

Decision mailed: 1/13/12  
Civil Service Commission

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

**SUFFOLK, ss.**

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

**JOSEPH KELLY, PHILLIP SIFFORD,  
MICHAEL FINN and LAWRENCE  
MACDOUGALL,**

Appellants

**CASE NOS: G2-09-230 (Kelly)  
G2-09-231 (Sifford)  
G2-09-232 (Finn)  
G2-09-233 (MacDougall)**

v.

**CITY OF BOSTON FIRE DEP'T,**  
Respondent

Appellant's Attorney:

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

Respondent's Attorney:

Paul R. Curran, Esq.  
City of Boston  
Office of Labor Relations  
Boston City Hall  
Boston, MA 02201

Commissioner:

Paul M. Stein

**DECISION**

The Appellants, Fire Lieutenants with the Respondent, City of Boston Fire Department (BFD), brought these appeals pursuant to Mass. G.L.c.31, §2(b) and §2(c), claiming to be aggrieved by the BFD's alleged practice of making "out-of-grade" or "acting" appointments outside of the 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. The Commission granted participant status to seven other BFD Fire Lieutenants, two of whose names appeared with the Appellants on the 2007 eligible list [the "2007 Captain's List Participants"], and five of whose names appeared at the top of the subsequent 2009 eligible list [the "2009 Captain's List Participants"] that replaced the prior list in May 2009.

The Commission held five days of evidentiary hearings which were digitally recorded. The witnesses included the BFD Fire Chief, the five Appellants, the two 2007 Captain's List Participants and one of the 2009 Captain's List Participants. Thirty exhibits were marked, including four CD exhibits containing evidence in electronic form. At the inception of the hearing, the 2009 Captain's List Participants submitted a Motion for Partial Summary Decision, on which the Commission has taken no action.<sup>1</sup> The parties and the 2009 Captain's List Participants submitted post-hearing submissions on May 14, 2010 and rebuttal memoranda on June 18, 2010. On April 26, 2011, the Appellants filed a Motion to Open Record for Newly Discovered Evidence, which the 2009 Captain's List Participants opposed.

#### **FINDINGS OF FACT**

Based on the exhibits introduced into evidence and the testimony of the witnesses (BFD Chief Ronald Keating and BFD Lieutenants Joseph Kelly, Phillip Sifford, Michael Finn, Lawrence MacDougall, Timothy Smith, Paul Glora & James Greene) and the inferences reasonably drawn from the evidence as I find credible, I make the following findings of fact:

##### **The Appellants/Participants Status on the Captain's Promotional Lists**

1. When these appeals were brought, the Appellants [Joseph Kelly, Phillip Sifford, Michael Finn & Lawrence McDougall], the 2007 Captain's List Participants [Timothy Smith & Paul Glora] and the 2009 Captain's List Participants [James Greene, Ed Munroe, Mark O'Brien, Sean Linnell & Brian Tully] held positions as BFD Fire Lieutenants. (*Claim of Appeal; Motions to Intervene; Exh. 20; Testimony of Appellants, Smith, Glora and Greene*)

2. The names of the Appellants and the 2007 Captain's List Participants appeared on the civil service eligible list for promotion to the position of permanent Fire Captain. (*Exhs. 6 & 7*)

---

<sup>1</sup> The 2009 Captain's List Participants sought intervenor status which the Commission denied. The submissions of the 2009 Captain's List Participants, including the Motion for Partial Summary Disposition, are considered solely as amicus argument of participants as prescribed by 801 CMR 1.00(9)(e).

3. The BFD made ten promotions to the position of permanent Fire Captain during the life of the 2007 Fire Captain's eligible list of the first ten names on that list. The last promotion was made on September 26, 2008, when Lt. Steven McGillis was promoted to Captain. (*Exhs. 1 & 3; Testimony of Chief Keating & Kelley*)<sup>2</sup>

4. Following the promotion of Lt. McGillis, the Appellants Kelly & Sifford, originally tied for 11<sup>th</sup> place on the eligible list, then stood tied for first place on the 2007 Fire Captain's eligible list. The Appellants Finn and MacDougall's names appeared below them, in third and fourth place, respectively. The names of the 2007 Captain's List Participants (Smith & Glora) appeared next on the list, tied in fifth place with four other Lieutenants. (*Exh 6*)

5. None of the 2009 Captain's List Participants' names appeared on the 2007 Fire Captain's eligible list. (*Exh. 6*)

6. The 2007 Fire Captain's eligible list expired on May 21, 2009 and was replaced by a new 2009 Fire Captain's eligible list, based on the scores of the candidates who took the civil service Captain's examination administered in 2009. As the highest scoring candidates who took that examination, the names of the 2009 Captain's List Participants appeared as the first five names on the 2009 Fire Captain's eligible list. (*Exh. 12D*)

7. The 2007 Captain's List Participants (Smith & Glora) appeared tied for thirteenth place on the 2009 Fire Captain's eligible list. Appellant Sifford's name appeared tied in 44<sup>th</sup> place and Appellant MacDougall appeared tied in 52<sup>nd</sup> place. The names of Appellants Kelly and Finn do not appear on the 2009 Fire Captain's eligible list. (*Exh. 12D*)

8. Appellant Kelly did not take the 2009 Fire Captain's examination. He stated that he did not take the examination based on assurances during a conversation with BFD Commissioner

---

<sup>2</sup> An eleventh promotion to Captain (Jose Estrella) was made during this period, although his name did not appear on the eligible list. This promotion is not questioned by any party. He was presumably deferred from another prior list due to military status.

Fraser in late September 2008 that additional promotions to the position of Fire Captain, up to the budgeted level of seventy-eight Captains, would be made shortly. (*Exh. 4; Testimony of Kelly*)

9. The Appellants Sifford and MaDougall appear well down on the 2009 Fire Captain's eligible list (44<sup>th</sup> and 52<sup>nd</sup> place, respectively). Appellant Sifford attributed his performance on the 2009 Captain's exam to the fact that he "didn't study" for the test, believing he would be promoted from the 2007 list. (*Exh. 12D; Testimony of Sifford*)

10. The name of the Appellant Finn does not appear on the 2009 Fire Captain's eligible list. (*Exh. 12D*)

11. As of the hearings of these appeals, the BFD made no promotions to permanent Captain from the 2009 Fire Captain's eligible list. (*Exh. 3; Testimony of Chief Keating & Greene*)

#### The Structure of the BFD

12. The BFD structure under the Fire Chief includes two fire suppression divisions, which are cross-divided into four work groups (commanded by a Deputy Chief) and eleven districts that cover the City of Boston (commanded by a District Chief). Each district has four work groups assigned to one of the fifty-nine fire suppression companies responsible for a specific apparatus (Engine 5, Ladder 21, etc.). Thus, there are more than 200 separate work groups within the BFD, four of which are assigned to each company, i.e. apparatus (i.e., 59 x 4). One of the four work groups assigned to each company (apparatus) is commanded by a Captain; the other three work groups in each company are commanded by a Lieutenant. (*Ex. 20; Testimony of Chief Keating*)

13. In addition, the BFD maintains various administrative positions, including an "Officers Pool", the latter in which officers from Lieutenant through District Chief were assigned and "floated" their duties according to departmental needs. (*Exh. 20; Testimony of Chief Keating*)

14. The BFD operates with a minimum officer strength that is prescribed by the terms of a collective bargaining agreement between the Boston Fire Fighters Local 718 International Association of Fire Fighters, AFL-CIO and the City of Boston (the CBA). (*Exh. 10*)

15. Article XIX, Section 19, of the CBA, states:

“The Fire Commissioner shall submit a requisition for the permanent promotional appointment of an officer forthwith but in no event later than three (3) working days immediately following the occurrence of a vacancy in an officer rank or upon a members completion of the application, for retirement process at the Boston Retirement Board. In the event a member withdraws his/her application for retirement, the Department will be deemed to have already met their requirement to that promotion. The Fire Commissioner shall establish and publish at the start of each fiscal year quotas for each officer grade.”

(*Exh. 10, p. 33*)

16. An amendment to the CBA effective January 1, 2002, contains, in part, the following:

Officer's Pool:

Pool Flexibility: The Department shall have flexibility in the number of officers maintained above the annual table of organization (Article XIX, Section 19)

Pool Officers shall generally be assigned to those companies that have generated the highest number of R4R overtime usage

Fire Captain

Vacation

The Senior Firefighter on the Captain's group shall cover the Captain's vacation.

Whenever the Senior Firefighter on the Captain's group is covering a Captain's vacation, the Senior Firefighter will be paid as a Fire Captain. [If] The Senior Fire Lieutenant on the Company assumes the responsibility of the Captain he/she shall remain on his/her own work group and be paid as a Captain for the same number of tours as the vacation generates.

Injured Leave

First four tours by Captain in the District (per current policy).

Fifth and subsequent tours:

- a. Pool Captain (if available)
- b. R4R up to eight hours (per company officer)
- c. Senior Fire Lieutenant on Company (when company overtime has been exhausted)  
Whenever the Senior Fire Lieutenant assumes the responsibility of the Captain, he shall remain on his own work group and be paid as a Captain for the same number of tours as the coverage generates.

If at any time during the coverage a Pool Captain becomes available, said Pool Captain shall fill the vacancy . . . .

(*Exh. 10, pp. 59-63*)

17. By memorandum dated June 30, 2008, the BFD Commissioner published the “Table of Organization” for FY2009 stating the “quota” for purposes of the CBA, or “minimum number of

officers to be maintained at each grade.” The Captain’s position quota was seventy-one. The memorandum stated that the BFD “is not restricted from exceeding its quota for any particular rank” and [a]s has been the case in previous years, the quota in this letter may be less than what is budgeted, but has no operational impact on how the department is presently operating”. The memorandum noted that there were seventy-eight “budgeted” active Captain’s positions for FY2009. These numbers do not include officers who were assigned to injured leave status or otherwise not actively serving the department. (*Exhs. 11 & 12B; Testimony of Chief Keating*)

18. The number of active permanent Captains never fell below the CBA “quota” of seventy-one. According to Chief Keating, the “quota” number (seventy-one) is the number that, if the BFD fell below, triggered an obligation under the CBA to make a permanent promotion of a Lieutenant to Captain. After making the Captain’s promotion in September 2008, the BFP had seventy-eight Captains. When the 2007 Fire Captain’s eligible list expired in May 2009, there were seventy-four permanent Captains. (*Testimony of Chief Keating, Kelley & Greene*)

#### Evidence of Permanent Vacancies in the Position of Fire Captain

19. In the BFD, a permanent vacancy may arise in a number of ways: the incumbent leaves the position (a) through retirement, termination or permanent transfer or (b) by a permanent promotion to a higher level. (*Testimony of Chief Keating; Administrative Notice, M.G.L.c.31*)

20. The absence from duty due to injury, alone, does not necessarily trigger a permanent vacancy. According to Chief Keating, many officers have returned to duty after prolonged injury leave lasting a year or more. Although it would be possible to permanently promote another officer to fill such a vacancy and later demote the promoted employee when the injured officer returned to duty, Chief Keating considered it generally unwise to prematurely promote to fill a position of an officer on injury leave who potentially was able to return as fit for duty. Although

there may be exceptions, in general, a permanent vacancy would not be filled unless it was clear that the injured officer had been approved for retirement. (*Testimony of Chief Keating*)

21. The Appellants introduced evidence that, following the promotion of Lt. McGillis in September 2008, the BFD failed to fill numerous vacancies in the position of Fire Captain created thereafter as a result of retirements and permanent promotions before expiration of the 2007 Fire Captain's eligible list. (*Exhs. 14, 14A, 15, 26ID & 27ID; Testimony of Kelley & Glora*)

22. The Appellants focused on six vacancies they contend "should have triggered" a Captain promotion after September 28, 2008, after they had reached the top of the eligible list:

- Captain Parker's disability retirement allegedly as of December 4, 2008
- District Chief Sullivan's retirement on January 31, 2009 (which should have triggered a promotion of a Captain to District Chief and, thus, a second vacancy for Captain)
- District Chief Walsh's retirement on January 31, 2009 (which should have triggered a promotion of a Captain to District Chief and, thus, a third vacancy for Captain)
- Captain Tobin's promotion to District Chief on February 25, 2009 (to replace District Chief Lucas who retired on February 25, 2009), leaving a fourth vacancy for Captain
- Captain Paschal's promotion to District Chief on March 20, 2009 (to fill District Chief Tully's position who became a Deputy Chief, to replace then Deputy Chief Keating who had been promoted to Chief of Department), leaving a fifth vacancy for Captain
- Captain Coan's disability retirement allegedly on April 30, 2009, leaving a sixth vacancy for Captain

(*Exhs. 15 & 27ID; Testimony of Chief Keating & Kelley*)

23. The Appellants also identified several instances in which a Captain in the "Officers' Pool" was transferred from the pool to command a field company and the BFD did not promote anyone to fill the vacant Captain's position in the pool. Pool Captains were reassigned to fill vacancies created by promotions (Captains Tobin & Paschal, noted above and Captain Costin) to District Chief. Other pool Captains were reassigned after the retirements of Captains Parker & Coan, noted above. Two pool Captains were reassigned to fill other vacancies in Captain's positions and not replaced in the pool. (*Exhs. 12E, 14, 14A, 18 through 22; Testimony of Kelley and Greene*)

24. The Appellants also pointed to examples of permanent Captain's vacancies at Headquarters they claim should have been filled by a permanent promotion during the life of the 2007 Captain's eligible list. None of these alleged permanent vacancies arose after September 26, 2008. The evidence credibly established that two positions (one in "Fire Prevention Construction" and one in "Fire Prevention Hazard") were filled by promotion or transfer of a permanent Captain within 60 days of the vacancy. As to the "Training and Research" position, the evidence was disputed, but the credible evidence supports the conclusion that the vacancy was filled by transfer of another active Captain. As to the "Fire Prevention Planning" vacancy, it appears that, in this one instance, the position was filled by a Lieutenant in an "acting" capacity for approximately three months before another Captain was permanently assigned to the position in December 2008. (*Exhs. 18E, 18S & 26ID; Testimony of Kelley*)

25. In mid-October 2008, the Governor announced a total of \$128 million in so-called "9C cuts" to FY2009 local aid, which resulted in a \$22.9 million cut for the City of Boston, effective in January 2009. (*Testimony of Chief Keating; Administrative Notice, Governor's 9C reductions [http://www.mass.gov/bb/gaa/fy2009/dnld\_09/sect39cdetail.xls]*)

26. According to the Chief Keating, as a direct consequence of the anticipated 9C cuts, the BFD stopped making permanent promotions to Fire Captain and, instead, decided to utilize existing Captains from the Officers' Pool to cover vacancies that arose and leave the pool Captains' positions vacant. As a result, following the September 26, 2008 promotion of Lt. McGillis, the number of permanent Captains serving in the BFD was frozen at the "budgeted" number of seventy-eight and, eventually, was reduced to seventy-four. No officers – neither Captains nor Lieutenants – was assigned to the officers' pool to replace pool Captains assigned to fill a permanent field Captain's vacancy after September 26, 2008. (*Exhs. 12E, 14, 14A, 15,*



*18 through 22; Testimony of Chief Keating, Kelley, McDougall & Greene)*

27. At no time during the life of the 2007 Fire Captain's eligible list did the number of permanent BFD Captains fall below seventy-four, i.e., three positions above the "quota" or Table of Organization minimum of seventy-one. (*Testimony of Chief Keating, Kelley & Glora*)

#### Post-Hearing Captain's Promotions<sup>3</sup>

28. Effective September 15, 2010, the BFD elevated 2009 Fire Captain Participants Greene, Linnell and O'Brien, then the first three Lieutenants on the 2009 Fire Captain's eligible list, to permanent Fire Captain. These promotions were the first promotions to permanent Fire Captain made by the BFD since September 2008. (*Appellant's Motion to Open Record, Exh. B*)

29. On February 9, 2011, the BFD made three additional promotions to permanent Fire Captain, elevating 2009 Fire Captain Participants Munroe & Tully, along with Lt. Patrick Murphy, the next three Lieutenants on the 2009 Fire Captain's eligible list, to permanent Fire Captain. These promotions were the first promotions to permanent Fire Captain made by the BFD since September 2008. (*Appellant's Motion to Open Record, Exh. C*)

#### Evidence of Lieutenants Acting-Out-of-Grade

30. Prior to July 2009, the BFD followed the practice prescribed in the CBA to fill temporary Fire Captain vacancies with the senior Lieutenant in the company commanded by the absent Captain. The BFD did not 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. (*Exhs 8, 9 & 10 [Art. IV & IX];*

---

<sup>3</sup> On April 26, 2011 the Appellants submitted a "Motion to Open Record for Newly Discovered Evidence", consisting of evidence of (1) the City of Boston's subsequent budget surpluses; and (2) the appointment of six new permanent Captains from the 2009 Fire Captain's eligible list. For reasons stated in the Conclusion, the Commission declines to reopen the record to take evidence of the budget surpluses, but will take administrative notice of the promotions made by the BFD to permanent Captain from the 2009 Fire Captain's eligible list between May 21, 2009 and April 26, 2011, which were referred to in the Appellant's motion and appear readily ascertainably and undisputed facts.

*Testimony of Chief Keating, Kelley, Sifford & Finn; Admin. Notice, G.L.c.31§§7, 31 & 59)*

31. A temporary opening arises from a variety of circumstances, some anticipated and some unanticipated, which results in the absence of a member of the BFD from duty. The reasons may include personal days off, vacation, bereavement, medical, suspension, temporary reassignment, or other contractually designated reasons for absence. (*Testimony of Chief Keating & Sifford*)

32. The Appellants calculated that, during the entire life of the 2007 Fire Captain's eligible list (May 1, 2007 to May 21, 2009), the payroll records of the BFD show that BFD Lieutenants worked a total of 71,505 hours as "acting Captains" ("ACG" time). Subtracting out 1,684 hours served by Lieutenants ranked higher on the 2007 Fire Captain's eligible list and 1,584 ACG hours served by Appellants and 2007 Eligible List Participants, leaves 68,237 ACG hours presumably served by Lieutenants ranked below or not on the eligible list. The Appellants calculated that 8,486 of these ACG hours reflected assignments as "acting Captain" for less than 30 days, and 59,751 ACG assignments over 30 days. (*Exhs. 1 [CD] & 16; Testimony of Kelley*)

33. Although the data are not broken down by rank, the Appellants provided evidence that, from 2005 through 2007, approximately 75% of all BFD firefighter retirements were due to disability, and approximately 50% of all disability retirements during that period were due to injuries suffered while temporarily serving out-of-grade in a higher level position, which resulted in the firefighter retiring at the higher grade with a larger annual pension. (*Exh. 28*)

34. When a Lieutenant filling a temporary Captain's vacancy is injured on duty while serving in that "acting capacity", the Lieutenant is placed on injured leave and continues to receive Captain's pay while on injured leave. The Appellants calculated that, from May 1, 2007 through May 21, 2009, an unspecified number of Lieutenants injured while acting out of grade received a total 44,854 hours of Acting Captain Injured pay ("ACGI" time). (*Exh. 16; Testimony of Kelley*)

35. The Appellants provided uncontroverted evidence that a full-time BFD Captain worked an average work week of 42 hours, or 4,494 hours per year, and that the pay differential between the rank of Lieutenant and Captain was \$5.51/hour. (*Exh. 16; Testimony of Kelley & Glora*)

36. 179 individual Lieutenants received ACG and/or ACGI pay during the life of the 2007 Fire Captain's eligibility list, from May 1, 2007 through May 21, 2009, which averages approximately 325 such hours per year, per Lieutenant. Forty-five Lieutenants served 100 ACG/ACGI total hours or less during the entire two year period; thirty-five served more than 1,000 total hours and nine served more than 3,000 total hours. On an aggregate basis, according to the calculations made by the Appellants, the ACG hours served by Lieutenants acting as Captain is equivalent to approximately 20% of all Captains' time during the relevant period, assuming an average of seventy-four Captains actively employed with the BFD. (*Exhs. 2 & 16*)

37. Although the Appellants provided considerable raw data, in both electronic and tabular form, neither the Appellants' calculations nor their post-hearing submissions broke down the individual Lieutenant hours between ACG and ACGI, and did not explicitly differentiate how many of the hours were recorded prior to September 28, 2008, the date on which the Appellants' names first rose to the top of the 2007 Fire Captain's eligibility list. Virtually all of the specific examples presented by the Appellants involved vacancies that allegedly arose prior to September 26, 2008. Which specific assignments were allegedly filled by the "senior man" system for more than 30 and/or 60 days was not credibly specified and the specific reasons for the duration of most of the ACG and ACGI assigned time was not identified by the testimony and cannot be credibly discerned. (*Exhs. 1, 2, 16, 23, 24, 26ID & 30ID; see also Exhs. 18 through 22; Testimony of Kelley, McDougall, Sifford, Glora, Smith & Greene*)

38. For example, one of the instances presented by the Appellants involved a Captain's vacancy in "Fire Prevention Construction" at BFD Headquarters, which the Appellants contended had been filled by a Lieutenant from August 18, 2008 until September 26, 2008 (39 days), after which the position was filled by the promotion of Lt. McGillis to Captain. Even if this were a situation that had required the BFD to fill the position temporarily from the eligible list, the Lieutenant on the top of the 2007 Captain's Eligible List was Lt. McGillis. Prior to his promotion, he, not any of the Appellants, would have been presumptively the person entitled to that brief temporary assignment. (*Exh. 26ID; Testimony of Kelley*)

39. In another example, the Appellants pointed to a Headquarters Captain's position in "Fire Prevention Hazard" held by Capt. Mahoney, who was injured on May 1, 2007, eventually placed on injured leave as of January 1, 2008. On March 1, 2008, Capt. McNulty was assigned to fill the position. The Appellants contend that, in the interim, a Lieutenant was assigned in the position as an "acting Captain". Even if the position should have been filled as a temporary appointment from the 2007 Captain's Eligible List, during the period involved (5/1/07 to 1/1/08), the Appellants were then well down on that list. The same circumstances exist with respect to vacancies that allegedly arose in July 2006 in "Headquarters Field Support" and in February 2008 in "Headquarters Emergency Management". (*Exhs 7 & 26ID; Testimony of Kelley*)

40. According to Chief Keating, to his knowledge, based on research of the records performed by the BFD Personnel Office, from September 28, 2008 through May 21, 2009, no Lieutenant filled a temporary vacancy in a Captain's position in excess of 60 days. His review covered assignments within all field units, but did not include a review of temporary assignments at Headquarters Division. He explained that Headquarters positions stood on a different footing because those positions required special qualifications. (*Testimony of Chief Keating*)

## CONCLUSION

### Summary

The Appellants established that the BFD did not fill certain permanent vacancies in the position of Fire Captain during the life of the 2007 Fire Captain's eligible list (i.e., after September 26, 2008 through May 21, 2009), choosing, instead, to leave the positions vacant or to transfer unassigned "pool" captains to those positions without making new promotions to replace the reassigned pool captains. This process resulted in a net reduction of four active captains. The Appellants also 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 then active eligible list.

The BFD credibly established that the decision to reduce the number of permanent captains was principally a management choice made in response to the undisputed FY2009 budgetary reductions forced by mandatory 9C cuts in statewide municipal aid. The Appellants failed to make a persuasive case that refuted this contention or permitted any inference that there were other ulterior motives for the decision that established a violation of the Appellants' rights under civil service law to be promoted to fill any of the vacant positions of Fire Captain during the life of the 2007 Captain's eligible list.

As to the BFD's use of an unauthorized system of appointing "senior men" to fill emergency and temporary vacancies, the Appellants clearly demonstrated, in gross, and the BFD did not dispute, that the practice was not authorized by civil service law and, indeed, is no longer followed by the BFD. The Commission does not sanction any such violations and notes the Appellants' point that there appear to have been some disturbing consequences of permitting unauthorized "out of grade" appointments that seemed to enable "gaming" of both the civil

service and disability retirement systems. The Appellants' evidence, however, falls short of establishing, as they must, the specific proof that demonstrates how any of them actually, as opposed to hypothetically, have been aggrieved by the "out of grade" appointments made during the life of the relevant civil service list, as well as what further or additional particularized equitable relief, if any, would be fairly warranted and realistically possible to remediate a loss of any civil service rights that may have occurred prior to the expiration of that list in May 2009, without unfair prejudice to the rights of other civil service BFD officers whose names appear on subsequent and current promotional lists.

#### Applicable Civil Service Law

Under the applicable civil service law and rules, original and promotional appointments to fill a permanent or a temporary vacancy in a municipal fire service position must be made after a certification prepared from among the current eligible list of candidates ranked highest in the order of their marks on the qualifying competitive examination, according to the so-called "2n+1 rule". See G.L.c.31, §§ 7, 25-27 & 59; PAR.07, PAR.08 & PAR.09.<sup>4</sup> In general, each eligible list lasts for a period of two years, after which it expires and is replaced by a new eligible list compiled from the results of a newly administered examination. G.L.c.31, §25.

Under G.L.c.31,§31, an appointing authority may make "emergency" appointments in certain circumstances, for periods of thirty days, without complying with these requirements:

An appointing authority may, without submitting a requisition to the administrator [HRD] 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 a laborer for a total of not more than thirty working days during a sixty day period. Such appointment shall be made only when the circumstances requiring it could not have been foreseen and when the public business would be seriously impeded by the time lapse incident to the normal appointment process. Upon making such an appointment, the appointing authority shall immediately notify the administrator in

---

<sup>4</sup> G.L.c.31,§8, which contains an alternative procedure for making promotional appointment, does not apply to public safety promotions. See Gillespie et al v. Boston Police Dep't, 24 MCSR 170 (2011).

writing, in such form and detail as the administrator may require, of the reason for the appointment and the expected duration of the employment thereunder. No renewal of such emergency appointment shall be made without the consent of the administrator.

An emergency appointment may, upon written request of the appointing authority and with the consent of the administrator, be renewed for an additional thirty working days. The administrator shall not consent to more than one such renewal of the appointment unless the position is in a department, institution or hospital carrying out functions connected with the public safety or public health and the public service would suffer if a second renewal were not granted, in which case the administrator may consent to a second renewal. No person shall receive more than one such appointment and renewal, as the case may be, in any twelve month period, except as otherwise provided in this section.

Nothing in the civil service law specifically defines what constitutes a “vacancy”, or whether the vacancy is “permanent” or “temporary”. An appointing authority is granted considerable latitude in making those decisions as a prerogative of sound management control over staffing levels, assignments and duties as to which, in the absence of arbitrary or capricious behavior, the Commission will not generally intrude. See Mayor of Lawrence v. Kennedy, 57 Mass.App.Ct.904, 906 (2003); City of Boston v. Boston Police Superior Officers Federation, 52 Mass.App.Ct. 296, 299-301 (2001); Somerville v. Somerville Mun. Employees Ass’n, 20 Mass.App.Ct. 594, 597, rev.den., 395 Mass. 1102 (1985); Gillespie et al v. Boston Police Dep’t, 24 MCSR 170 (2011); O’Toole v. Newton Fire Dep’t, 22 MCSR 563 (2009); Mandracchia v. City of Everett, 21 MCSR 307 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007)

Especially in fiscal matters, the law is settled that an appointing authority has discretion to “prudently manage its affairs” and, when faced with competing demands for its limited funds, it has the right to decide the nature and level of its services and allocate its funds accordingly, and it retains the sole discretion to decide if and when to fill vacant positions, whether on a permanent or temporary basis. See, e.g., Town of Billerica v. International Ass’n of Firefighters, Local 1495, 415 Mass 692, 694 (1993); Newton School Comm. v. Labor Relations Comm’n, 388 Mass. 557, 563 (1983); Debnam v. Town of Belmont, 388 Mass. 632, 635-36 (1982); School

Comm. of Salem v. Civil Service Comm'n, 348 Mass. 696, 698-699 (1965); Shaw v. Board of Selectmen of Marshfield, 36 Mass.App.Ct. 924, 926, rev.den., 417 Mass. 1105 (1994); City of Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, 597 (1985). Thus:

*"[I]n the absence of pretext or device to defeat the civil service law's objective of protecting efficient public employees . . . or to accomplish a similar unlawful purpose, the judgment of municipal officials in setting the municipality's priorities and in identifying the goods and services that are affordable, and those that are not, cannot be subject to the commission's veto."*

City of Gloucester v. Civil Service Comm'n, 408 Mass. 292,299-301(1990)(*emphasis added*)

See also Scheffen et al v. City of Lawrence, 24 MCSR 524 (2011), appeal pending; Ameral v. City of Fall River, 22 MCSR 653 (2009); Carroll v. Worcester Housing Auth., 21 MCSR 309 (2008); Bombara v. Department of Mental Health, 21 MCSR 255 (2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995); Snidman v. Department of Mental Health, 8 MCSR 128 (1993); Soucy v. Salem School Committee, 8 MCSR 64 (1995)<sup>5</sup>

Once an appointing authority meets its burden of proof to articulate legitimate economic reasons for its decisions, the burden then shifts to the employee to prove that the economic reasons were pretextual and that the municipality acted in bad faith. See, e.g., Commissioner of Health & Hospitals v. Civil Service Comm'n, 23 Mass.App.Ct. 410, 413 (1987); Carroll v. Worcester Housing Auth., 21 MCSR 2008); Holman v. Town of Arlington, 17 MCSR 108 (2004); Randazza v. Gloucester Housing Auth., 13 MCSR 3 (1999); Joslow v. Department of Mental Health, 8 MCSR 217 (1995) Even if additional savings could have been made by making different choices, absent evidence that those choices were made in bad faith or for unlawful

---

<sup>5</sup> Although many of the fiscal management cases typically involve appointing authority decision-making in the context of a layoff due to lack of funds, the same analysis also clearly applies when it comes to other cost-cutting decisions arising in any budgetary crisis, such as implementing attrition to avoid layoffs or other similar economic choices, which is what the BFD claims to have done here. See Mandracchia v. City of Everett, 21 MCSR 307 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007)



purposes, the Commission cannot disturb the exercise of an appointing authority's sound discretion to decide how best to manage its fiscal affairs. E.g., Debnam v. Belmont, 388 Mass 632, 634 (1983) (municipality could legitimately choose not to tap reserve fund).

The Commission and civil service case law, however, will not sanction the unauthorized use of so-called "out-of-grade" appointments when proved, in fact, to have been used as artifacts to circumvent the core merit principles of the civil service system for competitive merit hiring and promotion designed "[t]o secure the best qualified persons available for all positions in the state and local service, encouraging competition and offering an opportunity for all qualified persons to compete". whether on a "provisional", "temporary" or "emergency" basis. E.g., Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, 602-603, rev.den., 395 Mass. 1102 (1985), citing, Scholok v. Civil Service Comm'n, 348 Mass. 96, 99 (1964). See McDaid-Harris et al v. City of Peabody, 23 MCSR 363 (2010) (filling three lieutenant's positions for 8 months with "acting, out of grade" assignments deprived the three police sergeants at top of eligible list an opportunity for temporary promotion); O'Connor v. Boston Police Dep't, 22 MCSR 660 (2009) (6-month out-of-grade appointment to fill police captain's position deprived police lieutenant at top of list the opportunity for a temporary promotion); Greeley v. Town of Belmont, 19 MCSR 32 (2006) (filling position by 12-month appointment of an "acting Lieutenant" until eligible list expired was proved to be a purposeful subterfuge for refusing to appoint appellant who stood at top of the list); Sullivan et al v. Brookline Fire Dep't, 8 MCSR 41 (1995), supplemented, 9 MCSR 46 (1996), aff'd sub nom Brookline v. Civil Service Comm'n, Norfolk Sup. Ct. C.A. 1995NOCV-635 et al (1998) (unauthorized practice of out-of-grade appointments of appellants at the top of the promotional list as "acting" lieutenants to fill vacancies, including through death and retirement, circumvented civil service system and deprived them of the right

to be considered for temporary or permanent promotions to the “acting” positions in which they had been required to serve for as many as four consecutive years); Gaughan v. Boston Police Dep’t, 12 MCSR 245 (1999) (four vacant permanent lieutenant positions filled for over two years by sergeants acting out-of-grade without ever making promotions from the active eligible list)

Applying these principles to the evidence presented in these appeals, the preponderance of the evidence establishes that the BFD has not infringed the Appellants’ civil service rights by failing to promote them to Fire Captain, either on a permanent or temporary basis.

#### Permanent Promotions

There is substantial evidence to support the conclusion that, after September 26, 2008, the BFD left unfilled at least four, and as many as six, permanent vacancies in the position of Fire Captain and that, if the BFD had elected to fill those positions, the Appellants would have been considered for such position(s), as they were then within the top “2n+1” candidates on the eligible list. BFD, however, has met its burden to articulate a legitimate economic basis for declining to make permanent promotions to fill those vacancies and, instead, to use “pool” Captains to perform the duties of those positions within the BPD’s operating companies. The Appellants did not refute the substantial evidence that the fiscal landscape changed significantly after the last promotion to Captain was made at the end of September 2008, that the BFD did, indeed, fill the vacancies by transfer of existing captains from the Captain’s pool, rather than by making extended “acting” assignments of Lieutenants, and failed to prove any pretext or improper motive on BFD’s part for these choices. Hindsight evidence that the City of Boston eventually ran a surplus is not sufficient to impugn the initially rational choices that were made.

The fact that the BFD made no further permanent promotions to Captain until September 2010 does not support the argument that the decision to stop promoting was pretextual and intended to prejudice the Appellants. Indeed, the fact that the first three promotions were made sixteen months after the next 2009 Captain's eligible list became effective, and the next three promotions made twenty-one months into the life of the new list, reasonably infers that the 2008 decision to stop promotions to Captain was, indeed, motivated by the perceived exigencies of the impending fiscal downturn, and not simply by the desire to wait for the old list to expire.

Finally, the Appellants' misplace reliance on provisions concerning the obligation to make permanent promotions contained in the CBA, allegedly triggered whenever a Captain's position is vacated, at least in the case of a retirement. The BFD disputes the Appellants' interpretation of these provisions, contending that the BFD is contractually obliged only to maintain the Table of Organization "quota" level of seventy-one Captains, that, unless the total number of active Captains falls below the "quota" of seventy-one, it is not obliged to promote another Captain, and that, otherwise, it maintains the management right to choose to fill a vacancy or not.

To be sure, it would appear that either interpretation of the agreement would appear to be a proper subject for collective bargaining, as neither construction would present any conflict with civil service law. See, e.g., School Comm. of Newton v. Labor Relations Comm'n, 388 Mass. 557, 563-64 (1983); City of Boston v. Boston Police Superior Officers Federation, 29 Mass. App.Ct. 907 (1990) (rescript); City of Worcester v. International Bh'd of Police Officers, Local 504, 1998 WL 1183944 (Mass. Sup. 1998) and cases cited. The point is, however, that the duty to interpret or enforce terms of a collective bargaining agreement that do not conflict with civil service law is not within the purview of the Commission. As explained above, civil service law imposes no specific requirement on an appointing authority who chooses to leave a position

vacant for budgetary or any other rational reason. If the Appellants believe that the collective bargaining agreement imposed any additional obligations upon the BFD to fill a vacancy, that would be a matter to be pursued through a grievance, not a civil service appeal.

In sum, absent proof of any subterfuge or ulterior motives on BFD's part, the Appellants' claims that they were unlawfully deprived of the opportunity for permanent promotion to Fire Captain present no substantial evidence to distinguish those claims from the classic case of "dying on the vine", which is the inevitable plight of any person whose name appears at the top of an eligible list when it expires as provided by law, because (s)he did not take and pass the next examination and/or did not place high enough on the ensuing list over other candidates to be considered for the next series of future promotional opportunities. See Brackett v. Civil Service Comm'n, 447 Mass. 233, 253 (2006) and cases cited (placement on civil service list is no guarantee of appointment or promotion); Callanan v. Personnel Adm'r, 400 Mass. 597, 600-602 (1987) (no vested interest in position during life of an eligible list); Mandracchia v. City of Everett, 21 MCSR 307 (2008) ("A candidate whose name is not reached for promotion or appointment has no recourse but to take the next examination.")

#### Temporary Promotions

The Appellants produced substantial, credible evidence that, during the life of the 2007 Fire Captain's eligible list, BFD Lieutenants recorded upwards of 71,000 "ACG" hours working "out-of-grade" as acting Captains, as well some 46,000 additional "ACGI" hours (attributable to Lieutenants injured filling a Captain's position and paid as a Captain during their period of injured leave), and that a portion of those hours are attributable to the time period after September 26, 2008. The evidence also supports the conclusion that many, but not all, of these assignments were performed by Fire Lieutenants who were either not on the 2007 Fire Captain's

eligible list or who were ranked below the Appellants and the 2007 Captain's List Participants on that list. The Appellants, however, did not 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 Appellants or the 2007 Captain's list participants were aggrieved by any such violations.

The BFD emphatically disputed that any ACG time can be attributed to an out-of-grade assignment of a Lieutenant for more than 60 days. While, in theory, the Appellants may have a plausible reason to believe that such instances occurred, the evidence they produced failed to refute the BFD's sworn testimony on this point. The 60-day threshold is significant because the Commission has generally interpreted the civil service law and rules to authorize "emergency" appointments, pursuant to G.L.c.31, Section 31, for up to 60 days without making an appointment from the eligible list. See Gillespie et al v. Boston Police Dep't, 24 MCSR 170 (2011); Thomas v. Boston Police Dep't, 22 MCSR 157 (2009); O'Toole v. Newton Fire Dep't, 22 MCSR 563 (2009); O'Connor v. Boston Police Dep't, 22 MCSR 660 (2009); Mandracchia v. City of Everett, 21 MCSR 307 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007)

The Appellants make the point that a Section 31 emergency appointment is, initially, for only 30 days, that such appointments require the BFD to notify HRD of the appointment and require HRD's subsequent "consent" for any additional 30-day extension. The Commission agrees with the Appellants that this procedure is spelled out in the statute and ought to be complied with, but the Commission has never invalidated an "emergency" appointment solely because an appointing authority failed to comply with these ministerial procedures. See, e.g., Flynn v. Civil Service Comm'n, 15 Mass.App.Ct. 206, 210-211 (1983), rev.den., 38 Mass.1105 (1983)

(procedural defect did not justify relief when it was insubstantial and not motivated by improper reasons) The Commission notes that the requirement for notice to make an initial 30-day emergency appointment does not require prior notice to HRD and does not require any action by HRD to review or validate the initial appointment. Similarly, although the renewal of an emergency appointment for an additional 30 days does require HRD “consent”, the statute appears to suggest that, absent extraordinary circumstances, such consent is also essentially a ministerial act directed to the practical delay that would be involved if it were necessary to process a formal certification in order to keep the position filled. The Appellants have not identified any specific evidence that persuades the Commission that granting such consent would have been unlawful as to any of the appointments made under the facts presented in these appeals.

The Appellants also contend that Section 31 expressly limits the use of emergency appointments “only when the circumstances requiring it 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. As noted above, however, the burden required to meet that statutory requirement 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 Appellants did not demonstrate that any specific use of an emergency appointment in these premises would not meet this statutory standard.

That said, compliance with Section 31 is not onerous.<sup>6</sup> The BFD is directed to take care that it complies with the letter of Section 31 in making future emergency appointments.

---

<sup>6</sup> As noted below, the Commission does not construe compliance with the notice and “consent” requirements of the Section 31 “emergency” appointment process to be required under civil service law for short-term absences that are foreseen, such as scheduled vacations, which seem to be more appropriately left to management prerogative and subject to agreement between an appointing authority and the applicable collective bargaining unit.

The Appellants also contend that that BFD used “acting” out-of-grade appointments to circumvent the requirements of G.L.c.31, §7 when it filled more extended “temporary” Captain’s vacancies through a “senior man” system, rather than through a certification from the active eligible list. Again, in theory, based on the aggregate number of ACG hours, the Appellants have established that it is possible that such a violation may have occurred during the life of the 2007 Fire Captain’s eligible list. The Appellants, however, failed to demonstrate which such appointments violated Section 7 and whether, when those appointments were made, the Appellants respective positions on the eligible list put them in contention for those jobs. Thus, the present appeals are distinguishable from those cases that have come before the Commission, in which other appellants did produce the necessary evidence to persuade the Commission that the rights of those appellants were violated and that it was possible to tailor specific and limited equitable relief that would fairly remediate those violations without prejudicing the rights of other civil service employees. See Somerville v. Somerville Mun. Employees Ass’n, 20 Mass.App.Ct. 594, 602-603, rev.den., 395 Mass. 1102 (1985), citing, Scholok v. Civil Service Comm’n, 348 Mass. 96, 99 (1964); McDaid-Harris et al v. City of Peabody, 23 MCSR 363 (2010); O’Connor v. Boston Police Dep’t, 22 MCSR 660 (2009); Greeley v. Town of Belmont, 19 MCSR 32 (2006); Sullivan et al v. Brookline Fire Dep’t, 8 MCSR 41 (1995), supplemented, 9 MCSR 46 (1996), aff’d sub nom Brookline v. Civil Service Comm’n, Norfolk Sup. Ct. C.A. 1995NOCV-635 et al (1998); Gaughan v. Boston Police Dep’t, 12 MCSR 245 (1999)<sup>7</sup>

For example, the bulk of the ACG and ACGI time appears to relate to a period of time prior to September 26, 2008, when none of the Appellants had yet reached the top of the active eligible list. In addition, there is insufficient evidence upon which the Commission can determine

---

<sup>7</sup> The Commission issues another decision today to the same effect. See Gagnon v. City of Chicopee, CSC Case No. G2-10-250 , 25 MCSR --- (2012).

which appointments were made in violation of the civil service law and how much of the AGI time is attributable to appointment of more than 60 days, and how much was legitimate.

In this regard, the Commission takes the occasion to note that “temporary” appointments under G.L.c.31, §7 are intended to fill “vacancies” in a civil service position, and not all assignments of a junior officer to fill in for a superior necessarily come within the definition of a “vacancy.” For example, when a superior officer takes a scheduled vacation, that would not seem to generate an unforeseen “vacancy” in the position within the meaning of applicable civil service law and would not require going through the process of making either a temporary promotion under Section 7 or an emergency appointment under Section 31. Rather, in those circumstances, the civil service law is silent on how such brief, but scheduled absences may be covered (and, therefore, it would be a legitimate matter for collective bargaining). Thus, here, as there is no basis on which to parse the portion of time recorded as ACG paid time on the BFD’s payroll records in evidence, it remains unknown what part of the total 71,000 hours of ACG time is attributable to such normal coverage of absences, as opposed to coverage for sick or injured officers which would have required “emergency” appointments (up to 60 days) and “temporary” promotions after that.

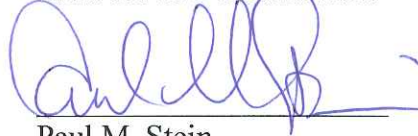
Finally, as to the reported ACGI time spent by “acting” Captains on injured leave, even the Appellants concede that those hours are not particularly relevant here. The fact that an officer was injured while acting in a higher grade has no bearing on whether the appointment was properly made or not. While questions certainly can be asked about the efficacy of paying an injured firefighter at his/her higher “acting” rate rather than the pay due in the permanent position, and seem clearly worthy of further scrutiny, the public policy issues involved are not matters under civil service law for this Commission.



In sum, while the Appellants may fairly argue that the substantial number of acting Captains (about 20% of the total budgeted number) at any one time suggested that the Appellants might have been reached to fill some unspecified number of temporary vacancies, even before rising to the top of the list, the Commission is left to speculate which such appointments those would have been, or whether that would have happened at all. Thus, unlike other "out-of-grade" cases, the Commission has not been shown the substantial evidence upon which it could "unscramble the egg" in this case (to use the Appellants' phrase) and fashion a fair and appropriate form of prospective equitable relief to remediate the actual lost opportunity, if any, to have served in the position of a temporary Captain prior to expiration of the Fire Captain's eligible list in May 2009.

Accordingly, for the reasons stated above, the Appellants' appeals in these matters are hereby *dismissed*.

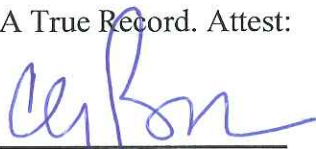
Civil Service Commission



Paul M. Stein  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis [ABSENT], McDowell, and Stein, Commissioners) on January 12, 2012.

A True Record. Attest:



Commissioner

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 the 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 a Civil Service Commission's final decision.

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 To:

F. Robert Houlihan, Esq. (for Appellants/2007 List Participants)

Richard Heavy, Esq. (for Appellants/2007 List Participants)

Paul R. Curran, Esq. (for Appointing Authority)

Leah M. Barrault, Esq. (for 2009 List Participants)

John Marra, Esq. (HRD)