Decision mailed: 12/31/10
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

KATHLEEN HAWKS,
Appellant

v.

D1-09-368

DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
Respondent

Appellant's Attorney: Nancy S. Tierney, Esq.
29 School Street
Lebanon, NH 03766

Respondent's Attorney: Kenneth Langley, Esq.
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One Winter Street
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Commissioner: Christopher C. Bowman

DECISION

The Appellant, Kathleen Hawks (hereinafter "Hawks" or "Appellant"), pursuant to G.L. c. 31, §§ 39 & 43, is appealing: 1) the decision of the Department of Environmental Protection (hereinafter "DEP" or "Appointing Authority") to lay her off; and 2) DEP's failure to provide her with appropriate bumping rights. While the Appellant has reserved her right to challenge whether there was a lack of funds that justified her layoff, both parties agree that the primary issue of this appeal is whether DEP afforded her the appropriate bumping rights under Section 39. Central to that dispute is whether the Appellant, at the time of her layoff, was a permanent Accountant IV (as alleged by the

Appellant) or a permanent Accountant III (as alleged by DEP). The instant appeal was filed on April 22, 2010[1] and a pre-hearing conference was held on May 12, 2010. I heard oral argument from both parties and subsequently accepted written briefs. On September 2, 2010, I sent a written request, copied to both parties, to the state's Human Resources Division (HRD) seeking additional information relevant to this appeal. HRD provided the information to the Commission (HRD Reply), with a copy to both parties, on September 21, 2010.

Based on the documents submitted and the statements of the parties, I find the following:

1. On March 20, 1988, the Appellant, who is a veteran, commenced employment with the former Department of Employment and Training, another state agency, as a provisional Accountant II. *(Appellant's Brief)*
2. On April 16, 1988, the Appellant took the civil service examination for the budget audit and accounting series – Accountant I – IV; Institution Treasurer II; Assistant Institution Treasurer; Budget Examiner; Budget Examiner III. *(HRD Reply)*
3. On October 14, 1988, HRD established the "eligible lists" from the April 16, 1988 exam. *(HRD Reply)*
4. Whenever an appointing authority seeks to fill a civil service position, HRD, if a suitable eligible list exists, "certifies" the names standing highest on such list in order

[1] The Appellant previously filed an appeal with the Commission on September 18, 2009. She withdrew that appeal after DEP rescinded the Appellant's layoff as they had not followed the procedural requirements of G.L. c. 31, §§ 41-45, including the opportunity for the Appellant to attend a hearing prior to her layoff. Based on that withdrawal, the Commission dismissed that appeal on March 18, 2010. After her reinstatement, those procedural requirements were followed and the Appellant was again laid off. The Appellant then filed the instant appeal with the Commission.

of their place on such list, except as otherwise provided by law or civil service rule. PAR.08(1)

5. Pursuant to Chapter 666 of the Acts of 1989, HRD was required to "certify the names of eligible candidates in the following order according to their scores: (1) candidates who are civil service employees in the department as of the date of such examination; (2) candidates who have been provisionally appointed in accordance with the provisions of said chapter thirty-one to a position in the department for at least one year prior to the date of such examination; (3) all other candidates." *(HRD Reply)*
6. On April 11, 1990, Certification No. 2003841 for three temporary Accountant IV positions was issued to the Department of Environmental Quality Engineering (now known as DEP). *(HRD Reply)*
7. When names have been certified to an appointing authority under PAR.08 and the number of appointments or promotional appointments actually to be made is n, the appointing authority may appoint only from among the first 2n + 1 persons named in the certification who are willing to accept employment. (PAR.09 (1))
8. Charles White (#3); Suzanne Frechette (#9), and Jean Molyneaux (#14) were selected for appointment to the positions of temporary Accountant IV from Certification No. 2003841. The Appellant's name appeared as #68. *(HRD Reply)*
9. On November 11, 1990, it appears the Appellant was promoted to Accountant III in a "temporary after certification" category from a subsequent certification, Certification No. 2003882. *(Appellant's Brief and HRD Reply)* HRD eliminated this peculiar "temporary after certification" category in 1995 and notified all state agencies that

such employees should henceforth be considered "permanent" in their positions. (See Silvia v. Department of Correction, 9 MCSR 2 (1996))

10. On October 16, 1992, Certification No. 2009779 for one temporary Accountant IV was issued to DEP. No appointments were made from this certification. The Appellant's name appeared as #60. *(HRD Reply)*

11. On October 15, 1993, Certification No. 1009498 for one temporary Accountant IV was issued to DEP. Wayne Eaton (#40) was selected for appointment to this position. The Appellant's name again appeared as #60. *(HRD Reply)*

12. On January 26, 1995, a certification for one temporary Accountant IV was issued to DEP. HRD has no information regarding if any appointment was made from this certification. *(HRD Reply)*

13. On August 21, 1995, apparently in response to the directive from HRD referenced in Finding 9, DEP notified the Appellant that she now had permanent status as an Accountant III retroactive to November 11, 1990. *(Attachment 3 to DEP's Brief and HRD Reply)*

14. In February 1997, after she had been deemed permanent as an Accountant III and while her name remained on the 1988 eligible list of individuals for Accountant IV, the Appellant filed an appeal with the Commission. *(CSC Case No. G-3631)*

15. The parties did not submit, nor does the Commission have a copy of, the Appellant's 1997 appeal. In her brief, the Appellant states that she was contesting the fact that an employee named Julia Grant was "awarded" the position of Accountant IV, even

though Ms. Grant was not on the eligible list and had less civil service seniority than the Appellant.[2] *(Appellant's Brief)*

16. On July 25, 1997, while the Appellant's February 1997 appeal was pending with the Commission, HRD revoked all non-public safety eligible lists, effective June 30, 1997, stating that … "a significant number of lists have been in effect for over five years … [and] … [HRD] has determined … that maintenance of the Merit System requires that [HRD] revoke such lists … in accordance with MGL Chapter 31, Section 25." *(Attachment 4 to Appellant's Brief)*
17. Sometime after 1997, DEP filed a motion to dismiss the Appellant's appeal with the Commission. *(Attachment 2 to Appellant's Brief)*
18. On January 14, 1998, an internal DEP email states: "Please be advised, the Civil Service Commission has denied our motion to dismiss in the Hawks bypass case. My contention that equity foreclosed remedy under a nine year old list after revocation did not carry. The commission ruled that because the filing of the appeal pre-dated the revocation, the right to appeal remained." *(Attachment 2 to Appellant's Brief)*
19. On June 8, 1998, the Commission issued a decision which stated in its entirety, "The Civil Service Commission decided the appeal based on the mutual agreement of the parties, which is incorporated into this decision, and orders the parties to take such action as required by the agreement."[3] *(Attachment 1 to DEP's Brief)*

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[2] I contacted HRD to determine the civil service status of Ms. Grant. According to HRD, Ms. Grant is a provisional Accountant V who previously served as a provisional Accountant IV. She has permanency as an Auditor II. She participated in an Auditor II exam on 4/16/88 and was appointed from a certification on 10/18/92. Subsequently, she was provisionally appointed as an Accountant IV. On 11/29/09, she was provisionally promoted to the position of Accountant V.

[3] At least since my tenure began on the Commission since 2006, the Commission has not issued any decisions which "incorporate" the terms of a parties' settlement agreement. Rather, the Commission regularly "dismisses" an Appellant's appeal based on the mutual agreement of the parties or due to the Appellant's voluntary withdrawal, which may be a requirement of parties' settlement agreement. In those

20. Paragraph 4 of the above-referenced settlement agreement states: "Ms. Hawks shall be reclassified to the title of Accountant IV and shall receive three months retro-active pay from the date of her reclassification. (emphasis added) *(Attachment 1 to DEP's Brief)*

21. An internal DEP email to the Appellant and others dated July 8, 1998, one month after the Commission decision, states in relevant part: "Kathleen's reclassification has been entered into the system with an effective date of March 22, 1998 ... Accountant IV. Paperwork has been given to Payroll, so retro should be coming along shortly." (emphasis added) *(Attachment 4 to Appellant's Brief)*

22. The Appellant submitted a printout from HRD and written correspondence from HRD which states that she is a permanent Accountant IV as of November 11, 1990. *(Attachment 2 of Appellant's Brief; Attachment 2 of DEP's Brief)*

23. In regard to the above-referenced HRD printout, HRD states: "The information contained in HRCMS [the printout] was transferred from a prior computer program, PMIS. This information was entered by [DEP], not HRD. HRD is unable to reconcile the discrepancy between the information in HRCMS and HRD civil service records. *(HRD Reply)*

24. G.L. c. 31, § 1 defines a "permanent employee" as "a person who is employed in a civil service position (1) following an original appointment ... or (2) following a promotional appointment ..." G.L. c. 31, § 1.

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cases, mostly bypass appeals, where the parties have reached a settlement agreement that requires relief from the Commission (i.e. – revocation of an expired list, placing the name of an individual at the top of future certifications until such time as he / she is granted at least one additional consideration), a dismissal is not appropriate. Rather, the Commission typically allows the parties' joint motion for relief and explicitly states what relief the Commission is ordering. A cursory review of Commission decisions indicates that, even during the 1997 – 1998 time period, the Commission would explicitly state what, if

25. "Original appointment" is defined as an appointment pursuant to section six or section twenty-eight."[4] Id. Section six provides that each such "original appointment in the official service shall be made after certification from an eligible list established as the result of a competitive examination..." G.L. c. 31, § 6 (emphasis added).

26. "Promotional appointment" is defined as "an appointment pursuant to section seven ... of a person employed in one title to a higher title in the same or a different series, or to another title which is not higher but where substantially dissimilar requirements prevent a transfer pursuant to section thirty-five." G.L. c. 31, § 1. Section seven provides that "each promotional appointment within the official service shall be made...after certification from an eligible list..." G.L. c. 31, § 7.

CONCLUSION

The Appellant's appeal is two-fold. First, she argues that DEP has not shown that it had a lack of funds to justify her layoff. Second, she argues that, even if DEP is able to meet this burden, she was not provided with the proper bumping rights under G.L. c. 31, § 39. Here, the Appellant has limited her argument to the issue of bumping rights and reserved her right to contest the "lack of funds" issue at a later time. As such, the Commission addresses only the issue of bumping rights in this decision and, if necessary, will allow the Appellant to file a motion for reconsideration with ten (10) days of this decision if she wishes to further pursue her appeal regarding the "lack of funds" issue.

G.L. c. 31, § 39, as inserted by St. 1978, c. 393, s. 11, states in pertinent part: "If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of

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any, relief the Commission was ordering, as opposed to actions that would be taken by the parties pursuant to a settlement agreement.

positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit ... ".

Section 15 of the Personnel Administration Rules states:

(1) All civil service rights of an employee rest in the position in which he holds tenure.

(2) When one or more employees must be separated from positions in the same title and departmental unit due to lack of work, lack of money or abolition of position, all persons filling positions provisionally in the designated title must be separated first, followed by all persons filling positions in temporary status in the designated title, before any civil service employees holding the designated positions in permanent status shall be separated from such positions.

(3) When one or more civil service employees holding permanent positions in the same title and departmental unit must be separated from their positions due to lack of work, lack of money, or abolition of position, the employee with the least civil service seniority computed pursuant to M.G.L. c. 31, §33 shall be separated first; provided that all disabled veterans are accorded the preference provided by M.G.L. c. 31, §26.

(4) When one or more persons among a larger group of civil service employees holding permanent positions in the same title and departmental unit are to be separated from their positions due to lack of work, lack of money or abolition of position, and the entire group has the same civil service seniority date, the appointing authority has the discretion to select for separation among those with equal retention rights, applying basic merit principles.
(PAR.15)

G.L. c. 31, § 26 states in relevant part: "A disabled veteran shall be retained in employment in preference to all other persons, including veterans."

Is the Appellant entitled to the retention rights afforded to veterans and/or disabled veterans?

The Appellant argues that she is a "veteran ... entitled to veteran's preference and an individual who suffers from a disability under ADA." As the Section 26 retention preference only applies to "disabled veterans" and not "veterans", we must first determine whether the Appellant is a veteran or a disabled veteran.

[4] Section twenty-eight applies to labor service; as such, it is not applicable to this analysis.

G.L. c. 31, § 1, defines a "disabled veteran" as a veteran within the meaning of G. L. c. 4, §. 7, Forty-third (and allowing for a slightly more expansive definition of qualifying service), "who (1) has a continuing service-incurred disability of not less than ten per cent based on wartime service for which he is receiving or [is] entitled to receive compensation from the veterans administration or, provided that such disability is a permanent physical disability, for which he has been retired from any branch of the armed forces and is receiving or is entitled to receive a retirement allowance, or (2) has a continuing service-incurred disability based on wartime service for which he is receiving or is entitled to receive a statutory award from the veterans administration."

The Appellant has not provided the Commission with any information to show that she has a "service-incurred disability". As such, she does not meet the definition of "disabled veteran" and is not entitled to the retention preference afforded to such individuals under Section 26.

Although the Appellant did not address this in her brief, we choose to address another section of the civil service law regarding veteran preferences and whether it is applicable here. G.L. c. 30, § 9A states:

> "A veteran, as defined in section one of chapter thirty-one, who holds an office or position in the service of the commonwealth not classified under said chapter thirty-one, other than an elective office, an appointive office for a fixed term or an office or position under section seven of this chapter, and has held such office or position for not less than three years, shall not be involuntarily separated from such office or position except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one to the same extent as if said office or position were classified under said chapter. If the separation in the case of such *unclassified offices or positions* results from lack of work or lack of money, such a veteran shall not be separated from his office or position while similar offices or positions in the same group or grade, as defined in section forty-five of this chapter, exist unless all such offices or positions are held by such veterans, in which case such separation shall occur in the inverse order of their respective original appointments." (emphasis added)

The Appellant argues that she should be considered a permanent Accountant IV for the purposes of determining bumping rights under Section 39 as a result of a reclassification many years ago. For reasons discussed in more detail below, the Commission has concluded that the Appellant's reclassification from Accountant III to Accountant IV did not result in her permanency as an Accountant IV. Thus, she had permanency as an Accountant III and was serving as a provisional Accountant IV at the time of her layoff. For this reason, it is relevant to address whether the Appellant, under Section 9A of Chapter 30, had retention rights as a result of her veteran status, regardless of whether she was permanent or provisional in that title. We conclude she did not. While the Appellant may have been serving as a provisional Accountant IV at the time of her layoff, the position of Accountant IV is still "classified" under Chapter 31.[5] Thus, the "Section 9A protections" afforded to veterans serving in positions "not classified" under Chapter 31 for three or more years, do not apply here.

Is the Appellant a permanent Accountant III or permanent Accountant IV?

The Appellant argues that she is a permanent Accountant IV and that her "bumping rights" under Section 39 should be determined based on her permanent Accountant IV status. To support her argument (that she was a permanent Accountant IV at the time of her layoff), the Appellant seeks to re-litigate a matter that was before the Commission over thirteen years ago and was disposed of through a settlement agreement. When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a

[5] All offices and positions in the official service of the commonwealth shall be subject to the civil service law and rules unless expressly exempted by this chapter or other law. G.L. c. 31, § 48. There is no law or rule that exempts the official service position of Accountant from the civil service law. Further, HRD has

subsequent action between the parties, whether on the same or a different claim." McCarthy v. Town of Oak Bluffs, 419 Mass. 227, 233 (1994) (quoting Restatement (Second) of Judgments § 27 (1982)).

Here, the Commission will not re-litigate the Appellant's appeal under CSC Case No. G-3631. Rather, the Commission is guided by the plain language of its June 8, 1998 decision in that matter which states: "The Civil Service Commission decided the appeal based on the mutual agreement of the parties, which is incorporated into this decision." Paragraph 4 of that settlement agreement states: "Ms. Hawks shall be reclassified to the title of Accountant IV and shall receive three months retro-active pay from the date of her reclassification. (emphasis added)

As the 1998 decision reclassified the Appellant from Accountant III, in which she held civil service permanency, to Accountant IV, we must address whether that reclassification bestowed permanency on the Appellant in the higher title of Accountant IV. The Commission recently addressed this issue in Lefrancois v. Department of Revenue, CSC Case No. D-09-415 (2010). In Lefrancois, the Appellant was a permanent Corporate Analyst who had been reclassified to the position of Tax Auditor I. She subsequently received a short-term suspension and appealed to the Commission. In determining whether the Commission had jurisdiction to hear that appeal, it concluded that the Appellant's reclassification did not bestow permanency in the higher title of Tax Auditor I.[6] The same rationale applies here.

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promulgated job specifications for titles in the Accountant series as part of its overall responsibility to classify job titles based on their respective duties, responsibilities, supervisory role, etc.

[6] Although the reclassification of LeFrancois occurred at the agency level, as opposed to an order of the Commission, we draw no distinction.

Absent a special act of the legislature, a civil service employee gains permanency only by original or promotional appointment. Nothing in the reclassification statute, G.L. c.30, § 49, detracts from this general rule. Recourse to that statute is available to any manager or employee of the Commonwealth. Thus, G.L. c.30, § 49 appeals are not limited to employees with civil service tenure or permanency, but may involve provisionally appointed employees and, even, state employees who do not hold any civil service status whatsoever. It appears that the principle purpose of G.L. c.30, § 49 was to provide a mechanism for oversight of employee classification and pay as set out in Chapter 30, and was not meant to create a wholly new alternative road to gain permanency in civil service jobs.[7]

Thus, in the absence of evidence that the Appellant received an original or promotional appointment to the position of Accountant IV, or evidence that her position was made permanent by Special Act, the Commission treats the Appellant as having permanency in the position of Accountant III and serving as a provisional Accountant IV at the time she was laid off.

[7] Ms. Lefrancois did not take and pass a civil service examination for the position of Tax Auditor I. Here, it is undisputed that Ms. Hawks did take and pass an examination for Auditor IV. However, as previously referenced, the Appellant voluntarily entered into a settlement agreement in which she agreed to be "reclassified". Further, there has been no evidence presented that the Appellant's name would have been high enough on a certification prior to the expiration of the Accountant IV eligible list to be eligible for a permanent appointment to Accountant IV. It is likely that those issues were discussed as part of the Appellant's 1998 appeal and may have been a factor in both parties' decision to reach a mutual agreement to "reclassify" the Appellant from Accountant III to Accountant IV. The Appellant, had she believed that she was high enough on that eligible list and that she should have received a promotional appointment, could have continued forward with her appeal and asked the Commission to enter an order to revive the eligible list until such time as one additional appointment was made. For whatever reason, the parties opted to reach a settlement agreement that did not result in the promotional appointment of the Appellant. As previously stated, re-litigating that decision over twelve years later would not be appropriate.

Can the Appellant bump a provisional Accountant V who has permanency as an Auditor II with a civil service seniority date of October 18, 1992?

Although the Appellant's next argument was partially premised on her belief that she was a permanent Accountant IV at the time of her layoff, the same general principles apply. The Appellant argues that she should be able to bump an employee by the name of Julia Grant. According to HRD, Ms. Grant is a provisional Accountant V with permanency as an Auditor II as of October 18, 1992. (The Appellant was first made permanent in 1990, two years prior to Ms. Grant.) At some point, Ms. Grant was provisionally appointed or promoted to the position of Accountant IV before her provisional appointment or promotion to her current position of Accountant V.

First, the Appellant argues that DEP violated the civil service law and rules when it provisionally appointed or promoted Ms. Grant to the positions of Accountant IV and Accountant V. The Appellant argues that since Ms. Grant (and at least one other employee) did not take an examination for the position of Accountant V, she can not serve in such position provisionally.[8] We disagree. G.L. c. 31, §§ 12 and 15 allows for provisional appointments and promotions when no eligible list exists.

Section 12 provides in relevant part that:

> "An appointing authority may make a provisional appointment . . . with the authorization of the administrator

[8] In the Appellant's argument regarding Ms. Grant's initial provisional promotion to Accountant IV on or around 1997, she also argues that DEP could not have made any provisional appointments or promotions since there was an eligible list in place at the time for the position of Accountant IV. While the Appellant's reading of the statue is correct in this regard, the Appellant, as referenced elsewhere in this decision, abandoned her 1997 appeal regarding this issue and agreed to a settlement that resulted in her re-classification as an Accountant IV. Today, more than thirteen years after abandoning her appeal, the Appellant is effectively asking the Commission to re-litigate that appeal, make determinations that, even at the time, would have involved the unraveling of various documents and other information that would form the basis for oral argument before the Commission. Further, as referenced in Finding 16, HRD revoked the relevant eligible list on July 25, 1997. While the Commission (in 1997), allowed the Appellant's appeal to go forward since she filed her appeal prior to that revocation, she, as stated above, chose not to fully litigate the matter and, instead, chose to reach a settlement agreement. What would have been a complicated endeavor at the time is impossible thirteen years later.

> . . .. Such authorization may be given only if no suitable eligible list exists . . . . A provisional appointment may be authorized pending the establishment of an eligible list . . . .
>
> After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list."

Section 15 provides in relevant part that:

> "An appointing authority may, with the approval of the administrator . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list ..."

In a series of recent decisions, the Commission has confirmed that provisional promotions are limited to "civil service employees" (those holding permanency after an original or promotional appointment). See Pease v. Department of Revenue, 22 MCSR 284; Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009). Here, there is no dispute that Ms. Grant was a permanent civil service employee. It can not be shown that DEP violated the civil service law by provisionally promoted Ms. Grant (or others) to the position of Accountant V.

Having been provisionally appointed or promoted to the position of Accountant V, Ms. Grant, and all other provisional Accountant Vs, ceased to be "in" their prior positions for the purposes of Section 39, as recently confirmed by the SJC in Andrews v. Civil Service Comm'n, 446 Mass. 611 (2006).

In Andrews, the SJC concluded that:

> "Provisional promotion pursuant to G. L. c. 31, s. 15, effects a real change from "one title to the next higher title." A provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect. General Laws c. 31, s. 15, provides only one exception to this rule, relating to calculation of eligibility for a promotional examination. "[T]he fact that the

> Legislature specified one exception . . . strengthens the inference that no other exception was intended." Protective Life Ins Co. v. Sullivan, 425 Mass. 615, 620 (1997), quoting LaBranche v. A.J. Lane & Co., 404 Mass. 725, 729 (1989). Regardless whether the five employees provisionally promoted to the SI-C position possessed or lacked rights in the SI-C position pursuant to rule 15, that was the position in which they were employed for purposes of s. 39."

Applied here, DEP was correct to consider the provisional promotion of Ms. Grant and others when contemplating layoffs. Specifically, even if the Appellant had been a permanent Accountant IV at the time DEP was laying off Accountant IVs, DEP was correct not to consider the civil service seniority dates of those employees who had been provisionally promoted to higher titles when determining which Accountant IVs should be laid off first under Section 39.

Did the Appellant maintain any rights under Section 39 as a Provisional Accountant IV who had permanency as an Accountant III?

In Andrews, the SJC concluded in relevant part that:

> "A provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect ..." (emphasis added)'

We view the above-referenced language from Andrews to be consistent with how HRD, state agencies and cities and towns appear to have interpreted Section 39 for many years. When layoffs occur in a title under Section 39, provisional employees in that title retain certain bumping rights if they formerly held a permanent civil service title in the department prior to their promotion. Specifically, the provisionally promoted employee, who held civil service permanency in a former position within the department, may, as an alternative to being laid off, "bump" other provisional or less senior permanent employees in the title or next lower titles for which they had permanency. Applied here, the Appellant, a permanent Accountant III who was serving as a provisional Accountant IV at the time the layoffs occurred, had the right to "bump" provisional Accountant IIIs,

Accountant IIs or Accountant Is in the department or permanent Accountant IIIs, Accountant IIs or Accountant Is in the department with less civil service seniority.

The related question raised here, and likely to be the subject of other appeals pending before the Commission, is whether DEP was required to lay off other provisional Accountant IVs in the department before the Appellant if the other provisional Accountant IVs had less civil service seniority in their former permanent positions. We conclude that the answer is "no".

In Leondike v. Randolph Public Schools, 13 MCSR 16 (2000), the Appellant in that case argued that she should be able to bump a less senior employee in a non-civil service position with a higher pay rate. The Commission found that there was no legal basis under Section 39 to permit the Appellant to bump into a non-civil service position. Similarly, in Provencher v. Lynn Public Schools, 21 MCSR 533 (2008), the Commission held that that the Appellant, a permanent a permanent clerk / typist who was provisionally promoted to clerk / stenographer, did not have the right to bump another provisional clerk / stenographer, merely because she had more civil service seniority than the person sitting provisionally in the clerk / stenographer position.

Applied here, the Appellant's seniority in a lower title, for which she held permanency, does not permit her to bump another provisional Accountant IV because that person has less service seniority in the lower position. Had the Appellant held permanency in the title of Accountant IV, DEP would have been required to lay off all provisional and temporary Accountant IVs in the department before the Appellant. As stated above, however, the Appellant's permanency rests in the title of Accountant III.[9]

[9] In the vast majority of cases, there are provisions within the applicable collective bargaining contracts that govern how layoffs occur when the civil service law does not apply. Applied here, since all of the

We conclude that these prior Commission decisions, and the conclusion reached here regarding the instant appeal, are consistent with Andrews (a provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect ..." (emphasis added); a reasonable interpretation of Section 39 and the Personnel Administration Rules (civil service rights of an employee rest in the position in which he holds tenure).

Summary of Conclusion

At the time she was laid off, the Appellant was a permanent Accountant III serving as a provisional Accountant IV. Her retention and / or bumping rights under Section 39 are limited to bumping any provisional or temporary Accountant IIIs, Accounant IIs or Accountant Is in the department or any permanent Accountant IIIs, Accountant IIs or Accountant Is in the department with less civil service seniority. As it appears that DEP has complied with these requirements, the Appellant's appeal under Docket No. D1-09-368 is hereby ***dismissed***.

As referenced in the procedural history above, the Appellant reserved the right to argue whether a lack of funds justified the Appellant's layoff pending the outcome of the remaining issues addressed as part of this decision. To the extent that the Appellant wishes to contest that additional issue, she may do so as part of a motion for reconsideration to be filed with the Commission within ten days of receipt of this decision.

Civil Service Commission

Accountant IVs held those positions provisionally, the CBA applied in regard to whose position would be eliminated. Here, the CBA provided for those with the least department seniority (as opposed to civil service seniority) to be laid off first. Those with the most senior department seniority were retained. As

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on December 30, 2010.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the 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 to:
Nancy Tierney, Esq. (for Appellant)
Kenneth Langley, Esq. (for Appointing Authority)
Martha O'Connor, Esq. (HRD)

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the Appellant was still provided with all of her civil service rights based on her permanency as an Accountant IV, there was no conflict with service law.