

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 10/3/07
Civil Service Commission

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

LAWRENCE HESTER,
Appellant

v.

CITY OF LAWRENCE,
Respondent

Case No.: C-05-266

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on September 27, 2007 to acknowledge receipt of the report of the Administrative Law Magistrate dated August 21, 2007 and the comments of the Appellant received by the Commission on September 20, 2007. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *dismissed*.

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on September 27, 2007.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:

Ozell Hudson, Jr., Esq. (for Appellant)
James M. Bowers, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)
Shelly L. Taylor, Esq. (DALA)



COMMONWEALTH OF MASSACHUSETTS

Division of Administrative Law Appeals

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August 21, 2007

Christopher Bowman, Chairman
Civil Service Commission
One Ashburton Place, 5th Floor
Boston, MA 02108

Ozell Hudson, Jr., Esq.
434 Massachusetts Ave.
Boston, MA 02118

James M. Bowers, Esq.
Suite 306, City Hall
200 Common St.
Lawrence, MA 01840

Re: *Lawrence Hester v. City of Lawrence*, C-05-266, CS-07-98 (DALA)

Dear Chairman Bowman, Attys. Hudson and Bowers:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c), they have 30 days to file written objections to the decision with the Civil Service Commission, which may be accompanied by supporting briefs.

Very truly yours,


Shelly L. Taylor
Chief Administrative Magistrate

encl.

SLT/df

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COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative
Law Appeals

Appeal of:

Lawrence Hester,
Appellant

Docket No. C-05-266
DALA No. CS-07-98

v.

City of Lawrence,
Appointing Authority

Appearance for Appellant:

Ozell Hudson, Jr., Esq.
434 Massachusetts Avenue
Boston, MA 02118

Appearance for Appointing
Authority:

James M. Bowers, Esq.
Suite 306, City Hall
200 Common Street
Lawrence, MA 01840

Administrative Magistrate:

Christopher F. Connolly

CORRECTED RECOMMENDED DECISION

Purportedly, pursuant to G.L. c. 30 s. 49, the Appellant, Lawrence Hester, is appealing the failure of the Appointing Authority, City of Lawrence, and the Personnel Administrator to reclassify his position from provisional to permanent civil service status. The appeal was filed on July 25, 2005 (Exhibit 20).¹

¹ I marked the appeal as exhibit 20 post hearing.

A hearing was held on February 7, 2007 at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, Boston, Massachusetts. One audiocassette tape was made of the hearing. Twenty documents (Exhibits 1 – 20) were entered into evidence. The parties stipulated to eleven facts (Exhibit 1). No testimony was received. Both parties stated their arguments on the record. Post hearing briefs were filed, the last of which was received on March 12, 2007 thereby closing the record.

FINDINGS OF FACT

Based on the stipulations of fact and the documentary evidence presented, I make the following findings of fact:

1. The Appellant, Lawrence Hester, is a registered, licensed Local Building Inspector, certified by the Commonwealth of Massachusetts Department of Public Safety-Board of Building Regulation and Standards (BBRS) pursuant to M.G.L. c. 143.(Stipulation)
2. In 1987 the Appellant was hired by the City of Lawrence as a provisional Local Building Inspector. (Stipulation)
3. The position of Local Building Inspector is a civil service position. (Stipulation)
4. The appointment of the Appellant was not from a certified civil service list but as a result of application for the job, which opening was publicly advertised pursuant to Exhibit 3. (Stipulation)
5. There was no eligible list or test given by the Massachusetts Human Resources Division (HRD) at the time of the appointment.

6. Appellant took the competitive examination for Local Building Inspector on June 24, 1989. The City of Lawrence did not certify a list for permanent appointments as a result of the 1989 examination.²
7. There has been no other examination for Local Building Inspector requested by the City of Lawrence, or test given by HRD, since the Appellant's appointment. (Stipulation)
8. After November 12, 1992, Appellant was deemed qualified and certified as a Local Building Inspector by the Building Official Certification Committee 780 CMR R7. (Stipulation)
9. Appellant was a registrant with the BBRS as a building code enforcement official in the capacity of Local Building Inspector. (780 CMR R7)
10. On August 29, 2004, Appellant successfully passed the International Code Council (ICC) Examination Module 1: Legal and Management Examination for Certified Building Official (CBO). This exam was developed in accordance with National Standards Competency Examinations for Certified Building Construction Code Administrator and Enforcement Officials. (Stipulation)
11. On February 17 and April 27, 2005, Appellant requested that the City of Lawrence change his provisional service classification to permanent status. (Exhibit 12)
12. The City of Lawrence did not respond to the Appellant's requests for a change in his civil service classification.

² The Appellant admits that he did not pass this examination.

13. Appellant requested that HRD change his status to permanent civil service on March 15 and April 27, 2005 but to no avail. (Exhibit 13)
14. Appellant filed his appeal with the Civil Service Commission for a status change (re-classification) from provisional to permanent on July 25, 2005. (Exhibit 20)
15. Appellant served as Local Building Inspector for the City of Lawrence from the time of his appointment until August 23, 2006, when he was discharged. The Appellant filed a grievance pursuant to collective bargaining and the arbitration is pending.

CONCLUSION AND RECOMMENDATION

Chapter 310 of the Acts of 1993 provides as follows:

Section 1: If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.

The thrust of the Appellant's position is that as a result of the failure of the administrator to administer an examination for Local Building Inspector since 1989, the Appellant, "through no fault of his own," has been deprived of the opportunity to gain permanent status. Consequently, he asks that the commission exercise its discretion pursuant to Section 1 and grant him permanent status.

The Appellant further argues that since he has been a registrant with BBRS since November 12, 1992 and has renewed his BBRS "registrant" position as required, he is suitable for permanent appointment based upon registration pursuant to G.L. c. 31, § 28

rather than by competitive examination. Thus, he urges that the Civil Service Commission exercise its discretion pursuant to Chapter 310 of the Acts of 1993 and award him permanent appointment to the position of Local Building Inspector retroactively to November 12, 1992. I note however, that there is no evidence that the position of Local Building Inspector is within the Labor Service rather than since an examination was given for the position in 1989, I infer and conclude that the position is within the official service.

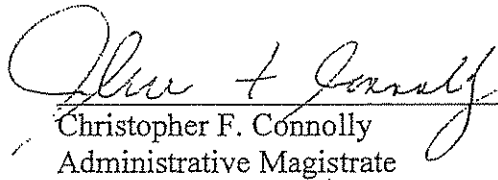
The Appointing Authority acknowledges that the personnel administrator may grant permanent status to an individual without the individual taking a competitive examination. Specifically, pursuant to G.L. c. 31, § 16 the administrator "may examine, qualify and rank applicants for original or promotional appointments solely on the basis of training, experience, education or other criteria considered appropriate by the administrator", "when the major duty of a position is such that applicants are required to possess a certificate, registration or license issued after an examination by a state board of registration or examiners or by a professional association specified by the administrator." Thus, for a Local Building Inspector to achieve permanent civil service status without taking a competitive examination, he must at a minimum, pass an examination administered by a state licensing board.

Here, the Appellant has not passed one of the two examinations necessary to be an ICC Certified Building Inspector. He has passed the Legal/Management Examination but has yet to take the second examination, Technology, which is required to become certified in Massachusetts as an Inspector of Buildings, unless, as is the Appellant's

case, certification as a local inspector is acquired through the grandfather process. See Exhibit 18.

In view of the fact that the Appellant failed the 1989 competitive examination for Local Building Inspector and has not completed the examination process to achieve certification as an Inspector of Buildings, I recommend to the Commission that it decline to exercise its discretion to grant the Appellant the relief that he seeks.

DIVISION OF ADMINISTRATIVE LAW APPEALS


Christopher F. Connolly
Administrative Magistrate

Dated: 8/21/07