

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

TERRY THOMAS,
MARTIN BROOKS, Jr.,
KEITH DALRYMPLE,
PAUL O'CONNOR,
RICHARD SEXTON and
JOSEPH GILLESPIE,
Appellants

Docket Nos.
E-08-68
E-08-69
E-08-70
E-08-175
E-08-176
E-08-177

v.

BOSTON POLICE DEPARTMENT,
Respondent

Appellants' Attorney:

Leah Barrault, Esq.
Pyle, Rome, Lichten,
Ehrenberg & Liss-Riordan, P.C.
18 Tremont Street: Suite 500
Boston, MA 02108

Respondent's Attorney:

Nicole Taub, Esq.
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

The Appellants filed the instant appeal with the Civil Service Commission appealing the action of the Boston Police Department in filling one (1) lieutenant position and one (1) captain position through "out of grade" temporary assignments, thereby bypassing the temporary and permanent promotional procedures under G.L. c. 31. The appeals from

Appellants Thomas, Brooks and Dalrymple relate to the lieutenant position and the appeals from Appellants O'Connor, Sexton and Gillespie relate to the captain position.

A pre-hearing conference was conducted at the offices of the Commission on September 15, 2008. The following facts are not disputed:

- The Boston Police Department has filled the two positions in question through “out of grade” temporary assignments for more than 60 days;
- The State’s Human Resources Division (HRD) maintains an active civil service eligibility list for the position of captain and lieutenant in the Boston Police Department;
- At the time of the pre-hearing conference, the lieutenant position had been filled via a permanent promotion;
- At the time of the pre-hearing conference, the captain position was still open and the Boston Police Department had not yet requested a certification from HRD to fill the position, either via a temporary or permanent promotion.

An appointment to a civil service position may be either “original” or “promotional.” G.L. c. 31, §§ 6 and 7. Both original and promotional appointments must be filled by certification from an eligible list, when an eligibility list exists. An Appointing Authority may make a temporary promotional appointment to a temporary position or to fill a temporary vacancy in a permanent position in accordance with the requirements of G.L. c. 31, §§ 7 and 8.

Under G.L. c. 31, § 31, an Appointing Authority may make an emergency appointment to a civil service position for not more than thirty working days during a sixty-day period in certain circumstances. An emergency appointment may also be renewed for an additional thirty days under certain circumstances.

The use of “out-of-grade” promotional appointments for extended periods of time, such as those that have occurred here, circumvent the civil service law and must be

avoided. See Somerville v. Somerville Mun. Employees Ass'n., 20 Mass. App. Ct., 594, 602-603 (1985).

For all of the above reasons, the Commission entered an interim order on September 18, 2008 ordering, pursuant to Chapter 310 of the Acts of 1993, that:

- The Boston Police Department requisition a certification from HRD for the position of captain to fill the current vacancy that is the subject of the instant appeal;
- Upon receiving the certification, the Boston Police Department fill the vacancy, either through a permanent or temporary promotion, in the most expeditious manner possible;

It was further ordered that a status conference would be conducted to review whether or not the captain position was filled and whether the candidates ultimately selected for the promotional appointment to the position of lieutenant and captain should be entitled to any further relief under Chapter 310 of the Acts of 1993, including a retroactive civil service seniority date for civil service purposes only.

A status conference was subsequently conducted at the offices of the Commission on December 23, 2008 and the parties have submitted additional correspondence to the Commission which indicates that:

- The lieutenant vacancy that is the subject of this appeal came about on January 2, 2008;
- Appellant Keith Dalrymple was promoted to the position of lieutenant effective July 28, 2008;
- The captain vacancy that is the subject of this appeal came about on May 31, 2008;
- Appellant Richard Sexton was promoted to the position of captain effective October 24, 2008;

These two Appellants are seeking a retroactive appointment date for civil service

seniority purposes “retroactive to the dates of the original lieutenant and captain permanent vacancies...” as well as the imposition of a \$1,000 fine against the Boston Police Department pursuant to G.L. c. 31, § 74. The request to impose a fine is denied.

In regard to the request for a retroactive seniority date by now-Captain Sexton, the City argues that although the position of captain became vacant on May 31, 2008, the City arguably had up to sixty (60) days to promote from the civil service list and any delay was caused by the need to obtain financial approval from City Hall. As such, the City argues that, if the Commission is inclined to grant a retroactive seniority date to Mr. Sexton, it should only date back to July 31, 2008, 60 days after the stipulated vacancy date. I concur.

In regard to the request for a retroactive seniority date by now-Lieutenant Dalrymple, the City asks the Commission to consider that there was pending litigation regarding this vacancy at the time (See BPSOF et al v. Boston Police Department and HRD, 21 MCSR 237, 240 (2008), issued by the Commission on June 13, 2008, which prevented HRD from issuing a certification regarding this vacancy until June 26, 2008. After receiving the list on June 26, 2008, the City made promotions in a timely manner to the rank of lieutenant on July 25, 2008, less than 30 days after receiving the certification from HRD. While the City is correct regarding the above-referenced procedural history, including the delay caused by the BPSOF et al case, I conclude that the delay was through no fault of the Appellant in this case. If the Commission were to apply the same criteria for relief as referenced above regarding the captain vacancy, the relevant retroactive seniority date to be granted to the Appellant would be March 2, 2008, sixty (60) days after the January 2, 2008 vacancy.

For all of the above reasons, the Commission, pursuant to Chapter 310 of the Acts of 1993, hereby directs the state's Human Resources Division (HRD) to take the following actions:

- For civil service seniority purposes only, Appellant Keith Dalrymple's effective date for his promotional appointment to lieutenant shall be established as March 2, 2008;
- For civil service seniority purposes only, Appellant Richard Sexton's effective date for his promotional appointment to captain shall be established as July 31, 2008.

These retroactive seniority dates are not intended to provide the Appellants with any additional and/or retroactive compensation and should not be used to determine time served in the ~~ir respective positions of lieutenant and captain~~ in regard to eligibility for any future civil service promotional examinations.

Deleted:
Deleted: of correction officer

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on February 12, 2009.

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. 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:

Leah Barrault, Esq. (for Appellants)

Suzanne Faigel, Esq. (for HRD)

John Marra, Esq. (HRD)

Nicole Taub, Esq. (for Appointing Authority)