

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**TIMOTHY McCORMACK**

**CASE NO: G2-11-305**

Appellant

v.

**CITY OF QUINCY**

Respondent

Appellant's Representatives:

Salvatore Romano  
Joseph McArdle  
Massachusetts Laborers' District Council  
7 Laborers Way  
Hopkinton, MA 01748

Attorney for the Respondent:

Deirdre Jacobs Hall, Esq.  
City of Quincy Solicitor's Office  
1305 Hancock Street  
Quincy, MA 02169

Commissioner:

Paul M. Stein

**DECISION ON MOTION TO DISMISS**

The Appellant, Timothy McCormack, acting pursuant to G.L.c.31,§2(b), filed this appeal with the Civil Service Commission (Commission) to contest his non-selection for the position of Pumping Station Operator/Supervisor within the Sewer, Water and Drain Department (SWD) of the City of Quincy (Quincy). On November 29, 2011, Quincy filed a Motion to Dismiss the appeal on the grounds that the Appellant was not eligible for consideration for the position as a matter of law, which the Appellant opposed. After a hearing on the motion held on January 23, 2012, the Commission requested and received comments on Quincy's Motion by letter, dated January 30, 2012, from the Massachusetts Human Resources Division (HRD). Quincy filed a Supplemental Brief on February 15, 2012. The Commission received further comments from HRD by letter dated April 3, 2012.

## **FINDINGS OF FACT**<sup>1</sup>

Giving appropriate weight to the documents submitted, oral arguments and inferences reasonably drawn from the evidence, I find the following to be the undisputed material facts:

1. The Appellant, Timothy McCormack, holds the permanent labor service title of Pumping Station Attendant in the Quincy SWD, with a civil service seniority date of October 4, 2004.

*(Claim of Appeal; Quincy Motion; Quincy Supplemental Brief, Exh. 2)*

2. The SWD is a separate “departmental unit” within the meaning of G.L.c.31, §§1 & 15, having been established as a distinct department of the Branch of Public Works by Chapter 2, Article II, Section 12 of the Revised Ordinances of the City of Quincy, as amended by Order No. 305 of the Quincy City Council on November 1, 1982, and Order No. 161 of the Quincy City Council on June 3, 1991. *(Quincy Supplemental Motion, Exh.1)*

3. On or about July 26, 2011, Quincy posted a “Notice of Available Position” for the job of “Pumping Station Operator/Supervisor” in the SWD, which Quincy treated as a labor service position. *(Quincy Motion, Exh. 1)*

4. Quincy’s Position Description (Form 30) for “Pumping Station Operator/Supervisor” describes the general duties and responsibilities of the position as “maintain sewer and water pumping facilities.” The specific duties include taking and recording readings on pumping station instruments (such as water meters, pressure gauges and flow recording equipment), cleaning, inspecting and lubricating machinery, performing minor repairs and other skilled work in the installation, testing and adjustment of meters, supervising contract engineers/mechanics performing routine maintenance, as well as other duties. *(Quincy Motion, Exh.1)*

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<sup>1</sup> As there have been substantial additional facts provided beyond those originally asserted in the Claim of Appeal and the initial Motion to Dismiss, the Commission treats the motion as a Motion for Summary Decision to be decided on material undisputed facts under the standards set forth in 801 CMR 1.01(7)(h).

5. The following Quincy SWD employees signed the posting for the position:

<u>Name</u>	<u>Department</u>	<u>Seniority Date</u>	<u>Current Title</u>
William Wright	SWD	9/19/78	WkgFmn/SpHvyHMEO
Chris Newton	SWD	10/14/96	WkgFmn/Toolkeeper
Stephen Kozlowski	SWD	5/22/00	WkgFmn/ SpHvyMEO
David Tamulis	SWD	6/5/01	SpHvyMEO
<b>Tim McCormack</b>	<b>SWD</b>	<b>10/4/04</b>	<b>PumpingStaAttendant</b>
Tony Grasselli	SWD	12/12/05	MEO Laborer
Tom Narciso	SWD	12/12/05	Heavy MEO I

*(Quincy Motion, Exh. 2; Quincy Supplemental Brief, Exh. 10)*

6. Quincy proceeded to fill the position according to the procedures for promotional appointments in the labor service under G.Lc.31,§29 and HRD PAR.19(5), which require selection from among the three candidates with the most seniority who qualified for the position, in this case, being Messrs. Wright, Newton and Kozlowski. The Appellant, Mr. McCormack was the fifth employee in the SWD in order of seniority who applied. *(Quincy Motion: Administrative Notice [Civil Service Law and Rules])*

7. Quincy does not assert that any of the SWD candidates, including Mr. McCormack, failed to meet the minimum qualification for the position of Pumping Station Operator/Supervisor. *(Claim of Appeal [Letter of Stephen McGrath])*

8. In August 2011, Quincy selected the most senior labor service applicant in the SWD, William Wright, to fill the position. *(Quincy Motion)*

9. Neither the Quincy Classification Plan, nor the Municipal Classification Plan for Massachusetts (MuniClass Manual) promulgated by HRD, contains an approved job title of “Pumping Station Operator/Supervisor” and that title is not a recognized Civil Service job title. Quincy’s Form 30 for “Pumping Station Supervisor/Operator has not been approved by HRD. *(Quincy Supplemental Brief, Exh.2; HRD’s 1/30/12 & 4/3/12 Letters; Administrative Notice [HRD MuniClass Manual])*

10. The HRD Municlass Manual lists five titles within the Pumping Station Operating Series:

**5449A Pumping Station Operator** (Official Service) – Operates, maintains, and repairs diesels and gas driven engines; electrically driven pumps, and auxiliary machinery and equipment in municipal sewage and/or water pumping, booster and flood control stations; takes readings on recording instruments and adjusts equipment as indicated to regulate flow of water and/or sewage and to control the amount of chlorine or other substance being added; maintains log of operations; inspects, cleans, and lubricates machinery; overhauls, maintains and repairs machinery and equipment; maintains the building and ground in clean and orderly condition, May supervise Laborers or Pumping Station Attendants.

**5449B Pumping Station Attendant** (Labor Service) – Cleans pumps and sediment screens; polishes railings and fittings; assists operator in the operation or repair of plant equipment as directed; cleans interior of building; mows grass and shovels snow; performs painting and minor maintenance duties.

**5449 Working Foreman Pumping Station Attendant** (Labor Service) – Supervises and works with a small group (generally ranging from 3 to 10) . . . Makes work assignments, enforces safety regulations, maintains discipline, orders supplies and equipment, and reviews work of the crew assigned to him during progress and upon completion for compliance with instructions and conformance with accepted trade practices. The working foreman . . . must be skilled in the trade being supervised. In all cases performs the same type of work as individuals supervised.

**5449D Head Pumping Station Operator** (Official Service) – In addition to performance of duties similar to above, supervises a small group of Pumping Station Operators.

**5449E Chief Pumping Station Operator** (Official Service) – This title is used when the position supervises a workforce sufficiently large that two or more Head Pumping Station Operators are required.

*(HRD's 4/3/12 Letter; Administrative Notice [HRD MuniClass Manual, p. 10, 78-79])*

11. The most recently promulgated Quincy Classification Plan, effective January 29, 1979, contains no job title of "Pumping Station Operator/Supervisor". It does contain the job titles: Pumping Station Operator – Official Service, and Pumping Station Attendant – Class I [unskilled] Labor Service. *(Quincy Supplemental Brief, Exh.2)*

12. The applicable collective bargaining agreement (CBA) between Quincy and Massachusetts Laborers District Council, Local 1139, LIUNA, includes, among other things, the following (starting step) pay grades :

Pumping Station Attendant	\$ 723.20
Special MEO	\$ 877.33
Working Foreman Heavy MEO	\$ 877.33
Working Foreman/Toolkeeper	\$ 901.13
Pump Station Oper/Supervisor	\$1,030.78

*(Quincy Supplemental Brief, Exh. 3)*

13. According to HRD, the approved official service title of “Pumping Station Operator” is the one most closely aligned with the position that Quincy calls “Pumping Station Operator/Supervisor” and I so find. (*HRD’s 4/3/12 Letter; Administrative Notice [HRD MuniClass Manual, p. 10, 78-79]*)

14. Quincy has identified two prior instances in which it said it made a provisional promotion of an SWD employee from the position of Working Foreman/Heavy MEO to Pumping Station Operator, once in 1988 and once in 1993. Quincy produced documentation (including HRD Forms 15A) that appear to have been submitted for HRD’s approval of these provisional promotions, but HRD reports that it is unable to verify whether or not HRD approved those promotions. (*Quincy Supplemental Brief, Exhs. 4 through 8; HRD’s 4/3/12 Letter*)

15. As HRD points out, the positions of Working Foreman/Heavy MEO cannot logically be considered to be the “next lower title” to the position of Pumping Station Operator, because there can only be one such next lower official service title within the meaning of the civil service law, and that next lower title must be in the same job series within the classification plan. Pumping Station Operator is in the “Pumping Plant Operating Series” (Occupational Code 5449), classified within the Fixed Industrial Operations Group, whereas Working Foreman/Heavy MEO falls within the Motor Equipment Operating Series (Occupational Code: 5703), classified within the Mobile Industrial Equipment Operations Group. (*HRD’s 4/3/12 Letter; Administrative Notice [HRD MuniClass Manual, p. 70 through 82]*)

16. Within the Pumping Plant Operating Series, Pumping Station Operator is the next higher title to Pumping Station Attendant. Although HRD seems to believe otherwise, this seems to be the only progression that makes logical and operational sense within the Quincy SWD, i.e., from a Class I (unskilled) labor service Pumping Station Attendant to an official service Pumping

Station Operator, whose job includes supervision of Pumping Station Attendants, and who earns 30% more than the Pumping Station Attendants (s)he is authorized to supervise. Similarly, it follows logically from the duties and responsibilities of the respective positions that a Pumping Station Attendant is a comparatively lower-level manual labor position, involved in cleaning and other similar maintenance duties, whereas a Pumping Station Operator requires computer skills, the ability to read, adjust and repair meters, as well as the ability to supervise and direct a less-skilled Pumping Station Attendant. Even a Working Foreman/Pumping Station Attendant is not required to have the skills of a Pumping Station Operator, and is required to be qualified to perform and supervise only at the Pumping Station Attendant level.

## **CONCLUSION**

### **Summary**

Quincy erroneously filled the Pumping Station Operator position on the basis of the rules of seniority applicable to permanent promotions in the labor service, under G.L.c.31,§29, rather than by following the rules regarding provisional promotions in the official service, under G.L.c.31,§15. The position, however, is classified in the official service, not the labor service. The Appellant was the only candidate in the departmental unit in the next lower title to Pumping Station Operator who applied and, so long as he was qualified for the position, he was improperly denied the opportunity for promotion.

### **Applicable Legal Standard**

A motion for summary decision on any appeal before the Commission, in whole or in part, may be granted pursuant to 801 C.M.R. 1.01(7)(h) if, “viewing the evidence in the light most favorable to the non-moving party”, the non-moving party has “no reasonable expectation” of prevailing on each “essential element of the case” and the moving party is entitled to prevail as a

matter of law. To survive a motion for summary decision, the non-moving party must offer “specific facts” that establish “a reasonable hope” to prevail after an evidentiary hearing. Conclusory statements, general denials, and factual allegation not based on personal knowledge or other competent evidence are insufficient to establish any triable issues. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005) The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing. See Catlin v. Board of Registration of Architects, 414 Mass. 1, 7 (1992); Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 782-83 (1980)

#### Relevant Civil Service Law

The position of Pumping Station Operator (or what Quincy calls Pumping Station Operator/Supervisor) is an official service job title, but no competitive examinations have been given for such positions for many years. Accordingly, there are no “eligible lists” from which appointing authorities can make permanent promotions, and they are confined to filling such a position through “provisional” promotions, pursuant to Sections G.L.c.31, §15, which provides, in relevant part:

*An appointing authority [i.e. Quincy] may . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit.* Such provisional promotion may be made only if there is no suitable eligible list . . . .No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

*If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission . . . of sound and sufficient reasons therefore.* . . .If the administrator has approved the holding

of a competitive promotional examination . . . he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.”

G.L.c.31, §15 (*emphasis added*).<sup>2</sup>

Unlike promotions made after certification from eligible lists as to which more highly ranked non-selected candidates may appeal a non-selection to the Commission, appointing authorities have discretion to make provisional promotions among qualified candidates without regard to ranking, and, in general, such choices are subject to challenge by appeal to the Commission only in very limited circumstances. The Commission will grant relief in such cases, however, when the appointing authority has failed to conform to the statutory requirements for making such promotion to the detriment of the rights of an affected tenured civil service employee. See, e.g., G.L.c.31,§27; PAR.08 & PAR.09; Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010); Gale v. Department of Revenue, 23 MSCR 534 (2010); Foster v. Department of Transitional Assistance, 23 MCSR 528 (2010); Garfunkel v. Department of Revenue, 22 MSCR 291 (2009), further considered, 24 MCSR 128 (2011)

In this case, Quincy acknowledges that it filled the position of Pumping Station Operator believing it was classified as a labor service position and, therefore, selected the most senior candidate for promotion. In so doing, Quincy believed that it had complied with the requirements of civil service law and rules, which mandate that labor service promotions be made from among the three most senior employees in qualified titles who applied. G.L.c.31,§29; PAR.19(5).

Quincy’s action, however, was clearly erroneous, as the position is not in the labor service, but in the official service. This fact is confirmed by the express terms of the Quincy Classification Plan of 1979 and the statewide MuniClass Manual. Indeed, Quincy’s prior

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<sup>2</sup> The use of a provisional appointment under G.L.c.31,§12, is another avenue through which official service positions may be filled, in some cases, by opening up the process to applicants outside the departmental unit, but that procedure was not employed by Quincy in this case. See, e.g., Clifford v. Department of Transitional Assistance, 24 MCSR 293 (2011)



promotions to the position of Pumping Station Operator in 1988 and 1993 were made on a “provisional” basis, subject to HRD approval, which is tacit acknowledgement of the official service status of the position. HRD approval of “provisional” promotions is only applicable to official service positions and only when the selected candidate is not serving in the “next lower title (which is not established on this record) would HRD approval of “sound and sufficient” reasons for selection have been required..Compare G.L.c.31, §15 with G.L.c.31, §29.

In sum, the procedures established for a provisional promotion in the official service should have been applied here. Those procedures provide that a provisional promotion shall be made from among candidates serving within the departmental unit in the “next lower title” who apply. Only if there are no persons in the next lower title who are qualified for and willing to accept the provisional promotion, may an appointing authority promote a person in the departmental unit in a different title from the “next lower title.” And only if the administrator has called for a competitive examination (which last occurred years ago), may an appointing authority provisionally promote someone from a different departmental unit. G.L.c.31,§15

To be sure, provisional promotions were meant for “only in what are supposed to be exceptional instances. . .” City of Somerville v. Somerville Municipal Employees Ass’n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). Public employees in provisional status have more limited rights than do their peers with civil service tenure. However, save for public safety positions (fire, police, and corrections), competitive civil service examinations have not been given for state or municipal official service jobs for decades, in most cases. Thus, in the absence of such examinations, non-public safety official service positions in municipal civil service communities, as here, must be filled “provisionally” under G.L.c.31,§ §12 or 15, meaning that an appointment

is made “pending” an examination, a fiction that never actually occurs. Thus, as predicted, the exception has now swallowed the rule and “a promotion which is provisional in form may be permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).<sup>3</sup>

When making provisional promotions, the relevant departmental unit is Quincy’s SWD, which was duly established by municipal ordinance as a distinct municipal department. See, e.g., Barrett v. Department of Public Works, 6 MCSR 167 (1993). See also Andrews v. Civil Service. Comm’n, 446 Mass. 611, 619 (2006) (Bureau of Special Investigation established by statute as subdivision of DOR was separate “departmental unit” under civil service law); cf. Herlihy v. Civil Serv. Comm’n, 44 Mass.App.Ct. 835, rev.den., 428 Mass. 1104 (1998) (agency’s internal organization into units by administrative order did not create separate “departmental units”)

Mr. Wright, the selected candidate, was employed by the SWD as Working Foreman/Heavy MEO, a position classified in a different Job Group and Job Series from Pumping Station Operator. Mr. McCormack, on the other hand, held the position of Pumping Station Attendant, which is the next lower title in the same Job Group and Job Series as Pumping Station Operator. In the absence of any contention that Mr. McCormack was not qualified for the position, he was erroneously denied the promotion through no fault of his own.

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<sup>3</sup> The Commission and the courts have wrestled with the so-called “plight of the provisional” and have decried the corrosive effects of allowing the use of “provisional” appointments and promotions to become the rule, not the exception. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff’d, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. See also; Pease v. Department of Revenue, 22 MCSR 284 (2009), further considered, 22 MCSR 754 (2009); Olufemi v. Department of Revenue, 22 MCSR 219 (2009); Keohe v. City of Boston, 21 MCSR 240 (2008); Asiaf v. Department of Cons. Rec., 21 MCSR 23 (2008); Rose v. Executive Office of HHS, 21 MCSR 23 (2008); Connelly v. Department of Social Services, 20 MCSR 366 (2007); Glazer v. Department of Revenue, 20 MCSR 51 (2007); Shea et al v. Department of Revenue, 19 MCSR 232 (2006); Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), reconsidered, 19 MCSR 34 (2006), further reconsidered, 20 MCSR 628 (2007); Tanca v. Department of Empl. & Training, 9 MCSR 18 (1996); Veneau v. Department of Revenue, 8 MCSR 8 (1995); Barrett v. Department of Public Works, 6 MCSR 167 (1993); Felder v. Department of Public Welfare, 6 MCSR 67 (1993) further considered, 7 MCSR 28 (1994). As much as the Commission regrets this state of affairs, the Commission must honor the clear legislative intent that allows for them so long as the statutory requirements are followed. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. at 389, 657 N.E.2d at 234

Quincy argues that Article XXV of the applicable CBA required it to select the most senior candidate in the SWD among all equally qualified persons, and that, had Quincy appointed anyone other than Mr. Wright, it would have been subject to numerous collective bargaining grievances. The answer to such a contention is found in the clear statutory priority that has been given to rights provided under civil service law over rights purportedly granted through collective bargaining. Simply stated, parties to a CBA may properly bargain over matters regarding the terms and conditions of employment so long as the collective rights and obligations created under a CBA are consistent with the individual employee's rights granted by the civil service law; where there is any material conflict or inconsistency, civil service rights prevail. See G.L.c.150E, §7(d); Local 1652, Int'l Ass'n of Firefighters v. Framingham, 442 Mass. 463, 477n.15 (2004); City of Fall River v. AFSCME Council 93, Local 3117, 61 Mass.App.Ct. 404, 411 (2004); Leominster v. Int'l Bh'd of Police Officers, Local 338, 33 Mass.App.Ct. 121, 124-125, rev.den., 413 Mass. 1106 (1992) Thus, Quincy is obliged to, not prohibited from, adhering to requirements imposed on it for making provisional promotions under G.L.c.31, §15 according to the letter of the civil service law, notwithstanding anything to the contrary within a CBA..<sup>4</sup>

#### Relief to be Granted

Pursuant to the Commission's authority under G.L.c.31, and c.310 of the Acts of 1993, and after considering all of the facts and the circumstance of this case, the Commission makes the following orders to grant appropriate relief to the Appellant:

- A. Quincy's promotion of William Wright to the official service position of Pumping Station Operator (which Quincy calls Pumping Station Operator/Supervisor), is vacated,

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<sup>4</sup> It is not for the Commission to interpret the CBA or determine whether Quincy's obligations under the CBA could be reconciled with civil service law, if, for example, Quincy were to fill future official service positions through different means, such as through provisional appointments (open to all current Quincy employees and outside applicants), rather than by promoting only employees within the departmental unit.

effective as of the date of this Decision;

- B. Quincy and HRD are directed to take such action as may be necessary to make a provisional promotion to the position of Pumping Station Operator, effective as of the date of this Decision, consistent with G.L.c.31,§15 as interpreted by this Decision;
- C. Nothing in this Decision shall be construed to require any other or further retroactive adjustment to the pay and benefits of either Mr. Wright or the Appellant.

For the reasons stated, as to Quincy's Motion to Dismiss, which the Commission treats as a Motion for Summary Decision, that motion is denied. For the same reasons, and to the extent provided above, the appeal of the Appellant, Timothy McCormack is *allowed*.

Civil Service Commission

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Paul M. Stein,  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on May 3, 2012.

A true record. Attest:

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Commissioner

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 the 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 a Civil Service Commission's final decision.

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:  
Salvatore Romano/Joseph McArdle (for the Appellant)  
Deirdre Jacobs Hall, Esq. (for the Respondent)