COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss. **CIVIL SERVICE COMMISSION**
One Ashburton Place- Room 503
Boston, MA 02108

JOSEPH McDOWELL,
Appellant

Case No. D-05-148

vs.

CITY OF SPRINGFIELD,
Appointing Authority

Appellant's Attorney: John S. Ferrara, Esq.
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Springfield, MA 01103

Respondent's Attorney: Maurice Cahillane, Esq.
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City of Springfield Law Department
36 Court Street, Room 210
Springfield, MA 01103

Commissioner: John E. Taylor

DECISION ON ADMINISTRATIVE MAGISTRATE'S RECOMMENDED DECISION ON APPOINTING AUTHORITY'S ORAL MOTION MOTION TO DISMISS

The Appellant, Joseph McDowell, acting pursuant to G.L.c.31,§42, appealed to the Civil Service Commission (Commission) from the decision of the City of Springfield (Springfield) as Appointing Authority, discharging him from his position as Deputy Director of Maintenance of the Springfield Department of Parks, Building and Recreation. Pursuant to Commission rules 801 CMR 1.00 et seq, the Commission referred the appeal for hearing to the Division of Administrative Law Appeals (DALA). The DALA Administrative Magistrate issued a recommended decision dated August 14, 2007, which recommended that the Appointing

Authority's oral motion to dismiss the appeal for lack of jurisdiction be allowed. The Appellant filed Objections to the recommended decision with the Commission to which the Appointing Authority responded. A hearing on the Appellant's Objections was held on May 28, 2008 at the Springfield State Office Building. By Interim Order dated May 7, 2009, the Commission determined that the Appellant had not waived his civil service rights, if any, under Chapter 31, §43, to appeal his discharge to the Commission, but requested additional information from the parties concerning the Appellant's civil service status. The Appellant and the Appointing Authority submitted the responses to the Interim Order on May 21, 2009 and May 20, 2009 respectively.

FINDINGS OF FACT

Based on the recommended decision of Division of Administrative Law Appeals Administrative Magistrate, Christopher F. Connolly and documents entered into evidence (exhibits 1 through 15), I find the following:

1. The Commission adopts the findings of fact contained in the DALA recommended decision, a copy of which are attached.
2. It is undisputed that the position occupied by McDowell as Deputy Director of Maintenance is a official service position.

CONCLUSION

As the Commission stated in its interim order, the fact that the Appellant served in a civil service position for eleven (11) years, more or less, is not in dispute. See, e.g., G.L.c.31, §51 ("All positions in all cites shall be subject to the civil service law and rules [unless otherwise specifically exempt by law]"). There was a contract executed by the parties on July 1, 2001 which stated that the position is without rights under civil service laws or any collective

bargaining agreement. That contract was only for one year duration. Although parties have the ability to reach agreements freely, such ability is not without limitations. The well-established law is that "contracts and agreements that violate strong public policy" cannot be enforced. See, e.g., Bureau of Special Investigations v. Coalition of Public Policy. 430 Mass. 60, 603 (2000). Chapter 31 bestows the Civil Service Commission with the authority to " hear and decide appeals by persons aggrieved by decisions, actions or failures to act by local appointing authorities in accordance with the provisions of section eight of chapter thirty-one A". G.L. c. 31 s. 2 (c). The Legislature clearly recognized a strong policy interest in preventing public employers from making unjustified decisions concerning its employees. If the Appellant were permitted to waive his future civil service rights by agreement, then the legislative purpose behind the law would be frustrated. Any action the Appointing Authority took against the Appellant would be without review. This is exactly the type of situation that Chapter 31 was enacted to prevent; an appointing authority having unchecked discretion to treat an employee as it wishes without the need to justify its actions. See Kenney v. Cambridge Housing Authority, 20 MCSR 160, 163-64 (2007) ("the Commission will not enforce an agreement containing a complete waiver of an employee's civil service rights for matters yet to arise.")

Thus, as the Commission stated in its interim order the Appellant has not waived his civil service rights, if any, solely because of the terms of the contractual waiver which the Commission finds is unenforceable as against public policy.

The remaining question for the Commission to decide is whether the Appellant had any right to appeal his discharge to the Commission, based on the fact that he was a tenured employee in a labor service position prior to his appointment to a provisional position in the official service.

The applicable provisions of the civil service law are contained in G.L.c.31, §43:

> Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent if he has served as a tenured employee since prior to October fourteen, nineteen hundred and sixty-eight, lowered in rank or compensation without his written consent, nor his position be abolished

The Commission has not previously construed this statute in the context raised in this case. The Commission now concludes that a provisional employee such as the Appellant, who held a tenured position in the labor or official service, and who, while in such tenured position, is provisionally appointed to another official service position, does have the right of appeal to the Commission to contest the just cause for his discharge under Section 41. The Commission concludes that, although an Appointing Authority may remove an employee "from" his provisional position or discipline him without cause, unless the Appointing Authority acts ***with*** just cause, the employee is entitled to be restored to the tenured position "from" which he or she had been permanently appointed or promoted.

Thus, any provisional employee who can claim tenured status in a previously held civil service position, may appeal to the Commission from a discharge or removal "from" that tenured position. If the Appointing Authority established just cause for the termination, the Appointing Authority's actions will be sustained and the appeal dismissed. If, however, the discharge was made without just cause, the Commission will deem the Appellant's civil service rights in the tenured position to have been affected through no fault of his own, and will allow the appeal and order the Appellant restored to his tenured position pursuant to the Commission's authority under Chapter 310 of the Acts of 1993.

The right of a provisional employee to bring a just cause appeal relating to a discharge or removal from his position and seek reinstatement to his prior tenured position must be

distinguished from an appeal by a provisional employee concerning discipline other than discharge or removal. The public policy that leads the Commission to permit an provisional employee to protect his the tenured status he has earned from loss through no fault of his own, does not apply if the discipline is limited solely to his status in the provisional position, but does not purport to deprive the employee of his right to tenured status in the former position. Thus, for example, an employee who is suspended from a provisional position for one-day would not have a right of appeal to the Commission under Section 41, because he has not suffered the loss of any rights attributable to the tenured position.

The Commission has repeatedly noted its concern with the unfortunate over-use of provisional appointments and promotions, necessitated by the fact that civil service examinations have not be given for most civil service positions for far too long. Until this systemic problem can be resolved, however, the civil service community must hew as closely as possible to the basic merit principles as the practical circumstances allow. This construction of Section 41 appears to best match the legislative intent of the civil service law to assure that employees who have earned tenure do not lose that status without just cause. See generally, G.L.c.31,§39 (bumping of tenured employees in layoffs); G.L.c.30, 9F (protection of civil service status of state employees elected to public office); G.L.c.30,§46D (rights of state managers to be restored to lower positions upon termination of service in higher position)

Accordingly, the conclusion of the recommended decision to allow the oral motion to dismiss must be rejected. The Commission denies the motion and will order this case to be scheduled for a full hearing on the merits.

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John E. Taylor
Commissioner

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

A true copy attests:

_____
Commissioner

Notice to:
John S. Ferrara, Esq.
Maurice Cahillane, Esq.