

**COMMONWEALTH OF MASSACHUSETTS  
SUFFOLK, SS.**

**CIVIL SERVICE COMMISSION**

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

**JEFFREY L. FELDER,**  
Appellant  
**v.**  
**CITY OF BOSTON,**  
Respondent

**G2-14-61**

Appearance for Appellant:

Philip Brown, Esq.  
Associate General Counsel  
AFSCME Council 93  
8 Beacon Street, 7<sup>th</sup> Floor  
Boston, MA 02108

Appearance for Respondent:

Robert J. Boyle, Esq.  
Labor Counsel  
Office of Labor Relations  
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Boston, MA 02201

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Jeffrey L. Felder, appealed to the Civil Service Commission (Commission), to contest his non-selection by the City of Boston (Boston) for a provisional promotion to the position of Street Lighting Construction Inspector (SLCI). A pre-hearing conference was held on April 29, 2014 and a full hearing held on July 29, 2014, at the Commission's Boston office.<sup>1</sup> Witnesses were sequestered. The full hearing was digitally recorded and the parties received a CD of the proceeding<sup>2</sup>. Both parties submitted proposed decisions.

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>2</sup> If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, the CD should be transcribed by the plaintiff in the judicial appeal into a written transcript.

## **FINDINGS OF FACT**

Twenty-two (22) Exhibits were introduced in evidence (Exhs. 1-14, 17-24) and two documents marked for identification (Exhs. 14ID & 15ID). By email dated August 7, 2014, per the Commission's request, Boston submitted additional documents which are marked PHExh.25. Based on the Exhibits and the testimony of the following witnesses:

### **Called By the Appointing Authority:**

- Patricia Casey, HR Director, Boston Department of Public Works (DPW)
- Glenn Cooper, Manager, Street Lighting Division, Boston DPW

### **Called by the Appellant:**

- Jeffrey L. Felder, Appellant

and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and reasonable inferences therefrom, a preponderance of the evidence establishes the following findings of fact:

### **The Appellant**

1. The Appellant, Jeffrey L. Felder is a tenured labor service employee with the Street Lighting Division of the Boston DPW. He began employment in the DPW in February 1999 as a Maintenance Mechanic (Lighting Service Repair). Since October 2000 he has held the title of Maintenance Mechanic 1 (Lighting Service Repair). (*Exh.24, PHExh.25; Testimony of Appellant*)

2. During his 15 years of employment with the Boston DPW, Mr. Felder received satisfactory performance reviews from his supervisors which document that he generally "meets expectations" in all categories of work performance. (*Exh. 22*)

3. Prior to his present appeal, Mr. Felder was disciplined on four separate occasions:

- (a) November 2004 – one day suspension
- (b) September 2005 – 4 day suspension
- (c) July/August 2008 – 5 day suspension
- (d) June/July 2013 – 20 day suspension

(*Exh. 13; Testimony of Casey*)

4. Mr. Felder's 2013 discipline was a result of an Agreement dated 7/2/2013, following a positive drug/alcohol test on June 11, 2013. In addition to accepting a 20-day suspension, Mr. Felder entered into a Rehabilitation Agreement which required, among other things that he seek counseling for substance abuse, including a minimum of one year of "after-care" treatment and that he submit to follow-up drug testing for a period of at least two years and up to five years following the completion of his treatment program. (*Exh.14; Testimony of Appellant, Casey & Cooper*)

Boston DPW Street Lighting Division Structure

5. Glenn Cooper, who holds a management title of Associate Electrical Engineer, is the current Manager of the Boston DPW Street Lighting Division. The Street Lighting Division handles responsibility for the engineering, design, maintenance and repair of the municipal street lighting infrastructure throughout Boston, which includes approximately 64,000 electrical and 3,000 gas light fixtures, along with associated poles and equipment.

6. The Street Lighting Division staff consists of three or four Supervisors of Street Lighting (SSLs) who report directly to Mr. Cooper and, under them, approximately eight Street Lighting Construction Inspectors (SLCIs), two to four Maintenance Mechanics 1 (MM1s) and approximately 20 to 25 Maintenance Mechanics (MMs), and two Store Keepers. The SSLs and SLCIs manage and supervise the work of the MMs and MM1s, who are assigned to one of four work crews (generally two MMs and/or MM1s plus a SLCI) assigned to the following functions: a Gas Crew that maintains the gas lighting, a Maintenance Crew that primarily handles outages, a Ground Maintenance Crew that attends to replacement of bulbs and other repairs, and a Construction Crew focused on pole removal, replacement and repair. (*Exhs. 1 through 4; Testimony of Cooper*).

7. The Street Lighting staff employees (below Mr. Cooper) are represented by AFSCME Council 93 pursuant to a collective bargaining agreement with the City of Boston effective from July 1, 2010 through June 30, 2016 (the AFSCME/Boston CBA). (*Exh.18*)

8. The Boston DPW positions of Supervisor of Street Lighting (SSL) and Street Lighting Construction Inspector (SLCI) are not specifically listed as approved job titles in the MuniClass Manual promulgated by the Massachusetts Human Resources Division (HRD) or in any specific classification plan in effect for Boston. Based on representation of counsel, I take administrative notice for purposes of this appeal that, insofar as the job of SLCI is concerned, that position has been treated by the parties and HRD as equivalent to the title of “General Construction Inspector” (Job Title 0809A) that appears in the official service “Construction Inspection Series”, and, therefore, I infer that the SLCI position is an official service position equivalent to that job title. (*Administrative Notice [MuniClass Manual; Kessler Aff’t submitted with Boston’s Motion to Dismiss]*)<sup>3</sup>

9. The MuniClass Manual does not appear to list either of the job titles of Maintenance Mechanic (Lighting Service Repair) or Maintenance Mechanic 1 (Lighting Service Repair). Based on representation of counsel, I take administrative notice that the title of “Street Lighting Maintenance Man” (Job Title 2806D) does appear in the labor service “Electrical Line Working Series” and that Boston’s classification plan contains the labor service positions of “Maintenance Mechanic (Lighting Service Repair)” and “Maintenance Mechanic (Lighting Service Repair) Apprentice”. (*Administrative Notice [MuniClass Manual; Kessler Aff’t submitted with Boston’s Motion to Dismiss]*)

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<sup>3</sup> I also take administrative notice that the last documented general revision to the MuniClass Manual was made in or about 1983. (*[Administrative Notice (MuniClass Manual, 1983 ed.)]*)

10. In a Supplemental Agreement to the AFSCME/Boston CBA, covering the DPW, the DPW agreed to seek approval in 2010 from the “Department of Personnel Administration” [the former name for HRD] for the additional titles in the Street Lighting Division of a “Gas Lamp Repairman”, “Working Foreman, Street Lighting Repair”, “Street Light Construction Inspector”, “Street Light Inspector” and “Supervisor of Street Lighting”. Apparently, however, the matter was never pursued and these titles were never approved by HRD. (*Exh.18; Administrative Notice [MuniClass Manual; Kessler Aff’t submitted with Boston’s Motion to Dismiss]*)

11. The job descriptions for the positions of MM and MM1 are mostly identical. Both describe the job requirements to include:

- Installation, maintenance, repair and related work on street lighting units, flood lighting units, underpass and overpass lighting, bridge and general extra lighting; repairs and maintains gas lamps; responsible for the proper handling and disposal of toxic materials; responsible for the care, custody and maintenance of floodlights on the outside of bridges; operates all types of equipment necessary for maintenance, repair and installation of lighting services.
- Subject to all applicable safety and dress code requirements.
- Required to work any emergency as directed by the Commissioner of Public Works
- Ability to exercise good judgment and focus on detail as required by the job.

The distinctions between the job descriptions for MM and MM1:

- The MM is required to have a minimum of 2 years’ experience in electrical work; the MM1 is required to have a minimum of 3 years’ experience in electrical work.
- The MM is required to hold a Class B CDL and Hoisting License; the MM1 is required to hold a Class A CDL (with trailer endorsement).
- The MM1 job duties also provide: “When working with a small work party will act as lead Mechanic, in order to ensure the proper operation and maintenance of the street lighting system”.<sup>4</sup>
- The MM is an AFSCME pay grade 15; the MM1 is an AFSCME pay grade 16.

(*Exhs. 2 & 3: Testimony of Appellant, Casey & Cooper*)

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<sup>4</sup> I note that the proviso for supervision by the MM1 is similar to the labor service position of “working foreman” for various trades, as defined in the MuniClass Manual, as well as the proposed “Working Foreman, Street Lighting Repair” identified in the DPW Supplemental Agreement to the AFSCME/Boston CBA but never apparently approved. (*Exh. 18; Administrative Notice [MuniClass Manual]*)

12. Functionally, both MMs and MM1s work under the general supervision of an SLCI or occasionally a SSL. In the absence of the regular supervisor, usually, a floating SLCI or occasionally an SSL will fill in. Occasionally, an MM1 or MM could fill in as a work crew supervisor, if no other supervisor was available, but those occasions were “very rare”(Testimony of Appellant & Cooper)

13. About 80% of the work of most work crews is performed using a “bucket truck”, which requires a Class B CDL and can be operated by an MM, MM1 or the SLCI. Hauling lighting poles usually requires a tractor/trailer, which can only be operated with a Class A CDL, so only an MM1 can perform that assignment. For that reason, MM1s, such as Mr. Felder, would typically be assigned to the Construction Work Crew that handled projects involving lighting poles. All MMs and MMIs are assigned on a rotating basis to “on-call” duty for which they are responsible to respond to emergencies during non-working hours. (Exhs. 1 through 3, 18, 21; Testimony of Appellant & Cooper)

#### The 2013/2014 SLCI Promotions

14. On or about December 16, 2013, the Boston DPW posted a “Departmental Only – Promotional Opportunity” to fill two full-time SLCI positions in the Street Lighting Division. The posting describes the position as follows:

- Under general supervision, inspects the progress of contractual services for the street lighting facilities to ensure compliance with specifications.
- Supervises and assists the work of employees engaged in the installation, maintenance and repair of the city-owned street lights; repairs and maintains gas lamps; responsible for the proper handling and disposal of toxic materials; responsible for the care, custody and maintenance of floodlights on the outside of bridges.
- Prepares related reports and recommendations for supervisors.
- Subject to all applicable safety and dress code requirements.
- Required to work any emergency as directed by the Commissioner of Public Works.
- Minimum of 3 years’ experience in electrical work.

- A Class B CDL and Massachusetts Hoisting License.
- Knowledge of methods of construction for underground lighting conduit facilities and relations to other utility company facilities, preferred, as well as knowledge of methods for above ground installation.
- AFSCME Grade R16

(Exh. 1; Testimony of Casey)

15. Mr. Felder and five other DPW departmental employees applied for the position, along with several other non-departmental applicants. As the position was posted as an internal departmental promotion, only the six DPW departmental employees were considered. (Testimony of Casey)

16. All six DPW departmental employees participated in a first-round interview process with DPW HR Director Patricia Casey and Street Lighting Division SSL Michael Donovan. The candidates were asked a series of standard questions. The candidates were rated by each interviewer on a scale of 5 (high) to 1 (low) on Performance, Job Knowledge, Job Skills and Interpersonal Skills. In addition, HR Director Casey rated the candidates on two additional criteria: (a) use of sick time for the past three years (3 - less than 4 absences; 2 - 4 to 7 absences; 1 - 8 to 11 absences; 0 – over 11 absences; and (b) past discipline (5 – no discipline; 3 – written warnings; 1 – suspension). The six candidates scores were as follows:

	<u>Performance</u>	<u>Knowledge</u>	<u>Skills</u>	<u>Interpersonal</u>	<u>Attendance</u>	<u>Discipline</u>	<u>TOTAL</u>
M. O’Leary	5	10	10	5	3	1*	34
D. Prioleau	5	10	10	5	2	1**	33
J. Felder	5	9	9	5	1	1	30
T. H.	4	6	6	4	2	1	23
P. L.	5	6	6	3	1	1	22
V. M.	4	6	6	3	0	1	20

\*5 day suspension in 2004

\*\*1 day suspension in 2013

(Exhs. 11 through 13, 17; Testimony of Casey)

17. In accordance with DPW practice, the three top-ranked candidates were selected for a second round of interviews with Street Lighting Division Manager Glenn Cooper, which occurred on February 11, 2014. Following the interviews, Mr. Cooper ranked the three candidates using the similar matrix from the first round of interviews, which produced a total score for each candidate as follows: 1–M. O’Leary:24; 2–D. Prioleau:23; J. Felder:20. (*Exhs. 7 through 10; Testimony of Casey & Cooper*)

18. Mr. Cooper considered all three candidates to be “qualified” for the position on the basis of their ability and job knowledge. He selected Messrs. O’Leary and Prioleau for appointment to the two SLCI positions over Mr. Felder due, in part, to Mr. Felder’s recent drug/alcohol positive test and his ongoing status under the rehabilitation agreement, pursuant to which he was undergoing twelve months of treatment and was subject to compliance with at least two additional years of random testing. Mr. Cooper considered this status incompatible with the level of confidence he required of an SLCI, who had responsibility to supervise and inspect work that was highly dangerous and required utmost attention to safety concerns. (*Testimony of Cooper*)

19. On or about February 25, 2014, a “Notice of Selection” of Messrs. O’Leary and Prioleau for the SLCI positions was posted in the DPW, in accordance with the requirements of the AFSCME/Boston CBA. (*Exh. 6*)

20. Mr. Felder saw the Notice of Selection and, he received a letter informing him of his non-selection on or about March 3, 2014. The letter stated no reasons for the decision not to appoint him to one of the two SLCI positions. (*Exh. 5; Testimony of Appellant*)

21. The Boston DPW did not submit a Form 15A with HRD or otherwise inform HRD of the provisional promotions of Messrs. O’Leary and Prioleau to the SLCI position



(as DPW did in prior provisional promotions, such as its promotion of Mr. Felder in 2000). (See *Exh. 24; Testimony of Casey; Administrative Notice [HRD, Civil Service Unit, Form 15A (Provisional Promotion)*, <http://www.mass.gov/anf/employment-equal-access-disability/civil-serv-info/appointing-authority-information/>)

22. On March 12, 2014, Mr. Felder filed this appeal. (*Claim of Appeal*)

### **APPLICABLE CIVIL SERVICE LAW**

The Boston DPW's authority to make a provisional promotion<sup>5</sup> to a position in the official service is governed by G.L.c.31, §15, that provides, in relevant part:

*"An appointing authority may, with the approval of the administrator [HRD] . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list . . ."*

*If there is no such employee in the next lower title who is qualified and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission to the administrator of sound and sufficient reasons therefor, satisfactory to the administrator. . . ."*

*". . . The administrator shall terminate any provisional promotion if, at any time, he determines that (1) it was made in violation of the civil service law and rules, or (2) the person provisionally promoted does not possess the qualifications or satisfy the requirements for the position. An appointing authority which makes a provisional promotion pursuant to this section shall report such promotion to the administrator."*

Id. (*emphasis added*)

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<sup>5</sup> "Provisional appointments or promotions . . . are permitted in what are supposed to be exceptional circumstances." *City of Somerville v. Somerville Municipal Employee's 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 the competitive examinations required to establish any eligible lists from which permanent civil service promotions may be made, and the professed lack of appropriations to permit examinations in the near future, the vast majority of non-public safety civil service positions in the official service in Massachusetts can now be lawfully accomplished only provisionally. Thus, as predicted, the exception has now swallowed the rule and a promotion "which is provisional in form may be permanent in fact." *Kelleher v. Personnel Administrator*, 421 Mass. 382, 399 (1995). That said, the Commission must apply the civil service law as written and the use of provisional promotions is not, per se, unlawful. As much as the Commission regrets this state of affairs, 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.

G.L.c.31, Section 15 includes a series of prescribed safeguards to ensure that the use of provisional promotions does not compromise the fundamental requirements of “basic merit principles” under Massachusetts civil service law that only persons who are qualified by training and experience are chosen for advancement, free of political influence or other unlawful personal bias. See G.L.c.31, §1. These safeguards include the preference for promoting persons from the “next lower title” over “skipping one or more grades” and requiring approval by the Personnel Administrator [HRD] of all such provisional promotions and mandating particularly heightened scrutiny when promotions do skip one or more grades. As stated in Kelleher v. Personnel Administrator, 4212 Mass. 382 (1995):

General Laws c.31, §15, governing provisional *promotions*, permits a provisional promotion from the next lower title within the departmental unit, with the approval of the administrator . . . In addition, the appointing authority may make a provisional promotion skipping one or more grades in the departmental unit, provided that he submits sound and sufficient reasons.

*. . . The . . . distinction between provisional promotions of one and more than one grade are strong indications that the variations in standard were not inadvertent. Furthermore, the approval requirement is sufficiently substantial that we need not, to make it meaningful, obliterate the distinction between that requirement and the textually more stringent requirement mandating submission of sound and sufficient reasons.*

*On the premise that . . . the statutory scheme is to assure the competence of the civil service and to guard against favoritism and bias, the different approval requirements may quite sensibly be taken to distinguish between the levels of scrutiny by the administrator appropriate to each occasion. . . .*

*Where a vacancy is filled provisionally by promotion, there is a greater assurance that the person chosen will have demonstrated some [on-the job] competence and familiarity with the duties of the office. This presumption is less plausible if the provisional promotion skips one or more grades; and that may be why the administrator is given a greater degree of supervision in such cases.*

*That the administrator may not call for sound and sufficient reasons does not. . . endow the appointing authority with “unbridled discretion” to make provisional promotions, or render the administrator's approval a merely ministerial function. We recognize that an important objective of the civil service system is “assuring*

*that all employees are ... protected from arbitrary and capricious actions,”* [citation], and that *the administrator has a substantial role to this end. The administrator can perform his important and substantive function faithfully by ensuring that:* (a) the statutory administrative requirements are met (i.e., there is no eligible list or the eligible list is a short list, and *the promotion is from the next lower grade*), and (b) *the candidate possesses adequate qualifications*. The Superior Court judge correctly noted that, as the mayor submits, *the administrator may “withhold [his] approval if it is shown that a candidate's record is questionable.”*

Id. 421 Mass. at 386-390 (*emphasis added*)

## **ANALYSIS**

Mr. Felder’s appeal raises three substantive issues:

- (a) Is the position of SLCI in the official service the “next higher title” to Mr. Felder’s labor service position of MM1 but not the labor service position of MM held by the two selected candidates for purposes of the provisional promotion statute?
- (b) If the SLCI is the “next higher title” to the MM1 position, but not the MM position, did Boston DPW prove “sound and sufficient reasons” to skip over Mr. Felder and appoint the two selected candidates from a lower grade?
- (c) What are the consequences of the failure of Boston DPW to notify HRD and obtain HRD’s approval of the provisional promotions of the two selected candidates?

In sum, the Boston DPW has presented credible reasons to conclude that it properly treated the SLCI position as the “next higher title” to both an MM and MM1 position. As the civil service law permits the promotion of any qualified candidate in the next lower title, Mr. Felder, even if qualified, is not aggrieved and has no right to appeal his non-selection for a provisional promotion of another qualified candidate. Thus, as the Commission lacks jurisdiction over Mr. Felder’s appeal for that reason, it is not necessary to consider the Appellant’s other arguments, i.e., that his recent failure of a drug test and on-going rehabilitation obligations were not disqualifying factors that justified Boston bypass him.

### Next Lower Title to SLCI

In most cases, the progression from one civil service job title to the “next higher title” is relatively straight-forward. For example, the official service “Accounting and Budget Group” contains eight job “Series”, each of includes a clearly defined hierarchy; e.g., the “Accounting” Series includes Junior, Senior, Principal, and Chief”; the “Accounts Maintenance Clerical” Series includes Account Clerk, Senior Account Clerk, Principal Account Clerk. See MUNICLASS MANUAL, pp. 161-169. See also Green v. City of Brockton, 28 MCSR 39 (2015) (clear hierarchy of construction supervisory titles)

In other cases, such as the present situation, the relationship among job titles is more ambiguous. For example, the “Pumping Plant Operating” Series in the “Fixed Industrial Equipment Operations Group” contains five job titles, three of which are official service and two are labor service; in addition, the listed order of the job titles in the series does not comprise a clear career ladder. Sorting out this hierarchy requires a certain degree of judgment and assessment by HRD, in particular. See MUNICLASS MANUAL, pp. 70-79; McCormack v. City of Quincy, 25 MCSR 184 (2012).

Massachusetts civil service law defines a job “title” as “a descriptive name applied to a position or to a group of positions having similar duties and the same general level of responsibility”. G.L.c.31,§1. A job “series” is a “vertical grouping of related titles so that they form a career ladder.” Id. In general, job titles in different job series are not considered part of the same career ladder for purposes of Section 15 analysis. See Garfunkel v. Department of Revenue, 24 MCSR 128 (2011). See also Poore v. City of Haverhill, 29 MSCR 260 (2016) (distinguishing different job series in municipal water department)

In the present situation, common sense suggests that the official service job of the SLCI is a “higher title” than the labor service positions of either an MM and MM1. The job is specifically designed to supervise the work-crews comprised of both MMs and MM1s. The job carries a pay grade under the AFSCME/Boston CBA that is one step above MM1 and two steps above MM. Historically, both MMs and MM1 have been promoted from those positions to the job of SLCI. The MM1’s job description does require a higher class of CDL and includes a provision for acting as the “lead mechanic”. Overall, however, the two positions do appear otherwise identical in their essential functions. Both MMs and MM1s handle “on-call” duties as the primary responder for after-hours emergency calls.

To be sure, there is some ambiguity as to whether the MM1 and MM positions are, in fact, truly different “titles” for Section 15 civil service purposes or, simply a “group of positions having similar duties and the same general level of responsibility” comprising a essential the same civil service “title”. This ambiguity is exacerbated by the fact that the proposed job titles and the career progression in the AFSME/Boston CBA, the job titles in the classification plan approved by HRD for the Boston DPW, and the approved MuniClass Manual job titles, are not clearly defined or consistent. In particular, under the MuniClass Manual, as Boston DPW points out, the job of an SCLI is equivalent to the position of “General Construction Inspector” in the “Construction Inspection Series”, whereas the MuniClass title of a “Street Light Inspection Man” in the “Electrical Line Working Series” seems the closest to the MM job title in the Boston DPW classification plan (which has no approved title of MM1). Thus, under the structure provided by the MuniClass Manual, the SLCI position would not be the “next higher title” to either an

MM or MM1, as they would fit in entirely different job series. Based on how the current Boston Classification Plan has been applied, however, it appears that the career progression has been from “MM (SLR) Apprentice” and “MM (SLR)” then to a “Street Light Construction Inspector”(SLCI) and, finally, “Supervisor of Street Lighting”. This does appear to establish a “career ladder” that would place all MMs in direct line below the SLCI. After considering all of the evidence, I conclude that Boston has correctly treated the positions of and MM1 to be a subset of the same job title as an MM. Thus, for purposes of the provisional promotion statute, under the Boston Classification Plan as currently in place, an MM and an MM1 are part of the same “title” as defined under G.L.c.31,§1

#### Reasons to Skip Over Mr. Felder

So long as an appointing authority makes a provisional promotion pursuant to G.L.c.31,§15,¶1 from among one of several “qualified” candidates in the next lower title,<sup>6</sup> absent proof of unlawful bias or subterfuge, none of the other non-selected candidates are aggrieved by their non-selection and they have no right of appeal to the Commission. Section 15 does not require that the appointing authority select the “most qualified” candidate or the one with the most seniority. See, e.g., Shugrue v. Department of Correction, 28 MCSR 82 (2015); Allison v. City of Cambridge, 27 MCSR 379 (2014); Higgins v. Boston Public Schools, 25 MCSR 416 (2012); Sullivan v. City of Boston, 20 MCSR 11 (2007)

Since I conclude that Boston is correct that MMs and MM1 properly are grouped together in the same “title”, the Commission lacks jurisdiction to hear an appeal by Mr.

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<sup>6</sup> Mr. Felder does not contend, and the evidence does not support the conclusion that the selection process was tainted or that either of the selected candidates did not meet the qualifications for the position of SLCI.

Felder from the selection of two qualified MMs over him. Thus, the Commission need not address Mr. Felder's contention that only he, as a MM1, held a job in the next lower title of SCLI, he would be entitled to preference in promotion under Section 15,¶1 and Boston could skip over him to select qualified candidates in the MM position only if Mr. Felder was not "qualified" for (or was unwilling to accept) the promotion and Boston submitted "sound and sufficient reasons . . . satisfactory to the administrator [HRD]" to appoint qualified candidates without regard to title. These determinations are questions of fact that rest on an appointing authority's sound judgment based on all relevant of the facts and circumstances and are subject to HRD's review and approval in the first instance. G.L.c.31, §15,¶2. *cf. Garfunkel v. Department of Revenue*, 24 MCSR 128 (appellant properly found "unqualified" by appointing authority lacked standing to appeal Section 15 provisional promotion); *Lusignan v. City of Holyoke Gas & Elec. Dep't*, 22 MCSR 135 (2009) (qualification for promotion to labor service position of working foreman determined from assessment of the candidate from entire application process)

Although not necessary to the decision of this appeal, I note that, even if Section §15,¶2 applied, Boston has a credible claim that Mr. Felder was not "qualified" for the job based on the undisputed fact that Mr. Felder had recently failed a drug/alcohol test and was in the process of completing a year-long rehabilitation program and was subject a minimum of two more years of random testing. Mr. Cooper concluded that he could not risk the safety of others that would be created by placing an employee under rehabilitation for substance abuse in a position of authority to supervise and inspect the work of gas and electric service maintenance and repair. I find it highly unlikely that, in these circumstances, the legislature intended that an appointing authority was prohibited

from invoking the authority of Section 15,¶2 to skip over appointing a candidate undergoing substance abuse counseling and rehabilitation for rational safety reasons.

#### HRD's Role in Approving Provisional Appointments

The Appeals Court has exhorted the Commission that it should not prejudice how HRD would exercise its review and approval authority. See Ahern-Stalcup v. Civil Service Comm'n, 79 Mass.App.Ct. 210, 216-17 (2011) When, however, HRD's role is more technical or ministerial than judgmental, HRD's functions may be delegated to the appointing authority. Sherman v. Town of Randolph, 472 Mass. 802 (2015) and Malloch v. Town of Hanover, 472 Mass. 783 (2015) To be sure, in general, it would be preferable for an appointing authority to comply with the letter of the statute calling for HRD approval of a provisional promotion. The reality is that, with no possibility that an examination will be given, such compliance now serves essentially a perfunctory role. As the decision in this case turns directly on how Boston classified its job titles, which is a matter more within the purview and knowledge of Boston than HRD, and the facts that are relevant to that decision have now been fully presented to and considered by the Commission, I see no reason that a technical failure to comply with Section 15 precludes the Commission from deciding this matter on the merits, based on the facts presented.

#### CONCLUSION

For the reasons stated, the appeal of the Appellant, Jeffrey I. Felder, under Docket No. G2-14-61, is hereby *dismissed for lack of jurisdiction*..

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein  
Commissioner



By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein, and Tivnan, Commissioners) on July 21, 2016.

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)(1), 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 to:

Philip Brown, Esq. (for Appellant)

Robert J. Boyle, Esq. (for Respondent)