Suffolk

8

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. ~~2013-00102~~

NOTICE SENT
03.01.13
L.P.G.
D./H.+C.D.
M.E.M.

12-993-H

RAMI M. AWAD,
Plaintiff

vs.

(LAT)

CIVIL SERVICE COMMISSION and
HUMAN RESOURCE DIVISION,
Defendants

Memorandum of Decision and Order on
Plaintiff's Motion for Judgment on the Pleadings

The plaintiff, Rami M. Awad, brought this action for judicial review under G. L. c. 30A § 14, of the defendant Civil Service Commission's decision not to require the defendant Human Resources Division ("HRD") to place Mr. Awad's name on the hiring list for the Boston Police Department. Before the court are the parties' cross-motions for judgment on the pleadings.

As summarized in the administrative record, the facts are as follows: On June 28, 2008, Mr. Awad, a life-long resident of the City of Boston, took and passed an open civil service competitive exam for municipal police officer, receiving a score of 97, and was thus placed on the eligible list established by HRD, effective November 1, 2008.

On April 25, 2009, HRD held another open competitive exam, a combined exam for municipal police officer and state trooper; applicants were allowed to register for both

positions, or to choose just one position. They were instructed to choose carefully because they would not be allowed to change their choice after the examination was held.

Mr. Awad registered on-line to take the 2009 examination, intending to select both the police officer and state trooper exam, but mistakenly clicked the wrong link, thus registering only for the state trooper exam.

Within several days, Mr. Awad telephoned the HRD Civil Service Unit and spoke with an employee, whom, he said, instructed him to advise his exam proctor of the problem when he arrived at the test site.[1] Mr. Awad did so, and the proctor took his name and said he would "take care" of the mistake. He did not.

On or about February 16, 2010, Mr. Awad received notice from HRD that he had passed "Examination No. 8373 Open State Police Trooper," and informing him of his score of 97. The notice made no reference to the Police Officer exam, but Mr. Awad failed to discern its absence.

Eight months passed. In October, 2010, Mr. Awad logged on line and saw that his record did not show him on the eligible list for Police Officer after November 1, 2010. Mr. Awad then telephoned and wrote HRD requesting that his name be restored to the eligible lists, but on February 24, 2011, HRD wrote Mr. Awad, stating that review of the proctor's exam reports failed to show any record of his claim, and therefore denied his request.

Mr. Awad's score on the 2008 & 2009 exams placed him at around 300 on the police officer list. The Civil Service Commission noted that had Mr. Awad's "eligibility been extended through the expiration of the merged list, the parties agree that he would

[1] The Hearing Examiner characterizes the time as "within a day or two;" Mr. Awad, in his letter to Assistant Attorney Quinan, which this court treats as a motion for judgment on the pleadings, says it was "the next morning." The difference, if any, is not material.

have been reached for consideration by the B[oston] P[olice] D[epartment] just prior to the expiration of that merged list in November 2010." Mr. Awad took the April 2011 exam, again scoring 97, but this time placing about 500 on the list, making it "not probable, that his name will be reached by the BPD within the two year life on that list."

Standard of Review

G. L. c. 30A, § 14 grants any person or entity aggrieved by a decision of any agency in an adjudicatory proceeding the right to appeal that decision to the Superior Court. The court does not try the matter anew, but essentially exercises the function of an appellate court. Unless irregularities in the procedure before the agency are alleged—and here, none are--this court's review of an agency decision is confined to the administrative record. G. L. c. 30A, § 14(5). Mr. Awad, as the appealing party, bears the burden of demonstrating the decision's invalidity. *Fisch* v. *Board of Registration in Med.*, 437 Mass. 128, 131 (2002); *Merisme* v. *Board of Appeals on Motor Vehicle Liab. Policies & Bonds*, 27 Mass. App. Ct. 470, 474 (1989).

This court may reverse or modify the agency decision only "if it determines that the substantial rights of any party may have been prejudiced" because the decision is "unsupported by substantial evidence," or is "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law." G. L. c. 30A, § 14(7)(e). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Lycurgus* v. *Director of Div. of Employment Sec.*, 391 Mass. 623, 627-628 (1984) (citations omitted). See G. L. c. 30A, § 1(6). "When determining whether an agency decision is supported by substantial evidence, the standard of review is 'highly

deferential' to the agency." *Connolly* v. *Suffolk County Sheriff's Dep't.*, 62 Mass. App. Ct. 187, 193 (2004), citing *Hotchkiss* v. *State Racing Comm'n.*, 45 Mass. App. Ct. 684, 695 (1998).

Discussion

The Hearing Examiner characterizes the material facts set forth in his decision, and essentially recapitulated above, as "undisputed." Nothing in the Administrative Record or presented to this court during oral argument casts doubt on that characterization. Rather, Mr. Awad quarrels with the conclusions the Commission draws from the facts.

It is true that from the facts recited above, the Civil Service Commission would have been within its discretion to draw conclusions much more favorable to Mr. Awad. It might have conceived this case as one in which an applicant, acting in good faith, made an inadvertent mistake, immediately moved to correct it, and was repeatedly thwarted by bureaucratic ineptitude, first by the unknown HRD employee who initially spoke with him by phone, and then by the unknown proctor, in whom he reasonably placed his trust. HRD's apparent inability to respond to Mr. Awad's initial requests could be seen as shifting the responsibility for any further delay from Mr. Awad to the agency. That, however, is not the view adopted by the Commission.

The Commission found that despite Mr. Awad's "diligence in recognizing his initial error," he was "less prudent in the degree of care and attention he took thereafter. In its view, "Mr. Awad essentially placed his career aspirations in the hands of an unknown HRD examination proctor, without taking any steps to document his actions or follow-up." He failed to draw the obvious conclusion from his February 2010 notice of

exam results, and did nothing for the following eight months. The Commission was also critical that "even then he did not put anything in writing until February 2011," and although HRD denied his claim on February 24, 2011, he delayed filing an appeal with the Commission until September, 2011.

The Commission considered Mr. Awad's appeal pursuant to its discretionary authority to grant equitable relief to one "prejudiced through no fault of his own."[2] "Fault," in the Commission's interpretation, is not confined to "willful or knowing error," but includes negligence or inadvertent mistake. "An agency's interpretation of its own regulation and statutory mandate will be disturbed only if the interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious." *Box Pond Association* v. *Energy Facilities Siting Board,* 435 Mass. 408, 416 (2001) (internal quotation marks omitted) and cases cited. Based on its interpretation of "fault," the Commission concluded that Mr. Awad was not without some responsibility for his own plight, that HRD had simply applied the rules and instructions it had issued to test applicants, that he had not moved with sufficient diligence to pursue his appeal, and that equitable relief was "not appropriate to advantage one applicant who has been wholly or substantially responsible for his plight, over the literally thousands of other totally innocent applicants who also took and passed these tests" by granting relief that would change the order of names on the current November 2011 eligible list.

---

[2] Chapter 310 of the Acts of 1993 provides that

> If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.

This court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, § 14(7). A court may not displace an agency's choice between two fairly conflicting views, even though the court justifiably would have made a different choice if faced with the same set of facts *de novo*. *Fisch* v. *Board of Registration in Medicine*, 437 Mass. at 138; *Lisbon* v. *Contributory Retirement Appeal Bd.*, 41 Mass. App. Ct. 246, 257 (1996). Under the substantial evidence test, an agency's conclusion will fail judicial scrutiny only if the evidence points to no appreciable probability of the conclusion or points to an overwhelming probability of the contrary. *Cobble* v. *Commissioner of the Dept. of Soc. Serv.*, 430 Mass. 385, 390-391 (1999).

This court cannot say the Commission committed error of law in its broad construction of "fault." Neither can it say that the evidence points to no appreciable probability of the Commission's conclusion that, despite the alacrity with which Mr. Awad initially attempted to correct his error and despite whatever missteps HRD itself made throughout the process, the plaintiff bore some responsibility for his own plight, and was thus not entitled to discretionary relief. See *Goldberg* v. *Board of Health of Granby*, 444 Mass. 627, 638 (2005) (the court may not displace the agency's decision simply because it is possible to disagree with it, but only where a contrary decision is "necessary," that is to say, positively required by the evidence or the law or both). See also *Wheat* v. *United States*, 486 U.S. 153, 164 (1988) (the essence of discretionary authority is the power to choose within a range of acceptable options, whether or not

courts might reach differing or even opposite conclusions on the same record). It follows that the Commission's decision must be affirmed.

Order

The Plaintiff Rami M. Awad's Motion for Judgment on the Pleadings is **denied**; the Civil Service Commission's Cross-Motion for Judgment on the Pleadings is allowed, and its decision of January 26, 2012 is hereby **affirmed**.

Robert C. Cosgrove
Justice of the Superior Court

February 28, 2013