

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

ROBERT KEOGH,
Appellant

v.

G2-17-180

CITY OF BOSTON,
Respondent

Appearance for Appellant:

Pro Se
Robert Keogh

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.
City of Boston
Boston City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

1. On August 30, 2017, the City of Boston (City) posted a “Notice of Selection” stating that a City employee (hereafter “Candidate A”) had been appointed as “Assistant Electrical Engineer”, an “official service” title within civil service.
2. The City made the above-referenced appointment as a “provisional appointment” under G.L. c. 31, s. 12, as there is no eligible list for Assistant Electrical Engineer.
3. On September 6, 2017, the Appellant, Robert Keogh (Mr. Keogh), a 27-year City employee who currently serves in a provisional title, but has permanency in a lower title, filed an appeal with the Civil Service Commission (Commission), contesting his non-selection by the City to this position.
4. On September 13, 2017, a Street Lighting Supervisor (Supervisor) penned a memorandum to the City’s Public Works Commissioner “amending [his] initial recommendation” of “Candidate A” and recommending that “Candidate B” [not the Appellant] be provisionally appointed as Assistant Electrical Engineer.

5. On September 20, 2017, the City filed a Motion to Dismiss Mr. Keogh's appeal, effectively arguing that no bypass occurs when an Appointing Authority makes a provisional appointment, thus removing this matter from the Commission's jurisdiction.
6. On October 10, 2017, I held a pre-hearing conference which was attended by Mr. Keogh, counsel for the City and the Human Resources Director for the City's DPW.
7. At the pre-hearing conference, I reviewed the civil service law with the parties, including the series of Commission decisions that confirm that: a) a bypass does not occur when a provisional appointment is made; and b) the appointing authority is not required to select a permanent civil service employee for a provisional "appointment" (as opposed to a provisional "promotion").
8. As part of the pre-hearing, Mr. Keogh raised the issue regarding whether the provisional appointment was influenced by personal bias (both against him and in favor of the selected candidate), which the City strenuously denied.
9. I do not recall, and my notes do not reflect, that either party informed me at the pre-hearing conference that the City had effectively rescinded the appointment of "Candidate A" and appointed "Candidate B" shortly after Mr. Keogh filed his appeal with the Commission. Rather, it was my understanding at the pre-hearing conference that Mr. Keogh's allegations of personal bias *in favor of the selected candidate* regarded "Candidate A".
10. I informed Mr. Keogh that the Commission has the option of initiating an investigation under G.L. c. 31, s. 2(a), but only does so sparingly and typically when a Petitioner shows that there is a likelihood that he/she will be able to show that personal and/or political bias occurred.
11. For these reasons, I informed Mr. Keogh that he had thirty (30) days to file a reply to the Motion to Dismiss. Said reply may include a request for investigation, should Mr. Keogh choose to make such a request.
12. On October 24, 2017, Mr. Keogh submitted his request for investigation stating that the "current employee selected for the assistant engineer position is not qualified. [T]here also appears to be an existing personal and professional relationship between the department head and the selected employee." Mr. Keogh also stated that he had been "butting heads" with the City's Public Works Commissioner and that his non-selection was "attributable to my outspoken nature and commitment to the department and the men I work with." Finally, Mr. Keogh stated that the Street Lighting Supervisor had been "politically inserted" into his position.
13. On October 31, 2017, the City submitted a reply to Mr. Keogh's request for investigation, seeking to rebut all of Mr. Keogh's allegations.
14. First, the City stated that the Commissioner for whom Mr. Keogh was allegedly "butting heads" left the City for other employment in 2016 and played no role in this provisional appointment.

15. Second, the City submitted the resume of the Street Lighting Supervisor to show that he is a long-time City employee who worked as an electrical inspector in the City's Inspectional Services Department before he was promoted to the position of Supervisor.
16. Third, the City submitted the score sheets of the supervisors who interviewed the candidates to show that Mr. Keogh was not scored highest by either of the supervisors who served as interview panelists. Through these documents, the City also sought to explain why, approximately one week after Mr. Keogh filed his appeal with the Commission, the City effectively rescinded the provisional appointment of Candidate A and appointed Candidate B. According to the score sheets, and the accompanying documentation, the score sheets show that, when the scores of the candidates was averaged together (as opposed to only the score of the lead Supervisor), that Candidate B scored higher. Thus, according to the City, the City was obligated under the applicable collective bargaining agreement, to appoint Candidate B over Candidate A.
17. On February 26, 2018, Mr. Keogh informed the Commission that he has filed a grievance (via the provisions in the collective bargaining agreement) regarding his non-selection here.

Analysis: Use of Provisional Appointment / Commission Jurisdiction

The Commission has issued a series of decisions in which the Commission, although it has repeatedly exhorted parties in the public arena to end the current practice of relying on provisional promotions (and provisional appointments) to fill most civil service positions, states that it must honor the clear legislative intent that allows for provisional appointments and promotions so long as the statutory requirements are followed. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. 382, 389, 657 N.E. 2d 229, 234 (1995).

In a series of decisions, the Commission has addressed the statutory requirements when making such provisional appointments or promotions. See Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); Glazer v. Department of Revenue, 21 MCSR 51 (2007); Asiaf v. Department of Conservation and Recreation, 21 MCSR 23 (2008); Pollock and Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Pease v. Department of Revenue, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Foster v. Department of Transitional Assistance, 23 MCSR 528; and Heath v. Department of Transitional Assistance, 23 MCSR 548.

In summary, these decisions provide the following framework when making provisional appointments and promotions:

- G.L.c.31, §15, concerning provisional *promotions*, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains less than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and “sound and sufficient” reasons are submitted and approved by the administrator for making such an appointment.
- Under Section 15 of Chapter 31, only a “civil service employee” with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for “sound and sufficient reasons” to another higher title for which she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title.
- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional “appointment” process as a subterfuge for selection of provisional employee candidates who would not be eligible for provisional “promotion” over other equally qualified permanent employee candidates.
- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Here, there is no dispute that there has been no examination, eligible list or Certification for the position of Assistant Electrical for many years. Nor is there a dispute that the City filled this position as a provisional appointment under Section 12 of the civil service law. For these reasons, a candidate’s non-selection does not constitute a bypass and the Commission does not have jurisdiction to hear this appeal under G.L. c. 31, s. 2(b).

Analysis: Request for Investigation

The Commission maintains authority under G.L. c. 31, § 2(a) to conduct investigations. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm’n & others, No. 2013-00639-D, Suffolk Superior Court (2014). We exercise this

discretion “sparingly”. See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011).

I have carefully reviewed all of the submissions by both parties here. An investigation, beyond the information-gathering already done by the Commission, is not warranted for the following reasons. First, Mr. Keogh’s appeal here was based in large part on alleged bias in favor of *Candidate A*. The parties agree that, ultimately, Candidate B was chosen for this provisional appointment. Second, assuming that Mr. Keogh’s allegations also apply to Candidate B, he has not supplied the Commission with the type of information (if any) that would potentially support an allegation of personal bias in favor of Candidate B. Third, some of Mr. Keogh’s allegations just don’t stand up to serious scrutiny, including his allegation that the decision here was somehow related to him “butting heads” with the DPW Commissioner. As noted by the City, that individual left the City’s employment in 2016 and had no role in this provisional appointment. Finally, according to Mr. Keogh, he is pursuing this matter through the grievance process, which, based on all of the facts here, may be the most appropriate venue to address his allegations.

Conclusion

For these reasons, Mr. Keogh’s appeal under Docket No. G2-17-180 is hereby *dismissed* and his request for the Commission to initiate an investigation is denied.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 15, 2018.

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 this order or 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 this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Robert Keogh (Appellant)

Robert J. Boyle, Jr., Esq. (for Respondent)