

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JAMIE POUDRIER,
Appellant

G2-14-302

v.

DEPARTMENT OF TRANSITIONAL ASSISTANCE,
Respondent

Appearance for Appellant:

Pro Se
Jamie Poudrier

Appearance for Respondent:

Julie Heller, Esq.
EOHHS
600 Washington Street; 7th Floor
Boston, MA 02111

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On December 26, 2014, the Appellant, Jamie Poudrier (Ms. Poudrier), filed an appeal with the Civil Service Commission (Commission), contesting her non-selection by the Department of Transitional Assistance (DTA) to the position of provisional Benefit Eligibility and Referral Social Worker C (BERS C).

On February 24, 2015¹, I held a pre-hearing conference at the offices of the Commission, which was attended by Ms. Poudrier and counsel for DTA. On April 21, 2015, I held a status conference, which was attended by Ms. Poudrier, counsel for DTA, one of the successful candidates who was appointed as a BERS C, the former Regional Director of the Western Region for DTA, the Director of the Springfield DTA office, and an Assistant Director of the Springfield DTA office who served on the interview panel related to this appointment.

Based on the documents submitted and the statements of the parties, the following appears to be undisputed, unless otherwise noted:

1. Ms. Poudrier has been employed by DTA since 1992. She serves as a BERS A/B She has an Associates degree in business administration.

¹ Three (3) previously-scheduled pre-hearing conferences were re-scheduled for weather-related reasons.

2. At all times relevant to this appeal, Yasmin Otero served as DTA's Regional Director of the Western Region. She held that position for ten (10) years and has worked for DTA since 1998. Ms. Otero was the hiring manager in regard to the BERS C provisional appointment that is the subject of this appeal.
3. As part of a hiring process to appoint ten (10) BERS Cs, who would serve as front-line supervisors, Ms. Otero appointed a three (3)-member "hiring panel" made up of three Assistant Directors. The hiring panel was responsible for interviewing candidates, ranking them based on a rating system and making recommendations to Ms. Otero.
4. The BERS C positions were posted as provisional appointments.
5. Both external and internal candidates were considered. Twenty (20) candidates, including Ms. Poudrier, were interviewed for the vacancies.
6. The panelists rated the candidates in eight (8) categories on a scale of 1 to 5, with 1 being the highest (outstanding) rating and 5 being the lowest (less than satisfactory) rating. Thus, the best possible score a candidate could receive from each interview panelist was 8 (1 x 8) with the worst possible score being a 40 (5 x 8).
7. The three (3) interview panelists scored Ms. Poudrier 26, 27 and 30 points respectively. Although all of the panelists listed many positive attributes about Ms. Poudrier, they each noted concerns about her supervisory skills.
8. The three (3) interview panelists scored another candidate (Candidate A) 18, 14 and 14 points respectively. Each of the panelists commented about Candidate A's prior supervisory experience before he was employed by DTA and his ability to motivate employees.
9. Ms. Poudrier was not among the ten (10) highest-ranked candidates and was not recommended for appointment.
10. Candidate A, who has served as a BERS A for DTA since 2013, and is not a permanent civil service employee, was among the ten (10) highest-ranked candidates and was recommended for appointment.
11. Ms. Otero accepted the recommendations of the hiring panel. This appeal followed.

Analysis

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over twenty (20) 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.

It has been long established that "[p]rovisional appointments or promotions ... are permitted only in what are supposed to be exceptional instances..." City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, after decades without HRD holding competitive examinations for many civil service titles, and the professed lack of appropriations to permit examinations in the near future, hiring and advancement of most civil service employees now can be lawfully accomplished only provisionally. Thus, as predicted, the exception has now swallowed the rule and an appointment "which is provisional in form may be permanent in fact." Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).

The Commission and the courts have wrestled with the issues surrounding the so called "plight of the provisional" and regularly exhort the civil service community of the corrosive effects of the excessive use of "provisional" appointments and promotions. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff d, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. Little has been done, however, or will be done, to wean the system from this practice without further appropriations from the legislature. As a result there appears no end to the reality that the vast number - probably most - current non public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy. Meanwhile, public employees' provisional status leaves them with diminished job security and advancement opportunities under civil service law, relegating them to enforcement of their rights under collective bargaining agreements, if any, and other laws, which are beyond the Commission's purview.

That said, it remains the duty of the Commission to apply the civil service law as written. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006), quoting Commissioner of Revenue v. Cargill, Inc., 419 Mass. 79, 86 (1999). As much as the Commission regrets this state of affairs, the use of provisional appointments is not, per se, unlawful, and a state agency cannot be estopped for hewing to the law. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address, whether on a systemic basis or through special legislation. See Kelleher v. Personnel Administrator, 421 Mass. at 389.

In regard to whether DTA could fill this position through a provisional appointment, as opposed to a provisional promotion, the Commission has addressed this issue through a series of recent decisions including: 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.

Applied to the instant appeal, DTA has not violated any civil service law or rule regarding provisional appointments. DTA posted these vacancies as provisional appointments and appointed both permanent and non-permanent employees. This does not constitute a “bypass” which could typically be appealed under G.L. c. 31, § 2(b).

Notwithstanding the above, the Commission always maintains authority under G.L. c. 31, § 2(a) to conduct investigations, including when allegations are made that an appointment process was not consistent with basic merit principles. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm’n & others, No. 2013-00639-D, Suffolk Superior Court (2014).

In summary, even though the process of making provisional appointments is not subject to many of the same requirements and restrictions associated with making permanent appointments, Appointing Authorities must still ensure that their decisions are consistent with basic merit

principles – *and free of any personal and/or political bias*. When there is evidence to the contrary, the Commission will act – and exercise all of the fairly broad authority granted to the Commission under Chapter 31. We exercise this discretion, however, “sparingly” and when there is evidence that personal or political bias has potentially infected the hiring process. See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011).

At the pre-hearing conference, Ms. Poudrier alleged that the appointment process here was indeed tainted by personal and/or political bias. To support this argument, Ms. Poudrier stated that Candidate A was related to the former Regional Director of Mass Health (who has the same last name as Candidate A.) Further, Ms. Poudrier stated that, while attending a social gathering at a co-worker’s house in January 2015, she heard Candidate A make statements to the effect that he was politically connected and that he would use those political connections to “keep climbing over everybody to get what I want.”

These allegations were enough for me to schedule a status conference and hear directly from those involved in the hiring process. As noted above, the following employees, all based in Western Massachusetts, chose to voluntarily attend the status conference at the offices of the Commission in Boston: Candidate A, the former Regional Director of the Western Region for DTA, the Director of the Springfield DTA office, and an Assistant Director of the Springfield DTA office who served on the interview panel related to this appointment.

At the outset of the status conference, counsel for DTA submitted a sworn affidavit from the co-worker who hosted the social function in question in January 2015. According to the co-worker’s affidavit: “Jamie Poudrier did not attend the party I hosted in January 2015.” In regard to the allegation that Candidate A was related to the former Regional Director of MassHealth, Candidate A submitted a sworn affidavit stating that, while they share the same last name, they are not related and Candidate A has never even met the former Regional Director.

Further, Ms. Otero, who was the hiring manager, stated that, prior to walking into the offices of the Commission, she had never met Candidate A and was never contacted by anyone in regard to his candidacy. The current office manager and the member of the hiring panel who attended the status conference, made similar statements, affirming that no individual contacted them on behalf of Candidate A. I believe them. As such, there is no basis for the Commission to initiate an investigation.

Conclusion

For the reasons stated above:

- Ms. Poudrier’s bypass appeal is dismissed.
- The Commission declines to exercise its authority under G.L. c. 31, § 2(a) to initiate an investigation.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman and Stein, Commissioners [McDowell – Not Participating]) on May 14, 2015.

Either party may file a motion for reconsideration within ten 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-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:

Jamie Poudrier (Appellant)

Julie Heller, Esq. (for Respondent)