

COMMONWEALTH OF MASSACHUSETTS

Decision mailed: 1/8/10
Civil Service Commission 03

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

MICHAEL CUTILLO &
JOHN P. KELLEY,
Appellant

Cutillo (E-09-254)
Kelley (E-09-255)

v.

CITY OF MALDEN,
Respondent

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Commissioner:

Christopher C. Bowman

DECISION ON JOINT REQUEST FOR RELIEF UNDER
CHAPTER 310 OF THE ACTS OF 1993

Malden Police Officers Michael Cutillo and John Kelley (hereinafter “Appellants”) and the City of Malden (hereinafter “City”) filed a Joint Request for Relief under Chapter 310 of the Acts of 1993 (“310 Relief”) with the Civil Service Commission (hereinafter “Commission”) on May 22, 2009.

The Appellants, claiming that they were aggrieved through no fault of their own, are asking the Commission to order the State’s Human Resources Division (hereinafter “HRD”) to revive an expired eligible list for the position of sergeant in the City of Malden upon which their names appeared at the top, or, in the alternative, place their names at the top of the next Certification to be issued to the City for the position of sergeant from the newly established eligible list.

Malden Police Officers Margaret MacDonald, Frank Spinale, Evan Tuxbury and Steven Noble, moved to intervene in this case. I denied their motion to intervene, but did deem them “participants” pursuant to 801 CMR 1.01 (9) (e). The Participants, sitting atop the newly established eligible list, oppose the joint motion of the Appellants and the City.

A pre-hearing was conducted on June 18, 2009 and a motion hearing was conducted over two days on August 20, 2009 and December 11, 2009¹. The motion hearing, which was digitally recorded, was attended by counsel for the Appellants, the City, the Participants and the state’s Human Resources Division (hereinafter “HRD”). All parties submitted written briefs to the Commission.

¹ Malden Police Commissioner Anthony Spadafora was unable to attend the first day of hearing at the offices of the Commission due to a medical appointment. As I deemed his testimony central to the instant

Factual Background

Based on the fifteen (15) documents submitted, the parties' post-hearing briefs and the testimony of Mayor Richard C. Howard, Police Commissioner Anthony Spadafora and Police Chief Kenneth Coye, I make the following findings of fact:

1. On October 21, 2006, HRD held the departmental promotional examination for Malden Police Sergeant. Both Appellants took and passed this examination.
2. On March 30, 2007, HRD established the "eligible list" for Malden Police Sergeant. The names of both Appellants appeared on that eligible list.
3. An individual's eligibility, pursuant to G.L. c. 31, § 25, is effective for a maximum of two years. It may, however, be in effect for a longer period of time if one of three of the following exceptions applies: (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order; or (3) no new list is established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position for which the original list was established; provided, however, that the administrator may revoke the eligibility of the entire list or of any persons on such list subsequent to said two-year period if he shall determine that the effective maintenance of the merit system so requires such revocation and, provided further, that a written notice and explanation for said revocation is sent to the clerks of the senate and house of representatives.

appeals, I convened a second day of hearing at Malden City Hall to take his testimony, as opposed to relyin on an affidavit that was submitted and marked as Exhibit 2.

4. On January 18, 2009, a vacancy occurred in the Malden Police Department due to a Captain retiring.
5. Police Commissioner Anthony Spadafora, appointed by the City's Mayor, is the Appointing Authority for the Malden Police Department. He has served as Police Commissioner for approximately twenty-five years. He has no role in the daily operation of the Police Department, which is managed by Police Chief Kenneth Coye.
6. On January 20, 2009, the City submitted a requisition to HRD to fill a vacancy for the position of Captain. At the same time, the City submitted a requisition to fill the vacancies that would occur in the positions of lieutenant and sergeant after the respective promotion occurred.
7. On January 27, 2009, HRD issued "Certification" No. 290040 with the following three names for the position of sergeant: Michael Cutillo, John Kelley and Steve Lubinger. Cutillo was ranked first and Kelley and Lubinger were ranked second. (Appointing Authorities may appoint only from among the first $2n + 1$ persons in the Certification willing to accept appointment, with n being equal to the number of positions available. PAR.09)
8. Cutillo, Kelley and Lubinger all signed the Certification indicating their willingness to accept appointment if selected.
9. Commissioner Spadafora testified that in his 25-year tenure as Police Commissioner, the Malden Police Department has always granted promotions in strict accordance with the rank order of the civil service Certification. Here, that would mean that Cutillo, whose name appeared at the top of the Certification, would be chosen for the one (1) vacant sergeant position.

10. PAR.08 provides that appointing authorities are given three weeks in which to make and notify HRD of promotional appointments from the names certified. An appointing authority may request an extension of time in which to complete the promotional process.
11. There was divergent testimony regarding why the City did not return the Certification for sergeant to HRD within three weeks of January 27, 2009 and /or request an extension.
12. On February 13, 2009, within the above-referenced three week time period, Cutillo filed a grievance with the City stating, "the Chief refuses to appoint the Senior Patrolman as defined by Civil Service Regulations and Rules to the position of sergeant for the Malden Police Department." That same day, Chief Coye ruled on Cutillo's grievance stating in relevant part: "I am denying it. At present there are fifteen sergeants on the roster. There are no openings. Promotion is also a non-delegable right of management. The City has the right and must have the right to choose the size of the department."
13. Chief Coye testified before the Commission that although this reason was not explicitly stated in the denial of the Appellant's grievance, both the sergeant and lieutenant vacancy were not being filled due to uncertainties regarding anticipated cuts in local aid.
14. On February 17, 2009, Mayor Richard Howard sent a memo to the City's Finance Committee outlining steps he was taking to respond to approximately \$1.5 million in local aid cuts in the existing fiscal year (FY09). As part of that memo, the Mayor

listed a \$35,000 budget reduction in the Police Department for “various P.S. accounts / vacancies”.

15. Mayor Howard testified before the Commission that shortly before issuing that memo, he informed the Police Chief that funding was only available to fill the vacant captain position and not the resulting vacancies for lieutenant or sergeant.
16. The candidate at the top of the lieutenant list filed a similar grievance on March 12, 2009. In denying that grievance, Chief Coye did state in relevant part, “It is the position of the Police Department that we simply do not have the money at this time. Malden was shorted \$1.6 million in the present fiscal year...”
17. Commissioner Spadafora testified before the Commission that he was never informed by the Mayor or the Police Chief that the positions of lieutenant or sergeant could not be filled due to cuts in local aid.
18. Commissioner Spadafora testified that shortly after Cutillo’s February 13, 2009 grievance hearing, he (Spadafora) and Chief Coye had a conversation at Spadafora’s place of business. During that conversation, Spadafora said to Coye words to the effect, “I helped you become a lieutenant [years ago], why can’t you help me make [Cutillo] a sergeant?”² In response, Coye said words to the effect that his (Coye’s) daughter would be upset with him and that it would be personally embarrassing to him if Cutillo were to be promoted to sergeant. Spadaforra was told by other members of the Department that Coye disliked Cutillo due to an alleged traffic incident many years ago when Cutillo was investigating an accident that involved Coye’s daughter.

² Spadafora testified that he has never met Cutillo and that his desire to “help him out” was solely a result of Cutillo’s grievance hearing.

19. In regard to the above-referenced conversation between Spadafora and Coye, I credit the testimony of Spadafora. Although Spadafora's didn't recall exact dates and other relevant details, he appeared to have a vivid recollection of this particular conversation. Further, his testimony does not appear to stem from any personal animus toward the Police Chief. On the contrary, during Spadafora's testimony, he talked about ongoing meetings he has with the Police Chief over coffee and the two of them left City Hall together at the conclusion of this hearing.

20. Coye testified that he has no personal animus or bias against Cutillo. Regretfully, I do not credit his testimony for the following reasons. First, it is contrary to the above-referenced credible testimony of Spadafora. Second, I found Coye's testimony before the Commission to be hesitant and less than forthcoming. It didn't ring true to me. Finally, for reasons discussed in the findings below, Coye was eventually required to offer written recommendations regarding who should be promoted to sergeant. At my request, he submitted those written recommendations to the Commission. I found his written comments regarding Cutillo to be curiously personal in nature, as opposed to an objective comparison of the eligible candidates. For all of these reasons, I find that Chief Coye had a personal animus for Cutillo.

21. Cutillo argues that he was denied a promotional appointment to sergeant for two reasons: 1) Coye's personal bias; and 2) HRD's refusal to issue a new Certification after March 31, 2009, when Coye eventually agreed to facilitate the appointment of Cutillo. (Kelley's appeal rests solely on HRD's refusal to issue a new Certification). For reasons discussed in more detail below, I have found that HRD was not required to issue a new Certification after March 31, 2009. Thus, findings regarding the first

leg of Cutillo's appeal will determine whether his appeal is successful and whether he is entitled to any relief.

22. Coye and Mayor Howard have testified that, during the three-week period after the Certification was issued by HRD on January 27, 2009, the promotional appointments for sergeant and lieutenant were temporarily put on hold due to budgetary reasons. Thus, according to Coye and Howard's testimony, even if Coye did have a personal bias against Cutillo, it would not have mattered because Cutillo would not have been appointed during this three-week period anyway.
23. While I found Mayor Howard to be a consummate professional who took his testimony before the Commission seriously, I am not inclined to dissect the exact extent to which Coye's personal bias may have led to the failure to process the January 27, 2009 Certification in a timely manner. Rather, I find that Coye's personal bias toward Cutillo likely played some role in the failure to process the January 27, 2009 Certification and/or seek an extension from HRD. At a minimum, had Coye not had a personal bias for Cutillo, he likely would have been more diligent in seeking an extension from HRD or providing the Mayor with an informed "heads-up" that failure to process the Certification before March 31, 2009 would prevent anyone from the eligible list at the time from being promoted. Given Coye's personal bias against Cutillo, he should have recused himself from this particular promotional process. He did not. As a result, he has cast a cloud over the entire selection process which is the subject of the instant appeals.

24. Pursuant to PAR.08, Certification No. 290040 expired on February 17, 2009. It is undisputed that the City did not seek an extension of that Certification. Further, it did not ultimately requisition another Certification until after March 31, 2009.
25. As referenced above, an eligible list (which is used to produce Certifications upon requisition from cities and towns) is effective for a maximum of two years. It may, however, be in effect for a longer period of time if one of three exceptions referenced in Finding 3 applies. G.L. c. 31, § 25.
26. The eligible list in question, established on March 31, 2007, was scheduled to expire on March 31, 2009.
27. On March 27, 2009, Plaintiffs in Pratt v. Human Resources Division and Civil Service Commission, SUCV2009-01254, filed a Request for Injunctive Relief in Superior Court to prevent HRD from issuing the anticipated 2009 police promotional eligible lists in “bands”.
28. Up until the filing on March 27, 2009, of a motion for preliminary injunction by the Pratt plaintiffs, HRD intended to revoke all previously established police promotional eligible lists, including the eligible list for Malden Police Sergeant, on March 30, 2009.
29. On March 28, 2009, a Malden police sergeant retired, creating a second sergeant vacancy in the Malden Police Department.
30. As of March 30, 2009, HRD ceased issuing Certifications from the 2007 sergeant eligible list.
31. On April 2, 2009, Mayor Howard issued a memorandum stating in relevant part that the Police Department may move forward with the filling of the lieutenant and [2]

sergeant vacancies. During his testimony before the Commission, Mayor Howard testified that he allowed the promotions to go forward at this point due to anticipated “COPS” grant funding.

32. On April 6, 2009, Coye requested another Certification from HRD, this time to fill 2 sergeant vacancies.

33. HRD did not issue a Certification for the City’s April 6, 2009 requisition because of the pending Pratt litigation.

34. On April 9, 2009, HRD notified Coye that Certification No. 290040 had expired on February 17, 2009.

35. On April 15, 2009, the Superior Court enjoined HRD “from issuing eligibility lists for the promotion of police officers in score bands rather than in the manner in which it has been doing so until a final resolution of this matter on its merits.” HRD had thirty days during which it could have appealed the Superior Court’s decision.

36. On April 29, 2009, despite being notified that Certification No. 290040 had expired and despite the fact that HRD had not issued the City a new Certification (with at least 5 names as there were now 2 sergeant vacancies), the City submitted a “Form 14” to promote Cutillo and Kelley (who had been tied for second on the expired Certification) to the position of sergeant.

37. On April 30, 2009, HRD notified the City that its April 29, 2009 promotions of Cutillo and Kelley were invalid because Certification No. 290040 had expired.

38. On May 13, 2009, HRD received a letter from the City requesting that HRD extend Certification No. 290040 pursuant to G.L. c. 31, § 25,

39. On May 15, 2009, HRD established the 2009 department promotional eligible list for Malden Police Sergeant. Cutillo's name does not appear on the eligible list for police sergeant because he did not take the subsequent examination. Kelley's name appears 5th on the new eligible list.
40. At the second day of hearing, Chief Coye stated that he anticipates that there will be 3 – 5 sergeant vacancies during the two year life of the new eligible list.

Chapter 310 of the Acts of 1993

Chapter 310 of the Acts of 1993 ("Chapter 310") states:

"If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration of such rights."

Summary of Appeals

Both Cutillo and Kelley argue that their rights have been prejudiced through no fault of their own and ask the Commission to order relief pursuant to Chapter 310 ("310 Relief"). Although the request for 310 Relief was filed jointly by the Appellants and the City, that does not relieve the Commission of its duty to determine if the Appellants were indeed prejudiced and that the relief requested is consistent with basic merit principles. (See Geary v. Salem Police Department, 19 MCSR 435, 439 (2006) (Commission opted not to allow Joint Request for 310 Relief after reviewing a 5 ½ page letter of negative reasons submitted by the Appointing Authority to justify the bypass. See also Hurley and Ford v. City of Melrose, 20 MCSR 44, 47 (2007) (Commission opted not to allow Joint

Request for 310 Relief agreeing with the Participants that the request amounted to a “backroom deal”.)

The Participants, who sit atop the new eligible list upon which the Appellants seek to be placed first, oppose the parties’ joint request.

Both Appellants argue that HRD was legally obligated to issue a Certification to the City on April 6, 2009 and that they were prejudiced by HRD’s failure to do so. Cutillo raises a second issue to show that he was prejudiced. Specifically, he argues that he was prejudiced as a result of Chief Coye’s personal bias against him.

Cutillo Appeal

Cutillo’s appeal can be decided solely on the question of whether he was prejudiced as a result of Chief Coye’s personal bias against him. For the reasons stated in the findings, I conclude that: 1) Chief Coye does have a personal bias against Cutillo; and 2) this personal bias played a role in the City’s failure to return the January 27, 2009 Certification to HRD in a timely manner, which resulted in Cutillo not be promoted to the position of sergeant. As such, Cutillo was prejudiced through no fault of his own and 310 Relief by the Commission is warranted. I base this conclusion on the credible testimony of Commissioner Spadafora as well as an assessment of Chief Coye’s testimony before the Commission and other relevant documents, including Exhibit 15. While I accept Mayor Howard’s credible testimony that budget cuts played a role in the failure to process the Certification in a timely manner, that does not remove the cloud that Chief Coye’s bias had over the process and the likelihood that his bias played a role in the events that unfolded regarding this process between January and March 2009.

Kelley Appeal

Kelley's appeal does not involve any allegation of personal bias. Rather, it focuses only on an issue of law. Specifically, Kelley argues that HRD was legally obligated to honor the City's April 6, 2009 request for a Certification *and* that HRD was obligated to generate this Certification from the eligible list that was established on March 30, 2007 (upon which Kelley's name was tied for second).

Appellant Kelley and City's Argument

Kelley and the City argue that two of the three exceptions referenced in Section 25 regarding the extension of eligible lists existed when the City sought a Certification to promotionally appoint two police sergeants on April 6, 2009. They argue that HRD was enjoined from certifying names from its own "banded list", and because of that banding-related legislation, HRD had not established a new eligible list. Thus, according to Kelley and the City, the eligible list, which was set to expire on March 31, 2009, was extended by operation of law and, pursuant to G.L. c. 31, § 6 and PAR.08(1), HRD was *required* to issue a Certification from that extended eligible list when the City requisitioned it on April 6, 2009.

HRD's Argument

HRD argues that it was not required to issue a Certification to the City from an eligible list that was intended to expire imminently. To do so, according to HRD, would have been arbitrary and capricious. Further, HRD argues that, but for the March 27, 2009 motion for injunctive relief in the Pratt matter, the City's April 6, 2009 requisition would have resulted in a Certification from the 2009 eligible list. Up until the filing of Pratt's motion for preliminary injunction, HRD intended to revoke the 2007 departmental

promotional list for Malden Police Sergeant on March 30, 2009 and establish the new 2009 eligible list on March 31, 2009. However, according to HRD, because of the Superior Court's pending decision in Pratt, HRD waited, day by day, for a decision regarding the 2009 eligible list. Thus, according to HRD, it would have been arbitrary and capricious if it issued a Certification from the 2007 eligible list to the City on April 6, 2009.

Participants' Argument

Agreeing with HRD, the Participants argue that HRD's decision to withhold the issuance of Certifications for the six-week period from the end of March to mid-May was consistent with prior practice and well within the discretion afforded it.

Conclusion

HRD was not required to issue a Certification to the City on April 6, 2009 when the 2007 extended eligible list was set to expire imminently. The Commission recently ruled just that in two recent cases with a striking similarity to the instant appeals. In Burke, O'Brien and Walsh v. Human Resources Division, 21 MCSR 177 (2008), the Commission ruled that HRD was not required to issue a Certification to the Appointing Authority from an eligible list that was scheduled to expire the next day. In Long v. Human Resources Division, 20 MCSR 412 (2007), the Commission similarly ruled that HRD was not required to issue a Certification from an eligible list that was scheduled to expire four weeks from the time HRD received the Certification.

Here, the City requisitioned a Certification less than two weeks after plaintiffs in the Pratt case sought injunctive relief prohibiting HRD from establishing a new eligible list through the use of banded scores, which had been its intent. The court ultimately issued

the injunction on April 15, 2009, triggering a 30-day period in which HRD could file an appeal, which it did not. It was perfectly reasonable – and prudent – for HRD not to issue any Certifications during this short period of uncertainty. Moreover, had the Pratt litigation never occurred, HRD would have been required to issue a Certification from the 2009 eligible list, in which the Appellant's name is ranked fifth, as opposed to second.

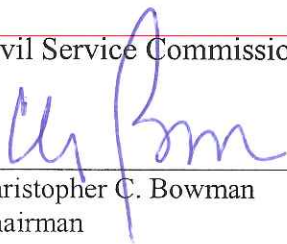
For these reasons, Kelley can not show that he has been prejudiced through no fault of his own and relief from the Commission is not warranted. Kelley's appeal under Docket No. E-09-255 is hereby *dismissed*.

Although relief is not warranted for Kelley, he is likely to have another opportunity to be considered for a promotional opportunity. His name appears fifth on the new eligible list and there are expected to be 3 -5 sergeant vacancies during the life of this eligible list.

310 Relief for Cutillo

Pursuant to Chapter 310 of the Acts of 1993, the Civil Service Commission hereby orders the state's Human Resources Division, or the City of Malden in its delegated capacity, to place the name of Michael Cutillo at the top of the current or next Certification for the position of police sergeant until such time as he has been afforded at least one additional consideration.

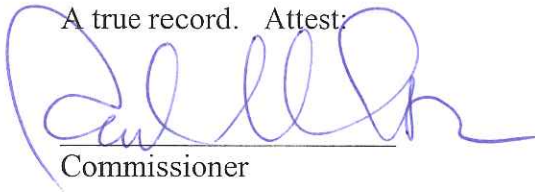
Civil Service Commission



Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, Commissioners [Marquis – Absent]) on January 7, 2010.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:

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