Decision mailed: 1/27/12
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JAMIE ROBITAILLE,
Appellant

v.

I-11-185

DEPARTMENT OF
TRANSITIONAL ASSISTANCE,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION REGARDING REQUEST FOR INVESTIGATION

On September 21, 2010, the Appellant, Jamie Robitaille (Appellant), filed an appeal with the Civil Service Commission (Commission) contesting her non-selection for the provisional appointment of Benefit Eligibility and Referral Social Worker C (BERS C) by the Department of Transitional Assistant (DTA or Respondent).

A pre-hearing conference was held on November 9, 2010. The Appellant subsequently filed a motion to amend her appeal to include a request for investigation

under G.L. c. 31, § 2(a) and a supporting brief. DTA filed an opposition asking the Commission to dismiss the Appellant's appeal and deny her request for an investigation.

It is undisputed that the Appellant is a permanent BERS A/B and has worked for DTA or its predecessor for thirty-seven (37) years. She also holds the position of Regional Vice President with SEIU Local 509, a union which represents employees at DTA. She has been in that position for ten (10) years. In her Union capacity, the Appellant acts as a representative for employees in grievance meetings and investigatory pre-disciplinary interviews.

On June 7, 2010, DTA posted two (2) BERS C supervisor positions for the Brockton office. The postings indicated that the position would be filled as a provisional appointments. Sixty-five (65) individuals applied for the vacancies and fifteen (15) were selected for interviews.

DTA assembled a hiring team which consisted of the Office Director and the two Assistant Office Directors. They interviewed fifteen (15) candidates and asked all of the candidates the same questions. The candidates that scored the best on the interview assessment form, one of whom is a provisional BERS A/B, were selected for the BERS C supervisor positions. The Appellant was interviewed for the BERS C positions and was not selected.

DTA's Argument

DTA argued that it has the authority to make provisional appointments to a position if no suitable eligible list exists from which certification of names may be made for such appointment. G.L. c. 31, § 12. Since there is no current eligible list for the position of

BERS C, they argue that the provisional appointment was permitted under civil service law and rules.

Although the civil service law and rules do not require DTA to show that the person is most qualified, DTA argues that they followed strict guidelines in selecting the candidate and used a process that was consistent with basic merit principles.

On the same grounds, DTA opposed the Appellant's request for an investigation under Section 2(a).

Appellant's Argument

The Appellant argued that DTA has engaged in subterfuge to avoid civil service law and rules by posting what is clearly a promotion as a provisional appointment. Further, the Appellant argued that one of the interview panelists had a personal bias against the Appellant that resulted from the Appellant's role as Vice President of the local union. At the pre-hearing conference, the Appellant referenced specific examples which she believed demonstrated the personal bias against her by one of the panelists.

Commission's Prior Conclusion Regarding Bypass Appeal and Request for Investigation

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.

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 appeal, it could not be shown at the time that DTA violated any civil service law or rule. DTA posted these positions as provisional appointments, and selected two (2) individuals for the position of BERS C, one of whom did not have permanency in the next lower title of BERS A/B. There was no allegation or showing, nor was it likely that it could be shown at a full hearing, that DTA used the provisional appointment process 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 Appellant was unable to show that DTA violated civil service law or rules or that DTA "bypassed" her for appointment as there was no eligible

list in place at the time. Thus, the Appellant's bypass appeal, under Docket No. G2-10-254, was 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 2 vacancies, DTA would have been limited to only considering the first 5 candidates on the eligible list willing to accept appointment (based on an examination score and other factors) if such eligible list existed. Here, DTA reviewed resumes from 64 job applicants and then interviewed 15 of them. Of these 15, 2 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. 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 carefully considered: 1) the statement of the Appellant during the pre-hearing conferences; 2) the written briefs of the parties; 3) the written comments of the interview panelists; and 4) the statements of counsel for DTA and the Appellant.

Based on that information, it appeared that DTA, in regard to these 2 appointments, used a review and screening process that was consistent with basic merit principles. A hiring team of 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.

While the Appellant did not provide sufficient evidence *at that time* to justify a Section 2(a) investigation by the Commission regarding the provisional appointment of 2 BERS Cs in the Brockton office, the Appellant did raise 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 2 BERS Cs in the Brockton office, the Commission opened Case No. I-11-185 and took the following steps:

- A hearing under Case No. I-11-185 was conducted on September 19, 2011 at the offices of the Commission.
- As part of the hearing, DTA provided 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 2 BERS C positions.
- As part of the hearing, I heard from: 1) Emma Nunes, the member of the interview panel that the Appellant argued had a personal bias against her; and 2) the Appellant.

Testimony of Emma Nunes

Ms. Nunes is the Assistant Director for DTA's Region 7 in Fall River. She has been with DTA or its predecessor for twenty-seven (27) years. As an Assistant Director, she manages the "centralized DTA cases" and oversees three (3) BERS Cs; eleven (11) BERS A/Bs; and three (3) clerks.

Prior to serving as Assistant Director, Ms. Nunes worked in the Brockton office where she supervised the Appellant for approximately one (1) year. During that time period, the

Appellant was the vice president of the local employees' union. Ms. Nunes would regularly interact with the Appellant in her union capacity in Brockton regarding issues raised by employees and/or grievances, although most of the grievances were handled directly by the Director. Prior to becoming a manager, Ms. Nunes was a member of SEIU Local 509 for seventeen (17) years.

In March 2009, sixteen (16) months prior to serving on the interview panel that is the subject of this appeal, Ms. Nunes became aware that the Appellant had filed a grievance against her. According to Ms. Nunes, this was the first time in her career that a DTA employee had filed a grievance against her personally. The grievance stemmed from a meeting with Ms. Nunes and one of her employees that was also attended by the Appellant. According to Ms. Nunes, she scheduled a meeting with this employee to talk to her about a project the employee was working on. Ms. Nunes was surprised that the Appellant showed up for the meeting with the employee and asked her why she was there. The Appellant said she was representing the employee as her union representative. Ms. Nunes testified that she never told the Appellant that she could not attend this meeting and allowed her to stay.

Ms. Nunes was asked if, during this meeting, she ever raised her arm and open hand at the Appellant to prevent her from speaking. She replied, "no". Ms. Nunes testified that although she regularly speaks with her hands, she never put her arm or hand in the Appellant's face at any time during this meeting.

According to Ms. Nunes, the Appellant's grievance against her went to Step 1 (with the Regional Director) and then to Step 2 (at the DTA offices in Boston). Although she believes the matter was resolved, she never received any formal notification of this.

Ms. Nunes testified that she had no bias or personal animus toward the Appellant when she served on a 3-member interview panel that evaluated the Appellant and others for two (2) BERS C vacancies in July 2010.

Each candidate was asked eight (8) questions by the 3-member panel and given a rating of 1 to 5, with 1 being the best score and 5 being the worst score. Thus, the "best" score a candidate could receive was an 8 (1 x 8) and the worst score a candidate could receive was a 40 (5 x 8). The Appellant received a rating of 20, while the selected candidates each received a rating of 9. After each candidate was interviewed, the 3-member panel discussed a rating for each individual category based on their observations and their own notes of what the rating should be for each category. Thus, the interview assessment form in evidence represents the collective rating of the 3-member panel regarding each category. Although the notes of each member of the interview panel were entered into evidence, there was no documentation submitted regarding the panelists' individual ratings. Ms. Nunes testified that she believes she did take notes indicating her recommended ratings, but did not save those notes.

Based on a review of the interview assessment form, her notes and her own recollection of the interviews, I asked Ms. Nunes to describe why the panel thought the selected candidates deserved the higher rating they received in most of the eight (8) categories as compared to the Appellant's less favorable rating.

Ms. Nunes' testimony largely tracked the comments on the interview assessment forms. Generally, however, I inferred from her testimony that while she thought the Appellant did well during the interview, she found the selected candidates to be more adaptable, committed individuals more able to oversee multiple programs, including

programs other than those they were currently assigned to work on. The three panelists, collectively, gave the Appellant a less favorable score and did not recommend her for the appointment.

Testimony of Appellant

In regard to the March 2009 meeting that resulted in her filing a grievance against Ms. Nunes, the Appellant testified that she was asked by an employee who was a member of the union to join her at a meeting with Ms. Nunes regarding productivity issues. The Appellant testified that Ms. Nunes: initially objected to her being present at the meeting; assented; but appeared agitated that she remained.

The Appellant testified that when she attempted to speak at the meeting, Ms. Nunes put her hand up in a "shushing manner" and said "I'm talking to her [the employee] now". The Appellant testified that she couldn't let this behavior stand and filed a grievance. The Appellant stated that she believes the grievance is still pending because, according to her, Ms. Nunes offered only a "non-apology, apology" at the Step 2 meeting which the Appellant deemed unacceptable.

In regard to her interview for the BERS C position, the Appellant testified that when she found out about the interview, she asked the Regional Director to ensure that Ms. Nunes was not a member of the interview panel. According to Ms. Nunes, the Regional Director told her that he'd be making the final recommendations and that it didn't matter who the other members of the interview panel were. The Appellant said that she thought she performed well at the interview and thought that her many positive performance evaluations would bode well for her. She acknowledged on cross examination that a glaring typographical error in her resume was unfortunate. (There is nothing in the

record that shows that the interview panelist noticed the error and, if they did, used this as a reason for non-selection.)

Review of Resumes

According to the candidates' resumes, the Appellant and the two (2) selected candidates have a bachelors degree. Ms. Heath has over twenty-five (25) years of experience at DTA and was employed by another state agency for five (5) years prior to that. Ms. Webster has approximately four (4) years of experience at DTA at the time of the interview and worked for two separate non-profit organizations for six (6) years prior to that. The Appellant, as previously referenced, has over thirty-five (35) years of experience at DTA and has served in a leadership position in the local union for approximately ten (10) years.

Conclusion

I carefully reviewed and considered all of the documentary evidence and the testimony of the Appellant and Ms. Nunes. The Appellant struck me as a dedicated public servant who rightfully takes pride in her many years of service to the Commonwealth. It is plausible that she was "shushed" via a hand gesture by Ms. Nunes at the March 2009 meeting and it appears that she was genuinely offended.

Although the grievance process will ultimately determine if what occurred violated the provisions of the contract that require mutual respect between management and the union, the reaction to the incident, even if I accept the Appellant's version, appears wildly overblown. In her grievance, the Appellant states that "Emma Nunes .... should be admonished and recognize my rights and responsibilities as an elected union officer to attend meetings with members. This was an aggressive act against an elected union

official. Failure to act on this aggressive, anti-union action indicates complicity on the part of the director who previously stated that she would always back her managers." There is a vast disconnect between what allegedly occurred at that meeting and the remedy requested by the Appellant.

The question before the Commission, however, is whether Ms. Nunes' subsequent participation on an interview panel reviewing BERS C candidates, including the Appellant, prevented the Appellant from receiving fair and impartial consideration. Based largely on the credible testimony of Ms. Nunes, I find that that the answer is: no.

Ms. Nunes was a good witness. She struck me as a professional who understands the balance between ensuring good customer service and recognizing the challenges faced by DTA employees trying to work through voluminous caseloads. She appeared sincerely committed to ensuring that the best candidate was selected for the position and her written and oral comments provided plausible reasons that distinguished the selected candidates from the Appellant. Further, I did not detect any personal bias or animus against the Appellant that would have tipped the scales against her.

For all of these reasons, the Commission's Investigation under Docket No. I-11-185 is hereby ***closed***.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson and Stein [Marquis – Absent; McDowell – not participating]) on January 26, 2012.

A True copy. Attest:

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 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 to:
Susan Horwitz, Esq. (for Appellant)
Daniel LePage, Esq. (for DTA)

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
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(617) 727-2293

IN RE: JAMIE ROBITALLE
V. DEPARTMENT OF TRANSISTIONAL ASSISTANCE - REQUEST FOR INVESTIGATION

CASE NO. I-11-185

CONCURRING OPINION OF COMMISSIONER STEIN

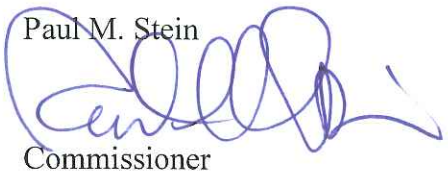
I accept Chairman Bowman's careful assessment of the evidence and credibility of the witnesses presented and, thus, concur in the conclusion that the DTA hewed to all lawful requirements in making the provisional appointments of two BERS C supervisors in question here, one with civil service permanency and one without permanency, and that none of the candidates who were not selected, whether permanent civil service employees or not, have any right to appeal their non-selection to the Commission.

I write to underscore the fact that this decision reflects how far the current civil service process has come from its initial statutory intent to create a merit-based civil service system in which hiring and promotion of public employees would be made, primarily, according to the results of objective competitive testing, and management discretion to deviate from that paradigm would be the exception, rather than the rule. As a result of decades without any competitive civil service examinations being administered (save for public safety positions), and the attrition of resources available to the Commission and the Human Resources Division's Civil Service Unit, the civil service system has come full circle to become a process that mirrors the corporate model in which most personnel decisions have been delegated to the discretion of the employer and subjectivity, rather than objectivity, is now the rule. As this case illustrates (except

for public safety employees), the intervention of the Commission in reviewing most personnel decisions is no longer a statutory right, but a matter for the Commission to choose, on a case-by–case basis. Indeed, in the case of provisional employees without civil service tenure, who now comprise the vast bulk of state and municipal employees, the Commission has no jurisdiction (and insufficient resources) to adjudicate disputes involving their layoff or discipline, even if we wanted to do so.

This does not mean that the original statutory system necessarily produced better qualified employees than the current, more subjective, de facto system, or that it is clear which system best serves the current needs of the public sector to maintain a merit-based, professional workforce free of political influence or personal bias. I believe, however, it is important for all those with a stake in the public sector (employees, agencies, municipalities, bargaining units and elected officials) to recognize, that, under the current system, there is no guarantee that the special scrutiny this Commission chose to give to the circumstances in this one case, wisely so in my opinion, can or will carry forward to future cases presented to this body (which has been operating, prior to and in my tenure, on a gradually reduced number of working commissioners and staff). Whether any particular personnel decision receives similar scrutiny and oversight from the Commission in the future will remain largely a matter of discretion, not of right, and subject to the resources and composition of this Commission at any given time. For better or for worse, this is the new reality and it bears notice.

Paul M. Stein



Commissioner