

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

ROBERT HIGGINS,
Appellant

v.

G2-12-215

BOSTON PUBLIC SCHOOLS,
Respondent

Appearance for Appellant:

Pro Se
Robert Higgins

Appearance for Respondent:

Virginia Casey Goscinak, Esq.
Boston Public Schools
26 Court Street
Boston, MA 02108

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On July 13, 2012, the Appellant, Robert Higgins (Mr. Higgins), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection to the position of senior building custodian by the Boston Public Schools (School Department).

On September 11, 2012, a pre-hearing conference was held at the offices of the Commission, which was attended by Mr. Higgins, counsel for the School Department and two (2) other representatives of the School Department.

The School Department complied with all civil service law and rules in making a series of provisional promotions to the position of senior building custodian and they were not required to provide Mr. Higgins with sound and sufficient reasons for his non-selection. Therefore, the appeal is dismissed.

Background

1. Mr. Higgins has been a permanent junior building custodian for the School Department since 1987.

2. The state's Human Resources Division (HRD) has not administered promotional examinations for the position of senior building custodian for approximately ten (10) years.
3. In 2011, pursuant to an agreement with the Painter and Allied Trades International Union Local 1952 (custodians union), the School Department administered a non-civil service examination for the position of senior building custodian. Only permanent junior building custodians were eligible to sit for the examination.
4. Mr. Higgins took the examination and received a score of 82.
5. Pursuant to the agreement with the custodians union, the School Department has made fifty-two (52) provisional promotions to the position of senior building custodian since 2011.
6. Mr. Higgins has not been considered for a provisional promotion as he has been on workers compensation since 2010.
7. Upon his return to work, he will be considered for a provisional promotion.

Legal Standard

In a series of decisions, the Commission has addressed the statutory requirements when making such provisional appointments or promotions. See Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); Glazer v. Department of Revenue, 21 MCSR 51 (2007); Asiaf v. Department of Conservation and Recreation, 21 MCSR 23 (2008); Pollock and Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Pease v. Department of Revenue, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Foster v. Department of Transitional Assistance, 23 MCSR 528; Heath v. Department of Transitional Assistance, 23 MCSR 548; Robitaille v. Department of Transitional Assistance, 25 MCSR 43 (2012).

In summary, these recent decisions provide the following framework when making provisional appointments and promotions:

- G.L.c.31, §15, concerning provisional *promotions*, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains less than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and “sound

and sufficient” reasons are submitted and approved by the administrator for making such an appointment.

- Under Section 15 of Chapter 31, only a “civil service employee” with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for “sound and sufficient reasons” to another higher title for which she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title.
- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional “appointment” process as a subterfuge for selection of provisional employee candidates who would not be eligible for provisional “promotion” over other equally qualified permanent employee candidates.
- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Applied to the instant appeal, it cannot be shown that the School Department violated any civil service law or rule. The School Department made a series of provisional promotions to the position of senior building custodian. All of the individuals selected were permanent civil service employees in the next lower title of junior building custodian. The School Department was not required to provide Mr. Higgins with sound and sufficient reasons for his non-selection and Mr. Higgins, under these circumstances, has no right to appeal his non-selection to the Commission.

Conclusion

For all of the above reasons, the appeal of Mr. Higgins under CSC Case No. G2-12-215 is hereby *dismissed*.¹

¹ Although the School Department has complied with all civil service law and rules in making these provisional promotions, I was perplexed to learn that there was no coordination between the School Department and HRD regarding the examinations administered here. Had such coordination occurred, HRD could have delegated the responsibility for administering the senior custodian examination to the School Department, thus allowing for permanent (as opposed to provisional) promotions, finally putting an end to the “plight of the provisionals” for these employees. I would encourage such coordination on a going-forward basis.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on September 20, 2012.

A True copy. Attest:

Commissioner

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)(I), 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:
Robert Higgins (Appellant)
Virginia Casey Goscinak, Esq. (for Respondent)
John Marra, Esq. (HRD)