

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, SS.**

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

**MAX GARFUNKEL,**  
Appellant

v.

**DEPARTMENT OF REVENUE,**  
Respondent

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

Appellant, Pro Se:

Max Garfunkel  
[REDACTED]

DOR Attorney:

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

HRD Attorney:

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Human Resources Division  
One Ashburton Place  
Boston, MA 02108

Commissioner:

Paul M. Stein

**DECISION ON MOTION FOR SUMMARY DECISION**

The Appellant, Max Garfunkel, acting pursuant to G.L.c.31, §2(b), asserts an appeal against the Department of Revenue (DOR) and the Massachusetts Human Resources Division (HRD), challenging his “by-pass” for provisional promotion to several positions of EDP Systems Analyst III and the failure of HRD to conduct examinations to fill such positions on a permanent basis. DOR and HRD moved for Summary Decision. The Appellant opposed these motions. A hearing on the motions was held by the Civil Service Commission (the Commission) on September 15, 2008. The motion hearing was recorded on one (1) audiocassette. The Commission requested further submissions from the parties, which were received from the Appellant on March 31, 2009 and from HRD and DOR on April 17, 2009.

## FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, and 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:

### Appellant's Background

1. The Appellant, Max 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. (*Claim of Appeal; HRD Motion; DOR Motion*)

2. Mr. Garfunkel holds a B.S. degree from Boston University School of Communications with a Major in Broadcasting and Film and a Minor in Computer Programming. 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.

(*Claim of Appeal; HRD Motion; DOR Motion*)

3. The Classification Specification for the Tax Examiner Series (Tax Examiner I through Tax Examiner VIII) was approved by the Department of Personnel Administration (now HRD) on July 1, 1987. The provisional appointment held by Mr. Garfunkel as Tax Examiner III is the third-level professional job in this series. The next higher title in the series is Tax Examiner IV, which is the first-level supervisory job in the series. (*HRD Motion*)

4. Neither Mr. Garfunkel nor DOR provided copies of Form 30s covering any of the positions in the Tax Examiner Series. According to the Classification Specification, the incumbents in the Tax Examiner Series “review and examine tax returns and records for accuracy and compliance with applicable laws, rules and regulations, audit corporations and other business establishments to determine tax liability; evaluate applications for tax abatements and determine tax assessments; provide technical assistance to others; and perform related work as required. The basic purposed of this work is to examine tax returns and financial records to determine tax liability and to ensure compliance with applicable tax laws, rules and regulations.” Tax Examiners must possess education, training and experience in the field of accounting, business administration or business management. (*HRD Motion*)

#### EDP Systems Analyst Job Postings

5. In 2007, the DOR decided to make appointments to fill several open positions in the title of EDP Systems Analyst III within the Audit-Bureau of Desk Audit. The title of EDP System Analyst III is a second-level supervisory job in the EDP System Analyst Series. (*DOR Motion; HRD Motion*)

6. 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. (*DOR Motion; HRD Motion*)

7. 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. (*HRD Motion*)

8. An EDP Systems Analyst III is responsible for direct supervision of 1-10 personnel and indirect (i.e., through an intermediate level supervisor) of 1-10 personnel. (*HRD Motion*)

9. The minimum entrance requirements for appointment to the title of EDP Systems Analyst III are “(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). (*HRD Motion*)

10. In the absence of an eligible list, DOR received approval from HRD to make provisional promotions to the EDP System Analyst 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. DOR posted the positions on Commonwealth Employment Website, and interviewed the candidates through two managers who asked the same prepared questions for each candidate. (*DOR Motion*)

11. Mr. Garfunkel applied for the posted positions of EDP Systems Analyst III and was interviewed. (*DOR Motion*)

12. 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. (*Claim of Appeal; HRD Motion; DOR Motion*)

13. The three persons selected for appointment to these positions as EDP Systems Analyst III were Zlatan Catic, Joan Hallisey and Alex Ravanis, all of whom are provisional employees performing at a “Meets” level as Tax Examiner IIs in the DOR’s Taxpayer Services Division, Customer Services Bureau. (*DOR Motion; DOR Argument*)

14. In November or December 2007, DOR decided to fill the fourth position, also with someone other than Mr. Garfunkel. Due to an unexplained glitch, Mr. Garfunkel was not properly notified of his non-selection for the fourth position, and the appointment of Iwona Joncyk to fill that position, until September 2008. (*DOR Supplemental Letter 9/10/08; Appellant’s Argument*)

15. On December 18, 2007, Mr. Garfunkel appealed to the Commission challenging the DOR's "bypass" of him for the three appointments of which he had been notified. He withdrew this appeal on January 25, 2008. (*CSC Docket No. G2-07-430; Appellant's Argument*)

16. On May 14, 2008, Mr. Garfunkel filed his present appeal, again challenging the DOR's "bypass" of him for "3 or 4" positions as well as complaining about the failure of HRD to conduct examinations for the positions. (*Claim of Appeal*)

#### Qualifications of the Appointed Candidates

17. DOR's October 25, 2007 notification to Mr. Garfunkel of his non-selection over the initial three appointees – Zlatan Catic, Joan Hallisey and Alex Ravanis - checked off the following reasons: "The applicants have been selected because he/she has been deemed to be more qualified than you by virtue of . . . better able to perform the job due to . . . more experience in the same or related work." The non-selection form made provision for checking "Interview", "Education", "More Seniority" and "Other", but DOR did not check any of these reasons. (*Claim of Appeal; HRD Motion; DOR Motion*)

18. The notification received by Mr. Garfunkel regarding the fourth position stated that the selected candidate – Iwona Jonczyk - was "Better able to perform the job due to . . . More experience in the same or related work", "Demonstrated competence in the same or related work" and "Education and training (directly related to the duties of the vacant position), including Licenses and Registration." (*DOR Letter 9/10/08*)

19. In response to Mr. Garfunkel's information request to DOR,<sup>1</sup> which included a request for the "qualifications and resumes" of the four candidates selected for the

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<sup>1</sup> Mr. Garfunkel's request was made and treated by DOR as a FOIA request under G.L.c.66,§10, rather than a discovery request under Commission Rules, 801 CMR 1.00 et seq.

positions of EDP Systems Analyst III, as well as the qualifications of any other DOR hires in to the titles of EDP System Analyst I, II, and III since 2003, he DOR stated the following:

Personnel information, such as resumes and other evaluative information, are exempt from the definition of public records . . . and are not subject to disclosure under the Public Records Law (G.L. c.66, §10).

However relevant degrees and certifications listed on the resumes of the successful applicants may be disclosed. For this reason, I can inform you that Joan Hallisey has completed courses in Computer Concepts, COBOL I and System Analysis and Design.

Alex Ravanis has completed courses in Win95/98/NT2000, ME, XP, AS400, Office 98/2000, Lotus CC:Mail, Outlook Mail, MS Exchange, Visio, Adobe suite, Network Connectivity (wiring patch panel) TCP/IP, Heat Database, McAfee/Norton Virus Protection(s), Unix, Novell, Televantage Phone software, Ghost, Palm Pilots, Blackberry Devices, Network Printers, Scanner, Masstax, Mirror, PC Service and Support and Computer Operation.

Finally, Zlatan Catic has a Bachelor's Degree in Business Administration and an Associates Degree in Computer Science.

Sheryl Calandra as completed courses in Masstax, Expanded Masstax, Masstax Payment Application, COMETS, Mirror, Trustee Tax, CIB Overview, Windows 95, Microsoft Office, Web Update, Technology Overview, and Windows 2000. Iwona Jonczyk has completed courses in MMARS Warehouse Information Training and received a Certificate of Crystal Report Design and Development.. Finnacle Yaniry Gil-Torres has received A+ PC technician certification, and has completed courses in NETWORK Plus, HTML Web Design, and Oracle 8i/9i PL/.SQL/Project Management.

(DOR FOIA Response dated 6/19/08)

20. Mr. Garfunkel apparently also asked for additional information, including the "interview notes" and "materials" reviewed by DOR in the selection process, to which DOR declined to respond. (*Appellant's FOIA E-mail 8/19/08; Appellant's Argument*)

#### Civil Service Examination Status

21. HRD outlines the history of the effort that has been made during the past ten years, which is well-known to the Commission, to establish a process for implementing a

procedure that would revive the practice of conducting regular testing for civil service positions so as to “qualify the current provisional employees into their positions” and “to ensure that no provisional appointments are made in the future”. The Commission takes administrative notice of this effort and the fact that the major reason this effort has fallen short is the absence of the necessary funding from the General Court for several years. *(HRD Motion)*<sup>2</sup>

## CONCLUSION

### Timeliness

G.L.c.31, §2(b) provides no specific limitations period for taking an appeal from the “action” or “inaction” of HRD. The Commission, by administrative rule, has established a 60-day period for taking an appeal from the approval by HRD of a “bypass” under Section 2(b). In the absence of a time specified by statute or rule, a claim of appeal is required to be filed within 30 days after “Agency notice of action is sent to a party.” appellant. 801 C.M.R. 0101(6)(b)

Mr. Garfunkel filed his appeal as a Section 2(b) bypass appeal from “decision, action or inaction” of HRD, using the Commission’s prescribed Section 2(b) appeal form. HRD and DOR, however, both contend that there is “no bypass”. HRD has never sent “notice of action” to Mr. Garfunkel. The main thrust of Mr. Garfunkel’s appeal appears to be the allegedly unlawful continuing “inaction” of HRD and DOR in permitting the promotion of provisional employees without having taking steps, before or since, to comply with

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<sup>2</sup> The Commission acknowledges that the General Court did appropriate funds in the current FY09 budget for the “Continuing Testing” program, and this line item (1750-0111) was zeroed out as part of the recent “9C” cuts required by the expected budget shortfall. No budget cuts are without consequences. The Commission remains concerned that the “provisional” employee problem persists, it will continue to engender disputes within the ranks of public employees such as presented in this appeal, and the conundrum will become more difficult to resolve every year that funding for the “Continuous Testing Program” is sacrificed to other choices.

alleged statutory obligations in making such appointments and the failure of HRD to conduct any examination that would enable DOR to make permanent appointments the position of EDP Systems Analyst III. Moreover, Mr. Garfunkel's original 2007 appeal, although withdrawn, was clearly filed within 60 days of DOR's initial notice to him; the Commission could entertain a reinstatement of that appeal if it had been withdrawn under a mistaken impression that the present appeal would not be challenged as untimely or, alternatively, although the present appeal may have been premature as to the fourth appointment when originally filed, the Commission could also entertain a motion to amend this appeal to include that appointment. See 801 C.M.R. 1.01(6) & (7). Thus, for all of the reasons above, the Commission decides that Mr. Garfunkel has not been dilatory in seeing an adjudication of his claim and the present appeal should not be dismissed as untimely.

#### Standing

HRD correctly asserts that if Mr. Garfunkel were unqualified to be appointed to the position of EDP Systems Analyst III, he would have no standing to contest either the action of DOR in failing to provisionally appoint him to the position or the failure of HRD to conduct an examination for which he would have been ineligible to sit. See PAR.06(d). The Commission, however, is unable to decide the question of standing on the present record because additional evidence is required to determine the question of Mr. Garfunkel's qualifications, and, therefore, his standing to appeal.

While it appears that Mr. Garfunkel's work experience and education may not fit the exact qualifications as described in the Classification Specification for EDP Systems Analyst, neither does the information in this record about the work experience and

education of the EDP Systems Analysts currently employed by DOR, including the four employees recently promoted to that position. None of them seem to meet the precise description in the Classification Specifications either. For example, as to the three persons appointed under Posting #08-AUD-010R, came from a lower level employment background. (TE IIs) than Mr. Garfunke (TE III). Also, Mr. Garfunkel, unlike the appointees, is a permanent Tax Examiner II who is assigned to the very same Bureau of Desk Audit as the posted positions. At least two of the selected individuals do not hold any academic degree and another holds a Bachelor's degree in Business Administration and an Associates Degree in Computer Science. (Mr. Garfunkel holds a B.S. degree with a minor in Computer Science). All the personnel, including Mr. Garfunkel, appear to have received a smorgasbord of continuing education training on computer subjects, which appears to be the principal criteria applied by DOR in finding the applicants qualified as EDP Systems Analysts. Thus, the record suggests it is reasonable to infer that Mr. Garfunkel has alleged in good faith and may well be able to establish that his qualifications in the areas of "electronic data processing" and "computer systems" are substantially equivalent to the qualifications of persons appointed by DOR as EDP System Analyst III and whom DOR has deemed to meet the minimum requirements for that position.

In sum, at this stage of the appeal, Mr. Garfunkel has established a sufficient issue of fact that calls for an evidentiary hearing to determine whether, in fact, he is qualified for and deserved to be appointed to the position of EDP Systems Analyst III, as measured by the same standards DOR used to qualify the appointed candidates applied to him. He has raised "above the speculative level" a claim "plausibly suggesting" that he is "aggrieved"

within the meaning of G.L.c.31, §2(b) and has standing to pursue this appeal. See Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (revising standard for deciding motions to dismiss); R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

### Provisional Promotions

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*)

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, as HRD has noted, 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).

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 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.

It remains the Commission’s duty to enforce the Civil Service law, as written. With this principle in mind, the Commission finds there are substantial questions of fact that require a full hearing to determine whether DOR’s provisional promotions in question conform to applicable requirements and whether Mr. Garfunkel is entitled to any relief.

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 Commission has not decided whether the title employees are “in” for purposes of provisional promotion to the “next higher” title under the first paragraph of Section 15 is (a) the permanent title they hold as a “civil service employee” (the pre-condition for any provisional promotion) or (b) may also mean any title into which the employee was subsequently promoted provisionally. In Andrews v. Civil Service Comm’n, 446 Mass. 611, 618, 846 N.E.2d 1132(2006), the SJC implied that a provisional employee is “in” the provisional title and but not “in” the original permanent title until the provisional promotion ceases to have effect, at least for purposes of layoff and reinstatement rights under G.L.c.31, §39. See also Connelly v. Department of Social Serv., 20 MCSR 366 (2007) (discharge appeal of provisional Program Manager V rejected, despite prior permanency as Social Worker III, because “[a]ppellant’s [current] status is provisional and he is therefore not entitled to a hearing before the Commission”)

The foregoing logic that is applied to interpreting rights of provisional employees who are disciplined or laid off for lack of work or lack of funds under Section 39 necessarily does not fully answer the present question of promotional rights under Section 15. In its April 17, 2009 submission, HRD makes a compelling argument that a provisional promotion under the first paragraph of Section 15 requires permanency in the “next lower title” and that if an employee is to be promoted more than one step above their permanent civil service title, the second paragraph of Section 15 would apply, i.e., such a promotion is authorized only if: (1) there is no qualified permanent employee in

the next lower title and (2) the appointing authority provides “sound and sufficient reasons for the promotion of such an employee.

The Commission agrees with HRD’s analysis as consistent with basic merit principles, generally accepted practice, and the statutory intent of Section 15. Thus, under Section 15, only a “civil service employee” with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for “sound and sufficient reasons” to another higher title for which she may subsequently be qualified, only if there are no qualified permanent civil service employees in the next lower title . See generally, Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007) (provisional promotion of a permanent Child Enforcement Worker C to next higher title of Child Enforcement Worker D under G.L.c.31, §15, ¶1); Glazer v. Department of Revenue, 21 MCSR 51 (2007) (provisional Tax Auditor II with permanency as Tax Auditor I, provisionally promoted to Tax Auditor III upon submission of “sound and sufficient” reasons under G.L.c.31, §15, ¶2) <sup>3</sup>

The present record does not present the Commission with sufficient facts to determine whether the DOR’s provisional promotions here meet either of the statutory requirements of the first or second paragraphs of Section 15. Mr. Garfunkel is a “civil service employee” by virtue of his permanency in the Tax Examiner II position, but the selected candidates who were promoted by DOR, according to the record presented, all appear to

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<sup>3</sup> The DOR’s April 17, 2009 submission relies on Kelleher v. Personnel Adm’r, 421 Mass. 382, 657 N.E.2d 229 (1995) (1995) to argue that a provisionally appointed employee holds “permanency” in a provisional title pending the holding of a qualifying examination and, therefore, all qualified provisional employees are entitled to be treated equally with permanent employees when it comes to making a provisional promotion. That question, however, clearly was not before the SJC in Kelleher, and the Commission does not interpret the court’s opinion as reasonably construed to support the DOR’s alchemistic argument that, in effect, would make all “provisionally” appointed and promoted personnel “permanent” civil service employees.

be “provisional” Tax Examiner IIs whose status as a “civil service employee” who has passed a competitive examination is not established. Without such status, none of the selected applicants appointed by DOR would have been permitted to be provisionally promoted ahead of Mr. Garfunkel, should he prove to be the only “qualified” permanent civil service employee who applied from the “next lower title.”

Moreover, even if the other candidates are “civil service employees”, there is a substantial question whether a promotion from a Tax Examiner II to an EDP Systems Analyst III is a promotion from “one title” to the “next higher title” within the meaning of Section 15. The two positions stand in entirely different Classification Series, with different educational requirements and different job duties. While the Commission does not foreclose the possibility that a title in one series could conceivably be considered the “next higher title” in a different series, this is clearly a question of fact which is not capable of being answered on this record. The uncertainty is further complicated insofar as the title of EDP Systems Analyst III (a *second-level supervisory* job in that series) does not appear reasonably capable of being construed as the “next higher title” to the title of Tax Examiner II (an *intermediate* level of *non-supervisory* professional job titles) Thus, this case is clearly different from the prior Commission Decision in Glazer v. Dep’t of Revenue, 20 MCSR 51 (2007), in which the provisional appointment involved promotion from the title of Tax Auditor II to Tax Auditor III within the same series that appellant and the selected applicant both held civil service permanency, and the appellant was found unqualified for the promotion after a full hearing.

Thus, in the event that the provisional promotions in this case do not meet the “next higher title” definition of Section 15, then, such promotions may be made without regard

to title, but only to “permanent” civil service employees after approval by HRD of “sound and sufficient reasons”, which the record does not reflect was done here.<sup>4</sup>

This requirement is not a mere ministerial act, but requires “reasonable justification”, based on a preponderance of the evidence, consistent with the fundamental purpose of the civil service system to insure decision-making in accordance with basic merit principles. E.g., MacHenry v. Civil Service Comm’n 40 Mass.App.Ct. 632, 635, 666 N.E.2d 1029, 1031 (1995), rev.den., 423 Mass. 1106, 670 N.E.2d 996 (1996) (noting that personnel administrator [then, DPA, now HRD] and Commission oversight thereof [in bypass cases] is to “review, and not merely formally to receive bypass reasons” and evaluate them “in accordance with basic merit principles”); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 577 N.E.2d 325 (1991) (“presumptive good faith and honesty that attaches to discretionary acts of public officials . . . must yield to the statutory command that the mayor produce ‘sound and sufficient’ reasons to justify his action)

The Commission also notes that the statutory definition of “basic merit principles” includes “recruiting, selecting and advancing of employees on the basis of their *relative* ability, knowledge and skills including open consideration of qualified applicants for initial appointment.” G.L.c.31,§1. This principle has been applied in bypass cases to mean that an appointing authority has certain discretion to select from “equally qualified” applicants (i.e. tied applicants). See Edson v. Town of Reading, 21 MCSR 453, 455 (2008) (Conclusion of the Majority). Although the paradigm presented for provisional promotions under Section 15 is not strictly a “bypass” in the normal sense of selecting a

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<sup>4</sup> This case does not involve a promotional appointment, which is governed by the different requirements as forth in G.L.c.31, §12. cf. Kelleher v. Personnel Administrator, 421 Mass. 382, 657 N.E.2d 229 (1995)

candidate with a lower test score than another candidate, the same principles would seem to apply when assessing whether “sound and sufficient reasons” are established for selecting among applicants under Section 15 as is required in the more traditional bypass case. In general, a candidate who is “more qualified” deserves to be promoted over one who is “less qualified”. If the parties believe that there ought to be different standards for establishing and reviewing “sound and sufficient reasons” under Section 15, the Commission will welcome those suggestions in the context of further proceedings in the appeal.

Finally, this Decision is limited to ruling on the standing of the Appellant to proceed with his appeal on the merits. The Commission has made no decision on the type of relief, if any, that may be appropriate should the provisional promotions involved be successfully challenged on the merits. The Commission recognizes, however, that, any ultimate relief that is granted to the Appellant in this case needs to take into account the practical reality that many public employees may hold provisional promotions through a process that this Decision has determined does not comply with Section 15 and which is not to be continued in the future. It is appropriate to provide the parties the opportunity for further hearing on the question of what additional evidence the Commission should receive in the matter and what relief, if any, may be appropriate in the circumstances of this case. The Commission need not, and will not, address the precise relief that the Appellant may be entitled to receive, if any, should he prevail at a full hearing, but the Commission will be very mindful that any such relief does not invalidate long-standing existing promotions previously made. The Commission welcomes input from the parties and HRD on that subject.

In sum, the Commission concludes that Mr. Garfunkel's appeal presents substantial and material issues of fact that should not be decided without a full evidentiary hearing and further consideration of the complex legal issues presented. Accordingly, the case will be scheduled for an additional pre-hearing conference and will proceed to full hearing thereafter. The HRD and DOR Motions to Dismiss are hereby *denied*.

Civil Service Commission

Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on April 29, 2009.<sup>5</sup>

A True Record. Attest:

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Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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:  
Max Garfunkel, Esq. (Appellant)  
Suzanne Quersher, Esq. (for Appointing Authority)  
Martha Lipchitz O'Connor (for HRD)

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<sup>5</sup> Commissioner Henderson and Commissioner Taylor concur in the decision except that they do not accept or adopt Finding of Fact No. 21.

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

Room 503

**CIVIL SERVICE COMMISSION**

One Ashburton Place:

Boston, MA 02108

(617) 727-2293

MAX GARFUNKEL,  
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v.

G2-08-118

DEPARTMENT OF REVENUE,  
Respondent

**OPINION OF CHRISTOPHER BOWMAN**

Although this decision is not dispositive of the instant appeal, it has implications for all state agencies and civil service communities and a large segment of their employees.

Specifically, the Commission, agreeing with HRD, limits provisional promotions under Section 15 of the civil service law to those employees who have permanency in some civil service title. Hence, thousands of career government employees who are considered provisional employees may not be provisionally promoted to a higher title under Section 15.

Nothing in this decision, however, limits an appointing authority from filling a vacancy through a provisional appointment under Section 12 and considering internal candidates who have not had the opportunity, through no fault of their own, of obtaining civil service permanency.

To the extent that this decision clarifies the above-referenced distinction, I support this well-reasoned decision. Should this decision become a potential precursor to: 1)

invalidating any provisional promotions made under Section 15 prior to this clarification;  
or 2) limiting the career paths of those employees in civil service positions who don't  
have civil service permanency, I would vigorously dissent.

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Christopher C. Bowman, Chairman  
April 29, 2009