

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108

BASHIER DOSS,
Appellant

v.

D1-09-369

DEPARTMENT OF ENVIRONMENTAL
PROTECTION,
Respondent

Appellant's Attorney:

Bahig F. Bishay, Esq.
P.O. Box 396
Norwood, MA 02062

Respondent's Attorney:

Kenneth F. Langley, Esq.
Massachusetts DEP
One Winter Street
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION ON SECTION 42 APPEAL

The Appellant, Bashier Doss (hereinafter "Doss" or "Appellant"), filed a timely appeal with the Civil Service Commission (hereinafter "Commission") on September 18, 2009 under both G.L. c. 31, § 42 ("Section 42 appeal" regarding procedural issues) and G.L. c. 31, § 43 ("Section 43 appeal" regarding whether there was just cause to lay him off due to a lack of funds). He is a tenured civil service employee in the title of Accountant III.

A pre-hearing conference was held at the offices of the Commission on October 6, 2009 and the parties subsequently submitted briefs regarding the Section 42 appeal.

Prior to terminating a tenured civil service employee, G.L. c. 31, § 41 requires that the employee be given: 1) a written notice by the appointing authority; and 2) a full hearing before the appointing authority or a hearing officer designated by the appointing authority. The written notice by the appointing authority must include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five.

If the Commission finds that the Appointing Authority failed to follow the above-referenced Section 41 procedural 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.” G.L. c. 31, § 42.

Here, it is undisputed that the Appellant never received a written notice by the Appointing Authority nor was he provided with a hearing before the Appointing Authority. Rather, it appears that he was only notified verbally by his supervisor that he was being laid off on September 17, 2009. On September 18, 2009, the Appellant filed the instant appeal with the Civil Service Commission.

The Appointing Authority failed to comply with the requirements of G.L. c. 31, § 41 by failing to provide the Appellant with a written notice regarding his layoff or providing him with a hearing.

G.L. c. 31, §42, however, requires that the Commission also find that the rights of the Appellant have been prejudiced by the City’s failure to meet these procedural requirements before it orders the Appointing Authority to restore said person to his employment immediately without loss of compensation or other rights.

The Appointing Authority, citing a series of prior Commission decisions, appears to argue that the Appellant's rights were not prejudiced because he promptly filed an appeal with the Commission and a full hearing has been scheduled regarding the Section 43 portion of his appeal.

The Appellant argues that the failure to provide the Appellant with written notification and a hearing prevented him from exercising his bumping rights pursuant to c. 31, § 39 and additional bumping rights provided to him under his collective bargaining agreement.

Conclusion

The Appellant has been prejudiced by the Appointing Authority's failure to provide him with written notification of his layoff and their failure to conduct a hearing regarding this matter. Although the Appointing Authority argued at the pre-hearing conference that the Appellant has no bumping rights because there are no vacant positions below Accountant III to which the Appellant can "bump" into, this is precisely the type of issue that should first be vetted at a local Appointing Authority hearing. At such a hearing, the Appellant would have had the opportunity to identify applicable positions to which he could presumably bump into and the Appointing Authority would be able to determine if they concurred and, if not, for what reasons. Thus, the failure to provide the Appellant with any written notification or any hearing prior to laying him off has prejudiced the Appellant's rights.

For these reasons, the Appellant's Section 42 appeal under Docket No. D1-09-369 is hereby *allowed* and the Appellant is to be restored to his position without any loss of pay or benefits. The Section 43 full hearing currently docketed for March 31, 2010 is canceled. Nothing in this decision prevents the Appointing Authority from initiating a

layoff after this decision has been issued. If such action is taken, it should be in accordance with all of the procedural requirements of the civil service law and rules, including written notification and the opportunity to participate in a hearing. Assuming these procedural requirements are followed, the Appellant would still have the right to file a new Section 43 “just cause” appeal with the Commission. The filing fee for any such appeal would be waived.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, Commissioners [Marquis – Absent]) on March 4, 2010.

A true Copy. Attest:

Commissioner
Civil Service Commission

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:
Bahig F. Bishay, Esq. (for Appellant)
Kenneth F. Langley, Esq. (for Appointing Authority)