

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293**

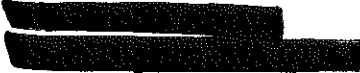
JOSEPH T. SYLVIA,
Appellant

v.

CASE NO: G2-10-270

**TAUNTON MUNICIPAL LIGHT
PLANT,**
Respondent

Appellant, Pro Se:

Joseph T. Sylvia


Appointing Authority's Attorney:

James B. Cox, Esq.
Rubin & Rudman, LLP
50 Rowes Wharf
Boston, MA 02110

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Joseph T. Sylvia, acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission) from an alleged action or inaction of the Taunton Municipal Light Plant (TMLP) purporting to bypass him for a promotional appointment to the position of Second Class Steam Fireman. On October 27, 2010, TMLP moved to dismiss the appeal for lack of jurisdiction. The Appellant opposed the motion by submissions on November 1, 2010 and December 6, 2010. The Commission also received a submission from the Massachusetts Human Resources Division (HRD) on November 2, 2010 which took no position on the motion.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, and the argument presented by the Appellant and TMLP, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Joseph T. Sylvia is employed by the City of Taunton (Taunton), his Appointing Authority, as a permanent civil service labor service employee in the position of Working Foreman/Inspector with the Streets and Drains Division of the Taunton Department of Public Works. He has 27 years of service in this position. (*TMLP Motion; Appellant's Findings of Fact; Claim of Appeal*)
2. The Respondent, TMLP, is a municipal electric utility that is a separate legal entity from the City of Taunton. (*TMPL Motion*)
3. In August 2010, TMLP posted a vacancy for provisional appointment to the official service position of Second Class Steam Fireman. At the time of this posting there was no civil service eligible list for the position, nor was there any re-employment list for the position. (*TMLP Motion; Appellant's Objection; Appellant's Findings of Fact*)
4. Mr. Sylvia, who holds a Second Class Fireman's license and met the other requirements for the job, applied for the position. (*Appellant's Findings of Fact*)
5. TMLP did not acknowledge Mr. Sylvia's application or interview him. Rather, on or about September 20, 2010, it hired Michael Emond, a TMLP provisional building custodian since March 2009. (*TMLP Motion; Appellant's Findings of Fact*)
6. According to the documentation submitted to HRD, the advertised position of Second Class Steam Fireman for which TMLP hired Mr. Emond was "newly created". When the vacancy "presented itself", Mr. Emond, who had enrolled in night school and

obtained his Second Class Steam Fireman's license, applied and "was deemed the successful and qualified candidate through our in-house process and in accordance with our union contract." (*TMLP Motion; Appellant's Findings of Fact*)

7. This appeal duly ensued. (*Claim of Appeal*)

CONCLUSION

Applicable Standard on Dispositive Motion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., "viewing the evidence in the light most favorable to the non-moving party" [i.e., Mr. Sylvia], TMLP has presented substantial and credible evidence that Mr. Sylvia has "no reasonable expectation" of prevailing on at least one "essential element of the case", and Mr. Sylvia has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005); cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008)

Specifically, this motion to dismiss must allowed when Mr. Sylvia fails to raise "above the speculative level" sufficient facts "plausibly suggesting" that he is aggrieved by any action or failure to act by HRD or TMLP that violates any Civil Service law or rules. See generally Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Applicable Civil Service Law

G.L.c.31, §10 through §14 contain the statutory provisions for making “provisional” appointments in the official service. These statutes prescribe, in part:

§ 12. Provisional appointments. An appointing authority may make a provisional appointment to a position in the official service . . . if no suitable eligible list exists from which certification of names may be made for such appointment. . . pending the establishment of an eligible list. . . .

After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator [HRD] shall proceed to conduct an examination as he determines necessary and to establish an eligible list. . . . The eligible list resulting from such new examination shall be established within eighteen months of the determination of the results of the last previous examination, provided, however, that such new examination shall be held no later than one year . . . if the appointment must comply with federal standards for a merit system of personnel administration as a condition for receipt of federal funds by the commonwealth or any of its political subdivisions.¹

. . .

§ 13. Provisional appointments; notice; filing. An appointing authority, in requesting authorization to make a provisional appointment, shall file with the administrator or, if the appointing authority is a department. . . within a executive office, with the secretary in charge of such office, a notice containing: (1) the information which the appointing authority believes is necessary to prepare and conduct an examination for the position for which such authorization is being requested, including a statement of the duties of the position, and the knowledge, skills and abilities necessary to perform such duties; (2) a proposal specifying the type of examination which should be held by the administrator; (3) a substantiation that the person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties.

§ 14. Provisional appointments; authorization; reports; length of service; termination. Upon receipt of the notice described in section thirteen, the administrator or the secretary in charge of the executive office, as the case may be, may authorize a provisional appointment if he determines that the contents of the notice are satisfactory. . . .

Each provisional appointment shall be reported. . . to the administrator. A provisional appointment may be terminated by the administrator at any time The administrator shall have the authority to terminate a provisional appointment which was approved by a secretary of an executive office.

It has long been established that “[p]rovisional appointments . . . through noncompetitive examinations are permitted only in what are supposed to be exceptional instances. . . .” City of Somerville v. Somerville Municipal Employees Ass’n, 20 Mass.App.Ct.594,598, rev.den., 396 Mass. 1102(1985) citing McLaughlin v.

¹ The Commission has received no evidence that indicates that the Commonwealth is at risk of losing any federal funds as a result of the use of provisional appointments.

Commissioner of Public Works, 204 Mass. 27, 29 (1939). However, passage of decades without HRD holding competitive examinations for non-public safety (i.e. police & fire) official service positions has meant that Appointing Authorities have resorted to filling the vast majority of civil service employees provisionally for many years. These provisional appointments (and provisional promotions) have been used because, without civil service examinations, HRD has no basis on which it can establish the “eligible lists” from which a certification of names can be made for permanent appointments or promotions. Thus, as predicted, the exception has now swallowed the rule and “a promotion which is provisional in form may be permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).

This is not a new issue – for the Commission, HRD, the legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions. As much as the Commission regrets this state of affairs, and has repeatedly exhorted parties in the public arena to end the current practice of relying on provisional promotions (and provisional appointments) to fill most civil service positions, the Commission must honor the clear legislative intent that allows for provisional promotions so long as the statutory requirements are followed. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. at 389.

That said, the law must be interpreted according to the plain meaning of the words chosen by the legislature. See, e.g., Commonwealth v. Biagiotti, 451 Mass. 559, 603-604, (2008). When a statute is clear and unambiguous, it is not the function of the Commission to rewrite it. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006),

quoting Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 86 (1999) It remains the duty of the Commission to enforce the Civil Service Law, as written.

Here, TMLP hired a Second Class Steam Fireman by provisional appointment, as may do in the absence of an eligible list. G.L.c.31,§12. In making such an appointment, TMLP is required to give preference to veterans. G.L.c.31,§26,¶5. Otherwise, unlike the statutory scheme requiring permanent civil service appointments to be made according to rank ordering of the candidates' exam scores, TMLP has considerable discretion in hiring provisional employees; there is no obligation to choose the most qualified or better qualified candidate, and unsuccessful candidates have been granted no recourse to the Commission to challenge the exercise of that sound discretion. See Richards et. al. v. Department of Transitional Assistance, 23 MCSR --- , CSC Case No. G2-10-194 et al (2010); Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Asif v. Department of Conserv.& Rec., 21 MCSR 23 (2008); Rainville v. Massachusetts Rehab. Comm'n, 19 MCSR 386 (2006), citing O'Brien v. Massachusetts Rehab. Comm'n, CSC Case No. G-1883 (1991)²

The Commission fully appreciates the apparent disparity in service between Mr. Sylvia (a 27-year Taunton permanent labor service employee) and Mr. Edmond (an 18-month TMLP provisional official service employee). In providing for provisional

² The statutory provision for provisional "appointments" under G.L.c.31,§12 differs from the requirements for provisional "promotions" under G.L.c.31,§15, within a departmental unit, as to which, under some circumstances, permanent civil service employees within the same departmental unit who hold permanency in the next lower title and are qualified for such promotion, may challenge the selection of another employee within the departmental unit who is not in the next lower title and/or has no permanency. See, e.g., Richards et. al. v. Department of Transitional Assistance, 23 MCSR --- (2010); Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010); Gale v. Department of Revenue, 23 MCSR 534 (2010); Pease v. Department of Revenue, 22 MCSR 284 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Asiaf v. Department of Conservation & Recreation, 21 MCSR 23 (2008). Clearly, Section 15 is not applicable here. Mr. Sylvia was not employee in TMLP and he would have had no rights under Civil Service law to challenge a departmental unit provisional "promotion" of an internal TMLP candidate.

appointments, however, the Legislature does not even require that civil service employees have preference over non-civil service employees. The Commission may only exercise jurisdiction over cases involving alleged violations of Civil Service Law with which the Legislature has vested it. Unfortunately, this is not such a case.

In sum, there is simply no legal basis on which Mr. Sylvia can be expected to assert any deprivation of his civil service rights that would entitle him to relief in this appeal.

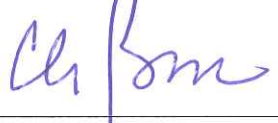
Accordingly, for the reasons stated above, TMLP's Motion to Dismiss is granted and the appeal of the Appellant, Joseph T. Sylvia, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on January 27, 2011.

A True Record. Attest:


Commissioner

**Commissioner Marquis was
absent on January 27, 2011**

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 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:

Joseph T. Sylvia (Appellant)

James B. Cox, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)