

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOHN R. SHUTT,
Appellant

v.

G2-12-204

TOWN OF WATERTOWN,
Respondent

Appellant's Representative:

Veronica Wythe Ciccone
116 Adam Street
Dunstable, MA 01827

Respondent's Representative:

Joseph Fair, Esq.
Kopelman and Paige, P.C.
101 Arch Street: 12th Floor
Boston, MA 02110

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On June 22, 2012, the Appellant, John R. Shutt, filed a promotional bypass appeal with the Civil Service Commission (Commission), contesting his non-selection to the position of Supervisor of Forestry, Parks and Cemeteries by the Town of Watertown (Town). A pre-hearing conference was held on August 21, 2012. Mr. Shutt has no standing to file this appeal and the Commission has no jurisdiction to hear this matter. Therefore, his appeal is dismissed.

Background

On or around 1990, Mr. Shutt was appointed by the Town to the position of Motor Equipment Operator, a *labor service* title under civil service law and rules.

On or around 1995, Mr. Shutt was promoted to the position of Heavy Equipment Operator, also a labor service title.

On or around January 2008, Mr. Shutt was provisionally promoted to the position of Working Foreman, an *official service* title. According to Mr. Shutt, he then also began performing the duties and responsibilities of Supervisor of Cemeteries when the Director of Forestry, Parks and Cemeteries took a medical leave.

The City recently filled the position of Supervisor of Forestry, Parks and Cemeteries and did not appoint Mr. Shutt to that position. Although the City incorrectly believed that this was a non-civil service position, it was posted both internally and externally and has all the indicia of being a provisional appointment.¹ This appeal ensued.

Discussion

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); Asiaf 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

¹ After the pre-hearing conferences, the state’s Human Resources Division (HRD) submitted email communication to the Commission confirming that the appointment in question was a provisional appointment. That email correspondence was forwarded to both parties’ representatives.

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 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, it cannot be shown that the Town violated any civil service law or rule. The Town made a provisional appointment to an official service position and was not obligated to select a permanent civil service employee.

Further, it is undisputed that, although Mr. Shutt was not appointed to this position, he has retained his employment with the Town and his civil service permanency in the lower title of Heavy Equipment Operator has not been impacted.

Conclusion

For all of the reasons cited above, Mr. Shutt has no standing to file this appeal and the Commission has no jurisdiction to hear his appeal. Therefore, his appeal under Docket No. G2-12-204 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on September 20, 2012.

A True copy. 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)(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.

Notice to:

Veronica Wythe Ciccone (for Appellant)

Joseph Fair, Esq. (for Respondent)

John Marra, Esq. (HRD)