

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

GREGORY MACKIN,
Appellant

v.

E-12-313

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Mark D. Stern, Esq.
34 Liberty Avenue
Somerville, MA 02144

Appearance for Respondent:

Kerry M. Anderson, Esq.
Office of Labor Relations
City of Boston
Boston City Hall: Room 624
Boston, MA 02201

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural History

On November 19, 2012, the Appellant, Gregory Mackin (Mr. Mackin) filed an appeal with the Civil Service Commission (Commission), asking the Commission to order the state's Human Resources Division (HRD) to extend the eligible list for Deputy Fire Chief in the Boston Fire Department (BFD), which expired on September 23, 2012.

On December 4, 2012, a pre-hearing conference was held at the offices of the Commission, which was attended by Mr. Mackin, his counsel, counsel for HRD and counsel for the BFD, at which time I heard oral argument.

The BFD subsequently filed a Motion to Dismiss and Mr. Mackin filed an opposition to the motion.

Factual Background

Mr. Mackin is a District Fire Chief at the BFD. As of April 2012, his name appeared highest on an eligible list of candidates for the next higher title of Deputy Fire Chief. That eligible list, which was established on September 23, 2010, expired on September 23, 2012.

While the above-referenced eligible list was in place, the BFD assigned a non-union Deputy Fire Chief to a Deputy Fire Chief position within the bargaining unit. Arguing that this violated certain provisions of the collective bargaining agreement, the Boston Firefighters Association, IAFF, Local 718 (Union), filed a grievance. The union subsequently filed a demand for arbitration and the matter is pending before an arbitrator.

Mr. Mackin filed a written request with HRD to extend the life of the eligible list until such time as the arbitrator issued a decision. HRD did not reply.

BFD's Argument

The BFD asks the Commission to dismiss Mr. Mackin's appeal, arguing that since the union decided to challenge this issue via arbitration, Mr. Mackin is precluded, pursuant to G.L. c. 150E, § 8, from filing an appeal with the Commission regarding the same issue.

Mr. Mackin's Argument

Mr. Mackin argues that his appeal to the Commission, while related to the matter currently pending before an arbitrator, raises a different issue. Mr. Mackin is not asking the Commission to rule on whether the BFD was permitted to transfer a non-union Deputy Fire Chief into a similar position in the bargaining unit. Rather, in the event that the arbitrator decides in the union's favor, Mr. Mackin is asking that any promotional appointment (as opposed to transfer) be made from the eligible list that has now expired. To accomplish that, Mr. Mackin seeks an order from the Commission reviving the expired eligible list.

Analysis

The issue before the arbitrator is different than the issue currently before the Commission. The arbitrator must decide if the BFD violated provisions of the contract by transferring a non-union Deputy Fire Chief into a Deputy Fire Chief position within the bargaining unit. Mr. Mackin is asking the Commission to revive an eligible list in the event that the arbitrator decides in the union's favor. Thus, the appeal cannot be dismissed based on provisions of c. 150E, § 8.

However, the Commission lacks jurisdiction to hear Mr. Mackin's appeal because he cannot show that he is "a person *aggrieved* by a[] decision, action, or failure to act by the administrator [HRD]". G.L. c. 31, § 2(b). (*emphasis added*) Rather, Mr. Mackin's potential harm is speculative and may only occur if an arbitrator, sometime in the future, rules in favor of the union.

Further, even if the arbitrator rules in favor of the union, it is unlikely that the Commission would act favorably on Mr. Mackin's request. "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 ... Moreover, individuals do not have a vested right in their particular positions on the eligibility list once it is established." Callanan & others v. Personnel Administrator for the Commonwealth, 400 Mass. 597 (1987).

Finally, in the event that the arbitrator does rule in favor of the union, I see nothing that would limit the arbitrator's ability to order relief that may ultimately be consistent with what Mr. Mackin seeks here.

Conclusion

For these reasons, Mr. Mackin's appeal under Docket No. E-12-313 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis and Stein, Commissioners [McDowell – Absent]) on February 21, 2013.

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:
Mark Stern, Esq. (for Appellant)
Kerry Anderson, Esq. (for Respondent)
John Marra, Esq. (HRD)