Decision mailed: 11/6/09
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

CATHERINE O'DONNELL &
ROBERT WASHINGTON,
Appellant

O'Donnell (D1-09-236)
Washington (D1-09-250)

v.

REGISTRY OF MOTOR VEHICLES,
Respondent

Appellants' Attorney:

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Participant:

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Commissioner:

Christopher C. Bowman

DECISION ON HUMAN RESOURCES DIVISION'S MOTION TO DISMISS &
APPELLANTS' REQUEST FOR RELIEF
UNDER CHAPTER 310 OF THE ACTS OF 1993

Procedural Background

Catherine O'Donnell and Robert Washington (hereinafter "Appellants") filed separate appeals with the Civil Service Commission (hereinafter "Commission") after they were laid off from the Registry of Motor Vehicles (hereinafter "RMV" or "Appointing Authority").

Both Appellants argue that RMV failed to comply with the requirements of G.L. c. 30, § 46D by not allowing them to return to their permanent civil positions after being laid off from their provisional management titles. (Both parties are represented by the same attorney.)

Separate pre-hearing conferences were conducted at the offices of the Commission. The state's Human Resources Division (hereinafter "HRD") filed motions to dismiss each appeal and the Appellants each filed an opposition thereto. The National Association of Government Employees R1-292 (hereinafter "NAGE") was allowed to join the proceedings as a participant.

A joint motion hearing was conducted at the offices of the Commission on September 28, 2009. The record was left open for RMV and HRD to provide information requested by this Commissioner. (The information was subsequently received and copied to all parties.)

FINDINGS OF FACT

Facts Specific to Catherine O'Donnell (Case No. D1-09-236)

1. RMV first employed Ms. O'Donnell on September 16, 1973. RMV appointed Ms. O'Donnell to the position of permanent full-time Receiving Teller on December 28, 1980. (HRD's Motion to Dismiss)
2. On July 20, 2000, RMV permanently appointed Ms. O'Donnell to the title of Clerk V, also known as Customer Service Representative III.[1] (HRD Motion to Dismiss)
3. Prior to September 17, 2000, Ms. O'Donnell was a member of the Union and subject to the Unit 1 collective bargaining agreement. (HRD Motion to Dismiss)
4. On September 17, 2000, RMV provisionally promoted Ms. O'Donnell to the title of Program Manager III. (HRD Motion to Dismiss)
5. On July 1, 2003, RMV provisionally promoted Ms. O'Donnell to the title of Program Manager IV, also known as Branch Manager. (HRD Motion to Dismiss)
6. On May 4, 2009, RMV laid off Ms. O'Donnell from her Program Manager IV position. (HRD Motion to Dismiss)
7. Ms. O'Donnell was notified of the layoff via a May 4, 2009 RMV letter which stated in relevant part:

   "Current budgetary circumstances mandate a reduction in expenditures for fiscal year 2009. I regret to inform you that the position you currently occupy has been identified for layoff. Therefore, you will be laid-off from your position of Branch Manager in the RMV effective 5/4/09." (May 4, 2009 RMV Letter)
8. At the time of her layoff, Ms. O'Donnell was a manager in the Fall River branch office. The Fall River branch office is in the Southeastern region of the

[1] In its Motion to Dismiss, HRD states that the Appellant was permanently appointed to the title of Clerk V on July 20, 2000. It appears that this is more appropriately deemed a promotional appointment.

Commonwealth. (Attachment to Appellant's Opposition to Motion to Dismiss: RMV response to separate MCAD complaint filed by Appellant)

Facts Specific to Robert Washington

9. RMV first employed Mr. Washington as a temporary Clerk I on March 4, 1986. (HRD Motion to Dismiss)
10. On February 7, 1988, Mr. Washington received permanency in the Typist II title. (HRD Motion to Dismiss)
11. Prior to February 4, 1990, Mr. Washington was a member of the Union and subject to the Unit I collective bargaining agreement. (HRD Motion to Dismiss)
12. On February 4, 1990, RMV provisionally promoted Mr. Washington to the title of Program Manager II. (HRD Motion to Dismiss)
13. On February 13, 1994, RMV provisionally promoted Mr. Washington to the title of Program Manager III. (HRD Motion to Dismiss)
14. On February 14, 1999, RMV provisionally promoted Mr. Washington to the title of Program Manager IV. (HRD Motion to Dismiss)
15. On May 1, 2009, RMV laid off Mr. Washington from his Program Manager IV position in a letter which stated:

> "Current budgetary circumstances mandate a reduction in expenditures for fiscal year 2009. I regret to inform you that the position you currently occupy has been identified for layoff. Therefore, you will be laid-off from your position of Branch Manager in the RMV effective 5/1/09." (May 1, 2009 RMV Letter)

Facts common to both appeals

16. RMV employees employed in job titles in bargaining Unit 1, as certified by the Division of Labor Relations, are members of NAGE. The terms and conditions of

such employees are governed by the Unit 1 collective bargaining agreement. Employees in management titles are excluded from the collective bargaining agreement. (NAGE Unit 1 Collective Bargaining Agreement)

17. The Appellants were two (2) of eight (8) RMV managers laid off in May 2009. According to RMV, Ms. O'Donnell was identified as one of the branch managers to be laid off because her salary ($58,577.00) was higher than that of most managers and as such afforded more savings to RMV than other managers. (Attachment to Appellant's Opposition to Motion to Dismiss: RMV response to separate MCAD complaint filed by Appellant) Mr. Washington's salary at the time he was laid off was approximately $64,000.
18. If Ms. O'Donnell is restored to the title of Clerk V (Customer Service Representative III), her annual salary would be approximately $47,000. (Testimony of Ms. O'Donnell) If Mr. Washington is restored to the title of Typist II, his annual salary would be approximately $28,000. (Testimony of Mr. Washington)
19. RMV has hired ten (10) new employees in management positions during the period January 1, 2008 through March 1, 2009. (Attachment to Appellant's Opposition to Motion to Dismiss: RMV response to separate MCAD complaint filed by Appellant)
20. At the motion hearing regarding this matter, RMV stated that some of the above-referenced new management employees were retained for "business reasons".
21. In May 2000, the management position of a person named Lorraine Lague was eliminated and she was permitted to take a demotion to her permanent civil service title of Receiving Teller. (October 9, 2009 RMV Correspondence to Commission)

22. In March 1991, the management position of a person named Paula Tosca was abolished and she was permitted to return to her permanent civil service title of Receiving Teller I. (October 9, 2009 RMV Correspondence to Commission)

23. In response to a request for information by this Commissioner, HRD provided correspondence to the Commission dated October 2, 2009 which states in relevant part:

> "Since at least 1983, layoff and bumping issues took place at the agency level and HRD would not have been notified. Upon information and belief, the practice regarding whether managers may revert to their tenured civil service titles was varied across state agencies. Although HRD would deny such a request today, it believes it is within the Civil Service Commission's broad equitable powers to permit a manager to return to his tenured civil service title if he relied, to his detriment, on representations that such a return would be permitted."

24. When they accepted their provisional promotions to management titles, both of the Appellants believed that they would have the option of being restored to their permanent civil service titles if they were laid off because of lack of funds and/or their positions were abolished or eliminated. (Testimony of Appellants)

25. The HRD publication "Guide to Managing Staff Reductions", updated on October 31, 2008, states in relevant part:

> "Some managers may have tenure in a non-management, lower civil service title. These are employees who passed a civil service examination and were appointed from a civil service list to a permanent position pursuant to G.L. c. 31. These managers have permanent civil serve status in a lower title than the one in which they currently serve.
>
> One consideration in making a layoff decision is determining whether that manager may return to the lower position in which they have civil service permanency. If the manager has rights to the lower position, the manager may displace another employee in the title in which the manager was a permanent tenured civil service employee, provided the displaced employee is provisional or has less

civil service seniority. A provisional employee is a person appointed or promoted to a civil service position pending the establishment of an eligible list.

A manager having tenure in a lower title who is to be laid off must receive no less than seven days notice of hearing, including date, time and place. Manager who is being laid off must be given written notice of the Appointing Authorities (sic) decision two days after said hearing."

26. G.L. c. 30, § 46D provides in pertinent part:

> "[i]n every instance of a manager or employee so promoted from a position classified under chapter thirty-one of the General Laws or from a position in which at the time of promotion he shall have tenure by reason of section nine A of this chapter, upon termination of his service in the position to which he was so promoted, the manager or employee shall, if he so requests, be restored to the position from which he shall have been promoted, or to a position in the same state agency, without impairment of his civil service status or his tenure by reason of said section nine A or loss of the seniority, retirement and other rights to which uninterrupted service in such position would have entitled him..."

27. G.L. c. 150E, § 7(d), provides in pertinent part that, the terms of a collecting bargaining agreement must prevail:

> If a collective bargaining agreement reached by the employer and the exclusive representative contains a conflict between matters which are within the scope of negotiations pursuant to section six of this chapter and... sections forty-five to fifty, inclusive, of chapter thirty... the terms of the collective bargaining agreement shall prevail."

ARGUMENT

HRD argues that the Appellants' appeals should be dismissed for any one (1) of the following three (3) reasons:

1. Since a conflict exists between G.L. c. 30, § 46D and the terms of the Unit 1 collective bargaining agreement, the terms of the agreement must prevail, thus preventing the Appellants from displacing employees covered by the contract.

2. The Appellants are not entitled to the relief requested because they did not occupy the civil service positions to which they seek to be restored "immediately before promotion to the management position [from which they were separated].

3. Mr. Washington is not entitled to the relief requested because he had not achieved tenure in the title to which he is seeking to be restored.

Issue 1: Is there a conflict between G.L. c. 30, § 46D and the CBA?

Chapter 30, § 46D provides a mechanism by which a manager may be restored into a lower permanent civil service position or to a position in the same state agency. If the Appellants were restored to their lower permanent civil service positions (Clerk V and Typist II respectively), it would impact an incumbent Clerk V and Typist II. HRD argues that since this is not permitted under the Unit 1 collective bargaining agreement, there is now a conflict between Section 46D and the CBA and the CBA must prevail.

NAGE, who was joined as an interested party in these appeals, disagrees with this argument. NAGE asserts that HRD can not be permitted to "interpose inapplicable contract language that NAGE has negotiated as a screen in an effort to deprive [a] working person of his or her rights under the law." NAGE argues that since the Appellants are not members of the union and they are not covered by the CBA, it would be illegal for NAGE to bargain for employees it does not represent. Therefore, according to NAGE, there can be no conflict with the CBA.

Further, NAGE argues that any Clerk V or Typist II impacted by the Appellants' restoration to their permanent civil service titles would be able to exercise his or her bumping rights pursuant to Article 18 of the CBA. HRD argues that Article 18 only provides such bumping rights if the union member's position is being abolished or eliminated. NAGE disagrees and maintains that bumping rights would be allowed, either under the CBA, or in the case of permanent civil service employees, under Chapter 31.

While interpretation of the applicable provisions of the CBA, at least in regard to provisional employees, would likely be resolved in a different forum from the Civil Service Commission, I concur with NAGE that an impacted Clerk V or Typist II would be entitled to certain bumping rights pursuant to the CBA and/or Chapter 31, Section 39.

Even if HRD is correct regarding the issue of bumping rights of Unit 1 members, Section 46D provides RMV with the option of restoring these provisional managers to their lower civil service positions "or to a position in the same state agency". This language gives RMV broad discretion to restore the Appellants to non-union positions, thus eliminating any question regarding a conflict with the CBA. For example, RMV could opt to retain and/or restore the Appellants in a different management title currently held by individuals that, according to RMV, were hired in the past three years. As referenced above, the Appellants are career RMV employees with just under 60 years of collective experience between them. Both of them worked their way up the ranks, ultimately being promoted to the functional position of Branch Manager. Section 46D permits such a course of action. Equity and good conscience demands it.

Issue 2: Is relief under Section 46D limited only to managers who held a permanent civil service position "immediately prior to their promotion?"

HRD argues that the Appellants are also not entitled to relief under Section 46D because they did not occupy the civil service title to which they are seeking to be restored immediately before their promotion to the management positions from which they were separated.

In support of their argument that such a requirement exists, HRD cites Knox v. Civil Serv. Comm'n, 63 Mass. App. Ct. 904, 906 (2005), in which the Appeals Court held, "under section 46D, one who loses her position in managerial grades may in certain

circumstances be restored to a civil service position which she had occupied immediately before promotion to the management position [from which she was separated], provided that she had received tenure in the position." (emphasis added)

The Appellants argue that HRD's reliance on a footnote in Knox is misplaced. I agree. In Knox, the facts were starkly distinguishable from the instant appeals. Most notably, the Appellant (Ms. Knox), never held permanency in any civil service title. A passing reference, presumably to Section 46D, via a footnote in the Appeals Court decision, does not preclude the Commission from fully examining this section of the civil service law and providing its interpretation. In doing so, I take note of G.L. c. 18, § 8, regarding the civil service status of commissioners at the Department of Transitional Assistance, which states in relevant part:

> "If an employee of the commonwealth or of a political subdivision, as defined in section one of chapter thirty-two, shall be appointed to the office of commissioner, deputy commissioner or assistant commissioner, he shall upon termination of his service in such office be restored to the position which he held immediately prior to such appointment."

In contrast, c. 31, § 46D contains no such language limiting restoration rights to those employees that held a position (in this case, a permanent civil service position), immediately prior to their appointment (in this case, as a Program Manager IV). The omission of those words in Section 46D, I believe, is significant.

Further, neither HRD or RMV has provided the Commission with any evidence that Section 46D has ever been interpreted, either by HRD or RMV, as being limited to employees who held a permanent civil service position immediately prior to the management position from which they are being laid off. Rather, according to RMV, when a manager by the name of Lorraine Lague had her management position eliminated,

she was permitted to take a demotion to her permanent civil service title of Receiving Teller. Based on the level of the management position held by Ms. Lague at the time and the level of the Receiving Teller position, it is reasonable to conclude that Ms. Lague received several intervening promotions between Receiving Teller and the management title she held at the time her management position was eliminated. I reach the same conclusion regarding the case of Paula Tosca, who was also permitted to return to her permanent Receiving Teller I position after RMV abolished her management position.

Similarly, an HRD guide regarding layoffs, updated as recently as October 2008, gives no indication that Section 46D protections are limited only to managers who held a civil service position immediately prior to their promotion. Had HRD previously interpreted Section 46D as having this restriction, I reach the reasonable conclusion that this would have been noted in their guide to state agencies.

Issue 3: Must an employee have previously been a tenured civil service employee in order to receive relief under Section 46D?

Citing the Knox case referenced above and the language of Section 46D, HRD argues that Mr. Washington is not entitled to the relief requested, because he was never a tenured civil service employee.

As referenced above, c. 31, § 46D states in relevant part that:

> 'In every instance of a manager or employee so promoted from a position classified under chapter thirty-one of the General Laws or from a position in which at the time of promotion he shall have tenure by reason of section nine A of this chapter, upon termination of his service in the position to which he was so promoted, the manager or employee shall, if he so requests, be restored to the position from which he shall have been promoted, or to a position in the same state agency, without impairment of his civil service status or his tenure by reason of said section nine A or loss of the seniority, retirement and other rights to which uninterrupted service in such position would have entitled him; provided, however, that if his service in the position to which he was promoted shall have been terminated for cause, his right to be restored

shall be determined by the civil service commission, in accordance with the standards applied by said commissioner in administering chapter thirty-one."

HRD argues that Section 46D requires that relief be limited to those individuals who were tenured civil service employees. The reference to tenure, however, is clearly limited only to veterans that are covered by Section 9A of Chapter 30. Here, by twice using the word "or", it is clear the legislature meant to add individuals who are to receive protection under Section 46D. Those "added" employees are those who held a position in which at the time of promotion he shall have tenure by reason of section nine. There is no reference to tenure in this first sentence for the broader group of employees referenced before the word "or". In fact, the distinction is confirmed later in the first sentence of this paragraph in which it states that individuals should be restored to their positions *without impairment of his civil service status* **or** *his tenure by reason of said section nine A*. It is clear that the legislature is distinguishing the two groups by providing that the first, broader group of employees shall have no impairment to their civil service status while the second, more limited group (veterans covered under Section 9A) shall no impairment to their tenure. Further, I reach the reasonable conclusion that civil service status refers to an individual's permanent civil service status. Thus, in addition to those afforded protection under Section 46D as a result of Section 9A, only those individuals who previously held a permanent civil service position are entitled to protections under Section 46D.

CONCLUSION

As is the case with most state agencies, the Registry of Motor Vehicles is facing the harsh reality of implementing layoffs as a result of budget cuts caused by an

unprecedented nationwide downturn in the economy. I do not underestimate the monumental task faced by RMV officials nor do I question their sincerity in trying to implement these budget cuts in a manner that has the least impact on its customers.

However, after a careful review of all the evidence in this case, I conclude that the Registry of Motor Vehicles did not comply with the provisions of Section 46D when it failed to provide the Appellants with the option of being restored to their permanent civil service positions after being laid off as branch managers. The Appellants, at the time of their promotions, reasonably relied upon a well-established interpretation and application of Section 46D by both RMV and HRD leading them to believe that they would be returned to their permanent civil service positions in the event they were laid off from their management positions.

For all of the above reasons, HRD's Motions to Dismiss are denied and the Appellants' request for relief is ***allowed***. Pursuant to Chapter 310 of the Acts of 1993, the Civil Service Commission hereby orders RMV to:

1. Restore Robert Washington to his permanent civil service position of Typist II or, at RMV's discretion, to another position in the agency (i.e. – Program Manger III, II or I);

2. Restore Catherine O'Donnell to her permanent civil service position of Clerk V, also known as Customer Service Representative III or, at RMV's discretion, to another position in the agency (i.e. –Program Manager III, II or I).

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on November 5, 2009.
A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:
Susan Byrd, Esq. (for Appellants)
John Casey, Esq. (for Appointing Authority)
Martha O'Connor, Esq. (for HRD)
John Mann (NAGE) (Participant)