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COMMONWEALTH OF MASSACHUSETTS

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SUPERIOR COURT  
CIVIL ACTION  
NO. 2010-04020

2014 JAN 31 P 2: 52

COMMONWEALTH OF MASS  
CIVIL SERVICE COMMISSION

THOMAS FOSTER,

Plaintiff,

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION and MASSACHUSETTS  
DEPARTMENT OF TRANSITIONAL ASSISTANCE,  
Defendants.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION  
FOR JUDGMENT ON THE PLEADINGS AND DEFENDANTS' MOTION TO  
DISMISS

The plaintiff, Thomas Foster, has appealed a September 23, 2010 decision of defendant Massachusetts Civil Service Commission ("Commission") finding that co-defendant Massachusetts Department of Transitional Assistance ("Department") was reasonably justified in determining that plaintiff was not qualified for a position as a benefits eligibility referral social worker, level C ("BERS C") in the Department's North Shore office. For the below reasons, this Court ALLOWS defendants' Motion to Dismiss (pleading # 6) and DENIES plaintiff's motion for judgment on the pleadings (pleading #7).

Relevant Facts

The following facts appear to be undisputed.

In April 2009, the Department posted a promotional opportunity for internal candidates for the position of BERS C at the Department's North Shore office. These were both provisional promotions, because there was no eligible list from which the

Department could have requested a certification. Foster applied for a promotion.

A. 439, 448-449.<sup>1</sup>

A Department interview panel determined the qualities that a BERS C level supervisor required, and interviewed all eligible candidates, asking each candidate the same questions. The panel then completed an Interview Assessment Form which assigned scores to all candidates, and recommended the two candidates who had scored the highest based on the qualities that the panel had identified as necessary for the job. Foster did not receive one of the two highest scores, and was not selected for promotion. A. 183, 206-211, 440-443.

One of the promoted employees did not have permanent civil service status, and her promotion to the position of BERS C was in violation of applicable law. A. 442, 450-451. Foster appealed his non-selection to the Commission. On September 23, 2010, the Commission's chairman issued a written decision affirming the Department's decision and dismissing Foster's appeal. See A. 436-455. Foster filed this lawsuit in Superior Court on October 22, 2010.

At the January 15, 2014 hearing before this Court, Foster admitted that he received a promotion to the position of BERS C in October 2010, one week before he filed suit, and that he is receiving the same salary he would have received if he had been promoted in 2009. Foster argues, however, that he is entitled to other relief, including making his promotion retroactive to 2009.

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<sup>1</sup> "A. \_\_\_" refers to the administrative record on appeal.

### **The Legal Standard**

Pursuant to G.L. c. 30A, § 14(7), this Court may reverse, remand, or modify an agency decision only if the decision is "based on an error of law, unsupported by substantial evidence, unwarranted by facts found on the record as submitted, arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Massachusetts Inst. of Tech. v. Department of Pub. Utils., 425 Mass. 856, 867-868 (1997). Foster bears the burden of demonstrating the invalidity of the Commission's decision. Merisme v. Board of Appeal on Motor Vehicle Liab. Policies and Bonds, 27 Mass. App. Ct. 470, 474 (1989). In reviewing an agency decision, the Court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it" by statute. G.L. c. 30A, § 14(7) (1997); Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 420 (1992); Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n, 401 Mass. 713, 721 (1988). The reviewing court may not substitute its judgment for that of the agency. Southern Worcester County Regional Vocational Sch. v. Labor Relations Comm'n, 386 Mass. 414, 420-21 (1982), citing Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n, 372 Mass. 152, 154 (1977).

### **Application of the legal standard to Foster's appeal**

Foster correctly notes that one of the two promoted employees was not eligible for the BERS C position, because she was not a civil service employee, and that as a civil service employee he is entitled to challenge the promotion. The Commission found that Foster was not aggrieved by the promotion under G. L. c. 31,

§ 15 because he was not “qualified” for the position. A. 454. Technically speaking, the Department found Foster to be *less* qualified than the candidates who were selected, not unqualified. While the Court does not believe that this difference is sufficient to invalidate the Commission’s decision, it need not reach the issue, because Foster’s appeal must be dismissed pursuant to Mass. R. Civ. P. 12(b)(1) as moot.

The Appeals Court has ruled that the “remedy to be accorded a plaintiff [in a civil service commission matter] is a matter within the commission’s discretion and will rarely be overturned.” Mulhern v. Civil Service Commission, 57 Mass. App. Ct. 920, 920 (2003). See also Hester v. Civil Service Commission, 78 Mass. App. Ct. 1109 (2010) (unpublished). The Commission has ruled that the remedy for a civil service employee who challenges an unlawful provisional promotion is a hearing to determine if the employee was qualified for the position. See A. 451. If the employee is qualified, the appointing agency must “put such [employee] in line for at least one additional consideration for future selection for the promotion in question.” *Id.* (citations omitted). Foster has already received far more than the remedy to which he is entitled. Beyond merely getting one more chance for a promotion to the position of BERS C, he was promoted to the job one week before filing this lawsuit.


Clearly, this is not the rare case in which the Superior Court should order relief that goes beyond the remedy devised by the Commission. The Commission’s chairman conducted a thorough hearing and wrote a detailed, well-reasoned opinion. Two of the three members of the panel who considered Foster’s

application testified, and the hearing officer found them both to be credible in describing why the Department selected two other candidates over Foster for the BERS C positions. Both selected candidates scored more favorably than did Foster on the interview assessment form. A. 441-442. Foster's organizational skills were deemed to be deficient because he had more than 200 tasks which were overdue at the time of his interview. A. 454. The panelists found Foster to be arrogant and overly confident in his abilities, which created concerns about his ability to relate to the employees that he would be required to supervise. A. 443. While Foster takes issue with these assessments, clearly they were rational grounds for a promotion decision. Moreover, Foster received the promotion he sought less than one month after the Commission's decision. These are not the extraordinary circumstances in which this Court should reject the remedy that the Commission has provided.

**Conclusion and Order**

For the above reasons, the defendants' Motion to Dismiss (pleading # 6) is **ALLOWED**, plaintiff's motion for judgment on the pleadings (pleading # 7) is **DENIED**, and the decision of the Commission is affirmed.

Dated: January 27, 2014

  
Robert L. Uilmann  
Justice of the Superior Court