10

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 10-4679-H

LOUISE A. DEROSA

vs.

MASSACHUSETTS CIVIL SERVICE COMMISSION

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Louise A. DeRosa ("DeRosa") filed a complaint with the Superior Court pursuant to G. L. c. 30A, § 14, seeking judicial review of the decision of the Massachusetts Civil Service Commission (the "Commission"). The matter is before the Court on DeRosa's motion for judgment on the pleadings. For the reasons set forth below, the motion is **DENIED** and the Commission's decision is **AFFIRMED**.

BACKGROUND

DeRosa was hired by the Department of Revenue ("DOR") as a Child Support Enforcement Worker in the Child Support Enforcement Division on April 4, 1986. On October 10, 1987, DeRosa was promoted to the position of Child Support Coordinator. The Child Support Coordinator position had a job grade of 21.

The Alliance between the American Federation of State County and Municipal Employees and the Service Employees International Union, Local 509 ("Local 509") is the exclusive bargaining representative of Commonwealth employees in job titles within Bargaining Unit 8. Child Support Coordinators are part of Bargaining Unit 8. The Commonwealth and Local 509 bargain over the terms and conditions of employment every three years and each time enter into a Collective Bargaining Agreement ("CBA"). A CBA between the Commonwealth and

Notice Sent
5-22-12

Local 509 was in effect from July 1, 1990 to June 30, 1993.[1]

On February 26, 1993, DeRosa requested that the DOR reallocate (or reclassify) her position of Child Support Coordinator to that of Special Investigator DOR I or Special Investigator DOR II. The Special Investigator DOR I position had a job grade of 22 and the Special Investigator DOR II position had a job grade of 24. On April 27, 1999, the DOR denied her request. On April 27, 1999, DeRosa appealed the denial to the Massachusetts Human Resource Division ("HRD"). On December 13, 1999, the HRD also denied her request.

On December 28, 1999, DeRosa appealed to the Commission, arguing that her position of Child Support Coordinator should be reclassified to the same class and job grade as either the Special Investigator DOR I position or the Special Investigator DOR II position. She contended that her position should be reclassified to a higher classification and job grade based on the fact that her duties exceeded those of a Special Investigator DOR I and were comparable to those of a Special Investigator DOR II.

A hearing was held on June 8, 2000. On July 13, 2000, the Commission denied DeRosa's appeal and upheld the decisions of the DOR and the HRD. The Commission addressed the question of whether DeRosa's request that her position of Child Support Coordinator be reclassified to Special Investigator DOR I was properly denied. In reaching its decision, the Commission determined that DeRosa did not perform the duties and functions of a Special Investigator DOR I at least fifty-one percent of the time on a regular basis, and therefore, her position should not be reclassified.

DeRosa retired from the DOR on March 16, 2002. Thereafter, DeRosa appealed the Commission's decision to the Superior Court. On October 29, 2003, the court vacated the

[1] While the Commonwealth and Local 509 negotiate a new CBA every three years, the relevant articles in the CBAs from 1990 to the present are similar.

Commission's decision (Giants, J.). The court found that the Commission addressed the wrong question in denying DeRosa's appeal. The court stated that the proper question was whether DeRosa's position should be reallocated to a higher job grade. The court reasoned that under G. L. c. 30, § 45(3), the correct standard for evaluating the reallocation request was the "fair and equal pay for similar work" standard. The court stated "Under the statutes reprinted above, [DeRosa] is entitled to a determination by the Commission regarding the question she did ask- Does her work as a Child Support Coordinator constitute 'similar work' to the work performed by a [Special Investigator DOR I] such that, under 'the principle of fair and equal pay for similar work,' she is entitled to the same job grade?"[2] The court remanded the matter to the Commission to answer the correct question and apply the proper standard.

On remand, the Commission held another hearing on May 20, 2005. For the first time, the DOR argued that the terms of the CBA superseded G. L. c. 30, §§ 45-50 and precluded DeRosa from bringing her appeal. On November 5, 2010, the Commission denied DeRosa's appeal finding: (1) Articles 17 and 17A of the CBA, which govern issues of wages and job classifications, superseded the provisions of G. L. c. 30, §§ 45-50 pursuant to G. L. c. 150E, § 7(d)(k); and (2) DeRosa was not a confidential employee exempt from the CBA.

DeRosa again appealed the Commission's decision to the Superior Court. DeRosa argues that the Commission's decision must be reversed on the grounds that it was based on an error of law in violation of G. L. c. 30A for following reasons: (1) the DOR waived its right to argue that the CBA supersedes G. L. c. 30, §§ 45-50; (2) the Commission violated the Superior Court remand order; (3) the CBA does not conflict with G. L. c. 30, §§ 45-50; and (4) DeRosa is a

[2] On July 1, 2001, the title of Child Support Coordinator was changed to Child Support Enforcement Specialist. It remained in job grade 21. Also, the Special Investigator titles were converted to Child Support Investigator A/B with a job grade of 22 and Child Support Investigator C with a job grade of 24. The Commonwealth and Local 509 agreed to these changes.

confidential employee exempt under the CBA.

DISCUSSION

Pursuant to G. L. c. 30A, § 14(7), this Court may affirm, reverse, remand, or modify an agency decision if "the substantial rights of any party may have been prejudiced" because the agency decision is based on an error of law, on an unlawful procedure, is arbitrary and capricious, is unwarranted by facts found by the agency, or is unsupported by substantial evidence. See G. L. c. 30A, § 14(7). The burden of showing that the agency's decision is invalid is on the party challenging the decision. Merisme v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

In reviewing the agency's decision, a court must give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). The court may not substitute its judgment for that of the agency. See Southern Worcester County Reg. Voc. Sch. Dist. v. Labor Relations Comm'n, 377 Mass. 897, 903 (1979). Further, the "court may not displace an administrative board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Labor Relations Comm'n v. University Hosp., Inc., 359 Mass. 516, 521 (1971).

I. The Commission did not err by considering the question of whether the CBA supersedes G. L. c. 30, §§ 45-50.

A. Waiver

DeRosa argues that the Commission erred by considering the question of whether the CBA supersedes G. L. c. 30, §§ 45-50 pursuant to G. L. c. 150E, § 7(d)(k) because the DOR waived the argument by failing to timely raise it. The Commission argues that it does not have the authority to waive the applicability of G. L. c. 150E, § 7(d)(k). See MacLean v. State Bd. of

Ret., 432 Mass. 339, 342 (2000).

It is uncontested that the argument that the CBA supersedes G. L. c. 30, §§ 45-50 was raised for the first time after DeRosa's appeal was remanded to the Commission by the Superior Court. Because the CBA was in force in 1993 when DeRosa first requested a position reallocation, the argument could have been raised at any point in the proceedings.[3]

Typically the failure to timely raise an argument would constitute waiver. Here, however, the issue involves whether the Commission has the authority to act. Because the argument involves the Commission's statutory authority to act, the argument that the CBA supersedes §§ 45-50 is not waived.

B. Superior Court Remand Order

Furthermore, DeRosa argues that the Commission violated the Superior Court remand order by failing to determine whether her "work as a Child Support Coordinator constitute[d] 'similar work' to the work performed by a [Special Investigator DOR I] such that, under 'the principle of fair and equal pay for similar work,' she is entitled to the same job grade?" The Commission argues that it could not apply the standard articulated by the Superior Court because the principle of "fair and equal pay" contained in § 45(3) was superseded by the CBA. Also, after determining that § 45 was inapplicable, the Commission adjudicated DeRosa's "individual reclassification appeal according to the standard for deciding such matters" and found that she did not spend fifty-one percent or more of her time performing the duties of a Special

[3] It appears the issue was not raised earlier because the Commission's interpretation of the question before it changed. In 2000, the Commission addressed the question of whether DeRosa's position should be reallocated to Special Investigator DOR I. As will be discussed in Section IIB infra, this question does not conflict with the CBA. However, the Superior Court remand order required the Commission to answer the question of whether DeRosa's position should be reallocated to a higher job grade. The Commission found that this second question was in conflict with the CBA.

Investigator DOR I.[4]

Again, the issue of whether the CBA supersedes §§ 45-50 involves the Commission's statutory authority to act. Therefore, the Commission did not err in first addressing whether it had jurisdiction to consider the Superior Court remand order on the merits.

II. The Commission did not err in determining that DeRosa could not directly challenge her position's job group.

A. Statutory Background

Pursuant to G. L. c. 30, § 45, "[t]he personnel administrator shall establish, administer and keep current and complete an office and position classification plan and a pay plan of the commonwealth." G. L. c. 30, § 45. Further,

> [i]n pursuance of such responsibility as to the said classification plan, the said administrator shall classify all appointive offices and positions in the government of the commonwealth . . . and he may from time to time reclassify any such office or position. In so classifying or reclassifying any such office or position, the said administrator (a) shall ascertain and record the duties, responsibilities, organizational relationships, qualifications for, and other significant characteristics of the office or position; (b) shall group into single classes all such offices and positions, regardless of agency or geographical location, which are substantially alike in the duties, responsibilities, organizational relationships, qualifications, and other significant characteristics . . . .

§ 45(1). The statutory scheme additionally provides that:

> [i]n pursuance of his said responsibilities as to the said pay plan, the personnel administrator shall allocate, as provided in paragraph four of this section, each such office or position to the appropriate job group . . . In so allocating or reallocating any such office or position, the said administrator shall use standard, objective methods and procedures for evaluating the same *so that the principle of fair and equal pay for similar work shall be followed*; and all offices and positions in the same class shall be allocated to the same job group.

§ 45(3) (emphasis added). A job group is defined "as a unit of the management or general salary

[4] In determining whether to reallocate a position pursuant to G. L. c. 30, § 49, the Commission uses the standard of whether the employee has demonstrated that she performs the duties of the position she wishes to be reallocated to more than fifty percent of the time at the time of her appeal. See, e.g., Brunelle v. Massachusetts Highway Dep't, 18 Mass. Civ. Serv. Rptr. 205, 206 (July 15, 2005). The Commission typically refers to these types of appeals as reclassification appeals, however, the appeal can also be properly called a position reallocation appeal.

schedule which includes all classes in the position classification plan which are sufficiently comparable in value as regards duties and responsibilities . . . ." § 45(9)

Lastly,

> [a]ny manager or employee of the commonwealth objecting to any provision of the classification affecting his office or position may appeal in writing to the personnel administrator . . . Any manager or employee or group of employees further aggrieved after appeal to the personnel administrator may appeal to the civil service commission . . . If said commission finds that the office or *position of the person appealing warrants a different position reallocation* or *that the class in which said position is classified should be reallocated to a higher job group*, it shall report such recommendation to the budget director and the house and senate committees on ways and means in accordance with paragraph (4) of section forty-five.

§ 49 (emphasis added).

However, G. L. c. 150E, § 7(d)(k) states that if the terms of a collective bargaining agreement conflict with G. L. c. §§ 45-50, the provisions of the collective bargaining agreement will prevail. See G. L. c. 150E, § 7(d)(k) ("[i]f a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations . . . [and] sections forty-five to fifty, inclusive, of chapter thirty . . . the terms of the collective bargaining agreement shall prevail.").

B. **Analysis**

The Commission found that Articles 17 and 17A of the CBA superseded the provisions of G. L. c. 30, §§ 45-50, and therefore, precluded DeRosa from bringing her appeal pursuant to §§ 45 and 49.

General Laws c. 30, § 49 allows an employee to appeal the denial of: (1) a position reallocation; and (2) a class reallocation. It is undisputed that the CBA is the sole vehicle for seeking a class reallocation. Article 17A, Section 3 of the CBA states:

> The parties acknowledge that the classification plan covering titles in Units 2, 8 and 10 addresses the issue of pay equity/comparable worth. The class reallocation process

> contained in this Article *shall be the procedure for addressing any additional pay equity/comparable worth concerns about titles within bargaining units covered by this Agreement.*

(emphasis added). The CBA makes clear that the class reallocation procedure provided in Article 17A is the only process for addressing pay equity and comparable worth concerns. Therefore, the issue before the Court is whether the CBA prevents DeRosa from appealing the denial of a position reallocation pursuant to § 49.

In their respective papers, the parties provide different definitions of position reallocations. The Commission describes a position reallocation as reallocating one job title to another based on the duties performed.[5] DeRosa contends that she is seeking to have her position reallocated to a different job group.

Based on the plain language of the statutes, a party cannot directly appeal her position's job group. Section 49 allows for the appeal of a "position reallocation." The term position reallocation is defined as "any subsequent official placing of a position in a class . . . ." § 45(9). Pursuant to § 49, DeRosa could appeal the class in which her position was placed and request that her position be reallocated to that of a Special Investigator DOR 1.[6]

Here, the CBA allows for position reallocations as defined by §§ 45(9) and 49. Article 17 of the CBA states that "[i]n consultation with the Office of Employee Relations and [Local 509], the Department of Personnel Administration shall determine" (1) job titles; (2) relationship of one classification to others; and (3) job specifications. Further, Article 17, Section 3 of the CBA

---

[5] General Laws c. 30, § 45(9) provides the same definition for the terms class and title. Therefore, the terms class and title can be used interchangeably.

[6] In describing the process outline in § 45, the Supreme Judicial Court stated, "the Personnel Administrator determines the title, duties, and qualifications for each position and then allocates the position to a 'class' and the class to a 'job group' level on the State salary schedule . . . ." Murphy v. Administrator of the Div. of Pers. Admin., 377 Mass. 217, 223 (1979). Further, in reallocating a class, "the Personnel Administrator reexamines the duties, required qualifications, and other characteristics of the positions in a given class. Then, based on the principle of fair and equal pay for similar work, he determines whether the class should be reallocated to a different job group on the pay scale." Id.

covers the individual appeal of classifications. It states "Individual employees shall continue to *have the same right to appeal the propriety of the classification of his/her position* through the Personnel Administrator or the Civil Service System which the individual employee enjoyed on June 30, 1976, and such appeal may not be the subject of a grievance or arbitration under Article 23A herein." (emphasis added).

Therefore, the CBA does not prevent DeRosa from appealing the class in which her position was placed.[7] Indeed, this was the question the Commission considered in 2000 when it denied DeRosa's appeal. DeRosa, however, cannot directly appeal her position's job group pursuant to § 49. Such an appeal is not permitted under § 49, and furthermore, is superseded by the terms of the CBA.

III. The Commission's determination that DeRosa was not a confidential employee was not in error.

DeRosa argues that the Commission erred in determining that she was not a confidential employee. DeRosa states that if she were a confidential employee, the CBA would not apply to her, and therefore, she could pursue her appeal pursuant to G. L. c. 30, § 45. DeRosa contends that although the Child Support Coordinator position is included in Bargaining Unit 8, neither the DOR nor Local 509 treated it as a position subject to the CBA from 1988 to 1995.[8]

---

[7] As previously stated, the CBA prevents DeRosa from seeking a class reallocation.

[8] DeRosa does not argue that she fits the statutory definition of a "confidential employee." General Laws c. 150E, § 1 defines "employee" or "public employee" as "any person in the executive or judicial branch of a government unit employed by a public employer except . . . managerial employees or confidential employees." The statute goes on to define managerial employees as those employees who:

> (a) participate to a substantial degree in formulating or determining policy, or (b) assist to a substantial degree in the preparation for or the conduct of collective bargaining on behalf of a public employer, or (c) have a substantial responsibility involving the exercise of independent judgment of an appellate responsibility not initially in effect in the administration of a collective bargaining agreement or in personnel administration.

§ 1. Further, "[e]mployees shall be designated as confidential employees only if they directly assist and act in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter." Id.

To support her argument, DeRosa points to a letter dated March 9, 1987 from the DOR Deputy Commissioner that stated Child Support Coordinators were considered confidential employees. However, this letter only addressed "incumbents." DeRosa was not appointed to the position of Child Support Coordinator until later that year. Further, the letter concerned a review of the classification level for the position of Child Support Coordinator "pursuant to Article 17A" of the CBA. Therefore, the letter indicates that the DOR believed that the CBA controlled the classification of Child Support Coordinators.

Also, DeRosa states that from October 1, 1988 to June 15, 1996, she was not a member of Local 509 and did not pay union dues. In support, DeRosa points to a 1995 letter from Local 509 indicating that until recently, Child Support Coordinators were treated as confidential employees. The letter welcomed DeRosa to Local 509 because her position was no longer considered confidential.

In response, the Commission points to the affidavit of Janet E. Monahan, Personnel Analyst for the DOR, which states that DeRosa's personnel records indicated that she was never designated as confidential. Further, the position of Child Support Coordinator was a Bargaining Unit 8 title. Lastly, "[t]he salary and pay grade of all employees in the Child Support Coordinator title, whether 'confidential' or not, is set by the terms of the collective bargaining agreement between the Commonwealth and [Local 509]."

Here, the Commission's determination that DeRosa was not a confidential employee was not against the substantial weight of the evidence. While DeRosa has pointed to some evidence that indicates that the DOR and Local 509 considered her a confidential employee, the Commission also considered other evidence, which supported the conclusion that she was not a confidential employee. This Court "may not displace an administrative board's choice between

two fairly conflicting views, even though [it] would justifiably have made a different choice had the matter been before it de novo." University Hosp., 359 Mass. at 521. Lastly, the Commission analyzed DeRosa's job duties and concluded that her position did not meet the requirements of a confidential employee as defined by G. L. c. 150E, § 1.

ORDER

For the foregoing reasons, DeRosa's motion for judgment on the pleadings is **DENIED** and it is therefore **ORDERED** that judgment enter **AFFIRMING** the decision of the Massachusetts Civil Service Commission.

Raymond J. Brassard
Justice of the Superior Court

DATED: May 22, 2012