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NOTIFY

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 1684-01233

NOTICE  
sent  
2-23-18  
LO RH  
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COMA  
RLQ  
(RB)

(post-marked  
2/26)

JOSEPH KELLEY & others<sup>1</sup>

vs.

CITY OF BOSTON FIRE DEPARTMENT & another<sup>2</sup>

MEMORANDUM OF DECISION AND ORDER ON  
PLAINTIFFS' AND DEFENDANT CITY OF BOSTON FIRE DEPARTMENT'S  
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The Plaintiffs, all fire lieutenants for the City of Boston Fire Department ("BFD"), brought an appeal to the Civil Service Commission ("Commission") claiming to be aggrieved by BFD's practice of appointing out-of-grade "acting" fire captains without following the provisions of the civil service laws. The Commission determined that BFD's appointments violated the civil service laws and that the Plaintiffs were eligible for four of these unlawful appointments. The Commission ultimately denied the Plaintiffs' appeal, finding that it was outside the limitations period to appeal a "bypass." The Plaintiffs now seek review of the Commission's decision by this Court under G. L. c. 30A, § 14. For the reasons set forth below, the Plaintiffs' motion for judgment on the pleadings is ALLOWED, and BFD's cross-motion for judgment on the pleadings is DENIED.

BACKGROUND

The Plaintiffs held positions as fire lieutenants for BFD. They each passed the promotional exam and were placed on the 2007 – 2009 eligible list for promotion to fire captain

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<sup>1</sup> Phillip Sifford, Michael Finn and Lawrence MacDougall.  
<sup>2</sup> Massachusetts Civil Service Commission.

MA Off. of Attorney General  
Administrative Law Division

("2007 Captain's List"). While this list was active, BFD followed the "senior man" policy prescribed by the collective bargaining agreement to fill temporary fire captain vacancies through "acting" or "out-of-grade" appointments of the senior lieutenant in the fire company commanded by the absent fire captain. In 2009, the Plaintiffs filed an appeal to the Commission challenging the appointments as inconsistent with the requirements of the civil service law that required BFD to fill such positions from the 2007 Captain's List. During the course of the appeal, both Lieutenants Kelley and Finn retired from BFD.

On January 13, 2012, the Commission denied the Plaintiffs' appeal ("Kelley I"). It found that although BPD's appointments appeared to be inconsistent with the requirements of the civil service law, under G. L. c. 31, § 31, BFD was allowed to make emergency appointments without reference to the 2007 Captain's List because none of BFD's emergency appointments lasted longer than sixty days. It further concluded that BFD's failure to comply with Section 31's requirement to notify and obtain permission from Human Resources Division ("HRD") to renew emergency appointments beyond thirty days was "ministerial." Lastly, the Commission found that the Plaintiffs failed to prove actual harm because they did not identify which illegal appointments they were aggrieved by.

The Plaintiffs sought review of Kelley I in the Superior Court. On August 5, 2013, the Superior Court vacated the Commission's decision. This Court found that the Commission committed an error of law when it held that BFD's failure to obtain approval to renew emergency appointments under G. L. c. 31, § 31 was "ministerial." It also concluded that the Commission erred in shifting the burden of proof to show that the emergency appointments were justified to the Plaintiff rather than BFD. This Court remanded the case back to the Commission and allowed the Plaintiffs to submit evidence that BFD's appointments to temporary captain

positions from May 2007 to May 2009 were in violation of the civil service law, and that the Plaintiffs should have received these appointments because of their position on the 2007 Captain's List.

On March 17, 2016, the Commission denied the Plaintiffs' appeal for a second time ("Kelley II"). The Commission identified four temporary fire captain vacancies in 2008, each lasting more than thirty days, for which the Plaintiffs would have been eligible because they were at the top of the 2007 Captain's List. Under the applicable civil service law, the Commission found that these vacancies "were either 'temporary' promotions that should have been made from the 2007 Captain's List or were 'emergency' appointments that lasted more than thirty days which should have been made either from [the 2007 Captain's List] or with renewal approval of [HRD] under G. L. c. 31, § 31 ...." *Decision After Remand*, pp. 24-25. The Commission found that if the vacancies were treated as temporary promotions, they violated the civil service law by appointing fire captains according to the "senior man" policy instead of HRD's certified list. If the vacancies were treated as emergency appointments, BFD still violated the civil service law because it failed to obtain HRD's approval to renew the emergency appointments past thirty days. The Commission nonetheless denied the Plaintiffs any relief because it determined that their appeal was untimely. It ruled that BFD's appointments resulted in a "bypass" to the Plaintiffs under G. L. c. 31, § 27, and under the Commission's rule, the Plaintiffs only had sixty days to appeal their bypasses. The Commission found that the Plaintiffs' appeal was outside the limitations period. It further found that Lieutenants Kelley and Finn's appeals were moot because they were retired and only prospective relief was available for



an unlawful bypass. The Plaintiffs again seek review of the Commission's decision by this Court pursuant to G. L. c. 30A, §14.

### DISCUSSION

A reviewing court may set aside or modify the Commission's final decision if it is "[b]ased upon an error of law." G. L. c. 30A, § 14(7)(c). In reviewing a decision of the Commission, the court grants "due weight to the experience, technical competence, and specialized knowledge of the agency." G. L. c. 30A, §14(7). "A court should not reverse an agency decision unless the errors alleged have prejudiced the substantial rights of a party." *City of Boston v. Massachusetts Comm'n Against Discrimination*, 47 Mass. App. Ct. 816, 819 n.6 (1999). Applying this standard, this Court concludes that the Commission committed an error of law that prejudiced the substantial rights of the Plaintiffs.

The Plaintiffs argue that the Commission erred when it ruled that BFD's failure to appoint the Plaintiffs to the temporary fire captain positions constituted a bypass. The Plaintiffs contend that because BFD failed to follow the procedural steps that define a bypass, a bypass never took place. This Court agrees.

Under G. L. c. 31, § 27, a bypass occurs in the following circumstances:

"If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department."

According to the Commission's own rule, an individual has sixty days to appeal their bypass once they receive notice of the bypass.

Here, BFD never requested a certified list of eligible candidates from HRD. Thus, it never appointed a candidate from a certified list whose name appeared lower than the Plaintiffs, or provided HRD with a written reason for appointing that candidate. Moreover, the Plaintiffs were never notified that they were bypassed. This Court is not bound by the Commission's erroneous interpretation of unambiguous statutory language, see *Franklin Office Park Realty Corp. v. Commissioner of Dep't of Envtl. Prot.*, 466 Mass. 454, 460 (2013), or the plain terms of its own rules. See *Amherst Nursing Home, Inc. v. Commonwealth*, 16 Mass. App. Ct. 638, 640-641 (1983). The process accorded for bypasses is expressly delineated in detail by G. L. c. 31, § 27 and the Commission's own rule. There is no dispute that this process was not followed. Accordingly, the Commission's determination that BFD bypassed the Plaintiffs is an incorrect interpretation of G. L. c. 31, § 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 to dismiss the Plaintiffs' appeal.

BFD argues, in the alternative, that the Commission's decision should be affirmed irrespective of whether the Plaintiffs' claims are barred by the limitations period because they lack standing to appeal to the Commission or this Court. See G. L. c. 30A, § 14; G. L. c. 31, §§ 2(b), 44. Specifically, BFD contends that the alleged loss of opportunity to be considered for a temporary out-of-grade assignment was not a direct or substantial harm to their employment status. See *Board of Health of Sturbridge v. Board of Health of Southbridge*, 461 Mass. 548, 577 (2012). The Plaintiffs, however, do not merely allege the opportunity to be considered, instead, the Plaintiffs demonstrated that they were first in line on the 2007 Captain's List for the four vacancies, and thus, the Commission inferred that they would have been appointed to the positions under the normal civil service appointment process. Moreover, these temporary

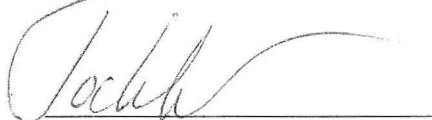
appointments would have improved their employment status because they offered the Plaintiffs higher pay as well as experience credits. Given these considerations, it is evident that the Plaintiffs were within the class of "aggrieved" parties with standing to appeal under G. L. c. 31, §§ 2(b), 44 and G. L. c. 30A, § 14. See *Shaker Cmty., Inc. v. State Racing Comm'n*, 346 Mass. 213, 216 (1963) (recognizing that the words "person ... aggrieved" in G. L. c. 30A, § 14 should not be given a narrow construction).

BFD also argues that the Commission's decision in Kelley II must be affirmed insofar as it found that Lieutenants 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, this 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 1993.

### **ORDER**

It is therefore **ORDERED** that the Plaintiffs' motion for judgment on the pleadings be **ALLOWED**, and BFD's motion for judgment on the pleadings be **DENIED**. The Commission's March 17, 2016 decision is **VACATED** with respect to its finding that a bypass occurred and that the Plaintiffs' appeal was untimely. This matter is **REMANDED** back to the Commission to determine the appropriate relief.

DATED: February 17, 2018

  
Robert N. Tochka  
Justice of the Superior Court