

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK,ss.

CIVIL SERVICE COMMISSION

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

SHEILA McDAID-HARRIS &  
ANTONE SIMS et al,  
*Appellants*

v.

Docket Nos.: (See Below)

CITY OF PEABODY,  
*Respondent*

<u>CSC Case No.</u>	<u>Appellant</u>	<u>Name was on which expired eligible list?</u>
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***“APPELLANT GROUP 1” (All currently serve in the title of sergeant)***

*E-10-39	Albert P. Lopes	Lieutenant
*E-10-26	Arthur F. Yeo	Lieutenant
*G2-09-330	Sheila McDaid-Harris	Lieutenant
**E-10-25	Steven Marques	Lieutenant
*E-09-424	Charles Randall	Lieutenant
**E-10-38	William Cook	Lieutenant
**E-10-27	Timothy Maroney	Lieutenant
**E-10-40	Glenn Fredericks	Lieutenant

***“APPELLANT GROUP 2” (All currently serve in the title of police officer)***

*E-10-24	Stephen Zampitella	Sergeant
*E-09-217	Antone Sims	Sergeant
*E-10-11	James Christman	Sergeant
*E-10-30	Douglas Marcus	Sergeant

<u>CSC Case No.</u>	<u>Participant</u>
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***N/A (Participant)	Scott Richards	(1 <sup>st</sup> on <i>new</i> Lieutenant list)
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\*Indicates individual is represented by Attorney James Lamond

\*\*Indicates that the individual is Pro Se

\*\*\*Indicates that the individual is represented by Attorney Michael Smerczynski

Note: The Appellants' names appear above in the rank order in which they appeared on the respective expired eligible lists that are the subject of these appeals.

Commissioner:

Christopher C. Bowman

DECISION ON CITY OF PEABODY'S MOTION TO DISMISS AND APPELLANTS'  
REQUEST FOR RELIEF UNDER CHAPTER 310 OF THE ACTS OF 1993

PROCEDURAL BACKGROUND

The Appellants in this case are Peabody police personnel whose names appeared on eligible lists for promotional appointments to the positions of either sergeant or lieutenant during the time frame from April 2007 through mid-May 2009. They argue that they are aggrieved individuals as a result of the City's failure to fill six vacancies during their period of eligibility, and ask the Commission to place their names at the top of the current eligible list [for either lieutenant or sergeant]. Sergeant Scott Richards has been deemed a participant in these matters. His name appears at the top of the current eligible list for lieutenant. He opposes the relief sought by the Appellants.

Following a series of pre-hearings, the City of Peabody (hereinafter "City" or "Appointing Authority"), filed a Motion to Dismiss the Appellants' appeals arguing that the Appellants are not aggrieved individuals, that the City complied with all civil service law and rules during the time period in question, and that the Appellant's appeals were not timely<sup>1</sup>.

A hearing was held at Peabody City Hall on March 15, 2010 which was attended by: counsel for the City, the City's Police Chief; counsel for those Appellants represented by counsel; the pro se Appellants; the Participant and his counsel; and counsel for the local police union. The parties submitted stipulated facts and twenty (20) joint exhibits at the hearing. Subsequent to the hearing, the City submitted forty-five (45) additional proposed exhibits which I have allowed and entered as Appointing Authority Exhibits 1 – 45. The Appellants represented by counsel submitted a proposed settlement agreement regarding a

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<sup>1</sup> The Appellants' appeals are deemed timely.

related matter which I have allowed and entered as Appellant's Exhibit 1. I also heard oral argument from the parties. In lieu of testimony, the parties agreed to submit additional stipulated facts and written briefs upon which the Commission would base its decision. Also, by mutual agreement of the parties, the City agreed to submit additional supporting documentation to all parties and the Commission prior to the submission of briefs. The Commission is now in receipt of the additional supporting documentation, the additional stipulated facts and the written briefs submitted by counsel for the City and counsel for those Appellants represented by counsel. All of this information was copied to all parties via an email distribution list that included the pro se Appellants, the Participant and counsel for the local union.

## **FINDINGS OF FACT**

Based on the stipulations of the parties, the documents submitted and relevant civil service law and rules, I make the following findings of fact:

1. As of May 1, 2007, the Peabody Police Department (hereinafter "Department") employed five (5) captains (MacGregor, Bellew, Carriere, Sweeney and R. Bettencourt) and six (6) lieutenants (Barardino, DeRosa, Bettencourt, Bonaito, McCory and Cohan). (Stipulated Facts and Exhibit 1)
2. Prior to May 1, 2007, Sergeant Scot Wlasuk had received a temporary promotional appointment to the position of lieutenant occasioned by the absence of Lieutenant Edward Bettencourt. That temporary promotional appointment continued until March 20, 2009. (Stipulated Facts)

3. On March 30, 2007, the state's Human Resources Division (hereinafter "HRD") created an "eligible list" of candidates for the position of sergeant that was effective through May 14, 2009. (PAR.07(2) and Stipulated Facts and Exhibit 4)
4. Also on March 30, 2007, HRD created an eligible list for the position of lieutenant that was effective through May 14, 2009. (PAR.07(2) and Stipulated Facts and Exhibit 5)
5. On March 30, 2008, HRD created an eligible list for the position of captain that is still in effect. (PAR.07(2) and Stipulated Facts and Exhibit 6)
6. In January 2008, Captain John Sweeney retired. Prior to his retirement, Captain Sweeney served as the Commander of the Criminal Investigations Division. The functional assignment of "commander" had historically been given to someone in the rank of captain but not at all times. (Stipulated Facts)
7. Upon Captain Sweeney's retirement, Lieutenant Martin Cohan, who was then the lieutenant assigned to CID / Special Operations, became responsible for the functions that Captain Sweeney had performed in part as Commander of the CID. (Stipulated Facts)
8. In June 2008, Captain Gerald Bellew retired. Prior to his retirement, Captain Bellew served in the functional assignment of Executive Officer. That function had historically been performed by someone in the rank of captain. (Stipulated Facts)
9. An appointing authority may make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit if there is no suitable eligible list. If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator

may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title. No provisional promotion shall be continued after a certification by HRD of the names of three persons eligible for and willing to accept promotion to such position. G.L. c. 31, § 15

10. In December 2008, the City provisionally promoted Captain Scott Carriere to the position of Deputy Police Chief, a position for which there was no eligible list at the time. His pay was increased at this time. Just before his provisional promotion, his functional role was as a “Patrol Commander”. The function of that assignment is to oversee the patrol division, and historically it has been assigned to someone in the rank of captain. (Stipulated Facts)
11. Also in December 2008, the City provisionally promoted Lieutenant Martin Cohan to the position of Deputy Police Chief. His pay was also increased at this time. After his provisional promotion, he continued to oversee the functions of Commander of the Criminal Investigations Division. In addition, he was responsible for the function of Traffic Special Services Records and Communications. (Stipulated Facts)
12. An appointing authority desiring to make a promotional appointment shall, if a suitable eligible list exists, submit a requisition to HRD. Upon receipt of such requisition the administrator shall certify from such list the names of persons eligible for such promotional appointment. G.L. c. 31, §§ 7 and 8.
13. An appointing authority may also make a “temporary” promotional appointment to a temporary position or to fill a temporary vacancy in a permanent position if HRD is satisfied that such vacancy is likely to become permanent within a reasonable period of time. If a person has received such a promotional appointment, HRD, upon the

request of the appointing authority, may approve such promotional appointment on a permanent basis when the position to which the temporary promotional appointment has been made becomes permanently vacated.. G.L. c. 31, § 8.

14. On February 19, 2009, the City promoted Lieutenant Martin Cohan to the title of Captain on a permanent basis. As referenced above, Cohan had previously been provisionally promoted to the position of (provisional) Deputy Police Chief.  
(Stipulated Facts and Exhibits 17(a) and 17(b))
15. Also on February 19, 2009, the City promoted Lieutenants Berardino, DeRosa and Bonaiuto to the title of Captain on a temporary basis. These temporary promotional appointments were still in effect as of the expiration of the sergeant and lieutenant eligible lists. (Stipulated Facts and Exhibit 19)
16. When Lieutenant DeRosa was temporarily promoted to the position of captain, he stopped performing the function of “watch commander” and took on new duties. His pay was increased to the level of captain. Thereafter, the duties Mr. DeRosa had been performing as watch commander were performed each day by a sergeant, who was designated as “officer in charge” or “OIC” and who received the pay of a lieutenant.  
(Stipulated Facts)
17. Just before his temporary promotion to captain, Lieutenant Bonaiuto was serving as the “officer in charge” (“OIC”) of the Records Division and performed functions at the Peabody District Courthouse. After his temporary promotion to captain, Mr. Bonaiuto began to be paid at the captain’s rate. He also became functionally responsible for the prosecution function at the Peabody District Court. (Stipulated Facts)

18. Just before his temporary promotion to captain, Lieutenant Berardino was serving as the “officer in charge” of the Research and Development Training. After his temporary promotion to captain, Mr. Berardino began to be paid at the captain’s rate. He took on a functional assignment as the “Area Commander” of the West Peabody area and the liaison to the “third watch”. He stopped performing the duties of officer in charge of the training division, and Sergeant Girolimon took on that function. Sergeant Girolimon’s pay did not change at that time.

19. On March 20, 2009, the City promoted Scott Wlasuk to the title of lieutenant on a permanent basis. The City maintains that the vacancy that Sergeant Wlasuk was selected to fill on a permanent basis was in the position held by Lieutenant Bettencourt, which it had deemed, at or around that time, to have become permanently vacant. Mr. Wlasuk’s March 2009 permanent promotion to lieutenant ended his temporary promotion to the position of lieutenant. His duties did not change at that time.

(Stipulated Facts)

20. The 2008 eligible list for Captain is still in effect. (Stipulated Fact)

21. The 2007 eligible list for lieutenant was revoked on May 14, 2009 and a new list was established on May 15, 2009 based on a promotional examination that was administered by HRD in October 2008. The names of all of the Appellants in “Appellant Group 1” appeared on the eligible list that was revoked on May 14, 2009. The names of most of the Appellants in “Appellant Group 1” either do not appear on the current eligible list that was established on May 15, 2009 or, if they do, appear lower than they did on the 2007 eligible list.

22. On September 9, 2009, the City promoted Carriere and Cohan to the position of Deputy Police Chief on a permanent basis. There was no eligible list for the position of Deputy Police Chief until August 15, 2009. (Stipulated Facts)
23. On October 29, 2009, the City promoted Berardino, DeRosa and Bonaiuto to the title of Captain on a permanent basis. As noted above, they had previously been appointed to the title of Captain on a temporary basis on February 19, 2009. The eligible list for Captain in place on February 19<sup>th</sup> was still in place on October 29, 2009. (Stipulated Facts)

#### 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).<sup>2</sup> 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 (1<sup>st</sup> 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).

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"

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<sup>2</sup> 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.")

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.

#### APPELLANTS’ ARGUMENT AND RESPONDENT’S RESPONSE

The Appellants argue that during their period of eligibility, the City failed to fill the following vacancies in a manner permitted under civil service law causing them harm and thus warranting an order from the Commission granting them relief.

- A. Vacancies in the rank of Captain were created in January 2008 and June 2008 upon the retirement of Captain Sweeney and Captain Bellew and the City filled these vacancies through de facto out-of-grade appointments.

Upon the retirement of Sweeney and Bellew, the Appellants’ argue that the City could have made a “level of services” decision to either abolish their positions or cease offering the services they provided. They argue that the record shows that it did neither, and that instead it assigned their duties to other individuals (i.e. – to Lt. Cohan when Captain Sweeney retired). Since, however, there was an active eligible list containing the names of more than three lieutenants seeking promotion to the rank of captain, the path taken by the City – a de facto “acting” appointment of Lt. Cohan - was *not* one that was legally open to it at that time. Rather, according to the Appellants, the City was obliged to make either a permanent promotional appointment or, if it felt it had the factual basis to do so, a temporary promotional appointment.

The Appellants argue that the City’s failure to treat the openings these retirements resulted in as vacancies affected the rights of those appellants in Appellant Group 1 who were waiting for an opportunity to be considered for either a permanent or temporary

promotion to *lieutenant*. They further argue that the promotion of a permanent lieutenant to fill the Sweeney captain's vacancy would have resulted in a vacancy in the position of lieutenant. Thus, they argue that it logically follows that had the City filled both the captain's and lieutenant's vacancies, there would have been a resulting vacancy in the position of sergeant, an opening that would have triggered the right of consideration possessed by those appellants in Appellant Group 2 on the eligible list for promotion to sergeant.

The City argues that the retirements of both Captain Sweeney in January of 2008 and Captain Bellew in June of 2008 do not establish a violation of civil service law. According to the City, the duties and responsibilities of the Captains that retired were absorbed by the remaining Captains as well as by the Chief himself. They argue that the record is absent of any proof otherwise. Further, the City argues that it did everything within the purview of the law when it temporarily promoted individuals into the positions of Captain subsequent to the stated retirements while also working to restructure the department to make it more efficient.

- B. The permanent promotion of then-Lt. Cohan to Captain in February 2009 created a lieutenant's vacancy that the City improperly failed to fill.

Although a permanent promotion to lieutenant was made at or around that time, the Appellants argue that that promotion (Sgt. Wlasku) was intended to fill the position formerly held by Lieutenant Bettencourt, who had been on a long-term absence that the City had determined to have come to an end without his return to work). The Appellants ask the Commission to conclude that the City wrongfully failed to treat as a vacancy the lieutenant's opening caused by the promotion to captain of Mr. Cohan.

- C. The City's temporary promotional appointment of three lieutenants to the rank of captain on February 22, 2009 created three vacancies in the rank of lieutenant.

The Appellants argue that following their temporary promotions to captain on February 22, 2009, each of the three lieutenants took on new substantive responsibilities and ceased performing their former roles. According to the Appellants, the record also shows that their former functions were then performed by sergeants. The Appellants argue that each day thereafter, police sergeants worked in an "out of grade" capacity to perform the duties vacated by the temporarily promoted lieutenants. They point to the "officer in charge" (OIC) pay records contained on the CD made part of the record which shows that prior to the temporary captain promotions, sergeants worked in the OIC capacity only in the absence of the responsible lieutenant. Starting with the temporary promotions, a sergeant received OIC pay each day for performing the lieutenant's function.

At a minimum, the Appellants argue that the February 22, 2009 temporary promotion of three lieutenants to captain should have triggered the filling of the underlying lieutenants' positions with eligible sergeants (Appellant Group 1) on at least a commensurate temporary basis. Further, filling the three vacant lieutenants' blocs with sergeants would have at the same time created three vacancies in the rank of *sergeant* which would have, in turn, been filled by obtaining a certification of names from HRD of those police officers (Appellant Group 2).

According to the City, the Appellants' argument that sergeants performed lieutenant duties through de-facto (and illegal) out-of-grade appointments rests on the false assumption that certain functional positions are essentially the same (i.e. - "Officer in Charge (OIC)" and "Watch Commander").

The City argues that the OIC is a patrol supervisor and is the point of contact for one shift and only that one shift. The OIC performs approximately twenty-five (25%) percent of the duties of the Watch Commander and having very little responsibility in comparison. The Watch Commander position, according to the City, is ultimately responsible and accountable for a shift. A Lieutenant hired at an overtime rate for the shift would be the OIC not the Watch Commander. They argue that they are distinct titles and each carry their own distinct responsibilities and duties. Providing titles (OIC/Watch Commander) to ascertain the chain of command in a fluid environment did not change or add duties. Further, according to the City, doing so did not require anyone thereby effected to perform the duties outside of his/her job description. In other words, Sergeants and Lieutenants are both supervisory ranks and thus performing the duties and responsibilities of an OIC/ Watch Commander does not in any way change this fact. The City argues that sergeants have a smaller span of control than a Lieutenant and are still obligated to follow the chain of command. Thus, the Watch Commander would be responsible for the shift in general in every aspect. The OIC would have a much smaller responsibility over very specific aspects of that shift. The chain of command remains constant and there are just different levels of responsibility pertaining to each title.

In regard to all of the above referenced allegations (A, B, C), the City argues that any delay in filling vacancies, or filling them through temporary rather than permanent appointments, related to an ongoing restructuring of the Department and financial uncertainties facing the Police Department at the time.

According to the City, the restructuring began with the creation of additional Deputy Police Chief positions which required City Council approval. Once approved, the City

argues that it began by filling the two deputy Chiefs positions temporarily with Captains which then created temporary captain vacancies in compliance with civil service law and rules.

According to the City, it did not make promotions down the line into the next lowest rank until the prior promotions were made permanent. They argue that this practice is well within the law and is a responsible and legal way to fill available vacancies. The City intended to fill positions as soon as it was possible to do so fiscally on a permanent basis.

In regard to financial uncertainties, the City argues that just like almost every other community in the Commonwealth, it faced an economic downturn as shown in the documents submitted (Exhibits 23, 34 and 45). They argue that their actions were prudent and fiscally responsible as they were meant to ensure that the necessary funds were available to make the promotions and then continue the process all the way down the line in ranks as the funds were secured.

The Appellants argue that the reference to a restructuring of the Department is a red herring. According to the Appellants, the introduction of the Deputy Chief position, and the provisional staffing of it with two individuals in late 2008, did not reduce the total number of captains or change the fact that the City was obliged to treat the openings caused by the retirement of two captains as vacancies and to fill them in a statutorily-permitted manner.

Further, the Appellants argue that there is no merit to the contention that the City was permitted to refrain from filling those vacancies because of economic pressures for two reasons. First, the provisional appointments of Carriere and Cohan to deputy chief was



accompanied by an *increase* in compensation to the affected officers. The City increased – to the captain’s level - the pay of Lt. Beradino, DeRosa and Bonaiuto upon their temporary promotions, and thereafter started paying on a daily basis OIC pay to the sergeants tapped to perform the vacated lieutenant functions. There was, in sum, no “freeze” on police pay increases for these position changes.

Second, the Appellants, citing a prior Commission decision, claim that financial uncertainty can not be a reason for not making promotional appointments. See Brookline, 8 MCSR 41.<sup>3</sup>

## CONCLUSION

Based on a review of the stipulated facts, all exhibits, oral arguments and written briefs submitted, I make the following conclusions:

- A. The City violated civil service law and rules between March 30, 2008 and February 19, 2009 by having then-Lt. Cohan serve in a de-facto “out-of-grade” position when he performed the duties and responsibilities of retired Captain Sweeney.<sup>4</sup> There was an active eligible list at the time and the City, instead of using a de-facto out-of-grade or acting appointment, was required to fill this position by requisitioning HRD for a Certification for either a permanent or temporary Captain. (See Finding of Fact #7) However, there is insufficient evidence to show that any of the Appellants in Appellant Group 1 were aggrieved by this violation as it has not been sufficiently shown that the all of the duties and

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<sup>3</sup> The Appellants’ reliance on Brookline is misplaced. In Brookline, the Commission did not state that financial uncertainty was an insufficient reason to make temporary appointments. Rather, it reiterated, as the Commission does again here, that there is no justification, including financial uncertainty, for making “acting” or “out-of-grade” appointments, which are not permitted under civil service law or rules.

<sup>4</sup> I am aware that Mr. Cohan began his de-facto appointment slightly before March 30, 2008 and there may be a question if he continued to perform those duties after December 2008 when he was provisionally promoted to Deputy Police Chief. The start date referenced in this order, however, tracks the establishment of the eligible list in question. The end date tracks when Cohan was appointed as a permanent Captain.

functions of Lt. Cohan were then performed by a sergeant in Appellant Group 1.

Further, the evidence does not show a violation of the civil service law or rules regarding any of the personnel decisions related to the retirement of Captain Bellew.

B. The record does not show that the City violated any civil service law or rule in regard to the permanent promotion of then-Lt. Cohan to Captain in February 2009.

C. The City violated the civil service law and rules from February 22, 2009 to October 29, 2009 by having sergeants serve in de-facto “out-of-grade” lieutenant positions when they performed the duties and responsibilities of lieutenants who had been appointed as temporary captains. There was an active eligible list at the time and the City, instead of using de-facto out-of-grade or acting appointments, was required to fill these positions by requisitioning HRD for a Certification for either permanent or temporary lieutenants. (See Findings of Fact #15 - 18)

These conclusions are consistent with years of Commission decisions in which it has ruled that the use of out-of-grade or acting appointments are not allowed under the civil service law. When there is an active eligible list in place and an Appointing Authority chooses to fill a vacancy for that position, it must so do through the use of a permanent or temporary appointment, except in the case of emergency appointments that can be used for up to sixty (60) days in certain circumstances. While the City argues that it did not use acting or out-of-grade appointments, I conclude that it did in regard to the positions referenced above.

There is nothing in the record, however, that would warrant a determination by the Commission that the vacancies referenced in Paragraph C above should have been filled through the use of permanent (as opposed to temporary) appointments. None of the Appellants have alleged that the City's personnel decisions were motivated by personal or political bias and there is sufficient evidence to conclude that the use of temporary appointments was defensible and prudent given the documented restructuring and financial uncertainties facing the City at the time.

#### APPROPRIATE REMEDY

In O'Connor et al v. Boston Police Dep't (22 MCSR 660, 661 (2009)), the Commission, similar to the case here, found that the Boston Police Department filled a captain position through an "out of grade" assignment for more than 60 days when there was an active eligible list in place upon which O'Connor's name appeared first, instead of filling the vacancy through the use of a temporary appointment.

As a remedy, the Commission ordered that O'Connor's name be placed at the top of future Certifications for promotion to temporary police captain for as long as it took the Boston Police Department to promote at least one temporary police captain. The Commission did not engage in speculation regarding potential harm that may have resulted to individual(s) in the next lower title. (i.e. – if then-Lt. O'Connor had been appointed temporary police captain, should a sergeant then have been appointed to the title of temporary lieutenant.)

While the Commission's relief in O'Connor was an attempt to place the injured Appellant in the position he would have been in had the appointing authority followed the law, the implementation of the Commission's order in that case has led to a cascade of

subsequent appeals regarding whether the position to which O'Connor was subsequently appointed to was "temporary" or "permanent". In short, the Commission's attempt to match the remedy to the actual harm has resulted in further uncertainty and protracted litigation for all parties.

Here, the Appellants ask that the Commission order HRD to immediately place the names of the sergeant Appellants (Appellant Group 1) at the top of the current Certification of names, in the order they appeared on the 2007-2009 eligible list, so that they are fairly considered for at least the next six permanent lieutenant appointments. They ask that the patrol officer Appellants (Appellant Group 2) have their names, in the order of their appearance on the 2007-2009 list, placed atop the next Certification of names for promotion to the position of permanent sergeant, until they have been fairly considered for six promotional opportunities.

As referenced above, the Commission has concluded that any violation of civil service law and rules by the City that warrants relief to the Appellants here related to only three (3) de facto out-of-grade lieutenant designations from February 22, 2009 to October 29, 2009 (where the City should have appointed 3 temporary lieutenants).

Consistent with O'Connor, the Commission will not engage in speculation and hypothetical scenarios regarding whether, assuming that 3 temporary lieutenants should have been appointed (from Appellant Group 1), the City would then have been required to fill three sergeant positions through temporary appointments (from Appellant Group 2). The evidence is insufficient to support such a speculative conclusion and no reconstruction of events, even if viewed in the light most favorable to Appellant Group 2,

could show otherwise. Thus, no relief is appropriate or warranted for those police officers in Appellant Group 2.

Placing the names of the Appellants in Appellant Group 1 at the top of the current eligible list so that they are considered for permanent positions of lieutenant would not be a remedy that matches the actual harm here and would not be consistent with O'Connor. Further, it would be unfair and inequitable to those individuals whose names appear on the current eligible list as a result of scoring highest on the most recent promotional examination.

Thus, the conundrum is to determine what, if any relief is appropriate to any of the individuals in Appellant Group 1 for the approximately 8-month period of time in which they would have been eligible for appointment as temporary lieutenants without the resulting complications that have resulted (and likely would here) in implementing the relief in O'Connor.

As referenced in the caption of this appeal, the following Appellants in Appellant Group 1 appeared first, second and third on the eligible list for lieutenant that was in place on February 22, 2009 (the day in which the Commission concluded that illegal de-facto appointments began):

- E-10-39                      Sergeant Albert P. Lopes
- E-10-26                      Sergeant Arthur F. Yeo
- G2-09-330                  Sergeant Sheila McDaid-Harris

The name of Albert Lopes does not appear on the eligible list now in place from which permanent lieutenant appointments will be made. Arthur Yeo is third on the current eligible list and Sheila McDaid-Harris is seventh.

For all of the above reasons, the Commission, pursuant to Chapter 310 of the Acts of 1993, hereby orders the following:

In the event that any of the following three (3) Appellants are appointed as permanent lieutenant in the City of Peabody from the current or future eligible lists, their civil service seniority date in the position of lieutenant will be adjusted retroactively by eight (8) months and 7 seven (7) days prior to the effective date that would have otherwise been used for their promotional appointment date: Albert P. Lopes, Arthur F. Yeo and Sheila McDaid-Harris.

Civil Service Commission

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Christopher C. Bowman  
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on July 1, 2010.

A True copy. Attest:

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Commissioner

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:

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