

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

CHERYL PERRY,  
Appellant

G2-15-17

v.

DEPARTMENT OF MENTAL HEALTH,  
Respondent

Appearance for Appellant:

*Pro Se*  
Cheryl Perry

Appearance for Respondent:

Martha Lipchitz O'Connor, Esq.  
Director of Labor Relations  
EOHHS  
600 Washington Street  
Boston, MA 02111

Commissioner:

Christopher C. Bowman

**ORDER OF DISMISSAL**

On January 20, 2015, the Appellant, Cheryl Perry (Ms. Perry), filed an appeal with the Civil Service Commission (Commission), contesting her non-selection by the Department of Mental Health (DMH) to the position of provisional Rehabilitation Counselor A/B.

On February 24, 2015, I held a pre-hearing conference at the offices of the Commission, which was attended by Ms. Perry and counsel for DMH. On March 24, 2015, I held a status conference, which was attended by Ms. Perry, counsel for DMH and the Southeast Regional Director for DMH.

Based on the documents submitted and the statements of the parties, the following appears to be undisputed, unless otherwise noted:

1. Ms. Perry has been employed by the Department of Mental Health (DMH) as a provisional Recreational Therapist I since 1988.
2. Howard "Buddy" Baker-Smith has been employed by DMH for twenty-six (26) years and has served as the Regional Director for Southeastern Massachusetts for 1 ½ years.

3. Sometime prior to July 2014, a Recreational Therapist position became vacant at Taunton State Hospital. Given the need to expand vocational and rehabilitation services at that facility, Mr. Baker-Smith decided to post and fill a Rehabilitation Counselor A/B position instead, as opposed to a Recreational Therapist position.
4. At the status conference, Mr. Baker-Smith stated that it was his intention that this position be filled by an individual with a background in employment counseling and rehabilitation.
5. On or around July 7, 2014, DMH posted a provisional Rehabilitation Counselor A/B position. ("Posting 1") Rehabilitation Counselor A/Bs are represented by SEIU Local 509.
6. DMH received twenty-three (23) applications for this position; five (5) applicants, including Ms. Perry, were interviewed on July 30, 2014.
7. An interview committee comprised of an Occupational Therapist II and two (2) Occupational Therapist Is reviewed and rated the applicants. Matthew Cianci, the Director of Rehabilitation and Recovery and a representative from AFSCME participated as observers.
8. Sometime after July 30, 2014, the interview committee forwarded the "hiring packet" to Mr. Baker-Smith, stating that the recommended candidate was Ms. Perry.
9. A review of the July 30, 2014 rating sheets indicates that all three "voting members" of the interview panel each provided Ms. Perry with the maximum 35 of 35 points.
10. On August 20, 2014, Mr. Baker-Smith penned an email to DMH human resource representatives stating in part "There are a number of concerns with the process and we will need to re-open the hiring process for this position."
11. The remainder of Mr. Baker-Smith's email states, in its entirety:

"Some concerns I have identified:

This is a BU 8 position and there were no BU 8 or managers on the hiring committee. The committee was composed of unit 7 members, there was an observer from Unit 2 [...], and the area representative [the only Unit 8 member present] was an observer status.

Discussing the process observed by Matt Cianci, Area Director of Rehabilitation and Recovery Services, his impressions were the opposite of the committee scoring, the lowest scoring candidate [that had the preferred qualification credentials] was described by Matt as being clearly the best candidate interviewed. Matt reported that there was no committee discussion after the interviews were completed. Later, via email, Matt had offered his reflection to the committee chair.

Matt reported that a statement was read by [the Occupational Therapist II] at the beginning of each interview indicating that the position was not primarily for employment/vocational

activities but had the responsibilities for evening activities, effectively describing the Rec Therapist 1 duties from the previous position.

Of the 23 resumes received, there was another applicant that met the preferred qualifications that was not interviewed.

We will need to initiate a new hiring process for this position with a different hiring committee composition. I will be discussing this with [HR representative] tomorrow.

Buddy”

12. On or around September 8, 2014, DMH re-posted the Rehabilitation Counselor A/B position (“Posting 2”).
13. The only “voting” member from the prior interview panel to serve on the new interview panel was the Occupational Therapist II. Three (3) other “voting” members were added, including Mr. Cianci; the Director of Quality Management and a Rehabilitation Counselor C.
14. During this second, new screening process, the Occupational Therapist II that served on the first interview panel gave Ms. Perry a perfect rating of 30 out of 30 possible points. She gave the candidate ultimately selected a rating of 22 out of 30. Mr. Cianci, who did not serve as a voting member on the first interview panel, gave Ms. Perry 13 out of 30 points, the lowest rating that he provided to any of the candidates. He gave the candidate that was ultimately selected a rating of 25 out of 30 points.
15. The third voting member of the interview panel gave 23 out of 30 possible points to both Ms. Perry and the candidate that was ultimately appointed.
16. The fourth voting member of the interview panel gave 19 out of 30 points to Ms. Perry and 21 out of 30 points to the candidate that was ultimately appointed. Thus, one panel member ranked Ms. Perry higher than the selected candidate, one considered them tied; and two (including Mr. Cianci) ranked the selected candidate higher.
17. Based on the collective ratings of the interview panelists, two (2) external candidates were ranked first and second. Ms. Perry was ranked fourth.
18. After the highest ranked candidate declined the appointment, the second-highest ranked candidate was appointed. The appointed candidate has a bachelors degree in psychology; a substance abuse counseling certification; and one (1) year of experience as a counselor in a treatment facility.
19. At the status conference, Mr. Baker-Smith stated that, prior to seeing the resumes of the two highest ranked candidates, he had never heard of them nor had anyone contacted him regarding either of these candidates.

20. Also at the status conference, Ms. Perry stated that she does not believe that the decision to appoint the external candidate was based on any personal or political bias.

### *Analysis*

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over fifteen (15) years. These provisional appointments and promotions have been used as there have been no “eligible lists” from which a certification of names can be made for permanent appointments or promotions. The underlying issue is the Personnel Administrator’s (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists. This is not a new issue – for the Commission, HRD, the legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions.

It has been long established that “[p]rovisional appointments or promotions ... 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, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, after decades without HRD holding competitive examinations for many civil service titles, and the professed lack of appropriations to permit examinations in the near future, hiring and advancement of most civil service employees now can be lawfully accomplished only provisionally. Thus, as predicted, the exception has now swallowed the rule and an appointment “which is provisional in form may be permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).

The Commission and the courts have wrestled with the issues surrounding the so called “plight of the provisional” and regularly exhort the civil service community of the corrosive effects of the excessive use of “provisional” appointments and promotions. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff’d, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. Little has been done, however, or will be done, to wean the system from this practice without further appropriations from the legislature. As a result there appears no end to the reality that the vast number - probably most - current non public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy. Meanwhile, public employees’ provisional status leaves them with diminished job security and advancement opportunities under civil service law, relegating them to enforcement of their rights under collective bargaining agreements, if any, and other laws, which are beyond the Commission’s purview.

That said, it remains the duty of the Commission to apply the civil service law as written. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006), quoting Commissioner of Revenue v. Cargill, Inc., 419 Mass. 79, 86 (1999). As much as the Commission regrets this state of affairs, the use of provisional appointments is not, per se, unlawful, and a state agency cannot be estopped for hewing to the law. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address, whether on a systemic basis or through special legislation. See Kelleher v. Personnel Administrator, 421 Mass. at 389.

Applied to the instant appeal, DMH has not violated any civil service law or rule regarding provisional appointments. DMH posted this vacancy as a provisional appointment and appointed an external candidate. This does not constitute a “bypass” which could typically be appealed under G.L. c. 31, § 2(b).

Notwithstanding the above, the Commission always maintains authority under G.L. c. 31, § 2(a) to conduct investigations, including when allegations are made that an appointment process was not consistent with basic merit principles. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm’n & others, No. 2013-00639-D, Suffolk Superior Court (2014).

In summary, even though the process of making provisional appointments is not subject to many of the same requirements and restrictions associated with making permanent appointments, Appointing Authorities must still ensure that their decisions are consistent with basic merit principles – *and free of any personal and/or political bias*. When there is evidence to the contrary, the Commission will act – and exercise all of the fairly broad authority granted to the Commission under Chapter 31. We exercise this discretion, however, “sparingly” and when there is evidence that personal or political bias has potentially infected the hiring process. See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011).

I carefully reviewed and considered the statements and arguments of the parties and the documents submitted related to whether an investigation, beyond the review already completed here, is warranted.

It is undisputed that: a) a three (3)-member interview panel initially recommended Ms. Perry for appointment; b) the Regional Director did not accept the panel’s recommendation; c) the Regional Director called for a new interview panel; and d) the new interview panel recommended someone other than Ms. Perry.

These events, alone, were enough for me to schedule a status conference and hear directly from the Regional Director, Buddy Baker-Smith. After hearing his statements, however, including his answers to some tough questions, I am satisfied that Mr. Baker-Smith’s actions here were not motivated by personal or political bias. Rather, he was trying to ensure that the selected candidate’s background, qualifications and experience were consistent with the duties and responsibilities required of a Rehabilitation Counselor A/B at Taunton State Hospital. A review of the selected candidate’s resume does appear to show that she fits that bill. Finally, Mr. Baker-Smith did not know the appointed candidate and, according to his statement, nobody called him on behalf of that candidate. Finally, even Ms. Perry does not argue that Mr. Baker-Smith’s decision was infected with the type of personal or political bias that has typically warranted an investigation by the Commission.

### *Conclusion*

For the reasons stated above:

- Ms. Perry's bypass appeal is dismissed.
- The Commission declines to exercise its authority under G.L. c. 31, § 2(a) to initiate an investigation.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners [McDowell – Not Participating]) on May 14, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this 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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Cheryl Perry (Appellant)

Martha Lipchitz O'Connor, Esq. (for Respondent)