

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARIA FERNANDES,
Appellant

v.

G2-13-252

DEPARTMENT OF REVENUE
Respondent

Appearance for Appellant:

Pro se
Maria Fernandes

Appearance for Respondent:

Elizabeth Baker, Esq.
Department of Revenue
100 Cambridge St.
Boston, MA 02114

Commissioner:

Paul Stein¹

DECISION ON RESPONDENT’S MOTION TO DISMISS

On November 25, 2013, the Appellant, Maria Fernandes (“Appellant” or “Ms. Fernandes”), acting under to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission (“Commission”), contesting her non-selection for the provisional appointment of Tax Examiner IV (“TE IV”) by the Department of Revenue (“Respondent” or “DOR”).

A pre-hearing conference was held on December 17, 2013 on which date DOR filed a Motion to Dismiss the Appellant’s appeal. Ms. Fernandes filed an opposition to DOR’s Motion to Dismiss on January 2, 2014. The Commission held a hearing on the Motion to Dismiss on January 13, 2014.

¹ The Commission acknowledges the assistance of Law Clerk Ryan Clayton in the drafting of this decision.

FINDINGS OF FACT:

1. It is undisputed that Ms. Fernandes began employment with DOR in August of 1988 as a Tax Examiner I and has held civil service permanency as a Tax Examiner II since December 4, 1993. Ms. Fernandes was provisionally promoted to a Tax Examiner III position on February 4, 1996, the position she currently holds. (*Stipulated Facts*)
2. In July of 2013, DOR posted a TE IV position. The Department posted the position both internally and externally. The posting indicated that the position would be filled as a provisional appointment. (*Pre-Hearing Exhibit 1*)
3. The TE IV civil service eligible list was deactivated effective June 30, 1997 and there has not been an examination for the TE IV position (or any other TE level position) since 1991. Due to this there is no “eligible list” from which a certification of names could be made to fill the appointment posted by DOR that is involved here. (*Respondent’s Motion*)
4. Ms. Fernandes joined the Bankruptcy Unit in 2005 and was assigned to the Chapter 13 group. (*Appellant’s Opposition*)
5. Ms. Fernandes had begun a romantic relationship with the supervisor of the Chapter 11 group in 2009 but kept the relationship private. (*Appellant’s Opposition*)
6. The supervisors of the Chapter 13 group and Chapter 11 group were known to have had a strained working relationship. (*Appellant’s Opposition*)
7. In July of 2012, Ms. Fernandes and the supervisor of the Chapter 11 group married in a private ceremony. A month later the supervisor of the Chapter 11 group announced his retirement effective September, 2012. A few days before his retirement he fully disclosed his and Ms. Fernandes’ marriage. (*Appellant’s Opposition*)

8. Ms. Fernandes's past performance reviews shows that she consistently "Exceeds" or "Meets" expectations and her non-selection is not indicative of poor performance. (*Pre-Hearing Exhibit 5*)
9. Ms. Fernandes applied for the TE IV position on July 20th, 2013. (*Pre-Hearing Exhibit 5*)
10. Fifty-eight (58) total applicants were considered; forty-three (43) were external candidates and fifteen (15) were internal candidates. (*Respondent's Motion*)
11. Management interviewed fifteen (15) individuals for the position, including three (3) external applicants. The interviews were conducted using a series of standard questions asked of all candidates whose responses were independently noted and scored by the member of the interview panel. (*Respondent's Motion; P.H.Exh. 30*)
12. Ms. Fernandes was among the twelve (12) internal candidates interviewed, but the position was ultimately awarded to another internal candidate, Isabel Mack. (*Respondent's Motion*)
13. Ms. Fernandes was interviewed on August 21, 2013. (*Post-Hearing Exhibit 3*)
14. Both Ms. Mack and Ms. Fernandes scored highly on their post-interview scores by the interviewers relative to other candidates. Ms. Ms. Mack's interview scores put her above Ms. Fernandes in several categories. (*Post-Hearing Exhibit 3*)
15. Ms. Fernandes and Ms. Mack held the same title (TE III) at the time of application for the appointment in question. (*Pre-Hearing Exhibits 3 and 4*)
16. Ms. Mack is a provisional employee, has been with the agency since July 9, 2007, and has never been a permanent civil service employee. (*Pre-Hearing Exhibit 4*)
17. Ms. Mack was a TE II from July, 2007 to December, 2012 at DOR, and was a TE III from December 2012 until she was provisionally appointed to TE IV. (*Pre-Hearing Exhibit 4*)

18. Ms. Mack was selected for and was provisionally appointed to the position of TE IV on November 11, 2013. She subsequently assumed assumed supervisory responsibility over the Bankruptcy Unit. (*Respondent's Pre-Hearing Memorandum; Appellant's Opposition*)
19. On November 20, 2013 DOR informed Ms. Fernandes that she had not been selected. The DOR stated in a NAGE (National Association of Government Employees) Non-Selection Form that the applicant selected was deemed to be more qualified. (*Pre-Hearing Exhibits 2 and 3*)
20. Since December 2008, the DOR has filled eight other TE-IV positions by provisional appointment. All of the positions were filled by internal candidates, two of whom had permanency in a civil service title and six of whom were provisional employees. (*P.H. Exhs. 2 & 3*)
21. Ms. Fernandes filed her appeal with the Commission on November 25, 2013. (*Claim of Appeal*)

Discussion

DOR's Argument in Favor of Motion to Dismiss

By indicating that the position would be filled by provisional appointment and posting the position both internally and externally, Ms. Fernandes's claim should be dismissed because she lacks standing as she cannot show she was "bypassed" for appointment where there is no eligible list in place.

Appellant's Argument Opposing DOR's Motion to Dismiss

Ms. Fernandes argues that she was improperly bypassed by someone who has less experience in the department and who has no permanent civil service status. She asserts that she is the victim of personal bias and that the appointing authority improperly employed the Section

12 provisional appointment process as a subterfuge to select a provisional employee for the position. She claims there was personal bias against her due to her marriage to her husband, a former supervisor at the DOR, who had a strained relationship with management before his retirement. She asks that the Commission deny the DOR's Motion to Dismiss.

Conclusion

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well 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, “notwithstanding 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 civil service examinations for the TE IV titles in over a decade meaning that no eligible lists have been established. Thus, DOR 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.

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.

Here, DOR posted the position of TE IV as a provisional appointment which was open to external and internal candidates. They selected an individual that was employed by DOR as a provisional TE III and does not have civil service permanency.

When the Commission issued its prevailing decisions regarding this issue, it fully anticipated that most state agencies would, on a going-forward basis, post non entry-level positions as provisional appointments, as opposed to provisional promotions, noting that Appointing Authorities should not be barred from filling a vacancy through a provisional appointment under Section 12 and considering internal candidates who have not had the opportunity, through no fault of their own, of obtaining civil service permanency. Richards et al. v. DTA, 23 MCSR 828 (2010). Furthermore, “there is no further obligation on the part of the Appointing Authority to prove that the person appointed was the most qualified candidate or better qualified than any other.” Asiaf v. Department of Conservation and Recreation, 21 MCSR 23 (2008).

Ms. Fernandes argues that since this was a “promotional opportunity” for the candidate selected (and would have been for the vast majority of candidates who applied); the filling of the vacancy via a provisional appointment and the alleged personal bias against her is a “subterfuge” for her not being selected.

The reference to “subterfuge” in the prevailing Commission decisions had a more straightforward meaning than what the Appellant has read into it here. For example, if the sole reason for posting a vacancy as a provisional appointment (as opposed to promotion) was to somehow effectuate a predetermined conclusion to not hire a certain permanent civil service employee, that would warrant investigation and possible intervention by the Commission. Wachsler v. Department of Transitional Assistance, 24 MCSR 323 (2011).

In this case, Ms. Fernandes had never before applied for a TE IV position. It is unlikely that when DOR posted the position as a provisional appointment, that was done because they had her in mind and pre-determined a process that would enable them to choose not to hire her. Rather, the process was used, as it has been used now for many years, to provide the only means presently at the agency's disposal to select the best qualified candidates to fill vacancies in the agency, in view of the lack of any civil service examinations or eligible lists from which to make such selections.

Here, the interview and selection process did not disclose any bias or preference in ruling in or ruling out candidates on the basis of their tenure or other status. In particular, the interview process discloses no particular intention to assure that Ms. Fernandes was not fairly and fully considered. She was one of the few candidates selected for interview and her interview scores appear to rate her fairly and consistently, both within the three ratings she received from the interviewers and in comparison with other candidates, many of whom scored well below Ms. Fernandes in many categories. The selected candidate, however, was perceived to be stronger in certain areas, including certain traits that would be expected of a successful supervisor.²

The Commission exercises its authority to conduct investigations under G.L. c. 31, § 2(a) sparingly, although we do not hesitate to do so when there is reason to suspect that a hiring process has been tainted by personal or political bias. While Ms. Fernandes may have presented facts that arguably might present a prima facie case that warrants proceedings in another forum, there is insufficient information here, however, to persuade the Commission that any alleged bias against Ms. Fernandes actually tainted the selection process such that it would amount to a

² Ms. Fernandes suggests that the scoring of one of the evaluators (Mr. Condon) is irrational and inconsistent with her job evaluations and performance. (P.H.Exh. 4) The Commission has considered that point, but, overall, the evaluations by all of the evaluators do not point to any particular irregularity in how Ms. Fernandes was rated by Mr. Condon or in relation to all other candidates. (See P.H.Exh.3)

potential violation of civil service law or rules. Accordingly, after carefully considering the matter, further investigation by the Commission is not warranted.

Ms. Fernandes clearly has served the DOR well and is a valuable contributor to that agency's important mission. Under the existing state of the civil service law, however, the Commission is not vested with the authority to review or override the reasonable judgments of the DOR in choosing among a pool of qualified candidates to fill a vacancy in the agency by means of provisional appointment.

For all the above reasons, Mrs. Fernandes' appeal under Docket No. G2-13-252 is hereby *dismissed* and the Commission opts not to investigate this matter further under G.L.c.31,§2(a).

Civil Service Commission

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on February 20, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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.

Notice:

Maria Fernandes (Appellant)

Elizabeth Baker, Esq. (For Respondent)

John Marra, Esq. (HRD)