

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
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In the Matter of:

CITY OF LYNN

and

I-11-44

JOSEPH ZUKAS

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Commissioner:

Christopher C. Bowman

**DECISION ON CITY OF LYNN'S REQUEST FOR RELIEF UNDER CHAPTER 310
OF THE ACTS OF 1993**

On February 3, 2011, the City of Lynn (City) filed a request with the Civil Service Commission (Commission) asking the Commission to exercise its authority under Chapter 310 of the Acts of 1993 (310 Relief) and vacate the permanent appointment of Joseph Zukas to District Fire Chief "until such time as there is a permanent vacancy."

As reason therefore, the City stated that the permanent appointment was in error as there was no permanent vacancy at the time of the appointment. According to the City, District Fire Chief James McDonald was provisionally promoted to Deputy Fire Chief on February 12, 2010. The City states that McDonald's provisional promotion created a temporary vacancy in District Fire Chief but not a permanent vacancy. Inadvertently, the City states that it requested a Certification for a permanent District Fire Chief.

A pre-hearing conference was held at the offices of the Commission on March 1, 2011. Prior to the pre-hearing, counsel for Local 739, International Association of Firefighters, AFL-CIO ("Local 739") filed a motion to intervene. That motion is allowed. In attendance at the pre-hearing was the Appellant, Chief Carmody and counsel for Mr. Zukas, the City, the state's Human Resources Division (HRD) and Local 739. I heard oral argument from all parties and subsequently received written briefs from Mr. Zukas and Local 739.

Based on the documents submitted to the Commission and statements made at the pre-hearing conference, I find the following:

1. On March 22, 2008, Mr. Zukas took the departmental promotional exam for District Fire Chief.
2. On August 1, 2008, HRD established the eligible list for District Fire Chief in the City of Lynn. Mr. Zukas was first on this list. The eligible list is still in effect.
3. The next examination for District Fire Chief in Lynn was scheduled for March 19, 2011. HRD will be establishing a new eligible list based on the results of this examination, replacing the existing eligible list.

4. On February 12, 2010, District Fire Chief James McDonald was promoted provisionally to Deputy Fire Chief.
5. On February 16, 2010, Chief Carmody forwarded a letter to City Personnel Director Joseph Driscoll informing him that Mr. Zukas would be made a provisional District Fire Chief.
6. On February 17, 2010, Chief Carmody posted a notice in the Fire Department notifying all personnel that Mr. Zukas had been provisionally promoted to the position of District Fire Chief.
7. At the pre-hearing conference, Chief Carmody stated that he was unsure of the proper civil service terms when making the above-referenced “provisional promotion”, but he knew the promotion was only temporary in nature since it was not known if Mr. McDonald would be permanently promoted to Deputy Fire Chief – or return to his position as District Fire Chief.
8. At some point shortly after February 17, 2010, Mr. Driscoll informed Chief Carmody that “provisional promotions” were not permitted under civil service law if there is an eligible list in effect for that position containing at least three names, which there was.
9. Unfortunately, Mr. Driscoll apparently never informed Chief Carmody that he had the option of making a “temporary” promotional appointment from this eligible list under civil service law (as opposed to a “permanent” appointment).
10. Having been told that provisional promotions were not permissible, and apparently being unaware of the option of making a “temporary appointment”, Chief Carmody accepted a Certification from Mr. Driscoll for 1 permanent District Fire Chief and decided to “see what happens”.

11. I credit the statements of Chief Carmody that at all time relevant to this appeal, he intended for the District Fire Chief's position to be filled on a temporary basis. Had he been aware that temporary appointments were permissible under civil service law, even when an eligible list with at least three names is in effect, he would have requested a Certification for a temporary District Fire Chief.
12. On February 24, 2010, the City created Certification #206195-1 for 1 permanent District Fire Chief. All three (3) candidates, including Mr. Zukas, signed the Certification as willing to accept appointment.
13. Also on February 24, 2010, Mr. Driscoll sent out interview notices to the three (3) candidates.
14. On March 8, 2010, Mr. Driscoll signed an Authorization of Employment Form 14 indicating that Mr. Zukas had been appointed as a permanent District Fire Chief.
15. On March 9, 2010, Lynn Mayor Judith Flanagan conducted a ceremonial swearing-in ceremony regarding Mr. Zukas's appointment as "permanent" District Fire Chief.

City's Argument

The City argues that the appointment of Mr. Zukas as a permanent District Fire Chief was the result of an administrative error that occurred due to a misunderstanding of the civil service law and breakdown in internal communication. They argue that the vacancy in question was at all times considered "temporary" and but for an administrative error and misunderstanding, Mr. Zukas would never have received a permanent appointment to fill a temporary vacancy. They seek to have the permanent appointment rescinded and retroactively designated as a temporary appointment.

Mr. Zukas's Argument

The Appellant argues that the driving force behind the City's request is actually Local 739 which, according to Mr. Zukas, wants the permanent promotion rescinded so that other members can take the new exam. The Appellant chastises the City for kowtowing to the union and accommodating their request to rescind the permanent promotion.

The Appellant argues that, having been appointed permanently, he saw no need to prepare for the next promotional examination in March 2011 and would be put at a real disadvantage in regard to scoring well enough to again place first on a newly-established eligible list.

Union's Argument

Local 739 argues that its only interest is to ensure that basic merit principles and the legal requirements of the civil service law are complied with. They argue that there was no permanent vacancy for the position of District Fire Chief and that the mistaken permanent promotion should be rescinded.

Conclusion

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.”

As to which method to use in filling promotional vacancies (permanent or temporary), the courts have said that cities and towns have the “power to decide whether to fill vacancies on either a permanent or temporary basis.” Somerville v. Somerville Municipal Employees Ass’n, 20 Mass. App. Ct. 594, 596 (1985).

Regarding the reference to a “provisional appointment”, section 12 provides in relevant part that:

“An appointing authority may make a provisional appointment . . . with the authorization of the administrator Such authorization may be given only if no suitable eligible list exists A provisional appointment may be authorized pending the establishment of an eligible list

After authorization of a provisional appointment pursuant to the preceding paragraph, the administrator shall proceed to conduct an examination as he determines necessary and to establish an eligible list.”

As to the reference to section 15, that term provides in relevant part that:

“An appointing authority may, with the approval of the administrator . . . make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list ...”

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.”)

A candidate whose name is not reached for promotion or appointment has no recourse but to take the next examination. See Callanan v. Personnel Administrator for the Commonwealth, 400 Mass 597, 601 (1987). (“The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that positions might become available immediately after the expiration of an old list or immediately before the establishment of a new list. The overall pattern of the statute does not justify

expectations that certain positions will become available during the period of a single list.”)

Here, I credit the statement of Fire Chief Carmody that at all time relevant to this appeal he intended to fill the District Fire Chief vacancy in question on a temporary basis. That vacancy was created when a District Fire Chief was provisionally promoted to Deputy Fire Chief. Uncertain if that individual would ultimately become the permanent Deputy Fire Chief or be returned to his permanent position of District Fire Chief, Chief Carmody sought to fill the position on a temporary basis.

Chief Carmody mistakenly believed that the only alternative to a permanent promotional appointment was a provisional promotion. Told by the City’s Personnel Director that provisional promotions were not permitted when there is an active eligible list containing at least three (3) names, Chief Carmody moved forward with a permanent promotional appointment. Had he been aware that an Appointing Authority, under civil service law and rules, may fill a vacancy through a permanent or temporary appointment, he would have filled the vacancy through a temporary appointment.

Had that occurred, Mr. Zukas would have served at all times relevant to this appeal as a temporary District Fire Chief. When a permanent vacancy became available, the City would be required to fill that permanent vacancy by creating a Certification of names from the eligible list in place at that time. Here, that permanent vacancy is likely to arise after the establishment of a new eligible list and it is uncertain if the name of Mr. Zukas will again be ranked first.

Although I have carefully considered the well-reasoned argument of Mr. Zukas, I have concluded that the City’s request for 310 Relief is warranted, consistent with basic merit

principles as well as the general statutory framework regarding civil service appointments and promotions.

For all of the above reasons, the Commission, pursuant to its authority under Chapter 310 of the Acts of 1993, hereby *vacates* the permanent promotional appointment of Joseph Zukas to District Fire Chief. He is to be considered a temporary District Fire Chief retroactive to February 24, 2010.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Stein, Marquis and McDowell) on June 16, 2011.

A True copy. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 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:

Neil Rossman, Esq. (for Joseph Zukas)
David Grunebaum, Esq. (for City of Lynn)
Paul Hynes (for Local 739)
Martha O'Connor, Esq. (HRD)