COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
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JOHN CONROY,
Appellant

v. B2-21-094

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellants: Alan Shapiro, Esq.
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Commissioner: Christopher C. Bowman

DECISION ON CROSS-MOTIONS

On May 5, 2021, John Conroy (Appellant), a police lieutenant with the Boston Police Department (BPD), filed an examination appeal with the Civil Service Commission (Commission), contesting the decision of the state's Human Resources Division HRD) to not award him two points for the so-called 25-year preference.[1]

On June 15, 2021, I held a remote pre-hearing conference which was attended by the Appellant, his counsel and counsel for HRD.

[1] Three (3) other decisions addressing the same issue are being issued today: Young and Six Others v. HRD, CSC Case Nos. B2-21-179 through 185; MacKinnon v. HRD, CSC Case No. B2-21-123; and Silta v. HRD, CSC Case No. B2-21-117.

The issues raised here and in the other cases cited in the margin are: 1) Does the time period for calculating the so-called 25-year preference *begin* when the Appellant first became employed with the BPD as a Student Police Officer (as argued by the Appellant) or the later date of when the Appellant was first sworn in as a police officer (as argued by HRD); and 2) Should the time period for calculating the 25-year preference *end* on the date when the examination was initially scheduled to be held (as argued by HRD) or the later date when the examination was actually held (as argued by the Appellant).

In order for the Appellant to prevail, the Commission would need to decide *both* of the above-referenced questions in his favor. Both parties submitted cross motions for summary decision.

Based on the motions submitted by the parties, including multiple attachments, as well as the information provided at the pre-hearing conference, the following appears to be undisputed:

1. The Appellant entered BPD Police Academy 31-95 on June 28, 1995.
2. The Appellant was not sworn-in as a police officer until at least October 19, 1995.
3. HRD delegated to the BPD the authority to administer a promotional examination for police captain.
4. BPD administered a weighted, graded examination for the position of police captain.
5. The written examination was scheduled to be administered June 27, 2020.
6. The written examination was postponed to August 29, 2020 due to the Covid-19 pandemic.
7. HRD opened the August 29th examination up to others who had not signed up for the June 27th examination, but any new applicants were still required to have met the eligibility criteria to sit for the examination as of June 27th.
8. The Appellant sat for the August 29, 2020 written examination.

9. In order to receive employment experience credit, including the two-point, 25-year preference credit, the Appellant was required to complete and submit an Employment Verification Form (EVF) to HRD within seven days of the written examination (September 5, 2020).
10. The EVF states in part: "***Applicants who are claiming the 25-year promotional preference***: This Form will serve as the primary source of verification and computation of an applicant's eligibility for this preference, and the exam date of **June 27. 2020** will be the computation cut-off date." (emphasis in original)
11. The Appellant timely submitted the EVF form to HRD seeking the two-point, 25-year preference. When asked to "List Date of Original Permanent Appointment", the Appellant wrote: June 28, 1995 … Police Officer." (emphasis added)
12. HRD denied the Appellant's request for the two-point preference. After HRD denied his appeal, the Appellant filed a timely appeal with the Commission.

Parties' Arguments

As referenced above, in order for the Appellant to prevail in his appeal before the Commission, he must show that: 1) HRD must use the August 29, 2020 date to determine eligibility for the two-point, 25-year preference; ***and*** 2) the start date for this calculation should be the date that the Appellant entered the Police Academy, as opposed to when he was sworn in as police officer.

The Appellant argues that, for purposes of the two-point preference under Section 59, his appointment date is June 28, 1995, the date he entered the Police Academy, arguing that since he was "employed" with the BPD as of that date, he was a "member of a regular police force" as required by Section 59. The Appellant argues that his June 28, 1995 civil service seniority date

further demonstrates that this is the correct "begin" date to use to calculate the 25-year preference. He also cites various Commission and judicial decisions which he argues supports his argument.

With regard to the proper calculation of the "end" date, the Appellant argues that the date cannot be any sooner than when the examination was *actually* administered or graded, making the earliest possible "end" date August 29, 2020, the date that the examination was actually administered.

Combining both arguments, the Appellant argues that, based on a "begin" date of June 28, 1995 (the day he entered the Police Academy) and an "end" date of no earlier than August 29, 2020 (the date the recent promotional examination was actually administered), he has just over 25 years of service and should be granted the two-point preference.

Citing its longstanding practice in this regard, HRD argues that using the original date of the written examination to calculate the 25-year preference is neither arbitrary nor capricious. For example, HRD points to 2013, when, in the wake of the Boston Marathon Bombing, the 2013 police officer / trooper exam was originally scheduled for April 20, 2013, but it was postponed and ultimately administered on June 15, 2013. The original examination date of April 20, 2013 was utilized as the date for calculating employment / experience credit. Further, in 2019, the Fire Promotional Examinations scheduled for November 16 were postponed for the Worcester Fire Department, in the wake of the line-of-duty death of a colleague. The original date of the examination, November 16, was utilized as the date for all calculations for the Worcester Fire Department, even though the examination was postponed to January 11, 2020. HRD argues that the unforeseen COVID-19 pandemic in 2020, which caused the postponement

and re-scheduling of that examination, should not change eligibility requirements or cut-off dates for determining eligibility for preferences.

In regard to the appropriate calculation "start" date, HRD argues that, while he was enrolled in the Police Academy, and prior to him being sworn in as a police officer, the Appellant was a "student officer" specifically exempted from the civil service law pursuant to G.L. c. 41, § 96B. HRD cites Commission and judicial decisions which HRD argues support its position. Therefore, Conroy's start date should not commence until he was sworn in as a police officer.

Motion for Summary Decision Standard

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 or she 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. 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law- i.e., "viewing the evidence in the light most favorable to the non-moving party", the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring an evidentiary hearing. See e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). Accord Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass_App_Ct. 240, 249, (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635 36, (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406

Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss).

Applicable Civil Service Law and Rules

The two-point preference for veterans was established by HRD through the Personnel Administration Rules (PARs). Specifically, PAR.14(2) states:

> "In competitive examinations for promotion to any position in the classified official service, the administrator [HRD] shall add two points to the general average mark obtained by any veteran, as defined in M.G.L. c. 31, § 1, provid[ed] such veteran has first obtained a passing mark in said examination. A veteran who has obtained twenty-five years of service shall not receive an additional two points to the general average mark."

The last sentence of this section was not initially included in the PARs, but, rather, was added by HRD as a result of a dispute regarding whether a veteran with 25 years of service as an official service civil service employee should receive 2 or 4 points. In short, PAR.14(2) did not envision there being a requirement to do a calculation with a start and end date, and so I do not read anything into the PARs with respect to the instant dispute related to the appropriate start and end date regarding the 25-year preference.

Section 59 of G.L. c. 31 states in relevant part:

> "Notwithstanding the provisions of any law or rule to the contrary, a member of a regular police force or fire force who has served as such for twenty-five years and who passes an examination for promotional appointment in such force shall have preference in promotion equal to that provided to veterans under the civil service rules."

There is no dispute that, since the "civil service rules" (the PARs) provide for a two-point preference for veterans in promotional examinations, then "a *member of a regular police force or fire force who has served as such for twenty-five years* and who passes an examination for promotional appointment in such force" shall be granted two additional points above their general average test mark as part of their final promotional examination score. The questions

presented here, for the purposes of when an applicant becomes eligible for these additional two points, are:

1) When does an applicant first become "a member of a regular police force or fire force"; and
2) What is the appropriate cut-off or end date for calculating the 25-year period?

I address the second question first.

In short, neither the statute or the PARs provide for a specific start or end date for calculating the 25-year period in question. Thus, the first question for the Commission is whether legislative intent can nonetheless be ascertained from the words employed by the Legislature. A tribunal's "primary duty in interpreting a statute is 'to effectuate the intent of the Legislature in enacting it.'" Spencer v. Civil Serv. Comm'n, 479 Mass. 210, 216 (2018), quoting Campatelli v. Chief Justice of the Trial Court, 468 Mass. 455, 464 (2014). Although the Commission is not a court, I believe we also must nonetheless endeavor to "ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense." Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006).

Here, the relevant statutory text, read in context, and even an extrinsic authoritative source such as the Personnel Administration Rules, still does not tell us much more than that the Legislature intended that a sworn police officer, who has served on a regular police force in that capacity for at least 25 years, should be given a competitive edge over other candidates in the promotional selection process. But when exactly such an individual is to become eligible for the bonus two points remains a mystery. In theory, the statute could support various possibilities

ranging from eligibility being fixed as of the cutoff date for registering for the promotional examination up through a date when promotional decisions are being finalized. Even accounting for important administrability concerns, reasonable people could disagree as to whether the end point of the 25-year period should be fixed on one or another of various dates controlled by the Personnel Administrator (who, after all, has to ascertain the correct tenure dates of scores of promotional candidates and finalize placements on the ranked certification lists according to final examination scores). No other provision within G.L. c. 31 sheds direct light on this question.

After ascertaining that the relevant statutory language in G.L. c. 31, § 59 is "sufficiently ambiguous to support multiple, rational interpretations," as I have done here, I must now proceed to determine whether the implementing agency's interpretation may "be reconciled with the governing legislation." Goldberg v. Board of Health of Granby, 444 Mass. 627, 633 (2005). "The ultimate question is whether the policy embodied by the agency's interpretation is reasonable." Biogen IDEC MA, Inc. v. Treas. & Receiver Gen'l, 454 Mass. 174, 187 (2009), citing 1 R.J. Pierce, Jr., Administrative Law § 3.06, at 172-173 (4th ed. 2002). If it is, this Commission "should not supplant [HRD's] judgment." Kalu v. Bos. Ret. Bd., 90 Mass. App. Ct. 501, 504-05 (2016).[2] See also Franklin Off. Park Realty Corp. v. Comm'r of Dep't of Env't Prot., 466 Mass. 454, 459–60 (2013) ("we will disturb an agency's interpretation of its statutory mandate only if it is "patently wrong, unreasonable, arbitrary, whimsical, or capricious." (quoting *Arthur D. Little, Inc. v. Commissioner of Health & Hosps. of Cambridge*, 395 Mass. 535, 553 (1985)).

[2] Particularly in cases involving "interpretation of a complex statutory and regulatory framework," courts "give substantial deference to a reasonable interpretation of a statute by the administrative agency charged with its administration enforcement." Dorrian v. LVNV Funding, LLC, 479 Mass. 265, 271, 273-74 (2018).

At bottom, then, the question for the Commission is whether HRD's calculation method is arbitrary or capricious. As referenced above, for the end date, HRD relies on the original date of the promotional examination, even when the examination date is postponed, as it was here due to COVID-19. Setting aside, for the moment, the issue of an examination date being postponed, there is nothing arbitrary or capricious about HRD's decision to use the "date of examination" as an end date. That date is consistent, predictable and, importantly, is known to promotional exam applicants prior to taking the promotional examination. If, for example, HRD were to use the date when the applicant "passes the examination", applicants would not know beforehand if they qualified for the two-point preference and the date would be highly susceptible to administrative challenges related to when the scores are calculated (by a private vendor in many instances) and released (by HRD or a delegated authority). See Clarke v. Human Resources Division and Boston Police Department, 29 MCSR 1 (2016) citing DeFrancesco v. Human Resources Division, 21 MCSR 662 (2008); and Clark v. Department of Employment & Training, 7 MCSR 261 (1994).

Using the "date of examination" also appears to be consistent with other sections of the civil service law. For example, for determining the residency preference, Section 58 of Chapter 31 provides a preference if the applicant " … has resided in a city or town for one year immediately prior to the date of examination for original appointment to the police force or fire force of said city or town …". (emphasis added) Similarly, Section 58A of Chapter 31 uses the "date of the entrance examination" to calculate whether the applicant has exceeded the maximum age requirement for those cities and towns that have adopted that section.

That brings us to the issue of whether it is arbitrary or capricious to use the original examination date for the end date calculation when the examination is postponed. Importantly,

the promotional examination here was not canceled, but, rather, postponed due to unforeseen circumstances. Further, although additional applicants were allowed to participate, any eligibility requirements to take the examination remained tied to the original examination date. Using a new "examination date" when an examination is postponed could have global adverse consequences. For example, in the case of the Boston Marathon Bombing, if HRD had relied on the later postponement date, instead of the original date of the examination, certain applicants who were eligible to sit for the examination would have then been deemed ineligible based on the maximum age restriction in Section 58A in which HRD considers "date of examination" to be the original, earlier date on which the examination was first scheduled to be held.

In Young et al., the Appellants argued, in part, that if you look to the plain language of the statute, HRD should calculate the end date as of the date that the applicant "passes [the] examination". I don't believe the Legislature ever intended for those words to be used as part of calculating an end date for measuring the 25-year period. Rather, that language was simply meant to clarify that applicants who do not receive a passing score—without the two-point preference—cannot then obtain a passing grade through the two-point preference. Put another way, if the passing score of a promotional examination is 70, an applicant who receives a failing score of 69 cannot be awarded the two additional points to obtain a passing score of 71.

Given the broad discretion that HRD has in administering the civil service law, and because the end date used here is rational, consistently applied and promotes predictability, as opposed to being arbitrary or capricious, there is no justification for the Commission to intervene and overturn how HRD has applied the civil service law and rules as they relate to the end date calculation. I have also reviewed all of the prior judicial and Commission decisions cited by the parties and I find nothing in those decisions that is inconsistent with this conclusion.

As referenced above, in order for the Appellant to prevail here, he would need to show that HRD erred in regard to the proper start date *and* end date. Since I have concluded that HRD did not err regarding the proper end date, I need not conduct the same analysis regarding the proper start date. However, even if HRD's determination that the original exam date had to be used as the *end*-point of any 25-year look-back calculation were not worthy of substantial deference (but rather the actual exam date of 8/29/21 should serve as the cutoff date instead), Conroy would still face a major obstacle in proving entitlement to the 25-year longevity bonus under the implied teaching of the Appeals Court in Ralph v. Civ. Serv. Comm'n & another, 100 Mass.App.Ct. 199 (2021) as it relates to an appropriate *start* date (concluding that the phrase "member of a regular police force" refers to the person's status as a regular police officer, rather than, for example, a reserve, intermittent, or call officer.) Here, it is undisputed that Conroywas not sworn in to serve as a regular police officer until, at the earliest, October 19, 1995. Until that time, Conroy served as a *student* police officer, a position in which the incumbent is not permitted to perform all of the duties of a regular police officer and is specifically exempt from the civil service law.[3] Thus, he was not a "member of a regular police force" until, at the earliest, October 19, 1995, making him ineligible for the 25-year preference based on that start date alone.

Conclusion

HRD's Motion for Summary Decision is allowed and the Appellant's appeal is hereby ***dismissed***.

[3] It does appear, however, that, until recently, HRD instructions to Appointing Authorities on the Employment Verification Form have been ambiguous regarding the proper date to record for this purpose. Recently clarified instructions should be reinforced to appointing authorities on a going-forward basis to ensure statewide consistency in the awarding of this two-point preference.

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 February 24, 2022.

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:
Alan Shapiro, Esq. (for Appellant)
Melissa Thomson, Esq. (for Respondent)