

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

MICHAEL LYNCH,
Appellant

v.

G2-19-171

TOWN OF ARLINGTON,
Respondent

Appearance for Appellant:

Pro Se
Michael Lynch

Appearance for Respondent:

Nicholas Dominello, Esq.
Valerio Dominello & Hillman
One University Avenue
Suite 300B
Westwood, MA 02090

Commissioner:

Christopher C. Bowman

DECISION

1. On August 16, 2019, the Appellant, Michael Lynch (Mr. Lynch), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection by the Town of Arlington (Town) for the position of Parks Supervisor.
2. On September 10, 2019, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. Lynch, the vice president of the local union, counsel for the Town and representatives from the Town's Human Resources Department and DPW.
3. At the pre-hearing conference, the parties agreed that Mr. Lynch is a permanent, tenured civil service employee in the labor service position of Working Foreman – Laborer. He has been employed by the Town for over thirty (30) years. The person selected is also a permanent,

tenured civil employee, previously holding the labor service position of Working Foreman – Water and Sewer.

4. According to the Appellant, he has previously served as “Acting Parks Supervisor” when the former incumbent(s) has/have been out for an extended period of time.
5. At the pre-hearing conference, the Town submitted a Motion to Dismiss, arguing that: a) the position of Parks Supervisor is an official service position; b) the vacancy was filled via a provisional appointment; and, therefore, c) there was no bypass.
6. At the pre-hearing, the City was unable to provide documentation to verify that the position of Parks Supervisor is an official service position in Arlington. Also, the posting did not specifically state that the position was filled through a provisional “appointment”. As both of these issues would impact the outcome of this appeal and/or how the appeal would be processed, I asked the Town to provide the Commission with additional information / verification on both issues.
7. On September 30, 2019, I received information from the Town which, according to the Town, verified that the position of Parks Supervisor was an official service position and that the Town made a provisional appointment to that position, as opposed to a provisional promotion.
8. On October 16, 2019, the Appellant submitted a reply, arguing that: 1) the Town had not shown that Parks Supervisor was an official service position; and 2) the Town made a provisional promotion (not a provisional appointment).
9. On October 29, 2019, I asked the state’s Human Resources Division (HRD) to provide me with any information regarding whether the Parks Supervisor position was an official service or labor service position. I received the requested information from HRD on January 10, 2020.
10. Based on a careful review of the record as of that point, including the information provided by HRD, the preponderance of evidence showed that the position of Parks Supervisor in Arlington was/is an official service position. Further, the preponderance of the evidence did not support the Town’s argument that the position was filled as a provisional appointment (i.e. – the posting was limited to internal applicants; there was nothing stated on the posting that it was a provisional appointment, etc.) Rather, the preponderance of the evidence shows that the position was filled as a provisional *promotion*.
11. Based on those findings, I provided the Town with the opportunity to submit an additional brief addressing whether the Town followed the provisions of G.L. c. 31, s. 15 regarding provisional promotions.
12. On February 28, 2020, the Town submitted a supplemental brief. While the Town continued to argue that the position was filled as a provisional appointment, it argued that, even if

deemed a provisional promotion by the Commission, the Town's actions here conformed with Section 15 of the civil service law.

13. On April 10, 2020, the Appellant submitted a rebuttal. Among the arguments raised by the Appellant was that the reference to the "departmental unit" in Section 15 should be considered the Parks Department, as opposed to the Town's argument that the "departmental unit" should be considered the Department of Public Works. Both the Appellant and the selected candidate work within the Department of Public Works, with the Appellant falling under Parks and the selected candidate under Water and Sewer.
14. On April 20, 2020, the Town, in partial response to my request, provided me with excerpts of those Acts related to the creation of a DPW in Arlington.

Applicable Law / Analysis

The position of Parks Supervisor is an official service position. All of the relevant records, including those provided by HRD, firmly establish this and the Appellant cannot provide any evidence to the contrary.

Since this involves an official service position, there was no permanent, "promotional appointment" as, pursuant to G.L. c. 31, §§ 7 & 8, permanent, promotional appointments to an official service position require taking an examination. As no examinations for Parks Supervisor have been given statewide for decades, appointing authorities must fill vacancies for this, and almost all other non-public safety positions, through a provisional appointment or provisional promotion. This is commonly referred to as the "plight of the provisionals" in Massachusetts.

For the purposes of deciding this matter, and because the evidence supports it, I have accepted the Appellant's argument that the Town made a provisional *promotion* here, as opposed to a provisional *appointment*. Specifically, the Town did not post this vacancy as a provisional appointment and considered only internal candidates. Thus, the question turns to whether the Town followed those provisions of the civil service law regarding provisional promotions.

In a series of decisions, the Commission has addressed the statutory requirements when making 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); Asiaf 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.

These decisions provide the following framework regarding provisional promotions that is relevant to this appeal: G.L.c.31, §15 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).

First, there is no dispute that both the Appellant and the promoted candidate were permanent civil service employees prior to this provisional promotion.

Second, the Town has established that both the Appellant and the promoted candidate were serving in a position in the next lower title. In fact, if the selected candidate cannot be considered to have been serving in the next lower title at the time of the promotion, the same would apply to the Appellant, potentially undermining his appeal on other grounds.

Third, the applicable Special Acts of the Legislature explicitly state that the Town's Board of Selectmen may establish a "Department Public Works" managed by a "Superintendent of Public Works" under which there are "divisions". This, along with the supporting documentation regarding guidance provided to the Town regarding prior layoffs, establish that the applicable "departmental unit" here is the Department of Public Works, as opposed to the *divisions* that fall under the DPW. (See Moran v. City of Brockton, 29 MCSR 102 (2016) citing Herlihy v. Civ. Serv. Comm'n, 44 Mass. App. Ct. 835, 840, rev. den., 428 Mass. 1104 (1998). Both the promoted candidate and the Appellant served in the DPW at the time of the promotion.

In regard to whether the Town was required to obtain HRD's approval before making this promotion, HRD, since 2009, has delegated the vast amount of decision-making authority regarding *permanent* appointments and promotions to cities and towns. Under that delegation, for example, cities and towns are no longer required to submit bypass reasons to HRD for approval regarding permanent appointments and promotions. Further, as referenced above, the vast majority of non-public safety civil service appointments and promotions have been done provisionally across Massachusetts for decades with no objection from HRD. In this context, the approval referenced here in regard to *provisional* promotions, even if not explicitly listed in the delegation agreements, has truly become a ministerial function.

For all of the above reasons, the Town has complied with those parts of the civil service law and rules regarding provisional promotions. Thus, the Appellant's appeal under Docket No. G2-19-171 is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 7, 2020.

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)(1), 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:

Michael Lynch (Appellant)

Nicholas Dominello, Esq. (for Respondent)