Decision mailed: 12/16/11
Civil Service Commission CS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

PAUL MENDONCA,
Appellant

v.

EXECUTIVE OFFICE OF LABOR & WORKFORCE DEVELOPMENT,
Respondent

Case No. D1-08-94

Attorneys for the Appellant:	Larry C. O'Bryan, Esq. Galen Gilbert, Esq. Gilbert & O'Bryan, LLP 295 Washington Street, Suite 351 Boston, MA 02108
Attorney for the Respondent:	Michael E. Williams, Esq. Director of Labor Relations Executive Office of Labor & Workforce Development 19 Staniford Street, 5th Floor Boston, MA 02114
Hearing Officer:	Angela McConney Scheepers, Esq.[1]

DECISION

Pursuant to the provisions of G.L. c. 31, §§ 41, 42 and 43, the Appellant Paul Mendonca (hereinafter "Appellant") appealed the decision of the Executive Office of Labor and Workforce Development (hereinafter "EOLWD" or "Appointing Authority") to lay him off from the position of Administrator III on April 10, 2008. The Appellant filed an appeal with the Civil

[1] The Commission gratefully acknowledges the assistance of Law Clerk Jihyun Choi in the drafting of this decision.

Service Commission (hereinafter "Commission") on April 22, 2008. On May 2, 2008, Appellant amended his appeal and waived the procedural issues under G.L. c. 31, §§ 41 and 42.

A full hearing was held on August 1, 2009. The hearing was declared private as neither party requested a public hearing. The hearing was digitally recorded and witnesses were not sequestered. The record was left open for thirty (30) days in order for the parties to submit further documents upon the Hearing Officer's request. The Respondent submitted a Proposed Decision on August 3, 2009. The Appellant submitted a Proposed Decision on December 28, 2009.

SUMMARY OF DECISION

The Appellant's appeal must be dismissed for lack of jurisdiction. The Appellant was laid off from employment as a provisional civil service employee in the classified position of Administrator III. His status as a disabled veteran does not grant him any additional right to challenge his layoff from a provisional position under Chapter 30, Section 9A (which applies only to management employees in positions in Grades M-V and above that are not classified under civil service law) or under Chapter 31, Section 39 (which applies to permanent civil service employees). Even if Section 39 were to grant preference in a layoff to provisionally appointed disabled veterans over permanently tenured veterans and non-veterans, that preference would not be absolute. In fact - the substantial evidence in this case demonstrated that the Appellant was not qualified for any of the other Administrator III positions - whose incumbents he claimed should have been laid off instead of him.

FINDINGS OF FACT

Based on the eight (8) exhibits entered into evidence and the testimony of the following witnesses:

For the Appointing Authority:

- Mr. David E. Olsen, Director of Human Resources, EOLWD

For the Appellant:

- Ms. Dana Johnson, Esq., DaMar, LLP

I make the following findings of fact:

1. Paul E. Mendonca (hereinafter "Appellant") is a Vietnam era disabled veteran. (Exhibit 1)
2. Appellant was hired as a *provisional* Administrator III on or about May 3, 1999. Appellant does not hold permanent civil service title to any underlying original position. (Exhibit 1)
3. Administrator III is a position within Job Group M-III of the Management Salary Schedule as set forth in G.L. c. 30 §46C(1) and is a civil service position classified under Chapter 31, within the meaning of G.L. c. 30 §46E. (Administrative Notice)
4. David E. Olsen (hereinafter "Olsen") has been the Director of Human Resources for EOLWD (hereinafter "HR") since February 2008. He is responsible for all personnel decisions within the secretariat including but not limited to hiring, termination, classifications and recruitment. Olsen's career has been dedicated to human resources within the Commonwealth of Massachusetts since 1998. (Testimony of Olsen)
5. Olsen testified that Appointing Authority employees have both an official title as well as a functional title. The official title reflects their classification within the agency structure, whereas the functional title provides a more accurate description of their duties and responsibilities within the specific position. (Testimony of Olsen)
6. When he was laid off on April 10, 2008, Appellant held the functional title of Manager of Special Program Oversight. He administered the Job Search/Job Readiness Program (hereinafter "JS/JR"), which was completely funded through federal funds. (Exhibit 1; Testimony of Olsen)

7. The state Human Resources Division (hereinafter "HRD") promulgates position classifications and job descriptions. (Testimony of Olsen)
8. HRD classifies positions as management or non-management. HRD evaluates the position duties and responsibilities in order to ensure that the job group, job grade and duties are similar within the agency. (Testimony of Olsen)
9. A "job group" is a classification, an occupational description. There are two orientations of job groups: line or staff orientation. A line oriented position is one that interacts with customers and the public. Conversely, a staff oriented position is one that serves and supports the functions, i.e. the line, of the agency. (Testimony of Olsen)
10. There are twelve (12) levels of managers within the managerial job groups for both line and staff positions. In each level there are four (4) different group classifications: program manager, program specialist, administrative officer and fiscal officer. (Testimony of Olsen)
11. On or about March 29, 2007, pursuant to the Appellant's reclassification appeal filed with HRD, HRD determined that Appellant's title of Administrator III was not an accurate reflection of his duties and responsibilities. HRD found that Appellant should have been classified as a Program Coordinator II. Nevertheless, the Appellant was allowed to retain the official title of Administrator III. Reclassification of the position would apply only to prospective appointments. (Exhibit 2 of Respondent's Memorandum in Support of its Motion for Summary Decision; Testimony of Olsen)
12. HR utilizes Management Questionnaires (hereinafter "MQ") in order to evaluate managerial positions. The MQ form states that it is "To be used for: a new managerial function; a managerial position that has never been evaluated; a managerial position for which there is no previous MQ or evaluation score; or, a managerial position that has undergone

considerable significant change." The MQ is to be completed by the incumbent and supervisor. (Exhibits 2, 3, 4, 5 and 6)

13. Appellant and his then supervisor, Mr. Edward Bartkiewicz (hereinafter "Bartkiewicz"), completed an MQ on October 31, 2006. The MQ was signed by Appellant and signed and approved by Bartkiewicz. The MQ erroneously stated that Appellant's official title was "Program Manager" instead of "Administrator III." (Exhibit 2, Testimony of Olsen)
14. The Appellant's job summary on the MQ states that he was responsible for monitoring and coordinating the JS/JR Program, its performance and program operations within legal and contractual requirements. Appellant's major responsibility areas were validating and reconciling financial reimbursements from the Department of Transitional Assistance ("DTA"), monitoring the preparation of documents to validate DCS compensation, resolving discrepancies and preparing invoices to DTA to secure program funding. Additionally, Appellant provided oversight and coordination of the JS/JR program in conjunction with field management units. (Exhibit 2; Testimony of Olsen)
15. None of Appellant's duties included the direct supervision or management of staff. (Exhibit 2; Testimony of Olsen)
16. On or about April, 2008, the Appointing Authority's funding source undertook budget reduction measures, and the agency determined that layoffs would be necessary. The Appointing Authority lost all federal funding for the JS/JR program. (Testimony of Olsen)
17. On or about April 10, 2008, Appellant was given a lay off notice. (Exhibit 1)
18. The entire JS/JR program was eliminated. No positions remained, and all duties were delegated to other divisions. (Testimony of Olsen)

19. Olsen undertook a review of Appellant's personnel record and overall qualifications and determined that Appellant was not qualified for retention in any of the agency's remaining Administrator III positions. (Testimony of Olsen)

20. At the time of Appellant's layoff, four (4) other individuals held the official title of Administrator III within EOLWD. One was a veteran with a permanent original appointment. The other three individuals were non-veterans. (Exhibit 1; Testimony of Olsen)

21. The functional titles of these positions were (1) Web Services Manager; (2) Deputy Director of Contracts and Procurement; (3) Hurley Building Superintendent; and (4) Manager of Office of Multilingual Services. (Exhibits 3, 4, 5 and 6; Testimony of Olsen)

22. Appellant retained the services of Dana Johnson, Esq. (hereinafter "Johnson") of DaMar, LLP, in order to evaluate the transferability of Appellant's skills to one or more of the other four (4) Administrator III positions. (Testimony of Johnson)

23. Johnson interviewed Appellant, and reviewed his resume, MQ and the other four (4) MQs provided by the Respondent. Her written report was submitted to the Commission. (Testimony of Johnson)

24. Johnson's expertise lies in evaluating private sector company employment programs, specifically as they relate to rehabilitation programs and job placement programs and services for disabled workers. (Exhibit 7; Testimony of Johnson)

25. Johnson testified that she has no experience with civil service law or employment practices, HRD classification and job description formulations, or the duties and responsibilities entailed in individual civil service positions. (Testimony of Johnson)

26. The Respondent objected to Johnson's qualification as an expert. I allowed Johnson to testify for the limited purpose of evaluating the proposed transferability of skills between the position previously held by Appellant and those four (4) Administrator III positions that

remained after Appellant's layoff. I do not credit or give weight to Johnson's testimony in regard to matters outside of her field of expertise.

27. Johnson testified that the Appellant possessed skills that were transferable to only two (2) of the four (4) positions: the position of Deputy Director of Contracts & Procurement in the Division of Career Services and Division of Unemployment Assistance (Exhibit 4), and the position of Hurley Building Superintendent (Exhibit 5). Appellant had insufficient skills for the positions of Web Services Manager (Exhibit 3) and Manager of the Office of Multilingual Services (Exhibit 6). (Testimony of Johnson)

28. In opposition to Johnson's opinion, the Appointing Authority concluded that Appellant's previous position as Manager of Special Program Oversight of the JS/JR Program is substantially different and dissimilar from each of the four (4) Administrator III positions. (Testimony of Olsen)

29. In regard to the Web Services Manager position, Appellant has no experience in website construction or computer networking. He has never built web content, created website architecture, or conducted site maintenance. Appellant further lacks the specialized educational training in web design, including but not limited to web programming skills. Appellant also lacked experience supervising interns and supporting staff. (Exhibits 2, 3 and 8; Testimony of Johnson; Testimony of Olsen)

30. In regard to the position of Deputy Director of Contracts and Procurement, Appellant has no experience in contract procurement activities and the laws regarding trade and procurement regulations. He has not reviewed procurement contracts, granted agreements or approved fee requests from attorneys representing Division of Unemployment Assistance, Unemployment Insurance clients. Appellant does not possess knowledge of the Respondent's Affirmative Market Program or of the laws and regulations on trade such as the North American Free

Trade Agreement ("NAFTA") and the Trade Adjustment Assistance Act. Furthermore, Appellant does not possess knowledge, skills or abilities relating to the MARS system (the state's accounting system), financial systems, or GAP (general accounting principles) policies and procedures specific to the comptrollers office. When Olsen reviewed Appellant's resume and previous work history, he found that he lacked the qualifications necessary for this position. (Exhibits 2, 4 and 8; Testimony of Olsen)

31. In regard to the Hurley Building Superintendent position, Appellant has no experience regarding building maintenance, security, Heating Ventilation Air Conditioning systems ("HVAC"), plumbing, electrical or elevator systems, or building codes and regulations. The Superintendent position requires knowledge of bureau state office procedures, policies, facility operations and HVAC systems. It also requires management supervision of contracted security personnel. The Appellant possesses none of these skills. (Exhibits 2, 5 and 8; Testimony of Olsen)

32. In regard to the Manager of Offices of Multilingual Services position, Appellant has presented no evidence that he speaks Spanish or is otherwise multilingual. He has not trained, supervised or managed translation or interpretation services. He has no experience in coordinating with specific offices that require multilingual services or the inner-workings of the Offices of Multilingual Services. (Exhibits 2, 6 and 8; Testimony of Johnson; Testimony of Olsen)

33. Thus the Respondent found that Appellant was not qualified for any of the four (4) Administrator III positions at EOLWED of Web Services Manager, Deputy Director of Contracts and Procurement, Hurley Building Superintendent or Manager of Office of Multilingual Services. (Testimony of Olsen)

CONCLUSION

The Appellant's appeal is premised on three claims: (1) he merits a veteran's preference from involuntary separation under Mass. G.L. c. 30, §9A; (2) a *disabled veteran* must be retained in employment in preference to every other civil service employee, including veterans, whether tenured or not, under Mass. G.L. c. 30, §26; and (3) a disabled veteran's Section 26 protection requires that, in a layoff, all other civil service employees, including veterans, occupying the same position must be laid off before any disabled veteran, whether tenured or not, may be laid off.

Appellant's Section 9A Claim

The Appellant first argues that as a *veteran* [defined in Chapter 31, Section 1] he enjoys certain protections under G.L. c. 30, Section 9A, which provides:

> "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, . . ., 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."

On its face, Chapter 30, Section 9A, applies only to veterans who hold positions that are not classified under the civil service law. The undisputed evidence here established that, the position of Administrator III, which Appellant held is an M-III position classified under civil service law. *See* G.L. c. 31, §48; G.L. c. 30, §§46c and 46E. Thus, pursuant to the clear and unambiguous language of the relevant statute, the Appellant's Section 9A argument patently lacks merit.

The Appellant's Section 26 Claim

Second, the Appellant argues that pursuant to Section 26 of Chapter 31,[2] he is entitled to "be retained in employment in preference to all other persons, including veterans" because he is a *disabled veteran.*[3] In his proposed decision, the Appellant argued:

> "There is no reason to inquire about the abilities of the disabled veteran. He or she may be highly skilled and capable of many other jobs, or he or she may be the worst employee in the department. Either way, the rights of the disabled veteran are the same, an *absolute preference* in lay off selection."

The Appellant's construction of Section 26 as creating an "absolute preference" flies in the face of common sense and basic merit principles. This argument has been clearly rejected by this Commission and the Massachusetts appellate courts in previous cases involving the rights of disabled veterans, in which those rights have been clearly defined as non-absolute. Because the Commission must adhere to the well-established construction of this statute derived from binding judicial precedent and its own prior decisions, the Appellant's Section 26 argument fails as a matter of law.

First, the civil service preference for disabled veterans was not intended to exempt disabled veterans from all of the other provisions of civil service rules. The legislative preferences for veterans built into the civil service law must be respected almost reverently, but so too must the Commission respect the other civil service provisions for job security provided to career public employees based on length of tenure in public service. *See* G.L. c. 31 §§1, 26, 28, 33, 39, 40 and

---

[2] The sixth paragraph of G.L. c. 31, §26 (2010 ed.) provides: "A disabled veteran shall be retained in employment in preference to all other persons, including veterans."

[3] The relevant statutory provision defining "disabled veteran" for civil service purposes is found in G.L. c. 31, §1: "Disabled veteran", any veteran, as defined in this section, 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 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.

59. These two sets of rights each represent equally important core objectives of the civil service law that must be read in harmony.

In Younie v. Doyle, 306 Mass. 567 (1967), the Supreme Judicial Court held that the disabled veteran's preference did not supersede all provisions of civil service law and that a disabled veteran may be required to complete a statutory probationary period (during which he or she may be terminated for any reason, or no reason, just as any other employee, and with no right of appeal to the Commission). In its opinion, the Court states this important principle:

> "The civil service law as a whole (and the rules made under the direction [of the Personnel Administrator] under direction of section 3 have the force of law) 'ought, if possible, to be so construed as to make it an effectual piece of legislation in harmony with common sense and sound reason' "

Id. at 572. The Court reasoned that at the time the Legislature enacted what is now G.L. c. 31, §23, relating to disabled war veterans,[4] it "must be taken to have known of the provisions of the civil service law requiring the board to make among other rules ... one providing for 'Preference to veterans in appointment and promotion, *not inconsistent with this chapter*' (c. 31, §3(f))." Id. at 570-71. (*emphasis added*) The Court further stated that it is "unable to perceive anything in Section 23 or in the other provisions of Chapter 31 relative to 'Veterans' Preference' that can be construed to mean that disabled veterans are not subject to the civil service rules. The legislature has not so specified." Id. at 571.

Similarly, in Hutcheson v. Director of Civ. Serv., 361 Mass. 480 (1972), the SJC invalidated the applicability of a disabled veteran's preference in that case, again noting that the preference

[4] G.L. c. 31, §23 provides as follows: "The names of veterans who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the order of their respective standing above the names of all other applicants, except that any such veterans who are disabled and who present a certificate of any physician, approved by the director, that their disability is not such as to prevent the efficient performance of the duties of the position to which they are eligible and who shall present proof satisfactory to the director that such disability was received in line of duty in the military or naval service of the United States in time of war or naval service of the United States in time of war or insurrection and is a continuing disability shall be placed ahead of all other veterans on such eligible lists in the order of their respective standing."

for disabled veterans is not absolute. In Hutcheson, two qualified applicants sought the office of assistant commissioner for children's services, where one of the applicants was a disabled veteran and the other a veteran, holding a *provisional appointment*, who was the best qualified and the man whom the Commissioner would appoint in the absence of the statutory mandate, namely: —'a disabled veteran shall be appointed and employed in preference to all other persons, including veterans.' Id. at 479-481. The Commission appointed the disabled veteran. However, the SJC held that the statutory mandate was capricious and contrary to the Declaration of Rights of the Consitution of the Commonwealth. Id. at 490. Interestingly, the SJC did not raise an issue about the civil service status of both parties; the SJC did not draw attention to the fact that the veteran was a provisional appointment. Rather, the SJC stated that "the present situation is that there is no 'absolute preference' of qualified veterans over qualified nonveterans. Nor is there any 'absolute preference' as between two veterans on an eligible list, or as between two disabled veterans on an eligible list ... we think the reasons for preferring a disabled veteran to other veterans are less compelling than the reasons for preferring veterans to nonveterans. We therefore have difficulty in articulating a rational ground for an 'absolute preference' of disabled veterans over other veterans when there is no such preference for veterans over nonveterans." Hutcheson at 489. For other cases resting on the principle that the statutory preference for disabled veterans is not absolute, *see* Andrews v. Civil Serv. Comm'n, 446 Mass. 611 (2006) (disabled veteran not entitled to be retained over departmental employees in a higher title); Commissioner of Metro. Dist. Comm'n v. Director of Civ. Serv., 348 Mass. 184 (1964) (disabled veteran's preference in hiring did not override civil service law prohibiting hiring persons convicted of a felony); Smith v. Director of Civ. Serv., 324 Mass. 455, 460-461 (1949) (upholding constitutionality of disabled veteran preference So far as "it requires that the names of *disabled veterans who pass the civil service examination* and are not physically disqualified be

placed ahead" of others veterans on eligible lists); (*emphasis added*), *cited in* Andrews v. Civil Serv. Comm'n, *supra*, 446 Mass. at 617, n.14; Pamplona v. New Bedford Sch. Comm., 23 MCSR 775 (2010) (an appointing authority may proceed with the involuntary demotion of a disabled veteran with less seniority than his peers when he refused to accept a demotion as part of a §39 layoff); Op.Att'y Gen., P.D. No. 12, p. 69-70 (March 29, 1930) (narrowly construing similar language in prior version of disabled veteran's preference statute to apply only to placement of "classified" (i.e. official service) employees on a certification, but not in their selection, and not to labor service employees)

Younie established the core principle that the civil service law as a whole ought, if possible, to be so construed as to make them effectual pieces of legislation in harmony with *common sense and sound reason.*" Id. at 571. (*emphasis added*)

Likewise, retaining an ineligible person in a specific position not only contravenes the provisions of Chapter 31, but also contradicts common sense and sound reason. It is wholly wrong-headed to believe that the civil service law would require that the "worst" provisional employee in the department must be retained in employment in preference to every other better performer, including all tenured veterans and non-veterans, solely because of the employee's status as a disabled veteran.

In addition, an "absolute preference" is inconsistent with the nature of our democratic and meritocratic government, which abhors the notion that an appointing power should be compelled by legislation, without any discretion, to appoint to public offices certain persons simply due to their group identity. *See* Hutcheson at 480 (1972). For instance, in Brown v. Russell, 166 Mass. 14 (1896), the SJC held that "making the appointment of veterans to the detective force of the Commonwealth's district police compulsory, without examination is unconstitutional whether the appointing power of the commissioners think they are or are not qualified to perform the

duties of the office or employment which they seek." Hutcheson at 483. The SJC further stated that

> *'it is inconsistent with the nature of our government, and particularly with articles 6 and 7 of our declaration of rights, that the appointing power should be compelled by legislation to appoint to public offices persons of a certain class, in preference to all others, without the exercise on its power of any discretion, and without the favorable judgment of some legally constituted officer or board designated by law to inquire and determine whether the persons to be appointed are actually qualified to perform the duties which pertain to the offices.'* Id. at 483. *(emphasis added)*

The SJC left open a possibility that a civil service law may allow "a preference for veterans who had been found qualified either by the appointing power or by examination, however. "It may be said that, other qualifications being equal, there are reasons to believe that a veteran soldier or sailor often will make a better civil officer than a person who never has been subjected to the discipline of service in war; and it is distinctly a public purpose to promote patriotism, and to make conspicuous and honorable any exhibition of courage, constancy, and devotion to the welfare of the state shown in the public service." Id. at 483. The court stated:

> "..the disabled veteran must pass an examination for appointment and must present a doctor's certificate, approved by the director, that his disability is not such as to prevent the efficient performance of the duties of the position sought. Even after he is properly on the eligible list, the *appointing power may in some circumstances refrain from appointing him on the ground that he is unfit or unsuitable.* "
> Id. at 487. (*emphasis added*)

Thus, the issue is not whether he is provisional or permanent, but whether "the persons to be appointed are actually qualified to perform the duties which pertain to the offices." Id. at 487.

Here, the substantial evidence established that the Appellant could not show that there were any other Administrator III positions for which he was qualified within EOLWD into which he could have been transferred.

At the time of Appellant's separation he held the functional title of Manager of Special Program Oversight. Appellant's duties and responsibilities were specific in nature as they pertained to the service of a defined community of citizens benefiting from a discrete program.

More importantly, after a human resources professional review of his classification done at the request of Appellant, it was determined that he was not performing the functions of an Administrator III and his position should have been more appropriately classified as a Program Coordinator II. Although this reclassification would not occur while Appellant retained his position, the results of the reclassification review demonstrates that the Appointing Authority determined that Appellant's position was more similar to Program Coordinator II positions and less similar to higher level Administrator III positions.

The four other Administrator III positions within the agency required substantially more complex and distinct skills and abilities than the positions or qualifications held by Appellant. These positions were Manager of Web Services, Manager of Hurley Building Operations, Deputy Director of Contracts and Procurement and Manager of the Office of Multilingual Services. When positions have either more complex or different duties there is no entitlement to a veteran retention preference. Andrews at 611. Appellant, although qualified for the position of Manager of Program Oversight, is not qualified to serve in any of the other Administrator III positions. As Mr. Olsen testified, Appellant lacks a multitude of fundamental skills and abilities that are necessary to satisfactorily perform in the other positions. These skills and abilities inherent to each position are reflected in the functional titles. Incumbent employees are expected to possess the requisite skills as they are not easily taught absent extensive work and educational experience. Therefore, pursuant to statutory language and its interpretation under the laws of the Commonwealth, Appellant's veteran status does not allow him to be retained in positions of different titles that require very different skills and abilities than those possessed by Appellant.

The Appellant's Section 39 Claim

Finally, the Appellant argues that he also enjoys certain protections as a *disabled veteran* under c. 31, §39. Section 39 provides:

> If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of . . . lack of money . . . they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit and shall be reinstated in the same unit and in the same positions or positions similar to those formerly held by them according to such seniority, so that employees senior in length of service. . .shall be retained the longest and reinstated first. Employees separated from positions under this section shall be reinstated prior to the appointment of any other applicants to fill such positions or similar positions, provided that the right to such reinstatement shall lapse at the end of the ten-year period following the date of such separation.
> ... Any such employee who has received written notice of an intent to separate him from employment for such reasons may, as an alternative to such separation, file with his appointing authority, within seven days of receipt of such notice, a written consent to his being demoted to a position in the next lower title or titles in succession in the official service or to the next lower title or titles in the labor service, as the case may be, if in such next lower title or titles there is an employee junior to him in length of service. As soon as sufficient work or funds are available, any employee so demoted shall be restored, according to seniority in the unit, to the title in which he was formerly employed.
>
> ... *Nothing in this section shall impair the preference provided for disabled veterans by section 26. (emphasis added)*

By its express language, Section 39 applies only to the layoff of "permanent", i.e., tenured civil service employees. It grants no additional rights to "provisional" employees that are not contained in Section 26. *See, e.g.,* Andrews, 446 Mass 611 (2006).

Moreover, the Supreme Judicial Court examined the rights of permanently tenured disabled veterans in the event of layoffs in Provencal v. Police Dep't of Worcester, 423 Mass. 626 (1966) (decided upon further appeal from a divided Commission decision). Twenty-nine (29) police sergeants, including Sgt. Provencal, were informed that the Worcester Police Department (hereinafter "WPD") was contemplating their layoff due to lack of funds. However, WPD informed the sergeants that they were entitled to a hearing to determine whether there was just cause for the layoffs; and that the sergeants were entitled to demotion if there were employees junior to them in seniority in the next lower title. Sgt. Provencal rejected the offer of demotion, and informed the WPD of his status as a disabled veteran. The WPD then informed him that it

would hold a §41 hearing in order to determine whether there was just cause to demote him due to lack of funds. After the hearing, WPD demoted Sgt. Provencal to patrol officer, while retaining other non-disabled-veterans with greater seniority in the position of sergeant. Id at 627. The Court ruled:

> Chapter 31, §39, does not directly deal with disabled veteran preferences . . . The legislative scheme is that, if a *permanent* employee is to be separated from his position because there is not enough work or money to justify his continuance therein, he or she shall be separated, not just from the position, but from his other employment relationship with, in this case, the department, unless, as provided in the second paragraph [of §39] he or she accepts demotion as an alternative. Whenever the alternative is accepted, the employee is 'retained in employment' but not in his or her position. We conclude that in the Legislature's collective mind, for purposes of G.L.c.31, including §26, 'retained in employment' does not mean or include retention in a specific position. *The provision at issue in §26 refers to disabled veterans being kept on the payroll in preference to others. It does not refer to a preference with respect to demotions.*"
> Id. at 628-30. *(emphasis added)*

Cases that are in accord with Provencal include: Greaney v. Department of State Police, 52 Mass.App.Ct. 789 (2001), aff'd, 446 Mass. 611 (2002) (distinguishing disabled veteran's preference in c. 31 §26 from preference to certain veteran managers in G.L. c. 30 §9A which expressly covers involuntary separation from an "office or position"); Pamplona v. New Bedford Sch. Comm., 23 MCSR 775 (2010) (an appointing authority may proceed with the involuntary demotion of a disabled veteran with less seniority than his peers when he refused to accept a demotion as part of a §39 layoff); Hawks v. Department of Envtl. Protection, 23 MCSR 814 (2010) (a provisional Accountant IV employee with underlying civil service permanency as an Accountant III would have bumping rights under §39, limited to bumping provisional or temporary Accountant IIIs or any permanent Accountant IIIs with less civil service seniority).

Thus, even a permanently tenured disabled veteran is not granted any unconditional absolute right to employment in his position in the face of budget cuts or layoffs; he may be separated if there are no other positions which he is qualified to perform and which are not then occupied by a tenured employee with greater seniority.

In this case, if the Appellant's provisional status were to grant him any rights under Section 26 (which it does not), his appeal would also fail because the evidence – as discussed above -- conclusively proved that there were no other suitable Administrator III positions for which he was qualified and into which he could have "bumped".[5]

For all the above reasons, the appeal filed under Docket No. D1-08-94 is hereby *dismissed.*

Angela McConney Scheepers
General Counsel

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein [Marquis, absent], Commissioners) on December 15, 2011.

A true record. Attest:

Commissioner

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:
Michael E. Williams, Esq. (for Appointing Authority)
Larry C. O'Bryan, Esq. and Galen Gilbert, Esq. (for Appellant)

[5] One of the positions was held by a permanent, tenured veteran. As discussed above, a provisional employee cannot bump a tenured employee under any circumstances. The evidence is inconclusive whether the other three positions were held by permanent or provisional employees.