COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

TIMOTHY GREEN,
Appellant

v.

CASE NO. G2-14-143

CITY OF BROCKTON,
Respondent

Appearance for Appellant:

Salvatore L. Romano
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Appearance for Respondent:

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Commissioner:

Paul M. Stein

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Timothy Green, has appealed to the Civil Service Commission (Commission) pursuant to Mass.G.L.c.31, §2(b) to contest his non-selection for a promotion in the Utilities Division of the Department of Public Works (DPW) of the Respondent, City of Brockton (Brockton). On July 31, 2014, Brockton filed a "Motion To Dismiss" which the Appellant opposed. On October 2, 2014, the Commission held a hearing on Brockton's Motion to Dismiss, which was digitally recorded and copies were provided to the parties.

FINDINGS OF FACT

I find the following facts to be undisputed:

1. The Appellant, Timothy Green, is a resident of Brockton employed in the tenured labor service position of a Working Foreman for the Water Section in the Utilities Division of the Brockton DPW. (*Stipulated Facts and Motion to Dismiss*)
2. The Brockton DPW is established by municipal ordinance as a single departmental unit under the general supervision of a Commissioner of Public Works. The DPW includes a Utilities Division under the supervision of the Superintendent of Utilities, who works under the direction of the Commissioner of Public Works, and encompasses a Sewer Section and a Water Section. (*Motion to Dismiss, Exhs. E & H*)
3. In February 2014, the DPW Commissioner posted a job opening for a General Foreman in the DPW Utilities Division – Sewer Section. The General Foreman's position is an official service title reporting to the Superintendent of Utilities and responsible for supervising Sewer Unit personnel, including construction foremen, working foremen, hoist operator's [sic] and water/sewer maintenance men. The DPW treated the posting as a provisional promotion. (*Motion to Dismiss, Exhs. C & H*)
4. Mr. Green applied for the General Foreman's position but the DPW Commissioner selected another employee, Patrick Hill, to fill the position. (*Motion to Dismiss, Exhs. B & H*)
5. Mr. Hill, the successful candidate, held the official service position of Construction Foreman in the Water Section of the Utilities Division of the DPW to which he had been provisionally appointed from a labor service position of Working Foreman in which he held permanency. (*Undisputed Facts*; *Motion to Dismiss, Exhs. C & H*)

6. Within the Utilities Division, a Construction Foreman earns approximately $10,000 more than a Working Foreman and approximately $5,000 less than a General Foreman. (*Motion to Dismiss, Exhs. H & I*)
7. The Commonwealth's Human Resources Division ("HRD") no longer administers examinations for the official service titles of Construction Foremen or General Foreman. There are no Construction Foremen employed within the Brockton DPW who hold permanency in that position. (*Undisputed Fact*)
8. Mr. Green, along with other DPW General Foremen, Construction Foremen and Working Foremen, are members of a collective bargaining unit known as the Massachusetts Laborers' District Council, Public Employees' Local Union 1162/Water & Sewer, of the Laborers' International Union of North America (Local 1162). (*Motion to Dismiss, Exhs. B & F*)
9. By letter dated March 14, 2014 from DPW Commissioner Thoreson, Mr. Green was notified that, "in accordance with the Collective Bargaining Agreement and civil service regulations", he had not been selected for promotion to the position of General Foreman. (*Motion to Dismiss, Exh. A*)
10. On March 17, 2014, Mr. Green filed a Step 1"Grievance Form" through his collective bargaining agent, Local 1162. The Grievance Form cited, among other things, an alleged violation of Mr. Green's rights under civil service law. (*Exhs. B & F*)
11. On June 23, 2014, the Appellant filed this appeal with the Commission. (*Claim of Appeal*)

Applicable Legal Standard

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". To survive a motion for summary decision, the non-moving party must offer "specific facts" which establish "a reasonable hope" to prevail after an evidentiary hearing. Conclusory statements, general denials, and factual allegation not based on personal knowledge are insufficient to establish triable issues. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

Civil Service Law Applicable to Provisional Promotions

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for more than two decades. These provisional appointments and promotions have been used as there are no "eligible lists" from which a certification of names can be made for permanent appointments or promotions. The underlying issue is the inability of the Personnel Administrator (HRD) to administer civil service examinations that are used to establish these applicable eligible lists. Although the Commission has exhorted parties in the public arena to end this practice, it remains the only means by which most official service positions can be filled and, so long as the statutory requirements are followed, the Commission must honor the legislative intent to permit appointing authorities to so do.

G.L.c.31, §§10 through 15, contain the statutory provisions for making "provisional" appointments and promotions in the official service. These statutes prescribe, in pertinent part:

§ 12. Provisional appointments. An appointing authority may make a provisional appointment to a position in the official service with the authorization of the administrator [HRD]. . . . Such authorization may be given only if no suitable eligible list exists from which certification of names may be made for such appointment. . .pending the establishment of an eligible list. Such authorization shall be void unless exercised within two weeks after it is granted.

After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list. . . . If, as the result of such examination, no suitable eligible list is established, the administrator . . . may authorize an extension of the provisional appointment pending the results of another examination. . . .The eligible list resulting from such new examination shall be established within eighteen months of the determination of the results of the last previous examination, provided, however, that such new examination shall be held no later than one year . . .if the appointment must comply with federal standards for a merit system of personnel administration as a condition for receipt of federal funds by the commonwealth or any of its political subdivisions.[1]

If no eligible list is established after a second examination for the same position, the administrator and the appointing authority shall confer and decide what action should be taken, such as the holding of another examination on a different basis.

§ 13. Provisional appointments; notice; filing. An appointing authority, in requesting authorization to make a provisional appointment, shall file with the administrator or, if the appointing authority is a department . . . a notice containing: (1) the information which the appointing authority believes is necessary to prepare and conduct an examination for the position for which such authorization is being requested, including a statement of the duties of the position, and the knowledge, skills and abilities necessary to perform such duties; (2) a proposal specifying the type of examination which should be held by the administrator; (3) a substantiation that the person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties.

§ 14. Provisional appointments; authorization; reports; length of service; termination. Upon receipt of the notice described in section thirteen, the administrator . . . may authorize a provisional appointment if he determines that the contents of the notice are satisfactory. . . .

Each provisional appointment shall be reported. . .to the administrator. A provisional appointment may be terminated by the administrator at any time . . . .The administrator shall have the authority to terminate a provisional appointment which was approved by a secretary of an executive office.

. . .

§ 15. Provisional promotions. An appointing authority may, with the approval of the administrator . . . 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 list . . . .

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 to the administrator by the appointing authority of sound and sufficient reasons therefor, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may

[1] The Commission has received no evidence that indicates that the Commonwealth is at risk of losing any federal funds as a result of the use of provisional appointments.

authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

. . .

. . . . The administrator shall terminate any provisional promotion if, at any time, he determines that (1) it was made in violation of the civil service law and rules, or (2) the person provisionally promoted does not possess the qualifications or satisfy the requirements for the position. An appointing authority which makes a provisional promotion pursuant to this section shall report such promotion to the administrator.

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 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 exception has now swallowed the rule. If there is a flaw here, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. 382, 389 (1995)

The Commission has issued a series of decisions which address how the statutory requirements for making official service provisional appointments and promotions apply in the current climate, where such "provisional" appointments and promotions have become, in effect, a fictional substitute for, and only means by which, most non-public safety civil service employees may be employed and advanced. See Hasomeris v. City of Brockton, 27 MCSR 593 (2014); Louissaint v. City of Boston, 27 MCSR 167 (2014); McCormack v. City of Quincy, 25 MCSR 185 (2012); Delmonico v. City of Quincy, 25 MCSR 185 (2012); Zuccala v. Town of Arlington, 25 MCSR 120 (2012); Rapa v. Dep't of Transitional Assistance (DTA), 24 MCSR 312 (2011); Michaud v. DTA, 24 MCSR 307 (2011); Posco v. DTA, 24 MCSR 309 (2011); Clifford v. DTA, 24 MCSR 293 (2011); Heath v. DTA, 23 MCSR 548 (2010); Foster v. DTA, 23 MCSR 528 (2010); Pollock and Medeiros v. Dep't of Mental Retardation, 22 MCSR 276 (2009);

Pease v. Department of Revenue, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Asiaf v Department of Conservation and Recreation, 21 MCSR 23 (2008); Kasprzak v. Dep't of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); Glazer v. Dep't of Revenue, 21 MCSR 51 (2007); Rainville v. Massachusetts Rehabilitation Comm'n, 19 MSCR 386 (2006); Sikorski v. Dep't of Correction, 13 MCSR 160 (2000); Kane v. Holyoke DPW, 6 MCSR 191 (1996)

These decisions provide the following framework for making provisional promotions in the absence of a suitable eligible list:

- Only employees with civil service permanency (tenure) are eligible for provisional promotion;
- If there are one or more qualified employees with permanency in the "next lower title" in the departmental unit, the appointing authority may "with approval of the Personnel Administrator (HRD)" provisionally promote any one of them; the non-selection of another qualified candidate is not a bypass that can be appealed to the Commission, the only exception being if the qualified non-selected candidate asserts that the selected candidate was not qualified for the position;
- If there are no qualified employees with permanency in the "next lower title", the appointing authority may provisionally promote another permanent employee in the departmental unit without regard to title by providing "sound and sufficient reasons" for the selection to HRD.

The use of a provisional appointment under G.Lc.31,§12, is another avenue through which official service positions may be filled, in some cases, by opening up the process to non-tenured

employees and applicants outside the departmental unit, which then triggers certain other requirements (such as a preference in hiring veterans). That procedure was not employed by Brockton in this case but, absent a clear judicial directive to the contrary, or in cases in which the evidence suggests that an appointing authority is using the Section 12 provisional "appointment" process as a subterfuge for selection of provisional candidates who would not be eligible for a provisional "promotion" over other qualified permanent employees, the Commission will continue to allow appointing authorities sound discretion to post a vacancy as a provisional "appointment" (as opposed to a provisional "promotion."). See, e.g., Louissaint v. City of Boston, 27 MCSR 167 (2014); Clifford v. DTA, 24 MCSR 293 (2011)

Statute of Limitations

By rule, the Commission has established a 60-day period within which a person, who claims to be aggrieved by an appointing authority's decision to bypass the employee for appointment or promotion in favor of another candidate, must file his or her appeal with the Commission for review pursuant to G.L.c.31. Commission Rule effective October 1, 2000.[2] This 60-day window generally commences upon the employee's receipt of notice that makes the employee aware of his or her non-selection and right of appeal to the Commission. Pursuit of a grievance under the employee's collective bargaining unit does not toll the time for appeal to the Commission. See, e.g., Walker v. City of New Bedford, 26 MCSR 398 (2013); Graver v. Springfield Housing Auth., 26 MCSR 16 (2013); DePina v. Boston Police Dep't, 24 MCSR 270 (2011); Stokinger v. City of Quincy, 24 MCSR 416 (2011). See also, "Memorandum of Decision and Order", Allen v. Civil Service Comm'n, C.A. 2013SUCV3239 (July 17, 2014), *citing*, United Steelworkers v.

[2] The time for appeal to the Commission from most actions, including disciplinary appeals, is set by statute, and all other appeals for which a specific statutory time or rule is prescribed, must be filed within a 30 day period from the notice of the action that gives rise to the appeal. See, e.g., G.L.c.31, §41; 801 C.M.R. 1.01 (4) as adopted by the Commission, Sept. 2, 1999.

Commonwealth Empl. Rels. Bd, 74 Mass.App.Ct. 656, 663-64 (2009) (union officials have duty to know and advise regarding Commission filing deadlines)

Here, Mr. Green's appeal came more than three months after he had been notified of his non-selection by the DPW Commissioner. Although the notice of non-selection did not expressly advise him of his right of appeal to the Commission, Mr. Green's assertion, by way of a collective bargaining grievance, makes clear that he was aware that he had a claim that his civil service rights had been infringed. In the absence of any explanation for the delay, this appeal is untimely.

Appellant's Standing to Contest The Provisional Promotion

In addition to being untimely, Mr. Green's appeal must be dismissed for lack of jurisdiction on the additional ground that he is not a permanent "civil service" employee in the next lower title to General Foreman and, therefore, he does not have proper standing to contest the provisional promotion of the successful candidate who did hold a provisional position in the next lower title (Construction Foreman) within the departmental unit, and who has civil service permanency in the previous labor service position (Working Foreman) from which he was provisionally promoted to Construction Foreman.

Brockton correctly asserts that the DPW is a single "departmental unit" for purposes of civil service law and rules. Brockton's municipal ordinances expressly define the DPW as a single departmental unit for purposes of Chapter 31. In addition, functionally, the municipal ordinances provide for the unified supervision of the DPW under the Commissioner of Public Works and, further, provide for a unified Sewer Unit and Water Unit within a single Utilities Division of the DPW, managed by a Superintendent of Utilities. These municipal ordinances confirm that the employees of the Sewer and Water Units of the Utilities Division of the Brockton DPW are

members of the same "departmental unit established by law" for purposes of the provisions of G.L.c.31. See Herlihy v. Civil Service Comm'n, 44 Mass.App.Ct. 835, 840, rev. den., 428 Mass. 1104 (1998).

Second, in terms of the structure of the positions within the Utilities Division, the levels of work are clear and run, in order of supervisory responsibility: (1) Superintendent of Utilities; (2) General Foreman (official service): (3) Construction Foreman (official service); and (4) Working Foreman (labor service). See generally, G.L.c.31,§30 (promotions from labor service to lowest official service title in the departmental unit)

Third, Mr. Hill, the successful candidate, held a Construction Foreman's position (provisionally) in the "next lower title" to a General Foreman but Mr. Green did not. For purposes of G.L.c.31, §15 ¶1, however, neither Mr. Hill nor Mr. Green would be considered "civil service employees" in the "next lower title" to General Foreman, i.e. Construction Foreman, as neither employee held tenure in that position. As they both had tenure in the labor service position of Working Foreman, however, they both would be considered "permanent" employees for purposes of making provisional promotions under G.L.c.31, §15, ¶2. See also G.L.c.31, §1 (definitions)

Third, in the absence of any qualified employees with permanency in the title of Construction Foreman, Brockton was authorized to provisionally promote Mr. Hill pursuant to G.L.c.31, §15, ¶2, based on his permanency in his former position of Working Foreman to the position of General Foreman, upon providing "sound and sufficient" reasons for selecting him. Alternatively, Brockton could have selected Mr. Green for "sound and sufficient reasons" to prefer him over Mr. Green. In either case, neither non-selected employee would have standing to appeal the non-selection. In this situation, the only employee with standing to file an appeal

would have been an employee with permanency in the "next lower title" (i.e. a tenured Construction Foreman), of which there are none in Brockton.

The Appellant suggests that it could be argued that, because Mr. Hill was previously promoted from his tenured labor service position and served in a provisional position, he could not be considered a "permanent" employee entitled to further provisional promotions under G.L.c.31, §15. If that were true, then Mr. Green was the only permanent employee who was qualified to receive the promotion. This construction of Section 15, however, would mean that, once a permanent employee accepted a provisional promotion, he or she could not be eligible for further promotions (absent examinations), essentially, frustrating further advancement. In addition, it would mean that Brockton was obligated to select a lower level supervisor over a higher level one for the position.

A statute or ordinance should not be construed in a way that produces absurd or unreasonable results when a sensible construction is readily available. E.g., Flemings v. Contributory Ret. Appeal Bd., 431 Mass. 374, 375-76 (2000); Manning v. Bos. Redevelopment Auth., 400 Mass. 444 (1987) The rational interpretation is to construe the statute to imply that a tenured civil service employee who has been provisionally promoted retains the status of a "permanent" employee for purposes of further promotions under Section 15, just as the employee retains that status when considering the just cause for discharge of a provisional employee who had been promoted from a permanent civil service position. See McDowell v. Civil Service Comm'n, 469 Mass. 370, 374-77 (2104). But see Andrews v. Civil Service Comm'n, 446 Mass. 611, 618 (2006) (provisional employee is "in" the provisional title and but not "in" the original permanent title until the provisional promotion ceases to have effect for purposes of layoff and reinstatement rights under G.L.c.31, §39)

CONCLUSION

For the reasons stated herein, the Commission lacks jurisdiction to hear this appeal. Therefore, Brockton's Motion to Dismiss is hereby ***granted*** and the appeal of the Appellant, Timothy Green, is ***dismissed.***

Civil Service Commission

_____
Paul M. Stein,Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on January 8, 2015.

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 this order or 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 this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:
Salvatore L. Romano (for Appellant)
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Katherine Feodoroff , Esq. (for Respondent)