

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

DENISE BARRY,
Appellant

v.

G2-12-141

BOSTON FIRE DEPARTMENT,
Respondent

Appellant's Attorney:

Karen E. Clemens, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Respondent's Attorney:

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

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On April 4, 2012, the Appellant, Denise Barry, filed an appeal with the Civil Service Commission (Commission), contesting her non-selection by the City of Boston's Fire Department (City or Fire Department) to the position of provisional Senior Administrative Assistant. ("Section 2(b) bypass appeal") A pre-hearing conference was held on June 12, 2012. Since the Fire Department has complied with those laws and rules related to provisional appointments, the Section 2(b) bypass appeal is dismissed.

As part of the pre-hearing conference, however, Ms. Barry stated that the person selected was chosen because of her political connections and because a member of the interview panel was the friend and neighbor of the selected candidate. Based on these statements, I scheduled a status conference for July 9, 2012 to determine whether the Commission should initiate an investigation under G.L. c. 31, § 2(a). ("Section 2(a) investigation). After hearing sworn testimony at the status conference from Ms. Barry, the two members of the interview panel and the selected candidate, I have concluded that an investigation is not warranted.

Background re: Section 2(b) bypass appeal

The Appellant has been employed by the Fire Department since 1996 as a Head Clerk. She, and hundreds of other City employees, were granted civil service permanency in 1998 as a result of a Special Act of the legislature.

In 2012, the Fire Department posted a position for Senior Administrative Assistant. Since no civil service examinations have been given for many years for most non-public safety official civil service positions in Massachusetts, cities and towns fill such vacancies through provisional appointments or promotions. Here, the Fire Department made a provisional appointment to the position of Senior Administrative Assistant and selected an external candidate. The Appellant was not appointed and this appeal followed.

Discussion re: Section 2(b) bypass appeal

In a series of decisions, the Commission has addressed the statutory requirements when making such provisional appointments or promotions. See Kasprzak v. Department of Revenue, 18 MCSR 68 (2005), on reconsideration, 19 MCSR 34 (2006), on further reconsideration, 20 MCSR 628 (2007); Glazer v. Department of Revenue, 21 MCSR 51 (2007); Asiaf v. Department of Conservation and Recreation, 21 MCSR 23 (2008); Pollock and Medeiros v. Department of Mental Retardation, 22 MCSR 276 (2009); Pease v. Department of Revenue, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Foster v. Department of Transitional Assistance, 23 MCSR 528; Heath v. Department of Transitional Assistance, 23 MCSR 548.

In summary, these recent decisions provide the following framework when making provisional appointments and promotions:

- G.L.c.31, §15, concerning provisional promotions, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains less than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and “sound and sufficient” reasons are submitted and approved by the administrator for making such an appointment.

- Under Section 15 of Chapter 31, only a “civil service employee” with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for “sound and sufficient reasons” to another higher title for which she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title.

- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional “appointment” process as a subterfuge for selection of provisional employee candidates who would not be eligible for provisional “promotion” over other equally qualified permanent employee candidates.

- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Applied to the instant appeal, it cannot be shown that the Fire Department violated any civil service law or rule. The Fire Department made a provisional appointment to an official service position and was not obligated to select a permanent civil service employee. Rather, they selected an external candidate who applied for the position. Therefore, the Appellant’s Section 2(b) bypass appeal is *dismissed*.

Background re: Section 2(a) investigation

As part of a status conference held on July 9, 2012, I heard sworn testimony from:

- Denise Barry, Appellant;
- Michelle McCourt, Human Resources Manager, Boston Fire Department;
- Robert Moran, Human Resources Director, Boston Fire Department;
- Kerry O’Shea, selected candidate.

At the outset, Ms. Barry recanted her statement, made at the pre-hearing conference, that Ms. McCourt, who served on the interview panel, was a friend and neighbor of the selected candidate. Rather, as part of her sworn testimony, Ms. Barry testified that Ms. McCourt and Ms. O’Shea were “neighborly” and that I misconstrued her statement. I did not misconstrue Ms. Barry’s pre-hearing statement. I have an independent recollection of her statement which is consistent with my contemporaneous hand-written notes.

The credible testimony of Ms. McCourt and Ms. O'Shea establishes that they are not neighbors and that they did not even know each other before this hiring process began. Rather, the two individuals apparently formed a quick friendship after Ms. O'Shea was hired.

Although Ms. O'Shea acknowledged that she is friendly with Boston City Councilor Rob Consalvo, she credibly testified that she never asked for – or received – assistance from him regarding this appointment.

Further, the credible testimony of Ms. McCourt and the documentary evidence established that Ms. O'Shea was ranked second by Ms. McCourt and that Ms. McCourt actually advocated for a different candidate.

However, the credible testimony of Ms. Barry, corroborated by Ms. McCourt, regarding an incident preceding Ms. Barry's interview, was of concern. Unaware that Ms. Barry was standing behind him, a Deputy Fire Chief who was not involved in the hiring process, advocated for another candidate (who was not selected) and then told Mr. Moran that he'd need to "watch his back" if he appointed Ms. Barry. The Deputy Fire Chief was apparently referencing prior complaints that Ms. Barry had filed against the Fire Department. While this incident is of concern, there is no evidence that it impacted the hiring process which is the subject of this appeal.

Finally, Ms. O'Shea's resume shows that she has many years of applicable experience, a bachelors degree in economics and the technical skills necessary to serve the Boston Fire Department and the citizens of Boston in an exemplary manner. No further investigation is warranted.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis and McDowell, Commissioners [Stein – Absent]) on August 9, 2012.

A True copy. 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)(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.

Notice to:

Karen Clemens, Esq. (for Appellant)

Robert J. Boyle, Jr., Esq. (for Respondent)

John Mara, Esq. (HRD)