**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

JAMIE ROBITAILLE,
Appellant

*v.*

G2-10-254

DEPARTMENT OF
TRANSITIONAL ASSISTANCE,
Respondent

Appellant's Attorney:

Susan Horwitz, Esq.
Sandulli Grace, PC
44 School Street: Suite 1100
Boston, MA 02108

Respondent's Attorney:

Daniel LePage
Assistant General Counsel
Department of Transitional Assistance
600 Washington St., 4th Floor
Boston, MA 02111

Commissioner:

Christopher C. Bowman

DECISION

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, posted BERS C supervisor positions for the Brockton office. The postings indicated that the position would be filled as provisional appointments. Sixty-five (65) individuals applied for the vacancy 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 position and was not selected.

*DTA's Argument*

DTA argues 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 opposes the Appellant's request for an investigation under Section 2(a).

*Appellant's Argument*

The Appellant argues 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 argues that the 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 believes demonstrates the personal bias against her by one of the panelists.

*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.

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 can not be shown at this 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 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 Appellant can not 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, is 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 2 vacancies, DTA would have been limited to only considering the first 5 candidates on the eligible list (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 have 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 this information, it appears 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 has not provided sufficient evidence *at this 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 has 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 2 BERS Cs in the Brockton office, the Commission hereby opens Case No. I-11-185 and makes the following orders:

- A status conference regarding Case No. I-11-185 will be conducted on Monday, August 6, 2011 at 10:00 A.M. at the offices of the Commission.
- 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 2 BERS C positions.
- DTA shall attempt to have the 3 interview panelists present to describe the interview process and answer any relevant questions. At a minimum, it is anticipated that DTA will have the interview panelist referenced during the pre-hearing testify before the Commission.

Civil Service Commission

_____
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein [McDowell – not participating]) on June 16, 2011.

A True copy. Attest:

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