COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

JOSEPH KASPRZAK,
Appellants

v.

G-01-1102

DEPARTMENT OF REVENUE,
Respondent

Appellant's Representative:	Robert McHugh SEIU Local 509 24 Chase Avenue Dudley, MA 01571
Respondent's Attorney:	Michael C. Rutherford, Esq. Department of Revenue 100 Cambridge Street: 6th Floor Boston, MA 02114
HRD's Attorney:	Michelle Heffernan, Esq. HRD One Ashburton Place: Room 211 Boston, MA 02108
Commissioner:	Christopher C. Bowman

DECISION ON DEPARTMENT OF REVENUE'S MOTION FOR RECONSIDERATION

Procedural History

Pursuant to the provisions of G.L. c. 31, § 2(b), Joseph Kasprzak (hereafter "Kasprzak" or "Appellant") appealed the action of the Massachusetts Department of Revenue (hereafter "DOR" or "Appointing Authority") failing to provisionally promote him *from* the position of Child Support Enforcement Specialist "C" *to* the position of

Child Support Enforcement Specialist "D". [1](DOR provisionally promoted Kathleen Crocker, another employee who also held the title of Child Support Enforcement Specialist "C" to the position.) The Appellant's appeal was timely filed with the Commission on May 31, 2001. DOR subsequently filed a Motion for Summary Decision seeking to dismiss the Appellant's appeal and a motion hearing was conducted on February 17, 2004 at the offices of the Commission. Both parties stipulated that there were no material facts in dispute.

On April 21, 2005, the Commission issued a decision on DOR's Motion for Summary Decision. The decision stated in part, "the Appointing Authority has sufficiently justified its decision to recommend that the Appellant be bypassed for the provisional promotion at the time that it made the recommendation." Reiterating its longstanding concern regarding the indefinite use of provisional appointments and promotions, however, the Commission "affirmed" a prior Commission decision (See Burns v. Department of Revenue, 14 MCSR 75 (2001)) in which DOR and HRD were "ordered to schedule examinations for all appointments, both original and promotional appointments. Until further orders from the Commission, no provisional appointments shall be made under the provisions of M.G.L. chapter 31, secs. 12, 13, 14 or 15. The Commission shall retain jurisdiction in this matter for any further orders." The April 29, 2005 decision further stated, "HRD is hereby ordered to schedule a new examination and create a certification list for the position now known as Child (Support) Enforcement Specialist D. Ms. Crocker's provisional promotion shall be vacated upon the creation of a certification by the administrator of the names of three persons, eligible for and willing to accept

[1] The position of Child Support Enforcement Specialist "D" was previously known as Child Support Enforcement Coordinator; Child Support Enforcement Specialist "C" was previously known as Child Support Enforcement Worker II"

promotion to such position." Finally, the decision stated that, "The Appellant should be provided with the opportunity to take the examination, but he should not be entitled to any special placement on the resulting list."

DOR subsequently filed a series of timely motions regarding the April 21, 2005 decision including a Motion for Reconsideration; a Motion for Clarification; a Motion for Stay of Decision; and a Request for Hearing on Short Order of Notice. In summary, the motions sought to reverse the Commission's decision to prohibit any new hires until the administration of civil service examination were resumed. A hearing regarding these DOR motions was conducted before the Commission on July 28, 2005. Notably, neither the Appellant nor his representative appeared for the hearing despite receiving notice. Pending its decision on DOR's Motions for Reconsideration and Clarification, the Commission allowed DOR's Motion to Stay the Appeal "until the Commission rendered its decision on the Motions for Reconsideration and Clarification".

On February 9, 2006, by a 3-2 vote, the Commission issued a decision on DOR's Motions for Reconsideration and Clarification. In its decision, the Commission included a more detailed admonishment regarding the continued use of provisional appointments and stated that, "placing a moratorium on further provisional hiring or promotions appears to be the only means by which the Commission can ensure that an overall remedy will be created, given the past failure to alleviate the problems of the provisional appointments and promotions." The Commission, while reiterating its April 21, 2005 order to HRD to schedule a new examination and create a certification list for the position now known as Child Support Enforcement Specialist "D", did, however, in the February 9, 2006 decision, clarify the requirements for removing the "moratorium".

Specifically, the February 9, 2006 decision, in addition to ordering the scheduling of a new examination and list for the position of Child Support Enforcement Specialist "D", ordered HRD and DOR to create a "remedy to provide for the eventual replacement of provisional positions with permanent employees in all civil service titles." (emphasis added) Further, the clarified decision states, "This remedy must then be submitted to the Commission for its approval. Until such an agreement has been approved by the Commission, (DOR) shall not make any further provisional appointments or promotions."

DOR subsequently filed a timely motion to stay the Commission's February 9, 2006 decision along with a motion to reconsider the decision and a request for hearing on short order notice. On March 30, 2006, the Commission allowed DOR's Motion to Stay the February 9, 2006 decision and ordered a full hearing to be conducted regarding its Motion for Reconsideration. As the full hearing would be scheduled in a timely manner, and in consideration of the above-referenced stay, the Motion for Short Order Notice was considered by the Commission to be moot and was therefore denied.[2]

A full hearing was conducted on DOR's Motion for Reconsideration at the offices of the Commission on November 8, 2006. Counsel for DOR appeared along with counsel for HRD. Despite receiving notice of the hearing, neither the Appellant nor his representative appeared. One tape was made of the hearing. In addition to oral argument, there was testimony by two DOR witnesses: James J. Reynolds, DOR's

[2] Due to an administrative error by the Commission, Landlaw Publishing Company, which publishes the Civil Service Reporter, received what was intended to be a draft copy of the March 30, 2006 order by the Commission. The ambiguous wording of that draft document, published in the Civil Service Reporter, has resulted in confusion, including one commentator's erroneous conclusion that the Commission has already reversed the February 9, 2006 decision. Rather, the Commission's March 30, 2006 order simply allowed DOR to receive a full hearing on its motion for reconsideration.

Deputy Commissioner for Administrative Services; and Paul Cronin, Associate Deputy Commissioner for the Department of Revenue's Child Support Enforcement Division. Four exhibits were entered into evidence and the record was kept open for DOR to submit a copy (both to the Commission and the Appellant) of collective bargaining agreement articles governing the promotion and grievance procedure of DOR employees in Bargaining Units 6 and 8 and for HRD to submit documentation regarding its annual state appropriation from state fiscal years 1998 through 2006. The requested documents were subsequently received and have been marked as exhibits 5 and 6 respectively.

Standard for Reconsideration

Pursuant to 801 CMR 1:01 (7)(l), a Motion for Reconsideration 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."

DOR's Argument for Reconsideration

In its Motion for reconsideration, DOR asks the Commission to reconsider that portion of the February 9, 2006 decision that requires an examination in the Child Support Enforcement Specialist D position and that no further provisional appointments or promotions be made until further order of the Commission.

In support of the above-referenced motion, DOR argues that the decision to conduct an examination is left to the personnel administrator "as he deems necessary." G.L. c. 31, s. 12. According to DOR, the Commission's February 9, 2006 decision, "mistakenly concludes that the personnel administrator used its authority to violate the basic merit principles of Chapter 31." Again according to DOR, this conclusion can not be reconciled with the Commission's conclusion in the same decision which stated that the

selected candidate (Crocker) was more qualified for the position than the Appellant. Accordingly, DOR argues that there was no basis for the Commission to "usurp the discretionary authority expressly delegated to the personnel administrator (HRD) who is in the statutory position to determine when to conduct civil service examinations.

Conclusion

There is no dispute, as explicitly stated in the most recent decision issued by the Commission regarding this matter on February 9, 2006, that DOR "complied with the statutory requirements necessary to make a provisional promotion" pursuant to G.L. c. 31, § 15. Specifically, the candidate selected for the provisional promotion was "qualified", the only statutory requirement in those cases, such as this, where the Appointing Authority provisionally promotes an individual to the next higher title. See Kelleher v. Personnel Administrator of Department of Personnel Administration, 421 Mass. 382, 388 (1995).

Citing the instant appeal as an example of "the malignant status quo", the Commission, in its February 9, 2006 decision, also concluded, however, that "the prolonged abuse of the provisional system has and continues to inflict significant harm on the employment status of civil service employees within (DOR) and similar agencies. Employees such as the Appellant are unable to compete for positions by means of an examination, and those holding provisional titles are denied many of the rights and protections that their permanent counterparts enjoy under Chapter Thirty-One." Specifically, the majority of the Commission concluded in the February 9, 2006 decision that "the Appellant's employment status was…harmed through no fault of his own by being denied the opportunity to demonstrate his suitability to fill the position in

question." As such, a majority of the Commissioners ordered HRD to issue a civil service examination for the position of Child Support Enforcement Specialist D and ordered a moratorium on all provisional appointments and promotions at DOR until such time as DOR and HRD present the Commission with an acceptable remedy to provide for the eventual replacement of provisional positions with permanent employees in all civil service titles.

Notwithstanding our continued angst regarding the very real inequities created by the reliance on provisional appointments and promotions, the Commission concludes that at least two factors were overlooked regarding the February 9, 2006 decision which justify a reconsideration of the Commission's February 9, 2006 decision. Those factors are as follows:

1. Alleged HRD inaction not supported by the evidence

An overarching conclusion of the February 9, 2006 Commission decision involves HRD's alleged complicity in allowing public sector employees to languish in provisional purgatory, at one point chiding HRD for not petitioning the Legislature for changes to the civil service law. That assertion is contradicted by an 8-page document dated September 11, 1998, of which the Commission takes Administrative Notice, that is part of the record in this case.

In the above-referenced 1998 document, which is attached to this decision, HRD outlined a comprehensive proposal to the Commission "to ensure that no provisional appointments are made in the future" and to "qualify the current provisional employees into their positions" (permanently). Through a two-pronged process, including a "Continuous Testing Program" (ConTest) and the "Provisional Population Process",

HRD proposed a road map that, if fully implemented, would finally put an end to the use of provisional appointments and promotions.

This HRD proposal was consistent with the findings and recommendations of the attached 1996 report, "Civil Service Reform in Massachusetts", prepared by the 1996 Special Commission on Civil Service Reform, of which the Commission also takes administrative notice. The Commission included the then-Senate and House Committee Co-Chairs of the Joint Committee on Public Service; the then-Senate and House Committee Co-Chairs of what was then the Joint Committee on Commerce and Labor; the Chairman of the Civil Service Commission; the Personnel Administrator; representatives from 5 of the largest public employee unions in Massachusetts; as well as four representatives from the Massachusetts Municipal Association.

HRD successfully obtained a separate line item from the Legislature in the FY98 – FY92 state budgets to begin phasing in this new program with the goal of ending the reliance on provisional employees. The state appropriation for the "ConTest" program was $330,000 in FY98; $369,000 in FY99; $339,000 in FY00; $339,000 in FY01; and $369,000 in FY02. In FY03, the "ConTest" line item was completely eliminated in the state budget and was only recently restored at a reduced amount, preventing HRD from continuing the initial phase of the program and/or fully implementing its plan to eventually cover all non-public safety positions under this process. (Exhibit 6)

The above-referenced information seriously diminishes an underpinning of the February 9, 2006 decision which relied heavily on HRD's alleged inaction as justification for the order to halt the use of provisional appointments and promotions. Rather, it supports DOR's contention, articulated during the prior Commission hearing, that the

Commission's order is not consistent with the Supreme Judicial Court's opinion in Kelleher, *supra*, which stated in regard to Section 15 of Chapter 31:

> The statute provides that, "[n]o provisional promotion shall be continued after a certification by the administrator of the names of the three persons eligible for and willing to accept promotion to such position." G.L. c. 31, Section 15. Kelleher argues that this statute is defective in that a promotion which is provisional in form may be permanent in fact. If this is a defect, it is a defect for the *Legislature* to address. (emphasis added)

Kelleher, 421 Mass. at 389.

The prior February 9, 2006 Commission decision, in response to DOR and HRD's contention that this part of Kelleher indicates a lack of specific action HRD may be required to perform under §15 (i.e. – promptly schedule an examination), stated in part,

> "the lack of specificity in the statue does not give HRD unbridled authority."
>
> The February 9, 2006 Commission decision went on to state in part,
>
> "HRD revoked the list for the Child Support Enforcement Specialist D position in 1997…having determined that the list was too old to remain relevant. No effort has been made by HRD since that time to ever fill the position permanently…we must conclude that HRD has summarily decided that these titles are simply not worth the effort to fill permanently. This is arbitrary action." (emphasis added)

As indicated by the previously-referenced HRD document from 1998, of which the Commission has now taken administrative notice, HRD did indeed make an effort in this regard, developing a proposal, that was approved by the Commission and funded by the Legislature through 2003, that would ultimately result in the position in question, and all non-public safety positions, being filled permanently. HRD can not shoulder responsibility, let alone be deemed to have engaged in an arbitrary manner, simply because their sound proposal was derailed due to budgetary shortfalls.

2. Undue Harm to the Families of Massachusetts

In practical terms, the Commission's February 9, 2006 decision effectively prohibits any hiring or promotions by the Massachusetts Department of Revenue (a 2,000-employee state agency) until further order of the Commission, including the routine backfilling of positions that become vacant because of attrition. In the 12-month period immediately preceding the Commission's November 8, 2006 hearing, 85 employees were separated from employment from DOR, 27 of whom worked for the Child Support Enforcement Division. (Exhibit 1) These critical vacancies were filled in a timely manner through a combination of provisional appointments and promotions, including the provisional promotion of over 40 employees during the same time period. (Exhibits 2, 3 and 4)

Paul Cronin, DOR/CSE's Associate Deputy Commissioner, testified before the Commission that DOR/CSE is currently responsible for over 225,000 child support cases in Massachusetts, resulting in a ratio of 1200 child support cases for every one employee involved in case management, with a ratio as high as 1500 to 1 in some regional offices. While the increased use of technology has allowed the agency to streamline the establishment, enforcement and modification of child support orders, the staggering 1200 to 1 ratio referenced above illustrates the burden facing existing employees – and the immediate harm that would result if the agency was unable to backfill critical positions in a timely manner. This Commissioner, having begun his career as a front-line worker for DOR's Child Support Enforcement Division, working primarily out of the Barnstable Probate Court, experienced first-hand the Herculean task facing those employees charged with managing child support cases. Moreover, I saw how the direct, personal

involvement of an individual child support worker could be the determining factor in the success or failure regarding the complicated tasks of: locating a non-custodial parent; effectuating proper service and notice; facilitating the establishment of a court-ordered support order; and, ultimately, enforcing the order on behalf of the custodial parent and his or her children. Any interruption involving the backfilling of positions, no matter how short or long in duration, would limit the agency's ability to perform its core mission of providing struggling families with financial security. For these reasons, there is sufficient and compelling justification to reconsider – and reverse – the Commission's most recent decision which effectively prevents DOR from making any new hires or promotions until further order of the Commission.

In summary, the majority of the Commission has concluded, based on the two above-referenced factors that may have been overlooked at the time, that the February 9, 2006 decision of the Commission under Docket No. G-01-1102 should be ***reconsidered and reversed***.

This decision to allow DOR's Motion for Reconsideration should not, however, be construed as a retreat from the Commission's steadfast opinion that DOR, and all Appointing Authorities, must end their unhealthy and improper reliance on provisional appointments and promotions. It is time for all interested parties to revisit the findings and recommendations of the 1996 Special Commission on Civil Service Reform and re-establish a course of action and remedies that results in an equitable resolution for all parties, ensures adherence to basic merit principles and finally ends the reliance on provisional appointments and promotions.

For all of the above reasons, DOR's Motion for Reconsideration is hereby *allowed*; the Appellant's appeal under Docket No. G-01-1102 is hereby ***dismissed***.

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Christopher C. Bowman, Chairman

By a 3-2 vote of the Civil Service Commission on November 8, 2007.

Bowman, Chairman – YES
Marquis, Commissioner – YES
Guerin, Commissioner – YES
Henderson, Commissioner – NO
Taylor, Commissioner - NO

A true record. Attest:

_____
Commissioner

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:
Robert McHugh (SEIU Local 509)
Michael C. Rutherford, Esq.
Michelle Heffernan, Esq.

Attachment1: September 11, 1998 memorandum from HRD to Commission re: Continuous Testing Program and Provisional Employees

Attachment 2: Civil Service Reform in Massachusetts, November 15, 1996.