COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

STEVEN F. MURZIN,
Appellant

v.

D1-10-189

CITY OF WESTFIELD,
Respondent

Appellant's Attorney:

Kevin Coyle, Esq.
Attorney At Law
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Springfield, MA 01103

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman[1]

DECISION ON APPOINTING AUTHORITY'S PROPOSED MOTION TO DISMISS

The Appellant, Steven F. Murzin (hereinafter "Murzin" or "Appellant"), pursuant to M.G.L. c. 31, §§ 42 and 43, filed an appeal with the Civil Service Commission (hereinafter "Commission") on July 30, 2010 following his layoff from his position of Permanent Full Time Laborer in the Solid Waste and Recycling division of the Westfield Department of Public Works (hereinafter "Department") for the City of Westfield (hereinafter "City" or "Appointing Authority") due to a lack of adequate funding.

[1] The Commission acknowledges the assistance of Law Clerk Shawn Weiske in the drafting of this decision.

A pre-hearing conference was conducted at the Springfield State Building on August 25, 2010. The Appointing Authority filed a Motion to Dismiss (hereinafter "Appointing Authority's Motion") on October 5, 2010, and the Appellant filed an Opposition to the Appointing Authority's Motion to Dismiss (hereinafter "Appellant's Motion"), on November 14, 2010. A hearing on the motions was held at the Springfield State Building on September 28, 2011. The hearing was digitally recorded and copies were provided to both parties.

The following facts appear to be undisputed:

1. On July 1, 2005, the Appellant was appointed to the position of Permanent Full Time Laborer with the Department. (Exhibit 2)
2. The Appellant worked under the job title description "Refuse/Recycling Laborer." This position is classified as a Class I, unskilled position, which requires no specific skills, education, training, or license. (Exhibit 15)
3. The duties of the Appellant involve "*unskilled labor duties*" which include "bending and/or squatting to lift trash barrels or bags of refuse, pulling or carrying these to the rear of a truck, lifting the barrel or bag, depositing the refuse and, if a barrel, returning it to the curbside." (Exhibit 15) (*Emphasis added*)
4. On June 22, 2010, the Appointing Authority hand delivered a Layoff Notification to the Appellant. (Exhibit 3).
5. The Layoff Notification cites budget cuts as the reason for the layoff. Further, the Layoff Notification states that §§39 through 45 were enclosed with the notice and that a hearing will be held on June 30, 2010 in the Westfield City Council Chambers. (Exhibit 3)

6. M.G.L. c.31, §§39-45 explains the process of reinstatement, laws governing the dismissal of employees, as well as the process and procedures for submitting an appeal to the Commission. (Appellant's Motion; Appointing Authority's Motion)

7. According to M.G.L. c. 31, §42 an appeal must be submitted to the Commission within ten (10) days:

> "Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment or compensation may file a complaint with the commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements."

(Appointing Authority's Motion)

8. The Appellant testified that copies of M.G.L. c. 31, §§39-45 were not included in the Layoff Notification. (Appellant Testimony)

9. Amy Casey (hereinafter "Ms. Casey"), the Personnel Clerk for the City of Westfield, submitted an affidavit stating that she is the person responsible for preparing and mailing Layoff Notifications and that she enclosed copies of M.G.L. c. §§39-45 with the Appellant's Layoff Notification. (Exhibit 6)

10. The Appellant did not attend the hearing on June 30, 2010 due to a health issue with his mother. (Appellant Testimony; Exhibit 5)

11. On July 1, 2010, the Appointing Authority mailed a letter to the Appellant indicating that the hearing was conducted and the layoff occurred as indicated in the layoff notification. (Exhibit 5)

12. The Appellant filed an appeal with the Commission on July 30, 2010. (Testimony of Appellant; Testimony of Appointing Authority)

13. At the time of the layoff, three (3) individuals remained employed as Laborers within the Department, all of whom maintained a seniority status that outranked the Appellant. (Exhibit 6)

14. Under M.G.L. c. 31, §39 (hereinafter "§39"), a labor service employee may invoke "bumping rights." The statute states:

> "Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service."

(Appointing Authority's Motion; Appellant's Motion)

15. The Appellant contends that he may bump into the Land and Resources Division as a Maintenance Man – Park. (Testimony of Appellant; Appointing Authority's Motion; Appellant's Motion)

16. The position of Maintenance Man – Park is classified as a Class II Skilled Laborer position. This position involves *"work of a skilled nature"* which includes: a working knowledge of tools, equipment and materials used on the job, skill in the use of such tools, equipment and materials, an ability to make minor repairs and adjustments to the equipment used, and a working knowledge of the hazards and safety precautions involved in the work performed. (Exhibit 12; Appointing Authority's Motion)

17. Appellant testified that he possesses the requisite qualifications for the position of Maintenance Man – Park, which includes knowledge of the use of jackhammers, cement mixers, air compressors, and lawn maintenance equipment. (Testimony of Appellant)

Issues

Based on the parties' motions, as well as the arguments presented at the motion hearing, it is evident that the parties are in agreement as to the facts of this case. They also agree that the issues to be decided are whether the Appellant filed a timely appeal to the Commission and whether the Appellant may exercise his bumping rights under §39 to bump into a position of a different Class.

Appellant's Argument

The Appellant sets forth two fundamental arguments: First, the appeal should be considered timely due to the omission of the required copies of M.G.L. c. 31, §§39-45 with the Layoff Notification, and second, given the duties of Maintenance Man – Park, the classification of said position as a Class II Skilled Laborer is incorrect and, even it wasn't he has the necessary qualifications for the position and should be able to bump a less senior employee in that title.

The Appellant relies on the assumption that he did not receive copies of M.G.L. c. 31, §§39-45 with his Layoff Notification as the basis for circumventing the statutory ten (10) day limitation for filing an appeal. Specifically, Appellant seems to be relying on the language in §42, which states, "such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or *after such person first knew or had reason to know of said action*, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements (Emphasis added)." The Appellant argues that he did not know that an appeal must be filed within ten (10) days of receipt of the Layoff Notification and this information was relayed to him only after seeking counsel on July 27, 2010. Further, the Appellant's previous

engagement with the Civil Service Commission was not subject to the ten (10) day timeframe, and thus he had no knowledge of the civil service appeal procedure.

While the position of Maintenance Man – Park is classified as a Class II Skilled position and the Appellant was employed in a Class I Unskilled position, the Appellant maintains that the position is similar to the position he held. Further, he argues that the City has arbitrarily classified the Maintenance Man – Park position as skilled simply because skills required for the position are "acquired on the job." Since the City has designated this position as a type that an individual may learn on the job, the classification of Maintenance Man – Park as a skilled position is erroneous according to the Appellant . Due to this misclassification, the Appellant argues that he should have the right to bump into that position.

The Appellant also maintains that he possesses the skills required for the position of Maintenance Man – Park. In his previous work experience, the Appellant has developed a working knowledge of jackhammers, cement mixers, air compressors, and lawn maintenance equipment.

The Appellant cites Almeida v. New Bedford Sch. Comm., G1-08-234 (2009) to support his proposition that he may exercise his bumping rights and move to the position of Maintenance Man – Park. Almeida stated that limiting bumping rights "…only to a position of the exact name…would give an unreasonably narrow interpretation to the relevant statutes, would be inconsistent with the basic tenets of the civil service law and, especially, would inequitably dilute the explicit protections that tenure (i.e. seniority) was meant to provide to permanent labor service employees under civil service law and rules."

Therefore, the Appellant argues that the City should have laid off a Maintenance Man – Park employee before the Appellant.

Appointing Authority's Argument

The Appointing Authority argues that the timing of the appeal is late, stating two fundamental reasons: First, Amy Casey, the Personnel Clerk for the City of Westfield, states in her affidavit that she was the one responsible for preparing and mailing off the layoff notifications. Further, she states that she enclosed the copies of M.G.L. c. 31, §§39-45 with the Appellant's layoff notification. Second, the Appointing Authority illuminates the fact that the Appellant has filed complaints with the Civil Service Commission in the past, which is evidence of knowledge of the appeal procedures.

To support their position, the Appointing Authority cites Flynn v. City of Attleboro, D1-10-8, which states: "The failure to file an appeal with the Commission within the statutory time is jurisdictional, or akin to a statute of limitations, and cannot be improperly expanded by the Commission." The Appointing Authority moves for a Dismissal due to the lack of timeliness of the appeal.

However, if the Commission denies the Motion to Dismiss, the Appointing Authority argues that the Appellant may not exercise bumping rights to bump into a Class II skilled labor position since the Appellant is employed as a Class I unskilled employee. Maintenance Man – Park, a Class II skilled position, requires the use of jackhammers, air compressors, cement mixers, and lawn maintenance equipment. Further, the position requires a working knowledge of the tools, equipment, and materials used in the job, skill in the use of such tools, equipment and material, an ability to make minor repairs and adjustments to the equipment used, and a working knowledge of the hazards and safety

precautions involved in the work performed. The position the Appellant was employed in, Laborer Class I, is an unskilled position, consisting of bending and/or squatting to lift trash barrels or bags, pulling or carrying these to the rear of the truck, lifting the barrel or bag and depositing the refuse into the truck, and returning the barrel to the curb.

The Appointing Authority argues that a comparison of the skills and duties reveals the vast differences in the positions. In accordance with §39 and the ruling in Almeida, the Appellant is not authorized to bump from a Class I unskilled position to a Class II skilled position since the two positions are not similar in nature. Therefore, the Appointing Authority moves for a Summary Decision.

Conclusion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., "viewing the evidence in the light most favorable to the non-moving party", the movant has presented substantial and credible evidence that the opponent has "no reasonable expectation" of prevailing on at least one "essential element of the case", and that the non-moving party has not produced sufficient "specific facts" to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

Timeliness of Appeal

M.G.L. c. 31, §42 states, in relevant part:

> "Any person who alleges that an appointing authority has failed to follow the requirements of section forty-one in taking action which has affected his employment

> or compensation may file a complaint with the Commission. Such complaint must be filed within ten days, exclusive of Saturdays, Sundays, and legal holidays, after said action has been taken, or after such person first knew or had reason to know of said action, and shall set forth specifically in what manner the appointing authority has failed to follow such requirements."

Further, the failure to file an appeal with the Commission within the statutory time is jurisdictional, or akin to a statute of limitations, and cannot be improperly expanded by the Commission. See Town of Falmouth v. Civil Service Comm'n, 441 Mass. 814, 822-23 (2006); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); Volpicelli v. Woburn, 22 MCSR 448 (2009); Novia v. City of Boston, 20 MCSR 639 (2007); Maurice v. Massachusetts Dep't of Mental Health, 19 MCSR 328 (2006); Konikowski v. Department of Corrections, 10 MCSR 79 (1997); Springer v. Town of Saugus, 8 MCSR 154 (1995).

The Appellant argues that since the Appointing Authority failed to enclose the requisite statutes, specifically M.G.L. c. 31, §42, the statutory time should be expanded to allow a timely appeal. In evaluating the plain language used in the statute, it makes clear that an appeal should be filed within ten (10) days "after said action has been taken, or after such person first knew or had reason to know of said action…"

In the instant case, the Appellant received a Layoff Notification which stated that M.G.L. c. 31, §§39-45 were enclosed with the notice. If the required statutes were not properly enclosed with the Layoff Notification, it should have been apparent to the Appellant that the Appointing Authority had failed to follow the proper procedure. Since the Layoff Notification specifically stated that M.G.L. c. 31, §§39-45 were enclosed, but were in fact allegedly missing, it is reasonable to conclude that the Appellant was on notice of the Appointing Authority's non-compliance. At that point, the Appellant had

"reason to know" that the Appointing Authority failed to abide by the requisite process of M.G.L. c. 31, §41. The statutory time began to run at the moment the Appellant received the Layoff Notification since the Appellant had "reason to know" that the proper procedure was not followed. The Appellant filed his appeal with the Commission on July 30, 2010, however, excluding Saturdays, Sundays, and accounting for the Fourth of July holiday, the appeal should have been filed by July 16, 2010. Allowing additional time for mail delivery would not account for the ten (10) day difference between July 16, 2010 and July 30, 2010. Therefore, the Appointing Authority's Motion to Dismiss due to the Appellant's failure to file a timely appeal is *allowed*.

Even if the appeal were timely, however, the Appellant's appeal would still fail for the reasons below.

Bumping Rights Under §39

M.G.L. c. 31, §39 states, in relevant part:

> "Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service."

Almeida addressed how he Commission majority interpreted §39, and discussed the boundaries of the "next lower title or titles in the labor service" as well as "similar positions." As stated in Almeida, "the Commission construes the terms 'lower title or titles in the labor service' and 'similar' positions, to include any other 'similar' labor service position for which the Appellant can demonstrate he is qualified, meaning that the

duties involve a *substantially similar or lower skill level of labor service work as performed by the Appellant* sufficient that the Appellant meets the criteria to be placed on the register for appointment to such position." Almeida, G1-08-234, 13 (2009) (Emphasis Added). Essentially, Almeida sets forth a two part test: First, an employee may bump only to a position in which the employee *performed duties which are substantially similar to duties of the new position* or the new position requires a lower skill set than the current position, and second, the employee must possess the proper qualifications for the new position in order to bump into that position.

Enforcing such a standard maintains the stability and predictability for an efficient system when exercising employee rights. "Predictability and precedent are fundamental aspects of any statutory scheme, so that all the parties would be able to make plans and projections in reliance on it." Moloney et al v. City of Lynn, 17 MCSR 13, 14 (2004).

Within the Labor Service three "classes" exist, each requiring an increasing level of skill for employment – Class I (Laborers), Class II (Skilled Laborers), and Class III (Mechanics and Craftsmen). Typically, Class I positions involve unskilled labor and require no experience. While Class II and III positions typically require a specified level of experience and specific skill sets.

A Class II position is fundamentally different than a Class I position in that Class II positions are deemed "skilled" while Class I positions are deemed "unskilled." Despite qualifications that any particular employee may possess while employed in either position, the duties performed are of significant importance. The exercise of specific skills is the determining factor by which to distinguish these positions.

Given the differences between the duties actually performed by a skilled employee and unskilled employee, an unskilled employee is unlikely to perform substantially similar duties as a skilled employee. As stated in Almeida, an employee looking to bump *must actually perform duties* that are substantially similar to or higher in skill level than the position they wish to bump. While the classification of a particular position is not determinative, it is highly unlikely that an unskilled employee will ever perform duties that are substantially similar to those of a skilled employee. Therefore, it will be under exceedingly rare and extraordinary circumstances when an unskilled employee will be able to sufficiently demonstrate that the duties performed in an unskilled position are of a substantially similar nature to those of a skilled position.

In the instant case, the Appellant was employed as a Class I unskilled laborer. Specifically, the Appellant was employed as a Refuse/Recycling Laborer, performing duties such as "bending and/or squatting to lift trash barrels or bags of refuse, pulling or carrying these to the rear of the truck, lifting the barrel or bag, depositing the refuse and, if a barrel, returning it to curbside." The job description lists no other qualifications or education required for the position.

The position in which the Appellant is attempting to bump into is Maintenance Man – Park, which is classified as a Class II skilled position and requires the operation of jackhammers, air compressors, pumps, power mowers, cement mixers, and other equipment that does not require any special licensing. The position also requires a working knowledge of the tools, equipment, and materials used in the job as well as the skill in the use of such tools, equipment and materials. Additionally, the position requires

the ability to make minor adjustments to the equipment used and a working knowledge of the hazards and safety precautions involved in the work performed.

To meet Almeida's test, the Appellant must have either been employed in a position in a higher skill Class than that of the position in which they wish to bump or the duties performed in the current position must have been substantially similar to the position of that which he wants to bump and, the Appellant must be qualified for the new position. It can be discerned immediately that the Appellant is not in a position classified in a higher Class as the position to which he aspires. Therefore, the Appellant fails that portion of the test.

Next, the Appellant must demonstrate that the position he wishes to bump performs duties substantially similar to the duties in the position to which he is/was currently employed. A side by side comparison of Refuse/Recycling Laborer and Maintenance Man – Park reveal vastly different duties. While a Refuse/Recycling Laborer's duties are primarily limited to removing the refuse from the curb, a Maintenance Man – Park's duties involve maintaining park grounds, using various equipment, such as jackhammers, cement mixers, and air compressors, and maintaining and servicing those pieces of equipment. Taking the decision in Almeida and §39 together, the Appellant does not perform duties of a substantially similar nature to a Maintenance Man – Park' duties. Refuse/Recycling Laborer does not perform tasks involving jackhammers, air compressors, cement mixers, or lawn mowing equipment. Nor does Refuse/Recycling Laborer maintain such equipment or equipment substantially similar in nature. A comparison of skills as exercised in each job reveal a substantial difference in the duties actually performed in the two positions.

A broad interpretation of Almeida, such as that of the Appellant, might be thought to permit a labor service employee to indulge in a search of any possible position for which an employee, engaged in the exercise of their statutorily permitted bumping rights under §39, may possibly be qualified to perform without regard to the classification of the position because the duties are slightly similar. That is, a Class I employee could possibly bump a Class II employee simply because they are qualified to perform the duties of the Class II position, perform slightly similar duties, and possess the appropriate seniority. This is inherently inconsistent with the holding in Almeida. An Appellant must perform duties that are of a substantially similar nature to that of the position to bump. A slight similarity, no matter how cleverly stated, does not suffice.

The Appellant maintains that due to his qualifications, he should be able to bump into Maintenance Man – Park. Citing previous work experience as evidence of his qualifications, the Appellant claims that Maintenance Man – Park is a position to which he should be able to bump. Further, the Appellant states that due to the fact that the majority of skill required for Maintenance Man – Park is acquired "on the job," that bumping rights should be extended. However, this type of reasoning is not in compliance with Almeida. Essentially, the Appellant wants the Commission to focus only on whether the Appellant is qualified for the position and ignore the other aspect of Almeida requiring substantially similar duties to have been performed. Possession of the proper qualification for a job is only one aspect to be evaluated. The Appellant did not perform duties of a substantially similar nature, nor was the Appellant employed in a position with a higher classification of skills than Maintenance Man – Park. Therefore, in accordance with our decision in Almeida, the Appellant may not bump into Maintenance Man – Park.

In certain instances, an Appointing Authority has asked employees in a Class I position to perform Class II duties and vice versa. Such a situation was described in Almeida, when Cafeteria Workers, a Class I position, were assigned to perform duties of Bus Operators, a Class II position, for a period of more than two years. Further, it was found that Bus Operators were asked to perform the duties of Laborer. Nevertheless, the issue in this case does not involve the ramifications of Class I employees performing Class II duties in response to cost cutting measures by the City. A request by the City to perform duties beyond one's job classification is beyond the scope of this case. The issue in this case is to what extent employees, within their respected job classifications and duties, may exercise bumping rights.

Furthermore, an Appointing Authority may have reinstated employees who held the same position as the Appellant and placed them into the position in which the Appellant seeks to exercise his bumping rights. However, the issue before the Commission is not whether other employees have been reinstated to the position that the Appellant aspires, but whether the Appellant may exercise bumping rights to gain entry into said position. These are two separate issues and an analysis of reinstatement rights of other employees and the proper placement of those employees into "similar" jobs is outside the scope of this case.

Finally, the Appellant argues that the Classification of Maintenance Man – Park is misclassified as a Class II skilled Labor position and should be reclassified as a Class I Unskilled Labor position. While I am sympathetic to the fact that the Appellant feels that the job is misclassified, absent any evidence of discrimination or purposeful

reclassification by the Appointing Authority toward the Appellant, an analysis of the proper job classifications is beyond the scope of this case.

For the reasons stated above, the Commission holds that the Appellant failed to file a timely appeal pursuant to M.G.L. c. 31, §42; therefore the Appointing Authority's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. D1-10-189 is hereby ***dismissed***.

Civil Service Commission

_____

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and McDowell, Commissioners [Marquis – Absent]) on December 15, 2011.

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)(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.

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:
Kevin B. Coyle, Esq. (for Appellant)
Kathleen E. Degnan, Esq. (for Appointing Authority)