

COMMONWEALTH OF MASSACHUSETTS

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

ERIC ZAHN,
Appellant

v.

E-19-162

CITY OF LAWRENCE,
Respondent

Appearance for Appellant:

Paul T. Hynes, Esq.
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Suite 203
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Appearance for City of Lawrence:

Jennifer King, Esq.
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Appearance for Human Resources Division:

Melinda Willis, Esq.
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Commissioner:

Cynthia A. Ittleman

ORDER OF DISMISSAL

On August 9, 2019, the Civil Service Commission (Commission) received a non-bypass equity appeal, under G.L. c. 31, § 2(b), from Eric Zahn, in his capacity as President of the local firefighters' union, seeking an order that the City of Lawrence (City) be required to participate in then-upcoming promotional examinations in November 2019 for Fire Lieutenant and Fire Captain.

On August 26, 2019, apparently anticipating that the Commission would not hear a Section 2(b) appeal from a person (Zahn, a Fire Captain) who was not aggrieved, counsel for the Appellant filed a Motion to Intervene on behalf of Lawrence Firefighter Michael Delaney and Lawrence Fire Lieutenant Dave Amero, two persons who would be eligible to sit for the fire lieutenant (Delaney) and fire captain (Amero) examination if offered to Lawrence firefighters and lieutenants in November 2019.

Also on August 26, 2019, I held a pre-hearing conference at the Mercier Community Cener in Lowell, MA, which was attended by counsel for: the City, HRD, the Appellant and the requested intervenors. Based on the information provided at the pre-hearing, it appeared undisputed that:

1. In November 2017, the City participated in the promotional examinations for fire captain and fire lieutenant.
2. On March 15, 2018, HRD established the eligible lists for fire lieutenant and fire captain.
3. The eligible lists were scheduled to expire on March 15, 2020, but would be extended (by default) through November 1, 2020 if no new eligible list had been established by March 15, 2020.

The Appellant (and requested intervenors) argued that the City was deviating from its longstanding practice of participating in promotional examinations every two years; that the current lists will likely be exhausted prior to their expiration; and, thus, the City should be ordered to participate in the upcoming promotional examinations.

The City, in addition to arguing that the Appellant (Zahn) had no standing to file this appeal, argued that the civil service law and rules do not require an appointing authority to

participate in promotional examinations in anticipation of the lists potentially being exhausted sometime in the future.

Counsel for HRD confirmed the dates referenced above and stated that, unless an appointing authority is requesting provisional promotions (due to no eligible list or a “short list”), HRD cannot require the appointing authority to participate in upcoming promotional examinations.

At or around the same time that this appeal was filed with the Commission, the local firefighters’ union filed a charge of prohibited practice with the Department of Labor Relations, arguing in part that the City’s failure to participate in the then-upcoming promotional examinations would violate “... the contractual requirement that the City maintain an active civil service list for each position ...”.

The Appellant and requested Intervenors asked the Commission to issue temporary orders extending the deadline for the City to participate in the upcoming promotional examinations. Based on the careful review of the record at the time, I declined to do so.

On September 10, 2019, the City filed a motion to dismiss the instant appeal. Neither the Appellant or the Intervenors filed a reply.

Analysis

This appeal was effectively a request for the Commission to issue an emergency order at the time requiring the City to participate in promotional examinations for which the deadline to participate was days away. Based on my review of the record at the time, such an order was not warranted, as it was undisputed that eligible lists were in place for both positions, the eligible lists would be automatically extended through November 2020 and, importantly, the City had not requested any provisional promotional appointments for either fire lieutenant or captain at the

time, which would trigger the statutory requirement for the City to participate in upcoming promotional examinations.

The City's motion to dismiss went unanswered by the Appellant and requested Intervenor, presumably because the matter effectively became moot once the deadline for participating in the promotional examinations had passed.

To ensure clarity, however, based on the facts of this particular appeal, I concur with the City that Captain Zahn, who was not eligible to sit for the lieutenant or captain examinations, had no standing to file a Section 2(b) appeal with the Commission.¹ I have allowed the motions to intervene by Firefighter Delaney and Fire Lieutenant Amero, who did have standing to file such an appeal. However, for all the reasons stated in the City's motion to dismiss, the intervenors, even when the facts are viewed most favorably to them, were unable to show that they were aggrieved persons in part because "... even assuming that Delaney and Amero [were] eligible to participate in [the] promotional examinations, it [was] entirely speculative as to how they might perform on such examination(s), whether the City would make any future promotions, or whether Delaney and/or Amero might even be entitled to consideration for promotion based on their performance on any promotional examination."

Further, as confirmed by the union's charge of prohibited practice filed with the Department of Labor Relations, this matter could be more squarely addressed in that forum as, at its core, this appeal related to whether the City was complying with the terms of the applicable collective bargaining agreement.

¹ I have also considered the Commission's authority to initiate an investigation into alleged violations of civil service law under G.L.c.31, Section 2(a) but, for the reasons set forth above, there has been no such violation in this case and an investigation is not warranted.

Conclusion

For all of the above reasons, the appeal filed under Docket No. E-19-162 is hereby *dismissed*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on September 23, 2021.

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:

Paul Hynes, Esq. (for Appellant and Intervenors)

Jennifer King, Esq. (for City of Lawrence)

Melinda Willis, Esq. (for HRD)