COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. **CIVIL SERVICE COMMISSION**

APRIL M. TROXELL,
Appellant

D-07-427

v.

CITY OF BROCKTON,
Respondent

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, April M. Troxell, filed an appeal with the Commission on December 7, 2007, based on her non-selection by the Respondent City of Brockton ("the City") for a position in the City's Department of Public Works (DPW). The appeal appears to have been timely filed. The issue of timely filing will be addressed later on, in this decision. A pre-hearing conference was held at the Commission offices on January 28, 2008, and a full hearing was held on April 4, 2008. At the full hearing, it was agreed to by the parties that the appeal could be decided by way of a Motion to Dismiss, supported by agreed to exhibits, on jurisdictional and/or other grounds. The City filed a Motion to Dismiss on May 1, 2008 claiming that the Commission is precluded from hearing this appeal because Appellant's grievance was "previously resolved or litigated" in accordance with G.L. Chapter 150E, § 8, when it was denied by the local appeals board, the City's Personnel and Labor Relations Board. See G.L.c. 31, § 43. The City also filed a second Motion to Dismiss on the grounds of failure to state a claim and lack of jurisdiction. The parties attached agreed upon exhibits, (Exhibits A-P) The Appellant filed an Opposition to the Motions to Dismiss on June 4, 2008.

Factual Background

On July 31, 2007, DPW posted a vacancy for an appointment to the position of Principal Clerk in the Highway Section of DPW, a position for which no current civil service list exists. The appointment was open to all DPW employees. (Exhibit A) Appellant is a senior employee in the Water Division who currently holds the title of Head Clerk. She has approximately ten (10) years of service with the City and is frequently called upon to assume the duties of her superior, the Head Administrative Clerk. The position of Principal Clerk would represent a decrease in pay and title for the Appellant and therefore would be a demotion. The job titles in "clerical" series as set forth by HRD in the "Municlass Manual," (Exhibit B), are as follows:

0301A Clerk
0301B Senior Clerk
0301C Principal Clerk
0301D Head Clerk
0301E Head Administrative Clerk

However, the Appellant applied for the position along with four junior candidates as she stated that she was interested in the potential overtime opportunities and the change of setting afforded by the position. After conducting interviews, the Appointing Authority selected another candidate who had one year less seniority than Appellant. The position of Principal Clerk requires working "under the direct supervision of a department supervisor." See Job Posting The position is primarily clerical, relating to department operations and customer service. See Affidavit of DPW Commissioner, Michael Thoreson, (Exhibit D) According to the City, this decision was based on the needs of the Department as a whole and on the candidates' interview performances.

The Appellant filed a grievance on October 30, 2007, alleging that the City violated the applicable collective bargaining agreement ("CBA") by denying her a "promotion." The Appointing Authority denied the grievance, and the City's Personnel and Labor Relations Board ("Board") conducted a hearing and affirmed the denial on December 7, 2007. The CBA calls for a mandatory Grievance Procedure in Article IV for the resolution of a dispute involving an interpretation or application of the terms of the CBA. However, Article V of the CBA allows the employee the option to submit the appeal of the grievance procedure determination to binding arbitration. (Exhibit I). The Appellant chose not to elect for binding arbitration of the City Board's decision of December 7, 2007. Instead, the Appellant appealed to the Civil Service Commission.

The Appellant filed her appeal at the Civil Service Commission on December 17, 2007. She claimed in her appeal that the City disciplined her, without just cause by not promoting her, all in violation of G.L.c. 31 § 43. The Appellant appears to argue that the Commission has jurisdiction under Article XIX of the CBA, which provides that "promotions of Civil Service employees shall be in accordance with Massachusetts General Laws Chapter 31."

Discussion:

The Respondent argues that the Commission must first determine whether it has jurisdiction to hear this matter, as the Appellant failed to exhaust the remedies available to her under the Agreement (i.e., arbitration). According to Respondent, the Commission is precluded from hearing this appeal because Appellant's grievance was "previously resolved or litigated" in accordance with Chapter 150E, § 8, when it was denied by the Department's Personnel and Labor Relations Board. See G.L.c. 31, §42 & §43.

The Commission has determined here, that the Appellant did properly exercise her option to appeal the December 7, 2007 decision of the City's Personnel and Labor Relations Board to the Civil Service Commission, pursuant to the terms of the CBA. The Appellant's grievance was not "previously resolved or litigated" in accordance with G.L. Chapter 150E, § 8, when it was denied by the City-Labor Relations Board ("Board"). That decision by the Board was not final. The Appellant thereupon, pursuant to Article V of the CBA, had the voluntary option of then submitting the matter to binding arbitration. (Exhibit I) The Appellant chose otherwise. The Appellant filed her appeal of that decision at the Civil Service Commission, on December 17, 2007.

The determination of some employment related issues are reserved exclusively to the Commission pursuant to the civil service laws and some that are within the purview of the CBA and reviewable by binding arbitration. However, there are some other issues which are mixed and intertwined. The Commission may decline jurisdiction on some matters or employ the definitions and terms of the CBA to determine "just cause" on such issues for example as "sick leave abuse" or "progressive discipline". The Commission is also mindful of the fact that the pursuit of binding arbitration according to the typical CBA requires union participation or initiation. The Commission also recognizes that the Appellant's union may not have a similar interest to the Appellant in a particular controversy.

The Commission may elect to defer to an arbitrator's decision based upon a violation of the CBA. However, the Commission will not defer to a remedy imposed upon the Appellant, by an arbitrator's decision, if it is in violation of civil service law. See Thomas Kennedy v Lawrence Fire Department, (D-6082), 12 MCSR 83 (1992).

Although, the Appellant claimed in her appeal to the Commission, that the City disciplined her, without just cause by not promoting her, all in violation of G.L.c. 31, § 43; the Commission has also considered the Appellant's appeal as possibly being founded on a violation of G.L.c. 31, § 2(b), a bypass for a promotional appointment. The term "*Bypass*," refers to "the selection of a person or persons whose name or names, by reason of [exam] score ... appear lower on a certification than a person or persons ... whose names appear higher on said certification." See Cotter v. City of Boston, 73 F.Supp.2d 62, 66 n.9 (Mass. 1999). Where an employer does not select the highest named individual on an exam generated eligibility list, the Commission has authority under § 2(b) to hear an appeal of HRD's acceptance of the employer's statement of reasons for bypass, pursuant to § 27. But where, as here, through no fault of the City, there was no eligibility list available with respect to this job opening, Sections 27 and 2(b) are not triggered. See Id. at 65-66 (Mass. 1999);

The Commission, on October 1, 2000 established a (60) sixty day limitation period, for the filing of an appeal pursuant to G.L. 31, § 2(b), running from the Appellant's receipt of notice of the bypass or other cause. It appears that the Appellant received notice of the alleged bypass (appointment of other candidate), on or about October 30, 2007. She filed her grievance with the City on that date. (Exhibit J). Even if the Commission considers that earlier date as the date of receipt of notice by the Appellant, the filing deadline is met. Therefore the appeal filed on December 17, 2007, is deemed to have been timely filed for a bypass or other claim under this section.

G.L.c. 31, § 2(b) also states in relevant part that; "No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific

allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

Jurisdiction under G.L.c. 31, § 2(b

The Commission finds that the Appellant has filed a timely appeal pursuant to G.L.c. 31, § 2(b) and it therefore has jurisdiction to hear or address this matter. However, the Commission maintains that the appeal must be dismissed on the merits because the position sought would represent a decrease in pay and title for the Appellant, and therefore, cannot be deemed a promotional opportunity but would by definition be a demotion. Given that the appointment was not a promotional opportunity, the seniority provisions in the CBA do not apply and the Appointing Authority was authorized, pursuant to Article XII of the CBA to exercise his reasonable discretion in filling the position in a way that best suited the needs of the department. (Exhibit H) The Commission agrees with the City's assertion here.

In the present case the Appellant is actually demanding the right to become "aggrieved", by requesting an actual harm to her employment status, a demotion. This is clearly not a right protected under the civil service laws. The Appellant has failed to the required showing under this section. The Appellant must make written allegations "...and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

On these alleged facts and circumstances, the Appellant failed to show that her rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to her employment status. Therefore, she lacks standing and the Commission lacks jurisdiction to determine this appeal, under G.L.c. 31, § 2(b)

Jurisdiction under G.L.c. 31, § 41-§ 45

The Commission further states that a demotion (reduction of rank or pay) is a form of discipline which is appealable to the Commission pursuant to G.L.c. 31, § 41-§ 45. Section 41states in relevant part that, "... Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent..." The Appellant's § 41 right of appeal to the Commission is procedurally outlined in §43. Section 43 states in relevant part "... If a person aggrieved by a decision of an appointing authority made pursuant to section forty-one shall, within ten days after receiving written notice of such decision, appeal in writing to the commission,..."In effect, the Appellant here is demanding a unilateral right to request and receive a demotion or discipline. This is not a cognizable right under any interpretation of either the CBA or chapter 31. The Appellant filed a timely appeal at the Commission, on the alleged disciplinary action, as a violation of G.L. c. 31 § 43. On December 7, 2007, she received notice, from the Personnel and Labor Relations Board of the City's final decision after a hearing. She filed her appeal at the Commission, on December 17, 2007 thereby meeting the ten (10) day filing limitation proscribed by G.L.c. 31, § 41.

In the present case the Appellant is actually demanding the right to become an "aggrieved" person, by requesting an actual harm to her employment status, a demotion. This is clearly not a right protected under the civil service laws. The Appellant has not suffered an actual statutorily proscribed harm to her employment status. On these facts and circumstances, she is not "aggrieved", lacks standing and therefore, the Commission lacks jurisdiction to decide this appeal, under G.L.c. 31, § 41-43.

CONCLUSION

Per the plain meaning of Agreement, seniority only counts for "promotional opportunities."[1] Since the position in question did not represent a promotion for Appellant, Article XIX is inapposite, and the ultimate prerogative rested with the Appointing Authority. Further, even if the appointment of Appellant could be construed as a "transfer," the provisions of G.L.c. 31, § 35 would require agreement by both parties. Here, the Appointing Authority did not consent. "[t]here simply is no affirmative obligation on the City to consent to a voluntary transfer request . . . . Civil service law does not provide appeal rights to [an] employee requesting a transfer when the Appointing Authority does not consent." Pepicelli, Ho and O'Connor v. City of Cambridge, Case No. G1-05-228 (Feb. 8, 2007), at p. 3 (employee seeking voluntary transfer from one department to another was not protected under Chapter 31). In this present case the Appellant is demanding the right to voluntarily transfer or promotional opportunity from one "departmental unit" to another, from the Water Division to the Highway Section of the DPW. In provisional promotional situations pursuant to G.L. c.

[1] Article XIX provides that "where two or more employees are under consideration for a promotion, the Department Head shall give due consideration to seniority and ability."

31 § 15, the personnel administrator is constrained to consider only the next lower title within each departmental unit and not DPW at large. See Barrett v. Department of Public Works, 6 MCSR 167 (1993)

Neither this CBA nor the civil service law confer upon any employee the right to a voluntary demotion, especially one outside the departmental unit or a right to claim a unilateral transfer. The Appellant was not "aggrieved", not having been disciplined nor did she suffer any actual harm to her employment status.

For the above reasons, the Respondent's Motion to Dismiss for Failure to State a Claim upon which relief could be granted, is allowed. The Appellant's appeal, Docket Number D-07-427 is hereby ***dismissed.***

Civil Service Commission,

Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Taylor and Stein, Commissioners) on July 24, 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:
Jennifer M. Riordan, Atty. City of Brockton and Anthony Pini