COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

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

JOHN RAPA,
Appellant

v.

G2-10-309

DEPARTMENT OF
TRANSITIONAL ASSISTANCE,
Respondent

Appellant's Attorney:

Pro Se
John M. Rapa

Respondent's Attorney:

Daniel LePage
Assistant General Counsel
Department of Transitional
Assistance
600 Washington St., 4th Floor
Boston, MA 02111

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

On November 12, 2010, the Appellant, John Rapa (Appellant), filed an appeal with the Civil Service Commission (Commission) contesting his non-selection for the provisional appointment of Benefit Eligibility and Referral Social Worker C (BERS C) by the Department of Transitional Assistant (DTA or Respondent).

A pre-hearing conference was held on December 14, 2010. DTA subsequently filed a Motion to Dismiss the Appellant's appeal on January 14, 2011. The Appellant did not file a reply.

It is undisputed that the Appellant is employed by DTA as a permanent BERS A/B.

On June 2, 2010, DTA posted a BERS C supervisor position for the Department's Lowell office. The posting identified that the position would be filled as a provisional appointment.

DTA assembled a hiring team which consisted of Daniel O'Connor, Director of the Lowell office and Maureen Donovan, Assistant Director of the Lowell office. They interviewed all of the candidates that were chosen for an interview and asked all of the candidates the same questions. After interviewing each of the candidates, the hiring team graded the candidates on the standard interview assessment form. The candidate that scored the best on his interview assessment form, who was also a permanent BERS A/B, was selected for the BERS C supervisor position. Because the Appellant did not score as well as the candidate that was selected for the BERS C position, he was not selected.

DTA's Argument

DTA argues that it has the authority to make provisional appointments to a position if no suitable eligible list exists from which certification of names may be made for such appointment. G.L. c. 31, § 12. Since there is no current eligible list for the position of BERS C, they argue that the provisional appointment was permitted under civil service law and rules.

Although the civil service law and rules do not require DTA to show that the person is most qualified, DTA argues that they followed strict guidelines in selecting the candidate and used a process that was consistent with basic merit principles.

Appellant's Argument

The Appellant is not disputing DTA's authority to make provisional appointments, but, rather, questions whether this particular appointment is consistent with basic merit

principles given a decision by this Commission upholding DTA's prior non-selection of this same candidate in a recent hiring cycle. See Foster v. Department of Transitional Assistance, 23 MCSR 528 (2010).

Conclusion

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for 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 examinations for the BERS titles (which replaced the FASW titles) (or most other non public safety official

service titles) in over a decade meaning that no eligible lists have been established. Thus, DTA 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, DTA posted the position of BERS C as a provisional appointment which was open to external and internal candidates. They selected an individual that was employed by DTA as a permanent BERS A/B. Thus, regardless of whether DTA filled the position through a provisional *appointment* or *promotion,* the selection of the chosen candidate was not a violation of the civil service law or rules.

The Appellant does not contest that point here. Rather, the Appellant citing the findings and conclusions of Foster v. Department of Transitional Assistance, 23 MCSR 528 (2010), questions how DTA can now justify the appointment of Mr. Foster to the same supervisory position for which they found him unqualified only a short time ago. The Appellant is effectively asking the Commission to investigate this matter using its broad authority under G.L. c. 31, § 2(a).

DTA did not address this issue in its Motion to Dismiss. However, as part of the pre-hearing conference, counsel for DTA stated that Mr. Foster appears to have performed well since transferring to the Lowell DTA office and the hiring team found him qualified for appointment.

Having served as the hearing officer in Foster, it is difficult to dismiss the Appellant's skepticism out of hand. In that appeal, DTA offered credible testimony that Mr. Foster

was not among the agency's top performers and that he was "too self assured" or "arrogant" to serve as an effective supervisor. Mr. Foster's testimony before the Commission that recently selected candidates were all "women with the same height and demeanor" only confirmed to me the validity of DTA's concerns.

Here, however, it appears that a new group of interview panelists took a fresh look at Mr. Foster's performance and, according to DTA, considered Mr. Foster's most recent job performance since transferring to the Lowell DTA office. Further, the Appellant has not shown, and does not appear likely to show at a full hearing that Mr. Foster's subsequent selection was motivated by personal or political bias. For these reasons, the Appellant's appeal under Docket No. G2-10-309 is hereby ***dismissed*** and the Commission finds an insufficient basis to conduct any investigation under Section 2(a).

Civil Service Commission

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Christopher C. Bowman
Chairman

By a 2-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Stein, Commissioner – No; and Marquis, Commissioner - Yes [McDowell, not participating]) on June 16, 2011.

A True copy. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 to:
John Rapa (Appellant)
Daniel LePage, Esq. (for DTA)

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DEPARTMENT OF
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DISSENTING STATEMENT OF COMMISSIONER STEIN

I respectfully dissent from the Commission's decision, which, in effect, denies this Appellant his chance to prove, at an evidentiary hearing, that his non-selection was the likely result of improper motives on the part of the Appointing Authority to select a person (Mr. Foster) whom this same Appointing Authority contended in a previous appeal heard by this Commission in September 2010, was singularly unqualified to be a DTA supervisor. In that prior case, in which this Commission affirmed the DTA's position, the evidence showed that Mr. Foster interviewed poorly before two veteran DTA managers, that he had an excessive record of more than 200 overdue tasks attributed to him at the time of the interview, that he made bizarre claims – suggesting that DTA had tampered with his application material, that it that it only hired "women with the same height and demeanor" and touting his "supernatural abilities". In that case, DTA questioned, and the Commission agreed the concern was justified, whether, as a supervisor, he would be approachable or empathetic to his employees and whether employees would respect a supervisor who couldn't keep up with his own work.

The Commission concurrently with this case, decides more than a dozen similar appeals involving DTA's recent hiring processes and, for the most part, DTA acquitted itself well as complying with applicable civil service law and rules in making its selections. There were some exceptions, however, that called for further inquiry and/or which prompted the Commission to warn the DTA that it had come close to the line on a few occasions. The circumstances of this case, as they have been disclosed so far, lead me to conclude that this, too, may be an instance where the DTA may have crossed the line. At a minimum, I believe the Appellant is entitled to a plenary inquiry into why the DTA's opinion about Mr. Foster, took such a dramatic turn in such a short period of time.

I appreciate the fact that both Mr. Foster and Mr. Rata hold permanency in the position of BERS A/B, and, that under G.L.c.31, §14 or §15, the DTA is generally free to appoint or provisionally promote any such candidates of their choice in the next lower title, and that other equally qualified candidates do not have recourse to the Commission to challenge those choices. I also appreciate the fact that, for reasons beyond the control of DTA or the Commission,, in the absence of civil service examinations, provisional appointments and promotions are the only means currently available to state agencies and municipalities to fill official service jobs. While most of the time, this process is used to pick the best candidates, the opportunity for mischief will always lurk so long as the system continues to stray from the statutory plan. I fear this case may be one in which further inquiry should be pursued to assure that, at the minimum, the spirit of the merit principles of the civil service law is followed, and there are no hidden agendas afoot that have impaired the rights of any innocent civil service employee.

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Paul M. Stein, Commissioner