# COMMONWEALTH OF MASSACHUSETTS
# CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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| BRENDA CHOINIERE,<br>Appellant | ) | |
| v. | ) | Docket No. D-06-172 |
| CITY OF W ORCESTER,<br>Respondent | ) | ON THE RESPONDENT'S MOTION TO DISMISS THE APPEAL FOR LACK OF JURISDICTION |

## DECISION

*Procedural Background*

Pursuant to G.L. c. 31, § 43, the Appellant, Brenda Choiniere (hereinafter "Appellant") filed this appeal with the Civil Service Commission (hereinafter "Commission") on July 18, 2006 claiming an action by the Respondent, City of Worcester (hereinafter "City") as Appointing Authority, caused her to be lowered in rank and compensation without just cause, as required by G.L. c. 31, § 41. On November 22, 2006, the appeal was ruled by Commissioner Donald R. Marquis as being timely filed. A Full Hearing was scheduled for October 9, 2007 at the offices of the Commission. Both parties appeared for the hearing and, in consideration of the threshold dispute regarding the Commission's jurisdiction to hear the appeal, the City was instructed to submit this Motion to Dismiss the Appeal pursuant to the Standard Adjudicatory Rules of Practice

and Procedure 801 CMR 1.01 (7)(g)(3). The motion was received by the Commission on November 13, 2007. The Appellant submitted an opposition to the motion on November 27, 2007.

*Respondent's Grounds for Dismissal of the Appeal*

The City moves to dismiss the appeal on the grounds that the Commission lacks jurisdiction to hear it. The City contends that the action of which the Appellant complains does not amount to a discharge, removal, suspension, transfer, abolition of office or reduction of rank or pay as those terms are utilized in G.L. c. 31, § 41, but instead was a reassignment of the Appellant, as part of a group of workers, authorized by the parties' collective bargaining agreement (hereinafter "CBA") and beyond the purview of the Commission. The City claims that the reassignments were necessary as part of a legitimate and appropriately bargained reorganization by the City of its school cafeteria personnel. Therefore, the City asserts that the Appellant fails to state a claim upon which a remedy can be granted by this Commission.

*Factual Background*

The Appellant was appointed as a permanent part-time intermittent cafeteria helper on October 22, 2002. The City stipulates that, upon the expiration of six months of service in April 2003, the Appellant had worked sufficient days to become a tenured civil service employee. Although the Appellant was regularly working approximately

thirty (30) hours per week, she was not guaranteed any set number of hours or any permanent work location.

Beginning as early as March 2003, representatives of the Worcester School Department (hereinafter "School Department") began to develop a reorganization plan for the school nutrition department. By May 2004, the Worcester School Committee (hereinafter "School Committee") had approved the reorganization plan, subject to any impact bargaining obligations it had to the union which represented the cafeteria workers. On May 28, 2004, the Appellant was advised in writing that she was being assigned to work three (3) hours per day, effective with the start of the 2004/2005 school year. On June 4, 2004, the Appellant bid on a three (3) hour position at the Gates Lane School, which position she assumed in September 2004. By virtue of successfully bidding this position, the Appellant was guaranteed three (3) hours per day and was assigned to only one work location.

Cafeteria workers employed by the Worcester Public Schools are represented by the National Association of Government Employees (hereinafter "NAGE"). The terms and conditions of employment affecting cafeteria workers are governed by a collective bargaining agreement between NAGE and the School Committee. During the course of the development of the reorganization plan, NAGE raised concerns about its members' eligibility for health insurance and other contractual benefits. In addition, subsequent to the School Committee's approval of the reorganization plan, impact bargaining sessions were held between NAGE and representatives of the School Committee on three (3) occasions. Ultimately, on August 31, 2004, NAGE and the School Committee entered into a Settlement Agreement which resolved all issues between them in connection with

the reorganization plan and the concerns raised about health insurance and other contractual benefits. Among the requirements of the settlement was that all employees would sign individual releases. Of the 43 affected employees, two refused to sign such releases, including the Appellant. Despite not signing the required release, the Appellant benefited from the settlement by securing a six (6) hour per day position at the Vocational High School, effective in May 2005.

Article III of the CBA provides that "[T]here will be a three (3) hour minimum work day for all permanent-intermittent employees and those permanent full-time employees who are appointed as permanent full-time employees on or after November 1, 1995." Accordingly, the three (3) hour per day assignment communicated in May 2004 to the Appellant was within the parameters established by the CBA.

On December 16, 2004, the Appellant filed an unfair labor practice charge with the Massachusetts Labor Relations Commission (hereinafter "Labor Relations Commission") relating to the reorganization plan. That case was dismissed by the Labor Relations Commission on March 31, 2006. That dismissal was upheld by the full Labor Relations Commission on June 21, 2006. On July 18, 2006, the Appellant filed the instant Appeal with the Commission.

*Appellant's Grounds for Opposition to Dismissal of Appeal*

The Appellant asserts that the action taken by the City in reassigning her to certain hours of work and place of assignment was not a reassignment but, rather, an abolishment of her civil service position and a reduction of her compensation. The

Appellant also appears to take issue with various communications that she received from the City during the reorganization process. She contends that she was never a "part time" employee, nor a "substitute" employee. In her "Legal Argument", included in her Opposition to the City's Motion to Dismiss, the Appellant states, in part:

> "Also I checked the website in the process I found a section called definitions. I am what the first one describes (enclosed).[1] I worked at a permanent work site from the time I was hired until I was reinstated to my permanent six hour position and when it was returned to me I had to except (sic) another worksite to receive it. My hourly rate of pay was not reduced but my weekly wages were reduced."

Further, the Appellant contends in a June 24, 2004 letter to City Manager Michael O'Brien and Superintendent of Schools James Caradonio the following, in pertinent part:

> "We the following employees[2] are filing this complaint because under Chapter 31 Section 34 probationary periods we have completed all of the requirements of this section and because of this; we feel that we should be deemed to be tenured employee's (sic) as set forth in this section.
>
> We have been continuously told that we are substitutes; we believe that at this time we are tenured employees and are entitled to all the privileges of being a tenured employee. If we do not hear anything from you in ten working days it is our intention to file a complaint with civil service on this matter."
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> (See Proposed Exhibit 5 in Appellant's Exhibit Book 1)

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[1] The Appellant attached a copy of what appears to be a list of certain civil service definitions from an unidentified website. Here, she notes by hand the following definition: "A PERMANENT CIVIL SERVICE EMPLOYEE is one appointed after certification to a permanent position without restriction as to the duration of such employment." We find that this is an accurate definition.

[2] The June 24, 2004 letter is signed by one other co-worker, Ruth Anne-Reeks.

*Discussion*

G.L. c. 31, § 41 provides that a tenured civil service employee, "Except for just cause . . . shall not be discharged, removed, suspended for a period of more than five days, laid off, transferred from his position without his written consent . . . lowered in rank or compensation without his written consent, nor his position be abolished." The Commission, pursuant to § 43, has jurisdiction to hear and decide appeals of any person aggrieved by a decision of an Appointing Authority made pursuant to § 41.

The threshold decision to be made in order for the Commission to have jurisdiction to hear this appeal is to determine whether the Appellant is a "person aggrieved", pursuant to § 41. In an August 3, 2004 response to the Appellant's June 24, 2004 letter regarding her civil service status, City Manager O'Brien writes, in pertinent part:

> "According to the information provided to me by the Office of Human Resources, you hold intermittent Cafeteria Helper positions which are permanent Civil Service positions. This means that, if you already worked the equivalent of six (6) months of full-time service in your positions, you are no longer considered probationary. However, management still has the right to change your work assignments as needed. This is specifically stated in the employment agreement you signed when you began your employment with the Public Schools. This right of assignment does not affect your permanent Civil Service status." (Id.)

From all the information submitted by both Parties, it is clearly not disputed that the Appellant, then and now, is a civil service tenured, permanent-intermittent cafeteria helper. The term "tenured" simply means that the employee is no longer a probationary employee in accordance with the provisions of c. 31. The term "permanent" denotes an employee who was "appointed after certification to a permanent position without

restriction as to the duration of such employment." To be a tenured and/or permanent civil service employee does not confer upon one any other rights or benefits other than those provided under civil service law. Any other fringe benefits of employment may be provided for in a CBA between a union and management in accordance with G.L. c. 150E. The Commission has no jurisdiction over any such rights or benefits.

The lexicon of Civil Service laws, rules and regulations is not always easily navigable. It appears that the term that seems most vexing to the Appellant is her status as an "intermittent" employee. She appears to take great umbrage with being referred to as a "part-time" or "substitute" worker, although both of these terms accurately describe an "intermittent" employee. In fact, upon her hire, the Appellant signed as understanding and accepting a document titled, "Conditions of Employment as School Cafeteria Helper (Permanent-Intermittent)" which contained the following language:

> "1. As a permanent-intermittent appointee I will be required to work at such time and location as the needs of such service is indicated.
>
> 2. As a permanent-intermittent appointee I will be considered for[3] full time employment (20 hours or 30 hours) based upon my seniority and record of dependability."
> (See Proposed Exhibit 6 in Appellant's Exhibit Book 1)

The Appellant's appeal concerns her reassignment to a three-hour position as a cafeteria helper. This assignment was consistent with her Civil Service appointment as an intermittent cafeteria helper. This assignment was also consistent with the terms and conditions of the applicable CBA. By virtue of the reorganization of the school nutrition program, the only work condition that materially changed was an initial decrease in the

[3] Note: "considered for" as opposed to "guaranteed".

hours that the Appellant worked. This is not unanticipated given the nature of her position as an intermittent employee and that her work hours were never guaranteed under civil service laws, rules or regulations. Indeed, as a result of the August 31, 2004 Settlement Agreement the Appellant eventually benefitted from a certainty of work hours and assignment. There was no change in the type of work that the Appellant performed, her job title, her hourly rate of compensation or her civil service tenure.

*Conclusion*

Pursuant to the Standard Adjudicatory Rules of Practice and Procedure 801 CMR 1.01 (7)(g)(3), "The Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter . . . " Here, the Commission finds that, since the Appellant is not an "aggrieved party" in accordance with G.L. c. 31, § 41, the Commission lacks jurisdiction over this appeal. Therefore, for all of the reasons stated herein, the appeal on Docket No. D-06-172 is hereby ***dismissed***.

Civil Service Commission

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John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Taylor, Marquis and Guerin, Commissioners) [Henderson, Commissioner absent] on March 13, 2008.

A true record. Attest:

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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:

Brenda Choiniere

Sean P. Sweeney, Esq.