COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

CARL E. PEARSON,
Appellant

v.

D1-09-40

CITY OF BROCKTON,
Respondent

Appellant's Representative:

Anthony Pini
Mass. Laborers' District Council
7 Laborers' Way
Hopkinton, MA 01748

Respondent's Attorney:

Jennifer M. Riordan, Esq.
City of Brockton Law Department
45 School Street
Brockton, Ma 02301

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Carl E. Pearson, pursuant to G.L. c.31, §§ 42 and 43, filed an appeal with the Civil Service Commission (hereinafter "Commission") on February 9, 2009 claiming that the City of Brockton (hereinafter "City" or "Appointing Authority") did not have just cause to terminate him as a Technical Support Specialist from the City's Information Technology Center and that the City failed to consider his health issues or comply with the Family Medical Leave Act (FMLA).

The City filed a Motion to Dismiss the Appellant's appeal and the Appellant filed an opposition to the City's motion. A motion hearing was conducted on May 4, 2009 at the offices of the Commission.

Although the title of Technical Support Specialist is not listed in the "Municlass Manual" maintained by the state's Human Resources Division (HRD), both parties have stipulated that the Appellant was provisionally appointed to this position and that he was a provisional employee at the time of his termination.[1] The Appellant was terminated for performance-related reasons.

The sole issue before the Commission is whether a provisional employee has a right to appeal his termination to the Commission. The City argues that the civil service law only required the City to conduct a local "name-clearing" hearing, which they did, and that a provisional employee can not appeal the City's decision to the Commission. The Appellant argues that since the City granted the Appellant a local hearing, they "gave the impression that the proper forum to challenge the discharge was Civil Service." (Appellant's Opposition to Motion to Dismiss)

The third paragraph of G.L. c. 31, § 43 provides the following limited protections to provisional employees, such as the Appellant, who have been employed for at least nine months in the provisional position and are discharged for reasons related to his personal character or performance:

> "If a person employed under a provisional appointment for not less than nine months is discharged as a result of allegations relative to his personal character or work performance and if the reason for such discharge is to become part of his employment

[1] At the request of the Commission, the City provided additional information to the Commission and the Appellant showing that the position of Technical Support Specialist was created in 2002 via an agreement between the City and the Mass. Laborers' District Council. Although this specific title is not listed in the "Municlass Manual", there are several similar titles listed in the "Computer Operation Series" of the Manual, which are all considered "official service" titles (as opposed to "labor service" titles).

> record, he shall be entitled, upon his request in writing, to an informal hearing before his appointing authority or a designee thereof within ten days of such request. If the appointing authority, after hearing, finds that the discharge was justified, the discharge shall be affirmed, and the appointing authority may direct that the reasons for such discharge become part of such person's employment record. Otherwise, the appointing authority shall reverse such discharge, and the allegations against such person shall be stricken from such record. The decision of the appointing authority shall be final, and notification thereof shall be made in writing to such person and other parties concerned within ten days following such hearing."

Provisional employees, however, do not enjoy the same protections as tenured civil service employees, including the right to appeal the City's decision to the Commission. (G.L. c. 31, § 43, ¶1) (See Rose v. Executive Office of Health and Human Services, 21 MCSR 23 (2008), (Provisional employee had no right to appeal her termination to the Commission even though she had been treated as a tenured civil service employee throughout her 28-year career); See also Hampton v. Boston, Case No. D-05-430 (2006) (Provisional employee had no right to appeal his 3-month suspension to the Commission).

Numerous court decisions have also confirmed the limited protections afforded to provisional employees under the civil service law. See Dallas v. Comm'r of Pub. Health et al, 1 Mass. App. Ct. 768, 771 (1974), referring to Sullivan v. Comm'r of Commerce and Dev, 351 Mass. 462, 465 (1966). (In the case of provisional employees, there is "no tenure, no right of notice of hearing, no restriction of the power to discharge.") See also Rafferty v. Comm'r of Pub. Welfare, 20 Mass. App. Ct. 718, 482 (1985) (Provisional employee has right to an informal hearing by the Appointing Authority, but no further right to appeal to the Civil Service Commission.)

In the instant appeal, the Appellant, a provisional employee, was provided with a hearing before the Appointing Authority which subsequently issued him a decision

terminating his employment. Based on the plain reading of the statute and the above-referenced Commission and court decisions, the Appellant may not appeal the City's decision to the Commission. For these reasons, the City's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. D1-09-40 is hereby ***dismissed***.

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Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; and Taylor, Commissioner - No) on July 2, 2009.

A true Copy. Attest:

_____
Commissioner
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of a 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:
Anthony Pini (for Appellant)
Jennifer Riordan, Esq. (for Appointing Authority)