

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

HECTOR MEJIAS,
Appellant

G2-20-047

v.

CITY OF BOSTON,
Respondent

Appearance for Appellant:

Pro Se
Hector Mejias

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.
City of Boston
Boston City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION TO DISMISS

On March 11, 2020, the Appellant, Hector Mejias (Mr. Mejias), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection by the City of Boston to the position of Supervisor of Highway Maintenance.

On May 19, 2020, I held a pre-hearing conference via videoconference which was attended by Mr. Mejias; counsel for the City; and two representatives of the City. Prior to the pre-hearing, the City filed a Motion to Dismiss and Mr. Mejias filed a reply. Based on the documents submitted; the statements of the parties, and facts established regarding Mr. Mejias in prior Commission decisions, it is undisputed that:

1. Mr. Mejias has been employed by the City since 1997. He and dozens of other City employees became permanent labor service employees in 2012 after a Commission Investigation. (Mejias et al v. City of Boston, 24 MCSR 476 (2011); Mejias et al v. City of Boston, 25 MCSR 206 (2012).
2. Mr. Mejias has previously filed appeals with the Commission contesting his non-selection to other positions. (Mejias and Allen v. City of Boston; 25 MCSR 323 (2012)

3. In 2014, Mr. Mejias was appointed to the higher position of Construction Foreman. (Appellant's Opposition to Motion to Dismiss)
4. Also in 2014, Mr. Mejias began serving as the Acting Supervisor of Construction. (Appellant's Opposition to Motion to Dismiss)
5. The City's Department of Public Works (Department) posted the Supervisor of Highway Maintenance position, both externally and internally, as a provisional appointment on September 24, 2019. (Attachment D to City's Motion to Dismiss)
6. The minimum qualifications for the job require that applicants "must have at least three (3) years of full-time, or equivalent part-time, experience in the repair, construction or maintenance of highways, streets or roadways, of which at least one year must have been in a supervisory capacity. Working knowledge of procedures and practices of snow removal, street repair, care of tools and equipment, laws, rules, regulations and policies pertaining to this position preferred. Ability in written and oral expression preferred. Must have the ability to exercise good judgment and be able to focus on detail as required by the job. Must have and maintain a current Mass. driver's license. BOSTON RESIDENCY REQUIRED." (Attachment D to City's Motion to Dismiss)
7. The Department interviewed four candidates including the Appellant. All three interview panelists ranked Mr. Mejias third among the four candidates. (Attachment C to City's Motion to Dismiss)
8. The Department selected Candidate CY, a candidate that was ranked first (tied) by the interview panel. (Attachment C to City's Motion to Dismiss)
9. CY has been employed by the City since 2013. He has held the positions of Motor Equipment Operator; Heavy Motor Equipment Operator; Special Heavy Equipment Operator; Highway Maintenance Inspector; and Highway Maintenance Foreman. (Attachment B to City's Motion to Dismiss)
10. As a Highway Maintenance Inspector (19 months), CY supervised the work of maintenance crews and inspected the work of contractors. As a Highway Maintenance Foreman (3 years), CY supervised a group of employees making repairs to streets and performed the duties of of supervisor when required to do so. (Attachment B to City's Motion to Dismiss)
11. Collectively, the duties CY has performed in all positions appear to show that he has a working knowledge of procedures and practices of snow removal, street repair, care of tools and equipment, laws, rules, regulations and polices pertaining to the position of Supervisor of Highway Maintenance. (Attachment B to City's Motion to Dismiss)

Analysis

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over two (2) decades. These provisional appointments and promotions have been used as there have been no “eligible lists” from which a certification of names can be made for permanent appointments or promotions.¹ The underlying issue is the Personnel Administrator’s (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists. This is not a new issue – for the Commission, HRD, the legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions.

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 recent 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

¹ By memorandum dated July 25, 1997, the personal administrator revoked non public safety civil service eligible lists over five years old.

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.

Applied to the instant appeal, the City has not violated any civil service law or rule regarding provisional appointments. The City posted this Supervisor of Highway Maintenance vacancy as provisional appointment and, as such, was not required to appoint candidates with civil service permanency. They were permitted to consider both external candidates as well as internal candidates, as they did here.

Ultimately, the City provisionally appointed one (1) internal candidate to the position of Supervisor of Highway Maintenance. For the reasons cited above, this is not a violation of those sections of the civil service law related to provisional appointments and, further, does not constitute a “bypass” of the Appellant, which could typically be appealed under G.L. c. 31, § 2(b).

Although no bypass occurred here, the Commission always maintains authority under G.L. c. 31, § 2(a) to conduct investigations, including when allegations are made that an appointment process was not consistent with basic merit principles. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm’n & others, No. 2013-00639-D, Suffolk Superior Court (2014).

I carefully reviewed Mr. Mejias’s written submission and his statements at the pre-hearing conference. Based on a review of the information provided and the statements of the parties, an investigation by the Commission is not warranted here. The City chose an incumbent employee who has the necessary qualifications, including supervisory experience. The allegation that two of the three interview panelists had, effectively, become annoyed with Mr. Mejias, is not sufficient for the Commission to initiate an investigation.

I reach this conclusion that an investigation is not warranted despite having some questions regarding the notes of the interview panelists. Those notes, while praising Mr. Mejias’s knowledge and abilities, appear to question Mr. Mejias’s supervisory performance over the years. Had this been a bypass appeal, in which a candidate ranked below Mr. Mejias was appointed (which is not the case here), I would have inquired as to whether this was an assessment of the Appellant’s interview performance or, rather, an assessment of his performance over the years. If it was the latter, the next level of inquiry would be whether the City had documented those concerns in prior performance evaluations.

This, however, is not a bypass appeal, as no candidate ranked below the Appellant was appointed as there is no eligible list in place. Rather, the question here is whether the Commission is warranted in initiating an *investigation* under Section 2(a), something the Commission does only sparingly. Based on a review of the entire record, such an investigation is not warranted. Employees such as Mr. Mejias are not, however, without recourse as the collective bargaining agreement provides for a grievance process where such issues can be addressed.

Conclusion

For all the reasons stated above, the Appellant's appeal under Docket No. G2-20-047 **dismissed** and the Commission opts not to initiate an investigation under G.L. c. 31, § 2(a).

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 June 18, 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)(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:
Hector Mejias (Appellant)
Robert J. Boyle, Jr., Esq. (for Respondent)