

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**WENDY POORE,**  
*Appellant*

**CASE NO: D1-14-27**

v.

**CITY OF HAVERHILL,**  
*Respondent*

Appearance for Appellant:

Joseph L. Sulman, Esq.  
David I. Brody, Esq.  
Law Office of Joseph L. Sulman  
1001 Watertown Street, Third Floor  
West Newton, MA 02465

Appearance for Respondent:

William D. Cox, Jr., Esq.  
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Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Wendy Poore, acting pursuant to G.L. c.31, §2(b), §39 & §41-§43, appealed to the Civil Service Commission (Commission), from a decision of the City of Haverhill, the Appointing Authority (Haverhill), that eliminated her position as a part-time clerk in Haverhill's Water Billing Office for lack of funds, without a hearing or opportunity for "bumping" rights to which she asserts she was entitled under civil service law. A pre-hearing conference was held on March 4, 2014. Haverhill moved to dismiss the appeal as untimely, which Ms. Poore opposed. A Procedural Order dated April 9, 2014 (Bowman, Chairman) denied the motion to dismiss without prejudice and ordered Haverhill to notify other Water Billing Office employees whose employment rights might be affected by the Commission's Decision in this appeal, so that they would have an opportunity to intervene or participate.<sup>1</sup> A full hearing was held over two days on

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<sup>1</sup> The Commission received no requests for intervention or participation by any other persons so notified. (*Exhs. 4 & 48; Testimony of Remmes; Testimony of Crowe*)

June 9, 2014 and July 8, 2014.<sup>2</sup> The hearing was declared private as no party requested a public hearing. The witnesses were sequestered. Haverhill called one witness. Ms. Poore called three witnesses and testified on her own behalf. Fifty-nine (59) exhibits were received in evidence and one (1) additional exhibit marked for identification (Exh. 50ID). The hearing was digitally recorded.<sup>3</sup> Both parties submitted proposed decisions. For the reasons stated below, Ms. Poore's appeal is dismissed as untimely and without merit as Ms. Poore was a non-tenured employee.

### **FINDINGS OF FACT**

Based on the exhibits and the testimony of the witnesses (the Appellant, former Haverhill Personnel Director Mary Carrington, former Haverhill Mayor John J. Guerin, Jr., Dorothy Crowe and Elizabeth Remmes) as I find credible, and reasonable inferences therefrom, I find:

#### **Haverhill's Civil Service Delegation Agreement**

1. In January 1995, the Massachusetts Department of Personnel Administration, now the Massachusetts Human Resources Division (HRD), executed a Memorandum of Agreement (MOA) with Haverhill by which HRD delegated to Haverhill, among other things, certain functions related to the hiring of clerical civil service personnel. The MOA remained in effect throughout the period involved in this appeal. (*Exh.34; Testimony of Carrington*)

2. The MOA designated Haverhill's Human Resources Director, Mary Carrington, as HRD's Delegation Administrator, with responsibility for:

“A. recruitment to participate in, security of, and administration and scoring of all open competitive examinations and testing processes that result in the establishment of eligible lists for all clerical titles used by the City of Haverhill;

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<sup>2</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

<sup>3</sup> The digital recording was transcribed into a written transcript by an Approved Court Transcriber at the parties' behest. If there is a judicial appeal of this Decision, the plaintiff in the judicial appeal would be obligated to supply the court with that transcript to the extent that he/she wishes to challenge the Decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

- B. establishment and maintenance of eligible lists for all titles examined in accordance with applicable statutory preferences; and
- C. certification from the City eligible lists in accordance with laws, rules, regulations and procedures.”

*(Exh.34; Testimony of Carrington)*

3. Ms. Carrington began employment with Haverhill in 1970. She was appointed Haverhill’s HR Director in 1988. She retired in June 2014. *(Testimony of Carrington)*

4. As HR Director, in addition to serving as Delegation Administrator under the MOA, Ms. Carrington’s duties included oversight of all personnel administrative functions, including collaboration with the Mayor of Haverhill and department heads to create job descriptions and job postings and maintaining personnel records, including what were called “green sheets” containing records of employees’ job titles and changes in job status, pay and benefits. She processed requisitions for certifications to fill civil service positions from eligible lists upon request from the Mayor, who was the appointing authority in Haverhill. *(Exhs.1 through 19, 36 through 32, 44 through 47,49 through 58; Testimony of Carrington; Testimony of Guerin)*

5. Notwithstanding the language in the MOA, Haverhill did not actually conduct any civil service examinations. As a result of further discussion with HRD, primarily for security and other logistical reasons, Haverhill continued to rely on HRD to actually administer and score civil service tests. *(Exhs.5 & 58; Testimony of Carrington)*

#### Haverhill’s Personnel Employment Policies and Job Classifications

6. Haverhill promulgated an Employee Handbook applicable to all Haverhill employees which includes, in part, the following descriptions of employment terminology:

##### 5.1. Employment Status Definitions

- A. Full-Time Employee. A “Full-Time Employee” is an employee working thirty-five (35) hours or more with full benefits . . . .
- B. Permanent Part-Time Employee. A “Permanent Part-Time employee” is an employee working at least twenty (20) hours per week and is entitled to all benefits equivalent to time spent on duties.

- C. Part-Time Employee. A “Part-Time Employee” is an employee working less than twenty (20) hours per week without insurance benefits.
  - D. Temporary Employee. A “Temporary Employee” is any employee retained for a fixed period of time not to exceed 52 weeks or an undetermined period of time. If the period of employment extends to six (6) months or more, consideration will be given to an offer of benefits prior to the beginning of employment.
  - E. Seasonal Employee. A “Seasonal Employee” is any employee retained for a fixed period of time not to exceed twelve (12) weeks to replace employees absent for extended periods, or under special conditions caused by increased work load, but not entitled to benefits.
  - F. Contractual Employee. A “Contractual Employee” is a person who enters into an agreement with the City, and is treated as an independent contractor to provide agreed upon services with no benefits.
  - G. Provisional Employee. A “Provisional Employee” is an employee hired to fill a Civil Service position, but has not been certified from an existing eligible Civil Service list to fill the vacancy.
- . . .
- I. Civil Service. Civil Service positions are covered within Chapter 31 of the Massachusetts General Laws. Civil Service is limited to a constricted form of recruitment, the conduct of competitive examinations, the certification of eligible appointees, and hearings and decision on suspension, as well as marking of examinations and dismissals. The job classification section will indicate if the position is covered by Civil Service. In addition, all city job postings indicate Civil Service status.

## 5.2. Employment Conditions.

- C. Seniority. Seniority is the length of employment computed from the first day of full-time employment within the same position as a permanent Civil Service employee. This includes any probationary period and bridge service.

(Exh. 7) (emphasis added)

7. Haverhill intended the employment terminology in the Employee Handbook mainly to distinguish the budget status of an employee’s position and the employee’s entitlement to paid holidays, sick and vacation time, union membership, access to the municipal retirement plan and other fringe benefits. Specifically, the Employee Handbook’s budgetary categories of “temporary” and “permanent” were not intended to delineate whether or not an employee’s status was permanent (tenured) or provisional for civil service purposes which, as the Employee Manual stated, is defined in Massachusetts law, i.e., Chapter 31 of the Massachusetts General Laws. (Exhs. 6, 7 & 51; Testimony of Carrington)

8. Ms. Carrington also understood that only employees who were “permanent” for Haverhill budget purposes could become eligible for civil service status. Thus, as Ms. Carrington understood it, an employee who held a position that was budgeted as “temporary” had neither permanent status for Haverhill benefits purposes nor came within Massachusetts civil service law. (*Testimony of Carrington*)

9. Teamsters Local 170 (the Union) is the bargaining unit for certain Haverhill employees, including employees in what is called the Water Department Group, which includes a Water Maintenance Office of hourly maintenance workers (e.g., general foreman, maintenance craftsmen, meter readers and repairmen) and a Water Billing Office of salaried clerical staff. (*Exhs.23A & 23B; Testimony of Carrington*)

10. Article V of the applicable Collective Bargaining Agreement (CBA) between the Union and Haverhill, provides, in relevant part, as to “Seniority & Promotion”:

“Section 1. Definition - Seniority shall be defined as the length of service with the City. *Seniority shall be acquired by an employee after completion of his/her probationary period* which shall be six (6) calendar months, at which time seniority shall be retroactive to the first day of his/her employment. *All new employees shall be hired from the Civil Service list as recommended by Civil Service and shall be given temporary six (6) month appointment [sic] at the end of which time he/she [sic] made a permanent employee under Civil Service in his/her respective classification. All present employees who have completed their six (6) months appointment at the effective date of this Agreement shall be given a permanent appointment immediately from the Civil Service list in their respective departments.*” (*emphasis added*)

. . .

“Section 4. Posting Seniority List – *A Seniority List of all employees covered by this Agreement* showing name, position, date of entering service, will be posted promptly on appropriate bulletin boards, accessible to all employee [sic] affected. The roster *will be revised and posted in March of each year* and will be open to protest and correction for a period of thirty (30) days and upon proof of error . . . such error will be corrected. . . .” (*emphasis added*)

(*Exhs.23 & 23A; Testimony of Carrington*)

11. The CBA effective from July 1, 1998 to June 30, 2000, in relevant part, sets out five titles and pay schedules for clerical employees of the Water Billing Office as previously established by Ordinance of the Haverhill City on November 24, 1998:

EFFECTIVE 7.1.98 7.66 +3%	<u>Step I</u>	<u>Step II</u>	<u>Step III</u>	<u>Step IV</u>	<u>Step V</u>	<u>Step VI</u>
Assistant Computer Specialist	\$651.92	\$703.24	\$733.89			
Head Clerk	\$490.93	\$505.12	\$519.76	\$534.82	\$550.33	\$566.32
Principal Clerk (40 hrs.wk)	\$515.47	\$530.31	\$545.96	\$561.62	\$577.69	\$615.59
Principal Clerk (35 hrs/wk)	\$452.07	\$465.11	\$478.53	\$492.36	\$506.63	\$539.64
Principal Data Entry Clerk	\$452.07	\$465.11	\$478.53	\$492.36	\$506.63	\$539.64
EFFECTIVE 7.1.99 3%	<u>Step I</u>	<u>Step II</u>	<u>Step III</u>	<u>Step IV</u>	<u>Step V</u>	<u>Step VI</u>
Assistant Computer Specialist	\$671.48	\$724.34	\$755.90			
Head Clerk	\$505.66	\$520.28	\$535.35	\$550.86	\$566.84	\$583.31
Principal Clerk (40 hrs.wk)	\$530.94	\$546.21	\$562.34	\$578.47	\$595.02	\$634.06
Principal Clerk (35 hrs/wk)	\$465.63	\$479.06	\$492.88	\$507.13	\$521.82	\$555.83
Principal Data Entry Clerk	\$465.63	\$479.06	\$492.88	\$507.13	\$521.82	\$555.83

(Exhs. 23A)

12. By Ordinance passed on September 26, 2000, the Haverhill City Council made the following changes to Haverhill's approved job titles and pay schedules:

Effective 7-1-00

After the words "Assistant Computer Specialist"

Delete:

Head Clerk	\$505.66	\$520.28	\$535.35	\$550.86	\$566.84	\$583.31
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Insert in its place the following:

Head Account Clerk	\$505.66	\$520.28	\$535.35	\$550.86	\$566.84	\$583.31
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After the words "Principal Clerk (40/hrs/wk)"

Delete:

Principal Clerk (35 hrs/wk)	\$465.63	\$479.06	\$492.88	\$507.13	\$521.82	\$555.83
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Insert in its place the following:

Principal Account Clerk	\$465.63	\$479.06	\$492.88	\$507.13	\$521.82	\$555.83
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After the words "Principal Clerk (35 hrr/wk)"

delete the following:

Principal Data Entry Clerk	\$465.63	\$479.06	\$492.88	\$507.13	\$521.82	\$555.83
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(Exh. 42)

13. As of July 1, 2011, the CBA listed these three clerical titles and pay schedules :

	<u>Step I</u>	<u>Step II</u>	<u>Step III</u>	<u>Step IV</u>	<u>Step V</u>	<u>Step VI</u>	<u>Step VII</u>
Head Account Clerk	\$613.94	\$631.49	\$649.03	\$667.83	\$687.20	\$707.18	\$742.53
Head Clerk (40 hours)	\$700.61	\$721.69	\$741.75	\$763.24	\$785.38	\$808.19	\$848.61
Office Account Clerk	\$643.69	\$663.06	\$681.48	\$701.22	\$721.57	\$742.53	\$779.66

(Exh. 23B)

## Job Classification Under Civil Service Law

14. HRD promulgates and maintains a “master state-wide municipal classification plan to which individual municipal classification plans must conform for Civil Service purposes.” This plan, known as the MuniClass Manual, categorizes civil service positions into “official service” and “labor service” job groups, each of which is further subdivided into separate job series containing a group of authorized civil service job titles within each job series (creating a career ladder of approved job titles within that job series). Approved “official service” jobs in the MuniClass Manual that correspond to positions in the Haverhill Water Department relevant to this appeal include:

- General Administrative, Clerical and Office Services Group, Clerical Series (Occupational Code 0301). This series includes positions the duties of which are to perform or supervise the performance of clerical work except where the clerical work requires such experience or training specialization that it becomes the major requirement of the position. The series includes six job titles: Clerk (0301A), Senior Clerk (0301B), Principal Clerk (0301C), Head Clerk (0301D), Head Administrative Clerk (0301E) and Weigh Clerk (0301F)
- Accounting and Budget Group, Accounts Maintenance Clerical Series (Occupational Code 0520). This series includes positions the duties of which are to supervise and/or perform clerical work required in the maintenance of all types of accounts and financial records. The series includes three job titles: Account Clerk (0520A), Senior Account Clerk (0520B) and Principal Account Clerk (0520C).
- Equipment, Facilities, and Services Group, Meter Reading and Inspecting Services (Occupational Code 1602). This series includes positions which perform work involved in reading and inspecting utility meters and related systems in municipal

gas, electric and water service operations. The series includes the positions of Meter Reader (1602A), Senior Meter Reader (1602B), Head Meter Reader (1602C), Water Services Inspector (1602D), Senior Water Services Inspector (1602E) and Head Water Services Inspector (1602F).

The MuniClass Manual also provides specific descriptions for most job titles which are “illustrative duties and are not all inclusive.” (*Exh. 33*)

15. Haverhill’s Classification Plan, as adopted on or about September 30, 1978, incorporated the following job classes and titles corresponding to the MuniClass Manual job codes described above, which job titles remained in effect through the period involved in this appeal :

- Clerk (0301A)
- Senior Clerk (0301B)
- Principal Clerk (0301C)
- Head Clerk (0301D)
- Account Clerk (0520A)
- Senior Account Clerk (0420B)
- Principal Account Clerk (0520C)
- Meter Reader [later, Water Meter Reader] (1602A)

(*Exh. 56*)

Ms. Poore’s Employment in Haverhill

16. Haverhill hired Ms. Poore on August 27, 1997 as a “seasonal” employee in the Water Billing Office to help with a back-log of mail that had resulted from a turnover in staff. Her duties involved opening the mail and processing the payments enclosed. The job was initially expected to last one month. (*Exhs.3 & 4; Testimony of Carrington; Testimony of Appellant*)

17. Ms. Poore continued her employment beyond the initial expected date. On December 22, 1997, a “green sheet” documented a change in her employment status to a temporary, part-time water meter reader, with an increase in hourly pay from \$6.00 to \$8.01. (*Exh.4; Testimony of Carrington*)

18. Ms. Poore's duties in the Water Billing Office did not change in 1997 and she does not recall ever learning that her job status had been converted to a water meter reader. She never performed any of the duties of a meter reader. She took no test and appeared on no list for appointment as a meter reader. (*Exh. 57; Testimony of Carrington; Testimony of Appellant*)

19. On November 4, 1998, a "green sheet" documented another job status change that placed Ms. Poore in the position of a "temporary part-time Principal Clerk". Ms. Poore assumed the duties of another Water Billing Office employee who held the permanent full-time job of Principal Clerk, filling in during that employee's three-month maternity leave. Ms. Poore received an increase in pay to \$12.32/hour. Her work schedule was extended from 18 to 21 hours, but she remained in part-time status. During this assignment, in addition to performing her regular duties as before, Ms. Poore assumed responsibility for payroll processing. In that capacity, she viewed the "green sheets" showing her job status up to that point in time. (*Exh.4; Testimony of Carrington; Testimony of Appellant*)

20. At all times on and after her initial hire until Ms. Poore's appointment as temporary, part-time Principal Clerk in November 1998, an active eligible list for Clerical Service III (including Principal Clerk) was in effect, having been established in October 1995 after an open competitive examination in March 1995. The parties stipulated that Ms. Poore's name did not appear on the 1995 eligible list. (*Stipulation; Letter from Haverhill Counsel dated June 26, 2014*)

21. After the employee returned from maternity leave, Ms. Poore resumed her previous job duties but Haverhill maintained her at 21 hours/week in the title of temporary part-time Principal Clerk. Her temporary employment was extended on three (3) occasions thereafter, with hourly pay increases, through July 31, 2000. (*Exh.4; Testimony of Carrington; Testimony of Appellant*)

22. Ms. Poore did pass the Clerical Service open competitive examination administered by HRD on November 12, 1998. She achieved a Level III score (corresponding to Principal Clerk) of 93.00 which placed her in 70<sup>th</sup> position on the 1999 Clerical Series Eligible List established December 30, 1999 (the 1999 Clerical Series Eligible List). The 1999 Clerical Series Eligible List remained in effect through November 18, 2002. (*Exhs.5,41,47&58; Testimony of Appellant*)

23. On April 14, 2000, Haverhill posted notice of an “Anticipated Opening” for a full-time (35 hours/week) “Principal Clerk - Water Billing Office (Civil Service Position)”. The position reported directly to the Billing/Collection Manager and Water/Wastewater Finance Manager.

The job duties included:

- Take telephone calls from lawyers for real estate transfers
- Work up figures on real estate transfers
- Set up appointments for final water readings
- Call lawyers with final figures on real estate transfers
- Print lawyer bills on real estate transfers
- Process payments on real estate transfers
- Enter figures in computer to new owner on real estate transfers
- Process municipal liens
- File paperwork
- Assist customers at counter and on telephone with questions

The salary range, per the CBA (see Finding #11), was \$465.63 to \$555.83/wk. (*Exhs. 8 & 23B*)

24. On or about May 2, 2000, Haverhill issued a Certification (Requisition #106) from the 1999 Clerical Series Eligible List for the above-described Principal Clerk position in the Water Billing Office. Ms. Poore signed this Certification not “willing to accept” the appointment. She did so because it was a full-time position and she was not interested in changing from her part-time assignment due to her child care responsibilities. (*Exhs.12 & 13; Testimony of Appellant*)<sup>4</sup>

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<sup>4</sup> On or about May 11, 2000, Ms. Poore also signed “not willing to accept” on a Certification (Requisition No. 107) for full-time appointment as Principal Clerk in City Clerk’s Office, eventually filled by the #2 person on the 1999 Clerical Series Eligible List. Of the eight who signed willing to accept, all ranked well above Ms. Poore. (*Exhs. 14 through 16*) Ms. Poore recalled signing other such Certifications “not willing to accept” as well. (*Exhs. 17, 18, 49; Testimony of Appellant*)

25. Twelve (12) people did sign Requisition #106 as willing to accept the Principal Clerk position, including seven (7) ranked above Ms. Poore on the 1999 Clerical Eligible List and five ranked below her. (*Exhs. 13 & 41*)

26. Haverhill cancelled the Principal Clerk's requisition, however, pending the on-going negotiations with the Union that, ultimately, culminated in the changes described in Finding #12, approved by the Haverhill City Council in September 2000 and resulted in a realignment of the job titles of the clerical staff in the Water Billing Office. (*Exh 42; Testimony of Carrington*)<sup>5</sup>

27. In anticipation of the realignment of the job titles, Haverhill reposted the Water Billing Office Principal Clerk's position as "Principal Account Clerk – Water Billing Office (Civil Service Position)", with the same duties and responsibilities, salary, and reporting structure. The one material change added a required qualification: "Must possess a strong background in Accounting through educational courses or work experience and be proficient in fundamental accounting procedures." (*Exh.9*)

28. By a "green sheet" dated July 19, 2000, Ms. Poore's job status as "Principal Clerk" changed from temporary to permanent, effective July 31, 2000. Her hourly pay increased to \$15.88, equivalent to the pay at the top step salary (\$555.83) of a full-time (35 hrs/wk) Principal Clerk as then contained in the CBA. She became eligible for paid vacation and other fringe benefits, access to retirement benefits and membership in the Union. (*Exhs. 4, 6, 11 & 42*)

29. Effective September 25, 2000, in anticipation of the City Council's final approval of the job title changes to the Classification Plan and the CBA (Finding #12 above), Haverhill offered employment as a full-time Principal Account Clerk in the Water Billing Office to Dorothy

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<sup>5</sup> The parties disputed the City Council's motive for the September 2000 job title changes. (*Testimony of Carrington; Testimony of Guerin; Testimony of Appellant*) I find that the changes are best characterized as a "class reallocation" negotiated by the Union and Haverhill under the authority of G.L.c.30, §45 through §49, which binds this Commission and with which the Commission lacks statutory jurisdiction to interfere.

Crowe and Danielle Mullen and elevated a current Water Billing Office employee (Traci Mickela) from Principal Clerk to the position of Head Account Clerk. Each of these employees received letters, which they acknowledged, to inform them of their respective appointments. These letters expressly stated that the appointments were made “on a provisional basis pending a Civil Service exam you will have to pass when offered” and subject to a six (6) month probation period. (*Exhs. 38, 44 & 55; Testimony of Carrington; Testimony of Crowe*)

30. As a result of the September 2000 realignment, Ms. Poore’s job title also changed to “part-time Principal Account Clerk”, although no documentation was generated and Ms. Poore received no written notification as was given to Ms. Crowe, Ms. Mullen and Ms. Mickela. Her duties and pay remained the same and she kept her purported “permanent” status in the new title. (*Exhs.6 & 11; Testimony of Carrington; Testimony of Appellant*)

31. Ms. Poore did acknowledge the change from Principal Clerk to Principal Account Clerk, however, when she signed the necessary personnel paperwork in September 2000 to enable her to enroll in the municipal retirement plan. She also acknowledged receipt of the Haverhill Employee Handbook at that time. She received a Haverhill “date of service” of April 1, 1999 that reflected a pro-rated adjustment for her prior part-time service since 1997. (*Exhs 6 & 10; Testimony of Carrington; Testimony of Appellant*)

32. At the time Haverhill made the September 2000 job title changes, the 1999 Clerical Eligible Series List still remained in effect. No civil service eligible list existed for any of the positions in the Account Clerk job series. The last examination for clerical positions in Haverhill in either job series was a 1999 make-up examination for placement on the 1999 Clerical Series Eligible List. (*Exh.58; Testimony of Carrington*)

33. Another “green sheet, dated April 9, 2002, documented that, effective June 30, 2002, Ms. Poore’s job title again changed, this time to part-time “Head Account Clerk”, the position from which she eventually would be laid off. The other two other employees in the Water Billing Office who also then held the title of Principal Account Clerk (Dorothy Crowe, Danielle Mullen) and one other employee, Beth Remmes<sup>6</sup>, were then provisionally promoted to “Head Account Clerk” at this same time. Also, Ms. Mickela’s title changed from “Head Account Clerk” to “Office Account Clerk”. These changes in job titles did not affect the assigned duties of the affected employees. (*Exhs.4, 36, 37, 44 & 53; Testimony of Carrington; Testimony of Appellant; Testimony of Crowe; Testimony of Remmes*)

34. In October and November 2002, Haverhill issued four requisitions retroactively ratifying the various appointments made since 1998 of Ms. Mickela, Ms. Remmes, Ms. Poore, Ms. Crowe and Ms. Mullen to Principal Account Clerk, Head Account Clerk and Office Account Clerk, respectively. Each appointment was documented by a letter from Mayor Guerin to HRD that stated, as to each appointment, that it was “provisional appointment”. All appointments were identified as full-time positions save for the appointments of Ms. Poore, which were documented as part-time (PT) Principal Account Clerk and Head Account Clerk, respectively. (*Exhs. 44, 53 through 55; Testimony of Carrington*)

35. At all times after Ms. Poore first became a part-time Principal Clerk in November 1998 until her layoff, she remained the only part-time clerical employee of the Haverhill Water Department. (*Exhs.4 & 55*)

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<sup>6</sup> Ms. Remmes had been hired in March 1998 as a Principal Data Entry Clerk without having taken any civil service examination. She did take and pass the Clerical Services Series test in 1999 and scored 85, which placed her 205<sup>th</sup> on the eligible list. She thought that having passed the test was sufficient to become entitled to “civil service” rights. Ms. Remmes is now acting supervisor of the Water Billing Office after further downsizing following the layoff involved here. (*Exhs. 37 ; Testimony of Remmes*)

Ms. Poore's Layoff

36. The FY2013 Haverhill budget, effective July 1, 2012, eliminated funding for a half-time clerical position in the Water Billing Office. (*Exh.43; Testimony of Carrington*)

37. As of June 2012, the clerical staff in the Water Department Group consisted of two Head Clerks in the Water Maintenance Office with civil service tenure (Debra Tandy – tenure date: 8/29/1994 and Beverly Desormeaux – tenure date 3/27/1995) and four Head Account Clerks in the Water Billing Office, all of whom were provisionally appointed. (*Exh. 21*)

38. Initially, Haverhill covered the reduction in funding by changing the full-time position of Head Account Clerk held by Dorothy Crowe to a half-time position. To mitigate this change, Haverhill offered Ms. Crowe a second part-time position as a “floater” working in the Haverhill Treasurer’s Office. (*Exh. 43; Testimony of Carrington; Testimony of Crowe*)

39. As a result of Ms. Crowe’s layoff, the word got around the Water Billing Office that Haverhill considered the clerical staff to be provisional employees, meaning they were not tenured employees and had no civil service rights. Ms. Remmes, then one of the other Head Account Clerks, “knew” what this meant, but still “didn’t believe it” could be true. (*Testimony of Remmes*)

40. Ms. Poore was aware of Ms. Crowe’s change in status, which she believed was consistent with her understanding that reductions in force required layoff of employees in terms of seniority. Ms. Poore still thought, as did her peers, that this didn’t mean they were not “civil service” employees. (*Testimony of Appellant; Testimony of Crowe; Testimony of Remmes*)

41. On June 26, 2012, the Union filed an unfair labor practice charge against Haverhill with the Commonwealth Department of Labor Relations (DLR) regarding Ms. Crowe’s change in job status. The charge was settled by an agreement between the Union and Haverhill which required

Haverhill to reinstate Ms. Crowe to her full time position in the Water Billing Office. (*Exh. 43; Testimony of Carrington; Testimony of Crowe*)

42. On or about September 21, 2012, the Superintendent of the Haverhill Water Department, Robert Ward, handed Ms. Poore a letter from Haverhill Mayor James J. Fiorentini (dated September 18, 2012) which informed her she would be laid off effective October 12, 2012. The letter stated:

“This will serve to officially notify you that your part-time position is being eliminated from the Water Billing Office as a result of changes in the City of Haverhill’s FY’13 Budget. This change will be effective at the close of business on October 12, 2012.”

“While you are not entitled to specific retention rights under Civil Service, you may be entitled to certain entitlements or other benefits and you should contact Denise McClanahan . . . immediately concerning this matter and any other questions you may have.”

“This action is not a reflection on your performance. . . . We will be available to discuss with you any questions you may have and/or to review your options. We will be working with you and your union to help place you in other possible City positions which may open due to retirements, vacancies, etc. in which you may be qualified for.”

(*Exh.20; Testimony of Appellant; Testimony of Carrington*)

43. As Haverhill had treated Ms. Poore at all times as a provisional civil service employee, the September 18, 2012 letter did not provide for any hearing or notice that Ms. Poore had the rights of a tenured civil service employee to contest her layoff or claim “bumping” rights under G.L.c.31, §39 or §41 through §43. (*Exhs. 20, 33, 44 through 46 & 53; Testimony of Carrington*)

44. Ms. Poore was surprised by the September 18, 2012 letter. She had no prior recollection that Ms. Carrington or the Union ever told her that she was considered a provisional employee who did not have the rights of a tenured civil service employee. She believed, as did other clerical peers in the Water Department that, by passing the civil service Clerical Series examination, she had earned “civil service” status and, since she had more seniority than Ms. Crowe, she should be retained over Ms. Crowe. (*Testimony of Appellant; Testimony of Remmes*)

45. Ms. Poore contacted her Union representative and requested a seniority list in anticipation of filing a grievance under the CBA. The list she received contained the names of the two Head Clerks in the Water Maintenance Office and the four Head Account Clerks in the Water Billing Office.

- In the column entitled “CS pos?” all six employees’ status was listed “Y”
- In the column entitled “Perm/Prov”, the two Head Clerks were listed as “perm”; the four Head Account Clerks were listed as “prov”
- In the column entitled “CS PERM date” each Head Clerk had a date entered; the column entitled “CS PROV date” was blank
- Each Head Account Clerk had a date entered in the column entitled “CS PROV date”; the column entitled “CS PERM date” was blank

*(Exh. 21; Testimony of Appellant)*<sup>7</sup>

46. Ms. Poore asked her Union representative what the reference to “CS PROV date” and “CS PERM date” meant. She learned that it meant Haverhill contended that she had never gained permanent tenured civil service rights. *(Exh.21; Testimony of Appellant)*

47. On September 25, 2012, Ms. Poore filed a grievance through her Union. She disputed her status as a provisional, rather than a tenured civil service employee. Her grievance cited Art. V, Section 1 of the CBA that stated; “ All present employees who have completed their six (6) months appointment at the effective date of this Agreement shall be given a permanent appointment immediately from the Civil Service list in their respective departments.” She also cited Art. VI – Section 2 – Paragraph 6: “In the event of lay-off the most junior employee shall be laid off . . . .” *(Exh.22; Testimony of Appellant)*

48. Ms. Poore attached the seniority list she received and disputed her status as provisional civil service. She believed that the CBA required Haverhill to have made her a tenured civil

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<sup>7</sup> Earlier seniority lists provided to the Union, which the CBA required to be posted for employees to see, also showed Ms. Poore’s status as a provisional employee. Ms. Poore and Ms. Remmes had no recollection that they ever saw any of those earlier lists. *(Exhs.45 & 46; Testimony of Carrington; Testimony of Appellant; Testimony of Remmes)*

service employee. She also relied on numerous communications with her supervisor and peers in the Water Billing Department, whom she claimed also believed they were tenured civil service employees, and a dearth of communication with Ms. Carrington that suggested otherwise. She further relied on the copies of the “green sheets” she had seen over the years which used the term “permanent” to describe her status. (*Testimony of Appellant*)

49. On September 25, 2012, after receiving Ms. Poore’s grievance, the Union withdrew from the settlement involving Ms. Crowe and asked the DLR to reopen the case involving Ms. Crowe. Pending the resolution of that matter, Haverhill continued to keep Ms. Crowe in a part-time position in the Water Billing Department and put Ms. Poore’s layoff “on hold.” (*Exhs.24 & 43; Testimony of Appellant; Testimony of Carrington; Testimony of Crowe*)

50. Haverhill filed a new charge against the Union for withdrawing from the settlement of Ms. Crowe’s status. Eventually, Haverhill and the Union reached a new agreement to resolve the DLR charges, which agreement was incorporated in a Memorandum of Understanding (MOU) dated October 9, 2013. In addition to other unrelated miscellaneous matters, the MOU made the following amendment to the CBA, retroactive to July 1, 2012:

**Article V Section 1A – Add to Contract: Reduction in Force**

In the event of a lay-off/reduction in force, all part-time employees shall be laid-off and/or have hours reduced before any full time employees are laid-off or have hours reduced.

(*Exhs. 39 & 43*)

51. The Water Billing Office employees, including Ms. Poore, were aware of the above language added to the CBA and understood that it meant part-time employees now would be laid off before full-time employees were impacted. (*Testimony of Appellant; Testimony of Crowe*)

52. As a result of the October 9, 2013 agreement, Haverhill proceeded to reinstate Ms. Crowe to her full-time position of Head Account Clerk and proceeded to revive the layoff of Ms. Poore instead. (*Exh. 39; Testimony of Carrington; Testimony of Crowe*)

53. At a meeting with her Union representative and Superintendent Ward on December 13, 2014, Ms. Poore again was informed (by letter from Mayor Fiorentini dated December 5, 2013) that she would be laid off for lack of funds effective January 3, 2014. As was the case with the September 2012 layoff notice, the December 5, 2013 letter gave Ms. Poore no notice of any rights to hearing and appeal to the Commission and expressly stated: “You are not entitled to specific retention rights under Civil Service”. The letter, again, directed Ms. Poore to contact Denise McClanahan “concerning this matter and any other questions you may have.” (*Exhs.25; Testimony of Appellant*)

54. On December 17, 2013, after consultation with counsel (not counsel in this appeal), Ms. Poore filed a renewed grievance through her Union contesting her status as a provisional civil service employee. The grievance attached the initial September 2012 grievance and stated, in part:

“My selection for termination is based on a longstanding contract violation that the City has failed to correct . . . . Had the City appointed me to a permanent position as required by the collective bargaining agreement, I would be entitled to certain retention rights under Massachusetts Civil Service law, including, according to the Massachusetts Human Resources Division’s Personnel Administration Rules, preference for retention over provisional or temporary employees in my unit.”

(*Exh. 26; Testimony of Appellant*)

55. On December 20, 2013, Haverhill denied the Union’s grievance filed on Ms. Poore’s behalf, citing the amendment to the CBA “which required part-time employees be laid off before full-time employees are impacted.” Following a series of e-mail exchanges between Ms. Poore and the Union, on or about December 31, 2013, the Union informed Ms. Poore that it would not pursue her grievance further. The Union informed Ms. Poore that it had asked Ms. Carrington to respond more specifically to her contentions about her civil service status. (*Exhs.27 through 29; Testimony of Appellant*)

56. By letter dated January 2, 2014, Ms. Carrington advised Ms. Poore that, as shown in documentation enclosed with the letter, Ms. Poore had become a part-time Principal Account Clerk in July 2000 and a part-time Head Account Clerk in 2002. As neither appointment was made from an existing civil service eligible list, Haverhill reaffirmed its position that each of her appointments had been provisional under Civil Service Law. (*Exh.30; Testimony of Carrington*)

57. On January 29, 2014, Ms. Poore filed this appeal with the Commission. (*Exh.31*)

## **ANALYSIS**

### **Summary**

Ms. Poore had known since October 2012, if not earlier, that Haverhill considered her a provisional civil service employee with no civil service retention rights in a layoff. Her two grievances rested the claim that her layoff was unlawful on the contention that Haverhill's actions, years earlier, wrongfully failed to make her a tenured employee. Whether her present appeal is construed as a Section 39/Section 43 and/or Section 42 procedural appeal from a layoff (as to which a 10 day statute of limitations applies), or a Section 2(b) appeal from the "action or inaction" of the Delegation Administrator (as to which a 30-day statute of limitations applies), her appeal is untimely. Moreover, on the merits, the evidence established that Ms. Poore was not, nor can she be deemed, a tenured civil service employee and she is not entitled to appeal her termination or lack of bumping rights to the Commission.

### **Applicable Civil Service Law and Rules**

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. . . 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 . . . 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 . . . if there is an employee junior to him in length of service.”

*(emphasis added)*

Civil service “seniority” is defined in Section 33 and means:

“. . . length of service, computed as provided in this section. Length of service shall be computed from the first date of full-time employment as a permanent employee, including the required probationary period, in the department unit, regardless of title . . .”

. . . Regardless of actual length of service, permanent municipal employees appointed on less than a full-time basis shall, for purposes of determining seniority, rank below all full-time permanent municipal employees. . . .” *(emphasis added)*

G.L.c.31, §1 defines “permanent”, “temporary” and “tenured” civil service employees:

“Permanent employee”, a person who is employed in a civil service position (1) following an original appointment, subject to serving of a probationary period as required by law, but otherwise without restriction as to the duration of his employment; or (2) following a promotional appointment, without restriction as to the duration of his employment.”

“Temporary employee”, a person who is employee in a civil service position, after a civil service appointment, for a specified period of time or for the duration of a temporary vacancy.”

“Tenured employee”, 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.”

*(emphasis added)*

For “official service” positions (as involved here), all original and promotional appointments, whether “permanent” or “temporary”, must be made, under applicable civil service law and rules from among the first “2n+1” ranked candidates willing to accept the appointment in the order they appear on a certification requisitioned from an eligible list issued after a civil service competitive examination. G.L.c.31,§6,§7 through §11,§27; PAR.08(1) through (7). PAR.09(1).

When no suitable eligible list exists, an appointing authority may make a “provisional” appointment or promotion, pending the establishment of such a list. G.L.c.31, §1 & §12 through §14. Since the appointment of a “provisional employee” is not made from any eligible list, it is not a “civil service appointment” to a “permanent” or “temporary” civil service position and, thus, a “provisional employee” is not a “tenured employee” for purposes of civil service law and rules. See, e.g., Cordio v. Department of Correction, 59 Mass.App.Ct. 1110 (2004) (unpublished), affirming, 14 MCSR 361 (2001); Dallas v. Commissioner of Public Health, 1 Mass.App.Ct. 768, 771 (1974) citing Sullivan v. Commissioner of Commerce & Dev., 351 Mass. 462, 465 (1966).

G.L.c.31, §41 governs the procedures and appeal rights of a civil service employee, including in case of layoffs, and states, in relevant part:

*“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 full hearing. . . before the appointing authority . . . [who] shall provide such employee a written notice of the time and place of such 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 after such Section 41 hearing, or 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 & §43. 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. A Section 42 and/or Section 43 appeal must be filed with the Commission within ten days from notice of the appointing authority’s actions that prejudiced the employee’s civil service rights. Id.

The Commission also has jurisdiction pursuant to G.L.c.31,§2(b):

“To hear and decide appeals by a person aggrieved by any decision, action or failure to act by the administrator [HRD or its delegated representative] . . . .”

“No person shall be deemed aggrieved under the provisions of this section unless . . . a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and . . . such person’s rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person’s employment status.”

Appeals brought under Section 2(b) must be filed within thirty (30) days from the date that notice was sent to the person claiming to be aggrieved. See Standard Rules of Adjudicatory Practice & Procedure, 801 C.M.R. 1.01(6)(b)<sup>8</sup>

### Timeliness

The facts established in this case lead to the conclusion that Ms. Poore’s appeal was filed well after the statutory deadline within which she was required to assert such an appeal. Ms. Poore knew in September 2012, if not before, that Haverhill disputed that she was tenured in her civil service position. She knew when she received Haverhill’s notice of termination dated September 18, 2012 that “you are not entitled to specific retention rights under Civil Service.” By September 25, 2012, after consultation with her Union, she learned, unequivocally, that her employment in Haverhill provided her only “provisional” not “permanent” civil service status. Her two grievances asserted that the failure to grant civil service permanency violated her rights. Ms. Poore now seeks relief from the Commission for this alleged violation of her civil service rights in an appeal asserted more than one year after she came to learn of the alleged violation. This long delay is clearly well beyond the statutory 10-day period to challenge a layoff or even the 30-day period to bring an appeal to challenge the violation under Section 2(b).

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<sup>8</sup> The only exception is a 60-day limitation established for a §2(b) appeal from non-selection for appointment or promotion to a civil service position, i.e “bypass appeal”, which was established by Commission Rule (adopted June 8, 2000).

The Commission's statutory filing deadlines are jurisdictional and have been strictly construed. See, e.g., Lane v. Newbury Police Dep't, 28 MCSR 587 (2015); Manolakis v. City of Quincy, 24 MCSR 393 (2011) and cases cited; Awad v. Human Resources Division, 25 MCSR 32 (2011). The fact that the initial layoff was put on "hold" does not change the result. Any suggestion that Ms. Poore's election to pursue a collective bargaining grievance tolled the time she was allowed to bring this appeal is without merit, as it flies in the face of the consistent rulings of the Commission and the jurisprudence of the Commonwealth to the contrary. Green v. City of Brockton, 28 MCSR 39 (2015) and cases cited; Kilson v. City of Fitchburg, 27 MCSR 106 (2014); aff'd, 2016 Mass.App. Unpub. LEXIS 98 (2016) (appointing authority awarded appellate attorneys' fees); Walker v. City of New Bedford, 26 MCSR 398 (2013); Allen v. Taunton Public Schools, 26 MCSR 376 (2013) aff'd sub nom., Allen v. Civil Service Comm'n, C.A. 2013SUCV3239 (Memorandum of Decision, July 17, 2014); Okoroafor v. Department of Mental Health, 21 MCSR 195 (2008)

Even assuming the Commission were to look only at the second layoff notice, that would lead to the same conclusion. Ms. Poore was fully informed not later than December 13, 2013, that Haverhill had not changed its original position that she had no retention rights under civil service law in the 2012 reduction in force that required the elimination of her part-time job. Four days later, on December 17, 2013, with advice of counsel, her second grievance expressly referenced the existence of the specific civil service law and rules she relied upon here:

*"My selection for termination is based on a longstanding contract violation that the City has failed to correct . . . Had the City appointed me to a permanent position as required by the collective bargaining agreement, I would be entitled to certain retention rights under Massachusetts Civil Service law, including, according to the Massachusetts Human Resources Division's Personnel Administration Rules, preference for retention over provisional or temporary employees in my unit." (emphasis added)*

Despite this knowledge, Ms. Poore's appeal came weeks after the statutory deadline had expired.

## Tenured Status

The untimeliness of this appeal, alone, is reason to require that it be dismissed. Indeed, the level of speculation that would be required about events that transpired many years ago reinforces the public policy justification for rejecting claims based on stale evidence and faded memories. In addition, however, the evidence unequivocally established that Ms. Poore's substantive claim to the status of a tenured civil service employee also lacks merit.

First, although Ms. Poore might rightly point to flaws in the way Haverhill administered the process for filling civil service positions, those flaws did not cause Ms. Poore any "actual harm", but, in fact, actually worked to her benefit. Indeed, if Haverhill had strictly "played by the rules", more likely than not, Ms. Poore would never have been hired as a Principal Clerk.

- When Haverhill first appointed Ms. Poore to the position of part-time temporary Principal Clerk in November 1998, the 1995 clerical eligible list of qualified candidates for that civil service position remained in effect and, therefore, the appointment should have been filled by requisition and appointment of a candidate from that eligible list. See generally, G.L.c.31,§1 & §6; City of Somerville v. Somerville Mun. Emply. Ass'n, 20 Mass.App.Ct.594, rev.den., 396 Mass. 1102 (1985) (vacating arbitrator's award of back pay to employees who had not been promoted in accordance with civil service law); Gillespie v. Boston Police Dep't, 24 MCSR 170 (2011)(temporary promotion); O'Connor v. Boston Police Dep't, 22 MCSR 550 (2009) (same). Ms. Poore did not appear on the 1995 eligible list and, therefore, she was appointed in violation of civil service law. She had no right to be appointed to that job.<sup>9</sup>

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<sup>9</sup> The subsequent serial extensions of the "temporary" appointment does raise a legitimate question as to whether the appointment should have been "permanent", but either way, the appointment should have been made from a civil service list. Similarly, Ms. Poore's interim appointment as a meter reader without reference to any civil service list, also problematic, provides no better claim to civil service tenure.

- Similarly, when Haverhill made Ms. Poore's job as Principal Clerk's a "permanent" position in July 2000, that appointment also should have been made from the applicable eligible list, i.e., the 1999 Clerical Eligible List. Although Ms. Poore had taken and passed the Clerical III competitive exam by that time, she was ranked 70<sup>th</sup> on the 1999 Clerical Eligible List. When Haverhill requisitioned the Certification for a Water Billing Office full-time Principal Clerk's position in May 2000, seven candidates ranked ahead of Ms. Poore on the 1999 Clerical Eligible List signed willing to accept the job. Had Haverhill similarly requisitioned a Certification for the part-time Principal Clerk position, as it should have done, at best, it is mere speculation to assume that Ms. Poore would have been, or could have been hired. Indeed, it is doubtful that she even would have been reached for consideration under the "2n+1" rule. Even if just one or two other more highly ranked candidate signed willing to accept the part-time job, Ms. Poore could not have been selected unless Haverhill showed reasonable justification at the time to bypass those more highly ranked candidates. See G.L.c.31,§27; PAR.08(1) through (7). PAR.09(1). The Commission is not warranted to entertain that level of speculation in order to find "actual harm" to an employee's civil service rights. See O'Neill v. City of Lowell, C.A. 1581CV00758 (Middlesex Sup.Ct. 2016), affirming, 28 MCSR 92 (2015); DeMatteo v. Town of Saugus, 14 MCSR 15 (2001) (employee not within "2n+1")
- Even assuming, however, that Ms. Poore had gained permanency as a part-time Principal Clerk, her seniority in a layoff would still "rank below all full-time permanent municipal employees." G.L.c.31,§33,¶5. As at least one other Water Billing Office clerk (Ms. Remmes) had also passed the Clerical series competitive exam by July 2000 and there were dozens of other candidates on the 1999 Clerical Eligible List ahead of Ms. Poore.

So long as at least one other full-time employee of the Water Billing Department also had achieved permanency by the time of the 2012 layoff, Ms. Poore, the only part-time employee, still would have been the one laid off, despite her civil service tenure. In order for Ms. Poore to be retained over such full-time clerical staff, the Commission would need to assume further that, despite all the alleged flaws in the process, only Ms. Poore, but none of her full-time peers, should be singled out for retroactive tenure, although she alleges that the CBA entitled all permanent employees to the same tenure she claims for herself. These assumptions are also too speculative to be credited. See also Burns v. City of Holyoke, 22 MCSR 637 (2009) (inequitable to grant permanency to one provisional dispatcher when there are other similarly situated dispatchers in department)

Second, the alleged unlawful conversion of the Principal Clerk's title to Principal Account Clerk, and Head Clerk to Head Account Clerk, further complicates Ms. Poore's path to tenure. Even if Ms. Poore were deemed to be duly entitled to permanency as a (part-time) Principal Clerk prior to conversion to a provisional Account Maintenance Clerical Series title, she had not yet completed the statutory probationary period as a Principal Clerk and, therefore, her job status could be changed or terminated at any time, for any reason, without recourse to appeal to the Commission. G.L.c.31, §1, §34; PAR.12(2). See, e.g., Selectmen of Brookline v. Smith, 58 Mass.App.Ct. 813, 815, rev.den., 440 Mass. 1103 (2003); DeJesus v. City of Lowell, 27 MCSR 562 (2014); Pearson v. City of Brockton, 22 MCSR 375 (2009)

I reject as unfounded Ms. Poore's contention that alleged chicanery with her civil service titles established some ulterior motive or bad faith for the 2000 job title changes. The changes were the product of negotiated "group reclassifications" with, and agreed to by the Union.<sup>10</sup> I decline

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<sup>10</sup> As noted above, the negotiation of a "group reclassification" is a matter within the purview of G.L.c.30, not the civil service law, over which the Commission has no statutory powers of review. G.L.c.30, §45 & §49, ¶3.

to make the far-fetched inference that Haverhill and the Union collaborated to orchestrate a plan to undermine the civil service rights of allegedly disfavored employees in some hypothetical future reduction in force. At the time of the reclassifications, Haverhill still was hiring personnel and was enhancing the status of personnel such as Ms. Poore from temporary to permanent status for budget purposes. Moreover, when the layoff eventually came a decade later, Haverhill and the Union initially took care to preserve Ms. Poore's job. As it turned out, settlement of the dispute as to whom to layoff – i.e., to retain full-time over part-time provisionals – actually brought the CBA into line with the same rules applicable to tenured personnel under Civil Service Law. I find no conflict between the CBA and Chapter 31 or any indication of unlawful motive or bias that would justify the Commission's attention, even assuming the claims had been duly and timely filed, which they were not. While it is understandable that Ms. Poore believed that Haverhill or her Union should have acted differently, and did not fairly represent her interests, the Commission has no jurisdiction to enforce contractual collective bargaining rights, per se, or to adjudicate unfair labor practices.

To be sure, as set forth in the Findings of Fact, the CBA-negotiated job classifications employed by Haverhill and the Union from time to time did not always track the approved job titles in the MuniClass Manual or Haverhill's own Classification Plan. The MuniClass Accounts Maintenance Clerical Series (OC 0520) includes three "approved" job titles: Account Clerk (0520A), Senior Account Clerk (0520B) and Principal Account Clerk (0520C), whereas three different "functional" positions also exist in Haverhill's "Account" Clerk career ladder – Principal Account Clerk, Head Account Clerk, and Office Account Clerk.<sup>11</sup>

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<sup>11</sup> There are other misnomers. The job title of Principal Data Entry Clerk (equivalent pay to a Principal Clerk in the 2000 CBA pay schedules) is not an approved title in either the Haverhill Classification Plan or MuniClass Manual. Haverhill treated the job of Water Meter Reader as a labor service title, when it is actually an official service title.

This disconnect between the “functional” job titles assigned by the CBA and City Ordinances, on the one hand, and the “approved” civil service titles contained in the MuniClass Manual and Haverhill’s Classification Plan, on the other hand, is more of a semantic issue, however, than it is a substantive violation. It does not support an inference of ulterior motive. Consistent nomenclature is certainly preferred, but, here, the career ladders are easily reconciled:

<u>MuniClass Code</u>	<u>Approved Title</u>	<u>CBA/City Functional Title</u>
0520A	Account Clerk	Principal Account Clerk
0520B	Senior Account Clerk	Head Account Clerk
0520C	Principal Account Clerk	Office Account Clerk

Whatever nomenclature is used, the fact remains that the job titles comprise a career ladder within the “Account Maintenance Clerical Series” which puts them in an entirely different job group and job series from the General Administrative, Clerical and Office Services Group, Clerical Series (Occupational Code 0301) to which the title of Principal Clerk is assigned.

In sum, Ms. Poore’s civil service position at the time of the layoff was in her Account Clerical Series job which must have been “provisional” for civil service purposes. Having not completed the required probationary period before assuming her provisional Account Clerical job series position, even were she a full-time Account Clerk, Ms. Poore had no tenured position in that (or any other) job series to which she could revert or bump. See Andrews v. Civil Service Comm’n, 446 Mass. 611 (2006) (for purposes of layoff, civil service status and “bumping” is determined by the “official service” position – tenured, probationary or provisional – that an employee is “in” at the time of the layoff); Tomashpol v. Chelsea Soldiers Home, 23 MCSR 52 (2010), aff’d sub nom Tomashpol v. Civil Service Comm’n, 2010SUCV459 (Suffolk Sup. Ct. 2011) (bumping limited to same job series in official service)

Third, Ms. Poore draws attention to a prior decision in which the Commission granted retroactive permanency. Certain Boston Municipal Police Officers & Sergeants v. City of Boston

[*BMOS Decision*], 19 MCSR 2006 (2006) citing *Condon v. City of Waltham*, CSC Nos. E-00-1699 to E-1713(2000) (unpublished) [*Condon*] and *Moody v. Lancaster Board of Selectmen*, CSC Nos. E-690 to E-692 (1999) (unpublished) [*Moody*] These cases are inapposite.

The *BMOS Decision* involved a unique and highly complex legal and factual situation. Petitions were filed by twenty-three officers and sergeants of the Boston Municipal Police Department (BMPD) who, but for an unusual statutory and regulatory glitch, were excluded from the class of all other BMPD officers and sergeants who received permanency under a 1998 special legislative act. The City of Boston and HRD both supported the remedial relief that put this group of officers and sergeants on the same footing for civil service status as their peers. Similarly, *Condon* and *Moody* involved petitions *by* the municipal appointing authority and/or HRD) on behalf of a class of public safety personnel to rectify the unintended consequences of municipal actions that had affected the positions to which they had been appointed and continued to serve. In *Condon*, a group of reserve police officers had passed the competitive examination and appeared on the eligible list but the municipality had not formally requisitioned the list from HRD. In *Moody*, HRD learned that the municipality had not followed civil service protocol for testing and appointing Emergency Telecommunications Dispatchers, so that these employees, whom the municipality thought had qualified for civil service tenure, in fact, had not. See also, *Hantmann v. Department of Mental Retardation*, 19 MCSR 226 (2006) (joint motion to bring employees on par with other similarly situated tenured peers after departmental merger)

None of these examples involved a request by a single employee for the type of unilateral, post-termination surgical relief sought by Ms. Poore for herself, but not for any of her peers, to selectively grant her civil service tenure in a position to which she had been appointed provisionally, especially one to which she probably should not have been appointed at all. None

of these decisions ordered the employer, after termination, involuntarily to convert a provisional appointment into a permanent one. I can find no prior example, and the parties have not brought one to my attention, in which the Commission has embraced such principles. See, e.g., Katz v. Town of Lynnfield, 28 MCSR 391 (2015) (rejecting “de facto” or other claims to be “deemed” tenured); Furey v. Town of Lynnfield, 28 MCSR 383 (2015); (same); Malooof v. Town of Randolph, 21 MCSR 217 (2008) (provisional youth services director terminated despite claim that the town had treated him as a tenured employee during 28 years on the job); Rose v. Executive Office of Health & Human Services, 20 MCSR 267 (2008) (28-year clerical employee was provisional despite having taken various civil service tests and apparent assumption by agency that she had earned tenure) See also, Phillips v. Department of Public Health, 25 MCSR 56 (2012); DelFavero v. Department of Correction, 25 MCSR 172 (2012); Braz v. New Bedford School Dep’t, 23 MCSR 757 (2010); Morin v. Boston School Comm., 23 MCSR 768 (2010); Soloman v. City of Fall River, 13 MCSR 161 (2000); Varone v. Human Resources Div., 13 MCSR 24 (2000); Cronin v. City of Brockton, 7 MCSR 13 (1994)<sup>12</sup>

Finally, as Ms. Poore also acknowledged, any “actual harm” from which she is aggrieved and is allegedly prejudiced “came from the City’s failure to appoint Ms. Poore to the position of Principal Clerk, and then again from the City’s unilateral change of her job title to Principal Account Clerk in 2000.” (Appellant’s Proposed Decision, p.23) (*emphasis added*). The Commission has consistently rejected appeals that sought to resurrect such stale claims of harm and prejudice, especially those that would require the Commission to single out one employee

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<sup>12</sup> A few other Commission Decisions have provided retroactive permanency, but these Decisions involved labor service and/or a specialized program known as “ConTest”, which present quite different circumstances intended to be confined to their unique facts. See, e.g., In re Civil Service Status of Seven Employees of the City of Springfield, 27 MCSR 230 (2014) (permanency granted to improperly appointed “provisional labor service” workers when no such civil service classification exists, but permanency denied to official service plumber); Ottomaniello v. City of Springfield, 25 MCSR 207 (2012) (city granted but, then, erroneously revoked permanency under “ConTest”); DiNicola v. City of Methuen, 22 MCSR 504 (2009) (employee had been properly qualified for appointed to permanent position under “ConTest” although city erroneously failed to document it at the time)

for extraordinary retroactive relief at the expense of the employment rights of other civil service employees, and no good cause has been shown to make an exception in this case. See, e.g., Mulligan v. Boston Police Dep't, 28 MCSR 57 (2015) (15 year delay in challenge to failure to make permanent appointment); Walker v. City of New Bedford, 26 MCSR 398 (2013) (three year delay in contesting layoff of “temporary” employees who should have been granted permanency); Guimont v. City of New Bedford, 23 MCSR 134 (2010) (18 month delay in claiming failure to recall and reemploy after layoff)

Nothing in this Decision should be construed as indifference to the situation Ms. Poore and many other provisional civil service employees currently face and will continue to face. Provisional appointments and promotions were intended to be “permitted in what are supposed to be exceptional circumstances.” E.g., City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985, citing McLaughlin v. Commissioner of Public Works, 204 Mass. 27, 29 (1939)). However, after decades without competitive examinations administered for many civil service titles and the apparent lack of appropriations to permit examinations any time in the future, hiring and advancement of most non-public safety civil service employees can now lawfully be accomplished only provisionally. The vast number – perhaps nearly all -- current non-public safety state and municipal civil service employees have not taken a qualifying civil service examination for the position they currently occupy and, therefore, have been left without the job security and advancement opportunity that tenured status under civil service law was expected to provide, relegating them to enforcement of the rights, if any, under public employee collective bargaining agreements and other laws that are beyond the Commission’s purview. Thus, as predicted, the exception has now

swallowed the rule and an appointment “which is provisional in form may be permanent in fact.”

Kelleher v. Personnel Adm’r, 421 Mass. 382, 399 (1995)

The Commission and the courts have wrestled for years with the corrosive effects of this so-called “plight of the provisional” but, especially now, given the enormous volume of provisional municipal and state employees across the Commonwealth, the Commission has concluded that, save for extremely rare instances, if there is a flaw in the procedure, it is a flaw that requires a global, systemic review for the General Court to address and fix through legislative action. See generally, Kelleher v. Personnel Adm’r, 421 Mass. 382, 389 (1995); Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006) quoting Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 86 (1999); In Re: Request By Jon Mograss, et al, to Investigate The Failure to Administer Civil Service Examinations, 28 MCSR 261 (2015)

### **Conclusion**

For the reasons stated above, the appeal of the Appellant, Wendy Poore, is hereby **dismissed**.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein, and Tivnan, Commissioners) on April 28, 2016.

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 to:  
David Brody, Esq. (for Appellant)  
William D. Cox, Jr., Esq. (for Appointing Authority)  
John Marra, Esq. (Human Resource Division)