

**COMMONWEALTH OF MASSACHUSETTS**

SUFFOLK, ss.

**CIVIL SERVICE COMMISSION**

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

ROBERT M. O'TOOLE,  
*Appellant*

E-09-71

v.

NEWTON FIRE DEPARTMENT,  
*Respondent*

Appellant's Attorney:

F. Robert Houlihan, Esq.  
Heavey, Houlihan, Kraft & Cardinal  
229 Harvard Street  
Brookline, MA 02446

Respondent's Attorney:

Donnalyn B. Lynch Kahn, Esq.  
Associate City Solicitor  
City of Newton  
1000 Commonwealth Avenue  
Newton Centre, MA 02459

Commissioner:

Donald R. Marquis

**DECISION ON APPELLANT'S MOTION FOR RELIEF UNDER  
CHAPTER 310 OF THE ACTS OF 1993**

*Procedural Background*

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Robert M. O'Toole (hereinafter "O'Toole" or "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") on March 10, 2009 claiming that he was harmed through no fault of his own when the Newton Fire Department (hereinafter "City" or "Appointing Authority") failed to fill two lieutenant vacancies in the Department. Since the Appellant was at the top of the eligible list of lieutenant candidates, he argued that his employment status was harmed as a result of the City's

failure to fill these vacancies and consider him for promotion. Further, the Appellant alleged that the City violated the civil service law by having individuals serve “out-of-grade” in these lieutenant positions without following the appropriate civil service law and rules.

On April 9, 2009, a pre-hearing conference was conducted at the offices of the Commission at which time there were discussions regarding a potential settlement agreement.

On April 14, 2009, the Appellant submitted a motion asking the Commission to enter an interim order granting him relief pursuant to Chapter 310 of the Acts of 1993. Specifically, the Appellant sought an order directing the City to requisition a certification from HRD for the two (2) lieutenant positions prior to May 1, 2009 and to fill the vacancies in the most expeditious manner possible. (The eligible list on which the Appellant’s name appeared at the top was set to expire on May 1, 2009.)

On April 15, 2009, the City submitted an opposition to the Appellant’s motion arguing that there were no open lieutenant positions in the Newton Fire Department.

On May 18, 2009, the Appellant filed a “Second Motion for Chapter 310 Relief”, modifying the relief being requested of the Commission., asking that his name be placed at the top of the newly-established eligible list for the position of lieutenant in the City of Newton until such time as he is given at least one consideration for the position. (The Appellant failed to take the subsequent promotional examination for the position of lieutenant so his name can not appear on an eligible list after May 1, 2009 absent an order from the Commission.)

On May 20, 2009, the City filed an opposition to the Appellant's second motion for Chapter 310 relief.

On July 9, 2009, a motion hearing was conducted regarding the Appellant's second motion for Chapter 310 relief at which time I heard oral argument from both parties. Post-hearing briefs were filed by the City and the Appellant on July 17, 2009 and August 5, 2009 respectively.

### *Factual Background*

In June 2007, an opening came about for a lieutenant's position when a Lieutenant John Geary was struck by a fire engine and gravely injured. The City requisitioned a certification from HRD for a temporary full-time lieutenant and appointed the Appellant, whose name appeared first on the Certification, on June 14, 2007. The Appellant remained in that temporary position until December 6, 2008, at which time Lieutenant Geary had recovered and returned to work.

On or about October 25, 2007, another opening occurred for a temporary full-time lieutenant position because a Lieutenant Doherty was out injured. The City again requisitioned a Certification from HRD for a temporary full-time lieutenant and made Michael Caddell, whose name appeared next on the Certification, as a temporary full-time lieutenant.

Lieutenant Doherty returned to duty on February 7, 2008 and Mr. Caddell reverted back to his firefighter's position until September 2008 at which time he was again appointed as a temporary lieutenant after Lieutenant Doherty was placed on administrative leave. On December 17, 2008, the City served Lieutenant Doherty with an involuntary retirement application which the Newton Retirement Board accepted on

December 17, 2008. On July 1, 2009, Lieutenant Doherty was officially retired, with an effective date of March 7, 2009.

On or about December 4, 2007, yet another opening occurred for a temporary full-time lieutenant position because a Lieutenant Chauca was out injured. The City again requisitioned a Certification from HRD for a temporary full-time lieutenant and made Thomas Smith, whose name appeared next on the Certification, as a temporary full-time lieutenant.

The civil service eligible list containing the names of the Appellant, Michael Caddell and Thomas Smith (in that order) expired on May 1, 2009. Neither the Appellant nor Thomas Smith are on the new eligible list that will be used to create a Certification in order to fill vacancies that occur after May 1, 2009. Michael Caddell is on that list because he took the next civil service promotional examination.

#### *Appellant's Argument*

The Appellant argues that Lieutenant Chauca's retirement application was accepted by the Newton Retirement board on August 27, 2008, and since there is "no prospect of him returning", a vacancy for permanent full-time lieutenant existed at that time and the City was required to fill that vacancy by requisitioning a Certification from HRD for a full-time permanent lieutenant.

The Appellant also argues that another permanent lieutenant vacancy existed as of December 17, 2008, when Lieutenant Doherty was served with an involuntary retirement application and that the City was required to fill that vacancy as of that date.

To bolster its argument that the City was required to begin filling these positions, the Appellant cites the collective bargaining agreement in place which, according to the

Appellant, states that the City is required to “make promotions as soon as practicable after a vacancy occurs.”

In summary, the Appellant argues that there were two permanent lieutenant vacancies that occurred prior to May 1, 2009 and the City was required to fill those permanent vacancies by requisitioning names from an eligible list upon which his name appeared first. Since the City did not fill these vacancies before May 1, 2009, the Appellant argues that he is aggrieved pursuant to G.L. c. 31, § 2(b) and that the Commission should grant him relief by placing his name at the top of the next Certification issued to the City for the position of permanent lieutenant until such time as the Appellant has received at least one consideration for the position.

#### *Appointing Authority’s Argument*

The City argues that there is only one vacancy for the position of permanent full-time lieutenant and that this vacancy occurred on July 1, 2009 when Lieutenant Doherty was retired. As such, the City argues that it was not required, nor would it have been appropriate, to fill this position, or that of Lieutenant Chauca (whose retirement application is still pending). Rather, the City argues that it acted appropriately and in accordance with civil service law by filling these vacancies on a temporary basis until the incumbents of these positions are officially retired.

#### *Conclusion*

The Appellant can not demonstrate that the City filled a permanent lieutenant vacancy outside of the civil service law or that he was otherwise entitled to a permanent lieutenant promotion prior to the eligible list upon which his name appeared first expired on May 1, 2009.

The City is not required under the civil service law to fill a permanent or a temporary vacancy in a permanent position. “The law vests considerable authority in the ‘appointing authority’ who retains the sole power to decide whether to fill vacancies on either a permanent or temporary basis.” See City of Somerville v. Somerville Municipal Employees Association, 20 Mass.App.Ct. 594, 597, citing Kenney v. McDonough, 315 Mass. 689, 693 (1994). If, however, the City decides to fill a temporary vacancy in a permanent position as it did here and a suitable eligible list exists, it must requisition a Certification from HRD to fill this temporary vacancy, which they did. G.L. c. 31, §§ 7 and 8.

Here, the City has shown that only one (1) permanent lieutenant vacancy has occurred and that vacancy did not occur until July 1, 2009 when Lieutenant Doherty’s retirement was officially approved. Until such time, there was no permanent vacancy and, even if there had been, the City retained the power to decide whether to fill that vacancy on either a permanent or temporary basis.

Although it appears that the City intends to fill the vacancy created by Lieutenant Doherty’s July 1, 2009 retirement through the appointment of a permanent lieutenant position, it is under no obligation to do so under the civil service law. However, even if the City were required to do so, the Appellant’s name does not appear on the new eligible list because he failed to take the next promotional examination. Hence, he is unable to show that he has been aggrieved through no fault of his own.

For all of the above reasons, the Appellant’s request for relief under Chapter 310 of the Acts of 1993 is hereby denied and his appeal under Case No. E-09-71 is hereby *dismissed*.

## Civil Service Commission

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Donald R. Marquis  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Marquis, Stein and Taylor,  
Commissioners [Henderson – Absent]) on October 7, 2009.  
A true record. Attest:

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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:

F. Robert Houlihan, Esq. (for Appellant)  
Donnalyn B. Lynch Kahn, Esq. (for Appointing Authority)  
Martha O'Connor, Esq. (HRD)