

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RUSSELL YASHINSKY,
Appellant

v.

D-07-414

CITY OF WALTHAM,
Respondent

Appellant's Representative:

Nelson T. Carneiro
Massachusetts Laborers' District Council
7 Laborers Way
Hopkinton, MA 01748

Respondent's Representative:

Bernadette D. Sewell, Esq.
Assistant City Solicitor
City of Waltham
119 School Street
Waltham, MA 02451

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

Background

Pursuant to the provisions of G.L. c. 31, § 42, the Appellant, Russell Yashinsky (hereinafter "Yashinsky" or "Appellant"), a provisional junior civil engineer, with permanency in the lower title of senior engineering aide, seeks to have the City of Waltham (hereinafter "City" or "Appointing Authority") compensate him for compensatory time. The Appellant's appeal has been fraught with difficulties from the start. The Appellant completed a Civil Service Discipline Appeal Form stating his reasons for the appeal that he "(1) Ha[s] not been paid for comp hours over 240 hrs. (2) Ha[s] not been permitted to take comp time accrued." The hearing that was

originally scheduled for March 26, 2008, was continued numerous times and ultimately dismissed without prejudice at the request of both parties on May 2, 2008 as a settlement agreement was purportedly imminent. On January 12, 2009, the Appellant sought reinstatement of his appeal as the parties had been unable to reach a settlement agreement. The Appellant's appeal was reinstated and a hearing was scheduled for February 22, 2010.

At the hearing held on February 22, 2010, the Commission confirmed that the Appellant's instant appeal related solely to his claim for compensatory time owed to him by the City. Notwithstanding my conclusion that the Commission had no jurisdiction to hear this appeal, I facilitated a mediation session for the parties at the Division of Administrative Law Appeals (DALA).

The parties attended the mediation session, but as of this date, have failed to reach a settlement agreement. I notified both parties that the Commission would issue a decision regarding the instant appeal.

Conclusion

G.L. c. 31, § 41 provides that a tenured civil service employee, "Except for just cause... shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent... lowered in rank or compensation without his written consent, nor his position be abolished." The Appellant is a permanent, tenured, senior engineering aide who was provisionally promoted to the title of junior civil engineer. There are limited circumstances in which a provisional employee with permanency in a lower title may file an appeal with the Commission.. The public policy that leads the Commission to permit a provisional employee to protect his tenured status he has earned from loss through no fault of his own, does not apply if the discipline is limited solely to his status in the provisional position, but

does not purport to deprive the employee of his right to tenured status in the former position. Thus, for example, an employee who is suspended from a provisional position for one-day would not have a right of appeal to the Commission under Section 41, because he has not suffered the loss of any rights attributable to the position. See McDowell v. City of Springfield, No. D-05-148 (2010). Here, the Appellant has not shown that he has suffered the loss of any right attributable to his permanent position. More broadly, the payment of compensatory time is governed by the collective bargaining agreement between the union and management in accordance with G.L. c. 150E, not the civil service law.

Pursuant to the Standard Adjudicatory Rules of Practice and Procedure 801 CMR 1.01 (7)(g)(3), “The Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter...” Here, the Commission finds that, since the Appellant is not an “aggrieved party” in accordance with G.L. c. 31, § 41, the Commission lacks jurisdiction over this appeal. Furthermore, the subject matter of the appeal is governed by the collective bargaining agreement and is beyond the Commission’s jurisdiction. Therefore, for all of the reasons stated herein, the appeal on Docket No. D-07-414 is hereby *dismissed*.

Civil Service Commission

Christopher Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, and McDowell, Commissioners [Marquis, Stein – Absent]) on August 26, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. 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:

Bernadette D. Sewell, Esq. (for Appointing Authority)

Nelson Carneiro (for Appellant)