

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PETER HUMPHREY,
Appellant

v.

E-10-310

CITY OF HAVERHILL,
Respondent

Appellant's Attorney:

Leah Barrault, Esq.
Pyle Rome Ehrenberg PC
18 Tremont Street: Suite 500
Boston, MA 02108

Respondent's Attorney:

William D. Cox, Jr., Esq.
145 South Main Street
Bradford, MA 01835

Commissioner:

Christopher C. Bowman

DECISION

On November 18, 2010, Peter Humphrey (hereinafter "Humphrey" or "Appellant") filed an appeal with the Civil Service Commission (hereinafter "Commission") alleging that the City of Haverhill (hereinafter "City") was using "acting" appointments or promotions in the City's Fire Department in violation of civil service law and rules. A pre-hearing conference was held on December 13, 2010 and a status conference was held on March 8, 2011.

The following facts are undisputed:

1. The Appellant has been a firefighter in the City of Haverhill since June 2004.

2. The Appellant took the 2007 promotional examination for lieutenant and, according to him, received a score of 72.
3. The above-referenced score resulted in the Appellant being placed third on the eligible list of candidates for lieutenant, which was established in 2008. It appears that the list contained only three (3) names.
4. The Appellant states that four (4) lieutenants retired since the list was established.
5. It is undisputed that the first two (2) candidates on the eligible list (Giampa and McCarthy) were promoted to the position of permanent full-time lieutenant.
6. After the appointment of Giampa and McCarthy, the eligible list, with only one (1) remaining name, was considered a "short list". Thus, if the City wished to fill a vacancy for lieutenant, it could fill the position either through a permanent or temporary appointment or, as it was a short list, through a provisional promotion.
7. A July 7, 2010 memo from the Haverhill Fire Chief stated that firefighters Saunders and Kimball have been designated as "Acting" lieutenants.
8. "Acting" appointments are not recognized by the civil service law or the Personnel Administration Rules and have been ruled a violation of the civil service law in a series of civil service decisions.
9. At the pre-hearing conference, the City was not sure if Saunders and Kimball had received provisional promotions or not.
10. In the interim, the eligible list upon which the Appellant's name appeared expired on November 1, 2010. He did not take the most recent examination for lieutenant.

11. Subsequent to the pre-hearing conference, the City notified the Commission that firefighters Brian Saunders and Tyler Kimball were designated as “Acting Lieutenants” as of July 11, 2010 and were not provisionally appointed or promoted.
12. The City does not dispute that these acting appointments were in violation of the civil service law and rules.
13. The City has now appointed Saunders and Kimball as provisional lieutenants.

Conclusion

There is no dispute that the City was in violation of civil service law and rules when it appointed Mr. Saunders and Mr. Kimball as “acting lieutenants.” Had there been an eligible list of candidates with five (5) or more names at the time of these designations, the City would have been required to fill these vacancies through permanent or temporary appointments or promotions. Since there was only one (1) name on the eligible list at the time, however, the City also had the option of making provisional appointments or promotions to fill these vacancies under the civil service law. The City has now provisionally promoted Saunders and Kimball through provisional promotions.

As the City had the discretion to make these provisional promotions at the time of the “acting” designations, I find that the Appellant is not an aggrieved person and no relief is warranted.

On a going forward basis, the City shall comply with all civil service law and rules and shall not use “acting” or “out of grade” appointments or promotions that do not comply with the civil service law or rules.

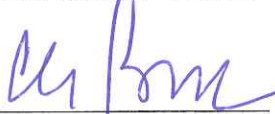
Civil Service Commission



Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on March 24, 2011.

A true record. Attest:



Commissioner

**Commissioner Marquis was
absent on March 24, 2011**

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:

Leah Barrault, Esq. (for Appellant)
William D. Cox, Jr., Esq. (for Appointing Authority)
Tsuyoshi Fukuda, Esq. (HRD)