

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

**VANESSA BYRNES and
NINE OTHERS,**

Petitioners

v.

CASE NO: I-08-318

**MASSACHUSETTS PAROLE
BOARD,**

Respondent

Petitioners:

Vanessa Byrnes, Pro Se

[REDACTED]

Timothy Ford, Pro Se

[REDACTED]

Massachusetts Parole Board Attorney:

Timothy V. Dooling, Esq
Deputy General Counsel
Massachusetts Parole Board
12 Mercer Road\
Natick, MA 01760

HRD Attorney:

Martha Lipchitz O'Connor, Esq.
Labor Counsel
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

**COMMISSION'S RESPONSE TO REQUEST FOR INVESTIGATION OF
MASSACHUSETTS PAROLE BOARD HIRING PRACTICES**

The Petitioners, acting pursuant to G.L.c.31, §2(a), requested that the Civil Service Commission (Commission) conduct an investigation concerning alleged violations of Civil Service law and rules by the Massachusetts Parole Board (the Board) in hiring candidates for positions of Parole Officer (PO) by use of a special certification for a

protected group of minority applicants under the provisions of the Personnel Administration Rules (PAR). The Commission held a pre-hearing conference on March 5, 2009 for the purpose of determining whether the Commission will conduct an investigation as requested. The Commission heard presentations from two petitioners (Vanessa Byrnes and Timothy Ford), from counsel representing the Board and from labor counsel for the Massachusetts Human Resources Division (HRD). An audiocassette recording was made of the hearing. The Commission requested additional data from the Board which was submitted to the Commission on March 31, 2009.

FACTUAL BACKGROUND

The Petitioners question the Board's selection process for appointment from a PAR.10 special certification of two full-time minority PO-A/B positions made in September 2008 from the "protected" open competitive list. The Petitioners' are departmental employees whose names appear on a departmental promotional list for PO-A/B but they were not considered for the positions in question here because they are not minority candidates and their names did not appear on the special PAR.10 certification; thus, they would not be persons entitled to pursue a bypass appeal.

At the hearing, the Petitioner's request for investigation was refined to include three areas of concern.

1. Was the Board's use of a special PAR.10 certification limited to minority candidates properly permitted under civil service law and rules?
2. Did the Board violate any civil service law and rules by increasing the number of minority hires (originally one) to two?
3. Is there any reason to investigate the Board's failure to use a special PAR.10 certification for females, in lieu of or in addition to the PAR.10 minority certification?

After review of the presentations and submissions of the parties, in the exercise of its discretion, the Commission has decided that, except in one limited respect, it will not open a formal investigation into the issues raised by the Petitioners.

Use of the PAR.10 Special Certification for Minority Candidates

In April 2008, a vacancy arose for a PO A/B in the Board's Springfield regional office. The position was advertised through a transfer bid memo required by the applicable Collective Bargaining Agreement, but no PO-A/B responded. In May 2008, the Board decided to fill the position through a PAR.10 certification for minority candidates and requested HRD approval to do so, submitting the required justifying documentation. The accuracy of the data supporting the PAR.10 request is not disputed.

The Board's rationale for requesting a PAR.10 minority certification stemmed from its Affirmative Action and Diversity Plans that included objectives that the Board would utilize the PAR.10 process when backfilling positions. In addition, the Board performed analysis of the demographics of the Board's caseload, both in the Springfield Regional Office and statewide, as well as the demographics of the existing PO A/B staff. Among other things, this analysis showed that out of a total of 118 POs, only 14 (7 males and 7 females) were minority. In the Springfield region, out of 16 POs, 3 were minority, while the demographics of the parolee population in the Springfield region showed 87 black and 120 Hispanic parolees out of 373 total parolees.

On June 20, 2008, the Board received a PAR.10 Certification Number 2080584 (Protected) from HRD, which consisted of a list of approximately 50 names of candidates who had passed the open competitive examination for PO-A/B and who had self-identified (under the penalty of perjury) as minorities (Cert. No. 208584 [Protected]) On

July 1, 2008, the Board received another PAR.10 Certification Number 2080614 (Protected), consisting of the two minority candidates who had passed the Board's departmental promotional examination for the position of PO-A/B.¹

Pursuant to PAR.07, the Board was required to select, first, from any candidates on the PAR.10 departmental promotional list. Neither of these departmental employees signed the certification indicating they were willing to accept the position. Accordingly, pursuant to PAR.07, the Board returned the departmental certification to HRD with "no action" and then proceeded to the open competitive PAR.10 certification. Candidates were interviewed in July 2008. On August 12, 2008, the Board submitted an Authorization of Employment Form 14 to HRD notifying them that the Board had selected two candidates for the position of PO A/B, which HRD approved on September 2, 2008. The candidates selected from the PAR.10 open competitive certification were a male disabled veteran who appeared first on the list, and a female, non-veteran, who was third on the list willing to accept.

Nothing specific appears in any of the information the Commission has received to suggest the process did not conform to applicable civil service law and rules. The clear disparity in the number of minority parole officers and the parolee population, particularly in the Springfield region would clearly justify the Board's decision to use a PAR.10 minority certification in these circumstances.

A certain degree of misinformation apparently was circulating among Board employees in the timeframe leading up to these hires. Apparently, according to standard

¹ HRD also supplied the Board with separately compiled lists that accompanied both PAR.10 certifications, which contained the names of the non-minority candidates on the departmental and open competitive eligible lists, respectively, but neither of those other "non-protected" lists was used by the Board in the hiring process.

HRD procedure, “willing to accept” notices are routinely sent to everyone whose name appears on the “Protected” portion of the certification as well as the non-protected portion, although those on the non-protected portion were not entitled to be considered for the position. Further confusion arose because, in this case, the open competitive certification (Cert. No. 208584 [Protected]) issued prematurely before the departmental certification, so non-departmental employees received their “willing to accept” notices before anyone on the departmental list. Despite this snafu, however, the process of considering the candidates proceeded in the proper order. Finally, apparently information was disseminated, incorrectly, that the Board was seeking a Spanish-speaking PO, which was not accurate. The Commission certainly appreciates how these mishaps would raise an eyebrow among the Petitioners and other Board staff who aspired to a promotion to PO, but the Commission does not find that the circumstances suggest any actual or potential future violation of civil service law or rules that would warrant further investigation on the Commission’s part.

Increasing the Number of PO Hires

The increase in the number of PO hires, from one to two, is more problematic. The Board explains that the decision to hire two PO-A/Bs evolved during the summer of 2008 as a result of impending retirement /transfer of a PO-C, and the anticipated future need to fill the vacant PO-C position with another PO-A/B. Whether the PO-C vacancy was ever actually filled, however, is unclear. The Petitioners claim that the second PO-A/B hired from the PAR.10 certification was assigned to Central Office, not the Springfield Regional Office. In addition, there does not appear to be any supporting documentation from the Board submitted to HRD indicating the requested increase, which is particularly

sensitive since HRD's initial review of the PAR.10 request presumably assumed the hiring of one minority for Springfield. These questions do call for further inquiry into the PAR.10 request and approval process.²

Failure to Request a PAR.10 Female Protected List

The Petitioners question why the Board chose to request a PAR.10 minority protected list, but not a PAR.10 female protected list, contending that the disparity between male and female POs is also of concern. The Petitioners point to the Commission's recent Decision in Heath v. Massachusetts Parole Board, 21 MCSR 508, 513 (2008), in which the Commission upheld a bypass appeal, in part, noting that "the evidence presented established a bias in the interviewing process that is not the result of an 'unprejudiced mind.' . . . and presented a bias against women." While the Commission holds gender discrimination on equal footing with minority discrimination, no more should be read into the Heath Decision than warranted by the facts of that case, which related to a 2006 bypass. There has been nothing presented to the Commission that would permit any inference that the actions involved in that case were systemic or continuing. Thus, the Commission does not find sufficient reason to suspect gender bias motivated the Board in the present instance. To the contrary, there is every reason to believe that the Board was acting in good faith based on its analysis of the minority demographics described above. It is not within the purview of the Commission to dictate how the Board chooses to implement affirmative action plans or root out discrimination in the workplace. If the

² A question was also raised as to whether the Board properly posted either position as required by PAR.10(2). The certificate filed by the Board attests to compliance as to one position, but the Commission infers from that the documentation was a standard form prepared in advance by HRD at the inception of the process (when only one position was at stake). This issue of PAR.10 posting compliance, however, probably would not rise to the level to warrant further Commission investigation, were it the only discrepancy.

Board has fallen short on that score, there are other more appropriate forums in which to address that issue.

For the reasons stated above, the Commission concludes that further investigation of the Board's hiring practices requested by the petitioners is not warranted at this time. The one area of concern for the Commission is the Board's apparent failure to follow HRD procedures in the process of amending the request for certification to increase the number of hires and change the location of the hires and the PAR.10 posting requirements associated with that change. The Commission concludes, however, based on the data provided by the Board, that the increase in the number of PAR.10 hires from one to two well may have been appropriate. Accordingly, the Commission orders that the Board provide to HRD, with a copy to the petitioners, any additional information that is necessary to permit HRD to ascertain whether the increase from one to two minority hires was justified and that HRD provide documentation that will confirm the authority for the increase to the Board, *nunc pro tunc* if necessary, with a copy to the petitioners. A request to reopen the matter for investigation would be in order only if HRD is unable to so confirm the justification for the additional PAR.10 minority hire.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on September 10, 2009

A True Record. Attest:

Commissioner

Notice to:

Vanessa Byrnes. (Petitioner)

Timothy Ford (Petitioner)

Timothy V. Dooling, Esq. (for Massachusetts Parole Board)

Martha Lipchitz O'Connor, Esq. (HRD)