

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JOAN WHITLOW,
Appellant

v.

G2-11-90

DEPARTMENT OF
TRANSITIONAL ASSISTANCE,
Respondent

Appellant's Attorney:

Pro Se
Joan Whitlow

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

Instant Appeal

The Appellant, Joan Whitlow (Whitlow or Appellant) is appealing her non-selection for the promotion to Benefits Eligibility Referral Social Worker C (BERS C) at the New Market and Dudley Square Office by the Department of Transitional Assistance (DTA).

The appeal was filed with the Civil Service Commission (Commission) on March 14, 2011. A pre-hearing conference was held on April 12, 2011 and a full hearing was held at the offices of the Commission on May 10, 2011.

Prior Appeal

The instant appeal is the result of a settlement agreement between the Appellant and DTA in CSC Case No. G2-09-343. That case was initially held in abeyance until the resolution of a companion case filed by fellow DTA employee Marion Heath. (CSC Case No. G2-09-313).

In those prior appeals, both the Appellant and Ms. Heath contested the provisional *promotions* of DTA employees that did not have civil service permanency.¹ Since Ms. Heath had been internally ranked higher for the vacancy in question, the parties agreed that it would be more efficient to issue a decision in the Heath matter first.

In Heath, the Commission concluded that DTA had violated civil service law and rules by granting provisional *promotions* to employees with no civil service permanency. Ms. Heath had civil service permanency in the next lower title of BERS A/B. After a full hearing, it was determined that she was “qualified” for BERS C and that the selection process in question had been tainted by personal bias. As a result, the Commission concluded that Ms. Heath was aggrieved and ordered appropriate relief. That relief consisted of receiving one additional consideration for the next BERS C vacancy and, if not selected, the right of appeal to the Commission. Ms. Heath was subsequently promoted to BERS C as a result of that additional consideration.

¹ For the most part, DTA no longer fills vacancy for non-entry level positions through provisional promotions. Rather, they are filled via promotional appointments for which there is no requirement to only consider permanent civil service employees.

After the issuance of a decision in the Heath matter, a status conference was held regarding Ms. Whitlow's appeal, previously held in abeyance, under CSC Case No. G2-09-343. As a result of that status conference, the parties reached a settlement agreement where Ms. Whitlow would receive consideration for the next BERS C vacancy and, if not selected, would have a right of appeal to the Commission.

Ms. Whitlow did receive additional consideration for the next provisional appointment to the position of BERS C in the Newmarket and Dudley Square office, but was not selected. As a result, she filed the instant appeal under Docket No. G2-11-90 contesting her non-selection.²

These particular vacancies were filled through the use of provisional appointments. DTA was permitted to appoint incumbent employees that did not have civil service permanency. Further, since there is no eligible list for the position of BERS C, vacancies, more generally, must be filled through the use of provisional appointments and promotions. Thus, the non-selection of individuals, such as Ms. Whitlow, does not constitute a "bypass" under the civil service law or rules.

Although the Appellant's non-selection here is not a bypass, the Commission, exercising its broad authority under G.L. c. 31, § 2(a) and Chapter 310 of the Acts of 1993, has, by mutual agreement of the parties in this unique case, granted the Appellant the right to appeal her non-selection to the Commission.

As part of this appeal, I heard sworn testimony from the two DTA employees who interviewed all of the candidates for the three (3) BERS C vacancies. A summary of their testimony is below.

It is undisputed that there were three (3) BERS C vacancies in the Dudley and Newmarket offices. Sixty-three (63) individuals applied for the provisional appointments; twenty-two (22) were interviewed; and three (3) were selected, all of whom were provisional employees with less than five (5) years of experience.

The Appellant is a permanent BERS A/B who has worked for DTA or its predecessor since 1985. On a scale of 1 to 40, with the best possible score being an 8 (1 in each of 8 categories) and the worst possible score being 40 (5 in each of 8 categories), the Appellant received a ranking of 33 by the two (2) interview panelists, while the selected candidates received rankings of 13, 14 and 14 respectively.

Testimony of Interview Panelist Diane Deban

Ms. Deban has been employed by DTA or its predecessor for over thirty (30) years. She worked her way up the ranks over the years and is currently the Assistant Director of the SNAP (formerly Food Stamps) unit. She was a BERS C since 1991. Ms. Deban supervises twenty-two employees in five (5) units. She served as one of the two (2) panelists who interviewed the candidates for the BERS C vacancies in question.

According to Ms. Deban, a BERS C is responsible for serving as a supervisor of employees who manage large caseloads. A BERS C must be thorough and organized, able to mentor his/her employees and able to understand and explain DTA policies.

Ms. Deban testified that all three (3) of the selected candidates gave “great interviews”; they were enthusiastic, demonstrated a strong knowledge of DTA policies and showed strong organization skills. They answered each of the questions in a complete and thorough manner.

² Ms. Whitlow is also a party in two other appeals related to the appointment of 19 BERS Cs at DTA. See CSC Case Nos. G2-10-221 (dismissed) and I-10-353 (Commission opted not to conduct a further

According to Ms. Deban, the Appellant appeared nervous throughout the interview. She had trouble gathering her thoughts and couldn't answer some of the questions. Ms. Deban stated that Ms. Whitlow's thoughts appeared "jumbled". Other than stating that she was the "best person" for the job, Ms. Whitlow was unable to articulate why she should be chosen for a BERS C supervisory position.

Ms. Deban previously served as Ms. Whitlow's supervisor many years ago and has a memory of Ms. Whitlow not being the best worker and having problems related to DTA policies. Ms. Deban liked Ms. Whitlow personally and felt that she had a good rapport with the clients. During the interview, Ms. Whitlow, when asked how her current supervisor would describe her, stated that her supervisor would probably say she wasn't knowledgeable about DTA policies. This statement concerned Ms. Deban.

Testimony of Cora Stewart-Forte

Ms. Stewart-Forte has worked for DTA or its predecessor for twenty-four (24) years and has been the Assistant Director of the Dudley office for the past two (2) years. She served as the other interview panelist regarding these three (3) BERS C vacancies.

Ms. Stewart-Forte testified that the three selected candidates were enthusiastic, gave impressive answers, were calm and collected, and were able to provide thorough answers related to DTA policies and diversity.

According to Ms. Stewart-Forte, Ms. Whitlow gave the impression that her years of experience should "speak for themselves". She was unable to provide adequate answers to basic questions regarding her strengths and weaknesses and appeared nervous. When asked why she should be selected, Ms. Whitlow simply stated that she was the best candidate.

Testimony of Appellant

Ms. Whitlow acknowledges that she was somewhat nervous at the interview, but attributed part of this to flu-like symptoms and other health-related issues. She stated that although she didn't find anything improper with the interview, she felt as if she wouldn't be chosen and that it wouldn't make a difference how she answered the questions.

Ms. Whitlow testified that she has many years of experience interpreting and implementing DTA policies and that her reply about what her current supervisor would say about her was misinterpreted.

Conclusion

I have carefully reviewed all of the sworn testimony and all of the documents submitted as part of this appeal. As a result of that review, I conclude that Ms. Whitlow's non-selection was based on basic merit principles. I base this largely on the credible testimony of the two DTA witnesses who served on the interview panel and did not recommend the Appellant for the BERS C position.

Both of these individuals worked their way up the ranks at DTA and they both appeared to take their responsibility of interview panelists seriously. Neither of them showed a personal animus or bias against the Appellant and they both appeared to be sincerely disappointed by Ms. Whitlow's poor performance during the interview.

It appears that Ms. Whitlow herself approached the interview with a predisposition that she would not be chosen, leading in part to her poor performance. She did not contest most of the observations of the interview panelists and focused more generally on her continued belief that the selections had been predetermined. During the hearing

before the Commission, she exhibited some of the same nervousness noted by the panelists and she had trouble organizing her thoughts.

As part of this appeal and the others referenced above, I have observed Ms. Whitlow on several occasions. She strikes me as a good, decent person who is genuinely frustrated at being passed over for promotions. Notwithstanding her many positive attributes, however, DTA has shown, by a preponderance of the evidence, that the hiring process in question was based on basic merit principles and they were justified in not selecting the Appellant for a BERS C position.

For all of the above reasons, the Appellant's appeal under Docket No. G2-11-90 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 record. 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)(1), 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:
Joan Whitlow (Appellant)
Daniel LePage, Esq. (for Appointing Authority)