

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

CIVIL SERVICE COMMISSION

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

JOHN FLYNN & EIGHT OTHERS,  
*Appellants*

v.

Docket Nos.: (See Below)

BOSTON POLICE DEPARTMENT,  
*Respondent*

<u>CSC Case No.</u>	<u>Appellant</u>	<u>Contesting Appointment to title of?</u>
John Flynn	E-11-70	Police Lieutenant
Mark Cooper	E-11-71	Police Lieutenant <sup>1</sup>
John Hughes	E-11-72	Police Lieutenant
Theresa Kozmiski	E-11-73	Police Lieutenant
Thomas O'Brien	E-11-74	Police Lieutenant
Christopher Walsh	E-11-75	Police Lieutenant
Joseph Gillespie	E-11-76	Police Captain
Wayne Lanchester	E-11-77	Police Captain
Steven McLaughlin	E-11-78	Police Captain

PROCEDURAL ORDER

On February 25, 2011, the Appellants, all superior officers in the Boston Police Department (BPD), filed an appeal with the Civil Service Commission (Commission). A pre-hearing conference was held at the offices of the Commission on March 22, 2011. A status conference, scheduled for April 5, 2011, was canceled due to the unavailability of a BPD witness.

On April 4, 2011, I notified the parties via email that: 1) the status conference was canceled; 2) the matter would proceed to a full hearing in August 2011; 3) the parties should notify the Commission forthwith of mutually available dates in August; and 4) the

<sup>1</sup> The Appellants' appeal indicates that the name of the Appellant is Mark Cooper. The only individual on the eligible list with that last name is Daniel Cooper.

Commission would enter a procedural order outlining the parameters of the full hearing. The parties failed to provide available dates and instead sought permission to consult their calendars after the issuance of the procedural order.

In general, the Appellants are contesting the Department's alleged use of "out-of-grade" appointments to fill vacancies they claim should be filled through either permanent or temporary appointments. This is not a new issue for the parties or the Commission.

In Locke and Ten Others v. Boston Police Department, CSC Case Nos. E-09-389 through E-09-399 (2009), the Commission again addressed the issue of the BPD's use of out-of-grade appointments to fill vacancies. In Locke, the Commission, citing Somerville v. Somerville Mun. Employees Ass'n., 20 Mass. App. Ct. 594, 602-603 (1985), reiterated its longstanding admonishment to the BPD that the use of out-of-grade promotional appointments for extended periods of time, such as the ones repeatedly used by the BPD, circumvents the civil service law and must be avoided.

In Locke, the Commission was assured, in-person, by the City's Director of Labor Relations, John Dunlap, that out-of-grade appointments would no longer be used. As part of a status conference in that matter, Mr. Dunlap provided a copy of a letter to Superior Officer Federation President Joseph Gillespie stating in part, "... the City now believes the current process for selecting individuals to fill temporary or permanent vacancies in excess of thirty (30) days is not in compliance with Civil Service Law and the Department must change the manner in which it fills these vacancies."

Here, well over a year after the Locke matter was disposed of, the nine (9) Appellants that are part of the instant appeals argue that the BPD, although complying with the Commission's directive to fill vacancies via permanent or temporary appointments, is

delaying the filling of these vacancies through the improper use of “emergency appointments”, permitted under certain circumstances under Section 31 of the civil service law.

Specifically, the Appellants take issue with 2 lieutenant vacancies (“morning watch” and “mobile”) and 1 captain vacancy. The Appellants, in their appeals as initially filed, argue that the BPD used “emergency appointments” in all three of these cases for greater than 30 days without approval from the state’s Human Resources Division (HRD) for an extension of an additional 30 days.

At the above-referenced pre-hearing conference, counsel for the Appellants indicated that the appeals regarding the “mobile” lieutenant vacancy and the 1 captain vacancy were being withdrawn. Thus, the only appeals remaining were those related to the “morning watch” lieutenant vacancy.

In regard to this morning watch lieutenant vacancy, the Appellants argue that the BPD has used out-of-grade sergeants to fill this temporary lieutenant’s vacancy, created when a Lt. Dwan was deployed on military duty, from January 31, 2011 to at least through the date of the pre-hearing (March 22, 2011).

The BPD does not dispute that it failed to fill this vacancy within thirty days and, instead, sought permission from HRD to extend the 30-day “emergency appointment” for an additional thirty (30) days. According to the BPD, it is “virtually impossible” for the Department to comply with the thirty (30)-day mandate and, as a result, routinely seeks the extension. Other than agreeing to request the 30-day extension earlier, the BPD has indicated that it intends to continue using a 60-day timeframe to fill any temporary vacancies similar to the one that is the subject of the instant appeal. Further, the BPD

indicated in a follow-up memo to the Commission that Appellants Flynn and Komiski were both promoted to the rank of lieutenant, on a permanent and temporary basis, respectively.

The Appellants argue that the BPD, even if some or all of the vacancies identified have now been filled, must be ordered to comply with civil service law and, presumably, ordered not to use emergency appointments for more than thirty (30) days without permission from HRD, as required by Section 31.

To the best of my recollection, for the first time, and only after an inquiry from this Commissioner, counsel for the Appellants alleged at the March 22<sup>nd</sup> pre-hearing conference that the recent use of out-of-grade appointments was based in part on retaliation against Lieutenant Gillespie for his political support of a challenger to the incumbent Mayor in the most recent city-wide election while Gillespie served as union president.<sup>2</sup> Implicit in this allegation is that the Police Commissioner, who serves as the Appointing Authority, is being influenced by purported intervention by the Mayor's Office regarding promotional appointments in the Boston Police Department.

While this agency's core mission is to prevent bias or improper political influence, I am hesitant to act based solely on an allegation that was not contained in the written appeal filed with the Commission regarding this matter, was only raised in response to an inquiry from this Commissioner and is apparently being litigated in another forum, the Federal District Court. Moreover, as referenced above, the Appellants indicated at the pre-hearing

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<sup>2</sup> Approximately four (4) weeks after the pre-hearing conference, published reports indicated that Appellant Gillespie filed a lawsuit in US Federal District Court accusing the incumbent Mayor of retaliating against him, by not promoting him to police captain, for practicing his First Amendment right to criticize the Mayor's administration and endorsing his opponent. (Boston Globe, April 19, 2011).

conference that the appeal involving the Captain's vacancy, which involves Lt. Gillespie, was being withdrawn.

Thus, it appears the question before the Commission is limited to whether the BPD's continued use of emergency appointments of more than thirty (30) days, but less than sixty (60) days, without HRD approval, is a violation of civil service law and, if so, whether intervention by the Commission is warranted in terms of a remedy and/or relief.

To address this issue, a full hearing will be held on Monday, August 8, 2011 at 10:00 A.M. at the offices of the Commission. For all of the reasons referenced above, the burden will be on the BPD to show that its actions are in compliance with civil service law and rules and, if not, why the Commission should not intervene to ensure such compliance. The BPD is required to produce as witnesses any individuals that play a direct or indirect role in the decision and/or timing related to the filling of permanent and/or temporary civil service vacancies within the BPD, whether they are employed by the BPD or the City of Boston. The BPD and the Appellants are ordered to provide the Commission and all parties with a witness list no later than June 3, 2011. Any discovery requests between the parties should also be completed by June 3, 2011.

Civil Service Commission



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Christopher C. Bowman  
Chairman  
May 12, 2011

Notice to:  
Nicole Taub, Esq. (for BPD)  
Leah Barrault, Esq. (for Appellants)  
Martha O'Connor, Esq. (HRD)