

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

HOLLY SHORTEN,  
Appellant

v.

D1-10-178

LYNN SCHOOL DEPARTMENT,  
Respondent

Appellant's Attorney:

William M. Appel, Esq.  
159 Washington Street  
Lynn, MA 01902

Respondent's Representative:

Barbara Rafuse  
Lynn School Department  
90 Commercial Street  
Lynn, MA 01905

Commissioner:

Christopher C. Bowman

**DECISION**

The Appellant, Holly Shorten (Appellant), pursuant to G.L. c. 31, §§ 39, 41, 42 and 43, filed an appeal with the Civil Service Commission (Commission), claiming that the Lynn School Department (School Department) did not provide her with the appropriate "bumping rights" when they laid her off on June 30, 2010.

The appeal was filed with the Commission on July 20, 2010. A pre-hearing conference was held on August 24, 2010 and a status conference was held on September 21, 2010.

As this decision would likely impact other current and former employees in various titles, I suggested at the status conference that the parties consult with the state's Human

Resources Division (HRD) to determine the civil service status of its current and laid off employees and seek clarification regarding the protections afforded to each of them when layoffs occur. Both parties agreed that such a review, if conducted expeditiously, should occur prior to the Commission issuing a decision.

Subsequent to the status conference, I exchanged voice mail messages with Regina Caggiano, the Assistant Director of HRD's Civil Service Unit. Ms. Caggiano, one of the state's premier experts on civil service matters, agreed to provide the parties with technical assistance and an on-site visit to the School Department. She suggested that such assistance should take the form of an audit ordered by the Commission.

Thus, I ordered HRD to conduct an audit of the civil service positions within the Lynn School Department to assist the School Department in determining the civil service status of its current and laid off employees and clarify what protections are afforded to each of them when layoffs occur.

HRD presented the findings of that audit to the Commission and the parties at a status conference held on March 29, 2011.

Based on the information obtained by the parties and the findings of the HRD audit, I make the following findings of fact:

**FINDINGS OF FACT**

1. On December 12, 1987, the Appellant took and passed a civil service examination for Clerk / Stenographer.
2. On July 19, 1989, the School Department appointed the Appellant as a permanent full-time Clerk / Stenographer.

3. On March 4, 1995, the Appellant took and passed a civil service examination for Senior Clerk / Stenographer.
4. On April 3, 1996, the School Department promoted the Appellant to the position of permanent full-time Senior Clerk / Stenographer.
5. At some point after April 3, 1996, the School Department provisionally promoted the Appellant to the position of Confidential Secretary.
6. On June 16, 2010, the School Department notified the Appellant that, due to a lack of funds, her Confidential Secretary position was being eliminated as of June 30, 2010.
7. As of June 30, 2010, several individuals were serving as provisional Senior Clerk / Stenographers in the School Department and several other individuals were serving as permanent Senior Clerk / Stenographers.
8. At least one of the individuals serving as a permanent Senior Clerk / Stenographer (Caroline LaPierre) has less civil service seniority than the Appellant.
9. The School Department, when laying off the Appellant, did not give her the option of "bumping" the permanent Senior Clerk / Stenographer with less civil service seniority or any of the provisional Senior Clerk / Stenographers.

## **CONCLUSION**

G.L. c. 31, § 39, as inserted by St. 1978, c. 393, s. 11, states in pertinent part: "If permanent employees in positions having the same title in a departmental unit are to be separated from such positions because of lack of work or lack of money or abolition of positions, they shall, except as hereinafter provided, be separated from employment according to their seniority in such unit ...".

Section 15 of the Personnel Administration Rules states:

- (1) All civil service rights of an employee rest in the position in which he holds tenure.
- (2) When one or more employees must be separated from positions in the same title and departmental unit 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, followed by all persons filling positions in temporary status in the designated title, before any civil service employees holding the designated positions in permanent status shall be separated from such positions.
- (3) When one or more civil service employees holding permanent positions in the same title and departmental 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 computed pursuant to M.G.L. c. 31, §33 shall be separated first; provided that all disabled veterans are accorded the preference provided by M.G.L. c. 31, §26.
- (4) When one or more persons among a larger group of civil service employees holding permanent positions in the same title and departmental unit are to be separated from their positions due to lack of work, lack of money or abolition of position, and the entire group has the same civil service seniority date, the appointing authority has the discretion to select for separation among those with equal retention rights, applying basic merit principles.  
(PAR.15)

In Andrews v. Civil Service Comm'n, 446 Mass. 611 (2006), the SJC concluded that:

"Provisional promotion pursuant to G. L. c. 31, s. 15, effects a real change from "one title to the next higher title." A provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect. General Laws c. 31, s. 15, provides only one exception to this rule, relating to calculation of eligibility for a promotional examination. "[T]he fact that the Legislature specified one exception . . . strengthens the inference that no other exception was intended." Protective Life Ins Co. v. Sullivan, 425 Mass. 615, 620 (1997), quoting LaBranche v. A.J. Lane & Co., 404 Mass. 725, 729 (1989). Regardless whether the five employees provisionally promoted to the SI-C position possessed or lacked rights in the SI-C position pursuant to rule 15, that was the position in which they were employed for purposes of s. 39."

Applied here, the School Department is correct to consider the provisional promotions of the other provisional Confidential Secretaries when contemplating layoffs.

In Andrews, the SJC concluded in relevant part that:

“A provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect ...” (emphasis added)’

We view the above-referenced language from Andrews to be consistent with how HRD, state agencies and cities and towns appear to have interpreted Section 39 for many years. When layoffs occur in a title under Section 39, provisional employees in that title retain certain bumping rights if they formerly held a permanent civil service title in the department prior to their promotion. Specifically, the provisionally promoted employee, who held civil service permanency in a former position within the department, may, as an alternative to being laid off, “bump” provisional or less senior permanent employees in the title or next lower titles for which they had permanency. Applied here, the Appellant, a permanent Senior Clerk / Stenographer who was serving as a provisional Confidential Secretary at the time of her layoff, has the right to “bump” individuals serving as provisional Senior Clerk / Stenographers (or in the next lower titles) or those serving as permanent Senior Clerk / Stenographer (or in the next lower titles) with less civil service seniority.

The related question raised here is whether the School Department was required to lay off other provisional Confidential Secretaries in the department before the Appellant if the other provisional Secretaries had less civil service seniority in their former permanent positions. We conclude that the answer is “no”.

In Leondike v. Randolph Public Schools, 13 MCSR 16 (2000), the Appellant in that case argued that she should be able to bump a less senior employee in a non-civil service position with a higher pay rate. The Commission found that there was no legal basis under Section 39 to permit the Appellant to bump into a non-civil service position.

Similarly, in Provencher v. Lynn Public Schools, 21 MCSR 533 (2008), the Commission

held that that the Appellant, a permanent a permanent clerk / typist who was provisionally promoted to clerk / stenographer, did not have the right to bump another provisional clerk / stenographer, merely because she had more civil service seniority than the person sitting provisionally in the clerk / stenographer position.

Applied here, the Appellant's seniority in a lower title, for which she held permanency, does not permit her to bump another provisional Confidential Secretary because that person has less service seniority in the lower position. We conclude that these prior Commission decisions, and the conclusion reached here regarding the instant appeal, are consistent with Andrews (a provisionally promoted employee ceases to be "in" the original title for purposes of s. 39, and does not return to the lower title until the provisional promotion ceases to have effect ..." (emphasis added); a reasonable interpretation of Section 39 and the Personnel Administration Rules (civil service rights of an employee rest in the position in which he holds tenure).

Although the Appellant may not "bump" other provisionally promoted Confidential Secretaries, she may "bump" an individual serving as a provisional or temporary Senior Clerk / Stenographer (or next lower titles) in the School Department or those serving as permanent Senior Clerk / Stenographer (or next lower titles) in the department with less civil service seniority.<sup>1</sup>

It appears that the Department did not comply with these requirements when it laid off the Appellant on June 30, 2010.

---

<sup>1</sup> As long as there is no conflict with the rights of permanent civil service employees, there is nothing that prevents the parties, via a collective bargaining agreement, from providing permanent civil service employees in the official service with additional bumping rights outside of the title, but within the same bargaining unit.

For all of the above reasons, the School Department is hereby ordered to restore the Appellant as an employee of the School Department, effective June 30, 2010, and allow her to exercise the bumping rights consistent with this decision. She shall be entitled to all appropriate retroactive pay and benefits and she shall retain her civil service seniority date.

If, by mutual agreement of the parties, they wish to delay implementation of this decision until the beginning of the 2011 / 2012 academic year, they may file a Motion for Reconsideration within the proscribed timeframe listed below.

Civil Service Commission

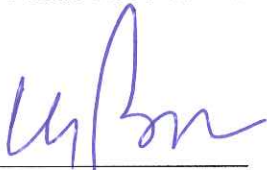


---

Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein, Commissioners [McDowell – Absent]) on April 7, 2011.

A True Record. Attest:



---

Commissioner

**Commissioner Marquis was  
absent on April 7, 2011**

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 to:  
William Appel, Esq. (for Appellant)  
Barbara Rafuse (for Appointing Authority)  
Lindsey Boyle, Esq. (HRD)