

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

WALTER DALEY,
Appellant

v.

E-17-193

TOWN OF WILMINGTON,
Respondent

Appearance for Appellant:

Pro se

Appearance for Respondent:

Nicholas J. Dominello, Esq.
Deutsch Williams, P.C.
One Design Center, suite 600
Boston, MA 02110

Appearance for HRD:

Patrick Butler, Esq.
Legal Department
Human Resources Division
One Ashburton Place, 2d Floor
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman

DECISION ON RESPONDENT’S MOTION TO DISMISS

Walter Daley (Mr. Daley) filed the instant appeal at the Civil Service Commission (Commission) on September 28, 2017 for equitable relief seeking an order permitting the Appellant to take an upcoming exam for the position of Deputy Fire Chief. The Commission conducted a prehearing conference in this case on October 23, 2017 at the Lowell Housing Authority Mercier Center at which the Appellant appeared *pro se* and the Respondent was represented by counsel.¹ The state’s Human Resources Division (HRD) requested, and was

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

allowed to participate in the prehearing conference by phone. At the prehearing conference, the Respondent was granted until November 6, 2017 to file a Motion to Dismiss (Motion), and the deadline for the Appellant and HRD to respond to the Motion was November 20. In addition, a full hearing for the appeal was scheduled for February 12, 2017 in the event that any dispositive motions were filed and denied. On October 24, I sent an email message to the parties confirming the deadlines for filing the Motion and responses thereto, as well as the February 12 full hearing date.

On October 31, 2017, the Respondent filed a Motion to Dismiss. On November 2, 2017, HRD sent an email message to the parties and the Commission simply stating that it “joins in the motion filed by the Town” On November 30, 2017, I sent an email message to the parties indicating that the Commission had not received Appellant’s response to the Motion, nor had I received a request from the Appellant to extend the time to file a response to the Motion, and that I would rule on the Motion. As of today, I have not received the Appellant’s response to the Motion. For the reasons stated herein, the Motion is granted.

Based on the information presented at the prehearing conference and in the Motion and HRD’s support thereof, the following appears to be undisputed, unless otherwise noted:

1. On September 3, 2015, the Commission allowed the Appellant’s 2014 promotional bypass appeal and ordered, pursuant to the powers of relief in St. 1993, Chapter 310, placed the Appellant’s name at the top of future certifications for promotion to the position of Fire Lieutenant in the Wilmington Fire Department (WFD). Daley v. Town of Wilmington, G2-14-161.
2. From September 3, 2015 to date, the Respondent has not requested a certification for the position of fire Lieutenant in the WFD.
3. The Appellant has not served in the position of Fire Lieutenant or Acting Lieutenant in the WFD.
4. The Respondent has scheduled a promotional examination for the position of Deputy Fire Chief to take place on December 6, 2017.
5. The Appellant applied to take the December 6, 2017 Deputy Fire Chief promotional exam and the Respondent denied his request.
6. On September 28, the Appellant filed the instant appeal asking HRD to order the Respondent to allow the Appellant to take the then-upcoming exam for Deputy Chief.

Relevant Law

The United States Supreme Court has held that in order to survive a motion to dismiss, the non-moving party must plead only enough facts to state a claim to relief that is plausible on its face. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007). Thus, the non-moving party must plead enough facts to raise a reasonable expectation that discovery will reveal evidence in support of the allegations. *See id.* at 545. Similarly, the Massachusetts Supreme Judicial Court has held that an adjudicator cannot grant a motion to dismiss if the non-moving

party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). The Standard Adjudicatory Rules of Practice and Procedure (hereinafter "Rules") govern administrative adjudication. 801 CMR 1.01, *et seq.* However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

G.L. c. 31, s. 59 provides, in pertinent part,

... An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force ... provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open

(Id.)

In Weinburgh v. Civil Service Comm'n, 72 Mass.App.Ct. 535, *rev. den.*, 452 Mass. 1110 (2008), the Court specifically addressed this portion of G.L. c. 31, s. 59. It determined that the Superior Court judge,

“ ... correctly concluded that G.L. c. 31, s. 59, requires that an employee: (1) be on the promotion list (and, thus, certified) for the immediate lower position one year prior to taking the exam for the higher position; and (2) actually serve in the force for one year after certification, but not necessarily in that lower position. ...”

(Id.)(emphasis added)

Parties' Arguments

The Respondent argues that the Appellant is not eligible to take the Deputy Chief promotional exam. Specifically, the Respondent asserts that the Appellant “ ... is not in the next lower title, Fire Lieutenant ...” and he “is not certified for the lower title of Fire Lieutenant and so he has not served in the force for at least one year since his name was first certified.” (Motion) This two (2)-pronged analysis, the Respondent avers, is the result of the Appeals Court's decision in Weinburgh, *supra*, and subsequent Commission decisions. In addition, the Respondent argues that it has not even scheduled a Lieutenant exam for which the Appellant could sit. As a result, it states, the Appellant is “merely eligible for certification for the title of Fire Lieutenant. ...” (Id.)

At the prehearing conference in this appeal, the Appellant argued that he was bypassed in 2014 for promotion to Lieutenant and the certification on which his name appeared expired. The Appellant adds that the Commission granted this prior bypass appeal but it has been for naught because the Respondent has not scheduled any additional Lieutenant exams, although it has issued a reading list for a Lieutenant exam. However, the Appellant states that he does not have to take the next Lieutenant exam when it is scheduled because the Commission ruled that his name would be put at the top of the next Lieutenant list. Given these circumstances, the

Appellant avers, he should be allowed to take the Deputy Chief exam. In addition, the Appellant asserts that a Lieutenant in the WFD is out on extended injury leave and the Respondent should provisionally appoint the Appellant to that position so he can acquire experience in that title.

Analysis

The Appellant has failed to plead sufficient facts to state a claim to relief that is plausible on its face and upon which relief can be granted. As a result of appellate case law interpreting the pertinent portion of G.L. c. 31, s. 59, a two (2)-part test is applied to determine who may take a specific firefighter or police officer promotional exam. As the Respondent notes, and it is undisputed, the Appellant has not held the next-lower title of Lieutenant, as required by the first part of the test. However, the Respondent misinterprets the second part of the test when it asserts that the Appellant, “is not certified for the lower title of Fire Lieutenant and so he has not served in the force for at least one year since his name was first certified. ...” Rather, the second part of the test requires that the person who wants to be eligible for a promotional exam “actually serve in the force for one year after certification, but not necessarily in that lower position”. G.L. c. 31, s. 59. With respect to the Appellant’s assertion that the Respondent should provisionally promote him Lieutenant while a current Lieutenant is out on injured leave, provisional appointments must be made according to G.L. c. 31, s. 15.²

Conclusion

For the foregoing reasons, the Motion is allowed and the appeal of Mr. Daley, docketed E-17-193, is hereby ***dismissed***.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan (Ittleman-absent), Commissioners) on December 21, 2017.

² G.L. c. 31, s. 15 provides, in pertinent part,

“An appointing authority may, with the approval of the administrator ... , make a provisional promotion of a civil service employee in one title to the next higher title in the same departmental unit. Such provisional promotion may be made only if there is no suitable eligible list, or if the list contains the names of less than three persons eligible for and willing to accept employment, or if an eligible list has been established as a result of a competitive examination for an original appointment and the appointing authority requests that the position be filled by a departmental promotional examination or pursuant to section eight. No provisional promotion shall be continued after a certification by the administrator of the names of three persons eligible for and willing to accept promotion to such position.

If there is no such employee in the next lower title who is qualified for and willing to accept such a provisional promotion the administrator may authorize a provisional promotion of a permanent employee in the departmental unit without regard to title, upon submission to the administrator by the appointing authority of sound and sufficient reasons therefor, satisfactory to the administrator. If the administrator has approved the holding of a competitive promotional examination pursuant to section eleven, he may authorize the provisional promotion of a person who is eligible to take such examination, without regard to departmental unit. ...” (emphasis added)

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:

Walter Daley (Appellant)

Nicholas J. Dominello, Esq. (for Respondent)

Patrick Butler, Esq. (for HRD)

John Marra, Esq. (HRD)