

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**PATRICK J. MULVEY,**  
*Appellant*

v.

**CITY OF BROCKTON,**  
*Respondent*

**CASE NO. G2-14-246**

Appearance for Appellant:

Joseph McArdle, President/Field Representative  
Massachusetts & Northern New England  
Laborers District Counsel  
7 Laborers' Way  
Hopkinton, MA 01748

Appearance for Respondent:

Katherine Feodoroff, Esq.  
Assistant City Solicitor  
City of Brockton – Law Department  
45 School Street  
Brockton, MA 02301

Commissioner:

Paul M. Stein

**DECISION ON RESPONDENT'S MOTION FOR SUMMARY DECISION**

The Appellant, Patrick J. Mulvey, appealed to the Civil Service Commission (Commission) pursuant to Mass.G.L.c.31, §2(b) to contest his non-selection for a labor service position of Heavy Motor Equipment Operator (HMEO) in the Refuse Section of the Operations Division of the Department of Public Works (DPW) of the Respondent, City of Brockton (Brockton). On July 31, 2014, Brockton filed a "Motion For Summary Judgment" (treated as a Motion for Summary Decision) which the Appellant opposed. On October 2, 2014, the Commission held a hearing on Brockton's motion, together with a hearing on Brockton's "Motion for Summary Judgment" in a related appeal by another candidate challenging his non-selection for the same position. Moran v.City of Brockton, CSC No. G2-14-237 (Moran Appeal) The hearing was digitally recorded and copies were provided to the parties.

The undisputed facts establish that the selected candidate was one of three qualified DPW applicants employed in the Operations Division who applied for the position. Pursuant to M.G.L.c.31, §29 and PAR.19, Brockton was entitled to select that candidate in the exercise of its sound discretion without having to justify the choice over the other two candidates. Accordingly, this appeal, as well as the Moran Appeal, must be dismissed for lack of jurisdiction.

### **FINDINGS OF FACT**

I find the following facts to be undisputed:

1. The Appellant, Patrick J. Mulvey, is a Brockton resident employed in the tenured labor service position of Maintenance Man in the Refuse Section of the Operations Division of the Brockton DPW. (*Brockton Motion, Exh. C; Appellant's Objection to Motion; Claim of Appeal*)

2. The Brockton DPW is established by municipal ordinances as a single departmental unit under the general supervision of a Commissioner of Public Works which contains three divisions, each headed by a superintendent – an Engineering Division, an Operations Division and a Utilities Division. The ordinances specify: “For purposes of departmental unit, as defined under chapter 31 of the General Laws, all employees shall be considered employees of the department of public works.” (*Brockton Motion, Exh. F*)

3. The Superintendent of the Operations Division is responsible for road and sidewalk maintenance and repair of all Brockton roads, sidewalks, traffic control equipment and signs, snow and ice control, forestry operations, landfill operations, trash collection and maintenance and repair of all DPW motor vehicles. The Operations Division is subdivided functionally into a Highway Section, a Maintenance Section and a Refuse Section. The Superintendent of the Operations Division manages the personnel within his division and has initial authority to initiate

discipline. (*Brockton Motion, Exh. F; [Administrative Notice, Moran Appeal, Brockton Motion, Exhs. A through D]*)

4. All labor service employees of the Brockton DPW are members of Massachusetts Laborers' District Council Public Employees Local Union 1162 of the Laborer's International Union of North America (the Union), which has entered into a Collective Bargaining Agreement (CBA) with the City of Brockton. The CBA (Arts. XVI & XVII) provides, among other things, for posting of promotional opportunities by "the appointing authority (Department Head)" and for the Department Head to approve salary adjustments for employees transferred from one position to another within the Department. The CBA (Art. XV) provides: "15-02 In the event of a transfer, promotion or increase or decrease of the work force and other matters pertaining to Civil Service, seniority for Civil Service employees shall be as defined in Massachusetts General Laws Chapter 31, Section 33 and other pertinent sections." In matters of discipline, grievances are filed with the Department Head [DPW Commissioner] and initially handled either by the Department Head or the Division Head [Superintendent], with further appeal to the Mayor of Brockton. (*Brockton Motion, Exhs. D & F*)

5. On September 15, 2014, Interim DPW Commissioner Larry Rowley posted an opening for permanent HMEO in the Refuse Section of the Operations Division. The duties include:

Works in coordination with the City's Recycling Depot.<sup>1</sup> Assists residents, provides information, and properly disposes of items accepted at the site. Assists Refuse General Foreman or his designee in checking route sheets for compliance with trash regulations for the City. Assists in cleanup of City-owned properties when necessary. Picks up illegal dumping materials, shopping carts, tires, etc. Must be capable of operating with a rated capacity of more than three tons and up through nine tons, dump trucks, large tractors and equipment. Required to grease, oil and clean equipment. Other duties as assigned by Superintendent of Operations, in his absence the DPW Commissioner or his designee.

(*Brockton Motion, Exhs. D & E*)

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<sup>1</sup> The Recycling Depot is manned and operates six days a week and services the general public in general recycling, hard-to-manage waste, hazardous waste, as well as accepting items not collected curbside. (*Brockton Motion, p. 4*)

6. The following three employees in the DPW's Operations Division applied for the position and were interviewed on October 1, 2014:

David Moran, HMEO, Highway Section, Seniority Date: 08/16/99

Joseph Monteiro, HMEO, Highway Section, Seniority Date: 05/06/02

Patrick Mulvey, Maintenance Man, Refuse Section, Seniority Date: 01/30/12

*(Brockton Motion, Exhs. D & E)*

7. An HMEO in the Highway Section performs the following duties:

Operates large tractors, dump trucks, sanders, road sweepers, snow loaders, leaf loaders, snow fighter, sidewalk rollers, and road plows with a rated capacity of more than three tons and up through nine tons; loads and unloads trucks; picks up and hauls material; plows and sands highways; greases, oils and cleans equipment normally operated by a Motor Equipment Operator. Performs manual labor duties and other related duties as assigned by supervisors. Performs similar or related duties as requested as situation dictates or as assigned by the Superintendent of Operations or his designee.

Drives snow plows, sands and salts roads, and performs other snow removal functions; participates in snow and ice removal by preparing trucks and plows, plowing snow, and shoveling snow; may work the evening shift and respond to emergency calls from the public, police, fire, or other emergency personnel. May answer and log in telephone calls for service.

*(Brockton Motion, Exh. H)*

8. On October 2, 2016, Interim DPW Commissioner selected Highway Section HMEO Joseph Monteiro for the position and he was transferred to the position, effective October 6, 2014. Mr. Mulvey was informed of his non-selection on or about October 2, 2014. His grievance filed under the CBA was denied. *(Brockton Motion, Exhs. C & E)*

9. This appeal ensued. *(Claim of Appeal)*

#### Applicable Legal Standard

The Commission treats Brockton's "Motion for Summary Judgment" as a Motion for Summary Disposition within the meaning of the Standard Rules of Adjudicatory Procedure, 801 C.M.R. 1.01 et seq (Formal Rules) as adopted by the Commission. 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)

#### Applicable Civil Service Law

G.L.c.31, §35,¶6 governs the voluntary transfer of a civil service employee from one position to another and provides:

Any permanent employee in a department unit may apply in writing to his appointing authority for transfer to a similar position within such unit or may apply in writing to the appointing authorities for such unit and for any other departmental unit for transfer to a similar position in such other departmental unit. With the written consent of such appointing authority or authorities, as the case may be, and with the written consent of the administrator,<sup>2</sup> such person may be so transferred.

In the case of a promotion within the labor service, G.L.c.31, §29 provides, in part:

An appointing authority shall, prior to any . . . 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 changes is being made, post a promotional bulletin . . . 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.

Pursuant to PAR.19(5), any such promotional appointments or changes of position

. . . shall be made from among the same number of persons with the greatest length of service as the number specified in making appointments under PAR.09, provided that such persons possess the required qualifications and serve in eligible titles, as determined by the administrator. If there are less than the requisite number of person, selection may be made from the lesser number.

These requirements mean that an appointing authority may select, in the exercise of its sound discretion, one of the three most senior qualified applicants for a promotion to a labor service

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<sup>2</sup> In the case of labor service, HRD has delegated its duties as the “administrator” to the municipalities. PAR.21.

positions and the non-selection of another of the group of three qualified candidates, even if more senior than the selected one, is not considered to have been bypassed and does not have a right to contest the non-selection as a bypass by appeal to the Commission. See, e.g., Vella v. City of Cambridge, 28 MCSR 514 (2015); Collins v. Town of Billerica, 28 MCSR 171 (2015); Stockinger v. City of Quincy, 24 MCSR 416, 422 (2011); Lusignan v. City of Holyoke G & E Dep't, 22 MCSR 137 (2009); Harrop v. Fall River School Comm., 22 MCSR 1 (2009) and cases cited.

### Analysis

Brockton correctly asserts that the DPW is a single “departmental unit” for purposes of civil service law and rules. Brockton’s municipal ordinances expressly define the DPW as a single departmental unit for purposes of Chapter 31. Both the municipal ordinances and the CBA provide, functionally, for the unified supervision of the DPW under the Commissioner of Public Works and, in particular, funnel all disciplinary matters through the “Department Head”, i.e. the DPW Commissioner. The ordinances further, provide for unified Highway, Maintenance and Refuse Sections within a single Operations Division, managed by a Superintendent of Operations. These municipal ordinances confirm that the employees of the Highway and Refuse Units of the Operations Division of the Brockton DPW are members of the same “departmental unit established by law” for purposes of the provisions of G.L.c.31. See Herlihy v. Civil Service Comm’n, 44 Mass.App.Ct. 835, 840, rev. den., 428 Mass. 1104 (1998); Green v. City of Brockton, 28 MCSR 39 (2015).<sup>3</sup>

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<sup>3</sup> The Appellant suggests that Brockton has treated the Highway and Refuse Sections as if they were separate “departmental units” for purpose of layoffs in the past. The specific circumstances of those prior events is not fully presented in the record and the Commission cannot ascertain precisely what may have occurred. A prior mischaracterization of the DPW, however, would not change the Commission’s view of how the relevant ordinances should be construed within the meaning of the applicable definition of a “departmental unit” under applicable civil service law and rules.

Accordingly, civil service law and rules clearly authorize the selection of HMEO Monteiro from the Highway Section of the Operations Division of the DPW to fill the HMEO vacancy in the Refuse Section. Treated as a request for voluntary transfer under G.L.c.31, § 35, ¶6, the DPW Commissioner was vested with full authority (under civil service law) to approve such a transfer without even posting the position or soliciting applications from other candidates. Alternatively, treating the transfer as a “change of position” under G.L.c.31, §29, since Mr. Monteiro was one of the three most senior applicants (indeed only three employees applied), his selection also falls properly within the discretion of the DPW Commissioner under that statute. The duties performed by Mr. Monteiro as an HMEO in the Highway Section and the duties of an HMEO in the Refuse Section both involve operation and minor maintenance of motor vehicles and some manual labor, but there are sufficiently “dissimilar” duties to bring the selection within the scope of Section 29 as well. In either case, Mr. Mulvey, although he was the only applicant from the Refuse Section and also have been qualified, has not been bypassed and he lacks standing to contest Mr. Monteiro’s selection by appeal to the Commission.

For the reasons stated herein, the Commission lacks jurisdiction to hear this appeal. Therefore, Brockton’s “Motion for Summary Judgment is hereby *granted* and the appeal of the Appellant, Patrick J. Mulvey, is *dismissed*.”

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on February 18, 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:

Joseph McArdle (for Appellant)

Katherine Feodoroff, Esq. (for Respondent)

John Marra, Esq. (HRD)