

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

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

THOMAS G. UNDERWOOD,  
Appellant

v.

G1-17-013

LOWELL PUBLIC SCHOOLS,  
Respondent

Appearance for Appellant:

*Pro Se*  
Thomas G. Underwood

Appearance for Respondent:

James P. Hall, Esq.  
Qua, Hall, Harvey & Walsh  
25 Fletcher Street  
Chelmsford, MA 01824

Commissioner:

Christopher C. Bowman

**ORDER OF DISMISSAL**

On January 17, 2017, the Appellant, Thomas Underwood (Mr. Underwood), filed a bypass appeal with the Civil Service Commission (Commission), contesting his non-selection for the position of custodian with the Lowell Public Schools (Lowell).

On February 27, 2017, I held a pre-hearing conference at the Mercier Community Center in Lowell, MA which was attended by Mr. Underwood and counsel for Lowell.

It is undisputed that: 1) Mr. Underwood is a veteran; 2) Lowell provisionally appointed a person other than Mr. Underwood to the position of custodian, prompting the current appeal; and 3) subsequent to the filing of this appeal, Lowell provisionally appointed Mr. Underwood to another custodian position.

Given that Mr. Underwood has now been appointed, his appeal is moot. However, I have opted to address the issues raised by Mr. Underwood as part of this appeal.

At the pre-hearing conference, Mr. Underwood argued that Lowell violated G.L. c. 31, § 28. That section does not apply here as it relates to those civil service positions which fall under the “labor service”. The position of custodian falls under the “official service” in which original

appointments are made after an examination, establishment of an eligible list and the issuance of Certifications.

Since no examination has been administered for the position of custodian since on or about 2003, there has been no eligible list for several years. Therefore, appointments to this position, like most other non-public safety positions, are made through the use of provisional appointments.

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

It has been long established that "[p]rovisional appointments or promotions ... are permitted only in what are supposed to be exceptional instances..." City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, after decades without HRD holding competitive examinations for many civil service titles, and the professed lack of appropriations to permit examinations in the near future, hiring and advancement of most civil service employees now can be lawfully accomplished only provisionally. Thus, as predicted, the exception has now swallowed the rule and an appointment "which is provisional in form may be permanent in fact." Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).

The Commission and the courts have wrestled with the issues surrounding the so called "plight of the provisional" and regularly exhort the civil service community of the corrosive effects of the excessive use of "provisional" appointments and promotions. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff d, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. Little has been done, however, or will be done, to wean the system from this practice without further appropriations from the legislature. As a result, there appears no end to the reality that the vast number - probably most - current non-public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy. Meanwhile, public employees' provisional status leaves them with diminished job security and advancement opportunities under civil service law, relegating them to enforcement of their rights under collective bargaining agreements, if any, and other laws, which are beyond the Commission's purview.

That said, it remains the duty of the Commission to apply the civil service law as written. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006), quoting Commissioner of Revenue v. Cargill, Inc., 419 Mass. 79, 86 (1999). As much as the Commission regrets this state of affairs, the use of provisional appointments is not, per se, unlawful, and an appointing authority cannot be estopped for hewing to the law. If there is a flaw in the statutory

procedure, it is a flaw for the General Court to address, whether on a systemic basis or through special legislation. See Kelleher v. Personnel Administrator, 421 Mass. at 389.

Also raised at the pre-hearing conference was the issue of the preference given to veterans as part of provisional appointments.

G.L. c. 31, § 26 states in relevant part:

“An appointing authority shall appoint a veteran in making a provisional appointment under section twelve, unless such appointing authority shall have obtained from the administrator [HRD] a list of all veterans who, within the twelve months next preceding, have filed applications for the kind of work called for by such provisional appointment, shall have mailed a notice of the position of vacancy to each of such veterans and shall have determined that none of such veterans is qualified for or is willing to accept the appointment.” (emphasis added)

The Commission has addressed the question of the definition of “qualified” in this context in the appeal of Campagna v. Department of Environmental Protection, 8 MCSR 70 (1995) stating:

“There is no dispute that the Appellant was the sole veteran to apply for provisional appointment . . . [T]he issue before the Civil Service Commission is whether the Appellant meets an appropriate standard for "qualification." If the Appellant is so qualified, he should have received the provisional appointment. The case does not involve a comparison of the qualifications of the Appellant, on the one hand, and the non veteran provisional appointee to the position. . . . Even assuming, arguendo, that [the non veteran] had superior qualifications, the Appellant is entitled to prevail if he satisfies an objective standard of qualification.”

Entrance requirements, however, are not the sole measure of qualification for provisional appointment. In Watson v. Department of Environmental Quality Engineering, CSC Case No. G 1684 (February 14, 1992), the Civil Service Commission declined to limit its inquiry into an applicant's "qualification" for provisional appointment to determine whether that candidate satisfied the entrance requirements for the position. As we pointed out in Watson, reliance on entrance requirements, alone, as a measure of qualification contravenes G.L.c. Chapter 31, section 13 which specifies that an appointing authority requesting authorization to make provisional appointments must substantiate that the person proposed for the provisional appointment "meets the proposed entrance requirements and possesses the knowledge, skills, and abilities necessary to perform such duties". When sections 13 and 26 are read together, it is clear that the Legislature intended the measure of qualifications to be all those attributes set forth in section 13.

See also, Hutchenson v. Director of Civil Service, 361 Mass. 480 (1972) (striking down, as unconstitutional, part of predecessor version of Section 26, insofar as it had granted an "absolute" preference to disabled veterans). See generally, Personnel Administrator v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (reviewing history of Massachusetts veteran's preference and insertion of the term "qualified" in response to constitutionality concerns).

The Commission has also been clear that, in ascertaining whether a candidate possesses the necessary "knowledge, skills and abilities", an appointing authority may utilize a fair and

objective interview and skills assessment process for evaluating candidates. E.g., Rainville v. Massachusetts Rehabilitation Comm'n, 19 MCSR 386 (2006). See Flynn v. Civil Service Comm'n, 15 Mass.App.Ct. 206 (1983) (approving use of interviews for permanent civil service promotions so long as they are structured "to protect candidates from arbitrary action and undue subjectivity on the part of the interviewers").

First, as stated above, the instant appeal became moot when Lowell appointed Mr. Underwood to another custodian position. However, had that subsequent provisional appointment not been made, the instant appeal would have gone forward to address whether Mr. Underwood was "qualified" for the position after considering all the factors discussed above.

Finally, Mr. Underwood expressed concern that most veterans (and appointing authorities) may not be aware of the preference afforded to veterans when making provisional appointments. I concur. As previously stated in Melton v. Department of Public Health, 29 MCSR 39 (2016), and reiterated here, "it is clear, to me, that there is not a seamless, user-friendly process to ensure that: 1) all veterans are aware of this preference when applying for a provisional appointment; and 2) [appointing authorities] can easily identify which candidates are veterans entitled to this statutory preference. HRD should take all necessary steps to ensure that current hiring practices of [appointing authorities] incorporate the statutory preference for veterans provided for in Section 26."

The form that veterans are required to complete to request a hiring preference for provisional appointments is posted on HRD's website at: [http://www.mass.gov/anf/searchresults.html?output=xml\\_no\\_dtd&client=mg\\_anf&proxystylesheet=massgov&getfields=\\* &ie=UTF-8&oe=UTF-8&tlen=215&sitefolder=anf&filter=0&requiredfields=&startsite=EOANFx&q=veterans+and+provisional+appointments&site=EOANFx&x=0&y=0](http://www.mass.gov/anf/searchresults.html?output=xml_no_dtd&client=mg_anf&proxystylesheet=massgov&getfields=* &ie=UTF-8&oe=UTF-8&tlen=215&sitefolder=anf&filter=0&requiredfields=&startsite=EOANFx&q=veterans+and+provisional+appointments&site=EOANFx&x=0&y=0) and is also attached to this decision as an appendix.

Since Mr. Underwood's appeal is moot, it is hereby *dismissed*.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 16, 2017.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Thomas G. Underwood (Appellant)

James P. Hall, Esq. (for Respondent)

John Marra, Esq. (HRD)

## VETERAN'S APPLICATION FOR PROVISIONAL APPOINTMENT

This is not an application for a civil service examination. This application is kept in the HRD file for only one year.

Mail or deliver to: The Commonwealth of Massachusetts  
Human Resources Division  
Civil Service Unit  
One Ashburton Place  
Boston, MA 02108

**INSTRUCTIONS: Print all entries. Check boxes as applicable.**

Exact Title of The Position Applied For \_\_\_\_\_

Applicant's Name (Last, First, Middle Initial) \_\_\_\_\_

Social Security # \_\_\_\_\_

Mailing Address (Number & Street, City/Town, State, Zip Code) \_\_\_\_\_

Daytime Phone # \_\_\_\_\_

- I wish to be considered as a veteran applicant under General Laws Chapter 31, Section 26, for provisional appointment to the above position.
- I wish to be notified of the date of the examination for this position if one is to be held within a year of this date.

I am a  veteran. Copy of DD214 must be submitted with application.

False information provided in this application could lead to removal from a civil service position. I hereby declare that the statements and answers on this application are true and are made under the penalties of perjury.

For information call 617-727-3777.

Date of Application: \_\_\_\_\_ Signature: \_\_\_\_\_

**FOR HRD USE ONLY**