

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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**MICHAEL
OTTOMANIELLO &
DANIEL LUKASIK,**

Appellant

v.

CITY OF SPRINGFIELD,

Respondent

Case Nos.: E-11-260 (OTTOMANIELLO)
E-11-259 (LUKASIK)

DECISION

On August 17, 2011, Michael Ottomaniello and Daniel Lukasik (Appellants), both employees of the City of Springfield (City), filed appeals with the Civil Service Commission (Commission) requesting civil service permanency, retroactive to their first day of employment in their respective civil service titles (Ottomaniello: Air Conditioning and Refrigeration Repairman; Lukasik: Plumber).

A pre-hearing conference was held on September 28, 2011 and a status conference was held on December 14, 2011, both at the Springfield State Building in Springfield, MA, which were attended by counsel for the Appellants, counsel for the City and a representative of the City's Human Resources Department.

I asked the City to provide additional information regarding the Appellants' employment as well as any other City employees who may be similarly situated. The City submitted the requested information to the Commission on April 5, 2012.

Based on the statements of the parties, the documents submitted and the applicable civil service law, rules and policies, I find the following:

Facts Related to Mr. Ottomaniello

Mr. Ottomaniello is employed by the City in the civil service title of Air Conditioning and Refrigerator Repairman, which is a labor service title.

So called "labor service" positions are those jobs for which applicants do not have to take a competitive examination, and appointments are made on the basis of priority of registration. (See G.L. c. 31, §§ 1, 28-29)

G.L. c. 31, § 28, which pertains to labor service appointments, states in relevant part:

“ ... the names of persons who apply for employment in the labor service

... of the cities and towns shall be registered and placed, in the order of the dates on which they file their applications, on the registers for the titles for which they apply and qualify. The name of any such person shall remain on such register for not more than five years ... The names of veterans who apply for employment in the labor service shall be placed ... ahead of the names of all other persons.”

Section 19 of the Personnel Administration Rules (PAR.19), promulgated by HRD and approved by the Commission, contains the rules that apply to all labor service employees in cities and towns covered by the civil service law.

PAR.19(2), which pertains to labor service appointments, states in relevant part:

“When positions are to be filled on a permanent or temporary basis in the labor service, the appointing authority shall make requisition to the administrator [HRD]¹ ... [HRD] shall establish and maintain rosters for each departmental unit and by appropriate class containing the names, position titles and effective dates of employment of persons appointed to ... labor service positions ... in the service of a ... municipality after certification from labor service registers ...”

PAR.19(2) also states that “selection and original appointments shall be made as provided in PAR.09.” PAR.09 contains the so-called “ $2n + 1$ ” formula which states that appointing authorities may appoint only from among the first $2n+1$ persons named in the “certification” willing to accept appointment, where the number of appointments is “ n ”. Applied to appointments in the labor service, appointing authorities can only appoint from among the first $2n+1$ [qualified] persons on the labor service register.

The City’s representative confirmed that the City is aware of the law and rules governing labor service appointments and that the City complies with them. However, the City stated that, in some cases, *provisional* labor service appointments are made when there are no names on the applicable labor service roster.

I am not aware of any case in which the Commission has recognized *provisional* labor service appointments, including when there are purportedly no names on the labor service roster in question. First, it is inconceivable, particularly in a City with a high unemployment rate such as Springfield, that nobody would express interest in highly sought-after public sector jobs by placing their name on the appropriate labor service roster. Second, and more importantly, any individual that is appointed, should first be required to place his/her name on the labor service roster, thus satisfying the procedural requirements and resulting in his / her permanent appointment as a labor service employee.

The City, in annual reports submitted to HRD, initially indicated that Mr. Ottomaniello was indeed a permanent Air Conditioning and Refrigeration Repairman, but then amended its records the following year to indicate that he was appointed provisionally, supposedly because his name did not appear on the applicable labor service roster.

¹ HRD delegated labor service functions to all civil service cities and towns, with the exception of the City of Boston, years prior to the appointment in question here. Thus, it is the City’s responsibility to maintain the labor service rosters, create labor service roster certifications, etc.

Mr. Ottomaniello now seeks to be deemed permanent in his labor service title of Air Conditioning and Refrigeration Repairman, retroactive to his appointment date of August 20, 2007. For the reasons stated above, his request is allowed.

Facts Related to Mr. Lukasik

Mr. Lukasik is employed by the City in the civil service title of Plumber, which, since, July 25, 2000, has been an official service title.² Individuals can only be permanently appointed to official service positions after taking a civil service examination,

So called “official service” positions are those jobs for which applicants must take a competitive examination, and appointments are made on the basis of individuals’ ranking on a certification created from an eligible list. (See G.L. c. 31, §§ 1, 25-27)

G.L. c. 31, § 25 states in relevant part:

“The administrator shall establish, maintain and revise eligible lists of persons who have passed each examination for appointment to a position in the official service. The names of such persons shall be arranged on each such list, subject to the provisions of section twenty-six, where applicable, in the order of their marks on the examination based upon which the list is established.

Following the certification of names to an appointing authority, such appointing authority shall submit a written report to the administrator indicating (a) with respect to each person whose name was certified, whether such person appeared to sign the certification, (b) whether each person who so appeared declined or expressed willingness to accept employment, and (c) each person selected for appointment.”

For many years, however, most non-public safety positions in the official service have not been filled via permanent appointments, since HRD has not had funding to conduct examinations for these positions. Thus, the vast majority of employees working in non-public safety, official service positions in state and municipal government, have been appointed as “provisional” employees, with limited or no civil service protections.

On August 19, 1998, HRD, in response a special legislative commission that addressed, in part, the large number of provisional employees, developed the “Continuous Testing (ConTest) Program.” ConTest provided a method for individuals to become qualified on a daily basis for entry level, non-public safety, official service positions in state and municipal government.

Applicants who wished to participate in the ConTest program visited the ConTest site in Boston to qualify for one or more civil service job titles across state agencies and municipalities. The individual would receive confirmation from HRD, on the same day or

² The initial correspondence from HRD, dated September 23, 2011, incorrectly stated that “Plumber” was a labor service title. HRD subsequently, in correspondence dated October 14, 2011, notified the Commission that it reclassified the title of Plumber from labor service to official service on July 25, 2000.

soon thereafter, indicating the civil service titles for which he/she was qualified to apply; and then remain on a statewide eligible list for two years.

When the ConTest program began on August 19, 1998, the position of Plumber was considered a labor service title and was not covered by ConTest. The limited number of titles covered by the ConTest program on August 19, 1998, included: Electrician I and II; Emergency Medical Technician; Nurse; Pumping Station Operator, First, Second and Third Class Stationary Engineers; First and Second Class Steam Firemen; Treatment Plant Operator; and Wire Inspector.

On December 21, 1998, HRD delegated responsibilities for the administration of certain aspects of the ConTest program to the City. A review of the Memorandum of Agreement between HRD and the City appears to indicate that the City would assume all responsibility of the ConTest program except for the initial qualification, which would be completed by HRD.³ As part of this same agreement, the City agreed that “once a position title goes on-line in ConTest, no provisional hiring will occur thereafter.” (emphasis added) The ConTest program also had provisions that allowed for provisional employees currently serving in those official service titles now covered by ConTest to become permanent.

On May 21, 1999, HRD added four (4) job titles to ConTest, including Elevator Inspector I (State); Gas Fitting Inspector (Municipal); Plumbing (and Gas Fitting) Inspector (Municipal); and Power Plant Engineer (State). Those seeking to qualify under ConTest for the position of Plumbing Inspector were required to have: a) a current and valid Journeyman or Master Plumber’s license issued through the Commonwealth of Massachusetts Division of Professional Licensure by the Board of State Examiners of Plumbers and Gas Fitters at the time of the application and original appointment; and b) five years of continuous full-time, or equivalent part-time practical experience ... as a journeyman or master plumber. The ConTest guidelines also stated that: “While you may qualify to be placed on the plumbing inspector’s eligibility list, please be advised that, according to Section 11 of Chapter 142 of M.G.L. as amended by Chapter 843 of the Acts of 1977, you must have had practical experience as a Journeyman or Master plumber, continuously, during the five years next preceding the date of your appointment.”

On July 25, 2000, HRD added thirteen (13) job titles to ConTest. At this time, HRD simultaneously converted the title of Plumber from labor service to official service and made it part of ConTest. Those seeking to qualify under ConTest for the position of Plumber were required to possess a current and valid Journeyman or Master Plumber’s license issued through the Commonwealth of Massachusetts Division of Professional Licensure by the Board of State Examiners of Plumbers and Gas Fitters at the time of the application and original appointment.

On March 7, 2005, Mr. Lukasik was appointed as a Plumbing Inspector in the City’s Department of Code Enforcement. Despite the existence of the ConTest program and the agreement that no provisional appointments could be made to ConTest titles such as Plumbing Inspectors, the parties both state that this appointment was a provisional appointment.

³ While it appears that HRD still determined the initial qualification, the outcome of these appeals does not rest on that issue and the outcome would not be any different if the City actually performed this function.

The parties offered vague and divergent statements regarding whether Mr. Lukasik completed the ConTest process in 2005 and, if not, whether he had all of the qualifications required for the position of Plumbing Inspector in 2005.

As part of his written appeal, Mr. Lukasik stated that he “worked as a full-time plumber for private sector employers from 1992 until he was provisionally appointed to the position of Plumbing Inspector ... in 2005.”

It appears that Mr. Lukasik, at the time he was (provisionally) appointed as a Plumbing Inspector on March 7, 2005, may not have met the statutory requirement of “practical experience as a Journeyman or Master plumber, continuously, during the five years next preceding the date of your appointment.”

On April 24, 2006, Mr. Lukasik transferred from his position as a Plumbing Inspector in the City’s Department of Code Enforcement to the position of Plumber in the City’s Department of Parks, Building and Recreation Management. As referenced above, the position of Plumber only required: a current and valid Journeyman or Master Plumber’s license issued through the Commonwealth of Massachusetts Division of Professional Licensure by the Board of State Examiners of Plumbers and Gas Fitters at the time of the application and original appointment, which the parties appear to agree that Mr. Lukasik had at the time of his transfer.

Similar to his former title, however, it is unclear if Mr. Lukasik completed the ConTest initial qualification process outlined above.

In 2008, as part of its annual report to HRD, the City listed Mr. Lukasik as a permanent civil service employee in the position of Plumber with an appointment date of April 24, 2006.

In an undated letter sometime in 2008, HRD notified all Appointing Authorities that, effective October 16, 2008, the ConTest program was discontinued due to budget cuts. In this letter, HRD stated that it was “no longer accepting original applications or renewal requests for placement on eligible lists in ConTest titles, nor will lists be certified to municipalities seeking to fill vacancies in said titles. Provisional appointments will be accepted in these titles ...”. ConTest has never been resurrected. As referenced above, HRD simultaneously converted the position of Plumber from labor service to official service when it added the title to ConTest. HRD did not convert the title back to labor service when it discontinued ConTest.

In 2009, after ConTest was discontinued, as part of its annual report to HRD, the City listed Mr. Lukasik as a *provisional* civil service employee in the position of Plumber with an appointment date of April 24, 2006.

Mr. Lukasik now seeks to be deemed permanent in his official service title of Plumber, retroactive to his appointment date of April 24, 2006. Since Mr. Lukasik has all of the qualifications for the position and because his appointment occurred while ConTest was active and the City was only authorized to make permanent appointments, his request is allowed.

Other Potentially Similarly Situated Individuals

As part of these proceedings, I asked the City to determine if there were any other individuals similarly situated to the Appellants for which similar relief was warranted. In correspondence dated April 5, 2012, the City notified the Commission that, based on their records, they believed that three (3) other individuals (John Foley, Thomas Kelliher and Stephen Guyer) were similarly situated and that relief may be warranted, for somewhat related reasons, for four (4) other individuals (Eamon Collins, Kevin Garvey, Brandon Roy, Timothy White) employed by the City.

Conclusion

For all of the reasons stated above:

- Michael Ottomaniello's appeal under Docket No. E-11-260 is hereby ***allowed***. Pursuant to its authority under Chapter 310 of the Acts of 1993, Mr. Ottomaniello shall receive a retroactive civil service seniority date in the labor service title of Air Conditioning and Refrigerator Repairman, effective August 20, 2007;
- Daniel Lukasik's appeal under Docket No. E-11-259 is hereby ***allowed***. Pursuant to its authority under Chapter 310 of the Acts of 1993, Mr. Lukasik shall receive a retroactive civil service seniority date in the official service title of Plumber, effective April 24, 2006.
- In order to consider whether relief is warranted for the other individuals identified by the City, the Commission will open an appeal under a new docket number (E-12-153) and schedule a pre-hearing conference to review the matter further. That pre-hearing conference will be held on Wednesday, June 27, 2012 at 9:30 A.M. at the Springfield State Building in Springfield, MA. The City shall provide those seven (7) individuals with a copy of this decision .

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on May 31, 2012.

A True Record. Attest:

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)(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.

Notice to:

Kevin B. Coyle, Esq. (for Appellants)

Jeffrey Krok, Esq. (for City of Springfield)

John Marra, Esq. (HRD)