

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

ERNEST BELL,
Appellant

v.

E-21-007

CITY OF BROCKTON,
Respondent

Appearance for Appellant:

Kenneth H. Anderson, Esq.
Anderson, Goldman, Tobin & Pasciucco
50 Redfield Street, Suite 201
Boston, MA 02122

Appearance for Respondent:

Aileen C. Bartlett, Esq.
Assistant City Solicitor
Law Department
Brockton City Hall
45 School Street
Brockton, MA 02301

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION

1. On January 4, 2021, the Appellant, Ernest S. Bell (Appellant), a police officer in the City of Brockton (City)’s Police Department (BPD), filed a non-bypass equity appeal with the Civil Service Commission (Commission), asking that his name be placed at the top of the current eligible list for police sergeant in Brockton.
2. On March 9, 2021, I held a remote pre-hearing conference via Webex which was attended by the Appellant, counsel for the Appellant, counsel for the City and the City’s Police Chief.
3. As part of the pre-hearing conference, the parties stipulated to the following:
 - A. In July 1997, the Appellant was appointed as a Brockton Police Officer.
 - B. On September 15, 2018, the Appellant took and passed the promotional examination for police sergeant.

- C. In March 2019, the Appellant's name appeared on the eligible list established from the above-referenced examination.
 - D. On or about May/June 2020, the Appellant, due to promotions of other candidates, was ranked 1st on the eligible list.
 - E. Since on or about June 30, 2019, a Brockton police sergeant (Sgt. A) has been out on injured leave pursuant to G.L. c. 41, § 111F.
 - F. The eligible list expired prior to any additional promotional appointments to sergeant.
 - G. Based on a new examination, a new eligible list for BPD police sergeant was established on December 15, 2020.
 - H. The Appellant is ranked 8th on the new eligible list.
4. According to the Appellant, the Police Chief, in or around June 2020, encouraged him (the Appellant) to reach out to Sgt. A to inquire about that sergeant's plans for retirement. According to the Appellant, Sgt. A told the Appellant that he did indeed plan on retiring.
 5. According to the Appellant, on December 15, 2020, the same day that the new eligible list was established, Sgt. A filed his application for disability retirement.
 6. Both parties agreed that Sgt. A's disability retirement application was still pending at the time of the pre-hearing conference.
 7. The Appellant argued that the BPD, in violation of the collective bargaining agreement, failed to fill the vacant sergeant position, after the BPD was aware that Sgt. A would not be returning to that position. Further, the Appellant argued that the sergeant's decision to wait until December 15, 2020 to file his application for disability retirement was not coincidental. Thus, he argued that he has been aggrieved, and asked that he be placed at the top of next eligible list, effectively arguing that he should be guaranteed consideration for the vacancy likely to become available if and when the sergeant's retirement application is approved.
 8. I discussed with counsel for both parties the well-established practice inherent in the civil service law regarding candidates "dying on the vine" and that the Commission, except in the rarest circumstances, does not intervene in such matters.
 9. I also discussed with counsel that, if it was determined (e.g. – through a grievance process) that the CBA required that this sergeant position be filled prior to the expiration of the prior eligible list; and/or the timing of Sgt. A's application for disability retirement was not coincidental, the Commission may consider a joint request for relief allowing the Appellant to be considered for the next sergeant vacancy.

10. The parties agreed to provide me with an update within thirty (30) days regarding whether a joint request for relief would be filed with the Commission for consideration.
11. On March 23, 2021, the City notified the Commission, that, upon further review, it would not be submitting a joint request for relief to the Commission to resolve this matter.
12. On April 14, 2021, counsel for the Appellant requested a “hearing date”.
13. A preliminary issue here was whether, even when viewing the facts most favorable to the Appellant, relief by the Commission is warranted. As of that point, there had been no allegation that the Appointing Authority engaged in some type of subterfuge to prevent the Appellant from being promoted, such as the Commission found in Cutillo and Kelley v. City of Malden. <https://www.mass.gov/doc/cutillo-and-kelley-v-city-of-malden-1710-affirmed-by-superior-court-on-1711/download>
14. Based solely on the arguments raised at that point, it appeared that, *when viewing the facts most favorable to the Appellant*, his non-promotion from the prior eligible list may have, arguably, been caused by the actions of a colleague who may have delayed his retirement to prevent the Appellant from being promoted.
15. As there was a question of whether, even when viewing the facts most favorable to the Appellant, as they had been presented to the Commission at that point, the Appellant would be entitled to any relief, I provided the City with thirty days to submit a Motion for Summary Decision and the Appellant with thirty days thereafter to file a reply.
16. Both parties filed timely submissions.

Summary of Parties’ Arguments in Submitted Briefs

The City’s brief provided more detailed and documented information regarding applicable language in a Memorandum of Agreement (MOA) amending the CBA and the timing of Sgt. A’s retirement as follows. The MOA states in relevant part that:

“Whenever an employee is incapacitated for duty ... [in accordance with G.L. c. 41, § 111F], he shall be granted leave without loss of pay for such period of absence, but not exceeding one (1) year.

The one (1) year cap shall not apply in individual cases where the employee involved is acting in good faith and in timely fashion either in filing and pursuing an application for retirement or in complying with a recommended rehabilitation program which may include surgical procedures.”

In regard to the timing of Sgt. A’s disability and retirement application, the City provided documentation showing the following:

- A. On June 30, 2019, Sgt. A sustained a work-related injury and was placed on injured leave pursuant to G.L. c. 41, § 111F.
- B. On December 30, 2019, Sgt. A underwent [REDACTED].
- C. On June 29, 2020, the City forwarded correspondence to Sgt. A notifying him of the City's intent to remove him from injured leave unless he filed for accidental disability retirement (ADR).
- D. In July 2020, Sgt. A attempted to file for ADR, but his treating physician would not sign off on the application, because Sgt. A [REDACTED].
- E. On December 14, 2020, after receiving the required sign-off from his treating physician one week earlier, Sgt. A filed a completed an application with the Brockton Retirement Board.

[The new eligible list was established on December 15, 2020.]

- F. Sgt. A's ADR application was subsequently approved and, at the time the City's brief was submitted, it was anticipated that Sgt. A would be retired effective May 14, 2021.

The City also provided excerpts from City ordinances showing that the Police Department's complement of police sergeants is limited to twenty-five (25).

Based on the above, the City argues that: the Appellant's name "died on the vine" of an eligible list that expired prior to a sergeant vacancy becoming available; the City's actions were guided by the applicable provisions of the CBA; there is no evidence to show that Sgt. A's retirement was timed to harm the Appellant; and, even if it was, there is no evidence of any subterfuge by the City.

The Appellant's brief argues that Sgt. A, contrary to the provisions of the collective bargaining agreement, should not have been permitted to be on injured leave for more than one year because Sgt. A. was not "acting in good faith" to bring his injured leave to closure, either by returning to duty or retiring. According to the Appellant, the City should have "forced" a resolution by at least requiring Sgt. A's return to light duty.

The Appellant's brief also states that three members of the Police Department's command staff "approached Detective Bell and suggested he pay Sgt. A money to entice him to retire. The Brockton Police Department's policy of paying officers who were blocking other officers' promotions by delaying their retirement was well-known and well-established."

Finally, the Appellant argues that the Mayor's Office and the City Council "have moved quickly in making promotions and calling for promotional lists when those next in line are 'friends of City Hall', as opposed to the Appellant, who, according to him, has "no particular connection to City Hall."

Legal Standard for Summary Disposition

An appeal may be disposed of on summary disposition when, “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005).

Analysis

The undisputed fact here is that, at no time while the Appellant’s name was ranked first on the eligible list for police sergeant, was there a permanent, full-time vacancy for police sergeant, nor was such position filled on a temporary or acting basis. Rather, according to the Appellant there *may* have been a vacancy before the eligible list expired *if* the City and Sgt. A had acted with the “good faith” expediency that the applicable collective bargaining agreement requires. First, the Appellant’s argument, even if true, is far too speculative to show that he was an aggrieved person who was harmed through no fault of his own. Second, the Appellant’s argument appears to more squarely involve whether there was a violation of the *collective bargaining agreement*, as opposed to civil service law.

Still there remains the troubling allegations raised in the Appellant’s brief that: a) there has been a “well-known and well-established policy” in the Brockton Police Department to pay officers out on injured leave to retire in order to create promotional opportunities prior to the expiration of an eligible list; and b) the Appellant was encouraged by three members of the command staff to engage in such behavior here.

While the Appellant does not allege that Sgt. A sought such a “payment” from him or anyone else who would stand to potentially benefit from the timing of Sgt. A’s retirement, the *allegation* is serious enough and sufficiently related to whether there have been violations of basic merit principles to warrant further inquiry.

Conclusion

For all of the above reasons:

- 1) The Appellant’s appeal under G.L. c. 31, § 2(b) (Docket No. E-21-007) is hereby ***dismissed effective March 4, 2022.***
- 2) Pursuant to its authority under G.L. c. 31, §§ 2(a) and 72 (Docket No I-21-203), the Commission opens an inquiry regarding the allegations raised by the Appellant.
- 3) The City has ninety (90) days to investigate these allegations and report its findings to the Commission.
- 4) Based on the findings of the investigation, the Commission may, either on its own initiative, or at the request of the Appellant, revoke the dismissal of Docket No. E-21-007 on or before

March 4, 2022 and/or issue further orders regarding the investigation of the Appellant's allegations.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 4, 2021.

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:

Ken Anderson, Esq. (for Appellant)
Aileen Bartlett, Esq. (for Respondent)