

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MARGARET HARROP,
Appellant

v.

CASE NO: G2-06-345

FALL RIVER SCHOOL COMMITTEE,
Respondent

Appellant's Attorney:

Jamie DiPaola Kenney, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appointing Authority's Attorney:

Bruce A. Assad, Esq.
16 Bedford Street
Fall River, MA 02720

Commissioner:

Paul M. Stein

DECISION

The Appellant, Margaret Harrop, acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission) from a decision of the Fall River School Committee (FRSC), the Appointing Authority, for failing to promote her to the position of Assistant Cook Manager. A hearing of the appeal was held before an Administrative Magistrate at the Massachusetts Division of Administrative Law Appeals (DALA), which issued a Recommended Decision dated June 10, 2008. After careful review of the DALA Recommended Decision, by Interim Order dated October 2, 2008, the Commission ordered the parties to provide additional documentation necessary to decide the appeal. A status conference was conducted on October 24, 2008 at which time oral argument was heard and certain additional documentation was received and marked as four additional

Exhibits FR-A, FR-B, FR-C and FR-D). As a result of a procedural order dated October 29, 2008, the FRSC submitted further responses and documentation which has been marked Exhibit FR-E)

FINDINGS OF FACT

Giving appropriate weight to the Exhibits (DALA Exhibits 1 thru 9, and FR-A thru FR-E) the testimony of the witnesses at the hearing before DALA, and inferences reasonably drawn from the credible evidence, the Commission adopts the findings of fact stated in the DALA Recommended Decision, and makes the following additional findings of fact set forth below.

14. The position description used by the Appointing Authority for the labor service job in which the Appellant, Ms. Harrop, and Ms. Young served is “Cook”. The job requires “an ordinary degree of skill in the preparation and service of food” and related ancillary tasks and record keeping. The “Cook” is responsible to the “Cook-Manager.” (*Exhibits FR-A & FR-C*).

15. The labor service title for the “Cook” position as established by HRD in the MuniClass Manual is “Food Service Worker” (Occupational Code 7402B) in the “Cooking Series” of the “Food Preparation and Service Group”. The occupant of this title is responsible for “large scale quantity cooking in a school, hospital, or other institution” and may be assigned planning, scheduling, record keeping and supervisory tasks. (*Exhibits FR-A, FR-B & FR-C*)

16. The position description for the job to which the Appellant aspired, and to which Ms. Young was appointed, is referred to by the Appointing Authority as “Assistant Cook Manager”. The duties and responsibilities of the job are “as designated by Food Service

Director and Cook-Manager” and includes ability to fully assume Cook-Manager’s duties and responsibilities upon his/her absence; preparation and cooking of food; supervision of staff in food preparation, food service and cleaning; and recordkeeping. (*Exhibit FR-D*)

17. There does not appear to be any labor service or official service title in the MuniClass Manual for an “Assistant Cook Manager”. (*Exhibit FR-B & FR-E1; Administrative Notice of HRD MuniClass Manual*)

18. The labor service includes a “Senior Cook” title (Occupational Code 7404C) in the Cooking Series, who “performs duties described for Cook; supervises a group of cooks; performs other duties such as scheduling and inspecting work.” (*Exhibit FR-B, FR-E1; Administrative Notice of HRD MuniClass Manual*)

19. The MuniClass Manual also includes two official service titles in the “Food Facility Management Series”, one for “Assistant Cafeteria Manager” (Occupational Code 1667D) and another for “Assistant Food Service Manager” Occupational Code 1667F). The duties for the titles of “Assistant Cafeteria Manager” and “Assistant Food Service Manager” in the official service include preparation of meals, cleaning utensils and equipment, as well as supervisory and administrative responsibilities over cooks and other kitchen staff. (*Administrative Notice of HRD MuniClass Manual*)

20. Based on the organizational chart for the FRSC food service staff, it appears that the position of “Assistant Cook Manager” at Durfee High School supervises a number of employees and reports to the “Cook Manager/Durfee”. (*Exhibit FR-E2*)

21. Both Ms. Harrop and Ms. Young had civil service permanency as “Cook”, in the “next lower title” to “Assistant Cook Manager”. (*Exhibits 3, 7 & 9*)

CONCLUSION

The decision of this appeal requires, as an initial matter, a determination of whether the position of “Assistant Cook Manager” to which the Appellant aspired and Ms. Young was appointed is a “labor service” or “official service” position.

It is well established under the Civil Service Law, that a “bypass” means the selection of a candidate from an eligible list prepared from a certification of applicants established according to their relative ranking on a competitive civil service examination for appointment or promotion to an “official service” position, when the successful candidate’s score was lower than the score of the unsuccessful candidate, and the appointing authority is able to justify the “bypass” for “sound and sufficient reasons” which must be approved by the personnel administrator, Human Resources Division (HRD) or HRD’s delegated representative. G.L.c.31, §26; PAR.02. See, e.g., Cotter v. City of Boston, 193 F.Supp.2d 62 (D.Mass.2002), rev’d other grounds, 323 F.3d 160 (1st Cir.), cert.den., 540 U.S. 825 (2003); Thompson v. Civil Service Comm’n, Middlesex C.A. No. MICV1996-5742 (Sup.Ct. 1996). An unsuccessful, lower ranked candidate who is “bypassed” is entitled to appeal to the commission for a de novo review of the sufficiency of the reasons for the bypass pursuant to G.L.c.31,§2(b). See, e.g., See Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001); MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996)

The same principles concerning a “bypass” for purposes of official service appointments and promotions, however, do not apply in the case of labor service appointments or promotions for which competitive civil service examinations are not required. Rather, labor service promotional appointments are made from “rosters” prepared on the basis of an applicant’s seniority, applying the “2n+1” formula to a list of qualified candidates “with the greatest length of service”. G.L.c.31, §§ 28 & 29; PAR.09; PAR.19. The Commission has consistently decided that an appointing authority is authorized to promote any applicant from among the requisite number of “2n+1” qualified labor service candidates who apply for the position, without stating reasons and, so long as such a qualified candidate with the requisite seniority is chosen, other unsuccessful candidates do not have standing to challenge their non-selection as an “aggrieved” party authorized to file a “bypass” appeal to the Commission under G.L.c.31, §2(b). See Brienzo v. Town of Acushnet, 20 MCSR 530 (2007); Murzin v. City of Westfield, 20 MCSR 305 (2007).

The civil service records concerning the positions in question are not entirely clear. It appears that FRSC established most of the job descriptions, titles and classifications in the 1970s and 1980s and they have not been modernized much, if at all, in the past thirty years or reconciled to the current version of the MuniClass Manual. There seems to be considerable overlap among the relevant job titles. The “Assistant Cook-Manager” job appears to fit several MuniClass titles, both in the labor service and official service.

On all of the evidence presented, however, the Commission concludes that the “Assistant Cook Manager” position should be treated as a labor service title of “Senior Cook” for purposes of this appeal. Accordingly, as there appears to be no dispute that

Ms. Young was a qualified candidate for the position and fits properly within the “2n+1” group of applicants (Ms. Young and Ms. Harrop were the only two candidates considered), the FRSC was fully justified to select her and was not required to state the reasons for choosing her over Ms. Harrop. The Commission also notes that Ms. Young has a more senior labor service registration and seniority date than does Ms. Harrop. Accordingly, Ms. Harrop is not a person aggrieved within the meaning of G.L.c.31,§2(b), and does not have a right of appeal to the Commission from her non-selection to the position of “Assistant Cook Manager.”

That said, the Commission believes that it would behoove HRD and the City of Fall River to confer in the near future, sooner rather than later, to review the state of their delegation agreement, as well as the labor service classification plans and official service titles currently in use by the City of Fall River, and to establish a plan to update those documents, if appropriate. The Commission acknowledges that the City of Fall River has always presented itself as a municipality that strives to comply with its obligations under the civil service laws, and the Commission’s recommendation by no means singles out Fall River as a target. Indeed, the same review might well be in order for other municipalities whose delegation agreements and classification plans similarly may not have been modernized for decades.

Accordingly, for the reasons stated above, the appeal of the Appellant, Margaret Harrop, is hereby, *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on January 8, 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:

Jamie DiPaola Kenney, Esq. (for Appellant)

Bruce A. Assad, Esq. (for Appointing Authority)

John Marra, Esq (HRD)

Shelly L. Taylor, Esq., Chief Administrative Magistrate (DALA)