

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

RE:

Tracking Number: I-14-304

Request by Jon Mograss, Stephen Hocking & Ted McLaughlin to investigate the failure to administer civil service examinations for the public safety position of Captain at the Massachusetts Department of Correction.

Appearance for Petitioners:

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Appearance for Human Resources Division:

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Appearance for Department of Correction:

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Appearance for Interveners:

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Commissioner:

Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION

On December 24, 2014, Jon Mograss, Stephen Hocking and Ted McLaughlin (Petitioners), all permanent Lieutenants at the Massachusetts Department of Correction (DOC) who are all members of the Massachusetts Correction Officers Union (MCOFU), filed a petition with the

Civil Service Commission (Commission), asking the Commission to investigate why the state's Human Resources Division (HRD) has not conducted promotional examinations for the public safety position of Captain and/or delegated to DOC the responsibility for conducting these examinations. MCOFU is a public sector labor union representing approximately four thousand (4,000) correction officers, sergeants and lieutenants employed by DOC within state bargaining unit 4.

On January 16, 2015, the Commission received a petition from the New England Police Benevolent Association (NEPBA), which represents Captains, all of whom are currently serving in a provisional capacity, asking to intervene in this matter. I subsequently allowed motions to intervene from seven (7) individual Captains¹, all of whom are NEPBA members.

On January 20, 2015, I held a show cause hearing to give the Petitioners the opportunity to show why the Commission should initiate an investigation regarding this matter. The show cause hearing was attended by counsel for HRD, counsel for DOC, the Petitioners, counsel for the Petitioners, counsel for the now-Intervenors (the provisional Captains) and some of the provisional Captains.

At the conclusion of the show cause hearing, I provided HRD & DOC with thirty (30) days to submit briefs regarding why the Commission should not initiate an investigation and/or order that examinations be administered for the public safety position of Captain at DOC. I also provided the intervening Captains with thirty (30) days to submit a brief regarding the same question and to address the following question: "If the Commission, as part of an order to begin examinations for Captain, required provisional Captains to take and pass that examination to retain their position, what would the position of the intervenors be regarding whether the

¹ Robert Tarantino, Jason Lanpher, Shaun Dewey, Mark Reilly, Michael Edwards, David Kenneally, Christopher Crown

Commission should order that such examinations be administered.” The Petitioners were given ten (10) days thereafter to file a reply. All of the briefs were received and reviewed.

Background

Unless otherwise noted, the following is not disputed:

1. Pursuant to c. 30, § 46E, as amended by Section 73 of Chapter 699 of the Acts of 1981, state management positions allocated to job group M-V through job group M-XII are exempted from the civil service law.
2. Captains at DOC are designated as Program Managers IV.
3. The predecessor title to the public safety position of Captain at DOC was Assistant Deputy Superintendent.
4. Since 1981, the public safety position of Captain, or the predecessor title of Assistant Deputy Superintendent, has been covered by the civil service law.
5. No civil service examinations have ever been administered since 1981, or at any time, for the public safety position of Captain or Assistant Deputy Superintendent at DOC.
6. During this time period, civil service examinations have been administered for other, lower, public safety titles at DOC such as Correction Officer I (CO I); Correction Officer II (CO II or Sergeant); and Correction Officer III (CO III or Lieutenant)
7. When asked during these proceedings, neither HRD or DOC could identify any other public safety position covered by the civil service law for which no examination is administered.
8. In the absence of civil service examinations, DOC has filled the public safety title of Captain through provisional (as opposed to permanent) promotions.

9. There are eighty-eight (88) individuals serving as provisional Captains at DOC. All of them have permanency in some lower title, but not all of them have permanency in the title of CO III (Lieutenant).

Position of the Petitioners

The Petitioners are asking the Commission to order HRD to: 1) begin conducting promotional examinations for the public safety position of Captain, either directly or through a delegation agreement with DOC; and 2) establish an eligible list from which Captain positions would be filled on a permanent, as opposed to provisional, basis.

The Petitioners argue that the civil service law unambiguously requires HRD to conduct an examination for this position; that failure to do so is contrary to basic merit principles and harmful to them; and that any argument regarding HRD (or DOC)'s lack of funds is either irrelevant and/or does not justify the failure to conduct an examination for this position since it was first required to do so over thirty (30) years ago.

Position of HRD

HRD argues that historical and ongoing budget constraints have impacted their ability to conduct an examination for this position, which it estimates would cost approximately \$90,000, partly because it would need to be developed "from scratch." That estimate apparently does not include any costs associated with the not uncommon legal challenges to the validity of the examination.

Further, HRD argues that there is little compelling evidence that any harm has been experienced by the Petitioners as they are all permanent, tenured civil service employees; their civil service seniority dates are unaffected by the failure to give examinations; and provisional Captains retain their right to revert to their lower, permanent positions.

Also, HRD raises the issue of whether it has the authority to delegate to DOC the responsibility for administering promotional examinations.

Finally, HRD argues that, without the intervention of the Commission, current provisional Captains who pass but score lower on the Captain examination would potentially be unseated from their positions.

Position of DOC

DOC argues that no civil service examination for the position of Captain is necessary as the current (provisional) promotional process for Captain satisfies the basic merit principles as defined by the civil service law and rules. DOC outlines in detail the process it follows (pursuant to its own regulations) to review and select candidates for Captain from a pool of candidates who have served a minimum of one (1) years as permanent Lieutenants. That review process includes a three-person panel to conduct initial interviews; a second, and separate, interview panel that review a subset of candidates who have been recommended to move forward in the selection process; followed by a recommendation to the DOC Commissioner, who consults with his / her Deputy Commissioners. DOC argues that this process fairly allows the Petitioners to be fairly considered for promotion and, thus, the Commission should not order HRD and/or DOC to conduct promotional examinations. Should the Commission be inclined to do so, DOC asks that the Commission first conduct a full investigation.

Position of the Interveners

The intervening Provisional Captains oppose any order to begin conducting promotional examinations for the position of Captain that would have an adverse impact on existing DOC Captains. If the Commission were to issue such an order, the Provisional Captains would ask

that all those currently employed as provisional Captains be made permanent in said position, without having to take and pass a civil service promotional examination for Captain.

Applicable Civil Service Law and Rules

“Basic Merit Principles”, as defined by G.L. c. 31, § 1, means:

“(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.”

G.L. c. 31, § 2(a) allows the Commission 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). The Commission exercises this discretion, however, “sparingly”, See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011).

Pursuant to G.L. c. 31, § 5(a), the Personnel Administrator (HRD) has a duty to: “administer, enforce and comply with the civil service law and rules and the decisions of the commission.” Under Section 5(e), HRD has a duty to: “conduct examinations for purposes of establishing eligible lists.” Section 5(l) allows HRD to: “delegate the administrative functions of the civil service system, so far as practicable, to the various state agencies and cities and towns of the commonwealth.”

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 one of the following types of examinations: (a) a departmental promotional examination pursuant to section nine, (b) an alternate departmental promotional examination pursuant to section ten or (c) a competitive promotional examination pursuant to section eleven ...

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.”

G.L. c. 31, § 8 states in relevant part:

“An appointing authority, with the approval of the administrator, may promote an employee in the official service from one title to the next higher title in the same series in the same departmental unit, subject to the following requirements: (a) such employee shall have been employed in such unit in such lower title as a permanent employee for three years or longer immediately preceding the request for approval of such promotion; (b) such employee is the first, second, or third ranking employee in length of service in such departmental unit who is willing to accept the promotion; and (c) such employee shall demonstrate, by the passing of an examination prescribed by the administrator, that he possesses the qualifications and abilities necessary to perform the duties of the higher title; provided that an employee in a departmental unit of a city, town or district who has been employed in such unit in a lower title as a permanent employee for not less than one year next preceding the date of such request may be promoted to the next higher title in the same series if there is no other employee in such lower title or any other lower title in such series who has also been so employed, and if such employee shall demonstrate, by the passing of an examination prescribed by the administrator, that he possesses the qualifications and abilities necessary to perform the duties of such higher title. The relative ranking of titles as next higher or lower shall be determined by the administrator.

In case of promotional appointments of more than one employee, the appointing authority may select from among the same number of employees with the greatest length of service as the number provided in the civil service rules governing appointments to fill more than one vacancy.

The effective date of a promotional appointment made pursuant to this section shall be the date on which the person promoted assumes the duties of the higher title, as certified by the appointing authority, following the approval of the promotion by the administrator.”

G.L. c. 31, § 9 states in relevant part:

“Pursuant to the provisions of this section, an appointing authority may make a promotional appointment within a departmental unit on the basis of a departmental promotional examination. Such departmental promotional examination shall be open, until there are at least two employees in lower titles eligible to apply, only to persons who have been employed in the departmental unit as civil service employees for at least one year immediately preceding the date of the examination, who have no permanent status in such unit in a title higher than the examination title, and who have been employed in such unit as civil service employees in a title equal to that of the position for which the examination is to be held or in the next lower titles, as determined by the administrator, for at least one year at any time preceding the date of the examination.”

G.L. c. 31, § 10 states in relevant part:

“An appointing authority may make a promotional appointment within a departmental unit on the basis of an alternate departmental promotional examination pursuant to this section. Eligibility to take such examination shall extend only to persons who have been employed in the departmental unit as civil service employees for at least one year immediately preceding the date of examination and who have no permanent status in such unit in a title higher than that of the position to which the promotional appointment is to be made. In addition, eligibility to take such examination shall extend only to: (1) persons who have been employed in the departmental unit as civil service employees for one year or longer at any time preceding the date of the examination in a position which the administrator determines to be directly qualifying for the position for which the examination is to be held or (2) employees who satisfy such experience or education and training requirements as the administrator determines shall be qualifying for the position for which the examination is to be held. Such experience, education or training may have been acquired within or without the departmental unit and shall be credited by the administrator only upon the presentation of evidence satisfactory to the administrator that such experience, education or training is of the length, type and quality determined by the administrator to be qualifying for the position for which the examination is to be held.”

G.L. c. 31, § 15 states in relevant 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, or if an eligible list has been established as a result of a competitive examination for an original appointment and the appointing authority requests that the position be filled by a departmental promotional examination or pursuant to section eight. No provisional promotion shall be continued after a

certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

If there is no such employee in the next lower title who is qualified for and willing to a permanent employee in the departmental unit without regard to title, upon submission to the administrator by the appointing authority of sound and sufficient reasons therefor, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit.

A provisional promotion pursuant to this section shall not be deemed to interrupt the period of service in the position from which the provisional promotion was made where such service is required to establish eligibility for any promotional examination.

A secretary of an executive office who approves a provisional promotion pursuant to this section shall notify the administrator of each such approval. Such approval shall be made pursuant to the civil service law and rules, and such notification shall be made in such form as shall be required by the administrator. The administrator shall terminate any provisional promotion if, at any time, he determines that (1) it was made in violation of the civil service law and rules, or (2) the person provisionally promoted does not possess the qualifications or satisfy the requirements for the position. An appointing authority which makes a provisional promotion pursuant to this section shall report such promotion to the administrator.”

In a “Certification Handbook: Departmental Public Safety Promotions Subject to Civil Service” issued by HRD to “delegated” cities and towns in 2009, HRD stated in relevant part:

“If a provisional promotion takes place, the Appointing Authority must submit documentation (Form 13, Exam Request) requesting to participate in the next exam cycle for the affected title.”

Chapter 310 of the Acts of 1993 states:

“If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirements of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.”

Commission-Related Decision Regarding Non-Public Safety Provisional Appointments & Promotions

The vast majority of *non*-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over two (2) decades. These provisional appointments and promotions have been used as there have been no “eligible lists” from which a certification of names can be made for permanent appointments or promotions. The underlying issue is the Personnel Administrator’s (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists. This is not a new issue – for the Commission, HRD, the legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions.

It has been long established that “[p]rovisional appointments or promotions ... are permitted only in what are supposed to be exceptional instances...” City of Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 598, rev.den., 396 Mass. 1102 (1985) citing McLaughlin v. Commissioner of Pub. Works, 204 Mass. 27, 29 (1939). However, after decades without HRD holding competitive examinations for many civil service titles, and the professed lack of appropriations to permit examinations in the near future, hiring and advancement of most non-public safety civil service employees now can be lawfully accomplished only provisionally. Thus, as predicted, the exception has now swallowed the rule and an appointment “which is provisional in form may be permanent in fact.” Kelleher v. Personnel Administrator, 421 Mass. 382, 399 (1995).

The Commission and the courts have wrestled with the issues surrounding the so called “plight of the provisional” and regularly exhort the civil service community of the corrosive effects of the excessive use of “provisional” appointments and promotions. See, e.g., Burns v. Department of Revenue, 14 MCSR 75, aff d, 60 Mass.App.Ct. 1124, rev.den., 442 Mass. 1101 (2001), on remand, dismissed as moot. Little has been done, however, or will be done, to wean the system from this

practice of provisional appointments and promotions in non-public safety positions without further appropriations from the legislature. As a result there appears no end to the reality that the vast number - probably most - current non-public safety civil service employees have never taken or passed, and will never take or pass a qualifying examination for the position they currently occupy. Meanwhile, non-public safety public employees' provisional status leaves them with diminished job security and advancement opportunities under civil service law, relegating them to enforcement of their rights under collective bargaining agreements, if any, and other laws, which are beyond the Commission's purview.

That said, it remains the duty of the Commission to apply the civil service law as written. Bulger v. Contributory Retirement Appeal Bd, 447 Mass. 651, 661 (2006), quoting Commissioner of Revenue v. Cargill. Inc., 419 Mass. 79, 86 (1999). As much as the Commission regrets this state of affairs, the use of provisional appointments is not, per se, unlawful, and a state agency cannot be estopped for hewing to the law. If there is a flaw in the statutory procedure, it is a flaw for the General Court to address, whether on a systemic basis or through special legislation. See Kelleher v. Personnel Administrator, 421 Mass. at 389.

Further, given the hundreds of non-public safety positions encompassed in the “plight of the provisionals”, it is hard to imagine a “fix” that could be accomplished solely through intervention by the Commission. A recent Commission decision illustrates that point. In Blasi v. Department of Revenue (G2-14-263), Ms. Blasi was a permanent Tax Examiner I, contesting a provisional appointment to the position of Tax Examiner V. In her appeal, Ms. Blasi argued that the Commission should order the commencement of examinations forthwith, so all positions can be filled permanently. If the Commission, absent any legislative remedy, were to issue such an order, Ms. Blasi could potentially be *demoted* four titles to TE I depending on several factors including,

but not limited to: a) her eligibility to even sit for a promotional examination to TE V given that her permanency was not in the next lower title; b) whether she passed the promotional examination; and c) if so, her rank on the eligible list for TE V. Put simply, given the passage of time, and the thousands of provisional appointments and promotions that have been made to non-public safety titles during this time period, the plight of the provisionals in the non-public safety arena requires more than an administrative fix, even if funds were available to administer examinations for the hundreds of non-public safety positions. Rather, the plight of the provisionals in non-public safety positions requires a global, systemic review, from a policy, fiscal and operational perspective.

Public Safety Appointments and Promotions

Almost all public safety positions that fall under the civil service law in Massachusetts, both in state government and across those cities and towns that are subject to the civil service law, are filled via permanent appointments and promotions. In those limited circumstances where provisional appointments and promotions are made (i.e. – promotions made from a “short list”), HRD conditions approval of these provisional promotions on receipt of a request to conduct another examination from which a permanent appointment or promotion can be made.

Promotions to the Public Safety Position of Captain at DOC

This is not the first time that the Commission has been asked to intervene regarding the lack of promotional examinations for the position of Captain at DOC. *Twenty-seven (27) years ago*, in Breslin v. Department of Correction and Department of Personnel Administration, Case No. G-1329 (1988), the Commission concluded that the extended failure to hold a civil service examination for the position of Assistant Deputy Superintendent (the predecessor title) at DOC was indefensible; represented a serious undermining of the civil service system; and ordered examinations to be held

within six (6) months, using either the traditional method of written, multiple choice examinations or one of the alternate methods allowed under the statute.

Almost eight (8) years later, in 1996, the Commission, in a case involving the use of “one-day appointments”, caused by the extended use of provisional appointments, stated: “To our knowledge, [the] directive [in Breslin] was never complied with.” (Silvia v. Department of Correction and Department of Personnel Administration, 9 MCSR 2 (1996).

Today, thirty-four (34) years after the position was first put under civil service, and twenty-seven (27) years after the Commission first ordered that an examination be administered for this position, it is undisputed that no examination has ever been given for the public safety position of Captain at DOC -- nor is there any plan to do so.

Put simply, the Commission, decades ago, heard all of the same arguments being put forth today by HRD and DOC to justify not conducting an examination for this position. Ultimately, prior Commissioners concluded that the failure to conduct examinations for this position was “indefensible.” Twenty-seven (27) years later, I concur. The plain language of the statute requires that examinations be conducted. That same statute allows a fairly wide degree of flexibility in regard to whether the examination be in the form of a traditional written examination or an alternate method. (G.L. c. 31, § 10) Further, unlike the myriad of issues that would be involved with addressing the hundreds of non-public safety positions for which no examinations have been given, a resolution here, regarding one (1) public safety position that, quite frankly, stands out like a sore thumb, would appear to be much simpler.

A two-part resolution could potentially include:

1. Utilizing its authority under Chapter 310 of the Acts of 1993, the Commission could grant tenured status, after a probationary period, to long-term provisional Captains whose

performance evaluations have been satisfactory and who have permanency in a lower title . See Tanca v. Department of Employment and Training and Department of Personnel Administration, 9 MCSR 18 (1996).

2. Either directly, or through a delegation agreement with DOC, HRD could administer either a traditional written or alternate examination on a going-forward basis for Captain, from which an eligible list and Certifications would be generated to make promotional appointments to the position of Captain.

While I am not unsympathetic to the very real fiscal constraints facing DOC, HRD and all state agencies (including the Commission), I have reached the inescapable conclusion that the failure to give promotional examinations for thirty-four (34) years has more to do with the unspoken desire to make promotional appointments to Captain free of the constraints associated with making permanent appointments from an eligible list. To me, that is not an invalid public policy argument. However, it is an argument that should be made to the *Legislature* in the context of whether this position, and all Management IV positions for that matter, should fall under the civil service law. Unless and until the statute is amended, DOC and HRD must move forward with a resolution that results in compliance with the civil service law and rules related to the public safety position of Captain at DOC.

I have laid out a cursory framework for resolution above. There are, undoubtedly, many other ways to achieve the same result and, despite the head-scratching delay in implementing prior Commission decisions regarding this same issue, HRD and DOC should be given a short, but sufficient amount of time to develop the most effective and cost-efficient plan to do so.

For all of the reasons stated above, the Commission, pursuant to its authority under G.L. c. 31, § 2(a), hereby initiates an investigation regarding the failure to administer examinations, either

through a traditional or alternate means, in order to make permanent promotional appointments to the position of Captain at DOC.

HRD and DOC shall have ninety (90) days to propose the most cost effective and efficient means to ensure compliance with the civil service law and rules, this decision and all prior Commission decisions related to the position of Captain at DOC. Any such proposal shall include provisions to protect the rights of provisional, long-term incumbents in this position.

A status conference will be held at the offices of the Commission on Monday, September 21st at 10:00 A.M to review the proposed plans of HRD and DOC.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on May 28, 2015.

Notice:
James Lamond, Esq. (for Petitioners)
Thomas E. Horgan, Esq. (for Interveners)
Michele Heffernan, Esq. (for HRD)
Earl Wilson, Esq. (for DOC)