

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, SS.

**CIVIL SERVICE COMMISSION**

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

RICHARD STONE,

Appellant

v.

G1-04-165

DEPARTMENT OF MENTAL  
RETARDATION,

Respondent

Appellant's Attorney:

*Pro Se*  
Richard B. Stone  
79 Wisteria Place  
Taunton, MA 02780  
(508) 977-1952  
ricsto11@aol.com

Respondent's Attorney:

Peter M. Mimmo, Esq.  
Assistant General Counsel  
Department of Mental Retardation  
500 Harrison Avenue  
Boston, MA 02118-2439  
(617) 624-7517  
peter.mimmo@state.ma.us

Commissioner:

Christopher C. Bowman

**DECISION**

The Appellant, Richard Stone, pursuant to G.L. c.31, § 2(b), filed an appeal with the Commission on December 4, 2003. At a pre-hearing conference before the Commission on September 15, 2004, the Appellant was allowed to amend his appeal and clarify that

he was seeking a permanent civil service seniority date of January 8, 1985. (The Appellant has subsequently clarified that the correct date, for which he is seeking permanency, is September 8, 1985). A full hearing was conducted at the offices of the Civil Service Commission on September 25, 2006 at which time the Department of Mental Retardation filed a Motion to Dismiss arguing that: 1) the appeal was not timely; 2) the Appellant's delay in filing in the appeal prejudiced the Appointing Authority; 3) the issue of the Appellant's permanent date was previously litigated; and 4) the Appellant has failed to state a claim for which relief can be granted. Oral arguments were heard on the Appellant's appeal and the Appointing Authority's Motion to Dismiss. The Appellant, who represented himself at the hearing, was given an additional thirty (30) days to provide any additional information or written arguments in response to the Motion to Dismiss.

The Appellant testified on his own behalf and counsel for the Appointing Authority argued on behalf of the Department of Mental Retardation. No other witnesses testified and thirteen (13) exhibits were entered into evidence, twelve (12) of which were entered as joint exhibits. The Appellant objected to Appointing Authority Exhibit 5, a settlement agreement signed by the Appointing Authority and the Appellant in 1999 on the grounds that the agreement is not relevant to the instant case. As the settlement agreement explicitly references the issue of the Appellant's civil service permanency date, it was entered into evidence over the Appellant's objection.

## **FINDINGS OF FACT**

Based on the oral arguments of the Appellant and counsel for the Appointing Authority as well as the above-referenced exhibits, I find the following:

1. The Appellant was first hired by the Department of Mental Retardation (DMR) on October 31, 1976 and began work at the Dever State School. (Joint Exhibit 6)
2. On May 11, 1980, he was appointed as a “Staff Psychologist” on a provisional basis. (The Appellant testified --and there was no evidence to refute his testimony-- that the terms “Staff Psychologist”, “Staff Psychologist II” and “Psychological Assistant II” have been used interchangeably over the years but all refer to the same position) (Joint Exhibits 2 & 6)
3. The Appellant sat for an open competitive civil service examination for the position of Staff Psychologist II on December 17, 1983, receiving a score of 84. (Joint Exhibit 1 and Testimony of Appellant)
4. On May 1, 1985, a certification list was generated by HRD in response to DMR’s request to fill three Staff Psychologist II positions. The Appellant’s name was among those included on this certification list (Certification No. 4-18117). He was fourth among ten individuals on the list who indicated that they would be willing to accept appointment to the position. (Joint Exhibit 1)
5. The above-referenced certification list states the position as “*Temporary* Staff Psychologist”. (A cautionary note: the term “temporary” is actually a misnomer in this case, a fact that both parties would not dispute. Years later, HRD determined that “temporary after certification” was indistinguishable from granting an individual permanent civil service status. Hence, any individuals appointed to the positions in the instant case were effectively receiving permanent civil service status.)
6. On August 12, 1985, DMR informed HRD that it was *selecting* the Appellant (#4 on the list) and two other individuals (ranked #2 and #7 respectively on the list) for the

three available positions of Psychologist II and listed the reasons for not selecting others ranked higher on the list. The August 12, 1985 correspondence from DMR indicated that the effective date of the Appellant's appointment would be September 8, 1985. (Joint Exhibits 1 & 8)

7. "If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator" (HRD). (See G.L. c. 31 § 27)
8. On September 9, 1985, HRD informed DMR that it could not approve the selection of the Appellant (or the two other candidates) as DMR had failed to submit a sufficiently detailed list of reasons for declining to appoint those candidates whose names were ranked higher than the three individuals selected. (Joint Exhibit 8)
9. On December 17, 1985, DMR submitted a more detailed list to HRD indicating why they were selecting the three individuals for the position of Psychologist II and bypassing the others ranked higher on the list. (Joint Exhibit 10)
10. DMR apparently re-submitted the same list of reasons justifying the bypasses on June 9, 1986 to HRD, but HRD again refused to approve the selection. A handwritten note on the June 9, 1986 memo states: "7/2/87: Called Marie Ritter re: certs. on R. Stone + J. Tamulivich. She will call me on Monday. Marie called – Cert for 6/22/86

was not approved!” This was apparently in reference to the DMR request submitted to HRD on June 9, 1986. (Joint Exhibit 11)

11. On September 17, 1987, DMR submitted another letter with detailed reasons to HRD regarding the selection of the three candidates plus, by now, one additional candidate, for the position of temporary Psychologist II with a requested effective date of October 18, 1987. (Joint Exhibit 12) In their written motion, DMR states that HRD approved this most recent request for appointments and the Appellant was given a civil service permanency date of October 18, 1987 in the position of temporary Psychologist II, as opposed to an effective date of September 8, 1985, which was the effective date initially requested by DMR when it first submitted the Appellant’s name to HRD in 1985.
12. On September 22, 1996, nine years later, HRD bestowed permanent employment status on all civil service employees then holding “Temporary-After-Certification” job titles and who did not possess an earlier date of permanent employment within their departmental unit. (Joint Exhibit 13)
13. Consistent with the above-referenced HRD decision, the Appellant received a letter from DMR on October 31, 1996 stating in part, “You now have permanent status in the position of Psychologist II, effective 10/18/87”. (Joint Exhibit 3)
14. The Appellant testified that, upon receiving this October 31, 1996 letter from DMR, he visited the DMR personnel office at Dever and was shown the 1985 memo from DMR to HRD originally seeking to certify his name and the name of two others who were also in the position at that time, with a requested effective for the Appellant of September 8, 1985. The Appellant testified that he was unaware at the time of any

avenue to correct what he believed to be inequitable (the permanency date of October 18, 1987). (Testimony of Appellant; Exhibit 8)

15. In 1997, the Appellant was laid off due to the closing of Dever. The Appellant exercised his “bumping” rights under G.L. c. 31, § 39 and “bumped” down to a Psychologist I position. (Joint Exhibit 6)
16. The employee whom the Appellant “bumped” subsequently litigated his layoff before the Civil Service Commission and was awarded a seniority date that predated that of the Appellant’s voluntary demotion.
17. In an agreement signed by the Appellant, his union representative and DMR in 1999, the Appellant was restored as a Psychologist II. As part of the agreement, written in the Appellant’s own handwriting, it states, “Reinstated to top step - #7 – grade 5 - \$1111.47 / wk. Relisted in his permanent civil service capacity of 10-18-87.” (Emphasis Added) (Appointing Authority Exhibit 5)
18. The Appellant testified that he does not believe the reference to a 10/18/87 seniority date in the 1999 agreement is relevant in the instant case as the 1999 agreement was not the forum in which to argue and seek changes on this issue. Further, the Appellant argues that he did not learn until 2003 that the Commission had authority to grant retroactive seniority dates in regard to civil service. (Testimony of Appellant)
19. The Appellant filed an appeal with the Commission on December 4, 2003 and later amended it on September 15, 2004 clarifying that he was seeking a retroactive permanent seniority date (of September 8, 1985). (Joint Exhibit 4)
20. This Commissioner informed both parties at the conclusion of the hearing that I would contact HRD and determine their standard practice regarding the awarding of

seniority dates, including whether or not the seniority date can fall on a date before HRD reviews and approves the reasons for bypassing other candidates.

21. In an email to HRD, the Commission asked the following question: “If an Appointing Authority submits a request to appoint individuals to a civil service position from a certification list – and there are delays because HRD is not satisfied with the reasons given for bypass – do the individuals eventually approved receive a retroactive seniority date back to when the AA made the request to HRD? Or, is the seniority date established as the date upon which HRD approves the reasons for bypass? In this case, there is a 2-year gap and the Appellant is seeking the retroactive date.” (Bowman email correspondence to HRD dated September 25, 2006)
22. In response to the above-referenced inquiry, HRD answered, “The seniority date is the date of appointment (1<sup>st</sup> day of employment)”. (Marra email correspondence to Bowman dated October 16, 2006)
23. There is no dispute that the Appellant was already employed (provisionally) in the position of Staff Psychologist II when DMR made its first request to HRD on August 12, 1985 seeking to appoint the Appellant to the position permanently with an effective date of September 8, 1985.

## **CONCLUSION**

This is not a bypass appeal. Rather, the Appellant is seeking a retroactive permanent civil service seniority date from the Civil Service Commission. Hence, the Commission rule that requires bypass appeals to be filed within sixty (60) days of being informed of the bypass does not apply here. For this reason, the Appointing Authority’s argument in its motion to dismiss, that the appeal should be deemed untimely, fails. The Commission

is also not persuaded on the other procedural grounds for which the Appointing Authority sought to dismiss this appeal.

Notwithstanding the somewhat tedious review of the facts that was presented to this Commissioner by the Appellant and counsel for the Appointing Authority during a full hearing on this matter, the issue is refreshingly simple. The Appellant was working provisionally in the position of Staff Psychologist II for several years when DMR sought to make permanent appointments to the positions in 1985. Specifically, DMR sent HRD a written request on August 12, 1985, asking that the Appellant – and two others – be appointed to the permanent position of Staff Psychologist II, with an effective date of September 8, 1985. Over an approximately two-year period, HRD and DMR engaged in an inexplicable tug-of-war regarding the level of detail needed to justify why DMR bypassed individuals ranked higher on the civil service list who were willing to accept the position. HRD finally approved the reasons for bypass in 1987. As a result, the Appellant's civil service seniority date, originally requested by DMR to be September 8, 1985, was established as October 18, 1987. In a somewhat vague response to a recent request, HRD has indicated that, in such cases, an individual's seniority date is based on his date of appointment (1<sup>st</sup> day of employment). There is no dispute that the Appellant was already employed and serving in the position provisionally when DMR made its initial request to HRD in 1985. Through no fault of his own, the Appellant's requested seniority date was changed, to his detriment, from September 8, 1985 to October 18, 1987.

A two-year bureaucratic paper-shuffle between two state agencies will not dictate the Appellant's appropriate civil service seniority date. Common sense – and the standard



practice of HRD – will prevail here and the Appellant’s seniority date will be established appropriately as September 8, 1985.

Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby directs HRD to establish the Appellant’s permanent civil service seniority date in the position of Staff Psychologist II (or whatever name the title is now referred to) as September 8, 1985.

---

Christopher C. Bowman  
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis, Commissioners [Taylor – Absent]) on November 2, 2006.

A true Copy. Attest:

---

Commissioner  
Civil Service Commission

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

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

Notice to:  
Richard Stone  
Peter Mimmo, Esq.