

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

MEGAN KEAVENEY,
Appellant

v.

TOWN OF BROOKLINE,
Respondent

Docket Number: G2-24-075

Appearance for Appellant: Gary G. Nolan, Esq.
Nolan Perroni, PC
73 Princeton Street, Suite 306
N. Chelmsford, MA 01863

Appearance for Respondent: Joseph Callanan, Esq.
Elena Brander, Esq.
Town of Brookline
333 Washington Street
Brookline, MA 02445

Commissioner: Christopher C. Bowman

SUMMARY OF ORDER

The Commission dismissed the bypass appeal of a Brookline police sergeant who was bypassed for promotional appointment to police lieutenant as Brookline has subsequently removed its police department from civil service, divesting the Commission of any jurisdiction regarding this matter. The Commission also clarified the limited extent of grandfathering rights of incumbent employees in towns that opt out of civil service.

ORDER

Procedural Background

On May 28, 2024, the Appellant, Megan Keaveney (Appellant), a police sergeant in the Town of Brookline (Town)'s Police Department, filed an appeal with the Civil Service Commission, contesting the decision of the Town to bypass her for promotional appointment to

police lieutenant. On July 2, 2024, I held a remote pre-hearing conference which was attended by the Appellant, her counsel, counsel for the Town, and a representative for the Town. After the pre-hearing, I issued a Procedural Order ordering the Town to produce documents; both parties to issue position statements related to whether the Town's police department has been removed from civil service; and for HRD to issue an opinion on the same question. The Town submitted responsive documents, both parties submitted position statements, and HRD issued an opinion. For the reasons stated below, the Commission is dismissing this appeal for lack of jurisdiction.

Undisputed Facts

1. On May 29, 1894, Brookline Town Meeting accepted the provisions of Chapter 267 of the Acts of 1894 (the Civil Service Act).
2. In 1992, the Town, via a Special Act of the Legislature, removed the position of Police Chief from civil service. (Chapter 262 of the Acts of 1992)
3. In 2010, the Town, via a Special Act of the Legislature, removed all Town positions from civil service, except for members of the police and fire departments. (Chapter 109 of the Acts of 2010)
4. On September 9, 2023, the Appellant took the civil service promotional examination for police lieutenant.
5. On February 15, 2024, the state's Human Resources Division (HRD) established an eligible list for Brookline police lieutenant.
6. On or about April 5, 2024, the Town promoted two candidates from the Brookline police lieutenant eligible list, including one candidate who was ranked below the Appellant. The Town subsequently notified the Appellant of the reasons for bypassing her for promotional appointment along with a notice of her right to appeal the bypass to the Commission.

7. On May 28, 2024, the Appellant filed an appeal with the Commission, contesting the Town's decision to bypass her for promotional appointment to police lieutenant.

8. On May 29, 2024, Brookline Town Meeting voted to:

... remove all positions in the police department of the Town of Brookline from the provisions of the civil service laws, Chapter 31, et seq., and the rules and regulations relating to the same, by revoking with respect to the police department the Town's acceptance of the provisions of Chapter 267 of the Acts of 1894, voted under the Third Article for the Town Meeting held on May 19, 1894.

Law authorizing municipalities to revoke their acceptance of a state statute

Section 4B of G.L. Chapter 4 authorizes municipalities, under certain circumstances, to revoke their acceptance of a state statute. It provides, in relevant part that:

At any time after the expiration of three years from the date on which a law to take effect upon its acceptance by a city or town or a municipality as defined in section four, or is to be effective in such cities, towns or municipalities accepting its provisions, has been accepted in any such city, town or municipality such statute may be revoked in the same manner as it was accepted by such city, town or municipality, but such revocation shall be subject to the following restrictions:

... (e) This section shall not affect any contractual or civil service rights which have come into existence between the city, town or municipality and any officer or employee thereof as a result of the original acceptance of any such law or the provisions thereof; provided, however, that such revocation shall apply to the successor to the incumbent officer or employee, which application shall prevent such contractual or civil service right from automatically continuing with respect to such successor officer or employee.

If a petition signed by five per cent or more of the registered voters of a city or town is filed in the office of the city or town clerk within sixty days following a vote other than a vote taken by voters on an official ballot to revoke the acceptance of any optional

provision of the General Laws, requesting that the revoking of such acceptance be submitted as a question to the voters of such city or town, said vote to revoke shall be suspended from taking effect until such question is determined by vote of the registered voters voting thereon at the next regular city or town election, or if the city council or board of selectmen or other authority charged with calling elections shall so direct, at a special election called for that purpose. ...¹

Standard Rules Regarding Jurisdiction.

The Presiding Officer may at any time, on his or her own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should first be decided.

801 CMR 1.01(7)(g).

Parties' Arguments

Counsel for the Appellant, in a thoughtful analysis, argues that the statute does not permit Brookline Town Meeting to remove select employees, *i.e.* – police officers, from civil service after accepting the civil service act. Rather, citing in part the language in Section 4B of Chapter 4 which states that “such statute may be revoked ***in the same manner as it was accepted***”, the Appellant argues that, absent a special act of the legislature, Brookline Town Meeting may only rescind its acceptance of the civil service law *entirely*, or not at all. Put

¹ The statute also addresses circumstances in which the municipality’s method of acceptance has been changed, stating: “If at the time a city, town, municipality or district is authorized to revoke its acceptance of a law under the provisions of this section and such city, town, municipality or district has adopted a change in charter or otherwise is required to adopt a different procedure for acceptance of such law other than that procedure used for its original acceptance, then the procedure for acceptance in effect at the time of revocation shall be the manner for revoking such original acceptance.” G.L. c. 4, § 4B, ¶ 4.

another way, the Appellant argues that Brookline Town Meeting cannot “cherry pick what it does and doesn’t like about a general law, [i.e. – its coverage of police department employees] and then, without legislative approval, remake the law in its own image, and its own standards.” Therefore, the Appellant argues that, since the Town has not successfully removed the Fire Department from civil service, all public safety appointments and promotions, including the non-selection underlying the instant appeal, are still subject to the civil service law and rules.

The Town argues that it validly removed its police force from applicability of the civil service law when it voted to so remove them at the May 2024 Town Meeting. In doing so, the Town argues that it was exercising its rights under G.L. c. 4, § 4B to revoke its 1894 acceptance of the provisions of the civil service law as to its police force, which revocation the Town completed “in the same manner by which it originally adopted its applicability.” The Town also cites to other communities whose Town Meeting voted to remove individual departments from civil service, actions which were deemed valid by HRD.

After reviewing the parties’ position statements, HRD opined that:

It is HRD’s position that Brookline successfully withdrew [its police officers, sergeants and lieutenants] from Civil Service. We base this from reviewing the documents submitted by the Town of Brookline demonstrating that they conducted a Town Meeting vote to accept the Civil Service provisions and similarly withdrew the police department from Civil Service by a Town Meeting vote. The language of the warrants mirror each other.

Analysis

HRD's determination that the Town has successfully removed its police officers, sergeants and lieutenants from the civil service law is not arbitrary and capricious. Rather, it is supported by the Town's well-reasoned analysis of Section 4B of Chapter 4, which was enacted in 1980, and applicable provisions of the civil service law including Sections 52, 54 and 55. Further, HRD's determination here appears to be consistent with prior HRD determinations that a Town can remove certain employees from the civil service law, without a Special Act of the legislature, even if the initial acceptance included a greater pool of positions.

I now turn to the issue of whether the Commission continues to have jurisdiction over a promotional bypass appeal regarding police lieutenant where the underlying bypass and the appeal to the Commission occurred prior to the Town Meeting vote to remove the Town's police officers, sergeants and police lieutenants from civil service.

Although the Town informed the Commission that it did not oppose the Appellant pressing her appeal before the Commission, and that it would not move to dismiss the Appellant's appeal, it later clarified that, should the Commission rule in the Appellant's favor, the Town reserved its right to raise the issue of jurisdiction upon judicial appeal. Put simply, the Town is seeking to have it both ways: avoiding the appearance of challenging the Appellant's right to appeal her bypass, possibly based on commitments or assurances made during the campaign to withdraw from civil service, while still intending to challenge any successful appeal on her part based on jurisdictional grounds.

Central to this issue is the language in Section 4B of Chapter 4 which states that:

... (e) This section shall not affect any contractual or civil service rights which have come into existence between the city, town or municipality and any officer or employee thereof as a result of the original acceptance of any such law or the provisions thereof; provided, however, that such revocation shall apply to the

successor to the incumbent officer or employee, which application shall prevent such contractual or civil service right from automatically continuing with respect to such successor officer or employee. (emphasis added)

The Commission previously addressed this issue in [Re: Request for Investigation against the Town of Franklin by Petitioners James Hagerty and 11 Others](#). Although the [Franklin](#) matter involved an erroneous conclusion by the Town that it had removed its Fire Department from civil service, the Commission nevertheless squarely addressed the issue of what rights an incumbent employee maintains after a Town has removed certain employees from civil service, quoting HRD's counsel's opinion regarding "grandfathering" provisions that:

"Although Franklin Fire Department employees who are covered under the civil service laws as of the Town's effective "opt-out" date will retain certain civil service protections (i.e. layoff & recall procedures, discipline appeals) beyond that date, these "grandfathered" protections do not extend to promotional appointments. The Town's Fire Department will no longer be covered by the civil service laws and, therefore, they will no longer receive eligible lists or certifications from the Commonwealth. In other words, the Commonwealth is removed entirely from the Town's appointment process. I presume that employee appeals of promotional appointments will be governed by the collective bargaining agreement between the Town and the Union."

The Commission further stated in [Franklin](#) that:

... to the extent that the Commission can provide clarity to the Town – and the civil service community in general – we concur with the clarifications provided here by HRD in regard to ... grandfathering provisions.

In regard to the hypothetical question related to the rules of the road if a revocation occurs while an eligible list and/or Certification has already been created, we would encourage the parties to resolve such issues through the collective bargaining process and/or ensure that clarifying language is included in the home rule petition. However, again for the sake of clarity, we

cannot envision any scenario where the Commission would hear a bypass appeal after the effective date of the civil service revocation of a Town or Town Department.

Franklin, *supra*, at 3-4 (emphasis added).

The Commission's 2015 conclusion in Franklin applies here – for good reason. Having removed its police department from civil service, there is no relief that could be awarded to the Appellant should she prevail in her appeal. For example, the most common relief issued to a successful Appellant is that she be placed at the top of the next certification to ensure reconsideration for promotional appointment. Here, based on the Town Meeting vote, there are no longer any eligible lists or certifications and, as HRD succinctly stated nine years ago, “the Commonwealth is removed entirely from the Town’s appointment process”.

I do not read the grandfathering provisions in Section 4B of Chapter 4 to provide any employee with the right to file or move forward with a bypass appeal once the Town has removed the applicable positions from civil service. Rather, in practical terms, the statutory grandfathering provisions are limited only to those employees with prior civil service tenure being able to file discipline appeals (only when applicable to the tenured position and only if the union is not contesting the discipline via arbitration) and contesting whether pre-existing civil service seniority was used to determine the order of potential layoffs, should they occur.

To provide greater clarity on the limited scope of these grandfathered rights:

- An employee serving in a probationary period at the time a position is removed from civil service shall never gain civil service permanency in the Town position that has been removed from civil service.
- No incumbent employee (or candidate for appointment) may contest a non-selection for appointment or promotion to the Civil Service Commission.
- No incumbent employee promoted to a higher position after the position has been removed from civil service shall maintain any civil service protections in that higher position.
- No incumbent employee may transfer to a civil service community under the provisions of Section 35 of the civil service law.
- Any reinstatement or re-employment rights of incumbent employees after layoff or resignation are limited to the Town only and do not extend to the placement on any statewide re-employment lists for the same or similar positions in civil service departments.

Further, the Town’s obligation to report information to HRD under Section 67 of the civil service law, including demographic data related to personnel, ceases regarding the removed positions.²

I am mindful of the impactful outcome of the Commission’s lack of jurisdiction here, particularly considering that the Appellant, a female³ with a

² As a benchmark going forward, the Town’s civil service police force attained 21% Minority representation under the civil service law as of January 2023. (Most recent “Section 67 report” submitted to HRD.) In a recent [report prepared for Lawyers for Civil Rights](#) regarding compliance with a federal consent decree, Brookline’s civil service police department was cited for making strides in hiring Minority police officers, with the report stating: “... there has been a clear improvement in the representation of Minority officers in the Brookline police force, particularly in recent years. By 2020, Minority officers are overrepresented compared to their population in the city. Minority officers begin with a low representation in 1990, with the ratio at around 0.6. In 2020, the ratio exceeds 1.5, indicating that the proportion of Minority officers in the police force is now higher than their percentage. During the period the Castro Decree was in place, the Brookline Police Department appears to have made notable strides in improving diversity of its officers. This trend continued after they achieved parity and were granted an exemption from the Castro Decree requirements.”

³ According to the Town’s most recent 2023 “Section 67” report, less than 3% of Brookline police officers are female.

bachelor's and master's degree, was bypassed by a lower-ranked male candidate purportedly based on the results of unrecorded interviews conducted by a panel of all males, shortly after the Appellant filed a complaint against the Town's Police Chief regarding alleged cronyism.⁴

The Commission, however, is guided by the law as it relates to jurisdiction – and the decision of Brookline Town Meeting to opt out of civil service which, according to the Town, had the full support of the local police union. Although the Commission has been divested of jurisdiction in this matter, the Appellant may have certain rights if they are outlined in a collective bargaining agreement and/or may be able to seek redress from other state agencies whose oversight the Town cannot unilaterally rescind, such as the Massachusetts Commission Against Discrimination.

Conclusion

As the Commission now lacks jurisdiction over appointments and promotions in the Town of Brookline, the Appellant's promotional bypass appeal under Docket No. G2-24-075 is hereby *dismissed*.

⁴ In a separate matter, on May 16, 2024, the Commission issued an order in [Goon v. Town of Brookline](#). In [Goon](#), the Appellant, a Brookline Police Officer, filed an appeal contesting the decision of the Town of Brookline to bypass him for promotional appointment to Police Sergeant in favor of the brother-in-law of the Town's Police Chief, who participated in the interview and selection process. The Town agreed to re-do the process, using an independent, outside review panel. The appeal was dismissed with a future effective date to allow that process to be completed.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chair

By a vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney and Stein, Commissioners) on November 14, 2024.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

Gary Nolan, Esq. (for Appellant)

Joseph Callanan, Esq. (for Respondent)

Elena Brander, Esq. (for Respondent)

Ashlee Logan, Esq. (HRD)

Regina Caggiano (HRD)