

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

PAUL SANTOS,
Appellant

v.

Docket Number G2-06-10

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:

Jaime DiPaolo-Kenny, Esq.
Associate General Counsel
AFSCME Council 93
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Respondent's Attorney:

Jane Medeiros Friedman, Esq.
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Hearing Officer:

John J. Guerin, Jr.¹

DECISION ON RESPONDENT'S MOTION TO DISMISS THE APPEAL

Pursuant to G.L. c. 31 §2(b), the Appellant Paul Santos (hereinafter "Appellant"), filed this appeal with the Civil Service Commission (hereinafter "Commission"), on September 27, 2005, for failure to act by the Personnel Administrator on his claim that he

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

was assigned duties of cleaning toilets in violation of his official service job classification. Pursuant to the Standard Adjudicatory Rules of Practice and Procedure 801 CMR 1.01 7(g)(3), the Respondent, City of New Bedford (hereinafter “City”), filed a Motion to Dismiss the Appeal on October 11, 2005 and the Appellant filed an Opposition to the Motion to Dismiss the Appeal on November 13, 2006. A hearing on the motion was held at the Commission on April 14, 2008.

Factual and Procedural Background

The Appellant has been employed by the City as a permanent Water Services Inspector since April 23, 1986. The Appellant works out of the Department of Public Infrastructure offices located at 1105 Shawmut Avenue in New Bedford and worked at that facility before Ronald H. Labelle (hereinafter “Mr. Labelle”) became Superintendent of the Water/Wastewater Department on March 20, 2000. When the Water/Wastewater Department was reorganized into the Department of Public Infrastructure (hereinafter “Department”) on July 1, 2003, Mr. Labelle became Commissioner of the Department.

When Mr. Labelle took over the Department, there was no custodial staff assigned to the Shawmut Avenue facility and City department heads were being required to find ways to reduce their respective budgets. Shortly after Mr. Labelle became Commissioner, he implemented procedures to keep the facility clean by assigning cleaning duties, including the cleaning of toilets, to all Department staff. Since that time, cleaning duties have been continually performed by Department staff, comprised of the Appellant, three (3) other civil service employees in the titles of Water Systems Attendant and Water Services Inspector and Mr. Labelle himself. The Appellant believed

that his job description did not include cleaning toilets and that he was aggrieved by this assignment.

The Appellant is a member of American Federation of State, County and Municipal Employees (AFSCME) Local 851. On October 4, 2004, the then-General Counsel of the AFSCME Council 93, Wayne Soini, Esq., sent a letter on the Appellant's behalf to the Personnel Administrator seeking intervention and a determination as to whether cleaning toilets is a valid duty under the Appellant's official service job classification. The Appellant claims there was no response.

On September 27, 2005, the Commission acknowledged the filing of the instant appeal by the Appellant, pursuant to G.L. c. 31, § 2(b), in which he claimed that he was aggrieved by the Personnel Administrator's failure to act in this matter.

Respondent's Grounds for Dismissal

The City asserts that the Appellant has not (1) complied with the procedural requirements of the statute, G.L. c. 31, §2(b) in that he failed to state a claim upon which relief can be granted, and (2) that his appeal was not timely.

Section 2(b) states, in pertinent part:

"No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.

Any person appealing a decision, action or failure to act of the administrator shall file a copy of the allegations which form the basis of the aggrieved person's appeal with the administrator within three days of the filing of such allegations with the commission and provided further such person shall not have standing before the commission until such filing takes place. Said allegations shall clearly state the basis of the

aggrieved person's appeal, and make specific references to the provisions of this chapter or the rules of the department or basic merit principles promulgated thereunder which are alleged to have been violated, together with an explanation of how the person has been harmed."

The City contends that the Appellant has not demonstrated that he is an aggrieved party pursuant to Section 2(b) because he has not made specific allegations that the administrator's alleged failure to act was in violation of c. 31 or the rules or basic merit principles promulgated thereunder. The City further maintains that the Appellant failed to demonstrate how his rights were "abridged, denied, or prejudiced in such a manner as to cause actual harm to [his] employment status." Finally, the City charges that the Appellant failed to "file a copy of the allegations which form the basis of the aggrieved person's appeal with the administrator within three days of the filing of such allegations with the commission" and also failed to make "allegations [that] shall clearly state the basis of the aggrieved person's appeal, and make specific references to the provisions of this chapter or the rules of the department or basic merit principles promulgated thereunder which are alleged to have been violated, together with an explanation of how the person has been harmed."

Additionally, the City claims that the Appellant cannot demonstrate that the assignment of cleaning duties to him violates the law because no such violation exists. The City argues that the Appellant has alleged that he is an "official service worker" who is not required to clean toilets under his job description but that the Appellant has provided no basis to support his allegation that an official service employee cannot be required to perform other necessary duties. While the City admits that the Appellant's job is primarily to read water meters, his job description is not limited solely to that function. The City argues that budget constraints do not permit the hiring of a custodian

to clean the facility. The City also argues the Water Service Inspector and the Building Custodian positions are both entry-level official service positions, while acknowledging that the Water Service Inspector position is in a higher pay grade.

The City further asserts that the appeal was not filed in a timely manner. The City incorrectly cites a violation of the filing deadline for appeals pursuant to G.L. c. 31, § 43 and contends that the Appellant had ten (10) days after being aggrieved in which to file an appeal with the Commission. In fact, as the appeal was filed pursuant to Section 2(b), the Appellant had 60 days, according to the Commission's filing rules, in which to file this appeal.

Opposition of the Appellant to Dismissal of the Appeal

The Appellant points out that a dispute arose as to whether the Personnel Administrator actually received his initial written notice of his grievance and request for the administrator's review and/or intervention in this matter. The Appellant strongly asserts that such notice was sent and that the administrator failed to act on the issue. Due to this failure to act, therefore, the Appellant claims that he then became an "aggrieved person" under Section 2(b). The Appellant argues that he complied with the procedural requirements of this appeal.

On the merits, the Appellant states that this Commission is charged with ensuring that the civil service system operates on "basic merit principles." One of these principles, according to the Appellant, is the notion of fundamental fairness. The appellant asserts that it was not fundamentally fair to require civil service employees to perform the toilet cleaning function outside of their job classification and is asking the Commission to correct this perceived wrong.

Conclusion

The Appellant's appeal of the alleged violation of the assignment of his job duties fails for two reasons.

The first reason is found in the Appellant's official job description. *See* Attachment 1 of Exhibit A – Affidavit of Ronald H. Labelle. The very last paragraph of the Water Service Inspector job description reads:

“The duties listed above are intended only as illustrations of the various types of work that may be performed. The omission of specific statements of duties does not exclude them from the position if the work is similar, related *or a logical assignment to the position.*” (Emphasis added.)

The City credibly explained that budgetary constraints prohibited the employment of a building custodian at the Shawmut Avenue facility. Therefore, Mr. Labelle exercised a reasonable managerial prerogative by dividing up basic cleaning duties among several employees, including the Appellant. The added job responsibility was not punitive, demeaning or unfair. The Appellant was not singled out for this assignment. The duties were distributed in a fair and equitable manner, so much so that Mr. Labelle, as Commissioner, also took his turn performing the task.

The Appellant failed to demonstrate how this menial but important work would be accomplished other than to argue that a labor service Night Watchman position was previously assigned this work, but was eliminated, and the task should not now be borne by someone in the official service. No argument was proffered by the Appellant that performing his fair share of the necessary cleaning duties was a pretext for any action by the City that was unrelated to basic merit principles. The Commission finds that the cleaning duties were necessary, could not be reasonably performed by other employees due to a lack of funds and therefore, were “a logical assignment to the position” in

accordance with the Appellant's job description. Therefore, the Appellant has failed to prove how, by the perceived failure of the administrator to intervene, his "rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

The second reason the Appellant's appeal fails is due to lack of timeliness. On June 8, 2000, the Commission adopted a Rule of Limitations requiring a Section 2(b) appeal to be filed with the Commission within sixty (60) days of the Appellant being aggrieved. This Commission rule took full force and effect on October 1, 2000. The time for filing the instant appeal is considered by the Commission as tolled beginning on the date of October 4, 2004. This is the date that the Appellant acknowledges that he notified the Personnel Administrator of the alleged harm to his employment status. The Commission acknowledged the actual filing of the instant appeal on September 27, 2005, *nearly one year* after the alleged violation of his civil service rights.

The Commission's Rule of Limitations allowing sixty (60) days for filing of the appeal had expired and the appeal, therefore, was not timely filed. Pursuant to 801 CMR 1.01 s. 7(g), I find that the appeal is time-barred. Therefore, for all the reasons stated herein, I recommend that the appeal on Docket No. G2-06-10 be hereby **dismissed**.

Civil Service Commission

John J. Guerin, Jr.
Hearing Officer

By a 3-2 vote on July 10, 2008, a majority of the Commission voted to reject the hearing officer's recommendation and, instead, deny the Appointing Authority's Motion to Dismiss. Therefore, the case will be scheduled for a full hearing.

Voting in favor of hearing officer's recommendation to allow Appointing Authority's Motion to Dismiss the Appellant's appeal:

Bowman, Chairman
Marquis, Commisisoner

Voting against the hearing officer's recommendation to allow Appointing Authority's Motion to Dismiss and, therefore, allowing a full hearing:

Henderson, Commissioner
Taylor, Commissioner
Stein, Commissioner

A true record. 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)(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:

Jaime DiPaola-Kenney, Esq. (for Appellant)

Jane Medeiros Friedman, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)