COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

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

KEVIN CLIFFORD,
Appellant

v.

G2-10-249

DEPARTMENT OF
TRANSITIONAL ASSISTANCE,
Respondent

Appellant's Attorney:

Pro Se
Kevin Clifford

Respondent's Attorney:

Daniel LePage
Assistant General Counsel
Department of Transitional Assistance
600 Washington St., 4th Floor
Boston, MA 02111

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

On September 17, 2010, the Appellant, Kevin Clifford (Appellant), filed an appeal with the Civil Service Commission (Commission) contesting his non-selection for the provisional appointment of Benefit Eligibility and Referral Social Worker C (BERS C) by the Department of Transitional Assistant (DTA or Respondent).

A pre-hearing conference was held on October 21, 2010. DTA subsequently filed a Motion to Dismiss the Appellant's appeal on November 22, 2010. The Appellant did not file a reply.[1]

It is undisputed that the Appellant has been employed by DTA since 1974 and is currently a permanent BERS A/B, the next lower title to BERS C.

On March 10, 2010, DTA posted sixteen (16) BERS C supervisor positions that were available at the Department's Dudley Square and Newmarket Square offices. The postings stated that the positions would be filled as provisional appointments. According to DTA, additional federal funds allowed them to ultimately hire nineteen (19) new BERS Cs. It is undisputed that there is no "eligible list" from which a certification of names could be made for a permanent or temporary appointment or promotion (as opposed to a provisional appointment or promotion).

Ninety-three (93) individuals applied for the nineteen (19) vacancies of which fifty-four (54) were interviewed, including one (1) external candidate. DTA assembled a hiring team consisting of five (5) veteran managers with a combined total of over eighty-six (86) years of experience with the Department. Due to the high volume of interviews, two-member subgroups of the hiring team interviewed the candidates. During the interview, the hiring team asked all the candidates the same questions and graded the candidates on a standard interview assessment form.

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[1] Eleven (11) other DTA employees, all permanent BERS A/Bs, also filed appeals with the Commission regarding these nineteen (19) appointments. See Jovetta Richards and Ten Others v. DTA, CSC Case Nos. G2-10-194, 195, 196, 198, 199, 205, 206, 216, 217, 221, 227 & CSC Case No. I-10-353. As a result of those appeals, the Commission conducted an inquiry to determine whether an investigation under G.L. c. 31, § 2(a) was warranted. That inquiry included sworn testimony from the Regional Director that oversaw this particular hiring process and one (1) of the Assistant Directors that served on an interview panel. Since many of the issues involved in this appeal are identical and involve many of the same facts, I take administrative notice of the decisions in those matters and, where appropriate, incorporate the findings and conclusions into this decision.

DTA selected the eighteen candidates with the best interview scores for the provisional BERS C positions. A number of candidates had a tied score for 19th. To determine which of these candidates should be awarded the final BERS C supervisor position, the interview team met to discuss the tied candidates. After deliberating, they selected 1 of the tied candidates for the 19th position. Five (5) of the nineteen (19) selected candidates were *permanent* BERS A/Bs and the remaining fourteen (14) candidates selected were *provisional* BERS A/Bs.

DTA's Argument

DTA argues that when there is no eligible list from which a certification of names may be made for such appointment, it may fill vacancies provisionally and may do so through provisional appointments or provisional promotions, citing G.L. c. 31, § 12 and two prior Commission decisions, Asiaf v. Department of Conservation and Recreation, 21 MCSR 23 (2008) and Medeiros and Pollock v. Department of Mental Retardation, 22 MCSR 276 (2009).

Here, since DTA decided to fill the Boston BERS C supervisor position as provisional appointments, there is no obligation under the civil service law pertaining to provisional appointments to prove that the persons so appointed were the most qualified or better qualified candidates. Nevertheless, DTA argues that it followed strict guidelines in selecting the candidates for these positions. The hiring team asked all of the candidates the same questions and completed an interview assessment form for all the candidates that were interviewed. According to DTA, they then selected the candidates that it believed performed best during the interview process for the available BERS C supervisor positions.

Therefore, DTA argues that the Appellants have failed to state a claim upon which relief can be granted and that their appeals should be dismissed.

Appellant's Argument

As part of the pre-hearing conference, the Appellant argued that it is against civil service law and rules to fill the BERS C supervisor positions with individuals that are not permanent civil service employees (i.e. – permanent BERS A/Bs).

Second, the Appellant, similar to the Appellants in Richards, argued that these nineteen (19) appointments are a violation of a 1994 Commission order regarding the use of provisional appointments in Felder et al v. Department of Public Welfare, 7 MCSR 28 (1994).

Finally, and more generally, the Appellant argued that by selecting many less senior employees (who are provisional employees), DTA has shown a bias against older, more senior employees.

Conclusion

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for over fifteen (15) years. 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. 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.

A series of Commission rulings and decisions in 1993 and 1994 (Felder et al v. Department of Public Welfare and Department of Personnel Administration, CSC Case Nos. G-2370 & E-632), provide a glimpse of the long and protracted history within the executive, judicial and legislative branch regarding the use of provisional appointments and promotions by Appointing Authorities.

Ironically, the 1993 and 1994 Felder rulings and decisions referenced above occurred as a result of civil service examinations actually being administered by the personnel administrator as mandated by the legislature in Section 26 of the Acts of 767 of the Acts of 1981. The delay in meeting that mandate caused considerable confusion and consternation regarding the status of provisional employees that were hired during the several year span that occurred between enactment of Section 26 and the establishment of the eligible lists. The Legislature ultimately armed the Civil Service Commission with fairly broad authority to protect the rights of these individuals and others, "not withstanding the failure of any [such] person to comply with any requirement of said chapter thirty-one or any such rule …" by amending Chapter 534 of the Acts of 1976 with enactment of Chapter 310 of the Acts of 1993 (over the veto of the Governor at the time).

The Felder rulings culminated with the Commission exercising its new "Chapter 310" authority and granting permanency to certain Department of Public Welfare provisional employees, hired after 1981, who took and passed civil service examinations, but were "bumped" or laid off because Section 26 of the Acts of 767 of the Acts of 1981 only provided protections (through preference on any certifications issued) to provisional employees hired before enactment of Section 26. Since there was a delay in administering these legislatively-mandated examinations, the Felder Appellants were deemed to have been

prejudiced through no fault of their own and granted relief (permanency in the title of FASW IV).

In the final paragraph of the 1994 Felder decision, the Commissioners at the time stated:

> "On page 5 of Appendix B, it is provided that 'no provisional hiring or promotions in (certain) titles will occur from 07/01/94 forward.' This is a laudable goal which we hope the DPA and the DPW can meet. Nevertheless, in order to deal with emergency circumstances which are now unforeseen and which the DPA assures us will not occur, we direct that the Proposal be modified to provide that no such hiring or promotions be made without prior approval of the Civil Service Commission, after a hearing, pursuant to our jurisdiction in this matter."

In retrospect, it appears that even the Commissioners were far too optimistic about how positions would be filled on a going-forward basis. There have been no examinations for the BERS titles (which replaced the FASW titles) (or most other non public safety official service titles) in over a decade meaning that no eligible lists have been established. Thus, DTA and all other state agencies, have relied on the use of provisional appointments and promotions to fill the vast majority of non-public safety positions during this time period.

Here, the Appellant argues that DTA has violated the 1994 Felder decision by filling positions provisionally without first getting permission from the Civil Service Commission. That argument overlooks the fact that the Commission has issued a series of more recent decisions in which the Commission, although it 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, states that it must honor the clear legislative intent that allows for provisional appointments and 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.

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) & 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 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, she may be further provisionally promoted for "sound and sufficient reasons" to another higher title for which she 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.

Applied to the instant appeal, it can not be shown that DTA violated any civil service law or rule. DTA posted these positions as provisional appointments, considered external and internal candidates, and selected 19 individuals for the position of BERS C, some of whom had permanency in the next lower title of BERS A/B and some of whom were provisional A/Bs. There has been no allegation or showing, nor is it likely that it could

be shown at a full hearing, that DTA used the provisional appointment process as a subterfuge. Rather, DTA candidly acknowledges that, in order to not exclude those provisional employees in the next lower title, some of whom have been with DTA for more than a decade, it followed the guidance and directives contained in the above-referenced Commission decisions and posted these vacancies as provisional appointments (as opposed to provisional promotions).

For all of the above reasons, the Appellant can not show that DTA violated civil service law or rules or that DTA "bypassed" him for appointment as there was no eligible list in place at the time. This is the same conclusion that the Commission reached in the Richards appeals. As part of that decision, however, the Commission opted to conduct a further inquiry to determine whether an investigation of this hiring process was warranted.

The findings and conclusions of that inquiry are included in a decision under I-10-353 being issued concurrently with this decision. In summary, the Commission, after conducting an inquiry, found that the hiring process was consistent with basic merit principles and that a formal investigation under G.L. c. 31, § 2(a) was not warranted.

For all of the above reasons, the Appellant's appeal under Docket No. G2-10-249 is hereby ***dismissed***.

Civil Service Commission

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Christopher C. Bowman
Chairman

By a 3-1 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Stein, Commissioner – Yes; and Marquis, Commissioner - Yes [McDowell, not participating]) on June 16, 2011.

A True copy. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(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:
Kevin Clifford (Appellant)
Daniel LePage, Esq. (for DTA)