

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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**In the Matter of the Civil Service Status of
Seven Employees of the City of Springfield**

Docket No.: E-12-153

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Commissioner:

Cynthia A. Ittleman, Esq.

RULING ON CIVIL SERVICE STATUS

This case is the result of the ruling on May 12, 2012 of the Civil Service Commission ("Commission") in Michael Ottomaniello and Daniel Lukasik v. City of Springfield ("City"), Docket Nos. E-11-260 and E-11-259, granting the appeals of Mr. Ottomaniello and Mr. Lukasik seeking civil service permanency retroactive to their first day of employment in their respective civil service titles. In allowing the appeals of Mr. Ottomaniello and Mr. Lukasik, the ruling also stated,

¹ Attorney Rome was preceded by Timothy D. Zessin, Esq., who is no longer at the same firm.

“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. ...

In order to consider whether relief is warranted for the other [seven] 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.”

I hereby incorporate by reference the Commission’s decision in docket numbers E-11-259 and -260.

The pre-hearing conference in this case was held instead on July 25, 2012 in Springfield at which the City was represented by counsel, six (6) of the seven (7) named individuals were present and represented by counsel, of whom Mr. Foley, Mr. Kelliher, and Mr. Guyer were also represented by the Springfield Public Tradesmen Association. Neither Mr. Collins nor a representative attended the pre-hearing conference as there appeared to be some confusion among those present about Mr. Collins’ address and who may represent him. A status conference was held on October 10, 2012 in Springfield, attended by counsel for Mr. Collins and five (5) of the six (6) remaining employees (not including Mr. White), as well as counsel for the City, and representatives of the City Human Resources Department and the Facilities Management Department. The parties provided certain employment information at the pre-hearing conference and status conference and submitted further information by electronic mail.

On May 13, 2013, I sent the parties embargoed draft findings for their comments. Shortly thereafter, I received comments only on behalf of Mr. Garvey and Springfield. Counsel for Mr. Garvey requested two changes: 1) to change the date of hire at the Franconia Golf Course from December 29, 2009 to November 16, 2009, and 2) add that he has a Massachusetts Pesticide License. Mr. Garvey’s request to change the date of hire is denied as Springfield’s records indicate that the applicable date of hire in this instance was December 29, 2009. Mr. Garvey’s request to add that he has a Massachusetts Pesticide License is also denied because he did not provide any documentation in this regard and he did not indicate the dates he was so licensed. Springfield does not oppose the permanence of Mr. White, Mr. Foley, Mr. Kelliher and Mr. Roy ² on the dates they requested. Springfield also states:

- 1) Mr. Garvey’s permanence date should be April 18, 2011 (not September 8, 1992, as Mr. Garvey requests) and that his correct title on December 29, 2009 was Laborer/Motor Equipment Operator/Heavy Motor Equipment Operator/Special Heavy Motor Equipment Operator. As indicated below, Mr. Garvey’s permanence

² Springfield reports that Mr. Roy resigned effective April 19, 2013.

date shall be September 8, 1992 and his title as on December 29, 2009 is corrected as noted by Springfield;

- 2) Mr. Collins' permanence should not be effective February 2, 2008 because Mr. Collins was not on any Labor Service list and there are others who "would qualify for permanent status ahead of Mr. Collins. The City requests guidance from the Commission on this issue." As indicated below, Mr. Collins' permanence shall be effective February 2, 2008³; and
- 3) Mr. Guyer's status should remain provisional because he was hired on January 24, 2011, after the ConTest program expired, and HRD informed appointing authorities that appointments after ConTest would be provisional. As indicated below, Mr. Guyer's status shall remain provisional.⁴

Based on the statements of the parties at the pre-hearing conference and status conference, the documents the parties have submitted, and the reasonable inferences therefrom, as well as the applicable civil service law and other applicable laws, rules and policies, I find the following:

Mr. Kevin Garvey, currently a provisional employee, was hired on September 8, 1992 in the labor service title of Tree Climber/Surgeon as a civil service employee (a City document states that he was hired "Park-T.F.T.After Cert."), a temporary fulltime job in the Forestry Division in the Park Department. As a temporary employee, he was laid off on April 16, 2009, which was about the time the Springfield Finance Control Board ("Control Board"⁵) appears to have privatized the Forestry Division of the Park Department. The Control Board term began June 30, 2004 and ended June 30, 2009. *Id.* Mr. Garvey was hired provisionally in the labor service title of Laborer/Motor Equipment Operator/Heavy Motor Equipment Operator/Special Heavy Motor Equipment Operator on December 29, 2009 (after the Control Board's term ended in June that year) in the Park Department from a reemployment list. From August 19, 1998 to October 16, 2008, the state's Human Resources Division ("HRD") operated the ConTest program to offer certain provisional employees to obtain permanent civil service status but Mr. Garvey was unaffected by the program because it applied to certain job titles in the official service, not the labor service. The City's records regarding Mr. Garvey's December 29, 2009 employment state that he "worked w/o formal auth." On April 18, 2011, which was at or about the time that the Forestry Division of the Park Department was returned to the City, Mr. Garvey was provisionally appointed in the labor service as an Arborist in the Forestry Division of the Park Department. There are job titles "Tree Surgeon" and "Tree Climber" in the labor service but not "Arborist." The City's records for the April 18, 2011 appointment of Mr. Garvey indicate that he was

³ In *Ottomaniello and Lukasik v Springfield*, Docket Nos. E-11-259, -260 (May 31, 2012)("Ottomaniello"), the Commission ordered Springfield to notify it of other Springfield employees similarly situated. Springfield identified the seven Appellants here. If Springfield is aware of yet additional employees who are similarly situated, it shall inform the Commission thereof **within thirty (30) days of this decision.**

⁴ Previously, Springfield favored changing all of the Appellants' civil service status from provisional to permanent and only questioned the applicable dates of permanence for each Appellant.

⁵ The City of Springfield was operated by a Springfield Finance Control Board for the cited time period. Chapter 169 of the Acts of 2004 and the website (http://www3.springfield-ma.gov/cos/control_board.0.html). See discussion of the Control Board, *infra*.

appointed provisionally for the duration of a vacancy (“prov’l dur. of vac”). There is no indication of the hiring process used when Mr. Garvey was hired. Mr. Garvey seeks permanent civil service status as of his September 8, 1992 appointment. Mr. Garvey holds a commercial driver license (“CDL”).

Mr. Brandon Roy, currently a provisional employee, was initially hired on July 18, 2011 (after the Control Board’s term ended) in the labor service as an Arborist in the Park Department not long after the Park Department was reconstituted and he remains employed in that title. There are job titles “Tree Surgeon” and “Tree Climber” in the labor service but not “Arborist.” Mr. Roy holds a CDL and Bachelor and Associate degrees. There is no indication how he was selected for employment. Mr. Roy seeks permanent civil service status as of his July 18, 2011 appointment.

Mr. Timothy J. White, currently a provisional employee, was hired on April 19, 2011 (after the Control Board’s term) in the labor service as a Lead Arborist after the Control Board term ended and the Park Department was reconstituted. There are job titles “Tree Surgeon,” “Tree Climber,” “Working Foreman Tree Surgeon,” and “Working Foreman Tree Climber” in the labor service but not “Lead Arborist.” There is no indication what process was used to select Mr. White for employment. Mr. White seeks permanent civil service status as of his April 19, 2011 appointment.

Mr. John Foley was hired on December 3, 2007 (during the Control Board’s term) in the labor service title of Air Conditioning/Refrigerator Repairman in the Facilities Management Department.⁶ His 2007 hiring, according to the City’s records, was provisional pending certification of an eligible list (“Prov’l pend cert. elig. List,” in the City records). Mr. Foley’s civil service status was made permanent effective October 10, 2011, according to City records (“PFT after cert eff. 10/19/11”) but there is no indication how permanency was established and the reason it was effective October 10, 2011 rather than his original date of hire. Mr. Foley seeks to have his permanent civil service status extended to his initial hire date of December 3, 2007.

Mr. Thomas Kelliher was hired in the labor service title of Steamfitter as a provisional employee in the Facilities Management Department on January 14, 2008 pending an eligibility list (“prov’l pend. elig. list” in the City’s records; this occurred during the Control Board’s term) and he was appointed a permanent fulltime Steamfitter in the labor service on October 12, 2011 (“PFT after cert. eff. 10/12/11” in the City’s records; this occurred after the Control Board’s term ended). There is no indication how Mr. Kelliher’s status was changed from provisional to permanent or the reason it was effective in 2011 rather than in 2008. Mr. Kelliher seeks the extension of his permanence to January 14, 2008.

Mr. Eamon Collins, currently a provisional employee, was hired February 2, 2008 (during the Control Board’s term) in the labor service as a Facilities Maintenance Man in the Facilities

⁶ In Ottomaniello, correspondence dated September 23, 2011 from HRD counsel to the Commission indicates that Mr. Foley’s job title is in the labor service.

Management Department. There is no “Facilities Maintenance Man” title in the labor service.⁷ Mr. Collins asserted that he successfully litigated this matter years ago at the Commission and yet he has still not been given permanent civil service status.⁸ There is no indication how Mr. Collins was selected for employment. Mr. Collins seeks to have his civil service status changed from provisional to permanent effective February 2, 2008.

The City of Springfield was operated by a Springfield Finance Control Board (“Control Board”) from June 30, 2004 to June 30, 2009. See Chapter 169 of the Acts of 2004 and Springfield Control Board website (http://www3.springfield-ma.gov/cos/control_board.0.html)

On or about December 6, 2004, the City of Springfield authorized the Control Board executive director (subject to the Control Board’s approval), to delegate powers, “To reorganize, consolidate or abolish departments, offices or functions of the city, in whole or in part, and to establish such new departments, offices or functions as it deems necessary, and to transfer the duties, powers, functions and appropriations of 1 department or office or function to another.” Control Board Executive Order. Pursuant to this Executive Order, the parties believe that the Control Board privatized the City Forestry Division of the Park Department and that the Control Board may have made personnel appointments in a manner inconsistent with civil service. The Forestry Division was returned to City government on or about April 18, 2011.

The City acknowledges that errors were made when appointing these individuals, that the Control Board may have taken actions inconsistent with civil service law, and/or that it was not authorized to make permanent appointments on certain occasions. The City favors changing the civil service status of the seven (7) named employees from provisional to permanent and only questions the applicable dates of permanence for these individuals.

Regarding the Requests of Mr. Garvey, Mr. Roy, Mr. White, Mr. Foley, Mr. Kelliher and Mr. Collins

Mr. Garvey, Mr. Roy, Mr. White, Mr. Foley, Mr. Kelliher and Mr. Collins are and/or were provisional labor service employees at various times who seek to have their provisional civil service status changed to permanent retroactive to the date they were first hired. They assert that such retroactive permanence will not harm other employees. They also aver that the HRD ConTest program could have affected their status. However, the ConTest program is not applicable to these six (6) employees because they were labor service employees and ConTest is related to official service positions. In any event, ConTest only operated from sometime in August of 1998 until mid-October in 2008. Mr. Garvey asserts that even though he was laid off in 2009, his permanence should extend back to his initial 1992 date of hire, at which time he was a Tree Climber/Surgeon, because it is basically the same as his current title of Arborist.⁹ He was laid off under the Control Board. Mr. Roy and Mr. White were not affected by the Control Board as they were hired after its term ended. Mr. Kelliher was hired during the term of the

⁷ The position of Facilities Maintenance Man may be similar to the title of “Building Maintenance Man” in the Building Maintenance Series but this is a matter for HRD’s determination with any necessary information to be provided by the City promptly upon receipt of this decision.

⁸ I have not received any documentation of the successful appeal.

⁹ While the function of the title Tree Climber/Surgeon and the title of Arborist may be the same, the Commission does not have a job description from the Munclass classifications for the Arborist title.

Control Board and made permanent thereafter as of October 12, 2011. Mr. Kelliher seeks permanence as of January 14, 2008, the date he was initially hired during the Control Board's term. Mr. Collins was hired during the Control Board term. Mr. Foley was hired in 2007, made permanent effective 2011, and seeks retroactive permanence effective his hiring date in 2007.

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, §§ 28-29. G.L. c. 31, § 28, which pertains to labor service appointments, states in pertinent 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 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 pertinent 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]¹⁰ ... [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) further 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] person on the labor service register. There is no evidence indicating whether the City followed these requirements with regard to the six labor service employees.

Whether or not the City followed these requirements, it appears that there is no Commission decision in which the Commission has recognized provisional labor service appointments. Indeed, PAR.19 refers only to temporary and permanent labor service positions. Any individual who is appointed should first be required to place his or her name on the labor service roster, thus satisfying the applicable requirements and resulting in his or her permanent appointment as a labor service employee. All seven (7) Appellants assert that they should have

¹⁰ HRD delegated labor service functions to all civil service cities and towns, with the exception of the City of Boston, years prior to these appointments. Thus, it is the City's responsibility to maintain the labor service rosters, create labor service roster certification, and address matters in this regard as were formerly addressed by HRD.

been hired as permanent civil service employees, not provisionals. Further, they argue that their job titles were included in the ConTest program implemented by HRD (see discussion below) to address provisional appointments and that, therefore, they should be deemed permanent civil service employees retroactive to their appointment dates. With the exception of Mr. Guyer, these employees were in labor service municipal titles, which were not included in the ConTest program.

Regarding the Request of Mr. Guyer

Mr. Stephen Guyer, currently a provisional employee, was hired on January 24, 2011 (after the Control Board's term) in the official service title of Plumber in the Facilities Management Department. Mr. Guyer did not take a civil service examination as none was available at or about the time he was considered for employment as a Plumber in Springfield. The ConTest program applied to the official service title of Plumber but Mr. Guyer was hired after the program ended in 2008. There is no indication what process was used to select Mr. Guyer for employment. Mr. Guyer seeks to have his civil service status changed from provisional to permanent effective January 24, 2011.

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 through 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 to a special legislative commission that addressed, in part, the large number of provisional employees, developed the 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. Applicants would receive confirmation from HRD, on the same day or 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, therefore, it 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.¹¹ 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.” *Id.* The ConTest program also had provisions that allowed for provisional employees currently serving in those official service titles then covered by ConTest to become permanent.

HRD added other job titles to ConTest on May 21, 1999 and July 25, 2000 not relevant here. However, on July 25, 2000 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 (“DPL”) by the Board of State Examiners of Plumbers and Gas Fitters at the time of the application and original appointment. I take administrative notice that the DPL website indicates that Mr. Guyer has been a licensed Plumber since May 31, 2008, well before his January 24, 2011 hiring date. Therefore, it appears that Mr. Guyer had the qualifications to be a Plumber at the time of his application and original appointment. However, in an undated letter to Appointing Authorities, HRD announced the end of the ConTest program effective October 16, 2008 due to budget cuts. In the letter, HRD advised,

“...[HRD] is 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, unless a re-employment and/or reinstatement list exists.** Appointing Authorities seeking to fill a vacancy in a ConTest title should still submit a Form 13 to ensure that all

¹¹ While it appears that HRD still determined the initial qualification, the outcome of the requests of these employees does not rest on that issue and the outcome would not be any different if the City actually performed this function.

applicable reemployment and/or reinstatements lists are issued. **The same applies to Delegated municipalities. ...”**

HRD letter, undated (emphasis added).

Therefore, by the time Mr. Guyer was hired in 2011, ConTest was no longer operating and he remains a provisional employee in the official service and not entitled to relief under Chapter 310 of the Acts of 1993. Based on this information, Mr. Guyer’s request for permanence is *denied*.

Conclusion

As noted above, there appears to be limited, if any, information about the manner in which the Appellants were hired/appointed. With respect to the Appellants employed in the labor service (Appellants Garvey, Roy, White, Foley, Kelliher and Collins), they were appointed in a manner that did not comport with civil service law through no fault of their own. Similarly, there is little information concerning the method and reason some of them were given permanence but not retroactive to their appointments through no fault of their own. Therefore, the requests of these six labor service employees are *allowed* and, pursuant to the Commission’s authority under Chapter 310 of the Acts of 1993, they shall be deemed permanent civil service employees effective their respective original dates of hire/appointment:

Mr. Garvey – September 8, 1992

Mr. Roy – July 18, 2011

Mr. White – April 19, 2011

Mr. Foley – December 3, 2007

Mr. Kelliher – January 14, 2008

Mr. Collins – February 2, 2008

In addition, within thirty (30) days of the date of this decision, Springfield shall provide HRD with any and all information it has with regard to the functions being performed by Mr. Collins, Mr. Garvey, Mr. Roy and Mr. White in their current positions so that HRD can determine their appropriate labor service employment titles. Within thirty (30) days of the date that Springfield sends such information to HRD, HRD shall 1) determine the appropriate labor service employment titles for Mr. Collins, Mr. Garvey, Mr. Roy, and Mr. White, which titles shall be effective on the dates of their respective appointments to those positions, and 2) promptly notify Springfield, Mr. Collins, Mr. Garvey, Mr. Roy and Mr. White of its determination.

Since Mr. Guyer was hired into the official service without an examination after the

ConTest program ended, and pursuant to the HRD notice to appointing authorities cited above, his appeal is ***denied*** and his status remains as a provisional employee. Within thirty (30) days of this decision, HRD shall advise the Commission whether the Plumber title shall be restored to the labor service from the official service in view of the termination of the ConTest program.

Civil Service Commission

Cynthia A. Ittleman, Esq.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on March 20, 2014.

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)(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 as stated below.

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 from the effective date specified in 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:

Mary Clark, Esq. (for Mr. Collins)
John Connor, Esq. (for Mr. Collins)
Kevin B. Coyle, Esq. (for Mr. Kelliher, Mr. Foley and Mr. Guyer)
David Rome, Esq. (for Mr. Garvey, Mr. Roy, and Mr. White)
Jason V. Sylvester (for Mr. Kelliher, Mr. Foley and Mr. Guyer)
Peter P. Fenton, Esq. (for the Respondent)
Maite A. Parsi, Esq. (for the Respondent)
John Marra, Esq. (HRD)