COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JACQUELYN BLASI,
Appellant

G2-14-263

v.

DEPARTMENT OF REVENUE &
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant: Galen Gilbert, Esq.
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Boston, MA 02108

Appearance for Department of Revenue: Elizabeth M. Sullivan, Esq.
Department of Revenue
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Appearance for Human Resources Division: Melinda Willis, Esq.
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner: Christopher C. Bowman

ORDER OF DISMISSAL

On November 13, 2014, the Appellant, Jacquelyn Blasi (Ms. Blasi), 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 Examiner V (TE V).

On November 25, 2014, I held a pre-hearing conference at the offices of the Commission, which was attended by Ms. Blasi, her counsel and counsel for DOR. At the pre-hearing conference, counsel for Ms. Blasi submitted a document with the heading: "Amended Appeal." In summary, the "Amended Appeal" states that DOR is violating the civil service law by failing to give civil service examinations and that the state's Human Resources Division (HRD) is also violating civil service law by failing to delegate the duty of conducting examinations to DOR. The Amended Appeal states that the Commission should prohibit any further promotions until

such time as DOR administers civil service examinations for said positions. Both DOR and HRD filed motions to dismiss Ms. Blasi's appeal and Ms. Blasi filed an opposition to both motions.

Based on the documents submitted and the statements of the parties, it is undisputed that:

1. Ms. Blasi has permanency as a Tax Examiner I (TE I)[1], but currently serves as a provisional Tax Examiner III (TE III) at DOR.

2. There is no eligible list for the position of TE V.

3. On June 2, 2014, DOR posted a Tax Examiner V (TE V) position. The position was posted as a provisional appointment (as opposed to promotion).

4. The position was posted both internally and externally.

5. DOR considered twenty-two (22) total applicants; 12 were external candidates and ten (10) were internal candidates. Management ultimately interviewed nine (9) candidates, one (1) of whom was an external candidate.

6. DOR ultimately made a provisional appointment to a candidate serving as a provisional TE III who has no civil service permanency in any position.

Analysis

General Use of Provisionals and Lack of Examinations

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over fifteen (15) years. 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. 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.

It has been long established that "[p]rovisional appointments or promotions ... are permitted only in what are supposed to be exceptional instances..." City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, after decades without HRD holding competitive examinations for many civil service titles, and the professed lack of appropriations to permit examinations in the near future, hiring and advancement of most civil service employees now can be lawfully accomplished only provisionally. Thus, as predicted, the

[1]Although Ms. Blasi was reclassified to the position of TE II in 1990, a reclassification does not result in permanency in the new title. (See LeFrancois v. Department of Revenue, 23 MCSR 217 (2010)).

exception has now swallowed the rule and an appointment "which is provisional in form may be permanent in fact." Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).

The Commission and the courts have wrestled with the issues surrounding the so called "plight of the provisional" and regularly exhort the civil service community of the corrosive effects of the excessive use of "provisional" appointments and promotions. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff d, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. Little has been done, however, or will be done, to wean the system from this practice without further appropriations from the legislature. As a result there appears no end to the reality that the vast number - probably most - current non public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy. Meanwhile, public employees' provisional status leaves them with diminished job security and advancement opportunities under civil service law, relegating them to enforcement of their rights under collective bargaining agreements, if any, and other laws, which are beyond the Commission's purview.

That said, it remains the duty of the Commission to apply the civil service law as written. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006), quoting Commissioner of Revenue v. Cargill. Inc., 419 Mass. 79, 86 (1999). As much as the Commission regrets this state of affairs, the use of provisional appointments is not, per se, unlawful, and a state agency cannot be estopped for hewing to the law. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address, whether on a systemic basis or through special legislation. See Kelleher v. Personnel Administrator, 421 Mass. at 389.

As the instant appeal illustrates, the only practical – and equitable – way to address the issue of provisional appointments is through a global, systemic approach, including legislative remedies. Here, Ms. Blasi is a permanent Tax Examiner I, contesting a provisional appointment to the position of Tax Examiner V. In her amended appeal, Ms. Blasi argues that the Commission should order the commencement of examinations forthwith, so all positions can be filled permanently. If the Commission, absent any legislative remedy, were to issue such an order, Ms. Blasi could potentially be *demoted* to TE I depending on several factors including, but not limited to: a) her eligibility to sit for a promotional examination to TE V; b) whether she passed the promotional examination; and c) if so, her rank on the eligible list for TE V. Put simply, given the passage of time, and the thousands of provisional appointments and promotions that have been made during this time period, the plight of the provisionals requires more than an administrative fix, even if funds were available to administer examinations for the hundreds of non-public safety positions. This also applies to Ms. Blasi's ancillary argument that the Commission should order HRD to delegate responsibility for administering examinations to DOR.

In regard to whether DOR could fill this position through a provisional appointment, as opposed to a provisional promotion, the Commission has addressed this issue through a series of recent decisions including: 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.

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 TE V vacancy as a 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 TE V who served as a provisional TE III and had no civil service permanency in any title. 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 Ms. Blasi, which could typically be appealed under G.L. c. 31, § 2(b).

Notwithstanding the above, 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 statements of Ms. Blasi at the pre-hearing conference, including her assertion that the hiring managers showed bias against her because she possesses a Masters in Public Administration. I found no merit to this head-scratching assertion.

DOR acknowledges that the selected candidate has less seniority, having been a full-time DOR employee since July 2000, whereas Ms. Blasi began her full-time employment with DOR thirteen (13) years earlier, in 1987. Further, the selected candidate has only served as a TE III since August 2012, whereas Ms. Blasi has been a TE III since 2007.

Although it is not required to prove such in regard to provisional appointments, DOR argues that the selected candidate is more qualified, citing the selected candidate's "substantive answers during the interview process" and her "ability to perform the job due to her demonstrated competence in the same or related work."

DOR did acknowledge, however, that they deviated from the normal process for making appointments, as the interview panelists, while asking the candidates the same questions, did not rank and/or score any of the candidates. Rather, the two (2) panelists, after conducting the interviews, reached a consensus on who was the best candidate for the position.

While I am troubled that DOR deviated from its normal selection process, the allegations raised here, which do not include any credible or substantive allegation of personal or political bias on behalf of the interview panelists, do not warrant the initiation of an investigation by the Commission.

In making this decision, I am confident that DOR understands the need, on a going-forward basis, to comply with its own internal practices regarding appointments including, but not limited to, the use of an acceptable scoring and ranking process.

Conclusion

For all the reasons stated above, Ms. Blasi's appeal under Docket No. G2-14-263 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; Ittleman, McDowell, and Stein, Commissioners) on January 8, 2015.

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.

Notice:
Galen Gilbert, Esq. (for Appellant)
Elizabeth M. Sullivan, Esq. (for Respondent)
Melinda Willis, Esq. (for HRD)