

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JACQUELINE PHILLIPS,
Appellant

G2-16-068

v.

CITY OF CAMBRIDGE,
Respondent

Appearance for Appellant:

Elizabeth S. Dillon, Esq.
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Boston, MA 02210

Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

**DECISION ON MOTION TO DISMISS AND
RESPONSE TO REQUEST FOR INVESTIGATION**

On April 4, 2016, the Appellant, Jacqueline Phillips (Ms. Phillips), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), contesting her non-selection by the City of Cambridge (City) for the position of Assistant Director of Human Resources / Development.

On April 15, 2016, the City filed a Motion to Dismiss the appeal.

On April 19, 2016, I held a pre-hearing conference at the offices of the Commission, which was attended by Ms. Phillips, her counsel, counsel for the City and two (2) City representatives. At the pre-hearing conference, counsel for Ms. Phillips submitted an Opposition to the City's Motion to Dismiss.

On April 29, 2016, per my instructions at the pre-hearing conference, counsel for Ms. Phillips submitted an amended opposition, which included a request for the Commission to initiate an investigation under G.L. c. 31, § 2(a).

On May 12, 2016, the City submitted a reply to the amended opposition and request for investigation.

The following appears to be undisputed, unless otherwise noted:

1. Ms. Phillips was first employed by the City in the position she now holds, Manager of Training and Staff Development, in 2007. She is Caucasian.
2. Ms Phillips never took a civil service examination for the position of Manager of Training and Staff Development or any other civil service position in the City.
3. In September 2014, the City posted a position for Assistant Director of Human Resources / Development. The posting indicated that both internal and external candidates were being considered.
4. Ms. Phillips and others applied for the position. No candidates were selected from the September 2014 posting.
5. On April 30, 2015, the Assistant Director of Human Resources / Development position was re-posted.
6. The April 30th re-posting contained the same language as the September 2014 posting regarding the need for internal candidates to submit a job bidding form, a resume and letter of interest.
7. In later December 2015, an external candidate who is African American was selected by the City for the position of Assistant Director of Human Resources / Development. She began employment in February 2016.

Arguments of the Parties

Ms. Phillips argues that she was unlawfully “bypassed for a promotion” due to reasons related to her race, age and gender. She argues that the Commission has jurisdiction to adjudicate this “bypass appeal” under G.L. c. 31, § 2(b). In the alternative, Ms. Phillips argues that the Commission should initiate an investigation regarding her allegations under G.L. c. 31, § 2(a).

First, the City argues that Ms. Phillips never applied for the “re-posted” position and, therefore, cannot be considered an aggrieved person with standing before the Commission. Second, the City argues that no “bypass” occurred because, similar to hundreds of other non-public safety positions in civil service communities, there has never been an examination for the Assistant Director of Human Resources / Development position. Thus, according to the City, the position was filled via a “provisional appointment”. Third, the City argues that Ms. Phillips has no standing as she is not a permanent civil service employee. Finally, the City argues that the Commission should dismiss this appeal and refuse the request for investigation as Ms. Phillips’s allegations fall more squarely under the jurisdiction of the Massachusetts Commission Against Discrimination (MCAD).

Analysis

General Use of Provisionals and Lack of Examinations

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for 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. 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.

It has been long established that “[p]rovisional appointments or promotions ... 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, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, after decades without HRD holding competitive examinations for many civil service titles, and the professed lack of appropriations to permit examinations in the near future, hiring and advancement of most civil service employees now can be lawfully accomplished only provisionally. Thus, as predicted, the exception has now swallowed the rule and an appointment “which is provisional in form may be permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).

The Commission and the courts have wrestled with the issues surrounding the so called “plight of the provisional” and regularly exhort the civil service community of the corrosive effects of the excessive use of “provisional” appointments and promotions. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff d, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. Little has been done, however, or will be done, to wean the system from this practice without further appropriations from the legislature. As a result, there appears no end to the reality that the vast number - probably most - current non-public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy. Meanwhile, public employees’ provisional status leaves them with diminished job security and advancement opportunities under civil service law, relegating them to enforcement of their rights under collective bargaining agreements, if any, and other laws, which are beyond the Commission’s purview.

That said, it remains the duty of the Commission to apply the civil service law as written. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006), quoting Commissioner of Revenue v. Cargill, Inc., 419 Mass. 79, 86 (1999). As much as the Commission regrets this state of affairs, the use of provisional appointments is not, per se, unlawful, and a state agency cannot be estopped for hewing to the law. 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.

In regard to whether appointing authorities can fill positions through a provisional *appointment*, as opposed to a provisional *promotion*, the Commission has addressed this issue through a series of decisions including: 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 (2010); Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010).

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 appointing authority, 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 appointing authority 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, the City has not violated any civil service law or rule regarding provisional appointments. The City posted this Assistant Director of Human Resources / Development vacancy and explicitly stated that it was open to both internal and external candidates. Since there has been no examination for this position and, thus, no eligible list from which to create a Certification, the City could only fill the position through the provisional

process. Ms. Phillips argues that there is a factual dispute as to whether this position was filled provisionally and, if so, whether it was a provisional appointment or promotion. Relatedly, Ms. Phillips argues that there is a factual dispute as to whether Ms. Phillips herself is a provisional or permanent employee. Thus, Ms. Phillips argues that the Commission must first conduct a hearing to resolve these “factual disputes” before disposing of this appeal. That argument fails for the following reasons.

First, Ms. Phillips had no “reasonable expectation” of proving that this position was not filled provisionally. See Kourouvacilis v. Gen. Motors Corp., 410 Mass. 706, 716 (1991). Here, Ms. Phillips has not refuted the City’s contention that, like hundreds of other civil service positions across Massachusetts, there was no civil service examination for this position; no creation of an eligible list; and, therefore, no creation of a Certification; all of which are requirements related to the traditional permanent appointment or promotion process. This is not unique to the City or this position. Rather, it is simply a fact that civil service examinations are no longer administered for non-public safety positions in Massachusetts, thus requiring the use of provisional appointments and promotions.

Second, although the posting did not explicitly state that the vacancy was being filled via the provisional appointment (as opposed to promotion) process, it did explicitly state that external candidates were also being considered, which could not occur if the position was being filled via a provisional promotion.

Third, for the reasons discussed above, if this could be construed as a provisional promotion, Ms. Phillips, as a provisional employee, would not have been eligible for a provisional promotion, as she is not a permanent civil service employee.¹

The parties also spent considerable time on whether Ms. Phillips actually applied for the re-posted position. Ms. Phillips argues that she verbally informed the Human Resources Director of her continued interest in the position and, thus, should not have been required to re-submit a job bidding form, resume and letter of interest in order to be considered for the re-posted position. The City argues that Ms. Phillips failed to follow the explicit instructions on the re-posting and, therefore, cannot be considered an aggrieved person regarding a position she never applied for. I do not need to resolve that issue to determine whether this is a bypass appeal which can be adjudicated by the Commission. Section 2 of the Personnel Administration Rules (PAR.02) defines a “bypass” as: “the selection of a person or persons whose name or names, by reason of score, merit preference status, court decree, decision on appeal from a court or administrative agency, or legislative mandate appear lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification.” (**emphasis added**)

A bypass only occurs when an appointing authority makes permanent (or temporary) civil service appointments or promotions from a Certification of names drawn from an eligible list of

¹ Ms. Phillips also makes the head-scratching argument that there is a factual dispute regarding whether she is a provisional or permanent employee. Again, given that she acknowledges that she never took a civil service examination for this position, she has no reasonable expectation of showing that she is anything other than a provisional employee in her current position.

candidates who took and passed a civil service examination. As stated above, that did not occur here.

Here, the City provisionally appointed one (1) individual to the position of Assistant Director of Human Resources / Development. This is not a violation of those sections of the civil service law related to provisional appointments and, further, does not constitute a “bypass” of Ms. Phillips, which could typically be appealed under G.L. c. 31, § 2(b).

Notwithstanding the above, the Commission maintains authority under G.L. c. 31, § 2(a) to conduct investigations, including when allegations are made that an appointment process was not consistent with basic merit principles. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm’n & others, No. 2013-00639-D, Suffolk Superior Court (2014).

In this regard, I carefully reviewed all of the allegations raised by Ms. Phillips, including those included as part of the “pre-hearing memorandum” submitted at the pre-hearing conference. Among the allegations raised by Ms. Phillips are:

- I. Prior to the commencement of the appointment process, Ms. Phillips was informed of the City’s intention to hire a “diversity candidate”;
- II. The City’s Mayor and a City Council member had a role in pre-determining that the selected candidate would be a minority;
- III. The City “disproportionately interviewed substantially younger individuals, and disproportionately interviewed African-American individuals ...”;
- IV. The City filled the position with a “substantially younger, African American woman” who “has substantially less relevant experience than does Ms. Phillips”;
- V. The City created this new position “(i) in an effort to make redundant Ms. Phillips’s Position; (ii) in an effort to convince Ms. Phillips to quit; and (iii) to enable the City to otherwise terminate Ms. Phillips’ employment”;
- VI. The City “(i) has failed and refused to promote other older, female employees; (ii) has pressured older, female employees to leave; and (iii) has substantially limited the job duties and responsibilities of other older, female employees”;
- VII. The City “has replaced such older, female employee with male and/or with substantially younger female employees”.

Even counsel for Ms. Phillips acknowledges that many of these allegations fall squarely under the category of an employment discrimination complaint under G.L. c. 151B. While that does not prohibit the Civil Service Commission from investigating whether an appointment process

was consistent with basic merit principles, the Commission, recently facing a similar request, opted not to investigate matters better suited for MCAD. (See Holden v. Department of Correction, 19 MCSR 245 (2016) (“The MCAD is clearly the agency primarily entrusted to investigate and enforce acts committed in violation of the anti-discrimination law ...”))

That guidance appears especially true here where the Commission would lack any ability to order any monetary relief if some of the allegations (i.e. – “The City created the [new] position in an effort to make Ms. Phillips quit”), were proven to be true. The legislature explicitly provided MCAD with both the jurisdiction to hear such complaints *and* various tools of remediation if the allegations are proven to be true.

Put simply, I believe what has been set forth here is a fairly classic employment discrimination complaint and the Civil Service Commission should not act in place of the agency (MCAD), charged with addressing such complaints.

Conclusion

For all of the above reasons, Ms. Phillips’s appeal under G2-16-068 is hereby ***dismissed*** and the request for investigation is denied.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso – Absent]) on July 7, 2016

Appeal rights regarding dismissal of appeal:

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:

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John Marra, Esq. (HRD)