COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

NICHOLAS GOON,
Appellant

v. **E-23-050**

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant: *Pro se*
Nicholas Goon

Appearance for Respondent: Sheila B. Gallagher, Esq.
Human Resources Division
100 Cambridge Street, Suite 600
Boston, MA 02114

Commissioner: Christopher C. Bowman[1]

DECISION ON CROSS-MOTIONS FOR SUMMARY DECISION

Introduction

On April 5, 2023, the Appellant, a police officer in the Brookline Police Department (Department), filed an appeal challenging the actions of the Human Resources Division (HRD) in (a) removing the Appellant's name from the eligible list for promotion to police sergeant in Brookline upon his resignation from the Department; and (b) refusing to restore the Appellant to his pre-resignation position on the eligible list after the Appellant was reinstated pursuant to G.L.

[1] The Commission acknowledges the assistance of Law Fellow Courtney Timmins in drafting this decision.

c. 31, § 46. As relief, the Appellant seeks restoration to the eligible list, enabling him to be considered for any prospective sergeant promotions which may occur prior to the expiration of the current list.

On May 9, 2023, I held a remote prehearing conference attended by the Appellant, counsel for the Town of Brookline (Town), and counsel for HRD.

At the prehearing conference, the Appellant argued that nothing in the civil service law or rules permits HRD to remove a candidate from an eligible list upon their resignation. The Appellant acknowledged that he would be unable to sign any certification created from the eligible list as willing to accept employment while he was not employed by the Department. However, the Appellant argued that his placement on the eligible list—which was based on an examination score that included experience and education credits preceding the establishment of the eligible list—should not be impacted by a resignation. The Appellant further argued that even if HRD were authorized to remove him from the eligible list upon his resignation, he should be restored to the eligible list upon his reinstatement.

HRD argued that "upon separation, an employee is no longer eligible for promotion and must be removed from the eligible list." Regarding restoration to the eligible list upon reinstatement, HRD argued that G.L. c. 31, § 46 does not provide for such restoration, and to do so would be akin to "holding a place in line" for an employee who has resigned.

On May 10, 2023, I issued a Procedural Order directing HRD to file a motion for summary decision providing any data that shows whether HRD has a practice of: (a) removing a candidate from an eligible list upon separation; and (b) denying a request to be restored to the eligible list upon reinstatement. The Procedural Order also directed HRD to address whether a resignation is distinguishable from other types of separation, including but not limited to a layoff

or reemployment under G.L. c. 31, §§ 39-40, in regard to whether a reinstated employee should be restored to an eligible list. Upon receipt of HRD's motion, the Appellant had an opportunity to submit an opposition and cross-motion for summary decision.

Unless otherwise noted, the following facts are undisputed:

1. The Appellant was sworn in as a police officer in the Brookline Police Department on November 9, 2016. (*Stipulated Fact*)
2. On September 19, 2020, the Appellant took the promotional examination for police sergeant administered by HRD. (*Stipulated Fact*)
3. On December 15, 2020, HRD established the current eligible list for police sergeant in Brookline. The list expires on December 15, 2023.[2] (*Stipulated Fact*)
4. The Appellant was ranked third on the eligible list at the time it was established. (*Stipulated Fact*)
5. On August 31, 2022, the Appellant resigned from the Brookline Police Department to work as a police officer in another state. (*Resp. Ex. 2-3*)
6. On November 17, 2022, the Town notified HRD of the Appellant's resignation and HRD removed the Appellant's name from the eligible list for police sergeant in Brookline. (*Resp. Ex. 4*)
7. On January 30, 2023, the Appellant was reinstated to the Brookline Police Department.
8. On February 9, 2023, the Appellant emailed HRD and asked:

> I was on the current Brookline Police Sergeants List with a score of 81. I briefly left the Department for a few months, but was recently reinstated.

[2] The list was extended an extra year due to the cancellation of the 2022 promotional examination for police sergeant. (*Stipulated Fact*)

> My name was removed from the sergeants list during my time away, will it be added back since I have returned? Thank you.

HRD did not respond. (*App. Ex. 3*)

9. On February 23, 2023, the Appellant sent another email to HRD restating the above question. HRD replied: "You would not be added back on the promotional eligible list. You would need to take a future promotional exam and pass to be placed on a promotional list again." (*App. Ex. 4*)

10. On March 10, 2023, Brookline Police Chief Jennifer Paster emailed HRD and asked the following:

> I have a police officer, Nicholas Goon, who [] appeared on the most recent approved promotional list to the rank of Sergeant. He left Brookline PD 8/31/2022 to pursue a career with an agency out of state. While he as gone, we promoted 1-2 sergeants but had his name removed from the eligibility list. He then returned to our agency on 1/30/23 (in good standing both here and the agency from which he left) and we would like to see about having him placed back on the eligibility list, in his same placement (he was not bypassed- he, I believe, would be tied at the top spot.)

(*App. Ex. 5*)

11. HRD replied: "I will have to run this by my supervisor [] and will have an answer for you early next week as he is away until then. Sorry for the inconvenience." (*App. Ex. 5*)

12. On March 27, 2023, HRD informed Chief Paster: "Nicholas Goon would not be eligible to be reinstated on the Sgt list due to his break in service. He will need to participate in the next available exam." (*App. Ex. 5*)

13. HRD submitted an affidavit from the Director of its Civil Service Unit stating in relevant part:

> (3) Based on my knowledge, when an employee voluntarily separates from their position, they forfeit the potential opportunity for promotion. If

an employee's name were on a departmental promotional list, HRD would remove the employee's name from that list.

(4) HRD relies upon the Appointing Authorities to submit the required Form 56 when an employee resigns.

(5) When an employee voluntarily resigns and is later reinstated, the employee will not be restored to the departments [sic] promotional list. The only available option for an employee who is reinstated and seeking promotion is to take another exam.

(6) HRD has consistently removed employees that transfer from one Department to another Department from the outgoing departments [sic] promotional eligible list. Over the past five years, there have been eighteen (18) employees that have were removed from the departments [sic] promotional eligible list after transferring to another Department.

(7) If an employee faces layoff based on seniority, and chooses to be demoted, their name would be removed from the departmental promotional eligible list. This employee has reinstatement rights for 10 years to the rank they were laid off from. If the employee is reinstated to former rank prior to the potential layoffs, the employee's name would be restored to the list as long as the departmental promotional eligible was still active.

(8) Departmental promotional eligible lists have a shelf life of approximately 2 to 2 ½ years and based on when a lay off happens and reinstatement, the probability of an eligible list still active is small.

(9) I do not recall a situation where an individual who voluntarily resigned was placed on a promotional list after being reinstated at the discretion of the Appointing Authority.

(*Resp. Ex. 5*)

14. According to the Appellant and Chief Paster, if the Appellant were restored to the eligible list, he would be ranked first—either by himself or tied with one other candidate.

15. The Appellant anticipates that the Town will be making promotional appointments to police sergeant before the current eligible list expires.

Motion for Summary Decision Standard

A party before the Commission may file a motion for summary decision pursuant to 801 CMR 1.01(7)(h), which provides:

> 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.

"Summary decision is proper when 'viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law.'" *Alston v. Civ. Serv. Comm'n*, 2018 WL 2944230, at *5 (Mass. Super. Apr. 12, 2018) (quotations and citation omitted). If a moving party "demonstrat[es] that the opposing party has no reasonable expectation of proving an essential element of the case," then "an agency may dispose of an adjudicatory proceeding by summary decision, rather than an unnecessary evidentiary proceeding." *Id.* Put another way, summary decision is appropriate whenever there is no issue of material fact for which a hearing is required. *Ralph v. Civ. Serv. Comm'n*, 100 Mass. App. Ct. 199, 203 (2021); see *Kobrin v. Bd. of Registration in Med*., 444 Mass. 837, 846 (2005) ("[N]either the statute nor due process required the board to hold a hearing to take evidence concerning undisputed facts. Such a hearing would be a meaningless exercise."). Summary decision is appropriate here because the material facts have been presented and are undisputed by the parties.

First, I turn to HRD's argument that the Appellant lacks standing because he has not shown that he is a person aggrieved under G.L. c. 31, § 2(b). I reject this argument because the Appellant has shown that he is an aggrieved person within the meaning of the statute. Section 2(b) of Chapter 31 states that in order to be deemed "aggrieved," a person must present

> specific allegations in writing that a decision, action, or failure to act on the part of the administrator[3] 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.

The Appellant has alleged that HRD's refusal to return his name to the eligible list for promotion violates basic merit principles and lacks any basis in Chapter 31. The Appellant has shown that HRD's decision cost him the opportunity to be considered for promotion in March, when he would have been first on the eligible list, as well as any future opportunities that may arise while the list is still active. Although HRD has discretion over the maintenance of eligible lists, it does not have "final and unlimited decision-making authority. Rather, those who are aggrieved by the administrator's actions and decisions have a right of appeal pursuant to G.L. c. 31, § 2(b), which broadly empowers the commission '[t]o hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator.'" *Staveley v. City of Lowell*, 71 Mass. App. Ct. 400, 405 (2008).

Applicable Civil Service Law

The mission of Massachusetts civil service law is to enforce "basic merit principles," which means, in relevant part, "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills . . ." and "assuring that all employees . . . are protected from arbitrary and capricious actions." G. L. c. 31, § 1; *see* PAR.02 (Personnel Administration Rules).

This issue of resignation and reinstatement, and how that affects one's previous position on a still-active list for promotion, is one of first impression to the Commission. It does not

[3] "Administrator" means "the personnel administrator of the human resources division within the executive office for administration and finance" (*i.e.*, the head of HRD or their delegated subordinate). G.L. c. 31, § 1.

appear to be addressed by any provision in the civil service law or rules. Section 46 of Chapter 31, which governs reinstatement, merely states:

> A permanent employee who becomes separated from his position may, with the approval of the administrator, be reinstated in the same or in another departmental unit in a position having the same title or a lower title in the same series, provided that the appointing authority submits to the administrator a written request for such approval which shall contain the reasons why such reinstatement would be in the public interest. No such request shall be approved if the person whose reinstatement is sought has been separated from such position for over five years and there is a suitable eligible list containing the names of two or more persons available for appointment or promotion to such position . . . .

"Reinstatement" is defined as "the restoration of an employee to a position pursuant to the civil service law and rules." G.L. c. 30, § 1. "Eligible list" is defined as "a list established by the administrator, pursuant to the civil service law and rules, **of persons who have passed an examination** . . . ." *Id.* (emphasis added).

Section 16 of Chapter 31 states that "[t]he administrator shall, subject to the provisions of section twenty-six, where applicable, examine, qualify, and **rank applicants for original or promotional appointments solely on the basis of training, experience, education** . . . ."[4] (Emphasis added).

Section 3 of Chapter 31 addresses rules implemented by HRD:

> The administrator shall make and amend rules which shall regulate the recruitment, selection, training and employment of persons for civil service positions; provided, however, that the commission shall review such rules and in the event the commission determines that any proposed rule violates the basic merit principles outlined in this chapter, it may, within fifteen days of receipt of such proposed rule, by a three-fifths vote, disapprove such proposed rule. Such rules and amendments thereto shall comply with the filing provisions of section five of chapter thirty A and such regulations shall not take effect until so filed.

---

[4] The administrator may also consider other appropriate criteria for positions requiring a graduate degree, a course in emergency medical care, or a professional certificate, registration, or license. G.L. c. 31, § 16. None of that applies in this case.

> Such rules shall include provisions for the following: . . . (e) Promotional appointments, on the basis of merit as determined by examination, performance evaluation, seniority of service or any combination of factors which fairly test the applicant's ability to perform the duties of the position as determined by the administrator.

Thus, Section 3(e) requires that a rule proposed by HRD must be approved by the Civil Service Commission before it may become effective.

Pursuant to G.L. c. 31, § 2(f), the Commission also has the power to "[r]ecommend any proposed rule changes to the administrator it feels would be consistent with basic merit principles outlined in this chapter and would be in the public interest."

Analysis

To begin, HRD has shown that it has a consistent, and reasonably justified, practice of removing someone from an eligible list for promotion after they are separated from the department through resignation, transfer, or layoff. The instant appeal does not challenge the rationale for this practice, and although such a rule has never been reviewed or approved by the Commission under G.L. c. 31, § 3, it comports with common sense and basic merit principles. The fairness of removal in such a situation is buttressed by the fact that even if HRD does not remove someone's name following separation—due to error or an appointing authority's failure to submit the required Form 56—one is, practically speaking, unable to sign a certification generated from the eligible list as willing to accept appointment after they leave the department. Thus, all cases of separation reach the same result: the person is not considered for promotion regardless of whether HRD removes their name from the list.

One's eligibility for promotion after reinstatement, however, is a different issue. HRD has failed to show that it has a consistent practice of denying requests for restoration on an eligible list upon reinstatement. HRD's affidavit asserts that "when an employee resigns and later

is reinstated, the employee is not restored to a promotional list and instead must take another examination." However, HRD provided no evidence or examples of such a practice or policy. HRD's position also lacks support from applicable law and precedent.

HRD's failure to articulate a rational basis for its position that reinstatement excludes restoration to a promotional list renders its decision arbitrary and capricious. See *Cambridge v. Civ. Serv. Comm'n*, 43 Mass. App. Ct. 300, 303 (1997) ("A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support."). The Appellant devoted resources to study for the 2020 promotional examination, paid to take the exam, performed well on it, and earned his spot on the eligible list generated from the exam. *Cf. Callanan v. Pers. Adm'r for Com.*, 400 Mass. 597, 601, 511 (1987) (holding that the rights of those on eligibility lists are limited with respect to the lifespan of the list, its expiration, adjustments to correct grading errors, adjustments to reflect veterans preferences, and the timing of examinations). The fact that the Appellant temporarily disqualified himself for promotion by leaving the Department should have no bearing on his current eligibility following reinstatement.

In this case of first impression, not addressed by the civil service law or rules, it appears that HRD effectively adopted a rule which was (a) not approved by the Commission, and (b) neither published nor practiced in any manner which would allow the Appellant to have notice of the rule. This goes against the procedural requirements of G.L. c. 31, § 3, as well as basic principles of fair procedure and uniformity.[5] Moreover, HRD's proposed rule is substantively

[5] The Supreme Judicial Court has held that when an agency adopts a rule, standard, or policy "of general application and future effect," concerning a class of individuals outside of "the internal management of an agency," that policy is subject to the procedures set forth in the Administrative Procedure Act (APA) for promulgating a regulation. *Carey v. Comm'r of*

inconsistent with the language of G.L. c. 31, § 3(f), which provides for the adoption of rules regarding "[p]romotional appointments, **on the basis of merit as determined by examination, performance evaluation, seniority of service or any combination of factors which fairly test the applicant's ability to perform the duties of the position** as determined by the administrator." (Emphasis added). HRD has not identified how its proposed rule—that when an employee resigns and is then reinstated, they are not eligible for promotion from a still-active list they occupied before resignation—relates to merit, performance, seniority, or any other aspect of an employee's ability to perform the duties of the promotional position.

If a local appointing authority wishes to consider someone's prior resignation when evaluating their candidacy for promotion, that is certainly within the appointing authority's discretion. The appointing authority would be familiar with why someone resigned, how they performed, and other relevant context surrounding their employment and suitability compared to other candidates. HRD is not in a position to know any of these things, especially given its delegation of the responsibility to review and approve bypass reasons. Moreover, HRD has failed to cite any credible authority, data, or other justification for its assumption that such a decision must be taken away from the appointing authority and made by HRD itself.

As such, the Commission rejects HRD's proposed rule as inconsistent with basic merit principles and fair procedure. To ensure uniformity, reinstatement to a department shall include,

---

Correction, 479 Mass. 367, 372 (2018); *see* G.L. c. 30A. The court noted the important purpose of the APA, which is to (a) establish minimum standards of fair procedure below which no agency should be allowed to fall, and (b) create uniformity in agency proceedings. *Carey*, 479 Mass. at 371. Although Chapter 31 provides HRD with an alternative means of rulemaking that involves the Commission's oversight rather than the APA, the principles of fair procedure and uniformity remain just as essential.

where applicable, restoration to a still-active eligible list for promotion. The ultimate decision whether to promote someone who previously resigned but returned to the employing department should be left to the appointing authority.

Conclusion

For the above reasons, HRD's Motion for Summary Decision is denied, the Appellant's Cross-Motion for Summary Decision is allowed, and the appeal of Nicholas Goon, Docket No. E-23-050, is ***allowed***. The Appellant shall be restored forthwith to his position on the eligible list for promotion to police sergeant in Brookline.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on August 24, 2023.

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 their 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:
Nicholas Goon (Appellant)
Sheila B. Gallagher, Esq. (for Respondent)