

Decision mailed: 7/18/08  
Civil Service Commission 122

**COMMONWEALTH OF MASSACHUSETTS  
CIVIL SERVICE COMMISSION**

One Ashburton Place  
Room 503  
Boston, MA. 02108

Brian Saunders,  
Appellant

v.

Docket No. G2-07-64

CITY OF HAVERHILL,

Respondent

Appellant's Representative:

Patrick N. Bryant, Esq.  
Sandulli Grace, PC  
One State Street  
Suite 200  
Boston, MA 02109

Respondent's Representative:

William D. Cox, Jr.  
City Solicitor, City of Haverhill  
145 South Main Street  
Bradford, MA 01835

Commissioner:

John E. Taylor

**DECISION ON RESPONDENTS' MOTION TO DISMISS**

*Procedural Background*

The Appellant, Brian Saunders, (hereafter "Appellant" or "Saunders") filed this appeal with the Civil Service Commission on January 30, 2007 claiming that his rights as a candidate on the promotional list following the 2001 Fire Lieutenant examination have

been prejudiced by the Respondent, City of Haverhill (the “City”), as Appointing Authority, failure to act. Several promotional appointments were made to Permanent Fire Lieutenant but the Appellants name was not on the certification list. On or about April 2, 2007, the Respondent filed a Motion to Dismiss for lack of jurisdiction to the Civil Service Commission. On or about April 24, 2007, the Appellant filed an Opposition to the City’s Motion to Dismiss to the Commission. A pre-hearing conference held at the offices of the Civil Service Commission on April 7, 2007 on the Motions.

### *Factual Background*

The Appellant began his employment with the City as a firefighter on February 13, 1983. On or about May 13, 2004, Firefighter Peter Schena was appointed Temporary Lieutenant. He served in that capacity until January 2007. In a certification list for Lieutenant published on or about May 2004, the Appellant ranked fifth. As a result of several promotions, the Appellant on or about January 4, 2006 ranked first on a list of three eligible and willing candidates for permanent full-time lieutenant. This list expired May 2006. The Collective Bargaining Agreement between Local 1011 IAFF and the City of Haverhill states that the city “shall anticipate and plan for the filling of vacancies in Officer Ranks and shall make all reasonable effort to have a promotional list available to fill such vacancies.” On or about February 8, 10 and 16, 2006, Local 1011 demanded the City make permanent appointments in ranking positions currently occupied by acting/temporary appointments. On or about March 23, 2006, The Union demanded arbitration about the City’s failure to promote and its reliance on temporary appointments. On or about May 12, 2006, the Appellant requested an extension of the

current certification list for Lieutenant given the ongoing arbitration. In May 2006 or thereafter, the Human Resources Division certified a new certification list for Lieutenant. Peter Schena and Philip Sykes were listed in the top two spots. As the Appellant did not sit for the Lieutenant's exam for this period, he is not on the list. On or about January 2007, the Union and the City settled the February 2006 grievance, which resulted in the City agreeing to replace current temporary appointments with permanent promotions. As a result of the settlement, the City promoted Firefighters Schena and Sykes to Lieutenant positions from the list in effect may 2006.

*Respondent's Grounds for Dismissal*

The Respondents ask the Commission to dismiss the Appellant's appeal pursuant to 801 CMR 1.01(7) (g) (3) for "lack of jurisdiction to decide the matter". The Respondents contend that the present appeal does not fall within the jurisdiction of the Commission. The Appellant's bypass appeal makes reference to his prior inclusion on a certification list, which expired in March, 2006. Prior to that time, the City had promoted a Deputy Fire Chief to acting Fire Chief. During the period Saunders did appear on an eligible list as there were two certifications issued for permanent full-time Fire Lieutenant vacancies, namely Certification List No. 240860, 250553 and 251179. The Appellant was not high enough on the list for appointment and all those chosen were higher than he was. Appellant chose not to take the most recent examination and was not on the eligible list for Certification List No. 261179. Appellant, not being on the certification list was not eligible for appointment to the permanent full-time Fire Lieutenant appointment. As the

Appellant has not been bypassed, there is no jurisdiction for the Commission and the appeal should be dismissed.

#### *Appellant's Opposition to Dismissal*

The Appellant asserts that the Civil Service Commission has jurisdiction of this matter because the Appellant appeals from the City's constructive bypass of him through the City's reliance on improper temporary Lieutenant. See Gaughan v. BPD, G-4399 (11/3/1999). Had the City replaced the temporary Lieutenant in January 2006 instead of January 2007, the Appellant likely would have been promoted. The City relied on a temporary Lieutenant throughout the duration of the Appellant's presence on a Lieutenant's civil service list and the City did not replace the Lieutenant until after the list featuring the Appellant expired. The City made the permanent promotion as a result of a grievance which the Union filed during the pendency of the list that included the Appellant. Because the reliance on a temporary Lieutenant was improper, the City should have filled the vacancy by early 2006 from the Appellant's list therefore the City's motion should not be allowed.

#### *Conclusion*

The Appellant asserts that the Respondent violated civil service law, citing Gaughan v Boston Police Department, G-4399 MCSR 2 (11/3/1996). regarding Temporary Appointments. However, examinations of both the case and Statute referred to do not indicate a violation. Specifically, the Appellant's situation is distinguishable from that of the Appellants in Gaughan as that case concerned temporary appointments of sergeants to fill four permanent lieutenant positions. On or about January, 2007, the City

of Haverhill and the Haverhill Firefighters Union Local #1011 IAFF entered into a settlement agreement. The settlement agreement states in part: *effective January 5, 2007 the City will call for Deputy Fire Chief, Fire Captain and Fire Lieutenants Civil Service lists and will make permanent promotions from such lists and will thereby eliminate the current temporary positions within said ranks. Also effective January 5, 2007 or the effective date of Deputy Meehan's retirement, whichever comes later, the City will additionally call for and promote a permanent Deputy Chief, Fire Captain and Fire Lieutenant to replace Deputy Meehan and the vacancies resulting therefore.*

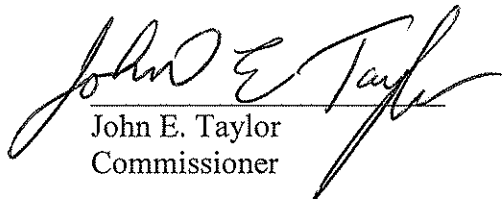
The City called for a certification list for Fire Lieutenant and selected the top two names on the list for appointment to permanent full-time Fire Lieutenant. The Appellant chose not to take the most recent examination and was not on the list for Certification List # 261179. The Appellant therefore was not bypassed.

The Commission may dismiss a matter on the motion of a party for, among other circumstances the "lack of jurisdiction to decide the matter." 801 CMR 1.01 (7) (g) (3).

Based on the above, the Appellant has not been bypassed therefore the Commission does not have jurisdiction in the matter.

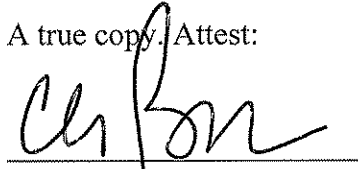
Respondents' Motion to Dismiss is allowed and the Appellant's appeal filed under Docket G2-07-64 is hereby ***dismissed***.

Civil Service Commission

  
John E. Taylor  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Marquis, Henderson, Stein and Taylor Commissioners) on July 17, 2008.

A true copy. Attest:

  
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Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 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:

Patrick N. Bryant, Esq.  
William D. Cox, Jr., Esq.