COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

Alan Whitman and Michael Williams,
Appellants

v. D1-08-85 & D1-08-89

City of Quincy,
Respondent

Appellants' Attorney: Anthony Pini
Mass. Laborers
7 Laborers Way.
Hopkington, MA 01748

Respondent's Attorney: Kevin J. Madden, Atty.
City of Quincy
1305 Hancock Street
Quincy, MA 02169

Commissioner: Daniel M. Henderson

DECISION

The Appellants, Alan Whitman and Michael Williams (hereafter "Appellants"), pursuant to G.L. c. 31, §42 and §43, filed an appeal with the Commission, claiming that the Appointing Authority, City of Quincy (hereafter "City") did not have just cause to terminate them as a Laborer/Motor Equipment Operator (hereafter "MEO") (Whitman) and Laborer (Williams). The appeal was timely filed. A hearing was held on July 8, 2008. As no written notice was received from either party, the hearing was declared private. One (1) audiotape was made of the hearing. The record of the hearing was left open to give the parties the opportunity to submit additional documentation as exhibits and for the City to file a Motion to Dismiss. Neither party submitted any additional exhibits nor filed any motions.

FINDINGS OF FACT

Based upon the documents jointly entered into evidence (exhibits #1-4) and the testimony of the two Appellants, Stephen McGrath –Director of Human Resources and Joseph McArdle –President and Business Manager of Mass. Laborers local #1139 , I make the following findings of fact:

1. The Appellant Williams was hired in the labor service as a Laborer, by the City in its Parks Department, on or about October 1, 2007 and terminated from that position on or about February 22, 2008. He was hired by the City near the end of the term of Mayor Phelan. He was terminated by the City near the beginning of succeeding Mayor Koch's term, which began on January 7, 2008. (Testimony of McGrath)
2. The Appellant Whitman was hired in the labor service as a Motor Equipment Operator/Laborer by the City, in its DPW, on or about January 3, 2008 and terminated from that position on or about February 8, 2008. He was hired by the City near the end of the term of Mayor Phelan. He was terminated by the City near the beginning of succeeding Mayor Koch's term, which began on January 7, 2008. (Testimony of McGrath)
3. The City's new Human Resources Director, Stephen McGrath began in his position on February 4, 2008. He immediately started acclimating himself to this new position and the financial operation of the City. A large number of union grievances had been filed in the prior administration, two of which were allowed. Those two allowed grievances forced the termination of the two Appellants since they were the most recently hired. The necessity of finding two positions for the grievances, prompted McGrath to look at the number of budgeted labor service positions. By looking McGrath also discovered that the two Appellants, plus a third employee, actually occupied unappropriated and unfunded positions. Their two positions exceeded the number of appropriated and funded positions in their titles, in their Departments. Their two positions were actually paid outside their Department's budget, from another account. The two positions occupied by the

Appellants were fictitious or "phantom positions"(Testimony of McGrath, Exhibits 1 & 2)

4. McGrath sent a letter of termination to Whitman dated February 6, 2008, with an effective termination date of February 8, 2008. The reason for termination stated in the letter was "…as a result of a grievance filed after your recent hiring. (Testimony of McGrath and Exhibit 1)
5. McGrath sent a letter of termination to Williams dated February 19, 2008, with an effective termination date of February 22, 2008. The reason for termination stated in the letter was "…as a result of a grievance filed after your recent hiring (Testimony of McGrath and Exhibit 2)
6. The two grievances which were allowed, determined that the two positions had been filled in the labor service without the prerequisite posting of the positions, per the CBA; for the opportunity of signing by union members who were interested in the positions. (Testimony of McGrath and Exhibits 1&2)
7. Chapter 31 is the Civil Service Law for the Commonwealth. **Chapter 31: Section 1. Definitions:** in part includes the *following relevant definitions*; "Basic merit principles", shall mean (a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions. "Civil service appointment", an original appointment or a promotional appointment made

pursuant to the provisions of the civil service law and rules. "Civil service position", an office or position, appointment to which is subject to the requirements of the civil service law and rules. "Departmental unit", a board, commission, department, or any division, institutional component, or other component of a department established by law, ordinance, or by-law. "Discharge", the permanent, involuntary separation of a person from his civil service employment by his appointing authority. "Permanent employee", a person who is employed in a civil service position (1) following an original appointment, subject to the serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment; or (2) following a promotional appointment, without restriction as to the duration of his employment. "Provisional employee", a person who is employed in a civil service position, pursuant to and in accordance with sections twelve, thirteen and fourteen. "Rules", the rules promulgated by the personnel administrator pursuant to civil service law. "Labor service", the composite of all civil service positions whose duties are such that a suitable selection for such positions may be made based upon registration pursuant to section twenty-eight, rather than by competitive examination. "Permanent employee", a person who is employed in a civil service position (1) following an original appointment, subject to the serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment; or (2) following a promotional appointment, without restriction as to the duration of his employment. "Tenured employee", a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2), a promotional appointment on a permanent basis. "Roster", a list of permanent employees in a departmental unit, arranged according to seniority, and of employees appointed pursuant to temporary or provisional appointments. (administrative notice)

8. **Chapter 31: Section 28. Labor service applicants; eligibility; age limit; veteran's preference** Section 28 states in relevant part: "Except as provided in the last paragraph of this section, the names of persons who apply for employment

in the labor service of the commonwealth and of the cities and towns shall be registered and placed, in the order of the dates on which they file their applications, on the registers for the titles for which they apply and qualify. The name of any such person shall remain on such register for not more than five years, subject to a renewal…"

"The names of veterans who apply for employment in the labor service shall be placed on the registers for the titles for which they qualify ahead of the names of all other persons. The names of spouse or surviving parent of veterans who were killed in action or died from service connected disability, incurred in wartime service, who present proof from official sources of such facts, satisfactory to the administrator, and who have not remarried, shall be placed on the registers for the titles in the labor service for which they apply and qualify above the names of all other applicants but below the names of veterans." (administrative notice)

9. **Chapter 31: Section 29. Labor service appointments; promotional bulletins**
Section 29 states in relevant part: "An appointing authority shall, prior to any request to the administrator for approval of a promotional appointment of a permanent employee in the labor service to a higher title in such service; or for approval of a change in employment of a permanent employee within such service from one position to a temporary or permanent position which is not higher but which has requirements for appointment which are substantially dissimilar to those of the position from which the change is being made, post a promotional bulletin. Such bulletin shall be posted for a period of at least five working days where it can be seen by all employees eligible for such promotional appointment or change in employment. Any such request shall contain a statement that the posting requirements have been satisfied, indicating the date and location of the posting." "…The promotional bulletin shall contain the following information about the position which is to be filled: the salary and location, any special qualifications or licenses which are required for performing the duties of the position, whether the position is permanent or temporary, if the position is temporary, the probable duration of the employment therein, and the last date to apply for the position. Such promotional bulletin shall be mailed to any employee

who, during the entire period of posting, is on sick or military leave, on vacation or off the payroll. Within fourteen days after approval by the administrator of a promotional appointment in the labor service, the appointing authority shall post in all areas under its control where five or more civil service employees start their tour of duty, the following information about the person who has been promoted: name, permanent title, position to which the promotional appointment has been made and the date from which length of service was measured for purposes of determining seniority." (administrative notice)

10. **Chapter 31: Section 32. Emergency appointments to laborer positions; renewal** Section 32 states: " An appointing authority may make an emergency appointment to the position of laborer without submitting a requisition to the administrator and without complying with the other provisions of the civil service law and rules; provided, however, that the circumstances requiring such appointment could not have been foreseen and the public business would be seriously impeded by the time lapse incident to the normal appointment process. Employment pursuant to such an appointment shall not continue for more than a total of thirty working days during the sixty calendar days following such appointment, provided that the appointing authority, with the consent of the administrator, may renew such appointment for an additional thirty working days or, at its discretion and without such consent, for not more than an additional fifteen working days. In the event of such renewal for not more than fifteen working days, no further emergency appointment shall be given such laborer within twelve months from the date that he began employment under such thirty-day appointment.

    In no event shall a person who is given such an emergency appointment as a laborer be permitted more than a total of sixty working days of emergency employment within any twelve month period, in any civil service position, including that of a laborer.

    Upon making such an appointment or any extension thereof, the appointing authority shall notify the administrator in writing of the reason for the

appointment or extension and the anticipated duration of such emergency." (administrative notice)

11. **Chapter 31: Section 34. Probationary periods** Section 34.states in relevant part that: "Following his original appointment to a civil service position as a permanent full-time employee, a person shall actually perform the duties of such position on a full-time basis for a **probationary period of six months** before he shall be considered a full-time tenured employee, except as otherwise provided by sections sixty-one and sixty-five, by other law, or by civil service rule…" (administrative notice)
12. The determination of labor service positions, titles and functions has been delegated by the Human Resources Division (HRD) of the Commonwealth to the City of Quincy. The City of Quincy is on HRD's list of delegated communities for the purpose of the administration of their labor service. (administrative notice)
13. The Appellants each testified that they were on the labor service list when hired for their respective positions. However, neither Appellant claimed that they were at or near the top of the (veteran or non-veteran) labor service list when hired. The Appellants failed to provide any documentation or testimonial evidence that they were properly selected from an existing civil service laborers list to fill an existing and properly funded position. Some testimony indicated they were far down on either the veteran or non-veteran, for which they qualified. The Appellants testified that when they were hired they were told that they would be on a six (6) month probationary period. Whitman testified that "City Hall called me and said we have a job for you" and told him where to show up the following morning at 7:30. (Testimony of Whitman and Williams)
14. Joseph McArdle –President and Business Manager of Mass. Laborers local #1139 confirmed that two people won grievances over failure to post openings and were awarded positions in the labor service of the DPW and Parks Department, just after Mayor Koch took office. Only union members could sign for a posted position to be in compliance with the CBA and their eligibility for the position would be determined by seniority. He also testified that Whitman had been

#127and Williams #163 on the “non-vet list” and Whitman #22 on the “vet list”(Testimony of McArdle)

CONCLUSION

G.L. c. 31 creates a comprehensive plan for the appointment of individuals to permanent and temporary civil service positions. City of Somerville v. Somerville Municipal Employees Assoc. 20 Mass App. Ct. 594, 597 (1985) Temporary and provisional employees "are entitled to none of the advantages secured by period of tenure under the civil service rules." McLaughlin v. Callahan, 304 Mass. 27, 30 (1939) The Commission has adopted the opinion that the protections of Section 43 are not available to non-tenured employees. The Commission may dismiss a matter on the motion of a party or if the facts as determined for, among other circumstances the "lack of jurisdiction to decide the matter." 801 CMR 1.01 (7)(g)(3).

Although the Respondent City did not file a Motion to Dismiss requesting the Commission to dismiss the Appellant's appeal; the City did present sufficient evidence to show that the Appellants were not in properly created and funded positions at the time they were terminated. The Appellants had been placed in recently created positions which were not included nor funded in their respective department budgets. They had been placed in those positions by someone in the then expiring administration of the prior mayor. The hiring of the two Appellants has all of the earmarks of a lame duck political appointment, but to positions without the protections provided by chapter 31, provided to tenured civil service employees. They were not permanent or tenured civil service employees at the time of their termination. They had not been properly placed in an

existing civil service (labor service) position or “opening” in compliance with applicable civil service law.

The Appellants acquired no rights of a permanent civil service employee, simply by being paid for a matter of a few months. They had no reasonable expectation of permanent employment under the circumstances of their hiring and certainly had no reasonable expectation of protection from termination by asserting civil service law. On the contrary, civil service law is aimed at the hiring and promoting of qualified individuals base on the application of “basic merit principles” and the avoidance of political influence in the process. See Callanan v. Personnel Adm’r for Comm. 400 Mass. 597, (1987) The Appellants were summarily removed or terminated from their jobs, as they were summarily placed in them. They took a gamble that they might be overlooked and be allowed to stay in their jobs, but lost that gamble.

At the time of Appellants’ separation from employment, they did not have permanent civil service rights in the position from which they were separated. The Respondent, City contends that as the Appellants are not a permanent civil service employee, she is therefore not entitled to a hearing on her appeal pursuant to G.L. c. 31, § 43, as this section provides hearing rights only to those employees whose permanent employment rights have been adversely affected. The Respondent maintained in testimony and exhibits that during their few months of employment, they occupied “phantom jobs”, unallocated and unfunded in the normal budget process. The Appellants were employed on a provisional or temporary basis and were never a "tenured" employee, as defined in G.L. c. 31, §1.

The Appellants, have failed to submit any persuasive evidence that they were permanent tenured civil service employees, despite their apparent belief that this was their status. In sum, the evidence indicates that throughout their few months of employment with the City, the Appellants were never permanent employees. Rather, their status was provisional or some similar status and therefore not entitled to a hearing before the Commission on their termination.

A tenured Civil Service employee must have been appointed to the position on a permanent basis and have performed "the duties of such position for the probationary period required by law." G.L. c. 31, § 1.

The City clearly terminated the Appellants' employment because they had been found to occupy unfunded and unallocated positions in their respective departments, even though the discovery had been prompted by the allowance of two grievances. The two allowed grievances causes the City to look for two people to vacate from positions on the basis of seniority and the Appellants had the least seniority, as well as holding non-permanent civil service positions. This was not a "lack of work or money" as a layoff is defined in c. 31, § 39.

This Commission does not have jurisdiction over non-tenured employees appealing personnel actions under c. 31, § 41. The Appellants were not tenured civil service employees and therefore not "aggrieved" persons afforded the protections of G.L. c. 31 §41-43.

For the above reasons, Appellants are not a permanent employee and is therefore not entitled to hearing rights under Section 43. Accordingly, the Appellants' appeals filed under Docket Nos.D1-08-85 and D1-08-89 are hereby ***dismissed***.

Civil Service Commission,

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Daniel M. Henderson,
Commissioner

By vote of the Civil Service Commission (Henderson, Marquis, Stein and Taylor; Commissioners), [Bowman absent] on February 19, 2009

A True Record. Attest:

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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:
Anthony Pini, Mass. Laborers
Kevin J. Madden, Atty. City of Quincy