

COMMONWEALTH OF MASSACHUSETTS

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

JOHN W. EARLEY,
Appellant

v.

E-20-120

BOSTON POLICE DEPARTMENT &
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

Pro Se
John W. Earley

Appearance for Human Resources Division:

Emily Sabo, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Appearance for Boston Police Department:

Kay H. Hodge, Esq.
Stoneman, Chandler & Miller LLP
99 High Street, Suite 1302
Boston, MA 02110

Commissioner:

Christopher C. Bowman

DECISION ON MOTIONS FOR SUMMARY DECISION

Procedural History

On August 4, 2020, the Appellant, John W. Earley (Appellant), a permanent, full-time lieutenant in the Boston Police Department (BPD), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (Commission), seeking an order from the Commission: 1) prohibiting the BPD from making any further permanent promotional appointments to Police Captain from the current eligible list; and 2) permitting such permanent appointments for this position only after a new eligible list has been established.

On August 25, 2020, I held a remote pre-hearing conference via Webex videoconference which was attended by the Appellant, counsel for the BPD and counsel for the state's Human Resources Division (HRD). Subsequent to the pre-hearing, the BPD and HRD filed motions for summary decision and the Appellant filed an opposition, which I have deemed to be a cross motion for summary decision.

Undisputed Facts

The following facts appear to be undisputed:

1. The Appellant is a permanent, full-time police lieutenant for the BPD.
2. On April 12, 2013, pursuant to G.L. c. 31, § 5(1), HRD and the BPD entered into a delegation agreement in which HRD delegated various functions to the BPD including: a) administering a Police Captain Assessment Center examination with the assistance of a consultant; and b) "establishment and maintenance of the eligible list for Police Captain for a minimum of two years ...".
3. In 2014, the BPD administered a Police Captain Assessment Center examination.
4. Though the Appellant participated in that examination, he chose not to complete all components of the examination and, thus, did not receive a passing score.
5. In March 2015, the BPD established an eligible list for Police Captain. The names of thirty-three (33) candidates who passed the examination appeared on the eligible list. For the reason referenced above, the Appellant's name did not appear on this eligible list.
6. On April 4, 2018, the BPD filed a request to extend the eligible list and stated that it planned to participate in a promotional exam cycle in the Fall of 2019.
7. By letter dated April 24, 2018, HRD allowed the BPD's request to extend the eligible list, writing in part that the list " ... has been extended in accordance with M.G.L. Chapter 31, §

25, with a date of revocation to be determined based on the [BPD]'s intent to participate in an exam during the Fall of 2019.”

8. In August 2019, the BPD notified Police Captain examination applicants that, due to problems that applicants had with accessing certain reading material, the item was being removed from the reading material and additional items were being added to the reading list.
9. The above-referenced change in the reading list resulted in a delay of the Police Captain examination, initially scheduled to be held in the Fall of 2019.¹
10. On October 24, 2019, the BPD requested that HRD allow a further extension of the eligible stating, writing in part that the BPD now planned on administering a new Police Captain examination on June 27, 2020.
11. By letter dated November 4, 2019, HRD approved the BPD's request “ ... with a date of revocation to be determined based on the [BPD]'s participation in an examination on June 27, 2020.”
12. Due to restrictions related to COVID-19, the June 27, 2020 examination had to be postponed until August 29, 2020.
13. On September 8, 2020, HRD granted another BPD request to extend the eligible list with a date of revocation to be determined based on the BPD's participation in the re-scheduled examination.
14. On August 29, 2020, the written portion of the BPD Police Captain Assessment Center Examination was held. The Appellant participated in that portion of the examination.

¹ The Appellant does not dispute that the change in the reading list caused a delay, but, in his brief, only stipulates to the change causing a 6-month delay in holding the examination.

Applicable Civil Service Law

G.L. c. 31, § 2(b) states in part that:

“No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status.”

G.L. c. 31, § 25 states in part that:

“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: (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order; or (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 for which the original list was established; provided, however, that the administrator may revoke the eligibility of the entire list or of any persons on such list subsequent to said two-year period if he shall determine that the effective maintenance of the merit system so requires such revocation ...”. (emphasis added)

Standard of Review: Motion for Summary Decision

The Commission may, on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(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 evidentiary hearing. See e.g., Lydon v. Massachusetts Parole Board, 18

MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.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 plaintiffs standing required denial of motion to dismiss).

Appellant's Argument

Citing Billerica et al v. HRD, 25 MCSR 193 (2012), the Appellant argues that HRD's actions – or inaction – are contrary to HRD's longstanding policy of revoking eligible lists two (2) years after they have been established, or, at most, three years after the date upon which the underlying examination was administered. The Appellant argues that, had HRD followed that policy here, the current eligible list would have been revoked in March 2018; no permanent promotions to Captain would have been made; and, presumably, the Appellant would have a greater opportunity for promotional appointment to Captain, assuming that he passes the new Captain examination and scores high enough to be within the statutory 2N+1 formula in a future promotional cycle using a yet-to-be-established eligible list.

HRD's Argument

HRD argues that the Appellant is not an aggrieved person because the harm he references has not actually occurred, but, rather, is speculative based on assumptions regarding what may or may not happen in the future (e.g. – will the Appellant pass the most recent Captain examination?). Further, HRD argues that there has been no violation of the civil service law or rules and HRD's decision not to revoke the current eligible list for Boston Police Captain was not arbitrary or capricious.

Analysis

Based on the plain reading of the statute, there has been no violation of Section 25 of Chapter 31. As referenced above, Section 25 explicitly states that an existing eligible list “shall be extended” if no new eligible list has been established, unless HRD exercises its *discretion* to revoke the eligible list. It is undisputed that no new eligible list has been established for Boston Police Captain. Thus, by operation of law, the existing eligible list must stay in place absent some affirmative action by HRD. That is precisely what has happened here.

The Appellant’s argument focuses on that part of Section 25 which grants HRD the discretionary authority to revoke the eligible list if HRD determines that “... the effective maintenance of the merit system so requires such revocation ...”. The case of Billerica, cited by the Appellant, is distinguishable from the instant matter for multiple reasons, including that the eligible list that was revoked in Billerica was not the result of a delegation agreement in which the Town was granted authority to establish and maintain the eligible list. Rather, the eligible list that was revoked in Billerica was established by HRD as part of the regular statewide testing process for police sergeant. Here, the comprehensive delegation agreement, entered into between HRD and the BPD was clearly intended to give the BPD more discretion in regard to how long the list would remain in place. Thus, it was not arbitrary and capricious when HRD decided *not* to automatically revoke the Boston Police Captain eligible list after two years (or the later date of three years after the examination was administered.)

Notwithstanding the additional discretion inherent in the delegation agreement, the BPD did, on three separate occasions, seek permission from HRD to extend the eligible, each time offering a reasonable justification, and each time offering a specific timeframe for when the Police Captain examination would begin, which it now has. HRD, after review, based on the

circumstances specific to this matter, granted extensions, effectively deciding not to exercise their discretionary authority to revoke the eligible list. Finally, the Appellant has not presented any evidence that the decision to extend the eligible list was based on any impermissible reasons, such as personal or political bias. I cannot conclude, even when viewing the facts most favorable to the Appellant, that the actions of HRD or the BPD were arbitrary and capricious or inconsistent with basic merit principles.

Conclusion

For all of the above reasons, the Respondents' Motions for Summary Decision are allowed; the Appellant's Cross Motion for Summary Decision is denied, and the Appellant's appeal under Docket No. E-20-120 is *dismissed*.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on November 19, 2020.

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:

John W. Earley (Appellant)
Emily Sabo, Esq. (for HRD)
Kay Hodge, Esq. (for Boston Police Department)