COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
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MICHELLE SHEA, MARK TRACHTENBERG,
& RICHARD PORIO,
Appellants

v.

D-02-759 (SHEA)
D-02-763 (TRACHTENBERG)
D-02-715 (PORIO)

DEPARTMENT OF REVENUE & HRD,
Respondent

Appellant Porio's Attorney:	Joseph L. Delorey, Esq. 8 Beacon Street Boston, MA 02108
Appellant Trachtenberg's Attorney:	Richard Waring, Esq. NAGE 159 Burgin Parkway Quincy, MA 02169
Appellant Shea's Attorney:	Galen Gilbert, Esq. Laura Unflat, Esq. 294 Washington Street: Suite 654 Boston, MA 02108
Department of Revenue's Attorney:	Michael C. Rutherford, Esq. Department of Revenue 100 Cambridge Street: 6th Floor Boston, MA 02114
HRD's Attorney:	Michelle Heffernan, Esq. HRD One Ashburton Place: Room 211 Boston, MA 02108
Commissioner:	Christopher C. Bowman

DECISION ON DEPARTMENT OF REVENUE'S MOTION FOR RECONSIDERATION

Procedural History

The Civil Service Commission issued a decision in the above-captioned case on July 26, 2005, ordering the Appellants, Richard Porio, Mark Trachtenberg and Michelle Shea to be restored to their positions without loss of compensation or other rights and invalidating the provisional promotion of some twenty-six employees to the Tax Examiner II position. (See 2005 Commission Decision.) On August 8, 2005, the Respondent, Department of Revenue ("DOR") filed a motion seeking reconsideration of the Commission's decision and counsel for the Appellants submitted Oppositions to DOR's motion for reconsideration. In the meantime, the case was appealed to Superior Court. On April 25, 2006, the court heard arguments on the parties' motions for judgment on the pleadings. The Commission subsequently issued a decision to schedule a hearing on the Motion for Reconsideration after which it would render a decision either affirming or reversing the existing decision, in whole or in part. Based on the Commission's decision to schedule a new hearing, the court, acting on an assented to motion by the parties, stayed judicial review pending the outcome of the Civil Service Commission's hearing. The hearing on the Motion for Reconsideration was then held at the offices of the Civil Service Commission on September 14, 2006. Oral arguments were heard from all parties and one additional exhibit was entered into evidence. Post-hearing briefs on the issue of retroactivity regarding a recent SJC decision were submitted by the parties.

Summary of the 2005 Decision

The Department of Revenue laid off all of its employees in the Tax Examiner I position pursuant to G.L. c. 31, § 39 in September 2002 after experiencing a budget shortfall. As of the date of the elimination of the Tax Examiner I position, there were more than 25 *provisional* Tax Examiner II positions held by persons with less seniority than the three Appellants. (No promotional examinations for the position of Tax Examiner II had been held since 1991.)

The Commission concluded that "the Appointing Authority had the right to lay off employees but the wrong employees were chosen for layoff" as, "all of the *provisional* Tax Examiner II's who held permanency as tenured employees in the position of Tax Examiner I should have been included in the group of Tax Examiner I's slated for layoff and then laid off individually, on the basis of seniority. No provisional employees or temporary employees, who performed the same or similar duties, should have been retained in employment, while laying off more senior permanent employees." The Commission also concluded that the elimination of the Tax Examiner I positions by DOR was "simply a pretext, or unnecessary complication by the DOR to makes itself appear as if it is complying with Chapter 31, Section 39 and (Personnel Administration Rules) 15 ("PAR.15") while at the same time confounding, if not outright contradicting the intent of the statute and rule."

Standard for Reconsideration

Pursuant to 801 CMR Standard Adjudicatory Rules of Practice and Procedure, Rule 1:01 (7)(l), a motion for reconsideration, "…must identify a clerical or mechanical error

in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case…".

In its motion for reconsideration, DOR argues that there are significant factors that were overlooked in deciding the case and that the Commission's 2005 decision was "based on findings of fact and assumptions not supported by and often contrary to the record." Specifically, DOR identified 12 (twelve) findings or conclusions in the 2005 Decision which they argue were not supported by the record.

Permanency "In the Position"

The underpinning of the 2005 Commission decision rests in its interpretation of Personnel Administration Rule (PAR) #15 which states in part, "all civil service rights of an employee rest in the position (emphasis added) in which he holds tenure" and "when one or more civil service employees holding permanent positions in the same title and department unit must be separated from their positions due to lack of work, lack of money, or abolition of position, the employee with the least civil service seniority…shall be separated first." In the instant case, the 2005 Commission decision interpreted PAR.15 as requiring that "all of the *provisional* TE II's, who held permanency as tenured employees in the position of TE I should have been included in the group of TE I's slated for layoff and then laid off individually, on the basis of seniority." (emphasis added)

In its written motion, DOR argued that this conclusion was contrary to the provisions of G.L. c. 31, § 39 as well as recent decisions by the Commission on this issue, including Andrews v. DOR, 17 MSCR 51 (2004). Subsequent to the filing of DOR's Motion for Reconsideration and the written Opposition of the Appellants, Andrews was affirmed in Superior Court and subsequently heard by the SJC. In affirming the Commission,

the SJC in Andrews held:

> Provisional promotion pursuant to G.L. c. 31, § 15, effects a real change from 'one title to the next higher title.' A provisionally promoted employees ceases to be 'in' the original title for purposes of § 39, and does not return to the lower title until the provisional promotion ceases to have effect.
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> Andrews v. Civil Service Commission et al, 446 Mass. 611, 618 (2006)

Issue of Retroactivity

All parties agree that the SJC language in Andrews is unambiguous and on point. The parties disagree, however, on whether or not Andrews applies in this case. The Appellants argue that the new holding should not be applied "retroactively" and cite Tamerlane Corp. v. Warwick Insurance Co., 412 Mass. 486 (1992) in support of their argument. In Tamerlane, the SJC promulgated a standard for calculating notice periods in regard to the cancellation of insurance policies. The court ruled that a special noon-to-noon day for insurance purposes would be abolished prospectively. The court noted that such changes in rules generally are applied on a retroactive basis but set out the standards for making an exception based on three factors: the extent to which the decision creates a novel and unforeshadowed rule; the benefits of retroactive application in furthering the purpose of the new rule; and the hardship or inequity likely to follow from the retroactive application.

The Appellants argue that the Andrews case represents a major departure from the plain text of the rule; there was no reason to expect that it would be overturned by any court; and applying the change to them would cause considerable hardship and unfairness as they were laid off in 2002, four years prior to the SJC ruling in Andrews. The Appellants further argue that, until Andrews, a civil service employee with a certain

seniority date had every reason to believe that for layoff and bumping purposes, he or she was senior to any employee permanent in the same title with a subsequent seniority date.

HRD and DOR argue that the court in Andrews did *not* create a new rule and the court's holding is "neither novel nor unforeshadowed." Rather, according to the Respondents, Andrews simply *affirmed* the Commission's decision in that case that the Appellant did not have a right to include employees in other titles in his title for the purpose of layoff. According to the Respondents, HRD and DOR have always taken the position that c. 31, § 39 and PAR.15 were clear and unambiguous and neither require an appointing authority to go beyond the actual title of an employee for purposes of determining which employees are laid off. This is consistent with the position articulated by HRD at the Commission hearing related to the 2005 decision.

In Andrews, the Civil Service Commission and DOR argued before the SJC that:

> Furthermore, the relevant group to be considered in scheduling lay-offs is employees 'having the same title.' G.L. c. 31 § 30. 'Title' is a descriptive name applied to a position or group of positions having similar duties and the same general level of responsibility,' and includes no distinction between employees holding permanent titles and employees holding provisional titles. See G.L. c. 31, § 1. This Court should decline Andrews' invitation to impose a distinction that the Legislature did not see fit to include. Andrews v. Civil Service Commission and Department of Revenue, Brief of the Appellees p. 21 (emphasis added)

The Respondents cite this unequivocal argument, made on behalf of the Commission and DOR, to argue that the Andrews decision does not constitute a new rule and, therefore, there is no reason to waiver from the accepted doctrine of retroactivity. According to the Respondents, the Court in Andrews did not invoke the exception to the rule of retroactivity and did not find that it was issuing a novel interpretation of civil

service laws. Rather, the Court simply rejected the argument raised by Andrews which had been previously rejected by the Commission in that case.

On the issue of retroactivity, the Commission concurs with the Respondents. Andrews does not reverse an acceptable and relied upon business practice or adopt a new rule contrary to such a practice. *See* Tamerlane Corp, *Supra*. Andrews simply affirms the established interpretation of HRD – and the Commission. Neither this exception to the doctrine of retroactivity nor any of the 3 Tamerlane exceptions apply in this case.

As such, the underpinning of the initial appeal in this case is dealt a fatal blow by the SJC decision in Andrews. The 2005 Commission decision already established that DOR had the right, due to a budget shortfall, to layoff employees. However, contrary to the 2005 Commission decision, the *provisional* TE II's, who held permanency as tenured employees in the position of TE I, should **not** have been included in the group of TE I's slated for layoff. The Department of Revenue complied with the requirements of G.L. c. 31, §39 and the applicable PAR.15 when it laid off the TE I's in question, including the Appellants. The reference to an alleged political pretext in the 2005 Commission decision is also dependent on the supposition that DOR erred in not including the provisional TE II's when it laid off the TE I's and therefore, is now moot.

As noted above, DOR and HRD raised several other issues regarding the 2005 Commission decision in support of its Motion for Reconsideration. While the SJC decision in Andrews makes it unnecessary to rule on the merits of each of these assertions, some of them must be addressed to put to rest any question regarding whether this case is distinguishable from Andrews in regard to the issue of provisional

appointments. It is not distinguishable --and some of the findings which might suggest otherwise must be corrected.

Two of the findings in the 2005 Commission decision imply that the Tax Examiner I and Tax Examiner II positions are interchangeable including the statement that, "it is assumed that since the duties of the two positions are similar, that all the TE I's, especially the TE I's with more seniority could perform the duties of the now new encompassing TE II position." DOR correctly argues that the evidence in this case does not support this assumption. The evidence, Stipulation of Fact 2, Stipulation of Fact 3 and Exhibit 11 establish that while there may exist similarities between a Tax Examiner I and II, it is undisputed that the two separate titles are not the same. They are distinguished by different pay, different supervision, differing levels of discretionary authority and different levels of distinguishing duties.

Similarly, the evidence does not support the finding in the 2005 Commission decision that "DOR has admitted here that it discontinued, in May 1984, seeking authorization from the administrator from any provisional original and provisional promotional appointments." There is nothing in the record to document such an admission. In fact, Stipulation of Fact 21 states, "From 1997 to 2003, all positions were flagged by HRD and could not be filled until HRD lifted the flag at the deadline date of the posting." ("Flagging" simply involves HRD's routine practice of populating a field in the computer system that prevents any state agency from filling the position until the field is no longer populated or "flagged".) HRD would not lift the flag if there were a Civil Service list for the title posted. As a former senior manager in state government who was involved in the hiring and promotional process of dozens of state employees, I take notice that HRD

actually micromanaged the process during the time period in question. All postings, for original provisional appointments or promotional provisional appointments, clearly stated to the applicant that it was a provisional position. After the hiring manager completed the screening and interview process and recommended a candidate, final approval and sign-off was required by HRD in the form of "removing the flag" from the provisional position in question.

On a final note, the 2005 Commission decision, in addition to trying to address the instant appeals, was an honest attempt to address the very real problem facing thousands of employees who have remained in provisional status for over a decade -- and breathe life into those sections of the civil service statute requiring the establishment of eligible civil service lists. The SJC decision in Andrews clarifies one such related provision by providing unequivocal confirmation that a provisionally promoted employee ceases to be 'in' the original title for purposes of § 39, and does not return to the lower title until the provisional promotion ceases to have effect.

A myriad of other issues related to provisional employees remain, however, including, but not limited to, 1) whether or not provisional employees will ever have an avenue to obtain permanency in their positions; and 2) whether or not a provisionally promoted employee retains appeal rights under G.L. c. 31, §§ 41-45 based on his or her "permanency" in the previous position for which he is no longer "in". While the issue of permanency for the thousands of employees currently in provisional status is not currently before the Commission in this Section 39 case, the Commission feels compelled to comment. A resolution is long overdue and the time is now for all parties to agree upon an equitable and practical solution regarding the issue of those public sector

employees that languish in provisional status. Demands that HRD immediately resume administering tests for thousands of non-public safety positions, however, are impractical and cost prohibitive. More importantly, they do not reflect the current reality of the ever-changing workplace, even in the public sector, in which new technologies, new programs and the need to modify programs in response to customer needs or new legislative mandates, quickly make many of the questions on a state-issued civil service exam obsolete ---and a high score less indicative of whether the candidate will be an asset to the organization and the public it serves. HRD's acceptance of the status quo, on the other hand, in which two classes of public sector employees, provisional and permanent, work side-by-side performing the same duties for decades, is also not acceptable. HRD needs to put forth some meaningful, good faith proposals to resolve this impasse. There is no shortage of good ideas, many of them recently proferred, in the public domain on this topic that could guide all parties toward an equitable resolution, including solutions that don't require any statutory changes.

In the interim, guidance from the court on the related issue of whether or not a provisionally promoted employee retains appeal rights under G.L. c. 31, §§ 41-45 based on his or her "permanency" in the previous position for which he is no longer "in" would bring much needed clarity to thousands of public employees and appointing authorities in Massachusetts.

For all of the above stated reasons, the Department of Revenue and HRD's Motion for Reconsideration is hereby allowed. The appeals under Docket Numbers D-02-759, D-02-763 and D-02-715 are hereby ***dismissed***.

Civil Service Commission

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Christopher C. Bowman, Commissioner

By a 3-1 vote of the Civil Service Commission (Bowman- YES, Marquis-YES, Guerin-YES, Taylor-NO) on October 19, 2006.

A true record. Attest:

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Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the commission's order or decision.
Notice:

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