

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 Worcester pertaining to the position of Public Works Foreman

Tracking Numbers: I-16-34 (Richard E. Maher, Jr.)
I-16-35 (Craig Kobel)
I-16-36 (Nicholas Pinto)
I-16-37 (Michael Urseleo)
I-16-38 (Sean Maher & 11 Others, Including Dennis Bombard)

Appearance for Petitioners: Michael F. Manning, Esq.
NAGE
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Quincy, MA 02169

Appearance for City of Worcester: William R. Bagley, Jr., Esq.
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Appearance for Human Resources Division: Mark P. Detwiler, Esq.
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Boston, MA 02108

Commissioner: Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION

1. On February 25, 2016, the Civil Service Commission (Commission) received multiple requests to initiate an investigation, all of which pertained to the position(s) of Public Works Foreman, an official service position in the City of Worcester (City).
2. The requests for investigation were filed by the following labor service employees in the City of Worcester : Richard E. Maher, Jr. (who is now represented by counsel) (I-16-34); Craig Kobel (I-16-35); Nicholas Pinto (I-16-36); Michael Urseleo (I-16-37); Sean Maher & 11 Others (including Dennis Bombard) (I-16-38).

3. On April 5, 2016, I held a show cause hearing at Worcester City Hall to allow the Petitioners to show why the Commission should initiate an investigation.
4. The show cause hearing was attended by: counsel for the City, the City's Coordinator of Employment for the Human Resources Department, counsel for the state's Human Resources Division (HRD); Richard E. Maher, Jr., his counsel, Craig Kobel, Nicholas Pinto, Michael Urseleo, Sean Maher, Dennis Bombard, Kenneth Webster (a recently retired City employee); and a regional representative from the local union.
5. Based on the statements of the parties and two (documents) that were submitted, I believe the following (below) is undisputed, unless otherwise noted:
6. Since the mid-1970s, the City has been delegated the responsibility of performing a wide array of civil service functions by HRD including, but not limited to: administering civil service examinations, establishing eligible lists and creating Certifications from these eligible lists from which official service appointments are made.
7. On October 30, 1999, the City, using examinations provided by HRD, administered various civil service examinations for positions in the official service, including, but not limited to, Public Works Foreman.
8. On November 22, 1999, the City established a promotional eligible list of names for Public Works Foreman.
9. The November 22, 1999 promotional eligible list contained the names of thirty-nine (39) City employees, most of whom were labor service employees, ranked in order of their test scores, which ranged from 85.48 to 73.53.
10. From November 1999 until November 2012 or January 2013, the City made many promotional appointments from this eligible list. Based on these promotions, in addition to retirements, quits, etc., only eight (8) names remained on the eligible list, two (2) of whom have retired. Among the remaining names on the eligible list are, in order: Michael Urseleo; Dennis Bombard; Nicholas Pinto; Craig Kobel, Thomas Simone and Richard Maher. With the exception of Mr. Simone, all of these individuals are Petitioners here.
11. According to the City, there are currently five (5) budgeted "vacancies" for the position of Public Works Foreman, but, only one (1) Department Head has requested that the vacancy be filled.
12. That one (1) vacancy has, according to the City, since early 2013, been filled by a "working craftsman" (labor service position), who is working "out of class." Based on the information provided by the City, I informed the attendees at the hearing that the term "out of class" appeared to be equivalent to the term, "Acting, out-of-grade", appointments which have been the subject of various prior Commission decisions.
13. The Petitioners argued at the hearing that four (4) other labor service employees are actually

working in an “Acting, out-of-grade” capacity, serving as Public Works Foremen. They identified those four (4) individuals during the show cause hearing and gave examples which they argue show that the individuals are actually performing the duties of Public Works Foremen.

14. In early 2016, the City decided to administer “new” civil service examinations for various official service positions, including the position of public works foreman, and to create new eligible lists.
15. The City’s intent was to use the same examination(s) from 1999.
16. According to the City, after consulting with HRD, and based on a recommendation from HRD that the City should not rely on the same 1999 examination, the City opted not to go forward with the civil service examinations at this time.
17. Given the cost of developing and validating new examinations, it is uncertain when the City will go forward with new examinations, if ever.
18. Although the City did not go forward with the examinations, it did revoke various outstanding eligible lists, including the 1999 eligible list for public works foreman.
19. Without any eligible list in place, vacancies for public works foreman will likely now be filled via provisional appointments.
20. According to the City, this decision was reached after consulting with HRD and learning that eligible lists are generally in place for two (2) or three (3) years – and rarely beyond five (5) years.
21. According to the City, the decision to revoke the eligible lists was also based on feedback from local union officials that failure to give new examinations was limiting the promotional opportunities for over 100 employees who had never had a chance to take an examination. Richard Maher, a Petitioner and President of NAGE Local 495, disputes this.
22. According to Petitioners Ursoleo, Bombard, Pinto, Kobel and (Richard) Maher, the City should not have revoked the eligible list for public works foreman. Rather, according to these Petitioners, the City should have waited until all of the remaining individuals on that list were considered for appointment.
23. The Petitioners also argued that, even if the list was properly revoked, the City, prior to the revocation, was using illegal, out-of-grade appointments to fill five (5) public works foreman positions. Thus, according to the Petitioners, they are aggrieved because the City was required to fill these positions from individuals on the eligible list which was active at the time.
24. In regard to the City’s decision to revoke the eligible list, I asked each of the Petitioners at the hearing whether they believed that the decision was based on any political or personal

bias against them or in favor of any other individuals. Each of them said no.

25. As part of the show cause hearing, I stated that the Commission was unlikely to initiate an investigation into the City's decision to revoke an eligible list that was seventeen (17) years old. I then issued a Procedural Order stating that: a) years of precedent-setting judicial decisions and Commission decisions have established that "dying on the vine" is inherent in the civil service appointment process; and b) absent any allegation that the City's decision was motivated by political or personal reasons, it was even more unlikely that the Commission would investigate that decision.
26. After the issuance of the Procedural Order, the Petitioners submitted written statements arguing that the City's decision to revoke the eligible list was the result of personal bias against them. I give no weight to these post-hearing written statements, but, rather, rely on the statements made by the Petitioners at the show cause hearing.
27. I gave the Petitioners, either individually, or collectively, the opportunity to submit a list of public works foreman positions that they believed were being filled by the City via Acting, out-of-grade appointments, in addition to the name of the person filling the position(s), the duties and responsibilities being performed by that person which are consistent with a public works foreman, how long each of the alleged acting, out-of-grade appointments have been in place and other information deemed relevant in regard to whether the Commission should investigate this matter further.
28. The City was given the opportunity to reply, indicating whether the City agreed or disagreed with the Petitioners' position regarding each position. Specifically, whether the City agreed or disagreed on whether it was being filled via an acting out-of-grade appointment, and, if the City disagrees, the reasons supporting their position.
29. As part of their post-hearing submission, the Petitioners stated that: a) in the City's Sewer Division, Working Foreman Craftsmen Robidoux and Reyez, Working Forman Maintenance Men Arcouette and Dupre and Maintenance Craftstman Miller have been performing Public Works Foreman duties on a full-time basis for periods between six months and three years; b) In the City's Streets Division, Working Foreman Craftsman Hyland is performing Public Works Foreman duties on a full-time basis and has been since the Fall of 2015; and c) In the City's Water Division, Working Foreman Craftsman Poske has been performing Public Works Foreman duties since May 2016.
30. As part of their post-hearing submission, the City disputes that any employees are working "out of grade" and seeks to clarify their definition of working "out of class". It is difficult to summarize their positions. The verbatim response, with cites and footnotes omitted, states in relevant part:

".... the City does not have any employees working "out of grade" in a Foreman position, including Timothy Robidoux as alleged by the Petitioners. Rather, the City merely used funds budgeted for the Foreman position to fill a Working Foreman position "out of class." Mr. Robidoux has at all times performed the work of a Working Foreman, and he has been

compensated as such.

In December 2011, the Department recommended Chad Arcouette and Mr. Robidoux, both of whom were Sewer Operation employees, for promotion to the position of Working Foreman. One of the positions the Department used for these promotions was a Working Foreman position. Mr. Arcouette was promoted to the position of Working Foreman using this position.

Importantly, the other position the Department used for these promotions, which was awarded to Mr. Robidoux, was a Pump Operator, Grade 2 (“PSO2”) position. The previous holder of this position was also a Working Foreman. His name was Raul Lugo, and he held the PSO2 position “out of classification” as a Working Foreman.

In March of 2015, an individual named Francis Beckwith, one of the Department’s existing Pump Station Operators, obtained his Grade 2 Wastewater Treatment Plant Operator license. As a result of his obtaining his license, Mr. Beckwith became eligible for promotion to the position of PSO2, and the Department wished to promote him. However, and as set forth above, the Department’s only PSO2 position in Sewers was already filled by Mr. Robidoux who was filling the position out of class as a Working Foreman. As a result, the Department needed to find a position that would allow it to proceed with the promotion of Mr. Beckwith to the PSO2 position.

At the time, the Department had a vacant Foreman position available in Sewers. One option would have been to use that vacant position to accommodate the promotion of Mr. Beckwith, which would have resulted in him working out of class as a PSO2, despite the fact that the Department actually had a PSO2 position. The second option was to move Mr. Robidoux out of the PSO2 position he was filling out of class as a Working Foreman, thus opening the PSO2 position. Logic dictated that the Department place Mr. Robidoux elsewhere and then promote Mr. Beckwith to the PSO2 position that he would actually hold. Accordingly, in March of 2015, the Department moved Mr. Robidoux’s position to the vacant Foreman position, and then promoted Mr. Beckwith to the PSO2 position that Mr. Robidoux had vacated. As was the case with the PSO2 position, Mr. Robidoux filled this position out of class as a Working Foreman.

Based on the foregoing, it is clear that the Department’s practice of filling positions “out of classification” used budgeted funds to create opportunities and fulfill its operational needs, and not to deprive employees of opportunities as alleged by the Petitioners.”

31. The City’s post-hearing submission also states that tasks referenced by the Petitioners have historically been performed by both Foreman and Working Foremen and provides numerous examples of overlap.

Legal Standard

Investigations

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).

Eligible lists

G.L. c. 31, § 25 states in relevant part:

"Persons on an eligible list shall be eligible for certification from such list for such period as the administrator shall determine, but in any event not to exceed two years, unless one of the following exceptions applies: (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order; or (3) no new list is established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position for which the original list was established; provided, however, that the administrator may revoke the eligibility of the entire list or of any persons on such list subsequent to said two-year period if he shall determine that the effective maintenance of the merit system so requires such revocation and, provided further, that a written notice and explanation for said revocation is sent to the clerks of the senate and house of representatives.

Out-of-Grade Appointments

G.L. c. 31, § 7 states in relevant part:

"Each promotional appointment within the official service shall be made pursuant to section eight or after Certification from an eligible list established as a result of [an] examination[] ... An appointing authority desiring to make a promotional appointment within the official service, other than a promotional appointment pursuant to section eight, shall, if a suitable eligible list exists, submit a requisition to the administrator. Upon receipt of such requisition the administrator shall certify from such list the names of persons eligible for such promotional appointment. If no suitable list exists, or if the list contains the names of less than three persons who are eligible for and willing to accept employment, the appointing authority may request authorization to make a provisional appointment pursuant to sections twelve, thirteen, and fourteen or a provisional promotion pursuant to section fifteen. "An appointing authority may make a temporary promotional appointment ... to fill a temporary vacancy in a permanent position."

Section 31 of the civil service law also affords appointing authorities a limited right to make another type of appointment – an emergency appointment. That section states in relevant part that “An appointing authority may, without submitting a requisition to the administrator and without complying with other provisions of the civil service law and rules incident to the normal appointment process, make an emergency appointment to any civil service position . . . for a total of not more than thirty working days during a sixty-day period. Such appointment shall be made only when the circumstances requiring it could not have been foreseen and when the public business would be seriously impeded by the time lapse incident to the normal appointment process. Upon making such an appointment, the appointing authority shall immediately notify the administrator in writing, in such form and detail as the administrator may require, of the reason for the appointment and the expected duration of the employment thereunder. No renewal of such emergency appointment shall be made without the consent of the administrator.

An emergency appointment may, upon written request of the appointing authority and with the consent of the administrator, be renewed for an additional thirty working days.”

In Somerville, the court noted that “in filling any vacancy, even temporarily, the appointing authority is required to follow the carefully prescribed requirements set forth in c. 31. Failure of an appointing authority in filling a position to follow the requirements will render the appointment invalid.” See also Fall River v. Teamsters Union, Local 526, 27 Mass. App. Ct. 649, 650 (1989)(“Ordinarily, when a vacancy in a civil service job occurs, the appointing authority selects from a list of eligibles drawn up as a result of a competitive examination.”)

Further, [U]nauthorized "out-of-grade" promotional appointments, whether provisional or temporary . . . circumvent the requirements of the civil service law. [S]uch appointments should be avoided because they "often are used to reward employees beyond the salary limits of their permanent positions." . . . This breeds favoritism, which tends to undermine the purpose of the civil service law – “[t]o secure the best qualified persons available for all positions in the state and local service, encouraging competition and offering an opportunity for all qualified persons to compete.” Somerville at 602-3. See also Gaughan v. Boston Police Dep’t, 12 MCSR 245 (1999)(ruling that using sergeants in out-of-grade capacity, City “is in violation of [c. 31 §73] by appointing and/or employing individuals in violation of civil service laws.”)

Analysis

The vast majority of non-public safety civil service positions have been filled via *provisional* appointments and promotions for over two (2) decades due to the failure of HRD, either on its own, or through its delegation authority, to administer civil service examinations, which allows for the creation of new eligible lists.

Until recently, one of the rare exceptions to this has been the City of Worcester. In Worcester, the City, rather than revoking aging eligible lists, has been filling certain non-public safety positions, including Public Works Foreman, using eligible lists that were established in 1999, approximately seventeen (17) years ago. By relying on this eligible list, no employee hired by the City after 1999 has been eligible for consideration for a promotional appointment to the position of Public Works Foreman.

Sometime in 2016, the City, under its delegation authority, decided to administer a new civil service examination for the position of Public Works Foreman, with the intent of establishing a new eligible list. This, too, would have been a rarity in the modern-day civil service system in Massachusetts, where non-public safety civil service examinations are simply non-existent. The City, however, planned to simply use the same questions that were on the 1999 examination, without any process to ensure that the 2016 test accurately, and validly, assessed the knowledge, skills and abilities of a Public Works Foreman in 2016. After consulting with HRD, the City opted not to go forward with the 2016 examination. Further, the City, under its authority as the delegated Personnel Administrator, decided to revoke various outstanding eligible lists, including the Public Works Foreman eligible list.

The Petitioners, including those whose names appear on the 17-year-old eligible list, allege that the revocation of the eligible list, and the reliance on provisional promotions, is not consistent with the effective maintenance of the merit system. I disagree. While the Commission has repeatedly called for the end of provisional appointments and promotions, it is difficult to imagine that the Legislature ever envisioned that eligible lists would stay in place for seventeen (17) years, preventing employees with tenures spanning up to sixteen (16) years from being considered for promotional appointments. Further, based on the Petitioners' own statements at the show cause hearing, the City's decision was not based on any personal bias against them. As previously referenced, the Petitioners, after becoming aware that an allegation of bias is one reason for the Commission to initiate an investigation, submitted written statements including allegations of personal bias. I was troubled by this about-face and (highly) skeptical of the suggestion that these men, who had already filed a request for investigation against the City, and who were sitting shoulder-to-shoulder with each other at the show-cause hearing, were somehow intimidated by the City's Personnel Director. I credit their own statements at the show cause hearing and give no weight to their post-hearing written statements as they pertain to allegations of bias.

That leaves the issue of whether the City may be using unauthorized (and illegal) acting, out-of-grade appointments. I have carefully reviewed the submissions of the Petitioners and the City, including the sworn affidavits that were attached to the City's submission. My review is limited to the position of Public Works Foreman.

Acting, out-of-grade appointments traditionally occur when a lower-ranked individual serves, in an "acting" capacity, in a higher civil service title when there is an active eligible list for that position that should have been used to make a permanent or temporary appointment. In short, I do not believe that is what is happening here or, more specifically, that there is sufficient information to justify the initiation of an investigation into whether this is occurring here.

Rather, it appears that the City is effectively "misclassifying" certain individuals due to certain internal administrative issues, including the availability of budgeted positions. While this is not harming any of the Petitioners, it is not advisable and potentially inconsistent with the overall framework of the civil service system. For that reason, the Commission expects the City to end this practice on or before July 1, 2017, the beginning of the next fiscal year, and ensure that appropriate steps are taken to ensure that all City employees are properly classified.

For all of the above reasons, the Petitioners' request to initiate an investigation is hereby ***denied*** and the matters docketed under CSC Tracking Nos. I-16-34-38 are ***closed***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman-Yes; Camuso, Commissioner-No; Ittleman, Commissioner-Yes; Stein, Commissioner-Yes; and Tivnan, Commissioner-No) on December 8, 2016.

Notice:
Michael Manning, Esq. (for Petitioners)
William Bagley, Jr., Esq. (for City of Worcester)
Mark Detwiler, Esq. (HRD)