

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108

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

G2-09-230 (Kelley)
G2-09-231 (Sifford)
G2-09-232 (Finn)
G2-09-233 (MacDougall)

v.

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellants:

Richard Heavey, Esq.
Houlihan, Kraft & Cardinal
229 Harvard Street
Brookline, MA 02446

Appearance for Respondent:

Robert J. Boyle, Jr., Esq.
City of Boston
Office of Labor Relations
Boston City Hall
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION AFTER SECOND REMAND

These appeals were first filed with the Civil Service Commission (Commission) approximately ten (10) years ago. This “Decision After Second Remand” relates solely to complying with the instructions, on remand, of the most recent Superior Court Decision related to this matter.

The Appellants, who were Fire Lieutenants with the Boston Fire Department (BFD)¹, brought these appeals to the Civil Service Commission in 2009 claiming to be aggrieved by the BFD’s alleged practice of making “out-of-grade” or “acting” promotional appointments outside of the

¹ Indicative of the lengthy nature of these appeals, all of the Appellants have now retired from the Boston Fire Department.

civil service system to fill vacancies in the position of Fire Captain, rather than from the 2007 eligible list for Fire Captain on which their names appeared. In January 2012, the Commission dismissed the appeals. Kelley et al v. Boston Fire Dep't., 25 MCSR 23, reconsideration denied, 25 MCSR 168 (2012). (*Kelley I*) The Commission, in *Kelley I*, found that, although BFD's appointments appeared to be inconsistent with Section 7 of the civil service law, the BFD was allowed to make emergency appointments under Section 31 of the civil service law for up to thirty days without approval from the state's Human Resources Division (HRD) and an additional thirty (30) days after notifying and obtaining permission from HRD. Although the BFD had not sought or obtained approval for the additional thirty (30) days, when applicable, the Commission concluded that this notification and approval was "ministerial." As the Commission found that none of the appointments in question lasted for more than sixty (60) days, the appeals were dismissed. Also, as part of that decision, the Commission found that the Appellants had failed to prove actual harm because they had failed to identify which illegal appointments they were aggrieved by.

The Appellants duly appealed to the Suffolk Superior Court and, by "Memorandum and Order on Cross-Motions for Judgment on the Pleadings", dated August 5, 2013 (Memorandum and Order), the Superior Court (Leibensperger, J.) allowed the Appellants' Motion for Judgment on the Pleadings. Kelley v. Massachusetts Civil Service Comm'n et al., No. SUCV 12-00571-H (2013). (*Kelley Court Remand I*) The Court, in *Kelley Court Remand I*, found that the Commission erred when it concluded that the BFD's failure to obtain approval to renew emergency appointments for thirty (30) additional days was "ministerial", stating in part:

"The [Commission'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.”

The Court, in *Kelley Court Remand I*, also concluded that the Commission had erroneously put the burden on the Appellants to prove that the emergency appointments failed to meet the statutory criteria. The instructions to the Commission on the first remand were:

“ ... to conduct a new evidentiary hearing. [Appellants] 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 promotional list.”

On remand, the Commission, after conducting a new evidentiary hearing over two (2) days, denied the Appellants’ appeals for a second time on March 17, 2016. Kelley et al v. Boston Fire Department, 29 MCSR 176 (2016) (*Kelley II*) The Commission concluded that the BFD had made four temporary Captain appointments for which one or more Appellants was bypassed without compliance with civil service law. Even if the vacancies were treated as emergency appointments, the Commission, consistent with *Kelley Court Remand I*, concluded that the BFD still violated the civil service law because it failed to obtain approval from HRD to renew these appointments beyond thirty (30) days. The appeals were dismissed, however, because the Commission concluded that the appointments resulted in a “bypass” of the Appellants and that, under the Commission’s rules, the Appellants had only sixty (60) days to file an appeal with the Commission, which they failed to do. Further, the Commission found that two (2) of the Appellants’ appeals were moot because they were now retired.

Although the appeals were dismissed by the Commission based on timeliness and mootness, the Commission did make specific findings regarding the assignments that each of the Appellants would have been eligible for had the BFD not used impermissible, acting, out-of-grade temporary appointments. Specifically, the Commission found that: a) Lt. Kelley would have been eligible for 126 additional tours; b) Lt. Sifford would have been eligible for 76

additional tours; c) Lt. Finn would have been eligible for 22 additional tours; and d) Lt. MacDougall would have been eligible for 36 additional tours.² Kelley II at p. 25.

The Appellants again appealed to the Suffolk Superior Court and, by “Memorandum of Decision and Order on Plaintiffs’ and Defendant City of Boston Fire Department’s Cross-Motions for Judgment on the Pleadings, dated February 19, 2018, the Superior Court (Tochka, J.) allowed the Appellants’ Motion for Judgment on the Pleadings, vacated the Commission’s and, for a second time, remanded the case back to the Commission. Kelley v. Massachusetts Civil Service Comm’n et al., No. SUCV 1684-01233 (2019). (*Kelley Court Remand II*)

The Court stated in relevant part that:

“... the Commission’s determination that BFD bypassed the Plaintiffs is an incorrect interpretation of G.L. c. 31, s. 27 and its own rules. The Commission committed an error of law by classifying BFD’s actions as a bypass and by applying the bypass limitations period [60 days] to dismiss the Plaintiff’s appeal[s].”

The Court, in *Kelley Court Remand II*, further stated that:

“BFD also argues that the Commission’s decision in *Kelley II* must be affirmed insofar as it found that Lieutenant Kelley and Finn’s appeals were moot. BFD contends that the Commission can only grant prospective relief to the Plaintiffs, which is unavailable to Lieutenants Kelley and Finn because they are retired. The Commission’s determination that only prospective relief was appropriate was premised on its finding that the Plaintiffs were unlawfully bypassed. Given that the Plaintiffs were not bypassed, the Court remands the case back to the Commission to exercise its broad discretion to determine the appropriate equitable relief for each of the Plaintiffs under Chapter 310 of the Acts of 2003.”

The BFD filed a motion for reconsideration of Kelley Court Remand II which was denied.

The BFD then filed an interlocutory appeal with the Appeals Court which was denied without prejudice on May 15, 2019. Kelley & Others v. Boston Fire Dep’t & another, 2019-P-0455 (2019).

² Tours are generally equivalent to 12 hours.

On June 11, 2019 and August 5, 2019, I held two (2) status conferences at the offices of the Commission, with the primary goal of encouraging the parties to reach a settlement agreement in lieu of any further orders by the Commission. The parties were unable to reach such agreement. As such, I issued a Procedural Order, providing each party with the option of submitting a brief “regarding the ‘appropriate relief’ to be awarded, consistent with the February 14, 2018 Superior Court Order.” The parties submitted briefs to the Commission on September 30, 2019.

In its brief, the BFD argues that: a) the Commission “must remain true to its longstanding precedent and reject the [Appellants]’ arguments that monetary relief should be awarded”; and b) the Appellants lacked standing and their appeals were time barred, under either the 60-day filing deadline for bypass appeals (previously rejected by the court) or, in the alternative, the default limitation of thirty (30) days contained in the Standard Adjudicatory Rules of Practice and Procedure. (801 CMR 1.01(6)(b)).

In their brief, the Appellants effectively ask the Commission to: a) revisit its findings in *Kelley II* regarding how many tours (at the higher title of temporary Captain) each of the Appellants lost out on due to the use of acting, out-of-grade appointments; b) issue relief that is punitive in nature in consideration of the BFD’s illegal use of these appointments; and c) direct that any relief be “paid to [their] pension[s].”³ Finally, the Appellants ask that the BFD be ordered to pay \$70,000 for legal fees.

It is time to bring closure to this matter.

The Commission’s prior findings regarding how many tours (at the higher title of temporary Captain) each of the Appellants lost out on due to the use of acting, out-of-grade appointments are well supported by the record. Also, these findings were not vacated by the Superior Court.

³ To the extent that a reply is warranted to this request by the Appellants, the Commission does not issue relief that is tailored toward bolstering a retiree’s pension.

Rather, the Superior Court vacated the Commission's conclusions regarding timeliness and mootness and remanded the case to the Commission for the sole purpose of determining the "appropriate relief." For these reasons, the relief to be ordered here is based on the amount of tours specified in the findings in *Kelley II*.

In regard to timeliness, the Superior Court has already vacated the Commission's conclusion that these appeals were not timely based on the Commission's sixty (60)-day filing deadline regarding bypass appeals. The BFD's argument that the Commission should now reject these appeals, filed a decade ago, based on the thirty (30)-day default limitation in the Commission's rules, is not persuasive. To the extent that the 30-day limitation is applicable, there are multiple reasons justifying the tolling of this rule including, but not limited to the BFD's then-ongoing failure to follow the civil service law. As a result of the BFD's flouting of the civil service law, the Appellants never had their names placed on a Certification; were never notified of their right to be considered for a temporary appointment; and were never provided with notice regarding their right to appeal to the Commission. Under these circumstances, it is appropriate for the Commission to toll its own rule relating to filing deadlines. See City of Worcester v. Civ. Serv. Comm'n & Karen Walsh, 83 Mass.App.Ct. 1112 (Rule 1:28 Decision) , rev.den., 464 Mass. 1100 (2013) (The Appeals Court rejected the City's argument on timeliness where the ten-day day complaint for filing a complaint with the Commission was linked to failures by the City to comply with the statute); See also Boston Police Dep't v. Civ. Serv. Comm'n & another, Suffolk Sup. Ct. No. 16CV00748 ("The Commission, however, maintains the discretionary power [under Chapter 310 of the Acts of 1993] to allow a candidate to appeal, even if they fail to comply with the statutory requirements.")

That leaves the issue regarding the appropriate relief to be ordered here. It is true, as argued by the BFD, that the Commission has a long-standing precedent of only granting prospective relief regarding bypass appeals or, as the Court has effectively deemed these appeals, non-bypass equity appeals. Put another way, the relief ordered by the Commission in these types of appeals has never included the payment of lost wages. Rather, the Commission’s relief regarding these types of appeals has always been non-monetary in nature (i.e. – retroactive adjustment of civil service seniority dates regarding original appointments; the placement at the top of the next Certification for consideration for the next permanent (or temporary) appointment, etc.). This contrasts with other types of appeals, such as disciplinary appeals, in which G.L. c. 31, s. 43 explicitly requires a successful Appellant to “ ... be returned to his position *without loss of compensation* or other rights.” (emphasis added)

Given the unique circumstances of these appeals, including the specific instructions of the Court on remand, and due to the fact that the Appellants have now retired, non-monetary relief, such as that referenced above, is not possible. Thus, in accordance with *Kelley Court Remand II*, and consistent with the Commission’s findings in *Kelley II*, the Appellants appeals are hereby ***allowed***. Pursuant to its authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the Boston Fire Department to compensate the Appellants for the difference in pay between Fire Lieutenant and Fire Captain as follows:

<u>Appellant</u>	<u>Tours</u>	<u>Total Hours (Tours x 12)</u>
Joseph Kelley	126	1512
Phillip Sifford	76	912
Michael Finn	22	176
Lawrence MacDougall	36	432

I inquired with counsel for the BFD, with a copy to counsel for the Appellants, regarding the hourly pay differential, between the position of Fire Lt. and Fire Captain during the applicable time period. According to the BFD, the applicable hourly pay differential at the time was \$6.09. Assuming this to be the case, the Appellants would be owed the following retroactive payments:

<u>Appellant</u>	<u>Hours</u>	<u>Retroactive Payment (Hours x \$6.09)</u>
Joseph Kelley	1512	\$9208
Phillip Sifford	912	\$5554
Michael Finn	176	\$1072
Lawrence MacDougall	432	\$2631

Although the Court is the appropriate forum to address any disputes related to accrued interest due regarding these payments, I offer the following in what is likely to be an unsuccessful attempt to fend off further litigation regarding this matter. Consistent with Boston Police Dep't v. Jones & others; Suffolk Sup. Ct. No. 2013-01250-A (2019) & Thompson & Others v. Civ. Serv. Comm'n & another, Suffolk. Sup. Ct No. 2013-01256-A (2019), it would appear that the Appellants are entitled to pre-judgment interest on the above payments pursuant to G.L. c. 231, s. 6 at a rate of twelve percent annum from the date their appeals were filed with the Commission in 2009 until at least the issuance of this decision (2019).

Finally, in regard to legal fees, neither Chapter 31 nor Chapter 310 of the Acts of 1993 authorizes the Commission to order the payment of legal fees in this matter.⁴

SO ORDERED.

⁴ G.L. c. 31, s. 45 requires the reimbursement of defense expenses, up to a maximum of \$900, only for “... a tenured employee who has incurred expense in defending himself against an unwarranted discharge, removal, suspension, laying off, transfer, lowering in rank or compensation, or abolition of his position ...”

Civil Service Commission

/s/ Christopher C. Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Camuso, Stein, and Tivnan, Commissioners) on November 21, 2019.

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:
Richard Heavey, Esq. (for Appellants)
Robert J. Boyle, Jr., Esq. (for Respondent)