

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, SS.**

One Ashburton Place - Room 503  
Boston, MA 02108  
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**MAX GARFUNKEL,**  
Appellant

v.

**CASE NO: G2-08-118**

**DEPARTMENT OF REVENUE,**  
Respondent

Appellant, Pro Se:

Max Garfunkel

DOR Attorney:

Suzanne Quersher, Esq.  
Department of Revenue  
100 Cambridge Street  
Boston, MA 02114

Commissioner:

Paul M. Stein

**DECISION**

The Appellant, Max Garfunkel, acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission) to challenge the decision of the Department of Revenue (DOR) and the Massachusetts Human Resources Division (HRD), to “bypass” him for provisional promotions to EDP Systems Analyst III (EDP SA-III) and failure to conduct examinations to fill such positions on a permanent basis. On April 29, 2009, the Commission denied Motions for Summary Disposition that had asserted Mr. Garfunkel lacked standing to appeal. Pursuant to Interim Order dated December 29, 2009, the Commission held an evidentiary hearing on February 11, 2010, limited to the issue of whether Mr. Garfunkel was qualified for the position of EDP SA-III. The DOR called three witnesses and Mr. Garfunkel testified on his own behalf. The hearing was digitally recorded. The Commission received post-hearing submissions from the DOR on March 31, 2010 and from Mr. Garfunkel on April 19, 2010

## **FINDINGS OF FACT**

Giving appropriate weight to the Exhibits, testimony of the Appellant, DOR Director of DTAX Joseph Lupica, DOR Director of EO & Diversity Angel Zayas and DOR Classification Analyst Shelly John, and inferences reasonably drawn from the evidence that I find credible, I make following findings of fact:

1. In 2007, the DOR decided to make appointments to fill several newly-created open positions in the title of EDP SA-III in the Discover Tax Unit (DTAX) within the Audit-Bureau of Desk Audit. The essential mission of these personnel was to develop and work projects that “mine” the voluminous databases to which the DOR has access to identify profiles and potential sources of non-filers and uncollected tax revenues through complex “queries” and other sophisticated data processing techniques. (*Exhs. 1, 3A & 3B; Testimony of Lupica; Findings on Commission’s Motion for Summary Disposition*)

2. The Classification Specification for the EDP Systems Analyst Series was approved by the Department of Personnel Administration (now HRD) on July 1, 1987. No civil service examination for these titles has been conducted since that date and any eligible list for the position of EDP System Analyst III has long expired. (*Exh.2; Testimony of Appellant & John; Findings on Commission’s Motion for Summary Disposition*)

3. The Classification Specification for the EDP Systems Analyst Series describes the work performed by incumbents of positions in the series to “analyze procedures and problems to refine data and convert it to programmable form for electronic data processing; confer with users to ascertain specific output requirements, such as types of breakouts, degree of data summarization, and format for management reports; and

perform related work as required. The basic purpose of this work is to develop computer applications by which subject-matter processes can be organized.” EDP Systems Analysts must possess education, training and experience in the fields of electronic data processing, computer programming, or computer or information science. (*Exh.2; Testimony of Zayas & John; Findings on Commission’s Motion for Summary Disposition*)

4. The title of EDP SA-III is a second-level supervisory job in the EDP System Analyst Series. An EDP SA-III is responsible for direct supervision of 1-10 personnel and indirect (i.e., through an intermediate level supervisor) of 1-10 personnel. (*Exh.2; Findings on Commission’s Motion for Summary Disposition*)

5. The Minimum Entrance Requirements (MERs) for appointment to a position in the EDP SA Classification Series (EDP SA-I), requires “two years of full-time or equivalent part time, professional experience in electronic data processing work the major duties of which included computer programming and/or computer systems analysis.” A college degree with a major in data processing and/or computer information science may be substituted for the required experience, and education toward such a degree may also be used, prorated on the basis of the proportion of the requirements actually completed. (*Exh.2; Findings on Commission’s Motion for Summary Disposition*)

6. At the higher level of EDP SA-III, the MER is “(A) four years of full-time, or equivalent part-time, professional experience in electronic data processing, of which (B) at least two years must have been in work in which the major duties included computer systems analysis”. An academic degree or diploma with a major in data processing or computer or information science, or completion of a program in computer programming

from a recognized business or vocational/technical school, may be substituted for up to two years of experience in category (A), but no substitution is allowed for any of the required experience in category (B). (*Exh.2; Testimony of John; Findings on Commission's Motion for Summary Disposition*)

7. In the absence of an eligible list, DOR received approval from HRD to make provisional promotions to the EDP SA-III positions. It appears that three positions were posted as Announcement #8-AUD-010R in July 2007 and a fourth position was posted as Announcement #08-AUD-016. The specific positions involved in this appeal were described in the DORNET (internal job webpage) as follows:

“Analyze and create queries based on data in the DTAX warehouse. Use SQL, SQL+, Discoverer and other query tools to solve complex queries. Design, create and analyze databases for analyses of tax related projects and queries. Write comprehensive reports explaining results of queries. Good understanding of MASSTAX, DTAX system, Massachusetts and Federal Tax Laws, with a concentration and background in Income, Trustee and Corp taxes needed. Responsible for project management involving the tasks of creating a project tracking instrument, putting together a project team, and other responsibilities as required.”

(*Exh.1; Testimony of John; Findings on Commission's Motion for Summary Disposition*)

8. According to Joseph Lupica, Director of DTAX, the goal of the hiring was to bring “in-house” a high degree of technical knowledge with both computer processing and analysis and tax laws in order to run tests and queries in various department tax software systems. This was intended to make the DTAX unit more technically self-sufficient and less dependent on outside sources for technical support of the DTAX mission. (*Exhs. 1, 3A & 3B, 10; Testimony of Lupica*)

9. Mr. Garfunkel applied for the posted positions of EDP SA-III. He was interviewed, along with other candidates. The interviews followed a pre-determined format and candidates were asked the same interview questions and their responses

recorded. The interview started off with the interviewer stating that “even though tax knowledge would be a plus, it was not mandatory for the position . . . . The technical part of the position and especially a background in the query language, namely SQL and SQL+ and SQL Development would allow the candidate to jump right into the position with little or no training.” (*Exhs. 4A, 12 thru 14; Testimony of Lupica*)

10. Mr. Garfunkel has been a DOR employee for more than twenty years. He has civil service permanency in the title of Tax Examiner II and currently holds a provisional appointment as a Tax Examiner III for which his most recent EPRS (Employee Performance Review Form) gives him a “Meets” rating. He had a “good” interview with Mr. Lupica. (*Exhs 4A & 4B; Testimony of Appellant & Lupica; Findings on Commission’s Decision on Motion for Summary Disposition*)

11. Mr. Garfunkel holds a B.S. degree from Boston University with a Major in Broadcasting and Film and a Minor in Computer Programming. He testified that his studies included 16 credit hours (4 5-credit hour courses) over two years in computer science in which he “programmed in COBOL and Pascal”. His resume summarizes his work experience as follows:

10/06 to present: Department of Revenue, Tax Examiner III. I am currently in the Bureau of Desk Audit, Business Tax/Voluntary Disclosure Unit. Duties have included cases of all tax types. *I am experienced with Mirrors, E-File and Infoimaging systems and have had training and experience with Audit Workbenck/DiscoverTax.*

1/94 to 10/06: Department of Revenue, Tax Examiner II. Duties included abatement/amended returns, written and telephone inquiries, Masstax accounts management and desk audits.

1/88 to 1/94: Commonwealth of Massachusetts, Department of Revenue. Tax Examiner I. Duties included face to face written, and telephone taxpayer inquiries. 2 years specializing in Corporate Excise tax.

9/86 to 12/87: Internal Revenue Service, Automated Collections System. Collections Representative. Telephone contact with taxpayers.

11/83 to 9/86: Internal Revenue Service, Taxpayer Service Division, Seasonal Taxpayer Service Representative.

1/88 to present. While at DOR I have received many hours of training in tax issues, writing, computer tech, and other job related topics.

11/83 to 12/87. While at IRS I received over 500 hours of training in federal taxes and related issues.

(*Exh. 4A; Claim of Appeal; Findings on Motion for Summary Disposition*) (*emphasis added*)

12. Mr. Garfunkel described the work he has performed over his 22-year career with DOR to have provided him with a broad range of knowledge about taxes and DOR information systems. He described a number of situations in which he was on the cutting edge of EDP applications as DOR converted from “paper” to computerized records, including one of the first groups in DOR to begin using PCs, and part of the pilot and introductory stages of electronic case management and e-filing. He described an example of how his work sometimes requires using his computer science skills to troubleshoot a problem in conjunction with an EDP SA-III, recalling a case in which the computer system was entering an incorrect date and, after “testing” the system, he discovered the error was due to a systems error that was defaulting to an erroneous date, which he directed to the EDP SA-III working the problem. (*Testimony of Appellant*)

13. In his interview, Mr. Garfunkel responded to the Question “Do you have any type of tax or financial background? Query and/or SQL background?” he responded: “On the job training – all taxes” and “no SQL background” “no query”. He does not dispute that he has not worked in that specific language. (*Exh.12; Testimony of Appellant & Lupica*)

14. On October 25, 2007, DOR wrote to Mr. Garfunkel notifying him that he was not selected for any of the three positions posted in Announcement #08-AUD-010R. The reason stated by DOR at that time was that the selected candidates were “Better able to

perform the job due to . . . More experience in the same or related work.” His notice of non-selection did not indicate that he had been disqualified for failing to meet the MERs. This appeal duly ensued. (*Exh.5; Claim of Appeal*) (*emphasis added*)

15. Two of the persons selected for appointment to these positions as EDP SA-III were provisional employees performing at a “Meets” level in there respective positions within the DOR’s Taxpayer Services Division, Customer Services Bureau. These candidates are referred to herein as “Candidate 1” and “Candidate 2”. (*Exhs. 6 thru 9; Findings on Motion for Summary Disposition*)

16. Candidate 1 was a career DOR employee, with over 25 years of service, then in a provisional position of Management Analyst II when selected for promotion to EDP SA-III.<sup>1</sup> Candidate 1’s educational background includes courses at Massasoit Community College and Stonehill College, but has no academic degree of any kind. Prior experience with DOR included two years as a Data Entry Operator (1981-1983), seven years as an EDP Programmer I (1983 to 1990) when she “wrote COBOL programs for Computer Auditing Retrieval Systems” and as a Tax Examiner I (1990-1999). In the interview, Candidate 1 stated “strengths – deals primarily with IT”, but stated “SQL – none.” The interview notes contain no mention of the candidate’s “Query” experience. Mr. Lupica testified, however, that Candidate 1 “must have run queries” as a COBOL programmer. (*Exh.6 & 13; Testimony of Appellant, Lupica & John; Findings on Motion for Summary Disposition*)

17. Candidate 2 has been a provisional DOR Tax Examiner II since December 2002. It is not disputed that Candidate 2 has never held permanency in any civil service title.

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<sup>1</sup> Candidate 1 may possibly have permanency in a prior title of Programmer I (1983) or Tax Examiner I (1990), but the parties stipulated that both Candidate 1 and Candidate 2 had no permanency in any other title and the Commission treats Candidate 1 as having no civil service tenure.

Prior experience includes approximately 12 years of private sector experience, including 18 months as a computer support specialist, which involved such duties as running “batch tests”, troubleshooting and resolving daily issues, hardware and software support of all users on multiplatform environments, installing and supporting desktop and laptop systems, printers, fax machines, phone system, set up new user accounts on Phone/network/e-mail; support Desktop/Network users, teach new user class, and repair and track inventory. Candidate 2’s education included computer courses at Boston University, but no degree obtained. During the interview of Candidate 2, it was noted: “Uses DTAX” “Some query language and computer background” “Help desk” “IT support”. (*Exhs. 8 & 14; Testimony of Lupica; Findings on Motion for Summary Disposition*)

18. According to DOR’s witnesses, based on their respective resumes, Candidate 1 and Candidate 2 met the minimum entrance requirements for the position of EDP SA-III, but Mr. Garfunkel did not. Specifically, Candidate 1 and Candidate 2 each had “at least . . . four years of full-time, or equivalent part-time professional experience in electronic data processing of which . . .at least two years must have been in work in which the major duties included systems analysis. . . .” According to DOR, unlike Candidate 1 and Candidate 2, who had experience in “electronic data processing” and “computer systems analysis” work, Mr. Garfunkel’s experience with DTAX and other computer hardware and software was exclusively limited to being an “end user”. Moreover, his educational experience (minor in Computer Science) was not a qualifying substitute for such hands on experience. (*Exhs. 1, 2, 4 thru 6, 8 & 10; Testimony of Lupica, Zayas & John*)

19. All DOR witnesses (including Mr. Zayas – who holds a college degree in Computer Science – seem to conflate, to some degree or other, Candidate 1’s ‘programming’ experience with “computer systems analysis”, although they did agree the two jobs were different and that programmers and systems analysts jobs are contained in completely different job series under civil service. As to Candidate 2, the DOR witnesses equated experience as a computer “operator/technician” as meeting the MER requirement of “computer systems analysis” because it involved responsibility for “daily batch jobs” and “systems recovery.” (*Exhs. 6 & 8; Testimony of Lupica, Zayas & John*)

20. The MERs for the EDP System Analyst Series do appear to distinguish the work of “computer programming” from the work of “computer systems analysis”. The MERs for the EDP SA-I position, call for “professional experience in electronic data processing work the major duties of which included computer programming and/or computer systems analysis”. The MERs for EDP SA-II thru EDP SA-IV, however, call specifically for experience exclusively in “computer systems analysis”. (*Exh. 2*) (*emphasis added*)

21. The Classification Specification for the EDP Programmer Series, however, also describe the MERs for all jobs in the EDP Programmer Series (EDP Programmer I thru EDP Programmer V) in the same terms as a EDP SA-I, i.e., a minimum number of years of “full-time or equivalent part-time, professional experience in electronic data processing work, the major duties of which included computer programming and/or computer systems analysis”. (*Administrative Notice, Commonwealth of Massachusetts, Human Resources Division, Class Specification “EDP Programmer Series”*)

22. According to the United States Department of Labor, Bureau of Labor Statistics, Occupational Outlook Handbook (2010-211 Edition) and Occupational Employment

Statistics (May 2009), the annual mean wages for computer programmers and computer systems analysts are roughly comparable. In fact, the average mean wage in Massachusetts for computer programmers (\$90,470) is actually slightly more than for computer systems analysts (\$88,900). Although these occupations are distinct, the two occupations often work collaboratively. In fact, it has become “more common” to have “programmer-analysts” who have dual proficiency in both programming and computer systems analysis. (*Administrative Notice, United States Department of Labor, BLS website, [www.bls.gov/oco/oco287.htm](http://www.bls.gov/oco/oco287.htm); [www.bls.gov/oco/ocos303.htm](http://www.bls.gov/oco/ocos303.htm); [www.bls.gov/oes/current/oes151051.htm](http://www.bls.gov/oes/current/oes151051.htm); [www.bls.gov/oes/current/oes150121.htm](http://www.bls.gov/oes/current/oes150121.htm)*)

23. Mr. Garfunkel disputes that the data processing experience of Candidate 1 and Candidate 2 met the requisite four years of “electronic data processing”, of which at least two must include “computer systems analysis”. (*Testimony of Appellant*)

24. As to Candidate 1, Mr. Garfunkel asserts that the candidate’s prior experience as a computer “programmer”, while sufficient as “electronic data processing”, are not sufficient to qualify as “computer systems analysis” within the meaning of the MERs. He asserts that such a position, in effect, was a low-level clerical position and that it cannot be credible that such experience in such a job in the 1980s meets the MER requirement of “computer systems analysis work” when his training and experience does not. He claimed that he did far more programming in his college courses than Candidate 1 would have done for the DOR. (*Exh. 6; Testimony of Appellant*)

25. As to Candidate 2, Mr. Garfunkel asserts that most of the candidate’s private sector experience as a computer operator/technician and customer support was not “electronic data processing” or “computer systems analysis” work. From 1989 to 1996,

his position was “Computer Operator/Technician” for American Red Cross Blood Services and from 1998 until June 2000, he was a “Product Specialist” for NEC Technologies, where it appeared he handled Telephone, Fax and E-Mail products. Since becoming a Tax Examiner II, Candidate 2’s experience with computers would have been substantially the same as Mr. Garfunkel’s experience as the “end user”. (*Exh.8; Testimony of Appellant*)

### CONCLUSION

G.L.c.31, §15 provides the process for the provisional promotion of civil service employees within a departmental unit in the absence of a suitable eligible list from which to make a permanent promotion. The statute prescribes, in relevant part:

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

*If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission to the administrator by the appointing authority of sound and sufficient reasons* therefore, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

A provisional promotion pursuant to this section shall not be deemed to interrupt the period of service in the position form which the provisional promotion was made where such service is required to establish eligibility for any promotional examination.

G.L.c.31, §15 (*emphasis added*)

The plain meaning of Section 15 allows only “civil service employees” to be provisionally promoted. A “civil service employee” is a person with an original or promotional “appointment” under Civil Service law, which, in the official (as opposed to

labor) service, means an appointment pursuant to G.L.c.31, §§6 or 7, following competitive examination. See G.L.c.31, §1. A “civil service employee” is different from a “provisional employee” who is appointed without having passed an examination. Id.

The parties have not argued that promotion from a Tax Examiner II (Candidate 2), Tax Examiner III (Mr. Garfunkel) or Management Analyst II (Candidate 1), to an EDP SA-III is a promotion from “one title” to the “next higher title” within the meaning of Section 15. It is not disputed that these positions stand in entirely different Classification Series, with different educational requirements and different job duties. Moreover, the title of EDP SA-III (a *second-level supervisory* job in that series) does not appear reasonably capable of being construed as the “next higher title” to the titles of Tax Examiner II and Tax Examiner III (*intermediate* levels of *non-supervisory* professional job titles) Under these circumstances, the DOR asserts correctly that the sole “next lower title” to EDP SA-III would be EDP SA-II. See generally, Tomashpol v. Chelsea Soldiers Home, 23 MCSR 52 (2010). Compare Pease I & Poe I (Tax Examiner II to Tax Examiner III); Gale v. Department of Revenue, 23 MSCR 528 (2010) (Tax Examiner II to Tax Examiner III); Glazer v. Dep’t of Revenue, 20 MCSR 51 (2007) (Tax Auditor II to Tax Auditor III)

Here, since none of the candidates in this case were in the “next higher title” definition of Section 15, such promotions may be made without regard to title, but only to qualified “permanent” civil service employees. See Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010); Gale v. Department of Revenue, 23 MSCR 534 (2010); Foster v. Department of Transitional Assistance, 23 MCSR 528 (2010); Pease v. Department of Revenue, 22 MCSR 284 (2009) [*Pease I*]; Poe v. Department of Revenue,

22 MCSR 287 (2009) [Poe I ]; Garfunkel v. Department of Revenue, 22 MSCR 291 (2009) [Garfunkel I]; Glazer v. Department of Revenue, 21 MCSR 51 (2007); Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), reconsidered, 19 MCSR 34 (2006), further reconsidered, 20 MCSR 628 (2007).

Applying these applicable principles to the facts of this case, it appears that Mr. Garfunkel held civil service tenure (Tax Examiner II) with permanency in another title, and was eligible for provisional promotion to EDP SA-III if he was otherwise “qualified”, but Candidate 1 and Candidate 2 fail to meet the statutory prerequisite to be provisionally promoted pursuant to Section 15 to the position of EDP SA-III. Thus, if Mr. Garfunkel were “qualified” for the EDP SA-III position, he was entitled to be selected for one of the open positions filled by the provisional employees – Candidate 1 and Candidate 2 – and he would be aggrieved by his non-selection. If he were unqualified, however, he would not be entitled to relief. See Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010); Gale v. Department of Revenue, 23 MSCR 534 (2010); Foster v. Department of Transitional Assistance, 23 MCSR 528 (2010); Pease v. Department of Revenue, 22 MCSR 284 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009).

DOR concluded that Mr. Garfunkel did not meet even the MERs for the position of EDP SA-III, because he lacked four years of “electronic data processing” experience of which two included “computer systems analysis”. This conclusion is supported by the preponderance of the evidence, save for the fact that the preponderance of the evidence also established that Candidate 1 does not expressly meet these qualifications either.<sup>2</sup>

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<sup>2</sup> As to Candidate 2, the evidence presented by DOR does establish that the candidate’s private sector experience from May 1998 through December 2001 as a computer support technician can reasonably be

As to Candidate 1, DOR relied on the resume that showed work in 1980s in “computer programming” writing “COBOL programs”. Conflicting evidence was presented on whether “programming” is the equivalent of “computer systems analysis”. Based on the plain meaning of how those terms are used distinctly in the EDP SA Classification Series specifications, and the fact that programmers and computer systems analysts are in completely different civil service job series, the two types of work are clearly not interchangeable. Nevertheless, the testimony of the DOR witnesses is persuasive that their assessment of the relevant experience of Candidate 1 in writing COBOL programs at the level of a DOR Programmer I in 1983-1990 “must have involved queries” and satisfied the intent of the MER-required two years of professional hands-on EDP work experience with the tools required to perform the job under consideration. Unfortunately, while Mr. Garfunkel credibly testified that he would have had at least two years of similar experience through his college courses in computer programming, DOR chose not to recognize that academic experience as equivalent to Candidate 1’s working experience in the field.

In sum, the evidence presented to the Commission sufficiently justifies how DOR concluded Candidate 1 was qualified for the position of EDP SA-III, which the DOR witnesses testified was based solely on writing COBOL programs in the 1980s as stated on her “resume”, while Mr. Garfunkel was not. To be sure, Mr. Garfunkel credibly testified that he actually may have had more “programming experience” than Candidate 1

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inferred to fit the definition of “computer systems analysis”, and that, overall, although even Candidate 2 did not have any specific prior “SQL” background, Candidate 2 possesses the necessary four years of “electronic data processing experience” needed to meet the MERs for an EDP SA-III. Although Mr. Garfunkel also strenuously argued to the contrary, the DOR has met its burden of proof on the qualification of Candidate 2.

and, as a tax examiner, he gave an example of how his work involved doing EDP SA-III type analysis, and, more generally, demonstrated that he has been on the cutting edge of EDP systems roll-outs at DOR for much of his career. Based on the record presented to the Commission, however, the conclusion that Candidate 1 had the requisite “electronic data processing” and “computer systems analysis” experience but Mr. Garfunkel did not, while somewhat subjective, simply cannot be said to be unreasonable or based on bias or favoritism, as opposed to a good faith professional judgment by the DOR hiring authorities. His appeal must be dismissed for lack of standing as an aggrieved party.

That said, this situation presents a conundrum for the Commission. If Section 15 is strictly applied, neither Mr. Garfunkel (lacking the qualifications) nor Candidates 1 and 2 (provisional employees) are entitled to be promoted to the EDP SA-III positions involved here. Although the Commission has the authority to vacate a civil service appointment or promotion that was made in violation of civil service law and rules, this action would not be appropriate under the circumstances of this case. To preclude filling these positions with qualified candidates until an examination is conducted, as civil service law technically requires, is completely impractical and counterproductive to the success of DOR’s important mission.

It has been long established that “[p]rovisional appointments or appointments through noncompetitive examinations are permitted only in what are supposed to be exceptional instances. . . .” City of Somerville v. Somerville Municipal Employees Ass’n, 20 Mass.App.Ct. 594, 598, 481 N.E.2d 1176, 1180-81, rev.den., 396 Mass. 1102, 484 N.E.2d 103 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29, 22 N.E.2d 613 (1939). However, the passage of decades without the personnel

administrator holding competitive examinations for many civil service titles, and the professed lack of funding to do so any time in the near future, has meant that advancement of most civil service employees is accomplished by means of provisional promotions under Section 15. Thus, as predicted, the exception has now swallowed the rule and “a promotion which is provisional in form may be permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399, 657 N.E.2d 229, 233-34 (1995).

In the absence of competitive examinations, civil service positions are no longer filled from an eligible list of candidates who have taken and passed the required examination, presumably in the order of their ranking on the examinations, and all qualified candidates, Mr. Garfunkel included, would have a fair and equal opportunity for career advancement.<sup>3</sup> Indeed, it is particularly ironic that, under the present system, Candidate 2, a provisional DOR employee for six years without any academic degree was able to advance his DOR career based on prior private sector work experience, while even a tenured 22-year DOR employee such as Mr. Garfunkel (or a provisional career employee such as Candidate 1) is blocked from such career advancement because they worked their entire career in public service (Mr. Garfunkel at the IRS or DOR, since obtaining his college degree).

As much as the Commission regrets this state of affairs, and has repeatedly exhorted parties in the public employment arena to end the current practice of relying on provisional promotions (and provisional appointments) to fill the majority of today’s civil

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<sup>3</sup> The DOR’s suggestion at the hearing that Mr. Garfunkel would not be qualified to sit even for an examination for the lowest level job in the EDP SA Series (EDP SA-I) is not entirely correct. HRD has considerable discretion to define who may sit for such examinations, as well as to update classification specifications. G.L.c.31, G.L.c.31, §7 thru 21. It would seem quite plausible that, if and when examinations were given in the future, and, especially given the long hiatus in civil service examinations, HRD, most likely, would revisit the applicable standards. It would seem unlikely to predict that a tenured civil service employee, such as Mr. Garfunkel, with his 22 years at DOR and an academic degree in computer science, would be barred from sitting for an examination in the EDP series.

service positions, the Commission must honor the clear legislative intent to allow such a procedure for provisional promotions. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address. See Kelleher v. Personnel Administrator, 421 Mass. at 389, 657 N.E.2d at 234.

Accordingly, for the reasons stated above, the appeal of the Appellant, Max Garfunkel, under Docket No. G2-08-118, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis[ABSENT], McDowell & Stein, Commissioners) on March 10, 2011

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), 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:  
Max Garfunkel (Appellant)  
Suzanne Quersher, Esq. (for Appointing Authority)  
Martha Lipchitz O'Connor (for HRD)