

Decision mailed: 12/17/10
Civil Service Commission *CS*

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, SS.

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

JULIO CESAR POMAR,
Appellant

v.

CASE NO: G2-10-170

TOWN OF BOURNE,
Respondent

Appellant (Pro Se):

Julio Cesar Pomar
Falmouth Sandwich Road
Forestdale MA 02644

Appointing Authority
Attorney:

Robert S. Troy, Esq.
Bourne Town Counsel
Troy Wall Associates
90 Route 6A
Sandwich, MA 02563-1866

Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Julio Cesar Pomar, acting pursuant to M.G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission) from his non-selection for appointment to the position of Temporary Lieutenant in the Town of Bourne Fire Department (BFD), Appointing Authority. On September 29, 2010, BFD filed a Motion to Dismiss the appeal on the grounds that the Commission lacked subject matter jurisdiction. The Appellant has not opposed the motion.

FINDINGS OF FACT

Giving appropriate weight to the documents and representations of undisputed facts submitted by the parties, and inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Julio C. Pomar, holds a permanent civil service appointment in the position of Firefighter with the BFD, with a civil service seniority date of February 3, 1994. (*Claim of Appeal*)

2. On or about May 7, 2010, the BFD Acting Fire Chief, Daniel Doucette, posted a position for a Temporary Fire Lieutenant due to a temporary vacancy created by the injury suffered by BFD Fire Lieutenant James Brown. (*BFD Motion*)

3. At the time of this vacancy, the current eligible list established 5/22/2009 by the Massachusetts Human Resources Division (HRD) for BFD Fire Lieutenant consisted of one name, Penny M Fusco. Thus, at the time of the temporary vacancy, there was a “short list” of less than three names. (There were, in fact, no available candidates on the current eligible list at the time of the temporary vacancy, since Ms. Fusco had previously been appointed to the position of permanent Fire Lieutenant..) (*HRD Documents; BFD Motion; Undisputed Fact of Fusco Appointment*)

4. Firefighter Pomar had not taken the Fire Lieutenant’s examination and was not on the 5/22/2010 eligible list. (*HRD Documents; BFD Motion*)

5. In the absence of an eligible list, BFD filled the temporary vacancy by inviting applications from any interested BFD Firefighters and received six applications, including one from Firefighter Pomar. (*BFD Motion*)

6. After an interview panel, consisting of Acting Chief Doucette and Deputy Chiefs Weeks and Carrara, met with each of the six candidates, Firefighter Phillip Tura, the candidate who had received the highest composite score from the combined individual scores of the interviewers was recommended for the temporary provisional promotion and he was so appointed as “Acting Lieutenant” by the Town Administrator. (*BFD Motion*)

7. Firefighter Pomar contended that this procedure violated the past practice of the BFD, which, he alleged, had previously made such appointments on the basis of seniority with the BFD. He contends that he holds greater seniority than the appointed candidate, which is not disputed. (*Claim of Appeal; BFD Motion*)¹

CONCLUSION

A party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., here, “viewing the evidence in the light most favorable to the non-moving party”, the movant (BFD) has presented substantial and credible evidence that the Appellant has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and that he has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008).

¹ Firefighter Pomar also appears to have filed a separate claim of employment discrimination with the Massachusetts Commission Against Discrimination (MCAD) concerning his non-selection. (*Claim of Appeal*) The Commission does not address the merits of the MCAD claim in this decision.

Specifically, this motion to dismiss must be allowed unless Firefighter Pomar raises “above the speculative level” sufficient facts “plausibly suggesting” that his alleged bypass and non-selection was erroneous and that the error was due to a mistaken interpretation of civil service law and rules and not through any “fault of his own.” See generally Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss. cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss))

Civil service positions, whether on a permanent or temporary basis, or whether “original” or “promotional”, are generally to be made by selection from a certification taken off an eligible civil service list, when an eligible list exists. G.L.c. 31, §§1, 6-8; see also Personnel Administration Rules, PAR.06-PAR.09. In the normal course, candidates should be selected according to their relative placement on the eligibility list, which creates a rank ordering based on their scores on the competitive qualifying examination administered by HRD for the position, unless the appointing authority shows reasonable justification, consistent with basic merit principles, that affirmatively justifies picking a lower ranked candidate. G.L.c. 31, §27. See, e.g., Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), citing Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Service Comm’n, 31 Mass.App.Ct. 315, 321n.11, 326 (1991).

When a temporary vacancy is created in a civil service position, an appointing authority may – but is not required – to make a “temporary” appointment or promotion from the applicable eligible list. G.L.c. 31, §§1, 7 & 8. When no eligible list exists, or when the list contains an insufficient number of names (i.e. a “short” list), the appointing

authority may fill a temporary or permanent vacancy by “provisional” appointment or promotion, pending establishment of an eligible list. G.L.c. 31, §§12 & 15; see also PAR.09(1) (2n+1 rule). Finally, in general, an appointing authority may in good faith chose to leave any vacancy – permanent or temporary – unfilled. See, e.g., Somerville v. Somerville Municipal Employees Ass’n, 20 Mass.App.Ct. 594, 596 (1985).²

In the absence of an appropriate eligible list, provisional promotions are authorized under Mass. G.L.c. 31, §15, which provides:

§ 15. Provisional promotions. *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. . . . if there is no suitable eligible list, or if the list contains the names of less than three persons eligible for and willing to accept employment,* or if an eligible list has been established as a result of a competitive examination for an original appointment and the appointing authority requests that the position be filled by a departmental promotional examination or pursuant to section eight. No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

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, upon submission to the administrator by the appointing authority of sound and sufficient reasons therefor, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

A provisional promotion pursuant to this section shall not be deemed to interrupt the period of service in the position from which the provisional promotion was made where such service is required to establish eligibility for any promotional examination.

A secretary of an executive office who approves a provisional promotion pursuant to this section shall notify the administrator of each such approval. Such approval shall be made pursuant to the civil service law and rules, and such notification shall be made in such form as shall be required by the administrator. The administrator shall terminate any provisional promotion if, at any time, he determines that (1) it was made in violation of the civil service

² The use of temporary and provisional appointments is clearly distinguished from so-called “out-of-grade” acting appointments, which are not authorized under civil service law. The Commission, as well as established judicial precedent is clear that nothing in the civil service law and rules recognizes the designation of “acting” in any civil service position. Thus, any contention that a past practice to fill temporary vacancies entirely on the basis of seniority, without regard to whether or not there exist any current civil service lists covering the position, even if that practice was incorporated into a collective bargaining agreement, must clearly fail. See, e.g., Amato v. City of Springfield, CSC Case No. G2-10-238 et al., 23 MCSR --- (2010); Bergeron v. City of Lawrence, 23 MCSR 361 (2010) and cases cited; Thomas et als v. Boston Police Dep’t, 22 MCSR 157 (2009)

law and rules, or (2) the person provisionally promoted does not possess the qualifications or satisfy the requirements for the position. An appointing authority which makes a provisional promotion pursuant to this section shall report such promotion to the administrator.

Id. (*emphasis added*)

These laws must be interpreted by reading the entire the statute as a whole, according to the plain meaning of the words chosen by the legislature, and we must avoid any interpretation that would render any part of the language in a statute superfluous. See, e.g., Commonwealth v. Biagiotti, 451 Mass. 559, 603-604, 888 N.E.2d 364 (2008). So long as the meaning of a statute is clear and unambiguous, it is not the function of the Commission to rewrite it. Bulger v. Contributory Retirement Appeal Board, 447 Mass. 651, 661, 856 N.E.2d 799 (2006), *quoting* Commissioner of Revenue v. Cargill, Inc., 429 Mass. 79, 86, 706 N.E.2d 625 (1999)

The Commission has repeatedly decided that, when it comes to provisional promotions into the higher title, an appointing authority has reasonable discretion to select any qualified candidates with permanency in the next lower title by any fair and reasonable procedure, and that non-selected candidates can contest that selection (barring evidence of favoritism or other improper bias) only by claiming that the selected candidate was not “qualified”; claims that the selected candidate was not the “best qualified” are not sufficient. See, e.g., Heath v. Department of Transitional Assistance, 23 MCSR 548 (2010); Gale v. Department of Revenue, 23 MCSR 534 (2010); Pease v. Department of Revenue, 22 MCSR 284 (2009); Poe v. Department of Revenue, 22 MCSR 287 (2009); Garfunkel v. Department of Revenue, 22 MCSR 291 (2009); Asiaf v. Department of Conservation & Recreation, 21 MCSR 23 (2008). In other circumstances, the Commission had deplored the undue reliance on provisional appointments. *Id.* Here, however, the BFD has employed a provisional promotion (although using the misnomer

of “acting” lieutenant) in precisely the situation in which the legislature envisioned it would apply – i.e., a temporary vacancy that needed to be filled while the permanent incumbent was out on injured leave, and there was no one to select from any current eligible list.

The Commission has also been clear that, as a general rule, in ascertaining whether a candidate possesses the necessary “knowledge, skills and abilities”, an appointing authority may utilize a fair and objective interview and skills assessment process for evaluating candidates. E.g., Rainville v. Massachusetts Rehabilitation Comm’n, 19 MCSR 386 (2006). See Flynn v. Civil Service Comm’n, 15 Mass.App.Ct. 206, 208-209, 444 N.E.2d 407 (1983) (approving use of interviews for permanent civil service promotions so long as they are structured “to protect candidates from arbitrary action and undue subjectivity on the part of the interviewers”). Use of such an interview process here does not, alone, violate civil service law and rules.³

In sum, Firefighter Pomar does not claim that the selected Firefighter Tura was not qualified to serve as a temporary Fire Lieutenant. He does not contend that the interview selection process was pre-determined or that it was tilted against him. Although he may well have been the more senior candidate, neither he nor any other candidate appeared on the current eligible list, so there was no “bypass” in the traditional sense under G.L.c.31, §27, which requires proof that a more “highly ranked” candidate on the list was rejected in favor of a lower ranked candidate. See generally, Edson v. Town of Reading, 21

³ The Commission does not address the Appellant’s argument that, in the absence of an eligible list, the terms of the applicable collective bargaining agreement (CBA) should have been followed and requires selection on the basis of seniority, not an interview. While it may be consistent with Chapter 31 for a CBA to so provide, whether or not that is the case is a matter of interpretation of the applicable agreement and is beyond the purview of the Commission to decide here. Such a question is more properly presented through the appropriate labor relations grievance process as provided by the CBA and/or Chapter 150E.

MCSR 453, 477 (2008), aff'd in relevant part, Middlesex Sup.Ct. C.A. No. 2009CV0111F (2009) (dismissing appeal by candidate on the eligible list with same exam score as selected candidate); Ramette v. Department of Correction, 22 MCSR 581 (2009) (no bypass where all positions were filled by higher ranking candidates); Centolo v. Boston Police Dep't, 19 MCSR 394 (2006) (no bypass where higher ranked candidates with residency preference selected). See also Breton v. City of New Bedford, 21 MCSR 127 (2008); Bartolomei v. City of Holyoke, 21 MCSR 94 (2008); Bianco v. Newton Fire Dep't, 20 MCSR 241 (2007)

Thus, there is simply no legal basis on which the Appellant can be expected to assert any violation of the civil service law that would entitle him to relief in this appeal.

Accordingly, for the reasons stated above, the Respondent, Town of Bourne's Motion to Dismiss Appellant's Bypass Appeal is hereby granted, and the appeal of the Appellant, Julio Cesar Pomar, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners) on. December 16, 2010.

A True Record. Attest:



Commissioner

Commissioner McDowell was
absent on December 16, 2010.

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 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:

Julio C. Pomar (Appellant)

Robert S. Troy, Esq. (Appointing Authority)