COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARIE LOUISSAINT,
Appellant

v.

G2-13-244

CITY OF BOSTON,
Respondent

Appearance for Appellant:

Karen E. Clemens, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

Jessica Dembro, Esq.
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Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

Background

On November 2, 2013, the Appellant, Marie Louissaint (Appellant), filed this appeal with the Civil Service Commission (Commission), contesting her non-selection for the provisional appointment of Senior Administrative Assistant by the City of Boston (City).

On January 7, 2014, the City filed a Motion to Dismiss the Appellant's appeal. On January 13, 2014, the Appellant filed an opposition to the Motion to Dismiss. A pre-hearing conference was held on February 4, 2014 at which time the City filed a response to the Appellant's opposition. I heard oral argument from both parties.

The Appellant began employment with the City in 1985 as a laborer. In 1987, she was appointed as a Principal Clerk. In 1992, she was appointed as a Head Clerk. Either by appointment from a certification or by a Special Act of the Legislature, the Appellant was a permanent Head Clerk as of 1998. The Appellant became an Administrative Secretary in 2000 and she claims she is permanent in this position.

In September 2013, the City posted a position for Senior Administrative Assistant. The City posted this position both internally and externally. The external posting stated, "this is a provisional appointment" while the internal posting did not contain this language. There has not been a civil service examination for the position of Senior Administrative Assistant in over a decade. Thus, there is no eligible list from which the City can request a Certification to make a permanent appointment or promotion. Thus, the City must fill this position through a provisional appointment or provisional promotion.

The City received applications from both internal and external candidates. The external candidates chosen for an interview did not appear for their scheduled interviews. Four (4) internal candidates were interviewed and the City ultimately appointed an employee who holds the title of provisional head clerk.

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

The Appellant argues that the City filled the position via a provisional promotion and, thus, was limited to selecting a permanent civil service employee, which the chosen candidate is not.

Analysis

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, "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 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, the City posted the position of Senior Administrative Assistant as a provisional *appointment*. Although that was not stated on the internal posting, it was indeed stated on the external posting and the City did accept both internal and external applications, which would not be the case if it was posted as a provisional promotion.

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 limited 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).

Moreover, there was no allegation here that the selection process was tainted by personal or other bias, which could potentially open the door to the Commission initiating an investigation under G.L. c. 31, § 2(a). The Commission exercises its authority to conduct investigations 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. Here, however, no evidence has been presented that would justify such an investigation.

Conclusion

For all the above reasons, the Appellant's appeal under Docket No. G2-13-244 is hereby ***dismissed*** and the Commission opts not to investigate this matter further under G.L.c.31,§2(a).

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on March 6, 2014.

A true record. Attest:

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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:
Karen Clemens, Esq. (for Appellant)
Jessica Dembro, Esq. (for Respondent)