

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

JACK BERGERON,

Appellant

v.

CITY OF LAWRENCE,

Respondent

Case No.: E-10-138

ORDER

The Appellant, Jack Bergeron, filed this appeal with the Civil Service Commission under G.L. c. 31, §§ 2(a) and 2(b), arguing that the City of Lawrence has failed to comply with the civil service law and rules regarding the filling of a vacancy for the position of Fire Chief.

A pre-hearing conference was held on June 29, 2010.

It is undisputed that the City's former Fire Chief retired on January 4, 2010 and that the City designated Deputy Fire Chief Brian Murphy as "Acting Fire Chief". There is nothing in the civil service law or rules that recognize the designation of "Acting" in any civil service position.

The applicable statutes and cases regarding the filling of civil service positions are as follows:

G.L. c. 31, § 7 states in relevant part:

"Each 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 [an] examination[] ...

An appointing authority desiring to make a promotional appointment within the official service, other than a promotional appointment pursuant to section eight, shall, if a suitable eligible list exists, submit a requisition to the administrator. Upon receipt of such requisition the administrator shall certify from such list the names of persons eligible for such promotional appointment. 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 fill a temporary vacancy in a permanent position.”

As to which method to use in filling promotional vacancies (permanent or temporary), the courts have said that cities and towns have the “power to decide whether to fill vacancies on either a permanent or temporary basis.” Somerville v. Somerville Municipal Employees Ass’n, 20 Mass. App. Ct. 594, 596 (1985).

Regarding the reference to a “provisional appointment”, section 12 provides in relevant part that:

“An appointing authority may make a provisional appointment . . . with the authorization of the administrator Such authorization may be given only if no suitable eligible list exists A provisional appointment may be authorized pending the establishment of an eligible list

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.”

As to the reference to section 15, that term provides in relevant part that:

“An appointing authority may, with the approval of the administrator . . . 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 ...”

Section 31 of the civil service law also affords appointing authorities a limited right to make another type of appointment – an emergency appointment. That section states in relevant part that

“An appointing authority may, without submitting a requisition to the administrator 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.”

In Somerville, the court noted that “in filling any vacancy, even temporarily, the appointing authority is required to follow the carefully prescribed requirements set forth in c. 31. Failure of an appointing authority in filling a position to follow the requirements will render the appointment invalid.” See also Fall River v. Teamsters Union, Local 526, 27 Mass. App. Ct. 649, 650 (1989)(“Ordinarily, when a vacancy in a civil service job occurs, the appointing authority selects from a list of eligibles drawn up as a result of a competitive examination.”)

Further, [U]nauthorized "out-of-grade" promotional appointments, whether provisional or temporary . . . circumvent the requirements of the civil service law. [S]uch appointments should be avoided because they "often are used to reward employees beyond the salary limits of their permanent positions." . . . This breeds favoritism, which tends to undermine the purpose of the civil service law – “[t]o secure the best qualified persons available for all positions in the state and local service, encouraging competition and offering an opportunity for all qualified persons to compete.” Somerville at 602-3. See also Gaughan v. Boston Police Dep’t, 12 MCSR 245 (1999)(ruling that using sergeants in out-of-grade capacity, City

“is in violation of [c. 31 §73] by appointing and/or employing individuals in violation of civil service laws.”)

Although it used the word “vacancy” a number of times in the course of the statute, one of the things the Legislature did *not* do in crafting its “comprehensive plan” for the appointment of individuals to civil service positions was to define it. As the Appeals Court has recently noted,

"Vacancy," . . . is not defined in G. L. c. 31 nor does the chapter contain provisions for determining whether or when a vacancy exists *Decisions about whether a vacancy exists may have an impact on any individual who holds the supposedly vacant position as well as on those who aspire to it.*

Mayor of Lawrence v. Kennedy, 57 Mass. App. Ct. 904, 906 (2003).¹ The court’s reference to the interests of those “who aspire” to fill vacancies refers to the substantive right, which the courts and the Commission have recognized, of persons who appear on eligible lists to be “fairly considered” for vacancies that occur during the period of their eligibility. See, e.g., Boston Police Dep’t, 17 MCSR 76 (2004); Boston Police Superior Officers Fed’n v. City of Boston, 147 F.3d 13, 16 (1st Cir. 1998).

The Commission has, in a handful of decisions, considered the question of whether a vacancy came into existence and, if so, whether the appointing authority filled it in one of the permissible ways. They are: O’Connor v. Boston Police Dep’t, 22 MCSR 660 (2009); Thomas v. Boston Police Dep’t, 22 MCSR 157 (2009); Greeley v. Belmont, 19 MCSR 32 (2006); Gaughan v. Boston Police Dep’t, 12 MCSR 245 (1999); Sullivan v. Brookline Fire Dep’t, 9 MCSR 46 (1996); Sullivan v. Brookline Fire Dep’t, 8 MCSR 41 (1995).

While the means used to fill asserted “vacancies” have varied somewhat from case to case (e.g., designating personnel as working in higher-rank in an “acting” capacity; having the

¹ The determination of whether a vacancy *exists* is different from the question of whether a vacancy *should be filled* or the position should instead be abolished. The courts have said the latter decision is a “level of services” decision that is up

duties of the higher rank performed by a lower-ranked officer working “out of grade”), the substantive concern is the same in each – that is, that an opening that qualified as a “vacancy” was not filled in one of the ways permitted by the Legislature.

ORDER

Per agreement of the parties, the City agrees to fully comply with all civil service law and rules regarding the Fire Chief position within ten days of the issuance of this order. The Appellant reserves his right to seek reinstatement of this appeal if he believes the City’s response is not in compliance with the civil service law or rules.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and McDowell, Commissioners) on July 1, 2010.

A True Record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this decision. 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:
Paul T. Hynes, Esq. (for Appellant)
Anne Randazzo, Esq. (for City of Lawrence)

to cities and towns to make. See, e.g., Fall River v. Teamsters Union, Local 526, 27 Mass. App. Ct. 649, 654 (1989) (labeling the decision of “whether a civil service vacancy ought to be filled at all” as “a staffing level decision.”)

Tsuyoshi Fukuda, Esq. (for HRD)