

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DANIEL L. BURNS, JR.
Appellant

v.

G2-13-16

DEPARTMENT OF REVENUE,
Respondent

Appearance for Appellant:

Pro se
Daniel L. Burns, Jr.

Appearance for Respondent:

Elisabeth Baker, Esq.¹
Department of Revenue
100 Cambridge Street
Boston, MA 02114

Commissioner:

Cynthia A. Ittleman

DECISION ON RESPONDENT’S MOTION TO DISMISS
AND
APPELLANT’S MOTION FOR SUMMARY DECISION

Mr. Daniel Burns (Mr. Burns or Appellant) filed this appeal with the Civil Service Commission (Commission) on January 26, 2013 contesting the decision of the Department of Revenue (DOR or Respondent) to not select him for appointment to the position of Tax Auditor I (TA-I). A Pre-Hearing conference was held in this case on February 12, 2013. On March 12, 2013, DOR filed a Motion to Dismiss (Respondent’s Motion). On April 16, 2013, Mr. Burns filed an opposition to the Respondent’s Motion, requesting summary decision in his favor

¹ At the time of the hearing in this matter, the Respondent was represented by Julayne Baker, Esq.

(Appellant's Motion). The Commission held a hearing on the parties' motions on May 6, 2013.² The hearing was recorded and copies of the recording were sent to the parties.³

FINDINGS OF FACT

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

1. Mr. Burns was hired by DOR on July 7, 1988. He has civil service permanency as a Tax Examiner (TE)-II effective February 15, 1992. Thereafter, he held the provisional title of TE-III. Mr. Burns was provisionally appointed to the position of TE-IV at DOR, Offer in Settlement Unit, in Fall River, effective September 1, 2005, pursuant to an August 2008 Settlement Agreement between DOR and Mr. Burns. (DOR Pre-Hearing Memorandum; Appellant's Appeal, Attachment; Settlement Agreement, August 21, 2008⁴; Burns v DOR, G-4287 (14 MCSR 75)(2001)⁵; Administrative Notice - File G2-13-16)
2. Mr. Burns lists the following under "Education" on his resume: MBA, University of Massachusetts; Certificate of Accounting, Bridgewater State College; Real Estate Sales

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

³ 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.

⁴ In 1999, Mr. Burns filed an appeal with the Commission against the state's Human Resources Division Resources (HRD) and DOR, docketed G-4287. In 2001, the Commission found that DOR violated basic merit principles when it did not use an eligible list to make appointments/promotions to the position to Tax Examiner IV. Further litigation ensued regarding an appropriate remedy. In Burns v. Civil Service Commission, DOR and HRD, Massachusetts Appeals Court, 02-P-1593 (Rule 1:28)(2004), the Court found the appropriate remedy was to place Mr. Burns' name at the top of a list for promotional appointment. In 2008, Mr. Burns, DOR and HRD entered into a settlement agreement providing, *inter alia*, for Mr. Burns' appointment to the position of Tax Examiner IV retroactive to September 1, 2005.

⁵ Mr. Burns also filed an appeal of DOR's earlier decision to deny his request to be reclassified from a Tax Examiner III position to Tax Examiner IV, which appeal was denied. Burns v. DOR, Docket No. C-03-183 (19 MCSR 133 (2006)).

Court and MA Licensing Exam; Bridgewater State College; and BA in Political Science, Stonehill College. (Administrative Notice - File in G2-13-16) Although he does not provide a separate section of his resume to list his computer skills, Mr. Burns includes in the description of his TE-IV job duties that he uses “various online systems such as MASSTAX, DTAX, Lexis, Pacer, RMV, Registry of Deeds, Assessor’s Offices, Secretary of State, etc.” (Respondent’s Motion, Attachment)

3. There have been no civil service examinations for the TA-I position for many years.

Consequently, there is no eligible list from which a certification of names could be developed for the position of TA-I. (Respondent’s Motion)

4. DOR posted a TA-I position in the New England Audit Bureau-Meals Tax Unit in Fall River with an application deadline of June 3, 2012. The posting states, *inter alia*,

“Comments: Initially restricted to those who have taken and passed the civil service examination for this position, then to all others. ***These appointments are provisional, subject to the civil service process.***

Any Employee who possesses the necessary qualifications and wishes to be considered for the position(s) should complete the following steps.

Submit an application in the form of a memorandum, including the information listed below:

1. Current job title
2. Internal job announcement #12-AUD-027
3. Inclusive dates of service
4. Listing of all academic attainment and applicants (sic) current grade
5. Any candidate whose name may appear on the civil service list for this position should indicate this information in writing at the time of application.
...
6. Unless otherwise indicated applicants must provide a copy of their final EPRS form for the previous fiscal year”

(Appellant’s Appeal, Attachment)(emphasis added)

5. The TA-I job posting was posted externally (External Posting No. J30862) and internally (DOR Posting No. 12-AUD-027. (Respondent’s Motion to Dismiss)
6. This job posting lists the following duties for the TA-I position:

“Auditors conduct pre-audit research to document the basis for audit selection. Independently conduct field audits of various taxpayers to determine the correct tax due has been reported on taxpayers’ returns and to initiate any changes that may be required in accordance with established policies and procedures. Maintain the confidentiality of information obtained or developed in the course of their duties. Properly document all proposed changes through the development of schedules, reconciliations, reports, etc. Confer with the taxpayer and/or their legal representatives to discuss and explain all findings developed on audit. Complete audits and case files in a professional and timely manner adhering to all applicable policies and procedures. Develops information for use in preparing guidelines, making recommendations on rules, regulations and procedures and in preparing cases for tax investigation by reviewing appropriate documentation and conferring with agency staff.”
(Respondent’s Motion to Dismiss; Appellant’s Appeal, Attachment)

7. The posting’s Minimum Entrance Requirements state, “Applicants must have at least (A) two years of full-time, or equivalent part-time, professional experience in accounting or auditing, or (B) any equivalent combination of the required experience and the substitutions below.” (Id.) The listed substitution in the posting is, “A Bachelor’s or higher degree with a major in accounting, business administration, or business management may be substituted for the required experience.” (Id.)
8. In response to the provisional TA-I posting, DOR considered a total of 54 applicants⁶, 42 of whom were external candidates and 12 of whom were internal candidates. DOR interviewed nine (9) applicants, including six (6) external applicants. In the interviews, DOR asked the same ten (10) questions of each applicant. (Respondent Pre-Hearing Memorandum)

⁶ An attachment to the Respondent’s Pre-Hearing Memorandum is an “Appointment Recommendation Form signed by “Hiring Manager” Bernard Schram and dated October 9, 2012, indicating that Ms. A (not the Appellant) was the person who was being recommended for appointment to the Tax Auditor I position. This form states that there were fifty-one (51) candidates, not fifty-four (54), as indicated in the Respondent’s Pre-Hearing Memorandum, dated February 12, 2013, and the Respondent’s Motion. Since the recommendation form was prepared during the appointment process and the Pre-Hearing Memorandum and Respondent’s Motion were submitted after the appointment, I find it is more likely than not that fifty-four (54) is the total number of applicants considered for the TA-I position. There is no indication that the difference in the number of applicants affects the outcome here.

9. By cover letter dated May 23, 2012, addressed to Ms. Lisa Craig, DOR Program

Coordinator, Mr. Burns applied for the TA-I position, writing,

“To whom it may concern,

Please find enclosed a copy of my resume in (sic) application for the position of Tax Auditor I, Fall River, MA (#12-AUD-027). I have been with the Department since 7/07/88 and am currently working in the Officer in Settlement Unit in Fall River as a Tax Examiner IV. I have three college degrees including an MBA. I think that you will find that I am more than qualified for this position. I would look forward to an interview. Thank you.”

(Appellant’s Appeal, Attachment)

10. DOR considered Mr. Burns’ Employee Performance Review Form (EPRF) for fiscal year

2011 in considering his candidacy for the TA-I position. The EPRF is lengthy, taking into account matters beyond Mr. Burns’ control and his new responsibilities; it also provides detailed suggestions for improving his performance in some regards. This EPRF rated Mr. Burns’ performance in six (6) duties; he received an “exceeds” rating for two (2) duties, “meets” for the other four (4) duties, as well as the “overall” rating. In the accompanying narrative, Mr. Burns’ supervisor wrote that staff caseloads rose due to staff who were out, that Mr. Burns had been delegated the responsibility to evaluate all new Offers and that Mr. Burns handled this “very well”. The narrative further states that Mr. Burns “meets” his duties for keeping pace with case inventory but urges him to increase the number of his “full-case reviews” and to provide more information on research findings on real property. The two areas in which Mr. Burns’ work was rated as “exceeds” involve his 1) assuming of a “more prominent role in the Intake process ... as to whether an Offer is viable or non-viable[]”, showing Mr. Burns’ “strong analytic skills and attention to details” and 2) providing “excellent support to taxpayers at the District Office Counter”. (Respondent’s Motion, Attachment)

11. The Form 30 (job description) for Mr. Burns' position as a TE-IV provides the following

"General Statement of Duties and Responsibilities," in part,

"The incumbent examines the returns, financial records and information of individuals, corporations, and other business establishments to determine the ability to pay tax liability, [illegible] and monitors investigations regarding the Offer in Settlement and any other functions with regard to the Department of Revenue and, in addition, oversees the timely processing of expedited, lower dollar offer cases. Performs related work as required. Answers counter and telephone inquiries, provides technical assistance by explaining tax laws, rules, regulations, guidelines and procedures, completes data purification and performs related duties and responsibilities as required. The basic purpose of the work is to ensure compliance with the enforcement of the tax laws, rules and regulations of the Commonwealth."

(Respondent's Motion, Attachment)

The form 30 lists thirty-six (36) detailed duties and responsibilities and twenty-six (26) required qualifications. Minimum requirements for the TE-IV job are 1) four years of full-time or equivalent part-time professional experience in accounting, auditing or tax examining work, or 2) any equivalent combination of the required experience with the following possible substitutions: A) a BA with a major in accounting, business administration, or business management may be substituted for two years of the required experience or B) an MA with a major in accounting, business administration, or business management may be substituted for three years of the required experience. (Id.)

12. Mr. Burns was one (1) of three (3) internal candidates interviewed for the TA-I position.

He was interviewed on August 20, 2012 by Director Richard Elliott and Supervisor Louis Pavao, who asked Mr. Burns ten (10) questions.⁷ Asked to describe himself and why he wanted the TA-I job, the interviewers wrote, in part, that he worked for a mortgage company before DOR, that the Audit Bureau is more professional and may have more opportunity for advancement. When asked to describe his current job, the interviewers

⁷ The interviewers recorded their comments about each candidate's responses to the ten (10) questions jointly on one form.

wrote, in part, that he works in Offer and Settlement, covers the counter, deals with different tax types, screens hundreds of applications for settlement, and researches related matters regarding transfer of property. Asked about how his education and experience would make him a successful TA-I, the interviewers wrote that Mr. Burns said he has a business background and took a cost accounting and finance course and he has an MBA. Asked what makes him the best candidate, the interviewers wrote that Mr. Burns said that he had a working knowledge of all tax types and that he had to learn on his own because there are no updates. Asked to describe a conflict he was involved with a co-worker, the interviewers wrote that Mr. Burns said that “sometimes you have to agree to disagree and let the Manager make the decision.” Asked about the meals and room occupancy taxes statutes and regulations involved in the TA-I job, they wrote that Mr. Burns cited Chapter 64H and gave several specific examples. Asked what computer applications he uses, they wrote that he said he uses MASSTAX, MACCS, the DTAX database, RMV information, Lexis and that he has “some experience with Excel”. Asked about his ability to work independently, they wrote that Mr. Burns said he does some field work, checks repair plates and equipment and has done revenue enforcement work. Asked if he wanted to add anything, they wrote that Mr. Burns said he has been at DOR for more than twenty (20) years, passed the Corporate Analyst test and is a step below TA-I; he added that he makes decisions as a TE-IV even though he works with a TE-V.

(Appellant’s Motion for Summary Judgment and Opposition to Respondent’s Motion to Dismiss (Appellant’s Motion), Attachment)

13. On November 13, 2012, a NAGE Non-Selection Form was sent to Mr. Burns, indicating that another internal candidate was selected who was “better able to perform the job due to: more experience in the same or related work.” (Appellant’s Motion, Attachment)

14. DOR sent Mr. Burns a letter dated February 1, 2013, which states, in part,

“I have carefully considered the recommendation of the Bureau Chief and appropriate Deputy Commissioner who evaluated applicants for the Tax Auditor I position that was posted in the New England Audit Bureau/Fall River, Announcement #12-AUD-027.

I regret to inform you that you were not selected at this time. Because of the high quality of the candidates, the selection was difficult and was made only after weighing all the pertinent criteria. Although you have not been selected, this is no reflection on your potential, and I hope you will persevere in your career development.

The individual selected for this position was [Ms. A].

Sincerely,

Susan E. Montgomery-Gadbois

Director,

Human Resources Bureau

(Appellant’s Motion, Attachment; Respondent’s Pre-Hearing Memorandum)

15. The eligible list for the TA-I position was “deactivated effective June 30, 1997.”

(Respondent’s Pre-Hearing Memorandum) By memorandum dated July 25, 1997, the Personnel Administrator (now Chief Human Resources Officer) revoked non-public safety civil service eligible lists over five years old. (Id.)

16. Ms. A was initially hired by DOR as a provisional TE-II in the Chelsea DOR facility in March 1999. In October 2007, Ms. A was provisionally appointed to the position of TE-III in Chelsea. (Respondent’s Pre-Hearing Memorandum) Ms. A applied for the provisional TA-I position in 2012 and was appointed on or around January 13, 2013; she was one (1) of the three (3) internal candidates given an interview. Ms. A’s resume indicates that her education includes a BS in Business Administration, “concentration

Accounting”, Salem State College⁸. Her resume also lists her computer skills as: “IBM, Microsoft Database, Microsoft Excel, Microsoft Works, Masstax, Mapper, Powerpoint, Discovery Tax, E-gain, E-file Viewing, Internet.” (Respondent’s Motion, Attachment)

17. On or about the time that Ms. A, Mr. Burns and other applicants were being considered for appointment to the TA-I position, “[Ms. A] ha[d] been employed with the Department for almost fifteen (15) years but ha[d] not been afforded the opportunity to sit for a civil service examination as examinations have not been administered during her tenure.” (Respondent’s Motion)

18. In an undated cover letter, Ms. A submitted her resume in response to the TA-I posting. The cover letter states, in part,

“My position with the Massachusetts Department of Revenue requires me to perform the following:

- Interpret statutes
- Review financial records
- Provide technical assistance by interpreting and explaining state tax laws, rules, regulations, guidelines, policies, and procedures
- review and resolve written inquiries submitted by taxpayers involving abatement claims, accounting adjustments, non filer (sic) assessments, and audit cases.

My proficiency in computers includes designing programs to help tax examiners facilitate speed and accuracy in processing claims on Microsoft Excel. ...” (Respondent’s Motion, Attachment)

19. The General Statement of Duties and Responsibilities for a TE-III provided in the Form 30 Job Description are,

“Provides one-stop-shopping to our customers at the initial point of contact through the highest level of professional service; represents DOR in direct public dealings; answers telephone inquiries; resolves written inquiries by deciding abatement claims and amended filings with a dollar delegation up to \$3,000, makes recommendations on claims over this delegated amount, provides technical assistance by interpreting and explaining state laws, rules, regulations, guidelines, policies and procedures; responsible for proficiency in use of MASSTAX and

⁸ I take administrative notice that since the appeal in this case was filed, the name of Salem State College was changed to Salem State University.

MAPPER; prepares necessary financial, registration and inquiry forms while conducting all allowable on-line transactions; assists and trains examiners of a lower grade; performs related tasks as required.”
(Respondent’s Motion, Attachment)

The Form 30 lists twenty (20) detailed duties and responsibilities and twenty (20) required qualifications. Minimum requirements for the TE-III job are 1) at least 1) three (3) years of full-time or equivalent part-time, professional experience in accounting, auditing or tax examining work, or 2) any equivalent combination of the required experience and the following: A) BA degree with a major in accounting, business administration or business management may be substituted for a maximum of two years of the required 1) experience; B) a Graduate degree with a major in accounting, business administration or business management may be substituted for a maximum of three years of the required 1) experience. (Respondent’s Motion, Attachment)(footnote omitted)

20. DOR considered Ms. A’s EPRF for fiscal year 2012. Her EPRF contains three duties, in each of which her supervisor rated her performance as “exceeds”; her overall performance for the fiscal year was also rated “exceeds”. There is far less detail in Ms. A’s EPRF than there is in Mr. Burns’ EPRF. Ms. A’s EPRF narrative states, in full,

“Duty 1: [Ms. A] promotes the Bureau’s one-stop shopping policy and makes every effort to be thorough and complete in finalizing taxpayers’ account inquires. She promotes online application usage and will assist taxpayers with online payments. She negotiates small payment agreements and makes proper bank and wage levy recommendations. She maintains the levy excel 9sic) application (cover sheet, levy release notices) and updates bank information as needed. She offers useful suggestions to expand WebAbt application use by utilizing DormTV, TaxTips on DOR blog and Vita sites and the suggestion to incorporate a breakdown of expenses on multiple family homes for CBC schedule. She utilized her Microsoft (sic) skills in preparing the power point (sic) materials in conjunction with our seasonal training for Ch 62C, M-2210 worksheet, Notices and Refund Review. She also participated in the WebAbt discussions for the upcoming year.
EXCEEDS

Duty 2: [Ms. A's] time management and organization skills allows (sic) her to effectively resolve her casework. She manages her PersHold and GenOnly Queues and does not appear on any exception report. She makes appropriate use of the information letter. Her systemic knowledge and technical knowledge enables her to readily identify the issues and resolve the issues efficiently.
EXCEEDS

Duty 3: [Ms. A] accurately resolves her casework assignments. She consistently and effectively utilizes all available research tools: DORNET, DTAX, external website, e-mails and meeting minutes. She adds appropriate MIRROR/MASSTAX notes and sends proper notifications to t/p's and POA's. She accurately interprets taxpayer issues and fully resolves the casework following established guidelines and procedures. She retains and properly applies information presented by supervisory or technical staff.
EXCEEDS

Overall

Review: Exceeds

During this evaluation period, [Ms. A] suggested an enhancement to the Circuit Breaker Schedule to indicate if the real property was a multi family (sic) home so that only the apportioned amount of real estate tax would enter in the computation of this credit. [Ms. A's] initiative was well received and implemented on the 2011 CB Schedule.

In addition, [Ms. A] continues to act as liaison between CSB and Child Support which requires a considerable amount of time. She also participated in reviewing Web abatement in preparation for testing. [Ms. A's] productivity and accuracy continues to be above average even with the time allocated to these projects.”
(Respondent's Motion, Attachment)

21. Ms. A was one (1) of three (3) internal candidates interviewed for the TA-I position. She was interviewed on August 10, 2012 by Director Richard Elliott and Supervisor Louis Pavao, who asked her the same ten (10) questions asked of Mr. Burns by the same interviewers.⁹ Asked to describe herself and why she wanted the TA-I job, the interviewers wrote, in part, that she works in the audit division and is looking for a “more challenging position”. Asked to describe her current job, the interviewers wrote that she performed many tasks for customer service and performs “peer training develops spreadsheets and reviews tax returns.” Asked what Ms. A thought of the DOR website,

⁹ The interviewers recorded their comments about each candidate's responses to the ten (10) questions jointly on one form.

they wrote that she said the new site is an “improvement” compared to the previous site. Asked about her education and experience, they wrote that she believes that her accounting degree and experience will make her a successful auditor. When asked what makes her the best candidate, they wrote that Ms. A said it was her skills with Excel, her “inquisitive nature and her exposure to tax laws and DOR procedures” make her the best candidate. Asked how she would resolve a conflict with a co-worker, they wrote that Ms. A said she “noticed that a co-worker made a mistake when they were conducting training but she avoided conflict by bringing the mistake up after the class.” When asked what she knows about state law on meals and room occupancy taxes, they wrote (in total) that Ms. A “was aware that the exemption for food did not apply to meals and she was also aware that sales to the government are exempt.” Asked about her ability to work independently, the interviewers wrote that Ms. A performs most of her job independently but has worked well with groups too. When asked if she would like to add anything, the interviewers wrote (in total) that Ms. A said she is “very willing to learn and that she has previously done some transaction tax to income statement comparison as part of her DOR duties.” (Respondent’s Motion, Attachment)

22. On October 9, 2012, Bernard Scram, listed as the “Hiring Manager” on a form,

recommended Ms. A for the TA-I job, writing,

“The candidate, [Ms. A] is currently employed by the DOR as Tax Examiner 3 in the Customer Service Bureau of the Taxpayer Services Division. [Ms. A] is presently performing multiple tasks including answering taxpayer inquiries that are received through correspondence or telephone calls. [Ms. A] also processes abatements and MASSTAX account adjustments. [Ms. A] was instrumental in creating a change to the income tax Circuit Breaker Schedule and her idea was implemented on the 2011 CB schedule. [Ms. A] also worked with her supervisors in developing standard work papers for all examiners in her work unit.

[Ms. A] has an excellent command of Word and Excel, the software applications that are used by auditors. She is also familiar with adding and retrieving information from the DOR's MASSTAX system.

[Ms. A's] answers to the interview questions indicated that she is a motivated person that seeks out challenges and crafts solutions to any problems that she encounters. The interview also made it apparent she has dealt with difficult taxpayers on many occasions. Also, I noted that [Ms. A] received an extremely favorable evaluation from her immediate supervisor and the reviewer for the EPRS.

Based on her background in the Taxpayer Service Division and her Customer Service Bureau job duties I am recommending Ms. A for the Tax Auditor I position.

I believe that [Ms. A's] experiences with taxpayers, DOR computer systems and the software that we use in NEAB make her *the best candidate for this job.*" (Respondent's Motion, Attachment)(emphasis added)

23. Mr. Burns filed the instant appeal on January 26, 2013. (Administrative Notice)

Applicable Legal Standard

An appeal before the Commission may be adjudicated summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(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 undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". *See, e.g., Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6, (2008); *Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005).

Applicable Civil Service Law

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over two (2) decades. 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.¹⁰ 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.

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) and 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

¹⁰ By memorandum dated July 25, 1997, the Personnel Administrator (now Chief Human Resources Officer) revoked non-public safety civil service eligible lists over five years old. (Respondent's Pre-Hearing Memorandum)

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, he may be further provisionally promoted for “sound and sufficient reasons” to another higher title for which he 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.

- When choosing to fill a position as a provisional appointment, there is no obligation under the civil service law pertaining to provisional appointments to prove that the person so appointed was the most qualified or better qualified candidate. *See Jovetta Richards & Ten Others v. Department of Transitional Assistance*, 23 MCSR 828 (2010); and *Joseph Asiaf v. Department of Conservation and Recreation*, 21 MCSR 23 (2008).

Analysis

Viewing the evidence in the light most favorable to the non-moving party with regard to the motions, the undisputed material facts establish that the Appellant has no reasonable expectation of prevailing on at least one essential element of the case and that the Appellant is not entitled to summary decision as a matter of law. Therefore, the appeal must be dismissed. Specifically, DOR has not violated any civil service law or rule regarding provisional appointments. DOR posted the TA-I vacancy as a provisional appointment and, as such, was not required to appoint candidates with civil service permanency. DOR was permitted to consider both external candidates as well as internal candidates with no civil service permanency, as they did here. Ultimately, DOR provisionally appointed one (1) individual to the position of TA-I who was a provisional TE-III. For the reasons cited above, this is not a violation of the pertinent sections of the civil service law related to provisional appointments and, further, it does not constitute a “bypass” of the Appellant, which could typically be appealed under G.L. c. 31, § 2(b).

The Appellant contrasts his Master's degree and other educational experiences with the selected candidate's Bachelor's degree and points out that he holds the title of TE-IV while Ms. A holds the title TE-III. The Appellant further points to his accomplishments over the years as well as to the previous litigation at the Commission and in court involving him and the Respondent, necessitated, he avers, by the Respondent's refusal to conduct examinations for advancement and a bias against him based on his previous litigation concerning DOR appointments. The Appellant asserts that the ten (10)-question interview is a poor substitute for an examination, that the questions were inadequate and interviewers' notes of his responses to the questions are too brief. Moreover, the Appellant asserts that he is more qualified than Ms. A and has been employed at DOR longer than she has. DOR disputes any allegation that it did anything improper in view of the lack of funding for examinations, that civil service statutes provide for provisional appointments, and that multiple Commission decisions recognize DOR's authority to make such appointments. In the end, DOR found Ms. A qualified for the TA-I position. It need not have found that Ms. A was more qualified than the Appellant in order to appoint her. Although Mr. Burns has a Master's degree and Ms. A does not, Mr. Burns' graduate degree is an MBA, his undergraduate degree was in Political Science. Ms. A's Bachelors' degree is in Accounting. DOR found Ms. A's computer skills to be strong and that she had made significant contributions applicable to other Tax Examiners and it implemented her suggestions. In addition, Ms. A's EPRF ratings were all "exceeds", whereas the Appellant was rated "exceeds" in only two (2) of the six (6) duties for which he was rated. DOR recognizes the Appellant's many years of experience but points out that the selected candidate is also a veteran DOR employee. As stated above, DOR is not required to show that the selected candidate was more qualified and/or that there was reasonable justification to not select him.

Even if that was required, however, the record provides ample evidence to support DOR's conclusion that the selected candidate was more qualified. Moreover, DOR's decision-making process here appears to be consistent with basic merit principles and the Appellant has no standing to challenge DOR's decision.

Conclusion

For all the reasons stated above, the Appellant's appeal under Docket No. G2-13-16 is hereby *dismissed*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on April 14, 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)(l), 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:

Daniel L. Burns (Appellant)
Julayne M. Lazar, Esq. (for Respondent)
John Marra, Esq. (HRD)