

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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**VICTOR MEDEIROS and
FRANCIS POLLACK, JR.,**
Appellants

**CASE NOS: G2-08-18
G2-08-19**

**DEPARTMENT OF MENTAL
RETARDATION,**
Respondent

Appellant's Attorney

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Hearing Officer:

John J. Guerin, Jr.¹

DECISION

Pursuant to the provisions of G.L.c.31,§2(b), the Appellants, Victor Medeiros and Francis Pollock (Mr. Medeiros, Mr. Pollock or Appellants), seek review of the decision

¹ John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision, including the referenced credibility assessments, which were made by Mr. Guerin.

of the Respondent, Department of Mental Retardation (DMR) as Appointing Authority, to not select them for the position of Mental Retardation Worker IV (MRW IV). The appeals were timely filed. A hearing was held on April 25, 2008. The witnesses were not sequestered. Two (2) audiotapes were made of the hearing. At the conclusion of the hearing, the record was held open until May 30, 2008 to allow the Human Resources Division (HRD) to review its records to resolve ongoing disputes concerning Mr. Pollock's civil service status and the process surrounding the revocation of the MRW IV eligible list at issue. At the request of the Commission, further submissions on issues concerning provisional promotions were received from HRD, DMR and the Appellant, on April 6, 2009, April 14, 2009 and April 17, 2009, respectively.

FINDINGS OF FACT

Sixteen (16) documents were entered into evidence (Joint Exhibits 1-16). Eight (8) stipulations of fact were agreed to by the parties prior to the hearing. An additional stipulation was reached at the hearing, namely that the eligible list generated by the examinations at issue in these appeals was revoked on June 30, 1997. On May 30, 2008, HRD submitted a total of thirteen (13) additional exhibits and the affidavit of Sally McNeely, Director of the Civil Service Unit (Ms. McNeeley). Based on the exhibits, the stipulations, the affidavit of Ms. McNeeley, and the testimony of:

For the Appointing Authority

- Kathleen Doyle, Personnel Officer (Ms. Doyle)
- Kim Pariseau, Assistant Unit Director (Ms. Pariseau)

For the Appellants

- Mr. Pollack
- Mr. Medeiros

I make the following findings of fact:

1. The Appellants are currently employed as Mental Retardation Worker IIIs (MRW IIIs) at the DMR's Wrentham Developmental Center (Wrentham). Mr. Medeiros has been an MRW III since 1986. Mr. Pollack has been an employee of DMR since 1982. He has held the MRW III title since 1987. (*Testimony of Appellants*)

2. Wrentham is subdivided, in part, into three (3) residential units. Employees in each residential unit may be assigned to one of three (3) shifts. (*Testimony of Ms. Pariseau*)

3. Mr. Medeiros is currently assigned to Unit 3 on the first shift. He has held this assignment since 1987. Mr. Pollock is currently assigned to Unit 2 on the third shift. He has held this assignment since 1995. (*Testimony of Appellants*)

4. The vacancy in question was for an MRW IV position in Unit 2 on the first shift. (*Exhibit 3*)

5. As of the date of the MRW IV vacancy was announced, Omer Tessier (Mr. Tessier) was an MRW III in Unit 2 on the first shift. (*Testimony of Ms. Pariseau*)

6. The Appellants were initially appointed to the position of MRW III on a provisional basis. (*Testimony of Appellants*)

The 1989 MRW III/MRW IV Examinations

7. On June 24, 1989, HRD administered promotional examinations for MRW III and MRW IV positions. (*Stipulated Fact*)

8. At the time of the examination, the Appellants held the MRW III title on a provisional basis. (*Testimony of Appellants*)

9. The MRW III and MRW IV promotional examinations were contained in one examination booklet. To complete the MRW III examination, applicants had to answer a

series of questions located in the first half of the examination. To complete the MRW IV examination, applicants had to answer the MRW III questions and a series of MRW IV questions located in the second half of the examination (*Affidavit of Ms. McNeeley*)

10. The Appellants each completed both portions of the exam. (*Testimony of Appellants*)

11. To sit for the aforementioned examinations, applicants had to complete separate applications for each examination. (*Affidavit of Ms. McNeeley*)

12. HRD records reflect that Mr. Pollack applied to take the MRW IV examination, but there was no record that indicated that he applied for the MRW III examination (*HRD Exhibit D*)

13. HRD records reflect that Mr. Medeiros applied to take both the MRW III and the MRW IV examinations. (*HRD Exhibit F*)

14. Mr. Pollock received notice from HRD (*Exhibit 1*) indicating that he had passed the promotional examination for MRW IV but which did not indicate that he had also passed the MRW III examination. (*Stipulated Fact*)

15. Mr. Medeiros received notice from HRD (*Exhibit 2*) indicating that he passed the promotional MRW III and MRW IV exams. Mr. Medeiros received two separate notifications: one for the MRW III exam, and one for the MRW IV exam. (*Stipulated Fact*)

16. On October 20, 1989, HRD established the MRW III and MRW IV eligible lists from the aforementioned examinations. (*Affidavit of Ms. McNeeley*)

17. On October 15, 1990, Mr. Pollock wrote to Mark Chavanni (Mr. Chavanni) of HRD notifying him of his (Mr. Pollack's) lack of an MRW III score. The letter asked if "rectification could be brought to the situation . . ." (*Exhibit 13*)

18. Mr. Pollack testified at the Commission hearing that he subsequently had a conversation with Mr. Chavanni, who told Mr. Pollack not to be concerned because he was certified to be considered for a MRW IV examination so the lack of a MRW III examination score "did not matter". (*Testimony of Mr. Pollack*)

19. Mr. Pollack never received a score for the MRW III examination and there is no indication that he pursued the matter further until the instant appeal. (*Testimony of Mr. Pollack*)

20. I found Mr. Pollock's testimony that he had actively sought to resolve the exam score matter with HRD to be credible. It is reasonable to conclude that he would take such steps given that he received no notification of a score on the MRW III portion of the exam that he clearly completed. I further find that the instruction and advise that he testified to have relied upon from Mr. Chavanni at the time was not refuted in any way by DMR or HRD during this appeal process. Therefore, I find Mr. Pollack's representation of his interaction with Mr. Chavanni to be credible, as well.

21. One of the primary factual disputes in this matter centers on whether or not Mr. Pollack actually applied to take the MRW III examination. Mr. Pollack states in his October 15, 1990 letter to Mr. Chavanni that "he sent an application for each [examination] prior to this test, but, I only received a score back for the Mental Retardation worker IV position." (*Exhibit 13*). However, HRD asserts and submits

evidence that there only exists a record of Mr. Pollack's application for the MRW IV examination. (*HRD Exhibit D*)

22. On April 3, 1990, HRD certified Mr. Medeiros into the MRW III temporary-after-certification position. (*HRD May 30, 2008 Response at ¶16*)

23. It has been Mr. Pollack's understanding that by virtue of having passed the MRW IV exam, he also must have passed the MRW III exam. (*Testimony of Mr. Pollack*)

24. It is Mr. Pollack's further understanding that by virtue of having passed the MRW III exam, he has become "certified" as an MRW III, and therefore no longer holds that title on a provisional basis. (*Testimony of Mr. Pollack*)

25. Mr. Medeiros credibly testified that following the examinations on June 24, 1989, he was required to sign off on eligible lists for the MRW III and MRW IV titles. (*Testimony of Mr. Medeiros*)

26. HRD's records reflect that Mr. Medeiros is a permanent MRW III. (*HRD Exhibit B*)

27. DMR searched its records for documents indicating that Mr. Pollack possessed civil service permanency. No document from the DMR stated words to that effect. Mr. Pollack's personnel file contained his October 15, 1990 letter to Mr. Chavanni which was marked as Exhibit 13. (*Stipulated Fact*)

28. HRD's records reflect that Mr. Pollack is a provisional MRW III. HRD records do not indicate that he has permanency in the title of MRW III. His civil service record indicates that he has never had civil service permanency in any title for DMR. (*HRD Exhibit A*)

29. Prior to 1996, the Commonwealth had two designations for employees appointed from a civil service certification: temporary-after-certification and permanent. The distinction between these two types of positions was based upon whether the position was allocated as part of the permanent staffing pattern for an agency (permanent appointment) or was allocated to be part of the temporary staffing pattern (temporary-after-certification appointment). Over time the distinction became irrelevant. Therefore, in 1996, the State Comptroller abolished this distinction and employees that occupied temporary-after-certification positions were given permanency. (*Affidavit of Ms. McNeeley*)

30. As a result, Mr. Medeiros, holding the position of MRW III temporary-after-certification, became permanent. (*HRD May 30, 2008 Response at ¶15*)

31. On June 30, 1997, HRD revoked the eligible lists for the MRW III and MRW IV positions. HRD, within the statutory discretion granted by G.L.c.31,§25, determined that the eligible lists should be revoked because the lists were approximately eight (8) years old, well beyond the time limitations allowed by law. (*Affidavit of Ms. McNeeley*)

The 2007 MRW IV Posting

32. On or about October 15, 2007, DMR posted a vacancy for an MRW IV position on the Commonwealth Employment Opportunity (CEO) website. This position was located on Unit 2 of Wrentham and was a first shift (7am – 3:30 pm position. (*Exhibit 3*)

33. Ms. Doyle, Personnel Officer for the Southeast Region, was responsible for generating the posting. She did so by contacting the hiring manager for a list of duties for the position. She attached these duties to a prefabricated MRW IV job posting. (*Testimony of Ms. Doyle*)

34. The posting contains a set of minimum qualifications that all candidates must meet to be considered for the position. These minimum qualifications come from the HRD job specifications for the MRW job series. The posting also contained a list of the duties and responsibilities tailored to the position and generated by the hiring manager. *(Testimony of Ms. Doyle)*

35. The posting did not contain any language limiting eligibility to those individuals with civil service permanency or to those that had ever passed an MRW IV exam. The position was not limited to department employees. In her four years' experience as a personnel officer, Ms. Doyle testified that she has never seen a job posting that contained such limitations. *(Exhibit 3; Testimony of Ms. Doyle)*

36. After Ms. Doyle posts a vacancy on the CEO website, she gathers submissions (resumes, applications) from all of the candidates. Ms. Doyle then reviews the submissions of each candidate to determine if they meet the minimum job qualifications. *(Testimony of Ms. Doyle)*

37. Ms. Doyle ultimately received eleven (11) applications for the MRW IV position. Of those eleven (11), seven (7) were deemed to meet the minimum qualifications for the job. *(Exhibit 4; Testimony of Ms. Doyle)*

38. Of those seven (7) minimally qualified candidates, one was not a departmental employee. Two qualified candidates were not in the next lower job title of MRW III. *(Exhibit 4; Testimony of Ms. Doyle)*

39. After determining which candidates were minimally qualified, Ms. Doyle forwarded a flow log (marked as Exhibit 4) and the candidates' application materials to Jim Jacinto (Mr. Jacinto), the Unit 2 Director. Mr. Jacinto established an interview panel

to review and recommend a candidate. This panel consisted of Ms. Pariseau, Assistant Unit Director, Ronnie Hill (Ms. Hill), MRW IV, and Maureen Ethier (Ms. Ethier), Unit 2 Medical Supervisor. *(Testimony of Ms. Pariseau)*

40. Interview panels at Wrentham typically consist of people employed in the unit and shift that contains the position to be filled. *(Testimony of Ms. Pariseau)*

41. The interview panel interviewed five (5) of the seven (7) candidates deemed to be minimally qualified, including the external candidate and one of the candidates not in the MRW III job title. *(Exhibit 5; Testimony of Ms. Pariseau)*

42. The posting specified the MRW IV position in question as being primarily responsible for unit office coverage. The Unit 2 officer coordinates and oversees the scheduling of direct care staff for 99 residents, ensures minimum staffing levels for eleven (11) residential sites, coordinates program schedules and appointments for the residents, sets up coverage for the incoming shift and generally supervises other MRWs. *(Exhibit 3; Testimony of Ms. Pariseau)*

43. The interview panel met with each candidate for approximately forty-five minutes, during which time they asked each candidate eight (8) pre-generated questions. Candidates were scored from one to five for each answer, with “one” being the highest score a candidate could receive. Candidates were also scored using an assessment form provided by the employment and staffing office. *(Exhibit 6; Testimony of Ms. Pariseau)*

44. Following each interview, the panel placed their scores in an envelope. Ms. Pariseau later created a grid upon which she recorded the candidates’ scores for each question. The panel then reconvened and determined which candidates were the highest ranked based upon their cumulative scores. *(Exhibit 7; Testimony of Ms. Pariseau)*

45. Mr. Tessier, Mr. Pollack, and Mr. Medeiros were the first, second and third highest ranked candidates, respectively. (*Exhibit 7*)

46. Ms. Pariseau subsequently researched the work histories of these three individuals to determine if there was anything that needed to be brought to the panel's attention. (*Testimony of Ms Pariseau*)

47. The panel recommended Mr. Tessier for the position. The panel cited Mr. Tessier's greater relevant job experience, greater breadth of supervisory training and a more exemplary work record than Messrs. Medeiros and Pollack in its recommendation. (*Testimony of Ms Pariseau*)

48. The panel concluded that Mr. Tessier had served as the Unit 2 officer on the first shift in a back-up capacity as an MRW III, and therefore was already familiar with the demands of the position. (*Exhibit 16; Testimony of Ms. Pariseau*)

49. Although Mr. Pollack and Mr. Medeiros both had experience as backup officers, it was not on the same unit or shift. The panel concluded that it would take the Appellants' longer to become acclimated to the position than Mr. Tessier. (*Testimony of Ms. Pariseau*)

50. Ms. Pariseau provided very detailed and knowledgeable testimony. She exhibited an excellent command of personnel information and what relative knowledge, skills and abilities each position in question required. Ms. Pariseau was very familiar with the Appellants, Mr. Tessier and their daily duties. I found her to be credible in her testimony and reliable in her expertise on the subject matter at hand.

51. Mr. Tessier is not a permanent civil service employee. (*Testimony of Ms. Pariseau*)

52. Mr. Tessier has never taken or passed the MRW III or MRW IV examinations. *(Testimony of Ms. Pariseau)*

53. Mr. Tessier has held the position of provisional MRW III for less time than both [either??] Mr. Medeiros and Mr. Pollack. *(Testimony of Ms. Pariseau)*

54. Mr. Tessier mentioned that he had undertaken a number of supervisory trainings both within the DMR and in the community. The panel was impressed by the number of trainings Mr. Tessier had taken, and felt that he had demonstrated incentive and a desire to increase his supervisory skills. *(Exhibit 16; Testimony of Ms. Pariseau)*

55. In contrast, the Appellants had only taken the DMR's mandatory supervisory trainings. During his interview, Mr. Pollack stated that his work experience was his training. Mr. Pollack claimed to have received credits from Framingham State College, but the panel could not confirm this statement. I find that this information, in that it is unsubstantiated, should not be held against Mr. Pollack but, neither should it be used to enhance his advancement. *(Exhibits 14 & 15; Testimony of Ms. Pariseau)*

56. Mr. Tessier stated that he received a number of awards and accolades during his service as an MRW III, including having been named the Wrentham Employee of the Quarter in 2007. These awards were verified by a review of Mr. Tessier's personnel record. *(Exhibit 16; Testimony of Ms. Pariseau)*

57. In contrast, neither of the Appellants had received the number or variety of accolades and awards as Mr. Tessier had received. *(Testimony of Ms. Pariseau)*

58. The panel made their recommendation of Mr. Tessier for the position of MRW IV to Mr. Jacinto, who forwarded the recommendation to the DMR for approval. *(Exhibit 8; Testimony of Ms. Pariseau)*

59. Ms. Pariseau distributed non-selection forms to the unsuccessful candidates, including the Appellants. Mr. Pollock's non-selection form indicates Mr. Tessier was selected, in part, based on having more seniority than Mr. Pollock. Ms. Pariseau credibly testified this entry was a clerical mistake. (*Exhibits 9 & 10; Testimony of Ms Pariseau*)

60. The record indicates that DMR did not communicate with, nor contact, the Personnel Administrator, or secretary of the executive office that encompasses the DMR, prior to or during the entire selection process. The DMR did not seek leave from the Personnel Administrator or such secretary pursuant to G.L.c.31,§12. The DMR did not seek leave from the Personnel Administrator or such secretary pursuant to G.L.c.31,§15.

61. Messrs. Pollack and Medeiros timely filed the instant appeals.

CONCLUSION

Summary

This appeal discloses certain potentially troubling flaws in the all-too-common process employed for filling civil service positions “provisionally”, which have festered for decades. Nevertheless, in this case, DMR has demonstrated that it made a good-faith, substantial effort to achieve compliance with basic merit principles and that the appellants have not been harmed by the violations, if any, of the Civil Service law which would be necessary to justify the relief they have requested in the present appeal, save for an order to rectify what seems to have been an oversight in the processing of Mr. Pollack's permanency in the title of MRW III.

Mr. Pollack's Civil Service Status

The Commission agrees with the position espoused by the Appellants that there is substantial, credible evidence to establish that there seems to be some administrative snafu regarding Mr. Pollack's application to take the 1990 MRW III/MRW IV civil service examination. . It is the function of the hearing officer to determine the credibility of the testimony presented before him. See Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 529 (1988); Doherty v. Retirement Bd. Of Medford, 425 Mass. 130, 141 (1997). See also Covell v. Dep't of Social Services, 439 Mass. 766, 787 (2003); (In cases where live witnesses giving different versions do testify at an agency hearing, a decision relying on an assessment of their relative credibility cannot be made by someone who was not present at the hearing); Connor v. Connor, 77 A. 2d. 697 (1951) (the opportunity to observe the demeanor and appearance of witnesses becomes the touchstone of credibility).

Mr. Pollack credibly testified that he took and passed the examinations for both MRW III and MRW IV which were conducted on the same day. The evidence is undisputed that Mr. Pollack was certified to have passed the MRW IV examination. The Commission finds that it impossible to conclude that Mr. Pollack is deemed qualified for the MRW IV position based on the results of the combined MRW III/MRW IV examination but somehow failed the MRW III component of the test. Mr. Pollack also credibly testified that he brought this issue to HRD's attention as soon as he discovered it, requested "rectification" and was told by an HRD employee not to worry about it because it "didn't matter". On balance, Mr. Pollack's testimony carries considerably more weight

than any inferences that might possibly be drawn from the state of the available records that HRD was able to produce nearly twenty years after the events in question.

Thus, it must be found more likely than not that Mr. Pollack took the necessary steps to take both the MRW III and MRW IV tests and that any lack of record that he passed the MRW III test (to become permanent in the position he then held provisionally) is not sufficiently probative to rebut his testimony or justify the conclusion that he did not take and pass that test, which, in turn, would have required that he be granted “permanency” in the position of MRW III in 1996 under the “temporary after certification” transition program. Given these circumstances, Mr. Pollack has been denied permanency is entitled to relief under Chapter 310 of the Acts of 1993 to adjust his civil service status to place him in the permanent civil service position of MRW III that he should have occupied when his provisional “temporary after certification” status became permanent in 1996. The Commission will order that relief.

Provisional Appointment or Promotion

The parties take different views as to how the civil service law applies to the case. The DMR asserts that it selected Mr. Tessier to fill the vacancy in question by making a lawful “provisional appointment” in accordance with the provisions of Section 12-14 of the civil service law. The Appellants contend that DMR failed to comply with all of the requirements stated above in Sections 12-14 necessary to make a “provisional appointment”. Alternatively, the Appellants content that the applicable law is not Sections 12-14, but Section 15, governing provisional “promotions”, and that Mr. Tessier does not have permanent status as a civil service employee in any title and cannot lawfully be provisionally “promoted” to MRW IV from the “next lower title” of MRW

IV. The crux of the Appellants argument is that Sections 12-14 and Section 15 are mutually exclusive, and that the former applies to “original” appointments, i.e., those that “introduces a person to the department or unit” as the “first step in that person’s career in the unit”, and does not apply when an employee is advanced from one position within his departmental unit to a higher position, as Mr. Tessier did here.

G.L.c.31, §12, concerning provisional appointments, permits a state agency to make such appointments, with the approval of the secretary of the executive office in charge of the agency, if (a) no suitable eligible list exists; or (b) the list contains less than three names (a short list), all those on the short list were interviewed and the appointing authority provides “sound and sufficient” reasons why none of those on the short list were selected. G.L.c.31, §13 & §14 requires that a request for approval of a provisional appointment be made by the submission of notice to the secretary of the executive office in charge of the agency containing a description of the duties, knowledge and skills required for the job, a specification of the type of competitive examination that should be conducted for the position, and a “substantiation” that the person proposed for provisional appointment meets the requirements for such appointment and possesses the knowledge, skills and abilities necessary to perform such duties.

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.

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, DMR has noted, 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 and appointments. 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 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. It remains the Commission’s duty to enforce the Civil Service law, as written. 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.

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.

Second, Section 15 also seem 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.

The Appellants, therefore, are correct that 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. 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, CSC Case No. G2-08-132, 22 MCSR --- (2009); Helen Poe v. Department of Revenue, CSC Case No. G2-08-133, 22

MCSR --- (2009); Garfunkel v. Department of Revenue, CSC Case No. G2-08-132, 22 MCSR --- (2009). Since it appears undisputed that Mr. Tessier does not hold civil service permanency in any title, if Section 15 is the applicable statute here, Mr. Tessier's provisional promotion would not be lawful under civil service law.

The Appellants rely on the SJC's decision in Kelleher v. Personnel Administrator, 421 Mass. 382, 657 N.E.2d 229 (1995) for the proposition that Mr. Tessier has been provisionally "promoted" and not "appointed". In Kelleher, the SJC affirmed the Commission's decision that "sound and sufficient" reasons were not required to be submitted to justify a provisional promotion from the "next lower title" of a candidate on a "short list". Id. The Appellants rely on dicta in the opinion arising in the context of distinguishing a provisional appointment and provisional promotion.

The Legislature makes a distinction between provisional promotions and provisional appointments by dividing them into separate sections. . . . [A]ppointments and promotions go forward in different circumstances and with different requirements for approval.

[G.L.c.31,§12 governs] provisional *appointments of persons from outside the departmental unit* . . .

G..L.c.31,§15], governing provisional *promotions* . . . *within the departmental unit*. . . .

. . . The move to separate treatment of provisional appointments and provisional promotions, and the distinction between provisional promotions of one grade and more than one grade are strong indications that the variations in standard were not inadvertent. . . .

On the premise that the purpose of the statutory scheme is to assure the competence of the civil service and to guard against favoritism and bias, the different approval requirements may quite sensibly be taken to distinguish between the levels of scrutiny by the administrator appropriate to each occasion. **"Provisional appointment" is not synonymous with, and does not include, "provisional" promotion.** [Citation] *An initial appointment introduces a person to the department or unit and may be the first step in that person's career in the*

unit. The Legislature may have concluded that . . . it is particularly important that initial hiring be done so far as possible on an objective and competitive basis. . . when people receive an initial appointment and so are allowed to get a foot in the door, even on a provisional basis.

When a vacancy is filled provisionally by promotion, there is a greater assurance that the person chose will have demonstrated some competence and familiarity with the duties of the office. This presumption is less plausible if the provisional promotion skips one or more grades; and that may be why the administrator is given a greater degree of supervision in such cases.

Id., 421 Mass. at 386-87, 657 N.E.2d at 232-33. (*emphasis added*)

The language of the SJC’s opinion in Kelleher does appear to assume that Section 12 provisional appointments are limited to original appointment of a person to a civil service position from “outside the departmental unit” and that Section 15 applies whenever a position is filled by “promotion” of an employee from within the unit. In two subsequent decisions, however, the Commission has suggested otherwise, indicating that, absent a “bad faith”, a vacancy may be filled in provisionally either by appointment under Section 12 or promotion under Section 15, as the appointing authority may chose in the exercise of its sound discretion. See Asif v. Department of Conservation & Recreation, 21 MCSR 23 (2008); Rainville v. Massachusetts Rehab. Comm’n, 19 MCSR 386 (2006), citing. O’Brien v. Massachusetts Rehab. Comm’n, CSC Case No. G-1883 (1991).

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 either a promotional or original provisional appointment, unless the evidence suggests that an appointing authority is using the Section 12 provisional “appointment” process as a subterfuge for selection of a specific candidate who would not be eligible for provisional “promotion” over other equally qualified choices. Thus, the Commission

eschews a rule that a provisional appointment can NEVER be made to advance a person within a departmental unit as opposed to an initial hiring into the unit.

There are sufficient differences in the process associated with each type of provisional selection that lead the Commission to be satisfied that the abuse of the process is likely to be the rare exception, rather than the rule. For, example, by opening up the process to provisional appointment, the pool of candidates becomes broader and qualified veterans who apply must be given a preference. See G.L.c.31 ,§26.

Applying these principles to the present appeal, both the Appellant and DMR can point to evidence that would tend to support its characterization of the selection of Mr. Tessier as a “promotion” or an “appointment, respectively.

It is undisputed that Mr. Tessier was elevated from his title of MRW III to a title of MRW IV, which is clearly advancement in the career ladder of his occupational series, a classic example of a promotion. In addition, in selecting Mr. Tessier, the interview panel relied, in part, on the fact that Mr. Tessier had direct experience within the unit in which the vacancy arose, which gave him a familiarity with the unit and the duties of the new position that others who did not work in the same unit did not have. There is certainly a legitimate question to be asked why, if prior experience in the department and/or unit was a factor, the DMR would not have elected to post such a position as an internal departmental promotion, rather than an appointment open to anyone?

On the other hand, it is also undisputed that DMR posted the vacancy as a provisional appointment and, in fact, secured applications from a number of persons outside of DMR.

Four of the outside candidates did not meet the minimum requirements for the job (essentially lacking the requisite direct care or supervisory experience and two outside candidates were deemed qualified and were interviewed. Both the outside candidates were rated satisfactory, although well below Mr. Tessier and the Appellants and, had either been a veteran, they would have been entitled to a preference in hiring over Mr. Tessier. It is also noted that nothing in the ranking of the candidates in their interviews suggests any reason to question the good faith of the interview panel.

Although the question is close and there is certainly some rational basis to expect the MRW IV Unit 2 position would have been more logically posted internally, on all of the evidence, it does not appear that the DMR's initial open posting carries sufficient indicia of bad faith to conceal a predisposition or intention to hire Mr. Tessier or a pattern and practice of abuse of the provisional appointment process. The Commission is not entitled to 'second-guess' the DMR on its choice in this particular case. That said, however, the Commission will continue to monitor the use of the provisional appointments to assure that they are not used as a subterfuge for what are really intended to be promotional advancements of existing provisional employees at the expense of qualified permanent employees "in the next lower title" who would be entitled to the positions if they were posted as promotions or if examinations for these positions were being duly conducted as required by law. As this is not the case here, however, the Commission reviews this appeal as a "provisional appointment" under Sections 12-14, as opposed to a "provisional promotion" under Section 15.

Validity of Provisional Appointment

The DMR is vested with considerable discretion to make a provisional appointment under Sections 12-14 in the circumstances presented here. The Commission is not persuaded by the Appellants' arguments that the provisional appointment must be vacated for a variety of procedural errors, including a failure to request a "suitable eligible list", obtain prior approval of the and file documentation describing the type of examination that HRD should conduct to enable a permanent appointment to the position. failure of the DMR to formally request an "eligible list".

It is undisputed that there was no "suitable eligible list" for the position of MRW IV, the last such list having been revoked by HRD in 1997. It is also undisputed that HRD has consistently advised that it has no intention of conducting examinations for lack of sufficient funds to do so. While the Commission has repeatedly exhorted that this systemic problem must be addressed sooner rather than later, it ia nor inclined to vacate, and will not vacate this this provisional appointment solely for failure to follow the reporting procedures of Sections 12-14 to request lists and examinations which, at the time, was well-known to have been considered a clear futility. ²

On the merits, the undisputed facts establish that Mr. Tessier, was found qualified, indeed, found most qualified for the appointment. Under these circumstances, Section 12 permits DMR to select him for appointment one without providing "sound and sufficient

² The Appellant makes the flawed argument that, although HRD revoked the last known eligible list for the position of MRW IV in 1997, HRD did not comply with the necessary statutory requirements, including notice to the clerks of the senate and house of representatives, so that the eligible list still in effect and precluded a provisional appointment. HRD is clearly authorized under G.L.c.31, §25 to exercise discretion to revoke an obsolete list (here, well over 10 years old) and there was no credible evidence that HRD did not follow procedures in doing so.

reasons” and such a selection will not be considered to be a bypass which the unsuccessful candidate may challenge by appeal to the Commission. cf. Kehoe v. City of Boston, 21 MCSR 240 (2008); Sullivan v. City of Boston, 20 MCSR 11 (2007); Botvin v. Massachusetts Boot Camp, DOR, 14 MCSR 3 (2001). See also Kelleher v. Personnel Administrator, 421 Mass.382, 657 N.E.2d 229 (1995) (discussing when sound and sufficient reasons are required and when appointing authority has discretion to appoint or promote from “short list”). Thus, the Appellants are without standing to challenge Mr. Tessier’s selection as a provisional *appointment*.

The Commission further finds the selection process used by DMR complies with the necessary standards of basic merit principals. The interview process was conducted thoughtfully, with a written questionnaire, independently graded with extensive written commentary from the interviewers to justify their opinions. The three top tier candidates – the Appellants and Mr. Tessier – were all well-regarded and the decision was clearly a tough judgment call. The Commission finds nothing in the process to suggest the process was slanted in advance in favor of Mr. Tessier.

For the reasons stated above, it is the recommendation of this Hearing Officer that the appeal of the Appellant, Francis J. Pollack, Jr. be *allowed, in part*, and that, pursuant to the powers of relief inherent in Chapter 310 of the Acts of 1993, the HRD is directed to adjust the personnel record of the Appellant, Francis J. Pollack, Jr., to reflect his permanency in the title of MRW III, retroactive to April 3, 1990. Except as allowed above, the appeal of the Appellant, Francis J. Pollack, Jr. is *denied*.

For the reasons stated above, it is the recommendation of this Hearing Officer that the appeal of the Appellant, Victor Medeiros, be *denied*.

Civil Service Commission

John J. Guerin, Jr.

By vote of the Civil Service Commission to adopt the recommended decision of the Hearing Officer (Bowman, Chairman [AYE]; Marquis, Commissioner [AYE], Stein, Commissioner [AYE], Henderson, Commissioner [NO], Taylor, Commissioner [NO], on April 29, 2009.

A True Record. Attest:

Commissioner

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

Jamie DiPaola-Kenny, Esq. (for Appellants)
Robert James Smith, Esq. (for Appointing Authority)
Suzanne L. Shaw, Esq. (for HRD)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
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(617) 727-2293

VICTOR MEDEIROS AND
FRANCIS POLLACK, JR.

Appellants

v.

G2-07-18 & G2-07-19

DEPARTMENT OF MENTAL RETARDATION,
Respondent

OPINION OF CHRISTOPHER BOWMAN

Some of the conclusions in this decision have implications for all state agencies and civil service communities and a large segment of their employees.

Specifically, the Commission, agreeing with HRD, concludes in this decision that provisional promotions under Section 15 of the civil service law are limited to those employees who have permanency in some civil service title. Hence, thousands of career government employees who are considered provisional employees may not be provisionally promoted to a higher title under Section 15.

An appointing authority should not be limited, however, from filling a vacancy through a provisional appointment under Section 12 and considering internal candidates who have not had the opportunity, through no fault of their own, of obtaining civil service permanency.

Further, I do not construe this decision as impacting any provisional promotions made under Section 15 prior to this clarification.

Christopher C. Bowman, Chairman
April 29, 2009

MINORITY OPINION OF COMMISSIONERS HENDERSON AND TAYLOR:

The failure of the personnel administrator (HRD) to curb the use and duration of provisional promotions and appointments is injurious to the individual employee as well as the civil service system as a whole. An individual's employment status may be harmed when a certification list is not created and a provisional position is allowed to exist indefinitely. See Burns v. Dep. of Revenue and Division of Human Resources, 14 MCSR 75 (2001). The Commission may hear and decide appeals brought by an individual whose employment status is harmed by HRD's action or inaction. G.L. c. 31 s. 2(b) (2005). Here, as in Burns, an examination has not been held for the relevant position for many years, if not decades. So long as an examination is not held, neither the Appellant nor any other applicant will be allowed the opportunity to objectively prove that they are better qualified by performance on a competitive examination. They are being denied an opportunity that must be provided to all civil service employees. The competitive examination is the lynch-pin of the civil service system.

After issuing its decision in Burns, the Commission subsequently ordered that, pursuant to Chapter 310 of the Acts of 1993, Burns was to be placed at the top of the suitable eligibility list for promotional appointment, and that no additional provisional appointments were to be made in the meantime. As a list for the proper certification did not exist at the time, the Commission effectively stated that, should the Department of Revenue wish to make another promotion, a new examination would have to be held. This decision was upheld by the Appeals Court as being "neither `arbitrary' nor `capricious' nor `unsupported by substantial evidence'". Burns v. Civil Service Comm., 60 Mass. App. Ct. 1124 (2004).

The personnel administrator, (HRD), has created this untenable situation by failing to hold non public-safety examinations for decades. HRD should not then be rewarded for its shirking, by allowing the appointing authority to make original and promotional appointments based on discretionary or subjective determinations.

HRD has failed to prove by sufficient reliable evidence that it is unable, for what ever reason(s), to hold regularly scheduled non public-safety examinations and establish eligibility lists there from.

Daniel M. Henderson,
Commissioner

John E. Taylor,
Commissioner

April 29, 2009