COMMONWEALTH OF MASSACHUSETTS
CIIVIL SERVICE COMMISSION

Suffolk, ss.

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

Joan C. Rainville,
Appellant

v. Case No. G2-06-11

Massachusetts Rehabilitation Commission,
Respondent

ORDER OF DISMISSAL

Joan C. Rainville (hereinafter referred to as "Appellant"), a Qualified Vocational Rehabilitation Counselor C for the Massachusetts Rehabilitation Commission (hereinafter referred to as "Respondent"), filed this appeal on January 10, 2006, challenging the Appointing Authority's decision to bypass her for the position of Qualified Vocational Rehabilitation Counselor D (hereinafter "QVR Counselor D"). The above-entitled matter had a Pre-Hearing conference on June 1, 2006.

The Respondent filed a Motion to Dismiss with the Commission on July 17, 2006. With the Motion to Dismiss, the Respondent filed exhibits (R1-R3) including an Affidavit of Teresa Belmont dated July 12, 2006 (R1), undated QVR Counselor D Job Posting (R2), and the Appellant's Rejection Letter dated October 28, 2005 (R3).

The Appellant, represented by Attorney Edward D. Donnelly, filed an Opposition to Respondent's Motion to Dismiss on October 2, 2006. With the Opposition to the Motion to Dismiss, the Appellant filed 6 exhibits (A1-A6) including an unsigned and undated Affidavit of Appellant (A1), a QVR Counselor D and QVR Counselor C score report from Human Resources Division (hereinafter referred to as "HRD") (A2), the Staffing Policy and Procedure Manual from the Respondent (A3), the Appellant's resume (A4), the Appellant's Employee Review Form (A5), and the Appellant's Rejection Letter dated October 28, 2005 (A6). Additionally on October 2, 2006, the Appellant filed 5 more exhibits (A7-A11) including an Affidavit of Susan Tousignant dated September 26, 2006 (A7), an e-mail from Respondent with the QVR Counselor D Promotional Job Posting dated April 13, 2006 (A8), a letter from Attorney Cochran dated August 21, 2006 (A9), a Candidate List from Attorney Kerry Bonner of Human Resource Department dated September 8, 2006 (A10), and an e-mail from Respondent with the QVR Counselor D Provisional Appointment/Promotion Job Posting dated August 12, 2005 (A11). On

October 11, 2006, the Commission received the Affidavit of Appellant signed and dated October 3, 2006 (A1) (this is the affidavit submitted October 2, 2006 that was unsigned and undated).

Pursuant to 801 CMR 1.01 (7)(g)(1), the Respondent has moved to dismiss the appeal on the ground that upon the evidence, or the law, or both, the Petitioner has not established her case. From the evidence entered in by the Parties, I find:

1) The Respondent provides services for individuals with disabilities throughout the Commonwealth. R1.

2) The Appellant has worked for the Respondent since 1989. The Appellant began her career as a QVR Counselor B in the Plymouth office in July of 1989. The Appellant received permanent status in March of 1990. A1.

3) The Appellant took HRD's "Prom Vocational Rehab Counselor III" and "Prom Vocational Rehab Counselor IV" exams in December 11, 1991 and passed both tests, as indicated in an HRD document submitted by the Appellant, March 13, 1992. A1, A2.

4) The Appellant was promoted to QVR Counselor C in or around 1995, and worked at the Walpole office for approximately eight years. Since November of 2003, the Appellant has worked in the Taunton Office as a Counselor C. A1.

5) On April 13, 2005, the Respondent posted a promotional opportunity for the position QVR Counselor D in the Roxbury Office. Three Candidates applied to the position and none were selected. A7.

6) On August 12, 2005, the Respondent posted a "Provisional Appointment/Promotion" vacancy with an application deadline of August 26, 2005. The position was entitled QVR Counselor D. A1, A7.

7) In August of 2005, the Respondent interviewed five candidates for the QVR Counselor D position, including the Appellant. Seven candidates applied for the position and five candidates were selected by the Respondent for interviews. A7.

8) The evidence does not support a finding that a civil service exam was given for the position of QVR Counselor D.

9) Although the Appellant was chosen for the interview, the Appellant was not appointed to the position of QVR Counselor D and was so informed of the Respondent's decision in a letter dated October 28, 2005. R3, A6.

10) A different applicant was provisionally appointed to the position, after receiving the highest score in the interview process, when there was no eligible list for the position of QVR Counselor D. A7.

The issue here is whether the Appointing Authority acted correctly when it made a "Provisional Appointment/Promotion" of an applicant who was a provisional employee in the position of QVR Counselor A/B instead of hiring the Appellant, who was in the permanent position of QVR Counselor C.

The Appellant argues that the Respondent's decision not to provisionally appoint the Appellant for the April 13, 2005 promotional position violated G.L. c. 31, §15. G.L. c. 31, §15 states, "An appointing authority may … make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit." Looking at the plain meaning of statute G.L. c. 31, §15, the word "may" indicates the Appointing Authority has the option of hiring or not hiring by way of provisional promotion. As the Appellant points out, the Respondent "could" have hired the Appellant. No language in the statute requires the Respondent to hire the Appellant.

Furthermore, the Appellant's argument relies on the holding in O'Brien v. Massachusetts Rehabilitation Commission, G-1883 (1991), where the Commission found it was unlawful when permanent employee O'Brien was bypassed by a provisional employee, after the Respondent re-characterized the provisional promotion to a provisional appointment. The O'Brien case, which appeared before the Commission over 15 years ago, stated:

> *"We [the Commission] are constrained to find, however, that the Appointing Authority treated the matter as a promotion, at least until the decision to select [the Appellant] made it inconvenient to do so. In fact, an internal policy memorandum makes it clear that the practice of the Appointing Authority was to be promoted from the next lower job title 'when no list exists,' and to make a provisional appointment only when "no list exists and there is no person eligible for provisional promotion."* (O'Brien, 2).

The August 12, 2005 job posting characterized the QVR Counselor D position as a "Provisional Appointment/Promotion." In O'Brien, there was a bad faith switch from a provisional promotion to provisional appointment to accommodate the Appointing Authorities decision to hire one applicant over another applicant. Here the Respondent intended to make a provisional appointment, rather than a provisional promotion, demonstrated by the fact that no civil service exam was held for the August 12, 2005 job posting and the Respondent chose to interview the candidates for QVR Counselor D position. In addition, the Commission finds that the applicable statute and case law does not bar the Respondent from choosing between a provisional appointment and a provisional promotion, absent an eligibility list.

The Appellant also looked at the Respondent's 1991 Personnel Policy and Procedure Manual, saying the bypass of the Appellant went against longstanding office policy. Under Respondent's Rule 3.2,

> *"When no list exists, the nominee must be a qualified Civil Service Employee (temporary or permanent) in the Commission in the job series for the vacant title … The resulting action is a provisional promotion. (Chapter 31, Section 15). Please note that an employee with Civil Service status in the next lower title*

(temporary or permanent) takes precedence when there is a promotional opportunity."

However, the Respondent's Personnel Policy and Procedure Manual doesn't require the Respondent to choose between making a provisional appointment or provisional promotion. It sets guidelines in this regard.

The Commission believes the August 12, 2005 job posting was intended to select a provisional appointment, therefore G.L. c. 31, §12 applies instead of G.L. c. 31, §15. G.L. c. 31, §12 provides "an appointing authority may make a provisional appointment" and further "a provisional appointment may be authorized pending the establishment of an eligible list." The Respondent made its selection after the Respondent's interview panel chose the employee who scored the highest during the interview procedure.

The Appointing Authority is inherently authorized to interview candidates by the language of G.L. c. 31, § 25. Flynn v. Civil Service Commission, 15 Mass. App. Ct. 206, 208 (1983). The purpose of the interview process is to allow the Appointing Authority to get a first-hand feel for the candidate's demeanor and ability to handle scenarios that may arise in the scope of employment in that position. Because the foundation of this process is personal interaction, the interview panel must possess some degree of discretion to allow its subjective interpretation of the candidate's responses and behaviors to affect their decisions. Burns v. Sullivan, 619 F. 2d 99, 104 (1980). Spicuzza v. Department of Corrections, 12 MCSR 187 (1999). Hebb v. Town of West Bridgewater & Department of Personnel Administration, 6 MCSR 43 (1993). This idea is harmonious with the fact that the Commission affords a great deal of discretion in appointing candidates to the Appointing Authority. Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660 (1971). Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315, 320-321 (1991).

In this case, the Respondent made its decision to select one candidate over the Appellant; it did so after the other candidate received the highest score in the interview process. R1. The Commission has upheld decisions respecting the interview process. In McCarthy v. Boston Fire Department, 7 MCSR 262 (1994), a successful candidate demonstrated superior relevant technical knowledge over the Appellant in his interview. In Elaine Schivek v. Registry of Motor Vehicles, 13 MCSR 71 (2000), the Appellant, an unsuccessful candidate, gave "bizarre, unsettling" answers to the interview panel, and demonstrated a lack familiarity with software and other duties crucial to the position.

In Alvin LaRoche v. Department of Correction, 13 MCSR 160 (2000), a successful candidate demonstrated greater leadership skills, knowledge of the job and professionalism than the Appellant during his interview.

The facts of the aforementioned case indicate that the Respondent acted in accordance with Chapter 31, when it provisionally appointed a new candidate and denied the Appellant a provisional promotion.

Consequently, the Petitioner, Joan C. Rainville, has not established her case in light of the facts and the law. The Respondent's Motion to Dismiss is allowed and the Appellant's appeal is dismissed.

Civil Service Commission

Donald R. Marquis,
Commissioner

By vote of the Civil Service Commission (Bowman, Guerin, Marquis, Taylor; Commissioners) on November 9, 2006.

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. 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 section 14 of chapter 30A 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:
Edward D. Donnelly, Esq.
Kerry A. Bonner, HRD