

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

KEVIN VAUGHN,
Appellant

v.

CASE NO: G2-08-108

CITY OF BOSTON,
Respondent

Appellant's Attorney:

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Commissioner:

Paul M. Stein

DECISION ON CROSS-MOTIONS TO DISMISS

The Appellant, Kevin Vaughn, acting pursuant to G.L.c.31, §2(b), asserts an appeal against the City of Boston (Boston) and the Massachusetts Human Resources Division (HRD), challenging his “bypass” for selection to a position of Parking Meter Operations Foreman. The City filed a Motion to Dismiss, which the Appellant opposed. A hearing on the motion was held by the Civil Service Commission (the Commission) on October 6, 2008. Three (3) exhibits received from HRD were marked in evidence. Post-hearing submissions were received from the Appellant on October 24, 2008 and from the City on November 10, 2008.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, and the argument presented by the Appellant, DOR and HRD, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. On January 10, 2008, Boston posted a notice entitled “City of Boston Employment Opportunity Departmental/Promotional”, to fill an official service position in the Boston Transportation Department of “Parking Meter Operations Foreperson RA1-15”, Job Code 36250, Position #00024749. (*HRD Exhibits 1, 1A, 3*).

2. The job posting stated that “Only Qualified Applicants From The Stated Department May Be Considered For This Vacancy”. (*HRD Exhibit 1*)

3. The title of Parking Meter Operations Foreperson RA1-15 is not an approved civil service title. (*HRD Exhibits 1, 1A, 2*)

4. The Boston Classification Plan does include job titles and position descriptions (Form 30s) for the titles of “Parking Meter Operations Foreman” (title code 3305E) and “Parking Meter Operations Man” (title code 3305C) and “Parking Meter Repairman” (title code 3305A). Based on the evidence presented, the Commission infers that Boston’s January 10, 2008 job posting – although denominated a “Parking Meter Operations Foreperson RA1-15” covers the position of “Parking Meter Operations Foreman” (title code 3305E).

5. According to the Form 30 for Parking Meter Operations Foreperson, the incumbent in such a position “directly supervises the work of the Parking Meter Operations Men in the installation, repair and maintenance of all parking meters and appurtenances.” (*HRD Exhibit 2*)

6. The Form 30 for Parking Meter Operations Man indicates that an incumbent in that position “works under supervision of an employee in a higher grade” and “installs, repairs and maintains parking meters; performs experimental and developmental work with marking meter mechanisms; collects and deposits monies from parking meters; does related work as required.” (*HRD Exhibit 2*)

7. Based on the evidence presented, specifically, I find that the positions of Parking Meter Operations Man and Parking Meter Operations Foreman are titles within the same job series, that there appears no titles in the series between the two positions, and the Parking Meter Operations Foreman is the direct supervisor of a Parking Meter Operations Man. (*HRD Exhibits 1, 1A, 2, 3*)

8. The minimum entrance requirements stated in Boston’s January 10, 2008 job posting was “Three (3) years of job-related experience”. The job posting also indicated that one (1) year of supervisory experience, experience with and knowledge of M/S office applications, and experience with City of Boston multispace meter maintenance and revenue software applications were preferred. (*HRD Exhibit 3*)

9. There is no current eligible list for Parking Meter Operations Foreman. (*HRD Exhibit 1*)

10. The Appellant, Kevin Vaughn (Mr. Vaughn), has civil service permanency in the title of Parking Meter Operations Man. His civil service permanency date is September 9, 1998. (*HRD Exhibits 1, 2*)

11. Mr. Vaughn applied for the posted position of Parking Meter Operations Foreperson. It appears that, given Mr. Vaughn’s nearly ten years of experience in the next lower title of Parking Meter Operations Man, he met the minimum qualifications for the

position and was interviewed, but he was not selected. (*Appellant's Amended Opposition to Motion to Dismiss, p. 3; HRD Exhibit 2; Respondent's Motion to Dismiss, p.2*)

12. According to Boston, the successful applicant, identified only as Ms. Bernard-Stapleton, was selected because her superior interview performance and better skills and experience made her better qualified than Mr. Vaughn. None of the specific details supporting the selection of Ms. Stapleton over Mr. Vaughn have been presented by either party. (*Respondent's Motion to Dismiss, p.2; Respondent's Sur-Reply, p.7*)

13. The evidence fails to disclose the precise position occupied by Ms. Bernard-Stapleton prior to her selection for the position of Parking Meter Operations Foreman except that she has been employed in some capacity within Boston's Transportation Department. According to HRD, Ms. Bernard-Stapleton had no civil service status, either with permanency or provisionally. Thus, her tenure and civil service status have not been conclusively established (*HRD Exhibit 1; Respondent's Motion to Dismiss; Respondent's Sur-Reply*)

14. Boston provided HRD with no notification or forms informing HRD of a vacancy in the position of Parking Meter Operations Foreman, seeking authorization from HRD to provisionally appoint to that title, or informing HRD of the selection of Ms. Stapleton and/or the non-selection of Mr. Vaughn for that position. (*HRD Exhibits 1, 1A*)

CONCLUSION

Summary of Conclusion

The Commission concludes that Mr. Vaughn appears to be a qualified, departmental employee with civil service permanency in the next lower title who applied for the departmental promotion to Parking Meter Operations Foreman. There is insufficient

evidence about the successful candidate to determine whether she held the requisite job titles and/or permanency to be eligible for selection over Mr. Vaughn. A definitive answer to these questions requires further evidence and cannot be decided on the basis of the present motions.

Applicable Legal Standard

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the movant has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that Mr. Stone has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008).

The Flaws in the Selection Process

As an initial matter, the parties appear to overlook whether the vacancy here was filled as a “provisional appointment” under Section 12 of the Civil Service Law or as a “provisional promotion” under Section 15. The Commission finds the answer to this question is clear. Boston’s own posting describes the selection as “Departmental/Promotional” and expressly restricts applicants to those within the department with three years meter operations experience. Based on these facts, there can be no reasonable inference that Boston intended or did make an original provisional

“appointment”, as opposed to a “promotion” of an existing departmental employee, to fill the vacancy. See generally, Kelleher v. Personnel Admin’r, 421 Mass. 382, 657 N.E.2d 229 (1995) (discussing statutory distinctions in Sections 12 and 15 appointments)

Accordingly, Section 15, not Section 12, of the Civil Service Law controls.

§ 15. Provisional promotions. *An appointing authority may, with the approval of the administrator or, if the appointing authority is a department, board, commission, institution or other agency within an executive office, with the approval of the secretary of such office, make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit.* Such provisional promotion may be made only if there is no suitable eligible list No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission to the administrator by the appointing authority of sound and sufficient reasons therefor, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

A provisional promotion pursuant to this section shall not be deemed to interrupt the period of service in the position from which the provisional promotion was made where such service is required to establish eligibility for any promotional examination.

A secretary of an executive office who approves a provisional promotion pursuant to this section shall notify the administrator of each such approval. Such approval shall be made pursuant to the civil service law and rules, and such notification shall be made in such form as shall be required by the administrator. *The administrator shall terminate any provisional promotion if, at any time, he determines that (1) it was made in violation of the civil service law and rules, or (2) the person provisionally promoted does not possess the qualifications or satisfy the requirements for the position. An appointing authority which makes a provisional promotion pursuant to this section shall report such promotion to the administrator.*

The law must be interpreted as a whole, according to the plain meaning of the words chosen by the legislature, and we avoid an interpretation that renders any part of the language superfluous. See, e.g., Commonwealth v. Biagiotti, 451 Mass. 559, 603-604, 888 N.E.2d 364 (2008). When a statute is clear and unambiguous, it is not the function of the Commission to rewrite it. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661, 856 N.E.2d 799 (2006), *quoting* Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 86, 706 N.E.2d 625 (1999)

The positions of Parking Meter Operations Man and Parking Meter Operations Foreman are titles within the same job series, that there appears no titles in the series between the two positions, and the Parking Meter Operations Foreman is the direct supervisor of a Parking Meter Operations Man. Thus, a Parking Meter Operations Foreman is the next higher title to a Parking Meter Operations Man within the relevant Boston Transportation Department unit.

Mr. Vaughn served as a tenured civil service Parking Meter Operations Man since 1998, and his qualification for promotion to Parking Meter Operations Foreman is implicitly acknowledged in the Respondent's Motion to Dismiss. The evidence fails to establish that Ms. Stapleton, the selected applicant was similarly situated, or, indeed, held any civil service status whatsoever. Thus, by the plain language of Section 15, on the present record, Mr. Vaughn is the only identified permanent civil service applicant entitled to be selected and Ms. Stapleton is not qualified for selection at all.¹

The parties also dispute whether Mr. Vaughn has standing to challenge his non-selection. Boston is technically correct that a "bypass" occurs when a permanent appointment or promotion is made of a person ranked lower than the appellant on an eligible list. See, e.g., Bielawski v. Personnel Admin'r, 422 Mass. 459, 460 (1966). This point, however, misses the mark when it comes to the Appellant's standing here, which is based on his status as the only apparently qualified permanent civil service employee

¹ Little was disclosed about Ms. Bernard-Stapleton or the interview process. Although, the dearth of evidence on that point does not affect this Decision, it would behoove Boston to heed and document its' future compliance with requirements for a properly designed and implemented process to weed out unqualified candidates and select from equally qualified "out-of-grade" candidates for "sound and sufficient reasons" as prescribed by Section 15, when it next fills this position or other similar vacancies. See, e.g., Flynn v. Civil Service Comm'n, 15 Mass.App.Ct. 206, 208-209, 444 N.E.2d 407 (1983) (approving use of interviews for permanent civil service promotions so long as they are structured "to protect candidates from arbitrary action and undue subjectivity" by the interviewers); Moses v. Winthrop, 21 MCSR 420 (2008) (discussing interview standards)

who is entitled to be promoted to the position of Parking Meter Operations Foreman, and whose selection has been derailed by the appointing authority's failure to comply with applicable civil service law and rules. The present situation is, as the Appellant argues, a matter of which the Commission appropriately takes jurisdiction under the authority to enforce the Civil Service laws under G.L.c. 31, Section 2(b) when an employee's rights have been "abridged, denied or prejudiced" without following the procedures for approval by HRD, as well as under its equitable powers to grant relief to persons whose civil service rights have been "prejudiced through no fault of their own", pursuant to Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993. See, e.g., Cremins v. City of Somerville, 21 MCSR 28 (2008) (appellants in next lower title successfully challenged appointment of out of grade appointment); Sullivan v. City of Boston, 20 MCSR 11 (2007) (distinguishing case from one in which Commission would take jurisdiction to determine whether "sound and sufficient reasons" existed to make "out-of-grade" provisional promotion); White v. Dep't of Revenue, 7 MCSR 11 (1994) (DOR cannot "bypass" a "qualified" candidate in next lower title for other "better" qualified without permanent status in next lower title); Holt v. Dep't of Revenue, 7 MCSR 10 (1994) (same)

In sum, Mr. Vaughn has made a sufficient showing to entitle him to standing to challenge his non-selection for a departmental/promotional appointment to a position of Parking Meter Operations Foreman.

The Remedy

The Commission has broad equitable powers to rectify a violation of the civil service law and has, in the past, exercised its discretion to vacate improper provisional

promotions. See, e.g., Lusignan v. Holyoke Gas & Elec. Dep't, 20 MCSR 4010 (2007); White v. Dep't of Revenue, 7 MCSR 11 (1994); Holt v. Dep't of Revenue, 7 MCSR 10 (1994) Although the violation here is, as a procedural matter, the failure of the Personnel Administrator [HRD] to act in authorizing the provisional promotion or in failing to vacate a promotion made in violation of civil service law, the true trigger of the violation is Boston's failure to provide HRD with the appropriate notice and to seek approval from HRD for that action.² While that may ultimately be the appropriate relief in this case, the Commission believes that further fact-finding is necessary to confirm whether or the Civil Service laws has been violated and, if so, how the violation ought to be remedied. The Commission will set the appeal down for a further pre-hearing status conference and, if necessary, schedule a full-hearing thereafter.

Finally, the Commission reiterates its long-standing angst over the improper overuse of the provisional system. The Commission acknowledges the dilemma that appointing authorities face from the breakdown in the statutorily prescribed process for conducting competitive examinations and making appointments from eligible lists for non-public safety positions, and also understands the fiscal limitations on the Commonwealth that have precluded HRD from complying with its obligations in that regard. Nevertheless, it must be noted that the present appeal, and the relief that has been granted here, is another example of the problems that are generated from the chronic disconnect between the requirements prescribed in the Civil Service Law and the wholly separate reality in which civil service employment decisions have been, and must actually be made, for far to many years.

² Indeed, HRD can hardly be faulted for failing to act to rectify a violation of which it apparently was not aware until after this appeal was filed.

Accordingly, for the reasons stated above, the Respondent's Motion to Dismiss is *denied*, the Appellant's Cross-Motion for Summary Judgment is *denied*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Henderson, Marquis, Stein and Taylor, Commissioners; Bowman, Chairman [absent]) on March 19, 2009.

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)(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:

Michael J. Maccaro, Esq. (for Appellant)
Helen G. Litsas, Esq. (for Appointing Authority)
Suzanne L. Faigel, Esq. (HRD)