

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

ROBERT POSKE
and
RICHARD MAHER,
Appellants,

**CASE NOS: G1-10-65 (Poske)
G1-10-66 (Maher)**

v.

CITY OF WORCESTER,
Respondent

Appearance for Appellants:

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

Appearance for Respondent

Lisa M. Carmody, Esq.
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Commissioner:

Paul M. Stein

DECISION

The Appellants, Robert Poske and Richard Maher, acting pursuant to Mass. G.L.c.31,§2(b), appealed to the Massachusetts Civil Service Commission (Commission) from the decision of the City of Worcester (Worcester), bypassing them for promotion to the labor service position of Working Foreman/Public Works Craftsman in the Water Division of the Worcester Department of Public Works (DPW). Two days of evidentiary hearings were held at the DPW Building in Worcester, on August 20, 2010 and February 23, 2011. The hearings were digitally recorded. Ten (10) exhibits were received in evidence. Worcester called two witnesses and the Appellants each testified on their own behalf. Each party filed proposed decisions with the Commission on March 30, 2011.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits, the testimony of the witnesses [the Appellants, Konstantin Eliade, DPW Director of Water/Sewer Operations and Ron Culverhouse Worcester Coordinator of Personnel and Payroll], and inferences reasonably drawn from the evidence as I find credible, I make the findings of fact below.

1. The Appellants, Robert Poske and Richard Maher, have been employed with the Worcester DPW since 1994. They have each held the permanent labor service positions of Maintenance Man, MEO I and MEO III. (*Testimony of Poske & Maher; Exh. 9*)

2. At the time of the promotional opportunity involved in this appeal, both Mr. Poske and Mr. Maher held the permanent labor service position of Working Foreman Public Works Maintenance Man (WFPW MAINT MAN) in the Worcester DPW Water Department. (*Exh. 9*)

3. On July 20, 2009, the DPW Water Department posted a promotional job opportunity for the position of “Working Foreman Public Works Craftsman” (WFPW CRAFTSMAN). The posting stated:

“This specific position will focus on the Water Meter Repairman specialty that is defined in the attached Job Description. Prior knowledge and experience in the Water Meter Program and particularly with large commercial water meters is required.”

(*Exhs. 1 & 6; Testimony of Eliadi & Culverhouse*)

4. The job description of the position of WFPW CRAFTSMAN is a working/supervisory position that covers a variety of ten specific trades and skills which are set forth in the job description. The WFPW CRAFTSMAN must be highly proficient in the particular specialty supervised and acts as the lead person for assigned projects.

(*Exh. 6*)

5. The Water Meter Repairman specialty is responsible to perform skilled manual labor associated with the repair, testing and maintenance of water meters. (*Exh. 6*)

6. As the supervisor of a Water Meter Repairman, the WFPW CRAFTSMAN serves as the lead person for all meter installations. Thus, he or she must have knowledge and experience with both residential and commercial meters, as well as a full understanding of all of their parts, familiarity with the municipality's HERA computer system in order to access the details and history of the meters on which work is performed, and have worked in the "Water Meter Program" that covered this work. (*Testimony of Eliadi*)

7. Prior experience with large commercial meters was a particularly important requirement for the position. There are numerous significant differences in the technology of reading and servicing large commercial meters that make such prior hands-on experience important. These include working with confined space techniques required in commercial meter pits and the significantly larger (tenfold) water flow of such meters. The technology involved in such large meters has also changed significantly in recent years, so that current experience and knowledge in this field is also critical to manage a lead and supervisory role in this area. (*Testimony of Eliadi*)

8. The DPW generates approximately \$26 million in revenue, of which the majority comes from commercial meters. (*Testimony of Eliadi*)

9. At the time involved, there were, in fact, no full-time Water Meter Repairmen in the DPW. Rather, the functions of these positions was performed by employees in other titles, on a "when assigned" basis. (*Testimony of Eliadi & Appellants; Exh. 9*)

10. The DPW also had a labor service position known as Water Service Inspector (WSI). This position is not one of the ten specific specialties set forth in the WFPW

CRAFTSMAN Job description. Rather, the WSI position is defined in a separate, stand-alone job description. Apparently, employees with the WSI job title also serve on a “when assigned” basis as a Water Meter Repairman and only WSIs currently are so assigned to work in the Water Meter Program. (*Exhs. 2, 7 & 9; Testimony of Eliadi*)

11. The Appellants were among 35 DPW employees who signed the job posting indicating interest in the position of WFPW CRAFTSMAN position. (*Exh. 9*)

12. Of the applicants for the promotion, only three of the employees were found to have the knowledge and experience described above required for the position according to the senior manager of the DPW Water Division, Director Konstantine Eliadi. These candidates were: Mr. Ursoleo, Mr. Bernardi and Mr. Trotto. (*Exh. 9; Testimony of Eliadi*)

13. Mr. Ursoleo held the labor service title of Maintenance Man, but has worked “when assigned” as a Water Meter Repairman. He had more seniority than the Appellants, but he had been selected for promotion to another position and was not further considered for the WFPW CRAFTSMAN position. (*Testimony of Eliadi & Appellants; Exh. 2*)

14. Mr. Bernardi had less seniority than the Appellants, but was considered the most qualified candidate. This determination was made based on Mr. Eliadi’s personal knowledge and without conducting any interviews. (*Exhs. 2 & 9; Testimony of Eliadi & Appellants*)

15. Mr. Bernardi was one of the employees who held the labor service title of WSI. He had performed on a “when assigned” basis as a Water Meter Repairman for many years. He had served as the lead person in the Water Meter Program and acted as working

foreman after the retirement of the previous supervisor in or about February 2009. Mr. Bernardi had specific experience with wiring of large commercial meters. (*Exh. 2; Testimony Eliadi*)

16. The Appellants held the labor service title of Working Foreman Public Works Maintenance Man (WFPW MAINT MAN). This is a working/supervisory position set forth in a separate job description, and covers performance “under supervision of” manual labor of “more than an ordinary degree of skill in the work of maintenance, construction, operation and repair” of public work projects, including the fields of carpentry, painting, masonry, plumbing, welding and other building and mechanical trades. There does appear to be some overlap in this job with the WFPW CRAFTSMAN position, although, unlike WFPW CRAFTSMAN, Water Meter Repairman is not one of the specific trades described in the job description for WFPW MAINT MAN. (*Exhs. 6, 7 & 9; Testimony of Appellants*)

17. Mr. Maher had never worked in the Water Meter Program. He provided no evidence that he had direct experience working with large commercial meters or knew much about the technical details of inspecting or servicing such meters. His recent assignment on the night shift meant that his responsibility for the water system involved mainly responding to emergency pipe breaks, shutting down the system which would be diagnosed and repaired as required on the day shift. (*Testimony of Eliadi & Maher*)

18. Mr. Poske had some experience in the Water Meter Program, and some experience on large commercial meters, but that experience was more than 10 years ago. Because of the changes in the technology, this experience was considered outdated by Mr. Eliadi. Mr. Poske had no relevant experience with the HERA computer system. His

current work as WFPW MAINT MAN involved supervision of a clerical person and one or more MEOs. (*Testimony of Eliadi & Poske*)

19. The pay grade (30) for Appellants' positions as WFPW MAINT MAN was above the pay grade (26) held by Mr. Bernardi as WSI. Mr. Bernardi, however, received some pay adjustment "when assigned" as Water Meter Repairman so the exact pay differential between these employees is not known. It was not disputed that the Appellants would be required to take a "demotion" were they to move from their current positions to a WSI position with Water Meter Repairman duties. (*Exh. 2; Testimony of Culverhouse*)

20. The WFPW CRAFTSMAN position awarded to Mr. Bernardi was assigned a pay grade 32. (*Exhs 1 & 2; Testimony of Culverhouse*)

CONCLUSION

As a delegated community for labor service functions, Worcester is authorized to approve appointments such as the position of Working Foreman Public Works Craftsman, as the appointing authority, in accordance with the provisions set forth in G.L.c.31, §28 & §29 and the applicable Personnel Administration Rules (PAR). PAR.19 provides, with respect to such delegation of labor service promotional appointments:

Promotional appointments and changes of position under the provisions of M.G.L. c.31, §29 shall be made from among the same number of persons with the greatest length of service as the number specified in making appointments under PAR.09 [2n+1], provided that such persons possess the required qualifications and serve in eligible titles, as determined by the administrator. If there are less than the requisite number of persons, selection may be made from the lesser number.

The role of the Commission in this matter is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by [it]." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct.

300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983). An action is "justified" if 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." Commissioners of Civil Service v. Municipal Ct. of Boston., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928).

“The commission’s task, however, is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether ‘there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision’” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

A “preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient.” Mayor of Revere v. Civil Service Commission, 31 Mass.App.Ct. 315, 321

(1991) The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956). See also Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928)

The Commission must take account of all credible evidence in the entire administrative record, including whatever would fairly detract from the weight of any particular supporting evidence. See, e.g., Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 264-65 (2001) It falls within the ambit of the Commission's fact-finding responsibility, through the person who heard the testimony, to determine the credibility of witnesses, the probative weight to be given to the evidence and, when required, to provide a "thorough and reasoned explanation", supported by the record, when choosing between fairly conflicting views. See Town of Brookfield v. Labor Relations Comm'n, 443 Mass. 315, 322 (2005); Covell v. Department of Social Services, 439 Mass. 766, 787n.19 (2003); Doherty v. Retirement Bd. of Medford, 425 Mass. 130, 141-42 (1997); Herridge v. Board of Registration in Medicine, 420 Mass. 154, 164-65 (1995); Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530-31 (1988); School Comm. of Wellesley v. Labor Relations Comm'n, 376 Mass. 112, 120 (1978).

Applying these principles to the facts of this appeal, Worcester has demonstrated that its promotion of Mr. Bernardi was supported by sound and sufficient reasons and complies with basic merit principles under civil service law and rules.

First, the preponderance of evidence established that Mr. Bernardi possessed the necessary qualification for the position while the Appellants did not. Mr. Bernardi had recent, relevant experience with the Water Meter Program and large commercial water meters, both of which were a requirement for the position. He also had supervisory experience filling in for the former supervisor.¹ While the Appellants claimed to be knowledgeable and experienced as well, I did not find their testimony supported this contention. At best, Mr. Maher's recent experience was limited largely to handling emergency "shut-downs". Mr. Poske's hand-on experience, if any, with the Water Meter Program generally, and the type of commercial meters currently in use in Worcester, was, at best, outdated. Although both Appellants did have supervisory experience over clerical and maintenance personnel, the evidence did not establish that either of them were qualified to act as lead person, much less supervise others, in reading, troubleshooting or repairing large commercial meter systems. Worcester's determination that the Appellants were not qualified was persuasive, and, absent political or improper bias, which was not shown here, the appointing authority's judgment about the qualifications for a highly technical position, will be respected See, e.g., Lusignan v. Holyoke Gas & Elec. Co., 22 MCSR 137 (2009). See also Garfunkel v. Department of Revenue, 24 MCSR 128 (2011) (affirming need for specialized qualifications for information technology position)

Second, even if the Appellants were qualified for the position, they have no standing to complain about the selection of Mr. Bernardi, also clearly qualified. Under the "2N+1 rule" of civil service law, Worcester was entitled to make a labor service promotion of any one of the first three qualified candidates in order of

¹ There was some question about how Mr. Bernardi came to fill in for the former supervisor, Mr. Bousquet, who had held an official service manager's job, after Mr. Bousquet's retirement. That issue, however, is not germane to the issues in these appeals and the Commission need not address that question further.

seniority. When the appointing authority hires one qualified candidate within the 2N+1 group for a labor service promotion, the other non-selected candidates have no standing to complain simply because they have more seniority. See, e.g., Harrop v. Fall River School Committee, 22 MCSR 1 (2009); Brienzo v. Town of Acushnet, 20 MCSR 330 (2007). Thus, since Mr. Ursoleo, the most senior candidate who signed the posting had previously been selected for another position, that left Mr. Bernardi in not lower than the third position, within the 2N+1 group from which Worcester could lawfully promote (even assuming that Mr. Poske and Mr. Maher both had demonstrated they also were qualified and the dispute on that point had been resolved in their favor, rather than against them).

The Appellants raised several questions about the operation and structure of the Worcester DPW which they argue should be considered by the Commission. For example, although the position of WFPW CRAFTSMAN has a focus on supervision of the Water Meter Repair specialty, it appears that Worcester has no one employed in the Water Meter Repair specialty. The functions of this position are performed by others on a “when assigned” basis.² Since the positions which are assigned these duties to work in the Water Meter Program are rated at pay grades lower than that of a WFPW MAINT MAN, there is no practical way that an employee such as Mr. Maher or Mr. Poske could acquire the necessary experience with the Water Meter Program and, thus, qualify for a promotion to WFPW CRAFTSMAN, without first taking a demotion. The Appellants also question why Director Eliadi made the selection based entirely on his personal

² Employees who perform Water Meter Repairman duties “when assigned” include those in the job of Water Service Inspector, which is a Grade 26 position that is not found in the statewide MuniClass Manual list of labor service titles promulgated by HRD, or within the list of trades covered by the WFPW CRAFTSMAN job title, but seems to be separately established and unique Worcester. Whether such a position has been approved by HRD for use in Worcester was not addressed.

knowledge of the qualifications of the various candidates and without conducting interviews, as was allegedly customary at the DPW. While these matters may seem unfair and may be worthy of scrutiny in a different context, or perhaps best addressed through collective bargaining, they are not germane to the issues presented in this appeal. The sole issue to be decided here is whether Worcester, in fact, selected a qualified candidate for the position of WFPW CRAFTSMAN from within the group of 2N+1 properly qualified applicants willing to accept the position. This is precisely what Worcester clearly has done.

Accordingly, for the reasons stated above, the appeals of the Appellants, Robert Poske and Richard Maher, are hereby *dismissed*.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, Marquis & Stein, Commissioners) on October 18, 2012

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten 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 the 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-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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 Manning, Esq. (for Appellants)
Lisa A. Carmody, Esq. (for Respondent)