

Decision mailed: 11/13/09
Civil Service Commission CB

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

PAUL O'CONNOR,
JOSEPH GILLESPIE,
THOMAS HOPKINS
Appellants

Docket Nos.
E-09-170
E-09-171
E-09-172

v.

BOSTON POLICE DEPARTMENT,
Respondent

Appellants' Attorney:

Harold L. Lichten, Esq.¹
Lichten & Liss-Riordan, P.C.
100 Cambridge Street: 20th Floor
Boston, MA 02114

Respondent's Attorney:

Nicole Taub, Esq.
Boston Police Department
One Schroeder Plaza
Boston, MA 02120

Commissioner:

Christopher C. Bowman

DECISION

The Appellants filed the instant appeal with the Civil Service Commission appealing the action of the Boston Police Department in filling one (1) captain position through "out of grade" temporary assignments, thereby bypassing the temporary and permanent promotional procedures under G.L. c. 31.

¹ At the time of the pre-hearing conference, the Appellants were represented by Attorney Leah Barrault. Subsequent to the pre-hearing conference and the submission of briefs by both parties, Attorney Harold Lichten filed an appearance on behalf of the Appellants.

A pre-hearing conference was conducted at the offices of the Commission on June 23, 2009 and a status conference was held on July 7, 2009. Both parties subsequently submitted briefs to the Commission. Based on the pre-hearing conference, status conference and the documents submitted, I find the following:

- The Boston Police Department filled one captain position through “out of grade” temporary assignments for more than 60 days;
- The State’s Human Resources Division (HRD) maintains an active civil service eligibility list for the position of captain in the Boston Police Department.
- The captain position in question was filled through “out of grade” temporary assignments from November 28, 2008 to June 5, 2009.
- Appellant Paul O’Connor was at the top of the captain’s promotional list during the period of November 28, 2008 to June 5, 2009. Thus, he had his rights affected under Chapter 31.

An appointment to a civil service position may be either “original” or “promotional.” G.L. c. 31, §§ 6 and 7. Both original and promotional appointments must be filled by certification from an eligible list, when an eligibility list exists. An Appointing Authority may make a temporary promotional appointment to a temporary position or to fill a temporary vacancy in a permanent position in accordance with the requirements of G.L. c. 31, §§ 7 and 8.

Under G.L. c. 31, § 31, an Appointing Authority may make an emergency appointment to a civil service position for not more than thirty working days during a sixty-day period in certain circumstances. An emergency appointment may also be renewed for an additional thirty days under certain circumstances.

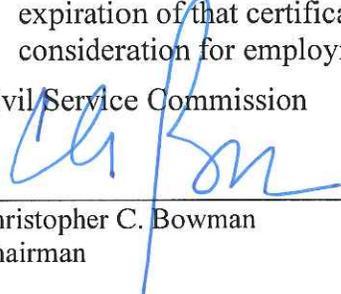
The use of “out-of-grade” promotional appointments for extended periods of time, such as the one that has occurred here, circumvents the civil service law and must be

avoided. See Somerville v. Somerville Mun. Employees Ass'n., 20 Mass. App. Ct., 594, 602-603 (1985).

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

- The Human Resources Division or the Boston Police Department acting in a delegated capacity, shall place the name of Paul O'Connor at the top of future certification lists for promotion to temporary police captain for as long as it takes the Boston Police Department to promote at least one temporary police captain. At the expiration of that certification list(s), Mr. O'Connor should have no further right to consideration for employment pursuant to this order.

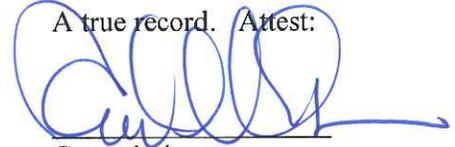
Civil Service Commission



Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis and Stein, Commissioners [Taylor – Absent]) on November 12, 2009.

A true record. Attest:



Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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:

Harold Lichten, Esq. (for Appellants)

Tsuyoshi Fukuda, Esq. (for HRD)

John Marra, Esq. (HRD)

Nicole Taub, Esq. (for Appointing Authority)