COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, SS.

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ROSEMARY LEFRANCOIS,
Appellant
v.
DEPARTMENT OF REVENUE,
Respondent

CASE NO: D-09-415

Appellant's Attorney:	Rebecca Lee Mitchell, Esq. SEIU/NAGE 1299 Page Boulevard Springfield, MA 01104
DOR Attorney:	Suzanne Quersher, Esq. Department of Revenue 100 Cambridge Street Boston, MA 02114
HRD Attorney:	Martha Lipchitz O'Connor, Esq. Human Resources Division One Ashburton Place Boston, MA 02108
Commissioner:	Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Rosemary LeFrancois appeals to the Civil Service Commission (Commission) from a one-day suspension from her position as a Tax Auditor I with the Department of Revenue (DOR). DOR moved to dismiss the appeal, asserting that the Appellant is provisionally appointed as a Tax Auditor I and, therefore, the Commission lacks jurisdiction to entertain her appeal. The Appellant opposed these motions. A motion hearing was held by the Commission on March 8, 2010. The hearing was digitally recorded. Pursuant to Procedural Order dated March 10, 2010, the Commission requested further submissions which were received from DOR and the Appellant on April 9, 2010,

and from the Massachusetts Human Resources Division (HRD) on April 28, 2010.[1]

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the argument presented by the Appellant, DOR and HRD, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. On or about October 30, 1996, the Appellant, Rosemary A. LeFrancois, achieved permanent civil service status as a tenured "official service" civil service employee in the title of Corporate Analyst, effective retroactively to April 17, 1993. (*DOR Motion, Exh. 1; Appellant's Opposition: HRD Supplemental Brief*)

2. In 2002, as a result of a request made by Ms. LeFrancois for reclassification to the position of Tax Auditor III, the DOR reclassified her from the title of Corporate Analyst to the official service title of Tax Auditor I, effective February 25, 2001. This reclassification was upheld by HRD. It was not appealed to the Commission. (*DOR Motion, Exhs. 2, 3; Appellant's Opposition; HRD Supplemental Brief*)

3. The Appellant, the DOR and HRD all construe Ms. LeFrancois's status in the position of Tax Auditor I after reclassification to be a provisional civil service employee. (*DOR Motion; Appellant's Opposition;; HRD Supplemental Brief*)

4. On or about October 14, 2009, while serving as provisional Tax Auditor I, Ms. LeFrancois received notice that she was to be disciplined with a one-day suspension, and was notified of a right to request "a hearing before the appointing authority to determine whether just cause exists for the suspension". (*DOR Motion, Exh. 4; Appellant's Opposition; Appellant's Claim of Appeal*)

[1] The Appellant moved to strike portions of HRD submission as unsolicited by the Procedural Order. The Commission declines to grant this request and has considered HRD's views, along with the positions of the parties, in aid of the resolution of the important issue of civil service law presented by this appeal.

5. The Appellant duly requested and received an appointing authority hearing on October 27, 2009. (*Appellant's Opposition*)

6. The Appellant asserts, and the DOR does not dispute that, by requesting an appointing authority hearing, the Appellant was irrevocably required to forego pressing a grievance through collective bargaining and that DOR knew or should have known that such an election had been made. (*Appellant's Opposition*)

6. On or about November 3, 2009, DOR Commissioner Navjeet Bal upheld the suspension. This appeal to the Commission duly ensued. (*Appellant's Opposition; Appellant's Claim of Appeal)*

5. On February 11, 2010, the Commission issued an interim decision in McDowell v. City of Springfield, CSC Case No. D-05-148; 23 MCSR 124 (2010) [*McDowell I*], in which the Commission took jurisdiction to hear a "just cause" appeal from the discharge of a provisionally appointed employee who alleged that: (1) he was tenured in another civil service position and (2) the discharge caused a "loss of any rights attributable to" the tenured position. The Commission subsequently decided that Mr. McDowell's discharge was not supported by "just cause", that the termination had unlawfully deprived him of his tenured civil service status in his permanent position, and that he was entitled to relief to restore him to that tenured position. McDowell v. City of Springfield, 23 MCSR 243 (2010) [*McDowell II*] (*Administrative Notice*)

6. The Appellant does not dispute that Ms. LeFrancois's one-day suspension, which she served on October 21, 2009, only affected her employment as a provisional Tax Auditor I and did not cause any harm to her tenured status or rights in the position of Corporate Analyst. (*DOR Motion; DOR Pre-Hearing Memorandum*)

CONCLUSION

Effect of Reclassification on Permanency

All the submissions received by the Commission suggest a consensus that Ms. LeFrancois is tenured in the official service title of Corporate Analyst, to which she was appointed in 1993, but that that she holds no permanency in the official service position of Tax Auditor I, to which she was later reclassified. HRD points out that, absent a special act of the legislature, a civil service employee gains permanency only by original or promotional appointment (in the case of official service, from a certification after successfully passing a civil service examination; in the case of labor service, by appointment from a roster of eligible applicants). See G.L.c.31, §§1, 6-8,25-30; Maloof v. Town of Randolph, 21 MCSR 217 (2008) (appellant never took and passed a civil service examination or gained permanency as a result of a Special Act of the legislature)

Nothing in the reclassification statute, G.L.c.30, Section 49, detracts from this general rule. As DOR points out, recourse to that statute is available to any manager or employee of the Commonwealth. Thus, G.L.c.30, Section 49 appeals are not limited to employees with civil service tenure or permanency, but may involve provisionally appointed employees and, even, state employees who do not hold any civil service status whatsoever. It appears that the principle purpose of G.L.c.30, Section 49 was to provide a mechanism for oversight of employee classification and pay as set out in Chapter 30, and was not meant to create a wholly new alternative road to gain permanency in civil service jobs without have to take and pass a civil service qualifying examination for the position as prescribed by the Massachusetts Civil Service Law, Chapter 31.

Indeed, G.L.c.30, Section 49 reads more as if a reclassification by HRD (or the Commission) is a provisional recommendation, and is subject to becoming permanent only upon submission "to the budget director and the house and senate committees on ways and means" who must approve the "permanent allocation or reallocation . . in a schedule of permanent offices and positions approved by the house and senate committees on ways and means, such permanent allocation or reallocation shall be effective as of the date of appeal to [HRD]." G.L.c.30, §49. See also G.L.c.30, §45(4)

Thus, in the absence of evidence that Ms. LeFrancois has passed any examination for the position of Tax Auditor I or evidence her position was made permanent by Special Act or pursuant to the requirements of G.L.c.30, Sections 45(4) and 49, the Commission, as does the Appellant, DOR and HRD, treats Ms. LeFrancois as having permanency in the position of Corporate Analyst but not in the position of Tax Auditor I.

The Commission acknowledges that this statutory view may chill the interest of certain civil service employees to seek reclassification from a permanent job title to what would be a higher, but provisional, title. The Commission also appreciates that employees seek reclassification because they no longer have opportunity to seek career advancement through successful achievement on civil service examinations, which have not been administered for most civil service positions for decades. While the Commission has repeatedly exhorted parties in the public employment arena to find a solution to this "plight of the provisional", it remains the Commission's duty to enforce the Civil Service law, as written. 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. 382, 389 (1995).

The Commission's Jurisdiction Over Provisional Employee Appeals

As Ms. LeFrancios is a provisional employee, the Commission must address the merits of DOR's motion to dismiss her appeal for lack of subject matter jurisdiction.

The Commission's jurisdiction to hear appeals from disciplinary actions is defined by G.L.c.31, §43, which authorizes an appeal for de novo hearing before the Commission to determine whether or not there was the "just cause" for an appointing authority's actions taken under G.L.c.31,§41. Section 41 provides, in relevant part:

> Except for just cause . . . *a tenured employee* shall not be discharged, removed, suspended for a period of more than five days, laid off . . . lowered in rank or compensation without his written consent, nor his position be abolished. Before such action is taken, such employee shall be given a written notice by the appointing authority, which shall include the action contemplated, the specific reason or reasons for such action and a copy of sections forty-one through forty-five, and shall be given a full hearing concerning such reason or reasons before the appointing authority or a hearing officer designated by the appointing authority. . . . [T] the appointing authority shall give to such employee a written notice of his decision, which shall state fully and specifically the reasons therefor.
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> *A civil service employee* may be suspended for just cause for a period of five days or less without a hearing prior to such suspension. . . . [T]the person authorized to impose the suspension shall provide the person suspended with a copy of sections forty-one through forty-five and with a written notice stating the specific reason or reasons for the suspension and informing him that he may, within forty-eight hours after the receipt of such notice, file a written request for a hearing before the appointing authority on the question of whether there was just cause for the suspension. If such request is filed, he shall be given a hearing before the appointing authority or a hearing officer designated by the appointing authority . . . [T]he appointing authority shall give the person suspended a written notice of his decision within seven days after the hearing. . . .
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> *If a person employed under a provisional appointment* for not less than nine months *is discharged* as a result of allegations relative to his personal character or work performance and if the reason for such discharge is to become part of his employment record, he shall be entitled . . . to an informal hearing before his appointing authority or a designee thereof within ten days of such request. If the appointing authority, after hearing, finds that the discharge was justified, the discharge shall be affirmed, and the appointing authority may direct that the reasons for such discharge become part of such person's employment record. Otherwise, the appointing authority shall reverse such discharge, and the allegations against such person shall be stricken from such record. *The decision of the appointing authority shall be final*, and notification thereof shall be made in writing to such person and other parties concerned within ten days following such hearing.
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> *If it is the decision of the appointing authority, after hearing, that there was just cause for an action taken against a person pursuant to the first or second paragraphs [above], such person may appeal to the commission as provided in section forty-three.*

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) ("It is well established that the Commission does not have jurisdiction to hear an appeal filed by an employee pursuant to G.L.c.31,§§42 or 43 when the employee was never a permanent or tenured employee . . . the Appellant was a provisional civil service employee at all times"). See also Sullivan v. Comm'r of Commerce & Devel., 351 Mass. 462 (1966) (provisional employee has "no tenure, no right of notice or hearing, no restriction of the power of discharge"); Knox v. Civil Service Comm'n, 63 Mass.App.Ct. 904 (2005) (Commission lacked jurisdiction to hear appeal of provisionally appointed employee, reclassified to management job group, and later discharged); Cordio v. Civil

Service Comm'n, 59 Mass.App.Ct. 1110 (2003) (unpublished) (discharged employee had no right of appeal to the Commission due to his provisional status).

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) (demoted appellant was provisionally appointed to his former position and as provisional employee had no right to appeal his removal from that position); Ralph v. Town of Webster, 19 MCSR 10 (2006) (Commission lacked jurisdiction to hear discharge and demotion appeal from non-civil service position of Deputy Police Chief when appellant's leave of absence in former civil service position of Police Sergeant had expired at the time of his discharge) See also Cox v. Civil Service Comm'n, 3 Mass.App.Ct. 793 (1975) (Section 43 appeal by employee demoted from temporary position dismissed for lack of jurisdiction); Dallas v. Comm'r of Public Health, 1 Mass.App.Ct. 768 (1974) (tenured civil service employee provisionally promoted and later removed without hearing and returned to tenured position had no cognizable appeal under civil service law) [2]

The fact that an appointing authority erroneously believed a provisionally appointed employee held a tenured position and/or treated them as if they had the rights of permanent employees to appeal to the Commission has never been deemed sufficient basis to vest the Commission with jurisdiction over such cases on a grounds of equity or

[2] By statute, a provisional employee, may, in certain situations, claim the right to an informal (sometimes called a "name clearing") hearing before the appointing authority, which is distinctly different from the "just cause" hearing to which a tenured employee is entitled, and which is expressly not appealable to the Commission. G.L.c.31, §41,¶3. There is some question whether this "name clearing" hearing applies to other types of actions as well, such as a demotion. See Smith v. Comm'r of Mental Retard., 409 Mass. 545, (1991).

waiver. See Rose v. Executive Office of HHS, 20 MCSR 266 (2007) (lack of jurisdiction over terminated appellant whom appointing authority treated as a tenured employee during her 28 years of service); Maloof v. Town of Randolph, 21 MCSR 217 (2008) (treated as civil service employee for 33 years); Connelly v. Dep't of Soc. Svcs., 20 MCSR 366 (2007) (dismissed appeal of former permanent Social Worker III provisionally promoted to Program Manager, although DSS had notified appellant of her purported statutory right of appeal to the Commission, because "Appellant's status is provisional and he is therefore not entitled to a hearing before the Commission") See also Torres v. Fall River School Dep't, 21 MSCR 613 (2008) (appellant lost his tenured civil service status when he resigned his labor service position and took a provisional appointment, despite appointing authority's representations to the contrary, he could not claim Section 39 "bumping rights" in a layoff from the provisional position he then held).

The McDowell appeal involved a former labor service employee of the City of Springfield (with permanency in his labor service title) who was subsequently promoted to an official service position. As a condition of the promotion, the City required him to execute a document waiving all of his civil service rights. After serving in the new position for a number of years, McDowell was accused of fraud and fired. He appealed to the Commission, claiming that his termination was without "just cause". The City defended on the merits and on lack of jurisdiction. After a full evidentiary hearing of the appeal had been completed, the Commission determined that the employee's waiver of his civil service rights was an unenforceable contract that violated civil service law and public policy and did not oust the Commission of jurisdiction. The Commission, however, still questioned whether it could exercise jurisdiction to hear the appeal since

McDowell was, at best, a tenured labor service employee with provisional status in the official service position from which he was terminated. See *McDowell I* & *II*

This precise issue had not been previously decided by the Commission. The Commission was not, and is not, aware of any precedent in which a provisional civil service employee had ever been permitted to pursue a "just cause" appeal to the Commission from discipline of any kind, and neither the Appellant, DOR or HRD have brought any such case to the Commission's attention here.

The prior decisional case law suggested that it was the "general principle that civil service rights are not personal but inhere in the position." McCarthy v. Civil Service Comm'n, 32 Mass.App.Ct. 166 (1992) (discharged employee lost civil service protection "when he voluntarily accepted promotion to a different and unprotected job") 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.[3] Similarly, the Commission decided that, under Section 15, only a civil service employee with "permanency" may be provisionally promoted, and once such employee is so promoted, she is not considered a "permanent" employee for purposes of future provisional promotions. See generally, Garfunkel v. Dep't of Revenue, 22 MCSR 291 (2009); Poe v. Dep't of Revenue, 22 MCSR 287 (2009); Pease v. Dep't of Revenue, 22 MCSR 284 (2009); Medeiros v. Dep't of Mental Retardation, 22 MCSR 276 (2009); Kasprzak v.

[3] The Commission subsequently applied the principle of the Andrews case retrospectively to dismiss the pending appeals of certain other DOR employees affected by the layoff. 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)

Dep't of Revenue, 18 MCSR 68 (2005), reconsidered, 19 MCSR 34 (2006), further reconsidered, 20 MCSR 628 (2007); Glazer v. Dep't of Revenue, 21 MCSR 51 (2007)

In *McDowell I*, the Commission was presented with a narrow question: whether or not, in the unique circumstances of that case, did G.L.c.31, Sections 41-43 allow Mr. McDowell to appeal his *discharge* (as opposed to demotion or other discipline) from a provisionally appointed position, because the *discharge* concurrently extinguished his civil service permanency in the former position as well, which tenure it was posited could not be forfeited without "just cause".

The Commission's conclusion in *McDowell I* carved out a narrow exception to the prevailing rule that provisional employees could not bring a Section 41 "just cause" appeal to the Commission. In *McDowell I*, former Commissioner Taylor reasoned:

> "[A] provisional employee such as the Appellant, who held a tenured position in the labor or official service, and who, while in such tenured position, is provisionally appointed to another official service position, does have the right of appeal to the Commission to contest the just cause for his discharge under Section 41. The Commission concludes that, although an Appointing Authority may remove an employee "from" his provisional position or discipline him without just cause, unless the Appointing Authority acts *with* just cause, the employee [may not be discharged but] is entitled to be restored to the tenured [former] position. . . ."
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> "Thus, any provisional employee who can claim tenured status in a previously held civil service position may appeal to the Commission from a discharge or removal "from" that tenured position. If the Appointing Authority established just cause for the termination, the Appointing Authority's actions will be sustained and the appeal dismissed. If, however, the discharge was made without just cause, the Commission will deem the Appellant's civil service rights in the tenured position to have been affected through no fault of his own, and will allow the appeal and order the Appellant restored to his tenured position pursuant to the Commission's authority under Chapter 310 of the Acts of 1993."

Id. (*emphasis* in original)

In construing G.L.c.31, Section 41 to allow previously tenured, provisional employees who are *discharged* without "just cause" to bring Section 41 appeals and to

seek the limited relief of reinstatement to their former tenured positions, the Commission expressly distinguished that singular exception to the general rule from all *other* provisional employee *discipline*, *short of discharge*, as to which the right of appeal under Section 41 did *not* extend:

> The right of a provisional employee to bring a just cause appeal relating to a discharge or removal from his position and seek reinstatement to his prior tenured position must be distinguished from an appeal by a provisional employee concerning discipline other than discharge or removal. The public policy that leads the Commission to permit a provisional employee to protect the tenured status he has earned from loss through no fault of his own, does not apply if the discipline is limited solely to his status in the provisional position, but does not purport to deprive the employee of his right to tenured status in the former position. Thus, for example, an employee who is suspended from a provisional position for one-day would not have a right of appeal to the Commission under Section 41, because he has not suffered the loss of any rights attributable to the tenured position."

In sum, the *McDowell I* exception to the general rule that the Commission lacks jurisdiction over disciplinary cases involving provisional employees did not change the pre-existing interpretation of Section 41 as applied to the facts of the present case, i.e., Ms. LeFrancois's one-day suspension from her provisional position of Tax Auditor I.

The Issue of Retroactivity

The Appellant puts up little resistance to most of the previous analysis, saving her big guns for an assault on the motion to dismiss as invoking an impermissible retroactive application *McDowell I* to her pending appeal, which she had filed several months before *McDowell I* was decided. Although well-armored, the Appellant's attack misses the mark on several fronts.

First, the Commission has some doubt that the same rules regarding retroactive application of prior decisions apply to issues of statutory construction regarding its subject matter jurisdiction. As a general rule, the subject matter jurisdiction of the

Commission can be raised by any party, or by the Commission, *sua sponte*, at any time. See 801 CMR 1.00(7)(g)3. It is well-settled that subject matter jurisdiction cannot be conferred on a judicial body by consent of the parties or waiver. See, e.g., ROPT Ltd Partnership v. Katin, 431 Mass. 601, 605-606 (2000); MacDougall v. Acres, 427 Mass. 363, 371 (1998); Jamgochian v. Dierker, 425 Mass. 565, 567-69(1997); Litton Bus. Sys., Inc. v. Comm'r of Revenue, 383 Mass 619, 342 (1981).[4] Thus, in a sense, it is immaterial whether or not the motion to dismiss is prompted by *McDowell I* or arises directly as matter of first impression here. In either case, the Commission finds no compelling reason why it should exercise jurisdiction over a matter which it has never entertained in the past, and which, after careful analysis of the law (both in *McDowell I* and here) the Commission concluded the enabling statute prohibits it from doing so. See generally, Bohner v. Bohner, 18 Mass.App.Ct. 545, 548-49, rev.den., 393 Mass. 1102(1984) (noting examples of jurisdictional changes applied retroactively as "procedural" not substantive rights); Cranberry Realty & Mortgage Co., Inc. v. Ackerly Communications, Inc., 17 Mass.App.Ct. 255 (1983) citing Goes v. Feldman, 8 Mass.App.Ct. 84, 87-90 (1979) (noting examples of retroactive application of jurisdictional statutes and rules)

Second, the Commission would reach the same result under any appropriate retroactivity analysis. Under the strand of analysis upon which the Appellant and DOR mainly rely, established by Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) and adopted by McIntyre v. Associates Fin. Svcs Co. of Mass.,Inc., 367 Mass. 708, 712-13 (1975), "[d]ecisional law is generally applied 'retroactively' to past events." E.g., Tamerlane Corp. v. Warwick Ins. Co., 412 Mass.

[4] The Commission distinguishes this case of subject matter jurisdiction from the case of exercising it discretion to reopen a previously properly filed appeal upon an appropriate showing of equitable justification. See, e.g., Ung v. City of Lowell, 22 MCSR 471, 562 (2009).

486, 489-90 (1992) and cases cited. Three factors are to be considered in determining when a case warrants an exception to the general rule of retroactivity: (1) whether a "new rule" has been established whose resolution was not clearly foreshadowed, (2) whether retroactive application will further the rule, and (3) whether inequitable results, or injustice or hardship, will be avoided by a holding of nonretroactivity. Id.

As to the first factor, the only "new" principle that *McDowell I* announced was a statutory construction of Section 41 that enabled a provisional employee to appeal a termination in one narrowly defined situation; it in no way changed the prevailing general rule that provisional employees such as Ms. LeFrancois did not have Section 41 appeal rights to bring "just cause" disciplinary grievances to the Commission. The Commission had not previously entertained any such appeals and the overwhelming weight of prior Commission Decisions and judicial case law gave no succor to the notion that provisional employees had any right of appeal under Section 41 whatsoever. This state of the law hardly seems to be the sort of "new rule" affecting the Appellant that "breaks new ground or imposes a new obligation" as contemplated by *Huson* and *McIntyre*. See Commonwealth v. Bray, 407 Mass. 296, 301 (1990), citing Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989)[5] As to the second and third factors, this present appeal appears to be the only "live" instance now pending (before or after *McDowell I*) in which a provisional employee pressed the right to a "just cause"

[5] The Appellant asserts that, by electing to file a civil service appeal, she was obliged to forego pursuit of her alternative rights under an applicable collective bargaining agreement to grieve, and potentially, arbitrate, the discipline; she further claims that she was misled by the DOR's granting her what appeared to be Section 41 appeal rights. As previously noted (pp.8-9, above), the Commission has never been persuaded by that argument, as it would let the parties' tail wag the jurisdictional dog. At the time Ms. LeFrancois chose to file her appeal with the Commission, there was absolutely no definitive authority to support her right to do so. Had *McDowell I* come out to extend such a Section 41 right of appeal to all provisional employees with tenure in another position (for discipline of any nature), surely the Appellant, not DOR, would have been the party arguing for retroactive application of that ruling.

determination by the Commission of a suspension. (There is a ten-day limitation on the right to bring a Section 41 discipline appeal to the Commission, so the time long has expired for any other such claims to be brought.) Thus, unlike *McIntyre*, in which retroactive application of the decision would have put untold numbers of real estate transactions and titles in limbo, the impact of "retroactively" applying the reasoning of *McDowell I* to dismiss Ms. LeFrancis's appeal will not affect any other person. On the flip side, however, it cannot be determined whether there may be a flood of "me too" appeals from other similarly situated employees, pleading they should be allowed to resurrect their appeals as well, should the Commission now allow her case to proceed. Cf. Commonwealth v. Amirault, 424 Mass. 618, 619-20, 638-39 (1997) (defendant may be entitled to move to reopen even a closed case to assert retroactive application of a subsequently adopted judicial decision concerning her allegedly "fundamental right" to confront witnesses)

Third, in the line of cases beginning with MacCormack v. Boston Edison Co., 423 Mass. 652 (1996), the Supreme Judicial Court stepped back from the *McIntyre* paradigm and decided that "we believe the issue of retroactivity may be resolved more simply." Id., 423 Mass. at 656. The *MacCormack* decision drew a distinction between retroactive application of "judicial rulings [that] altered rights in Massachusetts contract and property law where issues of reliance might impose hardship un unsuspecting parties", in which retroactive application was unwarranted, and a "decision that involves a matter of constitutional principle [that] with rare exceptions require retroactive application . . . so that all persons with live claims are entitled to have those claims judged according to what we conclude the Constitution demands", where retroactivity would be

presumptively appropriate. Id., 423 Mass. at 657. Compare Knott v. Racicot, 442 Mass. 314, 324 (2004) (no retroactivity to rule affecting the right of first refusal, which affected "a potentially sizable class of parties who have bound themselves under the previous law") with Stonehill College v. Massachusetts Comm'n Against Discrim., 441 Mass. 549, 568-69, cert.den., 543 U.S. 979 (2004) (citing *MacCormack* and *McIntyre* analysis to give retroactive effect to a decision curtailing constitutional right of jury trial in discrimination cases). See also Kimball, Bennett, Brooslin & Pava v. McGahan, 72 Mass.App.Ct. 1105, rev.den., 452 Mass. 1104(2008) (applying *Stonehill College* decision retroactively to vacate prior judgment on jury verdict) The Commission's *McDowell I* decision, involves a question of subject matter jurisdiction, which, although different, does seems to be closer in analogy to refinement of a constitutional right applicable to a discrete number of judicially active "live cases" (i.e., here, only this one pending appeal), as to which retroactivity is generally appropriate, than to the substantive change of a rule of tort or contract law that impairs the private property rights of an undetermined and "potentially sizable class of parties", as to which retroactivity would not be appropriate.

In sum, for the reasons stated above, the DOR's motion to dismiss for lack of subject matter jurisdiction is granted and the appeal of the Appellant, Rosemary LeFrancois is hereby ***dismissed.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on October 21, 2010.

A True Record. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of the 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Rebecca Lee Mitchell, Esq. (for Appellant)
Suzanne Quersher, Esq. (for Appointing Authority)
Martha Lipchitz O'Connor (for HRD)