No. NNH-CV-98-0412193

SHERYL BROADNAX, ET AL	J.D. OF NEW HAVEN
V.	AT NEW HAVEN
CITY OF NEW HAVEN, ET AL	SEPTEMBER 10, 2013

SPECIAL MASTER'S ANNUAL REPORT

This action was originally brought in 1998 by Firefighters Sheryl Broadnax, Ronald Benson, John R. Brantley, Danny Dolphin, Clifton Pettaway and Christopher Texeira, none of whom are still employed by the New Haven Fire Department. Their complaint focused on a practice known as "underfilling:" which

> . . . occurs when the fire department promotes an individual to a particular position, and the city's budget has not allocated funds to pay the salary of that position, whereby funds for a vacant higher ranking position are used to pay for the newly appointed lower ranking position. For example, if ten individuals are promoted to lieutenant, and only five vacancies exist in the budget for the position of lieutenant, but several vacancies exist in a higher ranking position, such as captain or battalion chief, the first five newly appointed lieutenants are promoted and paid with budgeted lieutenant funds, but the next five newly appointed underfilled lieutenants are paid with funds reserved for the vacant captain or battalion chief positions. Thus, when an individual employed at a lower ranking position is paid from funds reserved for a higher ranking position, that individual is

considered to have been underfilled. *Broadnax v, New Haven*, 294 Conn. 280, 984 A.2d 658 (2009)

The Superior Court, Munro, J., had concluded that this practice violated the city's charter and ordinances. On March 25, 2002, she appointed Attorney William Clendenen as Special Master to "monitor, oversee, and report to the Court compliance of all defendants with federal, state and municipal (charter and ordinance) law applicable to promotions within the City of New Haven Fire Department." *Broadnax v. City of New Haven*, No. 412193, 2002 WL 449712 (Conn. Super. Ct. Feb. 27, 2002). The appointment of the Special Master was subsequently affirmed by the Connecticut Supreme Court, although there is currently pending an appeal of Judge Robinson's 2012 order appointing the undersigned to replace the original Special Master, Attorney William Clendenen, who had resigned after nearly ten years of service in that position, and extending the Special Master appointment from September 4, 2012 through September 4, 2013. Among the duties of the Special Master is the filing of an Annual Report, and this document is submitted in fulfillment of that duty.

Although the appointment of the Special Master was in response to a complaint that had focused on the practice of underfilling, subsequent orders made it clear that the Special Master's mandate was broader in scope than this particular practice, extending to assuring compliance with all federal, state and municipal laws applicable to all aspects of the promotion process. That mandate, however, was not altogether without limitation. For example,

> We do not mean to intimate, however, that an individual may, in his or her capacity as a municipal employee, challenge the validity of a promotional practice solely on the basis that it purportedly violates an accounting practice as described in a city charter or other similar document. The rules relating to the city's budget present a different zone of interests than do the city's civil service rules and regulations.

Broadnax v. City of New Haven, 270 Conn. 133, 155 (2004).

In the course of his service as Special Master, Attorney Clendenen found no violations of federal, state or municipal law and approved all of the promotions made by the City during that period, with the exception of the 2005 promotion of one Marvin Bell, which promotion, ironically, had been the product of an agreement between City and the Union, which, although nominally an intervening defendant, is now the only remaining party in this case with an interest adverse to that of the City.

At the time of Clendenen's resignation, one set of promotions was still pending, and the undersigned, in his then capacity as Presiding Judge for Civil Matters in New Haven, assigned that issue, as well as the pending question of whether the position of Special Master should be continued, to Hon. Angela Robinson. Judge Robinson held a hearing regarding the outstanding promotional issues that had been addressed to the Special Master before his resignation and, while noting that the City could have and should have handled the proposed promotions better, she found no violations of federal, state or municipal law and therefore approved the promotions.

Judge Robinson also held a hearing to determine whether a new Special Master should be appointed to replace Clendenen and if not, to what extent, if any, the Court should retain jurisdiction over the promotional practices of the New Haven Fire

Department. Although none of the original plaintiffs testified, other members of the Department did testify in support of retaining the Special Master and, on September 4, 2012, Judge Robinson extended the term of the Special Master to September 4, 2013 and appointed the undersigned, who had already announced his impending retirement from the bench, to replace Attorney Clendenen as Special Master.

In making this appointment, the Court noted that if, after that one year, the Special Master found that the City of New Haven had been in substantial compliance with the requisite rules, regulations and laws, then the services of the Special Master would be terminated effective September 4, 2013. The undersigned sought and received an extension until September 10 to prepare this Annual Report addressing, inter alia, that very issue.

As spelled out in Judge Munro's original order dated March 25, 2002, the jurisdiction of the Special Master is limited to overseeing and reporting to the Court regarding compliance with federal, state and municipal (charter and ordinance) laws applicable to promotions within the Fire Department. Although, as the Union has pointed out, the relationship between the Local and its members, on one hand, and the City on the other, has been characterized by "distrust and animosity" neither Attorney Clendenen, nor, as will be discussed, infra, the undersigned, has found that any of the promotional practices complained of over the nearly 12 years since the creation of the Special Master position has risen to the level of a violation of law other than the previously mentioned single instance when the Special Master disapproved of the "promotion" of Marvin Bell in 2005. The City thus argues that with the possible

exception of the Bell promotion eight years ago, it has been in substantial compliance with the court order for more than eleven years, and certainly for the past eight years, during which time there have been no findings of violations of any federal, state or municipal laws.

Since the appointment of the undersigned, there have been four complaints about the promotional process, two brought directly by the Union, and two by individual firefighters, all but one of which arose out of the same sequence of events. Initially, on March 4, 2013, the Union complained that the City was attempting to thwart the promotional process by appointing Firefighters Scott Dillon and Corey Bellamy to the Fire Marshal's Office on an "acting" basis for an indefinite period of time. The undersigned engaged in several discussions . . . in person, via email and by phone, with counsel in an effort to resolve this matter. The City's threshold position was that since the Union had already initiated grievance proceedings with the State Labor Board, pursuant to its collective bargaining agreement with the City, the Union would have to exhaust that administrative remedy before the Special Master had authority to act. The undersigned, however, indicated that he was unlikely to agree with that position, and the parties again met with the undersigned to find the best way to address the issue directly. The City thereupon agreed to expedite the promotional testing process so that certain vacancies could be appropriately filled.

Those tests were conducted on July 14, 2013, using an outside private agency experienced in the conduct of promotional examinations, and the results were posted

on August 13, 2013. The Union objected to the certification of the results, but could cite no violation of federal, state or municipal law in doing so.

Following the testing and before certification of the results, a second complaint was submitted by Firefighter Scott Dillon. Although the complaint was forwarded to the undersigned and all counsel by the attorney for the Union, it was quite clear that this was an individual complaint made by the individual firefighter and did not represent the Union's position. (Indeed, counsel for the Union finds herself in an awkward position under these circumstances, as the favorable resolution of Dillon's complaint could have conceivably adversely affected other members of the Local that she represents.)

The City initially asked the undersigned to approve these promotions in advance, without having seen either documentation of the testing procedures or the actual results of the examinations, in light of the fact that he was to be out of the country from August 12 to 29, a period that included the date, August 13, on which the results of the examination were to be certified by the Civil Service Commission.. The Union objected, and the undersigned agreed that he should not approve them in advance, but would review all the paperwork once the Civil Service Commission had certified the process and produced the list of finalists from which the promotions should be made. The undersigned received all of the documentation via email while in the United Kingdom and reviewed it with care. Finding that no violation of federal, state or municipal law had been either colorably alleged or established, the undersigned gave his approval to the process and the list of certified candidates for

promotion. The undersigned dismissed Dillon's complaint, which was based primarily on his claim that he was not permitted to know the identity of the person or persons who scored his examination, as he produced no authority to support a conclusion that failure to reveal the identity of the individual testers (the identity of the agency with which the City had contracted to perform the testing was well known to all) was violative of any law, nor did he allege any specific impropriety, other than to claim that he felt that his score was too low.

In seeking approval of the promotions, the City asked to be permitted to fill the positions from the list of successful test-takers in accordance with the "Rule of Three," which allows the City to make appointments from among the top three scorers on the list of candidates certified as eligible for promotion. There was no specific objection to this request at the time it was first made, in a July 30, 2013 email to the undersigned, or when it was repeated at the time that the list of successful candidates had been made known. Some two weeks later, however, in the third complaint relating to these promotions that the undersigned entertained in his capacity as Special Master, the Union claimed that historically, the Department had never used the Rule of Three in "centuries," which claim was later modified to allege no use of the Rule in at least 35 years. Whatever the historical record, there is no dispute that Article XXX, Sec.160 of the City Charter authorizes the City to employ the Rule of Three. The Union's complaint that to do so violates federal state or municipal law is unavailing.

It is now clear why the City has chosen to do utilize this procedure on this occasion, passing over a successful applicant, Aaron Brantley, who is currently on paid administrative leave as a result of his arrest on two counts of felony bribery in connection with an alleged attempt to influence testimony in his pending CHRO complaint. The undersigned did not have time to rule on this complaint, which was presented only in the past couple of weeks, and he asked both the City and Union to provide additional information so that he could evaluate the complaint. Having received that information from both parties and reviewed the City's decision to "skip" Mr. Brantley in favor of the next highest scoring applicant on the list, the undersigned now dismisses that complaint for the reasons that follow.

.The City acknowledges that it skipped over Brantley, even though his score was higher than the person who was actually promoted. Although the City recognizes that with respect to both the criminal charges and the pending internal disciplinary proceedings against him, Brantley is entitled to the presumption of innocence, it is correctly concerned about the financial and practical consequences of promoting someone who is under a serious cloud and who, in any event, is unable to assume any new duties because he is on administrative leave. Indeed, he is not even permitted, pursuant to the terms of administrative leave, to set foot on City property. Not exercising the Rule of Three would result in the City's appointing a person who is unable to assume his new position, and who may never be able to do so.

The Union's last minute suggestion that the City should leave the position vacant flies in the face of their efforts to have the promotion process conducted and

completed. There is no way to determine when, or, indeed, whether, Brantley might in fact be able to assume the position. This is a perfectly legitimate of the use of the Rule of Three.

Finally, and also while away on vacation, the undersigned received an individual complaint from Firefighter Antonio Almodovar who had applied for, was tested for, but was not promoted to, the position of Drillmaster. (This was a separate testing procedure, not related to the ones just discussed.) It was not clear that counsel for the parties in this case had received copies of the Almadovar complaint, so the undersigned forwarded the complaint and the related documents submitted by Almodovar to them and solicited their comment. To date, no one has commented.

Almodovar's complaint is essentially based on his contention that he knows that he is a good firefighter who has mastered all of the material on the exam, and that his low scores could not possibly be accurate. He also complained that although the letter notifying him of this decision had promised to provide him with the high, low and average test scores of the other test-takers, he never received them. The undersigned concluded that no violation of federal, state or municipal law had been alleged and that his mandate therefore did not include acting on such a complaint. The Undersigned encouraged Mr. Almodovar to contact the Fire Department administration to request the missing information, and Mr. Almodovar sent a gracious reply thanking the undersigned for having reviewed his complaint. The undersigned has notified Mr. Almodovar and the other parties that the complaint was dismissed.

In its Reply to the City's Position Statement, the Union also complains that although the posting for the promotional exams stated that scoring would be based on the results of a written (50%) and oral (50%) examination, the candidates were also required to participate in an oral interview. While it is true that the posting made no reference to an oral interview, it is equally true that the only scores that were utilized in determining the top candidates were the written and oral test scores. The Union has not shown that the interview in any way influenced the test results or the hierarchy of candidates ultimately considered for promotion. To the extent that raising this issue may be construed as a complaint, it is also dismissed.

The City advances several reasons why the appointment of the Special Master ought not be renewed. Some of these relate to the City's claims of lack of standing on the part of the Union, the one remaining adverse party, and subject matter jurisdiction. As these are questions of law for the Court in the first instance, the undersigned does not address them here. Rather, for purposes of the discussion which follows, the undersigned assumes, without deciding, that the Union has standing and the Court has jurisdiction. The remainder of this Report will therefore address the City's principal substantive contention, that the Special Mastership has served its purpose, that there have been no colorable allegations of violations of law in the promotional process in years, and that the City has been in substantial compliance with the law and the

court's orders as required by Judge Robinson in her most recent order extending the Special Master's appointment through September of 2013.

The Union, while not at all conceding that compliance has been substantial, makes essentially a version of the same argument that reaches the opposite conclusion, namely that the promotion process this year may indeed have unfolded without the violations of law that had led to the filing of the original complaint and the appointment of the Special Master in the first instance, but that the only reason this has happened is because the City knew that the Special Master was looking over its proverbial shoulder. If the Special Master is removed, the Union argues, the City will quickly revert to the kind of behavior that led to this lawsuit in the first place.

In support of that conclusion, the Union notes that the relationship between it and the City is still characterized by distrust and a lack of harmony. Based on his one year of experience as Special Master, the undersigned is compelled to conclude that this is indeed the case. The Union, however, has not sought to establish that the Union-Employer relationship that exists within the City of New Haven Fire Department is markedly different from the tension that so often seems to exist in any Union-Management relationship, no matter what the context or the nature of the employment. Nor is it all clear that the responsibility for whatever animosity and distrust still exists is exclusively that of any one party.

The argument seems to boil down to this: On the one hand, the presence of a Special Master has certainly had, probably still has, and very well could continue to

have, a salutary effect on the fairness of the promotional process within the City's Fire Department. Because all promotions would need to be approved, and because the Union (which, although nominally an intervening defendant, actually acts as though it is the plaintiff in the case) scrutinizes the City's practices with care and is by no means shy about bringing its concerns to the attention of the Special Master, the undersigned concludes that, as the Union suggests, it is more likely than not that the position of Special Master has indeed played an effective role in overseeing and streamlining the promotional process. Moreover, if the appointment is extended, it is likely that the Special Master would continue to play such a role. That likelihood, however, is not the basis on which Judge Robinson indicated that she would ground a decision on whether to continue the Special Master's role, nor, in the view of the undersigned, should it be.

This case began with a group of plaintiffs who are no longer employed by the Department and who had attacked a specific practice, which the City has not employed since Judge Munro's original order. The case has been pending for fifteen years, and the City is paying for the services of a Special Master to scrutinize practices, which at least since 2005, have been found not to be violative of any federal, state or municipal laws. There are doubtless scores of cases in which the presence of a Special Master to monitor compliance with court orders would be helpful and in which even the mere presence of such an authority, despite the fact that there has been substantial compliance with court orders for several years, would continue to serve a useful purpose. This case is almost certainly one of those cases in

which the continued presence of a Special Master could serve such a hortatory purpose by encouraging cooperation and streamlining the path to resolution of conflicts relating to the promotional process.

Nevertheless, based on the track record of the past several years, it appears to the undersigned that the issues that are likely to arise in the future between these parties are reflective more of ongoing labor-management tensions and budgetary constraints than they are of possible violations of law. Thus, the question for the court may be whether it can, and/or should, continue the appointment of the Special Master, recognizing that its purpose is not likely to be the ferreting out of violations of law but rather serving more as an intermediary or mediator or facilitator. That, in the opinion of the undersigned (for whom the mediation of disputes has become a way of life) is not a bad idea, at least in the abstract. If this is its only purpose, however, whether a Special Master can and/or should continue to be imposed on the parties . . .and specifically on the City, on whom the funding burden has fallen . . . is a more difficult question and one that also raises possible precedential implications.

Counsel for the Union, after recapitulating some of the problems that have beset the Union and the City over the years, concluded her Position Statement with the plaintive observation, "There has to be a better way." In this observation, she is undeniably correct, but the undersigned is not persuaded that under the circumstances of this case, the continuation of the Special Master position is that "better way." With the claims of the original plaintiffs resolved, and those individuals no longer even a part of the case, with the use of underfilling essentially eliminated from the Fire

Department's promotional practices, with eleven years of findings that the City had not violated federal, state or municipal laws in connection with its Fire Department promotions (with the possible exception of the one instance where the promotion had been part of an agreement between the City and the Union), with the undersigned's conclusions that over the course of the past year the City has been in substantial compliance with the court's mandate that it comply with all federal, state and municipal laws relating to promotions within the Fire Department, it is hard to justify imposing on the City both the expense and the ignominy of continuing to have its promotional practices overseen by an outside individual appointed by the court. The fact that the relationship between the two remaining parties . . .the City and the Union . . . remains uncomfortably dysfunctional, with ample evidence of the distrust and animosity that has been previously described by others, does cry out for more reasonable dialog between the parties, but this is essentially an ongoing series of labor-management disputes that was not and could not have been the subject matter of the original litigation. Moreover, there is nothing to suggest that the feelings that underlie this atmosphere of distrust and animosity are so one sided that the financial burden of the Special Master position should be borne exclusively by the City, nor should the City have to continue to bear the implicit culpability that may be inferred from having a Special Master imposed upon it.

Yes, there ought to be a better way, and it may well be that some degree of third party facilitation or mediation would help. In the opinion of the undersigned, however, continuation of the Special Master position is not the appropriate vehicle for

trying to bring about harmony between the City and the Union, and with gratitude to the court for having made this appointment one year ago, he therefore now recommends that his appointment not be continued.

Respectfully Submitted,

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CERTIFICATION

Service in accordance with the Practice Book this 10th day of September, 2013 on:

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