COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JOHN DALRYMPLE,
Appellant

G2-14-257

v.

DEPARTMENT OF REVENUE,
Respondent

Appearance for Appellant:

David Brody, Esq.
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1001 Watertown Street, Third Floor
West Newton, MA 02465

Appearance for Respondent:

Elizabeth M. Sullivan, Esq.
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P.O. Box 9553
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Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On October 31, 2014, the Appellant, John Dalrymple (Mr. Dalrymple), 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 V (TE V).

On November 25, 2014, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. Dalrymple, his counsel and counsel for DOR. Based on the documents submitted and the statements of the parties, it is undisputed that:

1. Mr. Dalrymple has permanency as a Tax Examiner I (TE I), but currently serves as a provisional Tax Examiner III (TE III) at DOR.

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

3. The position was posted both internally and externally.

4. 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.

5. 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

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.

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 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 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 Mr. Dalrymple, 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 written and verbal statements of Mr. Dalrymple and his counsel in assessing whether an investigation is warranted here.

Mr. Dalrymple takes issue with the fact that the selected candidate is: "more junior"; purportedly "less qualified"; and allegedly has a record of formal and informal discipline.

DOR acknowledges that the selected candidate has less seniority, having been a full-time DOR employee since July 2000, whereas Mr. Dalrymple began his full-time employment with DOR twelve (12) years earlier, in July 1988. Further, the selected candidate has only served as a TE III since August 2012, whereas Mr. Dalrymple has been a TE III since May 2007.

DOR disputes that the selected candidate is less qualified than Mr. Dalrymple, 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."

In regard to the alleged prior discipline of the selected candidate, Mr. Dalrymple acknowledged at the pre-hearing conference that he was relying, in part, on hearsay statements and/or alleged events that purportedly occurred several years ago.

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.

Prior to rendering a decision regarding the request for investigation, I asked DOR to produce the written notes of the interview panelists in regard to Mr. Dalrymple and the selected candidate, which they provided. Those notes tend to show that the selected candidate offered more substantive, thoughtful answers to the questions posed than Mr. Dalrymple, notwithstanding Mr. Dalrymple's greater years of experience.

While I am troubled that DOR deviated from its normal selection process, the allegations raised here, which do not include an 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, Mr. Dalrymple's appeal under Docket No. G2-14-257 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:
David Brody, Esq. (for Appellant)
Elizabeth M. Sullivan, Esq. (for Respondent)
John Marra, Esq. (HRD)