

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

KAREN O'CONNOR-POWERS,  
Appellant

G2-15-240

v.

DEPARTMENT OF REVENUE,  
Respondent

Appearance for Appellant:

*Pro Se*  
Karen O'Connor-Powers

Appearance for Respondent:

Elizabeth M. Baker, Esq.  
Department of Revenue  
100 Cambridge Street  
P.O. Box 9553  
Boston, MA 02114

Commissioner:

Christopher C. Bowman

**ORDER OF DISMISSAL**

On December 21, 2015, the Appellant, Karen O'Connor-Powers (Appellant or Ms. O'Connor-Powers), filed an appeal with the Civil Service Commission (Commission), contesting her non-selection by the Department of Revenue (DOR) to the position of provisional Tax Auditor III (TA III).

On January 26, 2016, I held a pre-hearing conference at the offices of the Commission, which was attended by Ms. O'Connor-Powers and counsel for DOR. Based on the documents submitted and the statements of the parties, it is undisputed that:

1. On March 4, 1984, the Appellant was hired by DOR as a temporary Tax Examiner. She holds masters' degrees in both business and public administration.
2. In 1986, the Appellant obtained permanency as a Corporation Analyst.
3. In 1998, the Appellant took and passed a civil service examination for Tax Auditor I, II and III.

4. Over the years, the Appellant has held a number of titles at DOR, including one in which she was a supervisor from 1990-1992.
5. On April 15, 2012, the Appellant was provisionally appointed to a Tax Auditor I position, a non-supervisory position.
6. The Appellant is appealing her non-selection for provisional appointment to the position of Tax Auditor III.
7. The position was posted both internally and externally. DOR interviewed three (3) external candidates and nine (9) internal candidates, including the Appellant.
8. The interviews were conducted by: a) the hiring manager, who serves as the Director of the Pass-Through and Estate Unit; and b) the Business Income Bureau Chief. The same questions were asked of each candidate.
9. It does not appear that there was any formal rating system used to evaluate the interviewed candidates.
10. On November 1, 2015, DOR appointed another long-term DOR employee who has permanency as a Tax Examiner I and was serving in the supervisory position of Provisional Tax Examiner IV at the time.

### *Analysis*

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over two (2) decades. These provisional appointments and promotions have been used as there have been no “eligible lists” from which a certification of names can be made for permanent appointments or promotions.<sup>1</sup> The underlying issue is the Personnel Administrator’s (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists. This is not a new issue – for the Commission, HRD, the legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions.

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; Heath v. Department of Transitional Assistance, 23 MCSR 548.

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<sup>1</sup> By memorandum dated July 25, 1997, the personal administrator revoked non public safety civil service eligible lists over five years old.

In summary, these recent 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.

Applied to the instant appeal, DOR has not violated any civil service law or rule regarding provisional appointments. DOR posted this TA IV vacancy as provisional appointment and, as such, was not required to appoint candidates with civil service permanency. They were permitted to consider both external candidates as well as internal candidates with no civil service permanency, as they did here.

Ultimately, DOR provisionally appointed one (1) individual to the position of TA IV who served as a provisional TE IV and had civil service permanency as TE I. For the reasons cited above, this is not a violation of those sections of the civil service law related to provisional appointments and, further, does not constitute a “bypass” of the Appellant, which could typically be appealed under G.L. c. 31, § 2(b).

Although no bypass occurred here, the Commission always maintains authority under G.L. c. 31, § 2(a) to conduct investigations, including when allegations are made that an appointment process was not consistent with basic merit principles. 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).

I carefully considered the verbal and written statements of both parties in assessing whether an investigation is warranted here.

The Appellant contrasts her two (2) masters' degrees with the selected candidate's bachelor's degree. She suggests that the selection here was pre-determined as the selected candidate was purportedly told, during a prior hiring process, that he was the third-ranked candidate for two vacancies. More broadly, the Appellant points to her accomplishments over the years, including a high level of productivity, exemplary performance evaluations and multiple nominations for performance recognition. The Appellant alleges that the appointment is simply part of the "good old boy network" that favors men over women for promotional appointments.

DOR disputes any allegation that the decision here was influenced by any personal or gender bias, pointing to the fact that the Appellant herself successfully obtained a promotion as recently as 2012. DOR states that, ultimately, the selected candidate's nine (9) years of recent supervisory experience tipped the scales in his favor regarding the selection of a TE IV, a supervisory position. While DOR recognizes the Appellant's many years of experience, they argue that the selected candidate is also a veteran DOR employee with twenty-six (26) years of experience, including the aforementioned supervisory experience.

Prior to rendering a decision regarding the request for investigation, I reviewed the voluminous information provided by both parties, including, but not limited to: the resumes of both candidates, the notes of the interview panelists, the job description and the Appellant's performance evaluations and work product.

In summary, based on a review of the information provided and the statements of the parties, an investigation by the Commission is not warranted here. DOR chose a long-term employee with many years of recent supervisory experience for a supervisory position. DOR appears to genuinely appreciate the valuable and ongoing contributions of the Appellant and, based on the information submitted, the decision-making process here appears to be consistent with basic merit principles.

I reach this conclusion despite being dismayed that DOR has apparently ignored the Commission's recent directive in Palluccio v. Department of Revenue, 28 MCSR 118 (2015) to ensure that tally sheets and a rating system be used to evaluate candidates, as opposed to a more informal "consensus" rating process. Should DOR continue to ignore that directive, it is more likely that the Commission will reach a different conclusion in regard to whether an investigation of the selection process is warranted in the future.

*Conclusion*

For all the reasons stated above, the Appellant's appeal under Docket No. G2-15-240 is hereby ***dismissed*** and the Commission opts not to initiate an investigation under G.L. c. 31, § 2(a).

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 February 18, 2016.

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:

Karen O'Connor-Powers (Appellant)  
Elizabeth M. Baker, Esq. (for Respondent)  
John Marra, Esq. (HRD)