COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

GENE EGERSHEIM,
Appellant

v.

G2-09-414

CITY OF BOSTON,
Respondent

Appellant's Attorney:

Pro Se
Gene Egersheim
[redacted]

Respondent's Attorney:

Maria Paola Marotta, Esq.
City of Boston
Office of Labor Relations
Boston City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION ON CITY OF BOSTON's MOTION TO DISMISS

Procedural History

Pursuant to G.L. c. 31, § 2(b), the Appellant, Gene Egersheim (hereinafter "Appellant" or "Egersheim") filed an appeal with the Civil Service Commission (hereinafter "Commission") claiming that he was "bypassed" for appointment to the position of Sanitation Inspector by the City of Boston (hereinafter "City" or "Appointing Authority").

A pre-hearing conference was held on December 15, 2009. The City filed a Motion to Dismiss the Appellant's appeal on January 28, 2010 and the Appellant was given thirty (30) days to file a response, which he did not. A motion hearing was held on March 29, 2010 and I heard oral arguments from both parties. The hearing was digitally recorded and a CD of the proceeding is retained by the Commission.

Factual Background

The Appellant was appointed to the position of sanitation inspector approximately thirteen (13) years ago. The position of sanitation inspector is classified as an "official service" position in the "Municlass Manual" maintained by the state's Human Resources Division (hereinafter "HRD"). According to the unrefuted testimony of the Appellant, he was deemed a "permanent" civil service employee in the position of sanitation inspector as a result of Chapter 282 of the Acts of 1998, special legislation that deemed hundreds of "provisional" City employees as permanent in their existing titles.

Sometime after 1998, the Appellant was demoted to the labor service title of Laborer. He appealed this disciplinary action to an Arbitrator and was not successful. Thus, he has served in the position of Laborer for the past several years.

On August 19, 2009, the City posted two job vacancies for the position of Sanitation Inspector. Although the posting does not state whether the posting was intended to be a provisional "appointment" or a provisional "promotion", there does not appear to be a dispute that the intent was for the posting to be a provisional "appointment". It was not restricted to current employees and several outside candidates applied and were considered.

The Superintendent of Sanitation, along with one or two other members of his staff, interviewed thirty-seven qualified candidates and evaluated each candidate based on his/her qualifications, knowledge of trash and recycling, computer efficiency, sanitation experience, residence, attendance and disciplinary history in their current or past employment. The candidates were ranked on the aforementioned criteria. The Appellant was ranked nineteenth and the City selected April Maldonado and Gerard Gorman, the two top-ranked candidates.

City's Argument in Favor of Motion to Dismiss

The City argues that by selecting two qualified candidates, it has met the requirements regarding provisional appointments and the Appellant has no standing to file an appeal with the Commission.

Appellant's Argument Opposing City's Motion to Dismiss

At the motion hearing, the Appellant argued that since he held the position of permanent sanitation inspector in the past, he should be considered before others.

Conclusion

The City has sufficiently shown that the vacancies here were filled via provisional appointments, as opposed to provisional promotions. An appointing authority has some discretion in posting a provisional position as an "appointment" or a "promotion", and, absent evidence that the choice was a sham or subterfuge, such as to pre-select or screen out particular candidates, that sound judgment will not be disturbed by the Commission. See Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Asif v. Department of Conserv.& Rec., 21 MCSR 23 (2008); Rainville v. Massachusetts Rehab. Comm'n, 19 MCSR 386 (2006), citing O'Brien v. Massachusetts Rehab. Comm'n, CSC

Case No. G-1883 (1991). As explained in Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009), the Commission eschews any rule that a provisional appointment can NEVER be made to advance a person within a departmental unit as opposed to an initial hiring into the unit. But cf. Kelleher v. Personnel Administrator, 421 Mass. 382, 657 N.E.2d 229, 386-87 (1995) (dicta that Section 12 applies to appointments from "outside the departmental unit" and Section 15 apply "promotion" of an employee from within the unit). Similar to both Medeiros and Asif, the City has shown that the positions were "appointments" open to applicants regardless of civil service status.

Under G.L. c. 31, § 12, an Appointing Authority may make a provisional appointment to a position in the official service if no suitable eligible list exists from which certification of names may be made for such appointment.

Here, the City, after interviewing dozens of qualified candidates and reviewing their professional backgrounds and qualifications, selected the two candidates ranked highest by the Superintendent of Sanitation for provisional appointment. Absent the existence of an eligible list of candidates, they provisional appointments are valid.

It has been long established that "[p]rovisional appointments or appointments through noncompetitive examinations are permitted only in what are supposed to be exceptional instances. . ." City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 598, 481 N.E.2d 1176, 1180-81, rev.den., 396 Mass. 1102, 484 N.E.2d 103 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29, 22 N.E.2d 613 (1939). However, the passage of decades without the holding of competitive examinations for many civil service titles, and the professed lack of funding to do so any time in the near future, has meant that the appointment and advancement of

most non public safety civil service employees is accomplished by means of provisional appointments and promotions. 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, 657 N.E.2d 229, 233-34 (1995).

As much as the Commission regrets this state of affairs, and has repeatedly exhorted parties in the public arena to end the current practice of relying on provisional appointments and promotions to fill most civil service positions, the Commission must honor the clear legislative intent that allows for provisional appointments and promotions so long as the statutory requirements are followed. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. at 389, 657 N.E.2d at 234.

Finally, the fact that the Appellant once held the position of permanent sanitation inspector has no relevance to these appointments. It is undisputed that the Appellant was demoted from this position and an Arbitrator ruled against him. Thus, he is no longer a permanent sanitation inspector. Practically speaking, if he still held that position, he would not have applied for the two vacancies in that same title.

For all of the above reasons, the City's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. G2-09-414 is hereby ***dismissed***.

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Stein and Taylor, Commissioners), on April 22, 2010.

A true Copy. Attest:

_____
Commissioner
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
Gene Egersheim (Appellant)
Maria Paola Marotta, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)