

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

GARY SMYTH,
Appellant

v.

G2-08-295

CITY OF QUINCY,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON HRD'S MOTION TO DISMISS APPELLANT'S APPEAL

Procedural Background

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Gary Smyth (hereinafter "Smyth" or Appellant") has filed this appeal regarding the actions of the City of Quincy (hereinafter "City") and the state's Human Resources Division (hereinafter "HRD") with respect to the current vacancy in the permanent position of Fire Chief.

The Appellant filed his appeal with the Civil Service Commission (hereinafter “Commission”) on December 2, 2008. A pre-hearing conference was conducted on December 22, 2008. At the conclusion of the pre-hearing conference, this Commissioner set January 22, 2009 as the deadline for the City and HRD to file Motions to Dismiss the Appellant’s appeal. HRD subsequently filed a Motion to Dismiss on January 22, 2009. The City failed to file its own Motion to Dismiss. The Appellant filed an Opposition to HRD’s motion on February 20, 2009.

Factual Background

1. On May 21, 2008, then-Fire Chief Pettingelli notified the City of his intention to retire as of July 15, 2008. (Attachment 3 to Appellant’s Appeal Letter)
2. On July 14, 2008, HRD received a requisition from the City for one permanent full-time Fire Chief. (Attachment A to HRD’s Motion to Dismiss)
3. Also on July 14, 2008, the City, without consultation with HRD, installed Deputy Chief Joseph Barron to a position then-referred to by the City as “Acting Chief”, effective July 15, 2008. Mr. Barron remained in this position until October 31, 2008.
4. On July 18, 2008, HRD issued Certification No. 280671 to the City. The certification contained three names: George McGunagle, Gary Smyth and Paul Griffith. Mr. McGunagle and Mr. Smyth were tied for first with the highest score. (Attachment B to HRD’s Motion to Dismiss)
5. All three individuals were interviewed for approximately one hour by the Mayor, the City’s Human Resources Director and the City’s Director of Operations. (Stipulated at 12/22/08 Pre-Hearing Conference)

6. At the request of the City, HRD twice extended the deadline for returning Certification No. 280671, resulting in a new deadline of September 5, 2008.
(Attachments C and D to HRD's Motion to Dismiss)
7. On or about September 5, 2008, the City offered the position of Fire Chief to George McGunagle. (Stipulated at 12/22/09 Pre-Hearing Conference)
8. On September 17, 2008, The City requested a third extension of the deadline of Certification No. 280671 to September 22, 2008. On September 19, 2008, HRD denied the City's third extension request. (Attachment E to HRD's Motion to Dismiss)
9. As part of its September 19, 2008 letter to the City denying the third extension, HRD also stated: "Please be advised, no employee may be performing the duties of Fire Chief on an 'acting' or provisional basis when a current and eligible list exists. Currently, there is an eligible list of four names for the title of Fire Chief, Quincy Fire Department." (Attachment 10 to Appellant's Appeal)
10. On September 22, 2008, HRD learned that George McGunagle declined the appointment. Mr. McGunagle subsequently signed a letter dated October 3, 2008 stating: "Please be advised that I am declining to accept the position of Fire Chief in the City of Quincy, as the compensation offered did not meet my expectations."
(Attachment H to HRD's Motion to Dismiss and 12/22/08 Pre-Hearing Conference)
11. On September 23, 2008, the City requested an additional name for consideration from Certification No. 280671. (Attachment F to HRD's Motion to Dismiss)
12. On October 10, 2008, after receiving a copy of Mr. McGunagle's letter declining the position, HRD provided the City with Certification No. 280671 with one additional

name, Jeffrey Star. With the addition of Mr. Starr, the Certification now included three names in the following rank order: Gary Smyth, Paul Griffith and Jeffrey Star. (Attachment I to HRD's Motion to Dismiss)

13. In addition to providing the modified Certification, HRD again advised the City that no employee may be performing the duties of "Acting" or "provisional" Fire Chief as long as there was an active eligibile list for the position of Fire Chief. (Attachment I to HRD's Motion to Dismiss)

14. According to the City, Mr. Starr was interviewed by the same three individuals who had previously interviewed McGunagle, Smyth and Griffith. (12/22/08 Pre-Hearing Conference)

15. According to the Appellant, the City then "offered" the position of Fire Chief to Mr. Starr on October 24, 2008. (Appellant's Opposition to HRD's Motion to Dismiss)

16. According to the City, Mr. Starr was never "offered" the position of Fire Chief. Rather, according to the City, the City's Human Resources Director informed Mr. Starr what the starting salary would be at which point Mr. Starr informed the Human Resources Director that he would not accept the position if it was offered to him by the City. Hence, the Mayor never offered the position to Mr. Starr. (12/22/08 Pre-Hearing Conference)

17. On November 5, 2008, HRD received Certification No. 280671 with a letter signed by Mr. Starr declining the position. Mr. Starr's letter stated, in its entirety:

To whom it may concern:

Please be advised that I am declining to accept the position of Fire Chief in the City of Quincy.

Jeffrey Star

<handwritten> My decision is based on the fact that the compensation is not commensurate with the duties and responsibilities of Fire Chief nor is it consistent (sic) with the 23% differential between all other ranks as well as what previous chiefs of QFD receive / received. (sic) JHS (Attachment J to HRD's Motion to Dismiss)

18. The eligible list was now exhausted and there were no additional names for HRD to provide to the City. (HRD's Motion to Dismiss)
19. As there were now only two names on the list, this constituted a "short list" from which the City was not required to select either of the remaining candidates, including the Appellant. (G.L. c. 31, § 27)
20. On November 5, 2008, HRD received a request for a provisional promotion from the Appointing Authority pursuant to G.L. c. 31, § 15 (Form 15A). Specifically, the City requested to provisionally promote permanent Deputy Fire Chief Joseph Barron to the position of Provisional Fire Chief, effective October 31, 2008. (Attachment K to HRD's Motion to Dismiss)
21. On November 15, 2008, HRD approved the provisional promotion of Deputy Fire Chief Joseph Barron to the position of Provisional Fire Chief. (Attachment K to HRD's Motion to Dismiss)
22. The City has called for HRD to conduct an examination to be given in March 2009 for the position of Fire Chief which will result in the creation of a new eligible list for the position of Fire Chief in the City of Quincy. (12/22/08 Pre-Hearing Conference)

Standard of Review

Our review regarding the instant appeal is governed by G.L. c. 31, § 2(b). This section of the civil service law confers upon the Commission the power "[t]o hear and

decide appeals by a person aggrieved by a decision, action or failure to act by the administrator [HRD]...”. G.L. c. 31, § 2(b) defines a “person aggrieved” as one whose “rights were abridged, denied or prejudiced in such a manner as to cause actual harm to the person’s employment status.” Id.

Deputy Barron’s Installation as “Acting Chief”

The City does not contest that, effective July 15, 2008, and continuing until October 31, 2008, it installed and paid Deputy Chief Barron as “Acting Chief” of the Fire Department. This was in violation of the civil service law. No employee may be performing the duties of Fire Chief on an acting or provisional basis when a current and active eligible list exists. At the time, there was an eligible list of four names for the title of Fire Chief for the Quincy Fire Department. There is no provision in the civil service law for an “Acting” position. Section 31, entitled “Emergency Appointments,” sets out the only circumstances under which an appointing authority may make an appointment without regard to the usual rules and procedures of Chapter 31, none of which apply here.

The Appellant argues that, despite actual knowledge of the Appointing Authority’s “flouting of the statute” and HRD’s own warnings, HRD took no steps to cure the violations and that this inaction caused harm to the Appellant. The Appellant argues that he, as the “Senior Staff Deputy”, was the individual who, under past practice, would have continued to fill in as Chief, as he argues that he had from December 2007 to July 2008.

While the City violated the civil service law for approximately 3 ½ months by installing Deputy Chief Barron as “Acting Chief” when there was an active eligible list for the position, the evidence does not show that HRD “failed to act”. Rather, the evidence shows that on at least two occasions during this relatively short time period,

HRD put the City on notice that they were not in conformance with the statute. While the Appellant argues that HRD should have acted to invalidate the installation in question, there is no certainty that the position would have been awarded to the Appellant on a temporary basis. The Appellant is speculating that, based on *past practice*, he should have been the individual chosen to fill the position on a temporary basis. In regard to this portion of the Appellant's appeal, he is unable to show that he was an aggrieved person as defined by G.L. c. 31, § 2(b) because the statute requires that aggrieved persons show that the person has already "been harmed." Using the past tense, it is clear that the Legislature intended the statute to apply in cases where the harm has already occurred. Indeed, the Legislature appears to have determined that this principle is so important that it repeated and expanded upon it in the same section, stating that the appeal must show how the person's rights had already been "abridged, denied, or prejudiced in such a manner as to cause actual harm." It is not enough to speculate that they *may* be harmed at some undetermined time in an undetermined manner.

Actions taken regarding Deputy Chief McGunagle

There is no issue before the Commission regarding actions taken by the City or HRD in regard to Deputy Chief McGunagle, whose name was tied with the Appellant on the first Certification. At the pre-hearing conference regarding this matter, counsel for the Appellant acknowledged that even if Mr. McGunagle's name had been submitted to HRD for appointment (assuming he hadn't declined the appointment because of salary issues), this would not have constituted a bypass.

Actions taken regarding Deputy Chief Starr

This appeal centers on whether or not the City's actions regarding Deputy Chief Starr resulted in a "bypass" of the Appellant.

G.L. c. 31, § 27 states that "[i]f an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such an appointment, the appointing authority shall immediately file with [HRD] a written statement of his reasons for appointing the person whose name was not highest." The Personnel Administration Rules ("PAR") define a bypass as "the selection of a person or persons who are not appointed and whose names appear higher on said certification." PAR.02.

HRD argues that, in the present case, the City did not "make a promotional appointment" in regard to Deputy Chief Starr. As such, HRD argues that there was no bypass and the City was not required to submit selection reasons to HRD. At the pre-hearing conference on this matter, the City, like HRD, argued that they never "selected" Deputy Chief Starr for appointment, but rather only asked Mr. Starr if he would be willing to accept the position at the salary level that was previously offered to Mr. McGunagle. Once Mr. Starr indicated that the salary level would not be acceptable, the City chose not to offer him the position and Mr. Starr withdrew his name from consideration, resulting in a "short list" of only two candidates, including the Appellant.

The Appellant argues that the City "selected" Deputy Chief Starr when the City asked Mr. Starr if he would accept the position at the posted salary. The Appellant did not cite any caselaw or prior Commission decisions that are on point which would support this novel argument. Rather, the Appellant argues that the Commission should conduct a full

evidentiary hearing to determine whether a “selection” occurred here. I disagree. It is undisputed that Deputy Chief Starr was unwilling to accept the position of Fire Chief at the salary level being offered. He removed his name from consideration, in writing, and the City chose not to forward any names to HRD for promotion to the position of Fire Chief. Even if the Commission were to accept all of the Appellant’s allegations as true, there would be no evidence that a bypass occurred here as defined by the civil service law or Personnel Administration Rules as the City never made a promotional appointment.

Subsequent Provisional Appointment of Deputy Chief Barron

Pursuant to G.L. c. 31, §§ 27 and 15, HRD approved the City’s request to make a provisional promotion in November 2008. Section 27 provides in pertinent part,

Except as provided otherwise by section fifteen, if the administrator certifies from an eligible list the names of three persons who are qualified for and willing to accept appointment, the appointing authority, pursuant to the civil service law and rules, may appoint only from among such persons. If such eligible list contains the names of fewer than three such persons, the appointing authority may appoint from among those persons or may request authorization to make a provisional appointment pursuant to sections twelve, thirteen and fourteen. (emphasis added)

Section 15 provides in pertinent part,

An appointing authority may, with the approval of the administrator or, if the appointing authority is a department, board, commission, institution or other agency within an executive office, with the approval of the secretary of such office, 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, or if the list contains the names of less than three persons eligible for and willing to accept employment...

There were four individuals on the eligible list for the position of Fire Chief.

Ultimately, all four were certified in Certification No. 280671. Mr. McGunagle and Mr. Starr were not willing to accept employment and declined employment. As such, the

eligible list and resulting certification contained only two persons willing to accept employment. As is its right, the City did not make an appointment from the remaining two names on the certification. Rather, on November 5, 2008, the City requested approval from HRD to provisionally promote Deputy Fire Chief Joseph Barron to the position of Provisional Fire Chief, effective October 31, 2008. HRD approved this request.

The Appellant concedes that a valid provisional promotion, i.e., one made upon a legitimate “short list,” does not require the City to provide a written statement of reasons for appointing an individual not on the eligible list. However, the Appellant argues that HRD failed to follow the statute by not assuring that the person provisionally promoted (Barron) was “qualified.” The Appellant argues that Deputy Chief Barron “is the only [Deputy Chief] never to have studied for and taken the promotional examination for Chief”. Here, I reach the reasonable inference that HRD deemed Deputy Chief Barron “qualified” for this short-term, provisional promotion, based on his many years in the next lower title,

The Appellant questions, however, whether a legitimate “short list” existed at all, relying on its prior argument that Mr. Starr was indeed “selected” for appointment from a certification that, at the time, listed the names of three individuals willing to accept appointment as Fire Chief. Accepting the Appellant’s argument on this point would be contrary to the plain language of the statute and would defy common sense and logic. I decline to do so.

More broadly, the Appellant cites statements and actions that he claims show a predisposition on the part of the City not to promote him because he purportedly

supported the incumbent Mayor's opponent in the most recent mayoral election. In the event that the Appellant is bypassed for promotional appointment to the position of permanent Fire Chief, which is likely to be filled this year, he will have the opportunity to bring those charges before the Commission as part of a full hearing.

Except for the installation of Mr. Barron as "Acting Fire Chief" during the short-time period when there was an active eligible list, the City's actions in regard to the instant appeal are in compliance with the civil service law and Personnel Administration Rules. Further, the Appellant was not aggrieved by any action or inaction by the state's Human Resources Division and his appeal should be dismissed.

Finally, the new examination for Fire Chief will be conducted at about the same time this decision is being issued by the Commission. Upon the establishment of an eligible list, we urge the City to embark on a transparent selection process to ensure a sense of fair play among all eligible candidates and the public. For positions that carry far less responsibility than Fire Chief, the Commission has taken note of such exemplary screening and selection methods in other civil service communities that should be considered here, including, but not limited to:

- Use of an outside review panel of current and/or retired Fire Chiefs to conduct initial interviews and make recommendations and observations;
- Public final interviews that are broadcast on the local cable access channel in which each candidate is asked a similar set of question by the Mayor and other members of his interview panel.

We are confident that the City will understand the importance of ensuring a fair and transparent selection process in choosing its next Fire Chief and will incorporate the Commission's suggestions.

For all of the above reasons, HRD's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. G2-08-295 is hereby *dismissed* and the full hearing previously scheduled for May 6, 2009 is canceled.

Civil Service Commission

Christopher C. Bowman, Chairman

By a 3-2 vote of the Civil Service Commission (Bowman, Chairman – Yes; Henderson, Commissioner – No; Marquis, Commissioner – Yes; Stein, Commissioner – Yes; and Taylor, Commissioner - No) on April 2, 2009.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:

Betsy Ehrenberg, Esq. (for Appellant)
Martha O'Connor, Esq. (for HRD)
Kevin Madden, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)