RECEIVED
ENTRY 2013 AUG -8 A 9:40
COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

14

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 12-571-H

JOSEPH KELLEY, PHILLIP SIFFORD, MICHAEL FINN and LAWRENCE MACDOUGALL,

PLAINTIFFS

V.

CITY OF BOSTON FIRE DEPARTMENT and CIVIL SERVICE COMMISSION,

DEFENDANTS

MEMORANDUM AND ORDER ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiffs are lieutenants in the Boston Fire Department ("BFD"). They seek judicial review pursuant to G.L. c. 30A, § 14 of a decision (the "Decision") of a commissioner of the Civil Service Commission dated January 13, 2012. They commenced this action on February 10, 2012. In response, the Civil Service Commission ("CSC") filed the extensive record of the evidentiary hearing that took place before its commissioner. Plaintiffs move for judgment on the pleadings to reverse the Decision and to enter judgment in their favor. The City of Boston BFD opposes plaintiff's motion and cross-moves for judgment on the pleadings to affirm the Decision and to dismiss this action. For the reasons described below, the court will allow plaintiffs' motion to the extent that the Decision is vacated and the matter is remanded to the CSC to conduct a further hearing.

Notice Sent
8-6-13
FRH
RJB Jr
RLQ Jr

BACKGROUND

Plaintiffs commenced appeals with the CSC pursuant to G.L. c. 31, §§ 2(b) and 2(c), claiming to be aggrieved by BFD's practice of making out-of-grade, temporary appointments to fill vacancies in the position of fire captain. Plaintiffs were on the 2007 - 2009 eligible list for promotion to captain but were allegedly passed over with respect to the out-of grade appointments during the period they were on the list. They claim that BFD's practice of filling vacancies with individuals not on the promotion list was a violation of the civil service law. In their appeal to the CSC, plaintiffs challenged BFD's appointments to permanent as well as temporary captain positions during the eligible period. In the Decision, the CSC denied any relief to plaintiffs.

In this action seeking c. 30A review, plaintiffs abandon any claim that BFD's appointments to permanent captain positions were unlawful. They proceed only with their claim that BFD's appointments to temporary captain positions during the relevant period when they were on the promotion list (May 2007 to May 2009) violated the civil service law and caused them to be aggrieved.

DISCUSSION

Standard of Review

A court reviewing a decision made by the commission is bound to accept the findings of fact of the commission's hearing officer if supported by substantial evidence. *City of Beverly* v. *Civil Service Commission*, 78 Mass. App. Ct. 182, 188 (2010). The court may, however, if it determines that the CSC's decision is based upon an error of law, arbitrary or capricious, set

aside or modify the decision, or remand the matter for further proceedings before the Commission. See G.L. c. 30A, § 14 (7).[1]

The Decision of the Civil Service Commission

In the Decision, the commissioner found that BFD had filled temporary captain vacancies with senior lieutenants in the company commanded by the absent captain (the "senior man practice") rather than "requisition an eligible list from, or provide notification to the Massachusetts Human Resources Division (HRD) in accordance with the provisions of civil service law covering emergency and temporary appointments." Decision, p. 9. There was substantial evidence that approximately 50,000 hours of "acting captain" time was logged in the two year period of the eligible promotion list on assignments of more than thirty days. These hours were worked by lieutenants not on the promotion list appointed pursuant to BFD's senior man practice. The commissioner found that plaintiffs "established that during the life of the 2007 Fire Captain's eligible list, the BFD made emergency and temporary appointments using a so-called 'senior man' system which was inconsistent with the requirements of civil service law by which such positions should have been filled by persons appointed from the eligible list." Decision p.13.

The Decision, nevertheless, denies any relief to plaintiffs based upon findings that plaintiffs failed in their proof of actual harm. While plaintiffs offered evidence as to the gross

---

[1] BFD argues that the Decision in this matter is not subject to c. 30A review by this court. BFD's argument is that the proceeding before the Commission was an "investigation" rather than an adjudicatory hearing. The "investigation", according to BFD, was allegedly pursuant to St. 1993, c. 310. The record, however, demonstrates that there was a full adjudicatory hearing before the CSC's commissioner pursuant to an appeal under G.L. c. 31. BFD's argument in this regard is rejected. See G.L. c. 31, § 44.

amount of hours worked in the two year period by appointees under the senior man practice, they failed to "break down these aggregate numbers with sufficient particularity to ascertain which individual assignments were legitimate and which, if any, were made in violation of the civil service law and rules governing 'temporary' and/or 'emergency' appointments, and, more specifically, whether the [plaintiffs] or the 2007 Captain's list participants were aggrieved by any such violations." Decision, p. 21. In contrast, the commissioner accepted the testimony of the BFD fire chief that there was no time logged by a temporary appointee under the senior man practice that lasted for more than sixty (60) days. On those facts, and by the application of the commissioner's view of the requirements of G.L. c. 31, § 31 governing "emergency" appointments, the commissioner determined that plaintiffs had not proved they were aggrieved.

General Laws c. 31, § 31

General Laws c. 31, § 31 provides, in part, that "[a]n 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 other than laborer for a total of not more than thirty working days during a sixty day period." In the Decision, the commissioner focused his analysis on whether the violation of the civil service law by BFD's senior man practice was saved by application of this statute.

In order for BFD to be saved by the emergency appointment statute, it must rely upon proof that it met the requirements of the statute. First, BFD must show that it met the requirement that "[s]uch appointments shall be made only when the circumstances requiring it [emergency appointment] could not have been foreseen and when the public business would be seriously

impeded by the time lapse incident to the normal appointment process." G.L. c. 31, § 31. The statute goes on to require BFD to notify the administrator in writing of any such appointment, thereby emphasizing the requirement of a stated rationale by BFD for diverting from the normal appointment process. *Id.*

Second, the statute imposes strict requirements for renewal of the emergency appointment beyond thirty days. "No renewal of such emergency appointment shall be made without the consent of the administrator." With the consent of the administrator, an emergency appointment may be extended for an additional thirty working days. *Id.*

Analysis

If the issue were only whether there was substantial evidence for the commissioner to find that no emergency appointments to temporary captain lasted more than sixty days, the Decision would be allowed to stand. The Commissioner accepted the testimony of the chief in this regard and found that plaintiffs had not proved they were aggrieved by appointments of more than sixty days. The flaw, however, in the Decision is one of application of law.

It was admitted, and found by the commissioner, that BFD did not notify the administrator (HRD) of the initial emergency appointments and did not seek or obtain the consent of the administrator to renew the emergency appointments beyond thirty days. In the Decision, the commissioner concluded that such failure by BFD was "ministerial." While agreeing that the requirement of HRD consent "is spelled out in the statute and ought to be complied with," the commissioner found that "the Commission has never invalidated an 'emergency' appointment solely because an appointing authority failed to comply with these ministerial procedures." Decision, p. 21.

The requirement of consent by the administrator, in this case, HRD, is not ministerial. The plain language of the statute mandates that no renewal of an emergency appointment "shall be made" without the consent of the administrator. The substantive reason for this requirement may be inferred from the statute. The appointing authority is required to justify to the administrator, in writing, why it is departing from the civil service law regarding promotions, even temporary promotions. The requirement of an explanation, and the consent of the administrator, ensures that there is some oversight of the decision of the appointing authority to make "emergency" appointments as an exception to the civil service law. The commissioner's determination to give BFD a "pass" for its failure to obtain consent of HRD for emergency appointments that were, concededly, in excess of thirty days, was an error of law and an abuse of discretion.

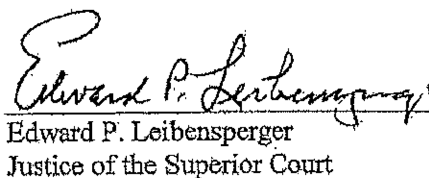
In addition, the commissioner appeared to place the burden of proof on the wrong party with respect to showing that the emergency appointments of BFD were justified as required by the statute. The commissioner found that "the burden required to meet that statutory requirement [emergency could not have been foreseen and public business would be seriously impeded] appears to allow for considerable discretion on the part of the appointing authority and, especially so, when the position involves a sensitive public safety position. Moreover, in this case, the *[plaintiffs] did not demonstrate* that any specific use of an emergency appointment in these premises would not meet this statutory standard." Decision, p.22 (emphasis added). The plain language of G.L. c. 31, § 31 puts the burden on the appointing authority, BFD, to justify the emergency appointments. The Decision is in error, as a matter of law, when it put the burden on plaintiffs to prove that the emergency appointments failed to meet the statutory criteria.

Given the erroneous application of law in the Decision, there is no way to tell whether plaintiffs' proof of temporary appointments during the two year time period fell short of showing that they would have received an appointment to temporary captain if the BFD acted in accordance with civil service law rather than the senior man practice. For example, the commissioner relied on the chief's testimony that no emergency appointments lasted more than sixty days. But if emergency appointments of over *thirty* days without the consent of HRD are illegal, the fact finder might have determined that plaintiffs' proof was adequate. Because the Decision contains errors of law it is vacated. The matter is remanded to the Civil Service Commission to conduct a new evidentiary hearing. Plaintiffs should be allowed to offer proof of specific appointments to temporary captain positions in the May 2007 to May 2009 period that (a) were in violation of the civil service law, and (b) they should have received because of their position on the promotion list.

ORDER

Plaintiffs' Motion for Judgment on the Pleadings is **ALLOWED**. The Decision of the Civil Service Commission is vacated. The matter is remanded to the Civil Service Commission to conduct proceedings consistent with this Memorandum and Order.

By the Court,



Edward P. Leibensperger
Justice of the Superior Court

Date: August 5, 2013