

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

SEAN BARRETT,
Appellant

v.

B2-14-155

BOSTON FIRE DEPARTMENT
HUMAN RESOURCES DIVISION
Respondents

Appearance for Appellant:

Sean Barrett
Pro se

Appearance for Boston Fire Department:

Robert Boyle, Esq.
Office of Labor Relations
Boston City Hall, Room 624
Boston, MA 02201

Appearance for Human Resources Division:

Mark Detwiler, Esq.
Labor Counsel
Human Resources Division
One Ashburton Place, Room 301
Boston, MA02108

Commissioner:

Cynthia A. Ittleman

**DECISION ON APPOINTING AUTHORITY'S
MOTION TO DISMISS**

Sean Barrett (Mr. Barrett or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on July 7, 2014 under G.L. c. 31, s. 2(b) challenging the decision of the state's Human Resources Division (HRD) to not allow him to take the Fire Captain promotional exam that was held on November 15, 2014. A prehearing conference was held in this regard on August 5, 2014 and HRD submitted information relating to the appeal. Chair Bowman issued a Procedural Order on August 11, 2014 stating, in part,

... In order to be eligible to sit for the promotional examination, an individual, as of the date of the examination, must be in the next lower title (Lieutenant) and have served in the (Boston Fire) force for at least one year after certification in the next lower title.

It is undisputed that Mr. Barrett meets the first prong of the eligibility criteria as he currently serves in the position of Fire Lieutenant in the Boston Fire Department.

According to the (Fire Department) records produced at the pre-hearing conference, Mr. Barrett's name first appeared on a Certification for the next lower title of Fire Lieutenant on March 10, 2014. Based on the March 10, 2014 date, Mr. Barrett will not have served in the force for at least one year after Certification in the next lower title as of the date of the November 15th [2014] examination. Based on this information, he is not eligible to sit for the Fire Captain's promotional examination.

Mr. Barrett's initial appeal was two-fold. First, he argued that **IF** HRD had not extended a 'prior eligible list' from May 23, 2013 to July 22, 2013, and **IF** HRD had not delegated the responsibility for creating promotional Certifications to cities and towns in 2009 and **IF** the Fire Department, in its delegated capacity, had included more names on the Certifications it created, his name may have appeared on an earlier Certification, thus making him eligible to sit for the upcoming Captain's examination.

Second, Mr. Barrett, under the mistaken belief that his name did not first appear on a Certification for Lieutenant until May 19, 2014, argued that, even under the delegation guidelines, his name should have appeared on a (Lieutenant) Certification BEFORE his actual promotion to that position. At the pre-hearing conference, the Fire Department produced a Certification to show that Mr. Barrett's name actually first appeared on a Certification on March 10, 2014, well prior to his actual promotion. Thus, the second part of his appeal is moot.

In regard to the first part of the appeal, [Chair Bowman] informed Mr. Barrett that [] his argument that he is an aggrieved person relies on highly speculative assumptions and that he had not put forth any evidence ... that HRD's decision to extend the prior eligible list was arbitrary and capricious. Rather, based on HRD's statements, it was actually based in part on other exam-related appeals pending before the Commission at the time. ...

Subsequent to the pre-hearing conference, Mr. Barrett has submitted multiple emails ... raising new issues ...

To ensure that all issues are addressed accordingly, and in the overall interest of due process, [Chair Bowman issued] the following orders (below):

The Boston Fire Department is hereby joined as a party.

Mr. Barrett has thirty (30) days to file a More Definite Statement with the Commission outlining all issues which form the basis of his appeal.

In the event that Mr. Barrett, in his More Definite statement, raises issues (i.e. – arguing that other firefighters should not have been permitted to sit for an examination) that could potentially impact the rights of others, those individuals will be joined as Intervenors. Upon receipt of Mr. Barrett’s More Definite Statement, HRD and the BFD will have thirty (30) days to file Motion(s) to Dismiss.

Mr. Barrett will have thirty (30) days thereafter to file a reply.

A motion hearing will be held on Thursday, December 4, 2014
(Commission August 11, 2014 Procedural Order after Pre-Hearing Conference)(emphasis in original)

Mr. Barrett filed A More Definite Statement regarding his appeal, the Boston Fire Department (Department) filed the Motion to Dismiss, Mr. Barrett filed an opposition to the Motion to Dismiss, and the Department filed a reply to Mr. Barrett’s opposition and renewed its Motion to Dismiss.

I conducted a hearing on the Motion on December 4, 2014 at the Commission. At the hearing, I ordered HRD to produce an affidavit pertaining to several matters related to the instant appeal. By email to the parties dated December 5, 2014, I specifically ordered, in part,

The affidavit ordered to be produced by HRD is due **December 11, 2014**. The affidavit shall indicate whether the Appointing Authority’s temporary promotional appointments (alleged by the Appellant to be inappropriate “out of grade appointments”) and other promotional appointments, have conformed to applicable civil service requirements since the time that the Department discussed temporary promotional appointments with HRD during the Daniels, et al case, as the Department indicated yesterday. As part of the affidavit, HRD shall address whether the Department’s temporary promotional appointments (made after the discussions involving HRD and the Department during the Daniels case) exceeded thirty days and, if so, whether such appointments exceeding thirty days conformed to applicable civil service requirements.
(Commission December 5, 2014 email message to Parties))(emphasis in original)¹

HRD produced the affidavit of Ms. Regina Caggiano on December 11, 2014. On December 17, 2014, the Commission received the Appellant’s response to this affidavit and requesting that the

¹ Daniels, Flaherty, Jr., Luciano, McGovern, Lyons, Jr. and Flynn v. Human Resources Division and Boston Fire Department, 26 MCSR 9 (2013).

Commission “ ... investigate the failure of the Boston Fire Department to follow the required procedures and order that [he] be allowed to take the current Captain’s Exam.”

On November 17, 2014, the Appellant filed another appeal, which was docketed B2-14-273. HRD provided information relating to that appeal. I conducted a prehearing conference on the additional appeal on December 4, 2014, the same day as the hearing on the Motion in the appeal docketed B2-14-155. The Appellant’s two (2) appeals were merged into docket number B2-14-155 in view of the common issues in them and the Appellant’s filing fee for appeal, initially docketed as B2-14-273, was returned. At the hearing on the Motion in the instant case, the Appellant asked to separate the two (2) appeals. I denied the request in view of the common issues in the cases. On December 8, 2014, the Appellant submitted a third appeal, essentially reiterating the assertions in his December 4, 2014 submission, which had already been merged with the instant appeal. I advised the parties that the Appellant’s December 8 submission would be included in, and considered part of the instant appeal and the Commission returned to the Appellant the \$75 filing fee he had submitted with his December 8 filing. For the reasons stated herein, the appeal is denied.

FINDINGS OF FACT

I take administrative notice of all of the parties’ submissions and attachments and the statutes, caselaw, regulations and policies cited by the parties; pertinent statutes, caselaw, regulations and policies not cited by the parties; and, without limitation, the HRD Certification Handbook, Departmental Public Safety Promotions Subject to Civil Service (HRD Delegation Manual). Giving these documents the appropriate weight, considering the parties’ arguments and viewing both in a light most favorable to the Appellant, I find that the following are not in dispute:

1. Mr. Barrett is a permanent, full-time, firefighter in the Boston Fire Department (Department) with a civil service seniority date of June 11, 2008. (HRD July 31, 2014 Letter and Attachments (HRD July 31, 2014 Letter))
2. In the fall of 2009, HRD delegated to appointing authorities its job of creating certifications of promotional candidates from HRD eligible lists. (Administrative Notice; HRD July 16, 2012 Letter to BFD Fire Commissioner Fraser (HRD July 16, 2012 Letter), provided by Appellant)
3. Mr. Barrett took and passed the Lieutenant exam on November 17, 2012. (HRD July 31, 2014 Letter)
4. At the time Mr. Barrett took the Lieutenant exam on November 17, 2012, there was an eligible list in existence from the prior Lieutenant exam.² (HRD July 31, 2014 Letter)
5. On January 10, 2013, the Commission issued its decision in Daniels, Flaherty, Luciano, McGovern, Lyons and Flynn et al v. HRD, Docket Nos. B2-12-310 and B2-12-319 - 323 (“Daniels”). In Daniels, the Commission granted the joint request for relief filed by the Department and the six (6) appellants whom HRD had determined were not eligible to

² The prior Lieutenant exam was either the first promotional exam, or one of the first such exams following HRD’s 2009 delegation to appointing authorities the job of preparing a certification from an HRD eligible list for promotion. As noted, *infra*, confusion followed this delegation, as is evident in the HRD letter to Department Fire Commissioner Fraser dated November 16, 2012 regarding the eligibility of certain candidates to take the 2012 Captain’s exam on November 17, 2012 not at issue here. Specifically, in the November 16, 2012 letter HRD wrote to Commissioner Fraser, in part, “You indicated ... that the Department’s Personnel Office made acting appointments using the eligible list [for 2010], mistakenly believing that such appointments were being made off of a certification. Based on this mistaken assumption, both the Department and affected firefighters operated under the belief that any time spent in an acting capacity would be counted towards determining time-in-grade eligibility for future promotional examinations. ... HRD reviewed ... the time-in-grade eligibility of 6 Captain applicants who were deemed ineligible by HRD to participate in the Fire Captain examination. Unfortunately, it was confirmed that none of these individuals satisfies the ‘one year after certification’ requirement contained in M.G.L. c. 31, § 59. ... “ HRD July 16, 2012 Letter. The same Letter also reminded Commissioner Fraser of the 2009 delegation of the certification function to appointing authorities and that whether or not the position being filled was temporary or permanent, certification is required. *Id.* In Daniels, et al v. HRD and Boston Fire Department, 26 MCSR 9 (2013), which was issued after the November 16, 2012 Letter, the Commission granted the joint request of the six (6) Captain applicants and the Department for the Commission to order HRD to provide the appellants with a make-up examination.

take the November 2012 Captain exam, two years prior to the Captain exam for which HRD found Mr. Barrett ineligible. The Decision on the joint request provided, in part,

At issue is whether or not the Appellants met the requirements of G.L. c. 31, § 59 to sit for the Fire Captain promotional examination held on November 17, 2012.

As articulated by the Appeals Court in Weinburgh v. Civil Serv. Comm'n & Haverhill, 72 Mass.App.Ct. 535, 538 (2008) and by the Commission in Dickinson and Hallisey v. Human Resources Division, 24 MCSR 200 (2011), there is a two-prong test to determine whether the Appellants were eligible to sit for this promotional examination:

1. Were the Appellants in the next lower title of Fire Lieutenant at the time of the November 17, 2012 Fire Captain examination?;
2. Had the Appellants served *in the force* for one (1) year after their names had been certified for Fire Lieutenant at the time of the November 17, 2012 Fire Captain examination?

In regard to Question 1, it is undisputed that all of the Appellants were in the next lower title of Fire Lieutenant at the time of the November 17, 2012 Fire Captain exam.

In regard to Question 2, there was confusion between HRD and BFD in regard to when the Appellants' names had been certified for the next lower title of Fire Lieutenant. For the Appellants to be eligible to sit for the November 17, 2012 Fire Captain Examination, their names must have been "certified" for the lower title of Fire Lieutenant on or before November 17, 2011, one (1) year prior to the date of the Fire Captain examination.

The genesis of the confusion is HRD's decision, in October 2009, to delegate the responsibility of creating certifications (for *promotional* appointments) to the approximately two hundred (200) civil service communities in Massachusetts. Prior to October 2009, HRD created the certifications upon request of the communities, thus ensuring a uniform and verifiable method for determining when an individual's name appeared on a certification for a given position. As referenced in Hallisey and Dickinson at page 22, there has been no uniform application of the rules related to the creation of certifications since HRD delegated this function in 2009. That is precisely what precipitated the confusion regarding the instant appeals and that will continue to vex the civil service community until HRD has the resources to once again assume this consequential responsibility.

In the interim, the onus will fall on the Commission to review each of these appeals on a case-by-case basis, examine the documents and practices of each

community and then determine whether the two-prong test referenced above has been met ...

... Appellants shall be eligible to sit for a make-up examinations for Fire Captain, which shall be administered by HRD forthwith.

(Id.)(emphasis in original)(footnote omitted)

6. The eligible list issued by HRD to the Department for the 2010 Lieutenant exam was due to expire on May 23, 2013. (HRD July 31, 2014 Letter)
7. As a result of the decision in Daniels and HRD's review of the education and experience component of the 2012 exam Lieutenant exam, the state's Human Resources Division (HRD) extended the date that the eligible list from the prior Lieutenant exam would expire from May 23, 2013 to July 22, 2013. (HRD July 31, 2014 Letter)
8. On May 22, 2013, the Department sent an email message to "BFD-SWORN Members" with attachments for "Lts and Cpt lists". The email message says, in part,

Due to the fact that the Civil service (sic) Commission (sic³) no longer supplies us with an accurate promotion list, the Personnel Division is asking members to send us your scores. Anyone who passed the 2012 promotional exam for Fire Lieutenant or Fire Captain is asked to send a copy of the official exam results notice that you received from ... as soon as possible. ...
(Department May 22, 2013 email)

9. On July 22, 2013, HRD issued to the Department an eligible list based on the results of the November 17, 2012 Lieutenant exam. Among the ninety (90) candidates on the eligible list created by HRD who passed the exam were the following rankings:

- | | |
|---|--------------|
| 1 | Candidate B |
| 2 | Candidate M |
| 3 | Candidate O |
| 4 | Candidate C |
| 4 | Candidate H1 |
| 4 | Candidate H2 |
| 4 | Candidate L |
| 4 | Candidate V |

³ It is HRD that produces eligible lists to appointing authorities, not the Commission.

10. The eligible list indicated that there were “0 Vacancies”. (Eligible List (Requisition 01039))

11. The July 22, 2013 eligible list issued by HRD to the Department following the 2012 Lieutenant exam states, in part,

... If, on 07/22/15, 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. “ (HRD July 22, 2013 eligible list)(emphasis added)

12. Mr. Barrett’s name was on a certification (“Requisition number: 07222013”) from the November 2012 Lieutenant exam dated on March 10, 2014. This certification indicates that there was one (1) fulltime permanent Lieutenant position to be filled at that time and listed three (3) eligible candidates in the following order: Candidate H1, Candidate H2, and Mr. Barnett. Only Candidate H1 signed the certification indicating his willingness to accept appointment. (Departmental Promotional Certification dated March 10, 2014)

13. Between July 22, 2013 and March 24, 2014, Mr. Barrett and other firefighters in the Department received various temporary promotions to Lieutenant. Mr. Barrett declined a temporary promotion to Engine 49, which started March 24, 2014, for “personal reasons”. In addition,”[t]here are some instances where [Mr. Barrett’s] name appears on the acting list, but the vacancy was filled when the lieutenant was returned to full duty and no time was served in the temporary assignment. ... After April 11, 2014 [Mr. Barrett] started a temporary promotion at Engine 51 until [he] was permanently promoted on May 19, 2014.” (Appeal in B2-14-273 (merged into the instant appeal⁴))

⁴ Mr. Barrett submitted a list of “assignments” in the Department from July 16, 2013 to May 10, 2014 presumably for the purpose of arguing that they indicate that there were vacancies to which he could or should have been

14. Mr. Barrett's name next appeared on certification 07222013 dated May 19, 2014. This certification stated that there was one (1) position to fill and it listed candidates in the following order: Mr. Barrett, Candidate C and Candidate BR. Mr. Barrett is the only candidate who signed this certification, from which he was permanently promoted to Lieutenant on May 19, 2014. (Departmental Promotional Certification; Appeal in B2-14-273 (merged into the instant appeal))
15. Mr. Barrett registered to take the November 15, 2014 Fire Captain promotional exam but HRD determined that he was ineligible to take the exam. (Appeal)
16. On June 21, 2014, Mr. Barrett sent an email message to Bruce Howard at HRD about taking the November 2014 promotional exam. On July 7, 2014, Mr. Howard responded to Mr. Barrett in an email message stating that he was waiting for information from the Department and that Mr. Barrett would likely need to address his eligibility at this Commission. (Appeal)
17. Mr. Barrett filed the instant appeal on July 7, 2014. (Administrative Notice)
18. In response to my order at the hearing on the Motion for HRD to provide an affidavit about the Department's appointments following the issuance of the 2012 Lieutenant exam eligible list, Ms. Regina Caggiano, Deputy Director of HRD, prepared an affidavit dated December 11, 2014 stating, in part,

appointed after HRD generated the eligible list in July 2013 for the 2012 Lieutenant exam, he argues, which could or should have led to his certification for Lieutenant one year prior to the 2014 Captain exam pursuant to G.L. c. 31, 59. The origin and accuracy of the list of assignments is unknown and, therefore, the information therein is not sufficiently reliable to be deemed undisputed. However, according to the legend thereon, the overwhelming number of assignments was to cover for personnel who were injured, sick or on vacation. Only a small percentage appear to have been filled by someone acting "out of grade", which term is not defined; Mr. Barrett would not have been eligible for such assignments under the 2n+1 formula because of his placement on the eligible list. The list of assignments also indicates that on some occasions there was a "vacancy" in certain positions in the Department (including Lieutenants) but the term "vacancy" is also not defined. As noted herein, Mr. Barrett was among those who benefitted from receiving temporary Lieutenant promotions prior to being permanently promoted.

3. ... As the promotional process is delegated, the BFD is responsible for processing all aspects of a promotional appointment. This means that BFD is responsible for generating their own referrals⁵, ensuring adequate signatures are gathered, and conducting the interview process.
4. All referrals generated by BFD when making promotional appointments must come from an eligible list established by HRD. Whenever an eligible (sic) is sent to BFD, HRD makes clear that it is the responsibility of the Appointing Authority to properly generate certifications from the eligible list. Attached as attachment A is the email sent by HRD to BFD on July 22, 2013 which included the eligible list relevant to the Appellant's appeal, and stated that "this is your official eligible list from which you will make certifications/referrals for promotion unless otherwise notified of a change."
5. BFD must use HRD's eligible list when establishing referrals for promotional appointments.
6. Temporary appointments are permitted under the applicable law and policies.
7. Temporary promotional appointments must be filled like permanent promotional appointments in that the Appointing Authority must issue a certification and appoint off the certification.
8. Temporary appointments may exist for the duration of the vacancy, as long as necessary, and do not have a time limit.
9. The use of "acting" time is captured on an employee's employment and experience credit when participating in a promotional examination. Acting time is utilized when an employee fills in a higher grade due to a sick call or vacation. ...
(December 11, 2014 Caggiano Affidavit)

Parties' Arguments

The Appellant avers that he is aggrieved by HRD's decision to refuse to allow him to take the November 2014 promotional exam for Captain. Specifically, he alleges that HRD should not have extended the life of the eligible list based on the 2010 promotional exam for Lieutenant. If HRD had not extended that list beyond the May, 2013 date when it was due to expire, the Appellant avers, he would have been appointed in time to be eligible to take the Captain exam in November 2014. Further, Mr. Barrett argues that when HRD finally issued the 2012 Lieutenant exam eligible list in July 2013, the Department should have placed his name (and, presumably, the names of all candidates who passed the exam) on a Lieutenant certification before November 2013 so that he would have been so certified one (1) year prior to the

⁵ The term "referral" is undefined.

November 2014 Captain exam and, therefore, he would have been eligible to take the 2014 Captain exam. If the Department created the certification sooner, he argues, he would have been reached for promotion in a more timely manner since he was ranked 5th on the eligible list, placing his name within the 2N+1 number of candidates to be considered for appointment.⁶ Mr. Barrett also argues that the Department incorrectly created a certification based on scores it requested from those who had taken the Lieutenant exam instead of creating a certification from HRD's eligible list, following applicable rules and policies. Next, Mr. Barrett avers that the Department erroneously made out of grade appointments while he was on the eligible list. Further, or in the alternative, he asserts that the Department incorrectly made emergency Lieutenant appointments and that those appointments exceeded the statutory limit for such emergency appointments to not more than thirty-days within a sixty-day period and that it did not inform HRD of such appointments. Mr. Barrett also argues that if the Department was making temporary appointments while he was on the eligible list, it bypassed him in making such appointments, it should have followed HRD procedures to create a certification and made such temporary appointments pursuant to the certification.

The Department argues that the Commission found in its August 11, 2014 Procedural Order that HRD appropriately decided that Mr. Barrett was not eligible to take the November 2014 Captain exam and that at the prehearing conference, the Commission determined that Mr.

⁶ Mr. Barrett provides two (2) "unofficial" and/or "unauthorized" lists which he asserts the Department wrongly used. He filed one of these lists at the Commission on November 24, 2014; it is undated and of unknown origin. It is a typed, formatted document listing fifty (50) names (marked 1 through 50) and scores. The highest ranked candidates on that list are the same as in the eligible list (*supra*) except that it does not include Candidate H2 and Candidate L on the eligible list. Mr. Barrett filed a second alternative list at the Commission on December 8, 2014; it is part of Mr. Barrett's memorandum entitled "Bypass Appeal B2-14-273" (which appeal was incorporated into the instant appeal). Mr. Barrett asserts therein that this alternative list was prepared by the Department personnel office. This second alternative list is similar to the highest ranked candidates on the eligible list except that Candidate L and Candidate V are not on the list, raising Mr. Barrett's appearance on the list by two (2) positions. Given the lack of information about the origins and reliability of this information and the conflicting information in them, I give them no weight.

Barrett's name was not on the certification in the next lower title of Lieutenant until on or about March 10, 2014, which is not one year prior to the Captain exam, as required by G.L. c. 31, § 59. In addition, the Department asserts that Mr. Barrett misconstrues the decision in Weinburgh v. Civil Service Commission, 72 Mass.App. Ct. 535 (2008) and Dickinson and Hallisey v. Human Resources Division, E-10-274 and E-10-278 (2011) because the caselaw provides that a person is eligible to take a promotional exam if she or he has been in the force for a year and the person is a permanent employee in the next lower title and the person's name appeared on a certification for the next lower title at least one year prior to the exam for the promotional title. According to the Department, Mr. Barrett acknowledged at the prehearing conference that his name did not appear on a certification until on or about March 10, 2014 and that Mr. Barrett provided no evidence to the contrary thereafter. Further, the Department avers that Mr. Barrett is not aggrieved by HRD's determination that he was not eligible to take the 2014 Captain exam. The Department denies Mr. Barrett's assertion that if the Department made a temporary promotion to Captain for the August 31, 2013 to October 28, 2013 time period, his name would have appeared within the required 2N+1 formula on a certification and he would have been certified as Lieutenant sooner and he would have been eligible to take the November 2014 Captain. The Department "emphatically" states that it was not required to generate a certification for the August 31, 2013 to October 28, 2013 time period and the assignment therefor. Finally, the Department argues that the HRD affidavit of Ms. Caggiano makes no reference to emergency appointments.

Legal Standard – Motion to Dismiss

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7)(h) when, as a matter of law, the

undisputed material facts affirmatively demonstrate that there is “no reasonable expectation” that a party can prevail on at least one “essential element of the case”. *See, e.g., Milliken & Co., v. 6 Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005).

Applicable Civil Service Law

Under the applicable civil service law and rules, original and promotional appointments to fill a permanent or a temporary vacancy in a municipal fire service position must be made after an exam is administered by HRD and after a certification is requisitioned from HRD that is prepared from among the current eligible list of candidates ranked highest in the order of their marks on the qualifying competitive examination, according to the so-called “2n+1 rule”. *See* G.L. c. 31, §§ 1, 7, 25-27 and 59; PAR.07, PAR.08 & PAR.09.⁷ “Persons on an eligible list shall be eligible for certification from such list for such period as the administrator shall determine” G.L. c. 31, § 25. In general, the eligible list lasts for a period of two years, after which it expires and is replaced by a new eligible list compiled from the results of a newly administered examination. *Id.* HRD’s eligible list revocation policy provides that eligible lists shall not exceed three years from the first day of the month on which an exam was held. (HRD December 22, 2014 Letter with Attachments)

With regard to promotions in the police and fire forces, G.L. c. 31, § 59 provides, in pertinent part,

... An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force, except that if the number of such employees, or the number of applicants eligible for the examination is less than four, the examination shall be opened to permanent employees in the next lower titles in succession in such force until

⁷ The “2n+1 rule” means that a vacancy must be filled from the top listed candidates on the eligible list who sign a Certification as willing to accept the appointment. For one vacancy, that means the top three candidates, two vacancies means the top five, and so forth. PAR.09(1).

either four such eligible employees have applied for examination or until the examination is open to all permanent employees in the lower titles in such force; provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open; and provided, further, that no such examination for the first title above the lowest title in the police or fire force of a city or town with a population in excess of fifteen thousand shall be open to any person who has not been employed in such force in such lowest title for at least three years after certification....

(Id.)

Thus, since the next title above firefighter is Lieutenant, firefighters who want to take the Lieutenant promotional exam and who work in municipalities with a population exceeding 50,000 are required to have been employed in their department for three years. Further, under this statutory structure, Fire Lieutenants who want to take the Captain promotional exam and who work in municipalities with a population exceeding 50,000 are required to have been employed in their department for one year.

Under G.L. c. 31, § 5, the Personnel Administrator of HRD has the following powers and duties:

- (a) To administer, enforce and comply with the civil service law and rules and the decisions of the commission. ...
- (d) To evaluate the qualifications of applicants for civil service positions.
- (e) To conduct examinations for purposes of establishing eligible lists. ...
- (l) To delegate the administrative functions of the civil service system, so far as practicable, to the various state agencies and cities and towns of the commonwealth. ...

(Id.)

In the fall of 2009 HRD delegated certain promotional procedures to civil service municipalities and issued A Certification Handbook, Departmental Public Safety Promotions Subject to Civil Service (HRD Delegation Manual). (Administrative Notice) The Handbook provides, *inter alia*, that “ ... this certification delegation instruction packet is intended as a general guide and cannot

provide complete detail on all aspects of the selection process” Id. The Handbook does not appear to deviate from G.L. c. 31, § 25 with respect to the time period that a candidate “on an eligible list shall be eligible for certification”. Id.

Pursuant to the authority granted to the Commission under Chapter 310 of the Acts of 1993, a candidate who was bypassed without reasonable justification is entitled to be placed at the top of all current and future Certifications until the candidate has received at least one further consideration for appointment to the position involved. *See* St. 1976, c. 534 as amended by St. 1993, c. 310. *See also, e.g., O’Connor v. Boston Police Dep’t*, 22 MCSR 660 (2009)(police officers deprived of temporary appointments to police captain by unlawful “out of grade” assignments of other officers, ordered to be placed on the eligible list for police captain for as long as it took to make at least one temporary promotion to police captain); *cf. Gagnon v. City of Chicopee*, 25 MCSR 20 (2013)(remedy for firefighter unlawfully assigned to Lieutenant’s position “out-of-grade” instead of as temporary appointment given an adjusted retroactive seniority date if and when appointed to permanent Lieutenant); *McDaid-Harris v. City of Peabody*, 23 MCSR 363 (2010)(ordered adjustment to seniority date of police sergeants deprived of temporary appointments through unlawful “out-of-grade” assignments so that the period for which they were eligible for such appointments [there, eight months] would be added to their seniority date if and when they were later appointed as Lieutenant in the future).

Under G.L. c. 31, § 31, in lieu of making “temporary” or “permanent” appointments from the applicable eligible list, in some cases, “emergency” appointments are authorized for periods of thirty days, subject to renewal with HRD’s approval. Section 31 provides, in relevant part,

An appointing authority may, without submitting a requisition to the administrator [HRD] and without complying with other provisions of the civil service law and rules incident to the normal appointment process, make an emergency appointment to any civil service position. . . for a total of not more than thirty working days during a sixty day period.

Such appointment shall be made only when the circumstances requiring it could not have been foreseen and when the public business would be seriously impeded by the time lapse incident to the normal appointment process. Upon making such an appointment, the appointing authority shall immediately notify the administrator in writing, in such form and detail as the administrator may require, of the reason for the appointment and the expected duration of the employment thereunder. No renewal of such emergency appointment shall be made without the consent of the administrator.

An emergency appointment may, upon written request of the appointing authority and with the consent of the administrator, be renewed for an additional thirty working days. The administrator shall not consent to more than one such renewal of the appointment unless the position is in a department . . . connected with the public safety or public health and the public service would suffer if a second renewal were not granted, in which case the administrator may consent to a second renewal. No person shall receive more than one such appointment and renewal, as the case may be, in any twelve month period, except as otherwise provided in this section.

G.L. c. 31, § 31.

Neither the civil service law, nor judicial decisions, specifically address what constitutes a “vacancy” or an “emergency”, or whether the vacancy is “permanent” or “temporary”. An appointing authority is granted considerable latitude in making those decisions as a prerogative of sound management control over staffing levels, assignments and duties as to which, in the absence of arbitrary or capricious behavior, the Commission will not generally intrude. *See* Mayor of Lawrence v. Kennedy, 57 Mass.App.Ct. 904, 906 (2003); City of Boston v. Boston Police Superior Officers Federation, 52 Mass.App.Ct. 296, 299-301 (2001); Somerville v. Somerville Mun. Employees Ass’n, 20 Mass.App.Ct. 594, 597, *rev.den.*, 395 Mass. 1102 (1985); Gillespie et al v. Boston Police Dep’t, 24 MCSR 170 (2011); O’Toole v. 18 Newton Fire Dep’t, 22 MCSR 563 (2009); Mandracchia v. City of Everett, 21 MCSR 307 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007).

G.L. c. 31, §2 states in relevant part,

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.

G.L. c. 31, §72 states in part,

The commission or the administrator may investigate all or part of the official and labor services, the work, duties and compensation of the persons employed in such services, the number of persons employed in such services and the titles, ratings and methods of promotion in such services. . . .

The commission or the administrator or any authorized representatives of either, may summon witnesses, administer oaths and take testimony for any hearing, investigation or inquiry conducted pursuant to the civil service law and rules. Fees for such witnesses shall be the same as for witnesses before the courts in civil actions and shall be paid from the appropriation for incidental expenses.

Id.

These statutes confer significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. *See Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n*, No. 2006-4617, Suffolk Superior Court (2007). *See also Dennehy v. Civ. Serv. Comm'n*, No. 2013-00540, Suffolk Superior Court (2014) (“The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion.”) As a general rule, the Commission has chosen to exercise its discretion to initiate a Section 2(a) investigation sparingly, and only when there has been a threshold showing that there is a reasonable likelihood that a systemic violation of civil service law and rules has occurred that has prejudiced the civil service rights of other innocent parties. A mere possibility of a violation will ordinarily not be sufficient to trigger a full investigation.

Analysis

A preponderance of the evidence establishes that the Appellant was ineligible to take the November 2014 Captain exam and he is not aggrieved by the actions of HRD or the Department.

Although Mr. Barrett satisfied the first prong of the two-prong test in this regard because he was a permanent firefighter in the Department at the time of the exam, he did not satisfy the second prong of the test since he had not served in the force for one (1) year since his certification (on March 10, 2014) for the Lieutenant position at the time of the 2014 Captain exam. Mr. Barrett's argument that he could have been eligible to take the 2014 Captain exam if HRD had not extended the 2010 Lieutenant list and/or the Department had acted faster on processing the 2012 Lieutenant list are nothing more than hypothetical assertions far too attenuated to render him aggrieved. As indicated in Ms. Caggiano's affidavit, it appears that the Department made temporary appointments; this affidavit makes no reference to emergency appointments. Mr. Barrett's name appeared on the March 10, 2014 certification for Lieutenant. The Department filled temporary Lieutenant positions when needed, mostly to cover firefighters who were out on Injured on Duty leave, illness and vacations, based on the November 2012 Lieutenant exam eligible list as permitted. Processing of the 2012 Lieutenant exam results was delayed by HRD but the delay was caused by HRD's response to the Commission's decision in Daniels, including the conduct of a make-up exam for the Daniels appellants and the scoring of all of the candidates' education and experience. Therefore, HRD did not act in an arbitrary or capricious manner when it extended the eligible list from the 2010 Lieutenant list and its decision that Mr. Barrett was not eligible to take the 2014 Captain exam stands.

Prior to the prehearing conference in this case at the Commission, Mr. Barrett did not sign the March 10, 2014 certification because he was not told his name was on it. The HRD Delegation Manual requires appointing authorities to notify all candidates on the certification. Going forward, the Department shall notify all candidates on a certification when the certification is created. The Appellant argues that the Department did not address that part of

the HRD Delegation Manual, like Personnel Administrator Rule (PAR).08(2), that provides that appointing authorities are to notify HRD of an appointment from a certification within three weeks of the creation of the certification. There is no indication in the record whether the Department informed HRD of its appointments from the Lieutenant exam. That said, it is not clear under the HRD Delegation Manual if an appointing authority is still required to submit to HRD information concerning appointments it has made or if appointing authorities are required to retain such information in the event of an HRD audit. Clarification in this regard from HRD is required. These matters do not alter Mr. Barrett's eligibility to have taken the 2014 Captain exam.

The Appellant also avers that the Department incorrectly created its own certification rather than preparing a certification from HRD's eligible list from the 2012 Lieutenants exam and that if the Department had created a certification based on the HRD eligible list, he would have been appointed to Lieutenant earlier and in time to be able to take the November 2014 Captain exam. The HRD eligible list and the Department's alleged incorrect certification are similar. The Appellant asserts that his rank on these lists was within the 2n+1 number of applicants on both lists to be considered for promotion. However, it appears that, initially, there were no vacancies to be filled and, later on, there was only one vacancy to be filled when certifications were prepared. In support of his argument, the Appellant relies on the Commission's findings in Kelley, Sifford, Finn and MacDougall v. Boston Fire Department, 25 MCSR 23, *reconsideration den.* 25 MCSR 168 (2012). In that case, the Commission dismissed the appeals, finding that although the Department had been making out of grade or acting appointments using the CBA "senior man" provision notwithstanding the existence of the 2007 eligible list it was permitted to do so in emergency and temporary situations. The Appellants

appealed and the Court (Leibensperger, J.) granted their Motion for Judgement on the Pleadings, remanding the case to the Commission for additional evidence. Kelley, et al. v. Massachusetts Civil Service Comm'n and Boston Fire Department, No. SUCV 12-00571-H (August 5, 2013). The Department's appeal to the Appeals Court was dismissed as premature. Kelley, et al. v. Civil Service Commission and Boston Fire Department, 86 Mass.App.Ct. 913 (2014) On remand, the Commission found that the Department made four temporary Captain appointments "for which one or more Appellant was bypassed without compliance with civil service law" but that the appeals were untimely, two of the appellants had retired, rendering their claims moot, and the appeals were dismissed. Kelley, et al. v. Boston Fire Department, 29 MCSR 176 (2016). The Kelley case is distinguishable for several reasons. First, the Kelley case involved the 2007 Captains exam, years prior to the 2014 Captains exam about which Mr. Barrett complains here. Further, there is no question of application by the Department of the "senior man" CBA provision in this case.⁸ In addition, the Kelley appellants did not argue that they were prevented from taking a Captains exam; rather they argued that they were not appointed Captains from the list generated as a result of the 2007 Captains exam that they took and passed. Further, there is no indication that a candidate ranked below Mr. Barrett bypassed him. Therefore, the Appellant's reliance on Kelley is misplaced.

The Appellant requested that the Commission conduct an investigation of the Department's hiring practices. In an August 9, 2014 email message Mr. Barrett stated, in part, "I understand that I am currently ineligible to take the captains exam, but I would like the Boston fire (sic) Department to follow the rules because it would create a lot less headaches." Id. As indicated above, the Commission has wide discretion in determining when to conduct an

⁸ The Department stated at the hearing on the Motion in the instant case that the Department no longer applies the senior man provision and that it is no longer in the collective bargaining agreement.

investigation, as well as the parameters, direction, action and conclusion of any such investigation. The matters about which Mr. Barrett complains have to do with the manner in which he was appointed to the position of Lieutenant, not his eligibility to take the 2014 Captain exam. In the course of this case, I requested an affidavit from HRD to assist in the assessment of the Department's hiring procedures involved in Mr. Barrett's promotion to Lieutenant. Ms. Caggiano's affidavit does not say whether the Department erred in its process but it describes the duties of appointing authorities in making promotional appointments, adding that temporary appointments have no time limit. This affidavit does not reference emergency appointments, suggesting that none were made or that HRD has not been informed of emergency appointments at the time that the Department was making apparent temporary promotional appointments to the position of Lieutenant. This decision provides that the Department is to notify promotional candidates whenever it places their names on a certification and that HRD is required to clarify how appointing authorities are to inform HRD when making promotions. Also as noted above, HRD has already made clear that the Department is required to make a certification from the eligible list provided to appointing authorities by HRD. No further action, including an investigation, is warranted here.

Conclusion

For these reasons, the Department's Motion to Dismiss is allowed and Mr. Barrett's appeal under Docket No. B2-14-155 is hereby *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq.
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Stein and Tivnan, Commissioners [Camuso – Absent]) on July 7, 2016.

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)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Sean Barrett (Appellant)

Robert C. Boyle, Esq. (for Respondent)

Mark Detwiler, Esq. (for HRD)

John Marra, Esq. (HRD)