COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

ABEL GAGNON,
Appellant

v.

G2-10-250

CITY OF CHICOPEE,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON CITY OF CHICOPEE'S MOTION TO DISMISS

The Appellant, Abel Gagnon, is a firefighter with the City of Chicopee's (City) Fire Department. On September 21, 2010, the Appellant filed an appeal with the Civil Service Commission (Commission), to challenge the City's use of "out-of-grade" appointments. Specifically, the Appellant argued that the City, though the use of an "out-of-grade" appointment, designated him as an "Acting Fire Lieutenant" from September 13, 2009 through November 23, 2010, a violation of civil service law and rules. He seeks an order from the Commission requiring the City to appoint him as a permanent Fire Lieutenant,retroactive to September 13, 2009.

On October 13, 2010, a pre-hearing conference was held before Commissioner Stein at the Springfield State Building in Springfield, MA (Springfield). On October 14, 2010, Commissioner Stein issued a Procedural Order which outlined the issues regarding the instant appeal and establishing various deadlines for production of information and giving the Appellant the opportunity to obtain counsel.[i]

On February 9, 2011, a status conference was held in Springfield. On April 15, 2011, the City filed a Motion to Dismiss. On November 23, 2011, a motion hearing was held in Springfield at which time I heard oral argument from both parties. The hearing was digitally recorded and both parties were provided with a CD of the recording.

Based on the documents received, the City's Motion to Dismiss, oral argument and statements made at the motion hearing, I find the following:

1. The Appellant is a firefighter for the City's Fire Department.
2. On November 17, 2007, the Appellant took and passed a promotional examination for Fire Lieutenant. He received a score of 88.
3. On April 19, 2008, the state's Human Resources Division (HRD) established an eligible list of candidates who had taken and passed the November 17, 2007 promotional examination.
4. The first three names on the April 19, 2008 eligible list were: Michael Guerin, Philip Sanford and Abel Gagnon.
5. The above-referenced eligible list was in place from April 19, 2008 through April 19, 2010.

6. It is undisputed that, as of September 13, 2009, the Appellant's name appeared first on the 2008 – 2010 eligible list as a result of promotions of other individuals ranked higher than him.
7. It is also undisputed that, on or around September 13, 2009, there was a vacancy in the position of Deputy Fire Chief and Fire Captain as a result of retirements.
8. There was a "short list" for the position of Fire Captain and the City had decided to wait until the establishment of a new eligible list in order to fill that vacancy permanently.
9. The City, consistent with the applicable collective bargaining agreements, appears to have made multiple "acting" appointments to fill various vacancies as opposed to making permanent, temporary or provisional appointments or promotions required by the civil service law.
10. The "acting" designation related to the instant appeal is the designation of the Appellant as an "Acting" Fire Lieutenant, which the Appellant argues occurred between September 13, 2009 and November 23, 2010.
11. Although the City argued at the motion hearing that no such designation was made, a letter from the City to HRD dated June 3, 2010 states in relevant part, "A vacancy did occur at the station in the group that Fire Fighter Abel Gagnon worked. With the vacancy existing he was placed in the capacity of Acting Fire Lieutenant …".
12. The Appellant submitted a fourteen (14)-page "Attendance Roster", which according to him, shows the period of time that he worked out-of-grade as an "Acting Lieutenant".
13. The Attendance Roster begins on October 29, 2009 and ends on September 22, 2010. According to these records, the Appellant worked ninety-six (96) shifts during this time

period as an "Acting Lieutenant" and seventy-three (73) shifts either on "regular duty" as a firefighter or on vacation.

14. During the above-referenced time period, it appears that the City designated the Appellant as an Acting Lieutenant on a shift-by-shift basis, including times when another Fire Lieutenant was not available to cover the shift in a particular station that required a Fire Lieutenant.
15. The parties do not dispute that the above-referenced arrangement was proscribed in the collective bargaining agreement and that the Appellant received additional compensation whenever he worked in an Acting Lieutenant capacity.
16. As referenced above, the 2008 eligible list, on which the Appellant's name ultimately appeared first, expired on April 19, 2010.
17. A new eligible list was established on May 14, 2010, based on a promotional examination that was administered on November 29, 2009. The Appellant received a score of 73 on this most recent promotional examination, and his name appears 15th on the new eligible list.
18. On November 23, 2010, three (3) permanent lieutenant appointments were made from the new, May 14, 2010, eligible list. The Appellant was not considered because he was not ranked high enough on this new eligible list to be within the statutory "2n+1" formula.

APPLICABLE STATUTES AND DECISIONS

G.L. c. 31, § 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 [an] examination[] …
>
> An appointing authority desiring to make a promotional appointment within the official service, other than a promotional appointment pursuant to section eight, shall, if a suitable eligible list exists, submit a requisition to the administrator. Upon receipt of such requisition the administrator shall certify from such list the names of persons eligible for such promotional appointment. If no suitable list exists, or if the list contains the names of less than three persons who are eligible for and willing to accept employment, the appointing authority may request authorization to make a provisional appointment pursuant to sections twelve, thirteen, and fourteen or a provisional promotion pursuant to section fifteen. "
>
> An appointing authority may make a temporary promotional appointment … to fill a temporary vacancy in a permanent position."

As to which method to use in filling promotional vacancies (permanent or temporary), the courts have said that cities and towns have the "power to decide whether to fill vacancies on either a permanent or temporary basis." Somerville v. Somerville Municipal Employees Ass'n, 20 Mass. App. Ct. 594, 596 (1985).

Regarding the reference to a "provisional appointment", section 12 provides in relevant part that:

> "An appointing authority may make a provisional appointment . . . with the authorization of the administrator . . .. Such authorization may be given only if no suitable eligible list exists . . . . A provisional appointment may be authorized pending the establishment of an eligible list . . . .
>
> After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list."

As to the reference to section 15, that term provides in relevant part that:

> "An appointing authority may, with the approval of the administrator . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list ..."

Section 31 of the civil service law also affords appointing authorities a limited right to make another type of appointment – an emergency appointment. That section states in relevant part that

> "An appointing authority may, without submitting a requisition to the administrator and without complying with other provisions of the civil service law and rules incident to the normal appointment process, make an emergency appointment to any civil service position . . . for a total of not more than thirty working days during a sixty-day period. Such appointment shall be made only when the circumstances requiring it could not have been foreseen and when the public business would be seriously impeded by the time lapse incident to the normal appointment process. Upon making such an appointment, the appointing authority shall immediately notify the administrator in writing, in such form and detail as the administrator may require, of the reason for the appointment and the expected duration of the employment thereunder. No renewal of such emergency appointment shall be made without the consent of the administrator.
>
> An emergency appointment may, upon written request of the appointing authority and with the consent of the administrator, be renewed for an additional thirty working days."

In Somerville, the court noted that "in filling any vacancy, even temporarily, the appointing authority is required to follow the carefully prescribed requirements set forth in c. 31. Failure of an appointing authority in filling a position to follow the requirements will render the appointment invalid." See also Fall River v. Teamsters Union, Local 526, 27 Mass. App. Ct. 649, 650 (1989)("Ordinarily, when a vacancy in a civil service job

occurs, the appointing authority selects from a list of eligibles drawn up as a result of a competitive examination.")

Further, [U]nauthorized "out-of-grade" promotional appointments, whether provisional or temporary . . . circumvent the requirements of the civil service law. [S]uch appointments should be avoided because they "often are used to reward employees beyond the salary limits of their permanent positions." . . . This breeds favoritism, which tends to undermine the purpose of the civil service law – "[t]o secure the best qualified persons available for all positions in the state and local service, encouraging competition and offering an opportunity for all qualified persons to compete." Somerville at 602-3. See also Gaughan v. Boston Police Dep't, 12 MCSR 245 (1999)(ruling that using sergeants in out-of-grade capacity, City "is in violation of [c. 31 §73] by appointing and/or employing individuals in violation of civil service laws.")

Although it used the word "vacancy" a number of times in the course of the statute, one of the things the Legislature did *not* do in crafting its "comprehensive plan" for the appointment of individuals to civil service positions was to define it. As the Appeals Court has recently noted,

> "Vacancy," . . . is not defined in G. L. c. 31 nor does the chapter contain provisions for determining whether or when a vacancy exists . . . . *Decisions about whether a vacancy* exists may have an impact on any individual who holds the supposedly vacant position as well as on *those who aspire to it.*

Mayor of Lawrence v. Kennedy, 57 Mass. App. Ct. 904, 906 (2003).[ii] The court's reference to the interests of those "who aspire" to fill vacancies refers to the substantive right, which the courts and the Commission have recognized, of persons who appear on eligible lists to be "fairly considered" for vacancies that occur during the period of their

eligibility. See, e.g., Boston Police Dep't, 17 MCSR 76 (2004); Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 16 (1st Cir. 1998).

The Commission has, in a handful of decisions, considered the question of whether a vacancy came into existence and, if so, whether the appointing authority filled it in one of the permissible ways. They are: O'Connor v. Boston Police Dep't, 22 MCSR 660 (2009); Thomas v. Boston Police Dep't, 22 MCSR 157 (2009); Greeley v. Belmont, 19 MCSR 32 (2006); Gaughan v. Boston Police Dep't, 12 MCSR 245 (1999); Sullivan v. Brookline Fire Dep't, 9 MCSR 46 (1996); Sullivan v. Brookline Fire Dep't, 8 MCSR 41 (1995).

While the means used to fill asserted "vacancies" have varied somewhat from case to case (e.g., designating personnel as working in higher-rank in an "acting" capacity; having the duties of the higher rank performed by a lower-ranked officer working "out of grade"), the substantive concern is the same in each – that is, that an opening that qualified as a "vacancy" was not filled in one of the ways permitted by the Legislature.

ARGUMENTS

The Appellant argues that: 1) there was a vacancy in the position of Fire Lieutenant since at least September 13, 2009; 2) the City violated civil service law and rules by designating him as an "Acting Lieutenant" during this period of time; and 3) he should have received a promotional appointment to permanent Fire Lieutenant prior to the expiration of the eligible list on April 19, 2010.

The City argues that since there was no bypass, as no appointment was made to Fire Lieutenant while the Appellant's name was first on the eligible list, the Commission lacks

jurisdiction to hear this appeal. If there was a bypass, the City argues that the Appellant failed to submit a timely appeal, by not filing an appeal within the proscribed sixty (60)-day filing deadline established by the Commission.

Even if the Commission has jurisdiction to hear the appeal as a "non-bypass" appeal under G.L. c. 31, § 2(b) and Chapter 310 of the Acts of 1993, the City argues that their decision not to fill a lieutenant vacancy permanently while the Appellant's name appeared first on the eligible list was based on sound and sufficient reasons, including: 1) there was a short list for the position of Fire Captain and the City chose to call for another examination, thus creating a delay in determining whether or how many vacancies would need to be filled in the next lower title of Fire Lieutenant; and 2) budgetary reasons prevented the City from filling the position of Fire Lieutenant permanently during the life of the 2008 – 2010 eligible list.

CONCLUSION

Based on a review of all relevant briefs, documents, oral argument and statements, I conclude that the City violated civil service law and rules by having the Appellant serve in a de-facto "out-of-grade" position when he performed the duties and responsibilities of a Fire Lieutenant. There was an active eligible list at the time and the City, instead of using a de-facto out-of-grade or acting appointment, was required to fill this position by creating a Certification for either a permanent or temporary Fire Lieutenant.

This conclusion is consistent with years of Commission decisions in which it has ruled that the use of out-of-grade or acting appointments are not allowed under the civil service law. When there is an active eligible list in place and an Appointing Authority chooses to fill a vacancy for that position, it must so do through the use of a permanent or temporary

appointment, except in the case of emergency appointments that can be used for up to sixty (60) days in certain circumstances.

There is nothing in the record, however, that would warrant a determination by the Commission that the vacancy should have been filled through the use of a permanent (as opposed to temporary) appointment. There is sufficient evidence to conclude that the use of a temporary appointment was defensible and prudent given the delay in filling the next higher title of Fire Captain due to a short list.

APPROPRIATE REMEDY

In O'Connor et al v. Boston Police Dep't (22 MCSR 660, 661 (2009)), the Commission, similar to the case here, found that the Boston Police Department filled a captain position through an "out of grade" assignment for more than 60 days when there was an active eligible list in place upon which O'Connor's name appeared first, instead of filling the vacancy through the use of a temporary appointment.

As a remedy, the Commission ordered that O'Connor's name be placed at the top of future Certifications for promotion to temporary police captain for as long as it took the Boston Police Department to promote at least one temporary police captain. The Commission did not engage in speculation regarding potential harm that may have resulted to individual(s) in the next lower title. (i.e. – if then-Lt. O'Connor had been appointed temporary police captain, should a sergeant then have been appointed to the title of temporary lieutenant.)

While the Commission's relief in O'Connor was an attempt to place the injured Appellant in the position he would have been in had the appointing authority followed the law, the implementation of the Commission's order in that case has led to a cascade of

subsequent appeals regarding whether the position to which O'Connor was subsequently appointed to was "temporary" or "permanent". In short, the Commission's attempt to match the remedy to the actual harm has resulted in further uncertainty and protracted litigation for all parties.

Here, the Appellant seeks an order appointing him as a permanent Fire Lieutenant. While not specifically requested, the Commission, when it finds that an individual has been aggrieved through no fault of his own, often orders the placement of that individual's name at the top of the next Certification for the position in question, in this case, Fire Lieutenant.

Placing the names of the Appellant at the top of the next Certification (or ordering his appointment as a permanent Fire Lieutenant) would not be a remedy that matches the actual harm here and would not be consistent with O'Connor. Further, it would be unfair and inequitable to those individuals (including the individual who filed a Motion to Intervene) whose names appear on the current eligible list above the Appellant as a result of scoring higher than the Appellant on the most recent promotional examination.

Thus, the conundrum is to determine what, if any, relief is appropriate to the Appellant during the period of time in which he would have been eligible for appointment as temporary Fire Lieutenant without the resulting complications that resulted in O'Connor.

For all of the above reasons, the Commission, pursuant to Chapter 310 of the Acts of 1993, hereby orders the following:

In the event that the Appellant is promoted to the position of permanent Fire Lieutenant in the City of Chicopee from the current or future eligible lists, his civil service seniority date in the position of Fire Lieutenant will be adjusted retroactively by ninety-six (96) days,

the equivalent of how many days he worked as an Acting Fire Lieutenant (which should have been a temporary appointment). Further, the City shall forthwith comply with all civil service law and rules and cease the practice of using "acting, out-of-grade" appointments that are not permitted by civil service law and rules. This relief is consistent with that ordered in McDaid-Harris and Sims et al v. City of Peabody, 23 MCSR 363 (2010), which has a strikingly similar fact pattern and was entered by the Commission with the benefit of hindsight regarding the O'Connor appeal.

Civil Service Commission

_____
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein, Commissioners [Marquis – Absent]) on January 12, 2012.

A True copy. Attest:

_____
Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice to:
Kevin Coyle, Esq. (for Appellant)
Thomas J. Rooke, Esq. (for Appointing Authority)

[i] On November 26, 2010, the Commission received a Motion to Intervene from Jason Karol, who identified himself as "a candidate from the current certification list." That motion was taken under advisement until it could be decided how, if at all, Mr. Karol's interests could be affected by the instant appeal and any relief that may be granted to the Appellant. As the relief ultimately granted to the Appellant does not impact Mr. Karol's standing on the current eligible list, his motion is denied.

[ii] The determination of whether a vacancy *exists* is different from the question of whether a vacancy *should be filled* or the position should instead be abolished. The courts have said the latter decision is a "level of services" decision that is up to cities and towns to make. See, e.g., Fall River v. Teamsters Union, Local 526, 27 Mass. App. Ct. 649, 654 (1989) (labeling the decision of "whether a civil service vacancy ought to be filled at all" as "a staffing level decision.")