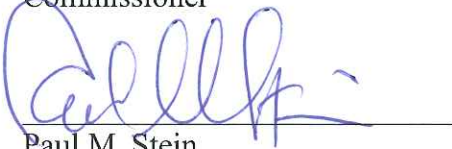
¹ Mr. DeFavero's appeal asserted numerous reasons that he believed DOC had violated his employment rights, including claims suggesting disability discrimination, misrepresentation, and violation of the whistleblower laws. These matters, however, do not fall within the jurisdiction of the Commission. His remedy, if any, would lie in another forum.

Accordingly, for the reasons stated above, the appeal of the Appellant, John DeFavero, is hereby dismissed.

Civil Service Commission



Cynthia A. Ittleman
Commissioner



Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis and Stein, Commissioners on May 3, 2012.

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:

Thomas F. Mixon, Esq. (for Appellant)
Heidi Handler, Esq. (for Respondent)
John Marra, Esq. (HRD)