

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 No.: I-10-353

DEPARTMENT OF TRANSITIONAL ASSISTANCE,  
*Respondent*

<u>Appellant</u>	<u>Date of Hire</u>	<u>BERS A/B Permanency Date</u>
Jovetta Richards	1979	1994
Rosalynn Gunn	1985	1994
Gloria Proenza	1990	1994
Victoria Mishchenko	1994	1994
Elaine Liendo	1979	1994
Zemira Santiago	1980	1994
Deborah Williams	1982	1987
Jackie Johnson	1979	1994
Suzanne Nguyen	1993	1994
Joan Whitlow	1985	1995
Helen Elinson	NA	1994

Commissioner:

Christopher C. Bowman

DECISION ON WHETHER AN INVESTIGATION  
UNDER G.L. c. 31, § 2(a) IS WARRANTED

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 19<sup>th</sup>. 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 19<sup>th</sup> 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.

#### *History of Appellants' Prior Bypass Appeals*

The Appellants, all pro se, previously filed individual “bypass” 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 7<sup>th</sup>, September 14<sup>th</sup> 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. The following arguments were made as part of those previous bypass appeals:

*DTA's Argument*

DTA argued 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 argued 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 argued that the Appellants 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, their argument was as follows:

First, the Appellants argued that it was 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 argued that these nineteen (19) appointments were 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 argued that by selecting many less senior employees (who are provisional employees), DTA has shown a bias against older, more senior employees such as themselves.

### *Commission's Decision on the Bypass Appeals*

On December 30, 2010, the Commission issued a decision with the following findings and conclusions:

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, “notwithstanding 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 Appellants’ bypass appeals, the Commission concluded that it could not be shown that DTA violated any civil service law or rule. DTA posted the 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 was no allegation or showing that DTA used the provisional appointment process as a subterfuge. Rather, DTA candidly acknowledged 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 Commission concluded that the Appellants could 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 were dismissed.

The Commission, however, entered the following additional findings and conclusions that resulted in a further hearing to determine whether it should conduct an investigation pursuant to G.L. c. 31, § 2(a):

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, after carefully considering: 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, the Commission concluded that it appeared 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 argued 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 did not provide sufficient evidence as part of their bypass appeal 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 Commission concluded that the Appellants 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 would initiate an investigation under Section 2(a) regarding the provisional appointment of 19 BERS Cs in the Dudley / Newmarket offices, the Commission opened the instant case under Docket No. I-10-353 and made the following orders:

- A pre-hearing conference regarding Case No. I-10-353 was to be conducted on Friday, February 11, 2011 at 10:00 A.M. at the offices of the Commission.
- As part of the pre-hearing conference, DTA would 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 would 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 should attempt to have the interview panelists present to describe the interview process and answer any relevant questions;
- DTA was permitted if it so chose, to have any relevant senior DTA officials present regarding the Department's hiring policies to address statements raised during the pre-hearing conference that DTA was purportedly focusing on younger candidates for the 19 BERS C positions.

*February 11, 2011 Hearing*

All of the Appellants, counsel for DTA, a DTA Regional Director and Assistant Regional Director (who also served on an interview panel) attended the February 11, 2011 hearing, which was conducted by myself and Angela McConney, the Commission's General Counsel. Both of the DTA witnesses provided sworn testimony and answered questions posed by the Appellants.

*Testimony of John W. Shirley, Jr.*

Mr. Shirley has been employed by DTA or its predecessor agencies since July 3, 1978. He has worked his way up the ranks from an entry level position of “generalist worker” to his current position of Regional Director for Eastern Massachusetts. He has held several supervisory and managerial positions overseeing a wide array of public assistance programs during his 33-year career with DTA.

In his current role, he oversees approximately 350 – 400 employees in various DTA offices throughout Eastern Massachusetts. Over the years, he has served on various interview panels responsible for selecting entry-level and at other times has delegated that responsibility to other individuals such as Assistant Directors.

Mr. Shirley described the overall process that is used when DTA hires or promotes individuals which includes receiving a list of eligible candidates and the creation of interview panels. All candidates interviewed are asked the same set of questions and the interview panelists complete an interview assessment form for each candidate with numerical ratings.

Mr. Shirley stated that, as a result of attrition and the receipt of additional federal funds, DTA was able to hire 50 BERS A/Bs and 19 BERS Cs as part of the hiring cycle that is the subject of these appeals.

The qualities and attributes that Mr. Shirley is looking for in a BERS C is someone who is organized, able to manage people and caseloads, able to implement quality control standards, able to operate the various computer programs, has good interpersonal skills and is able to work effectively with staff. He stated that he has committed himself over the years to making his workers the “best they can be” so that they are able to take

advantage of advancement opportunities. He expects that other supervisors will do the same with their employees and is looking for this ability when selecting new supervisors.

Mr. Shirley stated that this hiring process was consistent with all others and that he was not provided any type of special guidance or instructions from the Commissioner's office regarding the selection of candidates. Specifically, he was unaware of any suggestion that the agency, or the Commissioner in particular, was looking for "new blood" as alleged by some of the Appellants.

In regard to the hiring process that led to the promotion of the 19 BERS Cs that are the subject of these appeals, Mr. Shirley stated that he created 2 or 3 interview panels that would follow the standard process referenced above. All of the interview panelists were Assistant Directors or managers. Most of the panelists were long-term DTA employees with the exception of 1 panelist by the name of "Ms. Lehane" who has been a DTA manager for 2-3 years.

The panelists asked all of the candidates the same questions and completed an assessment sheet with various job-related categories. Each category was ranked on a scale of 1 to 5, with 1 being the best score and 5 being the worst. The categories included: communication / interpersonal skills; adaptability; education / work experience; commitment / motivation / initiative; organizational skill; ability to perform job function; managing diversity / diversity awareness; supervisory / management skills. The candidates with the lowest (best) scores were selected for promotion for 18 positions. Approximately a dozen candidates were tied for 19<sup>th</sup> and the panelists selected the most qualified candidate among those tied candidates.

None of the Appellants scored well enough on the interview assessment forms to be among the 18 best-ranked candidates or those tied for 19<sup>th</sup>. After the interviews were conducted, Mr. Shirley met with the interview panelists to review their recommendations and to ensure that the process was conducted properly.

Mr. Shirley stated that seniority plays “a role” but is not the only factor when making promotions. To the extent that someone’s seniority makes them more able to do the job, it will make them a more attractive candidate for promotion to a supervisory position, according to Mr. Shirley.

I asked Mr. Shirley to respond to the overarching argument of the Appellants that individuals with far less years of experience could be deemed more qualified than them for the supervisory positions in question. Mr. Shirley acknowledged that some of the candidates selected had less than five years of experience with DTA, but he was confident that they were the most qualified candidates for the promotions.

Mr. Shirley testified that he did personally interview one of the candidates who was ultimately selected for appointment. That individual was “added” to the selection process at the request of Lorraine Woodson, the Civil Rights Manager at DTA. Mr. Shirley stated that this candidate did not have any advantage as a result of being interviewed personally by him.

Mr. Shirley was asked to address what is clearly an error on the assessment form of Appellant Joan Whitlow, which erroneously indicated that she had only 1 year of experience at DTA when, in reality, she has 26 years of experience at DTA. He stated that he was not comfortable with that and that it should be reviewed.<sup>1</sup>

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<sup>1</sup> Ms. Whitlow has filed other appeals with the Commission related to her non-selection to BERS C as part of other hiring cycles. As a result of one of those other appeals (CSC Case No. G2-11-90), a hearing was



Mr. Shirley, who has supervised many of the Appellants during his tenure at DTA, stated that “there is a difference between being a good worker and being a good supervisor ... I think the individuals selected are good supervisors.”

Mr. Shirley stated that nobody contacted him as part of this hiring process and asked for special consideration of any of the candidates and that none of the candidates received special consideration.

*Testimony of Agnes Cunio*

Ms. Cunio has been employed by DTA or its predecessor agency for thirty-five years. Like Mr. Shirley, she has worked her way up the ranks, from the position of Social Worker I to her current position of Director of the Dudley / Newmarket Square offices. She has also held several supervisory and management positions during her tenure at DTA.

Ms. Cunio was one of the interview panelists and interviewed approximately half of all the candidates. She stated that each of the candidates was asked the same set of questions. After the 20-30 minute interviews were conducted, she and her fellow interview panelist jointly completed an interview assessment form, ranking each of the candidates in the 8 categories. She is looking for candidates that are organized, can motivate workers and have a strong knowledge of DTA policies.

Ms. Cunio did recommend candidates for promotion that had less than five (5) years of experience at DTA. I asked her to specifically address why she found some of these candidates more qualified for the position of BERS C than the Appellants. Ms. Cunio

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held and the interview panelists were directly questioned by me regarding their decision not to select Ms. Whitlow. For the reasons articulated in that decision (being issued concurrently with this response), I found that the decision to not select Ms. Whitlow was based on sound and sufficient reasons based on basic merit principles.

stated that these candidates performed better during the interview process, were better organized and had a better understanding of the role of a supervisor than the non-selected candidates who happen to have far more experience. She reviewed the most recent EPRS of each of the candidates, but gave more weight to the candidates' performance during the interview. Ms. Cunio stated that many of the selected candidates came in with more concrete ideas and were better prepared, including one candidate who discussed a new organization system she had initiated in her office. She stated that many of the non-selected candidates didn't fully answer the questions.

Ms. Cunio stated during her testimony that she received an email communication from DTA Commissioner Julia Kehoe asking her to interview one of the candidates who was ultimately selected for appointment, Tara Meoli. At the time of the interview, Ms. Meoli was a BERS A/B with less than five years of experience at DTA. Ms. Cunio stated that she did not feel any undue pressure regarding the selection of Ms. Meoli and that another pair of interview panelists interviewed and recommended Ms. Meoli for promotion.

I left the record open for DTA to provide copies of any email communication between DTA Commissioner Kehoe and Ms. Cunio regarding Ms. Meoli. Those emails were submitted to the Commission on March 18, 2011. The genesis of the email communication appears to be a chance meeting that Commissioner Kehoe had with Ms. Meoli during a site visit to the Newmarket Square DTA office in which the Commissioner sat in on a client intake session being conducted by Ms. Meoli. After her visit, Commissioner Kehoe penned an email directly to Ms. Meoli on March 19, 2010 which stated in its entirety:

“Hi Tara:

Thanks so much for letting me sit with you today. I learned a lot. Especially about what a great job you do! I told Mary that I thought you should apply for a Supervisor position and she agreed! Best of luck –whatever your decision. I’m just glad you’re at DTA! Have a nice weekend. Julia”

Ms. Meoli penned a response to the Commissioner ten minutes later stating:

“Commissioner Kehoe:

It was an honor and a pleasure having you sit in on an interview with me today. I am highly considering applying for the supervisor position. Thanks for the advice!

It was nice seeing you today. Thank you for listening to our suggestions.

Enjoy the weekend and take care.

Tara Meoli”

Commissioner Kehoe replied to that email stating in part, “I’m so glad you’re considering it” and then sent an email to DTA Manager Peter Faktorovich stating in part,

“I visited the office on Friday and spent some time with Tara Meoli and was very impressed! I told her I thought she did an excellent job and she told me she was able to do so well because you were such a terrific supervisor: extremely responsive, well-organized, helpful and committed ...”

Both Mr. Shirley and Ms. Cunio were among the DTA managers copied on this email correspondence.

The Appellants questioned Ms. Cunio regarding whether or not some of the candidates selected for appointment were scheduled for supervisory training before the selections were made, suggesting that the promotional decisions had been pre-determined. Ms. Cunio was unclear on the exact dates during her testimony and I kept the record open for her to review her records regarding the timing of the training in relation to the selection process.

On March 21, 2011, counsel for DTA submitted correspondence to the Commission, which was copied to the Appellants stating in relevant part:

“Another issue that was raised during the hearing was related to the timing of the training for the individuals selected for the BERS C positions. On April 23, 2010, Department managers were informed of a statewide mandatory training for supervisors. The training sessions were offered at various dates through the end of June 2010. Agnes Cunio, Director of the Boston Cash Program, has confirmed that individuals that were selected for the BERS C positions had already been determined prior to the supervisory training. Although the chosen candidates for the Boston BERS supervisor positions were not administratively processed as BERS C supervisors at the time of the mandatory training, which occurred in the summer of 2010, management sent the selected candidates to the training.”

Ms. Cunio also responded to various questions raised by the Appellants as part of this proceeding. In addition to the post-hearing information received from DTA, I also allowed the Appellants to submit their most recent EPRS evaluations for my review. Those documents have now been received and are included as part of the administrative record.

Finally, on May 18, 2011, DTA submitted correspondence to the Commission, copied to the Appellants, stating that the Massachusetts Commission Against Discrimination (MCAD) has issued findings of lack of probable cause in connection in the complaints filed against DTA in which ten of the Appellants involved in these appeals alleged that DTA discriminated against them on the basis of age in not selecting them for a BERS C position.

### *Conclusion*

I have carefully reviewed all of the sworn testimony from the February 11, 2011 hearing and all of the documents submitted by DTA and the Appellants, including the

interview assessment forms, the hand-written notes of the interview panelists on the answer sheets, the resumes of the selected and non-selected candidates and the EPRS forms of the candidates.

Based on this review, I have concluded that a further investigation of this matter by the Commission is not warranted. I base this in large part on the credible testimony of the two (2) veteran DTA employees who testified before the Commission, John Shirley and Agnes Cunio. They have each served the Commonwealth for over three decades and both of them struck me as decent, hard-working professionals who are a credit to public service. They care deeply about the mission of DTA and spoke eloquently about their commitment to career advancement. Despite some tough questions from this Commissioner, they provided honest, forthright testimony about the hiring process and how it was conducted. I credit their testimony and conclude that the hiring process here was based on basic merit principles.

Notwithstanding my conclusion that the overall hiring process was based on basic merit principles, certain actions did raise my eyebrow and should not be repeated on a going forward basis.

First, while I accept the representation that Commissioner Kehoe's prior meeting with one of the selected candidates was a chance encounter and that her email exchange with this employee was based on good intentions, it potentially gives the appearance of an unlevel playing field stacked against those not fortunate enough to have met with the Commissioner. Further, the Commissioner's specific recommendation, copied to the entire management team that would be among the interview panelists, encouraging the employee to apply for a supervisory position, had the potential of tipping the scales in

favor of that employee. However, based on the credible testimony of the DTA witnesses, including Mr. Shirley, I am confident that Ms. Meoli would not have been recommended for the supervisory position had she not been considered among the most qualified applicants.

I was also somewhat troubled by the unexplained late entry into the process of a candidate referred by Lorraine Woodson, DTA's Civil Rights Manager. He was subsequently the only candidate interviewed personally by Mr. Shirley. Taken together, these actions at least raise questions among the non selected candidates regarding whether this candidate had a leg up on them. However, after carefully reviewing this candidate's resume, which includes many years of experience at DTA, along with the credible testimony of Mr. Shirley, I am sufficiently satisfied that this particular promotion was, like all others, based on basic merit principles. Going forward, however, such exceptions to the normal routing / processing of applications should be fully documented and explained in writing at the time.

Finally, there is the overall issue that is central to all of these appeals. Most of the Appellants have at least two decades of experience at DTA or its predecessor, with some having a tenure that exceeds three decades. They are naturally frustrated when employees with five or less years of experience are chosen over them for supervisory positions. State agencies such as DTA could not function efficiently, particularly during periods of crisis, without the rich institutional knowledge of dedicated long-term employees such as the Appellants. While the criteria used here to assess the candidates was fair and reasonable, relying so heavily on a candidate's performance during a 30-minute interview may put some of these long-term employees at an inherent disadvantage

regarding promotional opportunities. DTA should initiate – or re-double any current efforts – to provide its long-term employees, the backbone of the organization, with training and other opportunities that improve their career advancement opportunities.

For all of the above reasons, the Commission concludes its inquiry into this matter and will not initiate an investigation under G.L. c. 31, § 2(a).

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; Stein, Commissioner – Yes; and Marquis, Commissioner - Yes [McDowell, not participating]) on June 16, 2011.

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

Courtesy Copy to:  
Tara Meoli