COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

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

JOVETTA RICHARDS &
TEN OTHERS,
Appellants

v. Docket Nos.: (See Below)

DEPARTMENT OF TRANSITIONAL ASSISTANCE,
Respondent

CSC Case No.	Appellant	Date of Hire	BERS A/B Permanency Date
G2-10-194	Jovetta Richards	1979	1994
G2-10-195	Rosalynn Gunn	1985	1994
G2-10-196	Gloria Proenza	1990	1994
G2-10-198	Victoria Mishchenko	1994	1994
G2-10-199	Elaine Liendo	1979	1994
G2-10-205	Zemira Santiago	1980	1994
G2-10-206	Deborah Williams	1982	1987
G2-10-216	Jackie Johnson	1979	1994
G2-10-217	Suzanne Nguyen	1993	1994
G2-10-221	Joan Whitlow	1985	1995
G2-10-227	Helen Elinson	NA	1994

Commissioner: Christopher C. Bowman

DECISION ON DTA'S MOTION TO DISMISS

The Appellants in this case are employees of the Department of Transitional Assistance (DTA) serving as permanent Benefit Eligibility Referral Social Worker A/Bs (BERS A/B).

On March 10, 2010, DTA posted sixteen (16) BERS C supervisor positions that were available at the Department's Dudley Square and Newmarket Square offices. The postings stated that the positions would be filled as provisional appointments. According to DTA, additional federal funds allowed them to ultimately hire nineteen (19) new BERS Cs. It is undisputed that there is no "eligible list" from which a certification of names could be made

for a permanent or temporary appointment or promotion (as opposed to a provisional appointment or promotion).

Ninety-three (93) individuals applied for the nineteen (19) vacancies of which fifty-four (54) were interviewed, including one (1) external candidate. DTA assembled a hiring team consisting of five (5) veteran managers with a combined total of over eighty-six (86) years of experience with the Department. Due to the high volume of interviews, two-member subgroups of the hiring team interviewed the candidates. During the interview, the hiring team asked all the candidates the same questions and graded the candidates on a standard interview assessment form.

DTA selected the eighteen candidates with the best interview scores for the provisional BERS C positions. A number of candidates had a tied score for 19th. To determine which of these candidates should be awarded the final BERS C supervisor position, the interview team met to discuss the tied candidates. After deliberating, they selected 1 of the tied candidates for the 19th position. Five (5) of the nineteen (19) selected candidates were *permanent* BERS A/Bs and the remaining fourteen (14) candidates selected were *provisional* BERS A/Bs.

The Appellants, all pro se, filed individual appeals with the Commission, contesting the appointment of the fourteen (14) provisional BERS A/BS. Pre-hearing conferences were held at the offices of the Commission on September 7th, September 14th, and October 4, 2010. I heard oral argument from all parties. It was agreed that DTA would file a Motion to Dismiss the Appellant's appeal and the Appellants could file a reply.

On October 19, 2010, DTA filed a Motion to Dismiss, which was copied to the Appellants. The Commission received written replies from Appellants Elinson, Whitlow and Liendo.

DTA's Argument

DTA argues that when there is no eligible list from which a certification of names may be made for such appointment, it may fill vacancies provisionally and may do so through provisional appointments or provisional promotions, citing G.L. c. 31, § 12 and two prior Commission decisions, Asiaf v. Department of Conservation and Recreation, 21 MCSR 23 (2008) and Medeiros and Pollock v. Department of Mental Retardation, 22 MCSR 276 (2009).

Here, since DTA decided to fill the Boston BERS C supervisor position as provisional appointments, there is no obligation under the civil service law pertaining to provisional appointments to prove that the persons so appointed were the most qualified or better qualified candidates. Nevertheless, DTA argues that it followed strict guidelines in selecting the candidates for these positions. The hiring team asked all of the candidates the same questions and completed an interview assessment form for all the candidates that were interviewed. According to DTA, they then selected the candidates that it believed performed best during the interview process for the available BERS C supervisor positions. Therefore, DTA argues that the Appellants have failed to state a claim upon which relief can be granted and that their appeals should be dismissed.

Appellants' Arguments

Based on their written appeal forms, their statements made during the respective pre-hearing conferences and the written submissions of three Appellants, it appears that there arguments are as follows.

First, the Appellants argue that it is against civil service law and rules to fill the BERS C supervisor positions with individuals that are not permanent civil service employees (i.e. – permanent BERS A/Bs).

Second, the Appellants argue that these nineteen (19) appointments are a violation of a 1994 Commission order regarding the use of provisional appointments in Felder et al v. Department of Public Welfare, 7 MCSR 28 (1994).

Finally, and more generally, the Appellants argue that by selecting many less senior employees (who are provisional employees), DTA has shown a bias against older, more senior employees such as themselves.

Conclusion

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for 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.

A series of Commission rulings and decisions in 1993 and 1994 (Felder et al v. Department of Public Welfare and Department of Personnel Administration, CSC Case Nos. G-2370 & E-632), provide a glimpse of the long and protracted history within the executive, judicial and legislative branch regarding the use of provisional appointments and promotions by Appointing Authorities.

Ironically, the 1993 and 1994 Felder rulings and decisions referenced above occurred as a result of civil service examinations actually being administered by the personnel administrator as mandated by the legislature in Section 26 of the Acts of 767 of the Acts of 1981. The delay in meeting that mandate caused considerable confusion and consternation regarding the status of provisional employees that were hired during the several year span that occurred between enactment of Section 26 and the establishment of the eligible lists. The Legislature ultimately armed the Civil Service Commission with fairly broad authority to protect the rights of these individuals and others, "not withstanding the failure of any [such] person to comply with any requirement of said chapter thirty-one or any such rule …" by amending Chapter 534 of the Acts of 1976 with enactment of Chapter 310 of the Acts of 1993 (over the veto of the Governor at the time).

The Felder rulings culminated with the Commission exercising its new "Chapter 310" authority and granting permanency to certain Department of Public Welfare provisional employees, hired after 1981, who took and passed civil service examinations, but were "bumped" or laid off because Section 26 of the Acts of 767 of the Acts of 1981 only provided protections (through preference on any certifications issued) to provisional employees hired before enactment of Section 26. Since there was a delay in administering these legislatively-mandated examinations, the Felder Appellants were deemed to have been

prejudiced through no fault of their own and granted relief (permanency in the title of FASW IV).

In the final paragraph of the 1994 Felder decision, the Commissioners at the time stated:

> "On page 5 of Appendix B, it is provided that 'no provisional hiring or promotions in (certain) titles will occur from 07/01/94 forward.' This is a laudable goal which we hope the DPA and the DPW can meet. Nevertheless, in order to deal with emergency circumstances which are now unforeseen and which the DPA assures us will not occur, we direct that the Proposal be modified to provide that no such hiring or promotions be made without prior approval of the Civil Service Commission, after a hearing, pursuant to our jurisdiction in this matter."

In retrospect, it appears that even the Commissioners were far too optimistic about how positions would be filled on a going-forward basis. There have been no examinations for the BERS titles (which replaced the FASW titles) (or most other non public safety official service titles) in over a decade meaning that no eligible lists have been established. Thus, DTA and all other state agencies, have relied on the use of provisional appointments and promotions to fill the vast majority of non-public safety positions during this time period.

Here, the Appellants argue that DTA has violated the 1994 Felder decision by filling positions provisionally without first getting permission from the Civil Service Commission. That argument overlooks the fact that the Commission has issued a series of more recent decisions in which the Commission, although it 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, states that it must honor the clear legislative intent that allows for provisional appointments and 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.

In a series of decisions, the Commission has addressed the statutory requirements when making such provisional appointments or promotions. See Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); Glazer v. Department of Revenue, 21 MCSR 51 (2007); Asiaf v. Department of Conservation and Recreation, 21 MCSR 23 (2008); Pollock and Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Pease v. Department of Revenue, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Foster v. Department of Transitional Assistance, 23 MCSR 528; Heath v. Department of Transitional Assistance, 23 MCSR 548.

In summary, these recent decisions provide the following framework when making provisional appointments and promotions:

- G.L.c.31, §15, concerning provisional ***promotions***, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains less than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and "sound and sufficient" reasons are submitted and approved by the administrator for making such an appointment.

- Under Section 15 of Chapter 31, 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.
- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional "appointment" process as a subterfuge for selection of provisional employee candidates who would not be eligible for provisional "promotion" over other equally qualified permanent employee candidates.
- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Applied to the instant appeals, it can not be shown that DTA violated any civil service law or rule. DTA posted these positions as provisional appointments, considered external and internal candidates, and selected 19 individuals for the position of BERS C, some of whom had permanency in the next lower title of BERS A/B and some of whom were provisional A/Bs. There has been no allegation or showing, nor is it likely that it could

be shown at a full hearing, that DTA used the provisional appointment process a subterfuge. Rather, DTA candidly acknowledges that, in order to not exclude those provisional employees in the next lower title, some of whom have been with DTA for more than a decade, it followed the guidance and directives contained in the above-referenced Commission decisions and posted these vacancies as provisional appointments (as opposed to provisional promotions).

For all of the above reasons, the Appellants can not show that DTA violated civil service law or rules or that DTA "bypassed" them for appointment as there was no eligible list in place at the time. Thus, their bypass appeals, under the docket numbers referenced on page 1 of this decision, are hereby ***dismissed.***

When making provisional appointments, appointing authorities are not required to limit their review to the first "2N + 1" candidates willing to accept appointment on an eligible list, with "N" being equal to the number of vacancies. As stated above, when examinations are not administered, no eligible list can be established, thus triggering the use of provisional appointments and promotions. Thus, when making provisional appointments, appointing authorities may choose from a broader applicant pool, as appears to be the case here.

With 19 vacancies, DTA would have been limited to only considering the first 39 candidates on the eligible list (based on an examination score and other factors) if such eligible list existed. Here, DTA reviewed resumes from 93 job applicants and then interviewed 54 of them. Of these 54, 19 were selected for a provisional appointment. Ironically, with the broader discretion granted under provisional appointments, the decision-making process is subject to less review by the Civil Service Commission, as no

bypass can occur when no eligible list is in place. Thus, incumbent employees who are not selected for provisional appointments rarely have recourse to the Commission and are limited to any grievance or arbitration rights provided under the respective collective bargaining agreements. Under certain circumstances, as appears to be the case with a large number of the Appellants, individuals may choose to file a complaint in other venues, such as the Massachusetts Commission Against Discrimination (MCAD).

While the Commission has limited, if any, right to review these "bypass" appeals under Section 2(b) of Chapter 31, the Commission maintains broad discretion to review hiring decisions of Appointing Authorities under Section 2(a) of Chapter 31. While the Commission exercises this discretion only sparingly, it has not been afraid to do so when there is some evidence that personal or political bias has infected the hiring process and prevented individuals from receiving fair consideration for appointment or promotion. See City of Methuen's Review and Selection of Firefighters and Reserve Police Officer Candidates, CSC Case Nos. I-09-290 and I-09-423 (2009). In Methuen, the Commission opened an investigation after a series of pre-hearings in which individuals alleged that hiring decisions were infected by political bias and that relatives of city officials with less qualifications were being selected over them. The Commission, under 2(a), was not limited to determining whether a bypass occurred, or whether there was sound and sufficient reasons for such bypass. Rather, based on the initial evidence presented by non-selected candidates, the Commission used its broad authority under Section 2(a) to investigate whether the overall hiring process was consistent with basic merit principles.

Here, I have carefully considered: 1) the statements of each of the Appellants during their respective pre-hearing conferences; 2) the additional written statements submitted

by some Appellants; 3) the interview assessment forms submitted of the non-selected candidates; 4) the statements of counsel for DTA as well as DTA's Motion to Dismiss. Based on this information, it appears that DTA, in regard to these 19 appointments, used a review and screening process that was consistent with basic merit principles.

A hiring team of veteran DTA managers asked all of the candidates the same questions and completed an interview assessment form for all the candidates that were interviewed. According to DTA, they then selected the candidates that it believed performed best during the interview process for the available BERS C supervisor positions. Further, counsel for DTA stated at one of the pre-hearing conferences that he personally contacted 4 of the 5 interview panelists and asked them if any external factors or outside influence affected their recommendations. Each of them emphatically stated that no external factors were considered and there was no outside influence.

None of the Appellants alleged that the individual interview panelists had a personal or political bias. Rather, the Appellants argue more generally that there was a bias in favor of younger applicants with far less experience than them. For example, one Appellant questioned how a candidate with 2 -3 years of experience could be selected over her for a supervisory position over her and others who have over two decades of experience and excellent performance evaluations and many commendations. Another Appellant argued that there was a general feeling that older employees were "being put out to pasture" and another expressed frustration that she trained one of the individuals who was provisionally appointed to the BERS C position. Another Appellant stated that she was told by a senior DTA official that DTA was interested in appointing younger people to supervisory positions.

While the Appellants have not provided sufficient evidence *at this time* to justify a Section 2(a) investigation by the Commission regarding the provisional appointment of 19 BERS Cs in the Dudley and Newmarket offices, the Appellants have raised serious enough concerns to justify the production of additional documents and information prior to the Commission making a final determination on whether to initiate an investigation.

Thus, for the sole purpose of obtaining additional documents and information in order to determine if the Commission should initiate an investigation under Section 2(a) regarding the provisional appointment of 19 BERS Cs in the Dudley / Newmarket offices, the Commission hereby opens Case No. I-10-353 and makes the following orders:

- A pre-hearing conference regarding Case No. I-10-353 will be conducted on Friday, February 11, 2011 at 10:00 A.M. at the offices of the Commission. If the parties are able to agree on a more convenient and suitable location (i.e. – a conference room at the Dudley / New Market offices) for such hearing, the Commission will allow a request for a change of venue.
- As part of the pre-hearing conference, DTA shall provide the following documents: 1) Resumes of all candidates who applied for the BERS C appointments with any personal or other confidential information redacted; 2) interview selection forms for all selected candidates; 3) interview selection forms for all Appellants; 4) any other written notes or correspondence related to the selection or non-selection of candidates for the 19 BERS C positions.
- As part of the pre-hearing conference, DTA shall provide answers to the following questions: 1) how many candidates applied for the 19 BERS C positions; 2) of the

total number of candidates that applied, how many were permanent civil service employees?; how many were provisional civil service employees?; how many were non-civil service employees; 3) how many candidates were interviewed for the 19 BERS C positions; 4) of the candidates interviewed, how many were permanent civil service employees?; how many were provisional civil service employees?; how many were non civil service employees?;

- DTA shall attempt to have the 5 interview panelists present to describe the interview process and answer any relevant questions;
- DTA may, if it so chooses, have any relevant senior DTA officials present regarding the Department's hiring policies and who may wish to address statements raised during the pre-hearing conference that DTA was purportedly focusing on younger candidates for the 19 BERS C positions.

Civil Service Commission

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Christopher C. Bowman
Chairman

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman - Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; and Stein, Commissioner – Yes; [McDowell – not participating]) on December 30, 2010.

A True copy. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:
Daniel LePage, Esq. (for DTA)
John Marra, Esq. (HRD)
11 Appellants