COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

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

PAUL MACCARONE,
Appellant
v.

E-10-160

CITY OF LAWRENCE,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON APPELLANT'S REQUEST FOR RELIEF
UNDER CHAPTER 310 OF THE ACTS OF 1993

On July 6, 2010, the Appellant, Paul Maccarone , filed an appeal with the Civil Service Commission (Commission), contesting the failure of the City of Lawrence (City) to appoint him as a permanent Fire Captain in the Lawrence Fire Department (Department) while his name was on an eligible list of candidates for this position.

On August 17, 2010, a pre-hearing conference was held at which time I heard oral argument from both parties. On October 6, 2010, the Appellant submitted a request for relief under Chapter 310 of the Acts of 1993 (310 Relief), ordering the City to promote him

to the position of permanent Fire Captain, retroactive to January 4, 2010. The City opposes the request but did not submit a reply.

The following facts do not appear to be in dispute:

1. The Appellant has been a permanent Fire Lieutenant in the Lawrence Fire Department for eleven (11) years.
2. He took and passed the civil service examination for Fire Captain on November 17, 2007. He did not pass a subsequent examination administered in November 21, 2009.
3. As a result of passing the November 17, 2007 Fire Captain civil service examination, HRD placed the Appellant's name on an eligible list of candidates for this position on April 19, 2008. His name was ranked third, behind John Meaney and Robert Wilson.
4. The 2008 eligible list expired on April 19, 2010, two years after it was established by HRD.
5. The Appellant's name did not appear on the subsequent eligible list for Fire Captain, established by HRD on May 14, 2010, because he did not pass the November 21, 2009 examination.
6. On January 6, 2010, the City "designated" the Appellant as "Acting Fire Captain", a designation that is not recognized under civil service law.
7. The City's decision to make this "acting" designation came after the Fire Chief retired, triggering the designation of a Deputy Fire Chief as "Acting Fire Chief" and the designation of a Fire Captain as "Acting Deputy Fire Chief". The Appellant's designation of "Acting Fire Captain" followed. (See Bergeron v. City of Lawrence, 23 MCSR 361 (2010)).

8. On January 11, 2010, the City requested a Certification of names for permanent full-time Fire Captain from HRD.
9. On January 28, 2010, HRD forwarded a Certification to the City for the position of permanent full-time Fire Captain. By this time, the only name that was on the Certification was the Appellant's.
10. As discussed in more detail below, the basis of the Appellant's appeal is that the City, as of January 28, 2010, should have appointed him as a permanent full-time Fire Captain, with a retroactive date of January 6, 2010.
11. Under civil service law, however, the City had three options available to them at that time: a) make a permanent appointment; b) make a temporary appointment; or, since the eligible list contained less than three names; c) make a provisional appointment.
12. On March 16, 2010, the Appellant signed Certification No. 205703 as willing to accept the position of permanent full-time Fire Captain if appointed.
13. The City's Appointing Authority (the Mayor) did not take any further action regarding filling the position of Fire Captain prior to the expiration of the 2008 eligible list on April 19, 2010.
14. As referenced above, the Appellant's name did not appear on the new eligible list for Fire Captain, established on May 14, 2010, because he did not pass the November 21, 2009 civil service examination.
15. The Appellant seeks to be appointed as permanent full-time Fire Captain with a retroactive civil service seniority date of January 4, 2010, the day he was designated as "Acting Fire Captain."

APPLICABLE STATUTES AND DECISIONS

G.L. c. 31, § 7 states in relevant part:

> "Each promotional appointment within the official service shall be made pursuant to section eight or after certification from an eligible list established as a result of [an] examination[] …
>
> An appointing authority desiring to make a promotional appointment within the official service, other than a promotional appointment pursuant to section eight, shall, if a suitable eligible list exists, submit a requisition to the administrator. Upon receipt of such requisition the administrator shall certify from such list the names of persons eligible for such promotional appointment. If no suitable list exists, or if the list contains the names of less than three persons who are eligible for and willing to accept employment, the appointing authority may request authorization to make a provisional appointment pursuant to sections twelve, thirteen, and fourteen or a provisional promotion pursuant to section fifteen. "
>
> An appointing authority may make a temporary promotional appointment … to fill a temporary vacancy in a permanent position."

As to which method to use in filling promotional vacancies (permanent or temporary), the courts have said that cities and towns have the "power to decide whether to fill vacancies on either a permanent or temporary basis." Somerville v. Somerville Municipal Employees Ass'n, 20 Mass. App. Ct. 594, 596 (1985).

Regarding the reference to a "provisional appointment", section 12 provides in relevant part that:

> "An appointing authority may make a provisional appointment . . . with the authorization of the administrator . . .. Such authorization may be given only if no suitable eligible list exists . . . . A provisional appointment may be authorized pending the establishment of an eligible list . . . .
>
> After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list."

As to the reference to section 15, that term provides in relevant part that:

> "An appointing authority may, with the approval of the administrator . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list ..."

Section 31 of the civil service law also affords appointing authorities a limited right to make another type of appointment – an emergency appointment. That section states in relevant part that

> "An appointing authority may, without submitting a requisition to the administrator 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 . . . 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 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."

In Somerville, the court noted that "in filling any vacancy, even temporarily, the appointing authority is required to follow the carefully prescribed requirements set forth in c. 31. Failure of an appointing authority in filling a position to follow the requirements will render the appointment invalid." See also Fall River v. Teamsters Union, Local 526, 27 Mass. App. Ct. 649, 650 (1989)("Ordinarily, when a vacancy in a civil service job

occurs, the appointing authority selects from a list of eligibles drawn up as a result of a competitive examination.")

Further, [U]nauthorized "out-of-grade" promotional appointments, whether provisional or temporary . . . circumvent the requirements of the civil service law. [S]uch appointments should be avoided because they "often are used to reward employees beyond the salary limits of their permanent positions." . . . This breeds favoritism, which tends to undermine the purpose of the civil service law – "[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." Somerville at 602-3. See also Gaughan v. Boston Police Dep't, 12 MCSR 245 (1999)(ruling that using sergeants in out-of-grade capacity, City "is in violation of [c. 31 §73] by appointing and/or employing individuals in violation of civil service laws.")

Although it used the word "vacancy" a number of times in the course of the statute, one of the things the Legislature did *not* do in crafting its "comprehensive plan" for the appointment of individuals to civil service positions was to define it. As the Appeals Court has recently noted,

> "Vacancy," . . . is not defined in G. L. c. 31 nor does the chapter contain provisions for determining whether or when a vacancy exists . . . . *Decisions about whether a vacancy* exists may have an impact on any individual who holds the supposedly vacant position as well as on *those who aspire to it.*

Mayor of Lawrence v. Kennedy, 57 Mass. App. Ct. 904, 906 (2003).[1] The court's reference to the interests of those "who aspire" to fill vacancies refers to the substantive

[1] The determination of whether a vacancy *exists* is different from the question of whether a vacancy *should be filled* or the position should instead be abolished. The courts have said the latter decision is a "level of services" decision that is up to cities and towns to make. See, e.g., Fall River v. Teamsters Union, Local 526, 27 Mass. App. Ct.

right, which the courts and the Commission have recognized, of persons who appear on eligible lists to be "fairly considered" for vacancies that occur during the period of their eligibility. See, e.g., Boston Police Dep't, 17 MCSR 76 (2004); Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 16 (1st Cir. 1998).

The Commission has, in a handful of decisions, considered the question of whether a vacancy came into existence and, if so, whether the appointing authority filled it in one of the permissible ways. They are: O'Connor v. Boston Police Dep't, 22 MCSR 660 (2009); Thomas v. Boston Police Dep't, 22 MCSR 157 (2009); Greeley v. Belmont, 19 MCSR 32 (2006); Gaughan v. Boston Police Dep't, 12 MCSR 245 (1999); Sullivan v. Brookline Fire Dep't, 9 MCSR 46 (1996); Sullivan v. Brookline Fire Dep't, 8 MCSR 41 (1995); McDaid-Harris & Sims et al v. City of Peabody, 23 MCSR 363 (2010).

While the means used to fill asserted "vacancies" have varied somewhat from case to case (e.g., designating personnel as working in higher-rank in an "acting" capacity; having the duties of the higher rank performed by a lower-ranked officer working "out of grade"), the substantive concern is the same in each – that is, that an opening that qualified as a "vacancy" was not filled in one of the ways permitted by the Legislature.

APPELLANT'S ARGUMENT AND RESPONDENT'S RESPONSE

The Appellant argues that during his period of eligibility, the City violated civil service law by: a) designating him as an "Acting Fire Captain"; and b) failing to appoint him as a permanent full-time Fire Captain.

The City does not dispute that it violated civil service law by making "acting" designations, but insists it was under no obligation to make any permanent appointment

649, 654 (1989) (labeling the decision of "whether a civil service vacancy ought to be filled at all" as "a staffing level decision.")

to the position of Fire Captain. The City argues that financial uncertainty and questions regarding what would happen with the Fire Chief's position, justified a temporary or provisional appointment at the time and that, under civil service law, they would have had the discretion not to make a permanent appointment.

CONCLUSION

Based on a review of the relevant facts, documents, oral arguments and written briefs submitted, I make the following conclusions. The City violated civil service law and rules between January 4, 2010 and May 14, 2010[2] by designating the Appellant as an Acting Fire Captain. The City was required to fill this position through a permanent, temporary or provisional appointment.

There is nothing in the record, however, that would warrant a determination by the Commission that the Fire Captain vacancy should have been filled through the use of a permanent (as opposed to temporary or provisional) appointment during the time that the Appellant's name appeared on an eligible list for the position of Fire Captain. There has been no evidence presented in this case that the City's decision was motivated by personal or political bias and there is sufficient evidence to conclude that the use of a temporary appointment was defensible and prudent given the uncertainty regarding the City's financial situation at the time the and the uncertainty regarding a decision on how to fill the vacant Fire Chief's position. It is the Commission's understanding that the City has subsequently ended the use of "acting" appointments and has complied the civil service law and rules that require either a permanent, temporary, or, in some cases, provisional appointments.

[2] I am aware that the acting designation extended shortly beyond May 14, 2010. For the purposes of this particular appeal, these are the relevant dates in question as the Appellant's name did not appear on the new eligible list that was established on May 14, 2010.

During the period of time that the Appellant's name appeared on the eligible list which expired on April 19, 2010, the City was not obligated to make a permanent appointment to the position of Fire Captain. The Appellant's name did not appear on the subsequent eligible list that established on May 14, 2010 because he failed to pass the 2009 Fire Captain civil service examination.

"The civil service system confers only limited rights to those on eligibility lists. Chapter 31 expressly directs that an eligibility list will be effective 'for such period as the administrator shall determine, but in any event not to exceed two years . . . .' G. L. c. 31, Section 25. The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that positions might become available immediately after the expiration of an old list -- or immediately before the establishment of a new list. The over-all pattern of the statute does not justify expectations that certain positions will become available during the period of a single list." Callanan and others v. Personnel Administrator, 400 Mass. 597 (1987).

For these reasons, the Appellant has not shown that he is an aggrieved person or that the relief he seeks from the Commission is warranted.

Civil Service Commission

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Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson and McDowell, Commissioners [Stein, Marquis – Absent]) on August 25, 2011.

A True copy. 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 to:
Paul T. Hynes, Esq. (for Appellant)
Anne L. Randazzo, Esq. (for Appointing Authority)