COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

ERIC PETERSON,
Appellant,

v.

DEPARTMENT OF CORRECTION,
Respondent

CASE NO: G2-11-323

Appellant's Attorney:	Joseph A. Padolsky, Esq. Louison, Costello. Condon & Pfaff, LLP 101 Summer Street Boston, MA 02110
Respondent's Attorney:	Earl Wilson, Esq. Department of Correction P.O. Box 946 – Industrial Drive Norfolk, MA 02056
Commissioner:	Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, acing pursuant to G.L.c.31, §2(b), brought this appeal to the Civil Service Commission (Commission), to protest his bypass for promotion to the position of Industrial Instructor III in the Department of Correction (DOC). The DOC moved for summary decision for lack of jurisdiction on the grounds that the Appellant was not bypassed because the appointment was not made from a certification, but was a provisional appointment made under G.L.c.31, §12, in the absence of a certification containing sufficient names from which to make a permanent appointment. The Appellant opposed the motion on the grounds that the DOC's use of the provisional appointment process was a subterfuge to discriminate against the Appellant. A hearing on the motion was held by the Commission on February 27, 2012.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the argument of counsel and the inferences reasonably drawn from the evidence, I find the following facts to be undisputed:

1. The Appellant, Eric Peterson, is a tenured civil service employee of the DOC who has permanency in the position of an Industrial Instructor II. (*DOC Motion; Appellant's Opposition [EPRSs]*)

2. In 2006, Mr. Peterson has been serving as the Assistant Shop Manager of Print Shop at the DOC's Old Colony Correctional Center Print Shop when the Shop Manager went out on injured leave. Since September 12, 2006, Mr. Peterson has been filling in as the Acting Shop Manager and receiving the higher rate of pay accorded to the position, which carries the job title of Industrial Instructor III. (*Appellant's Opposition [Nov. 2, 2006 Memo from James Karr and attached pay requisition]; Appellant's Representation at Motion Hearing*)

3. Mr. Peterson's performance evaluations, including evaluations of his work as the Acting Shop Manager, reflect that he meets or exceeds expectations. (*Appellant's Opposition [EPRSs]*)

4. According to the documentation provided by DOC, the most recent eligible list for the position of Industrial Instructor III was established from an examination administered on or about September 27, 2007. (*Hearing Exhs. 1 & 2; PH Exh. 4*)

5. Mr. Peterson had taken and passed several prior examinations for Industrial Instructor III. However, he did not take the September 27, 2007 examination and his

name did not appear on the eligible list generated from the results of that examination. (*Hearing Exhs. 1 & 2, PH Exh.4; Representations of Appellant at Hearing*)

6. On or about December 1, 2009, the DOC requested and received a Promotional Certification # 4090024 and an Open Certification #4090023 to fill the position of Old Colony Print Shop Manager/Industrial Instructor III. None of the candidates on the Promotional List signed willing to accept and, of the four candidates who signed willing to accept on the Open Certification, the DOC determined that none of them possessed the minimum qualifications for appointment to the position. (*DOC Motion; Hearing Exhs. 3 & 4*)

7. Approximately one year later, on or about February 18, 2011, the DOC issued a job posting (IDJ20992) to fill the position of Old Colony Print Shop Manager as a provisional appointment to the position of Industrial Instructor III. Sixteen individuals, including the Appellant, as well as several outside candidates, applied and were interviewed. (*DOC Motion*)

8. Eventually, one of the outside candidates, Anthony Carosi, received the appointment, effective November 27, 2011. (*DOC Motion*)

9. Mr. Carosi did not assume the duties of the position of Print Shop Manager, however, as he declined to pursue the job after attending several days of training and orientation at the DOC. At the time of the motion hearing, the DOC was in the process of re-posting the position. (*DOC Motion; Representation of the Appellant and DOC at Hearing*)

10. Mr. Peterson has remained in the position of Acting Shop Manager at all times since September 12, 2011. (*Representation of Appellant at Hearing*)

CONCLUSION

A motion for summary decision of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". To survive a motion for summary decision, the non-moving party must offer "specific facts" which establish "a reasonable hope" to prevail after an evidentiary hearing. Conclusory statements, general denials, and factual allegation not based on personal knowledge are insufficient to establish a triable issues. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

The Commission may also, on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3). See Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, (2008) (discussing standard for deciding motions to dismiss)

Based on the facts presented to the Commission at the motion hearing, although the Appellant has raised a sufficient factual issue that would otherwise entitle him to a hearing on the merits of his challenge to the DOC's use of a provisional appointment to fill the position that he has occupied for nearly six years, the selected candidate never actually replaced Mr. Peterson and the position is in the process of being reposted. Thus, it is plain that the present appeal should be dismissed as premature and/or moot.

However, as DOC proceeds to again fill the position of Print Shop Manager, certain requirements of civil service law and rules may bear notice.

First, although eligible lists appear to have existed, DOC filled the position as a "temporary" out-of-grade appointment for many years, when, civil service law requires that, in general, such appointments cannot exceed 60 days. G.L.c.31,§31. See, e.g., Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, 602-603, rev.den., 395 Mass. 1102 (1985), citing, Scholok v. Civil Service Comm'n, 348 Mass. 96, 99 (1964); Kelly v. City of Boston, 25 MCSR 23 (2012) and cases cited. Had proper procedures been followed, Mr. Peterson might have been in line for provisional promotion to Industrial Instructor III in or about 2006, and, perhaps, even should have been considered for permanent appointment to that position while his name still appeared on the appropriate eligible list. See Gagnon v City of Chicopee, 25 MCSR 20 (2012); McDaid-Harris et al v. City of Peabody, 23 MCSR 363 (2010); O'Connor v. Boston Police Dep't, 22 MCSR 660 (2009); Greeley v. Town of Belmont, 19 MCSR 32 (2006); Sullivan et al v. Brookline Fire Dep't, 8 MCSR 41 (1995), supplemented, 9 MCSR 46 (1996), aff'd sub nom Brookline v. Civil Service Comm'n, Norfolk Sup. Ct. C.A. 1995NOCV-635 et al (1998); Gaughan v. Boston Police Dep't, 12 MCSR 245 (1999)

Second, Mr. Peterson has articulated a fair issue for appeal whether the DOC has used the provisional "appointment" process as a subterfuge for circumventing selection of the Appellant, who has been satisfactorily performing the job for many years and, as a tenured Industrial Instructor II, would seem a logical choice for "provisional promotion", while calling for a new examination and, eventually, making the appointment permanent, all as required by civil service law. G.L.c.31,§§7 & 8, 12 through 15.

The DOC correctly understands that the Commission construes the practical implications stemming from the many years without civil service examinations to allow a degree of discretion in how non-permanent (i.e. "provisional") promotions are made. See, e.g., Michaud v. Department of Transitional Assistance, 24 MCSR 307 (2011); Posco v. Department of Transitional Assistance, 24 MCSR 309 (2011); Pease v. Department of Revenue, 22 MCSR 754 (2009).

These principles may not be entirely applicable here, however, as the Commission understands, unlike most other civil service positions. DOC still continues to administer examinations and hire employees based on the statutory system of certifications from an eligible list. Indeed, as this case illustrates, the DOC did have such an eligible list for the position in question, could appoint from a "short list" and/or call for a new examination upon making a provisional appointment, all as the civil service law originally intended. Thus, noncompliance with these express requirements may not be excused as easily as with other state agencies that lack the same degree of control over administration of examinations. Moreover, the Appellant also correctly asserts that, when the Commission is presented with evidence that an appointment process was a subterfuge for pre-determined results, either favoring a certain candidate or discriminating against one, the Commission may choose to intervene to grant relief in such a case, if appropriate.

While these issues are not ripe for consideration in the present appeal, they may well become issues in a future appeal and the parties are encouraged to consider these potential concerns as they chose how to proceed in the future.

In sum, for the reasons stated above, DOC's Motion for Summary Decision is denied and the appeals of the Appellant is hereby ***dismissed as moot and without prejudice.***

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on April 19, 2012.

A True Record. Attest:

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Commissioner

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 the 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 a Civil Service Commission's final decision.

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.
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Notice to:
Joseph A. Padolsky, Esq. (for Appellant)
Earl Wilson, Esq. (for Respondent)
John Marra, Esq. (HRD)