

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

BARRY G. GOLNER,
Appellant

v.

B2-14-125

HUMAN RESOURCES DIVISION,
Respondent

**JAMES J. HODGDON,
MICHAEL KILMARTIN,
PAUL LAFERRIERE,**
Intervenors

Appearance for Appellant:

Michael G. Zaim, Esq.
Zaim Law Firm
755 Dutton Street
Lowell, MA 01054

Appearance for Respondent:

Patrick G. Butler, Esq.
Labor Counsel
Human Resources Division
One Ashburton Place
Boston, MA 02108

Appearance for Intervenor, Paul LaFerriere

David Brody, Esq.
Law Office of Joseph Sulman
1001 Watertown Street, 3rd Fl.
West Newton, MA 02465

Commissioner:

Cynthia A. Ittleman¹

DECISION ON MOTIONS FOR SUMMARY DECISION

The Appellant, Barry G. Golner (Mr. Golner or Appellant), acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission) on June 6,

¹ The Commission acknowledges the assistance of Law Clerk Barbara Grzonka in the drafting of this decision.

2014 asserting that the Respondent, the state's Human Resources Division (HRD), had incorrectly calculated his years of service in a "regular" police force and denied him two preference points on the Police Captain Promotional Examination for twenty-five years of service as a police officer. HRD filed a Motion to Dismiss asserting that Mr. Golner did not have twenty-five years of police service in the Commonwealth of Massachusetts. A pre-hearing conference was held, at the Commission, on July 8, 2014 during which Chairman Bowman deemed HRD's Motion to Dismiss a Motion for Summary Decision and granted the Appellant thirty days to file a Motion for Summary Decision. On August 7, 2014, the Appellant filed a Cross-Motion for Summary Decision. Additionally, Chairman Bowman issued a procedural order requiring the Lowell Police Department to provide notice to higher ranked candidates who may be adversely impacted if the Commission were to grant this appeal. These individuals could intervene in the matter if they desired.² In response, James Hodgdon, Michael Kilmartin and Paul LaFerriere requested and were granted status as intervenors.³ A full hearing was held on September 4, 2014 at the office of the Commission.⁴ The hearing was digitally recorded, with copies provided to the parties and the intervenors.⁵

² See 801 CMR 1.01 (9).

³ Mr. Hodgdon appeared at the full hearing on September 4, 2014 *pro se* and did not make a statement. Mr. Kilmartin did not attend the hearing due to a work commitment and Mr. LaFerriere retained David Brody, Esq., who filed a response to the Motion and/or Cross-Motion for Summary Decision.

⁴ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudicatory hearings before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

⁵ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the argument of counsel and the inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant was hired as a police officer in the Lowell Police Department on October 9, 1994. He was promoted to Police Sergeant on September 5, 1999 and further promoted to Police Lieutenant on October 5, 2003. (Appellant's Motion)

2. Prior to his initial appointment to the Lowell Police Department, the Appellant was a police officer in Hudson, New Hampshire beginning on December 16, 1985. He served there for nine years. (Appellant's Motion)

3. While serving as a police officer in Hudson, New Hampshire, Mr. Golner resided in the City of Lowell, with the exception of residing in Tyngsborough, Massachusetts for one year and eight months. (Appellant's Motion)

4. During his years on the Hudson Police Department, Mr. Golner received additional training beyond his initial training. (Appellant's Motion)

5. At the time of his appointment to the Lowell Police Department, Mr. Golner received an exemption to G. L. c. 41, § 96B, a statute requiring police recruits to be trained prior to exercising police powers. An appointing authority may petition the state Municipal Police Training Committee formerly, the Massachusetts Criminal Justice Training Council for an exemption to this requirement under certain circumstances. (Appellant's Motion, Exhibit 15 and 16)⁶

⁶ Upon my request at the Commission hearing, the Appellant submitted copies of Mr. Golner's exemption application and confirmation of training exemption via e-mail after the hearing.

6. On May 7, 2014, Mr. Golner took and passed the Massachusetts Police Captain Promotional Examination. (Appellant's Motion)

7. Mr. Golner ranked sixth on the eligibility list issued by HRD following the promotional exam. (Appellant's Motion)

8. Mr. Golner applied for but did not receive the two-point preference for officers who have twenty-five years of service as provided under G.L. c. 31, § 59. (Appellant's Motion)

9. Mr. Golner filed an appeal at HRD requesting that he be awarded the two-point preference under G.L. c. 31, § 59 and HRD denied his appeal via email on June 18, 2014. (Respondent's Motion)

10. Mr. Golner filed a timely appeal of HRD's decision at the Commission. (Appellant's Motion)

DISCUSSION

Legal Standard for Motion for Summary Decision

Pursuant to the Standard Adjudicatory Rules of Practice and Procedure, adopted by the Commission in 1999, at 801 CMR 1.01(7)(h),

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 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))

Applicable Civil Service Law

G.L. c. 31, § 2(b) provides that the Commission shall have the following powers and duties:

To hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator, except as limited by the provisions of section twenty-four relating to the grading of examinations ...

No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record.

(Id.)

G.L. c. 31, §59 provides 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.

(Id.)

Thus, such officers are granted a preference of two points, which are added to their scores. This statute does not mean that the applicant must have served twenty-five years within the same department for which the promotional examination was given; rather such service includes police or fire work with any regular police or fire force (as opposed to service in a “special” police force, such as a campus police officer). DeFrancesco v. Human Resources Division, 21 MCSR 662 (2008); Lopes v. Human Resources Division, 13 MCSR 49 (2000). Also, it is not necessary that the police department in which the service was performed is a civil service community. DeFrancesco v. Human Resources Division, 21 MCSR 662 (2008). Such service must be within regular police or fire forces located in the Commonwealth of Massachusetts. Cataldo v. Human Resources Division, 23 MCSR 617 (2010).

Parties’ Positions

The Appellant argues that the Commission interpreted Section 59 too narrowly in Cataldo because nothing in the plain language of the pertinent portion of the statute

indicates that service within the Commonwealth shall be counted toward determining who is eligible for extra points for twenty-five years of service. Further, since the Appellant has been a lifelong resident of the Commonwealth of Massachusetts, he argues that, he is entitled to the two preference points. HRD rejects the Appellant's claims and states that the interpretation of Section 59 in Cataldo, applying Section 59 only to service in Massachusetts, is controlling. Further, HRD's position is that the intent of G.L. c. 31, § 59 was to credit service provided to the citizens of the Commonwealth of Massachusetts.

Analysis

HRD has established by a preponderance of the evidence that it did not err when it denied the Appellant's request that two preference points be added to his promotional exam score for twenty-five years of employment as a police officer, which included years of employment as a police officer in New Hampshire. Further, HRD has established that the Appellant has no reasonable expectation of prevailing on at least one essential element of the case, he has not produced sufficient facts to rebut this conclusion or plausibly suggested that HRD's determination was erroneous, and he has not established a claim beyond speculation. In addition, HRD has established that there is no genuine issue of material fact and it is entitled to a ruling in its favor as a matter of law.

The Commission has repeatedly interpreted G.L. c. 31, §59. *See, e.g., Lopes v. Human Resources Division*, 13 MCSR 49 (2000)(the intent of Section 59 is to give credit to a member of a regular police force or a fire force with twenty-five years of service); *Neville v. Town of Wilmington*, 18 MCSR 188 (2005)(temporary or full time police officers can be considered members of a regular police force); *DeFrancesco v. Human*

Resources Division, 21 MCSR 662 (2008)(special police officers such as campus police officers are not regular police officers and therefore time spent as a special police officer will not be credited under Section 59); Cataldo v. Human Resources Division, 23 MCSR 617 (2010)(applying established rules of statutory interpretation, the mandatory two-point preference created by Section 59 is to be narrowly applied to service as a member of a “regular police or fire force” within the Commonwealth). Each decision has further clarified Section 59. In view of these decisions, police service only counts towards the twenty-five years required for preference points when it was served in a regular police or fire force within the Commonwealth of Massachusetts.

The issue before the Commission in Lopes was whether a police officer who served in two different Massachusetts municipalities could combine his years of service in both to establish that he had served a total of twenty-five years and was entitled to two preference points under Section 59. The Commission decision in Lopes noted, by analogy, that G.L. c. 31, § 33 provides that in establishing a person’s civil service longevity, and therefore, his or her seniority, his or her civil service employment in one department or unit of the Commonwealth is combined with his or her employment in another such unit. Specifically, Section 33 provides, in part,

If the employment of such full-time [civil service] employee is changed through an original or promotional appointment or transfer from one departmental unit of the commonwealth to another under the same appointing authority, or from one departmental unit to another within the same department in a city or town, the length of service of such employee in the unit to which the appointment or transfer is made shall be computed from the date which was used to compute his length of service immediately prior to such appointment or transfer. If the employment of such full-time employee is changed through an original or promotional appointment from one departmental unit of the commonwealth to another not under the same appointing authority, from one departmental unit to another not within the same department in a city or town, from one city or town to another, from a city or town to the commonwealth, or from the commonwealth to

a city or town, the length of service of such employee shall be computed from the date of such change of employment, but if the employee completes one year of service in the new employment, from the date which was used to compute the employee's length of service immediately prior to the change of employment...
(Id.)

Given the repeating structure of Section 33, referring to service in different departments “of the commonwealth” and in different departments “in a city or town”, it is clear that, in determining seniority of full-time civil service employees, the Legislature included only service in Massachusetts state and local governments. Seniority provides a benefit in recognition of a full-time civil service employee's longevity. Like Section 33, Section 59 provides a benefit in recognition of a full-time civil service employees' longevity, adding two preference points to the promotional exam score of promotional candidates who pass the exam and have served as police officers (or firefighters) for twenty-five (25) years.

In Cataldo, the Commission determined that service in a regular police force outside of Massachusetts was eligible for education and experience credit, pursuant to G.L. c. 31, § 22, which the candidate would note on his promotional exam under Category Eight-Work Experience.⁷ However, the Commission also said in Cataldo that Mr. Cataldo's service outside of the Commonwealth was not eligible towards the twenty-five years of service needed to obtain the two-point preference under Section 59 because it is intended to benefit Massachusetts employees serving Massachusetts communities.⁸

⁷ The Appellant did not raise the issue that his credits under Category 8-Work Experience were erroneous therefore, the Commission only mentioned Category 8-Work Experience to distinguish between the types of work experience credits potential available to the Appellant and to further elucidate the Cataldo decision.

⁸ In Cataldo, Commissioner Stein explained the effect of an interpretation of Section 59 that awards the two preference points to service performed outside of the Commonwealth, “[f]or example, taken to the extreme, a person who was born and raised in Ohio could serve 25 years as a police officer or firefighter in a suburb of Cleveland, could relocate to a small city or town in Massachusetts, be appointed to its police or fire force, and then could claim the two-point preference in any future promotional examination (including but

Given these statutory interpretations and applications, police service outside the Commonwealth cannot be included in calculating the twenty-five years of service needed to be awarded preference points under Section 59. That the Appellant was exempted from statutorily required training when he was hired by the Lowell Police Department is not dispositive because by that time, the Appellant had been a police officer in New Hampshire and the Massachusetts mandatory training for new recruits was deemed unnecessary. Further, although he apparently was an effective police officer in New Hampshire who sought to maintain and advance his police skills, his service there inured to the benefit of New Hampshire, not Massachusetts.

Conclusion

For the reasons stated above, the Respondent's Motion for Summary Disposition is *allowed*, the Appellant's Cross-Motion for Summary Decision is *denied* and the appeal under Docket No. B2-14-125 is *denied*.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on August 6, 2015.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

not limited to a position of Police or Fire Chief), leapfrogging him or her above long-time career civil servants who served their Massachusetts communities for 20 years or more. Absent a clear expression to that effect, the Commission is reluctant to presume that the Legislature intended such a result. See generally, G.L.c.31, §1, §59, ¶2." Cataldo v HRD, 23 MCSR 617 (2010).

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's 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:

Michael G. Zaim, Esq. (for Appellant)

Patrick G. Butler, Esq. (for HRD)

David Brody, Esq. (for Intervenor, Paul LaFerriere)

James Hodgdon (Intervenor)

Michael Kilmartin (Intervenor)

John Marra, General Counsel (HRD)