

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT DEPT.
CIVIL ACTION NO. 10-0420

JOHN P. KELLEY
Plaintiff

vs.

CIVIL SERVICE COMMISSION
Defendant

**MEMORANDUM OF DECISION AND ORDER
ON THE PARTIES' CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS**

This is an action by plaintiff John Kelley against the defendant Civil Service Commission, challenging the defendant's decision to uphold the Commonwealth's Human Resources Division (HRD) in its denial of a certification to permit his promotion to the rank of sergeant. The matter is before this court on the parties' Cross-Motions for Judgment on the Pleadings. For the following reasons, the plaintiff's Motion is **DENIED** and the defendant's Motion is **ALLOWED**.

BACKGROUND

The plaintiff is an officer of the Malden Police Department. On October 21, 2006, Kelley passed the examination to qualify for the rank of Sergeant and HRD consequently published his name on an "eligible list" issued on March 30, 2007. These lists contain the names of officers who may be certified by HRD to be appointed to a particular police rank. They are generally effective for two years, although they can be effective for longer under certain conditions set forth by statute.

In January 2009, a Malden police captain retired, prompting Malden Police Chief Coye to submit a requisition to HRD for certifications to fill the vacancy for the position of captain, as

well as the positions of lieutenant and sergeant that would open up after the filling of the vacancy. HRD duly issued a certification on which Kelley's name appeared second. Chief Coye did not make the appointment within the required three weeks and did not request an extension. Consequently the certification expired pursuant to Personnel Administrative Rule .08 on February 17, 2009. A Malden police sergeant retired on March 29, 2009, creating a second vacancy in that rank.

The 2007 eligibility list from which certified candidates could be drawn was set to expire on March 31, 2009, and be replaced by a new list based on 2008 test scores. On March 27, 2009, plaintiffs in a different action, *Pratt v. Diel*, Henry, J. 4/15/2009, Suffolk, Superior Court No: 2009-1254, sued to enjoin HRD from issuing this new 2009 eligible list, contending it was inappropriate to rank the candidates in "bands" instead of whole numbers. On April 6th, having failed to appoint a new police sergeant pursuant to HRD's January certification, the city submitted a new request for certification for both open sergeant positions.

HRD did not issue the certifications alleging uncertainties stemming from *Pratt*. Ultimately, this court (Henry, J.), determined that banding was inappropriate and granted an injunction: HRD did not officially promulgate a new list until after HRD had revised it to comport with that court ruling. Despite lacking a valid certification, the city purported to promote Kelley and another officer, Michael Cutillo, to the rank of sergeant on April 29th.

Kelley and Cutillo ultimately sought relief with the Civil Service Commission to enforce their promotions to the rank of Sergeant. On January 7, 2010, the Commission granted Cutillo's request but denied Kelley's.¹ Kelley now seeks review of the Commission's decision.

¹ The Commission held that the only reason Cutillo had not been certified earlier was because of the Chief Coye's personal bias against him.

DISCUSSION

The proper method for an appeal of the Commission's decision is a claim for judicial review pursuant to G.L. c. 31, § 44. A claim for judicial review under this statute is governed, insofar as applicable, by the provisions of G.L. c. 30A, § 14. *Id.* Claims under G.L. c. 31, § 44 are resolved through a motion for judgment on the pleadings, Mass. R. Civ. P. 12(c). See Massachusetts Superior Court Standing Order 1-96, § 4. This court's review is confined to the record, *Id.* § 5, and this court can set aside the decision of the Commission, *inter alia*, if the decision is based upon an error of law or is arbitrary and capricious. See G.L. c. 30A, § 14(7).

"Persons on an eligible list shall be eligible for certification from such list for such period as the administrator shall determine, but in any event not to exceed two years, unless one of the following exceptions applies . . . (3) no new list is established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position" G.L. c. 31, § 25. The plaintiff contends that this provision automatically extended the life of the 2007 eligibility list by operation of law. Since the law is framed in an imperative manner, providing that after receiving a requisition, HRD "shall certify from the eligible list sufficient names of persons for consideration . . . ," G.L. c. 31, § 6, the plaintiff argues it did not afford HRD any discretion to fail to certify names from the 2007 eligible list once the City of Malden submitted a requisition. The plaintiff also contends that the Commission was arbitrary and capricious in failing to grant relief to him when it granted relief to Cutillo.

The plaintiff, however, must surmount a high hurdle in arguing that a correct interpretation of the statute leaves HRD with absolutely no room for independent judgment in the timing of when it should certify candidates from an eligible list. The statute itself provides that those on eligible lists are deemed to be eligible for certification "for such period *as the*

administrator shall determine” (emphasis added). This scheme grants HRD “wide discretion in administering the lists.” *Davis v. Personnel Administrator of the Dept. of Pers. Admin.*, 27 Mass. App. Ct. 1113, 1115 (1989).

This wide discretion is mirrored by “the limited nature of the rights conferred on persons who pass” civil service examinations, including the fact that individuals do not have a vested right in their particular positions on the list. *Callanan v. Personnel Administrator for the Commonwealth*, 400 Mass. 597, 601 (1987). The narrow interpretation of applicants’ rights is a product of a statutory scheme that leaves important issues of timing almost completely out of their control: “there can be no expectation that certain positions will become available during the period of a particular list. Positions might become available immediately before the establishment of a new list, or immediately after the expiration of an old one.” *Davis*, 27 Mass. App. Ct. at 1115; see *Kern v. Personnel Administrator of Dept. of Pers. Admin.*, 28 Mass. App. Ct. 938, 940 (1990) (agency had discretion to refuse certification under G.L. c. 31, § 25 because the promotion process would not have been completed before the expiration of the existing list, rendering them void).

In light of the case law demonstrating that HRD often may exercise wide discretion in carrying out its statutory duties, this court finds that the Commission’s determination that HRD may exercise discretion was not based on an error of law. The plaintiff cites no case authority to the contrary.

The question remains whether HRD’s exercise of that discretion was reasonable or arbitrary and capricious. See G.L. c. 30A, § 14(7). Here, HRD initially declined to issue a certification because it was awaiting a ruling from this court regarding a motion for a preliminary injunction against issuing the 2009 list; had that injunction been denied, any

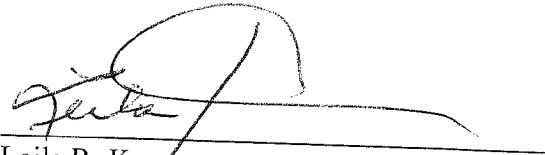
certification would have been futile, since the 2009 would have presumably been put into effect immediately. See G.L. c. 31, § 25; *Kern*, 28 Mass. App. Ct. at 940.

It is not entirely clear why HRD did not resume certification after the injunction was granted and instead opted to delay all certifications pending the establishment of a new eligible list. Regardless, it could have reasonably concluded that certification was improper while the legal status of the 2007 eligible list was unclear and with the 2009 list set to be imminently released. This is not a case where the agency inexplicably neglected its statutory responsibilities. Indeed, its failure to establish the 2009 list in the first place stemmed from a good faith desire to avoid unnecessarily complicating matters for this court. It is notable that had HRD established the new list before the granting of the preliminary injunction, then the automatic extension provision of G.L. c. 31, § 25 would not have come into effect and the plaintiff would have had no case at all. HRD's decision not to issue new certifications under the old 2007 list pending the establishment of the 2009 list was not arbitrary or capricious.

Nor was the Commission arbitrary or capricious in denying relief to the plaintiff while granting it to Cutillo. The Commission found that the Chief Coye did not fill the open police sergeant position in February, 2009, even after HRD had issued a certification, due to personal animus against Cutillo. At that point, there was only one open position, not two. The Commission rightly reasoned that, had Coye acted appropriately, only Cutillo, who was first on the eligibility list, would have been promoted. A second position, for which the plaintiff might have been selected, did not open up until *after* this first certification had already expired. As such, the plaintiff was not prejudiced by Coye's actions whereas Cutillo was.

ORDER

For the reasons stated above, the plaintiff's Motion is **DENIED** and the defendant's Motion is **ALLOWED**. Judgment will enter for the defendant.

A handwritten signature in black ink, appearing to read 'Leila R. Kerr', is written over a horizontal line. The signature is stylized and cursive.

Leila R. Kerr
Justice of the Superior Court

Dated: January 7, 2011