COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JUAN-PEDRO ANTUNES,
Appellant

v.

B2-15-122

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro Se
Juan-Pedro Antunes

Appearance for Respondent:

Mark Detwiler, Esq.
Melinda Willis, Esq.
Melissa Thomson, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Commissioner:

Christopher C. Bowman

DECISION ON MOTION FOR SUMMARY DECISION

Procedural History

On June 16, 2015, the Appellant, Juan-Pedro Antunes (Mr. Antunes), acting pursuant to G.L. c. 31, § 2(b), timely appealed to the Civil Service Commission (Commission) contesting a decision by the Respondent, the Massachusetts Human Resources Division (HRD), that he was ineligible to sit for the Correction Officer III (CO III) Promotional Examination on May 16, 2015.

On July 7, 2015, I held a pre-hearing conference which was attended by Mr. Antunes, counsel for HRD and counsel for the Department of Correction (DOC). HRD subsequently filed a Motion for Summary Decision and the Commission received a reply on behalf of Mr. Antunes.[1]

Background

Mr. Antunes has been employed by DOC since 1989 when he was appointed as a provisional Correction Officer I (CO I). In 1991, after taking and passing a civil service examination, he was appointed as a permanent CO I, a civil service position he served in for approximately eighteen (18) years, until 2009. In 2009, after taking and passing a promotional examination, Mr. Antunes was promoted to the position of Correction Officer II (CO II), a civil service position he served in for approximately five (5) years, until August 9, 2014.

From August 10, 2014 to the present, Mr. Antunes has served as a Program Manager VI, a title not classified under the civil service law.[2] His functional title is Director of Security. Mr. Antunes stated that he is on a DOC-approved "leave of absence" from his permanent CO II position.

Mr. Antunes applied to take the CO III promotional examination scheduled for May 16, 2015. HRD reviewed the employment records for Mr. Antunes and determined that he was not eligible to for the examination because he did not meet a requirement in G.L. c. 31, § 9, which

[1] On July 28, 2015, the Commission received a reply to HRD's Motion from an Appellant in an other appeal (Servello v. HRD, CSC Case No. B2-15-128) involving the same issue and similar facts. On August 3, 2015, Mr. Antunes informed the Commission that he was relying on that reply as his response to HRD's Motion.

[2] Section 46E of Chapter 699 of the Acts of the 1981 states: "Notwithstanding any provision of law to the contrary, after June twenty-seventh, nineteen hundred and eighty-one, no position allocated to job group M-V through job group M-XII, inclusive, of the management salary schedule provided in section forty-six C shall be classified under chapter thirty-one; provided, however, that this section shall not apply to positions for which full or partial reimbursement is made by the federal government and which are required by federal law or regulation to be covered by a merit system, so-called; and provided, further, that no exemption from the provisions of this section shall be allowed unless certification of the federal requirement is received from the appropriate federal official an unless such certification is renewed at regular intervals." At the pre-hearing, Mr. Antunes submitted a letter from DOC Personnel Analyst James O'Gara stating that Mr. Antunes had been employed as a *Provisional* Program Manager VI since 8/10/14. In light of c.699 of the Acts of 1981, the reference to "provisional" is erroneous. This is a non-civil service title.

states, in relevant part, that promotional examinations are open "only to persons who have been employed in the departmental unit as civil service employees for at least one year immediately preceding the date of the examination …" Since Mr. Antunes was not employed in a civil service title for at least one year immediately preceding the date of the examination, HRD deemed Mr. Antunes ineligible to sit for the promotional examination.

Summary Decision Standard

Section 1.01(7)(h) of the applicable Standard Adjudicatory Rules of Practice and Procedure at 801 CMR provides that, "When a Party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. If the motion is granted as to part of a claim or defense that is not dispositive of the case, further proceedings shall be held on the remaining issues". 801 CMR 1.01(7)(h). The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass.R.Civ.P.56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing. *See* Catlin v. Board of Registration of Architects, 414 Mass. 1, 7 (1992); Massachusetts Outdoor Advertising Counsel v. Outdoor Advertising Board, 9 Mass.App.Ct. 775, 782-83 (1980).

Applicable Civil Service Law

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on "[b]asic merit principles." Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001), citing Cambridge v. Civil Serv. Comm'n., 43 Mass.App.Ct.300, 304 (1997). "Basic merit principles"

means, among other things, "assuring fair treatment of all applicants and employees in all aspects of personnel administration" and protecting employees from "arbitrary and capricious actions." G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

G.L. c. 31, § 2(b) addresses appeals to the Commission regarding persons aggrieved by "… any decision, action or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations …." It provides, *inter alia*, "No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record."

In Cataldo v. Human Resources Division, 23 MCSR 617 (2010), the Commission stated that " … under Massachusetts civil service laws and rules, HRD is vested with broad authority to determine the requirements for competitive civil service examinations." G.L. c. 31, § 22(1)

G.L. c. 31, § 9 states:

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

G.L. c. 31, §1 defines a "civil service employee" as: "a person holding a civil service appointment." That same section defines a "civil service appointment" as: "an

original appointment or a promotional appointment made pursuant to the provisions of the civil service law and rules" and a promotional appointment as: "an appointment pursuant to section seven or in the labor service, pursuant to the civil service rules, of a person employed in one title to a higher title in the same or a different series, or to another title which is not higher but where substantially dissimilar requirements prevent a transfer pursuant to section thirty-five."

HRD's Argument

HRD argues that Mr. Antunes is not aggrieved as its determination that he was ineligible to sit for the promotional examination was compulsory under Chapter 31. Specifically, HRD argues Mr. Antunes was not employed in the departmental unit *as a civil service employee* one year immediately preceding the date of the examination, a requirement under Section 9 of Chapter 31. HRD argues that while Mr. Antunes meets the other two (2) requirements of Section 9, he does not meet the first requirement as he was not employed in a civil service title one year immediately preceding the date of the examination.

Mr. Antunes's Argument

Mr. Antunes argues that, in January 2015, DOC granted a CO III "promotional appointment" to a DOC employee who was serving as a Program Manager VII. I infer that Mr. Antunes is suggesting that this employee was also ineligible to take the CO III promotional examination, presumably because she was serving as a Program Manager VII during the one year preceding the promotional examination, although he provides no evidence to substantiate any of this.

Mr. Antunes also argues that he should be deemed eligible to sit for the promotional examination as his name appeared on an initial list of candidates scheduled to take the examination.

Finally, Mr. Antunes identifies five (5) other DOC employees who "reverted back to their permanent positions prior to retirement" from their respective non-civil service positions.

Analysis

While, ultimately, it is not relevant to this decision, it is worth noting the practical, if not strategic, impetus behind this appeal, and two (2) other related appeals that have been filed with the Commission. Mr. Antunes is contemplating retirement. To maximize his retirement, he is seeking to retire in the most favorable retirement "group" as defined by G.L. c. 32, § 3(2)(g). In order to be considered as part of any retirement "group", the employee "must be actively performing the duties of the position for which he/she seeks classification for not less than twelve consecutive months at the time of classification." Having determined that serving as a CO I, II or III will place him in a more favorable retirement group than Program Manager VI, Mr. Antunes seeks to revert to one (1) of these titles and actively perform the duties of said title for at least twelve (12) months prior to filing for retirement. Rather than revert to his permanent CO II title, Mr. Antunes would prefer to revert to the higher title of CO III. Hence, his decision to apply for the CO III promotional examination.

Solely for the purposes of this decision, which is being decided on a motion by HRD, I assume that all of the factual assertions and implications made by Mr. Antunes are true, including that: 1) in the past, other DOC employees serving in non-civil titles have been permitted to sit for CO III promotional examinations; 2) the name of Mr. Antunes appeared on a list of individuals who were scheduled to sit for this CO III promotional examination; 3) other DOC employees serving in non-civil service titles have been permitted to "revert" to their permanent titles; and 4) Mr. Antunes is currently on an approved leave of absence from his permanent CO II position.

Mr. Antunes did not serve in a civil service title for the entire one-year period immediately preceding the CO III promotional examination on May 16, 2015. Rather, during the relevant one-year period, he served in the civil service title of CO II from May 16, 2014 to August 9, 2014 and then then served in the *non*-civil service title of Program Manager VI from August 10, 2014 to May 16, 2015.

Mr. Antunes appears to argue that, even though he was serving in a non-civil service *title* for part of this one-year period, he was still a civil service *employee* as a result of his permanency in the civil service title of CO II, from which he was on a leave of absence. HRD reads the statute differently, arguing that, if you are not in a civil service title, you cannot be considered a civil service employee.

The interpretation of HRD, which is vested with broad authority to determine the requirements for competitive civil service examinations, is more logical. In 1981, the Legislature specifically *removed* all state management titles classified as M-V and above (such as the one here) from civil service. To now deem employees serving in those titles as civil service employees would appear to be contrary to the legislative intent.

Further, nothing in the applicable paragraph of G.L. c. 31, s. 37, which governs leaves of absence, states that employees such as Mr. Antunes shall be deemed as civil service employees during their leave. That does not appear to be an accident. Paragraph 1, which applies to any leave of absence that would have been taken Mr. Antunes, contains no such language while the second and third paragraphs of this section, which pertain to civil service employees who take a leave of absence *after being elected to public office*, specifically state that these individuals shall not "suffer any loss of rights under the civil service law or rules" during their leave of absence. No such language is contained in Paragraph 1. If the Legislature had intended for individuals

such as Mr. Antunes to not suffer any loss of rights under the civil service law or rules, including the ability to sit for a promotional examination while on leave, they would have said so. They did not.

Even if HRD has unwittingly allowed similarly situated individuals to sit for a promotional examination in the past and/or if Mr. Antunes's name appeared on an initial list of candidates to sit for the examination, that does not change my conclusion that the statute is being correctly being applied here – and on a going-forward basis.

Conclusion

HRD's Motion for Summary Decision is allowed and Mr. Antunes's appeal under Docket No. B2-15-122 is ***dismissed***.

Civil Service Commission

Christopher C. Bowman
Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on August 20, 2015.

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 this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission 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:
Juan-Pedro Antunes (Appellant)
Mark Detwiler, Esq. (for Respondent)
Melinda Willis, Esq. (for Respondent)
Melissa Thomson , Esq. (for Respondent)
Earl Wilson, Esq. (Department of Correction)