

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

JIM KUKENE & TWENTY-THREE (23)
OTHERS¹,
Appellants

v.

I-11-298

AMESBURY FIRE DEPARTMENT,
GLENN FOURNIER & DAVID MATHER²,
Respondents

Appellants' Attorneys:

Leah M. Barrault, Esq.
Timothy D. Zessin, Esq.
Pyle Rome Ehrenberg PC
18 Tremont Street: Suite 500
Boston, MA 02108

Amesbury Fire Department's Attorney:

Darren R. Klein, Esq.
Kopelman & Paige, P.C.
101 Arch Street
Boston, MA 02110

Commissioner:

Christopher C. Bowman

DECISION

On October 5, 2011, the Appellants, all sworn fire personnel of the City of Amesbury's Fire Department (City), asked the Civil Service Commission (Commission), pursuant to G.L. c. 31, § 2(a), to investigate whether the City was violating civil service law and to issue relief pursuant to Chapter 310 of the Acts of 1993. A pre-hearing and two status conferences were held and the parties submitted briefs and reply briefs.

The issue presented here is whether the positions of Deputy Fire Chief and Assistant Fire Chief in the City's Fire Department are covered by the civil service law. I conclude that they are and

¹ Robert Fredette, Jr., Brian Dixon, Gerry Morrill, Tom Mullaly, Jim Nolan, Scott Cloutier, Jamie Clark, Jim Bateman, Brian Moran, Jameson Ayotte, Richard Shellene, John Kane, Mark Bruno, Russell Rickert, Ryan York, Todd Calderwood, Iain McGregor, Darcie Condelli, Michael Bell, Jeff King, Jeremy Bean, Jerry Fowler and Justin Petrillo. (Craig Deguio, Tim Haynes and Steve Mason were initially listed as Appellants but subsequently withdrew.)

² I joined Mr. Fournier and Mr. Mather as parties on February 28, 2012.

that the current incumbents of these positions were illegally appointed, thus requiring intervention by the Commission.

Background

In or around July of 1975, a classification plan for the City was established and filed with the state's Human Resources Division (HRD). This plan included the positions of Firefighter, Fire Lieutenant, Fire Captain and Call Firefighter.

In or around 1976, the City's Fire Department changed from a Board of Fire Engineers to a full-time Fire Chief. At or around this time, the position of Deputy Fire Chief was created. The City did not update the classification plan with HRD. The City acknowledges that it has never considered this is a civil service position and has not filled this position through the process proscribed by the civil service law (i.e. – examinations, assessment centers, eligible lists, certifications, etc.) David Mather is the current incumbent.

In or around July of 2011, the position of Assistant Fire Chief was created. Similar to the Deputy Fire Chief position, the City does not consider this to be a civil service position and the current incumbent, Glenn Fournier, was not appointed through the traditional civil service process.

Discussion

G.L. c. 31, § 51 provides that:

“All positions in all cities shall be subject to the civil service law and rules except as provided by section forty-eight or other law³ and except that, in cities with less than one hundred thousand residents, positions which would fall within the labor service shall not be so subject unless the city council votes to accept the applicability of the civil service law and rules to the labor service. (emphasis added)

Notwithstanding the provisions of section forty-eight, the following offices and positions in cities shall be subject to the civil service law and rules: (1) the position of parking meter supervisor in cities whose city councils vote to accept the applicability of civil service law and rules to such position; (2) the office or offices of chief of police or chief of fire department, or the officer performing similar duties, whatever his title, in cities which vote pursuant to the provisions of sections fifty-four and fifty-five to accept the applicability of the civil service law and rules to such office or offices; (3) any municipal office to which the civil service law and rules are made applicable pursuant to section fifty-three; and (4) any office or position to which the civil service law and rules were applicable immediately preceding the effective date of this chapter.”

³ Nothing in Section 48 exempts a Deputy Fire Chief or Assistant Fire Chief from the civil service law.

In summary, an affirmative vote of the City is required for the position of Fire Chief to fall under the civil service law. All other official service positions, with the exception of those listed in Section 48, are automatically covered by the civil service law.

The Appellants argue that the plain language of the statute and the admissions by the City establish that there has been an ongoing violation of the civil service law and that intervention by the Commission is required.

The City argues that, since the positions of Deputy Fire Chief and Assistant Fire Chief perform duties “similar” to those of a Fire Chief, Section 51 requires specific acceptances of said positions into civil service. Even it doesn’t, however, the City argues that they “innocently believed that said positions were exempt from civil service in the City.” The City also argues that the Commission, particularly if any relief is granted, should consider the long period of time that has elapsed and the harm that could result from the incumbents of the two positions who, through no fault of their own, may now potentially be ineligible to sit for an examination for the positions they now hold. Thus, they ask that any relief granted should be prospective in nature beginning only after the current incumbents vacate their position.

The City’s interpretation of Section 51 is incorrect. Clearly, when the legislature included the words “or the officer performing similar duties” after “chief of the fire department”, it was referring to those communities that use a title other than “chief” (i.e. – Commissioner, Fire Engineer, etc.) It did not intend to require an affirmative acceptance for other, lower ranked positions such as Deputy Fire Chief and Assistant Fire Chief.

Conclusion / Orders

The City currently employs an Assistant Fire Chief (Glenn Fournier) and Deputy Fire Chief of Emergency Medical Services (David Mather). In creating and filling each of these positions, the City failed to comply with the civil service law and rules.

Pursuant to Chapter 310 of the Acts of 1993, the Commission orders the following:

1. Forthwith, Glenn Fournier shall be deemed provisional Assistant Fire Chief retroactive to the date that he began performing the duties of this position.
2. Forthwith, David Mather shall be deemed provisional Deputy Fire Chief of Emergency Medical Services, retroactive to the date that he began performing the duties of this position.
3. In regard to any future civil service examinations, Mr. Fournier and Mr. Mather shall be given all appropriate training and experience credit for serving in the provisional titles, retroactive to the date they began performing their duties in these titles.
4. Forthwith, the City shall seek approval from the state’s Human Resources Division (HRD) to amend the existing classification plan to include the titles of Assistant Fire Chief and Deputy Fire Chief of Emergency Medical Services.
5. Upon modification of the classification plan, but no later than ninety (90) days from the issuance of this order, the City shall file a requisition to HRD to conduct a promotional examination for permanent promotional appointments to these two positions. Nothing in this

order shall prevent the City from requesting approval to conduct an assessment center, in lieu of, or in conjunction with, written examinations.

6. Notwithstanding any civil service law, rule or policy to the contrary, Mr. Fournier and Mr. Mather shall be eligible to sit for the examinations for the positions they now occupy on a provisional basis.
7. Upon the establishment of an eligible list for these two (2) positions, the City shall follow all of the proscribed steps in the delegation agreement between HRD and the City including, but not limited to, the establishment of a Certification and review and consideration of those individuals who fall within the so-called “2n +1” formula.
8. In the event that the City does not appoint Mr. Fournier or Mather to the aforementioned permanent promotional appointments, he or they shall be demoted to their rank held prior to their promotion.

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Marquis, Commissioners [Stein – Absent]) on August 9, 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 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.

Notice:

Leah M. Barrault, Esq. (for Appellants)
Timothy D. Zessin, Esq. (for Appellants)
Darren R. Klein, Esq. (for Respondent)
Glenn Fournier (Respondent)
David Mather (Respondent)