COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

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

CAROLINE PEASE,
HELEN POE,
Appellants,

v.

DEPARTMENT OF REVENUE,
Respondent

CASE NO: G2-08-132 (Pease)
G2-08-133 (Poe)

Appellant, Pro Se: Caroline Pease
[redacted]

Appellant, Pro Se: Helen Poe
[redacted]

DOR's Attorney: Suzanne Quersher, Esq.
Department of Revenue
100 Cambridge Street
Boston, MA 02114

Commissioner: Paul M. Stein

DECISION

The Appellants, Caroline Pease and Helen Poe, acting pursuant to G.L.c.31, §2(b), assert appeals against the Department of Revenue (DOR) and the Massachusetts Human Resources Division (HRD), challenging their non-selection for appointment to Tax Examiner III. By Decisions issued April 29, 2009, the Commission denied motions for summary disposition, holding that Ms. Pease and Ms. Poe had standing to bring these appeals. On October 6, 2009, the Commission held a full evidentiary hearing on the appeals. The DOR called one witness and the Appellants testified on their own behalf. The Commission received 14 exhibits in evidence and an additional 11 exhibits were marked for identification. The hearing was digitally recorded.

FINDINGS OF FACT

Giving appropriate weight to the testimony of the witnesses (the Appellants; Shelly John, DOR Classification Analyst) the exhibits in evidence (Exhibits 1 through 6,7A, 7B,8A,8B,9A,9B,10J,11); administrative notice of the findings and conclusions of the Commission set forth in the Decisions in these appeals dated April 29, 2009 ("Pease I" and "Poe I", incorporated herein by reference); and inferences reasonably drawn from that evidence, I find the following material facts to be undisputed:

1. The Appellant, Carolyn R. Pease, has been employed by the DOR for approximately twenty-three years. Ms. Pease was appointed to the permanent title of Tax Examiner I (TE-I) in June 1985 and was provisionally promoted to the title of Tax Examiner II (TE-II), the title she currently holds. She works in the Taxpayer Services Division, Collections Bureau, at the DOR's Springfield Office. (*Pease I, Finding #1)*

2. Ms. Pease has consistently received satisfactory "meets" or "exceeds" ratings on her EPRS evaluations. She has considerable experience in handling a full caseload working the customer service counter and has trained other employees in this function. She asserts that she is the only TE-II who performs this duty, all other employees who work the customer service counter being TE-IIIs. (*Pease I, Finding #2*)

3. The Appellant, Helen M. Poe, has been employed by the DOR for approximately twenty-one years. Ms. Poe was appointed to the permanent title of TE-I in November 1990 and was provisionally promoted to the title of TE-II, the title she currently holds. She works in the Taxpayer Services Division, Collections Bureau, at the DOR's Springfield Office. Ms. Poe has considerable experience in the Taxpayer Assistance, Audit and Collections bureaus. (*Poe I, Findings #1,#2)*

4. The Tax Examiner Series consists of six levels, from TE-I through TE-IV. The basic purpose of the work performed by incumbents in these positions, as described in the Classification Specification for the Tax Examiner Series, is to examine tax returns and financial records to determine tax liability and to ensure compliance with applicable tax laws, rules and regulations. (*Exhibit 1*).

5. TE-I through TE-III are the first, second and third level professional jobs in the series. TE-IV through TE-VI are the first, second and third level supervisory jobs in the series. (*Exhibit 1*)

6. According to the Classification Specification, the level distinguishing duty between a TE-II and TE-III is that a TE-III is expected to "review audit activities including audit reports for content, accuracy and completeness". In addition, a TE-III may be assigned supervisory duties and must have the ability to supervise, including planning, assigning, controlling and reviewing work of subordinates, as well as training, motivating and disciplining them. (*Exhibit 1*)

7. On or about February 28, 2008, posted an announcement inviting applicants for three open positions of TE-III in the TSD-Collections Bureau, located in Springfield MA (Posting ID 313869). The posting stated that the "Job Is For Internal Distribution Only", which means that, although the posting appears on the Massachusetts Human Resources Division jobs webpage, only current DOR employees are able to access the posting. (*Exhibit 4; Testimony of Ms. John*)

8. The three TE-III positions were also posted as Internal Posting 08-TSD-037 on the DOR's webpage, DORNET. According to the DORNET posting: "Internal postings apply to current state agency employees only. Contract and seasonal employees are not

eligible." The position also invites "any employee who possesses the necessary qualifications" to submit an application which must include a "copy of their final EPRS form for the previous fiscal year." (*Exhibit 3*; *Testimony of Ms. John*)

9. A total of ten internal candidates were selected to be interviewed for the three TE-III positions, including Ms. Pease and Ms. Poe. (*Exhibits 7A,7B,8A,8B,11*)

10. On one of the interview forms pertaining to Ms. Poe, the interviewer wrote that she "is not prepared for promotion at this time". (*Exhibit 7B*)

11. Although Ms. Pease and Ms. Poe had sufficient qualifications, they were not recommended "at this time" because DOR determined that they were not the "best" candidates, and other applicants were "better" qualified for the positions based on the interview performance of the candidates. (*Pease I, Finding #4; Poe I, Finding #4; Exhibits 7A,7B,8A,8B,11; DOR Proposed Decision, Proposed Fact #9*)

12. In April 2008, DOR selected Mike Narey, Elminia Kawa and Richard Senecal for the three positions of TE-III. The employees selected were provisional Tax Examiner IIs in the Collections Bureau, one of whom also held permanency in the title of Tax Examiner I and two of whom had no civil service permanency and less than five years of employment with DOR. (*Pease I, Finding #3; Poe Finding #3; Exhibit 6*)

13. The hiring manager's internal e-mail to staff announcing the three selections contained congratulations on the "promotions" and stated: "As always, selections were very hard and I encourage folks not selected to apply for future promotions." (*Exhibit 6*)

14. It appears that Ms. Kawa was subsequently further elevated to a position of TE-V, but her selection for that position is not at issue in these appeals. (*Exhibits 6 & 10J; Testimony of Ms. John*)

15. The three TE-III positions involved in this appeal were filled through provisional promotions. It is not disputed that no civil service examination has been given for the position of TE-III for more than ten years and there is no active eligible list for the position of Tax Examiner III. (*Pease I,Finding #5; Poe I, Finding #5; DOR Proposed Decision Proposed Facts #1,# 11; Testimony of Ms. John*)

CONCLUSION

Summary

The Commission concludes that G.L.c.31,§15 – governing provisional promotions – and not G.L.c.31,§12 – governing provisional appointments – applies to the posting and process for filling the three TE-III positions in this case. DOR plainly considered them provisional *promotions* throughout the selection process and its argument that it is now free to deem them "provisional *appointments*", *nunc pro tunc*, cannot be sustained. Accordingly, since these are deemed provisional *promotions,* only permanent civil service employees (i.e., those holding permanency in some civil service title) were eligible to be selected for promotion to those positions. Since two of the three selected candidates had no civil service permanency, their selection over Ms. Pease and Ms. Poe, both of whom had permanency as TE-Is and were qualified for the position, was erroneous. As such, the Appellants have been aggrieved through no fault of their own and are entitled to some form of equitable relief. The Appellants will be granted equitable, prospective relief, so that they are given at least one future consideration for for the position of TE-III to which they should have been promoted.

Discussion

G.L.c.31, §§10 through 15 contain the statutory provisions for making "provisional" appointments and promotions in the official service. These statutes prescribe:

§ 12. Provisional appointments. An appointing authority may make a provisional appointment to a position in the official service with the authorization of the administrator [HRD] or, if the appointing authority is a department. . .within an executive office, with the authorization of the secretary of such office. Such authorization may be given only if no suitable eligible list exists from which certification of names may be made for such appointment. . .pending the establishment of an eligible list. Such authorization shall be void unless exercised within two weeks after it is granted.

After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list. . . . If, as the result of such examination, no suitable eligible list is established, the administrator . . . may authorize an extension of the provisional appointment pending the results of another examination. . . .The eligible list resulting from such new examination shall be established within eighteen months of the determination of the results of the last previous examination, provided, however, that such new examination shall be held no later than one year . . .if the appointment must comply with federal standards for a merit system of personnel administration as a condition for receipt of federal funds by the commonwealth or any of its political subdivisions.[1]

If no eligible list is established after a second examination for the same position, the administrator and the appointing authority shall confer and decide what action should be taken, such as the holding of another examination on a different basis.

§ 13. Provisional appointments; notice; filing. An appointing authority, in requesting authorization to make a provisional appointment, shall file with the administrator or, if the appointing authority is a department. . .within a executive office, with the secretary in charge of such office, a notice containing: (1) the information which the appointing authority believes is necessary to prepare and conduct an examination for the position for which such authorization is being requested, including a statement of the duties of the position, and the knowledge, skills and abilities necessary to perform such duties; (2) a proposal specifying the type of examination which should be held by the administrator; (3) a substantiation that the person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties.

§ 14. Provisional appointments; authorization; reports; length of service; termination. Upon receipt of the notice described in section thirteen, the administrator or the secretary in charge of the executive office, as the case may be, may authorize a provisional appointment if he determines that the contents of the notice are satisfactory. . . .

Each provisional appointment shall be reported. . .to the administrator. A provisional appointment may be terminated by the administrator at any time . . . .The administrator shall have the authority to terminate a provisional appointment which was approved by a secretary of an executive office.

. . .

[1] The Commission has received no evidence that indicates that the Commonwealth is at risk of losing any federal funds as a result of the use of provisional appointments.

§ 15. Provisional promotions. An appointing authority may, with the approval of the administrator or, if the appointing authority is a department . . within an executive office, with the approval of the secretary of such office, make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list . . . .

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 therefor, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

. . .

A secretary of an executive office who approves a provisional promotion pursuant to this section shall notify the administrator of each such approval. Such approval shall be made pursuant to the civil service law and rules, and such notification shall be made in such form as shall be required by the administrator. The administrator shall terminate any provisional promotion if, at any time, he determines that (1) it was made in violation of the civil service law and rules, or (2) the person provisionally promoted does not possess the qualifications or satisfy the requirements for the position. An appointing authority which makes a provisional promotion pursuant to this section shall report such promotion to the administrator.

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, 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 under Section 15. 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 arena to end the current practice of relying on provisional promotions (and provisional appointments) to fill most civil service positions, the Commission must honor the clear legislative intent that allows for provisional promotions so long as the statutory requirements are followed. 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. Meanwhile, public employees whose provisional status leaves them with fewer opportunities under the civil service law than their peers with permanency will be left to enforcement of their rights as members of the collective bargaining units to which they may belong, which the Commission does not control.

That said, the law must be interpreted according to the plain meaning of the words chosen by the legislature, and we avoid an interpretation that renders any part of the language superfluous. See, e.g., Commonwealth v. Biagiotti, 451 Mass. 559, 603-604, 888 N.E.2d 364 (2008). When a statute is clear and unambiguous, it is not the function of the Commission to rewrite it. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661, 856 N.E.2d 799 (2006), *quoting* Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 86, 706 N.E.2d 625 (1999) It remains the duty of the Commission to enforce the Civil Service Law, as written.

In the prior decisions in these appeals, the Commission was required to determine whether the Appellants had standing to challenge their non-selection. The Commission held under Section 15, that only a "civil service employee"[2] with permanency may be

[2] 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.

provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for "sound and sufficient reasons" to another higher title for which she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title. See generally, Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007) (provisional promotion of a permanent Child Enforcement Worker C to next higher title of Child Enforcement Worker D under G.L.c.31,§15,¶1); Glazer v. Department of Revenue, 21 MCSR 51 (2007) (provisional Tax Auditor II with permanency as Tax Auditor I, provisionally promoted to Tax Auditor III upon submission of "sound and sufficient" reasons under G.L.c.31, ,§15,¶2)

The DOR does not challenge the Commission's prior rulings, but now contends that the three positions were filled as "provisional appointments" (under Section 12) rather than "provisional promotions" (under Section 15) as previously presumed. Since provisional appointments are not limited to permanent civil service employees, DOR argues that they properly filled the three positions, even though the persons selected were not permanent civil service employees, as would have been required for a Section 15 "provisional" promotion. The Commission cannot accept the DOR's argument in this particular case.

The DOR's current position is a complete about-face from the position that it took in challenging the Appellant's standing in its original Motions to Dismiss, where the DOR consistently referred to the postings in question as provisional "promotions." This is also how the hiring manager apparently referred to them, as did one of the interviewers. While those characterizations are not entirely dispositive, they certainly create a

reasonable inference, consistent with the postings for the positions, that these positions were meant to be considered provisional promotions and not provisional appointments. Only after the Commission's decision in *Pease I* and *Poe I*, did the DOR begin to refer to these three postings as provisional "appointments".

The DOR's point is well-taken that an appointing authority has some discretion in posting a provisional position as an "appointment" or a "promotion", and, absent evidence that the choice was a sham or subterfuge, such as to pre-select or screen out particular candidates, that sound judgment will not be disturbed by the Commission. See Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Asif v. Department of Conserv.& Rec., 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). As explained in Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009), the Commission eschews any 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. But cf. Kelleher v. Personnel Administrator, 421 Mass. 382, 657 N.E.2d 229, 386-87 (1995) (dicta that Section 12 applies to appointments from "outside the departmental unit" and Section 15 apply "promotion" of an employee from within the unit). In both Medeiros and Asif, however, unlike here, the appointing authorities were consistent in posting the position as a provisional "appointment" open to applicants regardless of civil service status.

Here, the DOR posting process, and the language of the posting itself, made clear that this was intended to be posted as a provision promotion of a departmental employee. Only after it appeared that some of the selected candidates were not eligible for

provisional promotion, did DOR call the posting a provisional appointment. To allow an appointing authority to change the basis on which it fills provisional positions after the positions have been filled does not comport with the requirements of the civil service law. The statutes clearly require approval and justification in advance for either a provisional appointment or a provisional promotion.

The Commission recognizes that the "provisional" landscape now operates under somewhat fictitious assumptions, but the statutory language still must be enforced as written to the extent possible. Since it is not possible for the Commission to envision the entire universe in which appointing authorities currently employ "provisional" appointments and promotions, out of necessity, the Commission intends to move cautiously in this area. Thus, for now, the Commission is not disposed to invalidate the two TE-III promotions in this particular case that were erroneously filled by candidates without any civil service permanency.

However, in regard to the Appellants, the Commission will act, pursuant to Chapter 310 of the Acts of 1993, and orders that the DOR put them in line for at least one additional consideration for future selection to a TE III position which they would be willing to accept if it was offered to them, on the same terms under which they should have been considered for the promotion in question. The Commission expects that, so long as either or both of the Appellants are able to demonstrate that they remain qualified for the position(s) and no other qualified permanent civil service employees apply, they will be selected for such position(s). To ensure the Appellants receive such serious consideration, and, in addition to whatever other rights, if any, she may have, in this particular case, if either Appellant is not selected in favor of another applicant with no

civil service permanency, she will be allowed to contest the non-selection in further proceedings before the Commission on the grounds that such non-selection was inconsistent with the requirements of this Decision.

As to all other DOR civil service positions that the DOR fills "provisionally" in the future, until such time as competitive examinations again become available, the DOR is ordered to specify, in advance, whether the position is being posted as a provisional appointment or a provisional promotion and comply with the applicable provisions of Section 12 or Section 15 as the case may be. In particular, if the position is posted as a provisional promotion, it must limit selection to permanent civil service employees and, if there is a qualified permanent civil service employee in the next lower title, that candidate must be selected for the provisional promotion.

Accordingly, for the reasons stated, and to the extent described above, the appeals of the Appellants, Caroline Pease and Helen Poe, are hereby ***allowed in part.***

Civil Service Commission

Paul M. Stein
Commissioner

By 4-1 vote of the Civil Service Commission (Bowman, Chairman [YES]; Henderson [YES], Marquis [YES], Stein [YES] and Taylor [NO], Commissioners) on December 10, 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:
Caroline Pease (Appellant)
Helen Poe (Appellant)
Suzanne Quersher, Esq. (for Appointing Authority)
John Marra, Esq (HRD)