COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

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

CAROLINE PEASE,
Appellant
v.
DEPARTMENT OF REVENUE,
Respondent

CASE NO: G2-08-132

Appellant, Pro Se: Caroline Pease
[redacted]

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

HRD Attorney: Lidia Rincon, Esq.
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner: Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, Caroline Pease, acting pursuant to G.L.c.31, §2(b), asserts an appeal against the Department of Revenue (DOR) and the Massachusetts Human Resources Division (HRD), challenging her by-pass for provisional promotion to Tax Examiner III. DOR and HRD moved for Summary Decision. The Appellant opposed these motions. A hearing on the motions was held at the Springfield Office Building by the Civil Service Commission (the Commission) on September 15, 2008. The motion hearing was digitally recorded. The Commission requested further submissions from the parties, received from the Appellant on April 16, 2009 and from HRD and DOR on April 17, 2009.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, and the argument presented by the Appellant, DOR and HRD, and inferences reasonably drawn from the 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 in June 1985 and was provisionally promoted to the title of Tax Examiner II, the title she currently holds. She works in the Taxpayer Services Division, Collections Bureau, at the DOR's Springfield Office. (*DOR Pre-Hearing Memorandum; DOR Motion for Summary Decision; Appellant's July 23, 2008 and November 12, 2008 Responses to DOR Motion)*

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 Tax Examiner II who performs this duty, all other employees who work the customer service counter being Tax Examiner IIIs. (*Appellants' July 23, 2008 and November 12, 2008 Response to DOR Motion*)

3.In April 2008, DOR made three provisional promotions to the positions of Tax Examiner III in the Springfield Office, Collections Bureau. The employees selected for promotion 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 that five years of employment with DOR. (*DOR Pre-Hearing*

Memorandum; DOR Motion for Summary Decision; Appellant's July 23, 2008 Response to DOR Motion; HRD April 17, 2009 Submission)

4. The promotions were posted in the Collections Bureau, Announcement 08-TSD-037, Job Posting #J13869. Ms. Pease applied for the position and was interviewed but was not selected because DOR determined that other applicants were "better" qualified based on the interview performance of the candidates. DOR does not support these claims with any specific documentation, but the DOR's assertion that the selected candidates were qualified for the position of Tax Examiner III was not disputed by the Appellant. (*DOR Pre-Hearing Memorandum; DOR Motion for Summary Decision; Appellant's July 23, 2008 Response to DOR Motion*)

5. There is no active eligible list for the position of Tax Examiner III. (*DOR Motion*)

CONCLUSION

Summary

The Commission determines that Ms. Pease's status as a permanent Tax Examiner I and provisional Tax Examiner II provides standing to appeal her non-selection for promotion to one of the two positions of Tax Examiner III that were awarded to other Tax Examiner IIs who had *no* civil service permanency in any title. The Commission will proceed to conduct a full hearing of this appeal to consider what relief, if any, is appropriate in the circumstances.

Applicable Standard on Dispositive Motion

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", i.e., DOR 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 Ms. Pease 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, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008) Specifically, a motion to dismiss for lack of standing must allowed when the appellant fails to raise "above the speculative level" sufficient facts "plausibly suggesting" that that Ms. Pease would have the standing necessary to find her "aggrieved" within the meaning of G.L.c.31, §2(b) to pursue this appeal. See Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Provisional Promotions

G.L.c.31, §15 provides the process for the provisional promotion of civil service employees within a departmental unit in the absence of a suitable eligible list from which to make a permanent promotion. The statute prescribes, in relevant part:

> *An appointing authority* [i.e. DOR] *may, with the approval of the administrator* [i.e. HRD] . . . *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 . . . .No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.
>
> *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* therefore, 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 provisional promotion pursuant to this section shall not be deemed to interrupt the period of service in the position form which the provisional promotion was made where such service is required to establish eligibility for any promotional examination.

G.L.c.31, §15 (*emphasis added*)

The law must be interpreted as a whole, 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.

Section 15 permits 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.[1]

The Commission has not decided whether the title employees are "in" for purposes of provisional promotion to the "next higher" title under the first paragraph of Section 15 is

[1] This case does not involve a promotional appointment, which is governed by the different requirements as forth in G.L.c.31, §12. cf. Kelleher v. Personnel Administrator, 421 Mass. 382, 657 N.E.2d 229 (1995)
.

(a) the permanent title they hold as a "civil service employee" (the pre-condition for any provisional promotion) or (b) may also mean any title into which the employee was subsequently promoted provisionally. In Andrews v. Civil Service Comm'n, 446 Mass. 611, 618, 846 N.E.2d 1132(2006), the SJC implied that a provisional employee is "in" the provisional title and but not "in" the original permanent title until the provisional promotion ceases to have effect, at least for purposes of layoff and reinstatement rights under G.L.c.31, §39. See also Connelly v. Department of Social Serv., 20 MCSR 366 (2007) (discharge appeal of provisional Program Manager V rejected, despite prior permanency as Social Worker III, because "[a]ppellant's [current] status is provisional and he is therefore not entitled to a hearing before the Commission")

The foregoing logic applied to interpreting rights of provisional employees who are disciplined or laid off for lack of work or lack of funds under Section 39 necessarily does not fully answer to the present question of promotional rights under Section 15. In its April 17, 2009 submission, HRD makes a compelling argument that a provisional promotion under the first paragraph of Section 15 requires permanency in the "next lower title" and that if an employee is to be promoted more than one step above their permanent civil service title, the second paragraph of Section 15 would apply, i.e., such a promotion is authorized only if: (1) there is no qualified permanent employee in the next lower title and (2) the appointing authority provides "sound and sufficient reasons for the promotion of such an employee.

The Commission agrees with HRD's analysis as consistent with basic merit principles, generally accepted practice, and the statutory intent of Section 15. Thus, under Section 15, only a "civil service employee" with permanency may be 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) [2]

Appellant's Standing to Appeal

The undisputed facts establish that one Tax Examiner II (Michael Nary) who was selected for promotion to Tax Examiner III also held permanency in the title of Tax Examiner I. Thus, Mr. Neary and Ms. Pease are similarly situated permanent civil service employees, but not in the next lower permanent title. Under these circumstances, the second paragraph of Section 15 permits DOR to select either one for "sound and sufficient reasons", which a qualified, but unsuccessful candidate may challenge by appeal to the Commission. See 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

[2] The DOR's April 17, 2009 submission relies on Kelleher v. Personnel Adm'r, 421 Mass. 382 (1995) to argue that a provisionally appointed employee holds "permanency" in a provisional title pending the holding of a qualifying examination and, therefore, all qualified provisional employees are entitled to be treated equally with permanent employees when it comes to making a provisional promotion. That question, however, clearly was not before the SJC in Kelleher, and the Commission does not interpret the court's opinion as reasonably construed to support the DOR's alchemistic argument that, in effect, would make all "provisionally" appointed and promoted personnel "permanent" civil service employees.

MCSR 3 (2001). See also Kelleher v. Personnel Administrator, 421 Mass.382, 657 N.E.2d 229 (1995) (discretion to appoint from "short list" under §15)

The paradigm is different, however, as to the two positions which DOR filled by promoting two other Tax Examiner IIs who had no civil service permanency whatsoever. Ms. Poe has a legitimate claim that, as a permanent civil service employee with who was qualified for promotion from her current position as Tax Examiner I into the title of Tax Examiner III, she should have been selected for one of these other positions over a provisional employee who is not entitled to be provisionally promoted at all.

In sum, Ms. Poe has grounds to argue, under G.L.c.31, §2(b) and §15, ¶2, that she has been injured as a result of a violation of the civil service laws and has standing to appeal that violation to the Commission and is entitled to an evidentiary hearing.

The Remedy

This Decision is limited to ruling on the standing of the Appellant to proceed with her appeal on the merits. The Commission has made no decision on the type of relief, if any, that may be appropriate should the provisional promotions involved be successfully challenged on the merits.

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). [3]

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.

The Commission recognizes, however, that, any ultimate relief that is granted to the Appellant in this case needs to take into account the practical reality that many public employees may hold provisional promotions through a process that this Decision has determined does not comply with Section 15 and which is not to be continued in the future. It is appropriate to provide the parties the opportunity for further hearing on the

[3] The Commission acknowledges that the General Court did appropriate funds in the current FY09 budget for the "Continuing Testing" program, and this line item (1750-0111) was zeroed out as part of the recent "9C" cuts required by the expected budget shortfall. No budget cuts are without consequences. The Commission remains concerned that the "provisional" employee problem persists, it will continue to engender disputes within the ranks of public employees such as presented in this appeal, and the conundrum will become more difficult to resolve every year that funding for the "Continuous Testing Program" is sacrificed to other choices.

question of what additional evidence the Commission should receive in the matter and what relief, if any, may be appropriate in the circumstances of this case. The Commission need not, and will not, address the precise relief that the Appellant may be entitled to receive, if any, should she prevail at a full hearing, but the Commission will be very mindful that any such relief does not invalidate long-standing existing promotions previously made. The Commission welcomes input from the parties and HRD on that subject.

Accordingly, the case will be scheduled for further pre-hearing conference and will proceed to full hearing, if necessary, thereafter.

For the reasons stated, DOR Motion for Summary Decision is hereby ***denied*.**

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) 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:
Caroline Pease (Appellant)
Suzanne Quersher, Esq. (for Appointing Authority)
Lidia Rincon, Esq (for HRD)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **CIVIL SERVICE COMMISSION**
One Ashburton Place:
Room 503
Boston, MA 02108
(617) 727-2293

CAROLINE PEASE,
Appellant

v. G2-08-132

DEPARTMENT OF REVENUE,
Respondent

OPINION OF CHRISTOPHER BOWMAN

Although this decision is not dispositive of the instant appeal, it has implications for all state agencies and civil service communities and a large segment of their employees.

Specifically, the Commission, agreeing with HRD, limits provisional promotions under Section 15 of the civil service law 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.

Nothing in this decision, however, limits an appointing authority 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.

To the extent that this decision clarifies the above-referenced distinction, I support this well-reasoned decision. Should this decision become a potential precursor to: 1)

invalidating any provisional promotions made under Section 15 prior to this clarification; or 2) limiting the career paths of those employees in civil service positions who don't have civil service permanency, I would vigorously dissent.

_____

Christopher C. Bowman, Chairman
April 29, 2009