

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

ROBERT BERGERON,

Appellant

v.

G2-15-23

**TOWN OF FALMOUTH &
HUMAN RESOURCES DIVISION,**

Respondents

Appearance for Appellant:

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Boston, MA 02110

Appearance for Town of Falmouth:

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Appearance for HRD:

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Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellant, Robert Bergeron, acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission), alleging that the Town of Falmouth (Falmouth) and the Massachusetts Human Resources Division (HRD) unlawfully deprived him of a promotion to the position of Fire Captain with the Falmouth Fire Rescue Department (FFRD)¹. A pre-hearing conference was held on February 11, 2015 at the UMass School of Law at Dartmouth. Falmouth and HRD moved to dismiss the appeal, which the Appellant opposed. After a motion hearing on April 30, 2015, the parties made Supplemental Submissions requested by the Commission. At a status conference on November 18, 2016, the parties confirmed that the Appellant was promoted to Fire Captain in or about December 2015.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

FINDINGS OF FACT

Based on the submissions of the parties, including all documents, affidavits and memoranda submitted with the Motions and Supplemental Submissions and at the motion hearing and status conference, I find the following material facts are not in dispute:

1. The Appellant, Robert Bergeron, held the position of Fire Lieutenant with the FFRD at the time he brought this appeal. (*Exh. H1 [Claim of Appeal]*)

2. Lt. Bergeron took and passed a promotional examination for Fire Captain administered by HRD in November 2012 and his name was placed on the Captain's promotional eligible list established on May 24, 2013 (the "2013 Captain's List"). (*Exh. H1 [Claim of Appeal]; Exh. H4 [HRD Brief, Exh. 6]; Exh. H6 [Appellant Amended Addendum]; Exh. H9 [Appellant Aff't]*)

3. At the end of 2012, then FFRD Fire Chief Mark Sullivan approached the Falmouth Town Manager, Julian M. Suso, who is the FFRD Appointing Authority, with a proposal to conduct an assessment center examination to fill a vacancy in the position of FFRD Deputy Fire Chief. On November 1, 2013, as a result of further discussion with the FFRD firefighters' union, Falmouth Firefighters Local 1397 (the "Union"), Town Manager Suso and the Union President Russell Ferreira entered into an agreement which provided for the use of assessment center examinations to fill the existing vacancy of Deputy Fire Chief and, beginning in July 2014, to use the assessment center examination process to establish new eligible lists for promotion to all other officer positions as well, i.e., Fire Lieutenant and Captain. (*Exh. H5 [Falmouth Reply, Sullivan Aff't & Suso Aff't]*)

4. The July 2014 delayed implementation date for the assessment center process for the positions of Fire Lieutenant and Captain were the result of Town Manager Suso's concern with the additional cost to conduct these examinations, for which Falmouth had not budgeted, and,

therefore, these examinations were deferred until the next fiscal year. (*Exh. H5 [Falmouth Reply, Sullivan Aff't & Suso Aff't]*)

5. When the November 2013 agreement was signed, two names remained on the 2013 Captain's List. Lt. Bergeron was second on the list. The top ranked candidate, Lt. Thrasher, was promoted to Captain on March 20, 2014, leaving Lt. Bergeron as the sole remaining person on the 2013 Captain's List. (*Exh. H1 [Claim of Appeal]; Exh. H6 [Appellant's Amended Addendum]; Exh. H5 [Falmouth Reply, Sullivan Aff't]; Exh. H9 [Appellant Aff't]*)

6. At some point during October 2013, Lt. Bergeron had come to learn that a new system for handling holiday pay and sick leave had been implemented that was allegedly causing some Union members to lose pay they claimed was due. He questioned the validity of the new system at the October 2013 Union meeting. The controversy persisted for several months thereafter. Lt. Bergeron and Union President Ferreira engaged in a heated exchange about the issue during the December 2013 Union meeting. (*Exh. H3 [Appellant Opposition]; Exh. H9 [Appellant Aff't]*)

7. On May 21, 2014, HRD processed Falmouth's request for two requisitions, one for a Lieutenant's assessment center promotional examination and one for a Captain's assessment center promotional examination. (*Exh. H8 [Falmouth April 29, 2015 Letter]*)

8. On July 2, 2014, Fire Chief Sullivan circulated a memorandum to all FFRD members informing them that an assessment center style promotional examination would be conducted in late August or early September 2014 for the positions of Captain and Lieutenant. (*Exh. H1 [Claim of Appeal]; Exh. H5 [Falmouth Reply, Sullivan Aff't]*)

9. Upon receipt of the July 2, 2014 memorandum, Lt Bergeron inquired about the effect of the assessment center examination process on his current status as the last remaining candidate at the top of the 2013 Captain's List. Based on initial information received from HRD, Chief

Sullivan informed Lt. Bergeron that the 2013 Captain's List was good for two years and Lt. Bergeron would remain at the top of that list. The next day, however, HRD informed Chief Sullivan that, because the 2013 Captain's List was established through a written examination and the new list would be established from an assessment center, HRD's initial information was incorrect and the list established from the assessment center process would replace and supersede the existing 2013 Captain's List. This information was passed along to Lt. Bergeron. (*Exh. H5 [Falmouth Reply, Sullivan Aff't & Suso Aff't]*; *Exh. H8 [Falmouth April 29, 2015 Letter]*)

10. On July 18, 2014, Falmouth Town Manager Suso informed HRD that Falmouth had selected MMA Consulting as its vendor for the Fire Captain's and Fire Lieutenant's assessment center examination. (*Exh. H4 [HRD Brief, Ward Aff't, Exh. 1]*; *Exh. H8 [Falmouth April 29, 2015 Letter]*)

11. On August 4, 2014, based on further discussion with Chief Sullivan and Town Manager Suso, an e-mail to Union President Ferreira (to which he received no response) and a phone conversation with a Union Executive Board member, Lt. Bergeron decided that he would take the new assessment center examination. (*Exh. H3 [Appellant Opposition]*; *H5 [Falmouth Reply, Sullivan Aff't & Suso Aff't]*)

12. On September 24, 2014, MMA Consulting conducted the FFRD Fire Captain's Assessment Center. Five candidates took the assessment center examination, including Lt. Bergeron. (*Exh. H2 [Falmouth's Motion to Dismiss, Exh. A]*; *Exh. H [HRD Brief, Ward Aff't]*; *Exh. H5 [Falmouth Reply, Sullivan Aff't]*)

13. On October 1, 2014, upon receipt of the preliminary results of the 2014 Captain's Assessment Center from MMA Consulting, HRD determined that FFRD and HRD had not executed a formal Delegation Agreement that authorized the use of MMA Consulting to conduct

the Captain's assessment center examination. (*Exh. H2 [Falmouth Motion to Dismiss, Exh. A; Exh. H4 [HRD Brief, Ward Aff't, Exh. 2]*)

14. On October 2, 2014, HRD forwarded the standard template for a Delegation Agreement to Falmouth, which was executed on October 14, 2014, and ratified by HRD on November 6, 2014. (*Exh. H2 [Falmouth Motion to Dismiss, Exhs. D & E; Exh. H4 [HRD Brief, Ward Aff't, Exhs. 1 through 5; Exh. H7 [Appellant Reply, Exh.A]*)

15. On November 24, 2014, a new eligible list for FFRD Fire Captain was established, containing the names of five candidates (the "2014 Captain's List"). Lt. Bergeron was ranked as the #2 candidate on 2014 Captain's List with a score of 85. (*Exh. H1 [Claim of Appeal]; H2 [Falmouth Motion to Dismiss, Exh.A; Exh. H5 [Falmouth Reply, Sullivan Aff't, Suso Aff't & Attach. A]; Exh. H6 [Appellant Amended Addendum]*)

16. Pursuant to HRD notice dated November 6, 2014, the 2013 Captain's List was revoked, effective November 24, 2014. (*Exh. H1 [Claim of Appeal, FFRD Letter dated January 8, 2014]; Exh. H2 [Falmouth Motion to Dismiss, Exh. E]*)

17. On January 25, 2015, the #1 ranked candidate on the 2014 Captain's List, Chad Absten, was promoted to Permanent Fire Captain. (*Exh. H1 [Claim of Appeal]; Exh. H2 [Falmouth Motion to Dismiss, Exh. B]; Exh. H5 [Falmouth Reply, Sullivan Aff't & Suso Aff't; Exh. H6 [Appellant Amended Addendum]*)

18. In December 2015, Lt. Bergeron, then the #1 ranked candidate on the 2014 Captain's List, was appointed a permanent FFRD Fire Captain and, along with the #3 ranked candidate, Bruce Girouard, now serves in that position. (*Administrative Notice [http://www.capenews.net/falmouth/news/chief-fire-officials-sworn-into-new-roles/article_a0d8b48e-7eb2-55e2-9778-a1dece862c2b.html]; Colloquy at Status Conference; E-mail from Counsel dated 12/6/16)*)

STANDARD OF REVIEW

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7) (h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is “no reasonable expectation” that a party can prevail on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

ANALYSIS

Mootness

Promotion of the #1 ranked candidate on the 2014 Captain’s List, and, now promotion of the Appellant, himself, to FFRD Fire Captain during the pendency of this appeal, moots his claims. He has now received all of the relief to which he might have been entitled even if he prevailed on the merits and his appeal allowed. In that case, the Appellant would become entitled to the Commission’s traditional relief for one who was unlawfully bypassed for promotion, namely, the Commission would order that the candidate be placed at the top of the current eligible list so that he received consideration for the next available promotional opportunity.

Since the Appellant was already at the top of the 2014 Captain’s List, and has now been promoted, there is no further relief that is necessary to restore any of his civil service rights. A promotional bypass appeal is different from an appeal from the bypass of an original appointment. The Commission does order that a candidate for original appointment to a civil service position who was unlawfully bypassed, if later appointed, be given a retroactive civil service appointment date equal to the same appointment date the candidate would have received had that candidate not been bypassed, because the civil service seniority rights (for purposes of

layoffs, etc.) turns on an employee's initial appointment date. In the case of a promotional appointment, however, there is no corresponding statutory relevance to the effective date of the promotion for civil service law purposes, as distinguished from the rights, if any, under other laws, such as shift bidding or vacation time prescribed by a collective bargaining agreement). See, e.g., Town of Dedham v. Dedham Police Ass'n, 46 Mass.App.Ct. 418 (1999), rev.den., 429 Mass. 1109 (1999). See also Sarmiento v. Town of Carver, 28 MCSR 249 (2015); Schifone v. Town of Stoughton, 27 MCWR 543 (2013) (retroactive appointment date does not provide right to retroactive pay or benefits); Michel v. City of Waltham, 24 MCSR 452 (2011) (retroactive seniority date applies to civil service rights only and does not affect credible service for retirement purposes); Dickinson v. Human Resources Division, 24 MCSR 200 (2011) (seniority date is no longer used to determine eligibility to sit for promotional exam): Gillan v. City of Quincy, 24 MCSR 16 (2011) (same).

The Supreme Judicial Court's decision in Bielawski v. Personnel Administrator, 422 Mass. 459 (1996), cited by the Appellant, is persuasive. Although the employee in that case was promoted with "retroactive seniority", at the time of the Bielawski decision the Commission had believed that the "date of promotion" would be relevant to computing the time required to serve in a position for purposes of defining eligibility to sit for the next higher title's promotional examination, but that potential was subsequently eliminated by the paradigm established by the judicial decision in Weinberg v. Civil Service Comm'n, 72 Mass.App.Ct. 535, rev.den., 452 Mass. 1110 (2008), See generally, Dickenson et al v. Human Resources Div., 24 MCSR 200 (2011) (date name appears on a certification is now what measures time required to be eligible to sit for promotional exam)

Lack of Jurisdiction

In the alternative, this appeal must be dismissed because the undisputed evidence establishes that the Appellant was never unlawfully bypassed for promotion to Fire Captain but simply “died on the vine” when the 2013 Captain’s List (a so-called “short” list) was duly revoked and replaced by the 2014 Captain’s List, all in compliance with applicable civil service law and rules. See, e.g., Kelly v. City of Boston, 25 MCSR 23 (2012), remand decision, 29 MCSR 176 (2016) (“dying on the vine” is the “inevitable plight of any person whose name appears at the top of an eligible list when it expires as provided by law”); Mandracchia v. City of Everett, 21 MCSR 307 (2008) (“A candidate whose name is not reached for promotion or appointment has no recourse but to take the next examination.”)

First, civil service law regulates the applicable maximum period that an eligible list will generally remain in effect, but provides no guarantee that an eligible list will, or must, remain valid for any minimum period of time. G.L.c.31, §25 (“persons on an eligible list shall be eligible for certification from such list for such period as the administrator [HRD] shall determine, *but in any event not to exceed two years*” (emphasis added) Indeed, the intent of this law, which is to ensure that civil service appointments are based on a reasonably current test of candidates’ knowledge and qualifications, tends to encourage, rather than discourage, more frequent testing of persons seeking original appointment or promotion to civil service positions. See Baldassari v. City of Revere, 25 MCSR 68 (2012) (“While examinations are customarily given every two years, it is not uncommon for an examination for a particular position to be given more frequently.”)

Second, the administrative oversight that caused a delay in the execution of the Delegation Agreement between Falmouth and HRD and gave retroactive HRD approval to use an outside

consultant to conduct the assessment center does not rise to the level of an action by HRD or Falmouth that impaired the Appellant's civil service rights. No claim has been asserted that the assessment center process failed to comply with the any of the substantive requirements of the Delegation Agreement. In executing the Delegation Agreement shortly after the assessment center had been held (but before approval of the establishment of the 2014 Captain's List), and ratifying the use of the selected consultant (who had conducted many other HRD approved assessment centers in the past), HRD was duly performing a ministerial act within the purview of its broad discretion to conduct examinations that does not in any way affect the validity of the appointment. See, e.g., Davis v. Personnel Administrator, 27 Mass.App.Ct. 1113, rev. den. 405 Mass. 1202 (1989) citing Callanan v. Personnel Administrator, 400 Mass. 597 (1987) (noting the "wide discretion" granted to the Personnel Administrator in administering examinations); Malloch v. Town of Hanover, 472 Mass. 783 (2015) (HRD's duty to "receive" bypass reasons was ministerial and did not imply any intent that HRD make a substantive "review or issue a "decision")

Third, a person's ranking on an eligible list does not create any "vested right" or expectation to receive an appointment or promotion during the life of the eligible list. As stated in Callanan v. Personnel Administrator, 400 Mass. 597, 601 (1987):

"The system the Legislature created, in which eligible lists expire and are replaced by new lists, involves risk that positions might become available immediately after the expiration of an old list – or immediately before the establishment of a new list. . . . [T]he statute does not justify expectations that certain positions will become available during the period of a single list."

See Brackett v. Civil Service Comm'n., 447 Mass. 233, 253 (2006) and cases cited (placement on civil service list is no guarantee of appointment or promotion); Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991); Marks v. Department of State Police, 74 Mass.App.Ct. 291 (2009); Davis v. Personnel Administrator, 27 Mass.App.Ct. 1113 (1989) (Rule 1:28)

Fourth, since the 2013 Captain's List contained the names of less than three candidates, or a so-called "short list", Falmouth retained broad discretion to decide, in good faith, whether to make any promotions from such a list or call for a new examination at any time and, even if an appointment were made from such a short list, it would not necessarily be permanent but could be merely provisional, pending the holding of a new examination. See G.L.c.31, §§7 & 27; Kelleher v. Dumont, 3 Mass.L.Rptr. 37 (1994); Baldassari v. City of Revere, 25 MCSR 68 (2012). Finally, in general, an appointing authority may in good faith exercise sound discretion to leave any vacancy—permanent or temporary—unfilled. See, e.g., Somerville v. Somerville Municipal Employees Ass'n, 20 Mass.App.Ct. 594, 596 (1985);

Finally, the Appellant's contention that Falmouth's decision to use the assessment center process to establish a new Captain's List was motivated by the animus between him and his Union leadership is mere speculation which fails to rise to the level of a disputed and material issue of fact on which the Appellant would have any "reasonable expectation" to prevail. For example, the undisputed evidence shows that Falmouth's decision to move to the assessment center model began in late 2012 and had nothing to do with the Appellant. By the time of the Appellant's quarrel with his Union on the overtime and holiday pay issue, the assessment center agreement had already been hammered out. Thus, on timing alone, the Appellant's claim of retaliation is without merit.

Moreover, whatever quarrel Lt. Bergeron may have had with his Union, there is no evidence that it played any role in the Appointing Authority's decision-making process. The undisputed evidence establishes that the origin and development of the assessment center plan was based on a bona fide judgment by Chief Sullivan and Town Manager Suso that it would be in the best interest of the Town and be likely to produce a stronger field of candidates. The Appellant does

not assert that Town Manager Suso or Fire Chief Sullivan harbored any animus against him. Indeed, the fact that the assessment center agreement included promotional examinations for all FFRD officers (i.e., Deputy Chief and Lieutenant, as well as the Captain's position), leave no room to infer that the process was a scheme specifically targeted with the Appellant in mind or designed to disadvantage him in any way. Indeed, as it turned out, Lt. Bergeron almost topped the new list and has now been promoted.

CONCLUSION

Accordingly, for the reasons stated, the Motion to Dismiss is GRANTED. The appeal of the Appellant, Robert Bergeron, under Docket No. G2-15-23 is *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on December 8, 2016.

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 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. 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 to:

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Melissa R. Murray, Esq. (for Town of Falmouth)

Mark Detwiler, Esq. (for HRD)