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NOTICE: Decisions issued by the Appeals Court pursuant to its rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28, issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

LAWRENCE HESTER *vs.* CIVIL SERVICE COMMISSION & another. [FN1]

09-P-1908

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff appeals from a Superior Court judgment entered on the pleadings dismissing his complaint for judicial review under the provisions of G. L. c. 31, § 44. The Superior Court judge affirmed the decision of the Civil Service Commission (commission) upholding the denial by the city of Lawrence (city) of his request to have his status changed from 'provisional' local building inspector to 'permanent' local building inspector. We affirm.

1. *Background.* The city hired the plaintiff in 1987 as a provisional employee. Although the position is a civil service position, at the time he was hired there was no civil service eligible list for the position. In 1989, a civil service examination for the position was administered, but the plaintiff did not pass the examination. Despite that failure, he has remained in the position as a provisional employee. There have been no subsequent examinations for that position since 1989.

In 1992, the Legislature amended G. L. c. 143, § 3, to require that local building inspectors be certified by the State board of building regulations and standards (State board) in accordance with its own regulations. See St. 1992, c. 168, § 1. The Legislature also grandfathered local building inspectors so that they did not have to meet the State board's certification requirements and were 'deemed qualified and certified in the position held on' the effective date of the act. St. 1992, c. 168, § 3. Accordingly, the plaintiff was deemed certified as a local building inspector.

In 2005, the plaintiff requested that the city change his position from 'provisional' to 'permanent.' The city denied his request, and the plaintiff appealed to the commission, which referred the matter to the Division of Administrative Law Appeals (DALA) for a hearing. DALA issued its decision recommending that the plaintiff's request for a permanent appointment be denied, and the commission adopted that decision. The plaintiff appealed to the Superior Court pursuant to G. L. c. 30A, § 14, which affirmed the commission. A timely appeal to this court followed.

2. *Discussion.* In reviewing a statutory interpretation by the commission, 'we must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate.' *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ.,* 436

Mass. 763, 771 (2002), quoting from *Consolidated Cigar Corp.* v. *Department of Pub. Health,* 372 Mass. 844, 855 (1977). Such a regulation will be declared void only if there is an 'absence of any conceivable grounds upon which [the rule] may be upheld.' *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ., supra,* quoting from *Purity Supreme, Inc.* v. *Attorney Gen.,* 380 Mass. 762, 776 (1980). 'We only disturb an agency's interpretation of its own regulation if the 'interpretation is patently wrong, unreasonable, arbitrary, whimsical, or capricious." *TBI, Inc.* v. *Board of Health of N. Andover,* 431 Mass. 9, 17 (2000), quoting from *Brookline v. Commissioner of the Dept. of Envtl. Quality Engr.,* 398 Mass. 404, 414 (1986).

The plaintiff argues that because he was 'certified' by the State as a local building inspector pursuant to the grandfathering provision of St. 1992, c. 168, § 3, he need not take a civil service examination as a condition for 'permanent' status. He relies on G. L. c. 31, § 16, amended by St. 1981, c. 767, § 16, which provides that the personnel administrator, [FN2] 'where applicable,' can qualify an applicant for a promotional appointment without the need for a civil service examination 'when the major duty of a position is such that applicants are required to possess a certificate, registration or license issued after examination by a [S]tate board of registration.' Interpreting that provision, the hearing officer determined that 'for a local building inspector to achieve permanent civil service status without taking a competitive examination, he must at a minimum, pass an examination administered by a [S]tate licensing board.' The plaintiff asserts this constitutes an error of law because it fails to recognize the effect of the grandfathering provision of the 1992 statute. We disagree as we cannot say that the decision of the commission was legally untenable.

By its express terms, G. L. c. 31, § 16, requires that an applicant possess a 'license issued after examination.' The plaintiff has not taken an examination to be a local building inspector and he has failed to pass an examination under the civil service laws. Indeed, to allow the plaintiff to change from a 'provisional' to 'permanent' employee would require the commission to assume an element that neither the statute nor regulations provides, namely, under the circumstances of this case, that the plaintiff must be deemed qualified for appointment as a permanent employee without having satisfied the necessary requirement of passing an examination. The commission has chosen a justifiable interpretation of the legislation for which neither the Superior Court, nor this court may substitute its judgment. We also cannot say that the commission's decision is wholly lacking in evidentiary support or tainted by legal error, that its administrative interpretation is not 'in harmony with the legislative mandate,' is devoid 'of any conceivable grounds upon which [its decision] may be upheld,' *Massachusetts Fedn. of Teachers, AFT, AFL-CIO v. Board of Educ., supra,* or is 'patently wrong, unreasonable, arbitrary, whimsical, or capricious.' *TBI, Inc.* v. *Board of Health of N. Andover, supra.*

The plaintiff also argues that the commission should have exercised its discretion to grant him permanent status pursuant to St. 1993, c. 310, § 1, which provides: 'If the rights of any person acquired under the provision of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights.' The plaintiff contends he was prejudiced, through no fault of his own, by the personnel administrator's failure to conduct a civil service examination for the position since 1989. While this may be true, the relief the plaintiff seeks is purely discretionary, and it is not open to the court to substitute its judgment for that of the commission. See *Thomas v. Civil Serv. Commn.,* 48 Mass. App. Ct. 446, 451 (2000).

Consequently, the judgment of the Superior Court, upholding

the decision of the commission, must be affirmed.

So ordered.

By the Court (Duffly, Berry & Fecteau, JJ.),

Entered: November 16, 2010.

FN1. City of Lawrence.

FN2. Of the human resources division within the executive office for administration and finance.

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