

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

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

KEVIN VAUGHN,
Appellant

V.

Case No. G2-08-108

CITY OF BOSTON,
Respondent

Appellant's Representative:

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8 Beacon Street, 3rd Floor
Boston, MA 02108

Respondent's Representative:

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Commissioner:

Paul M. Stein

DECISION

Pursuant to the provisions of G.L. c. 31 § 2(b), the Appellant, Kevin Vaughn, appealed to the Civil Service Commission (Commission), from a decision of the Respondent, City of Boston (hereinafter "Boston"), as Appointing Authority, challenging his bypass for selection to a position of Parking Meter Operations Foreperson. The appeal was timely filed. On June 5, 2008, a pre-hearing conference was held.

On June 19, 2008, Boston filed a Motion to Dismiss the Appellant's appeal which the Appellant opposed. Three (3) exhibits received from the Massachusetts Human Resources Division (HRD) were marked in evidence. On March 19, 2009, I denied the Motion to Dismiss and scheduled an evidentiary hearing. A full hearing was held on

November 12, 2009 and was recorded and declared private. Boston called three witnesses and eight (8) exhibits were entered into the record. The record was left open for Boston to submit additional documents which the Commission received on December 21, 2009, and has marked as Post-Hearing Exhibit 9. The parties' post-hearing proposed decisions and findings of fact were received on January 15, 2010.

FINDINGS OF FACT:

Giving appropriate weight to the Exhibits, the testimony of Steve Dolan, Director of Administration and Finance; Timothy Hallahan, Parking Meter Maintenance Supervisor; Paul McColgan, Director of Operations; the findings in the previous Decision on Cross-Motions to Dismiss, and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact set forth below.

1. The Appellant, Kevin Vaughn, holds the permanent labor service civil service position of Parking Meter Operations Man in Boston's Transportation Department. He has been a Boston employee since 1989 and received civil service permanency through Chapter 282 of the Acts of 1998, effective September 9, 1998. (*Exh.. 3; Motion Exh.2*)

2. On January 10, 2008, Boston posted a notice entitled "City of Boston Employment Opportunity Departmental/Promotional", to fill the Parking Meter Operations Foreperson RA1-15", Job Code 36250, Position #00024749 in the Boston Transportation Department. (*Exhs. 1 & 4.*

3. The job posting stated that "Only Qualified Applicants From The Stated Department May Be Considered For This Vacancy". (*Exh. 4*)

4. According to the Form 30 for Parking Meter Operations Foreperson, the incumbent in such a position "directly supervises the work of the Parking Meter

Operations Men in the installation, repair and maintenance of all parking meters and appurtenances.” (*Exh. 5*)

5. The Form 30 for Parking Meter Operations Man indicates that an incumbent in that position “works under supervision of an employee in a higher grade” and “installs, repairs and maintains parking meters; performs experimental and developmental work with marking meter mechanisms; collects and deposits monies from parking meters; does related work as required.” (*Exh. 6*)

6. The position of Parking Meter Operations Foreperson is the direct supervisor of a Parking Meter Operations Man (*Exh. 5*)

7. The minimum entrance requirements stated in Boston’s January 10, 2008 job posting was “Three (3) years of job-related experience”. The job posting also indicated that one (1) year of supervisory experience, experience with and knowledge of M/S office applications, and preferred experience with City of Boston’s multispace meter maintenance and revenue software applications. (*Exh. 4*)

8. The title of Parking Meter Operations Foreperson RA1-15 is not an approved civil service title; therefore, the Human Resources Division (“HRD”) presumed that this is the position of Parking Meter Operations Foreman (title code 3305E) which is an official service title. (*Exh. 3; Motion Exh.2*)

9. The Human Resources Division confirms and Mr. Vaughn agrees that no current eligible list exists for the position at issue. (*Exh.3; Motion Exh.2; Testimony of Dolan*)

10. As a condition to making a provisional promotion, Boston is supposed to request that HRD conduct an examination for the position. Boston (and other municipalities)

have not done so knowing that it would be futile to request exams that will never be given by HRD. (*Testimony of Dolan; Administrative Notice*)

11. Mr. Vaughn applied for the posted position of Parking Meter Operations Foreperson. (*Testimony of McClogan & Hallihan*)

12. Of the five applicants that were interviewed for the position, two were selected as final candidates and were scheduled for a final interview on Wednesday, March 5, 2008. Parking Meter Supervisors Tim Hallahan and Lawrence P. Neves conducted the first round of applicant interviews. Director of Operations Paul F. McColgan conducted the final round of interviews, along with Hallihan and Neves. (*Exhi. 8; Testimony of Hallihan*)

13. In preparation of these interviews, Neves and Hallahan compiled a written list of interview questions that were used during all candidate interviews. (*Exhi 7, Testimony of Hallahan*)

14. Mr. Vaughn participated in two rounds of interviews for the position of Parking Meter Operations Foreperson, but was not selected. (*COB Exhibit No. 8, Testimony of Hallihan and McClogan*)

15. The successful applicant, Lisa Bernard Stapleton was also interviewed for the position of Parking Meter Operations Foreperson in two rounds of interviews, and was selected based on the second interviews, detailed discussions after the interviews and unique skill set. (*Exhi. 8; Testimony of Hallihan and McClogan*)¹

¹ Mr. Vaughn argues that the hearing was held to determine whether the successful candidate, Ms. Stapleton held the requisite job titles and/or permanency to be eligible for selection over Mr. Vaughn. I allowed the COB to go into Mr. Vaughn's qualifications during the hearing and overruled the Mr. Vaughn's objection permitting the city to inquire.

16. Mr. Dolan submitted an Affidavit after the hearing stating that Ms. Stapleton was a permanent civil service employee in the next lower title of Parking Meter Operations Man. Mr. Dolan attached as Exhibit A to his Affidavit Ms. Stapleton's first employment application to Boston, dated 5/17/01, stating that Ms. Stapleton was hired from a "List". Ms. Stapleton's application also had a handwritten note indicating her civil service number. (*Dolan Testimony; Exhibit 2; Post-hearing Exhibit 9*)

17. Mr. Dolan's Affidavit also attached as Exhibit B a print-out of software used by the COB that indicated Stapleton was appointed on 8/18/2001 from a civil service list. (*Post- hearing Exhibit 9*)

18. Both Mr. Vaughn and Ms. Stapleton held an R-4 position at the same grade and level when they applied for the position of Parking Meter Operations Foreperson. (*Dolan Testimony*)

19. Mr. Hallahan recommended Ms. Stapleton for the position based on observations he made on her work. Mr. Hallahan considered Ms. Stapleton for the position as she met all the skills on the posting. Mr. Hallahan chose Ms. Stapleton over Mr. Vaughn as he thought she had a better work performance and work ethic, among other skills. Mr. Hallahan stated that "Ms. Stapleton's unique skill set coupled with her ability to perform under normal as well as off scheduled operations has been exceptional." (*COB Exhibit 8; Hallahan testimony; McClogan testimony*)

20. The HRD has no civil service record of the selected applicant, Ms. Stapleton. HRD has not received the required notification and forms from Boston informing HRD of Ms. Stapleton's provisional appointment. (*Exhibit 3*)

21. I take administrative notice that, save for public safety positions (fire and police) and custodians, no civil service examinations have been administered by HRD for over twenty years. I also take administrative notice that, by special act of the legislature, HRD was directed to certify as a permanent civil service employee, any employee of the City of Boston who been provisionally appointed or promoted for a period of at least six months prior to January 1, 1998. (*Administrative Notice; Chapter 282 of the Acts of 1998*)

22. Finally, I take administrative notice that Boston is not a municipality which has been delegated with the responsibility to administer the civil service law respecting labor service hiring and promotions, as are most other communities in the Commonwealth. Accordingly, the hiring of labor service employees by the City of Boston remained, at all times subject to the requirements that labor service appointments be made from rosters maintained by HRD. In fact, however, for many years, Boston did not adhere to this procedure and the Commission has determined that appointments to labor service positions since January 1, 1998 did not comply with civil service law and did not vest permanent civil service status on the labor service employees hired. Administrative Notice; Mejia, and others v. City of Boston, CSC Case Nos. G2-10-224 et al, 24 MCSR --- (2011); Allen v. City of Boston, CSC Case No. G2-10-286, 24 MCSR --- (2011)]

CONCLUSION

Here, it is undisputed that no current eligible list exists for the position at issue. Thus, Section 15 provides the process for the promotion of a civil service employee to an official service position within a departmental unit in the absence of a suitable eligible list from which to make a permanent promotion. As Boston's January 10, 2008 posting to fill

the Parking Meter Operations Foreperson position was entitled “City of Boston Employment opportunity Departmental/Promotional”, G.L.c.31, §15 applies.² The statute prescribes, in relevant part:

§ 15. Provisional Promotions. *An appointing authority may, with the approval of the administrator. . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit.* Such provisional promotion may be made only if there is no suitable eligible listNo provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission to the administrator by the appointing authority of sound and sufficient reasons therefore, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

. . . .
. . . The administrator shall terminate any provisional promotion if, at any time, he determines that (1) it was made in violation of the civil service law and rules, or (2) the person provisionally promoted does not possess the qualifications or satisfy the requirements for the position. An appointing authority which makes a provisional promotion pursuant to this section shall report such promotion to the administrator.

It has been long established that “[p]rovisional appointments or 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. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, the passage of decades without the personnel administrator holding competitive examinations for many civil

² There had been some initial confusion about whether the title of Parking Meter Operations Foreperson was an official service or labor service position. Had the promotional appointment been from one labor service to another labor service position, the applicable statute would have been G.L.c.31,§29 and PAR.19(5), which requires appointment from among the most senior members of the department in civil service tenure, according to the “2n+1 formula. Here, however, the evidence clearly showed that the position of Parking Meter Operations Foreperson was in the official service. Thus, Section 15, not Section 29 applies.

service titles, and the professed lack of funding to do so any time in the near future, has meant that advancement of most civil service employees is accomplished by means of provisional promotions under Section 15. 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).

As much as the Commission regrets this state of affairs, and has repeatedly exhorted parties in the public employment arena to end the current practice of relying on provisional promotions (and provisional appointments) to fill the majority of today’s civil service positions, the Commission must honor the clear legislative intent to allow such a procedure for provisional promotions. 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. Meanwhile, public employees whose provisional status leaves them with fewer opportunities under the civil service law than their peers with permanency will be left to enforcement of their rights as members of the collective bargaining units to which they may belong, which the Commission does not control.

It remains the Commission’s duty to enforce the Civil Service Law, as written. The plain meaning of Section 15 allows only “civil service employees” to be provisionally promoted. A “civil service employee” is a person with an original or promotional “appointment” under Civil Service law, which, in the official (as opposed to labor) service, means an appointment pursuant to G.L.c.31, §§6 or 7, following competitive examination. See G.L.c.31, §1. A “civil service employee” is different from a “provisional employee” who is appointed, without having passed an examination. Id. See also Pease v. Department of Revenue, 22 MCSR 284; Poe v. Department of Revenue, 22

MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009).

I am now satisfied that the evidence is insufficient to establish that Ms. Stapleton was a permanent civil service employee in the next lower title of Parking Meter Operations Man. Rather, the evidence infers that Ms. Stapleton was hired in 2001 from a “list” maintained by Boston that did not comply with civil service law and rules, and that HRD had no notice that Ms. Stapleton had been duly hired as a labor service employee from the roster that HRD maintained.

Section 15 also seems to require that a provisionally appointed “civil service employee” be “in one title” below the “next higher title” into which the appointment is made; if the promotion involves advancement *other than* the “next higher title”, the provisional promotion requires the appointing authority to provide, and HRD to approve, “sound and sufficient” reasons for the promotion. Here, the evidence shows the position of Parking Meter Operations Man is one title below Parking Meter Operations Foreperson. The Form 30 for Parking Meter Operations Foreperson states that it “directly supervises the work of the Parking Meter Operations Man in the installation, repair and maintenance of all parking meters and appurtenances.” Additionally, I find that it does not make any difference for purposes of Section 15 analysis that the departmental promotion is from a labor service title to an official service title.

An appointing authority may choose from among any qualified candidates in the next lower title without being required to state the reason and an unsuccessful candidate’s only recourse is to establish that the successful candidate was unqualified.. See, e.g., 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); Asif v. Department of Conservation & Recreation, 21 MCSR 23 (2008)

On March 19, 2009, I denied Boston's Motion to Dismiss as it appeared from the record at that point that Mr. Vaughn may have been the only permanent civil service employee in the "next lower title" and the civil service status of Ms. Stapleton was unknown. Since it now has been established that Ms. Stapleton was NOT a permanent civil service employee in the next lower title of Parking Meter Operations Man, her provisional promotion was unlawful under civil service law.

That said, the question remains what relief is appropriate in these circumstances. The Commission's recent decisions in Mehjas and Allen ordered that Boston bring its labor service appointment process into compliance with civil service law and, within 180 days, Boston submit a plan to the Commission that addresses the appropriate remedy, if any, that should be granted to address the civil service status of all Boston civil service employees who had been improperly appointed to the labor service in the past. Ms. Stapleton would appear to be among the employees who may be affected by this proposed remedy. Should Ms. Stapleton ultimately be deemed to be a permanently appointed labor service employee, it would require dismissal of Mr. Vaughn's appeal. The evidence clearly established that Mr. Vaughn and Ms. Stapleton each has met all the other requirements for provisional promotion— i.e., they were both "qualified" employees in the next lower title, and Boston would have been free to choose either one pursuant to Section 15, save for Ms. Stapleton's lack of permanency, without any basis for the other to claim an unlawful bypass. On the other hand, if Ms. Stapleton is not deemed to have

held a permanent labor service position, Mr. Vaughn would be the only qualified candidate in the next lower title and he, alone, would have been entitled to the promotion.

Accordingly, for the reasons stated above, the Commission hereby orders the following:

1. Upon submission of the proposed remedy to the Commission and the public hearing on that proposed remedy set forth in the Commission's decisions in Mejias and others v. City of Boston (CSC No. G2-224 et al) and Allen v. City of Boston (CSC No. G2-286), the Commission will issue a final decision establishing Ms. Stapleton's civil service permanency status as part of the proceedings in CSC Docket No. I-11-267.
2. The appeal of the Appellant, Kevin Vaughn, filed under Docket No. G2-08-108 is ***dismissed with an effective date of June 1, 2012.*** In the event that Ms. Stapleton is not deemed a permanent civil service employee prior to May 1, 2012, the Commission will accept and allow a Motion to Revoke this Dismissal seeking to reinstate the Appellant's appeal for further consideration of the relief he should be granted. No additional filing fee will be required. In the absence of a Motion to Revoke, the dismissal of this appeal shall become final for purposes of G.L.c.31, §44 on June 1, 2012.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Henderson, McDowell and Stein, Commissioners; Bowman, Chairman [absent]; Marquis, Commissioner [absent] on October 6, 2011.

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

Notice:

Michael J. Maccaro, Esq. (for the Appellant)

Helen G. Listas, Esq. (for the Appointing Authority)