COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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CHARLES A PICARD, JR. **CASE NOS: G2-09-352(Picard)**
THOMAS STOKINGER, **G2-09-353(Stokinger)**
WILLIAM W. CHASE, JR. **D-10-28 (Chase)**
STEVE MANOLAKIS **D-10-29 (Manolakis)**
Appellants

v.

CITY OF QUINCY,
Respondent

Appellant Charles Picard	Pro Se
Appellant Thomas Stokinger	Pro Se
Attorney for Appellants William Chase and Steven Manolakis	Gerard S. McAuliffe, Esq. 43 Quincy Avenue Quincy, MA 02169
Attorney for City of Quincy	Janet S. Petkun, Esq. Assistant City Solicitor Office of the City Solicitor Quincy City Hall 1305 Hancock Street Quincy, MA 02169
Commissioner:	Paul M. Stein

DECISION

These four appeals to the Civil Service Commission (Commission) involve claims by employees of the City of Quincy (Quincy) to positions of Foreman and Working Forman in the Highway Division of the Quincy Department of Public Works and Transportation (DPW). In August 2009, the Appellants, Charles Picard and Thomas Stokinger, appealed, pursuant to G.L.c.31, §2(b), protesting their non-selection for promotions made in 2007 and 2008 to Working Foreman and Forman, respectively. In February 2010, the Appellants, William Chase and Steven Manolakis who had been promoted to those positions in 2008, brought appeals to the Commission

pursuant to G.L.c.31,§41-§43, claiming that they were unlawfully demoted from those positions without just cause. Because the appeals involved common issues of fact and related issues of law, the appeals were consolidated for hearing, which was held by the Commission on May 27, 2010. Quincy called two (2) witnesses and Messrs. Picard and Stokinger testified on their own behalf. Witnesses were not sequestered. Five (5) Exhibits were marked in evidence. On June 23, 2010 and June 25, 2010, the Commission received post-hearing submissions from Quincy and from Messrs. Picard and Stokinger on July 9, 2010, added to record as P.H. Exhibits 7 through 10, respectively. On July 21, 2010, the Commission received a letter from the Massachusetts Human Resources Division (HRD),added to the record as P.H. Exhibit 11. On July 9, 2010, the Commission received a motion for summary disposition of the appeals of Messrs. Chase and Manolakis, and post-hearing memoranda from Quincy and Messrs. Chase and Manolakis.

FINDINGS OF FACT

Giving appropriate weight to the Exhibits; to testimony of the Appellants, Quincy Commissioner of Public Works Lawrence Prendeville and Quincy Business Manager Michael Coffey, and to inferences reasonably drawn from the evidence I find credible, I make the findings of fact set forth below.

The Appellants

1. The Appellant, Thomas J. Stokinger, is a tenured labor service employee of the Quincy DPW Highway Division, with a civil service seniority date of August 11, 1975. At the times relevant to the facts involved in this appeal, he has held a position called "Mason/Heavy MEO (Motor Equipment Operator), sometimes also referred to as "Laborer/Heavy MEO I" and "Mason/CDL Driver". At various times in the past, he has served "out-of-grade" temporarily as a "Foreman." (*Exhs. 2, 3, 6, P.H.Exh.10C; Testimony of Prendeville & Stokinger; Stokinger Claim of Appeal*)

2. The Appellant, Charles A. Picard, Jr., is a tenured labor service employee of the Highway Division of the Quincy DPW, with a civil service seniority date of September 26, 1994. At the times relevant to the facts involved in this appeal he held the position called "Special Heavy MEO/Laborer". (*Exhs.2, 3, 6 & 7; Testimony of Prendeville; Picard Claim of Appeal; Stipulated Facts in Quincy Motion for Summary Disposition)*[1]

3. The Appellant, Steven Manolakis, is a tenured labor service employee of the Highway Division of the Quincy DPW, with a civil service seniority date of July 6, 1993. At the time of his appeal, he held the position sometimes called a "Working Foreman/Laborer" and sometimes called "Working Forman/ Special MEO". (*Exhs. 2, 3, 6 thru 8; Testimony of Prendeville; Stipulated Facts in Quincy Motion for Summary Disposition*)

4. The Appellant, William W. Chase, is a tenured labor service employee of the Highway Division of the Quincy DPW, with a civil service seniority date of March 21, 2000, or possibly earlier.[2] At the time of his appeal, he held the position called "Special Heavy MEO/Laborer" (*Exhs. 2, 3, & 6; Testimony of Prendeville; Quincy Motion for Summary Disposition*)

Quincy DPW Job Classifications

5. According to the most recent (1979) Classification Plan filed with HRD by Quincy, the job title of "Heavy MEO" is a Class II labor service position, which appeals equivalent to the labor service job title of "Heavy MEO", Job Code 5703B, in the Mobile Industrial Equipment Operating

[1] In August 2010, Mr. Picard filed a separate appeal challenging his subsequent reassignment to the job title of "Heavy MEO II", which appeal was heard separately and is the subject of a separate Decision issued by the Commission. (CSC Docket No. D-10-213).

[2] Mr. Chase is carried on Quincy's records with a seniority date of March 21, 2000, which is when he started working for the DPW, although he is alleged to have begun employment as a "Provisional MEO" with the Quincy Public Schools in October 1986 and "transferred" to the DPW in 2000. Since the evidence fails to disclose whether Mr. Chase's provisional employment with the Quincy Public Schools ever became permanent, and provisional employment does not count toward tenured status, for purposes of these appeals, it cannot be determined that his seniority date is any earlier than the date began with the DPW (as the records reflect) or some earlier date. (*Exh. 11;[HRD 7/21/10 Letter]; Quincy Motion for Summary Disposition*). The Commission's decision does not turn on a resolution of this factual uncertainty.

Group of the Muni-Class Manual promulgated by HRD, and covers work with trucks having a rated capacity of 3 to 9 tons, unless used with accessory equipment such as blades and spreaders. (*Administrative Notice [www.mass.gov/csc] and Quincy Classification Plan on file at HRD; See also Exh.2 in CSC Case No. D-10-213]*)

6. The Quincy Classification Plan job title of "Special Heavy MEO" is a Class II labor service position which appears equivalent to the Muni-Class labor service job titles of "Special MEO", Job Code 5703C in the Mobile Equipment Operating Group, which covers work with trucks over 9 tons and other trucks when operated with accessory equipment such as blades and spreaders. (*Administrative Notice [www.mass.gov/csc and Quincy Classification Plan on file at HRD]; See also Exh.1 in CSC Case No. D-10-213]*)

7. Both Quincy job titles of "Heavy MEO" and "Special Heavy MEO" also include job duties that appear equivalent to the Muni-Class labor service job title of "Hoisting Equipment Operator", Job Code 5710A in the Mobile Equipment Operating Group, which covers operators of hoisting equipment such as backhoes, cranes, front-end loaders and other equipment that requires a special license from the Massachusetts Department of Public Safety. (*Administrative Notice [www.mass.gov/csc and Quincy Classification Plans on file at HRD]; See also Exhs.1& 2 in CSC Case No. D-10-213]*)

8. Neither the Quincy Classification Plan nor the Muni-Class Manual contain any specific job titles of "Working Forman, Special MEO". The Muni-Classs Manual does provide a general authority for use of the job title of "Working Forman" in most labor service job groups, to apply to a supervisor of other labor service employees having the same occupation or working in the same operational unit. Quincy's Classification Plan also contains "Working Forman" job titles for a variety of Class I, II and Class III labor service occupations and operational units. (*Administrative Notice [www.mass.gov/csc and Quincy Classification Plans on file at HRD]*)

9. The Muni-Class Manual does not provide for a labor service job title of "Foreman". The Quincy Classification Plan does contain several official service job titles of "Foreman", including 'Highway and Sanitary Foreman" and "General Foreman of the Highway and Sanitary Divisions". (*Administrative Notice [www.mass.gov/csc and Quincy Classification Plans on file at HRD]*)

10. Article I of the collective bargaining agreement (CBA) between Quincy and Local 1139, Laborers International Union of North America, AFL-CIO (the Union), provides, in part:

> "[Quincy] hereby recognizes the Union as the sole and exclusive bargaining agent . . . for the purposes of collective bargaining with respect to rates of pay, wages, and hours of employment as follows: (a) All employees in the Highway, Water, Sanitary, and Sewer Divisions of the Department of Public Works, the Cemetery and Park Departments and Department of Traffic and Parking. . . . Foremen and General Foremen in the Highway, Water, Sanitary, and Sewer Divisions of the Department of Public Works and General Foremen and Foremen in the Cemetery and Park Departments will be allowed to vote among themselves to determine whether or not they desire to be excluded from this bargaining unit. If in fact they vote to exclude themselves from this unit, then the parties hereto agree that they will be excluded . . . ."

(*P.H.Exh. 7, Attch. 5*)

11. According to Quncy, the DPW foremen and general foreman have not voted to exclude themselves from the Union. Based on this event, Quincy deems these foremen and general foreman as labor service employees. (*P.H.Exh. 7, Attch. 5*)

12. The HRD Form 30 (job descriptions) for the positions of "Foreman", "Working Foreman", "Heavy MEO" or "Special Heavy MEO" prepared and currently in use by Quincy are undated and unsigned, and contain no job codes. (*Exh. 4, P.H.Exh.8; See also Exhs.1 & 2 in CSC Case No. D-10-213]*)

The 2007 DPW Promotions to Working Foreman and Forman

13. The Appointing Authority for positions within the Quincy DPW is the Mayor of Quincy. William J. Phelan served as Mayor through January 2, 2008, after which his successor, Thomas P. Koch, the incumbent Mayor, assumed the office. (*Exh. 4; Testimony of Prederville & Coffey*)

14. In May 2007, Quincy posted a job opening in the labor service for a DPW Highway Divison "Working Foreman, Special MEO". The applicants included Mr. Picard, Mr. Chase, and certain other Highway Division personnel, listed below in the order of their seniority:

Name	Title	Seniority Date
Richard MacKenzie	Special Heavy	12/05/83
Ed Rowan	Heavy MEO I	9/06/94
Mark Pitts	Special Heavy	9/19/94
Charles Picard (Appellant)	Special Heavy	9/26/94
Jim Adams	Heavy MEO II	10/27/97
William Chase (Appellant)	Special Heavy	3/21/00
Stephen Kozlowski	Special Heavy	5/22/00
Shaun Brennion	Heavy MEO I	8/11/03
Thomas Mackay	Heavy MEO I	5/05/04

(*Exh. 4; P.H.Exh. 7, Attch 4*)

15. The Form 30 job description attached to the posting stated that the position reported to the Commissioner of Public Works and would supervise and be required to operate equipment with a rated capacity of more than 3 tons and up through 9 tons, hold a valid Massachusetts Class B CDL and a valid Massachusetts DPS Hoisting Engineer License. (*P.H.Exh. 8*)

16. In September 2007, Quincy posted a job opening in the labor service for a DPW Highway Division Foreman. The applicants for that position included Mr. Stokinger and Mr. Manolakis, and 19 other personnel. Some of the DPW employees who received interviews, together with their job titles, is listed below in the order of their seniority:

Name	Title	Division	Seniority Date
Tom Stokinger (Appellant)	Heavy MEO	Highway	8/11/75
Richard MacKenzie	Special Heavy	Highway	12/05/83
Steve Philbrook	Special Heavy	Highway	1/22/88
Steve Manolakis	Working Forman	Highway	7/06/93
Mark Pitts	Special Heavy	Highway	9/19/94
Charles Picard	Special Heavy	Highway	9/26/94
Karl Wood	Working Foreman	Highway	2/05/96
Chris Newton	Working Foreman	Water	10/14/96
Bill Chase	Special Heavy	Highway	3/21/00
Stephen Kozlowski	Special Heavy	Highway	5/22/01

(*Exh. 4; P.H.Exh. 7, Attch. 3*)

17. On or about January 2, 2008, in his final week in office, Mayor Phelan appointed Mr. Kozlowski to the position of Working Foreman and Mr. Pitts to the position of Foreman. A number of other applicants (including Mr. Picard) filed grievances through the Union that these appointments were made in violation of the CBA. On February 1, 2008, then Acting DPW Commissioner Michael Coffey allowed the grievances and agreed to vacate the appointments and repost both positions. (*Exhs. 1 & .4; Testimony of Prendeville & Coffey*)

18. On February 6, 2008, Messrs. Kozlowski and Pitts were notified that they were removed from the position of Working Foreman and Foreman, respectively, and returned to their former positions and salary as Special Heavy MEOs. On February 7, 2008, Quincy reposted the positions of Working Foreman, Special MEO - Highway and Foreman-Highway, along with revised Form 30 job descriptions for each position. (*Exhs. 1 & 4, P.H. Exhs. 7 & 8; Testimony of Coffey*)

19. The first ten of the fourteen applicants for the re-posted position of Working Foreman and their job titles to the extent known, included, in order of seniority:

Name	Title	Seniority Date
Richard MacKenzie	Special Heavy	12/05/83
Steve Philbrook	Special Heavy	01/11/88
Mark Pitts	Special Heavy	09/19/94
Charles Picard (Appellant)	Special Heavy	09/26/94
Charles Henwood	N/A	01/22/96
James Adams	N/A	10/27/97
James Flaherty	N/A	12/14/98
Donald Buckley	N/A	11/15/99
William Chase (Appellant)	Special Heavy	03/21/00
Stephen Kozlowski	Special Heavy	05/22/00

(*P.H.Exh.7, Attch. 2*)

20. Interviews were conducted of selected candidates for the Working Forman's position on March 27, 2008. Mr. Picard was not among the candidates who were selected to be interviewed. On April 9, 2008, William Chase was selected to fill the position, effective April 14, 2008. (*Exh. 4; P.H. Exh. 9; Testimony of Prendeville, Coffey & Picard*)

21. Fourteen DPW employees applied for the re-posted position of Foreman–Highway:

Name	Title	Division	Seniority Date
Tom Stokinger (Appellant)	Heavy MEO	Highway	8/11/75
Richard MacKenzie	Special Heavy	Highway	12/05/83
William Wright	N/A	Water	5/23/85
Steve Philbrook	Special Heavy	Highway	1/22/88
John McMahan	N/A	Highway	5/15/89
Steve Manolakis (Appellant)	Working Forman	Highway	7/06/93
Mark Pitts	Special Heavy	Highway	9/19/94
Charles Henwood	N/A	Highway	01/22/96
Karl Wood	Working Foreman	Highway	2/05/96
Chris Newton	Working Foreman	Water	10/14/96
Larry Levasseur	N/A	Highway	8/31/98
Stephen Kozlowski	Special Heavy	Highway	5/22/00
David Tamulis	N/A	SWD	4/25/01
Michael Caporale	N/A	SWD	4/11/05

(*Exh. 4; P.H.Exh. 7, Attch. 1*)

22. Selected Foreman-Highway candidates were interviewed on March 18, 2011. Mr. Stokinger was not one of those applicants who were granted an interview. On March 20, 2008, Mr. Manolakis was selected to fill the position, effective March 24, 2008. (*Exh. 4; Testimony of Prendeville, Coffey & Stokinger*)

23. Messrs. Pitts and Kozlowski filed grievances alleging that their demotions were without just cause. On April 9, 2008, Mayor Koch denied these grievances. (*Exhs 1 & 4*)

24. On April 10, 2008, Messrs. Pitts and Kozlowski appealed to the Commission alleging that their demotions were without just cause. In September 2008, these appeals were withdrawn. and the parties agreed to submit the disputed demotions to arbitration. (*Exhs. 1 & 4; Administrative Notice[CSC Docket Nos. D-08-834 and D-08-84]*)

25. On August 5, 2009, Arbitrator Gregory M. McMahon issued an Award which determined :

> "The City did not have just cause to demote Stephen Kozlowski or Mark Pitts. Stephen Kozlowski shall be returned to the position of Highway Working Foreman, Special M.E.O. and he shall be made whole for all lost wages and benefits. Mark Pitts shall be returned to the position of Highway Foreman, and he shall be made whole for all lost wages and benefits."

(*Exh.1*)

26. Quincy's request for reconsideration of the Award was denied on October 2, 2009. Quincy thereafter complied with the award and reinstated Messrs. Pitts and Kozlowski to the positions of Foreman and Working Forman respectively. (*Exhs. 1 & 4; Testimony of Prendeville & Coffey*)

27. On January 22, 2010, Mayor Koch issued letters to Messrs. Manolakis and Chase stating that he had ordered their reduction from their positions of Foreman and Working Foreman, respectively. The grounds for the decision was a lack of funds (i.e., the money being insufficient to support the retention of both Mr. Pitts and Mr. Manolakis as Foremen and both Mr. Kozlowski and Mr. Chase as Working Foremen). Messrs. Chase and Manolakis duly appealed these demotions to the Commission on February 4, 2010. (*Manolakis and Chase Claims of Appeal; Exhs. 2 & 3; Testimony of Coffey*)

28. Meanwhile, on August 28, 2009, Messrs. Stokinger and Picard lodged appeals to the Commission alleging that their non-selection in 2007 and, again in 2008, for the positions of Foreman and Working Foreman, respectively, violated their civil service rights. (*Stokinger and Picard Claims of Appeal*)

CONCLUSION

Summary

The appeals of Messrs. Stokinger and Picard from their 2008 non-selections must be dismissed because neither appeal was timely filed, as the promotions involved were made one or two years prior to the date of the appeals, which is far past the 60 day period for filing a bypass appeal. In addition, as to Mr. Stokinger (a Heavy MEO), even if timely, the Commission would lack jurisdiction to hear an appeal from non-selection for what was clearly a provisional appointment or promotion to an official service position that was filled by other qualified candidates who held higher job titles (i.e., a Special Heavy MEO and a Working Foreman) at the time of his selection. Similarly, on the merits of Mr. Picard's appeal, he has no standing to complain about non-

selection for a labor service promotion from Special Heavy MEO to Working Foreman in April 2008, when he appears as the fourth most senior Special Heavy MEOs who applied, which puts Mr. Picard outside the "2n+1" range of the qualified labor service candidates entitled to be promoted (none of whom appealed). Thus, his civil service rights were not violated by the selection of Mr. Chase, although Mr. Chase's seniority also place him outside the "2n+1" range.

The appeal by Mr. Manolakis from his 2010 demotion from Foreman to Working Foreman must also be dismissed. As noted above, the job title of Highway Foreman is classified in the official service, and that classification cannot be altered in a collective bargaining agreement. Thus, Mr. Manolakis held provisional, not permanent status in the position of Foreman, and he has no standing under Section 39 to complain about demotion from such a provisional position to his former permanent civil service title.

The appeal by Mr. Chase from his 2010 demotion from Working Foreman to Special Heavy MEO also will be dismissed. His involuntary demotion did not comply with the procedures required by Section 39, by which Quincy was required to implement a reduction in force according to seniority, as Mr. Kozlowski was junior to Mr. Chase. Moreover, whatever rights Mr. Kozlowski may have held under a collective bargaining agreement or Award cannot alter Mr. Chase's rights under civil service law. Mr. Chase's 2008 promotion to Working Foreman, however, also was made in violation of civil service law (Mr. Chase was not within the "2n+1" range of qualified applicants by seniority entitled to be promoted), and, under the circumstances, it would not be appropriate to grant him retrospective equitable relief.

Both Bypass Appeals Were Untimely

The Commission has adopted a 60-day period of time within which a civil service employee is required to bring an appeal that challenges his non-selection for promotion or appointment to a civil service position. See CSC Standing Order dated June 8, 2000. See also 801 CMR

1.00(6)(b)(time for filing claim is 30 days from notice of action or such other time as prescribed by statute or Agency rule). The failure to file an appeal with the Commission within the prescribed time is jurisdictional, or akin to a statute of limitations, and cannot be improperly expanded by the Commission. See Town of Falmouth v. Civil Service Comm'n, 441 Mass. 814, 822-23 (2006); Donnelly v. Cambridge Public Schools, 21 MCSR 665 (2008); Volpicelli v. Woburn, 22 MCSR 448 (2009); Novia v. City of Boston, 20 MCSR 639 (2007); Maurice v. Massachusetts Dep't of Mental Health, 19 MCSR 328 (2006); Konikowski v. Department of Corrections, 10 MCSR 79 (1997); Springer v. Town of Saugus, 8 MCSR 154 (1995).

Here, Mr. Stokinger and Mr. Picard appealed years after their non-selection. They assert that, until the arbitration Award, the appointments in question were not final and their appeals would have been premature. This effort to excuse the timely filing of an appeal does not pass muster.

As to the January 2008 appointments, there was no arbitration proceeding. Those appointments were, in fact, promptly rescinded and the process was repeated. They both reapplied for the positions in February 2008. If there were grounds to complain about non-selection the first time around, no impediment existed to making such a claim in a timely manner. Moreover, the fact that the appointments were vacated and re-posted within a matter of a week or two, essentially rendered any such potential appeal moot.

Similarly, as to the subsequent appointments in March and April 2008, the fact that Mr. Pitts and Kozlowski had taken action to question their demotions created no legal or factual impediment to any person who was not selected in the second hiring round from contesting that process in a timely manner. Indeed, Quincy and Local 1139 did not submit the matter to arbitration until late in 2008, long before any bypass appeal that could have been asserted and should have been filed with the Commission. Messrs. Stokinger and Picard have presented no plausible justification for bringing their appeals long after they knew that their civil service rights, if any, had been violated.

The Merits of Mr. Stokinger's Appeal

It is well established under the Civil Service Law, that a "bypass" means the selection of a candidate from an eligible list prepared from a certification of applicants established according to their relative ranking on a competitive civil service examination for appointment or promotion to an "official service" position, when the successful candidate's score was lower than the score of the unsuccessful candidate, and the appointing authority is able to justify the "bypass" for "sound and sufficient reasons" which must be approved by the personnel administrator, Human Resources Division (HRD) or HRD's delegated representative. G.L.c.31, §26; PAR.02, PAR.08; PAR.09. See, e.g., Cotter v. City of Boston, 193 F.Supp.2d 62 (D.Mass.2002), rev'd other grounds, 323 F.3d 160 (1st Cir.), cert.den., 540 U.S. 825 (2003); Thompson v. Civil Service Comm'n, Middlesex C.A. No. MICV1996-5742 (Sup.Ct. 1996). An unsuccessful, lower ranked candidate who is "bypassed" is entitled to appeal to the commission for a de novo review of the sufficiency of the reasons for the bypass pursuant to G.L.c.31,§2(b). See, e.g., See Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass 256, 264-65, 748 N.E.2d 455, 461-62 (2001); MacHenry v. Civil Service Comm'n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996)

The position of "Foreman–Highway" is classified by HRD and Quincy as an official service job title, but no competitive examinations have been given for such positions for many years. Accordingly, there are no "eligible lists" from which appointing authorities can make permanent promotions, and they are confined to filing such a position through "provisional" promotions, pursuant to Sections G.L.c.31, §15, which provides, in relevant part:

> *An appointing authority* [i.e. Quincy] *may . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit.* Such provisional promotion may be made only if there is no suitable eligible list . . . .No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

> *If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission . . . of sound and sufficient reasons therefore*. . . .

G.L.c.31, §15 (*emphasis added*)

Unlike promotions made after certification from eligible lists as to which more highly ranked non-selected candidates may appeal a non-selection to the Commission, appointing authorities have discretion to make provisional promotions among qualified candidates without regard to ranking, and, in general, such choices are subject to challenge by appeal to the Commission only in very limited circumstances. See, e.g., G.L.c.31,§27; PAR.08 & PAR.09; Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010); Gale v. Department of Revenue, 23 MSCR 534 (2010); Foster v. Department of Transitional Assistance, 23 MCSR 528 (2010); Pease v. Department of Revenue, 22 MCSR 284 (2009), further considered, 22 MCSR 754 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MSCR 291 (2009), further considered, 24 MCSR 128 (2011); Glazer v. Department of Revenue, 21 MCSR 51 (2007); Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), reconsidered, 19 MCSR 34 (2006), further reconsidered, 20 MCSR 628 (2007).

To be sure, provisional promotions are supposed to be 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, 481 N.E.2d 1176, 1180-81, rev.den., 396 Mass. 1102, 484 N.E.2d 103 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29, 22 N.E.2d 613 (1939). However, save for public safety positions (fire, police, and corrections), competitive civil service examinations are no longer given for state or municipal official service jobs. In most cases, it has been decades since an examination was held for most positions. Thus, in the absence of such examinations, non-public safety official service positions in municipal civil service

communities, as here, must be filled "provisionally" under G.L.c.31,§12 or §15, meaning that the appointment is made "pending" the giving of an examination, a fiction that never actually occurs. Thus, as predicted, the exception has now swallowed the rule and "a promotion which is provisional in form may be permanent in fact." Kelleher v. Personnel Administrator, 421 Mass. 382, 399, 657 N.E.2d 229, 233-34 (1995). Meanwhile, public employees seeking or holding provisional status, which grants them no civil service tenure within the meaning of G.L.c.31, §1, are left with fewer rights under the Civil Service Law than their peers with permanency.[3]

In Mr. Stokinger's case, his civil service title of Heavy MEO is lower than the job titles held by either candidate selected for the Foreman's position. Mr. Kozlowski, appointed in January 2008, held the higher title of Special Heavy MEO and Mr. Manolakis, appointed in March 2008, was in the "next lower title" of Working Foreman. As each of those candidates held jobs that made them equally, if not more, qualified for the position of Foreman, Mr. Stokinger would have little basis to challenge his non-selection over either of them as a violation of his civil service rights as defined by the applicable law, G.L.c.31, §15. Indeed, as to the re-posted selection of Mr. Manolakis in March 2008, who held the "next lower title", Section 15 clearly allows his appointment without requiring Quincy to provide any justification or reason for its selection.

[3] 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 to address the corrosive effects of allowing the use of "provisional" appointments and promotions to become the rule, not the exception. 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; Pease v. Department of Revenue, 22 MCSR 284 (2009), further considered, 22 MCSR 754 (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); 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); Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), reconsidered, 19 MCSR 34 (2006), further reconsidered, 20 MCSR 628 (2007); Tanca v. Department of Empl. & Training, 9 MCSR 18 (1996); Veneau v. Department of Revenue, 8 MCSR 8 (1995); Barrett v. Department of Public Works, 6 MCSR 167 (1993); Felder v. Department of Public Welfare, 6 MCSR 67 (1993) further considered, 7 MCSR 28 (1994). As much as the Commission regrets this state of affairs, the Commission must honor the clear legislative intent that allows for them so long as the statutory requirements are followed. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. at 389, 657 N.E.2d at 234

The result here is not affected by the provisions of the CBA which permit Foremen and General Foreman to "opt out" to the bargaining unit that represents the labor service employees of the Quincy DPW. Their failure to do so has caused Quincy to treat those positions as labor service jobs, rather than official service positions. This approach, however, is flawed. The classification of jobs into the "official" and "labor service" is the sole prerogative of the Personnel Administrator [HRD] and the Commission under Chapter 31, §5(b) Chapter 150E plainly prescribes that collective bargaining cannot detract from a civil service employees rights under Chapter 31 and, where a conflict exists, Chapter 31 controls. See, e.g., G.L.c.150E, §7(d) (civil service law not one of enumerated statutes which may be superseded by collective bargaining law) ; City of Fall River v. AFSCME Council 93, Local 3177, 61 Mass.App.Ct. 404, 810 N.E.2d 1259 (2004)(discussing when provisions of collective bargaining are invalid as conflicting with civil service law); (City of Leominster v. International B'h'd of Police Officers, Local 338, 33 Mass.App.Ct. 121, 596 N.E.2d 1032, rev.den., 413 Mass. 1106, 600 N.E.2d 1000 (1992) (same).

Thus, for these additional reasons, as well as being untimely, Mr. Stokinger's appeal would fail on the merits as well.

Mr. Manolakis's Appeal

Mr. Manolakis's appeal from his demotion for "lack of money" from Foreman to Working Foreman must be dismissed for reasons similar to those requiring dismissal of Mr. Stokinger's appeal, which flow from the fact that he was provisionally promoted to Foreman, which is an official service position. A provisional employee holds no tenure in the position for purposes of a Section 39 reduction in force. In Andrews v. Civil Service Comm'n, 446 Mass. 611, 618 (2006), the Supreme Judicial Court implied that a provisional employee is "in" the provisional title and but not "in" the original permanent title until the provisional promotion ceases to have effect, at least for purposes of layoff and reinstatement rights under G.L.c.31, §39. See also Shea et al v. Dep't of

Revenue, 19 MCSR 232 (2006), aff'd sub nom Massachusetts Human Resources Div. v. Porio, 2007 WL 4809244 (Mass.Sup.Ct. 2007) (Andrews applied retroactively)

Similarly, the Commission's jurisdiction to hear appeals from disciplinary actions is defined by G.L.c.31, §43, which authorizes an appeal to the Commission by a "tenured employee" who claims there was no just cause for an appointing authority's actions. The definition of a "tenured employee" is "a civil service employee who is employed following (1) an original appointment to a position on a permanent basis and the actual performance of the duties of such position for the probationary period required by law or (2) a promotional appointment on a permanent basis. A "civil service employee" is a person holding a civil service "appointment", which, in turn is defined as a "original appointment or a promotional appointment" made pursuant to the provisions of civil service law and rules", i.e. through selection from an official service certification after passing the required civil service examination, or from a duly constituted roster of eligible labor service applicants. A "civil service employee" is different from a "provisional employee" who is appointed without having passed an examination. G.L.c.31, §§1, 6-8, 12-15, 25-30.

These statutes have been consistently construed to limit the Commission's jurisdiction to appeals contesting the "just cause" for discipline of permanent civil service employees only; persons employed in a provisional status have never been allowed the right of appeal to the Commission. See, e.g., Maloof v. Town of Randolph, 21 MCSR 217 (2008); Sullivan v. Comm'r of Commerce & Devel., 351 Mass. 462 (1966). See also Knox v. Civil Service Comm'n, 63 Mass.App.Ct. 904 (2005); Cordio v. Civil Service Comm'n, 59 Mass.App.Ct. 1110 (2003) (unpublished) Similarly, the Commission consistently declined jurisdiction over appeals seeking to challenge the "just cause" for a demotion from a provisional position back to the civil service title in which they held permanency. See Donahue v. Town of Weymouth, 20 MCSR 424 (2007);

Ralph v. Town of Webster, 19 MCSR 10 (2006); (Cox v. Civil Service Comm'n, 3 Mass.App.Ct. 793 (1975); Dallas v. Comm'r of Public Health, 1 Mass.App.Ct. 768 (1974)

The only exception recently made to these long-established rules was to permit a provisionally appointed employee with permanency in another lower civil service title to appeal the just cause for his termination from the provisional position and seek relief limited to reinstatement to the lower permanent civil service title. See McDowell v. Springfield, 23 MCSR 214 (2010), further considered, 23 MCSR 243 (2010), reconsidered, 24 MCSR 1534 (2011). See also LeFrancois v. Department of Revenue, 23 MCSR 639 (2010) (provisional employee cannot appeal a suspension, despite permanency in another title, since the suspension did not cause her loss of permanency)

Applying these principles to the facts of this case, Mr. Manolakis has no basis to appeal his demotion, either as a violation of Section 39 (the reduction in force statute) or as a Section 43 ("just cause" appeal), which statutes attach solely to employees who lose permanent civil service status. At the most, the only relief to which Mr. Manolakis would arguably be entitled would be reinstatement to his permanent labor service position of Working Foreman, which is precisely where he was placed as a result of the demotion in question.

Mr. Picard's Appeal

The job title of Working Foreman, sought by Mr. Picard, is classified as a labor service position and, therefore, promotions to that position are governed by G.L.c.31,§§28 through 30. Pursuant to these statutes, promotions to a position in the labor service are made from among the three applicants with the greatest seniority in the department who are qualified for the position, applying the so-called 2n+1 rule. See PAR.19; Lusignan v. Holyoke G&E Dep't., 20 MCSR 401, further considered, 21 MCSR 287, after hearing, 22 MCSR 137 (2009)

In the case of Mr. Picard, in April 2008, when Mr. Chase was promoted from Special Heavy MEO to Working Foreman, Mr. Picard was the fourth most senior Special Heavy MEO

departmental employee who applied for the position. Thus, save for the highly improbable event that one of the other three Special Heavy MEOs with more seniority than Mr. Picard were "unqualified" (as to which there is no evidence whatsoever in this record), Mr. Picard may claim no expectation to be selected for the position. The fact that Mr. Chase, with even less seniority than Mr. Picard, was selected, does not give Mr. Picard any more civil service rights to claim a position to which he was not otherwise entitled. Thus, on this record, presented after an extreme lapse of time between the promotion and the assertion of this appeal, Mr. Picard simply has not provided sufficient evidence to prove that his civil service rights were abridged.

In sum, the appeal of Mr. Picard must be dismissed as untimely and, even if it were timely, dismissal would be required on substantive grounds as well.

Mr. Chase's Appeal

Mr. Chase's appeal presents a quite complicated scenario. Mr. Chase contends that he was improperly demoted from his position of Working Foreman (a permanent promotion in the labor survive) following the arbitration Award that determined that Mr. Kozlowski had been wrongfully removed from that position in 2008 and ordered that "Stephen Kozlowski shall be returned to the position of Highway Working Foreman, Special M.E.O. and he shall be made whole for all lost wages and benefits." Quincy contends that, due to a lack of money, it could not retain two employees in the position of Working Forman, and, therefore, was required to abolish Mr. Chase's position and demote him to his former title of Special Heavy MEO.

The order in which civil service employees are to be laid off in the case of lack of money is prescribed by G.L.c.31, §39, which provides in relevant part:

> [P]ermanent employees . . . 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 . . . *according to their seniority* in such unit and shall be reinstated . . . according to such seniority, so that *employees senior in length of service, computed in accordance with section thirty-three, shall be retained the longest* and reinstated first. . . .

> *Any action by an appointing authority to separate a tenured employee from employment for the reasons of lack of work of lack of money or abolition of positions shall be taken in accordance with the provisions of section forty-one*. Any 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 . . . (*emphasis added*)

Seniority is defined in Section 33 and means "ranking based on length of service . . . computed from the first date of full-time employment. . . ."

G.Lc.31, §41 prescribes the procedures required to terminate a civil service employee::

> "*Except for just cause and except in accordance with the provisions of this paragraph, a tenured employee shall not be . . . laid off . . . nor shall his position be abolished. Before such action is taken*, such employee *shall be given a written notice* by the appointing authority . . . and *shall be given a full hearing*. . . *if the action contemplated is the separation of such employee from employment because of lack of work, lack of money, or abolition of position the appointing authority shall provide such employee with such notice at least seven days prior to the holding of the hearing and shall also include with such notice a copy of sections thirty-nine and forty*." (*emphasis added*)

A tenured civil service employee who is terminated by an appointing authority which has failed to follow the requirements of Section 41 may appeal to the Commission. G.L.c.31,§42. If the employee can establish that "the rights of such person have been prejudiced thereby", the Commission "shall order the appointing authority to restore such person to his employment immediately without loss of compensation or other rights." Id.

In a case involving a reduction in force due to alleged lack of money, the well-established rules permit the Commission a very limited role in reviewing cost-cutting choices made by an appointing authority faced with a serious budgetary shortfall. See Ameral v. City of Fall River, 22 MCSR 653 (2009); Bombara v. Department of Mental Health, 21 MCSR 255 (2008); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995); Snidman v. Department of Mental Health, 8 MCSR 128 (1993);

Soucy v. Salem School Committee, 8 MCSR 64 (1995) As stated in Gloucester v. Civil Service Comm'n, 408 Mass. 292, 299-300 (1990):

> "[I]n the absence of pretext or device designed to defeat the civil service law's objective of protecting efficient public employees from partisan political control . . . or to accomplish a similar unlawful purpose, the judgment of municipal officials in setting the municipality's priorities in identifying the goods and services that are affordable and those that are not cannot be subject to the [C]ommission's veto."

See also School Comm. of Salem v. Civil Service Comm'n, 348 Mass. 696, 698-699 (1965); Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 926, rev.den., 417 Mass. 1105 (1994).

Once an appointing authority meets its burden of proof to articulate legitimate economic reasons for the layoffs, the burden then shifts to the employee to prove that the economic reasons were pretextual and that the layoff(s) were made in bad faith. See, e.g., Commissioner of Health & Hospitals v. Civil Service Comm'n, 23 Mass.App.Ct. 410, 413 (1987); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995) Thus, absent affirmative evidence demonstrating that a separation for lack of funds is but a mere pretext for another improper motive for separation, the Commission cannot override a good faith determination by the appointing authority to separate employees for cost-cutting purposes. See, e.g., Denham v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap into reserve fund); City of Gardner v. Bisbee, 34 Mass.App.Ct. 721, 723 (1993) (pretext established when mayor improperly injected himself and dictated to appointing authority who should be laid-off); Cambridge Housing Auth..v. Civil Service Comm'n, 7 Mass.App.Ct. 586 (1979) (finding pretext when appellant's position was "abolished" so that another person could be appointed to perform the same duties).

In the present appeals, Quincy met its burden to articulate a legitimate economic basis for deciding to layoff the Appellants. The undisputed fact is that the funds available to Quincy did not

suffice to carry both Mr. Chase and Mr. Kozlowski as Working Foremen. The Appellants did not prove any pretext or improper motive on Quincy's part. Even if additional savings could have been made by making different choices, absent evidence that those choices were made in bad faith or for unlawful purposes, the Commission cannot disturb the exercise of an appointing authority's sound discretion to decide how best to manage its fiscal affairs. E.g., Denham v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap reserve fund).

Although Quincy was justified to eliminate one of the Working Foremen's positions, it did not do so in accordance with the requirements of civil service law. The statutory procedures for abolishing a position due to a lack of money as described above require that employees with the most seniority be separated from their positions before employees with less seniority. The statutes also prescribe a specific process, including notice and hearing, before such reduction in force may be implemented. These procedures include a process by which an employee in a position targeted for elimination may elect to be demoted. There is no provision for the appointing authority to unilaterally decide which employee to demote in a reduction in force. Thus, Quincy's unilateral decision to reduce the number of Working Foremen in the DPW Highway Division by demoting Mr. Chase, who had seniority over Mr. Kozlowski was unlawful. Mr. Kozlowski should have been the employee who was first notified that his position was abolished and given the opportunity to elect to be demoted or laid off.[4]

This conclusion, however, does not fully resolve the matter of whether Mr. Chase should be granted equitable relief that would restore him to the position of Working Forman retroactive to February 2008. As explained in the analysis of Mr. Picard's appeal, promotional appointments in the labor service must be made from among the "2n+1" most senior employees who are qualified

[4]For the reasons explained earlier in the discussion of Mr. Pitts' appeal,, Mr. Chase's civil service rights cannot be altered by a collective bargaining agreement, and the Award in favor of Mr. Kozlowski cannot be construed to require Mr. Chase's demotion ahead of Mr. Kozlowski.

and apply for the position. PAR.19; Lusignan v. Holyoke G&E Dep't., 20 MCSR 401, further considered, 21 MCSR 287, after hearing, 22 MCSR 137 (2009) Here, the undisputed facts show that Mr. Chase was, at best, the fifth employee in order of seniority to apply for the Working Foreman's job in February 2008. Thus, he was clearly outside the range of "2n+1" employees from whom Quincy was lawfully entitled to make that promotion. Since Mr. Chase received a promotion to which he was not lawfully entitled under civil service law, it would be inequitable for the Commission to now grant him relief that would restore him to the pay and benefits of a civil service position to which he was never lawfully entitled. Accordingly, the Commission cannot justify allowing Mr. Chase's appeal.

Compliance Review

In view of the numerous procedural and documentation issues highlighted by these appeals, the Commission believes that it would behoove HRD and the City Quincy to confer in the near future, sooner rather than later, to review the state of their delegation agreement, as well as the labor service classification plans and official service titles The Commission puts Quincy on notice that it Labor Service Director must take immediate steps to insure that Quincy is brought into full compliance with all of its labor service obligations under Civil Service Law. Should Quincy be unable to demonstrate such compliance on or before January 1, 2012, the Commission may exercise its authority to open an investigation pursuant to its authority under G.L.c.31,§2(a) and to take such action, including the granting of appropriate relief, as may be warranted.

Accordingly, for the reasons stated above, the appeals of the Appellants, Messrs. Picard (G2-09-352) Stokinger (G2-90-353), Chase (D-10-28) and Manolakis (D-10-29) are ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis [Absent], McDowell, and Stein, Commissioners) on August 11, 2011.

A True Record. Attest:

_____
Commissioner

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:
Charles A. Picard (Appellant)
Thomas Stokinger (Appellant)
Janet S. Petkun, Esq. (for Appointing Authority)
Gerard S. McAuliffe, Esq. (for Appellants Manolakis & Chase)
Martha Lipchitz O'Connor, Esq. (HRD)