

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JONATHAN GALE,
Appellant

v.

G2-06-280

DEPARTMENT OF REVENUE,
Respondent

Appellant's Attorney:

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Fall River, MA 02720

Respondent's Attorney:

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P.O. Box 9557
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Commissioner:

Christopher C. Bowman¹

DECISION

The Appellant, Jonathan Gale (hereinafter "Gale" or "Appellant"), pursuant to G.L. c. 31, § 2(b), is appealing the decision of the Department of Revenue (hereinafter "Department," "DOR" or "Appointing Authority") to not select him for the position of Tax Examiner III.

¹ Commissioner Taylor's term on the Commission expired before he was able to draft a written decision. The matter was assumed by Commission Chairman Christopher Bowman. Pursuant to 801 CMR 1.11(e), when a Presiding Officer becomes unavailable before completing the preparation of the initial decision, the Agency shall appoint a successor to assume the case and render the initial decision. If the presentation of the evidence has been completed and the record is closed, the successor shall decide the case on the basis of

The appeal was filed with the Civil Service Commission (hereinafter “Commission”) on October 31, 2006. A pre-hearing conference was held on April 9, 2007. The Department filed a Motion for Summary Decision on April 9, 2007 and the Appellant filed an Opposition to Respondent’s Motion for Summary Decision on June 25, 2007. A full hearing was held on October 23, 2007 and February 20, 2008. The witnesses were sequestered. The hearing was recorded. The Appellant filed a Proposed Decision on March 19, 2008, and the Department filed a Proposed Decision on March 21, 2008. On April 1, 2009, the Commission issued a Procedural Order, to which the Appellant responded on April 24, 2009 and the Department responded on April 27, 2009.

FINDINGS OF FACT:

Forty (40) exhibits were entered into evidence at the hearing (Exhibits 31 through 38 are decisions for which the Commission took administrative notice).² Based on the documents submitted and the testimony of the following witnesses:

For the Appointing Authority:

- Robert O’Neill, Chief of the Customer Service Bureau, Department of Revenue;
- Geralyn Page, Personnel Analyst, Department of Revenue;
- Angel Zayas, Director of Diversity and Equal Opportunity, Department of Revenue;
- James Reddington, Director of Internal Affairs, Department of Revenue;
- Cara Catanzaro, Inspector, Department of Revenue;
- Sally McNeely, Director of Civil Service Unit, Human Resources Division;

For the Appellant:

- Jonathan Gale, Appellant³

the record. Otherwise, the successor may either proceed with evidence or require presentation of evidence from the beginning.

² There is a protective order on Exhibits 11, 14, 15

I make the following findings of fact:

1. The Appellant is a permanent civil service employee in the position of Tax Examiner II (“TE II”) with the Department of Revenue. He is employed in the Customer Service Bureau (“CSB”), Income Tax Unit, in Chelsea. He is totally blind and has been since he began his employment at DOR in 1988. (Exhibit 12; Testimony of Appellant)
2. In May 2006, the Department posted two positions for the title of Tax Examiner III (“TE III”) in the CSB, Income Tax Unit, in Chelsea, with an application deadline of May 27, 2006. The positions were posted on the Commonwealth Employment Opportunity site (hereinafter “CEO”), as well as on DORNet, the Department’s internal site, with posting ID 06-TSD-013. (Testimony of O’Neill and Page; Exhibits 1 and 30).
3. On the CEO site, the Job Information category indicates it is an “Internal Posting” for the Department of Revenue. The Comments section states, “This is a civil service position. Initially restricted to those who have taken and passed the civil service examination for this position, then to all others. These appointments are provisional, subject to the civil service process. Any candidate whose name may appear on the civil service list for this position should indicate this information in writing at the time of the application. The Comments section also states, “[u]nless otherwise indicated applicants must provide a copy of their final EPRS form for the previous fiscal year.” (Exhibit 1)

³ The Appellant had a reader present with him at the hearing.

4. The Appellant applied for the TE III positions by submitting his resume and an employment application on May 24, 2006. (Testimony of Appellant; Exhibit 2)
5. The Appellant was not selected for a TE III position. He received a letter notifying him of the decision on September 19, 2006. On the non-selection form, “Other” was the reason selected. The Comments/Explanation category of the form states: “Background check [sic].” (Exhibit 13)
6. The selected candidates, Christopher Dufault and Kathleen Weaver-Saunders were both provisional TE IIs, with civil service permanency in the Tax Examiner I (“TE I”) title. (Exhibit 12)
7. Besides the Appellant, two other candidates with permanency in the TE II title applied to the May 2006 posting. One candidate was offered a position, but turned it down; the other candidate was determined not to be qualified. (Testimony of O’Neill; Exhibits 11 & 12)
8. Both of the selected candidates passed their background checks, and neither had any disciplinary history. (Testimony of O’Neill)
9. Robert O’Neill, the Chief of the CSB, testified on behalf of the Department. He has been in the position of Chief since October 2001. As Chief, he supervises the three sections, or units, of the CSB: Income Tax, Business, and Corporate Excise. Each section has a Deputy Chief who reports to O’Neill. Prior to becoming Chief, O’Neill was Deputy Chief from approximately 1999 through 2001. From 1995 through 2001, he was a Tax Supervisor, a position in which he was the direct supervisor of the Appellant. As Deputy Chief, he was a second level supervisor of the Appellant.

Before supervising the Appellant, O'Neill knew him as a co-worker. (Testimony of O'Neill)

10. The CSB is the first level of contact at the Department for taxpayers, and its employees handle telephone calls, rule on applications for abatement, draft general correspondence, make account adjustments, and ensure balances are correct before issuing a bill. (Testimony of O'Neill)
11. Prior to approximately June 1996, the CSB was located in the Saltonstall Building in Boston. O'Neill moved to Chelsea in June, but the Appellant stayed in Boston until approximately August or September 1996. While he remained in Boston, the Appellant worked at the counter operation, although no other customer service employees remained in Boston. O'Neill testified that at this time, the Appellant did not report to him, but he was the Appellant's direct supervisor when he moved to Chelsea. (Testimony of O'Neill)

The Posting and Hiring Process In General

12. Gerilyn Page testified on behalf of the Department. She is a Personnel Analyst and the supervisor of the Classification and Performance Evaluation Unit for the Department. She has been with the Department since 1984, and has been in her current position for approximately eight and one-half years. The responsibilities of the unit include ensuring that positions to be posted are properly classified, ensuring that the performance evaluation system is fair and timely, and processing appointments and promotions. (Testimony of Page)
13. The typical process for posting a position begins with a request from the hiring manager to the Director of Human Resources (hereinafter, "HR") with the

justification for the position, the Form 30, and an organizational chart. The Classification and Performance Evaluation Unit determines if the position is properly classified and, once approved, the request is forwarded to the Personnel Actions Unit for review, which includes determining whether there is a civil service eligible list for the position and, if so, notifying those on the list. The position is then posted on the CEO site, which is administered by HRD. (Testimony of Page)

14. The “Minimum Entrance Requirements” for a job posting are developed by the Human Resources Division (“HRD”) of the Commonwealth. The Department has input into the “Duties” and “Preferred Qualifications” that are included in a posting. The duties can vary for the same job title depending on the unit, but the preferred qualifications are not unique to each position. (Testimony of O’Neill)
15. Postings that are marked as “Internal” are restricted to employees within the agency that posted the position. “External” postings are open to anyone inside or outside the specific agency. Internal postings are also distributed on DORNet, the internal website which all employees can access. The May 2006 TE III posting was not available to the public. Anyone within the Department could have applied for the position, including employees who were not TE Is or TE IIs. (Testimony of Page)
16. On May 31, 2005, a memo was distributed from the Director of Human Resources regarding new policies for tax and background checks. Page testified that she had input into the memo, and one of the changes was that promotional candidates would now be subject to tax and background checks to ensure that current employees are held to the same standards of integrity as external hires, effective June 6, 2005. Prior

to this, internal employees were not subject to a background check. (Testimony of Page; Exhibit 18)

17. With the new policy, after interviews are conducted, the hiring manager will select the top candidates to go through the tax and background check, which is coordinated between the Classification and Performance Evaluation Unit, Inspectional Services Division, and Problem Resolution Office. The tax and background check includes confirmation that the candidate is paying taxes, a child support check to ensure that he is timely with any child support obligations, an education verification, and a criminal background check for Unit 8 candidates. (Testimony of Page)
18. When an employee applies for a position, the resume and application are included in the candidate's personnel file, and if the candidate does not receive the position, a copy of the Regret Letter is also included. (Testimony of Page)
19. When a candidate from the next lower title for a promotional position is bypassed, the Department is required to notify HRD with sound and sufficient reasons for the bypass. (Testimony of Page, Exhibit 11)
20. The Department provides candidates not selected for a promotion with a non-selection letter (referred to as a "Regret Letter"), along with a non-selection form, which is a requirement of the Collective Bargaining Agreement. (Testimony of Page)

The May 2006 Posting

21. The differences between a TE II and a TE III position include differing levels of delegation. For example, a TE II can allow up to \$1000 on an abatement claim without any supervisory approval, while a TE III can allow up to \$3000. Other level distinguishers include the fact that a TE III can take part in special projects and

committees, review forms, work on the Department's website, implement procedures, and conduct training for lower grades and seasonal staff. (Testimony of O'Neill)

22. In the TE series, the TE II is the entry-level position and is the only TE position that would be posted externally. All higher-level titles in the TE series are offered only as internal promotional opportunities. (Testimony of O'Neill)

23. O'Neill testified that the Department developed the May 2006 posting to offer career advancement and promotions to employees. (Testimony of O'Neill)

24. There was no civil service eligible list for TE III title in May 2006. (Testimony of Page; Testimony of McNeely)

25. O'Neill testified that he is not aware of any request for an exam to be held for the TE III position, that there has not been an exam held or scheduled for it, and he is unaware of any internal discussions about requesting an exam. (Testimony of O'Neill)

26. Resumes that were received for the May 2006 posting were directed to O'Neill. In considering candidates, he was looking for individuals who already worked in the Income Tax unit, as it would be too difficult for someone from a different unit to learn the position. He received applications from outside the unit, but does not recall if he received any from candidates outside of the Department. No external candidates, if there were any, were interviewed for the position. (Testimony of O'Neill)

27. Charlene Hannaford, the Deputy Chief of the Income Tax unit, and MaryEllen Sinagra, the Personnel Coordinator for the CSB, conducted the interviews of

candidates. After the interviews, they met with O'Neill to discuss how the interviews went and to ensure that they were all on the same page. (Testimony of O'Neill)

The Appellant's Application for the May 2006 Posting

28. The Appellant was interviewed for the May 2006 TE III positions. According to O'Neill, the opinion was that his interview was "average, okay," and he was not out of the running. The selected candidates' interviews were "average to good."
(Testimony of O'Neill)
29. After the interview, the candidates filled out an employment application, CORI authorization, and Tax Information and Background Questionnaire, which were submitted to HR for clearance. Once a candidate was cleared by HR, he could be recommended for the position. (Testimony of O'Neill; Exhibit 2)
30. In the Appellant's employment application and resume for the May 2006 posting, he lists the Perkins School for the Blind as his high school. There is no further education listed. (Exhibit 2)
31. O'Neill testified that he recalled when the Appellant applied for a May 2005 TE III opening, his resume and application indicated that he attended Bentley College, Boston University ("BU"), and had a degree from Harvard. He specifically remembered the education because of the reference to Harvard, which he thought was impressive. O'Neill thought it was odd for the Applicant to remove these credentials in his May 2006 application. (Testimony of O'Neill; Exhibit 17)
32. After reviewing both application packets from May 2005 and May 2006, O'Neill testified that he and Charlene Hannaford asked the Appellant why his education was removed from his 2006 application. The Appellant replied that he did not think it was

relevant because his years of experience qualified him for the position. (Testimony of O'Neill)

33. In June 2006, O'Neill contacted Internal Affairs by email to request that the Appellant's educational background be verified. He explained that the CSB had recently posted "a promotional opportunity" for TE III and that he had noticed discrepancies between the Appellant's May 2006 application and resume and his May 2005 application and resume. (Testimony of O'Neill; Exhibit 4)

34. O'Neill received a copy of a memo from Angel Zayas, the Director of the Office of Diversity and Equal Opportunity, to Susan Montgomery-Gadbois, the Director of HR, dated June 27, 2006. In this memo, Zayas explained that in June 2005, he had requested that the Appellant's employment application be replaced with a corrected version, as the Appellant had mistakenly indicated he received a business degree from Harvard Extension School. In this memo, Zayas included the original application from 2005 with the inaccuracies, as well as the corrected version. He also included a copy of a memo from June 2005 in which he explained the errors and correction. O'Neill testified that June 2006 was the first time he recalls seeing the June 2005 memo from Zayas, although he was cc'd on it. (Testimony of O'Neill; Exhibit 3)

35. In August 2006, O'Neill received an email from Internal Affairs advising that the Appellant was a "Do Not Promote" as a result of his background check. (Testimony of O'Neill; Exhibit 10)

36. O'Neill testified that the Appellant received a six day suspension in August 1998 for conducting another business, which involved unauthorized use of the Department's telephone system. In February 2002, the Appellant received a seven day suspension

for preparing tax returns for someone other than immediate family members, which is not permitted by the Department. (Testimony of O'Neill)

37. According to O'Neill, the past discipline raised concerns regarding the Appellant's integrity and trust necessary for the job. The past discipline was a factor in his decision not to select the Appellant for a TE III position. (Testimony of O'Neill)

38. O'Neill testified that other than the past discipline, the Appellant met his expectations and performed his required duties. (Testimony of O'Neill)

39. O'Neill knows both of the selected candidates, but he has not directly supervised them. He was a second level supervisor to both of them when he was Deputy Chief. Weaver-Saunders has been employed with Department since 1984, and Dufault since 1985. Neither of them has had Code of Conduct violations or concerns regarding credibility. (Testimony of O'Neill; Exhibits 14 & 15)

The Appellant's May 2005 Application

40. Angel Zayas testified on behalf of the Department. He is the Director of the Office of Diversity and Equal Opportunity and has been in this position since 2000. His duties include ensuring that the Department complies with executive orders and policies as they relate to affirmative action and equal opportunity. He has direct contact with employees, as they come to him with issues in applying for positions and for referral to EAP services. He is also the ADA Coordinator, and as such works with employees on reasonable accommodation requests. Zayas was a credible witness. (Testimony of Zayas)

41. As part of the job posting process, Zayas confirms that the recommended candidate meets the minimum requirements and also ensures that members of protected classes were given the opportunity to participate in the hiring process. (Testimony of Zayas)
42. Zayas had previously worked with the Appellant on reasonable accommodation requests, which included the Department providing the Appellant with a full-time reader and JAWS software training at the Carroll Center for the Blind. JAWS software reads data back, similar to a talking computer program. (Testimony of Zayas)
43. Zayas testified that in June 2005, the Appellant asked him to change certain items in his May 2005 application, specifically, that he did not obtain a Bachelors degree from Harvard Extension School or receive a certificate from the Bentley College paralegal program. Zayas testified that the Appellant told him that he and his daughter had recently had a conversation about career obstacles the Appellant had faced, so she put the information in the application about the Bachelors degree and paralegal certificate. It was Zayas's understanding at that time that the Appellant had attended the programs. Zayas complied with the Appellant's request and made the changes. (Testimony of Zayas; Exhibit 19)
44. Zayas did not make any changes to the Appellant's resume in June 2005. (Testimony of Zayas)
45. After Zayas corrected the information in the Appellant's May 2005 application, he sent a memo regarding the changes to HR and O'Neill on June 8, 2005. Zayas testified that he did not recall having a conversation with anyone about this issue in 2005. (Testimony of Zayas)

46. In 2006, Zayas was contacted by O'Neill and the Appellant because O'Neill had found discrepancies between the Appellant's May 2006 application and his May 2005 application. Zayas also learned at this time that his June 2005 memo regarding the Appellant's corrected application had not reached everyone, specifically O'Neill. Zayas could not locate his own copy of the June 2005 memo, so he obtained one from the Appellant and provided it to O'Neill. (Testimony of Zayas)
47. Zayas testified that he was later interviewed by Internal Affairs regarding the changes to the Appellant's May 2005 application and learned that the Appellant may not have attended the referenced institutions. (Testimony of Zayas)
48. Zayas testified that the purpose of his June 27, 2006 memo to HR was to ensure that Human Resources was aware of the updated 2005 application, and it was his understanding at the time that the updated 2005 application was correct. (Testimony of Zayas)

The Internal Affairs Investigation

49. James Reddington testified on behalf of the Department. He is the Director of Internal Affairs (hereinafter, "IA") and has been in this position for three months. Prior to this, he was the Deputy Director for eight years and prior to that he was a Senior Inspector. He has been with the Department for 21 years. (Testimony of Reddington)
50. Cara Catanzaro also testified on behalf of the Department. She is an Inspector in IA and has been in this position for approximately one and one-half years. (Testimony of Catanzaro)

51. In May 2005, the procedures in Internal Affairs changed so that any promotion into a professional position required that the candidate undergo an education verification. (Testimony of Reddington)
52. On June 30, 2006, Reddington learned from O’Neill that the Appellant had made significant changes in his employment application from applications and resumes he had submitted previously. Specifically, three colleges that were listed on previous applications and resumes had “disappeared.” (Testimony of Reddington, Exhibit 4)
53. Reddington testified that Jeffrey Harnois, a Junior Inspector/Intern who is no longer with the Department, was responsible for all of the education verifications during this time period. To conduct an education verification, Harnois would check relevant databases, call the schools, and visit the schools in person. (Testimony of Reddington)
54. On July 7, 2006, Harnois and Cara Catanzaro went to Harvard for information on the Appellant’s education. They spoke with the Records Clerk, Rachel Ward, who checked the database for students who had enrolled full-time, and found no record of a degree or attendance for the Appellant. Ms. Ward advised that Catanzaro and Harnois should check the Academic Records Office, which held all the records for part-time, summer, and Extension school students. (Testimony of Catanzaro; Testimony of Reddington)
55. Catanzaro and Harnois went to Academic Records Office and spoke to Regina Dres. Dres checked the computer databases and microfilm back to 1911 and found no record that the Appellant had attended or obtained a degree. Dres did not indicate

that there were any missing records. (Testimony of Catanzaro; Testimony of Reddington, Exhibit 5)

56. Catanzaro testified that she does not know when the records were transferred by Harvard onto a computer database or microfilm. (Testimony of Catanzaro)

57. Reddington testified that he spoke to the Appellant on the phone about the Harvard matter. The Appellant then contacted Harvard Extension School himself, and was told that if an individual signed up for a course, but dropped it before the course started, then the school did not keep any records. According to the Appellant, he registered at Harvard Extension in the early 1980s, but withdrew because the Massachusetts Commission for the Blind would not pay for the class. Reddington testified that Harnois contacted Harvard and confirmed that the school did not keep records of students who withdrew from class. (Testimony of Reddington; Testimony of Appellant; Exhibit 9)

58. At BU, Catanzaro and Harnois went to the office of the Metropolitan College and spoke with Michael Bourque, who provided them with the Appellant's transcript. Catanzaro testified that it showed that he signed up for four classes from 1974 through 1977, withdrew from three of these courses, and received a grade in one course. Catanzaro does not know if the Appellant ever attended the courses for which he did not receive credit. Catanzaro testified that she learned that BU Metropolitan College keeps student records on a computer database, but she has no knowledge of how the records were transferred onto the computer database. Bourque did not indicate that BU had any missing records. (Testimony of Catanzaro; Testimony of Reddington; Exhibit 6)

59. The Appellant's transcript from Boston University Metropolitan College, which is for the second semester of 1974 – 1975 and first semester in 1976 – 1977, shows that he received a grade for “Freshman Eng” and withdrew from “General Psych” twice and “Western Civ.” (Exhibit 7)

60. Reddington testified that Harnois went to Bentley by himself because he lived nearby. Harnois learned that over the course of two years, the Appellant registered for three courses and attended one of the courses twice, and dropped the others. Bentley originally could not find any records for the Appellant. However, the Appellant contacted Bentley himself and records were then found in the attic. A letter from the Bentley Registrar with information regarding the Appellant was faxed to IA.
(Testimony of Reddington)

61. The letter from the Bentley Registrar, dated July 11, 2006, states that the Appellant was registered for and attended “Effective Use of Legal Materials” in 1985, but did not receive a grade. He was registered for “Criminal Law and Procedure” and “Corporations” in 1986, but never attended. (Exhibit 8)

The Civil Service Testing Situation

62. Sally McNeely testified on behalf of the Department. She is the Director of the Civil Service Unit of HRD. She has been Director since April 2003 and, prior to this position, she was the Deputy Director. She has been at HRD for almost 25 years.
(Testimony of McNeely)

63. The Civil Service Unit is responsible for the development of selection devices, which includes the development of civil service exams, the administration, validation, and scoring of the exams, issuing marks, establishing and certifying the list, ensuring that

appointments are made in accordance with merit principles, and administering the Personnel Administrator Rules in accordance with Chapter 31. (Testimony of McNeely)

64. The last TE III exam that was given was in 1988; the last exam in the TE series was in 1991 or 1992, which was the TE II exam. (Testimony of McNeely)
65. McNeely testified that over the years, the funding for the Civil Service Unit has changed from procreation to revenue, which had led to fewer and fewer resources for testing. The unit is now totally self-funded, and has a revenue cap that is set by the Governor, House, and Senate, although they do not instruct the unit as to which exams it must give. Because of this limited funding, the unit concentrates its resources on public safety exams. (Testimony of McNeely)
66. According to McNeely, the Civil Service Unit has no plans for the development or administration of an exam in the TE series. If the unit were to go beyond testing for public safety, it would concentrate on titles with high occupancy that cut across state and municipalities, such as the clerical series; or titles that are highly-populated in municipalities, such as Building Custodian. The Civil Service Unit would be unlikely to give an exam for one title or a series in one department. For series with multiple titles, an exam would be most likely held for the entry-level title, as that would attract the most candidates to the exam. Because of this, McNeely testified that even if the Civil Service Unit were to hold an exam for a TE title, it would most likely be for TE II, which is the entry level. (Testimony of McNeely)
67. McNeely testified that she does not know who was involved in the decision to not hold any more TE exams. She does not know if the Department has requested any

TE exams, and she does not know if the Department submitted a proposal for an exam in connection with the May 2006 posting. She testified that if the Department had requested a TE III exam, the Civil Service Unit would not have been prepared to administer it. (Testimony of McNeely)

68. McNeely testified that the Personnel Administrator determines how the unit's revenue will be used. She is involved in reviewing the resources that are available for the Civil Service Unit relative to its ability to give exams, and she makes requests to the Personnel Administrator regarding the use of resources. In 2003, she requested that the Civil Service Unit be provided with resources to hold a Building Custodian exam, which was allowed. This exam required an allotment of funds from retained revenue. This exam was the only non-public safety exam since 2003. She has never requested funds to give exams for DOR. (Testimony of McNeely)

69. McNeely testified that the Personnel Administrator Rules (hereinafter, "PAR") are rules that further interpret certain sections of Chapter 31, and must be followed. Within PAR 9, there is a mechanism to remove a candidate from a civil service list. To do so, the Department must provide reasons for removal to HRD, who acts for the Personnel Administrator and either approves or denies the removal after carefully considering the reasons. In some cases, HRD may deny the removal, but agree to bypass the candidate instead. If HRD does agree to remove the candidate from the list, he will be removed from consideration for any position within that series for that Department. (Testimony of McNeely; Exhibit 29)

70. McNeely testified that she has approved the removal of a name from a list for reasons that are documented and job-related. Such reasons have included domestic violence,

not fully disclosing information from the past, criminal records, and other reasons that have suggested a lack of integrity. She testified that she has allowed the submission of fraudulent documents as a reason for removal. According to McNeely, each removal is considered on a case by case basis and it is not possible to say what the outcome of a case would be without all the facts. (Testimony of McNeely)

The Appellant's Testimony

71. Jonathan Gale testified on behalf of himself. He has been employed with the Department since August 1988. (Testimony of Appellant)
72. The Appellant went to high school at the Perkins School for the Blind, where he graduated in 1973. He testified that he has no further education. He has attempted to take classes, but has been unable to because he was not able to get assistance or personal and family issues got in the way. (Testimony of Appellant)
73. The Appellant testified that he completed an English class at BU around 1976 or 1977. (Testimony of Appellant)
74. Gale testified that in the early 1980s, he registered at Harvard Extension School, but had to withdraw because he was not able to get a purchase order from the Commission for the Blind in time to pay for the class. He was told that if he withdrew within two weeks, he would not be billed. According to him, he started a Psychology class, and attended two to three classes, before he had to withdraw. (Testimony of Appellant)
75. The Appellant testified that he signed up for the Paralegal Studies program at Bentley College and completed the first couple of modules out of 13 modules. He could not

continue because of family and transportation issues. He recalled that he attended late spring, summer, and fall of one year. (Testimony of Appellant)

76. The Appellant became employed at DOR in August 1988 after passing an exam for TE I. He heard that the Department was calling people on the list, but he was not getting a call. He contacted the Affirmative Action Officer at that time, whose first name was Tim, and was told to come in for an interview. The Appellant does not remember Tim's last name, and testified that he is recently deceased. The Appellant went in for an interview with Tim and one other person, whom he does not remember, and was told about the job duties and asked about his background. The Appellant testified that at this interview, he told Tim that he was trying to take college classes, but was not able to have someone come to class with him to take notes as he could not write himself. According to the Appellant, he did not tell Tim that he had completed eighty-six of ninety credits at BU, seven courses at Harvard, or four of thirteen courses at Bentley, although he may have told him that he completed a "few" of the thirteen modules at Bentley. The Appellant testified that he also went over his work background with Tim. (Testimony of Appellant)

77. According to the Appellant, at the interview, Tim told him that he would take care of his employment application. On the first day of work, a reader was assigned to him, who showed him where to sign the job application and tax, insurance and other employment forms. The Appellant testified that the reader assigned to him did not read any of the documents to him, and he was not comfortable asking her to do so. (Testimony of Appellant)

78. As a TE I, the Appellant worked in the Saltonstall Building in Boston. His duties included taxpayer assistance, answering questions about rules, laws and procedures and providing information about refunds. Sometimes it was necessary to look information up on the computer screen and the Appellant would have to ask co-workers to do it for him because he did not have a reader. (Testimony of Appellant)
79. The Appellant first applied for a promotion to TE II in 1992. He testified that at that time, he asked HR for help with a resume. He was told that he already had a resume on file and HR would send it down to him so that the Affirmative Action Officer could add his current duties and responsibilities. The Appellant testified that he knew nothing about this resume, he had nothing to do with preparing it, and he made no inquiry to HR as to its contents. (Testimony of Appellant)
80. The Appellant's resume from this time period included the following information:
- 1986 to present: Internal Revenue Service
- Duties: To understand and disseminate tax law as it appears to the general public
- Responsibilities: To accurately provide the public with information concerning tax preparation and application of tax law upon request. To understand and explain rulings, findings and orders of the tax code as they apply to the business community.
- 1981 to 1986: Research Associates
- Duties: To write, research and develop proposals for non-profit organizations, i.e., Schools, hospitals, and social service agencies in Eastern Massachusetts. To develop continuance mechanisms for funding to such agencies on an ongoing basis.
- 1979 to 1981: The Cambridge, Somerville Economic Committee, 11 Inman Street, Cambridge, MA
Fuel Assistant Coordinator

Duties: To direct fuel assistance operations for nine cities and towns in and around the Boston area. To develop outreach and crisis intervention plans with home care agencies and civil defense coordinators. To write proposals and represent the agency at state and federal hearings.

Responsibilities: Responsible for supervising 36 staff in the energy department. Coordinated payments and managed operations between the fuel assistance program and 288 oil, gas and utility companies involved in our program.

1978 to 1979: The Armed Services YMCA, 32 City Square, Charlestown, MA
Assistant to the Executive Director

Duties: To research and write all contracts and proposals for the YMCA. To supervise 27 staff people for the program department and Public Service Employment Training Act.

Responsibilities: Established emergency assistance program for members of the Armed Forces in and around the New England area. Coordinated satellite programs at military bases throughout the New England area.

1976 to 1978: Somerville Housing Authority, 30 Memorial Road, Somerville, MA
Social Services Department

Duties: To develop recreational and educational programs for the residents of the Mystic Housing Development. To act as an advocate on behalf of the clients and to provide counseling on a one-to-one basis.

Responsibilities: To design, organize and promote educational, career [sic] and public assistance workshops for the residents of the development. To write proposals and advertisements for the Social Services Department and the Mystic Housing Tenants' Association.

Education

1985 to
Present: Bentley College, Paralegal Program

1981 to
1982: Harvard University, Extension Program
Part-time, Liberal Arts (Pre-law major)

1974 to

1980: Boston University, Metropolitan College
Part-time, Liberal Arts

It is not plausible that someone else prepared this resume without the Appellant's knowledge and was able to include such a detailed description of his work and education history. (Testimony of Appellant; Exhibit 20)

81. The Appellant testified that he continued to apply for a TE II promotion several times, and nobody from the Department ever talked to him about the contents of his resume and he did not try to find out. He eventually received a promotion to TE II, for which he did not submit an employment application, just his EPRS and resume. (Testimony of Appellant)

82. When the Appellant was promoted to a TE II, he testified that it was still mostly the same work as TE I, although he was able to get more involved in the explanations to taxpayers. His supervisor was O'Neill in 1994 or 1995 until late 1998 or early 1999. (Testimony of Appellant)

83. The Appellant testified that when he worked at the Saltonstall Building, O'Neill's desk was directly behind him. The Appellant often had to ask his co-workers for assistance in looking up information, and his co-workers told him that O'Neill had instructed them not to help. (Testimony of Appellant)

84. Eventually, the Saltonstall Building was closed as a "sick building." The CSB was transferred to Chelsea, but the Appellant stayed behind. He testified that he had no telephone and no computer. The Commission for the Blind had recommended that he stay in Boston, but the conditions were unsafe. He testified that he spoke to O'Neill about the situation, and O'Neill told him that he could not do anything about it. The Appellant then complained to the Governor's Office, which, after sending someone

over to look at the conditions, ordered the Appellant's immediate removal from the building. He then transferred to Chelsea. (Testimony of Appellant)

85. The Appellant testified that for the next two years, he had no work to do, no computer, and no assistance. He filed a complaint with the Massachusetts Commission Against Discrimination (hereinafter, "MCAD") because he did not have the necessary technology for his work, and he named O'Neill in his complaint. The MCAD charges were eventually dismissed and the Appellant testified that this was because the Department provided him with a reader. (Testimony of Appellant)

86. O'Neill testified that he was not aware of being personally named in this complaint. (Testimony of O'Neill)

87. The Appellant testified that the May 2005 TE III posting was the first time he had to fill out an employment application since he was originally hired by the Department. He gave his daughter a copy of his resume and asked her to complete the application for him. He did not dictate the contents of the application, but did give her his social security number. His daughter suggested that she could condense the resume to one page, and he told her to only include the DOR and IRS as part of his work history. He submitted this application, along with his resume and EPRS to O'Neill. (Testimony of Appellant)

88. When asked why his daughter indicated on his application that he had graduated from Harvard Extension without his knowledge when this was not accurate, the Appellant testified that recently he had explained to his daughter that he had problems going back to school, so she listed the Bachelor's degree on her own. She was 17 at the time and applying to colleges herself. He testified that she is currently at college in

Hawaii. It is not plausible that he would allow his teenage daughter to prepare his employment application without assistance from him. (Testimony of Appellant)

89. The Appellant testified that a couple of days after he submitted his application, a friend who was visiting his house saw a copy of the resume and application on the table and asked the Appellant about the schools that were referenced. According to the Appellant, this was the first time he became aware that these schools were on his resume and application. The next day the Appellant called Zayas to explain that the information on the application was “absolutely wrong,” and Zayas came to Chelsea to assist him in filling out a corrected application. According to the Appellant, Zayas told him that there was no need to complete a new resume because the corrected application would take care of everything. The Appellant further testified that Zayas called O’Neill about the error and sent over the corrected information. I find that the Appellant did not inform Zayas that the information on the resume was also inaccurate, which is why Zayas did not think it was necessary to make any changes to it. (Testimony of Appellant)

90. The Appellant testified that for the May 2006 TE III position, Michael Casey, his supervisor, assisted him in completing his resume. He did not put BU, Bentley, or Harvard on this resume because he thought the issue had been rectified with his corrected application the previous year. (Testimony of Appellant)

91. A few days after submitting the May 2006 application, the Appellant was called into O’Neill’s office to speak with him and the Assistant Chief of the Department, who told him there was a problem because of the schools he had listed on previous employment applications. The Appellant told O’Neill that this had been corrected the

prior year, and that O'Neill had been informed of this. According to the Appellant, O'Neill responded that he knew no such thing. (Testimony of Appellant)

92. Following this meeting, the Appellant called Zayas. Zayas could not find a copy of his memo to O'Neill from 2005 regarding the corrected application, so the Appellant supplied him with a copy, which Zayas then provided to O'Neill. The Appellant testified that Zayas told him there was nothing to worry about. (Testimony of Appellant)

93. The Appellant testified that he was concerned about taking a trip to visit his son while this issue was ongoing. Zayas told him that he should go on the trip because he had spoken with James Reynolds, the First Deputy of Administrative Services, and Elizabeth Herriott of the legal office, who both reassured Zayas that the matter was resolved. (Testimony of Appellant)

94. The Appellant later received a certified letter from O'Neill at home which stated that he was in violation of the Code of Conduct for falsifying information on his application and resume. (Testimony of Appellant)

95. The Appellant testified that he did not know whether the Department conducted education verifications prior to 2005, and he had no knowledge of the new policy promulgated on May 31, 2005 to conduct education verifications for promotions. (Testimony of Appellant)

96. The Appellant testified that he met the Minimum Qualifications for the TE III position, which was three years full-time professional experience in accounting, auditing or tax examining work because he had been a TE II for approximately nineteen years. (Testimony of Appellant)

97. The Appellant testified that he met the Preferred Qualifications because: he has worked in customer service for the Department since day one; he analyzes tax data by answering taxpayer questions over the telephone; he has completed abatements and made decisions regarding refunds or money owed; his EPRSs have consistently noted that he has a very good knowledge of tax law and handles telephone communication very well; he has worked abatement cases at least four to five years; his problem-solving skills involve explaining to taxpayers by telephone why there are discrepancies, how interest is calculated, and determining which documents are needed to make decisions for cases; and he works well in a team setting and always asks for more projects. He testified that he does not have computer proficiency since he cannot see, and his reader is not able to do some of the work on the computer, which he has brought to the attention of his supervisors. (Testimony of Appellant)
98. The Appellant testified that when he submits cover letters for positions, he dictates them to someone. He has done this with a neighbor and a former supervisor, but not with family members. He has had a computer in his home since the late 1990s. (Testimony of Appellant)
99. The Appellant testified that after Bentley found his records, he was told that they may have been missing some sign-in sheets, and they would need a subpoena to look any further. He did not convey this information to IA because he did not get the chance to do so. (Testimony of Appellant)
100. The Appellant's resumes that have been submitted to the Department for promotional opportunities have indicated his education as follows:
- September 1994; Announcement 196
1985 – present: Bentley College, Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

January 1997; Announcement TSD-1

1985 – 1988: Bentley College, Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

February 1997; Announcement CSE-1027

1985 – 1988: Bentley College, Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

November 1997

1985 – 1988: Bentley College, Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

January 1998; Announcement 98-TSD-006

1985 – 1988: Bentley College, Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

January 1998; Announcement 98-TSD-005

1985 – 1988: Bentley College, Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

January 1998, 98-TSD-004

1985 – 1988: Bentley College, Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

April 2001; Announcement 01-TSD-011

1985 – 1988: Bentley College, Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

May 26, 2005

1985 – 1988: Bentley College Paralegal Program

1981 – 1982: Harvard University, Extension Program, Part time, Liberal Arts (Pre-law major)

1974 – 1980: Boston University, Metropolitan College, Part time, Liberal Arts

May 24, 2006

1973 Graduate - Perkins School for the Blind

(Exhibits 2, 3, 21- 28)

101. Regarding the changes made in his resumes, specifically home address changes and the dates of attendance at Bentley, the Appellant testified that he does not know how the changes were made.

Department's Argument

The Department argues that the Appellant was not a qualified candidate for promotion based on the fact that he had failed a portion of his tax and background check. Specifically, the Appellant was found to have violated the Department's Code of Conduct and state laws when he submitted falsified application materials to the Department on numerous occasions throughout his employment. The allegations that the Appellant falsified his education credentials was verified by the Department's Office of Internal Affairs after in-person visits to the educational institutions listed on several of the Appellant's resumes and applications. The Department further argues that the Appellant had a history of discipline, including a six-day suspension in 1998 and a seven-day suspension in 2002. For these reasons, the Department chose not to promote the Applicant to either of the TE III positions in question.

In addition, the Department argues that a civil service list did not exist for the title and so it made a proper provisional promotion under Ch. 31, § 15. The Department relies on Sullivan v. City of Boston, 20 MCSCR 11 (2007) for the proposition that "where there

is a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit for a position in which there is no civil service list,” there is no basis for the appeal. Since the selected candidates are civil service employee, there is no basis for the appeal.

Appellant’s Argument

The Appellant argues that the position at issue was filled by a provisional appointment, and not a provisional promotion. The Appellant also cites Sullivan v. City of Boston to point out that “...the Commission reiterates its longstanding admonishment to all appointing authorities and the state’s Human Resources Division to end the unhealthy and improper reliance on provisional appointments and promotions.” As demonstrated by the evidence at the hearing, it is clear that the Department had no intention of filling the positions by the use of examinations as required by Ch. 31, §§ 6-7, and that it was the intent of the Department that, once the positions were filled by provisional appointments, to not seek examinations.

The Appellant goes on to argue that the Department and HRD have acted in bad faith and in open contempt of the intent of Chapter 31, which is that appointments and promotions within the civil service system shall be effectuated by examinations, with provisional appointments and promotions only being tightly circumscribed temporary acts which are intended to be subject to examinations to be given at the earliest possible time. Because the process used to fill the positions was illegal from its inception, the relative qualifications between whoever received the provisional appointments and the Appellant is irrelevant. The Appellant seeks an order that the positions in question be vacated and that open competitive examinations be held for them.

Regarding the Appellant's qualifications for the position, he contends that the information on a prior application that he had received a degree was placed there without his knowledge. Once he became aware of it, he brought it to the attention of the Department and it was rectified. Further, he did not rely on any claim of college education in applying for the present positions. The Appellant also notes that he has historically been the subject of harassing and unfair treatment by his supervisor and the Department during the period of his employment, on account of his blindness.

Conclusion

G.L.c.31, §§12 through 15 contain the statutory provisions for making "provisional" appointments and promotions in the official service. These statutes prescribe:

§ 12. Provisional appointments. An appointing authority may make a provisional appointment to a position in the official service with the authorization of the administrator [HRD] or, if the appointing authority is a department. . .within an executive office, with the authorization of the secretary of such office. Such authorization may be given only if no suitable eligible list exists from which certification of names may be made for such appointment. . .pending the establishment of an eligible list. Such authorization shall be void unless exercised within two weeks after it is granted.

After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list. . . . If, as the result of such examination, no suitable eligible list is established, the administrator . . . may authorize an extension of the provisional appointment pending the results of another examination. . . .The eligible list resulting from such new examination shall be established within eighteen months of the determination of the results of the last previous examination, provided, however, that such new examination shall be held no later than one year . . .if the appointment must comply with federal standards for a merit system of personnel administration as a condition for receipt of federal funds by the commonwealth or any of its political subdivisions.⁴

If no eligible list is established after a second examination for the same position, the administrator and the appointing authority shall confer and decide what action should be taken, such as the holding of another examination on a different basis.

§ 13. Provisional appointments; notice; filing. An appointing authority, in requesting authorization to make a provisional appointment, shall file with the administrator or, if the

⁴ The Commission has received no evidence that indicates that the Commonwealth is at risk of losing any federal funds as a result of the use of provisional appointments.

appointing authority is a department. . .within a executive office, with the secretary in charge of such office, a notice containing: (1) the information which the appointing authority believes is necessary to prepare and conduct an examination for the position for which such authorization is being requested, including a statement of the duties of the position, and the knowledge, skills and abilities necessary to perform such duties; (2) a proposal specifying the type of examination which should be held by the administrator; (3) a substantiation that the person proposed for the provisional appointment meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties.

§ 14. Provisional appointments; authorization; reports; length of service; termination. Upon receipt of the notice described in section thirteen, the administrator or the secretary in charge of the executive office, as the case may be, may authorize a provisional appointment if he determines that the contents of the notice are satisfactory. . . .

Each provisional appointment shall be reported. . .to the administrator. A provisional appointment may be terminated by the administrator at any timeThe administrator shall have the authority to terminate a provisional appointment which was approved by a secretary of an executive office.

. . . .
§ 15. Provisional promotions. An appointing authority may, with the approval of the administrator or, if the appointing authority is a department . . . within an executive office, with the approval of the secretary of such office, 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

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 therefor, 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 secretary of an executive office who approves a provisional promotion pursuant to this section shall notify the administrator of each such approval. Such approval shall be made pursuant to the civil service law and rules, and such notification shall be made in such form as shall be required by the administrator. The administrator shall terminate any provisional promotion if, at any time, he determines that (1) it was made in violation of the civil service law and rules, or (2) the person provisionally promoted does not possess the qualifications or satisfy the requirements for the position. An appointing authority which makes a provisional promotion pursuant to this section shall report such promotion to the administrator.

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).

As much as the Commission regrets this state of affairs, and has repeatedly exhorted parties in the public arena to end the current practice of relying on provisional promotions and provisional appointments to fill most civil service positions, the Commission must honor the clear legislative intent that allows for provisional promotions so long as the statutory requirements are followed. 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. Meanwhile, public employees whose provisional status leaves them with fewer opportunities under the civil service law than their peers with permanency will be left to enforcement of their rights as members of the collective bargaining units to which they may belong, which the Commission does not control.

The Commission recognizes that the “provisional” landscape now operates under somewhat fictitious assumptions, but the statutory language still must be enforced as written to the extent possible. Since it is not possible for the Commission to envision the entire universe in which appointing authorities currently employ “provisional” appointments and promotions, out of necessity, the Commission intends to move cautiously in this area.

The first issue for the Commission to decide is whether the positions at issue were filled by provisional appointment and subject to Sections 12 through 14, as the Appellant argues, or by provisional promotion and subject to Section 15, as the Department argues. Based on the documents and testimony, the Commission concludes that the positions were filled by the provisional promotion process.

The Appellant supports his argument by pointing out language in the posting that states, “these appointments are provisional...” and testimony by Page that anyone in the Department could have applied for the position. While the Commission finds that the Department was not as clear as it should have been in the language of the posting, the intent was to fill the positions through the provisional promotion process. First, the position was only posted internally and available only to DOR employees, both on the CEO website and DORNet. The Department witnesses referred to the positions as promotions, and O’Neill explained that they were offered for career advancement and promotional opportunities to current employees. He further explained that the TE II is the entry-level position in the TE series; all other TE positions are offered only as internal promotional opportunities. In an email to IA regarding the Appellant, O’Neill referred to the postings as “a promotional opportunity.” In addition, the letter to the Personnel Administrator notifying him of the non-selection of three permanent civil service employees in the lower title states, for two of them, that they were “not qualified for this promotion.” The Department also referenced Chapter 31, Section 15 in the subject line of this letter to the Personnel Administrator. While these characterizations are not dispositive, they certainly create reasonable inference that these postings were provisional promotions and not provisional appointments.

As referenced above, the Department provided its reasons for the non-selection of the permanent civil service employees in the next lower title to the Personnel Administrator, i.e., two were not qualified and one turned the position down, as required by Section 15. The Commission has held that only a “civil service employee” with permanency may be provisionally promoted, and once such employee is so promoted, he or she may be further promoted for “sound and sufficient reasons” to another higher title for which he may be qualified, provided there are no qualified permanent civil service employees in the next lower title. See Poe v. Dept. of Revenue, 22 MCSR 287 (2009). Here, there is no challenge to the fact that the selected candidates are permanent civil service employees in the TE I title; therefore, the next step is for the Commission to determine whether the Department was justified in its conclusion that the Appellant was not qualified for the TE III positions.

The role of the Commission is to determine “whether the Appointing Authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority.” Cambridge v. Civil Service Comm’n, 43 Mass. App. Ct. 300, 304 (1977). Reasonable justification means the Appointing Authority’s actions were based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928); Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

The Commission finds that the Department was justified in its decision that the Appellant was not qualified based upon his background check. It is clear that there has

been fraudulent information submitted to the Department on the part of the Appellant, which is a valid reason for not promoting him to a position that requires a great deal of trust and integrity.

Specifically, the Appellant supplied inaccurate information to the Department on his first employment application, and continued to do so by submitting resumes over the course of approximately 17 years that contained false information about his education. The Appellant attempts to blame this situation on several different people, but never takes any personal responsibility. According to him, first the Affirmative Action Officer, Tim, apparently took it upon himself to complete the Appellant's first employment application and add inaccurate educational information, such as that the Appellant had completed 86 of 90 credit hours at BU, all without any input or knowledge on the part of Appellant. Second, Tim (or someone else) also took it upon himself to prepare a resume for the Appellant which also contained inaccurate educational information, without telling the Appellant, and submit it to HR. Over the years, any updates and changes that were made to the resume were done by HR or the Affirmative Action Officer, and the Appellant had no involvement. All these years, he still was not even aware of the contents of the resume. In 2005, his teenage daughter was the one responsible for indicating on an employment application that the Appellant had a Bachelors Degree from Harvard Extension School with a business major (where all other resumes indicated he was a pre-law major) and a paralegal certificate from Bentley College. Similar to Tim, the Appellant's daughter allegedly did this without any knowledge on the part of Appellant.

At the very least, it is an employee's responsibility to ensure that the information he is submitting on a resume or employment application is accurate. While the Commission is

sympathetic to the fact that this is not as simple for the Appellant as it would be for candidates who are not blind, this does not relieve him of this responsibility.

Unfortunately, here, the situation is much more than negligence on the part of the Appellant. Rather, I find that he actively provided fraudulent information on resumes and applications to the Department on numerous occasions.

The Appellant presented as an intelligent and articulate witness, who has been very vocal with the Department about protecting his rights over the years. It is inconceivable that a person such as this would submit resumes and employment applications for which he had no idea of the contents, year after year after year. I can not accept the Appellant's argument that Tim prepared his initial employment application and resume without any knowledge on the part of the Appellant. Instead, it must be concluded that the Appellant was very well aware of the information that was contained in the 1988 application, which had very specific information about the courses he had taken and completed. I also conclude that the Appellant was aware of, and had input into, the contents of his initial resume on file with HR. The resume contains specific information about his job history with several employers, including detailed information about job duties and responsibilities, and even employer addresses. It is highly unlikely that Tim, or anyone else, could have gleaned this information from an interview with the Appellant, and then decided to put it all together into a resume, without even informing the Appellant.

Following the initial application and resume, I conclude that the Appellant continued to be aware of the contents of his resume over the course of the next 17 years, and was the one responsible for making changes and updates, such as to his home address. He admitted that he dictated cover letters to submit with his resumes; it is only logical that

the Appellant would be the one to ensure that updates to his resume were also made at this time.

With regard to the May 2005 application, I do not credit the Appellant's testimony that his daughter was solely responsible for indicating that he had a Bachelors degree and paralegal certificate on the employment application. Again, it is not plausible that the Appellant would allow someone to prepare a document for him and not insist on learning the contents before submitting it, especially since this is the first employment application he had to submit since 1988, and is signed under the pains and penalties of perjury. I also note that the Appellant came forward to Zayas with the inaccurate information only after the Department announced that it would be conducting background checks, including education verifications, on promotional candidates, a procedure that had not been done in the past. The fact that the Appellant had submitted inaccurate information for approximately 17 years, but suddenly became aware of inaccuracies only days after this announcement, is questionable at best.

With regard to the Appellant's argument that he did attend the institutions in question, and therefore the only document with inaccurate information was the May 2005 application, which he corrected, I finds that his reasoning is flawed. The following is a summary of the major inconsistencies that exist in his applications and resumes:

- The Appellant's original application states that he went to Boston University part-time from 1974 – 1976 and completed 80 of 96 hours. On subsequent resumes it is stated that the Appellant went to Boston University Metropolitan College part-time from 1974 through 1980. The information obtained from IA is that he registered for four courses from 1974 through 1977, but only

received credit for one course. Therefore, none of the information he has submitted with regard to BU is accurate.

- On the Appellant’s original application, it is indicated that he went to Harvard Extension School part-time from 1977 through 1980 and took seven courses. Subsequent resumes show that he went to Harvard Extension part-time from 1981 – 1982. IA contacted Harvard Extension and was told that there was no record of the Appellant having attended or graduated. The Appellant admitted that he had registered for one class, and claims he attended a couple of sessions, but had to withdraw because he was not able to obtain assistance from Massachusetts Commission for the Blind. Again, none of the information that the Appellant submitted with regard to Harvard Extension School is accurate.
- On the Appellant’s original application, it is indicated that he had completed four of thirteen classes in the Bentley College paralegal program, without any dates referenced. Subsequent resumes indicate that he attended Bentley from “1985 to present” (referenced on 1988 and 1994 resumes) or 1985 - 1988. Bentley provided information to IA that the Appellant had registered for three courses from 1985 through 1986, but did not receive a final grade for any of them, and only attended one of them. Therefore, the information Appellant submitted about Bentley College has also been wholly inaccurate.

Therefore, even if I were to disregard the false information on the Appellant’s May 2005 application, it is still a fact that the Appellant submitted fraudulent information in his original application and resume, and then on resumes for at least nine job postings

between 1994 and 2001. Moreover, as explained above, I do not credit the Appellant's testimony that he was not aware of the inaccuracies on his May 2005 application. As explained by the Department, the TE III position is one which requires a high level of trust and integrity, which the Appellant has shown that he lacks. Thus, the Department was justified in its decision that the Appellant was not qualified for the position of Tax Examiner III.

The Department also included past discipline as part of its justification to the Commission that the Appellant was not qualified for the positions. The Appellant argued that only "background check" was referenced as the reason on his non-selection form, and therefore the disciplinary history cannot now be included. The non-selection form, which is required by the collective bargaining agreement, does not preclude the Department from arguing that discipline was also taken into consideration. It is not necessary for the Commission to delve any deeper into whether the discipline provided justification, as it has determined that the fraudulent resumes and applications were sufficient reasons to deem the Appellant not qualified. Also, the Appellant has claimed that he has been subject to harassing and discriminatory treatment by the Department and O'Neill, implying that the Department was biased against him and that this was the real reason for his non-selection. I find that there is no evidence to reach this conclusion.

As to all other Department civil service positions that the Department fills "provisionally" in the future, until such time as competitive examinations again become available, the Department must specify, in advance, whether the position is being posted as a provisional appointment or a provisional promotion and comply with the applicable provisions of Section 12 or Section 15 as the case may be.

For all of the above reasons, the Appellant's appeal under G2-06-280 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on September 23, 2010.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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:

Paul Patten, Esq. (for Appellant)

Elizabeth Herriott Tierney, Esq. (for Appointing Authority)

John Marra, Esq. (HRD)