COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108
(617) 727-2293

DAVID CODAIR,
Appellant
v.

D-14-58

MASSACHUSETTS WATER RESOURCES AUTHORITY,
Respondent

Appearance for Appellant:

Michael Manning, Esq.
NAGE
159 Burgin Parkway
Quincy, MA 02169

Appearance for Respondent:

Kathleen M. Chaloux, Esq.
BBO #558015
Massachusetts Water Resources Authority
100 First Avenue
Charleston Navy Yard
Boston, MA 02129

Commissioner:

Paul Stein[1]

DECISION ON MOTION TO DISMISS

The Appellant, David Codair (Mr. Codair) appeals to the Civil Service Commission (Commission) from a sixty (60) day suspension with the Massachusetts Water Resources Authority (MWRA). MWRA moved to dismiss the appeal, asserting that the Appellant's appeal fails to state a claim upon which relief can be granted because he lacks civil service tenure and is therefore not subject to the jurisdiction of the Commission, as well as stating that the Appellant's appeal is moot due to him electing for arbitration. The Appellant opposed the motion. A motion

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

hearing was held by the Commission on June 5, 2014. The hearing was digitally recorded. For the reasons stated herein, the appeal is dismissed.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the arguments presented by the parties, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed.

1. Mr. Codair began his employment at the Metropolitan District Commission ("MDC") on April 24, 1983. He held a civil service permanent position as a Skilled Laborer until March 3, 1985 when he accepted a provisional promotion to Diesel Power Plant Operator, an official service position. (*Respondent's Motion; Respondent's Exhibit 1*)
2. On July 1, 1985, certain MDC employees, including Mr. Codair, were transferred to the newly created MWRA. Mr. Codair was transferred to MWRA in the position he held as a provisional Diesel Power Plant Operator, an official service title at that time. Mr. Codair has since worked as a Transport Operator and as an Operator, his current position, at the MWRA. (*Respondent's Motion; Appellant's Opposition; Exhibit 7*)
3. On February 20, 2014, Mr. Codair was involved in a motor vehicle accident with an MWRA vehicle. In accordance with MWRA's Drug and Alcohol Testing Policy, he was required to provide a urine sample. On February 24, 2014, MWRA was notified that his urine sample results were "dilute." He was again tested in accordance with the policy and the results indicated a dilute sample for a second time. The MWRA's policy states that, "except for cases where the employee has a documented medical condition…," the employee, "… shall be subject to a minimum thirty (30) calendar day suspension…" Mr. Codair does not have a documented medical condition. On March 14, 2014, a pre-

disciplinary hearing was held to review the allegations. As Mr. Codair had received a thirty (30) calendar day suspension on October 31, 2012, for violating the drugs and alcohol testing policy, he received a sixty (60) day suspension on March 27, 2014. (*Appellant's Exhibit B*)

4. Mr. Codair filed an appeal with the Commission on March 10, 2014.
5. On May 23, 2014, Mr. Codair filed a demand for arbitration. (*Respondent's Exhibit 2*)
6. G.L. c. 150E § 8 states, in part, "… where such arbitration is elected by the employee as the method of grievance resolution, [it shall] be the exclusive procedure for resolving any such grievance involving suspension, dismissal, removal or termination…" (*Respondent's Exhibit 3*)

Analysis

All the submissions received by the Commission suggest a consensus that Mr. Codair is tenured as a civil service employee in the position of Skilled Laborer, to which he was appointed in 1983, but that he holds no permanency in his current position of Operator. As Mr. Codair was provisionally promoted to the position of Diesel Power Plant Operator in 1985 and has had his title subsequently changed twice since then, it subsequently follows that he holds the position of Operator as a provisional employee. The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over fifteen (15) years. These provisional appointments and promotions have been used as there have been no "eligible lists" from which a certification of names can be made for permanent appointments or promotions. The underlying issue is the Personnel Administrator's (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists.

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.

The Commission has repeatedly exhorted parties in the public arena to end the current practice of relying on provisional promotions (and provisional appointments) to fill most civil service positions, states that it must honor the clear legislative intent that allows for provisional appointments and promotions so long as the statutory requirements are followed. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address. *See* Kelleher v. Personnel Administrator, 421 Mass. 382, 389 (1995); *See also* Felder et al v. Department of Public Welfare and Department of Personnel Administration, CSC Case Nos. G-2370 & E-632.

In sum, absent an act of the legislature, a civil service employee gains permanency only by original or promotional appointment (in the case of official service, from a certification after successfully passing a civil service examination; in the case of labor service, by appointment from a roster of eligible applicants). See G.L. c. 31, §§1, 6-8, 25-30; Maloof v. Town of Randolph, 21 MCSR 217 (2008) (appellant never took and passed a civil service examination or gained permanency as a result of a Special Act of the legislature). Thus, in the absence of evidence that Mr. Codair has passed any examination for the position of Operator or evidence her position was made permanent by Special Act or pursuant to the requirements of G.L. c. 30, Sections 45(4) and 49, the Commission treats Mr. Codair as having permanency in the position of Skilled Laborer but not in the position of Operator. As Mr. Codair currently serves in a provisional position, the Commission must address the merits of MWRA's motion to dismiss his appeal for failure to state a claim and because Mr. Codair has simultaneously elected for arbitration.

The Commission's jurisdiction to hear appeals from disciplinary actions is defined by G.L.c.31, §43, which authorizes an appeal for de novo hearing before the Commission to determine whether or not there was the "just cause" for an appointing authority's actions taken under G.L.c.31,§41. Section 41 provides, in relevant part:

> Except for just cause . . . *a tenured employee* shall not be discharged, removed, suspended for a period of more than five days, laid off . . . lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. . . . [T] the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor.
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> *A civil service employee* may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. . . . [T]the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority . . . [T]he appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing. . . .
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> *If a person employed under a provisional appointment* for not less than nine months *is discharged* as a result of allegations relative to his personal character or work performance and if the reason for such discharge is to become part of his employment record, he shall be entitled . . . to an informal hearing before his appointing authority or a designee thereof within ten days of such request. If the appointing authority, after hearing, finds that the discharge was justified, the discharge shall be affirmed, and the appointing authority may direct that the reasons for such discharge become part of such person's employment record. Otherwise, the appointing authority shall reverse such discharge, and the allegations against such person shall be stricken from such record. *The decision of the appointing authority shall be final*, and notification thereof shall be made in writing to such person and other parties concerned within ten days following such hearing.

If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first or second paragraphs [above], such person may appeal to the commission as provided in section forty-three.

The definition of a "tenured employee" is "a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2) a promotional appointment on a permanent basis. A "civil service employee" is a person holding a civil service "appointment", which, in turn is defined as a "original appointment or a promotional appointment" made pursuant to the provisions of civil service law and rules", i.e. through selection from an official service certification after passing the required civil service examination, or from a duly constituted roster of eligible labor service applicants. A "civil service employee" is different from a "provisional employee" who is appointed without having passed an examination. G.L.c.31, §§1, 6-8, 12-15, 25-30.

These statutes have been consistently construed to limit the Commission's jurisdiction to appeals contesting the "just cause" for discipline of permanent civil service employees only; persons employed in a provisional status have never been allowed the right of appeal to the Commission. See, e.g., Maloof v. Town of Randolph, 21 MCSR 217 (2008) ("It is well established that the Commission does not have jurisdiction to hear an appeal filed by an employee pursuant to G.L.c.31,§§42 or 43 when the employee was never a permanent or tenured employee . . . the Appellant was a provisional civil service employee at all times"). See also Sullivan v. Comm'r of Commerce & Devel., 351 Mass. 462 (1966) (provisional employee has "no tenure, no right of notice or hearing, no restriction of the power of discharge"); Knox v. Civil Service Comm'n, 63 Mass.App.Ct. 904 (2005) (Commission lacked jurisdiction to hear appeal of provisionally appointed employee, reclassified to management job group, and later discharged);

Cordio v. Civil Service Comm'n, 59 Mass.App.Ct. 1110 (2003) (unpublished) (discharged employee had no right of appeal to the Commission due to his provisional status).

The prior decisional case law suggested that it was the "general principle that civil service rights are not personal but inhere in the position." McCarthy v. Civil Service Comm'n, 32 Mass.App.Ct. 166 (1992) (discharged employee lost civil service protection "when he voluntarily accepted promotion to a different and unprotected job") In Andrews v. Civil Service Comm'n, 446 Mass. 611, 618 (2006), the Supreme Judicial Court implied that a provisional employee is "in" the provisional title and but not "in" the original permanent title until the provisional promotion ceases to have effect, at least for purposes of layoff and reinstatement rights under G.L.c.31, §39. Similarly, the Commission decided that, under Section 15, only a civil service employee with "permanency" may be provisionally promoted, and once such employee is so promoted, she is not considered a "permanent" employee for purposes of future provisional promotions. See generally, Garfunkel v. Dep't of Revenue, 22 MCSR 291 (2009); Poe v. Dep't of Revenue, 22 MCSR 287 (2009); Pease v. Dep't of Revenue, 22 MCSR 284 (2009); Medeiros v. Dep't of Mental Retardation, 22 MCSR 276 (2009); Kasprzak v. Dep't of Revenue, 18 MCSR 68 (2005), reconsidered, 19 MCSR 34 (2006), further reconsidered, 20 MCSR 628 (2007); Glazer v. Dep't of Revenue, 21 MCSR 51 (2007).

In more recent years, the Commission decided McDowell v. City of Springfield, in which the Commission took jurisdiction to hear a "just cause" appeal from the discharge of a provisionally promoted employee who alleged that: (1) he was tenured in another civil service position and (2) the discharge caused a "loss of any rights attributable to" the tenured position. 23 MCSR 124 (2010) [*McDowell I*]. The Commission subsequently decided that Mr. McDowell's discharge was not supported by "just cause", that the termination had unlawfully

deprived him of his tenured civil service status in his permanent position, and that he was entitled to relief to restore him to that tenured position. McDowell v. City of Springfield, 23 MCSR 243 (2010) [*McDowell II*].

In a similar case to the one at hand, LeFrancois v. Department of Revenue, the Commission declined to take jurisdiction to hear the appeal of a one-day suspension imposed on a provisionally promoted DOR Tax Auditor I who was tenured in a lower position, finding that the McDowell rulings could not be stretched to reach the facts of that case. 23 MCSR 639 (2010).

The Commission's conclusion in *McDowell I* carved out a narrow exception to the prevailing rule that provisional employees could not bring a Section 41 "just cause" appeal to the Commission. In *McDowell I*, the Commission reasoned:

> "[A] provisional employee such as the Appellant, who held a tenured position in the labor or official service, and who, while in such tenured position, is provisionally appointed to another official service position, does have the right of appeal to the Commission to contest the just cause for his discharge under Section 41. The Commission concludes that, although an Appointing Authority may remove an employee "from" his provisional position or discipline him without just cause, unless the Appointing Authority acts *with* just cause, the employee [may not be discharged but] is entitled to be restored to the tenured [former] position. . . ."
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> "Thus, any provisional employee who can claim tenured status in a previously held civil service position may appeal to the Commission from a discharge or removal "from" that tenured position. If the Appointing Authority established just cause for the termination, the Appointing Authority's actions will be sustained and the appeal dismissed. If, however, the discharge was made without just cause, the Commission will deem the Appellant's civil service rights in the tenured position to have been affected through no fault of his own, and will allow the appeal and order the Appellant restored to his tenured position pursuant to the Commission's authority under Chapter 310 of the Acts of 1993."

Id. (*emphasis* in original)

In construing G.L.c.31, Section 41 to allow previously tenured, provisional employees who are *discharged* without "just cause" to bring Section 41 appeals and to seek the limited relief of reinstatement to their former tenured positions, the Commission expressly distinguished that singular exception to the general rule from all *other* provisional employee *discipline*, *short of discharge*, as to which the right of appeal under Section 41 did *not* extend:

> The right of a provisional employee to bring a just cause appeal relating to a discharge or removal from his position and seek reinstatement to his prior tenured position must be distinguished from an appeal by a provisional employee concerning discipline other than discharge or removal. The public policy that leads the Commission to permit a provisional employee to protect the 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 tenured position."

In sum, the *McDowell I* exception to the general rule that the Commission lacks jurisdiction over disciplinary cases involving provisional employees did not change the pre-existing interpretation of Section 41 as applied to the facts of the present case, i.e., Mr. Codair's sixty-day suspension from his provisional position of Operator.

Lastly, it was revealed on the day of motion hearing that Mr. Codair had elected for arbitration. G.L. c. 150E, § 8 makes it clear that when arbitration is elected by an employee as the method of grievance resolution, it will be the exclusive procedure for resolving any such grievance involving a suspension, notwithstanding any contrary provisions of sections 39, and 41-45. As discussed above, the Commission does not have jurisdiction to hear this case as Mr. Codair's discipline does not affect his tenured civil service employee rights in the form of a discharge, and so, therefore, Mr. Codair's decision to elect for arbitration is the exclusive procedure for resolving his disciplinary claim.

CONCLUSION

Based on the facts and the law and rules herein, the Appellant's appeal under Docket No. D-14-58 is hereby ***dismissed.***

Civil Service Commission

/s/ Paul M. Stein
Paul M. Stein, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell [Absent] and Stein, Commissioners) on July 10, 2014.

A true record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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:
Michael Manning, Esq. (For Appellant)
Kathleen M. Chaloux, Esq. (for Respondent)