

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503

Boston, MA 02108

(617) 727-2293

PAUL BLAKE,
Appellant

v.

D1-11-94

TOWN OF AGAWAM,
Respondent

Appellant's Attorney:

John Connor, Esq.
Law Offices of John Connor
101 State Street, Suite 501
Springfield, MA 01103

Respondent's Attorney:

Russell J. Dupere, Esq.
Dupere Law Offices
223 College Hwy
Southampton, MA 01073

Commissioner:

Christopher C. Bowman¹

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

Pursuant to G.L. c. 31, §43, the Appellant, Paul Blake, (hereinafter "Blake" or "Appellant") appealed the decision of the Town of Agawam (hereinafter "Town" or "Appointing Authority") to the Civil Service Commission on March 22, 2011. A pre-hearing conference was conducted at the Springfield State Building on April 13, 2011, at which time the Town, contending that the Appellant did not have permanent civil service status and, therefore, was not entitled to a hearing under G.L. c. 31, § 42, filed a Motion

¹ The Commission acknowledges the assistance of legal intern Tanya Mustacchio in preparing this decision.

to Dismiss the Appellant's appeal. At the pre-hearing conference, the Town was unable to verify that the Appellant was hired as a provisional junior custodian. The Town submitted an amended Motion to Dismiss on April 22, 2011. On May 6, 2011, Appellant requested an extension until May 13, 2011 in order to respond thereto. The Commission granted the request for extension. On May 13, 2011, the counsel for the Appellant informed the Commission that the Appellant had been hired as a provisional junior custodian.

Factual Background

On June 6, 2005, the Town gave Appellant a provisional appointment as a Junior Building Maintenance Custodian. On February 25, 2011, the Mayor of Agawam informed the Appellant in writing, that his employment with the Town was being terminated due to his inappropriate, profane, and discriminatory comments made to several public school teachers. The appellant requested a hearing, which the Town scheduled for March 15, 2011. On March 17, 2011, upon review, including the evidence submitted at the hearing, the Mayor upheld his decision to terminate the Appellant's employment.

Town's Motion to Dismiss

The Town argues that the Commission does not have jurisdiction to hear an appeal filed by a non-civil service employee. Instead, the Town argues that it is required to follow the provisions of M.G.L. c. 31, §41, which apply to a "person employed under a provisional appointment for not less than nine months."

Conclusion

Given counsel for the Appellant's submission on May 13, 2011, both parties agreed that the Appellant received a provisional appointment as a junior custodian on June 6, 2005.

G.L. c. 31, § 41 states in relevant part:

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, upon his request in writing, 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." (emphasis added)

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, §43 when the employee was never a permanent or tenured employee pursuant to G.L. c. 31. See Rose v. Executive Office of Health and Human Services, 20 MCSR 266, 267 (2007). (Appointing Authority prevailed in its Motion to Dismiss, based on lack of jurisdiction, because the Appellant's position was provisional, despite her 28 years of service.)

For all of the above reasons, the Town's Motion to Dismiss the Appellant's appeal is allowed and the Appellant's appeal under Docket No. D1-11-94 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on June 16, 2011.

A True copy. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice to:
John Connor, Esq. (for Appellant)
Russ Dupere, Esq. (for Appointing Authority)