

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108

JEANINE WALKER,
Appellant

v.

D1-12-341

CITY OF NEW BEDFORD,
Respondent

Appearance for Appellant:

Pro Se
Jeanine Walker

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
First Asst. City Solicitor
City of New Bedford
133 William Street
New Bedford, MA 02740

Commissioner:

Christopher C. Bowman

DECISION

On December 10, 2012, the Appellant, Jeanine Walker (Ms. Walker), filed an appeal with the Civil Service Commission (Commission) contesting various actions of the City of New Bedford (City) including: 1) laying her off from her position as a Clerk / Typist; 2) failing to grant her permanency in the title of Clerk / Typist; and 3) failing to provide her with civil service “bumping rights” that are afforded to permanent, tenured civil service employees.

On January 11, 2013, a pre-hearing conference was held at the UMASS Dartmouth School of Law in North Dartmouth at which time the City filed a Motion to Dismiss the Appellant’s appeal, arguing that: 1) she had no standing to file the appeal because she

was not a permanent, tenured civil service employee; and 2) even if she were, the appeal was untimely as the layoff occurred approximately four (4) years ago. Ms. Walker, who appeared pro se, filed a reply to the City's Motion to Dismiss and a motion hearing was held at the same location on February 22, 2013.

The following chronology, most of which is undisputed, provides some clarity as to how this matter made its way before the Commission.

- On or around 1998, Ms. Walker took and passed a civil service examination for the position of Clerk I. She received a score of 90.
- On or around August 7, 1998, the City, via its delegated responsibility from the State's Human Resources Division (HRD), created Certification No. 98-7 for the purpose of appointing two "*temporary* full-time clerk typists."
- Ms. Walker signed Certification No. 98-7 indicating her willingness to accept employment as a temporary full-time clerk typist if appointed.
- Effective December 7, 1998, Ms. Walker was appointed as a temporary full-time clerk typist.
- Although Ms. Walker stated at the motion hearing that she never received the letter at the time, there is a letter dated December 10, 1998 in her personnel file which states in relevant part, "The purpose of this letter is to inform you that the position of Clerk Typist to which you have been appointed is a temporary position. Therefore, because of the temporary appointment, you obtain no tenure rights to this position."
- On February 13, 2009, as a result of cuts in local aid via so-called "9C cuts", the City laid off dozens of employees, including Ms. Walker. She was provided with written notification which stated in relevant part, "The position you currently fill on a

provisional, *temporary*, or other non-tenured basis, cannot be funded after February 13, 2009 under these budget limitations. (*emphasis added*) Since Ms. Walker was a temporary employee, she was not provided with any “bumping rights” and her name was not placed on a statewide reemployment list or the City’s reinstatement list.

- Sometime shortly after February 13, 2009, AFSCME Council 93 (of which Ms. Walker was a member) filed a complaint with (what is now) the state’s Division of Labor Relations (DLR), arguing that the City a) unlawfully failed to bargain over the implementation of a layoff of a bargaining unit member (Ms. Walker) and b) unlawfully transferred the work formerly performed by Ms. Walker to a non-bargaining unit member.
- On March 21, 2012, three (3) years after the layoff occurred, a DLR hearing officer issued a decision dismissing the first part of AFSCME’s complaint, but allowing the second part. The hearing officer ordered a full status quo remedy, including reinstatement of Ms. Walker.
- Shortly after March 21, 2012, the City filed a timely notice of appeal of the hearing officer’s decision with the full Commonwealth Employment Relations Board (Board). As part of its appeal, the City, for the first time, informed the Board that it laid off two permanent, tenured civil service employees at the same time and that, any reinstatement rights to the position in question would fall to one of those employees and not Ms. Walker.
- On November 15, 2012, the Board issued a decision, upholding much of the hearing officer’s decision, but modifying that part of the decision that required Ms. Walker to be reinstated to the Clerk / Typist position.

- On November 29, 2012, the City and AFSCME met for the purpose of impact bargaining. As a courtesy, Ms. Walker was allowed to attend the session, but the agreement reached, involving the posting and filling of at least one clerk / typist position, no longer involved Ms. Walker. According to Ms. Walker, it was not until this meeting on November 29, 2012, that she first became aware of the December 10, 1998 letter addressed to her confirming that she was a temporary employee with no tenure rights to this position.
- On December 10, 2012, Ms. Walker filed the instant appeal with the Commission.

Parties' Arguments

The City argues that Ms. Walker's appeal should be dismissed for three (3) reasons. First, the City, citing Somerville v. Somerville Mun. Employee Ass'n, 20 Mass. 594, 597 (1985), citing Kenney v. McDonough, 315 Mass. 689, 693 (1944), argues that the City retains sole authority to decide if an appointment is permanent or temporary and, thus, the issue is beyond the scope of the Commission's jurisdiction.

Second, the City argues that, even if the Commission did have jurisdiction regarding the "temporary v. permanent appointment" issue, the City was justified in deeming Ms. Walker's position as "temporary" for over ten (10) years, because another permanent Clerk / Typist I, by the name of Deborah Dupont, was *provisionally* promoted to the position of Accountant / Clerk in 1994 (four year prior to Ms. Walker's temporary appointment in 1998.) According to the City, since Ms. Dupont retained her right to permanency in the position of Clerk / Typist I, no permanent appointment could be made to her former position of Clerk / Typist I. Finally, the City argues that Ms. Walker's appeal is time-barred because her layoff (the first-prong of her appeal) occurred over four

(4) years ago; and the issue of her temporary (vs. permanent) appointment occurred over fourteen (14) years ago.

Ms. Walker, appearing pro se, citing G.L. c. 31, § 56, stated that she always believed that, after six (6) months, she was no longer a temporary employee and, citing the same statute, argues that the City was obligated to deem her position permanent after six (6) months. Further, Ms. Walker argues she first became aware of the City's position that she remained a temporary employee at the impact bargaining session on November 29, 2012, after which she promptly filed an appeal with the Commission within ten (10) business days.

More broadly, Ms. Walker argues that the City had no justification to deem her a temporary employee and deprive her civil service rights.

Analysis

The City's first argument in favor of its Motion to Dismiss is misplaced. The City has misconstrued the Court's rulings in Somerville, citing Kenney. A careful reading of the Kenney decision indicates that the Court did *not* state that Appointing Authorities have sole authority to determine whether an appointment is permanent or temporary. Rather, a clear reading of Kenney indicates that the Court stated that Appointing Authorities retain sole authority to make – or not make – an appointment, including permanent and temporary vacancies. The City has misread the Court's decision as granting them the unfettered ability to deem any (and potentially all) civil service appointments as temporary, effectively denying *any* employee the right to civil service tenure and all the protections that come to a tenured employee. Such an interpretation is illogical and contrary to the plain language of the decision.

The City's second argument for dismissing Ms. Walker's appeal, that they had no choice but to make a temporary appointment, is not persuasive. To ensure the City's argument is placed in the proper perspective, a brief summary of the "plight of the provisionals" is warranted. For many years, the state's Human Resources Division (HRD) has been unable to conduct civil service examinations for non-public safety official service positions, such as Clerk / Typist. Thus, cities and towns, such as New Bedford, have been forced to make *provisional* appointments and promotions for these positions. The "plight of the provisionals" is most commonly-used to refer to those individuals who have been unable to obtain a permanent appointment or promotion as a result of no examinations being administered for the position(s) in question.

Here, it is undisputed that Ms. Walker took and passed a civil service examination for Clerk / Typist and received a score of 90 (at a time when examinations were still being administered.) Ms. Walker's name appeared on an eligible list of candidates and, when New Bedford sought to fill two (2) Clerk / Typist positions in 1998, her name appeared on a Certification, which she signed as willing to accept appointment. There is no civil service law or rule that prevented the City from appointing Ms. Walker as a permanent Clerk / Typist. Instead, the City chose to appoint Ms. Walker as a *temporary* (not to be confused with *provisional*) Clerk / Typist and kept her in that status for over ten (10) years, depriving her of the right to obtain tenure under the civil service law. The City's justification for doing so, a provisional promotion of former Clerk / Typist that occurred four (4) years prior, is nebulous. According to the City, they were required to leave the permanent position "open" so long as that promoted employee had any right to reclaim her permanent position of Clerk / Typist. The City is incorrect.

A “temporary employee” is a person who is employed in a civil service position, after a civil service appointment, for a specified period of time or for the duration of a *temporary vacancy*. G.L. c. 31, § 1. Although it used the words “temporary vacancy” in Section 1 and generally the word “vacancy” is used a number of times in the course of the statute, one of the things the Legislature did *not* do in crafting its comprehensive plan for the appointment of individuals to civil service positions was to define vacancy, permanent vacancy or temporary vacancy. However, as the SJC recently noted in Andrews v. Civil Service Commission et al, 446 Mass. 611, 618 (2006), “provisional promotion pursuant to G.L. c. 31, § 15, effects a real change from ‘one title to the next higher title.’ A provisionally promoted employee ceases to be ‘in’ the original title for purposes of § 39, and does not return to the lower title until the provisional promotion ceases to have effect.”

Applied here, the provisionally promoted employee was no longer “in” the position of Clerk / Typist once she was promoted to the position of Accountant / Clerk. In the event that the provisionally promoted person was ever subject to layoff, she would have retained her right to “bump” back into her permanent position when she was laid off and her promotion ceased to have effect. See McDowell v. Springfield, 23 MCSR 124 (2010) (a provisionally promoted employee who is discharged without just cause (or whose position was abolished) shall be restored to his tenured position.) (upheld by Superior Court. See Springfield v. Civ. Serv. Comm’n and another, Hampden Sup. Ct. No. 10-0697 (2012) (currently pending appeal before Appeals Court.) Contrary to the City’s argument, the bumping rights of the provisionally promoted employee are in no way limited to only bumping “temporary” employees. Rather, if the provisionally promoted

employee was laid off from her position as an Accountant / Clerk, she could reclaim her permanent Clerk / Typist position (presuming she had more civil service seniority) and “bump” Ms. Walker regardless of whether Ms. Walker was a permanent or temporary “Clerk / Typist.” In short, the City’s argument that it was simply acting to protect the bumping rights of the provisionally promoted employee is not persuasive. Rather, in deeming this and other appointments as “temporary”, the City was able to deprive Ms. Walker and others with the protections that come with being a permanent tenured civil employee, including a right of appeal to the Commission. That strikes me as an arbitrary and capricious action that cannot be sanctioned by the Commission.

That leaves the City’s final argument, that Ms. Walker’s appeal is untimely.

G.L. c. 31, § 43 states that , “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, he shall be given a hearing before a member of the commission or some disinterested person designated by the chairman of the commission.” (emphasis added)

On February 13, 2009, the City, as part of the layoff process, sent Ms. Walker a letter informing her of her layoff. Ms. Walker failed to file an appeal with the Commission for over three (3) years, well-beyond the statutory ten (10)-day filing requirement.

Although AFSCME Council 93 filed a complaint with the Division of Labor Relations at the time in 2009, this did not toll the statutory deadline for filing an appeal with the Commission. See Graver v. Springfield Housing Authority, 26 MCSR 16 (2013) (The Appellant’s choice to initially pursue a grievance does not save her late filing with the Commission.)

Ms. Walker, as referenced above, is also contesting the City's failure to make her a permanent civil service employee. There is no specific statutory deadline for this type of appeal.

The standard adjudicatory rules of practice and procedure provide in pertinent part:

6) Initiation of Formal Adjudicatory Proceedings.

(a) Agency Notice of Action. When an Agency initiates a proceeding against a Person regarding an Agency action or intended action, the Agency shall provide the Person with notice of the action or an order to show cause why the action should not be taken. . . .

(b) Claim for Adjudicatory Proceeding. Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or Agency rule. In the absence of a prescribed time, the notice of claim must be filed within **30 days from the date that the Agency notice of action is sent** to a Party.

(c) Form and Content of Claims. The notice of claim for an Adjudicatory Proceeding shall identify the basis for the claim.

801 CMR 1.01(6) (emphasis added).

Even when viewing the facts most favorable to Ms. Walker, and accepting, for the purposes of this decision, that she did not receive the letter from the City dated December 10, 1998, she *did* sign a Certification in or around August 1998 which clearly stated that the positions to be filled were “two temporary full-time Clerk Typists.” (emphasis added) Further, on February 13, 2009, the City, as part of the layoff process, sent Ms. Walker a letter which explicitly stated that she had been filling a non-tenured position. Even if I

were to use the February 13, 2009 date as the official agency notice, Ms. Walker failed to file an appeal with the Commission for over three (3) years, well over 30 days from the date she received the 2009 notice.

Since Ms. Walker's appeal was not timely, her appeal to the Commission is

dismissed.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on August 22, 2013.

A true Copy. Attest:

Commissioner
Civil Service Commission

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)(I), 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.

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 after receipt of 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:
Jeanine Walker (Appellant)
Jane Medeiros Friedman, Esq. (for Respondent)
John Marra, Esq. (HRD)