

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**

100 Cambridge Street – Suite 200  
Boston, MA 02114  
617-979-1900

**JASON LABER,**

*Appellant,*

v.

**TOWN OF BARNSTABLE,**

*Respondent*

**E-23-254**

Appearance for Appellant:

Patrick N. Bryant, Esq.  
Pyle, Rome & Ehrenberg PC  
2 Liberty Square, 10<sup>th</sup> Floor  
Boston MA 02109

Appearance for Respondent:

Michael J. Maccaro, Esq.  
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Commissioner:

Paul M. Stein

**Summary of Decision**

The Commission ordered the Town of Barnstable to fill a position of Police Lieutenant that was permanently vacated in September 2023 and covered by Sergeants acting out-of-grade in violation of the civil service rights of candidates on the then current Lieutenant's promotional eligible list and to place the three top candidates on the prior eligible list in effect when the promotion should have been made at the top of the current eligible list so that they receive the consideration for promotion that they should have received had the Town complied with civil service law.

**CORRECTED DECISION ON MOTION FOR SUMMARY DECISION**

(Correcting non-substantive scrivener's errors)

On December 23, 2023, the Appellant, Jason Laber, a Police Sergeant with the Town of Barnstable (Town)'s Police Department (BPD), filed this appeal with the Civil Service

Commission (Commission)<sup>1</sup>, to contest the failure of the BPD to make a promotion to fill a permanent vacancy in the position of Police Lieutenant in the BPD which had been filled since September 2023 by assigning Police Sergeants to fill the position, through acting out-of-grade appointments on a “day-to-day” basis, allegedly in violation of the civil service rights of the Appellant, who was that at the top of the eligible list for promotion to BPD Police Sergeant.

On January 30, 2024, the Commission held a pre-hearing conference at which time the Presiding Commissioner verbally ordered the BPD to commence the process to appoint a Police Lieutenant from the then existing eligible list (on which the Appellant’s name appeared first). When it appeared that there was insufficient time to make that promotion before the list expired, with the assent of both parties, the Commission issued an Interim Order on February 20, 2024, allowing the BPD to proceed to make a *temporary* appointment from the new eligible list, pending further proceedings. A Procedural Order was issued for a full hearing to be held on April 19, 2024 and the matter was assigned to me.

After consultation with the parties, it appeared that few, if any, issues of disputed material facts remained.<sup>2</sup> I encouraged the parties to consider a resolution through a dispositive motion.

On April 3, 2024, the Appellant filed a Motion for Summary Decision, to which the BPD responded on April 12, 2024 with its Opposition and Cross-Motion for Summary Decision seeking dismissal of the appeal. The Appellant replied to the BPD’s Cross-Motion on April 15, 2024. Both

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<sup>1</sup> The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

<sup>2</sup> The parties vigorously dispute whether the BPD command staff, as alleged by the Appellant, harbored any animus against him and whether the decision to defer making a promotion to fill the vacancy in the Lieutenant’s position was motivated by such animus and/or the Appellant’s own alleged interference in the process, but it is not necessary to address or resolve these disputes in order to decide the present appeal. The rights of the parties to dispute those issues are saved and may be raised in any future bypass appeal that may arise as a result of this Decision.

parties requested that the full hearing scheduled for April 19, 2024 be cancelled and agreed that the motions may be decided on the papers. I converted the full hearing to a motion hearing , which was recorded via Webex. <sup>3</sup> Based on the submission of the parties, and after hearing argument of counsel, I find that the material facts are not disputed and the relief requested in the Appellant's Motion for Summary Disposition ought to be granted. Accordingly, the Appellant's Motion for Summary Decision is allowed and the BPD's Cross-Motion is denied. The BPD shall place the names of the Appellant and the two other candidates listed immediately below him on the prior eligible list at the top of the current eligible list and shall proceed forthwith to make a permanent promotion to the position of Police Lieutenant from that list in accordance with civil service law and rules.

### **UNDISPUTED FACTS**

Based on the submissions of the parties, and the representations of counsel at the Commission's pre-hearing conference and at the April 19, 2024 motion hearing, the following material facts are not disputed:

1. The BPD is a municipal police force subject to the provisions of civil service law and rules pursuant to Chapter 31 of the General Laws.
2. In February 2022, pursuant to civil service law and rules, HRD issued an eligible list of candidates for promotion to the position of permanent BPD Police Lieutenant. The candidates on the eligible list included, in rank order, among others: First: Sgt. Joseph Green; Second: Sgt. Jason

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<sup>3</sup> A link to the recording was provided to the parties. If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, the recording provided to the parties should be used to transcribe the hearing.

Laber (the Appellant) and Sgt. Meagan Cunningham, tied; Third: Sgt. Robert Bitinas; Fourth: Sgt. Nathan St. Onge.

3. Sgt. Green was promoted to BPD Police Lieutenant in April 2022 and Sgt. Cunningham was promoted to BPD Police Lieutenant in January 2023.

4. Following the promotions of Sgts. Green and Cunningham, the top three candidates on the BPD Police Lieutenant eligible list, in rank order, were: Sgt. Laber (the Appellant), Sgt. Bitinas and Sgt. St. Onge.

5. On or about September 5, 2023, BPD Lt. Jennifer Ellis, then filling the position of evening shift commander, was promoted provisionally to BPD Deputy Chief (Field Services) to replace Deputy Chief Mark Cabral who had retired in August 2022, creating a permanent vacancy in the position of BPD Police Lieutenant.

6. When Lt. Ellis was appointed as provisional Deputy Police Chief (and presently), no eligible list for that civil service position had been issued. As it is not disputed that all of the candidates who will appear on the eligible list for Deputy Police Chief when it is eventually issued are BPD Police Lieutenants, Barnstable has always intended that any promotion to replace the vacancy in BPD Police Lieutenant created by the provisional promotion of Lt. Ellis would be made as a permanent promotion.

7. The BPD had arranged to participate in the written civil service examination for Police Lieutenant to be administered on September 23, 2023, to be followed by an assessment center that was later held on October 21, 2023.

8. On or about September 14, 2023, Deputy Chief Ellis and Deputy Chief Jean Challies (Administrative Bureau), met with then Police Chief Matthew Sonnabend to discuss calling for an eligible list from which to make a promotion to fill the permanent Lieutenant vacancy. They

reached a consensus to defer calling for an eligible list which they explained as based on a concern for the impact that commencing a “rigorous application and interview process” would have on the Sergeants studying for the September 23, 2023 written examination and subsequent assessment center.

9. On September 25, 2023, BPD Police Chief Sonnabend unexpectedly took leave and never returned to his job.

10. On September 27, 2023, Deputy Chief Challies was appointed as the provisional Police Chief and since that time has been serving in that capacity as well as continuing to perform her duties as Deputy Chief.

11. At all times on and after Lt. Ellis’s promotion, the evening shift commander’s position was not filled by an appointment from the existing BPD Lieutenant’s eligible list but was filled through acting out of grade appointments of a BPD Police Sergeant receiving BPD Lieutenant’s pay while acting in the position.

12. During the Fall of 2023, the Appellant contacted Acting Chief Challies regarding the Lieutenant’s vacancy and his interest in a promotion into the position.

13. In October 2023, the Appellant filed a complaint of discrimination under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA).

14. On November 30, 2023, the Appellant, through counsel, made a formal demand that, among other things, he be promoted forthwith to Police Lieutenant.

15. By letter dated December 7, 2023, the US Department of Labor informed the Appellant that it found the evidence did not support a violation of USERRA.

16. On December 22, 2023, the Appellant filed this appeal with the Commission.

17. On February 20, 2024, HRD established a new eligible list for BPD Police Lieutenant. Sgt. Bitinas was ranked #1, Sgt. St. Onge was ranked #5 and Sgt. Laber (the Appellant) was ranked #7.

18. On March 27, 2024, pursuant to the Commission's Interim Order issued in this appeal, Sgt. Bitinas was promoted to the position of temporary Lieutenant.

### **APPLICABLE LEGAL STANDARD**

The Commission may, on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3). A motion before the Commission, in whole or in part, via summary decision may be filed pursuant to 801 C.M.R. 1.01(7)(h). An appeal may be decided on summary disposition only when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". See, e.g., Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). See also Mangino v. HRD, 27 MCSR 34 (2014) and cases cited ("The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass. R. Civ. P. 56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing."); Morehouse v. Weymouth Fire Dept., 26 MCSR 176 (2013) ("a party may move for summary decision when . . . there is no genuine issue of fact relating to his or her claim or defense and the party is entitled to prevail as a matter of law.")

### **ANALYSIS**

After careful consideration of the facts and the law, I conclude that the BPD's use of "acting out of grade" Sergeants who were paid as an "acting" Lieutenant to serve as evening shift

commander after the position was vacated by Lt. Ellis in September 2023, rather than promote a Lieutenant from the then active eligible list to assume the position, was contrary to the requirements of civil service law and prejudiced the rights of the candidates who had taken and passed the civil service examination for Police Lieutenant and whose names appeared on the eligible list for promotion to that position.

The plain meaning of the provisions of Sections 27 and 59 of Chapter 31, and Personnel Administration Rules PAR.09, mandate that promotional appointments to fill a permanent vacancy in a civil position must be filled from the first 2N+1 names on a certification drawn from the names in rank order on an active eligible list containing at least three candidates. See Memorandum and Order, Kelley v. City of Boston Fire Dep't, Suffolk Sup. C.A. No. 12-571-H (8/5/2012), *Commission decision after remand*, 29 MCSR 176 (2016), *further appeal after remand*, Suffolk Sup. C.A.1684-01233 (2018) (employer cannot use “out-of-grade” promotions for more than 30 days when a current eligible list exists from which promotions can be made).

First, the record does not fully explain what prompted the decision to provisionally promote Lt. Ellis to the position of Deputy Chief that had been vacated by retirement more than a year earlier. Under those circumstances, I find it problematic that the promotion can reasonably be construed to trigger an “emergency” promotion. See G.L.c.31, §31 (an emergency appointment “shall be made only when the circumstances requiring it could not have been foreseen . . .”) Giving the BPD the benefit of the doubt on that point, however, any emergency appointment could have continued only for 30 days, and the position would still need to have been filled by promotion from the active eligible list no later than October 5, 2023. Even if it were possible that HRD would approve a renewal of such an emergency appointment, at the very latest, the promotion from the eligible list would have to have occurred on or before November 5, 2023.

Second, the BPD cannot be excused from making a promotion from an active eligible list as required by civil service law because they had purportedly been advised by HRD that “civil service will never force you to make a promotion.” It is true that, when it comes to filling a vacancy in a civil service position, an appointing authority is vested with “considerable authority . . . [and] retains the sole power to decide whether to fill vacancies . . . .” City of Somerville v. Somerville Municipal Employee’s Ass’n, 20 Mass. App. Ct. 594, 597, rev. den., 396 Mass. 1102 (1985). “The appointing authority . . . many not be required to appoint any person to a vacant post [and] may select, in the exercise of sound discretion, among persons eligible for promotion or may decline to make any promotion.” Goldblatt v. Corporation Counsel of Boston, 360 Mass. 660, 6665 (1971); O’Toole v. Newton Fire Dep’t, 22 MCSR 563 (2009) (Notwithstanding a provision in the collective bargaining agreement to make “promotions as soon as practicable after a vacancy occurs”, the appointing authority “is not required under the civil service law to fill a permanent or a temporary vacancy in a permanent position.”) See also Mayor of Lawrence v. Kennedy, 57 Mass. App. Ct. 904, 906 (2003); Gillespie et al v. Boston Police Dep’t, 24 MCSR 170 (2011); Mandracchia v. City of Everett, 21 MCSR 307 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007). What civil service law does not permit, however, is to decide to fill a vacancy through acting, out-of-grade appointments when there is an active, eligible list for that position, which is precisely what happened here.

Similarly, the BPD’s belief, no matter how honestly felt, that the Appellant, himself, bears responsibility for the failure to make a permanent promotion to fill the evening shift supervisor’s vacancy, by demanding to be promoted and other alleged inappropriate conduct, does not excuse the initial decision to ignore the active eligible list and use “out of grade” Sergeants to fill a

vacancy. Nor do those allegations explain why the promotion could not have proceeded with those allegations being taken into account in deciding which candidate to promote.

In sum, as the candidate sitting at the top of an active eligible list, the Appellant's civil service rights (along with the other two candidates at the top of the list) have been prejudiced by the BPD's decision to ignore an eligible list and fill the vacancy in the evening shift commander's position over a period of months from September 2023 to February 2024. He deserves one additional opportunity for consideration for that position.

### **CONCLUSION**

For the reasons stated above, the Appellant's Motion to For Summary Decision is granted, and the Appellant's appeal under Case No. E-23-256 is *allowed*. Pursuant to the Commission's authority under Chapter 310 of the Acts of 1993, the Commission hereby orders the following:

1. The Town of Barnstable shall proceed forthwith to make a promotional appointment to the position of a permanent full-time Police Lieutenant
2. HRD and/or the BPD in its delegated capacity, shall place the names of the Appellant, Sergeant Robert Bitinas and Sergeant Nathan St Onge (the prior top candidates), in that order, at the top of the certification used to fill the permanent lieutenant vacancy.
3. Once the prior top candidates have been provided with the relief ordered above, the Department shall notify the Commission, with a copy to the Appellant, that said relief has been provided. After verifying that the relief has been provided, the Commission will notify HRD that the names of the three prior top candidates should no longer appear at the top of future certifications, but, rather, appear in rank order based on their rankings from the September 2023 promotional examination.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney and Stein, Commissioners) on May 2, 2024.

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:

Patrick N. Bryant, Esq. (Appellant)

Michael J. Maccaro, Esq. (for Respondent)

Madison Harris-Parks, Esq. (for Respondent)

Ashlee Logan, Esq. (HRD)

Regina Caggiano (HRD)