COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss. **CIVIL SERVICE COMMISSION**

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JOEL McCARTHY, PAUL JOSEPH, DANIEL TRACEY & JAMES BLAKE,
Appellants

v. E-14-296

BOSTON POLICE DEPARTMENT,
Respondent

Appearance for Appellants: James Hykel, Esq.
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Commissioner: Christopher C. Bowman

DECISION ON BOSTON POLICE DEPARTMENT'S MOTION TO DISMISS

Procedural Background

The Appellants in this case are all sergeants in the Boston Police Department (BPD) whose names appeared on an eligible list for promotional appointment to the position of lieutenant during the time frame relevant to this appeal, from November 2014 to January 2015. They argue that they are aggrieved individuals as a result of the BPD's decision to allegedly use illegal "out-of-grade" appointments on a day-to-day basis to fill a lieutenant vacancy as opposed to appointing one of them as a temporary lieutenant from the eligible list.

I held a pre-hearing on January 6, 2015 and a status conference on March 3, 2015. The status conference was attended by counsel for both parties, a representative from the Boston Police Superior Officer Federation (BPSOF), the BPD's Human Resources Director and BPD Superintendent Bernard O'Rourke, who serves as the Chief of the BPD's Bureau of Field Services. The BPD has filed a Motion to Dismiss and the Appellants filed a reply / opposition. As part of their submissions, I asked the BPD to memorialize the process that will be used for filling vacancies on a going forward basis, and for the Appellants to offer any comments regarding this process.

Summary of Events Relevant to the Instant Appeal

1. Effective November 22, 2014, Lt. Fred Williams was reassigned from District C-6 to the Internal Affairs Division.
2. On the same day, the BPD approved a request from Lt. Charles Kelly to be reassigned from District C-11 to District C-6.
3. Lt. Kelly's reassignment became effective December 26, 2014.
4. Prior to Lt. Kelly being reassigned to District C-6 (November 22nd through December 25th), the BPD covered the District C-6 lieutenant shift (previously covered by Lt. Williams) through daily overtime, known as Temporary Service in a Higher Rank (TSHR), under the applicable collective bargaining agreement (CBA).
5. According to the BPD, a review of the payroll records for District C-6 during this time period reflects twenty-four (24) occasions where a sergeant worked "out-of-grade" covering this particular shift.
6. The BPD did not notify the state's Human Resources Division (HRD) that it was utilizing "emergency appointment(s)" from November 22nd to December 25th.

Parties' Arguments

The BPD argues that since the vacancy created by the reassignment of Lt. Williams did not exceed thirty "working" day, the only requirement pursuant to the statute was to "notify" HRD of the use of emergency appointments. According to the BPD, they should not be penalized for omitting a solely administrative and "ministerial" procedure. Finally, the BPD provided a written summary of the procedure to be used on a going-forward basis to fill vacancies.

The Appellants argue that, since, according to them, the C-6 "vacancy" from November 22nd to December 25th was not "unforeseen", the use of emergency appointment(s) was not justified. Assuming an emergency appointment was justified, the Appellants, citing Kelly v. City of Boston Fire Dept., Suffolk Sup. Crt. No. 12-571-H (2014), argue that the BPD violated the civil service law by failing to notify HRD as required by G.L. c. 31, § 31. Finally, the Appellants argue that the process proposed by the BPD to fill vacancies on a going forward basis fails to comply with the civil service law.

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."

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 right, which the courts and the Commission have recognized, of persons, such as the

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

Appellants, 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). Kelly et al v. Boston Fire Department, 25 MCSR 23 (2012).

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.

Analysis

As a preliminary matter, the parties disagree on how long a "vacancy" existed here, with the BPD arguing that a vacancy existed for twenty-four (24) working days and the Appellants arguing that a vacancy existed for thirty-one (31) working days. Given the statutory language related to emergency appointments, and the additional requirements that are triggered after thirty (30) working days, that dispute is potentially relevant to this appeal.

The Appellants' calculations, however, rely on an erroneous, albeit creative, assumption. The Appellants seek to effectively add seven (7) working days to the duration of the "C-6

Vacancy" by including days attributable to a *subsequent* short-term "vacancy" related to an entirely different position, that was triggered by the filling of the C-6 vacancy that is the subject of this appeal. Put simply, the Appellants do not get to string together a series of different vacancies to argue that that the 30-day threshold has been triggered. A proper reading of the statute supports the BPD's argument that the C-6 position was filled using out-of-grade appointments for twenty-four (24) working days.

Even if the correct calculation of twenty-four (24) working days is applied, the Appellants still argue that the BPD violated civil service law for two reasons. First, the Appellants argue that the vacancy was not unforeseen, thus the use of emergency appointments is not justified. Second, even if the use of an emergency appointment was justified, the Appellants, citing the Superior Court's decision in Kelly, argue that the BPD violated the civil service law by failing to notify HRD of its use of the emergency appointment(s).

A reality check, and a large dose of common sense, is warranted here in order to put the Appellants' argument in the proper context. It appears that what the Appellants are arguing here is that one (1) of them should have been promoted to the position of temporary lieutenant for the entire twenty-four (24) working days in question, as their names were within the statutory "2N + 1" formula on the eligible list in place at the time.

The civil service law and rules (the Personnel Administration Rules [PARs]), lay out how such a temporary appointment would be made. Specifically, PAR.08 (along with delegation guidelines established by HRD in 2009), outline the need to create a "Certification" of sufficient names from the eligible list; to notify these candidates of the right to sign the Certification; and to provide a sufficient amount of time for the candidates to sign the

Certification. In total, PAR.08 allows appointing authorities, such as the BPD, with "three weeks" from the creation of the Certification to make a promotional appointment from among the eligible candidates.[2] The civil service law and rules do not require an appointing authority to make the promotional appointment on the first day that the "vacancy" occurs. Rather, the overall framework provides for a short, but sufficient amount of time to make such a promotional appointment. Applied here, the "three-week" period would generally mirror the twenty-four (24) working days in which "out-of-grade" appointments, *provided for under the collective bargaining agreement*, were used to ensure coverage in the applicable lieutenant position.

Based on the circumstances here, I see no conflict between the civil service law and those provisions of the contract that allow the BPD to ensure coverage of critical positions on a limited, short-term basis, while it is in the process of making a promotional civil service appointment for that position from a Certification.

In short, based on the circumstances here, I do not believe that an "emergency appointment" actually occurred, similar to if the BPD was required to ensure coverage for vacation and other leave on a short-term basis through the process agreed to in the CBA.

Even if an emergency appointment did occur here for twenty-four (24) working days, the only violation that arguably occurred was the BPD's failure to "notify" HRD. This is distinguishable from the Court's decision in Kelly, where the out-of-grade appointments occurred over many years and involved vacancies in *excess* of thirty (30) and often sixty (60) days.

[2]HRD has interpreted this three-week timeframe, for which extensions can be granted, to mean that the appointing authority must grant a conditional offer to the candidate.

Finally, I carefully considered the process that the BPD has in place for filling vacancies on a going-forward basis. To me, the process, as outlined by BPD, will go a long way in filling vacancies on a timely basis and ensuring compliance with the civil service law and rules.

While I also considered the concerns raised by the Appellants in regard to the process to be used on a going-forward basis, those concerns generally rely on an unrealistic role for the Commission vis-à-vis the BPD. Put simply, the Commission is not responsible for the day-to-day operations of the BPD.

It would be a mistake, however, for either party to view this decision as a retreat from the years of Commission decisions regarding out-of-grade appointments. See Thomas et al v. Boston Police Department, E-08-68, 69, 70, 175, 176, 177 (2008) (relief granted to Appellants who were on an eligible list while out-of-grade appointments were used for five (5) and six (6) months respectively); O'Connor et al v. Boston Police Department, E-09-170-172 (2009) (relief granted to Appellant who was on eligible list while out-of-grade appointments were used for over six (6) months); Roake et al v. Boston Police Department, E-09-444-447 (2010) (relief granted to Appellant who was on eligible list while out-of-grade appointments were used for two and a half (2 ½) months); McDaid Harris et al v. City of Peabody, E-10-11 and others (2010) (relief granted to Appellants who were on eligible lists while out-of-grade appointments were used for eleven (11) months); Gagnon v. City of Chicopee, G2-10-250 (2012) (relief granted to Appellant who was on eligible list while out-of-grade appointment was used for ninety-six (96) days).

Here, as stated above, the BPD, for a period of less than thirty (30) working days, and while it was working to make an appointment through the civil service process, ensured

coverage for the position in question using a process outlined in the CBA. That is distinguishable from the series of decisions referenced above in which intervention (and relief) by the Commission was warranted.

Conclusion

For the reasons stated above, the BPD's Motion to Dismiss is allowed and the Appellants' appeal under Docket No. E-14-296 is hereby ***dismissed.***

There are two (2) other appeals regarding the use of alleged out-of-grade appointments currently pending before the Commission involving the same counsel (McCarthy et al v. Boston Police Department, CSC Case No. E-14-290 & Tevnan et al v. Boston Police Department, CSC Case No. E-15-30). In regard to those appeals, counsel are hereby ordered to provide the Commission with a status update on those appeals within thirty (30) days.

Civil Service Commission

/s/Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on May 14, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of this 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
James Hykel, Esq. (for Appellants)
Nicole Taub, Esq. (for Respondents)