

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KEVIN ALVES,
Appellant

G2-18-132

v.

DEPARTMENT OF REVENUE,
Respondent

Appearance for Appellant:

Pro Se
Kevin Alves

Appearance for Respondent:

Richard V. Gello, Esq.
Department of Revenue
100 Cambridge Street
P.O. Box 9553
Boston, MA 02114

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On July 14, 2018, the Appellant, Kevin Alves (Mr. Alves), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection by the Department of Revenue (DOR) to the position of provisional Tax Examiner VII (TE VII).

On August 14, 2018, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. Alves and counsel for DOR. Based on the documents submitted and the statements of the parties, it is undisputed that:

1. Mr. Alves has been employed by DOR for forty-four (44) years and has been a permanent Tax Examiner VI (TE VI) since 1989.
2. DOR posted a TE VII position as a provisional appointment.
3. Thirty-six (36) candidates applied for the position, including twenty-one (21) external candidates and fifteen (15) internal candidates, including Mr. Alves and a provisional TE V.
4. No external candidates were interviewed.

5. Ten (10) internal candidates, including Mr. Alves and the provisional TE V, were interviewed.
6. The interview panelists asked the candidates the same questions and took notes regarding the candidates' answers; these notes were provided to the Commission along with the resume of Mr. Alves and the selected candidate.
7. It does not appear that there was any formal rating system used to evaluate the interviewed candidates.
8. DOR appointed the provisional TE V to the provisional TE VII position.

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.¹ 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.

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

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

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 VII 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 VII who served as a provisional TE V and had no civil service permanency. 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 gave Mr. Alves the opportunity, both at the pre-hearing and via written submission, to argue why the Commission should open an investigation here. 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. While Mr. Alves is to be commended for his valuable and ongoing contributions, the decision here appears to be consistent with basic merit principles.

I reach this conclusion despite being dismayed that DOR has apparently ignored, again, the Commission's recent directive in Palluccio v. Department of Revenue, 28 MCSR 118 (2015) and O'Connor-Powers v. Department of Revenue, 29 MCSR 118 (2016) to ensure that tally sheets and a rating system be used to evaluate candidates, as opposed to a more informal "consensus" rating process. In O'Connor-Powers, the Commission stated that: "... 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."

It appears that DOR requires more clarity. Should DOR fail to adopt, forthwith, a more formal rating process, which includes tally sheets that capture the *independent* observations and conclusions of each interview panelist, the Commission *shall* initiate an investigation upon request of a non-selected candidate.

Conclusion

For all the reasons stated above, the Appellant's appeal under Docket No. G2-18-132 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, Stein and Tivnan, Commissioners [Camuso – Absent]) on September 27, 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:

Kevin Alves (Appellant)

Richard V. Gello, Esq. (for Respondent)