

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RE: Request for Investigation against the City of Somerville by Petitioner Thomas Gorman

Tracking Number: I-15-67

Appearance for Petitioner:

Jillian Ryan, Esq.
Pyle Rome
2 Liberty Square: 10th Floor
Boston, MA 02109

Appearance for City of Somerville:

Matthew J. Buckley, Esq.
Assistant City Solicitor
City of Somerville
93 Highland Avenue
Somerville, MA 02143

Commissioner:

Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION

1. On April 16, 2015, the Petitioner, Thomas Gorman (Mr. Gorman), a Fire Lieutenant in the City of Somerville (City), filed a request for investigation with the Civil Service Commission (Commission) asking the Commission to conduct an investigation “into the City of Somerville’s current efforts to appoint a new Fire Captain from an expired eligible list for such rank.”
2. On April 21, 2015, I held a show cause hearing which was attended by Mr. Gorman, his counsel, counsel for the City and the City’s Personnel Director.
3. At the conclusion of the show cause hearing, I provided the City with the opportunity to submit affidavits from various City officials to address issues relevant to this request for investigation. Mr. Gorman was given the opportunity to respond.
4. The City subsequently submitted affidavits from the City’s Mayor, Chief Engineer (Fire Chief), Deputy Fire Chief and Personnel Director. In response, Mr. Gorman submitted a “Statement in Support of Petitioner’s Request for Investigation.” The parties then submitted dueling emails in regard to certain allegations contained in Mr. Gorman’s response.

5. The information that follows is based on the documents submitted, the statements of the parties and any inferences I have drawn.
6. Mr. Gorman has been a Somerville firefighter for eight (8) years and has held the rank of Lieutenant for the past three (3) years.
7. On May 24, 2013, the state's Human Resources Division (HRD) established an eligible list for Fire Captain in Somerville. The individuals ranked 1st, 2nd, 3rd and 4th were promoted to Fire Captain between July 2013 and November 2014. The eligible list was initially set to expire on May 24, 2015.
8. As of March 1, 2015, there were three lieutenants tied for 5th (now first as a result of the above-referenced promotions) on the Fire Captain eligible list. The names, listed in alphabetical order on the eligible list, were: John Byrne; Brian O'Donovan; and Stephen Ortolani. Mr. Gorman's name was not on this eligible list.
9. In a memorandum from HRD dated March 19, 2015, HRD notified Fire Department Appointing Authorities that the Fire Captain (and Lieutenant) eligible list would expire on April 9, 2015, as opposed to the initially announced date of May 24, 2015. The memorandum stated in relevant part, "Promotions made through the certification delegation process off of a current eligible list will be valid only if the selected individuals receive the promotion on or before April 9, 2015. Candidates cannot be promoted subsequent to the revocation of an eligible list on which their name appears."
10. On March 30, 2015, the City's Deputy Fire Chief recommended to the Fire Chief that a Fire Lieutenant position in the Fire Prevention Bureau be upgraded to a Captain position.
11. All three (1) of the candidates tied for first signed as willing to accept appointment as Fire Captain. One (1) of the candidates subsequently withdrew his name from consideration and the Fire Chief and Deputy Fire Chief interviewed the two (2) remaining candidates. They recommended the appointment of Lt. Donovan.
12. The City's Mayor is the civil service appointing authority for Somerville.
13. In an email sent on April 8, 2015 at 9:50 A.M., HRD informed Fire Department Appointing Authorities that, "This is just a friendly reminder that the lists appearing on the attached memorandum or (sic) scheduled for revocation so if you are currently intending to promote, all **conditional offers** should be made no later than tomorrow." (**emphasis added**) The subject line of that email was "Fire **Promotional** List Maintenance". (**emphasis added**)
14. In a letter dated April 8, 2015 from the City's Mayor to then-Lt. Donovan, the Mayor wrote in relevant part: "Re: Conditional Offer of Employment ... I am pleased to inform you of your promotion to Fire Captain for the Somerville Fire Department. This promotion is a conditional offer subject to approval by the City of Somerville Board of Alderman."

15. On April 9, 2015, the City's Board of Aldermen voted to refer the Mayor's request to promote Mr. O'Donovan to Fire Captain to the Board's Appointments Committee. Several other Mayoral recommendations regarding police appointments and promotions were also on the agenda and referred to the Appointments Committee. The appointment was subsequently approved by the Board on April 21, 2015.
16. Mr. Gorman's name appears first on the new eligible list established for Somerville Fire Captain on April 10, 2015. Mr. O'Donovan's name does not appear on this new eligible list.

Legal Standard

The Commission maintains authority under G.L. c. 31, § 2(a) to conduct investigations. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n, No. 2006-4617, Suffolk Superior Court (2007). See also Erickson v. Civ. Serv. Comm'n & others, No. 2013-00639-D, Suffolk Superior Court (2014). We exercise this discretion "sparingly". See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011).

Analysis

Here, Mr. Gorman's request for investigation is based primarily on two premises. First, Mr. Gorman argues that, in order for the promotion of Mr. O'Donovan to be valid, the actual promotional appointment, as opposed to a conditional offer of employment, must have been made on or before April 9, 2015, which is when the eligible list upon which his name appeared expired. Second, Mr. Gorman argues that the circumstances surrounding this promotional appointment, including the speed in which a new Captain position was created and filled, suggests that something untoward occurred here. Underlying this entire request for investigation appears to be Mr. Gorman's belief that the promotional vacancy should have been filled by a candidate from the new eligible list, upon which his name appears first.

In regard to the first argument regarding conditional offers of employment, Mr. Gorman is mistaken. Candidates must only be offered a conditional offer of employment prior to the expiration of the eligible list, as opposed to actually being appointed. This is HRD's longstanding practice regarding original appointments (See Burke et al v. HRD and City of Fall River, 21 MCSR 177 (2008)) and there is no evidence to show that the same requirement is not applied to promotional appointments. Rather, an email from HRD one (1) day prior to the expiration of the promotional eligible list in question unequivocally states in relevant part that: "all conditional offers should be made no later than tomorrow." Mr. Gorman's suggestion that the City altered this email is baseless – and bizarre.

In regard to the second argument regarding the speed in which this vacancy was created and filled, it does appear that the City moved in relative warp speed here, shortly before the eligible list was about to expire. That, alone, however, is not a sufficient reason for the Commission to initiate an investigation, which is done only sparingly, and typically when there is some evidence of political or personal bias.

In Cutillo and Kelley v. Malden, 23 MCSR 48 (2010), the Commission intervened and granted relief after Mr. Cutillo showed that personal bias on behalf of the Police Chief was the sole reason that he was allowed to die on the vine of a promotional eligible list. Specifically, at the outset of his appeal with the Commission, Mr. Cutillo alleged that the Police Chief had a bias against him related to Mr. Cutillo arresting, many years prior, a family member of the Police Chief.

Here, Mr. Gorman offers no evidence to show that anyone in this promotional process was biased – against him or in favor of Mr. O’Donovan. In fact, when I asked Mr. Gorman, as part of the show cause hearing, whether he was aware of any such bias, he bluntly, and candidly, said “no”. The written brief submitted on his behalf, however, suggests that the Commission should open an investigation to go searching for a personal or political bias that even Mr. Gorman is unaware of. That is not the standard by which the Commission decides to initiate an investigation of Appointing Authorities and the officials employed by them.

For the reasons stated above, the Commission declines to open an investigation and this matter is *closed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on June 25, 2015.

Notice:
Jillian Ryan, Esq. (for Petitioners)
Matthew Buckley, Esq. (for City of Somerville)
John Marra, Esq. (HRD)