

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

ANTHONY D. AMATO et als,
Appellants

v.

**CASE NOS: G2-10-238 thru 248 &
G2-10-257 thru 261**

CITY OF SPRINGFIELD,
Respondent

Appellant's Attorney:

Joseph G. Donnellan, Esq.
Angoff, Goldman, Manning, Wagner,
Hynes & Dumlap, P.C.
100 River Ridge Drive, Suite 203
Norwood, MA 02062

Respondent's Attorney:

Suzanne L. Shaw, Esq
Labor Relations Counsel
City of Springfield
36 Court Street,
Springfield, MA 01103

Commissioner:

Paul M. Stein

DECISION

The Appellants filed these appeals with the Civil Service Commission (Commission) arguing that the Fire Department of the City of Springfield (Springfield) has failed to comply with civil service law and rules regarding the filling of vacancies in the positions of Fire Lieutenant, Fire Captain and District Fire Chief through "acting" or out-of-grade assignments, thereby bypassing the temporary, provisional and permanent promotional procedures under G.L.c. 31. A pre-hearing conference was conducted at the Springfield State Office Building on October 13, 2010 and a follow-up conference with counsel was conducted on October 28, 2010.

The following facts are not disputed:

1. The following certified eligible lists for promotional appointments in the Springfield Fire Department have been reported to be currently active and approved by the Massachusetts Human Resources Division (HRD):

- a. Fire Lieutenant - List containing 11 names established 5/14/2010
- b. Fire Captain – List containing 5 names established on or about April 2009.
- c. District Chief – List containing 3 names established on or about November 2008.

2. The Appellants are permanent civil service employees of the Springfield Fire Department whose names appear on one of these eligible lists.

3. For a period of at least four months, and perhaps longer, prior to the filing of these appeals, Springfield has been filling vacancies in the positions of Fire Lieutenant, Fire Captain and District Chief through the use of “acting” or out-of-grade assignments.

4. There are currently 19 Springfield Firefighters serving as Fire Lieutenants in an “acting” capacity, 3 Fire Lieutenants serving as Fire Captains in an “acting capacity” and one Fire Captain serving as District Chief in an “acting” capacity. Springfield has indicated no present intention to eliminate any of these positions in the immediate future.

5. Springfield is currently processing a certification containing the names of the eleven applicants on the Fire Lieutenant’s eligible list, for permanent appointment to the position of Fire Lieutenant. Each of these eleven individuals has been serving as an “acting” Lieutenant for more than 60 days.

6. Springfield has reported that it has called for a new examination for Fire Lieutenant to be administered by HRD and, subject to funding, intends to fill one or more

of the remaining 8 vacancies in the position of Fire Lieutenant by permanent appointments upon establishment of a new eligible list by HRD.

7. Springfield is in the process of completing the administrative and/or funding arrangements necessary to fill three vacancies in the position of Fire Captain from the current eligible list for those positions. The Commission has been informed that there is an active certification for these positions containing the five names on the eligible list described above, but neither the current eligible list nor the certification for Fire Captain has been provided to the Commission.

8. Springfield is in the process of completing the administrative and/or funding arrangements necessary to fill one vacancy in the position of District Chief from the current eligible list for that position. The Commission has been informed that there is an active certification for these positions containing three names remaining on the eligible list described above (one of the persons on the eligible list having been appointed District Chief), but neither the current eligible list nor the certification for District Chief has been provided to the Commission.

Conclusion

A permanent appointment to a civil service position may be either “original” or “promotional”, both of which must be filled by certification from an eligible list, when an eligible list exists. G.L.c. 31, §§6 & 7. An appointing authority may also make a “temporary” appointment to a “temporary position” or to fill a “temporary” vacancy in a permanent position. G.L.c. 31, §§7 & 8. When there is no eligible list, or when the list contains an insufficient number of names to meet the so-called 2n+1 criteria (i.e. a “short” list), the appointing authority may choose to make a “provisional” appointment or

promotion, pending the establishment of an eligible list. G.L.c. 31, §§12 & 15. Finally, an appointing authority may chose to leave a vacancy unfilled. See, e.g., Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 596 (1985).

The Commission, as well as established judicial precedent, however, is clear that nothing in the civil service law and rules recognizes the designation of “acting” in any civil service position. See, e.g., Bergeron v. City of Lawrence, 23 MCSR 361 (2010) and cases cited; Thomas et als v. Boston Police Dep't, 22 MCSR (2009). In the current scenario, there can be no question, and it does not appear disputed, that Springfield’s use of “out-of-grade” promotional assignments for extended period of time such as those that have occurred here, have circumvented, and continue to circumvent the civil service law. The Commission understands that Springfield appreciates that this status quo cannot be maintained indefinitely but must be rectified with all deliberate speed, and that all parties have been engaged in a good faith effort to resolve the issues by mutual agreement.

Accordingly, in accordance with its authority under Chapter 31, §§2(a) and 2(b) and the provisions of Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of 1993, and after considering the parties’ positions, and for the purpose of ensuring timely closure of the dispute, the Commission ORDERS AS FOLLOWS:

- A. On or before December 31, 2010, Springfield shall bring its practices and procedures for filling all existing vacancies in the positions of Fire Lieutenant, Fire Captain and District Chief, into compliance with all civil service law and rules by eliminating all “acting” out-of-grade assignments, and, on or before December 31, 2010, appointing or promoting personnel to any such vacancies that

continue to be filled, through permanent, temporary and/or provisional appointments, as appropriate and in accordance with civil service law and rules.

- B. The Commission encourages the parties to agree as to the terms of any other relief that may be appropriate to the Appellants or any other persons, including but not limited to retroactive seniority dates. The Commission will retain jurisdiction to receive the parties joint motion for Chapter 310 relief or, alternatively, any party's motion to reconsider whether to grant Appellants other or further relief, for which the time to so move will be tolled until January 31, 2010.
- C. Except as stated above, the Appellants appeals are dismissed, without prejudice.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell, & Stein, Commissioners) on November 18, 2010.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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

Notice to:

Joseph G. Donnellan, Esq. (for Appellants)
Suzanne L. Shaw, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)