

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**

100 Cambridge Street, Suite 200  
Boston, MA 02114  
617-979-1900

**NICHOLAS BONACETO,**  
*Appellant*

B2-23-109

v.

**BOSTON FIRE DEPARTMENT,**  
*Respondent*

Appearance for Appellant:

James Hykel, Esq.  
Pyle Rome Ehrenberg PC  
2 Liberty Square, 10<sup>th</sup> Floor  
Boston, MA 02109

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.  
Labor Counsel  
City of Boston Labor Relations  
Boston City Hall, Room 624  
Boston, MA 02201

Commissioner:

Paul M. Stein

Summary of Decision

The Commission dismissed the appeal of a Lieutenant in the Boston Fire Department (BFD) who complained that the BFD failed to promote him to fill a vacancy in the position of Fire Captain before the expiration of the eligible list on which his name appeared first, finding that the BFD's decision not to fill that vacancy was not a bypass and did not violate civil service law.

**DECISION ON BOSTON FIRE DEPARTMENT'S MOTION TO DISMISS**

On July 21, 2023, the Appellant, Nicholas Bonaceto, a Lieutenant with the Boston Fire Department (BFD), appealed to the Civil Service Commission (Commission)<sup>1</sup>, disputing the

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

decision of the BFD to decline to fill a vacancy in the position of BFD Fire Captain prior to the expiration of the eligible list on which his name had appeared first. I held a remote pre-hearing conference on this appeal on August 22, 2023. On September 29, 2023, the BFD filed a Motion to Dismiss to which the Appellant filed an Opposition on October 13, 2023. For the reasons stated below, the BFD's Motion to Dismiss is allowed and the Appellant's appeal is dismissed.

### **UNDISPUTED FACTS**

Based on the submission of the parties, the following facts are not disputed:

1. The Appellant, Nicholas Bonaceto, is a Lieutenant with the Boston Fire Department. (BFD).
2. On February 27, 2021, the Appellant took and passed a promotional examination administered by the state's Human Resources Division (HRD) for Boston Fire Captain and his name was placed on the eligible list for Boston Fire Captain established on June 25, 2021, with an expiration date of July 21, 2023. (the 2021 BFD Captain's List). (*HRD Letter to Commission dated 8/22/2023*)
3. On March 25, 2023, the Appellant took another promotional examination administered by HRD for Boston Fire Captain. (*HRD Letter to Commission dated 8/22/2023*)
4. On July 20, 2023, the BFD promoted BFD Fire Captain Shawn Gibbons, who was then at the top of the BFD District Chief's eligible list, to the position of District Fire Chief. (*Claim of Appeal*)
5. On July 20, 2021, the Appellant's name, originally ranked tied in 10<sup>th</sup> place on the 2021 BFD Captain's List, was listed in first place on that list, as a result of prior promotions.

6. On July 22, 2023, HRD established a new Boston Fire Captain's Eligible list (the 2023 Boston Captain's List) and revoked the 2021 Boston Fire Captain's List. (*HRD Letter to Commission dated 8/22/2023*)

7. The Appellant's name is ranked 35<sup>th</sup> (tied with 7 others) on the 2023 Boston Captain's List. (*HRD Letter to Commission dated 8/22/2023*)

8. Shawn Gibbons took and passed the March 2023 Boston District Chief's Examination and his name appeared on the 2023 District Chief's eligible list, also established on July 22, 2023, in 14<sup>th</sup> place. (*Appellant's Opposition*)

9. According to the Appellant, for some time beginning on July 21, 2023, the position vacated by Captain Gibbons was filled by lieutenants acting "out of grade" or Temporary Service in a Higher Rank (TSHR). At the August 22<sup>nd</sup> pre-hearing conference, the BFD was unable to confirm how the vacancy had been filled. For purposes of this motion, I draw the inference that the Appellant's representation is correct. (*Appellant's Opposition*)

10. At the Pre-Hearing Conference, BFD's Deputy Commissioner of Labor Relations, Connie Wong, stated that she first learned of the BFD's decision to promote Captain Gibbons to District Fire Chief, to fill a newly created position in the recently established Boston Fire Cadet Program, on July 19, 2023. Prior to that time, Deputy Commissioner Wong was not aware that the BFD intended to make any further promotions to District Chief (or any other BFD promotions) from the soon-to-expire eligible lists.

11. Shawn Gibbons's father was a member of the BFD who died in the line of duty. (*Appellant's Opposition*)

## **APPLICABLE LEGAL STANDARD**

The Commission may, on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3). A motion to resolve an appeal before the Commission, in whole or in part, via summary decision may be filed pursuant to 801 C.M.R. 1.01(7)(h). An appeal may be disposed of, however, on summary disposition only when, “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co. v. 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). See also, Mangino v. HRD, 27 MCSR 34 (2014) and cases cited (“The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing.”); Morehouse v. Weymouth Fire Dept., 26 MCSR 176 (2013) (“a party may move for summary decision when . . . that there is no genuine issue of fact relating to his or her claim or defense and the party is entitled to prevail as a matter of law.”)

## **ANALYSIS**

The undisputed facts, viewed in a light most favorable to the Appellant, establish that his appeal must be dismissed.

First, a person’s ranking on an eligible list does not create any “vested right” or expectation to receive an appointment or promotion during the life of the eligible list. In Callanan v. Personnel Administrator, 400 Mass. 597, 601 (1987), the plaintiffs, BFD firefighters, claimed that failure of

the personnel administrator [HRD] to establish the eligible list for district fire chief deprived them of the opportunity to be considered for promotion to fire lieutenant before the time for expiration of the lieutenant's eligibility list. The delay in creating the district fire chief list had a “ripple effect” and prevented promotions from captains to fire chief, from lieutenants to captain, and hence from fire fighter to fire lieutenant. In rejecting the plaintiff’s claims, the Supreme Judicial Court stated: “The system the Legislature created, in which eligible lists expire and are replaced by new lists, involves risk that positions might become available immediately after the expiration of an old list – or immediately before the establishment of a new list. . . . [T]he statute does not justify expectations that certain positions will become available during the period of a single list.” See also Brackett v. Civil Service Comm’n., 447 Mass. 233, 252-53 (2006) and cases cited (placement on civil service list is no guarantee of appointment or promotion); Stuart v. Roache, 951 F.2d 446, 455 (1st Cir. 1991), cert. den., 504 U.S. 913 (1992) (“a police officer's expectation of promotion based on that list will not rise to the level of a “property interest” entitled to constitutional protection”); Davis v. Personnel Administrator, 27 Mass. App. Ct. 1113 (Rule 1:28) (citing Callanan), rev. den., 405 Mass. 1202 (1989).

Second, nothing in the civil service law specifically defines what constitutes a “vacancy”, 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); Gillespie et al v. Boston Police Dep’t., 24 MCSR 170 (2011); Mandracchia v. City of Everett, 21 MCSR 307 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007). Thus, when it comes to filling a vacancy in a civil service position, an appointing

authority is vested with “considerable authority . . . [and] retains the sole power to decide whether to fill vacancies on either a permanent or temporary basis.” City of Somerville v. Somerville Municipal Employee’s Ass’n, 20 Mass. App. Ct. 594, 597, *rev. den.*, 396 Mass. 1102 (1985). “The appointing authority . . . may not be required to appoint any person to a vacant post [and] may select, in the exercise of sound discretion, among persons eligible for promotion or may decline to make any promotion.” Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660, 6665 (1971); O’Toole v. Newton Fire Dep’t, 22 MCSR 563 (2009) (Notwithstanding a provision in the collective bargaining agreement to make “promotions as soon as practicable after a vacancy occurs”, the appointing authority “is not required under the civil service law to fill a permanent or a temporary vacancy in a permanent position.”)

Third, I have considered the Appellant’s contention that this case presents the rare situation, which the Commission does take seriously, in which an appointing authority was motivated by personal animus to manipulate the appointment process. *See, e.g., LeDuc v. City of Lawrence, after further investigation*, E-23-135 (2023), (mayor’s animus); Cutillo v. City of Malden, 23 MCSR 348 (2010) (police chief’s personal animus). I certainly appreciate the Appellant’s disappointment to learn that the BFD had appointed a District Fire Chief at the top of the eligible list a day or two before that list expired but that it would not make “ripple effect” appointments from the Captain’s list or any other eligible lists before those lists also expired at the same time. However, I find that, unlike other cases in which the Commission has been presented with concrete evidence of animus, here the Appellant has demonstrated no “reasonable expectation” that the BFD’s decisions were more than a legitimate management call. There is no dispute that Shawn Gibbons was then at the top of the eligible list for District Fire Chief and fully qualified to serve in that position, which had only been recently created to oversee the newly established Boston Fire

Cadet Program. The Appellant offers no explicit rationale sufficient to suggest that the BFD command staff harbored any ulterior motive against promoting him to Captain, but only that the BFD chose to appoint a person to District Chief with a “deeply personal connection to the Department” due to the tragic death of his father who had died in the line of duty while serving as a BFD firefighter. Although the timing of the appointment might be considered unusual, so were the unique circumstance surrounding the timing of the 2023 Boston Fire Promotional Examination. There simply isn’t enough here to warrant embarking on a fishing expedition or further investigation by the Commission.

In sum, the Appellant’s civil service rights have not been impaired and he is not aggrieved by the failure to fill a vacancy to which he might have been, but was not required to be, appointed. His position is no different than any other person who is not appointed from an eligible list before it expires, also referred to as “expiring on the vine,” which is the inevitable plight of any person whose name appears at the top of an eligible list when it expires as provided by law. This common phenomenon is inherent in the civil service appointment process. See, e.g., Eyma v. Department of Correction, 35 MCSR 227 (2022); Cuhna v. Department of Correction, 34 MSCR 224 (2021); Bergeron v. Town of Falmouth, 29 MCSR 546 (2016).

## **CONCLUSION**

For the reasons stated above, the BFD’s Motion to Dismiss is *allowed*, and the Appellant’s appeal under Case No. B2-23-109 is *dismissed*.

Civil Service Commission

/s/Paul M. Stein  
Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein, and Tivnan, Commissioners) on November 16, 2023.

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. 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:

James Hykel, Esq. (for Appellant)

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