

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place, Room 503
Boston, MA 02108

DENISE CURRAN,
Appellant

v.

D-10-263

CITY OF LEOMINSTER
Respondent

Appellant's Attorney:

Andrea R. Levy, Esq.
O'Connor and Ryan, P.C.
61 Academy Street
Fitchburg, MA 01420

Respondent's Attorney:

Brian M. Maser, Esq.
Kopelman & Paige, P.C.
101 Arch Street
12th Floor
Boston, MA 02110

Commissioner:

Christopher C. Bowman

DECISION

Pursuant to G.L. c. 31, § 43, the Appellant, Denise Curran (hereinafter "Curran" or "Appellant") filed an appeal with the Civil Service Commission (hereinafter "Commission") on October 6, 2010 claiming that she was aggrieved by a decision of the City of Leominster (hereinafter "City" or "Appointing Authority") to reduce her weekly hours of work.

A pre-hearing conference was held at the offices of the Commission on November 2, 2010. On November 12, 2010 a subsequent pre-hearing conference was held at City Hall in Leominster, MA. Based on the information presented in each of the conferences, the Appellant filed a Motion for Summary Decision on December 23, 2010. I held a hearing on the Motion at the Commission offices on January 24, 2011. The hearing was digitally recorded.

FINDINGS OF FACT:

Based on the documents submitted and the statements of the parties and counsel, I find the following facts:

1. On or about January 2002 through approximately January 2005 the Appellant was a tenured civil service employee employed as a "Head Clerk" in the Comptroller's Office of the Appointing Authority. The Appellant worked 38.25 hours per week and was assigned to City Hall. (Appellant's Motion)
2. On or about January 2005, the Appellant became a "Provisional Employee" as the Administrative Secretary for the Office of Planning and Development and Community Development Block Grant (CDBG) Program. Her salary was funded through a grant from the Office of Housing and Urban Development. Her work location remained City Hall. (Appointing Authority's Motion)
3. On or about July 2, 2010, the Appointing Authority proposed that the Appellant work part-time at its Senior Center but was unable to relocate her due to restrictions imposed by the Office of Housing and Urban Development. (Appointing Authority's Motion)

4. Shortly thereafter, the Appointing Authority notified the Appellant that her hours were being reduced from 38.5 to nineteen hours per week. The Appellant alleged that the Appointing Authority was in violation of G.L. c. 149 § 185. The Appointing Authority reinstated her hours and notified her of a hearing to determine the reduction of her hours. (Appellant's Motion)
5. After a September 28, 2010 hearing, the Appellant was notified on September 30, 2010 that, effective October 4, 2010, her hours were being reduced to nineteen per week with no benefits. (Appellant's Motion)
6. The Appellant filed an appeal with this Commission on October 6, 2010 contesting the actions of the Appointing Authority. In the course of the hearing process, the Commission held two pre-hearing conferences. (Appointing Authority's Motion)
7. Effective November 29, 2010, the Appointing Authority agreed to rescind its decision to reduce the Appellant's hours and restored her to working 38.25 hours per week. The Appointing Authority also agreed to make the Appellant whole for the period of September 29 through November 28, 2010 less the amount received from unemployment insurance. (Appointing Authority's Motion)
8. The Appointing Authority returned the Appellant to her position and added additional job duties in the area of community outreach. The Appointing Authority determined that the most effective location for her to perform her job functions was the Appointing Authority's Senior Center. (Appointing Authority's Motion)

9. The Appellant informed all parties and counsel that at least four clerical positions were held by employees with less seniority than the appellant and were eligible to be "bumped" as they were provisional employees. (Appellant's Motion)
10. The Appellant returned to work at the Appointing Authority's Senior Center on November 29, 2010. (Appointing Authority's Motion)

Appellant's Argument

The Appellant argues that the facts of this case are not in dispute. She argues that, pursuant to G.L. c.31 § 2(b), she is an aggrieved person as she has been illegally "removed...transferred...lowered in rank or compensation...and her civil service position is alleged to have been illegally abolished."

The Appellant contends that the actions of the Appointing Authority violated several applicable civil service laws. She claims that the Appointing Authority failed to provide her a disinterested fact finder at her September 28, 2010 hearing and that they removed her from her position "based upon harmful error in the application of the appointing authority's procedure and conduct not reasonably related to her fitness to perform her position." She argues that the action taken by the Appointing Authority should be reversed and the Appellant should be returned to her former position.

The Appellant further argues that the position from which she was removed has been abolished. She alleges that her transfer to the Appointing Authority's Senior Center and the addition of several new responsibilities to her workload effectively constitutes the creation of a new position and triggers both her status as an aggrieved party and her bumping rights pursuant to civil service law. She contends that she should be allowed to bump any employee in her former position with less seniority, of which, she alleges there

are several. According the Appellant, simply reinstating her to a 38.25 hour per week position does not render her appeal to this Commission moot, nor does it affect her status as an aggrieved party nor her bumping rights.

Appointing Authority's Argument

The Appointing Authority argues first that, bumping rights accrue in permanent positions only and, because the Appellant's position as Administrative Secretary was provisional, she does not have the right to bump other, less senior employees in the Administrative Secretary position. While the Appointing Authority contests her right to bump any of its employees at all, they argue that, even if it exists, it must be limited to her permanent civil service position of Head Clerk.

Further, the Appointing Authority contends that the Appellant's entire appeal is moot as she is no longer a person aggrieved by a decision of the Appointing Authority. According to the Appointing Authority, her return to a 38.25 hour per week position is a rescission of their earlier decision, the decision upon which her appeal to this Commission is based.

Conclusion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(h) is entitled to dismissal under the well recognized standards for summary disposition. "When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the party may move, with or without support affidavits, for summary decision on the claim or defense." Based on the motions before this Commission as well

as the arguments presented at the hearing, it is evident that the parties are in agreement as to sufficient facts to allow the Commission to rule on this motion.

The role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983); McIssac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995); Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000); City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is justified when it is done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.

G.L. c.31 § 39 defines the bumping rights of employees. It provides in relevant part:

"If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.

Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work or lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one. Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any

employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed."

As the statute makes clear, provisional employees in a particular title retain certain bumping rights if they formerly held a permanent civil service title in the department prior to their promotion. Specifically, the provisionally promoted employee who held civil service permanency in a former position within the department, may, as an alternative to being laid off, "bump" other less senior provisional or permanent employees in their title or the next lower titles for which they had permanency.

Commission decisions on this issue follow this reasoning. In Provencher v. Lynn Public Schools, 21 MCSR 533 (2008), the Commission held that the Appellant, a permanent clerk/typist who was provisionally promoted to clerk/stenographer, did not have the right to bump another provisional clerk/stenographer merely because she had more civil service seniority than the person sitting provisionally in the clerk/stenographer position.

Similarly, in Gist v. Cambridge Public Schools, Docket No. D1-10-78 (Dec. 2010), the Commission determined that the Appellant, a permanent Senior Clerk/Typist serving as a provisional Secretary was limited in her retention/bumping rights to bumping any individual serving as a provisional Senior Clerk/Typist (or next lower titles) in the department, or those serving as permanent Senior Clerk/Typists (or next lower titles) in the department with less civil service seniority.

In this case, all parties have agreed that the position from which the Appellant had her hours reduced was a provisional appointment to the position of Administrative Secretary. Her permanent position was as Head Clerk in the Appointing Authority's Comptroller's Office. As she was not a permanent employee in the position at the time of the reduction,

she is without bumping rights with regard to any other employee in the Administrative Secretary position. Rather, she had the right to "bump" individuals serving as provisional Head Clerk (or in the next lower titles) or those serving as permanent Head Clerk (or in the next lower titles) with less civil service seniority.

A related issue is the Appellant's allegations linking her knowledge of potential impropriety on the part of the Appointing Authority to her transfer and eventual layoff. If true, these allegations represent a serious issue for the Appointing Authority to answer and the Appellant may potentially seek redress in another venue.

At the time her position was eliminated, the Appellant was a permanent Head Clerk acting as a provisional Administrative Secretary. Her bumping rights are limited to bumping any individual serving as a provisional or permanent Head Clerk in the department with less Civil Service seniority than she had.

For these reasons, the appeal filed under Docket No. D-10-263 is hereby **dismissed**.

Civil Service Commission

Christopher Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein Commissioners) on June 30, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 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:

Andrea R. Levy, Esq. (for Appellant)

Brian M. Maser, Esq. (for Appointing Authority)