Decision mailed: 2/10/12
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
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CHARLENE PHILLIPS,
Appellant

CASE NO: D1- 11-228

v.

DEPARTMENT OF PUBLIC HEALTH, and **PAUL DIETL, CHIEF HUMAN RESOURCES OFFICER**
Respondents

Appellant's Attorney:	Galen Gilbert,Esq. Jeremy King, Esq. Gilbert & O'Brien LLP 294 Washington Street, Suite 351 Boston, MA 02108
Department of Public Health Representative:	Christopher Groll, LR Specialist Executive Office of HHS 600 Washington Street – 7th Floor Boston, MA 02111
HRD Attorney:	Martha Lipchitz O'Connor, Esq. Anna Shapell, Law Clerk Human Resources Division One Ashburton Place Boston, MA 02018
Commissioner:	Paul M. Stein

DECISION

The Appellant brought this appeal to the Civil Service Commission (Commission) claiming she was unlawfully terminated from her position as a Contract Specialist I (CS-I) with the Department of Public Health (DPH) and that the Massachusetts Human Resources Division (HRD) unlawfully denied her request to postpone the DPH layoffs pending a "classification study" under G.L.c.30, §45 and reclassification of her position to the tittle of Administrative Assistant I (AA-I). The DPH moved to dismiss the appeal

on the grounds that the Appellant was a provisional employee appointed in 1997 with no right of appeal to the Commission, that no request for a "reclassification" under G.L.c.30,§49 was made until after she learned of her layoff, and that the Commission lacks jurisdiction to review the failure to conduct a Section 45 classification study.. HRD moved for summary decision on substantially similar grounds. The Appellant opposed both motions. A hearing on the motion was held before the Commission on September 12, 2011. At the Commission's request, on September 30, 2011 and October 26, 2011, the DPH and the Appellant submitted additional documentation and arguments in support of their respective positions.

FINDINGS OF FACT

Giving appropriate weight to the documents and oral argument submitted by the parties, I find the following material facts to be undisputed:

1. The Appellant, Charlene Philips worked at the DPH Clinical Diagnostic Laboratory (State Lab) in the title of Contract Specialist I (CS-I) from July 1, 1997 through June 30, 2011. (*Claim of Appeal; DPH Motion, Exhs. A & B; HRD Motion, Exh. B*)

2. The Contract Specialist job series falls within the official service. The CS-I job title is the entry level title in the job series. (*DPH Motion, Exh., C; Appellant's Opposition to DPH Motion, Exh.B; HRD Motion, Exh. C*)

3. Immediately prior to her state employment, Ms. Phillips worked at the State Lab as the employee of a private company, Massachusetts Health Research Institute (MHRI), when her MHRI job was converted to a civil service position. Ms. Phillips does not claim that her appointment to the position of CS-I (or to any civil service position in the official

service) was made from any certification or eligible list established after taking and passing a competition civil service examination for the position. There is no dispute that HRD has not given any competitive examination for the position of CS-I or AA-I during the period relevant to this appeal. (*Claim of Appeal; DPH Motion, Exh. B; Appellant's Opposition to DPH Motion, Exh. A; Appellant's Affidavit, Exhs H; HRD Motion, p. 5; Representations at Motion Hearing*)

4. At all times during her employment as a CS-I, Ms. Phillips was a member of the Unit 6 of the National Association of Government Employees (NAGE) and subject to the terms of a collective bargaining agreement (CBA) between NAGE and the Commonwealth. (*DPH Motion, Exhs. A, B, F & Suppl. Exh. G; HRD Motion, p. 2 & Exhs. B, D & G; Appellant's Affidavit, Exhs. D through F*)

5. On or about April 28, 2011, Ms. Phillips received written notice from DPH that her position was being eliminated due to substantial cuts in the DPH budget for FY2011. She was offered a $3,500 incentive to accept a voluntary layoff. Ms. Phillips does not contest that financial constraints were the reason for the decision to eliminate her position. The Commission takes administrative notice that the FY2012 budget for the State Lab was reduced to $12,713,000 from the FY2011 level of $13,295,881. (*DPH Motion, Exh. D; Appellant's Opposition to DPH Motion; Appellant's Affidavit; Administrative Notice [http://www.mass.gov/bb/gaa/fy2012/app_12/dpt_12/hhdph.htm/]*)

6. As a result of a request from NAGE Unit 6, Ms. Phillips' layoff date was extended from May 13, 2011 to June 30, 2011. (*DPH Motion, Exh. B*)

7. On or about June 2, 2011, after further negotiations, Ms. Phillips was offered a settlement agreement, through her union, by which she would be allowed to "bump" into

a vacant position of Administrative Assistant I (AA-I) at the Lemuel Shattuck Hospital, subject to certain conditions, in lieu of being laid off. As Ms. Phillips had no contractual rights to bump any existing DPH employees and the position of AA-I was a promotion and pay grade increase (from Job Grade 6 to Job Grade 7), DPH conditioned the settlement upon, among other things, Ms. Phillips waiving future claims against the DPH. (*DPH Motion, Exhs. B, Suppl. Exh. G; Appellants Opposition to DPH Motion, Exhs. C & D, Appellant's Affidavit, Exhs. E through G*)

8. On June 6, 2011, Ms. Phillips e-mailed DPH that she had decided to "respectfully decline the offered position" of AA-I. (*DPH Motion, Suppl. Exh. G; Appellant's Affidavit, Exh. G*)

9. Ms. Phillips testified that one of the reasons she did so was that she believed that taking the position would require her to forfeit her prior 14 years of seniority with DPH. In particular, she said she believed that acceptance of the position would mean her seniority date would be changed from her hire date (July 1, 1994) to May 11, 2011 (the date she was originally scheduled to be laid off) because the DPH "Bumping Options" form showed an entry of "5/13/2011" as the "Dept.Sen.Date" in the description of the vacancy she was being offered. (*DPH Motion, Suppl. Exh. G; Appellant's Affidavit*)

10. The second reason given by Ms. Phillips for declining the offer was her reluctance to waive all claims against DPH "relative to her bump award", including, in particular, MCAD complaints. Ms. Phillip's stated that she was the only DPH employee who had not been afforded "bumping rights" and that she had been singled out for this treatment due to her race and her age. (*Appellant's Affidavit*)

11. Ms. Phillips stated that her decision was made after consultation with her union representative, but that she discussed neither the "seniority of the job offer nor the waiver of discrimination claims" with her union. Ms. Phillips stated that if she was not required to waive her discrimination claims and did not believe she would lose her fourteen years of seniority "I would have gladly accepted" the AA-I position. (*Appellant's Affidavit*)

12. DPH disputed both reasons stated by Ms. Phillips for declining the offer for a position as an AA-I at Lemuel Shattuck Hospital. As to the alleged loss of seniority, DPH points out that Ms. Phillips misread the form, which clearly identified, in bold type, in TWO separate places, that **her** "**Dept. Seniority Date**" was "**07/01/1997**". The 5/13/2011 date on the form was simply a default date because the position was vacant and there was no incumbent in the position (i.e.., a means of data tracking that allowed any otherwise eligible employee whose seniority date would necessarily be earlier than 5/13/2011, to bump into the position.) DPH also points out that Ms. Phillips seniority was governed by the Article 18.2 of the CBA with NAGE, which clearly stated that her seniority was measured by her length of service at DPH, and that, had she accepted the position, she would have been the most senior AA-I in the department. (*DPH Motion, Exh. F, Suppl. Exh. G; See also HRD Motion, Exh. D*)

13. As to the second reason, DPH did not contest that the requirement for a settlement agreement was a unique circumstance, but justified the requirement on the fact that Ms. Phillips had no contractual bumping rights under the union contract (because her CS-I position was the lowest, entry level position in her job series and there were no other CS-I positions into which she could have bumped) and the DPH wanted to assure that, if Ms.

Phillips accepted the position, it would put closure to any possible future questions regarding the matter. (*DPH Motion, Exh. B, Suppl. Exh. G*)

14. DPH also stated that Ms. Phillips never mentioned either the loss of seniority or waiver of claims to DPH. The only concern DPH recalled that Ms. Philips mentioned was the fact that she had been allowed to work a four-day alternative work schedule in her position as a CS-I and that the AA-I position was a full-time five-day a week job. DPH informed Ms. Philips that she was entitled to request an alternative schedule for the AA-I position as well, but, as with any employee, it would be subject to future approval after she reported to her new location. (*DPH Motion, Suppl. Exh. G*)

15. On June 17, 2011, DHP wrote to Ms. Phillips acknowledging her request to be processed through the Voluntary Layoff Incentive Program, with her last date of employment on June 30, 2011. (*DPH Motion, Exh. F*)

16. On June 23, 2011, Ms. Philips filed a claim of discrimination against DPH with the MCAD. It appears that matter is still pending. (*Appellant's Affidavit*)

17. On June 28, 2011, Ms. Phillips, through her attorney, wrote to HRD, to "request under M.G.L.c.30, §45(4)(a) for the personnel administrator to perform a classification study" and to "postpone any pending layoffs until the completion of that study". The letter stated that it was "common knowledge at the William Hinton State Lab that many employees have long worked out-of-title", and contended that "DPH's misclassification scheme has also served to eliminate any 'bumping rights' that Ms. Phillips would have under her union contract" and, had she been "properly classified she would not be facing layoff." Ms. Phillips June 28, 2011 letter shows no copy sent to DPH. (*Appellant's Motion, Exh. A: HRD Motion, Exh. F*)

18. According to Ms. Phillips, although she had worked as a contract specialist for MHRI, she did not ever perform the duties of a CS-I as defined by the HRD Classification Specification for that position at any time after her job was converted to a civil service position. Rather, she claims that the job was essentially a clerical position, that involved such duties as data entry, typing, filing, order processing, telephone and switchboard coverage and delivery of mail and other documents, all as reflected on her FY2010 Employee Performance Review Form. (*Appellant's Opposition, Exhs A &. B*)

19. At no time during her fourteen years of employment did Ms. Phillips file any appeal seeking a reclassification of her position in accordance with the provisions of Chapter 30, Section 49, the provisions of Article 17.3 of the CBA with NAGE, and the DPH practice and procedures prescribed for making such requests . (*DPH Motion, Exhs. B &F; HRD Motion, pp. 9-11, Exh. D*)

20. Ms. Phillips was laid off, effective July 1, 2011. The record does not indicate that she received or accepted the $3,500 layoff incentive payment. (*HRD Motion, Exh B*)

CONCLUSION

Summary

Ms. Philips was appointed as a provisional employee and never gained the legal status of a tenured civil service employee entitled to appeal the abolition of her position under G.Lc.31,§39, which right the statute expressly provides solely to permanent civil service employees. Her claim that DPH and HRD are equitably estopped to deny her status as a permanent civil service employee, her claim that G.L.c.30, §9B grant her such rights, and her claim to nunc pro tunc relief to be reclassified under G.Lc.30, §45 and §49, all are without merit. Indeed, Ms. Phillips' own laches and lack of due diligence on her part make her a particularly unappealing candidate for form of equitable relief.

Applicable Legal Standard

The Commission may, on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before he Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(7)(h).

These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, (2008). See also Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-36, (2008) (discussing standard on motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Statutory Layoff Rights Under Civil Service Law

Section 39 of G.L.c.31 prescribes the procedures for selecting civil service employees for layoff, as well as the process by which employees whose positions are abolished may "bump" down to a lower level job held by a less senior employee, in lieu of layoff.

> *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

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. (*emphasis added*) [1]

An employee aggrieved by a violation of his/her rights under Section 39 is entitled to a hearing before the appointing authority and may appeal to the Commission for a de novo review of the appointing authority's decision. G.L.c.31, §41 through 43.

An employee gains "permanent" status (or "tenure") in a civil service position within the meaning of Chapter 31 in one of several specific ways – through an "original" or "promotional" civil service appointment made by selection from a certification prepared

[1] The term "title" is defined in G.L.c.31, §1 as "a descriptive name applied to a position or group of positions having similar duties and the same general level of responsibility". G.L.c.31,§1 defines a "series" as "a vertical grouping of related titles so that they form a career ladder." The Commission construes these terms in the layoff statute, to mean that an official service employee is restricted to bumping rights under Section 39 within the employee's job series – i.e., under civil service law, a CS-II could bump a CS-I, but not an AA-I. See Tomashpol v. Chelsea Soldiers Home, 23 MCSR 52 (2010), affirmed sum non Tomashpol v. Civil Service Comm'n, Suffolk Superior 2010SUCV459 (4/11/2011). Here, the specific issue of Ms. Phillips' civil service bumping rights do not need to be addressed, as either the position she held (CS-I) or the position she claimed she should have been assigned (AA-I) are both entry level official service positions and there is no lower title in the series into which she could have bumped. While some collective bargaining agreements provide more expanded "bumping corridors", failure to observe the requirements of such an agreement, if any, would be a matter for a union grievance pursuant to G.Lc.150E, which is not a matter within the jurisdiction of the Commission to interpret or enforce. *Id.*

from an eligible list of candidates ranked according to their marks on a competitive examination, through special legislation, or through an order by the Commission pursuant to Chapter 310 of the Acts of 1993. G.L.c.31, §§1, 6 through 11, 16 through 27; e.g., Shea v. Boston Municipal Police Dep't, 15 MCSR 90 (2002) A permanent civil service employee is different from a "provisional" employee, who is appointed, in the absence of the existence of an eligible list and without having passed a competitive examination. G.L.c.31, §§1, 12-15.

Similarly, Personnel Administration Rule (PAR) 15(1) regarding layoffs provides that "[a]ll civil rights of an employee *rest in the position in which he holds tenure*" and PAR.15(2) provides: "When . . . employees must be separated from positions . . . 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* . . . . before any civil service employees holding the designated positions in permanent status shall be separated from such positions." ((*emphasis added*).

These laws give tenured civil service employees with "permanency" in a civil service position, but not "provisional" employees who have never held any tenured civil service position, a preference in retention and the right of appeal to the Commission from an alleged improper layoff or termination action of an appointing authority. As stated in Dallas v. Commissioner of Public Health, 1 Mass.App.Ct. 768, 771 (1974):

> "While [G.L.c.31] s 43(a) confers tenure on certain public employees and imposes notice and hearing requirements. . .that section applies only to the removal of a 'person holding office or employment under permanent appointment. . .from such office or employment without his consent. . . .' [T]he petitioner's appointment . . . was only a provisional one, defined by G.L.c.31 s1 . . . as 'an appointment authorized on a requisition where there is no suitable eligible list.' *In the case of a provisional employee, there is 'no tenure, no right of notice or hearing, no restriction of the power to discharge . . . .'* " *citing* Sullivan v. Commissioner of

Commerce & Development, 351 Mass. 462, 465, 221 N.E.2d 761 (1966)(*emphasis added*)

See, e.g., Andrews v. Civil Service Comm'n, 446 Mass. 611, 618-19 (2006) (employee provisionally promoted from tenured position is "in" the provisional position for purposes layoff under G.Lc.31,§39 and has no bumping rights or appeal rights to the Commission); Smith v. Commissioner of Mental Retardation, 409 Mass. 545, 567 N.E.2d 924 (1991) (provisional employee has no right to a Section 41 appointing authority hearing to contest a demotion); Knox v. Civil Service Comm'n, 63 Mass.App.Ct. 904 (2005) (Commission lacked jurisdiction to hear appeal of provisionally appointed employee, reclassified to a management job group, and late discharged); Cordio v. Civil Service Comm'n, 59 Mass.App.Ct. 1110 (2003) (unpublished) (discharged provisional employee had no right of appeal to Commission despite claim that he "should have" been made a permanent employee); McCarthy v. Civil Service Comm'n, 32 Mass.App.Ct. 166, 172n.11 (1992) (citing PAR.15(1) which "regulate the civil service system, G.L.c.31, §3 and have the force of law."); LeFrancois v. Department of Revenue, 23 MCSR 217 (2010) ("The Commission . . . is not aware of any precedent in which a provisional civil service employee has *ever* been permitted to pursue a 'just cause' appeal to the Commission") (*emphasis in original*); Maloof v. Town of Randolph, 21 MCSR 217 (2008) (""It is well established that the Commission does not have jurisdiction to hear an appeal filed by . . . a provisional civil service employee. . . . .")

In the present case, the facts are clear: from the date of her initial appointment through her termination date, Ms. Phillips held her position with DPH as a provisional appointment. She has never held any position as a permanent civil service employee in any title. Thus, by the plain meaning of Section 39 as construed by the Commission and

the courts, she has no right to protest her layoff by way of an appeal to the Commission through Chapter 31, Sections 39 and/or 41. Ms. Phillips seeks to escape this inevitable conclusion by asserting three alternative grounds for relief, all of which are unavailing.

Section 2(b) Appeal

G.L.c.31, §2(b) authorizes appeals to the Commission by persons aggrieved by the actions or inactions of HRD which have abridged their rights under civil service law and rules.[2] The statute provides:

> *No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles* promulgated thereunder *and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status. (emphasis added)*

Chapter 310 of the Acts of 1993 prescribes the discretionary authority granted to the Commission to remediate any violation of civil service law:

> *If the rights of any person acquired under the provisions of [G.L.]chapter thirty-one* . . . or under any rule made thereunder *have been prejudiced through no fault of his own*, the civil service commission may take such action as will restore or protect such rights notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.(*emphasis added*)

The Commission does hear appeals brought against HRD under Section 2(b) from persons other than permanent civil service employees – the most common example being a candidate who alleges he/she was rejected (bypassed) for a civil service job in violation of basic merit principles. There are, however, strict time constraints for bringing such appeals. Except for bypass appeals (i.e., non-selection for original or promotional appointment under G.,L.c.3.1, §27 and PAR.08(3)), appeals to challenge HRD's actions

[2] A similar provision permits appeals from the actions or inactions of an appointing authority, limited to making promotional appointments, and that statute is not applicable here. G.Lc.31,§2(c).

or inactions must be filed with the Commission within 30 days of receipt of notice of the violation. Standard Rules of Adjudicatory Procedure, 801 CMR 1.00(6)(b).

Ms. Phillips makes two arguments that she contends support relief against under Section 2(b) and Chapter 310 as a result of HRD's failure to act. First, she contends that HRD has failed to conduct any civil service examination and, thus, prevented Ms. Phillips from earning the status of a permanent civil service employee "through no fault of her own", which, equitably estops HRD and DPH from claiming that Ms. Phillips is not a permanent employee. Second, she contends that she is misclassified as a CS-I, when she should have been classified as an AA-I. She argues that HRD's failure to rectify this mistake deprived her of retention and bumping rights which she alleges would have enabled her to retain her job, because, had she been reclassified as an AA-I, she would have had more seniority that all other AA-I's and would not have been laid off.

Failure to Conduct Civil Service Examinations

Ms. Philips' first argument has considerable superficial appeal. Save for public safety positions (fire, police, corrections), HRD had not given competitive civil service examinations for state or municipal civil service jobs, for decades in most cases. Further, most Classification Specifications for civil service jobs have not been updated since 1987, as is the case for the CS-I position involved in this appeal. Thus, in the absence of such examinations, non-public safety civil service positions in the Commonwealth (and municipal civil service communities) must be filled "provisionally" under G.L.c.31,§12 or §15, which permits appointment (theoretically) on a "temporary" basis, "pending" the giving of an examination, the latter, a fiction that never occurs. Provisional employees have no civil service tenure and very limited rights under civil service law.

It has been long established that "[p]rovisional appointments or promotions . . . are permitted only in what are supposed to be exceptional instances. . ." City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, after decades without HRD holding competitive examinations for many civil service titles, and the professed lack of appropriations to permit examinations in the near future, hiring and advancement of most civil service employees now can be lawfully accomplished only provisionally. Thus, as predicted, the exception has now swallowed the rule and an appointment "which is provisional in form may be permanent in fact." Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).

The Commission and the courts have wrestled with the issues surrounding the so-called "plight of the provisional" and regularly exhort the civil service community of the corrosive effects of the excessive use of "provisional" appointments and promotions. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff'd, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. See also Poe v. Department of Revenue, 22 MCSR 287 (2009); Pease v. Department of Revenue, 22 MCSR 284 (2009); Olufemi v. Department of Revenue, 22 MCSR 219 (2009); Keohe v. City of Boston, 21 MCSR 240 (2008); Asiaf v. Department of Cons. Rec., 21 MCSR 23 (2008); Rose v. Executive Office of HHS, 21 MCSR 23 (2008); Kasprzak v. Department of Revenue, 20 MCSR 628 (2007) [Kasprzak III]; Connelly v. Department of Social Services, 20 MCSR 366 (2007); Glazer v. Department of Revenue, 20 MCSR 51 (2007); Shea et al v. Department of Revenue, 19 MCSR 232 (2006) [Shea II]; Kasprzak v. Department of Revenue, 19 MCSR 34 (2006) [Kasprzak II]; Tanca v. Department of

Empl. & Training, 9 MCSR 18 (1996); Veneau v. Department of Revenue, 8 MCSR 8 (1995); Felder v. Department of Public Welfare, 7 MCSR 28 (1994) [Felder II; Barrett v. Department of Public Works, 6 MCSR 167 (1993); Felder v. Department of Public Welfare, 6 MCSR 67 (1993) [Felder I]. Little has been done, however, or will be done, to wean the system from this practice without further appropriations from the legislature. As a result there appears no end to the reality that the vast number – probably most – current non-public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy, and the job descriptions for many positions will remain woefully out-of-date. Meanwhile, public employees' provisional status leaves them with diminished job security and advancement opportunities under civil service law, relegating them to enforcement of their rights under collective bargaining agreements, if any, and other laws, which are beyond the Commission's purview.

That said, it remains the duty of the Commission to apply the G.L.c.31 as written. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006), *quoting* Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 86 (1999). As much as the Commission regrets this state of affairs, the use of provisional appointments is not, per se, unlawful, and a state agency cannot be estopped for hewing to the law. If there is a flaw in the statutory procedure, it is a flaw for the General Court, whether on a systemic basis or through special legislation or a court order. See Kelleher v. Personnel Administrator, 421 Mass. at 389.

Failure to Reclassify Ms. Phillips

Ms. Phillips contends that she was never properly classified in the position of a CS-I, as she never performed the duties of that title as set forth in the applicable Classification Specification for a CS-I in the Contract Specialist Job Series. Rather, she contends that her essentially clerical duties meant she should have been placed in the title of AA-I, the entry level job in the Administrative Assistant Job series.

The normal procedure through which an individual employee may seek to have their job title changed is through a "position reallocation request" made pursuant to G.L.c.30, §49, through HRD, with a right of further review by the Commission. In most cases, as is true here, most state agencies have adopted a practice that requires the employee to first process such a request initially within their own departmental Human Resources, and exhaust that remedy, prior to submission of the request to HRD. See also G.L.c.30,§45(9) ("position reallocation" defined); G.Lc.30,§45(4) (all allocations and reallocations require a prior recommendation of the appointing authority)

In this case, Ms. Phillips did not pursue any request for a position reallocation, either with DPH or HRD, at any time during her employment and has never filed any Section 49 appeal with HRD or the Commission. Rather, two days before her layoff was to take effect, she filed a request with HRD for a "classification study" pursuant to G.L.c.30,§45(4) which provides, in part:

> "*No permanent allocation or reallocation*, in accordance with this section, of any office or position subject to the classification and pay plans provided by this section, *shall be effected, unless and until (a) a request for such allocation or reallocation have been made in writing to or by the personnel administrator* [HRD]: (b) the written recommendation, if any, upon such request shall have been prepared by said administrator, *which shall include the request, the comment and the recommendation of the appointing authority concerned which he is hereby required to make to said administrator*; (c) the written recommendation complying

> with clauses (a) and (b) shall have been filed . . . with the house and senate committees on ways and means; [and] (d) included in a schedule of permanent offices and positions approved by the house committee on ways and means . . ." (*emphasis added*)

DPH and HRD correctly argue that Ms. Phillips June 28, 2011 request to HRD vests this Commission with no jurisdiction to hear an appeal that contests her layoff.

First, HRD points out that, under G.L.c.30, the statutory procedure for classification requests that affect the job title(s) of all employees in the subject title(s) [here, all CS-I's and AA-I's] are expressly superseded by the provisions of Article 17.4 and 17.5 of the CBA with NAGE, which make mutual negotiation through the collective bargaining process, not the statutory, unilateral appointing authority and HRD decision-making process, the exclusive means of remediating such alleged systemic misclassifications. G.Lc.30,§45(9) & 49; G.L.c.150E, §7(d); see., e.g., Service Employees Int'l Union, Local 509 v. Labor Relations Comm'n, 410 Mass. 141, 142-43 (1991); Commonwealth v. Labor Rel. Comm'n, 404 Mass. 124, 126 (1989); Duxbury v. Duxbury Permanent Firefighters Ass'n, Local 2167, 50 Mass.App.Ct. 461, 466 (2000); DeRosa v. Department of Revenue, 23 MCSR 686 (2010), appeal pending. Thus, as Ms. Phillips is precluded by the CBA from asserting a systemic claim that her job title was misclassified as a Contract Specialist and belonged in the Administrative Assistant series (one job grade, i.e., salary level, higher, by the way), and she never filed any Section 49 individual position reallocation request or appeal, the Commission is preempted and without jurisdiction to hear this matter.

Second, even if Ms. Phillips' were to prevail and be deemed an AA-I, her status would still be one of a provisional employee in that job title as well. See., e.g.., LeFrancois v. Department of Revenue, 23 MCSR 217 (2010) (reclassified permanent employee held

provisional status in the reclassified position) Thus, under whatever statutory rubric Ms. Phillips' would chose to place her "classification study" request, even she admits that DPH's alleged "misclassification scheme" allegedly deprived her of her *union* bumping rights, *not* her civil service bumping rights (she has none as explained earlier.) Reclassifying her might have affected her rights as a union member (presumably to the detriment of another provisionally appointed AA-I union member with less seniority), and changed her status from a provisionally appointed CS-I to a provisionally appointed AA-I. Such a reclassification, however, would not have converted her to a permanent employee with tenure and would not entitle her to claim any bumping or layoff retention rights under civil service law. See LeFrancois v. Department of Revenue, 23 MCSR 217 (2010) (reclassified employee is provisional, not permanent, in reclassified position). The Commission has no jurisdiction under either G.Lc.31,§2(a) or Chapter 310 to require HRD to take action to remediate a loss of collective bargaining rights, but not civil service rights.

Third, even assuming that Ms. Phillips had a right to seek a Section 45(4) "classification study" of DPH's alleged "misclassification scheme", the timing of the request makes an appeal alleging a "failure to act" wholly without merit. As a factual matter, there is no reasonable basis on which to establish that HRD and DPH could possibly have taken even the initial steps to conduct such a study, much less obtain the necessary input and prepare the written recommendations required under Section 45(4) with only two days between the receipt of the request and Ms. Phillips layoff, the latter event essentially making the request moot, at least as to Ms. Phillips. On these facts, the Commission cannot find Ms. Phillips aggrieved by a "failure to act" by HRD or DPH.

Chapter 30, Section 9B Claim

Alternatively, Ms. Phillips contends that, G.Lc.30, §9B entitles her to the same right to a "just cause" appeal from her termination as a tenured civil service employee is granted under G.Lc.31,§§41 through 44.. G.L.c.30, §9B provides:

> "*No person permanently employed in any institution under the department of* mental health, mental retardation, *public health*, public welfare, correction or youth services, or in the soldiers' homes in Massachusetts, except an employee, other than a nurse, rendering professional service, *who is not classified under chapter thirty-one*, and no maintenance employee permanently employed in any institution under the department of education, *shall, after having actually performed the duties of any office or position continuously for a period of six months* in such an institution or department, *be discharged, removed, suspended, laid off*, or transferred from the latest permanent office or employment held by him without his consent, lowered in rank or compensation, *nor shall his office or position be abolished, except for just cause and in the manner provided by sections forty-one to forty-five, inclusive, of chapter thirty-one*." (*emphasis added*)

Ms. Phillips's claims that she is a "person" employed in a public health institution and is "unclassified", thus, covered by Section 9B, and, therefore, DPH cannot abolish her position without the required Chapter 31 "just cause" hearing and determination, with right of appeal to the Commission.

Ms. Phillips held the position of CS-I which is a position classified under civil service law and covered by a CBA. The fact that she was provisional in the title of CS-I and held no permanency in the title does not alter the fact that the position is a classified civil service title. Ms. Phillips' contends that the use of the word "person" as opposed to the word "position", means that, although the "position" of CS-I is a civil service "position", she has no civil service status as a tenured employee in the position, and, thus, she is a "person . . . who is not classified" under chapter thirty one" and, accordingly, is covered by Section 9B. The Commission disagrees.

Ms. Phillips' argument is flawed as a matter of semantics and statutory construction. There is no merit to the suggestion that the legislature's choice of words in Section 9B was meant to distinguish the type of employee covered by that section, as opposed to the type of employee covered by the parallel sections of Chapter 30 [Sections 9A through 9G], as to which the Commission has decided that "not classified under Chapter 31" refers to the job title of the position, not that the person holding the position lacks permanent civil service status. As DPH points out: "It is axiomatic that that if a position is classified within civil service, then the person holding the position is also classified within civil service." The Commission reached this conclusion in the case of Hawks v. Department of Environmental Protection, 23 MCSR 814 (2010), in which a provisionally appointed veteran claimed the benefit of a "just cause" hearing on her layoff from the position of Accountant IV:

> '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 . . . Thus, the "Section 9A protections" afforded to veterans "not classified" under Chapter 31 . . . do not apply here. All offices and positions in the official service of the commonwealth shall be subject to the civil service law and rules unless expressly exempted. . . . Further, HRD has promulgated job specifications for titles in the Accountant series as part of it overall responsibility to classify job titles . . . ." Id.[3]

Standing to Claim Equitable Relief

Although Ms. Phillips appeal must fail as a matter of law, the facts also show that her own inequitable actions would bar her from obtaining any equitable relief from this Commission pursuant to G.L.c.31 or Chapter 310.

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[3] The Commission also would be warranted to construe the limitation of the protections of Section 9B to be limited to employees of a public health "institution", i.e. a hospital or other treatment facility. It could be fairly questioned whether a position in a laboratory that does not render direct patient care qualifies as an "institution" within the meaning of the statute. It should be noted further that, as to the "just cause" for the abolishment of Ms. Phillips' position, the evidence of the funding reductions affecting the State Law was compelling and not disputed.

First, Ms. Phillips failed to seek any redress for the claims she now asserts at any time during the 14 years she was employed by DPH. It was not until well after she was notified of her termination, and two days before its' effective date, that she first raised the claim that she, along with many other DPH employees, had been systematically misclassified and asked HRD to require DPH to postpone the layoffs, pending the "classification study" on her claim. She never claimed that she should be "deemed" a permanent employee until after her layoff went into effect. She never asked that competitive examinations be conducted, either for her position of CS-I or for the position of AA-I. This conduct represents a classic case of "sitting on one's rights" and such laches, alone, would justify denial of her claim to equitable relief.

As the Appeals Court recently stated in Hester v. Civil Service Comm'n, 78 Mass.App.Ct. 78 (2010):

> "The plaintiff also argues that the commission should have exercised its discretion to grant him permanent status pursuant to St.1993, c. 310 . . . . The plaintiff contends he was prejudiced, through no fault of his own, by the personnel administrator's failure to conduct a civil service examination for the position since 1989. While this may be true, the relief the plaintiff seeks is purely discretionary, and it is not open to the court to substitute its judgment for that of the commission. See *Thomas v. Civil Serv. Commn.*, 48 Mass.App.Ct. 446, 451, 722 N.E.2d 483 (2000)."

Second, prior to her layoff, Ms. Phillips was offered the very position of AA-I to which she claims she was entitled, and into which she purportedly seeks the Commission to place her in the exercise of its broad discretionary powers of equitable relief under Chapter 310. The reasons she articulated for declining the offer are disputed. She claims that she did so believing (erroneously) that it would mean she would lose her fourteen years of seniority and that she did not want to waive her rights to bring a discrimination claim against DPH. The DPH contends that the only reason she ever stated to DPH was

that it would involve some uncertainty as to whether, in the new position, she could continue to work a four-day week or would be required to revert to a normal five day work schedule.

Although the DPH's explanation does carry the ring of truth more than Ms. Phillips' explanation, the Commission a decision on the conflicting evidence is not necessary or material to the Commission's conclusion. Taking Ms. Phillips' claim at face value, her action is plainly an inexcusable neglect of her duty to take reasonable measures to mitigate her loss. Although she was fully represented by her union in the negotiations with DPH over the job offer, she never inquired of her union about either the seniority issue or the waiver issue. She is plainly wrong about the loss of seniority, as any reasonably informed union representative would surely have advised her. Similarly, while her interest in preserving her MCAD rights is clearly an appropriate concern, had she sought proper advice, she could well have realized that, having lost nothing up to that point, and with an offer on the table, and having been granted a deferral of her termination to allow her to consider the offer that provided her all the employment benefits she is claiming here, the value of her "right" to bring and likelihood to prevail on an MCAD claim, if any, was de minimums compared to the looming loss of her job. While the Commission will not fault Ms. Phillips for her choice, that is the choice she must live with. She made her decision based on erroneous, but easily discoverable facts, without seeking advice that was clearly available to her. The Commission will not aid and abet such behavior by construing it to be action "through no fault of her own" that commends the exercise of the Commission's discretionary powers of equitable relief.

In sum, for the reasons stated above, DPH's Motion to Dismiss and HRD's Motion for Summary Decision are granted. The appeal of the Appellant, Charlene Phillips, is hereby, ***dismissed.***

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on February 9, 2012.

A True Record. Attest:

Commissioner

Commissioner Marquis was absent on February 9, 2012

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 the 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 a Civil Service Commission's final decision.

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:
Galen Gilbert, Esq. [for Appellant]
Christopher J. Groll [for Respondent DPH]
Martha Lipchitz O'Connor, Esq. [for Respondent HRD]