

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

TERENCE KEARNEY
Appellant

v.

CASE NO: G2-09-324

**DEPARTMENT OF CONSERVATION
& RECREATION**

Respondent

Appellant:

Terence Kearney
46 Bennett Street
Hudson, MA 01749

Appointing Authority Representative:

Frank E. Hartig, Esq.
Assistant General Counsel
Department of Conservation &
Recreation
251 Causeway Street, Suite 600
Boston, MA 02114-2119

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Terence Kearney, purporting to be acting pursuant to G.L.c.31, §2(b), asserts an appeal against the Department of Conservation and Recreation of Commonwealth (DCR), the Appointing Authority, challenging his non-selection for provisional appointment to the position of Forest and Park Supervisor I. On September 9, 2009, and supplemented on December 2, 2009, DTA filed an Motion to Dismiss, which asserts that the Commission lacks jurisdiction of the appeal because the Appellant's appeal was untimely and because the Appellant lacks standing to appeal. A hearing on the motion was held by the Civil Service Commission (Commission) on July 20, 2009, at which DCR appeared.. The Appellant filed an opposition to the Motion to Dismiss on November 23, 2009, but did not appear at the hearing.

FINDINGS OF FACT

Based on the information provided in DTA's motion and the Appellant's Opposition, and the inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Terence Kearney, was employed by the DCR as a Skilled Laborer II. (*DCR Motion; Appellant's Opposition*)

2. On February 11, 2009, ECR posted two positions for Forest & park Supervisor I at West Boylston (Functional Title: Crew Sub-Foreman Wachusetts). (*DCR Motion*)

3. The title of Forest & Park Supervisor is the entry level supervisory position in the Forest & park classification series and the lowest title in the official service in the departmental unit. Presently, and at the time of the vacancy, there was and is no eligible list for the title of Forest & Park Supervisor I.

4. In March 2009, DCR interviewed twenty (20) of the candidates who applied for the position, including the Appellant. (*DCR Motion*)

5. The Appellant scored 15th of 20 interviewees. He was not appointed to either of the two positions and was so informed of the DCR's decision by letter dated May 18, 2009. (*DCR Motion*)

6. The Appellant received notice of his non-selection on or before May 21, 2009, on which date his collective bargaining unit filed a grievance on his behalf. (*DCR Motion*)

7. The Appellant filed the present appeal on July 31, 2009. (*DCR Motion; Claim of Appeal*)

CONCLUSION

The party moving for summary disposition pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) in an appeal pending before the Commission is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party [i.e. Mr. Kearney], DCR has presented substantial and credible evidence that Mr. Kearney has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that Mr. Kearney has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

In the absence of a statutorily prescribed period of limitations, the time within which the Appellant is required to file an appeal with the Commission to redress a violation of the Civil Service Law is governed by the Commission’s administrative rules. In the case of “bypass” appeals, the Commission, by administrative rule, has established a sixty-day period for taking an appeal from the approval of HRD of a “bypass” under G.L.c.31, §2(b) and a thirty-day period after “Agency notice of action is sent to a party”, in the case of any other claim of appeal for which a statutory period has not been prescribed.. Commission By-Pass Statute of Limitations (adopted effective October 1, 2000); 801 CMR 1.01(6)(b).

The DCR contends that the Appellant’s appeal is a challenge to a provisional promotion under G.L.c.31, Section 15 and is not a by-pass approved by HRD under Section 2(b), and his appeal should be governed by the 30-day limitation period, rather

than the sixty-day limitations period covered by the bypass rule. The facts presented on this record are not sufficient to determine whether the appeal is properly treated as a bypass case or not. However, whether the sixty-day period or the thirty-day period applies, the present appeal is untimely, having been filed more than 70 days after the Appellant was notified of his non-selection

Accordingly, for the reasons stated above, the DCR's Motion to Dismiss is hereby allowed, and the appeal of the Appellant, Terence Kearney is *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By 4-0 vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, Commissioners, Marquis, Commissioner [absent]) on February 11, 2010.

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:

Terence Kearney, Pro Se (Appellant)
Frank E. Hartig, Esq. (for Appointing Authority)
John Marra, Esq (HRD)