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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2016-3450

PHILLIP CUCCHI & another¹

RECEIVED

vs.

AUG 02 2017

CITY OF NEWTON & others²

MA Off. of Attorney General
Administrative Law Division

MEMORANDUM OF DECISION AND ORDER ON DEFENDANTS' MOTION TO DISMISS

The plaintiffs, Phillip Cucchi and Ed Melendez (together "the plaintiffs"), are lieutenants with the City of Newton Fire Department ("the Department"). They brought the instant action against the defendants, the City of Newton ("the City"), the Civil Service Commission ("the Commission"), and the Human Resources Division of the Commonwealth of Massachusetts ("HRD") (collectively, "the defendants"), seeking judicial review of a September 1, 2016 Commission "Response to Request for Investigation" (Count I), and seeking a declaratory judgment pursuant to G. L. c. 231A that HRD's Personnel Administration Rule .08 applies to municipalities (Count II). This matter is now before the court on the defendants' motion to dismiss the complaint for lack of subject matter jurisdiction. For the reasons that follow, the defendant's motion is ALLOWED.

BACKGROUND

The following facts are taken from the complaint and the exhibits attached thereto. On September 1, 2009, HRD transferred civil service administrative functions in promotions to civil

¹ Ed Melendez

² Civil Service Commission and Human Resources Division of the Commonwealth of Massachusetts

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service municipalities. By memo dated November 24, 2009, HRD proposed amendments to the Personnel Administration Rules (“PAR”) that govern civil service appointments. The proposed changes included adding language to PAR .08 to specify when an eligibility list, from which appointments and promotions are made, effectively expires.³ In March 2010, the proposed changes went into effect, including PAR .08(2)(d) which states that, promotions cannot occur within three weeks of the expiration of an eligibility list, although “[a]n extension of the time period may be permitted by the administrator upon written request from the appointing authority” After the proposed changes went into effect, HRD distributed a certification handbook to municipalities who had delegated authority. The handbook included details regarding the promotion process, but did not include the specific timelines from PAR .08 as to when promotions were prohibited from occurring.

On April 4, 2016, Cucchi filed a request for the Commission to conduct an investigation into the Department’s “hiring practices for promotional positions.” That request alleged that the April 2016 captain promotion violated HRD’s PAR and the certification handbook because the Chief made that promotion shortly before the expiration of the captain eligibility list. According to Cucchi, this was done to benefit Gregory Gentile, the son of a longtime associate of the Chief.

On April 19, 2016, the Commission held a show-cause hearing. The information revealed at the hearing established that in 2014, HRD established an eligibility list for the position of Fire Captain in Newton. That list, which expired on April 10, 2016, included Gentile, Cucchi, and Melendez, among others. Gentile ranked at the top of this list. On March 25, 2016, an assistant fire chief in Newton passed away, creating a vacant position. On April 8, 2016, the Chief announced various promotions, including the promotion of Gentile to captain. On April

³ According to the plaintiffs, an “eligibility list” refers to the order ranking qualified candidates for promotion.

10, 2016, a new eligibility list was established based upon an updated promotional examination. On the newer list, Cucchi and Melendez were tied for the number three spot, while Gentile placed fifth. Based upon the language of PAR .08(2)(d), Cucchi argued at the hearing that Gentile's promotion to captain was invalid, and that the City was required to make the appointment from the updated list established on April 10, 2016. Cucchi argued that Gentile's promotion was based, in part, upon the chief's friendship with the Gentile family.

On June 20, 2016, Cucchi's request for investigation was amended to include Melendez as a petitioner. On September 1, 2016, the Commission issued its written Response to Request for Investigation and declined to exercise its discretionary authority to conduct an investigation. The Commission reasoned as follows: "[s]ince October 2009, the vast majority of functions related to promotional appointments, previously performed by the Personnel Administrator (HRD), have been delegated to appointing authorities." (emphasis in original). According to the Commission, the timeframes referenced in PAR .08 are not referenced in the handbook and thus, according to the Commission, the language from PAR .08, stating that the Personnel Administrator will not issue certifications within three weeks of the expiration of an eligibility list, was "moot." Even if the language was not moot, according to the Commission, PAR .08 allows for extensions of time when "permitted by the administrator." The Commission determined that the appointing authority here effectively granted itself a time extension. On September 7, 2016, the plaintiffs requested reconsideration of the Commission's decision, which the Commission denied in a decision dated October 13, 2016.⁴

⁴ The decision was sent to the plaintiffs the next day, October 14, 2016.

The plaintiffs filed this suit on November 20, 2016. The defendants moved to dismiss on March 31, 2017.⁵ The court heard oral argument from the parties on July 11, 2017.

DISCUSSION

When evaluating the sufficiency of a complaint under the motion to dismiss standard of Mass. R. Civ. P. 12(b)(6), the court must accept as true the factual allegations of the complaint and all reasonable inferences drawn from those allegations that are favorable to the plaintiff. Blank v. Chelmsford Ob/Gyn, P.C., 420 Mass. 404, 407 (1995). The complaint must contain “allegations plausibly suggesting (not merely consistent with) an entitlement to relief . . .” Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008), quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). While the complaint need not set forth detailed factual allegations, a plaintiff is required to present more than mere labels and conclusions and must raise a right to relief “above the speculative level.” Id.

In Count I, pursuant to G. L. c. 30A, § 14, the plaintiffs seek judicial review of the Commission’s decision dismissing the plaintiffs’ request for an investigation, as well as denial of the plaintiffs’ request to reconsider. The defendants argue that dismissal is proper because the plaintiffs lack standing to challenge the Commission’s decision declining to pursue an investigation for three reasons: (1) because responses to investigation requests are generally not reviewable as they are discretionary agency decisions; (2) because the plaintiffs are not “aggrieved” persons under the statute; and (3) because the plaintiff’s suit was untimely pursuant to G. L. c. 31, § 44.

⁵ The state defendants, the Civil Service Commission and the Human Resources Division, filed a comprehensive memorandum in support of their motion to dismiss. The City filed a brief memorandum stating that “[t]he City agrees with, endorses and adopts the state defendants’ arguments”

The court will address the timeliness issue, as it dispositive of the case. Massachusetts General Law c. 31, § 44 governs judicial review of Commission decisions, and states: “Any party aggrieved by a final order or decision of the commission following a hearing . . . may institute proceedings for judicial review in the superior court within thirty days after receipt of such order or decision.” G. L. c. 31, § 44 (emphasis added). The statute goes on to state that, “[a]ny proceedings in the superior court shall, insofar as applicable, be governed by the provisions of section fourteen of chapter thirty A”

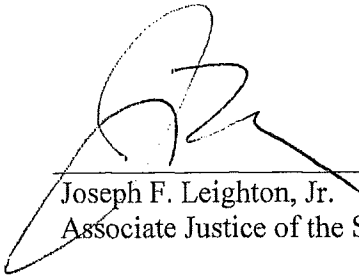
Here, the Commission’s original decision was issued on September 1, 2016. The plaintiff’s filed the instant complaint with this court eighty days later, on November 10, 2016. In the interim, the plaintiffs filed a “Request for Reconsideration of Commission’s Declination of Investigation” on September 7, 2016. Complaint, Exhibit 3. The plaintiffs contend that a complaint need only be filed within thirty days of the Commission’s denial of the plaintiff’s motion for reconsideration, rather than within thirty days of the Commission’s initial decision. Section 44 of G. L. c. 31 provides that “proceedings in the superior court shall, insofar as applicable, be governed by the provisions of [c. 30A, § 14]” G. L. c. 31, § 44. Massachusetts General Laws c. 30A specifically provides that actions for judicial review in the Superior Court “shall, “except as otherwise provided by law, be commenced in the court within thirty days after receipt of notice of the final decision of the agency or if a petition for rehearing has been timely filed with the agency, within thirty days after receipt of notice of agency denial of such petition for rehearing.” Since c. 30A provides this tolling provision, and G. L. c. 31, § 44 cross references c. 30A, the plaintiffs claim the motion for reconsideration tolled the thirty-day period in which to file an appeal with this court.

The defendants, in opposition, note that the Commission's own policy instructs that a motion for reconsideration does not toll the thirty-day time period provided in G. L. c. 31, § 44. More persuasively, the defendants direct this court to Curley v. Lynn, 408 Mass. 39 (1990). In Curley, the Supreme Judicial Court held that a motion for reconsideration filed before the Commission did not toll the statutorily prescribed thirty-day period for seeking judicial review under G. L. c. 31, § 44. Id. at 41-42. Although the Supreme Judicial Court in Curley was interpreting a prior version of G. L. c. 31, § 44, the provision in the statute regarding the *time period* in which a party must seek judicial review was not changed in the new version.⁶ It is true, as the plaintiffs note, that the previous version of the statute did not make reference to G. L. c. 30A as the statute does now; however, this does not change the fact that G. L. c. 31, § 44 prescribes a time period in which judicial review must be properly sought in this court. Further, as counsel for the City noted at oral argument, if the legislature intended a tolling provision to apply to G. L. c. 31, § 44, it could have included such a provision directly in the statute. The court concludes that Curley remains good law and is controlling. The motion for reconsideration did not toll the thirty-day period for seeking judicial review and, thus, Plaintiff's complaint was untimely. Accordingly, dismissal is proper.

⁶ The relevant portion of the statute, as quoted by the Supreme Judicial Court in Curley, provides: "Within thirty days after receiving notice of the decision of the commission following a hearing requested by him pursuant to section forty-two or section forty-three, a person may, if he is aggrieved by such decision, file a petition (for judicial review)"

ORDER

For the foregoing reasons, the defendants' motion to dismiss is **ALLOWED**.



Joseph F. Leighton, Jr.
Associate Justice of the Superior Court

July 28, 2017