

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

One Ashburton Place - Room 503
Boston, MA 02108
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ROBERT F. STONE,
Appellant



v.

CASE NO: G1-07-403

**DEPARTMENT OF MENTAL
RETARDATION,**
Respondent

G1-07-404

Appellant, Pro Se:

Robert F. Stone, Esq.



DMR Attorney:

Julian T. Tynes, Esq.
Department of Mental Retardation
171 State Street
Palmer, MA 01069

HRD Attorney:

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Commissioner:

Paul M. Stein

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

The Appellant, Robert F. Stone, brought these appeals, pursuant to G.L.c.31, §2(b), alleging that he was unlawfully bypassed for appointment to one of two open positions of Compliance Officer III posted by the Respondent, Department of Mental Retardation (DMR). At issue is the Appellant's claim to a veteran's preference to these appointments. The Appellant and DMR each filed Motions for Summary Decision. A hearing was held on the motions by the Civil Service Commission (Commission) on September 15, 2008, recorded on one (1) audio cassette. The Commission received post-hearing submissions from the DMR on October 8, 2008 and from the Appellant on October 15, 2008.

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:

The Appellant's Background and Experience

1. The Appellant, Robert F. Stone resides in Conway, Massachusetts. He is a licensed Massachusetts attorney who holds a B.A. and M.Ed. degrees from the University of Massachusetts, a J.D. degree from the University of Connecticut School of Law, and a B.A. degree in Theology from Columbia Union College. He has completed a non-degree criminal justice program at American University and graduated (in the top 10% of his class) from the Metropolitan Police Academy, Washington D.C. (*Resume of Robert F. Stone as filed with Documents produced in Response No. 20 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories*)

2. Mr. Stone is a military veteran who has served with the United States Navy and United States Army from 1964 to 1992. His veteran's status was confirmed by the Massachusetts Human Resources Division (HRD) in a letter dated November 22, 2006 which stated that HRD "determined that you qualify as a veteran for purposes of receiving veteran's preference pursuant to Section 26 of Chapter 31 of the Massachusetts General Laws [which law] grants preference to qualified veterans who apply for original provisional civil service appointments in accordance with Section 12 of Chapter 31." (*Appellant's Motion for Summary Decision, Exhibit C*)

3. Mr. Stone's experience includes more than 20 years of investigatory and law enforcement work, including military service in criminal investigation and training as a

military police instructor, and civilian experience as an OSHA investigator and compliance officer, an insurance claims adjuster and a patrol police officer and plain clothes detective. He (*Resume of Robert F. Stone as filed with Documents produced in Response No. 20 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories*)

The Central Office/West (Palmer) Compliance Officer Positions

4. In April 2007, DMR posted notice on the Commonwealth of Massachusetts Employment Opportunity website (Posting ID 13329) for two positions in the Central/West Regional Office of DMR, located in Palmer, for a provisional civil service position with the "Official Title" of Compliance Officer III, having a "Functional Title" of Regional Contract Officer in the Investigation & Inspection Occupational Group. (*Appellant's Motion for Summary Decision, Exhibit A*)

5. The hiring for these positions was approved by Roger Tremblay, who is the Human Resources Director for the Executive Office of Health and Human Services (HHS) cluster in which DMR is a member, in his capacity as the designee of the Secretary of HHS for purposes of exercising the authority delegated to the Secretary under Mass. G.L.c.31 for provisional appointments and promotions. (*Appellant's Response to Respondent's October 8, 2008 Submissions and Response to the Commission's September 17, 2008 Order, Exhibit C*)

6. The posting stated the "Minimum Entrance Requirements" for the positions as follows:

Applicants must have at least . . .four years of full-time, or equivalent part-time experience in investigatory or law enforcement work A Bachelor's or higher degree may be substituted for a maximum of two years of the required experience.

(*Appellant's Motion for Summary Decision, Exhibit A*)

7. The position's Duties were described in the posting as:

Directly supports Regional Area Offices by providing technical support for the fiscal management of the Purchase of Services (POS) MM (budget) allocations. Provides financial recommendations requiring detailed knowledge of the services provided in DMR. Requires travel to meetings and regular communications with Areas and Regional staff to review the current status of contract allocations, POS plan, and provider spending analysis. Reviews and process contract amendments and Master Service Agreements (MSA's). Coordinates re-contracting activities with assigned Area Offices. Reviews provider Uniformed Financial Reports (UFR) and advises relevant managers. Maintains electronic financial tracking, and provides detailed analytical reports of expenditures for the area(s) of responsibility. Coordinates work activities and projects within the unit. Ensures compliance of statutes, regulations, rules and polices. Uses various computer applications and software programs to carry out work such as Excel, IMPACT, Meditech, customized Access programs, e-mail, MMARS and electronic Rate calculators. Works with agency vendors to ensure all contractual agreements are followed. Works with the Central Office, agency staff and consultants as required. Performs related duties as required.

(Appellant's Motion for Summary Decision, Exhibit A)

8. In fact, the Regional Contract Officer in the Central/West Regional Officer serves as the day-to-day bookkeeper and accountant for all financial aspects of that region's POS. Solid experience in financial and computer use are essential job requirements as the majority of the work is done in Microsoft Excess and Access database programs. The position is an administrative technical position and, in fact, is neither investigatory nor law enforcement related. *(Response No. 18 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories)*

9. DMR received applications for the positions from both internal and external candidates, including Mr. Stone. *(Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories; Respondent Department of Mental Retardation [Amended] Motion for Summary Decision)*

10. One of the positions was filled by reassignment of a DMR Compliance Officer III employee from the Holyoke/Chicopee Area Office. That employee had previously held the position in Palmer and she requested, and was approved, to transfer back into the

position. (*Response No. 17 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories; Respondent Department of Mental Retardation [Amended] Motion for Summary Decision*)

11. Six candidates, including Mr. Stone, were chosen to be interviewed by an interviewing committee for the second open position. The interviews were conducted before a four-person committee, using a standard set of 14 questions. The interviewers rating each candidates answers separately on a scale of 1 (lowest) to 5 (highest). In addition, each candidate was given a written skills test, which required the candidate to prepare a written response to a vendor payment inquiry using Microsoft Word, to prepare a spread sheet using Microsoft Excel, and to use a calculator to perform a variety of mathematical calculations requiring addition, subtraction, multiplication and division. The interviews' form provided space for narrative comments and most of the interviewers took extensive notes on each candidate's responses. (*Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories and Documents Attached; Respondent Department of Mental Retardation [Amended] Motion for Summary Decision*)

12. On the interview component, the candidates fell into two clear tiers. In the first tier, the first three candidates scored 233 (the score of the eventually successful applicant), 220 and 222 points out of a possible 240. In the second tier, the remaining three candidates, scored 164 (Mr. Stone), 152 and 148. (*Documents attached to Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories*)

13. On the practical skills tests, the candidates scored 46 (the successful applicant), 45, 40, 43, 42, and 25 (Mr. Stone). Mr. Stone's score was the lowest because he received zero points on the Excel spreadsheet exercise, being totally unable to prepare an Excel spreadsheet. (*Documents attached to Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories; Respondent Department of Mental Retardation [Amended] Motion for Summary Decision*)

14. DMR selected the candidate who had scored the highest in the interviews and the highest in the practical testing. (*Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories and Documents Attached; Respondent Department of Mental Retardation [Amended] Motion for Summary Decision*)

15. The successful candidate who filled the second Palmer position is not a veteran. (*Appellant's Motion for Summary Decision, Exhibit H*)

16. DMR notified HRD of the provisional appointment electronically through HRCMS. (*Appellant's Response to Respondent's October 8, 2008 Submissions and Response to the Commission's September 17, 2008 Order, Exhibit C*)

The Holyoke/Chicopee Area Office Compliance Officer Positions

17. As a result of the employee transfer from Holyoke/Chicopee to fill one of the two Regional Contract Officer positions in Palmer, a position for Compliance Officer III opened up in the Holyoke/Chicopee Area Office. (*Respondent Department of Mental Retardation [Amended] Motion for Summary Decision*)

18. In May 2007, DMR posted notice on the Commonwealth of Massachusetts Employment Opportunity website (Posting ID 14434) for the provisional civil service position in the Holyoke/Chicopee Area Office with the "Official Title" of Compliance

Officer III, having a “Functional Title” of Compliance Officer III –DMR – Central West Region, in the Investigation & Inspection Occupational Group. I also note that the interview forms used for this position describe the job as “Holyoke/Chicopee Program Director Search Process” and position of “Program Monitor”. (*Appellant’s Motion for Summary Decision, Exhibit B; Documents attached to Response No. 25 of DMR’s Supplemental Responses to Appellant’s First Set of Interrogatories*)

19. The hiring for this position was approved by Roger Tremblay, who is the Human Resources Director for the Executive Office of Health and Human Services (HHS) cluster in which DMR is a member, in his capacity as the designee of the Secretary of HHS for purposes of exercising the authority delegated to the Secretary under Mass. G.L.c.31 to approve provisional appointments and promotions. (*Appellant’s Response to Respondent’s October 8, 2008 Submissions and Response to the Commission’s September 17, 2008 Order, Exhibit C*)

20. The posting stated the position’s “Minimum Entrance Requirements” as follows:

Applicants must have at least . . . four years of full-time, or equivalent part-time experience in investigatory or law enforcement work A Bachelor’s or higher degree may be substituted for a maximum of two years of the required experience.

(*Appellant’s Motion for Summary Decision, Exhibit B*)

21. The position’s Duties were described in the posting as:

Develop and implement procedures and guidelines to accomplish agency goals and objectives and ensure that contracted programs meet the goals of the DMR Mission Statement. Responsible for oversight of programs/services, representing 16.7 million of POS budget on an annualized basis.

1. Oversee and provide direction to vendor agencies in the design, implementation, and evaluation of contracted residential, individual, day/employment, and/or family support respite programs with support diverse communities, including a large Latino population. Work within a team process, in collaboration with service coordinators and service coordinator supervisors to ensure programs and services are responsive to changing client needs.

2. Monitor and evaluate all contract and state operated services for compliance with applicable programmatic and regulatory standards. OQE and investigation findings and contract objectives. Maintains on-going records of agency performance and completes the Annual Standard Contract Review.
3. Participates in the development and implementation of area long-range and strategic plans. Performs complex data analyses and write reports and analyses, as requested.
4. Participates in all aspects of the procurement process including RFR design and development, annual re-contracting process, and on-going contract management to assure that provider agencies operate within resource allocation and contractual parameters.
5. Assures all data related to contracts is accurate and up-to-date. Provides timely, accurate financial data to Regional contracts office through various data base and reporting mechanisms.
6. Maintain liaison with various private, local, state and federal agencies and others to exchange information and/or to resolve problems.
7. Participates in CRT process as CRT Coordinator.

(Appellant's Motion for Summary Decision, Exhibit C)

22. Seven candidates, including Mr. Stone, were chosen to be interviewed by an interviewing committee for the position. These interviews were conducted before a five-person committee, using a standard set of 10 questions. The interviewers rating each candidates answers separately on a scale of 1 (lowest) to 5 (highest). The interview response form provided for narrative comments and the interviewers took extensive notes on each candidate's responses. The candidates were not asked to perform any practical skills tests. *(Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories and Documents Attached; Respondent Department of Mental Retardation [Amended] Motion for Summary Decision)*

23. Mr. Stone received 134 out of a possible 250 interview points, or an average score of 2.7 out of 5.0. The eventually successful candidate received a score of 197 interview points, or an average score of 3.9. No interview scores for the other five candidates were produced. *(Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories and Documents Attached)*

24. The following illustrative remarks from the successful candidate's interviewer

sheets seem noteworthy:

- “will need budgetary experience”
- “know need to learn Ex-Cell”
- “Ø budget experience”
- “knows the system”

(Documents attached to Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories)

25. The following remarks from Mr. Stone's interviewer sheets seem noteworthy:

- “overqualified?”
- “talented answer not based on “our system”
- “not familiar w/these [DMR Meditech & HCSIS] systems”
- “answered all question [No.3] components exceptionally well”
- “unfamiliar with the tool/technology of DMR”

(Documents attached to Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories)

26. Following the initial interviews, three candidates were selected for a second interview with the Area Director Robin Harmetz. Mr. Stone was not selected for a second interview. Following the second round of interviews, Director Harmetz selected an existing DMR employee in the Central/West Area Officer with a prior work history in social work and who had held the civil service title of Human Services Coordinator A/B since 1997. *(Response No. 25 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories and documents attached)*

27. The successful candidate who filled the Holyoke/Chicopee Area position is not a veteran. *(Response No. 17 of DMR's Supplemental Responses to Appellant's First Set of Interrogatories and documents attached; Appellant's Motion for Summary Decision, Exhibit H)*

28. DMR processed the hiring of the selected candidate as a promotion from her positions as Human Services Coordinator A/B to Compliance Officer III. However,

DMR produced no evidence that the position of Compliance Officer III is “the next higher title” to Human Resources Coordinator A/B, and the Commission takes administrative notice that the two positions are, in fact, in different occupational series. Nor did DMR produce evidence that “sound and sufficient” reasons were submitted to the Secretary of HHS or her designee for promotion of an employee without regard to title. (*Response No. 25 of DMR’s Supplemental Responses to Appellant’s First Set of Interrogatories and Documents Attached; Respondent Department of Mental Retardation [Amended] Motion for Summary Decision*)

29. DMR notified HRD of the provisional promotion electronically through HRCMS. (*Appellant’s Response to Respondent’s October 8, 2008 Submissions and Response to the Commission’s September 17, 2008 Order, Exhibit C*)

CONCLUSION

Summary of Conclusion

The Civil Service law provides a preference to veterans in both original and provisional appointments, but that preference does not apply to promotions from one civil service title to another. In order to be entitled to claim the preference, a veteran must be “qualified” for the position to which he or she is seeking to be appointed. The term “qualified” includes, but is not synonymous with, the term “minimum entrance requirements” and encompasses a broader consideration which permits an appointing authority to make reasonable inquiry, consistent with basic merit principles, to determine whether the candidate is able to demonstrate an ability to perform in a satisfactory manner all of the essential job requirements.

As to the Palmer position, no material question of fact fairly disputes the DMR's position that Mr. Stone was unqualified for that position, based on his performance in his interview and skills assessment, and DMR was not required to offer him the Palmer position over other qualified candidates who were not veterans. Mr. Stone's claims that DMR committed various procedural errors in the hiring process are not without some basis (failing to request a veteran's list, failing to seek to fill the position on a permanent basis after examination, etc), but the Commission finds none of the procedural claims rise to the level that would entitle Mr. Stone to any relief in his case.

As to the Holyoke/Chicopee position, the Commission does find that material issues of fact are presented that compel a full evidentiary hearing to determine whether DMR has complied with the requirements of the Civil Service Law in filling that position and, if so, whether Mr. Stone is entitled to any relief as a result.

Applicable Legal Standards

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", the movant 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 Mr. Stone 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).

The veterans' preference is provided in G.L.c.31, §26, which states in relevant part (*emphasis added*):

The names of persons who pass examinations for original appointment to any position in the official service shall be placed on eligible lists in the following order: (1) disabled veterans, in the order of their respective standings; (2) veterans in the order of their respective standings;

An appointing authority shall appoint a veteran in making a provisional appointment under section twelve, unless such appointing authority shall have obtained from the administrator a list of all veterans who, within the twelve months next preceding, have filed applications for the kind of work called for by such provisional appointment, shall have mailed a notice of the position vacancy to each of such veterans and shall have determined that none of such veterans is qualified for or is willing to accept the appointment.

A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

Provisional appointments and promotions (as opposed to “permanent” civil service appointments and promotions from an eligible list after examination) are authorized under Mass. G.L.c. 31, §§12 through 15, which provide in relevant part:

§ 12. Provisional appointments. *An appointing authority may make a provisional appointment to a position in the official service with the authorization of the administrator or, if the appointing authority is a department, board, commission, institution or other agency within an executive office, with the authorization of the secretary of such office.* Such authorization may be given only if no suitable eligible list exists from which certification of names may be made for such appointment or if the list contains the names of less than three persons who are eligible for and willing to accept employment and the appointing authority submits a written statement to the administrator that each person whose name was certified and who reported for an interview was interviewed and considered for appointment and states sound and sufficient reasons, satisfactory to the administrator, for not making an appointment from among such persons. A provisional appointment may be authorized pending the establishment of an eligible list. Such authorization shall be void unless exercised within two weeks after it is granted.

After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list. Such examination shall be held and such eligible list shall be established within one year from the date of such authorization if the appointment must comply with federal standards for a merit system of personnel administration as a condition for receipt of federal funds by the commonwealth or any of its political subdivisions. If, as the result of such examination, no suitable eligible list is established, the administrator, upon the request of the appointing authority, may authorize an extension of the provisional appointment pending the results of another examination. Upon authorization of such an extension, the administrator shall arrange to hold a new examination forthwith and to determine the results of such examination. The eligible list resulting from such new examination shall be established within eighteen months

of the determination of the results of the last previous examination, provided, however, that such new examination shall be held no later than one year from the date the last examination was held if the appointment must comply with federal standards for a merit system of personnel administration as a condition for receipt of federal funds by the commonwealth or any of its political subdivisions.

If no eligible list is established after a second examination for the same position, the administrator and the appointing authority shall confer and decide what action should be taken, such as the holding of another examination on a different basis.

§ 13. Provisional appointments; notice; filing. An appointing authority, in requesting authorization to make a provisional appointment, shall file with the administrator or, if the appointing authority is a department, board, commission, institution or other agency within a [] executive office, with the secretary in charge of such office, a notice containing: (1) the information which the appointing authority believes is necessary to prepare and conduct an examination for the position for which such authorization is being requested, including a statement of the duties of the position, and the knowledge, skills and abilities necessary to perform such duties; (2) a proposal specifying the type of examination which should be held by the administrator; (3) a substantiation that the person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties.

§ 14. Provisional appointments; authorization; reports; length of service; termination. Upon receipt of the notice described in section thirteen, the administrator or the secretary in charge of the executive office, as the case may be, may authorize a provisional appointment if he determines that the contents of the notice are satisfactory. If the administrator or secretary and the appointing authority which filed the notice agree that the duties, qualifications and entrance requirements are correct as stated in the notice and if no person who meets the entrance requirements can be found for provisional appointment to the position pending the holding of an examination and the establishment of an eligible list, the position shall remain unfilled until such eligible list is established; provided, however, that if an emergency exists, and the appointing authority describes the reasons for the emergency, states that such position must be filled because of such emergency, and submits a statement which describes to the satisfaction of the administrator the steps which have been taken to find a person who meets the entrance requirements for the position, the administrator may authorize a provisional appointment of a person who does not meet such entrance requirements. Such authorization in the case of such emergency shall not constitute a finding that the person so provisionally appointed is eligible to take the examination for such position.

Each provisional appointment shall be reported by the appointing authority to the administrator. A provisional appointment may be terminated by the administrator at any time and, except as provided in the preceding paragraph, shall be terminated forthwith whenever the administrator or secretary shall determine that the person appointed does not, in fact, possess the approved qualifications or satisfy the approved requirements for the position. The administrator shall have the authority to terminate a provisional appointment which was approved by a secretary of an executive office.

§ 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, or if the list contains the names of less than three persons eligible for and willing to accept employment, or if an eligible list has been established as a result of a competitive examination for an original appointment and the appointing authority requests that the position be filled by a departmental promotional examination or pursuant to section eight. 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.

These laws must be interpreted by reading the entire the statute as a whole, according to the plain meaning of the words chosen by the legislature, and we must avoid any interpretation that would render any part of the language in a statute superfluous. See, e.g., Commonwealth v. Biagiotti, 451 Mass. 559, 603-604, 888 N.E.2d 364 (2008). So long as the meaning of a statute is clear and unambiguous, it is not the function of the Commission to rewrite it. Bulger v. Contributory Retirement Appeal Board, 447 Mass. 651, 661, 856 N.E.2d 799 (2006), *quoting* Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 86, 706 N.E.2d 625 (1999)

The Palmer Positions

The parties do not dispute that DMR filled one of the Palmer positions by transferring another DMR employee holding the same title and Mr. Stone does not claim that his

veteran's preference entitled him to that position. He does assert, however, that he should have been hired for the other posted position of Compliance Officer III in Palmer because he was the only veteran who applied. The parties also do not dispute that the second position was filled by an original "provisional appointment" of an external candidate under Section 12, and that the veteran's preference provided by Section 26 does apply to that appointment.

The dispute between the parties centers on a difference of opinion as to the meaning of the statutory requirement in Section 26 that the veteran's preference applies only to "qualified veterans". Mr. Stone interprets this term to be equivalent to the "minimum entrance requirements" for the position and asserts that there can be no dispute that his education and experience meet these requirements. The DMR contends that a "qualified" veteran is someone who has demonstrated, not only that he or she meets the minimum entrance requirements, but also demonstrates an ability actually to perform the essential requirements of the position. The DMR claims that, under this interpretation, Mr. Stone was unqualified and, therefore, not entitled to a hiring preference as a veteran.

Applying the applicable rules, and after review of the appropriate law, the Commission is compelled to agree with the DMR position. The Commission has addressed this question in the appeal of Campagna v. Department of Environmental Protection, 8 MCSR 70 (1995) (*emphasis added*):

There is no dispute that the Appellant was the sole veteran to apply for provisional appointment . . . [T]he issue before the Civil Service Commission is whether the Appellant meets an appropriate standard for "qualification." If the Appellant is so qualified, he should have received the provisional appointment. The case does not involve a comparison of the qualifications of the Appellant, on the one hand, and the non-veteran provisional appointee to the position. . . . Even assuming, arguendo, that [the non-veteran] had superior qualifications, the

Appellant is entitled to prevail if he satisfies an objective standard of qualification.

....

Entrance requirements, however, are not the sole measure of qualification for provisional appointment. In *Watson v. Department of Environmental Quality Engineering*, SCS Case No. G-1684 (February 14, 1992), the Civil Service Commission declined to limit its inquiry into an applicant's "qualification" for provisional appointment to determine whether that candidate satisfied the entrance requirements for the position. As we pointed out in *Watson*, reliance on entrance requirements, alone, as a measure of qualification contravenes G.L.c. Chapter 31, section 13 which specifies that an appointing authority requesting authorization to make provisional appointments must substantiate that the person proposed for the provisional appointment "meets the proposed entrance requirements and possesses the knowledge, skills, and abilities necessary to perform such duties" When sections 13 and 26 are read together, it is clear that the Legislature intended the measure of qualifications to be all those attributes set forth in section 13.

See also, Hutchenson v. Director of Civil Service, 361 Mass. 480, 281 N.E.2d 53 (1972) (striking down, as unconstitutional, part of predecessor version of Section 26, insofar as it had granted an "absolute" preference to disabled veterans). See generally, Personnel Administrator v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) (reviewing history of Massachusetts veteran's preference and insertion of the term "qualified" in response to constitutionality concerns)

The Commission has also been clear that, in ascertaining whether a candidate possesses the necessary "knowledge, skills and abilities", an appointing authority may utilize a fair and objective interview and skills assessment process for evaluating candidates. E.g., Rainville v. Massachusetts Rehabilitation Comm'n, 19 MCSR 386 (2006). See Flynn v. Civil Service Comm'n, 15 Mass.App.Ct. 206, 208-209, 444 N.E.2d 407 (1983) (approving use of interviews for permanent civil service promotions so long as they are structured "to protect candidates from arbitrary action and undue subjectivity on the part of the interviewers").

Here, the DMR's interview process hewed to proper standards. The DMR's conclusion that Mr. Stone did not possess the necessary knowledge, skills and abilities to perform the job duties of the Palmer position is supported by the substantial evidence. The DMR's contention that the job required a daily and hands-on working knowledge of numerous financial and statistical software is not disputed; nor is it disputed that Mr. Stone lacked any ability to complete even a rudimentary spreadsheet exercise using the widely available and well-known Microsoft Excel program that comes (often pre-installed) on many of the PCs manufactured today. Although Mr. Stone may well be right that he could have learned Excel on-the-job, that does not detract from the undisputed fact that DMR was entitled to require a candidate who was savvy and conversant with the numerous kinds of software (not just Excel) that are critical to the performance of what appears to be a job whose core is focused on financial and accounting work. Thus, the Commission is satisfied that Mr. Stone has no "reasonable expectation" that he can overcome these undisputed facts and prevail on any claim that he was qualified for the Palmer position.

The Commission recognizes that Mr. Stone has a point that DMR may not have followed all of the proper procedures in filling the Palmer positions as specified in Sections 12 through 14 of the Civil Service Law. The Commission is concerned that DMR, and other appointing authorities, continue to over-utilize the practice of making provisional appointments (and promotions) without following the procedures required by the Civil Service Law, prompted by the fact that it remains impossible, as a practical matter, to make permanent appointments to most positions because of decades of delay in conducting civil service examinations for the vast majority of non-public safety civil

service jobs. Mr. Stone's case provides yet one more example of the inequities that this unpleasant situation creates, namely, that veterans who could demonstrate their qualifications for a position by passing a civil service examination that automatically would put them at the "top of the list", must struggle with a more problematic process of demonstrating their qualifications on an ad hoc basis as they compete one-on-one with non-veterans for provisional positions that were intended to be short-lived, but, in fact, are likely to last for years, if not for a career. There is no question that this process is likely to make it more difficult for a "veteran" to get "in the door" than the legislature may have intended by enacting the veteran's preference. However, since the Commission has concluded, in the present case, that DMR did demonstrate Mr. Stone was not "qualified" for the position, the procedural problems are moot and need not be addressed further at this time.

The Holyoke/Chicopee Position

The Commission reaches a different conclusion, however, as to the Holyoke/Chicopee position. Unlike the Palmer position, DMR does not specifically contend that Mr. Stone was "unqualified" for the job, but claims that the position was filled by "provisional promotion", as to which DMR asserts (correctly) that the veteran's preference would not apply. The results of the interview process are equivocal as to whether Mr. Stone was qualified or not. (One interviewer's notes actually suggested he had entertained the idea that Mr. Stone's training and experience made him "overqualified.")

The actual duties of Holyoke/Palmer position, although carrying the same official service title of "Compliance Officer III" as the Palmer position, are clearly different. In

particular, although financial and database manipulation appear to be a part of the job, the record leaves it somewhat uncertain whether, and to what extent, coming to the job with actual experience in these subjects is essential. The functional job titles that DMR uses to describe the position – “Program Director” and “Program Monitor” – suggest that the preparation of budgetary and statistical documentation may be more ancillary, rather than a core function. The evidence indicates that even the successful candidate had limited experience in budgeting and statistical software such as Excel. Thus, although, after a full hearing, the preponderance of the evidence may well prove otherwise, the Commission cannot conclude on this record that Mr. Stone has “no reasonable likelihood” to establish that he was qualified for the Holyoke/Chicopee position.

The foregoing would not be relevant if, indeed, the position was filled by a Section 15 provisional “promotion”, as opposed to a Section 12 provisional “appointment”, as the veteran’s preference applies only to the latter and not the former. The record, however, also leaves several material issues that require a full hearing on whether the position was properly filled as a provisional promotion in compliance with Section 15 and, if not, what relief, if any, might be appropriate in the circumstances. In particular, a question is presented whether the “promotion” from Human Resources A/B to Compliance Officer III constitutes elevation to the “next higher title” (Section 15, ¶1) or not, and, if not, whether the provisions for approval of a promotion “without regard to title” based on submission of “sound and sufficient reasons therefore” (Section 15, ¶2) are applicable and have been complied with. Accordingly, an evidentiary hearing is required to determine those questions.

Accordingly, for the reasons stated above, the DMR's Motion for Summary Decision appeal of the Appellant, Robert A. Stone in CSC Case No. G1-07-403 is hereby *granted*, the Appellant's Motion for Summary Decision is hereby *denied*, and the appeal of Case No. G1-07-0403 is hereby *dismissed*. The Appellant's Motion for Summary Decision and the DMR's Motion for Summary Decision in CSC Case No. G1-07-0404 are hereby *denied* and that appeal will be scheduled for a further pre-hearing conference followed by a full hearing, if necessary.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on February 26, 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)(1), 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:

Robert F. Stone, Esq. (Appellant)

Julian T. Tynes, Esq. (Appointing Authority)

Tsuyoshi Fukada, Esq. (HRD)