COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

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

PHILIP WACHSLER,
Appellant
v.

G2-11-83

DEPARTMENT OF
TRANSITIONAL ASSISTANCE,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

On March 4, 2011, the Appellant, Philip Wachsler (Appellant), filed an appeal with the Civil Service Commission (Commission) contesting his 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 March 29, 2011. DTA subsequently filed a Motion to Dismiss the Appellant's appeal on May 2, 2011 and the Appellant filed an opposition on May 18, 2011.

It is undisputed that the Appellant has been employed by DTA since 1987 and has served as s permanent BERS A/B, the next lower title to BERS C, since 1987.

On November 1, 2010, DTA posted a BERS C supervisor position for the Revere officer. The posting indicated that the position would be filled as a provisional appointment. Forty-seven (47) individuals applied for the vacancy and fifteen (15) were selected for interviews.

DTA assembled a hiring team which consisted of the Revere Office Director and the two Assistant Directors. They interviewed fifteen (15) candidates and asked all of the candidates the same questions. The candidate that scored the best on the interview assessment form was selected for the BERS C supervisor position. 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.

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. The

Appellant argues that DTA has done this to skirt prior Commission decisions stating that only qualified permanent civil service employees are eligible for provisional promotions. Further, the Appellant argues that DTA has violated basic merit principles because, "the Appellant is an older man who was passed over by a younger woman and that he may have been disfavored because of his need to use approved medical leave for a serious health condition." He asks that the Commission deny DTA's Motion to Dismiss and allow him to prosecute his case in order to prove these allegations.

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.

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.

Here, DTA posted the position of BERS C as a provisional appointment which was open to external and internal candidates. They selected an individual that was employed by DTA as a provisional BERS A/B and does not have civil service permanency.

The Appellant argues that since this was a "promotional opportunity" for the candidate selected (and would have been for the vast majority of candidates who actually applied), the filling of the vacancy via a provisional appointment is a "subterfuge" to avoid civil service requirements. I disagree.

When the Commission issued its prevailing decisions regarding this issue, it fully anticipated that most state agencies would, on a going-forward basis, post non entry-level positions as provisional appointments, as opposed to provisional promotions, noting that Appointing Authorities should not be limited from filling a vacancy through a provisional appointment under Section 12 and considering internal candidates who have not had the opportunity, through no fault of their own, of obtaining civil service permanency.

In summary, the Appellant, and many other similarly situated employees, want to take advantage of the ongoing "plight of the provisionals" by limiting career advancement opportunities at DTA and all other state agencies to those individuals, such as themselves, who had the opportunity to take and pass a civil service examination over two decades ago. This would be an illogical result that is not consistent with basic merit principles.

The reference to "subterfuge" in the prevailing Commission decisions had a more straightforward meaning than what the Appellant has read into it here. For example, if the sole reason for posting a vacancy as a provisional appointment (as opposed to promotion) was to somehow effectuate a predetermined conclusion to not hire a certain permanent civil service employee, that would warrant investigation and possible intervention by the Commission.

That leads to the second prong of the Appellant's appeal, in which he argues that he is "an older man passed over by a younger woman" who was disfavored because of his "need to use approved medical leave for a serious health condition."

The Appellant argues that, even if the Commission does not consider the use of provisional appointments in general here to be a violation of civil service law and rule, it should exercise its broad authority under G.L. c. 31, § 2(a) to investigate this matter, possibly in conjunction with an ongoing investigation under Case No. I-10-353.

Although the Commission exercises its authority to conduct investigations under Section 2(a) sparingly, we do not hesitate to do so when there is a strong indication that a hiring process has been infected by personal or political bias. While the Appellant may have presented facts that potentially establish a prima facie case that warrants review in

another forum, there is insufficient information here to establish a potential violation of civil service law or rules that would justify an investigation by the Commission.

For all of the above reasons, the Appellant's appeal under Docket No. G2-11-83 is hereby ***dismissed.***

Civil Service Commission

_____
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:

_____
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:
Alfred Gordon, Esq. (for Appellant)
Daniel LePage, Esq. (for DTA)