COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

One Ashburton Place - Room 503
Boston, MA 02108
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DANIEL DINOCOLA,
Appellant
v.
CITY OF METHUEN,
Respondent

CASE NO: D1-08-200

Appellant's Attorney:

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City of Methuen's Attorney:

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Commissioner:

Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, Daniel Dinicola, acting pursuant to G.L.c.31, §§41-45, asserts this appeal to the Civil Service Commision (Commission) from the termination of his employment as a Water Treatment Plant Operator by the City of Methuen (Methuen), following a failed DOT regulated random drug test and engaging in unprofessional conduct while on duty. Methuen filed a Motion for Summary Disposition asserting the Appellant lacks standing to appeal to the Commission and various other grounds for dismissal. The Appellant opposed these motions. A hearing on the motions was held by the Commission on March 9, 2009. The motion hearing was recorded on one (1) audiocassette. Methuen submitted a Rebuttal on April 13, 2009 and, pursuant to the Commission's Procedural Order, filed a further Response on June 29, 2009.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, and the argument presented by the Appellant and Methuen, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Daniel Dinicola, was employed by the City of Methuen in 1987 in a civil service position in the labor service and worked for Methuen continuously since that date. (*Claim of Appeal; Oral Representation of Respondent's Counsel*)

2. In 1998, the Massachusetts Human Resources Division (HRD) established what is called the Continuous Testing (ConTest) Program through which appointing authorities were authorized to make appointments to certain "unassembled" civil service positions based on a procedure for qualifying applicants who met certain minimum entrance requirements. (*Motion Exhibits AA1, AA2; Methuen's Rebuttal, Exhibits 7 & 8*)

3. The position of Treatment Plant Operator in Methuen is an official service position included as one of the "unassembled" positions as part of the Continuous Testing (ConTest) Program for which no written examination was required, but for which an applicant who had previously passed a qualifying civil service test and met the other minimum entrance requirements was awarded a "passing score" which put him into a Score Category "C" and eligible for permanent civil service appointment to the applicable position. (*Methuen's Response to Procedural Order*)

4. In June 2000 Methuen made use of the ConTest Program to place six employees of the Water Treatment Plan into permanent civil service positions of Treatment Plant Operator. (*Motion Exhibits AA3,AA4, AA5:Appellant's Opposition, Exhibits 3,4,5*)

5. The Appellant went through the ConTest process and was issued an "Appointing Authority ConTest Results Form", with a "Qualification Date" of 7/05/2000, an "Expiration Date" of 07/05/2002, and was awarded a ConTest "Score Category" of "4C", the latter indicating he is a non-veteran with a passing score, and that Methuen received notice of this status on or about October 25, 2000. (*Motion Exhibits,AA1-AA3, AA6-AA7*)

6. In November 2000, Mr. Dinicola was employed at Methuen's Water Treatment Plant as a Water Machinery Maintenance Man. (*Motion Exhibit AA7; Appellant's Opposition, Exhibit* 7; *Methuen's Response to Procedural Order*)

7. On November 27, 2000, Mr. DiNicola was promoted to the position of Treatment Plant Operator. (*Motion Exhibit AA7; Appellant's Opposition, Exhibit* 7; *Methuen's Response to Procedural Order*)

8. Although the documentation indicates that Mr. DiNicola was "promoted" to Treatment Plant Operator, there is no indication that the promotion was made from any certification of an eligible list of then qualified ConTest applicants. (*Motion Exhibits AA1, AA2; Methuen's Rebuttal, Exhibits 7 & 8; Methuen's Response to Procedural Order*)

9. By letter dated July 21, 2008, Mr. Dinicola was notified that he was terminated from his position as Treatment Plant Operator, effective July 10, 2008, because he had failed a DOT regulated random drug test and for engaging in unprofessional conduct while on duty. (*Appellant's Opposition, Exhibit 9*)

10. On July 30, 2008, pursuant to Mr. Dinicola's request, a Step 4 grievance hearing was held pursuant to the provisions of the applicable collective bargaining agreement

11. On August 13, 2008, Methuen Mayor William Manzi, accepted the recommendation of the hearing officer and upheld Mr. Dinicola's termination. (*Claim of Appeal; Appellant's Opposition, Exhibit 9*)

12. On August 19, 2008, Mr. Dinicola filed this appeal with the Commission, asserting that Methuen discharged him in violation of the procedures required by civil service law and rules and without just cause. (*Claim of Appeal*)

CONCLUSION

Applicable Standard on Dispositive Motion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., when "viewing the evidence in the light most favorable to the non-moving party" (here, Mr. Dinicola), the moving party (here Methuen) has proffered substantial and credible evidence that Mr. Dinicola, has "no reasonable expectation" of prevailing on at least one "essential element of the case", and Mr. Dinicola has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008)

Specifically, this motion to dismiss for lack of standing must be allowed unless the Mr. Dinicola raises "above the speculative level" sufficient facts "plausibly suggesting"

See, e.g., See also Connelly v. Department of Social Serv., 20 MCSR 366 (2007) (discharge appeal of provisional Program Manager V rejected, despite prior permanency as Social Worker III, because "[a]ppellant's [current] status is provisional and he is therefore not entitled to a hearing before the Commission") See generally Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

The Appellant's Lack of Standing

The undisputed evidence has established that the position of Treatment Plant Operator occupied by Mr. Dinicola at the time of his termination is an official service position. The evidence also establishes that, in November 2000, at the time Mr. Dinicola was promoted or appointed to the position of Treatment Plant Operator, he had fulfilled the requirements of the ComTest program and, under that program, so long as there were ComTest qualified personnel available and willing to accept the appointment as a Treatment Plant Operator, Methuen was obligated to fill vacancies in that position through selection of candidates from a ComTest eligible list. Although the record does not explicitly establish that Methuen followed this required procedure, the Commission finds no reason to infer otherwise or that it did not, at a minimum, intend to comply with all applicable civil service law and rules in appointing Mr. Dinicola to the civil service position of Treatment Plant Operator. cf. Lusignan v. Holyoke Gas & Electric, 21 MCSR

287, 289 (2008) (vacating provisional appointment to the labor service when the proper procedure required the municipality to create and appoint from an eligible list). Thus, the Commission is satisfied that the record is sufficient to warrant the finding that Mr. Dinicola was appointed to the position of Treatment Plant Operator as a permanent civil service employee and held tenure in that position at the time of his discharge in 2008. Accordingly, Mr. Dinicola has standing as a permanent, tenured civil service employee with standing to appeal his discharge to the Commission.

Timeliness

Methuen also makes the argument that Mr. Dinicola's appeal is untimely, having been filed nearly a month after he learned of his discharge, and, arguably after the 10 day period for filing an appeal prescribed by G.L.c.31, §41-43. The Commission rejects this argument for two reasons.

First, as a general rule, the Commission construes that it would be unreasonable to interpret the ten day period for appealing to the Commission to run from the date of Methuen's notice of discharge to Mr. Nicola in this case. That discharge notice was issued without a prior hearing and without any of the disclosures (specifying the employee's right to a hearing and appeal to the Commission) as required by G.L.c.31, §41. While Methuen's failure to follow these requirements was obviously motivated by the (mistaken) belief that Mr. Dinocola was not a civil service employee, the fact remains that the undisputed facts establish that he never received, and Methuen never made any attempt to advise him of, the lawful appellate rights to which he was entitled as a tenured civil service employee.

An employee who has no tenured civil service status is not entitled to all the same notice and hearing protection as a tenured civil service employee. However, the preferred practice in any discharge situation in which the employee's status may be disputed is to provide the standard disclosures, with such appropriate caveats or reservation of rights as the appointing authority deems appropriate.[1] Absent such disclosures, the appointing authority leaves itself open to a claim that its failure to follow procedure tolled an employee's time for appeal, with the attendant consequences, including a remand pursuant to Section 42, with reinstatement and retroactive pay until the proper hearing procedures are followed. The Commission has never deemed the fact that an appointing authority treated a person to have tenured civil service status, or provided the Section 41-43 disclosures even when not strictly required, as sufficient to confer tenured civil service status or appellate rights when the statute does not authorize them. See, e.g., Rose v. Executive Office of Health & Human Services, 20 MCSR 266 (2007)

On the other hand, the Commission finds it would be wholly inappropriate to deprive Mr. Dinicola of a right of appeal on the grounds of untimeliness, when the delay is caused by the fact that the appointing authority omitted the required hearing or disclosures out of a mistaken belief that he was not a civil service employee.

Second, the undisputed facts in this record establish that Mr. Dinicola acted expeditiously and without delay in pursing the matter. Immediately upon being informed of his discharge, he took steps to seek a grievance hearing and filed this appeal within days following the adverse decision of Methuen Mayor Manzi upholding the discharge,

[1] Even a non-tenured, provisionally appointed, civil service employee who is discharged after at least nine months service is entitled to a non-appealable "name clearing" hearing before the appointing authority, upon request made within a reasonable time. G.L.c.31,§31. See generally, Police Comm'r v. Cecil, 431 Mass. 410, 416 (2000); City of Fall River v. AFSCME Council 93, 61 Mass.App.Ct. 464 (2004)

and within a month of the original notice of discharge. The Commission would take a different view of an appellant who delayed longer or whose actions were not the consequence of an appointing authority's flawed notice of discharge.

Accordingly, the Commission will not dismiss this appeal as untimely as it was filed immediately after Mayor Manzi's final decision upholding the discharge.

Election of Collective Bargaining Remedy

Methuen misses the mark to assert that by requesting a grievance hearing, Mr. Dinicola elected his collective bargaining rights as the exclusive remedy. The Commission's long-standing rule, based on applicable civil service and collective bargaining law, permits a public employee to simultaneously grieve a discharge through collective bargaining, short of demanding arbitration, while simultaneously pursuing a civil service appeal. Only when the collective bargaining process reaches the arbitration stage will the employee be deemed to have elected that remedy to the exclusion of a civil service appeal. See G.L.c.31, §43,¶1; G.L.c.150E,§8; Canavan v. Civil Service Comm'n, 60 Mass.App.Ct. 910, rev.den., 441 Mass. 1107 (2004); Ung v. Lowell Police Dep't, CSC Case No. D1-08-150, 22 MSCR --- (2009); Carmody et al v. City of Lynn, CSC Case Nos. G2-07-65/G2-07-66, 22 MCSR --- (2009); Roberge v. Westfield G & E, 18 MCSR 247 (2005); Bullock v. Springfield Bd of Fire Comm'rs, 7 MCSR 36 (1994)

Section 42 Claim

The Commission finds that, having promptly afforded Mr. DiNicola an appointing authority hearing (albeit 10 days after, rather than prior to the discharge) and given the serious nature of the charges (i.e., failing a random drug screen and alleged long-standing substance abuse issues), there is no reasonable likelihood that Mr. Dinicola has been

See, e.g., Rizzo v. Lexington, 21 MCSR 70 (2008) (discharge; §42 appeal denied); Coronella v. Mashpee, 19 MSCR 67 (2006) (discharge; §42 appeal denied); Gariepy v. Department of Correction, 19 MCSR 211 (2006) (discharge; §42 appeal denied); Fopiano v. Scituate, 12 MCSR 154 (1999) discharge; §42 appeal denied); Dodge v. Athol Police Dep't, 11 MSCR 207 (1998) (discharge; §42 appeal denied); Carey v. Nahant, 6 MCSR 149 (1993) (discharge; §42 appeal denied)

For the reasons stated above, Methuen's Motion to Dismiss is hereby denied. This appeal will be scheduled for a full hearing on the merits of Methuen's just cause for discharging the Appellant.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on September 10, 2009.

A True Record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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:
Tom Coffey, Esq. (for Appellant)
Peter J. McQuillan, Esq.. (for Appointing Authority)
John Marra, Esq. (HRD)