

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

JAMES KARPOWICZ,
Appellant

v.

G2-17-171

CITY OF BOSTON,
Respondent

Appearance for Appellant:

Pro Se
James Karpowicz

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.
Labor Counsel
City of Boston Office of Labor Relations
Boston City Hall, Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

1. On September 8, 2017, the Appellant, James Karpowicz (Mr. Karpowicz), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection by the City of Boston (City) for the position of Assistant Electrical Engineer, an "official service" title within civil service.
2. On September 26, 2017, I held a pre-hearing conference which was attended by Mr. Karpowicz, counsel for the City and the Human Resources Director for the City's DPW.
3. Prior to the pre-hearing conference, the City submitted a Motion to Dismiss the appeal.
4. At the pre-hearing conference, the parties agreed that Mr. Karpowicz is a long-time City employee who is currently serving in a provisional title, but has permanency in a lower title.
5. In regard to the official service title of "Assistant Electrical Engineer", there has been no examination for this position for many years. Hence, there has been no eligible list and no Certifications from which the City could make a permanent appointment.

6. For this reason, the City filled this position via a “provisional appointment” under G.L. c. 31, s. 12.
7. Non-selection for a provisional appointment does not constitute a “bypass” under the civil service law.
8. For this reason, the Commission has no jurisdiction to hear the bypass appeal filed by Mr. Karpowicz.
9. As part of the pre-hearing, Mr. Karpowicz raised the issue regarding whether the provisional appointment was influenced by personal bias, which the City strenuously denies.
10. I informed Mr. Karpowicz that the Commission has the option of initiating an investigation under G.L. c. 31, s. 2(a), but only does so sparingly and typically when a Petitioner shows that there is a likelihood that he/she will be able to show that personal and/or political bias occurred.
11. For these reasons, I informed Mr. Karpowicz that he had thirty (30) days to file a reply to the Motion to Dismiss. Said reply could include a request for investigation, should Mr. Karpowicz choose to make such a request.
12. All of the above was included in a Procedural Order sent to both parties on September 27, 2017.
13. Mr. Karpowicz did not file a reply to the City’s motion and/or a request for investigation.

Analysis

In a series of decisions, the Commission has addressed the statutory requirements when making such provisional appointments or promotions. See Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); Glazer v. Department of Revenue, 21 MCSR 51 (2007); Asiav v. Department of Conservation and Recreation, 21 MCSR 23 (2008); Pollock and Medeiros v. Department 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); Foster v. Department of Transitional Assistance, 23 MCSR 528; Heath v. Department of Transitional Assistance, 23 MCSR 548.

In summary, these decisions provide the following framework when making provisional appointments and promotions:

- G.L.c.31, §15, concerning provisional *promotions*, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains less than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the

position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and “sound and sufficient” reasons are submitted and approved by the administrator for making such an appointment.

- Under Section 15 of Chapter 31, only a “civil service employee” with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for “sound and sufficient reasons” to another higher title for which she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title.
- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional “appointment” process as a subterfuge for selection of provisional employee candidates who would not be eligible for provisional “promotion” over other equally qualified permanent employee candidates.
- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Here, the undisputed facts show that the City of Boston made a provisional appointment to the official service position of Assistant Electrical Engineer. For the reasons cited above, this provisional appointment is permitted under civil service law. Further, since this was a provisional appointment, there is no bypass.

Further, the Appellant failed to provide the Commission with a reply to the City’s Motion to Dismiss or any written submission regarding whether the Commission should initiate an investigation.

Conclusion

For all of the above reasons, the City of Boston’s Motion to Dismiss is allowed; the Appellant’s appeal under Docket No. G2-17-171 is *dismissed*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan [Iittleman – Absent]) on December 21, 2017.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

James Karpowicz (Appellant)

Robert J. Boyle, Jr., Esq. (for Respondent)