

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

GEORGE SANDS,
Appellant

v.

CITY OF SALEM,
Respondent

Case No. D-06-346

Appellant's Attorney:

Michael Maccaro, Esq.
Associate Counsel
AFSCME, Council 93
8 Beacon Street
Boston, MA 02108

Respondent's Attorney:

Daniel B. Kulak, Esq.
147 Russell Street
Peabody, MA 01960

Commissioner:

Daniel Henderson

DECISION

Pursuant to G.L. c. 31, §35, the Appellant George Sands, (hereinafter "Sands" or "Appellant") is appealing the decision of the City of Salem (hereinafter "the City" or "Appointing Authority") to transfer him from the Highway Division of the Public Works Department to the Cemetery Department. The appeal was timely filed, and a full hearing was scheduled for November 28, 2007 at the office of the Civil Service Commission

(hereinafter "Commission"). At the hearing, the City submitted a Motion to Dismiss/Motion for Summary Judgment on the grounds that no transfer had taken place. One (1) tape was made of the hearing and is held by the Commission. Since no notice was received from either party, the hearing was declared private. Both parties submitted proposed decisions.

FINDINGS OF FACT:

Twelve (12) Exhibits were entered into evidence at the hearing. Based on the documents submitted into evidence and the testimony of:

For the Appointing Authority:

- Elizabeth Rennard, Esq.; City Solicitor

For the Appellant:

- George Sands, Appellant

I make the following findings of fact:

1. Since April 27, 1987, the Appellant has been permanently employed with the Department of Public Services. (Exhibit 3)
2. On January 4, 1988, the Appellant was promoted to the position of Heavy Motor Equipment Operator within the Department of Public Works. (Exhibit 4)
3. On April 4, 1988, Appellant was promoted to the position of Hoisting Equipment Operator, and has held the position since. (Exhibit 5)
4. The duties required of a Hoisting Equipment Operator are as follows:
 - Regularly operate street sweeper in accordance with the schedule and route assigned by the general foreman.
 - Operate backhoe, sweeper, payloader, sander, grader, and other equipment.

- In winter use heavy equipment to remove and dispose of snow.
 - Perform basic heavy equipment maintenance including but not limited to changing oil, hydraulic and torque fluids and minor repairs.
 - Respond to emergency situations related to public services and notify appropriate staff if assistance is required.
 - Perform other duties as assigned.
- (Exhibit 8)

5. In 2001, the Appellant injured his left wrist on the job while operating a street sweeper. (Testimony of Appellant)
6. Following the injury, the Appellant had surgery on his wrist, and was cleared medically to return to work on June 24, 2002 as per a medical certificate from the Lahey Clinic. (Exhibit 9; Testimony of Appellant)
7. Sometime in June, 2002, the Appellant presented to the City a medical certificate indicating he was limited in performing all of the duties of Hoisting Equipment Operator. Specifically, he was not to use a jackhammer or street sweeper. (Exhibit 9; Testimony of Appellant)
8. At some point in 2002, the Appellant returned to work and continued to perform his duties as a Hoisting Equipment Operator in the Highway Division of the Public Works Department. (Testimony of Appellant)
9. On November 12, 2004, the Appellant had a follow up appointment at the Lahey Clinic for his 2001 wrist injury. The Appellant again received a medical certificate restricting him from using a jackhammer and a street sweeper. (Exhibit 9)
10. On January 31, 2005, the Appellant received a letter from two City Councilors commending him on the work that he had done during a large snowstorm. (Exhibit 6)

11. On November 7, 2005, the Appellant had another follow up with the Lahey Clinic for his 2001 wrist injury and received a third medical certificate restricting him from using a jackhammer and a street sweeper. (Exhibit 9)
12. In January 2006, Kimberly Driscoll (hereinafter "Driscoll") assumed the Office of Mayor of the City of Salem. (Testimony of Elizabeth Rennard)
13. Upon doing so, Driscoll was faced with a four million dollar budgetary deficit. In attempt to improve the deficit, Driscoll initiated a reorganization of various city departments. (Testimony of Elizabeth Rennard)
14. One result of the reorganization was to place the care and maintenance of the city cemeteries under the direction of Richard Rennard, the Director of Public Services (hereinafter "Director"). (Testimony of Elizabeth Rennard)
15. This reorganization is reflected in the Salem City Ordinances, Article VI, §§2-1066 – 2-1069, enacted on June 29, 2006. (Exhibit 11)
16. By Section 2 – 1069(f), the Director of Public Services:

"Shall be responsible to the cemetery commission and perform various duties as the cemetery commission may determine in the management of city cemeteries."
(Exhibit 11)
17. In October 2006, the Director informed his wife and acting Personnel Director, Elizabeth Rennard (hereinafter "Mrs. Rennard") that he had asked the Appellant to perform some work, and that the Appellant stated he could not do it because of his wrist injury. (Testimony of Elizabeth Rennard)
18. On or about October 17, 2006, the City had the Appellant submit to a "Fitness for Duty Examination" which confirmed the medical condition asserted by the Appellant. (Exhibit 10)

19. Shortly after obtaining the City physician's report from the Appellant's "Fitness for Duty Examination," Mrs. Rennard made the decision to transfer the Appellant to the Cemetery Division. Mrs. Rennard never sought written approval from anyone regarding the transfer of the Appellant. (Testimony of Elizabeth Rennard)
20. On November 22, 2006, the Appellant had a third follow up with the Lahey Clinic for his 2001 wrist injury, and received another medical certificate restricting him from using a jackhammer and a street sweeper. (Exhibit 9)
21. Well prior to November 2006, because of his medical restriction, the Appellant was assigned to removing trash and to perform general Maintenance in the Central Business District of the City. (Testimony of Appellant)
22. Both before and after the alleged transfer, Appellant was performing the same duties over the entire period of time. (Testimony of Appellant)
23. Although the Appellant had to report to work at a different location, this change of reporting did not cause him any hardship. (Testimony of Appellant)
24. Both before and after the alleged transfer, the Appellant remained on the payroll of the Department of Public Services. (Exhibits 1 and 2)
25. On November 28, 2006, the Appellant timely filed his appeal with the Commission.
26. On March 19, 2007, a pre-trial hearing was held at the Commission.
27. On November 26, 2007, the City filed a Motion to Dismiss/Summary Judgment alleging there was no transfer of the Appellant.
28. On November 28, 2007, a full hearing was held at the Commission.

CONCLUSION

In order to invoke the protection of G.L. c. 31, §35, the Appellant is required to establish that he was “transferred” within the meaning of Civil Service Law. This he has failed to do. “The Civil Service Commission has defined the term “Transfer” as a “change of employment under the same appointing authority from a position in one class to a similar position in the same or another class or a change of employ in the same position, under the same appointing authority, from one geographical location to a different geographical location, provided that a different geographical location shall be one which is both more than a commuting distance from the employee’s residence than its prior location and more distant from the employee’s residence than his prior location...” *Sullivan v. Department of Transitional Assistance*, 11 MCSR 80 (1998).

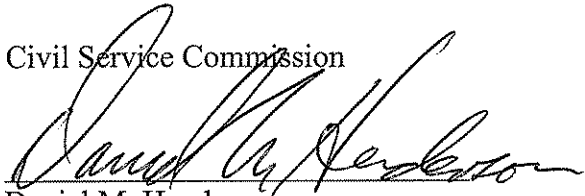
By the City of Salem Ordinances adopted on June 26, 2006, the responsibility of the Cemetery Department was placed under the Department of Public Services. This allows the Director to perform the various duties as the cemetery commission may determine in the management of its cemeteries. The Appellant remains an employee within the Department of Public Services, and he was reassigned to perform cemetery related duties, not transferred. The Appellant was no longer able to perform some of the essential duties in his previously held position and therefore, in order to make reasonable accommodation for his medically documented permanent disability, he was reassigned to perform cemetery related duties.

Even if the Appellant proves that he was transferred, his sole remedy is that which is provided for in Section 35. That being the case, even assuming, arguendo, that his distance of travel from his residence was greater than previously, Section 35, imposed an

additional burden of proof upon the Appellant, that being whether such a change in travel "...impose unreasonable hardship on the employee..." By the Appellant's admission at the hearing, it did not. At best he was required to travel not more than one-half mile than was previously required. Certainly, this is not a "hardship". Therefore, since no transfer has occurred, the Appointing Authority's Motion to Dismiss this Appeal is allowed.

For all of the above reasons, the appeal under Docket No.D-06-346 is hereby *dismissed*.

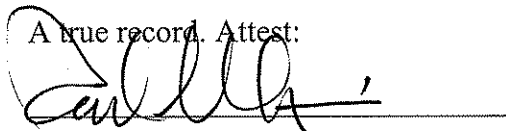
Civil Service Commission



Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Henderson, Marquis, Stein and Taylor Commissioners) Bowman absent, on September 11, 2008.

A true record. Attest:



Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. C. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Michael Maccaro, Atty.
Daniel B. Kulak, Atty..