

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

DEBRA OLUFEMI,
Appellant

v.

DEPARTMENT OF REVENUE,
Respondent

CASE NO: G2-08-20

Appellant, Pro Se:

Debra Olufemi
[REDACTED]

DOR's Attorney:

Suzanne Quersher, Esq.
Department of Revenue
100 Cambridge Street
Boston, MA 02114

HRD Attorney:

Tsuyoshi Fukuda, Esq.
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION ON MOTION FOR SUMMARY DECISION

The Appellant, Debra Olufemi, acting pursuant to G.L.c.31, §2(b), asserts an appeal against the Department of Revenue (DOR) and the Massachusetts Human Resources Division (HRD), challenging her bypass for provisional promotion to Tax Examiner III. DOR and HRD moved for Summary Decision. The Appellant opposed these motions. A hearing on the motions was held at the Civil Service Commission (the Commission) on August 4, 2008. The motion hearing was recorded on one (1) audiocassette.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, and the argument presented by the Appellant, DOR and HRD, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Debra Olufemi, has been employed by the Department of Revenue for approximately twenty years. Ms. Olufemi was appointed to the permanent title of Tax Examiner I in November 1996 and provisionally promoted to the title of Tax Examiner II in 1999. Since 1998, Ms. Olufemi has worked in the Taxpayer Services Division, Customer Service Bureau. (*Claim of Appeal; DOR's Pre-Hearing Memorandum; Appellant's May 1, 2008 Submission*)

2. Ms. Olufemi's FY 2007 Stage C EPRS rated her overall performance as "meets". She was rated "meets" as to three job duties, and "below" as to Duty 2. As to Duty 2 – Responsible for completing all work assignments in a timely manner – the EPRS states:

"Overall performance rating for this duty is below. . . . Overall she fell below the average of her peers in all production areas. She completed 65% of the average for abatements; 49% of the average for correspondence; 93% for telephone calls and 60% of problem sets completed. She will have to work smarter and harder to raise her productivity to a level approximating that of her fellow examiners."

(*Claim of Appeal*)

3. According to DOR, Ms. Olufemi has received "below" ratings for Duty 2 in other prior EPRSs dating back to 2003, but these EPRSs were not submitted to the Commission. (*DOR Motion*)

4. In October 2007, DOR made three (3) provisional promotions to the position of Tax Examiner III in the Taxpayer Services Division. The employees selected for promotion were a permanent Tax Examiner II and two provisional Tax Examiner IIs. (*DOR Motion*)

5. The position was duly posted on the Commonwealth Employment Opportunities (CEO) website as Job Posting # J11306. Neither the job posting nor the Form 30 for the position was provided, but DOR asserts that the job was a “high volume” position, and the Appellant has not disputed that assertion. (*DOR Motion*)

6. Ms. Olufemi applied for the posted positions and was interviewed but was not selected because DOR considered her “below” EPRS rating on Duty 2 to disqualify her. DOR also claims that Ms. Olufemi failed “to accurately answer basic interview questions.” (*Claim of Appeal; DOR Motion*)

7. DOR claims that, unlike Ms. Olufemi, the three candidates who were chosen for promotion were all qualified for the job, they all had received “meets” or “exceeds” ratings on their prior EPRSs, and they all had demonstrated the knowledge, skills and ability to perform as a Tax Examiner III in their interview sessions and application materials. DOR did not support these claims with any specific documentation but the DOR’s assertions in this regard were not disputed by the Appellant. (*DOR Pre-Hearing Memorandum; DOR Motion*)

8. There is no active eligible list for the position of Tax Examiner III. (*DOR Motion*)

CONCLUSION

Applicable Standard on Dispositive Motion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., “viewing the evidence in the light most favorable to the non-moving party”, i.e., DOR has presented substantial and credible evidence that the opponent has “no reasonable expectation” of prevailing on

at least one “essential element of the case”, and that Ms. Olufemi has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008)

Specifically, a motion to dismiss for lack of standing must allowed when the appellant fails to raise “above the speculative level” sufficient facts “plausibly suggesting” that DOR lacked reasonable justification for its determination that Ms. Olufemi’s sub-par prior performance and interview deemed her unqualified for promotion, which is necessary to find her “aggrieved” within the meaning of G.L.c.31, §2(b) and with standing to pursue this appeal. See Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

The Appellant’s Lack of Standing

The role of the Commission in this matter is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by [it]." City of Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997). See also City of Leominster v. Stratton, 58 Mass. App. Ct. 726, 728, 792 N.E.2d 711, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep’t of Boston v. Collins, 48 Mass.App.Ct. 411, 721 N.E.2d 928, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm’n, 38 Mass App.Ct. 473, 477, 648 N.E.2d 1312 (1995); Town of

Watertown v. Arria, 16 Mass.App.Ct. 331, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983). An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214, 268 N.E.2d 346 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, 682 N.E.2d 923, rev.den., 426 Mass. 1102, 687 N.E.2d 642 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482, 160 N.E. 427 (1928).

"The commission's task, however, is not to be accomplished on a wholly blank slate. [T]he commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'" Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823, 857 N.E.2d 1053, 1059 (2006). See Town of Watertown v. Arria, 16 Mass. App. Ct. 331, 334, 451 N.E.2d 443, rev.den., 390 Mass. 1102, 453 N.E.2d 1231 (1983) and cases cited.

The applicable statute governing provisional promoted is G.L.c.31, §15, which provides in relevant part:

§ 15. Provisional promotions. An appointing authority may, with the approval of the administrator or, if the appointing authority is a department, board, commission, institution or other agency within an executive office, with the approval of the secretary of such office, 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 No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

If there is no such employee in the next lower title who is qualified for 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 by the appointing authority of sound and sufficient reasons therefor, satisfactory to the

administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

A provisional promotion pursuant to this section shall not be deemed to interrupt the period of service in the position from which the provisional promotion was made where such service is required to establish eligibility for any promotional examination.

A secretary of an executive office who approves a provisional promotion pursuant to this section shall notify the administrator of each such approval. Such approval shall be made pursuant to the civil service law and rules, and such notification shall be made in such form as shall be required by 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. (emphasis added)*

DOR correctly asserts that, under Section 15, if Ms. Olufemi were unqualified for the position of Tax Examiner III, she would have no standing to contest the action of DOR in failing to provisionally promote her to the position over other qualified candidates.

In support of its contention, DOR points to Ms. Olufemi's "below" EPRS ratings on Duty 2, together with her failure to "accurately answer basic interview questions", as support for the conclusion that she was not qualified for the promotion to a higher level of responsibility which DOR asserts would require an even greater proficiency in the ability to work productively in the timely manner that Duty 2 of her EPRS measures.

It is well-established that an employee who failed to challenge an EPRS through a timely appeal under G.L.c.31, §§6A-6C is barred, in the context of a subsequent bypass appeal, from contesting the accuracy of the review. Thus, it cannot be disputed that Ms. Olufemi did not complete her work assignments in a timely manner as DOR may reasonably require. Although the Commission agrees with Ms. Olufemi that she may well be able to point to other facts concerning her qualifications, and the DOR might have been more forthcoming in explaining their conclusions, the Commission is convinced from all of the evidence in the record that such additional proof is not likely to

rebut the undisputed evidence presented by DOR. Thus, it is speculative, at best, that, drawing all reasonable inferences in her favor, Ms. Olufemi could prove DOR was not reasonably justified in finding her unqualified for promotion to Tax Examiner III.

As much as the Commission regrets this state of affairs, and has repeatedly exhorted parties in the public employment arena to end the current practice of relying on provisional promotions (and provisional appointments) to fill the majority of today's civil service positions, the Commission must honor the clear legislative intent to allow such a procedure for provisional promotions so long as the statutory requirements for doing so have been met. That said, the Commission is also mindful that the over-use of provisional appointments and promotions does call for a heightened degree of transparency in the substantially subjective evaluation process used for selection of candidates for "provisional" appointments and promotions that, for all intents and purposes, are permanent in fact. I conclude that the Commission should to continue to monitor the situation closely and, when appropriate, expect provisional appointment and promotional decisions to be thoroughly (as opposed to minimally) documented so as to permit meaningful review when challenges are presented to the Commission, and to ensure that hiring and promotional decisions continue to be made in a manner that is consistent with basic merit principles, without favoritism, bias or other unlawful motives.

Accordingly, for the reasons above, the DOR/HRD Motion for Summary Disposition is *granted* and the appeal of the Appellant, Debra Olufemi, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on April 2, 2009.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:

Debra Olufemi. (Appellant)

Suzanne Quersher, Esq. (for Appointing Authority)

Tsuyoshi Fukuda, Esq. (for HRD)

John Marra, Esq (for HRD)