

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MARGARET GIST,
Appellant

v.

D1-10-78

CAMBRIDGE PUBLIC SCHOOLS,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

The Appellant, Margaret Gist (hereinafter "Gist" or "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") claiming that the Cambridge Public Schools (hereinafter "School Department" or "Appointing Authority") failed to provide her with proper "bumping rights" pursuant to G.L. c. 31, § 39. After a status conference on August 4, 2010, the parties agreed that the Appointing Authority would submit a Motion to Dismiss; the Appellant would submit a reply; and the Commission would rely on the written submissions to issue a decision in this matter.

The following facts appear not to be in dispute:

1. On April 17, 1984, the Appellant was appointed as a permanent part-time Clerk – Typist by the School Department. (Attachment 1 to Appellant’s Brief)
2. On November 1, 1988, the Appellant was provisionally promoted to the position of Secretary working under the supervision of the Chief Financial Officer. (Appellant’s Brief and Appointing Authority’s Brief)
3. On May 16, 1989, the Appellant received a permanent appointment as a full-time Senior Clerk - Typist, but continued to work in her provisional Secretary position. The Appellant’s functional duties and who she reported to changed over the years, but there is no dispute that she retained her permanency as a full-time Senior Clerk – Typist. (Appellant’s Brief and Appointing Authority’s Brief)
4. While the Appellant was serving as a provisional Secretary, other provisional appointments or promotions were made to this position throughout the Department. Attachment 6 to the Appellant’s Brief contains the names of six (6) other individuals who were provisionally appointed or promoted to the position of Secretary. Three (3) of these individuals have a civil service seniority date (presumably in the title of Senior Clerk-Typist, but this is not clear) that is less senior to the Appellant. (Appellant’s Brief)
5. In July 2010, as a result of a budget shortfall, the Appellant’s provisional Secretary position was eliminated. (Appellant’s Brief and Appointing Authority’s Brief) Other provisional Secretaries with civil service seniority dates less senior to the Appellant were retained in their positions as provisional Secretaries in the School Department. (Appellant’s Brief)

6. The Appellant, who has permanency as a Senior Clerk-Typist, was allowed to “bump” into a Senior Clerk-Typist position, presumably either replacing a provisional or temporary Senior Clerk-Typist or a Senior Clerk-Typist with less civil service seniority.

Appellant's Argument

The Appellant, a provisional Secretary who previously served as a permanent Senior Clerk-Typist, argues that the School Department erred by not allowing her to “bump” other provisional secretaries in the Department with less civil service seniority, which, presumably, also stems from their permanency in a Senior Clerk-Typist position. In the alternative, the Appellant argues that, based on past practice, the Appellant should have been able to retain her existing salary even if she elected to bump into a Senior Clerk-Typist position.

Appointing Authority's Argument

The School Department argues that the Appellant does not have bumping rights as a provisional Secretary and can not bump another provisional Secretary who has less civil service seniority. Rather, the School Department argues that, as an employee with permanency as a Senior Clerk-Typist, the Appellant, upon the elimination of her position, had the right to bump those serving as Senior Clerk-Typist with less or no civil service seniority in that position.

Conclusion

G.L. c. 31, § 39, as inserted by St. 1978, c. 393, s. 11, states in pertinent part: "If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of

positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit ... ”.

Section 15 of the Personnel Administration Rules states:

- (1) All civil service rights of an employee rest in the position in which he holds tenure.
- (2) When one or more employees must be separated from positions in the same title and departmental unit due to lack of work, lack of money or abolition of position, all persons filling positions provisionally in the designated title must be separated first, followed by all persons filling positions in temporary status in the designated title, before any civil service employees holding the designated positions in permanent status shall be separated from such positions.
- (3) When one or more civil service employees holding permanent positions in the same title and departmental unit must be separated from their positions due to lack of work, lack of money, or abolition of position, the employee with the least civil service seniority computed pursuant to M.G.L. c. 31, §33 shall be separated first; provided that all disabled veterans are accorded the preference provided by M.G.L. c. 31, §26.
- (4) When one or more persons among a larger group of civil service employees holding permanent positions in the same title and departmental unit are to be separated from their positions due to lack of work, lack of money or abolition of position, and the entire group has the same civil service seniority date, the appointing authority has the discretion to select for separation among those with equal retention rights, applying basic merit principles.
(PAR.15)

In Andrews v. Civil Service Comm’n, 446 Mass. 611 (2006), the SJC concluded

that:

“Provisional promotion pursuant to G. L. c. 31, s. 15, effects a real change from "one title to the next higher title." A provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect. General Laws c. 31, s. 15, provides only one exception to this rule, relating to calculation of eligibility for a promotional examination. "[T]he fact that the Legislature specified one exception . . . strengthens the inference that no other exception was intended." Protective Life Ins Co. v. Sullivan, 425 Mass. 615, 620 (1997), quoting LaBranche v. A.J. Lane & Co., 404 Mass. 725, 729 (1989). Regardless whether the five employees provisionally promoted to the SI-C position possessed or lacked rights in the SI-C position pursuant to rule 15, that was the position in which they were employed for purposes of s. 39.”

Applied here, the School Department was correct to consider the provisional promotions of the other provisional Secretaries when contemplating layoffs.

In Andrews, the SJC concluded in relevant part that:

“A provisionally promoted employee ceases to be “in” the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect ...” (emphasis added)’

We view the above-referenced language from Andrews to be consistent with how HRD, state agencies and cities and towns appear to have interpreted Section 39 for many years. When layoffs occur in a title under Section 39, provisional employees in that title retain certain bumping rights if they formerly held a permanent civil service title in the department prior to their promotion. Specifically, the provisionally promoted employee, who held civil service permanency in a former position within the department, may, as an alternative to being laid off, “bump” other provisional or less senior permanent employees in the title or next lower titles for which they had permanency. Applied here, the Appellant, a permanent Senior Clerk-Typist who was serving as a provisional Secretary at the time of her layoff, had the right to “bump” individuals serving as provisional Senior Clerk-Typists (or in the next lower titles) or those serving as permanent Senior Clerk-Typists (or in the next lower titles) with less civil service seniority.

The related question raised here, is whether the School Department was required to lay off other provisional Secretaries in the department before the Appellant if the other provisional Secretaries had less civil service seniority in their former permanent positions. We conclude that the answer is “no”.

In Leondike v. Randolph Public Schools, 13 MCSR 16 (2000), the Appellant in that case argued that she should be able to bump a less senior employee in a non-civil service position with a higher pay rate. The Commission found that there was no legal basis under Section 39 to permit the Appellant to bump into a non-civil service position. Similarly, in Provencher v. Lynn Public Schools, 21 MCSR 533 (2008), the Commission held that that the Appellant, a permanent a permanent clerk / typist who was provisionally promoted to clerk / stenographer, did not have the right to bump another provisional clerk / stenographer, merely because she had more civil service seniority than the person sitting provisionally in the clerk / stenographer position.

Applied here, the Appellant's seniority in a lower title, for which she held permanency, does not permit her to bump another provisional Secretary because that person has less service seniority in the lower position. We conclude that these prior Commission decisions, and the conclusion reached here regarding the instant appeal, are consistent with Andrews (a provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect ..." (emphasis added); a reasonable interpretation of Section 39 and the Personnel Administration Rules (civil service rights of an employee rest in the position in which he holds tenure).

Summary of Conclusion

At the time her position was eliminated, the Appellant was a permanent Senior Clerk-Typist serving as a provisional Secretary. Her retention and / or bumping rights under Section 39 are limited to bumping any individual serving as a provisional or temporary Senior Clerk-Typist (or next lower titles) in the department or those serving as

permanent Senior Clerk-Typist (or next lower titles) in the department with less civil service seniority. It appears that the Department has complied with these requirements.

Finally, we find no merit to the Appellant's alternative argument that, based on a purported past practice, she was entitled to retain her current rate of pay. There is nothing in the civil service law or rules that requires such an outcome.

For these reasons, the Appellant's appeal under Docket No. D1-10-78 is hereby

dismissed.

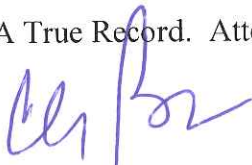
Civil Service Commission



Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on December 30, 2010.

A True Record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the 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:

John M. Becker, Esq. (for Appellant)

Laurie W. Engdahl, Esq. (for Appointing Authority)