

COMMONWEALTH OF MASSACHUSETTS
HAMPSHIRE, ss.

SUPERIOR COURT
CIVIL NO. 18-0079

RECEIVED

DEAN DOWNER

JAN 2 2019

v.

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

CIVIL SERVICE COMMISSION and CITY OF NORTHAMPTON

**MEMORANDUM AND ORDER ON
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

The plaintiff, Dean Downer, appeals from a decision of the Civil Service Commission (Commission), affirming Northampton's demotion of the plaintiff to the position of laborer from that of Water Treatment Operator. The parties now move for judgment on the pleadings under Mass. R. Civ. P. 12(c).

1. Facts from the Administrative Record

The following facts were stipulated by the parties at a hearing before Commissioner Christopher C. Bowman on the defendants' motion to dismiss plaintiff's appeal before the Commission.

Downer has been employed by the City of Northampton since September 24, 2007, when he was hired as a DPW Seasonal Laborer. Since January 18, 2010, he was serving as a Water Treatment Plant Operator. On May 4, 2017, Downer was demoted to the position of laborer and was notified of said demotion the same day. On June 29, 2017, Downer filed his appeal with the Commission contesting his demotion.

The Commissioner also concluded that the position of Water Treatment Plant Operator in Northampton is an "official service" title position and the position of laborer is a "labor service" title position.

Based on these facts, Commissioner Bowman determined that the Commission had no jurisdiction to hear the appeal for two reasons. First, the appeal was not timely filed and second, Downer was a provisionally promoted employee and such employees have no right of appeal to the Commission.

2. Discussion

Judicial review of an appeal from an agency decision is confined to the administrative record. See G. L. c. 30A, § 14. In accordance with G. L. c. 30A, § 14(7),

“[t]he court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is (a) in violation of constitutional provisions; or (b) in excess of the statutory authority or jurisdiction of the agency; or (c) based upon an error of law; or (d) made upon unlawful procedure; or (e) unsupported by substantial evidence; or (f) unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or (g) arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law.”

In conducting judicial review pursuant to G. L. c. 30A, § 14, the court is highly deferential to the administrative agency, see *Friends & Fishers of Edgartown Great Pond, Inc. v. DEP*, 446 Mass. 830, 836-837 (2006), and must accord due weight to the agency’s experience, technical competence and specialized knowledge as well as the discretionary authority conferred upon it. See G. L. c. 30A, § 14.

A. Failure to File Timely Appeal to Commission

General Laws c. 31, § 43, allows for a hearing before the commission “[i]f a person aggrieved by a decision of an appointing authority made pursuant to [§ 41] shall, within ten days after receiving written notice of such decision, appeal in writing to the commission....” There is no disagreement that Downer’s statutory ten-day period to appeal from the City’s decision, excluding weekends as required under the statute, expired well before June 29, 2017.

Rather, the dispute here is whether Downer’s election to proceed with his union grievance procedure stayed the commencement of the statutory ten-day appeal period until the grievance was resolved. In other words, is the time for seeking review tolled by the timely filing of a union grievance.

There is no question that Downer had the option to proceed through the five-step grievance process culminating in arbitration and/or appeal to the State Civil Service Commission. The first is by contract, the second is by statute. Each route is independent of the other and entailed different deadline for initiating and pursuing a claim.

As an initial observation, it is highly unlikely that the Legislature intended that a party seeking review by way of chapter 30A should be able to restart the statutory period at will by simply filing a union claim. Certainly there is nothing in Section 43 that

suggests or contemplates such a result. Indeed, I am aware of no administrative rule can modify the statutorily prescribed time limits for appellate review. Likewise, if the plaintiff had pursued the Civil Service claim it would not have tolled his grievance deadlines.

More importantly, as cited by the defendants, the case of *United Steelworkers of Am. v. Commonwealth Employment Relations Bd.*, 74 Mass. App. Ct. 656, 664-665 (2009) seem dispositive of this issue. In *United Steelworkers*, an employee missed the ten-day deadline to appeal to the Commission “because of a mistaken assumption that the civil service appeal remained timely” by pursuing a grievance claim. In affirming a decision that the union violated its duty of fair representation, the Appeals Court stated that the union “incorrectly and affirmatively advised [the employee] that he could defer filing his civil service claim in favor of the grievance process.” The court added, “[t]his breach of the duty of fair representation arguably deprived [the employee] only of his preferred choice of forum by causing him to defer filing an appeal with the commission until it was too late.”

The case of *Kilson v. City of Fitchburg*, 80 Mass. App. Ct. 1103 (2016) also supports this outcome. In *Kilson*, a police officer was terminated for inappropriate conduct and proceeded with union arbitration with the City’s consent. After the arbitrator concluded that the dispute was not subject to arbitration, he immediately appeal to the Commission. The Appeals Court upheld the Superior Court’s dismissal of the appeal based on the fact that the “ten-day limitation is jurisdictional and may not be waved or extended.”

In *Curley v. City of Lynn*, 408 Mass. 39, 41-42 (1990), the SJC held that the commission had acted outside the scope of its statutory authority by expressly allowing litigants to extend the deadline for appeal by filing a motion to rehear or reconsider. See *Herrick v. Essex Regional Retirement Bd.*, 68 Mass. App. Ct. 187, 190 (2007) (“With extremely rare exceptions not relevant here, failure to timely file is ... typically an absolute bar to a plaintiff’s ability to obtain judicial review of a final agency action.”).

As the Commissioner correctly determined, the statute, not the union contract controls this action. See *Curley v. Lynn*, 408 Mass. 39, 41-42 (1990) (“[T]he [Commission] through its ... rules cannot modify the statutorily prescribed time limits for filing petitions for review”) (citation omitted); *Town of Falmouth v. Civil Serv. Comm’n*, 64 Mass. App. Ct. 606, 610 (2005) (“The determination of ... jurisdiction is left exclusively to the statute”).

The plaintiff, at oral argument, suggested that there were constitutional violations in enforcing the ten-day appeal period. He cites no authority for this position in his pleadings or memorandum and I have found none. To the extent that this is an argument, it has not been properly presented.

B. Commissioner's Decision on its Merits

The Commissioner determined, based on the record before him, that Downer, who had been promoted provisionally to the position of Water Treatment Plant Operator, held a "promotional appointment" but not on a permanent basis, and therefore was not a "tenured employee" at the time the city demoted him.¹ As a provisional employee he did not have right of appeal to the Commission.

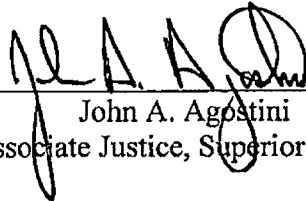
Given the specific provisions of the statute, (G.L. c. 31, §§1, 6-8, 12-15, 25-31) and the case of *City of Springfield v. Civ. Serv. Comm'n & Joseph McDowell*, 469 Mass. 370, 375-376 (2014), this is certainly not an unreasonable position and consistent with the statute.

ORDER

It is therefore ORDERED that the Plaintiff's Motion for Judgment on the Pleadings is *DENIED*. The Defendants' Motion for Judgment on the Pleadings is *ALLOWED* and the decision of the Defendant, the Commission, is *AFFIRMED*.

SO ORDERED

12/26/18
Date



John A. Agostini
Associate Justice, Superior Court

¹ He did not hold the position by either have an original appointment to the position or a promotional appointment made pursuant to the provision of civil service law and rules.