Decision mailed: 11/27/12
Civil Service Commission

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

McCLAIR MAILHOT,
Appellant

v.

E-11-236

TOWN OF SOUTH HADLEY,
Respondent

Appellant's Attorney:

Kevin Coyle, Esq.
Attorney At Law
935 Main Street
Springfield, MA 01103

Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION

BACKGROUND

The Appellant, McClair Mailhot (Mr. Mailhot or Appellant) has been a police officer in the Town of South Hadley (Town) since 1986 and has served as a detective for the past ten (10) years. He took and passed a promotional examination for the position of police sergeant in 2008 with a score of 92. Five (5) other individuals who took the same examination failed. Thus, only Mr. Mailhot's name appeared on the eligible list for police sergeant established by the state's Human Resources Division (HRD) on May 15, 2009. An eligible list that contains the names of less than three (3) persons eligible for and willing to accept appointment is considered a "short list" which, under G.L. c. 31, § 15, allows an

appointing authority to make a provisional promotion until such time as a new eligible list is established. The May 15, 2009 eligible list expired two years later, on May 15, 2011. During this two-year period, the Town did not promote *any* individual to the position of police sergeant.

The Appellant argues that there was a sergeant vacancy during this time period, that he is qualified for the position and, consistent with basic merit principles, he should have been promoted.

The Town argues that this "sixth sergeant position" has not always been filled and was only filled in recent years at the discretion of the Board of Selectmen (the Appointing Authority) in an effort to control overtime costs. Even if there was a vacancy to be filled, however, the Town argues that it was under no obligation to appoint from a short list of candidates and/or provide the Appellant with sound and sufficient reasons for not granting him a promotional appointment. However, even is such reasons were required, the Town argues that there are multiple reasons to justify their decision to not promote Mr. Mailhot.

Although there was no bypass, I instructed the parties that I would take testimony from both the Appellant and the Town's Police Chief, to determine if the Commission should exercise jurisdiction under the broad umbrella of G.L. c. 31, § 2(a) and Chapter 310 of the Acts of 1993.

A hearing was held on November 23, 2011 at the Springfield State Building and I heard testimony from South Hadley Police Chief David Labrie and the Appellant.

Testimony of Chief Labrie

Chief Labrie began as a police officer for the Town in 1978 and has been the Police Chief since 2006. He oversees a department of 27 employees including two (2) lieutenants, five (5) sergeants, three (3) detectives and seventeen (17) police officers.

When he became Police Chief, he was tasked by the Town Manager and the Board of Selectmen with reducing overtime. To that end, he proposed the creation of a sixth sergeant position, which was first filled by Mark Linehan in 2009. In 2009, when this sixth sergeant position was first filled, Chief Labrie "candidly spoke to [the Appellant]" about why he was not being selected including: the Appellant's overly aggressive personality; his tendency to make controversial and demeaning comments to others.

When Sergeant Linehan vacated the sergeant position in 2010, the Appellant was the only individual on the eligible list. Chief Labrie said he chose not to backfill the sergeant position because the issues he brought to the attention of the Appellant in 2009 still persisted and the Appellant did not have the support of the command staff. When the Appellant told Chief Labrie that he did have the support of the command staff, Chief Labrie suggested that the Appellant solicit written letters of support from them. Three (3) sergeants and one (1) lieutenant submitted letters to Chief Labrie. Chief Labrie testified that he was not swayed by these letters of support in part because of the qualifiers that each of the authors included in the letters. (Exhibit 2)

Chief Labrie testified that there were other reasons for choosing not to fill the sixth sergeant position with the Appellant. For example, the Appellant received a written reprimand in December 2009 for accessing the Criminal Justice Information System (CJIS) for personal reasons. (Exhibit 4)

Asked on cross examination to give examples of the Appellant's overly aggressive behavior and/or inappropriate remarks, Chief Labrie testified that the Appellant: a) caused a stir when he cited a Springfield Fire Lieutenant for having a dog in his lap while driving; b) received a letter of complaint from a woman complaining that she was profiled by the Appellant because of her sexual orientation; c) told the victim of a home invasion that she needed to be a better mother and not leave her teenage children home alone; and d) told fellow officers taking up a collection for a terminated dispatcher that the dispatcher's children could "rot in hell."

Chief Labrie testified that despite all of these shortcomings, he considers the Appellant to be a dedicated, hard working detective and a personal friend. However, he testified that he did not think it was in the best interest of the department to promote the Appellant until he addresses the above-referenced problems regarding his demeanor and communication skills.

Testimony of the Appellant

The Appellant has been a police officer with the Town since 1986 and has served as a detective for the past ten (10) years. He was president of the local police officers' union from 2000 to 2006.

The Appellant was unapologetic about his "tell it like it is" communication style and his willingness to enforce the letter of the law. He testified that he routinely cites drivers who have a dog in their lap and that the Springfield Fire Lieutenant's gripe was the result of the Appellant's unwillingness to "fix the ticket" for him. He testified that he was found to have acted appropriately regarding the female citizen who filed a complained about him. He acknowledged telling the mother whose home was invaded that she needed to stay home and be a better mother and he did not dispute the "her kids can rot in hell" comment

attributed to him in regard to a terminated dispatcher. He also did not dispute that he inappropriately accessed the CJIS system for personal reasons but testified that he "owned up" to his wrongdoing and that this minor incident should not be held against him.

LEGAL STANDARD

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).

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). The court's reference to the interests of those "who aspire" to fill vacancies refers to the substantive 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).

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 & others v. Personnel Administrator, 400 Mass. App. Ct. 507 (1987)

G.L. c. 31, Section 15, governing provisional promotions ... allows the appointing authority to make a provisional promotion to the next higher grade, where there is only a short list of eligible persons, without submitting to the personnel administrator "sound and sufficient reasons" for not making a permanent promotion from that list. Kelleher v. Personnel Administrator, 421 Mass. App. Ct. 382 (1995).

The Commission has, however, in a handful of cases, examined whether a city or town's decision not to fill a vacancy was driven by political factors or personal animus designed to deprive the right of an individual to ever be considered for a promotional opportunity. Most recently, in Cutillo and Kelley v. City of Malden, 23 MCSR 48 (2010), the Commission found that the City's failure to fill a sergeant vacancy was related to the Police Chief's personal grudge against the Appellant for arresting his daughter-in-law several years ago in an alcohol-related incident.

CONCLUSION

The Town chose not to backfill a sergeant vacancy that arose while there was a "short list" of candidates. The Appellant was the only individual on that list. There is nothing in the civil service law or rules that compel a city or town to fill a vacancy. Here, however, the Commission exercised its discretion to examine whether that decision was rooted in impermissible reasons such as political factors or personal animus against the Appellant.

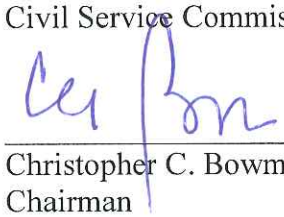
Based on Chief Labrie's credible testimony, the decision not to fill the vacancy while the Appellant was the only eligible candidate is not attributable to inappropriate

motivations such as personal animus or political considerations. Rather, Chief Labrie, who considers himself a personal friend of the Appellant, offered many valid reasons for not promoting the Appellant including his concerns about the Appellant's recent disciplinary history (accessing CJIS for personal reasons) and his aggressive demeanor and poor communication skills. Several examples, including some that the Appellant did not dispute, supported the Police Chief's well-grounded concerns about promoting the Appellant.

Notwithstanding these concerns, Chief Labrie appears to be keeping an open mind on a going-forward basis regarding whether the Appellant is well-suited for the command position of police sergeant. The Appellant, a hard-working and dedicated detective, should take advantage of that goodwill and seriously reflect on how he can address the issues related to his demeanor and communication skills. In short, the choice here lies with the Appellant.

For all of the above reasons, the Appellant's appeal under Docket No. E-11-236 is hereby ***dismissed***.

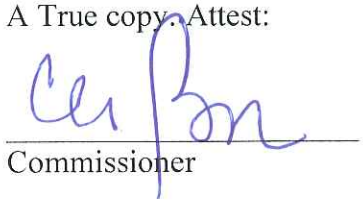
Civil Service Commission



Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, McDowell and Stein, Commissioners [Marquis – Absent]) on January 26, 2012.

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:
Kevin B. Coyle, Esq. (for Appellant)
Tim D. Norris, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)