

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

THOMAS DELMONICO
Appellant

CASE NO: G2-11-221

v.

CITY OF QUINCY
Respondent

Appellant's Representatives:

Salvatore Romano
Joseph McArdle
Massachusetts Laborers' District Council
7 Laborers Way
Hopkinton, MA 01748

Attorney for the Respondent:

Deirdre Jacobs Hall, Esq.
City of Quincy Solicitor's Office
1305 Hancock Street
Quincy, MA 02169

Commissioner:

Paul M. Stein¹

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, Thomas Delmonico, acting pursuant to G.L. c. 31, § 2 (b), filed this appeal with the Civil Service Commission ("Commission") to contest his non-selection for the position of Foreman in the Cemetery Department of the City of Quincy (Quincy). On September 19, 2011, Quincy filed a Motion for Summary Decision on the grounds that the Appellant lacked standing to appeal, which the Appellant opposed. The Commission heard oral argument from the parties on September 22, 2011. The Commission received post-hearing submissions from the Appellant on September 30, 2011 and October 26, 2011 and from Quincy on October 13, 2011.

¹ The Commission acknowledges the assistance of Law Clerk ThyThy Le in the drafting of this decision.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, oral argument and the inferences reasonably drawn from the evidence, the following material facts are not undisputed:

1. The Appellant, Thomas Delmonico, holds the permanent labor service title of Working Foreman Special MEO in the Quincy Highway Department, with a civil service seniority date of June 22, 1992. (*Exhibit "A"*)

2. On or about April 1, 2011, Quincy posted a "Notice of Available Position" for the official service job of Foreman in the Quincy Cemetery Department. (*Exhibit "A" [Exhs 1 through 4]*)

3. The Quincy Cemetery Department is a separate "departmental unit" within the meaning of G.L.c.31, §§1 & 15, having been established as a distinct department within the Branch of Public Service and under the jurisdiction of the Park and Recreation Board (PRB) by statute (Chapter 78 of the Acts of 1961) and Chapter 2, Article II, Section 13 of the Revised Ordinances of the City of Quincy, as amended by Order No. 304 of the Quincy City Council on September 20, 1982. (*Exhibit "A" [Exh. 7]*)

4. The Quincy Highway Department is a separate "departmental unit" within the meaning of G.L.c.31, §§1 & 15, having been established as a distinct department within the Branch of Public Works by Chapter 2, Article II, Section 13 of the Revised Ordinances of the City of Quincy, as amended by Order No. 304 of the Quincy City Council on November 1, 1982, and Order No. 161 of the Quincy City Council on June 3, 1991. (*Exhibit "A" [Exh. 8]; Quincy's Post-Hearing Submission [Exh.22]*)

5. Local 1139 of the Massachusetts Laborers' District Council of the Laborers' International Union of North America ("Union") is the bargaining agent for the employees of the Cemetery and Highway Departments, among other Quincy departments. (*Exhibits "C" & D"*)

6. Fourteen (14) members of Local 1149, including the Appellant, signed the job bulletin to be considered as a candidate for the position of Cemetery Department Foreman. Of these applicants, four (4) employees worked in the Cemetery Department:

<u>Name</u>	<u>Seniority Date</u>
Fernando Patricio	4/28/86
Jason D'Angelo	4/3/06
Charles Jaehnig	9/17/07
Patrick McNamara	4/28/08

(Exhibit "A" [Exhs. 1 through 4])

7. Kristin Powers, Quincy's Executive Director of the Park, Forestry and Cemetery Departments, selected candidate Jason D'Angelo for provisional promotion to the position. Mr. D'Angelo held a permanent labor service position in the Cemetery Department. He had previously served as a Cemetery Department Foreman on a temporary basis. *(Exhibit "A")*

8. The parties disputed whether Quincy had a consistent past practice of promotion from within the same departmental or not. Quincy provided documentation of 19 instances in which promotions to the position of Foreman or General Foreman were made from within the same department. The Appellant offered six examples of purported exceptions, but five of these examples related to promotions within the labor service rather than the official service. On one occasion in 2004, Quincy does appear to have promoted Lawrence Lavasseur from a labor service position in the Parks Department to a Foreman's position in the Highway Department. *(Appellant's Post-Hearing Letter; Quincy's Post-Hearing Submission)*

9. The Appellant submitted a copy of a May 13, 2011 AAA Arbitration Award in the matter of "Massachusetts Laborers District Council and. City of Quincy", Case No. 11 390 2194 10, in which the Grievant, Paul Damore, a Foreman in the Highway Department targeted for layoff in a reduction in force, was permitted to bump a less senior Foreman in the Cemetery Department,

pursuant to the terms of Article XXXVIII of the applicable collective bargaining agreement. The provisions Article XXXVIII – Reduction in Force, stated:

Any reduction in force shall be made consistent with civil service law and regulations, M.G.L.Ch.31. In the event of a reduction in force, seniority throughout the bargaining unit will prevail with the affected individual having the ability to bump less senior employees within his/her classification and in lower classifications”

(Exhs. “C” and “D”)

10. The Appellant filed this appeal with the Commission on July 11, 2011. (*Claim of Appeal*)

CONCLUSION

Applicable Legal Standard

A motion for summary decision on any appeal before the Commission, in whole or in part, may be granted pursuant to 801 C.M.R. 1.01(7)(h) if, “viewing the evidence in the light most favorable to the non-moving party”, the non-moving party has “no reasonable expectation” of prevailing on each “essential element of the case” and the moving party is entitled to prevail as a matter of law. To survive a motion for summary decision, the non-moving party must offer “specific facts” that establish “a reasonable hope” to prevail after an evidentiary hearing. Conclusory statements, general denials, and factual allegation not based on personal knowledge or other competent evidence are insufficient to establish any triable issues. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005) The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing. See Catlin v. Board of Registration of Architects, 414 Mass. 1, 7 (1992); Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 782-83 (1980)

Relevant Civil Service Law

The statutes relevant to this appeal include G.L.c.31,§1 and G.L.c.31,§15. Section 15 provide for provisional promotions in the official service.² That statute states, in relevant part:

An appointing authority [i.e. Quincy] may . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible listNo provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission . . . of sound and sufficient reasons therefore. . . .If the administrator has approved the holding of a competitive promotional examination . . . he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.”

G.L.c.31, §15 (*emphasis added*)

“Departmental unit” is defined in Section 1 as “a board, commission, department, or any division, institutional component, or other component of a department *established by law, ordinance, or by-law.*” (*emphasis added*)

Applying these principles to the facts of this appeal, Mr. Delmonico is not aggrieved by the promotion of Mr. D’Angelo to the position of Cemetery Department Foreman. The relevant departmental unit in this case is the Cemetery Department, which has been duly established according to Quincy municipal ordinance as a distinct municipal department. See, e.g., Barrett v.

² Provisional promotions were meant for “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). Public employees in provisional status have more limited rights than do their peers with civil service tenure. However, save for public safety positions (fire, police, and corrections), competitive civil service examinations are no longer given for state or municipal official service jobs. In most cases, it has been decades since an examination was held for most positions. Thus, in the absence of such examinations, non-public safety official service positions in municipal civil service communities, as here, must be filled “provisionally” under G.L.c.31,§ 12 or 15, meaning that an appointment is made “pending” an examination, a fiction that never actually occurs. 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).

Department of Public Works, 6 MCSR 167 (1993). See also Andrews v. Civil Service. Comm’n, 446 Mass. 611, 619 (2006) (Bureau of Special Investigation established by statute as subdivision of DOR was a separate “departmental unit” under civil service law); cf. Herlihy v. Civil Serv. Comm’n, 44 Mass.App.Ct. 835, rev.den., 428 Mass. 1104 (1998) (agency’s organization into internal units by administrative order did not create separate “departmental units”)

Mr. Delmonico is employed in the Highway Department, a distinct departmental unit established by Quincy ordinances. He has no right under G.L.c.31, §15 of the civil service law to a provisional promotion outside his own departmental unit.³ Thus, he has no standing to appeal the selection of another candidate for such promotion from within a different department.

The examples presented by the Appellant do not lead the Commission to reach any different result. As to promotions within the labor service (i.e., from one labor service position to a higher labor service position), those promotions are made according to seniority of the qualified candidates (as defined by the appointing authority) from among those who apply, and may or may not be limited to a single departmental unit. See G.L.c.31,§29. Thus, labor service promotional examples are inapposite.

Similarly, the alleged 2004 selection of Mr. Lavasseur for a Highway Foreman’s position is not persuasive. The facts of that situation were not fully developed on the record. Moreover, even if such a single isolated instance (out of nearly two dozen other similar promotions) showed a “past practice” of significance in interpreting a collective bargaining agreement, such anecdotal evidence does not change the plain meaning of the civil service law as the Commission must apply it in the appeal now pending.

³ The use of a provisional appointment under G.L.c.31,§12, is another avenue through which official service positions may be filled, in some cases, by opening up the process to applicants outside the departmental unit, but that procedure was not employed by Quincy in this case. See, e.g., Clifford v. Department of Transitional Assistance, 24 MCSR 293 (2011)

Finally, nothing about the 2011 AAA Award can serve to justify Mr. Delmonico's appeal here. The civil service status of the employees is not stated in the Award. The question before the Arbitrator appeared to be whether a Foreman in one department could bump a Foreman with less seniority in a different department. Since the positions involved were both official service, the most reasonable inference would be to assume that the incumbents were provisionally appointed in their respective Foreman's positions, there having been no examinations for such positions for some time. In that situation, civil service law would not apply, as the layoff and bumping rights under G.L.c.31, §39 only cover employees with civil service permanency, and do not control bumping by one provisional employee of another provisional employee. See Andrews v. Civil Service Comm'n, 446 Mass. 611, 619 (2006) Thus, if the Grievant in the arbitration was simply one provisional Foreman bumping another provisional Foreman, the Section 39 civil service rights of neither would be implicated by such an action. Parties to a CBA may properly bargain over such matters regarding the terms and conditions of employment that do not conflict with the individual employee's rights granted by the civil service law. See G.L.c.150E,§7(d); Local 1652, Int'l Ass'n of Firefighters v. Framingham, 442 Mass. 463, 477n.15 (2004); City of Fall River v. AFSCME Council 93, Local 3117, 61 Mass.App.Ct. 404, 411 (2004); Leominster v. Int'l Bh'd of Police Officers, Local 338, 33 Mass.App.Ct. 121, 124-125, rev.den., 413 Mass. 1106 (1992)

It would present a concern if the Award had stated explicitly that the CBA were interpreted to permit bumping a permanent civil service employee in a different departmental unit, as that situation would be inconsistent with the permanent employee's right of retention in a layoff under civil service law, which permits such a permanent employee to be bumped only by other senior permanent employees within the same departmental unit. See G.L.c.31,§39. The

Commission does not presume, however, that the Award was intended to be interpreted in such a way, which impermissibly would have conflicted with civil service law.

In sum, Mr. Delmonico lacks standing to question the provisional promotion of a qualified candidate for the position of Cemetery Department Foreman because he does not serve in the same departmental unit.

Accordingly, for the reasons stated above, the appeal of the Appellant, Thomas Delmonico, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell 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 the 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 a Civil Service Commission's final decision.

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:

Salvatore Romano/Joseph McArdle (for the Appellant)
Deirdre Jacobs Hall, Esq. (for the Respondent)