

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

JEFFREY L. FELDER,

Appellant

v.

CITY OF BOSTON,

Respondent

G2-16-060

Appearance for Appellant:

Philip Brown, Esq.

Associate General Counsel

AFSCME Council 93

8 Beacon Street, 7th Floor

Boston, MA 02108

Appearance for Respondent:

Robert J. Boyle, Esq.

Labor Counsel

Office of Labor Relations

Boston City Hall, Room 624

Boston, MA 02201

Commissioner:

Paul M. Stein

DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION

The Appellant, Jeffrey L. Felder, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), contesting his non-selection by the City of Boston (Boston), for the second time,¹ to fill a vacancy in position of provisional Street Light Construction Inspector (SLCI) in the Boston DPW Street Lighting Division². A pre-hearing conference was held on April 19, 2016. On May 11, 2016 Boston filed a Motion for Summary Disposition, which the Appellant opposed.

¹ The Appellant had previously applied in 2013 for provisional promotion to another position of SCLI and his non-selection for that promotion was appealed to the Commission and has been allowed in part. Felder v. City of Boston, CSC No. G2-14-61 (*Felder I*)

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

FINDINGS OF FACT

Based on the pre-hearing stipulations and submission of the parties, and taking administrative notice of the Findings of Fact in the Commission's Decision in Felder I, the following material facts are not in dispute:

1. The Appellant, Jeffrey L. Felder is a tenured labor service employee with the Street Lighting Division of the Boston DPW. He began employment in the DPW in February 1999 as a Maintenance Mechanic (Lighting Service Repair). Since October 2000 he has held the title of Maintenance Mechanic 1 (Lighting Service Repair). (*Claim of Appeal; Boston Motion; Appellant's Opposition; Administrative Notice [Felder I]*)

2. During his employment with the Boston DPW, Mr. Felder received satisfactory performance reviews from his supervisors which document that he generally "meets expectations" in all categories of work performance. (*Administrative Notice [Felder I]*)

3. Prior to his present appeal, Mr. Felder was disciplined on four separate occasions:

- (a) November 2004 – one day suspension
- (b) September 2005 – 4 day suspension
- (c) July/August 2008 – 5 day suspension
- (d) June/July 2013 – 20 day suspension

(*Administrative Notice [Felder I]*)

4. Mr. Felder's 2013 discipline was a result of an Agreement dated 7/2/2013, following a positive drug/alcohol test (cocaine) on June 11, 2013. In addition to accepting a 20-day suspension, Mr. Felder entered into a Rehabilitation Agreement which required, among other things that he seek counseling for substance abuse, including a minimum of one year of "after-care" treatment and that he submit to follow-up drug testing for a period of at least two years and up to five years following the completion of his treatment program. (*Boston Motion; Appellant's Opposition. Attch. B & C; Administrative Notice [Felder I]; Claim of Appeal*)

5. The Boston DPW Street Lighting Division handles responsibility for the engineering, design, maintenance and repair of the municipal street lighting infrastructure throughout Boston, which includes approximately 64,000 electrical and 3,000 gas light fixtures, along with associated poles and equipment. (*Administrative Notice [Felder I]*)

6. The Street Lighting Division staff consists of three or four Supervisors of Street Lighting (SSLs) who report directly to the Street Lighting Division Manager and, under them, approximately eight Street Lighting Construction Inspectors (SLCIs), two to four Maintenance Mechanics 1 (MM1s) and approximately 20 to 25 Maintenance Mechanics (MMs), and two Store Keepers. The SSLs and SLCIs manage and supervise the work of the MMs and MM1s, who are assigned to one of four work crews (generally two MMs and/or MM1s plus a SLCI) assigned to the following functions: a Gas Crew that maintains the gas lighting, a Maintenance Crew that primarily handles outages, a Ground Maintenance Crew that attends to replacement of bulbs and other repairs, and a Construction Crew focused on pole removal, replacement and repair. (*Administrative Notice [Felder I]*).

7. On or about January 14, 2016, the Boston DPW posted a vacancy for the position of SLCI. The posting expressly stated that vacancy would be filled by making a provisional appointment to that position. The posting invited both internal departmental unit candidates and external candidate to apply. (*Boston Motion*)³

8. The Boston DPW received applications for the SLCI vacancy from a mixed pool of departmental unit applicants as well as external candidates, including Mr. Felder. (*Boston Motion; Appellant's Opposition, Attch. B*).

³ The 2016 posting as a "provisional appointment" is different from the 2013 posting for the earlier vacancy in the position of SLCI involved in Felder I, which the Boston DPW distinctly treated as a "provisional promotion." (*Administrative Notice [Felder I]; Appellant's Opposition, Attch. A*)

9. Mr. Felder was the only MM1 to apply. He was not selected to be interviewed for the position because he remained subject to the terms of his 2013 Agreement regarding his failed drug/alcohol test. Although Mr. Felder had completed his rehabilitation treatment program, and has tested negative for the initial two year period that he was subjected to random testing, he continued to be subject to such testing for an additional period of up to five years following the completion of his rehabilitation treatment. Boston DPW found that Mr. Felder remained unqualified to perform the supervisory position of an SLCI for these reasons. (*Boston Motion; Appellant's Opposition, Attch. B; Administrative Notice [Felder I]*)⁴

10. By letter dated February 24, 2016, Mr. Felder received notice that he was not being selected to be interviewed for the 2016 provisional appointment to SLCI. "because you are currently participating in a rehabilitation agreement for a positive drug test." (Claim of Appeal)

11. On or about March 21, 2016, the Boston DPW appointed a Street Lighting Division employee who held an MM title to the provisional SLCI position. (*Boston Motion; Appellant's Opposition, Attch. B; Claim of Appeal*)

12. On March 28, 2016, Mr. Felder brought this appeal. (*Claim of Appeal*)

STANDARD OF REVIEW

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7) (h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is "no reasonable expectation" that a party can prevail on at least one "essential element of the case". See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

⁴ The Boston DPW also declined to interview Mr. Felder for selection to fill an opening for provisional SLCI vacancy in October 2014, which Mr. Felder did not appeal at the time. (*Claim of Appeal*)

ANALYSIS

The original expectation in Massachusetts civil service law was that provisional appointments or promotions were “supposed to be exceptional circumstances”, intended to allow an appointing authority to fill a vacancy temporarily, pending the establishment of a suitable eligible list of candidates who had qualified for the position by passing the requisite civil service competitive examination. City of Somerville v. Somerville Municipal Employee’s 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) After decades without HRD holding competitive examinations for most non-public safety civil service positions, however, and the professed lack of appropriations to permit examinations in the near future, the vast majority of current and future non-public safety civil service employees have not taken or passed, and never will take, a qualifying examination for the position they occupy or aspire to achieve. As a result, appointments and promotions to nearly all non-public safety civil service positions in the official service in Massachusetts now can be lawfully accomplished only provisionally. Thus, the exception has now swallowed the rule. An appointment or promotion “which is provisional in form” is, essentially, “permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995)

Provisional status leaves an employee with quite different and diminished job security and advancement opportunities that civil service law was meant to provide public servants, relegating them to enforcement of their rights under collective bargaining agreements, if any, and other law, which are beyond the Commission’s purview. That said, the Commission must continue to apply the civil service law as written. Bulger v. Contributory Retirement Appeal Bd., 447 651, 661 (2006), quoting Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 86 (1999). If there is a

flaw in the statutory procedure, it is a flaw for the General Court to address, whether on a systemic basis or through special legislation. See Kelleher v Personnel Administrator, 421 Mass. at 389.

This is not a new issue for the Commission, HRD, the legislature, the courts or the various other interested parties including appointing authorities, employees or public employee unions. Through a series of decisions, the Commission has wrestled with these issues. In essence, as much as the Commission regrets this state of affairs, it must hew to the legislative intent that allows an appointing authority to fill vacant positions through use of either a provisional appointment or a provisional promotion, so long as the statutory requirements are followed and there is no significant indication of a likelihood that the appointment process was a subterfuge or otherwise shown to be so inconsistent with basic merit principles as to trigger the Commission's independent exercise of discretion to initiate an investigation of such alleged irregularity under G.L.c.31, §2(a). See, e.g., Blasi v. Department of Revenue, 28 MCSR 15 (2015); Palluccio v. Department of Revenue, 28 MCSR 118 (2015); Louissant v. City of Boston, 27 MCSR 167 (2014). In particular, the Commission has repeatedly explained that the selection of one candidate for provisional appointment does not constitute a "bypass" of any other candidate for which the non-selected candidate can claim to be aggrieved or have any right of appeal to the Commission. See, e.g., Poudrier v. Department of Transitional Assistance, 28 MCSR 246 (2015); Perry v. Department of Mental Health, 28 MCSR 243 (2015); Pollock v. Department of Mental Retardation, 22 MCSR 276 (2009)

Based on the principles established by these prior Commission Decisions, Mr. Felder's appeal fails. Unlike the appeal in Felder I, which involved a provisional promotion, the present appeal arises from a posting for a vacancy of SLCI that Boston duly processed as a provisional

appointment. The statutory requirements for making a provisional appointment are contained in G.L.c.31, §13 & §14. Section 13 provides, in relevant part:

“An appointing authority, in requesting to make a provisional appointment, shall file with the administrator[HRD] . . . a notice containing (1) the information which the appointing authority believes is necessary to prepare and conduct an examination for the position for which such authorization is being requested, including a statement of the duties of the position, and the knowledge, skills and abilities necessary to perform such duties; (2) a proposal specifying the type of examination which should be held by the administrator; (3) a substantiation that that person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties.” (*emphasis added*)

Section 14 provides, in relevant part:

“Upon receipt of the notice described in section thirteen, the administrator [HRD] . . . may authorize a provisional appointment if he determines that the contents of the notice are satisfactory. . . . [I]f no person who meets the entrance requirements can be found for provisional appointment pending holding of an examination . . . the administrator may authorize a provisional appointment of a person who does not meet such entrance requirements. . . .” (*emphasis added*)

Each provisional appointment shall be reported by the appointing authority to the administrator. . . .” (*emphasis added*)

All indicia point to the undisputed fact that Boston intended to fill the position through a provisional appointment pursuant to G.L.c.31, Sections 13 & 14. The posting was not limited to departmental employees and both departmental and external candidates applied and were considered. Thus, unlike Felder I, the Commission need not inquire whether Mr. Felder’s position as a MM1 placed him in a higher title than the selected candidate, who was an MM. Nor must the Commission inquire as to whether Mr. Felder’s continuing obligations under his drug testing rehabilitation Agreement disqualified him from consideration or provided sound and sufficient reasons to HRD to approve “skipping over” Mr. Felder even if he were considered to be in a higher title, as would have been the case in making a provisional promotion under G.L.c.31, Section 15. In the case of a provisional appointment, whether or not Mr. Felder met

the qualifications for the appointment provides no standing for him to challenge selection of another qualified candidate.

To be sure, Boston has not strictly complied with the requirements for filing a notice to obtain HRD's "authorization" to make a provisional appointment, and reporting the appointment, as set forth in G.L.c.31, §13 & §14.⁵ The parties, however, do not dispute that the selected candidate met the minimum qualifications for the appointment. Although the "contents of the notice" required to be filed with HRD in the case of a provisional appointment must also contain other details, that additional information concerns the form and contents of the proposed competitive examination, which are a moot point given the lack of any prospect that any such examinations actually will ever be given. Under the current version of G.L.c.31, Section 12, HRD does not have the same statutory obligation to provide a substantive review and approval of a provisional appointment as would be the case with issues raised by the provisional promotion presented in *Felder I*. Accordingly, while Boston must take care to comply, and will be expected to comply in the future, with the appropriate notice and reporting requirements for both provisional promotions and appointments, the failure to do so here does not implicate any violation of Mr. Felder's substantive civil service rights.

CONCLUSION

Accordingly, for the reasons stated, Boston's Motion for Summary Disposition is **allowed** and the Appellant's appeal under Docket No. G2-16-60 is **dismissed**.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

⁵ In making a provisional appointment, Boston is also required to request from HRD that names of any veterans interested in the provisional appointment, whose names appear on a list that is supposed to be compiled and maintained by HRD. G.L.c.31, §26, ¶5. Mr. Felder's present appeal, however, does not assert any such preference.

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on July 21, 2016.

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 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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Philip Brown, Esq. (for Appellant)

Robert J. Boyle, Esq. (for Respondent)