

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RE: Request for Investigation against the Newton Fire Department by Petitioners Philip Cucchi & Edgardo Melendez¹

Tracking Number: I-16-064

Appearance for Petitioners:

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Appearance for Newton Fire Department:

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Commissioner:

Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION

1. On April 4, 2016, the Petitioner, Philip D. Cucchi (Mr. Cucchi), filed a request for the Civil Service Commission (Commission) to conduct an investigation into “the City of Newton Fire Department’s hiring practices for promotional positions.”
2. On April 19, 2016, I held a show cause hearing for Mr. Cucchi to show why the Commission should conduct an investigation. The show cause hearing was attended by counsel for the City of Newton (City), the City’s Fire Chief and Deputy Fire Chief; counsel for the state’s Human Resources Division (HRD); and Mr. Cucchi.
3. The show cause hearing was also attended by Attorney Leah Barrault, who subsequently

¹ On June 20, 2016, Mr. Melendez, via counsel, submitted a request to be added as a Petitioner, which I have allowed.

filed an appearance on behalf of Mr. Cucchi and Edgardo Melendez. Attorney Barrault stated that she would be seeking to amend the Petition to add Mr. Melendez as a Petitioner, which occurred on June 20th.

4. The information that follows (below) is based on the statements of those present at the show cause hearing and the documents submitted and/or referenced as of the date of the pre-hearing conference.
5. In 2014, HRD established an eligible list for the position of Fire Captain for the Newton Fire Department. Five (5) names appeared on that eligible list in the following order: 1) **Gregory Gentile**; 2) Michael Caddell; 3) **Phillip Cucchi**; 4) Michael Murphy; 5) **Edgardo Melendez**.
6. The 2014 eligible list for Fire Captain expired on or about 4/10/16, when HRD established a new eligible list for Fire Captain in Newton.
7. On or about March 25, 2016, an Assistant Fire Chief passed away after an illness, creating a permanent vacancy in that position (Assistant Fire Chief), Deputy Fire Chief and Captain.
8. On or about March 29, 2016, approximately twelve (12) days prior to the expiration of the eligible list for Captain, the Fire Chief made promotional appointments to Assistant Fire Chief, Deputy Fire Chief and Captain.
9. **Gregory Gentile**, who was ranked first on the eligible list set to expire on April 10, 2016, was promoted to Captain.
10. On April 10, 2016, a new eligible list for Captain was established, based on a subsequent promotional examination. Eight (8) names appeared on that eligible list in the following order: 1) Mark Hernandez; 2) Michael Caddell; 3) **Phillip Cucchi**, Eric Fricke & **Edgardo Melendez** (tied); 4) Chris Markoski; 5) **Gregory Gentile**; 6) Thomas McGary.
11. Citing PAR.08(d), the Petitioners argued that Newton, as the “delegated” Administrator, was prohibited from creating a Certification within three (3) weeks of the expiration of the eligible list. Thus, they argued that the promotional appointment of Gregory Gentile to Fire Captain was invalid.
12. The Petitioners argued that the City was required to make the promotional appointment from the new eligible list, established on April 10, 2016. (As reference above, the Petitioners are tied for third on the new eligible list and Mr. Gentile is ranked fifth.)
13. In support of initiating an investigation, the Petitioners argued that the decision to promote Mr. Gentile from the eligible list that was about to expire was based on the Fire Chief’s purported friendship with Mr. Gentile and his family.
14. At the show cause hearing, the City’s Fire Chief strongly disputed any allegation of personal bias and stated that, while, at one point he had a friendship with Mr. Gentile’s father, they

have not socialized in approximately five (5) years.

15. The City disputed that the promotional appointment of Mr. Gentile violated the PARs, particularly in light of the authority that has been delegated to them (and all other civil service cities and towns) since 2009.
16. Counsel for HRD stated that, based on an initial review of this matter, the promotional appointment was valid, citing those provisions of G.L. c. 31, s. 8 regarding temporary appointments becoming permanent.
17. Based on the above information, including the fact that HRD appeared to be undertaking its own review of this matter, I ordered the following as part of a Procedural Order issued on April 20, 2016:
 - A. The City shall, forthwith, forward this Procedural Order to Gregory Gentile.
 - B. Mr. Gentile, should he wish to participate in this matter, shall file a [Notice of Appearance](#) with the Commission with his current contact information, including his email address.
 - C. On or before May 20, 2016, HRD shall complete its review of this matter and report its findings and conclusions to the Commission, the City, the Petitioners and Mr. Gentile, should he have filed a Notice of Appearance by that date. HRD's response should include, but not be limited to, a determination as to whether the promotional appointment to Fire Captain, referenced above, is a violation of any civil service law or rule.
 - D. Upon receipt of HRD's findings, the Petitioners will have ten (10) days thereafter to supplement their Petition to show cause why the Commission should initiate an investigation.
 - E. Upon receipt of the Petitioner's supplemental filing, the City and Mr. Gentile, should he have filed a Notice of Appearance by that date, will have ten (10) days thereafter to file a reply.
18. On April 26, 2016, the City forwarded the Procedural Order to Mr. Gentile.
19. On May 10, 2016, Mr. Gentile filed a Notice of Appearance.
20. On May 20, 2016, HRD submitted their "findings in its review of the City of Newton's promotions."
21. HRD's findings state in relevant part:

"On March 18, 2016, HRD notified the Appointing Authorities by memorandum that on April 10, 2016, it will establish the new eligible lists resulting from the November 2015 Fire Promotional Series Examination for Fire Lieutenant and Captain. Included in the

memorandum, HRD advised Appointing Authorities that ‘Promotions made through the certification delegation process off of a current eligible list will be valid only if the selected individuals receive the promotion on or before April 9, 2016.’

The [Newton Fire] Department appointed candidates for the promotional positions of Fire Lieutenant, Fire Captain, and Deputy Fire Chief effective April 8, 2016. Prior to selection, all candidates considered for each vacancy were notified, and signed the certification indicating their willingness for consideration. An interview committee conducted the interviews of the candidates, and made their recommendations. You [Fire Chief] approved the recommendations of the committee. The selected candidates for each vacancy were performing the duties of the position for approximately one (1) year, having been appointed to the position in a temporary capacity. The permanent vacancies for each position were created by the passing of the former Assistant Fire Chief on or about March 24, 2016.

HRD issued the new eligible lists for Fire Lieutenant and Captain on April 10, 2016. Based upon our review, the promotional process for each vacancy was conducted consistent with Massachusetts General Laws Chapter 31. Therefore, HRD finds no violation of Chapter 31.”

22. On May 31, 2016, the Petitioners submitted a twenty-four (24)-page “Statement in Support of Petition for Investigation” with hundreds of pages attached.
23. In summary, the Petitioners’ Statement argues that the promotions violated provisions of the Personnel Administration Rules (PARs) and the “Certification Handbook” which HRD provided to all Appointing Authorities in 2009 regarding delegation. In regard to the promotion to Captain, the Petitioners argue that the April 8th promotion “capped a year of extraordinary efforts by the Chief to benefit Gentile, which included making an unprecedented temporary promotion of Gentile to Acting Captain and pleading with the City, the City Council and the Union to suspend ordinances to allow for the creation of a new position to enable this promotion” to benefit “the son of the Chief’s longtime associate Donny [Gentile].”
24. In regard to the PARs, the Petitioners argue that the timing of the promotion here violated PAR.08(d) which, according to the Petitioners, “clearly states that promotions cannot occur within three weeks of the expiration of the [eligible] list.”
25. In regard to the Certification handbook, the Petitioners argue that the City failed to comply with the provisions of this handbook by failing to provide written notification to the candidates of the vacancy. Here, according to the Petitioners “no written notice occurred. The City, instead, provided oral notice and allowed candidates to sign the certification only if they agreed to be interviewed, in clear violation of the Certification Handbook.”
26. Finally, the Petitioners, in their statement, ask the Commission to view the above-referenced steps in the context of a process which they describe as “pre-ordained to promote Gentile permanently to Captain.”
27. On June 13, 2016, the Commission received the City’s opposition to the Petitioners’ request for investigation. In its response, the City states that the initial eligible list for Fire Captain,

sent to the City by HRD on May 20, 2014, was initially set to expire on May 20, 2016. On March 18, 2016, HRD forwarded a memorandum to appointing authorities, including the City, stating that the Fire Captain eligible list would be revoked on April 9, 2016. The HRD memorandum stated in relevant part: "Promotions made through the certification delegation process off of a current eligible list will be valid only if the selected individuals receive the promotion on or before April 9, 2016. Candidates cannot be promoted subsequent to the revocation of an eligible list on which their name appears."

28. According to the City, at the time it received the March 18th memorandum from HRD, the City's permanent Assistant Fire Chief was on sick leave, suffering from a terminal illness. One week later, on March 25, 2016, the permanent Assistant Fire Chief passed away, creating a vacancy in that position and the attendant positions below, including Fire Captain.
29. According to the City, the Fire Chief, after the death of the permanent Assistant Fire Chief, began the process of securing signatures from eligible, interested candidates (from the list now set to expire on April 9th), formed interview committees and conducted interviews on April 4th and April 7th. According to the City, the Fire Chief accepted the recommendations of the interview committees and, in regard to the Fire Captain position, appointed Mr. Gentile, who was ranked first on the eligible list in place at time, as permanent Fire Captain.
30. The City argues that the Fire Chief's decision to make appointments from the eligible list in place at the time was in compliance with civil service law and rules and was not the result of any favoritism. The City argues that since the eligible list was *revoked* on April 9, 2016, but was initially set to *expire* on May 20, 2016, the City's April 8th appointments fall well within the three-week period cited by the Petitioners. Finally, the City argues that the Commission should afford the appropriate weight and deference to HRD's conclusion that the promotional appointment did not violate any civil service law or rule.

Applicable Laws and Rules

The Commission maintains authority under G.L. c. 31, § 2(a) to conduct investigations. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm'n & others, No. 2013-00639-D, Suffolk Superior Court (2014). We exercise this discretion "sparingly". See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011)

G.L. c. 31, s. 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 one of the following types of examinations: ... (c) a competitive promotional examination pursuant to section eleven, provided that promotional appointments in such police and fire forces of cities and towns as are within the official service shall be made pursuant to section fifty-nine or section sixty-five."

G.L. c. 31, s. 59 states in relevant part:

“... original and promotional appointments in police and fire forces of cities and of such towns where such forces are within the official service, including appointments to the position of chief or similar position where the civil service law and rules are applicable to such position, shall be made only after competitive examination except as otherwise provided by section sixty and by sections thirty-six and thirty-six A of chapter forty-eight.”

Personnel Administration Rule .08 (PAR.08) states in relevant part:

“(1) Whenever any appointing authority shall make requisition to fill a position, the Personnel Administrator shall, if a suitable eligible list exists, certify the names standing highest on such list in order of their place on such list, except as otherwise provided by law or civil service rule. Insofar as possible, sufficient names shall be certified to enable such appointing authority to make appointments from among the number specified in PAR.09.

(2) Unless an appointing authority shall, within the time periods set forth in this paragraph, make and notify the administrator of an appointment from the names certified, the certification shall become void. An extension of the time period may be permitted by the administrator upon written request from the appointing authority, stating sound and sufficient reasons as to why the appointments cannot be made during the time periods set forth. The time periods are as follows:

(a) within three weeks of any certification of names to the appointing authority by the administrator from any eligible list established as the result of a promotional examination;

(b) within six weeks of any certification of names to the appointing authority by the administrator from any eligible list established as the result of an open competitive non-public safety examination;

(c) within twelve weeks of any certification of names to the appointing authority by the Administrator from any eligible list established as the result of an open competitive public safety examination.

(d) In the event that an eligibility list will expire within the time periods listed in (a) – (c) above, the administrator will decline to issue a certification from the list.”

In October 2009, HRD delegated various functions related to promotional (and original) appointments to cities and towns including the creation of Certifications from eligible lists. The delegations instructions state in relevant part:

“When a vacancy occurs within a department, a list of candidates is generated by the Appointing Authority. This list is called a certification.

The number of names on a certification is based on the number of vacancies identified by the Appointing Authority and Personnel Administration Rule .09 requires that the certification contain enough names to reflect at least twice the number of vacancies plus 1 (2n + 1). The Appointing Authority may certify names in excess of the minimum number to insure adequate response from candidates on the list.

The certification will contain the name and address of the Appointing Authority from the municipality filling the vacancy. An original list and one copy are to be maintained by the Appointing Authority. The heading of the certification summarizes primary information about the position; that is, the number and type of vacancies, and a statement of any required licenses which the applicant must present at the time of the interview.

The last page of the certification contains in the lower left-hand corner the date by which the signed certification and promotions must be processed. All processing of candidates should be completed by that date; if the Appointing Authority finds that, due to unusual circumstances, the certification cannot be processed by the due date, a written statement, signed by the Appointing Authority and stating the reason for the delay and the length of time which will be required for its completion must be documented and maintained with the certification.

At the time that the certification is generated by the Appointing Authority, interview notices or Notices to Appear are to be mailed to all those candidates whose names appear on the certification. The notice tells candidates where and to whom they must report to sign the certification if they wish to be considered for promotion; this information is drawn from the requisition. Candidates are given a specific date by which they must respond. Interview notices for vacancies are forwarded to the local Police Chief or Fire Chief for distribution. Police and Fire Chiefs are asked to remember that it is their responsibility to insure that the interview notices are mailed, delivered, or handed to the candidates in adequate time to insure their ability to be considered on the certification.

If the person identified as interviewer is different from the Appointing Authority, the Appointing Authority should provide the interviewer with the certification package immediately upon its receipt, to insure that incumbents will have access to a list to sign when they report for interview.”

Analysis

The Petitioners’ request for an investigation is based on two (2) premises:

- 1) The promotional appointments made here were invalid because the City violated the PARs by: a) making promotional appointments within three (3) weeks of the expiration of the eligible list; and b) failing to notify the candidates *in writing* that their names appeared on a Certification; and
- 2) The Fire Chief’s decision to make promotional appointments from an existing eligible list, as opposed to waiting for the next eligible list to be established, was based on favoritism by the Fire Chief.

I don't believe the City violated the above-referenced sections of PAR.08 by making promotional appointments on April 8, 2016. Since October 2009, the vast majority of functions related to promotional appointments, previously performed by the Personnel Administrator (HRD), have been *delegated* to appointing authorities.

The timeframes referenced in PAR.08, which are *not* referenced in the delegation handbook, clearly were written in a "pre-delegation context" in which HRD was responsible for issuing the Certification to the appointing authority from an eligible list; being notified of the candidate(s) appointed as well as receiving and reviewing the reasons for bypassing any candidates. Post-delegation, HRD no longer performs *any* of these functions regarding promotional appointments. Thus, the PAR.08 language which states that the Personnel Administrator will not issue Certifications within three (3) weeks of the expiration of an eligible list is effectively moot.

Even if it was not moot, and the Appointing Authority was required to abide by this time restriction, the language in PAR.08 allows for extensions which the Appointing Authority, now serving in the role of the Personnel Administrator, effectively granted itself here.

The City tacitly acknowledges that it did not notify the candidates *in writing* that their names appeared on a promotional Certification. It is undisputed, however, that the Petitioner who was within the statutory 2N+1 formula (Mr. Cucchi) was *aware of the Certification, signed the Certification and was interviewed for the promotional appointment*. I simply don't see how this administrative oversight by the City in any way prejudiced the Petitioners or, more broadly, warrants the initiation of an investigation by the Commission.

That leaves the allegation that the Fire Chief's decision to make promotional appointments from an existing eligible list was based on favoritism. Specifically, the Petitioners allege that a personal friendship between the Fire Chief and Mr. Gentile's father caused the Fire Chief to rush the appointment process to ensure that Mr. Gentile, who was ranked first on the soon-expiring eligible list, was promoted to the position of permanent Fire Captain.

While such allegations are routinely considered as part of *bypass appeals*, where an appointing authority promotes a lower-ranked candidate on a Certification, it is undisputed that no bypass occurred here. Rather, Mr. Gentile was ranked first among those willing to accept the promotional appointment.

Further, it is inherent in the civil service process that, based on the ongoing creation and expiration of eligible lists, some candidates will benefit from the timing of promotional appointments and others will not. See Callanan v. Personnel Adm'r, 400 Mass. 597, 600 (1987).

In considering whether to take the step of initiating an investigation, I also considered that the Petitioners here are not ranked first – or second – on the new eligible list for Fire Captain, but, rather, third.

Finally, the Petitioners, in effect, argue that the Fire Chief orchestrated almost every aspect of these promotions to ensure that Mr. Gentile was promoted to Fire Captain. The stark reality is

that Mr. Gentile's promotional appointment, in large part, resulted from Mr. Gentile scoring higher than the Petitioners (who were ranked third and fifth on the eligible list in place at the time) on a civil service promotional examination and the untimely death of the City's Assistant Fire Chief, which created a permanent vacancy in that position and positions below it – two (2) factors clearly beyond the Fire Chief's control.

After considering all of the above information, I conclude that an investigation, beyond that already conducted here, is not warranted and that this matter be *closed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on September 1, 2016.

Notice:
Patrick Bryant, Esq. (for Petitioners)
Donnalyn B. Lynch Kahn, Esq. (for City of Newton)
Melissa Thomson, Esq. (HRD)