

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DAVID NOVO,
Appellant

v.

D1-12-253

NEW BEDFORD SCHOOL DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se
David Novo

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
City of New Bedford
133 William Street

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

The Appellant, David Novo (Mr. Novo) filed an appeal with the Civil Service Commission (Commission) claiming that the New Bedford School Department (School Department) failed to provide him with proper “bumping rights” pursuant to G.L. c. 31, § 39. A pre-hearing conference was held at UMASS School of Law in North Dartmouth on September 28, 2012. Since Mr. Novo was not entitled to any bumping rights in his provisional position of senior building custodian, and because his status as a permanent junior building custodian has not been impacted, his appeal is dismissed.

Background

Mr. Novo has been employed by the School Department for approximately twenty-eight (28) years. He is a permanent junior building custodian. From approximately 2005 to 2010, Mr. Novo served as a provisional senior building custodian. As a result of some school closings, some provisional senior building custodians were restored to their permanent junior building custodian positions. Mr. Novo believes that he had more seniority than some other provisional senior building custodians and should not have been restored to his permanent junior building custodian position.

Applicable Civil Service Law and Rules

G.L. c. 31, § 39, as inserted by St. 1978, c. 393, s. 11, states in pertinent part: "If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit ...".

Section 15 of the Personnel Administration Rules states:

- (1) All civil service rights of an employee rest in the position in which he holds tenure.
- (2) When one or more employees must be separated from positions in the same title and departmental unit due to lack of work, lack of money or abolition of position, all persons filling positions provisionally in the designated title must be separated first, followed by all persons filling positions in temporary status in the designated title, before any civil service employees holding the designated positions in permanent status shall be separated from such positions.
- (3) When one or more civil service employees holding permanent positions in the same title and departmental unit must be separated from their positions due to lack of work, lack of money, or abolition of position, the employee with the least civil service seniority computed pursuant to M.G.L. c. 31, §33 shall be separated first; provided that all disabled veterans are accorded the preference provided by M.G.L. c. 31, §26.
- (4) When one or more persons among a larger group of civil service employees holding permanent positions in the same title and departmental unit are to be separated from their positions due to lack of work, lack of money or abolition of position, and the entire group has the same civil service seniority date, the appointing authority has the discretion to select for separation among those with equal retention rights, applying basic merit principles.
(PAR.15)

In Andrews v. Civil Service Comm'n, 446 Mass. 611 (2006), the SJC concluded that:

"Provisional promotion pursuant to G. L. c. 31, s. 15, effects a real change from "one title to the next higher title." A provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect. General Laws c. 31, s. 15, provides only one exception to this rule, relating to calculation of eligibility for a promotional examination. "[T]he fact that the Legislature specified one exception . . . strengthens the inference that no other exception was intended." Protective Life Ins Co. v. Sullivan, 425 Mass. 615, 620 (1997), quoting LaBranche v. A.J. Lane & Co., 404 Mass. 725, 729 (1989). Regardless whether the five employees provisionally promoted to the SI-C position possessed or lacked rights in the SI-C position pursuant to rule 15, that was the position in which they were employed for purposes of s. 39."

In Leondike v. Randolph Public Schools, 13 MCSR 16 (2000), the Appellant in that case argued that she should be able to bump a less senior employee in a non-civil service position with a higher pay rate. The Commission found that there was no legal basis under Section 39 to permit the Appellant to bump into a non-civil service position.

Similarly, in Provencher v. Lynn Public Schools, 21 MCSR 533 (2008), the Commission held that the Appellant, a permanent clerk / typist who was provisionally promoted to clerk / stenographer, did not have the right to bump another provisional clerk / stenographer, merely because she had more civil service seniority than the person sitting provisionally in the clerk / stenographer position.

In Gist v. Cambridge Public Schools, 23 MCSR 812 (2010), the Appellant's seniority in a lower title, for which she held permanency, did not permit her to bump another provisional Secretary because that person had less service seniority in the lower position.

Analysis

Even if Mr. Novo did have more seniority than other provisional senior building custodians who were not restored to their permanent junior building custodian positions (which has not been determined), the Commission has no jurisdiction to hear his appeal.

Mr. Novo's purported greater seniority in a lower title, for which he holds permanency, would not have permitted him to "bump" another provisional senior building custodian who purportedly had less seniority.

This is consistent with Andrews (a provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect ...) (*emphasis added*); a reasonable interpretation of Section 39 and the Personnel Administration Rules (civil service rights of an employee rest in the position in which he holds tenure) and all of the prior Commission decisions referenced above.

Conclusion

Mr. Novo's appeal under Docket No. D1-12-253 is hereby ***dismissed***.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on October 18, 2012.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the 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:

David Novo (Appellant)

Jane Medeiros Friedman, Esq. (for Respondent)