

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

THOMAS FOSTER,
Appellant

v.

G2-09-360

DEPARTMENT OF
TRANSITIONAL ASSISTANCE,
Respondent

Appellant's Attorney:

Pro Se
Thomas Foster



Respondent's Attorney:

Daniel LePage
Assistant General Counsel
Department of Transitional
Assistance
600 Washington St., 4th Floor
Boston, MA 02111

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Thomas Foster (hereinafter "Foster" or "Appellant"), pursuant to G.L. c. 31, § 2(b), is appealing his non-selection for the promotion to Benefits Eligibility Referral Social Worker C (hereinafter "BERS C") by the Department of Transitional Assistance (hereinafter "Department" or "Appointing Authority" or "DTA").

The appeal was filed with the Civil Service Commission (hereinafter "Commission") on September 4, 2009 and the Appellant filed a request to amend his appeal on October 1,

2009, seeking to expand the number of job postings for which he is contesting his non-selection. A pre-hearing conference was held on October 15, 2009 and a status conference was held on Department 8, 2009.

On February 11, 2010, the Department filed a Motion to Dismiss all parts of the Appellant's appeal except that portion related to a position in the North Shore office filled by an employee without civil service permanency. On March 2, 2010, the Appellant filed an opposition to the Department's motion. On March 29, 2010, I allowed the Department's motion and a full hearing was scheduled for May 6, 2010 to hear whether the Appellant was "qualified" for the BERS C position in the North Shore office filled under Posting No. 28324. On May 6, 2010, the instant appeal and a companion case (See Mazur v. DTA, CSC Case No. G2-09-361), were scheduled for a full hearing. On the day of the hearing, the Mazur case was settled and the instant appeal was re-scheduled for a full hearing on August 4, 2010. The Appellant's subsequent request for a continuance was allowed and a full hearing was held on September 9, 2010. The hearing was digitally recorded.

Findings of Fact

Sixty-six (66) exhibits were entered into evidence at the hearing (Appointing Authority Exhibits 1-6 and Appellant Exhibits 1-60). Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Lisa Griffin, Director, North Shore Office, Department of Transitional Assistance;
- Paul Bastarache, Assistant Director, North Shore Office, Department of Transitional Assistance;

For the Appellant:

▪ Thomas Foster, Appellant

I make the following findings of fact:

1. The Appellant is a permanent civil service employee in the position of Benefits Eligibility Referral Social Worker A/B (“BERS A/B”). (Appointing Authority Exhibit 6; Appellant Exhibit 45, Class Specification)
2. The Appellant was made permanent in his current position as a result of taking and passing a civil service examination on which he scored an 84. (Appellant Exhibit 4)
3. The Appellant has been employed by the Department for approximately seventeen (17) years, and worked in the Revere office at all times relevant to this appeal.¹
(Testimony of Appellant)
4. Prior to working for the Department, the Appellant worked for Filene’s Department Stores from 1990 to 1994, at one point serving as a Customer Service Manager.
(Testimony of Appellant and Appellant Exhibit 33)
5. The Appellant currently works in the Department’s Food Stamp Program (now referred to as “SNAP”). His responsibilities include creating RFAs, processing new food stamp applications, customer service, acting as a liaison within the community, daily maintenance on cases, and compiling statistics. He is assigned his own caseload that he manages from intake through closing of the case. As part of his case management duties, he makes determinations regarding eligibility for food stamps, and monitors clients for continuing eligibility. (Testimony of Griffin)

¹ For approximately 15 months between February 2003 and May 2004, the Appellant was employed by the Department of Revenue’s Child Support Enforcement Division. (Appellant Exhibit 33)

6. For approximately ten (10) years during his employment with the Department, the Appellant also served as the regional vice president for SEIU Local 509. Pursuant to provisions in the applicable collective bargaining agreement, the Appellant was granted paid release time for approximately ½ of his normal hours to conduct union business. In this capacity, he facilitated grievances filed by employees and conducted other union business. (Testimony of Appellant)
7. On April 10, 2009, the Department posted a promotional opportunity for internal candidates for the position of BERS C at the North Shore office, with the functional title of Supervisor. (Appointing Authority Exhibit 1)
8. The Appellant applied for the BERS C position at the North Shore office.
(Testimony of Appellant)
9. The names of eighteen (18) candidates were deemed by the Department's central office to have the minimum entrance requirements for the BERS C position and all were interviewed, including the Appellant. (Testimony of Griffin)
10. The interviews were conducted by a panel that included Lisa Griffin, Director of the North Shore office; Paul Bastarache, Assistant Director of the North Shore office; and Brian Mulholland, another Assistant Director in the North Shore office. (Testimony of Griffin and Bastarache; Appointing Authority Exhibits 4 – 6)
11. Lisa Griffin and Paul Bastarache testified on behalf of the Department.
12. Ms. Griffin is the Director of DTA's North Shore office and oversees 70 – 75 employees. She is responsible for the overall operation of the office, including the selection of candidates for vacant positions. She has been the Director for approximately five (5) years and has worked for the Department for approximately

thirty (30) years. She worked her way up the ranks to her current position. Ms. Griffin was a good witness. She had a solid grasp of the details regarding office operations and DTA policies and procedures. She displayed a sincere and admirable commitment to providing DTA clients with excellent customer service while still recognizing the heavy workload of employees. She struck me as someone who takes her job seriously and puts considerable thought and consideration into determining who is qualified to serve in a supervisory role in DTA's North Shore office. I did not detect any personal animus toward the Appellant nor did she display any ulterior motive for testifying against him. I credit her testimony. (Testimony, demeanor of Griffin)

13. Mr. Bastarache is an Assistant Director in the North Shore office and has served in that capacity for approximately ten (10) years. For approximately eleven (11) months, he served as the Acting Director of the office. He has been with DTA for approximately thirty-six (36) years and currently oversees the cash assistance programs. Like Ms. Griffin, he worked his way up the ranks to his current position. He is part of the management team involved in all hiring decisions. Mr. Bastarache was also a good witness. Although more blunt than Ms. Griffin, he too struck me as a long-time career employee who cares deeply about the effective delivery of services to DTA clients. I credit his testimony. (Testimony, demeanor of Bastarache)

14. The interview panel followed the hiring procedures that were provided by the Human Resources department of the Executive Office of Health and Human Services (hereinafter "EOHHS"). The practice is for EOHHS to handle the job posting, check the submitted resumes for minimum requirements, and forward the hiring package to

the interview panel. The package provided by EOHHS also included specific questions for the panel to ask the applicants during the interviews. Based on the answers to the interview questions, the panel was to complete a form entitled “Interview Assessment,” in which they were to answer questions about each candidate’s demonstrated ability to do the job and rank the candidates in various categories from one (1) to five (5), with a score of “1” being the best and “5” being the worst. (Testimony of Griffin and Bastarache; Appointing Authority Exhibit 2)

15. The eight (8) categories in which the panel scored the candidates on the Interview Assessment were: 1) Communication/Interpersonal skills; 2) Adaptability; 3) Relevant Education/Work Experience; 4) Commitment/Motivation/Initiative; 5) Organizational Skill; 6) Ability to Perform Job Function; 7) Managing Diversity/Diversity Awareness; and 8) Supervisory/Management Skill. The documents show that each interviewer was to complete their own Interview Assessment, and then a final Interview Assessment was completed for each candidate, which appears to summarize the interviewers’ individual assessments. At the end of the Interview Assessment form, the panel answered whether they were recommending the candidate for the position. (Testimony of Griffin and Bastarache; Appointing Authority Exhibits 3 -5; Appellant Exhibits 46 - 54)
16. The Appellant received a total score of “22” on the Interview Assessment. The interview panel did not recommend him for the position. (Testimony of Griffin; Appointing Authority Exhibit 5)

17. One of the selected candidates, Kimberly Poor, (hereinafter “Poor”) received a total score of “18”. The best score a candidate could have received was an “8.”
(Testimony of Griffin; Appointing Authority Exhibit 3; Appellant Exhibit 48).
18. The other selected candidate, Megan Nicholls, (hereinafter “Nicholls”) received a total score of “14”. (Testimony of Griffin; Appointing Authority Exhibit 4; Appellant Exhibit 47)
19. Nicholls does not have permanent civil service status. (Stipulation of Department)
20. The interview panel recommended Poor and Nicholls for the positions by memo (penned by Regional Director James Gorman) to Lorraine Woodson, Civil Rights Manager, on June 23, 2009. The memo stated that “[a]fter interviewing and assessing eighteen (18) very qualified candidates for the position of BERS C, Megan Nicholls and Kimberly Poor have been selected as our recommendation for the two BERS C positions for the North Shore TAO. Ms. Griffin testified that this was a form letter and is the same letter used for other promotions. (Testimony of Griffin; Appellant Exhibit 45)
21. The Appellant was informed of his non-selection for the position by letter dated July 10, 2009 from Ms. Griffin. In the letter, it was stated that the Department interviewed “several well qualified candidates for the position.” The reasons checked off on the Appellant’s Non-Selection Form were “Ability to do the job” and the sub-category, “Interview.” (Appointing Authority Exhibit 6)
22. Ms. Griffin testified that she knows the Appellant because she worked with him in the Revere office and she has interacted with him in his role as former Regional Vice President of SEIU Local 509. (Testimony of Griffin)

23. Ms. Griffin testified that the qualities the interview team were looking for in a candidate for the position included: 1) knowledge of the relevant regulations and programs; 2) ability to mentor and be a coach to the staff; 3) ability to oversee four (4) to six (6) members of the team; 4) ability to ensure that employees are able to prioritize their work and complete it in a timely manner, despite having a heavy caseload; and 5) ability to be open, accessible and approachable to all staff and an ability to relate and talk with these employees on a 1-on-1 basis. (Testimony of Griffin)
24. In Category 1 of the Interview Assessment, “Communication/Interpersonal Skills,” the Appellant received a “2.” The comments indicate that he was “Articulate. Bright, but at times appears to be too self assured.” (Appointing Authority Exhibit 5)
25. Ms. Griffin testified that the Appellant spoke of his “intelligence” during the interview and appeared overly confident in his abilities. She was concerned that the Appellant would be unable to relate to the employees he was supposed to supervise and would be unwilling to compromise or admit mistakes. (Testimony of Griffin)
26. Mr. Bastarache testified that, in retrospect, the Appellant’s interview demeanor would be better described as “arrogant.” He testified that although he asked all of the questions, the Appellant never looked him in the eye and appeared to be more focused on the note-taking of the other panelists. (Testimony of Bastarache)
27. During his testimony before the Commission, the Appellant testified that, “I am intelligent. I test high. I have a high I.Q. Some people are not comfortable with that.” As evidence of his ability to test well, the Appellant pointed to his score of 84

on a civil service examination that resulted in him becoming permanent in his current position. (Testimony of Appellant)

28. The Appellant testified that he has a very good working relationship with others as evidenced by his fellow employees electing him as a regional officer in the local union and his service on the local Workforce Investment Board (WIB). (Testimony of Appellant; Appellant Exhibits 34 and 35)
29. In Category 5, "Organization Skill" the Appellant received a "3." The comments on the Interview Assessment state that, "Organization skills is suspect in light of his Beacon views which compared unfavorably to other applicants for this position." (Appointing Authority Exhibit 5)
30. Mr. Bastarache testified that, prior to the interviews, he ran a report of all the "outstanding views" on the Department's Beacon system, a computer program that assigns tasks to employees related to their assigned cases. "Outstanding views" represent tasks that have been assigned, but not completed. (Testimony of Bastarache)
31. Mr. Bastarache testified that the Appellant had more than 200 "open views" on the Beacon system and the selected candidates had approximately ten each. Thus, Mr. Bastarache was surprised to hear the Appellant state during his interview how up-to-date his work was. Further, he questioned how subordinate employees could respect a supervisor who couldn't keep up with his own work. (Testimony of Bastarache)
32. The Appellant testified that he had a high number of outstanding views because: 1) he had a higher case load than others; 2) he was assigned the most complicated cases; and 3) he was required to spend time training employees. (Testimony of Appellant)

33. The Appellant also cited his performance evaluations as evidence that he is a good worker. The performance evaluations, completed by a supervisor named Joseph Malone, rated the Appellant as exceeds in almost every category over a 2-year period. Mr. Malone's comments about the Appellant include: "An amazing talent. Amazing ability to remain well organized in a somewhat chaotic environment. Always preternaturally keen to detect a weakness or inconsistency. Innate ability to organize. A master of both the written and spoken word. Truly one of technology's children. Complete mastery of the Beacon system. I see a future for Tom in management. Tom should have been a lawyer for his penchant for detail. Meticulous attention to detail is a hallmark of Tom's work. Always a smile on his face. Tom's creative intellect and promethean work ethic have been a boon to the entire office. Tom will never be outworked. Tom is fast, compassionate and accurate. Tom is flawless in this aspect of the job [NPA-FS ESP Referrals]." (Appellant Exhibits 29 – 32)
34. When the Appellant subsequently transferred to the Lowell DTA Office, Mr. Malone penned an unsolicited email to the Appellant's new supervisor citing many of the attributes referenced above including his assessment that the Appellant was always "preternaturally keen to detect a weakness or flaw in any case." (Appellant Exhibit 56)
35. In Category 8 of the Interview Assessment, "Supervisory/Management Skills," the Appellant received a "3." The comments on the Interview Assessment state "Has the knowledge and work experience, but must pay greater attention to details of BERS work first." (Appointing Authority Exhibit 5)

36. As part of the final question on the interview assessment, the panelist answered “no” when asked if they would recommend the hiring or promotion of the Appellant.
(Appointing Authority Exhibit 5)
37. Ms. Griffin testified that in addition to the concerns referenced above, she was concerned about the Appellant’s approach to customer service. As part of the interview, all candidates were given two scenarios to assess their customer service abilities. In the first scenario, the candidates were asked to explain how, as a supervisor, they would handle a complaint for a client that their caseworker was not responding to their calls. In the second scenario, the candidates were asked to explain how they would respond to a client’s complaint that a case worker was rude to her.
(Testimony of Griffin)
38. According to Ms. Griffin, she was surprised that the Appellant, in response to the first scenario, stated that he would explain to the client how busy the office was and provide her with a self-addressed stamped envelope to send in her information or request. Ms. Griffin stated that this was not the type of response she expected from a supervisor charged with ensuring a high level of customer service in the office.
(Testimony of Griffin)
39. The Appellant testified that the self-addressed stamped envelope option was only a part of his answer, but that he did feel it was important to let clients know how busy workers are. (Testimony of Appellant)
40. Ms. Griffin was also concerned about the Appellant’s answer to the second scenario in which he stressed that he would not “throw an employee under the bus.” Ms. Griffin testified that while its important to stand behind your employees, the primary

focus in this scenario should have been on addressing the clients' concerns first.

(Testimony of Griffin)

41. The Appellant testified that he stood by his answer and, like the previous scenario, this was only one part of his answer, which included offering an apology to the client.

(Testimony of Appellant)

42. Ms. Griffin and Mr. Bastarache testified that the Appellant was not qualified for the position of supervisor based on the interview and all of the concerns referenced above. (Testimony of Griffin and Bastarache)

43. The Appellant testified that he is qualified for the BERS C position citing his favorable performance evaluations, the fact that he was deemed by the central office to possess the minimum entrance requirements, the form letters references that all candidates were "highly qualified" and his overall background and experience.

(Testimony of Appellant)

44. The Appellant testified that he believes that material related to his application was tampered with by the Department arguing that: 1) certain copies of interview notes had smudges on them, while the original did not; 2) his summary rating sheet was typed while others were hand written; and 3) the signature dates of the three interview panelists were not the same. (Testimony of Appellant)

45. Ms. Griffin steadfastly denied that the Appellant's application materials were tampered with, surmising that the smudge marks occurred when copies were made to respond to the Appellant's request for information in preparation for this appeal and that she was advised midway through the interview process that it was more advisable

to use an online template for the interview summaries as opposed to hand writing them. (Testimony of Griffin)

46. The Appellant testified that an email from the state's Director of Diversity, Equal Opportunity and Civil Rights, shows that the selection process was flawed. The June 24, 2009 email from the Director to James Gorman states, "Jim, I can not sign this packet [recommending Kimberly Poor and Meghan Nicholls] before receiving clarification on the selection ---After reviewing the packet and knowing the staffing patterns at the North Shore TAO I have questions regarding your selection...Can you have Lisa call me" (Appellant Exhibit 55)
47. Asked by this Commissioner whether he thought the email related to his non-selection, the Appellant stated, "It's a pattern of selection; it seems to be women [of] all the same height and demeanor ... if you were to line them all up, it's all a pattern of similar. You know, if people feel uncomfortable because you may or not be smart, are they uncomfortable because you're tall?" (Testimony of Appellant)
48. The Appellant filed a timely appeal of the Appointing Authority's decision to the Civil Service Commission.

Conclusion

G.L.c.31, §15 provides the process for the provisional promotion of civil service employees within a departmental unit in the absence of a suitable eligible list from which to make a permanent promotion. The statute prescribes, in relevant part:

An appointing authority may, with the approval of the administrator . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list . . . No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission to the administrator by the appointing authority of sound and sufficient reasons therefore, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

A provisional promotion pursuant to this section shall not be deemed to interrupt the period of service in the position from which the provisional promotion was made where such service is required to establish eligibility for any promotional examination.

G.L.c.31, §15

It has been long established that “[p]rovisional appointments or appointments through noncompetitive examinations 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, 481 N.E.2d 1176, 1180-81, rev.den., 396 Mass. 1102, 484 N.E.2d 103 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29, 22 N.E.2d 613 (1939). However, the passage of decades without the personnel administrator holding competitive examinations for many civil service titles, and the professed lack of funding to do so any time in the near future, has meant that advancement of most civil service employees is accomplished by means of provisional promotions under Section 15. Thus, as predicted, the exception has now swallowed the rule and “a promotion which is provisional in form may be permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399, 657 N.E.2d 229, 233-34 (1995).

As much as the Commission regrets this state of affairs, and has repeatedly exhorted parties in the public employment arena to end the current practice of relying on provisional promotions (and provisional appointments) to fill the majority of today’s civil service positions, the Commission must honor the clear legislative intent to allow such a

procedure for provisional promotions. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. at 389, 657 N.E.2d at 234. Thus, the Commission’s initial determination in the instant case is whether the Department’s provisional promotion of Megan Nicholls, a provisional employee, was lawful under Chapter 31.

First, the plain meaning of Section 15 allows only “civil service employees” to be provisionally promoted. A “civil service employee” is a person with an original or promotional “appointment” under Civil Service law, which, in the official (as opposed to labor) service, means an appointment pursuant to G.L.c.31, §§6 or 7, following competitive examination. See G.L.c.31, §1. A “civil service employee” is different from a “provisional employee” who is appointed without having passed an examination. Id. See also Pease v. Department of Revenue, 22 MCSR 284; Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009).

Second, Section 15 also seems to require that a provisionally appointed “civil service employee” be “in one title” below the “next higher title” into which the appointment is made; if the promotion involves advancement other than the “next higher title”, the provisional promotion requires the appointing authority to provide, and HRD to approve, “sound and sufficient” reasons for the promotion.

Therefore, only an employee with permanency in a civil service title may be provisionally promoted under Section 15, either from the “next lower title” or by skipping a title. The plain meaning of Section 15 allows only “civil service employees” to be provisionally promoted. In this case, since it is undisputed that Nicholls does not

hold civil service permanency in any title, and Section 15 is the applicable statute here, Nicholls' provisional promotion was not lawful under civil service law.

The Commission recognizes that the "provisional" landscape now operates under somewhat fictitious assumptions, but the statutory language still must be enforced as written to the extent possible. Since it is not possible for the Commission to envision the entire universe in which appointing authorities currently employ "provisional" appointments and promotions, out of necessity, the Commission intends to move cautiously in this area. Thus, for now, the Commission is not disposed to invalidate the promotion in this particular case that was erroneously filled by a candidate without any civil service permanency.

By such holding, the Commission does not intend to leave the Appellant, and other similarly-situation civil service employees, without any recourse, however. In a series of recent cases, the Commission has held that an appellant who has appealed an unlawful provisional promotion, such as the one here, is entitled to a full Commission hearing to determine if the appellant was qualified for the position at issue. If the Commission finds for the appellant, then the Appointing Authority will be ordered to put such appellant in line for at least one additional consideration for the future selection for the promotion in question. See also Pease v. Department of Revenue, 22 MCSR 284; Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009). Thus, the Appellant's full hearing on September 9, 2010 was to determine whether he was qualified for the position of BERS C, Supervisor of the North Shore Office.

The Appellant argues that he is qualified for the BERS C position citing his favorable performance evaluations, the fact that he was deemed by the central office to possess the minimum entrance requirements. The Appellant is mistaken. The determination of the qualifications necessary to meet the minimum entrance requirements of a particular job is distinct from the determination as to whether any particular candidate actually *possesses* the necessary qualifications for appointment.

The Appellant also argues that the assessment of his interview performance was not accurate and that the interview summary sheets may have been tampered with to ensure that he received a less favorable rating than the selected candidates.

The Department, arguing that the Appellant is not qualified for the supervisory position, cites certain answers to interview questions that were problematic regarding customer service, their impression that he was too “self assured” or “arrogant”; and that, as a supervisor, he would not be approachable or empathetic to his employees. They also cited concerns that the Appellant had an excessive number of outstanding tasks on an automated case tracking system, questioning whether employees would respect a supervisor who couldn’t keep up with his own work. Finally, the Department rejects any suggestion that the Appellant’s application material was tampered with.

For the reasons cited in the findings, I found Ms. Griffin and Mr. Bastarache to be good witnesses and I credit their testimony. I do not believe they had any ulterior motive for concluding that the Appellant was not qualified for the supervisory position, including his many years of service as a regional director for SEIU Local 509. While the Appellant raised this as a possible motive for his non-selection, he did not provide any evidence to substantiate this claim. Moreover, the testimony of Griffin and Bastarache was consistent

with my own observations of the Appellant's demeanor and presentation. With the full knowledge that the Department had deemed him "too self assured" or "arrogant", he testified before the Commission that, "I am intelligent. I test high. I have a high I.Q. Some people are not comfortable with that." He then pointed to his score of 84 on a civil service examination taken approximately fifteen (15) years ago as evidence of his superior test-taking ability. It is reasonable that these types of responses, if offered at an interview, would give two veteran DTA managers pause regarding whether the Appellant was qualified to serve as an effective supervisor and motivate subordinate employees. The Appellant's testimony before the Commission that recently selected candidates were all "women with the same height and demeanor" only confirmed to me that the Department's version of the Appellant's interview performance was likely more accurate than the Appellant's

The Department was also justified in assessing the Appellant's views on customer service when determining whether he was qualified for the supervisory position in question. As referenced in the findings, Ms. Griffin struck me as a seasoned DTA manager that values superior customer service. Here, based on the interview responses, she concluded that the Appellant, as a supervisor, would not meet the high standards she has set for her employees regarding customer service. In response, the Appellant provided written performance evaluations over a two-year period from a supervisor by the name of Joseph Malone that included high marks for his customer service abilities. During my tenure in state government, I have been required to prepare and /or review hundreds of employee performance evaluations. Rather than providing a factual, objective assessment of the Appellant's performance, Mr. Malone's evaluations of the

Appellant struck me more as an exercise in stringing together a series of superlatives including an eyebrow-raising reference to the Appellant's supernatural abilities. After a careful review of the performance evaluations, I give more weight to the interview observations of Ms. Griffin and Mr. Bastarache regarding the issue of customer service than I do to the written evaluations submitted by the Appellant.

I was not convinced by the Appellant's testimony that there was any justification for the over 200 overdue tasks attributed to him at the time of the interview, as opposed to approximately ten overdue tasks attributed to the selected candidates. The Department was on firm ground in considering that information when determining whether the Appellant, and all other candidates, were qualified for the supervisory position in question.

Finally, the Appellant has failed to show that his application materials were tampered with as alleged.

For all of the above reasons, I conclude that the Department was reasonably justified in determining the Appellant was not qualified for the BERS C supervisory position in the North Shore office. The Appellant's request for relief under Chapter 310 of the Acts of 1993 is denied and his appeal under Docket No. G2-09-360 is hereby *dismissed*.

As to all other Department civil service positions that the Department fills "provisionally" in the future, until such time as competitive examinations again become available, the Department must specify, in advance, whether the position is being posted as a provisional appointment or a provisional promotion and comply with the applicable provisions of Section 12 or Section 15 as the case may be. In particular, if the position is posted as a provisional *promotion*, it must limit selection to permanent civil service

employees and, if there is a qualified civil service employee in the next lower title, that candidate must be selected for the provisional promotion.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein, Commissioners [McDowell – not participating]) on September 23, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:

Thomas Foster (Appellant)

Daniel LePage, Esq. (for Appointing Authority)