

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

THOMAS FOSTER,
Appellant

v.

G1-04-282

DIVISION OF MEDICAL ASSISTANCE,
Appointing Authority

Appellant's Representative:

Fred Trusten
Local 509
400 Talcott Avenue
Watertown, MA 02472

Respondent's Representative:

Pamela Fitzpatrick, Esq.
Executive Office of Health and
Human Services
600 Washington Street
Boston, MA 02111

Commissioner:

John J. Guerin, Jr.

DECISION

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Thomas Foster (hereinafter "Appellant"), filed this appeal claiming that the Respondent, the Division of Medical Assistance (hereinafter "DMA") as Appointing Authority, bypassed him when it did not recall him to the position of Benefits Eligibility & Referral Social Worker A/B

(hereinafter “BERS A/B”). The Appellant filed a timely appeal. A hearing was held on October 10, 2006 at the offices of the Civil Service Commission (hereinafter “Commission”). Witnesses were not sequestered. One audiotape was made of the hearing. Following the hearing, Proposed Decisions were submitted by both parties as instructed.

FINDINGS OF FACT:

Based upon the documents entered into evidence (Joint Exhibits 1 – 3) and the testimony of the Appellant, Executive Office for Health and Human Services Undersecretary and Human Resources Liaison Lisa Pace-Tucker, Assistant DMA Director Gail Torla and DMA-Tewksbury Team Manager Michael Morgan, I make the following findings of fact:

1. The Appellant was tenured in the position of BERS A/B with a civil service seniority date of July 1, 1994 (Exhibit 2).
2. On October 4, 2002, the Appellant was laid off from the position of BERS A/B at the Department of Transitional Assistance (hereinafter “DTA”) (Id.).
3. On February 16, 2003, the Appellant was hired by the Department of Revenue (hereinafter “DOR”) as a provisional Child Support Enforcement Specialist A/B (Exhibit 3).
4. The Respondent provides health care insurance to citizens of the Commonwealth. The majority of the clients that the Respondent provides

services to are impoverished, uneducated and/or disabled (Testimony of Ms. Torla).

5. In or about October 2003, the Respondent called for the BERS A/B Civil Service eligibility list in order to fill three positions at its Tewksbury location. Although the requisition was for three positions, the Respondent only filled two positions (Exhibit 3).
6. The Civil Service list was signed, pursuant to G.L. c. 31, § 25, by the Appellant and four other individuals as to their willingness to accept employment (Id.).
7. The Respondent interviewed all five individuals who signed the list. The interviews were conducted by Ms. Torla, Mr. Morgan and Brian McGuiness. The interviewees were each asked the same 15 questions (Exhibit 3 and Testimony of Ms. Torla and Mr. Morgan).
8. Based on the responses provided by the interviewees, the Respondent selected Sylvia Soberon and Mayra Vazquez for the positions. Both Ms. Soberon and Ms. Vazquez had civil service seniority dates of July 1, 1994 (Id.).
9. Two other candidates for the positions, Marybeth O'Connell and Lorelei Fastiggi, withdrew their names from consideration (Exhibit 3).
10. The Appellant was not selected for the position based on some responses he provided at the interview, as well as in a follow-up telephone conversation with Ms. Torla. Specifically, he indicated that working the schedule of 8:45 a.m. to 5:00 p.m. would be problematic for him in that he needed a work

schedule that provided flexibility (Exhibit 2 and Testimony of Ms. Torla and Mr. Morgan).

11. In response to a question regarding the Appellant's strengths and weaknesses, he indicated to the interview team that one of his weaknesses was that he was "too intelligent" (Exhibit 2 and Testimony of Ms. Torla).
12. In response to a question involving dealing with a mentally challenged individual, the interview team did not feel that the Appellant conveyed the level of compassion that was exhibited by the other applicants. Mr. Morgan testified that the Appellant's answer was "businesslike" when he (Mr. Morgan) was seeking a more "compassionate" response from the interviewees on that question (Testimony of Mr. Morgan).
13. Based on the clientele to whom the Respondent provides services and the Appellant's responses at the interview regarding the servicing of these clients, the interview team concluded that the Appellant would not be an appropriate candidate for the position (Exhibit 3 and Testimony of Ms. Torla and Mr. Morgan).
14. The interview team felt that the answers provided by Ms. Vazquez and Ms. Soberon, coupled with their references, made them the better candidates for the position (Testimony of Ms. Torla and Mr. Morgan).
15. Upon completion of the interview process, a letter was sent to the Human Resources Division (hereinafter "HRD") advising it of the selected candidates. Included with the letter were the signed Certification form, a Certification and Report Supplement form and a list of the candidates

interviewed with justifications for selection/non-selection (Exhibit 3 and Testimony of Ms. Pace-Tucker).

16. In December 2004, the Respondent contacted the Human Resources unit for the Executive Office of Health and Human Services in order to fill two BERS A/B positions at its Tewksbury location. At this time, the Respondent was not provided with a Civil Service eligibility list. The vacancies were instead posted on the HRD Commonwealth Employment Opportunities web page in accordance with the Commonwealth/Alliance, SEIU Local 509 collective bargaining agreement (Exhibit 2 and Testimony of Ms. Pace-Tucker).
17. The Appellant applied for the posted positions (Exhibit 2 and Testimony of Ms. Torla).
18. Based on his responses at the recent, previous interview and the determination that he was not an appropriate candidate for the DMA BERS A/B position, the Respondent determined that it was not necessary to conduct another interview with the Appellant (Testimony of Gail Torla).
19. The Respondent offered the positions to Joan St. Cyr and Michelle Trainor. Both Ms. St. Cyr and Ms. Trainor are provisional employees (Exhibit 3).
20. On or about May 2, 2004, the Appellant was recalled as a BERS A/B by the Department of Transitional Assistance (Id.).
21. The positions of BERS A/B and Child Support Enforcement Specialist A/B are in the same pay grade (Id.).

22. I find that the Appellant's testimony revealed a person who seemed overly interested in what was best for him. His demeanor was confident, bordering on cocky. His prevailing attitude provided a glimpse of the self-interest that doomed his interview. This was, in part, evidenced by his attempt to explain one of his interview answers by stating that one of his *strengths* is intelligence (not a weakness as he believed the interviewers to have "misinterpreted" his answer) and one of his "weaknesses" is providing "overly detailed" work product and answers to questions. I find that this attempt to clarify the answer only succeeded in perpetuating his image of having an inflated sense of self (Testimony and Demeanor of Appellant).
23. I find that Ms. Pace-Tucker exhibited a professional demeanor. She was very knowledgeable about the subject matter and her answers to examination were clear, detailed and frank. Her twenty-three (23) years of experience in state government – thirteen (13) of which were with the DMA - were evident in her testimony. I assign a great deal of credibility to her testimony as she did not attempt to gloss over or avoid addressing the reasons no second interview was given to the Appellant (Testimony and Demeanor of Ms. Pace-Tucker).
24. I find that Ms. Torla's testimony was very thoughtful and she provided measured, reasoned answers to examination. Her twenty-two (22) years of experience with the DMA clearly lended confidence to her demeanor and the clarity of her responses. She had an adequate recall of the interviews but it was notable that she especially remembered, with particular clarity

three (3) years hence, the Appellant's comment that one of his weaknesses was being "too intelligent." She very credibly explained that this comment raised a "red flag" in her mind as to the suitability of the Appellant for the position (Testimony and Demeanor of Ms. Torla).

25. I find that Mr. Morgan's demeanor and testimony displayed the characteristics of professionalism and command of subject matter which would be consistent with thirty-two (32) years of state employment. He credibly explained that he was looking for a sense of compassion from certain answers that he did not receive from the Appellant. Mr. Morgan, as the other witnesses, did not seek to disparage the Appellant and there was no evidence presented or to be gleaned from their testimony that they had any non-merit based motives for not selecting the Appellant. Mr. Morgan made clear that the Appellant's answer regarding dealing with a mentally challenged individual was not technically wrong but was "businesslike" and thus lacked compassion (Testimony and Demeanor of Mr. Morgan).

CONCLUSION:

The Respondent contends that it did not bypass the Appellant when it selected Ms. Soberon and Ms. Vazquez nor when it hired Ms. St. Cyr and Ms. Trainor. In the context of reviewing a bypass decision by an Appointing Authority, the role of the Civil Service Commission is to determine "whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken

by the Appointing Authority.” City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 304 (1997). Town of Watertown v. Arria, 16 Mass. App. Ct. 331 (1983). McIsaac v. Civil Service Commission, 38 Mass. App. Ct. 473, 477 (1995). Police Department of Boston v. Collins, 48 Mass. App. Ct. 411 (2000). City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728 (2003). An action is “justified” when it is “done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law.” City of Cambridge at 304, quoting Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 211, 214 (1971).

In order to show that an Appointing Authority’s decision was not justified, an Appellant must demonstrate that the stated reasons of the Appointing Authority were untrue, applied unequally to the successful candidates, were incapable of substantiation, or were a pretext for other impermissible reasons. MacPhail v. Montague Police Department, 11 MCSR 308 (1998) *citing* Borelli v. MBTA, 1 MCSR 6 (1987). In the task of selecting public employees of skill and integrity, moreover, Appointing Authorities are invested with broad discretion. City of Cambridge at 304-5; Goldblatt v. Corporate Counsel of Boston, 360 Mass. 660 (1971). This tribunal cannot “substitute its judgment about a valid exercise of discretion based on merit or policy considerations by an Appointing Authority.” City of Cambridge. at 304.

The Appointing Authority is inherently authorized to interview candidates by the language of G. L. c. 31 s. 25. Flynn v. Civil Service Commission, 15 Mass. App. Ct.

206, 208 (1983). The purpose of the interview process is to allow the Appointing Authority to get a first-hand feel for the candidate's demeanor and ability to handle scenarios that may arise in the scope of employment in that position. Because the foundation of this process is personal interaction, the interview panel must possess some degree of discretion to allow its subjective interpretation of the candidate's responses and behaviors to affect their decisions. Burns v. Sullivan, F. 2d 99, 104 (1980). Spicuzza v. Department of Corrections, 12 MCSR 187 (1999). Hebb v. Town of West Bridgewater & Department of Personnel Administration, 6 MCSR 43 (1993).

The Appellant, Ms. Soberon and Ms. Vazquez each had a civil service seniority date of July 1, 1994. In addition to identical seniority dates, the selected candidates were deemed to be better qualified for the position based on their interview responses. The interview team felt that the Appellant provided disturbing answers to interview questions regarding his ability to work the required hours, his level of compassion and his perceived "weaknesses". In contrast, the interview team did not have similar concerns with the selected candidates' responses. In sum, the team felt that the Appellant would not be a good fit for their clients or other staff members. The Commission has upheld these reasons in prior decisions as proper exercises of the Appointing Authority's (and thus the interview panel's) discretion in selecting one candidate over another. See McCarthy v. Boston Fire Department, 7 MCSR 262 (1994) (where successful candidate demonstrated superior relevant technical knowledge over the Appellant). Elaine Schivek v. Registry of Motor Vehicles, 13 MCSR 71 (2000) (where the Appellant gave "bizarre, unsettling" answers to the panel and demonstrated a lack of familiarity with software and

other duties crucial to the position). Alvin LaRoche v. Department of Correction, 13 MCSR 160 (2000) (successful candidate demonstrated greater leadership skills, knowledge of the job and professionalism than the Appellant).

Furthermore, the Respondent did not violate the law when it hired provisional employees. Pursuant to M.G. L., c 31, s 12, an Appointing Authority may appoint or retain a provisional employee in a position for which a suitable eligible list exists when:

“... the list contains the names of less than three persons who are eligible for and willing to accept employment and the Appointing Authority submits a written statement to the Administrator that such person whose name was certified and who reported for an interview was interviewed and considered for appointment and states sound and sufficient reasons, satisfactory to the Administrator, for not making an appointment from among such persons.”

In this case, the Appellant was interviewed less than two months before the provisional positions were posted. At the time of the initial interviews, there were five individuals who signed the certification. Two of the individuals were offered and accepted the position. Two of the individuals withdrew their applications from consideration. The Appellant was interviewed for the position and was given full and complete consideration. It was determined that he was not an appropriate candidate for the position. At the time of the first bypass, the Respondent notified the Administrator of its decision to not select the Appellant and provided written justification to support its decision. At the time of the second posting, the list contained only one person who was eligible for and willing to accept the appointment, the Appellant.

For all of the above stated findings of facts and conclusion, the Commission determines that by a preponderance of the evidence the Respondent acted with reasonable justification in bypassing the Appellant. Therefore, the appeal on Docket No. G1-04-282 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Guerin, Marquis and Bowman, Commissioners) [Taylor, Commissioner absent] on March 22, 2007.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c 30A s.14(1) for the purpose of tolling the time for appeal.

Under the provisions of M.G.L. c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Fred Trusten,, Local 509, SEIU
Pamela Fitzpatrick, Esq.