

CIVIL SERVICE COMMISSION SPECIAL MEETING

Tuesday, February 28, 2012, 10:00 a.m.

**Fire Headquarters, 30 Congress Street, 2nd Floor,
Fire Commission Room, Bridgeport, CT 06604**

MINUTES

Commissioner Guedes called the February 28, 2012 special meeting of the Civil Service Commission to order at 10:07 a.m. Present were Commissioners Correa, Plummer, McBride and Rodgers. Also attending were Personnel Director David Dunn, Clerk to the Commission Deborah Brelsford, and City Attorney John Mitola.

Mr. Dunn explained that the matter before the Commission is one of eligibility for the Captain exam that was announced by the Civil Service office a couple of months ago. There is a dispute about the dates and Mr. Dunn calculated April 21, 2011 as the eligibility date and Attorney Thomas Bucci's clients believe the correct eligibility date is April 1, 2011. Mr. Dunn further explained that the date of April 21, 2011 opened up the Captain exam to another 15 employees.

Mr. Dunn stated that three year time and grade is August 21, 2011 under the Walker Rule. Walker is determined as 3 years plus 4 months or 120 days and this is the date Civil Service uses.

Mr. Dunn explained that Attorney Bucci's clients believe the Walker date is August 1, 2011. Fifteen (15) Lieutenants reached the eligibility date on August 10, 2011. Mr. Dunn explained that the meeting needed to be concluded by 11:30 a.m. to accommodate the schedules and commitments of several people in attendance.

Mr. Dunn explained that the theory in Civil Service is that the larger the pool of candidates, the better the test results. Civil Service has strived for a larger pool, recognizing dates that get cut off. Everybody has legitimate concerns.

Mr. Dunn further stated that the matter revolves around the termination of Lieutenant John MacNicholl. He had taken the Captain test 3 weeks before terminated. Promotions were made. MacNicholl got reinstated and Chief Brian Rooney put him back as Lieutenant. MacNicholl felt he should have been Captain. The Commission awarded the service rating to MacNicholl and he was promoted to Captain, through a settlement agreement dated 2008.

While MacNicholl was terminated a number of Captains had been promoted, including Paul Cocca. Through a union grievance in December 2009 Cocca settled retroactive to June 1, 2009. Cocca's promotion is critical to Mr. Bucci's clients' case, as they will assert that he was not eligible to be promoted. Mr. Dunn rejects that theory because the City is entitled to make promotions from the hiring list in order, and, to have a full complement of Captains.

When MacNicholl was finally settled at the end of 2009, his promotion was effective January 2, 2010 to Captain.

Captain Luis Rivera retired on April 1, 2011 and Attorney Bucci's clients feel the vacancy occurred on April 1st. Cocca was laid-off when MacNicholl came back and the reason was lack of work. MacNicholl bumped him out and he became a Lieutenant.

Richard Thode was promoted to Assistant Chief on April 21. The Captain's written exam is scheduled for March 31st. Oral exams are scheduled for April 3, 4, 5, and 6.

Under the Charter, litigation cannot stand in the way of making promotions. Mr. Dunn asserted again that the City acted properly when Cocca was promoted, laid-off and recalled. All was proper. He did say that he empathized with the group of 35. A difference of 3 weeks is critical to them and exams don't come along that often and they cannot be ignored. Mr. Dunn added that Attorney Mitola will speak later about settlements and how they play into this.

Attorney Thomas Bucci thanked the Commission for arranging the special meeting. He stated that Mr. Dunn's outline is somewhat skewed. Attorney Bucci said that the matter centers around the Walker Ruling, which is a rule of reconstruction, for no better term. State Supreme Court ruled that if a test is not given under the Charter when it should have been given time wise the eligibility date is determined as if the test was given, within 120 days of that day. It is a rule of fairness. Individuals have had to wait and are seeking to have test given as if it was 120 days from April 1st.

Attorney Bucci added that while it is important to have a wide field of candidates, there are legal constraints. It all deals with the City of Bridgeport Charter and semantics cannot dictate what the Charter means. The issue is when Cocca was demoted from Captain to Lieutenant and the Department's handling of Lieutenant MacNicholl's case. He was a member of the Department when Lieutenant Cocca was promoted to Captain.

Attorney Bucci continued that the Department promoted Lieutenant Cocca, Lieutenant MacNicholl persisted and MacNicholl was awarded his Captain spot. The Department did not lay off Lieutenant Cocca as the term is used in the Charter and Civil Service Rules. It was not a lay off to put him on a reemployment list, what New Haven did for years and promoted people even though there were not positions.

Attorney Bucci explained that a person is laid-off due to lack of funds or lack of work and put on a reemployment list. He stated that this case does not deal with this. If there are too many people in the Department the Department could have increased by one. Layoffs are for financial reasons or lack of work. It is the same with the Civil Service Rules. If an employee resigns in good standing and requests to come back to the Department within 6 months the employee is put on a reemployment list.

Attorney Bucci further explained that Captain Rivera retired April 1. There should have been no reemployment list. The vacancy is in the Captain spot. The Charter kicks in

and says you have 120 days from that day to give examination. There was nobody eligible on the Civil Service list to be promoted to Captain. The City should have given the test within 120 days of April 1. This date is through the mandates of the Charter and the date did not get picked out of the air.

Attorney Bucci continued that it is not a question of fairness to Captain Cocca, it is looking at Civil Service Rules and Regulations and how somebody goes on a reemployment list. The Charter says a reemployment list is legitimate if the layoff is for financial reasons or lack of work. The vacancy was April 1st and there were no eligible candidates.

Lieutenant Shevlin thanked the Commissioners for their time. He explained that he is in his 24th year in the Bridgeport Fire Department. He has been constantly held back on opportunities to take promotional exams and his group has been denied to take promotional exams.

Lieutenant Shevlin explained that for the previous Captain exam given in 2008 there had not been a vacancy since the year 2000. This test was not given until 2008. Between 14 and 18 positions became eligible to compete for. They were eligible by the Charter. Several applied to take test and were denied because they were not eligible. None of them got attorneys. They were hopeful to get testing back on track and decided to take the test the next time it was offered. He explained that they were being gentlemen. Now he feels it's his turn and their turn. Some have been lieutenants for 12 years and others have been lieutenants for 14 years. On a personal level, they waited their turn, now is their turn.

Lieutenant Shevlin continued to say that some are highly qualified for the Lieutenant position they hold now and he is not disputing that. What he is disputing is that it is not their turn. Some of them have only been lieutenants for 3 years.

Lieutenant Carlos Reyes addressed the Commission and thanked them for their time. He was sent a letter in 2006 by then Personnel Director Ralph Jacobs, and he wanted it put on the record. The letter stated that he did not have 3 years qualification. For 9 years there was not an exam. He had 5 years time and service and was not qualified. He was denied. He has waited and waited. He added that 2 Lieutenants, Domschine and Elwood, have waited over 14 years to take the exam. This frustrates him as an employee because he tries to follow the rules of Walker Jankura and the Charter and the Civil Service Rules and we violate them all the time and we violate them right now.

He said that it has always been 3 years and now there is a new spin and new interpretation. He said that rules are always changing here. He added that in December he was on the Civil Service Agenda and the meeting was adjourned while he was speaking. He said it irks him that rules are broken everyday when we say we are trying to follow rules.

Lieutenant Shevlin spoke and added that the purpose of Walker vs. Jankura is to prevent any person in position of authority to manipulate any list. He added that he thinks Chief Brian Rooney has manipulated the eligibility list for this exam. He stated that Chief Rooney delayed MacNicholl's legal right to a promotion for 1 year and the eligibility list was manipulated. Lieutenant Shevlin added that MacNicholl won his litigation and he should have been promoted right away.

Attorney Bucci added that he was told by his clients this had occurred. The 2000 date was used for the exam and vacancies were only supposed to be filled for 2 years of that date. There should be a new list for vacancies for the following 2 years. Lieutenants have told him through their experience that when the test was given in 2008 that all vacancies from 2000 to 2008 were filled and that would have been a violation.

Attorney Mitola said it was the City's contention that the Charter is being complied with. With regard to MacNicholl the Labor Board ruled termination was too severe but did impose a 2 month suspension. MacNicholl was reinstated as a Lieutenant in March 2009. The Labor Board did not say to make him a Captain.

Attorney Mitola further explained that Chief Rooney has the authority to take a look at the next name on the list and whether that person should be promoted. Under Chapter 14 Section 5, the Chief has authority to review whether the candidate is fit for promotion. The Fossesigurani situation got him terminated. He got his job back but was suspended for 2 months. Chief Rooney did not recommend him for Captain. Rooney acts and Cocca was the next name on the list. He has a legitimate right to the Captain position subject to the Chief and on September 2, 2009 he became a Captain.

MacNicholl had the right to appeal the Chief's actions to the Civil Service Commission and that's what happened here. The City was not under any legal obligation to wait to see how the MacNicholl matter comes out before it makes a promotion to Captain. As an example, Attorney Mitola said if the Commission had denied his appeal and MacNicholl went to Superior Court, the City would not have to wait to fill the Captain position. MacNicholl appealed in January 2010 and the Civil Service Commission granted his appeal. In September 2009 Cocca is promoted to Captain. Now there is one extra Captain because the Civil Service Commission granted his appeal.

Attorney Mitola referred to Section 210 of the Charter about Reemployment Lists. It states that any employee in the classified service who has been performing his duties in a satisfactory manner as shown by the records of the department or other agency in which he has been employed, shall be laid-off because of lack of work or lack of funds..... cause the name of such employee to be placed on the reemployment list. He is laid-off from Captain. We had 1 too many Captains and he goes down to the position of Lieutenant. There is also a lack of funds in the budget in the Fire Department. The Fire Department needs x amount of Captains. It does not need one more. There is a lack of work. Section 210 of the Charter says he goes on the reemployment list.

Commissioner Correa asked the number of Captains in the Fire Department Table of Organization and Deputy Chief Porzelt said the maximum is 17. Attorney Mitola stated that the only way to add another Captain is to go to the City Council and request funding and then you could have 18. He added that Cocca was on the recall list by virtue of the language of the Charter. Attorney Mitola further added that Rivera retired. Cocca came off the recall list and we are still at 17. Attorney Mitola asserted that Attorney Bucci's argument is incorrect. Attorney Mitola said Chief Rooney acted based on the authority of the Charter. He said the Chief was not agreeable to promoting MacNicholl to the position of Captain based on prior conduct. He said that Cocca was next on the list and can be promoted. MacNicholl appealed Chief Rooney's decision to the Civil Service Commission and the Commission granted his appeal 4 months later.

Attorney Mitola continued to explain that Rivera retired April 1, 2009, Cocca's recalled and a few weeks later Captain Thode is promoted to Assistant Chief on April 23, 2011. This day plus 120 days is what the Personnel Director used to determine eligibility.

Attorney Mitola said he understands that members are frustrated with what happened historically. He is following the Rules of the City Charter. Attorney Mitola believes Charter Rules have been followed and that the April 23 date needs to be used. Bumping of Cocca is a layoff. He was demoted because there was a lack of funds and a lack of work because the Department has determined that they need 17 Captains and they don't need 18. Section 210 requires the City to bump him and put him on recall list. Attorney Mitola stated that he feels Mr. Dunn has followed the Rules and interpreted the Charter correctly.

Attorney Bucci responded that he respects Attorney Mitola's position, however, the City acted at its jeopardy. If the City proceeds and promotes when there is an appeal outstanding it acts at its own jeopardy. There is no good faith when there is a pending appeal. That position could have been provisional, temporarily, until that appeal was determined. This was the City's choice, the Department's choice, to promote on a permanent basis. Attorney Bucci said the City knew that the appeal was coming and acted at its jeopardy.

Attorney Bucci continued that, Cocca was removed, not because of lack of funds or lack of work, but because the City acted when the appeal was outstanding and somebody had a superior claim to that position. Employee cannot be punished a second time. This is double jeopardy, being punished twice, and this should have been realized right at the start. Attorney Bucci stated that this may be one reason why the Civil Service Commission reversed because MacNicholl had already been punished.

Commissioner Correa stated that her recollection is that the Commission voted unanimously to reinstate. She added that she is weary of the possibility of any perception that as a Commission or as the Civil Service office that we are heading in that direction of punishing someone for something they already were punished for and absolved. We are moving into a new direction. Traditionally, certain people are unable to be Captains because a test did not occur. This is not their fault. She cautioned the

Commission, that from her perspective, she said she needs to be convinced by the Civil Service staff and by the City Attorney's office that the Charter is really being followed. With regard to reemployment, how many Captains are there supposed to be? If the budget calls for 17 and there is a vacancy and somebody is not laid-off, they are demoted. From the explanation and with due respect to Cocca, he stayed in the Department with all benefits and was demoted because there was no position available for him given the Table of Organization.

Attorney Mitola said that he interpreted the language of Section 210 differently than Attorney Bucci did; however, Attorney Mitola believes his own interpretation is correct. Cocca was laid-off from the position of Captain and demoted to Lieutenant.

Commissioner Correa stated that she did not understand the language then and asked for it to be clearly defined. Commissioner Rodgers stated that to be demoted is not to be laid-off. If a person is terminated from his company he goes to the unemployment office.

Mr. Dunn explained that maybe there is a misunderstanding with the action that occurred and what it is being called. The fact remains that Cocca was put back to Lieutenant and because of the action the Commission took with MacNicholl when Cocca was put back to Lieutenant Cocca gets recall rights applied to him to go back to Captain if there was ever an occasion. It is reflected in the City Charter in Section 210 Lay-off. The Civil Service Commission took action to reinstate MacNicholl. Cocca was the odd man out. He does not go out the door and home. He does not collect unemployment. However one describes it, he still gets recall rights. He's not ignored from that point on. Mr. Dunn added that he feels this is what Attorney Bucci would ask that the Commission think of. However, he still has future rights. When he was brought back and when he was promoted, he had claims that he should have been promoted earlier. The union settled the grievance and he was awarded back pay. Cocca is a real person with real rights.

Commissioner Correa stated that she did not feel the Commission is taking away Lieutenant Cocca's rights but semantics are extremely important. Mr. Dunn responded that yes this is stated in the Charter. He continued to explain that the word demotion has 2 definitions. It is a disciplinary definition and also as it applies to Cocca a lay off and put back as a Lieutenant. Attorney Mitola said Cocca was laid-off from Captain. Commissioner Guedes said a lay off is perceived differently in the private sector. Mr. Dunn reminded the Commissioners that in a paramilitary organization such as the Fire Department, demotions are not uncommon and that the use of the term demotion might cause confusion. Mr. Dunn clarified that when Cocca was removed as a Captain and put back as a Lieutenant Cocca has rights back to Captain because of the Charter.

Attorney Bucci said that the only rights for legitimate lay off are financial reasons or lack of work. The City acted at its peril by filling the position on a permanent basis when an appeal was pending.

Attorney Mitola responded that if based on when MacNicholl filed an original grievance, the City should not have promoted anyone for 2 years. Attorney Bucci said the position should have been left open in the event MacNicholl succeeds.

Attorney Mitola said a person is entitled to that position, according to his interpretation of the Charter and following the Charter. Cocca does not go into black hole. The City took into consideration everyone's rights under the Charter and under the grievance position.

Commissioner McBride asked if the City ran into this problem with the Lieutenant's test. Attorney Bucci said that a separate agreement was signed off by Lieutenants and Union and City and approved by a Federal Judge. Attorney Mitola said there was a global agreement and there were demotions and people were recalled.

Commissioner Correa asked if moving forward was the issue the test. Mr. Dunn explained that the issue here is the eligibility date. April 1 or April 21 + 120 days – August 1 is cutoff or August 21 is cut off under Walker. He stated that Civil Service applied August 21 and this allowed 15 lieutenants who reached time and grade to take the test.

Provisional Captain Darrien Penix and Lieutenant Ellis addressed the Commission. They explained that there was a further complication with the 4/5 Rule in that previous Personnel Director Ralph Jacobs held up exam. The results were in and 14-16 months of time went by. The test was given in 2007. Other things were involved with this. He said he felt sorry but it should be 3 years according to rules. If he takes this test he is not harmed. The delay caused by then Personnel Director Ralph Jacobs is a problem.

Mr. Dunn explained that he had not spoken with Lieutenant Ellis about this but the group would have been made Lieutenants a long time prior had the promotion not been held up for months. They took the test in the spring of 2007 and were made Lieutenants on August 10, 2008.

Attorney Mitola added that their situation is the 4/5 Rule from the Ricci case out of New Haven. Lieutenant Ellis stated that they got letters saying the results were in and the appeals were in, but there would not be promotions. The 15 names off the list in rank order were promoted provisionally to Lieutenant on March 2nd while interpreting the Rule and all would be eligible to take the Captain's exam. Lieutenant Ellis continued that the matter got very contentious before the Commission. Their argument would be the date would not have mattered had Mr. Jacobs not held up the promotions. Time is crucial to everybody. They were very much impacted by the delay of the 4/5 Rule Ricci case.

Commissioner Guedes responded that they are facing a similar dilemma because they were impacted by the 4/5 Rule.

Provisional Captain said they tested in the spring of 2007 and had results and they waited and waited and waited. They were made provisionals in rank order in March and

waited again. In August it was decided to make them probationary. All the time doing the position didn't count toward anything.

Mr. Dunn said he was not completely aware of this issue that they have now outlined. Lieutenant Ellis stated no harm no foul at this point.

Commissioner Correa said that the Commission can't make a decision on what *could* happen to a group. Lieutenant Ellis countered that the Jacob's decision does figure into their careers.

Attorney Mitola said that at the time it was a very heady issue, based on the U.S. Supreme Court decision for the Ricci case and federal law requirements. He added that the Fire personnel are part of the union and that the matter was getting off track.

Commissioner Guedes said the Commission does understand that and to Commissioner Correa's point whether or not to stay with April 21st date as eligibility or April 1st, whether or not the Personnel Director's argument is valid to the Civil Service Commission.

Commissioner Plummer stated that valid is strong but he is looking at it as a legalism issue and that both Attorney Mitola and Attorney Bucci were testing the argument of legalism. He added that no one has shown that illegality has taken place and it comes down to a matter of judgment and if a precedent was set. Commissioner Guedes added that sometimes it comes down to precedence.

Mr. Dunn asserted and suggested to the Civil Service Commission that there is one course of action open: to order him to recalculate or leave the eligibility date alone at April 21. Mr. Dunn suggested the Commission leave the date alone as April 21. He was empathetic as could be to those who had to wait 10 to 14 years to take the test and whatever cases were in play in the past with previous Personnel Directors Jack (Colligan) and Ralph (Jacobs). He does not want to run the risk of creating another situation just like what we already have. Mr. Dunn said he thought his interpretation would stand in court review. He asked the Commission to keep the eligibility date as April 21. He again stated that with all due respect to Attorney Bucci and the Lieutenants that are affected to please keep the date April 21st.

Commissioner Plummer stated that if the date changes they do not take the test. Mr. Dunn replied that all 50 take the test if the Commission leaves the date alone. Attorney Mitola said that maybe Attorney Bucci's clients go to court and if the court determines they are successful then their scores get thrown out and there really is not any harm. The Commissioners would be moving the process along.

Commissioner Correa expressed her concern regarding the reinstatement of MacNicholl by the Board and of not wanting to be caught in a quagmire if there is a perception that there is retaliation to somebody already absolved. Attorney Mitola said he got a 2 month suspension. Commissioner Correa said that does not mean he cannot be a

Captain. Mr. Dunn replied that MacNicholl was fully restored and made whole. He added that this MacNicholl was a side story in that it created the Cocca promotion. What should enter in to this consideration is that in the last 2 ½ years is that Civil Service was getting up to speed with all of the testing; the Administration made funds available. He stated that there is still a test needed for Pumper Engineer and Superintendent of Maintenance and maybe another one for jobs not at such a large of interest level as this one. The department does not want to make mistakes like those made in the past.

Lieutenant Lawrence Donnelly addressed the Commission as being part of the 15 that might not be able to take the test. He hears the argument between the attorneys being Cocca was bonafide or provisional/interim/acting. Rules state a promotion time limit if there is an existing list once the Chief asked for it. Legally a provisional can't be put in, it takes 2 years. The hiring list is done. There is a harm there; had to legally make him bonafide. Attorney Bucci said that the question is when they removed Cocca.

Commissioner Guedes thanked the Lieutenant for his clarity and asked Mr. Robert Whitbread, Fire Union President to address the Commission.

Mr. Whitbread said that with regard to the reemployment list both attorneys spoke of Section 210 and 211 and there is a rule on seniority and procedures that nobody spoke about. He said if you are laid-off you are still under the employ of the City. Mr. Whitbread asked for clarity of page 45. Mr. Whitbread added that Commissioner Rodgers brought that up also. Attorney Bucci stated that it still talks about a layoff or reemployment if you go back to previous position.

Mr. Dunn said that with all due respect he had practiced that issue for many years in his other job and when an employee is removed the employee has rights, Cocca has rights, and that Mr. Whitbread pointed out that we have a rule that he (Cocca) has rights. Whether promotion or disciplinary – he had the right to be recalled on April 1st.

Commissioner Correa asked to hear a last statement made from Attorney Bucci and he replied that he does not change his position because Rule 13 Seniority said if a permanent employee is laid-off in particular job classification he enjoys seniority rights with the prior classification and has his name placed on the reemployment list. Then go to the Charter to determine what lay off means and Attorney Bucci says it means lack of funds or lack of work.

Then there was a discussion between Commissioner Guedes and Attorney Mitola on the wording of the motion. Attorney Mitola concluded that the motion was for the Commission to affirm April 21 as the eligibility date as presented by Personnel Director David Dunn. Commissioner Guedes polled the Commissioners and respectively Commissioners McBride and Rodgers each voted to overturn the date of April 21. Commissioner Plummer asked to come back to him. Commissioner Correa voted to overturn the April 21 date and use the April 1 date and Commissioner Plummer then voted to overturn the April 21 date.

Commissioner Guedes stated that all were in favor by a unanimous vote to overturn the April 21st eligibility date and use the April 1st eligibility date.

On a motion made by Commissioner Correa the special meeting on February 28, 2012 of the Civil Service Commission was adjourned at 11:30 a.m.