COMMONWEALTH OF MASSACHSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 4/25/08
Civil Service Commission
CB

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

MILTON H. BRIGHTMAN,
Appellant

v.

DEPARTMENT OF CONSERVATION AND RECREATION

Case No.: G2-07-217

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on April 24, 2008 to acknowledge receipt of the report of the Administrative Law Magistrate dated March 18, 2008. No comments were received by the Commission from either party. The Commission voted to adopt the findings of fact and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby ***dismissed.***

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on April 24, 2008.

A true record. Attest.

Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:
Mr. Milton H. Brightman
Tsuyoshi Fukuda, Esq. (for HRD)
Francis Hartig, Esq. (for Appointing Authority)
Kimberly A. Fletcher, Esq. (DALA)

COMMONWEALTH OF MASSACHUSETTS
Division of Administrative Law Appeals
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March 18, 2008

Christopher Bowman, Chairman
Civil Service Commission
One Ashburton Place
Boston, MA 02108

Milton H. Brightman
75 Clara St.
New Bedford, MA 02744

Francis Hartig, Esq.
Department of Conservation and Recreation
251 Causeway St.
Boston, MA 02114

Tsuyoshi Fukuda, Esq.
Human Resources Division
One Ashburton Place
Boston, MA 02108

Re: *Milton Brightmanr v. Department of Conservation and Recreation,* G2-07-217, CS-08-86

Dear Chairman Bowman, Mr. Brightman, Attorney Hartig and Attorney Fukuda:

Enclosed please find the Recommended Ruling that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c), they have 30 days to file written objections to the ruling with the Civil Service Commission, which may be accompanied by supporting briefs.

Very truly yours,

Kimberly A. Fletcher
First Administrative Magistrate

encl.

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.	Division of Administrative Law Appeals
Milton H. Brightman, Petitioner	
v.	Docket Nos. G2-07-217, CS-08-86
Department of Conservation and Recreation, Respondent	
Appearance for Petitioner:	Milton H. Brightman 75 Clara St. New Bedford, MA 02744
Appearance for Respondent:	Francis Hartig, Esq. Department of Conservation and Recreation 251 Causeway St. Boston, MA 02114
Appearance for Human Resources Division:	Tsuyoshi Fukuda, Esq. Human Resources Division One Ashburton Place Boston, MA 02108
Administrative Magistrate:	Kimberly A. Fletcher, Esq.

RECOMMENDED RULING ON MOTION TO DISMISS

On June 14, 2007, Milton Brightman filed a bypass appeal form with the Civil Service Commission, complaining that he was bypassed for a promotional appointment with the Department of Conservation and Recreation (DCR). On October 9, 2007, DCR and the Human Resources Division (HRD) filed a joint motion to dismiss with the Civil Service Commission. On January 25, 2008, the Commission denied the motion "at this time" with the following provisos:

- Full hearing to proceed as scheduled; based on information received at hearing, Magistrate may choose to act on motion

- Motion to Dismiss fails to address whether Commission has jurisdiction and/or whether certain factual issues are in dispute, including but not limited to: 1) were there candidates w[ith] permanency in next lower title that applied? 2) If so, were they chosen? 3) Regardless, were candidates selected 'qualified'?

A hearing was scheduled for February 11, 2008 at the offices of the Division of Administrative Law Appeals, 98 North Washington Street, Boston. At the beginning of the hearing, I advised the parties that the hearing would be limited to the motion to dismiss. I marked certain documents that accompanied the motion, as well as certain others, as A – G. Post-hearing, I marked the February 8, 2008 letter from HRD to the Division of Administrative Law Appeals as H. Robert Samuels, Personnel Analyst at DCR, testified as did the Petitioner. John Roberts, Union Steward, and Michael Foster, Staff Representative at AFSME, were present and made brief statements. There is one tape of the hearing.

Findings of Fact

1. Milton Brightman served in the U.S. Navy from 1970 to 1974. In 1985, the State Office of Affirmative Action reviewed Mr. Brightman's military status and certified that he was eligible for affirmative action status (G).
2. On March 1, 1988, Mr. Brightman obtained civil service permanency in the title of Laborer II; he currently holds that title for DCR (A).
3. For a number of years, there have not been any civil service examinations given for the Forest and Park Supervisor series (Samuels, testimony).

4. In late 2006, DCR posted a job listing for Forest and Park Supervisor III at Scusset Beach State Reservation. The job information stated that it was non-management and civil service (F).
5. The Forest and Park Supervisor III position is the highest supervisory level in the Forest and Park classification series (A).
6. There was no list associated with the Forest and Park Supervisor series (I, II and III). All internal candidates who met the qualifications were interviewed, including Mr. Brightman (Samuels, testimony).
7. Based solely on the questions asked during the interview, Mr. Brightman scored at the bottom and was not given a second interview (Samuels, testimony).
8. The candidate who scored the highest during the interview process was given a provisional appointment as Forest and Park Supervisor III at Scusset Beach (Samuels, testimony).
9. On June 14, 2007, Mr. Brightman filed a bypass appeal with the Civil Service Commission.
10. On February 8, 2008, DCR and HRD requested that the hearing scheduled at the Division of Administrative Law Appeals be limited to a hearing on the motion to dismiss and gave a written response to the Commission's three questions posed when, on January 25, 2008, it denied the motion to dismiss "at this time."

Conclusion and Recommended Ruling

I recommend that DCR's and HRD's joint motion to dismiss be allowed.

General Laws, c. 31, § 12 provides that an appointing authority may make a provisional appointment if no suitable eligible list exists from which certification of names may be made for such appointment. See *Joseph Asiaf v. DCR,* G2-07-218, Decision on Respondent's Motion to Dismiss, 1/10/08. There was no list for Forest and Park Supervisor III and DCR was entitled to give a provisional appointment to the individual who scored highest during the interview process. Unfortunately, Mr. Brightman, with almost 20 years of experience in the department, did not score well during his interview.

Mr. Brightman argues that the following language of G.L. c. 31, § 26 compels his selection: "An appointing authority shall appoint a veteran in making a provisional appointment under section twelve…" Case law does not support his contention. In *Aquino v. Civil Service Commission,* 613 N.E.2d 131, 133 (Mass.App.Ct. 1993), the Court held that veterans' preference in provisional civil service appointments is limited to original provisional appointments and does not extend to provisional promotions.

> [W]e construe the language of § 26 to limit the veterans' preference to original appointments. The opening sentence of the section explicitly refers to 'persons who pass examinations for *original appointment'* (emphasis added).... Nothing in § 26 refers to a veterans' preference in promotions.

The Court went on to conclude that its "construction is consistent with a policy that prefers veterans in hiring, but does not favor them once they have obtained civil service employment."

I note that in the February 8, 2008 letter to the Division of Administrative Law Appeals, HRD and DCR responded to the Commission's three questions quoted above. "1) No candidates with permanency in the next lower level applied for the vacancy; 2)

therefore, no candidates with permanency in the next lower level were chosen for the vacancy; and 3) DCR selected the most qualified candidates based on the candidates that received the highest scores in the interview process."

For the above reasons, I recommend that the motion to dismiss be allowed.

DIVISION OF ADMINISTRATIVE LAW APPEALS

Kimberly A. Fletcher
First Administrative Magistrate

DATED: 3/18/08