COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

DANIE CHARLES,
Appellant,

v.

BOSTON RETIREMENT BOARD,
Respondent

CASE NO: G2-12-74

Appearance for Appellante	Danie Charles, Pro Se
Appearance for Respondent:	Robert Boyle, Esq. City of Boston Boston City Hall Boston,MA 02201
Commissioner:	Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Danie Charles, appealed to the Civil Service Commission (Commission) under the provisions of G.L.c.31, §2(b), claiming that her employer, the Boston Retirement Board (BRB) denied her the opportunity for promotion to the position of an Administrative Assistant. On May 17, 2012, the BRB filed a Motion to Dismiss the appeal on the grounds that the Commission lacked jurisdiction over the BRB, and, in the alternative, for untimeliness and on the grounds that the Appellant was not aggrieved by any violation of civil service law. A hearing on the Motion to Dismiss was held on June 25, 2013. The hearing was digitally recorded. Four (4) exhibits were marked at the hearing. At the Commission's request, the BRB submitted additional documentation (P.H.Exh 5)

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, I find the following material facts to be undisputed:

1. The Appellant, Danie Charles, was employed by the BRB in 1987. (*Ex. 2*)

2. The Commonwealth's Human Resources Division ("HRD") certified the Appellant as well as a number of other BRB employees as permanent civil service employees, tenured in the positions that they held in 1998.This action was taken as a result of a special act of the legislature, St. 1998, c. 282 which provided:

> 'Notwithstanding the provisions of any general or special law to the contrary, the personnel administrator [HRD] shall certify any active employee who served in a civil service position in the City of Boston as a provisional or provisional[ly] promot[ed] employee for a period of at least six months immediately prior to January 1, 1998, to permanent civil service status in that position."

(*BRB Motion to Dismiss, Kessler Aff't*)

3. As a result, since 1998, Ms. Charles has been classified as a permanent civil service employee of the BRB, either in the job title of Principal Account Clerk or Head Clerk. (*Exhs 1 &. 2; BRB Motion to Dismiss, Kessler Aff't)*[1]

4. On or about January 31, 1999, Ms. Charles was reclassified to the position of Principal Account Clerk. (*Exh. 2*)

5. In or about 2007, the BRB hired Victoria DaRosa in the provisional job title of Head Clerk. (*BRB Motion to Dismiss, Smith Aff't*)

6. At some unspecified date in 2011, BRB assigned Ms. DaRosa to perform the duties of Administrative Assistant, following the retirement of the incumbent who previously held that position. (*Exh. 2; Smith Aff't; Colloquy at Hearing*)

[1] The record is not clear which position is the one in which Ms. Charles was tenured, or the precise effective date of her tenure, but the present appeal does not turn on that point.

7. In August 2011, Ms. DaRosa initiated a grievence through her collective bargaining unit, asserting that she was acting "out-of-grade" in the position of Administrative Assistant, which is a pay grade higher than Head Cleark, but had not received the pay adjustment to which the collective bargaining agreement entitled her. As a result of the grievance, Ms. DaRosa received a retroactive pay adjustment, effective back to August 30, 2011.

8. On or about January 20, 2012, BSB formally reclassified Ms. DaRosa to the position of Administrative Assistant. (*Exh. 3*)

9. On February 29, 2012, Ms. Charles filed the present appeal. (*Claim of Appeal*)

CONCLUSION

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h).

These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451

Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Civil Service Jurisdiction Over the BRB

G.L.c.31, Section 51 provides, in pertinent part applicable to the City of Boston, that: "All positions in all cities shall be subject to the civil service law and rules except as provided by section forty-eight [applicable to certain management service positions] or other law. . . ."

Chapter 31 defines an "appointing authority" as "any person, board, or commission with power to appoint or employ personnel in civil service positions." G.Lc.31,§. A "departmental unit" is "a board, commission, department, or any division, institutional component, or other component of a department established by law." Id.

The BRB contends that the Commission has never decided that it was an "appointing authority" subject to Chapter 31, and that the intent of Chapter 31 was to exclude it from the requirements of the civil service law, so that none of its employees would be subject to civil service law and rules. Although this claim does appear to be a matter of first impression before the Commission, there is nothing in the statutory language that expressly supports the BRB's conclusion. The BRB is a "board" established by law within the City of Boston, with offices at Boston City Hall and serviced by the City of Boston's Human Resources Division (Exh.1) and Office of Labor Relations (P.H.Ex.5). The City of Boston's Human Resources Division, as well as the Commonwealth's HRD,

plainly had long treated BRB employees as subject to civil service law, as evidenced by the classification of Ms. Charles in 1998 as a permanent civil service employee pursuant to Chapter 282 of the Acts of 1998. Absent any specific exclusion, the Commission finds no reason to conclude that it has no authority to exercise jurisdiction over the employees of the BRB who serve in civil service job titles as is every other "person, board, or commission with power to appoint or employ personnel in civil service positions." See generally, 1978 Mass.Op.Atty.Gen.No.29, 1978-79 Mass.Op.Atty.Gen 161, 1979 WL 42137 (Teachers' Retirement Board within state Department of Education was an appointing authority under civil service law) Thus, the argument that the Commission lacks jurisdiction in this appeal must fail.

Timeliness

The BRB also argues that Ms. Charles's appeal is untimely, contending that she failed to act for more than six months from the date that Ms. DaRosa first filed her grievance about being underpaid while acting out of grade as an Administrative Assistant.

According to the BRB's own records, however, Ms. DeRosa was not officially placed in the position of Administrative Assistant until January 20, 2012. While a fair argument could be made that Ms. Charles was aggrieved by Ms. DeRosa's acting "out of grade", even if an appeal from that decision had been permitted, the relief to which Ms. Charles would have been entitled, if any, would be limited to her being appointed to the next available temporary appointment. See generally, Kelley v. Boston Fire Dep't, 25 MCSR 23, 30 (2012) (remanded on other issues); Gillespie v Boston Police Dep't, 24 MCSR 170 (2011) Ms. Charles's civil service rights, if any, to be appointed to the Administrative

Assistant position provisionally, however, were not infringed until BRB appointed Ms. DeRosa to that position, which did not occur until January 2012.

The Commission, by administrative rule, has established that a person may appeal from his or her non-selection for promotion or appointment to a civil service position within 60 days of the bypass. Thus, Ms. Charles has acted in a timely manner to assert her appeal from that employment action by filing this appeal on February 29, 2012.

The Lawfulness of the Provisional Appointment

Ms. Charles' appeal fails, however, for the final point made by the BRB. She cannot be aggrieved by Ms.Derosa's provisional appointment to Administrative Assistant because (a) that job title is an entry level position in the official service that is not within the same official service series as the job title of Head Clerk held by Ms. Charles and (b) the appointment has not been made through selection of a candidate ranked below her on an eligible civil service list on which her name appeared. See G.L.c.31, §27.

The BRB is entitled to make a provisional appointment to the entry level position of Administrative Assistant and may choose any qualified candidate. Under civil service law, so long as the selected candidate is qualified for the position, it is not necessary in making a provisional appointment under G.Lc.31, Section 14, to give preference to a qualified permanent employee over a provisional candidate, or a qualified internal candidate over an external one, and other such qualified candidates do not have the right to appeal their non-selection to the Commission. See Barry v. Boston Fire Dep't, 25 MCSR 336 (2012); Zucalla v. Arlington, 25 MCSR 121 (2102); Rapa v. Department of Trans. Assistance, 24 MCSR (2011); Posco v. Department of Trans.Assistance, 24 MCSR 309 (2011); Richards v. Department of Trans. Assistance, 23 MCSR 828 (2010)

It has been long established that "[p]rovisional appointments or appointments through noncompetitive examinations 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, 481 N.E.2d 1176, 1180-81, rev.den., 396 Mass. 1102, 484 N.E.2d 103 (1985) (*emphasis added*), citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29, 22 N.E.2d 613 (1939). However, the passage of decades without funding to enable the personnel administrator to hold competitive examinations for virtually any civil service title (other than public safety positions), and the professed lack of funding to do so any time in the near future, has meant that hiring and advancement of civil service employees is accomplished by means of provisional appointments under Section 14 or provisional promotions under Section 15. Thus, as predicted, the exception has now swallowed the rule and an appointment or promotion which is "provisional in form may be permanent in fact." Kelleher v. Personnel Administrator, 421 Mass. 382, 399, 657 N.E.2d 229, 233-34 (1995).

No budget cuts are without consequences. The Commission remains concerned that the "provisional" employee problem persists and that it will continue to engender disputes within the ranks of public employees such as presented in this appeal, and the conundrum will become more difficult to resolve every year that funding for providing a path to permanency is not forthcoming. As much as the Commission regrets this state of affairs, and 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, the Commission must honor the clear legislative intent that allows for provisional 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. Meanwhile, public employees whose provisional status leaves them with fewer opportunities under the civil service law than their peers with permanency will be left to enforcement of their rights as members of the collective bargaining units to which they may belong, which the Commission does not control.

For the reasons stated, the BRB's Motion to Dismiss is granted and the appeal of the Appellant, Danie Charles, is hereby, ***denied***.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners on September 19, 2013.

A True Record. Attest:

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Commissioner

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 the 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 a Civil Service Commission's final decision.

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.

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Notice to:
Danie Charles, Pro Se (Appellant)
Robert J. Boyle, Esq.. (for BRB)
John Marra, Esq. (HRD)