COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

DENNIS CARMODY &
JAMES McDONALD,
Appellants

v.

G2-07-65 (CARMODY)
G2-07-66 (McDONALD)

CITY OF LYNN,
Respondent

Appellant Carmody's Attorney:

Robert H. Clewell, Esq.
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(617) 439-9559

Appellant McDonald's Attorney:

Pro Se
James McDonald
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Lynn, MA 01904
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Respondent's Attorney

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Commissioner:

Donald R. Marquis

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

The Appointing Authority has moved to dismiss the Appellants' disciplinary appeals to the Commission on the grounds that the subject of the instant promotional bypass

appeals are currently being adjudicated under the provisions of the collective bargaining agreement between the City of Lynn and Local 739 IAFF.

Chapter 150E, section 8 provides in part that:

"Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provision of chapter thirty-one."

In the current case, the Appellants, via Local 739 IAFF, have elected binding arbitration as the method of resolving their claims. Consequently, they are precluded by statute from pursuing an appeal under the civil service law.

The Appellants offer four unpersuasive arguments in opposition to dismissing the appeals pending before the Commission. First, the Appellants argue that neither of them is a grievant in the above-referenced arbitration. The City argues that this is a misleading argument that attempts to elevate form over substance as only a union can file a matter for arbitration. The Commission concurs with the City. Where a union files a Demand for Arbitration on behalf of an employee within a bargaining unit which it represents, that action must, absent evidence of bad faith, be imputed to the employee, since submission of the Demand is, of necessity, made by the union -- which is a party to the applicable agreement -- rather than the individual. (See Sandra Rose v. Peabody School Department, D-5056, October 27, 1994.)

The three other arguments offered by the Appellants in opposition to dismissal of the current appeals pending before the Commission focus on the Appellants' assertion that

they don't intend to present the same facts before the arbitrator as they would before the Commission. As correctly argued by the City, what strategy the Appellants employ in both fora is not at issue. Rather, what is at issue is that the Appellants' redress in both fora involve the same issue.

Civil service employees have two avenues of appeal when disciplined or bypassed -- either to the Civil Service Commission or, as the final step in a contractual grievance procedure, to arbitration. Such employees are free, if the applicable collective bargaining agreement permits it, to file an appeal with the Commission and also to appeal through the grievance procedure up to -- but not including -- arbitration. At that point, such employees must make a binding election between one route or the other.

The Commission has regularly held that the filing of a Demand for Arbitration with the American Arbitration Association constitutes such an election. See Campbell et al. v. City of North Adams, D-5046, D-5071, September 28, 1994; Finneran v. Hull Municipal Lighting Plant, D-4092, July 17, 1991; and Hawkes et al. v. Boston Housing Authority, D-4565, January 12, 1992 (appeals dismissed where a Demand or Petition for Arbitration had been submitted.)

For all of the above reasons, the Appellants' appeals under Docket Nos. G2-07-65 and G2-07-66 are hereby ***dismissed.***

Donald R. Marquis,
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on July 26, 2007.

A true Copy. Attest:

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Commissioner
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:

David F. Grunebaum, Esq. (for Appointing Authority)
Robert H. Clewell, Esq. (for Appellant Carmody)
James McDonald (Appellant)
John Marra, Esq. (HRD)