

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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**TOWN OF BILLERICA,
CRAIG GROGAN &
JOHN HARRING,**

Appellants

v.

**HUMAN RESOURCES
DIVISION,**

Respondent

Case No.: E-12-99

**DECISION ON MOTION FOR RELIEF
PURSUANT TO CHAPTER 310 OF THE ACTS OF 1993**

Background

On March 8, 2012, the Town of Billerica (Town), joined by Craig Grogan and John Haring¹, filed a request with the Civil Service Commission (Commission), seeking relief under Chapter 310 of the Acts of 1993 (310 Relief) as a result of an action by the state's Human Resources Division (HRD) to revoke an eligible list for police sergeant in the Town of Billerica (Town). The Appellants are asking the Commission to revive the eligible list for the purpose of making permanent promotions from this now-revoked list, as opposed to making permanent promotions from a new eligible list which has not yet been established.

On March 27, 2012, a pre-hearing conference was held at which time I heard oral argument from counsel for the Town and HRD.

On April 11, 2012, as agreed by the parties, HRD filed a Motion for Summary Decision, asking the Commission to deny the request for 310 Relief. The Town filed an opposition to HRD's motion on April 27, 2012.

Craig Grogan and John Haring are Billerica police officers who took and passed a promotional examination for police sergeant on October 1, 2008. Based on their scores, their names eventually were ranked first and second on an eligible list of candidates that was created by HRD on May 15, 2009.

Pursuant to G.L. c. 31, § 25, "persons on an eligible list shall be eligible for certification from such list for such period as [HRD] shall determine, but in any event not to exceed two years unless one of the following exceptions applies ... (3) no new list is established, in which

¹ According to email correspondence from their counsel, Craig Grogan serves as treasurer of the local police union and John Haring serves as president. Counsel stated that the local union, as well as Messrs. Grogan and Haring support the request for 310 relief. There has been no indication that there is any bias against them because of their roles in the union. In fact, the fact the Town is one of the moving parties here shows otherwise.

case eligibility of all persons on such list shall be extended until a new list is established for the same position ...”.

Pursuant to HRD’s “revocation policy”, all eligible lists are revoked three years from the date of the examination, even if no new eligible list exists. Applied here, HRD revoked the eligible list for police sergeant in Billerica on October 1, 2011, three years from the date of the examination taken by Officers Grogan and Harring. Any permanent or temporary promotions to police sergeant in Billerica, must now be made from an eligible list that will be created after the next examination. In the interim, only provisional appointments or promotions can be made.

Arguments of the Parties

The Town and the two police officers now ask the Commission, pursuant to Chapter 310 of the Acts of 1993, to order HRD to revive the eligible list so the Town can promote Officers Grogan and Harring to the position of police sergeant.

In support of their request, the Town and police officers argue the following:

- The *sergeant* promotions were delayed because of ongoing collective bargaining negotiations related to the Town’s use of an assessment center for promotions to the position of *lieutenant*.
- The Town was unaware of HRD’s revocation policy and HRD provided the Town with misleading, incomplete and untimely communication, leading the Town to conclude that it would likely be granted an extension of the October 1, 2011 revocation.
- HRD’s actions were arbitrary, capricious and inconsistent with basic merit principles.

In response, HRD argues the following:

- It acted reasonably when it denied the Town’s request to extend a stale list when there seemed no end in sight for the Town’s negotiations with the Union, and where the Town failed to participate in promotional examinations despite having been placed on notice that the eligible list would be revoked on October 1, 2011.²
- HRD never provided the Town with any assurance, in writing or otherwise, that the eligible list would be extended beyond October 1, 2011.
- The police officers cannot show that they are aggrieved individuals because there has been no violation of either civil service law or basic merit principles.

Conclusion

G.L. c. 31, § 25 provides that those on an eligible list are eligible for certification “for such period as [HRD] shall determine.” (emphasis added) This grants HRD “wide discretion in

² In their reply brief, the Town states that the negotiations in question have now been concluded and it has now requested that a promotional examination be scheduled for police sergeant.

administering the lists.” Kelley v. Civil Serv. Comm’n, No. 10-0420, Middlesex Sup. Ct. ((2011) citing Davis v. Personnel Administrator of the Dept. of Pers. Admin., 27 Mass. App. Ct. 1113, 1115 (1989).

Further, there is a “limited nature of the rights conferred on persons who pass” civil service examinations, including the fact that individuals do not have a vested right in their particular positions on the list. Kelley citing Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987).

The narrow interpretation of applicants’ rights is a product of a statutory scheme that leaves important issues of timing almost completely out of their control: “there can be no expectation that certain positions will become available during the period of a particular list. Positions might become available immediately before the establishment of a new list, or immediately after the expiration of an old one. Kelley citing Davis at 1115 and Kern v. Personnel Administrator of Dept. of Pers. Admin., 28, Mass. App. Ct. 938, 940 (1990).

Based on a review of all the information provided to the Commission, much of which is not disputed, I conclude that HRD’s revocation of the eligible list in question on October 1, 2011 was consistent with its longstanding and uniformly enforced revocation policy. Further, HRD did not act in an arbitrary or capricious manner when it denied the Town’s request to make an exception to this revocation policy. At the time, the Town was still involved with protracted union negotiations that purportedly caused the delay and, at the time, had not requested a new promotional examination for sergeant.

Finally, the Town’s argument regarding any miscommunication between HRD and the Town is not compelling. The Town was notified, in writing, months in advance of October 1, 2011, that the list would expire. Less than thirty (30) before October 1st, the Town then submitted a request to extend that deadline, apparently assuming it was granted when no response was received by October 1st. Interpreting ambiguity in one’s favor cannot form the basis upon which the Commission grants the extraordinary relief requested here. The Town failed to create a Certification from the eligible list and make conditional offers of employment for permanent or temporary police sergeant prior to the eligible list’s expiration on October 1, 2011. HRD acted appropriately when it subsequently denied the Town’s request to make an exception to its uniformly-enforced revocation policy.

Just as the statute envisioned, Officers Grogan and Harring will need to take the next promotional examination and score high enough to fall within the so-called “2n +1” formula should they wish to be considered for subsequent promotions for permanent or temporary police sergeant in Billerica.

For these reasons, the request for 310 Relief is denied and the appeal under Docket No. E-12-99 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell and Stein, Commissioners) on May 31, 2012.

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 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:

Kevin Feeley, Esq. (for Town of Billerica)

Elizabeth Whitcher, Esq. (for HRD)

Gary G. Nolan, Esq. (for Craig Grogan and John Harring)