

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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REQUEST FOR INVESTIGATION BY HAVERHILL FIREFIGHTERS: DEPUTY CHIEF
RICCI ACCARDI, CAPTAIN GREGORY ROBERTS AND LIEUTENANT
MICHAEL ZAINO

Tracking No. I-16-124

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Commissioner:

Cynthia Ittleman

RESPONSE TO REQUEST FOR INVESTIGATION

Procedural Information

By letter dated July 18, 2016 (July 18, 2016 letter), Deputy Chief Ricci Accardi (Dep. or Mr. Accardi); Captain Gregory Roberts (Capt. or Mr. Roberts); and Lieutenant Michael Zaino (Lt. or Mr. Zaino)(collectively Petitioners), all of whom are Haverhill Firefighters, filed a request with the Civil Service Commission (Commission), asking the Commission to initiate an

investigation to determine whether Haverhill (Haverhill or Appointing Authority¹) “followed appropriate procedures with the Human Resources Division (HRD) to promote [the Petitioners] and, if so, whether it was provisional, temporary, or permanent.” *Id.* The Petitioners further asked the Commission to investigate the recent appointment/promotion of Chief Laliberty, particularly with regard to what actions, if any, were taken relating to his former position of Deputy Chief. (July 18, 2016 letter) I conducted a show cause conference on September 12, 2016 in Lowell at the Mercier Center of the Lowell Housing Authority. Counsel for the Petitioners attended the status conference, as did Dep. Chief Accardi, Capt. Roberts and Local Union President Timothy Carroll. Counsel for Haverhill attended the conference with Ms. Denise McLanahan (Ms. McLanahan), the Haverhill Human Resources Director. Counsel for HRD appeared by phone. At the show cause conference, the Petitioners advised that Lt. Zaino no longer seeks relief because his appointment to Lieutenant has been made permanent. HRD, the Petitioners and the Appointing Authority have produced the available documents requested.

Background

Based on the statements made at the show cause conference, the documents submitted and the pertinent email messages of the Petitioners, the Appointing Authority and HRD, the following appears to be undisputed, unless otherwise noted:

1. The position of Fire Chief in Haverhill was exempted from civil service law, effective February 2, 2012. St. 2012, Chapter 16.²
2. For a period of time prior to the removal of the Fire Chief position from civil service in 2012, the position of Fire Chief was filled with “Acting Chiefs” for specific time periods because there was no eligible list with three (3) or more candidates on the list (short list).

¹ I take administrative notice that Haverhill’s Appointing Authority is the Mayor.

² This statute further provided that it will not “impair the civil service status of the person holding the position of fire chief” in Haverhill when the Special Act became effective.

3. On December 30, 2015, the Haverhill Human Resources Department posted the position of Fire Chief, a “3 year (sic) contract”. This would be the first time after the enactment of St. 2012, Chapter 16 that a Haverhill Fire Chief exempt from civil service would be appointed.
4. By requisition #02696, the Appointing Authority asked HRD for an eligible list from the 2015 Deputy Fire Chief exam. On June 25, 2015, six (6) months prior to the Fire Chief posting, HRD issued to Haverhill an eligible list for one (1) “Permanent Full-Time” Deputy Fire Chief, listing three (3) candidates: Mr. Akstin (ranked first), Mr. Accardi (ranked second) and Mr. Robinson (ranked third). The eligible list would expire June 25, 2017. This eligible list provided, in part, “[i]f there is not an eligible list scheduled to be established and replace an existing eligible list, the Department’s existing eligible list will be extended for a period of time, but will not exceed three years from the first day of the month the exam was held, in accordance with our revocation policy.” (Id., provided by HRD)(emphasis added) A second version of this list was issued subsequently, listing Mr. Accardi first and Mr. Robinson second.
5. By requisition #03101, the Appointing Authority asked HRD for an eligible list from the 2016 Fire Captain exam for the position of “Permanent Full-Time” Fire Captain. The eligible list provided four (4) candidates: Mr. Stronach (ranked first), Mr. Fredette³ (ranked second) and Mr. Hinds and Mr. Roberts (who were tied for third). This eligible list would expire April 10, 2018. Further, this eligible list provided, in part, “[i]f, on 4/10/18, there is not an eligible list scheduled to be established and replace an existing

³ In 2016, Mr. Fredette filed a promotional bypass appeal for not having been promoted to Captain. However, the Union is reported to have filed a complaint against the Appointing Authority at the Mass. Labor Board over part of the promotion process, delaying at least the Captain promotion. The Union and the Appointing Authority subsequently reached an agreement about the promotion process and Mr. Fredette withdrew his appeal. (G2-16-248)

eligible list, the Department's existing eligible list will be extended for a period of time, but will not exceed three years from the first day of the month the exam was held, in accordance with our revocation policy.” (Id., provided by HRD)(emphasis added)

6. On June 29, 2016, while the 2015 eligible list for permanent full-time Deputy Fire Chief and the 2016 eligible list for permanent full-time Captain were still in effect, then-Fire Chief Parow posted General Order #2016015 indicating, in part, that effective July 3, 2016, then-Captain Accardi had been promoted to “Acting Deputy” and then-Lt. Roberts was promoted to “Acting Captain”. Below the then-Fire Chief's signature on this General Order appeared the following: “*Acting is synonymous with Temporary”. (General Order #2016015 attached to Petitioners' and Union's July 18, 2016 letter to the Commission requesting an Investigation)
7. By letter dated July 1, 2016, citing G.L. c. 31, s. 37, Mr. Laliberty asked the Mayor for a one (1) year leave of absence (“at least”) from his civil service position as Deputy Fire Chief “as I have accepted the position of Acting Fire Chief ... which is not a civil service position. The contract period for the Acting Fire Chief is for a one-year period” Id.
8. On or about July 3, 2016, the Appointing Authority completed a Notification of Employment Form for HRD indicating that on July 3, 2016 it promoted Mr. Accardi to the position of Deputy Fire Chief, checking the boxes on this Form to indicate that it was a fulltime but temporary job, “for duration of vacancy” with no end date provided as requested in the Form for temporary positions. (emphasis added)
9. On July 4, 2016, the Mayor submitted to HRD an Absence and Termination Notice/Form 56 for new Chief Laliberty, whose “Last Date of Paid Employment” as a civil service Deputy Chief was June 30, 2016, attaching Mr. Laliberty's July 1 letter to the Mayor

requesting a leave of absence from his Deputy Fire Chief position. The Form 56 is stamped “approved” and signed by HRD personnel.⁴

10. On July 6, 2016, William Laliberty and Mayor James Fiorentini (Mayor or Appointing Authority) signed an “Employment Contract”, appointing Mr. Laliberty “Acting Fire Chief” effective July 1, 2016. Section 8 of the Employment Contract, entitled “Duration of Agreement” provides,

The ACTING FIRE CHIEF shall serve as an at will (sic) employee at the sole discretion of the Mayor for a period of one year from the effective date. In the event that the ACTING FIRE CHIEF is not reappointed, resigns, is unable to serve or is removed for any reason, he shall retain the right to return to his previous civil service rank as Deputy Fire Chief.
(Employment Contract)(EMPHASIS in original)(emphasis added)

11. On September 12, 2016, I held a show cause conference in this case. At this conference, I asked the parties to produce certain documents. I received the documents shortly thereafter. (Administrative Notice)

12. A week after the conference, the Appointing Authority submitted the following information by a September 19, 2016 email:

on September 14, 2016, while the 2016 eligible list for permanent full-time Captain was still in effect, the Appointing Authority submitted to HRD a Civil Service Requisition (Form 13) to promote one (1) member of the Department to Captain as a fulltime but temporary position, indicating that the position was “for duration of vacancy” and the date that employment for that position was to begin retroactively on July 3, 2016;

Certification 03101, to fill an unknown number of vacancies for permanent full-time Fire Captains, printed from the HRD NEOGOV website on September 14, 2016, listing two (2) candidates: Mr. Fredette and, below him, Mr. Roberts; and indicating that the Appointing Authority had promoted two (2) Captains;

A Notice of Employment Form, dated September 14, 2016, indicating only that Mr. Roberts had been promoted to full-time temporary Captain retroactively to July 3, 2016;

⁴ The HRD employee’s name is illegible and there is no date indicating when HRD approved the Appellant’s leave request.

the Appointing Authority submitted to HRD a Certification and Report Supplement Departmental Promotional List, dated September 14, 2016, listing Mr. Fredette and Mr. Roberts as the candidates willing to accept the (unnamed) position and indicating that Mr. Roberts had been promoted;

on September 14, 2016, while the 2015 eligible list for permanent full-time Deputy Fire Chief was still in effect, the Appointing Authority submitted to HRD a Civil Service Requisition (Form 13) for one (1) full-time temporary Deputy Fire Chief “for duration of vacancy” and the date that employment for that position was to begin retroactively on July 3, 2016;

Certification 02696 to fill one (1) vacancy for a permanent full-time Deputy Fire Chief, listing Mr. Accardi and, after him, Mr. Robinson, and indicating that one (1) of the candidates had been selected;

the Appointing Authority submitted to HRD a Notice of Employment form, dated September 14, 2016, indicating that Mr. Accardi had been selected as a full-time temporary Deputy Fire Chief retroactively to July 3, 2016; and

the Appointing Authority submitted to HRD a Certification and Report Supplement, Departmental Promotional List, dated September 14, 2016, for an unknown position but listing Mr. Accardi and Mr. Robinson (both Deputy Fire Chief candidates) as the persons who indicated their willingness to accept the position, and indicating that it had promoted Mr. Accardi.

13. The same September 19, 2016 email from the Appointing Authority stated, in part,

You should also be aware that further discussions with HRD following the September 12, 2016 [show cause conference], HRD has advised us that these appointments could have been made in either one of two ways. Those persons filling the temporary vacancies created by the Fire Chief’s lawful leave of absence from his permanent rank of Deputy Fire Chief could have either been provisionally promoted to hold the position until such time as an eligible list with the required number of candidates for which the Appointing Authority must make an appointment to the positions exists, or, the positions can be filled by making a temporary appointment. Although the City initially choose (sic) to make a provisional⁵ appointment to these positions, you should be further aware, that we are in the process of making the appointments to these positions as temporary appointments retroactive to the initial appointment date. The primary benefit of doing so is that those persons appointed will receive credit for time in grade (sic) provided they are appointed as a temporary, where a provisional appointment would not provide such a benefit....

Id.

⁵ I note that the Appointing Authority’s July 3, 2016 promotions referred to the promoted Captain and Deputy Fire Chief as “acting” promotions, not provisional promotions.

14. On August 10, 2017, the Appointing Authority informed the Commission (copying the Petitioners) that Mr. Laliberty's appointment as Chief had been made permanent and his leave of absence has not been renewed.

Applicable Law and Policies

Pursuant to G.L. c. 31, s. 2, "In addition to its other powers and duties, the commission shall have the following powers and duties: (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth." *Id.* Pursuant to Erickson v Civil Service Commission and Town of Rockland (Defendants) and Heaney (Intervener), SUCV2013-00639-D (Sup. Ct. 2014), the Commission has "broad discretionary authority" with regard to investigations. This discretion includes the discretion to decide whether or not to conduct an investigation as well as the parameters of any such investigation. *Id.* at 6 (*citing*, e.g., Whitehouse v Town of Wareham, 25 MCSR 438 (2012); Richards v. Dept. of Transitional Assistance, 24 MCSR 315 (2011); O'Neill v. City of Lowell, 21 MCSR 683 (2008, *aff'd sub nom O'Neill v. Civil Service Comm'n*, MICV2009-00391 (Sup. Ct. 2009)(*aff'd*, 78 Mass.App.Ct. 1127 (2011)(1:28 Decision)).

With respect to promotions, G.L. c. 31, s. 7 provides, in part,

[e]ach promotional appointment within the official service shall be made pursuant to section eight or after certification from an eligible list established as a result of one of the following types of examinations: (a) a departmental promotional examination pursuant to section nine, (b) an alternate departmental promotional examination pursuant to section ten or (c) a competitive promotional examination pursuant to section eleven, provided that promotional appointments in such police and fire forces of cities and towns as are within the official service shall be made pursuant to section fifty-nine ...

... If no suitable list exists, or if the list contains the names of less than three persons who are eligible for and willing to accept employment, the appointing authority may request

authorization to make a provisional appointment pursuant to sections twelve, thirteen, and fourteen or a provisional promotion pursuant to section fifteen. ...

An appointing authority may make a temporary promotional appointment to a temporary position or to fill a temporary vacancy in a permanent position. ...

Id.

There is no definition for “acting” appointments in G.L. c. 31, s. 1. Section 1 defines a “temporary employee” as, “a person who is employed in a civil service position, after a civil service appointment, for a specified period of time or for the duration of a temporary vacancy.”

Id. Under the Personnel Administration Rules (PAR), specifically, PAR. 11, “[t]emporary appointments may be made only after a requisition for temporary certification from the administrator. Time spent by an employee ‘acting’ in a position is not recognized unless such employee was temporarily appointed to the position” Id.

Provisional promotions may be made “ ... only if there is no suitable eligible list, or if the list contains the names of less than three persons eligible for and willing to accept employment ... 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. ...

G.L. c. 31, s. 15.

The Certification Handbook for Departmental Public Safety Promotions Subject to Civil Service (Handbook) requires municipalities, as delegated authorities, to use and retain appropriate forms tracking the promotion process, which HRD may audit.

Section 37 of G.L. c. 31 affords permanent service employees the ability to request a leave of absence. It provides, in part,

An appointing authority may grant a permanent employee a leave of absence or an extension of a leave of absence; provided that any grant for a period longer than fourteen days shall be given only upon written request filed with the appointing authority by such person, or by another authorized to request such leave on his behalf, and shall be in writing. The written request shall include a detailed statement of the reason for the

requested leave and, if the absence is caused by illness, shall be accompanied by substantiating proof of such illness. A copy of the written grant shall be kept on file by the appointing authority, who shall, upon request, forward a copy thereof to the commission or administrator. No leave of absence for a period longer than three months, except one granted because of illness as evidenced by the certificate of a physician approved by the administrator, shall be granted pursuant to this paragraph without the prior approval of the administrator.

... Any person who has been granted a leave of absence or an extension thereof pursuant to this section shall be reinstated at the end of the period for which the leave was granted and may be reinstated earlier. ...

Id.

Analysis

The Appointing Authority promoted Mr. Roberts to “Acting” Captain and Mr. Accardi “Acting” Deputy Fire Chief, effective July 3, 2016, with a footnote stating that an “acting” position was “synonymous” with a temporary position. There are temporary positions in civil service but no “Acting” Fire Department civil service positions and, thus, “Acting” positions are not the same as temporary positions. PAR.11 requires that an appointing authority request a temporary certification from HRD. Provisional appointments/promotions may be made when there is no eligible list but such appointments/promotions must be rescinded within thirty (30) days of the establishment of an eligible list.

At the time that the Appointing Authority made the “Acting” appointments, there were open eligible lists for permanent full-time Captain and Deputy Fire Chief 2016 but there were only two (2) names on the lists, meaning that they were short lists. Further, prior to the show cause conference, there is no indication in the record that the Appointing Authority notified HRD of the “Acting” appointments, nor is there any indication in the record that the Appointing Authority asked HRD for lists for temporary appointments to Captain and Deputy Fire Chief.

However, after the show cause status conference on September 12, 2016, the Appointing Authority discussed its actions with HRD personnel, who said that the Appointing Authority

could make the acting promotions temporary or provisional and the Appointing Authority submitted the appropriate forms to HRD, effective retroactively to July 3, 2016. As a result, if the Petitioners were aggrieved by the Appointing Authority's acting promotions initially, they were no longer aggrieved after the Appointing Authority provided the appropriate information to HRD. Since the Appointing Authority has addressed questions regarding the Captain and Deputy Chief promotions, and based on the information provided to the Commission, these matters do not warrant a decision by the Commission to conduct an investigation beyond the steps already taken here.

The Petitioners also argue that more needed to be done by HRD before approving Mr. Laliberty's one (1)-year leave of absence request when he was promoted from Deputy Chief to the newly non-civil service position of Chief for one (1) year because then-Captain Accardi had been promoted to acting Deputy Fire Chief and then-Lt. Roberts had been promoted to acting Captain. Section 37 of G.L. c. 31 does not indicate specific steps required of HRD in processing and approving leaves of absence. In addition, the Appointing Authority and Chief Laliberty disclosed to HRD the reason for the absence. Therefore, I find that no further action was required of HRD in this regard. The remaining question regarding section 37 is if Chief Laliberty were to be removed from his position as Chief within one (1) year, what would happen to the promotion of Mr. Accardi to acting Deputy Fire Chief directly and to the promotion of Mr. Roberts to acting Captain? Speculation regarding hypothetical events does not merit investigation.

Conclusion

As the cited shortcomings noted herein have been addressed, and in view of the Commission's broad discretion in conducting investigations, the request for an investigation is ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan Commissioners) on August 2, 2018.

Notice to:

James Hykel, Esq. (for Appellant)
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William D. Cox, Jr. Esq. (for Respondent)
Melissa Thomson, Esq. (for HRD)
John Marra, Esq. (HRD)