

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, SS.

**CIVIL SERVICE COMMISSION**

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

JOSEPH ASIAF,  
Appellant

v.

G2-07-218

DEPARTMENT OF CONSERVATION  
AND RECREATION,  
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT'S MOTION TO DISMISS**

*Procedural Background*

The Appellant, Joseph Asiaf, Jr. (hereafter "Appellant" or Asiaf") is appealing his non-selection by the Department of Conservation and Recreation (hereafter "DCR" or "Appointing Authority") for provisional appointment to the position of Forester I, a position for which no eligible civil service list exists.

After a pre-hearing conference held at the offices of the Commission on September 17, 2007, DCR and the state's Human Resources Division (HRD) submitted a Motion to Dismiss the Appellant's appeal on October 9, 2007. The Appellant submitted an Opposition to the Motion to Dismiss on November 21, 2007.

*Factual Background*

In December 2006, DCR posted a vacancy for a provisional appointment to the position of Forester I, a position for which no current civil service list exists. The Appellant, who has civil service permanency as a Tree Climber I and currently holds the provisional title of Insect Pest Control Specialist II for DCR, applied for the position along with five other candidates. On June 11, 2007, DCR selected another applicant for the provisional appointment in question, after that candidate received the highest score in the interview process.

*Argument of DCR and HRD*

DCR and HRD argue that the Appellant lacks standing to appeal the provisional appointment to the Forester I position at DCR as Forester I is the entry-level title in the Forester series for which no eligible civil service list exists. Citing G.L. c. 31, § 12, DCR and HRD argue that an Appointing Authority may make a provisional appointment when there is no suitable list from which to make a permanent appointment.

DCR and HRD also argue that even if the Commission had jurisdiction to hear the instant appeal, it should be dismissed because DCR has the right to utilize an interview process to select the most qualified candidate. According to DCR, they did indeed select the most qualified candidate after completing the interview process.

### *Argument of Appellant*

The Appellant argues that the Commission should first determine whether the appointment in question should be deemed a *promotional* provisional appointment, as it would represent an increase in pay and title for the Appellant. Moreover, the Appellant argues that the tenets of basic merit principles should compel the Commission to hear his instant appeal, as, according to the Appellant, the selected candidate is less qualified than the Appellant.

In regard to the validity of the interview process, the Appellant argues that the Appointing Authority is still required to show to the Commission that the interview process did indeed reveal that the selected candidate had superior qualifications.

### *Conclusion*

G.L. c. 31, § 12 states that an appointing authority may make a provisional appointment 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. There is no further obligation on the part of the Appointing Authority to prove that the person so appointed was the most qualified candidate or better qualified than any other. A provisional appointment may be authorized pending the establishment of an eligible list.

The Appellant appears to argue that the position should have been posted as a provisional *promotion*, rather than a provisional *appointment*, thus requiring, pursuant to G.L. c. 31, § 15, that the Appointing Authority demonstrate that the candidate chosen is qualified (if selected from candidates holding the next lower title) or the most qualified

(if selected from candidates not holding the next lower title). The Commission disagrees. First, the position in question is “Forester I”, the entry-level position in the series. The fact that the position would represent a higher pay grade for the Appellant, who happened to apply for the position, does not require the Appointing Authority to post this position as a provisional promotion. Moreover, even if the position in question were, for example a “Forester II” position (which it is not), there is nothing preventing the Appointing Authority from exercising its discretion to post the position as a provisional appointment, rather than a promotion.

Notwithstanding the fact that the Appointing Authority has met its statutory obligation under the civil service law in the instant case, the Commission reiterates its longstanding admonishment to all appointing authorities and the state’s Human Resource Division to end the unhealthy and improper reliance on provisional appointments and promotions. As the Commission has noted before, the solution need not require the establishment of cost prohibitive and often outdated paper-and-pencil tests. Rather, the solution can include a selection process which emphasizes past performance, managerial evaluations and candidate interviews. (See Holt v. Department of Revenue and DPA, CSC Case No. G-2463 (1994) & Porio, Shea and Trachtenberg, CSC Case Nos. D-02-759, D-02-763 and D-02-715 (2006)).

For the above reasons, the Appellant’s appeal filed under Docket No. G2-07-218 is hereby ***dismissed*** and the full hearing previously scheduled for January 22, 2008 is canceled.

Civil Service Commission

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Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on January 10, 2008.

A true record. Attest:

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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)(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:

Paul H. Merry, Esq. (for Appellant)

Frank Hartig, Esq. (for Appointing Authority)

Martha O'Connor, Esq. (for HRD)

Shelly L. Taylor, Esq. (DALA)