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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 15-02233-A

BOSTON POLICE SUPERIOR OFFICERS FEDERATION & others¹

vs.

CITY OF BOSTON/BOSTON POLICE DEPARTMENT & another²

*Notis sent
02.27.17
JH
PREPC
JOA
AAG
NT
BPD
(mjd)*

MEMORANDUM OF DECISION AND ORDER ON
(1) PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS AND
(2) DEFENDANTS' CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

Plaintiffs, Boston Police Superior Officers Federation, Joel McCarthy, Paul Joseph, Daniel Tracy, and James Blake, filed this action under G.L. c. 31, § 44 against defendants, the City of Boston/Boston Police Department (BPD) and the Civil Service Commission/the Commonwealth of Massachusetts (Commission), after the Commission dismissed plaintiffs' appeal to the Commission relating to BPD's use of a procedure known as Temporary Service in a Higher Rank (TSHR), an out-of-grade appointment, to fill a vacancy within BPD. Plaintiffs move for judgment on the pleadings pursuant to Mass. R. Civ. P. 12(c) and request that this Court vacate the Commission's decision and direct it to proceed to a hearing on plaintiffs' original appeal. BPD and the Commission filed separate cross motions for judgment on the pleadings. On January 11, 2017, this court held a hearing on the motions. For the reasons stated below, plaintiffs' motion for judgment on the pleadings is allowed and defendants' motions for

¹ Joel McCarthy, Paul Joseph, Daniel Tracy, and James Blake.

² Civil Service Commission/Commonwealth of Massachusetts.

judgment on the pleadings are denied.

BACKGROUND

The facts as revealed by the Administrative Record are as follows.

Plaintiffs McCarthy, Joseph, Tracy, and Blake are sergeants in the BPD. Their names appeared on an eligible list for promotional appointment to the position of lieutenant from November, 2014 to January, 2015. Plaintiffs argue that the BPD improperly used out-of-grade appointments on a day-to-day basis, TSHR, to fill a lieutenant vacancy; instead, they believe that BPD should appoint one of them as a temporary lieutenant from the eligible list.

More specifically, effective November 22, 2014, BPD reassigned Lieutenant Fred Williams from District C-6 of the BPD to the Internal Affairs Division. On the same day, BPD approved Lieutenant Charles Kelly's request for reassignment from District C-11 to District C-6.³ Lieutenant Kelly's reassignment became effective on December 27, 2014. Prior to Lieutenant Kelly's reassignment to District C-6, November 22 through December 25, BPD covered the District C-6 lieutenant shift, which Lieutenant Williams previously covered, through daily overtime. This was known as TSHR under the applicable collective bargaining agreement. According to BPD, a review of the payroll records from District C-6 revealed that during the relevant time period, a sergeant worked out-of grade on twenty-four occasions covering this shift. BPD did not notify the Massachusetts Human Resources Division (HRD) that it was utilizing

³ It appears as if Lieutenant Kelly applied for the transfer on November 21, 2014, and his District/Unit Commander approved the request that same day. Administrative Record at 32. The Bureau Chief approved the transfer request the following day. Yet, the Police Commissioner did not actually approve the request until December 26, 2014. Administrative Record at 34. Plaintiffs contend that BPD's approval of Lieutenant Kelly's transfer to District C-6 was a consequence of their December 23, 2014 appeal to the Commission. This is a fact that was never verified because the Commission declined to hold an evidentiary hearing.

emergency appointments from November 22 to December 25.

By letter dated December 23, 2014, plaintiffs McCarthy, Joseph, Tracy, and Blake notified the Commission that they were appealing BPD's actions in using TSHR to fill the vacant lieutenant position, which in their view, bypassed the procedures set forth in G.L. c. 31. Plaintiffs argued that in this instance, BPD's use of emergency appointment procedures pursuant to G.L. c. 31, § 31 was improper.

Plaintiffs and the BPD subsequently began proceedings before the Commission. In April, 2016, the BPD filed a motion to dismiss the plaintiffs' appeal to the Commission. The BPD argued, among other things, that its use of TSHR was proper under G.L. c. 31, § 31 because its emergency appointment did not exceed thirty "working days." The BPD asserted that payroll records from District C-6 during the relevant time period showed that there were only twenty-four occasions where a sergeant worked out-of-grade to cover the vacant lieutenant position. Moreover, the BPD believed that since the emergency appointment did not exceed thirty days, notification to HRD under G.L. c. 31, § 31 was unnecessary. In addition, the BPD explained that it developed a process for filling vacancies, both temporary and permanent, through the use of eligible lists, that it would utilize going forward. Administrative Record at 27.

Plaintiffs filed an opposition to the BPD's motion to dismiss. They argued that: (1) the BPD could not use an emergency appointment to fill the lieutenant vacancy because it did not result from unforeseen circumstances and public business would not be impeded by the normal appointment process; (2) assuming that an emergency appointment was justified, the BPD did not comply with the strict requirements of G.L. c. 31, § 31; (3) the BPD reacted to plaintiffs' appeal by shifting an improperly filled vacancy to a different district and then continued to fill

the vacancy improperly; and (4) the BPD's proposed process for filling future vacancies is improper under G.L. c. 31, § 31 and not relevant to the instant appeal.

On May 14, 2015, Christopher C. Bowman, Chairman of the Commission, issued the Commission's decision allowing the BPD's motion to dismiss. Administrative Record at 67-78. Prior to issuing the decision, the Commission held a pre-hearing on January 6, 2015 and a status conference on March 3, 2015. It did not hold an evidentiary hearing related to plaintiffs' appeal. In its decision, the Commission attempted to analyze G.L. c. 31, §§ 7, 31, Massachusetts case law, and prior Commission decisions. The Commission seemed to agree that G.L. c. 31, § 31 applied⁴ and that "[a] proper reading of the statute supports the BPD's argument that the C-6 position was filled using out-of-grade appointments for twenty-four (24) working days." Administrative Record at 75. Moreover, the Commission did not definitively resolve the issue of whether an "emergency appointment" actually occurred under the instant circumstances.⁵ Administrative Record at 76. The Commission noted that the BPD "for a period of less than thirty (30) working days, and while it was working to make an appointment through the civil service process, ensured coverage for the position in question using a process outlined in the CBA." Administrative Record at 77-78. Consequently, the Commission dismissed the

⁴ The parties disputed whether there was a vacancy for twenty-four working days or thirty-one working days. The Commission noted that: "Given the statutory language related to emergency appointments, and the additional requirements that are triggered after thirty (30) working days [notification requirements], that dispute is potentially relevant to this appeal." Administrative Record at 74.

⁵ The Commission did not "believe" that an emergency appointment actually occurred, but noted that "[e]ven if an emergency appointment did occur here for twenty-four working days, the only violation that arguably occurred" was the BPD's failure to notify HRD. Administrative Record at 76.

plaintiffs' appeal under Docket No. E-14-296.

Plaintiffs filed a motion for reconsideration, and the BPD filed an opposition to that motion. On June 25, 2015, the Commission denied plaintiffs' motion for reconsideration and notified plaintiffs of the decision on June 26, 2015 via e-mail.

On July 24, 2015, plaintiffs filed this action in the Superior Court pursuant to G.L. c. 31, § 44 for judicial review of the Commission's decision.

ANALYSIS

Under G.L. c. 31, § 44, "[a]ny party aggrieved by a final order or decision of the commission following a hearing pursuant to any section of this chapter or chapter thirty-one A may institute proceedings for judicial review in the superior court within thirty days after receipt of such order or decision." Moreover, "[a]ny proceedings in the superior court shall, insofar as applicable, be governed by the provisions of section fourteen of chapter thirty A" G.L. c. 31, § 44. A court reviewing a decision issued by the Commission is bound to accept the findings of fact of the Commission's hearing officer if supported by substantial evidence. *Beverly v. Civil Service Comm'n.*, 78 Mass. App. Ct. 182, 188 (2010). If the court determines that the Commission's decision is based upon an error of law, arbitrary, or capricious, it may set aside or modify the decision, or remand the matter for further proceedings before the Commission. G.L. c. 30A, § 14(7). Although the court gives weight to the Commission's experience and authority, the court exercises de novo review of legal questions and will not affirm agency decisions or interpretations of statutory language that are "inconsistent with governing law." *Plymouth v. Civil Serv. Comm'n.*, 426 Mass. 1, 5 (1997).

"The civil service law, G.L. c. 31, establishes a comprehensive plan for the appointment

of individuals to civil service positions, whether on an original or a promotional basis, and whether permanent or temporary.” *Somerville v. Somerville Mun. Employees Ass’n*, 20 Mass. App. Ct. 594, 597 (1985). Promotional appointments are generally made from a certification based on an eligible list after an examination. G.L. c. 31, § 7. “[I]n filling any vacancy, even temporarily, the appointing authority is required to follow the carefully prescribed requirements set forth in c. 31.” *Somerville v. Somerville Mun. Employees Ass’n*, 20 Mass. App. Ct. at 597. “Failure of an appointing authority in filling a position to follow the requirements will render the appointment invalid.” *Id.* Pursuant to G.L. c. 31, § 31, appointing authorities are permitted to make “emergency appointments” to a civil service position for a total of not more than thirty “working days” during a sixty-day period. G.L. c. 31, § 31. General Laws c. 31, § 31 states:

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 other than laborer 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. The administrator shall not consent to more than one such renewal of the appointment unless the position is in a department, institution or hospital carrying out functions connected with the public safety or public health and the public service would suffer if a second renewal were not granted, in which case the administrator may consent to a second renewal. No person shall receive more than one such appointment or one such appointment and renewal, as the case may be, in any twelve month period, except as otherwise provided in this section.

G.L. c. 31, § 31 (emphasis added).

The plaintiffs argue, among other things, that: the Commission exceeded its authority and abused its discretion by creating a thirty-day window during which the BPD could ignore the civil service law; the Commission's finding that the BPD was "working to make an appointment through the civil service process" is not supported by substantial evidence; the Commission's finding that the District C-11 vacancy was a different vacancy is unsupported by substantial evidence and an error of law⁶; the Commission abused its discretion and exceeded its authority when it solicited and approved a process for resolving future vacancies that had no relationship to the instant appeal. Plaintiffs request that the court set aside the Commission's decision dismissing their appeal and remand the matter to the Commission with an order that the Commission grant them a hearing on the merits.

The BPD and the Commission filed separate oppositions to the plaintiffs' motion for judgment on the pleadings.⁷ The BPD argues that: Boston Police Superior Officers Federation does not have standing⁸ to bring this action and should not have been allowed to add the

⁶ Plaintiffs allege that the BPD tried to shift the vacancy by approving Lieutenant Kelly's transfer after they appealed to the Commission in an effort to avoid the Commission's review of the BPD's actions here. See Plaintiffs' Memorandum at 13-14.

⁷ The BPD and the Commission also filed cross motions for judgment on the pleadings.

⁸ On September 2, 2016, the court (Sullivan, J.) issued a Decision and Order on a motion for reconsideration regarding standing. Judge Sullivan found that the plaintiffs, including the Boston Police Superior Officers Federation, have standing and that specifically, the Boston Police Superior Officers Federation has associational standing. Judge Sullivan also noted that in his prior decision dated April 8, 2016, he denied the defendants' motion to dismiss on the issue of whether the plaintiffs' complaint was timely. This court declines to revisit the issue of timeliness or standing, both of which Judge Sullivan determined were not grounds to dismiss the plaintiffs' appeal. See *Vittands v. Sudduth*, 49 Mass. App. Ct. 401, 413 n.19 (2000) (explaining that "law of the case" doctrine reflects reluctance of a second judge to rule differently from first

individual plaintiffs to this action; the Commission's conclusion that the BPD properly filled the vacancy in District C-6 is supported by substantial evidence and not an abuse of discretion or an error of law in excess of its statutory authority. The BPD also argues that the civil service law and rules do not require an appointing authority to make a promotional appointment on the first day that the vacancy occurs and that the Commission properly analogized the instant case to the promotion process set forth in the Personnel Administrator Rules (PAR), specifically PAR .08. BPD asserts that it must utilize TSHR during a certain grace period to ensure that all positions are filled and in order to avoid a disruption in day to day operations of the impacted district. BPD's Opposition at 9. The BPD contends that, "[g]iven the factual circumstances resulting in this vacancy, including the approved request to transfer into the position, the Commission appropriately concluded that [the BPD] . . . had no obligation to hire off the civil service list and the use of temporary service in a higher rank by Sergeants already assigned to District C-6 was not contrary to any civil service law or rule." *Id.*

The Commission makes several arguments in opposition to the plaintiffs' motion and in support of its cross motion for judgment on the pleadings. It argues that: (1) the court lacks subject matter jurisdiction because the plaintiffs' appeal was not timely filed and the union lacks associational standing; (2) the Commission properly concluded that the BPD did not violate the civil service laws when covering a short-term vacancy, arguing BPD's use of TSHR as found in the CBA was proper and even if the appointments were deemed emergency appointments under

judge on a case, issue, or question of fact or law once decided by final judgment or on appeal). In addition, this court notes that the defendants raised the issue of standing again in their memoranda filed on August 29, 2016, **prior to** Judge Sullivan's September 2, 2016 ruling.

G.L. c. 31, § 31, the vacancy did not exceed thirty days and thus did not violate the statute.

After a careful review of the Administrative Record and after hearing, this court is satisfied that the plaintiffs' motion for judgment on the pleadings must be allowed, and this matter must be remanded to the Commission for further proceedings and consideration. At issue in this case is whether the BPD properly complied with the civil service law, G.L. c. 31, when it decided to use TSHR to fill the District C-6 vacancy after the BPD reassigned Lieutenant Fred Williams from District C-6 to the Internal Affairs Division. On December 23, 2014, plaintiffs McCarthy, Joseph, Tracy, and Blake notified the Commission that they were appealing BPD's actions in using TSHR to fill the vacant lieutenant position, which, in their view, bypassed the procedures set forth in G.L. c. 31. As discussed above, the BPD subsequently filed a motion to dismiss the plaintiffs' appeal to the Commission, and the Commission allowed the motion. The Commission did not hold an evidentiary hearing or attempt to receive the facts surrounding the lieutenant vacancy in District C-6 prior to dismissing the plaintiffs' appeal. Cf. *Kelley v. Boston*, SUCV2012-00571-H, slip op. at 1-6 (Mass. Super. Ct. Aug. 5, 2013) (Leibensperger, J.) (noting that Civil Service Commission filed an extensive record of the evidentiary hearing that took place in determining whether the Boston Fire Department's out-of-grade, temporary appointments to fill vacancies for position of fire captain violated the civil service law and analyzing G.L. c. 31, § 31).

Thus, there is only a limited record before this court as to what transpired in November and December, 2014, and this court is left with more questions than answers. For instance, was the BPD utilizing G.L. c. 31, § 31 in this instance because it needed to make an "emergency

appointment?”⁹ Was Lieutenant Williams’ transfer from District C-6 to Internal Affairs a circumstance that could not have been foreseen?¹⁰ Would the public business be seriously impeded by the time lapse incident to the normal appointment process? How many “working days” actually applied to the vacancy? Was the BPD truly “working to make an appointment through the civil service process” as the Commission concluded in its decision, and if so, how? See Plaintiffs’ Memorandum at 12-13 (alleging that the BPD attempted to escape the Commission’s review and kept a permanent lieutenant position available until a new list was certified at the beginning of 2015). Was the BPD’s December 26, 2014 approval of Lieutenant Kelly’s transfer from District C-11 to District C-6 merely a response to plaintiffs’ appeal to the Commission, and if so, did this violate the civil service law? Moreover, was this actually a “temporary” vacancy such that TSHR should or could be lawfully applied here consistent with G.L. c. 31? Without factual findings specifically related to the events that occurred in November and December, 2014, this court cannot conclude that the Commission’s decision was proper. See *Kelley v. Boston*, SUCV2012-00571-H, slip op. at 4 (“In order for BFD to be saved by the

⁹ In their pleadings before the Commission, the parties seemed to agree that G.L. c. 31, § 31 may apply to the instant case. General Laws c. 31, § 31 only applies to “emergency appointments.” The word “emergency” is defined as: “A sudden and serious event or an unforeseen change in circumstances that calls for immediate action to avert, control, or remedy harm.” Black’s Law Dictionary (10th ed. 2014). If G.L. c. 31, § 31 does not apply, then the Commission must determine whether the vacancy was filled in compliance with the other provisions of G.L. c. 31. See G.L. c. 31, § 7 (recognizing that promotional appointments are generally made from a certification based on an eligible list after an examination).

¹⁰ Under G.L. c. 31, § 31, “[s]uch 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.” If the BPD knew weeks or months in advance about Lieutenant Williams’ transfer, it probably could not properly invoke G.L. c. 31, § 31 or TSHR to fill the vacancy that the transfer created.

emergency appointment statute, it must rely upon proof that it met the requirements of the statute”). Accordingly, this court concludes that the Commission’s decision is not supported by substantial evidence (it did not hold an evidentiary hearing) and is based on an error of law (it applied speculative or assumed facts to statutes that may or may not apply depending on the detailed findings of fact that it failed to make in adjudicating the plaintiffs’ appeal to the Commission). See *Plymouth v. Civil Serv. Comm’n*, 426 Mass. at 5. This case is therefore remanded to the Commission for further proceedings and factual findings that may ultimately allow it to determine whether the BPD properly complied with the civil service law, G.L. c. 31, when it decided to use TSHR to fill the District C-6 lieutenant vacancy in November and December, 2014.