

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

MARTIN GLAZER,
Appellant

v.

G-01-1323

DEPARTMENT OF REVENUE,
Respondent

Appellant's Attorney:

Pro Se
Martin Glazer
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Newton, MA 02459
(617) 887-6161

Respondent's Attorney:

Michael C. Rutherford, Esq.
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Commissioner:

John E. Taylor

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Martin Glazer (hereafter "Glazer" or "Appellant") is appealing an action taken by the Department of Revenue (hereafter "DOR" or "Appointing Authority") to bypass him for a provisional promotion to the position of Tax Auditor III within DOR's Legal Division. A hearing was held at the offices of the Civil Service Commission on December 15, 2004.

The Appointing Authority introduced 12 exhibits into evidence; the Appellant introduced 8

exhibits into evidence. At the request of DOR, a protective order was issued for Appointing Authority Exhibits 4, 5, 9 and 10. These exhibits are not to be photocopied or exhibited and all copies will be returned to DOR upon the conclusion of this matter. Two tapes of the hearing were made. Based upon the documents entered into evidence and the testimony of the following witnesses:

- Lawrence Modestow, Bureau Chief, Department of Revenue;
- Janet Monahan, Personnel Analyst IV, Department of Revenue;
- David Cella, Deputy Director, Department of Revenue;
- Martin Glazer, Appellant;

I make the following findings of fact:

FINDINGS OF FACT:

1. The Appellant is challenging a provisional promotion to a Tax Auditor III position in the Department of Revenue's Appeal and Review Unit within the Legal Division, located in Boston, MA.
2. The position was filled *provisionally* pursuant to an internal posting and interview process in which Mr. David McCartan was recommended for the promotion. (Appointing Authority Exhibit 1)
3. At the time of the provisional promotion, there was no Tax Auditor civil service eligible list in existence.
4. The Appellant is a permanent Tax Auditor II.
5. David McCartan, the employee chosen for the provisional promotion, held a permanent civil service title of Tax Auditor I and was serving provisionally as a Tax Auditor II.
6. The provisional promotional posting was initially restricted to those employees who had taken and passed the civil service examination for Tax Auditor III, which was most recently administered in 1988.

7. Both Mr. McCartan and the Appellant took and passed the Tax Auditor III exam in 1988. However, at the time the position was posted, there was no longer an active civil service list for the position of Tax Auditor III.
8. The functional job title of the promotional position is that of a hearing officer in the Legal Division's Appeal and Review Unit. (Appointing Authority Exhibit 2)
9. The Appeal and Review Unit conducts administrative hearings from taxpayer appeals that challenge Notice of Assessments issued by the Department's Audit Division as well as hearings required as part of the Tax Abatement process.
10. The Tax Auditor III/Hearing Officer position requires a high degree of technical knowledge of tax law and the ability to hear and decide appeals on a variety of tax cases including: sales and use tax; corporate excise tax; personal income tax; partnership tax and estate tax.
11. The Tax Auditor III/Hearing Officer position also requires advanced legal writing skills; the ability to write quality "Letters of Determination", an acute attention to detail as well as the ability to conduct legal research on complicated tax issues.
12. Both Mr. McCartan and Mr. Glazer were interviewed by Lawrence Modestow, Esq. and David Cella, Esq. for the Tax Auditor III/Hearing Officer position.
13. At the time of the interviews, Attorney Modestow was the acting chief of the Appeal and Review Unit. Attorney Modestow had been with the Department and in the Appeal and Review Unit since 1988. (Appointing Authority Exhibit 12). Attorney David Cella had been with the Department since 1993 and had been with the Appeal and Review Unit since 1994.
14. David McCartan, prior to the provisional promotion, was the senior hearing officer in the Appeal and Review Unit and had been a hearing officer in the Unit since 1993.
15. Prior to his promotion, David McCartan was handling the most complex cases in all tax types and possessed a superior writing ability. (Appointing Authority Exhibits 9 and 10).

16. Prior to his promotion, David McCartan was performing as a hearing officer in the Appeal and Review Unit at an “Outstanding” performance level. (Appointing Authority Exhibits 4 and 5).
17. Mr. Glazer, at the time of his application, was working in the Customer Service Bureau of the Department’s Audit Division.
18. Attorneys Modestow and Cella both testified credibly that Mr. Glazer did not demonstrate an ability to perform the duties of the position.
19. Mr. Glazer’s writing sample (Appointing Authority Exhibit 7) “did not demonstrate an ability to frame or analyze a legal issue, fundamental elements of a properly constructed legal memoranda or letters of determination.” (Appointing Authority Exhibit 8).
20. Mr. Glazer, by his own admission, acknowledged that his knowledge and experience with these tools (tax research tools) is limited (Appointing Authority Exhibit 8)
21. Attorneys Modestow and Cella did not recommend Mr. Glazer for the position. (Appointing Authority Exhibit 8)
22. Attorney Modestow concluded in not recommending Mr. Glazer that, “Overall, we have no doubt that Marty performs his duties in an exemplary fashion, as his EPRS review indicates, but we are not convinced that he would meet many of the EPRS requirements of a Hearing Officer in A & R.” (Appointing Authority Exhibit 8).
23. During the hearing, Mr. Glazer was observed by this Commissioner to be rambling and to not specifically address the issue as to why he and not Mr. McCartan should have been appointed to the position of Tax Auditor III/Hearing Officer.
24. Attorneys Modestow and Cella recommended Mr. McCartan for the Tax Auditor III/Hearing Officer position because he is “clearly the best qualified.” (Appointing Authority Exhibit 8)

25. Consistent with standard operating procedure, the Department of Revenue submitted a “Flag Release Request” to the Human Resources Division for the provisional appointment of, among others, David McCartan to the Tax Auditor III position. (Appointing Authority Exhibit 11).
26. The position was filled provisionally by David McCartan effective April 22, 2001.

CONCLUSION

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). G.L. c. 32, s. 2(b) requires that such cases be determined by a preponderance of the evidence.

During the process involved in this case, the Appellant, who is a permanent Tax Auditor II, which was the next lower title to the promotional position of Tax Auditor III, did not demonstrate an ability to perform the duties and responsibilities of the Tax Auditor III position. Mr. Glazer’s writing sample did not demonstrate the proficiency required for the position in question. During the hearing before the Commission, Mr. Glazer admitted that his most recent experience in using tax research tools had been limited to rudimentary tasks such as retrieving a case from the Department’s archives.

Mr. Glazer also acknowledged that his knowledge and experience with tax research tools was limited. In his current position, which Mr. Glazer held at the time of the promotional opportunity, Mr. Glazer has limited opportunities to write legal tax memoranda or letters of determination. After listening to the Appellant's testimony at the hearing, this Commissioner found the Appellant to be evasive and rambling during his own direct testimony and during cross-examination.

David McCartan, the applicant chosen for the provisional promotion, was a permanent Tax Auditor I, serving provisionally as a Tax Auditor II at the time of the posting for the provisional promotion to Tax Examiner III. He had passed the last Tax Auditor III exam. Mr. McCartan was performing the duties and responsibilities of the Tax Auditor II position with a performance rating of "Outstanding." Mr. McCartan had the necessary qualifications for the position of Tax Auditor III and the Appellant did not.

G. L. c. 31, § 15 allows an Appointing Authority to make a provisional promotion in one title to the next higher title in the same departmental unit if a suitable list did not exist. "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..." *Id.* (emphasis added)

In this matter, there was no active civil service list for the position of Tax Auditor III. Hence, DOR was required to fill the position via a provisional promotion. The Appellant in the instant case, although holding permanency in the next lower title of Tax Auditor II, was not qualified for the position of Tax Auditor III. The chosen candidate, Mr. McCartan, had superior qualification for the position of Tax Auditor III.

DOR has shown that it was in compliance with G.L. c. 31, § 15 as it relates to provisional promotions and has shown, through a preponderance of the evidence, that it had sound and sufficient reasons for promoting Mr. McCartan to the Tax Auditor III position provisionally.

Finally, the Commission reiterates its longstanding admonishment to all appointing authorities and the state's Human Resource Division to end the unhealthy and improper reliance on provisional appointments and promotions. As the Commission has noted before, the solution, particularly regarding promotions, need not require the establishment of cost-prohibitive and often outdated paper-and-pencil tests. Rather, the solution can include a selection process for permanent promotions which emphasizes past performance, managerial evaluations and candidate interviews. (See Holt v. Department of Revenue and DPA, CSC Case No. G-2463 (1994) & Porio, Shea and Trachtenberg, CSC Case Nos. D-02-759, D-02-763 and D-02-715 (2006)).

For all of the above reasons, the Appellant's appeal under Docket No. G-01-1323 is hereby *dismissed*.

John E. Taylor, Commissioner

By vote of the Civil Service Commission (Goldblatt, Chairman; Bowman, Guerin, Marquis and Taylor, Commissioners) on January 25, 2007

A True Record. Attest:

Commissioner

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

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.

Notify:

Martin Glazer

Michael Rutherford, Esq.

John Marra, Esq.