

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

ALBERT N. MOSESSO,  
*Appellant*

G1-09-310

v.

DEPARTMENT OF TRANSITIONAL  
ASSISTANCE,  
*Respondent*

Appellant's Attorney:

*Pro Se*  
Albert N. Mosesso



Respondent's Attorney:

Thomas E. Noonan, Esq.  
General Counsel  
Department of Transitional Assistance  
600 Washington Street  
Boston, MA 02111

Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT'S MOTION TO DISMISS**

*Procedural Background*

The Appellant, Albert Mosesso (hereinafter "Mosesso" or "Appellant") filed an appeal with the Civil Service Commission (hereinafter "Commission") on July 21, 2009, alleging that the Department of Transitional Assistance (hereinafter "DTA" or "Appointing Authority") bypassed him for a "BERS C" position in DTA's Brockton office.

A pre-hearing conference was conducted at the offices of the Commission on August 18, 2009, which was attended by the Appellant, counsel for DTA and counsel for the state's Human Resources Division (hereinafter "HRD").

DTA filed a Motion to Dismiss the Appellant's appeal with the Commission on October 30, 2009 and forwarded a copy of its motion to the Appellant and HRD. The Commission sent another copy of DTA's motion to the Appellant on November 4, 2009, reminding him that he had thirty (30) days to file a response. The Appellant opted not to file a response.

#### *Factual Background*

"BERS" is the acronym for Benefit Eligibility Referral Social Worker, the case worker job series in DTA. The entry level position is BERS A/B. Supervisory positions are BERS C and BERS D. The Appellant is a permanent civil service employee in the title of BERS C.

By a posting dated April 6, 2009, DTA sought to fill a BERS C position in the Brockton Call Center through a provisional promotion, which is governed by G.L. c. 31, § 15. The Appellant applied for the position and was interviewed. He was not selected to fill the position and subsequently filed the instant appeal.

This appeal is one of three filed with the Commission challenging DTA's decision. The other two appeals are Heath v. DTA (CSC Case No. G2-09-313) and Whitlow v. DTA (CSC Case No. G2-09-343). The basis for the two other appeals, which are still pending before the Commission, is that DTA, in violation of G.L. c. 31, § 15, incorrectly selected a person who did not meet the statutory language of being a "civil service employee in one title to the next higher title..." Appellants Heath and Whitlow are

permanent civil service employees in the next lower title of BERS A/B. DTA does not dispute that the individual selected is not a “civil service employee” as that term is defined in G.L. c. 31, § 1. The Appellant, however, is not a permanent civil service employee in the next lower title of BERS A/B. Rather, he is a permanent BERS C and has been permanent in that title since July 1, 1994.

#### *DTA’s Argument*

DTA argues that the Appellant is not seeking a provisional promotion, but, rather, a transfer or reassignment. According to DTA, the Appellant can not claim rights under Section 15 because he does not meet the standards for being promoted under it. His appointment would be neither “provisional” nor a “promotion”. He is not a “civil service employee in one title [seeking to go to] the next higher title...” G.L. c. 31, § 15.

#### *Conclusion*

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party”, the movant has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that Mr. Mosesso has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

The Appellant is presently a permanent BERS C at DTA, having acquired this permanent civil service status in 1994. Thus, his appointment to the vacant position would not be a provisional promotion. Accordingly, the provisions of Section 15 do not apply to him.

While it is possible that the last paragraph of G.L. c. 31, § 35 may apply here, the Appellant would not prevail under that section of the statute either. The last paragraph of Section 35 states:

“Any permanent employee in a departmental unit...may apply in writing to the appointing authorities for such unit and for any other unit for transfer to a similar position in such other departmental unit. **With the written consent of such appointing authority or authorities, as the case may be, and with the written consent of the administrator**, such person may be so transferred. (emphasis added)”

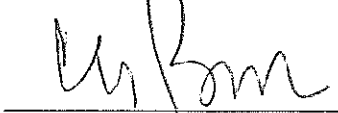
Although G.L. c. 31, §35 grants permanent employees the right to seek a transfer from one civil service position to another, it does not oblige appointing authorities and the administrator to make such a transfer. See Ho, Pepicelli and O'Connor v. City of Cambridge and Human Resources Division (20 MCSC 96, 97 (2007)) citing Cooper v. Civil Service Commission, 314 Mass. 76, 79 (1943) (“The statutes do not confer upon a person within the classified civil service the right to be transferred from one office or employment to another.”) In Cooper, the appointing authority first requested that the appellant be transferred, but subsequently failed to challenge the Civil Service Director’s (a comparable title to today’s Personnel Administrator) refusal to permit the transfer. The Court, in upholding the Civil Service Director’s action, noted that “it would serve no useful purpose for the commission...to review the decision of the director if the school committee, the ‘appointing authority’ in the department to which the transfer was to be

made, did not seek review of this decision by the director.” Cooper, 314 Mass. at 82. It is clear from the holding in Cooper that voluntary transfers under §35 are made at the discretion of the Appointing Authority, pending the approval of HRD.

The statutory scheme does protect the employee from being transferred without his consent, but does not provide appeal rights when an Appointing Authority does not consent to the employee’s requested transfer. There is simply no affirmative obligation on the part of DTA to consent to a requested transfer.

For these reasons, DTA’s Motion to Dismiss is allowed and the Appellant’s appeal under Docket No. G1-09-310 is hereby *dismissed*.

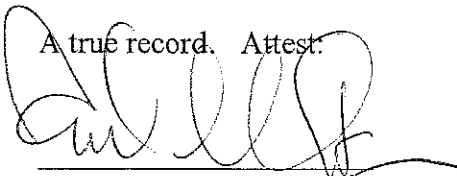
Civil Service Commission



Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, Commissioners [Marquis – Absent]) on January 7, 2010.

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)(I), 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 sent to:

Thomas E. Noonan, Esq. (for Appointing Authority)

Albert N. Mosesso (Appellant)

Martha O’Connor, Esq. (HRD)