COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

LUIS S. SPENCER,
Appellant

v.

MASSACHUSETTS DEPARTMENT OF CORRECTION,
Respondent

Docket No.: D1-14-205

Appearance for Appellant:

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Commissioner:

Paul M. Stein

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Luis S. Spencer, appeals to the Civil Service Commission (Commission) to contest the decision of the Respondent, Massachusetts Department of Correction (DOC) which refused his request to be restored to a position of DOC Correction Officer II (Sergeant) in accordance with G.L.c.30,§46D,¶2 and without hearing pursuant to G.L.c.31,§41 et seq. The Commission held a pre-hearing conference on September 23, 2014. On October 14, 2014, the Commission received DOC's Motion to Dismiss, along with DOC's Motion to Stay Discovery, both of which Mr. Spencer opposed. DOC's Motion to Stay Discovery was denied. I held a

hearing on the Motion to Dismiss on November 13, 2014, which was digitally recorded.[1] On November 21, 2014, at my request, DOC submitted a Supplemental Motion to Dismiss and Mr. Spencer filed an Appellant's Supplemental Opposition to the Respondent's Motion to Dismiss. For the reasons set forth below, DOC's Motion to Dismiss is allowed and Mr. Spencer's appeal is dismissed. .

STATEMENT OF UNDISPUTED FACTS

Based on the parties' submissions and argument of counsel, I find that, viewing the evidence most favorably to the Appellant, the following relevant facts are not in material dispute:

1. The Appellant, Luis S. Spencer, began his tenure with DOC when he was appointed to the civil service position of Correction Officer I (CO-I) in 1980. He served honorably in the United States Air Force from 1982 to 1985 and returned to DOC where he rose through the ranks, holding various non-tenured, management positions of increasing responsibility over the years. He became Captain (1991), Director of Security (1993), Deputy Administrator (1995), Superintendent (1997) and Assistant Deputy Commissioner (2008). (*DOC Motion; DOC Supplemental Motion, Cabral Aff't Exh. B; Appellant's Opposition; Spencer Aff't, Exh. C*)

2. On January 12, 1992, (then) Captain Spencer received a "one-day" permanent appointment to Correction Officer II, the highest tenured civil service appointment he ever held. By letter dated July 14, 2003, from DOC Deputy Director of Human Resources, (then Superintendent) Spencer was informed that "the Personnel Administrator has approved you to be on a leave of absence from your permanent Civil Service title of Correction Officer II (see

[1] The hearings were conducted pursuant to the Standard Rules of Adjudicatory Procedure, 801 C.M.R. 1.01 (Formal Rules) adopted by the Commission. If there is a judicial appeal of this decision the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that person wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal as the official record from which to transcribe the recording into a written transcript

attached)[2]. Management positions M-5 and above are considered to be non-Civil Service positions, therefore you need to be on a leave in order to have rights to revert to a permanent Civil Service title. A copy of these letters will be placed in your personnel folder in case you should need this in the future." (*Appellant's Opposition, Exh. 7*)

3. In April 2011, pursuant to G.L.c.27, §1, then serving as Acting DOC Commissioner, Mr. Spencer was appointed as DOC Commissioner (job group M-XII) by then Secretary of the Executive Office of Public Safety & Security (EOPSS) Mary Elizabeth Heffernan. His appointment was approved by Governor Patrick on or about May 26, 2011. (*DOC Motion; DOC Supplemental Motion, Cabral Aff't, Exh. A; Appellant's Opposition; Spencer Aff't, Exhs. B & C*)

4. As DOC Commissioner, Mr. Spencer promoted a departmental initiative which he called the "Team DOC" concept. Among the accomplishments of which he was most proud, he worked to reduce recidivism, negotiated a new inmate/medical/mental health services contract, including a revised management approach for the special population of seriously mentally ill inmates, implemented the "first in the nation" program for implementing the Prison Rape Elimination Act (PREA), improved staff wellness programs, including enhancements to the Employee Assistance Unit, and focused on quality metrics and data collection for tracking performance. He served as a member of the Executive Board of the Association of State Correctional Administrators (ASCA) and as Commissioner of Standards and Accreditation for the American Correctional Association (ACA). (*DOC Motion; Cabral Aff't, Exh. A; Appellant's Opposition, Exh. 5; Spencer Aff't, Exhs. B & C*)

5. In 2014, Commissioner Spencer came under criticism for his actions regarding his handling of an investigation into the 2009 death of an inmate at Bridgewater State Hospital who

[2] The attached letter from the Massachusetts Human Resources Division was a blanket approval for a list of DOC employees then serving in non-civil service job titles to be placed on leave from the permanent civil service positions to which they had previously been appointed at various times in the past. (*Appellant's Opposition, Exh. 7*)

was being put in restraints by DOC personnel. The death was later ruled a homicide. Commissioner Spencer served as the assistant deputy commissioner with oversight over the southern sector of prisons, including Bridgewater State Hospital, at the time of the inmate's death. In March 2014, Commissioner Spencer received a written "Letter of Reprimand" from EOPSS Secretary Andrea Cabral for his lapse of judgment in "failing to be vigilant in tracking the results of the [investigation], and ordered him to revisit the investigation and place the officers involved on administrative leave, pending renewed inquiry into the matter." (*Appellant's Opposition, Exh. 5; DOC Supplemental Motion; Cabral Aff't, ¶8 & Exh. G*)[3]

6. On July 22, 2014, following discovery of an incident that had occurred in May 2014 involving alleged abuse of a mental health patient by a correction officer at Bridgewater State Hospital, Secretary Cabral spoke with Commissioner Spencer by telephone and informed him that Governor Patrick had requested his resignation. Secretary Cabral requested two letters of resignation, one dated July 23, 2014 and one dated July 28, 2014, to cover the possibility that it would take several additional days to transition DOC to his successor. (*DOC Supplemental Motion; Cabral Aff't, ¶4 & Exh. A; Appellant's Opposition, Spencer Aff't*)

7. On July 23, 2014, the evidence shows the following five e-mail exchanges:

   a. At approximately 2:55 PM, Commissioner Spencer received a fax transmission, sent to his wife's office, from Kelly Correia, DOC Acting Assistant Deputy Commissioner (for Human Resources), which included the following:

> Just as an fyi, years ago we would have the person request to resign from their current position then in the next paragraph they would request to revert back to their former position. More recently employees would not request to resign from their current position; they would just request to revert to either their permanent position

[3] Mr. Spencer disputes the reprimand and claims that his actions were entirely justified and wholly consistent with his responsibilities under DOC rules and procedures at all times. (*Appellant's Opposition*) Both parties agree that Mr. Spencer was not "terminated for cause". (*Representation of Counsel; Appellant's Supplemental Opposition, footnote 1*). The underlying merits of his performance are not germane to the present motion and need not be addressed further..

> or a Captain's position if they held a Captains position in the past. Karen would also take a verbal request and process it. Below is very basic language that is used in requesting to revert back. Sorry for the delay in getting you this, we are having computer issues here today.
>
> July 23, 2014
> To Whom It May Concern:
>
> I am formally requesting to return to my previous held position title of Captain, effective Sunday.
>
> If additional information is required, please do not hesitate to contact me at (508)
>
> "incerely,

(*Appellant's Opposition, Spencer Aff't,¶¶4-7 & Exh. A*)

b. At approximately 3:06 PM, Commissioner Spencer, through his wife's e-mail account, sent two PDF versions of the requested resignation letter to Secretary Cabral. The letters were identical save for the effective date of the resignation. Secretary Cabral received these letters at approximately 4:06 PM. (*Appellant's Opposition; Spencer Aff't, ¶7 & Exh. B; DOC Supplemental Motion; Cabral Aff't, ¶4 & Exh. A*)[4]

c. At approximately 5:13 PM, Commissioner Spencer sent another e-mail to Secretary Cabral, addressed "To Whom It May Concern" which stated:

> I respectfully request to revert back to my former position of Captain within the Massachusetts Department of Correction (DOC). If this request is approved, according to the 'Estimated Pension Benefit's' calculations I would then be able to retiree within a year at 80%. If I retire from the DOC on this date I would only be eligible for 50.4%. Financially, retiring now would create a hardship for me and my family, which would be an estimated loss of $44,263.23 annually.
>
> . . .
>
> I would like to thank you in advance for your consideration in this matter.
> Very Truly Yours
> /s/
> Luis S. Spencer
> Commissioner

(*Appellant's Opposition; Spencer Aff't, ¶8 & Exh. C; DOC Supplemental Motion; Cabral Aff't, ¶5 & Exh. B*)

[4] I infer that the delay between transmission and receipt is due to the fact that the initial transmission to Secretary Cabral was incorrectly addressed to a "state.maus" e-mail server, and, when the error was discovered, "forwarded" to Secretary Cabral at the correct "state.ma.us" server. The one hour delay is not material.

d. At approximately 6:11 PM, Commissioner Spencer, through his wife's email account, sent another message to Secretary Cabral with an attached page from the "Benefit Guide for the Massachusetts State Employees' Retirement System", highlighting the criteria for "certain correction officers" to be classified in Group Four for retirement benefit purposes. This classification requires, among other things, that the employee "must be actively performing the duties of the position for which he/she seeks classification for not less than twelve consecutive months immediately preceding retirement at the time of classification." (*Appellant's Opposition; Spencer Aff't, ¶9; DOC Supplemental Motion; Cabral Aff't, ¶6 & Exh. C*)

e. At approximately 7:29 PM, Commissioner Spencer, through his wife's email account, sent Secretary Cabral another message: "Amended letter with additional salary info; hope this isn't over-kill but wanted to make sure you have as much info as possible. Thank You. Luis." Commissioner Spencer attached a revised version of his 5:13 PM "request to revert" letter to which he added the sentence: "I currently earn $151,529.61 annually, if allowed to revert to a Captain position I would earn $93,544.88 annually." (*Appellant's Opposition; Spencer Aff't, ¶9; DOC Supplemental Motion; Cabral Aff't, ¶7 & Exh. D*)

8. The next day, July 24, 2014, Secretary Cabral and Commissioner Spencer spoke by telephone about the resignation. Secretary Cabral made it clear that his resignation would be accepted by Governor Patrick only if it was unconditional and the terms of the resignation would not be negotiated. She specified that the request to revert to a correction officer's position could not be included in the resignation letter. Commissioner Spencer said he was told that "if I did not allow that request to be removed, my employment would be terminated." (*Appellant's*

Opposition, Exhs. 3 & 4; Spencer Aff't, ¶10; DOC Motion; DOC Supplemental Motion; Cabral Aff't, ¶8)

9. During this conversation, Secretary Cabral and Commissioner Spencer also discussed the merits of the request to revert to a lower-rank. Viewing the undisputed evidence in the light most favorable to Commissioner Spencer, Secretary Cabral noted that the request for reversion to a correction officer from the position of DOC Commissioner was unprecedented. She mentioned concerns for his continued presence in the agency but told him "she would consider my request to be reinstated." (*Appellant's Opposition; Spencer Aff't, ¶10; DOC Motion; DOC Supplemental Motion; Cabral Aff't, ¶8; Representation of Counsel*)

10. At approximately 2:20 PM on July 24, 2014, Secretary Cabral sent an email, through Commissioner Spencer's wife's email account, stating: "Hi Lou. Per our discussion, please see attached. Will send by regular mail as well." The attachment was a verbatim copy of the July 28, 2014 resignation letter, as originally drafted and signed by Commissioner Spencer, save for the final phrase, which she had redacted ("and accept my request to revert back to my last uniformed positon, which was Captain for the MDOC"). (*Appellant's Opposition; Spencer Aff't, ¶10 & Exh. D; DOC Motion; DOC Supplemental Motion; Cabral Aff't, ¶10 & Exh. E*)

11. At approximately 2:25 PM on July 24, 2014, Commissioner Spencer, through his wife's email account, replied to Secretary Cabral, acknowledging receipt of her 2:20 PM email. (*Appellant's Opposition; Spencer Aff't, ¶10; DOC Motion; DOC Supplemental Motion; Cabral Aff't, ¶1 & Exh. F*)

12. On July 28, 2014, Secretary Cabral verbally informed Mr. Spencer that his request to revert was denied. (*Appellant's Opposition; Spencer Aff't, ¶11*)

13. At approximately 5:28 PM on July 30, 2014, Mr. Spencer, through his wife's email

account, sent a message to DOC Acting Assistant Deputy Commissioner Kelley J. Correira, to which he attached "my request for reinstatement to service according to civil service law, G.L. Chapter 31." The attached letter, dated July 28, 2014, stated:

> In accordance with civil service law G.L.Chapter 31, I hold the permanent civil service title of Correction Officer II.
>
> Please accept this letter as a formal request to be reinstated to my last formal uniform position in the Department of Correction as Captain. This is an established past practice with other managers who have left appointed positions within the Department of Correction.

(*Appellant's Opposition; Spencer Aff't, ¶12 & Exh. E*)

14. By letter dated August 7, 2014, Acting Assistant Deputy Commissioner Correira informed Mr. Spencer that his July 28, 2014 request for reinstatement as DOC Captain had been denied. The letter also advised Mr. Spencer that his "buyout is being processed and that a check representing your accrued compensatory and vacation time will be mailed to you on the next pay date, which is August 15, 2014." (*Appellant's Opposition; Spencer Aff't ¶13 & Exh. F*)

15. By letter, also dated August 7, 2014, Mr. Spencer wrote to Acting Assistant Deputy Commissioner Correira, stating:

> Once again, I am requesting to be reinstated to my permanent civil service position with the Department of Correction, in accordance to civil service law, G.L.Chapter 31. I hold the permanent civil service title of correction officer II.
>
> Also, please accept my request that you cease processing any payouts on my behalf until my civil service request is properly resolved.

(*Appellant's Opposition; Spencer Aff't, ¶14 & Exh. G*)

16. By letter dated August 15, 2014, Acting Assistant Deputy Commissioner Correira informed Mr. Spencer that his August 7, 2014 request for reinstatement as DOC Correction Officer II had been denied. The letter also advised that his "buyout has been processed" and enclosed a check for $34,385.93, for accrued compensatory and vacation time owed. The DOC internal paperwork stated the "Reason for Term and Eff Date: Resigned from Mgmt position 7/24/14". The evidence does not disclose whether or not Mr. Spencer negotiated the "buyout"

check. (*Appellant's Opposition, Exh. 10; Spencer Aff't, ¶15 & Exh. H*)

17. On August 28, 2014, Mr. Spencer filed this appeal with the Commission. (*Claim of Appeal*)

18. According to redacted documents provided by DOC, during the period from 2001 to 2014, DOC permitted thirty-one (31) DOC employees, holding various unidentified non-tenured management positions, to revert to a uniformed civil service title. The documents are redacted and do not disclose the identity or level of management of the employees at the time of their requests. Most of the demotions appear to be initiated by the employee as "voluntary" requests. None of the examples involve a former DOC Commissioner. (*Appellant's Opposition, Exhs. 1, 3 & 8; Representation of Counsel*)

19. The redacted documents produced by the DOC contain two letters that appear to involve an "involuntary" removal of a DOC employee whom DOC offered to return to a lower level civil service position:

- In January 2004, the Acting DOC Commissioner informed an unidentified employee that "[e]ffective immediately, you will no longer be the [title redacted]. It is my understanding that you have a permanent position as a [title redacted] and may choose to return to that position. If you choose to elect this option, please let me know by February 6, 2004."
- In April 2005, DOC's Director of Human Resources wrote another unidentified employee to "confirm that you are being removed from your current position [title redacted] and assigned to a provisional Captain's position at the Bridgewater State Hospital, effective April 24, 2005."

(*Appellant's Opposition, Exh. 9*)

SUMMARY OF CONCLUSION

The Commission has consistently ruled that, absent lack of mental capacity, duress or other comparable extenuating circumstances, a public employee who voluntarily chooses to resign his position, even in the face of a threat of termination, lacks standing to dispute the loss of civil service employment rights, if any, by appeal to the Commission. The present appeal presents no compelling reason to depart from this well-established rule. The undisputed evidence establishes that Mr. Spencer resigned from his position as DOC Commissioner of his own free will and without evidence of legal duress. Neither G.L.c.30,§46D nor G.L.c.31,§41 et seq, afford him any basis upon which the Commission is required to compel the DOC to reinstate him to a position of Correction Officer II under those circumstances.

STANDARD OF REVIEW

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(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 undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

ANALYSIS

As a part of the 1981 revisions of the law designed to modernize the Commonwealth's ability to recruit and retain qualified managers, all upper and middle management employees of the Commonwealth (job groups M-V through M-XII) were removed from the classified civil service,

leaving only junior level managers (job groups M-I through M-IV) eligible for civil service tenure and other rights set forth in Chapter 31 of the General Laws. See St. 1981, c.699, §73; G.L.c.30, §46C et. seq.

The 1981 revisions also established a preference to encourage promotion of junior (civil service) managers to senior level management and, to encourage this, the law provided a mechanism by which a tenured civil service state employee who accepted a non-tenured management position may return to his/her tenured position if s/he were later terminated from the "at-will" management position. In this regard, the statute provides:

> "Whenever it is deemed practicable . . . appointments to positions allocated to job groups M-V through M-XII . . . shall be made by promoting managers of the commonwealth serving in positions allocated to job groups M-I through M-IV. . . .
>
> "*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[5] *upon termination of his service in the position from which he shall have been 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 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 [sic] in administering chapter thirty-one*."

G.L.c.30, §46D (*emphasis added*)

The Commission is not aware of any prior occasion, and neither party has identified such an occasion, in which the Commission has ever exercised its statutory role under the proviso at the end of the second paragraph of Section 46D, which is specifically limited to adjudicating disputes over whether an appointing authority's "termination" of a state manager was made with "just cause", calling for same standards used by the Commission in deciding civil service appeals

[5] Section 9A provides tenure for certain managers with veteran's status, but does not apply to the position of DOC Commissioner. See G.L.c.30, §§9A & 46F.

brought by tenured civil service employees under G.L.c.31, Sections 41 through 45.[6] In this case, neither party claims that this is a "just cause" termination dispute that would trigger such proceedings. Thus, this case does not invoke the Commission's jurisdiction to conduct such a "just cause" hearing under the proviso of Section 46D.

Here, the Appellant's complaint asserts a claim that DOC breached a "ministerial" duty, under G.L.c.30, §46D, to implement his request to be "restored" to the last tenured civil service position from which he was promoted into management after "termination of his service" as DOC Commissioner. He seeks a Commission order to enforce this request and to require DOC to reinstate him as a Correction Officer II (Sergeant). The DOC does not dispute that Section 46D requires that a senior manager who was "terminated" from his/her position must be restored to his/her former civil service title if s/he so requests. The DOC contends, however, that the Section 46D duty to restore a manager does not apply to Mr. Spencer because he was not "terminated" but, rather, chose voluntarily to resign his position as DOC Commission. The dispute presents a novel question of statutory interpretation of the meaning of the phrase "termination of his service" of an employee serving in a management position, found, not in the proviso, but within the main body of Section 46D. Although the statute is not strictly part of the Civil Service Law (G.L.c. 31) over which the Commission has express authority to administer and enforce, the question presented does touch and concern the rights of civil service employees and, therefore, it

[6] Tenured civil service employees may be discharged only for "just cause" after due notice and hearing and a written decision "which shall state fully and specifically the reasons therefore" G.L.c.31,§41. Employees aggrieved by such decision, may appeal to the Commission for a "de novo" review, pursuant to G.L.c.31,§43. See, e.g., Falmouth v. Civil Serv. Comm'n, 447 Mass. 814, 823 (2006); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); Cambridge v. Civil Serv. Comm'n, 43 Mass. App. Ct. 300, 303-05, rev.den., 428 Mass. 1102 (1997). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983). The appropriate focus of a "just cause" determination is the employee's "duties and obligations" in the tenured position he holds or into which he claims the right to be reinstated. See City of Springfield v. Civil Service Comm'n, 469 Mass. 370, 380-81 (2014)

is appropriate that the Commission express its view of how Section 46D ought to be applied in this case of first impression presented by the facts of this appeal.

The two prior occasions on which the Commission did address the application of Section 46D were cases in which there was no dispute that the employees had been involuntarily terminated from management positions, there, both as a result of reductions in force. Graham v. Department of Environmental Mgmt, 6 MCSR 192 (1993); O'Donnell v. Registry of Motor Vehicles, 22 MCSR 638 (2009).

In Graham, a DEM lawyer who had been reclassified into a management position (M-VI) that, later, was abolished in a reduction in force, was permitted to be returned to the position (Program Manager IV) in which he had tenure by virtue of Section 9A of Chapter 30. The Graham case turned on its quite unique facts, and does not bear directly on the present issue.

In O'Donnell, the RMV closed down several branch offices in a reduction in force, eliminating a number of junior management positions of branch managers (M-IV) who held the title by "provisional" promotion (technically a temporary promotion without tenure), but who had previously held other lower-level "provisional" junior management titles, and prior to that, had held tenure in certain non-management civil service titles. The Commission analogized Section 46D to infer that involuntary layoffs of "provisionally" appointed junior managers in civil service titles (M-IVs) were entitled to the same "bumping" rights applicable to other similarly situated civil service employees. Specifically, the Commission interpreted civil service law to mean that, although a "provisionally" promoted junior manager who had been laid off did not have the right to be restored to a lower-ranked position in which s/he did not have tenure, the manager was entitled to return to a prior tenured civil service title s/he once held (i.e., Clerk V and Typist II).The Commission also determined that such right was not limited just to employees

who held such a tenured civil service position immediately prior to the promotion to the management job from which they were laid off, but restoration extended to any such prior tenured position they once held. The Commission exercised its equitable authority under Chapter 310 of the Acts of 1993 to allow these junior managers, in effect, to "bump" back to a previous tenured civil service positions that had not been eliminated in the reduction in force. See also City of Springfield v. Civil Service Comm'n, 469 Mass. 370 (2014) (provisionally-appointed employee had right to appeal his termination for a "just cause" hearing before the Commission under G.L.c.31,§41 et seq. based on his claim to be allowed to bump back to his tenured status in his previous position as laborer)

Mr. Spencer's claim stands on a very different footing. The Commission must address two separate but related questions not presented in Graham or O'Donnell: (1) whether the right to be restored to a former tenured civil service position applies only to an "involuntary" termination but not to an "voluntary" resignation as a matter of law and (2) if so, whether or not any factual issue exists for hearing as to whether Mr. Spencer was terminated or resigned.

No judicial precedent provides the Commission with any guidance on these questions. The statutory language, however, at least in the context of civil service law, does appear clear. The "termination" of an employee's service, in the context of triggering rights under civil service and other similar law, in the absence of fraud, coercion or duress, does not include an employee's voluntary resignation, even when it is prompted by a threat of termination. See, e.g., Monahan v. Romney, 625 F.3d 42 (1st Cir. 2010), cert. den., 131 S.Ct. 2895 (2011) and cases cited. See also Mulgrew v. City of Taunton, 410 Mass. 631 (1991) (police officer's resignation terminated disability benefits); Jones v. Town of Wayland, 374 Mass. 249 (1978) (same); Campbell v. City of Boston, 337 Mass. 676 (1958 (resignation "under protest") The Commission has consistently

applied this principle in appeals brought under G.L.c.31. See Forrest v. Weymouth Fire Dep't, 28 MCSR ---,CSC No. D1-13-2 (2015); Simmons v. Department of Conservation & Rec., 25 MCSR 249 (2012); Champion v. Weymouth Fire Dep't, 25 MCSR 223 (2012); Sawicki v. City of Malden, 25 MCSR 118 (2012); Walsh v. City of Worcester, 24 MCSR 234 (2011); Williamson v. Department of Transitional Assistance, 22 MCSR 436 (2009); Sullivan v. City of Taunton, 22 MCSR 146 (2009); Ojeda v. City of Pittsfield, 22 MCSR 34 (2009); Travers v. City of Fall River, 21 MCSR 182 (2008); Liswell v. Registry of Motor Vehicles, 20, MCSR 355 (2007)

The legislative history of Section 46D, if significant at all, tends to confirm the very narrowly limited legislative intent behind that statute. The thrust of the l981 legislation, as described by the message from Governor King, who submitted the bill, was to create a "modern personnel system" that would bring the Commonwealth's management structure in line with comparable public sector employment pay and management practice.

> "In addition to increasing salaries . . . the attached legislation would also lay the foundation for a program of career development and training for managers. *It would remove all upper and middle management positions from coverage under civil service or tenure statutes, although anyone who currently has such status or tenure would retain such rights as long as he or she occupied the position.* . . ."

1981 House Doc. No. 6279 (Feb. 17, 1981 (*emphasis added*) (copy attached as Exh. 6 to Appellant's Opposition) The study that accompanied the Governor's message described the legislative proposal similarly:

> "A *new exemption of managerial positions above a certain level from coverage under civil service and tenure laws; and*
>
> "A *guarantee to all current managers* that. . .they will lose no salary or . . .other rights, such as civil service status, tenure, seniority, or time in grade.
>
> . . .
>
> ". . .*[I]n government as in any other organization, there must be considerable flexibility in filling upper and middle management positions. And, for this reason, it is recommended that anyone appointed to such a position could no longer acquire civil service status or tenure*."

> "*It is also proposed, however, that such status or tenure could be acquired in lower management positions; and, that anyone promoted from such a position to a middle or upper level positon could retain such status or tenure and could return to the position from which he or she was promoted*."

Id., Management in Massachusetts, pp. 4, 17-18 (*emphasis added*) See also G.L.c.30, §46F (no appointee to M-V through M-XII position after 6/27/1981 shall have tenure in in that position)

This legislative history is, at best, ambiguous. The law clearly bifurcated the status of junior and senior managers. It preserved civil service rights traditionally accorded to public employees (e.g., tenure, seniority and advancement through civil service examinations) solely for junior level managers, who generally did not exercise significant policy-making responsibility as did their senior counterparts. It abolished civil service protection and substituted broad discretion in hiring and firing of senior managers, in the belief that such a discretionary approach at the senior policy-making level made sense under modern public employment practices. Indeed, it is reasonable to construe the intent of the law as merely "grandfathering" the civil service and tenure status of current middle and upper level managers who, after November 1981, otherwise would be "at will" employees serving at the discretion of their appointing authority, who, ultimately, hold their positions at the pleasure of the incumbent elected executive. But, whether or not the overall intent was simply to grandfather existing civil service rights of "current" tenured managers at all levels or protect "anyone" who came up from a junior position in the future as well, the legislation's overarching goal clearly was to recognize that there were two distinct classes of management and each class deserved to be treated differently.

In sum, the plain language of the statute and its legislative history confirm that the legislature's choice of the term "termination of service" in Section 46D is nothing more than the recognition that, unlike their junior counterparts, senior managers could be "terminated" for any reason, or for no reason, at the pleasure of the executive who appointed them, or his or her

successor, and, therefore, they deserved some small, but limited, modicum of protection from such adverse job actions. It is not within the realm of reason, however, to believe that the legislature meant to give better "bumping" benefits to senior executives – i.e., to include even those who chose to voluntarily leave their jobs – which benefits are not, and never were, afforded to their subordinate civil service employees. Thus, "termination of service" in Section 46D rationally must be construed consistently to preserve, not abolish, the traditional, well-recognized distinction in civil service law between involuntary "termination" and voluntary "resignation", with involuntary termination (i.e., discharge, abolishment of the position) being the sole trigger for any "right" of an employee to revert to a lower-level tenured position (that could, in some cases, mean "bumping" out another employee with less seniority in the reclaimed position).

Second, the Commission must next consider whether or not Mr. Spencer's departure was, as a matter of law, an involuntary termination or a voluntary resignation or, whether bona fide disputed factual issues exist that preclude summary disposition and require an evidentiary hearing to decide to which of those two possibilities it belongs.[7]

It is not disputed that, on its face, Mr. Spencer's departure took the form of a letter of resignation, originally drafted by him and altered by Secretary Cabral with his prior knowledge and prior to its acceptance and effective date, to bifurcate the request to revert to a lower-level position from the resignation itself. It is also not disputed that, for at least four days (July 24 to July 28) Mr. Spencer, while still occupying his position of DOC Commissioner, knew that his resignation had been explicitly made unconditional but took no action to protest, rescind or dispute that decision, either before or after knowing those facts. Indeed, he continued to press his "request to revert", as he was instructed, solely through separate channels for several weeks

[7] Were such an evidentiary hearing required, it would present a further question as to whether the proper venue for such a hearing would be before the Commission (whose jurisdiction under Section 46D seems to belimited to holding "just cause" hearings after termination) or another forum.

thereafter. He asked that DOC defer processing his "buyout" check for accrued compensatory and vacation time. It is not disputed that DOC eventually did send it to him. Thus, the question is posed: under these circumstances, viewing the evidence in the light most favorable to Mr. Spencer, do the undisputed material facts demonstrate that he has "no reasonable expectation" of prevailing on a claim that his resignation was procured through duress, coercion or fraud, which is an "essential element" of his case. I conclude that Mr. Spencer fails this test.

The Commission has been clear that mere evidence that a resignation was made under threat of facing discipline does not itself create a factual issue that the resignation was induced by "fraud, coercion or duress" sufficient to survive a motion to dismiss. See, e.g., Forrest v. Weymouth Police Dep't, 28 MCSR --- (2015) and cases cited (motion to dismiss granted); Williamson v. Department of Transitional Assistance, 22 MCSR 436 (2009) and cases cited (motion to dismiss granted); Sullivan v. City of Taunton, 22 MCSR 146 (2009) (summary decision granted). See also, City of Worcester v. Civil Service Comm'n, 18 Mass.App.Ct. 278, rev.den., 392 Mass. 1104 (1984) (statutory requirement to elect to accept demotion and waive right to contest validity of layoff, although consent was necessarily induced under threat of separation from employment, did not violate employee's civil service rights); Sawicki v Malden, 25 MCSR 118 (2012) (granting summary decision dismissing employee's claim to reinstatement that alleged appointing authority had violated agreement under which employee had agreed to resign); Ojeda v. City of Pittsfield, 22 MCSR 34 (2009) (granting motion to dismiss employee's claim to "constructive discharge" on grounds that resignation was induced by misunderstanding of his retirement rights) Similarly, this is not a case in which Mr. Spencer contends that he lacked the mental capacity to make a conscious, informed decision to resign his employment, as was the situation in Champion v. Weymouth Fire Dep't, 25 MSCR 223 (2012).

Mr. Spencer, an experienced senior manager, consciously chose the resignation route that afforded him the opportunity to write his own favorably-couched letter highlighting his career, rather than face a difficult and costly process that would have likely raised issues better left undisturbed. He was fully capable of refusing the "request" to resign and even after learning that the resignation had to be unconditional, could have protested or rescinded the letter before it became effective. This would, however, have triggered a disciplinary discharge and "just cause" adjudicatory hearing that, at best, would question his management credentials and, at worst, potentially, do more harm than good to his reputation.[8] I make no judgment as to the merits of Mr. Spencer's credentials, his career accomplishments or his contention that he was unfairly targeted for errors in judgment that he did not commit. However, it is clear that his proffer of evidence presents no "reasonable expectation" that the choice to resign rather than fight to clear his name, knowing the consequences of both choices, was caused by a disabling mental capacity or legally provable fraud, duress or coercion, but, rather, was. his own conscious decision.

Third, Mr. Spencer's alternative argument that the Commission should take jurisdiction under G.L.c.31,§42 also fails. That statute provides that a tenured civil service employee whose civil service rights granted under G.L.c.31,§41 have been violated (which does include being "discharged" or "laid off" from a tenured civil service position) may file a complaint with the Commission and "[if] the commission finds that the appointing authority has failed to follow said requirements and that the rights of the person have been prejudiced thereby, the commission shall order the appointing authority to restore said person to his employment immediately without loss of compensation or other rights." G.L.c.31, §§41 & 42. Mr. Spencer's claim to

[8] The "just cause" termination hearing would focus on the right to revert to Correction Officer II. Although the relevance might be disputed, the parties could be expected to proffer evidence at such a hearing from part or all of Mr. Spencer's entire record as evidence of good reason to support or question his ability to perform even at a lower level of supervision. See generally City of Springfield v. Civil Service Comm'n, 469 Mass. 370, 380-81 (2014)

restoration to a lower-ranked position is a right that arises under Section 46D of Chapter 30, not Chapter 31. In the absence of "just cause" issues, Section 46D seems to make no provision for a hearing before the Commission, or anywhere else, on the issue of an alleged breach of a "ministerial" duty to grant a request for restoration. Even if G.L.c.31, Section 42 rights could be construed as an indirect vehicle to enforce a breach of G.l.c.30, Section 46D rights, the same persuasive authority that takes resignation out of the realm of Section 46D, clearly applies with even more compelling force to the notice and hearing requirements applicable to adverse employment actions protected under G.L.c.31, Section 41 as well.

Finally, I note that this case presents a very different scenario from the situation in which the Commission chose to weigh in on a Section 46D matter to exercise its equitable discretion to preserve the employment of junior RMV managers who had been laid off in a reduction-in-force. See O'Donnell v. Registry of Motor Vehicles, 22 MCSR 638 (2009). Unlike this case, the RMV employees in O'Donnell had no choice between resigning or being laid-off, and did not, in any way, face disciplinary action of any kind that implicated their continued fitness for duty. In addition, the predicament in which these employees found themselves was complicated because of their "provisional" civil service status. As junior managers, they were "civil service" employees, but, due to the lack of civil service examinations for decades, through which tenure in these positions could have been earned, their status, although permanent in fact, was "provisional" and without civil service tenure. The Commission has long recognized this "plight of the provisional" and, to the extent possible within existing law, on very rare occasions, as in O'Donnell, has made accommodations for this disconnect between theory and practice, although it remains for the legislature, not the Commission, to address this dilemma more globally. See City of Springfield v. Civil Service Comm'n, 469 Mass. 370, 380-81 (2014) (accepting

jurisdiction to contest termination of provisionally appointed employee who held tenure in another lower level position); Codair v. Massachusetts Water Resources Auth., 27 MCSR 407 (2014 (discussing rights of provisional employees in disciplinary cases); Louissant v. City of Boston, 27 MCSR 167 (2014) (discussing hiring and promotional rights of provisional employees in absence of civil service examinations) See also Walker v. City of New Bedford, 26 MCSR 399 (2013); Phillips v. Department of Public Health, 25 MCSR 56 (2012)

Here, none of these equities are present. Mr. Spencer does not seek temporary demotion to preserve a desire to preserve continuity in his public service career, as did the RMV junior managers. His clearly expressed singular intention to revert to a uniformed-level job, after over twenty years in management, was solely to position himself for retirement in a year as a Group 4 employee to gain dramatic enhancement to his (already healthy) expected future pension over what he would be entitled to receive if he retired as DOC Commissioner, which is classified as a Group 1 position for retirement purposes. See G.L.c.32, §3(2)(g) & §5(2)(a).

There is no dispute that, over the years, DOC has consented to similar requests of a significant number of DOC managers, all below the DOC Commissioner level, to be demoted to "uniformed-level" positions immediately prior to retirement solely to qualify for such an enhanced pension that the law arguably allowed. (*Appellant's Opposition, Exhs. 1, 3 & 8*) [9] Assuming the law still permits the practice, absent further legislative changes, the Commission

[9] Historically, the retirement statute was used to allow employees to revert to a unformed position for just one day and then retire in Group 4 (for two such explicit examples, see *Appellant's Opposition, Exh. 8*). This so-called "King for A Day" practice was eliminated with enactment of a one-year minimum service rule as part of the 2012 overhaul of the state pension law. Acts of 2011, C. 176, §8. Even before the 2012 reform, however, "sham" retirement schemes, participated in by employers and employees, to make short-term demotions solely to enhance retirement benefits and without a bona fide work-related purpose, had been struck down as illegal.. See Public Employee Retirement Administration Comm'n v. Madden, 86 Mass.App.Ct. 1107(2014) (Rule 1:28 opinion) citing Pysz v. Contributory Retirement Appeal Board, 403 Mass. 514 (1988) It also could be questioned whether the practice furthers, or frustrates, the intended purpose of the special treatment of Group 4 employees. Id., (noting the purpose of the law to allow maximum retirement benefits at an earlier age to employees in more hazardous occupations was intended to encourage turnover and "the succession of younger employees better able to perform arduous work")

has no power to prevent DOC (or others) from voluntarily choosing to enable its top managers to accept demotions to lower level positons (tenured or not) and take advantage of the law, although the only motivation is to qualify the managers for enhanced Group 4 benefits.

It is another matter, however, to ask the Commission to put its imprimatur on such a questionable practice by asking it to invoke its equitable powers and, in effect, to mandate that result in this, and, by implication, in every other similar case, as a matter of law and public policy. It becomes especially problematic here, where the manager is the DOC Commissioner, who served at the pleasure of the Secretary of EOPSS and the Governor, who are his appointing authority; but neither of those officials serve as the appointing authority over DOC correction officers, such as the CO-II position that Mr. Spencer wanted to assume. See G.L.c.27,§1. As neither Chapter 30 nor Chapter 31 expressly compels the Commission to require that DOC approve Mr. Spencer's request, the decision to allow him to revert to a "high risk" level job (which he has not performed in more than twenty years), if lawfully permitted at all, is one for the appropriate appointing authority or authorities. This is not a matter in which the Commission is empowered to, nor should it exercise its discretion in the form of equitable relief.

Accordingly, for the reasons set forth above, DOC's Motion to Dismiss, as amended by its Supplemental Motion to Dismiss, is granted. The appeal of the Appellant, Luis S. Spencer, under Docket No. D1-14-205, is hereby ***dismissed***.

Civil Service Commission.

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein & Tivnan, Commissioners) on November 12, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice sent to:

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