

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108
617-979-1900

THOMAS F. UNDERWOOD,
Appellant

CASE NO. E-20-025

v.

CITY OF LOWELL,
Respondent

Appearance for Appellant:

Thomas F. Underwood, Pro Se

Appearance for Respondent:

Adam R. LaGrassa, Esq.
Ass't City Solicitor
City of Lowell – Law Department
375 Merrimack Street – 3rd Floor
Lowell, MA 01852

Commissioner:

Paul M. Stein

DECISION ON RESPONDENT'S MOTION TO DISMISS

On February 11, 2020, the Appellant, Thomas F. Underwood, appealed to the Civil Service Commission (Commission) to contest the action of the City of Lowell (Lowell) to discontinue his status as an Acting Captain with the Lowell Fire Department (LFD).¹ On March 6, 2020, Lowell filed a Motion to Dismiss on the grounds that the Commission lacked jurisdiction to consider the appeal, which the Appellant duly opposed. A hearing on the motion was held via remote videoconference (Webex) before Commissioner Cynthia Ittleman.² A copy of the digital recording

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence.

² . Commissioner Ittleman conducted the hearing in this matter, but she subsequently retired from the Commission prior to finalizing this decision. The case was subsequently re-assigned to me by the Chair. I have reviewed the entire record, including the recording of the hearing; all exhibits; briefs; and all other relevant documents.

of the motion hearing was provided to the parties.³ For the reasons stated below, Lowell’s Motion to Dismiss is granted and this appeal is dismissed.

FINDINGS OF FACT

1. On or about December 26, 2019, the LFD Fire Captain assigned to Engine Company No.7 at the Stevens Street Station began an absence from work for medical reasons. (*Motion to Dismiss; Aff’t of Dep. Chief Roth*)

2. The Appellant, Thomas Underwood, served as the Senior Lieutenant for Engine No. 7 at the time his Captain went out on medical leave. (*Motion to Dismiss; Aff’t of Dep. Chief Roth*)

3. Pursuant to the terms of the applicable collective bargaining agreement (CBA) between Lowell and Local 853, International Association of Firefighters, AFL-CIO (the Union), as the Senior Lieutenant, the Appellant was assigned to serve “out-of-grade” as the Acting Company Captain on Engine No.7 and began to receive “out-of-grade” compensation as Acting Captain as provided by the CBA. (*Motion to Dismiss, Exhs. B & C; Aff’t of Dep. Chief Roth*)⁴

4. When the Engine Company No.7 Captain went out on medical leave, there was an active civil service eligible list that had been established on 7/26/2019 (the 2019 LFD Captain’s Eligible List) for appointment to the rank of Fire Captain. (*Motion to Dismiss, Exh.E*)

5. The Appellant’s name did not appear on the eligible list. (*Motion to Dismiss, Exh.E*).

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the recording to supply the court with the stenographic or other written transcript of the hearing to the extent that he/she challenges the decision as unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion.

⁴ The relevant provisions of the CBA specify:

Art. XXXVIII, Section 4: “When the Company Captain is absent for one (1) calendar week or more, the Company’s Senior Lieutenant who serves as the Company Captain will be compensated at the rate of the Captain’s rank for the full duration of the Captain’s absence will [sic] full retroactivity of such compensation to the first tour of the Captain’s absence. . .”

Art. VIII, Section 2: “. . . . This Agreement shall not be construed to deprive employees of any benefits or protections granted by the laws of the Commonwealth of Massachusetts”

6. On January 26, 2020, Lowell appointed the Lieutenant ranked first on the 2019 LFD Captain’s Eligible List to rank of permanent Fire Captain to fill a permanent vacancy and appointed the second and third ranked candidates to the rank of Temporary Captain, one of whom was assigned to the continuing vacancy in the Captain’s position on Engine No.7. (*Motion to Dismiss, Exhs H, I & J*)

7. Lowell’s actions follow its prior practice of replacing the acting “out-of-grade” senior company officer by making a temporary appointment from the active civil service list after a 30-day absence of the permanently appointed officer. (*Motion to Dismiss, Exh.P; Aff’t of Dep. Chief Roth*)⁵

8. Upon the assignment of a Temporary Captain to Engine No. 7, the Appellant reverted to the rank of Lieutenant and his extra “out-of-grade” compensation stopped. (*Motion to Dismiss, Exh. N; Aff’t of Dep. Chief Roth*)

9. This appeal ensued. (*Claim of Appeal; Motion to Dismiss, Exhs. K & L*)

APPLICABLE LEGAL STANDARD

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law—i.e., “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008);

⁵ Lt. Underwood does not dispute that Lowell has followed the practice of replacing an “out-of-grade” appointment with a temporary appointment from the civil service list, but contends that the practice misconstrues civil service law and violates his rights under the CBA. (*Motion to Dismiss, Exhs. K & N; Appellant’s Response to Motion to Dismiss*)

Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005).

ANALYSIS

The Appellant has failed to establish that replacing him as an “out-of-grade” Acting Captain with a Lieutenant whose name then appeared at the top of the active Captain’s eligible list has infringed on the Appellant’s civil service rights in a way that would entitle him to equitable relief from the Commission. In fact, Lowell’s practice to make a temporary appointment after a permanent officer has been out on medical leave for more than 30 days is fully authorized, if not required, by civil service law.

The core mission of Massachusetts civil service law is to enforce “basic merit principles” for “recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills” and “assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.” G.L. c. 31, §1. See, e.g., Massachusetts Ass’n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); MacHenry v. Civil Serv. Comm’n, 40 Mass. App. Ct. 632, 635 (1995), rev. den., 423 Mass. 1106 (1996). These requirements mean that, normally, all original and promotionally appointed candidates, whether permanent or temporary, must be selected according to their relative placement on an eligible list, which creates a rank ordering based on their scores on the competitive qualifying examination administered by HRD for the position, along with certain statutory preferences. See G.L. c. 31, §6 through §11 & §25 through §27; Somerville v. Somerville Mun. Employees Ass’n, 20 Mass. App. Ct. 594, 597 (1985). The appointing authority “retains the sole power to decide whether to fill vacancies on either a permanent or temporary basis.” Id., citing Kenney v. McDonough, 315 Mass. 689, 693 (1944). See also Sabourin v. Town of Natick, 18 MCSR 79 (2005) (“A civil service test

score is the primary tool in determining relative ability, knowledge and skills and in taking a personnel action grounded in basic merit principles.”)

A person who has not taken and passed a civil service promotional examination may be appointed to a civil service position in two circumstances: (1) a person may be “provisionally promoted” to fill a vacancy in a civil service position if there is no current civil service list containing the names of at least three persons who have taken and passed the promotional examination for the position; and (2) an appointing authority may make an “emergency” appointment of an employee for no more than thirty (30) days in any sixty (60) day period. See G.L. c. 31, §15 & §31.

Here, Lowell fully complied, as it must, with the requirements of civil service law. A “provisional appointment” was not authorized as there *was* a current eligible list from which promotions, either temporary or permanent could be made. By limiting the duration of the appointment of Lieutenant Underwood to an “out-of-grade” appointment of Acting Captain to a period of thirty (30) days, the maximum time Lowell was authorized by Section 31 of G.L. c. 31 to grant an “emergency” appointment, Lowell acted in compliance with the requirements of civil service law and gave effect, to the extent it could, to relevant CBA provisions. Art. VIII, Section 2, of the CBA does not permit Lowell to go further. See footnote 4, *supra*, and further discussion, *infra*.

The Appellant cites no authority to support his argument that Lowell has “misused” the authority of Section 7 of G.L. c. 31 to make a temporary appointment. As noted above, civil service law vests the appointing authority with full discretion to decide whether to treat a vacancy as permanent or to make a temporary promotion, or to make no promotion at all. E.g., Somerville v. Somerville Mun. Employees Ass’n, 20 Mass. App. Ct. 594, 597 (1985), *citing* Kenney v. McDonough, 315 Mass. 689, 693 (1944). In fact, civil service law has been construed to prohibit

the use of “out-of-grade” promotions for more than thirty (30) days when a current eligible list exists from which temporary promotions can be made. See Memorandum and Order, Kelley v. City of Boston Fire Dep’t, Suffolk Sup. C.A. No. 12-571-H (8/5/2012), *Commission decision after remand*, 29 MCSR 176 (2016), *further appeal after remand*, Suffolk Sup. C.A. 1684-01233 (2018). Thus, by extending an out-of-grade appointment beyond thirty (30) days, when there was an eligible list from which temporary appointments can be made, Lowell would have impaired the civil service service rights of those Fire Lieutenants who, unlike the Appellant, had taken and passed the Captain’s examination and stood in line for such a temporary or permanent promotion.

The Appellant’s argument that the CBA requires that Lowell maintain his “out-of-grade” appointment “for the full duration of the Captain’s absence” also lacks merit. As the CBA itself acknowledges, civil service law may not be superseded by a collective bargaining agreement and the requirements of Chapter 31 prevail over any provisions in the CBA that are inconsistent with civil service law. See G.L. c. 150E, §7(d); Local 1652, Int’l Ass’n of Firefighters v. Framingham, 442 Mass. 463, 477 n.15 (2004); School Committee of Natick v. Education Ass’n of Natick, 423 Mass. 34 (1996); City of Fall River v. AFSCME Council 93, Local 3117, 61 Mass. App. Ct. 404, 411 (2004); Leominster v. Int’l Bh’d of Police Officers, Local 338, 33 Mass. App. Ct. 121, 124-125, rev. den., 413 Mass. 1106 (1992). Here, however, the provisions of the CBA are, and have been interpreted by Lowell in practice as, consistent with civil service law – the senior company Lieutenant may act “out-of-grade” on an emergency basis for the duration of a Captain’s absence of thirty (30) days or less but, when the Captain’s absence continues beyond thirty (30) days, and there is an active civil service promotional list from which temporary appointments may be made, the position must be filled in accordance with the requirements of civil service law, which require such appointments to be made, either permanent or temporary, from such list. To interpret the CBA in any other way would be inconsistent with civil service law.

CONCLUSION

In sum, for the reasons stated herein, the Motion to Dismiss is hereby *granted* and the appeal of the Appellant, Thomas F. Underwood, CSC No. E-20-025, is *dismissed*.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners [Camuso – Absent]) on April 21, 2022.

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 this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Thomas F. Underwood (Appellant)

Adam R. LaGrassa, Esq. (for Respondent)