

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MICHAEL TORRES,
Appellant

v.

CASE NO: D1-08-162

FALL RIVER SCHOOL DEPARTMENT,
Respondent

Appellant's Attorney:

Karen E. Clemens, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appointing Authority's Attorney:

Bruce A. Assad, Esq.
16 Bedford Street
Fall River, MA 02720

Commissioner:

Paul M. Stein

DECISION

The Appellant brought this appeal pursuant to G.L.c.31,§43, seeking relief related to his layoff from employment by the Fall River School Committee (FRSC). At Pre-Hearing Conference on September 26 2008, an issue concerning the jurisdiction of the Civil Service Commission was presented, namely, the right of appeal to the Commission by a provisionally appointed civil service employee who was laid off for budgetary reason, allegedly in violation of G.L.c.31,§39 because he holds greater seniority than others who were retained. Submissions have been received on this matter from counsel on behalf of the Appellant, the Appointing Authority and the Massachusetts Human Resources Division (HRD). After consideration of the submissions, the Commission acts, pursuant to 801 C.M.R. 1.01(7) (g)(3), to dismiss this appeal for lack of jurisdiction.

STATEMENT OF UNDISPUTED FACTS

1. The Appellant, Michael Torres, was employed by the Fall River School Department in a civil service labor service position during the period from September 11, 1989 until November 11, 1995, at which time he resigned from his employment. Mr. Torres withdrew his retirement contributions upon his resignation. (*HRD Submission; Representation of Counsel*)

2. HRD delegated certain civil service functions for labor service titles to the local appointing authority, i.e., FRSC in any labor service position. The FRSC describes his labor service position as “Cafeteria Worker” which is not a civil service title; HRD believes Mr. Torres most likely held the position of Cafeteria Helper or Cafeteria Attendant during this period. (*HRD Submission*)

3. FRSC and the Appellant dispute Mr. Torres’ labor service seniority date. The FRSC computes his seniority from October 31, 1994 while the Appellant contends his seniority date is the original hire date of September 11, 1989. (*Representations of Counsel*)

4. On or about May 3, 2000, Mr. Torres became reemployed with the FRSC in the position of “Assistant Storekeeper”, which is a civil service title in the official service, performing services as a carpenter. (*HRD Submission; Representation of Counsel; FRSC Letter dated June 27, 2008*)

5. Civil service functions for official service titles have not been delegated to FRSC. HRD does not have any records regarding Mr. Torres’ employment as Assistant Storekeeper. However, according to HRD, there would have been no eligible list from

which to make a permanent appointment of Assistant Storekeeper at the time of Mr. Torres' employment in that position. (*HRD Submission*)

6. The parties do not dispute that, at all times from his employment in 2000 until his termination, Mr. Torres held a provisional appointment as Assistant Storekeeper. (*Representation of Counsel*)

7. On June 27, 2008, after conducting a hearing in accordance with M.G.L.c.31,§41, the FRSC notified Mr. Torres that the FRSC lost fourteen (14) full-time positions in the Facilities and Operations Division and that his employment, among others, was being terminated for lack of funds, as of the close of business that day. The termination letter states that the termination decision was made in consideration of his seniority and that "[w]hen finances allow us to return a position of carpenter to the Department of Engineering & Maintenance, you will have the first opportunity to accept that position." The termination letter does not otherwise make reference to the right of appeal to the Civil Service Commission. (*FRSC Letter dated June 27, 2008*)

8. The Appellant does not contest that the reason for termination is the lack of funds as stated in the FRSC's termination letter. (*Representation of Counsel*)

CONCLUSION

The Civil Service Law, Mass. G.L.c.31, makes a significant distinction between civil service employees who hold "tenured" or "permanent" status and those who are "provisional" employees (either by original appointment or promotion). As stated in Dallas v. Commissioner of Public Health, 1 Mass.App.Ct. 768, 771, 307 N.E.2d 589, 591 (1974):

"While [G.L.c.31] s 43(a) confers tenure on certain public employees and imposes notice and hearing requirements. . .that section applies only to the removal of a

‘person holding office or employment under permanent appointment. . .from such office or employment without his consent. . . .’ [T] petitioner’s appointment . . . was only a provisional one, defined by G.L.c.31 s1 . . . as ‘an appointment authorized on a requisition where there is no suitable eligible list.’ In the case of a provisional employee, there is ‘no tenure, no right of notice or hearing, no restriction of the power to discharge’ ” citing Sullivan v. Commissioner of Commerce & Development, 351 Mass. 462, 465, 221 N.E.2d 761 (1966) (*emphasis added*)

See also Smith v. Commissioner of Mental Retardation, 409 Mass. 545, 567 N.E.2d 924 (1991) (provisional employee has no right to a Section 41 appointing authority hearing to contest a demotion); Cordio v. Civil Service Comm’n, 59 Mass.App.Ct. 1110, 797 N.E.2d 1223 (2003) (unpublished Rule 1:28 opinion) (Commission lacked jurisdiction to hear appeal from discharged provisionally appointed employee).

The Commission notes that the prior cases involve provisional employees who sought to challenge discipline under Section 41 through 43 of the Civil Service Law, but do not specifically address rights, if any, held by employees provisionally promoted to a position from another permanent civil service title and who claim rights derived from their prior “permanency”. The only decision that deals with that situation, albeit indirectly, is Andrews v. Civil Service Comm’n, 446 Mass. 611, 846 N.E.2d 1126 (2006) which seems to imply that civil service employees in a “provisional” position who had “permanency” in another title might well have some rights under Section 39 in the case of layoffs and “bumping” rights following separation from employment for lack of work or lack of funds.

In the present case, however, at the time he was separated from employment, Mr. Torres’ only civil service status was as a provisional employee in the official service position of Assistant Storekeeper. The fact that he once held permanent civil service status in another position, whether with seniority from 1989 or 1994, does not now seem

relevant. Mr. Torres resigned such a position and there is no evidence presented to suggest that he has any basis to claim continuing “permanency” in his prior position or that he was “reinstated” to such a permanent position. Absent any basis to claim current permanency in any position, the Commission concludes that the principles of the Sullivan and Dallas line of cases preclude the Appellant from asserting rights under Section 39 and, more specifically, preclude the Commission from assuming jurisdiction over an appeal from alleged violation of those rights.

Therefore, for the reasons stated herein, Mr. Torres’ appeal is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on October 30, 2008.

A True Record. Attest:

Commissioner

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:

Karen Clemens, Esq. [Appellant]

Bruce A. Assad, Esq. [Appointing Authority]

John Marra, Esq. (HRD)