

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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JOSEPH GILLESPIE, JOHN DANILECKI,
JAMES M. VAUGHAN & WAYNE LANCHESTER,

Appellants

v.

E-10-20 (Gillespie)
E-10-21 (Danilecki)
E-10-22 (Gaughan)
E-10-23 (Lanchester)

BOSTON POLICE DEPARTMENT,

Respondent

&

PAUL O'CONNOR,

Intervenor

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DECISION

¹ Attorney Gilbert, after submitting a post-hearing brief, subsequently filed a notice of withdrawal as counsel and instructed the Commission to direct any future correspondence to the Appellant at _____.

Procedural History of Instant Appeals

On February 2, 2010, the Appellants filed an appeal with the Civil Service Commission (Commission) challenging the temporary promotion of Paul O'Connor (O'Connor) to the position of Captain by the Boston Police Department (BPD).

On March 2, 2010, a pre-hearing conference was held at the offices of the Commission.

On April 15, 2010, BPD filed a Motion to Dismiss the Appellants' appeal. Appellant Danilecki filed an opposition to BPD's motion on April 23, 2010 and Appellants Gillespie and Lanchester file their opposition on May 14, 2010.

On June 7, 2010, a motion hearing was held at the offices of the Commission. Following oral argument, I determined that O'Connor was likely to be substantially and specifically affected by the proceedings and deemed him an intervenor pursuant to 801 CMR 1.01 (9)(d). The parties were ordered to provide O'Connor with copies of all motions, briefs and correspondence, after which he was given sixty (60) days to file a response. O'Connor requested an extension and his response was submitted on November 15, 2010.

Factual Background

The instant appeals arise out of the Appellants' challenge to BPD's continued use of "temporary assignments" for permanent positions within the Boston Police Department. This subject matter has been previously litigated and resulted in this Commission issuing a decision under Docket No. E-09-170-172. In that case, Joseph Gillespie along with Paul O'Connor and Thomas Hopkins, filed an appeal with the Commission challenging BPD's decision to fill one (1) Captain position through the use of so called "out of grade

temporary assignments.” In essence, BPD filled a Captain’s position for more than 60 days with a Lieutenant, thus bypassing the active promotional list. Paul O’Connor² was ranked at the top of the eligibility list for promotion to Captain within the Department during the relevant period that the Department used the out of grade temporary assignment.

After pre-hearing and submission of briefs, the Commission on November 13, 2009, found the following:

- The Boston Police Department filled one captain position 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 in the Boston Police Department;
- The captain position in question was filled through “out of grade” temporary assignments from November 28, 2008 to June 5, 2009;
- Appellant Paul O’Connor was at the top of the captain’s promotional list during the period of November 28, 2008 to June 5, 2009. Thus, he had rights affected under Chapter 31.

The Commission found that the use of “out of grade” promotional appointments for extended periods of time circumvents civil service law and must be avoided. The Commission ordered that Paul O’Connor be placed at the top of future certification lists for promotion to *temporary* police captain for as long as it takes the Department to promote at least one temporary police captain.*(emphasis added)* At the expiration of the certification list(s), O’Connor would have no further rights.

² The eligibility list for Captain that O’Connor headed as since expired and a new promotional list for Captain has been certified by HRD. O’Connor is not on the current list and thus not eligible for a

O'Connor was placed in a "temporary" Captain's position or about January 15, 2010 within the Department's Hackney Unit. He continues to hold this "temporary" position to this day. Prior to the Commission's ruling, another Captain, James Claiborne retired from his position on October 31, 2009. (B-3)

Following an election of officers in the Boston Police Superior Officers' Federation, ("BPSOF") Captain Frank Armstrong became the new union president.³ He was the Captain in District E-18. Among police departments in the Commonwealth, the City of Boston is one of the few that utilize "union leave" for certain union officials within the Boston Police Department. President of the BPSOF is one such position wherein the holder of office is on leave from his duties within the Department so that union duties may be addressed. The president's position is for a 3 year term and, based on past history, the tenure of BPSOF presidents have been for at least 3 terms (9 years).

When Captain Frank Armstrong vacated his position at E-18, another Captain (Ciccolo) was transferred from the Hackney Division to fill his spot. O'Connor was then placed in the Hackney Division as a temporary captain.

The Appellants filed the instant appeal contesting O'Connor's continued service as a Captain on the grounds that: 1) O'Connor should have filled a vacancy created by the retirement of Captain Claiborne from District 3 from October 31, 2009, until the position was filled through a permanent promotion on January 20, 2010; and 2) the length of the vacancy in Armstrong's position was not temporary in light of his three-year appointment to the union presidency.

BPD's Argument

permanent promotion off of the current list.

First, BPD argues that the Appellants' appeals are untimely as, according to BPD, they are seeking to challenge the Commission's order dated November 12, 2009, which provided relief to O'Connor, and the Appellant's failed to file a Motion for Reconsideration within ten (10) days or file an appeal in Superior Court within thirty (30) days of the final decision.

Second, BPD argues that the Commission does not have authority to determine the nature of a vacancy, including whether or not said vacancy is "temporary" or "permanent"

Third, BPD argues that the vacancy established by Captain Claiborne's retirement was of a permanent nature. According to BPD, when Captain Claiborne submitted his intent to retire with the BPD, it was clear the he would not be returning to his employment as a Captain. The definitive nature of his departure, as well as its finality, in BPD's view, constitutes a permanent vacancy in the rank of Captain. Thus, according to BPD, appointing O'Connor to this position would not have been in compliance with the Commission's prior order.

Appellants' Argument

In regard to timelines, Appellants Gillespie and Lanchester argue that they are challenging the Department's continued use of "out of grade temporary" assignments to fill permanent vacancies within the Department, not the Commission's order itself. O'Connor, according to Gillespie and Lanchester, was promoted temporarily to fill a permanent captain's vacancy which is contrary to both the spirit and plain language of the Commission's prior decision and order. Appellant Danilecki makes a similar argument

³ Although it is not relevant to this appeal, Captain Armstrong replaced Appellant Gillespie as BPSOF President.

on timeliness and also notes that he was not a party regarding that prior Commission decision.

All of the Appellants dispute BPD's argument that the Commission does not have jurisdiction to hear this matter involving whether a vacancy is "permanent" or "temporary".

According to the Appellants, G.L. c. 31 does define what a "temporary employee" is; G.L. c. 31 Section 1 (definitions): "Temporary employee", a person who is employed in a civil service position, after a civil service appointment, for a specified period of time or for the duration of a temporary vacancy.

Guided by that definition, the Appellants argue that the Commission does have the power to review appointments of individuals to civil service positions, whether original or on a promotional basis. They argue that this power is the basic foundation to which the Commission was created. "Basic Merit Principles" ensures that appointments/promotions are done pursuant to statutory authority under Chapter 31. Basic merit principles as defined by G.L. c. 31 Section 1, require that applicants be selected and advanced on the basis of their relative ability, knowledge and skills, assured fair and equal treatment in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap or religion, that they be protected from arbitrary and capricious actions.

Further, the Appellants cite Somerville v. Somerville Municipal Employees Association, 20 Mass. App.Ct. (1985), which they argue found that the Commission had the authority to review temporary appointments by an Appointing Authority.

Assuming that the Commission has jurisdiction to hear these appeals, the Appellants argue that O'Connor could be serving as a temporary captain for at least 3 years if not more⁴. O'Connor's temporary promotion, according to the Appellants, should be just that; for a specified period of time or for the duration of a temporary vacancy.

Further, the Appellants argue that O'Connor could have been temporarily assigned to the vacancy created by Captain Clairborne's retirement until such time as a permanent Captain was chosen. In that case, during the period of October 31, 2009-January 15, 2010. Citing a prior Commission decision in Finerty v. Milton 6 MCSR 222 (1993), the Appellant argues that temporary appointments should be used to cover for absences, sick or vacation leave.

The Appellants argue that under the scheme advanced by BPD, it could designate vacancies as temporary and place individuals in such positions for indefinite periods thus, bypassing active promotional lists. Such a scheme, they argue is contrary to Chapter 31. The Appellants argue that there is nothing to hinder BPD from making a permanent appointment to fill the Armstrong vacancy and demoting the least senior Captain back to Lieutenant should Armstrong return to that position in the future (i.e. – not re-elected as BSPOF President).

Appellants Gillespie and Lanchester also cite the reference to a "reasonable period of time" standard in G.L. c. 31, §8, which states in relevant part:

"The provisions of this section may be utilized to make a temporary promotional appointment to fill a temporary vacancy in a permanent position if the administrator is satisfied that such vacancy is likely to become permanent within a reasonable period of time. If a person has received such a promotional appointment, the administrator, upon the request of the appointing authority, may approve such

⁴ In addition to Union leave, Captains can be promoted to non-civil service ranks such as Deputy Superintendent/Superintendent and may serve in those capacities for years. The Department could backfill those vacancies with "temporary out of grade" promotions as well.

promotional appointment on a permanent basis when the position to which the temporary promotional appointment has been made becomes permanently vacated.”

Appellant Danilecki also cites to a prior Commission decision in Dever v. DMR and HRD, 11 MCSR 330 (1998) which he argues held that since there had been no limit on the duration of a temporary appointment, it was a misuse of the appointment.

Intervenor's Argument

O'Connor argues that his promotion was in compliance with the Commission's November 12, 2009 order and all relevant civil service law and rules. O'Connor argues that the Appellant's reliance on Section 8's "reasonable period of time" language is misplaced as Section 8 does not apply to police and fire appointments and promotions, citing Section 59 which states in relevant part: "original and promotional appointments in police and fire forces of cities and towns ... shall be made only after competitive examination ...". According to O'Connor, the primary purpose of Section 8 is to provide for the use of a non-competitive examination to effectuate promotions, which is not permitted under Section 59. As such, O'Connor argues that the Appellants' reference to Section 8 is inapposite and can not be relied on to argue that the vacancy in Armstrong's position is really permanent based on either the actual or anticipated length of time he will be absent.

Rather, O'Connor argues that he is a temporary employee as defined by Section 1 as he is "a person employed in a civil position for a specified period of time."

Conclusion

Intervenor Paul O'Connor's name was at the top of an eligible list during a period of time (November 28, 2008 until June 5, 2009) that the BPD was using illegal "acting, out-of-grade" appointments to fill a Captain's position. O'Connor, Gillespie and another lieutenant by the name of Thomas Hopkins filed appeals with the Commission contesting these out-of-grade appointments. By decision dated November 12, 2009, the Commission found that O'Connor's rights under Chapter 31 had been affected for the period in question and ordered that his name be placed at the top of future certifications for promotion to temporary captain. The remedy attempted to recognize that had the BPD complied with civil service law and rules during the period of time in question, it would have filled the temporary vacancy with a temporary appointment from November 28, 2008 until June 5, 2009. As O'Connor's name was at the top of the eligible list of captain during this period of time, he likely would have received this temporary promotion for that period of time. Since the vacancy in question was a temporary vacancy of approximately six (6) months, O'Connor would not have been appointed as a permanent captain.

BPD responded to the Commission's order by placing O'Connor into what they argue was the first temporary vacancy available after the Commission's order was entered, a vacancy created by Captain Armstrong when he was elected to a three (3)-year term as BPSOF President. The Appellants argue that O'Connor should have filled a vacancy created by the retirement of Captain Claiborne from District 3 from October 31, 2009, until the position was filled through a permanent promotion on January 20, 2010; and/or the length of the vacancy in Armstrong's position was not temporary in light of his three-year appointment to the union presidency.

As a threshold matter, the Appellants' instant appeal is timely and BPD's motion to dismiss their appeal as untimely is denied. The Appellants are not, as argued by BPD, contesting the Commission's November 12, 2009 order. Rather, they are contesting whether or not BPD has harmed their employment rights by the manner in which they have sought to comply with that order. As such, the ten-day period to file a Motion for Reconsideration or the thirty (30)-day period to file for judicial review of that decision do not apply here.

In regard to applicable civil service law, I concur with Intervenor O'Connor that Section 8 of Chapter 31 does not apply here. Section 7 states in relevant part that: "each promotional appointment within the official service shall be made pursuant to section eight or after certification from an eligible list ...". (emphasis added)

Section 59 states that "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." (emphasis added)

When read together, it is clear that the legislature intended for police and fire appointments to be governed by Section 7 after a civil service examination was administered, an eligible list created and Certification(s) were issued to the Appointing Authority.

For these reasons, Section 7 applies here. 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 “the law vests considerable authority in the appointing authority, who retains the sole 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) citing Kenney v. McDonough, 315 Mass. 689, 693 (1944).

Here, the BPD has decided that the captain vacancy created by Captain Armstrong is a temporary vacancy that should be filled through a temporary appointment. As such, they argue that O’Connor’s temporary appointment to this captain position is in compliance with the Commission’s November 12, 2009 decision. When guided by the Court’s unambiguous language in Somerville, I concur. Captain Armstrong was elected to a three-year term as president of the BPSOF. Per the applicable collective bargaining agreement, Armstrong has the right to return to this captain’s position when he is no longer serving in that capacity. BPD’s decision to fill this position through a temporary vacancy is not arbitrary or capricious and there has been no evidence presented that the decision was based on factors inconsistent with basic merit principles such as personal or

political bias. Thus, in this case, intervention by the Commission, ordering BPD to fill this vacancy through a permanent appointment, is not warranted.

Conversely, for the same reasons, there is no basis for the Commission to usurp BPD's conclusion that the retirement of Captain Claiborne was a permanent vacancy that should be filled through a permanent appointment. The vacancy established by Captain Claiborne's retirement was of a permanent nature. Specifically, when Captain Claiborne submitted his intent to retire with the Department, it was clear that he would not be returning to his employment as a Captain with the Boston Police Department. BPD had a reasonable basis to conclude that the definitive nature of his departure, as well as its finality, constituted a permanent vacancy in the rank of Captain.

For all of the above reasons, the Appellant's appeals under Docket Nos. E-10-20, E-10-21, E-10-22 and E-10-23 are *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, and Stein, Commissioners [McDowell – Absent]) on April 7, 2011.

A True copy. Attest:

Commissioner

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

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