COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
Civil Action No. 07-5591-F 6

Notice sent 08.07.09. O.H. Jr.
Mass AG. D.H.
J.M.B.

LAWRENCE HESTER,

Plaintiff,

v.

CIVIL SERVICE COMMISSION OF THE COMMONWEALTH OF MASSACHUSETTS; and CITY OF LAWRENCE,

Defendants.

AUG 11 2009

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

This is an appeal, pursuant to G.L.c. 30A, § 14 (7), seeking judicial review of a decision by the defendants, the Civil Service Commission (the "Commission") and the City of Lawrence ("City") refusing to change the plaintiff Lawrence Hester's employment position as a "local building inspector" for the City, from provisional to permanent civil service status. The plaintiff contends that the decision was not supported by substantial evidence and was based upon errors of law. This case is now before the court on the parties' cross-motions for judgment on the pleadings. For the reasons set forth below, I conclude that the administrative decision should be affirmed.

REVIEW STANDARDS

In appealing an administrative decision, the plaintiff bears the burden of establishing the invalidity of the decision. *Coggin v. Massachusetts Parole Board*, 42 Mass. App. Ct. 584, 587 (1997).

This burden is heightened by the due weight the court is required to accord the agency's specialized knowledge, technical competence, experience, and any discretionary authority conferred on it by statute. *Iodice v. Architectural Access Board*, 424 Mass. 370, 375-376 (1997), citing G.L.c. 30A, § 14(7); *Arnone v. Comm'r of the Dept. of Social Services*, 43 Mass. App. Ct. 33, 34 (1997). In addition, the Commission's decision must be affirmed unless it was arbitrary, unsupported by substantial evidence or based upon an error of law or unlawful procedure that prejudiced the substantial rights of a party. *Boston Police Department v. Collins*, 48 Mass. App. Ct. 408, 412 (2000); *Police Commissioner of Boston v. Civil Service Commission*, 22 Mass. App. Ct. 364, 369 (1986); G.L.c. 30A, § 14 (7). In challenging the decision in the instant case as being unsupported by substantial evidence, the plaintiff is required to show that the evidence relied upon was not "such evidence as a reasonable mind might accept as adequate to support a conclusion." *Salaam v. Comm'r of the Dept. of Transitional Assistance*, 43 Mass. App. Ct. 38, 39 (1997), citing G.L.c. 30A, § 1.

This Court may not substitute its judgment for that of the agency, and "is not empowered to make a de novo determination of the facts, to make different credibility choices, or to draw different inferences from the facts found by the [agency]." *Hotchkiss v. State Racing Commission*, 45 Mass. App. Ct. 684, 651 (1988), quoting *Pyramid Co. v. Architectural Barriers Board*, 403 Mass. 126, 130 (1988). In other words, a court may not reject an administrative agency's choice between two conflicting views, even though the court justifiably would have made a different choice had the matter been presented de novo. *Zoning Bd. Of Appeals v. Housing Appeals Comm'n*, 385 Mass. 651, 657 (1982) (citations omitted).

BACKGROUND

The Administrative Record ("AR") before the Court reveals *inter alia* the following facts: The plaintiff was hired by the City of Lawrence as a provisional Local Building Inspector in 1987. The appointment of the plaintiff was not from a certified civil service list but as a result of application for the job, which was publicly advertised. The plaintiff took the competitive civil service examination for Local Building Inspector on June 24, 1989 but did not pass the

examination. There have been no additional civil service examinations for Local Building Inspector requested by the City, or given by the Massachusetts Human Resources Division ("HRD"), since the June 1989 examination. (AR 206-207). Pursuant to M.G.L.c. 143 § 3, enacted on November 12, 1992, the plaintiff was deemed certified ("grandfathered") as a Local Building Inspector. (AR 57). On August 29, 2004, the plaintiff successfully passed the International Code Council (ICC) Examination Module 1: Legal and Management Examination for Certified Building Official (CBO). (AR 207).

In 2005, the plaintiff made requests to the City and HRD that his Local Building Inspector position be changed from its provisional civil service classification to permanent status but to no avail. (AR 207-208). Subsequently, on July 25, 2005, the plaintiff filed his appeal with the Civil Service Commission for reclassification from provisional to permanent status. (AR 208). On August 21, 2007 an administrative law judge recommended that the Civil Service Commission deny the plaintiff's request suggesting, in effect, that the decision might be different were Hester to take, and pass, a second ICC sponsored examination concerning technology. (AR 205-210). The Commission accepted the administrative law judge's recommendation and the plaintiff appealed to this court from that decision in November 2007. (AR 214).

Even though the plaintiff's request for reclassification was denied, the plaintiff continued to serve in his position as provisional Local Building Inspector until August 23, 2006 when he was discharged. (AR 208). The plaintiff has since been reinstated to his old position as provisional Local Building Inspector, and seeks reclassification to permanent status as Local Building Inspector.

THE PLAINTIFF'S ARGUMENTS AND THE COURT'S RULING

The plaintiff contends that the Commission's decision was not supported by substantial evidence and was based upon errors of law. The plaintiff argues that it was an error of law to "require" him to take a second examination for a different position senior to his provisional Local Building Inspector position. The City and the Commission maintain that this was only a

suggestion as to an alternative path to permanent appointment, the requirements for which include passing an examination pursuant to M.G.L.c. 31 § 16. While the plaintiff objects to this alternative, he has already successfully completed one ICC examination and apparently only needs to pass a second examination to be reclassified to permanent status. This Court agrees with the Commission that it would be preferable for the HRD to offer civil service examinations, pursuant to M.G.L.c. 31 § 5, more often, and that the Administrator's failure to do so may not seem fair to those in plaintiff's position. However, this judge also recognizes that there is no obligation for the Administrator to do so.

M.G.L.c. 31 § 16 clearly states that it is mandatory that for permanent civil service appointment an applicant is required to possess a certificate, registration or license issued after examination by a state board of registration or examiners or by a professional association. Additionally, M.G.L.c. 31 § 6 provides that with certain exceptions not applicable here "[e]ach ... original appointment in the official service shall be made after certification from an eligible list established as a result of a competitive examination for which civil service employees and non-civil service employees were eligible to apply." Permanent civil service appointments, in other words, may only be made from lists composed of individuals who have taken and passed a competitive examination for the position in question. If no examination has been given and thus no eligible list exists, "the appointing authority may make a provisional appointment". (M.G.L. c. 31 § 6). M.G.L.c. 31 § 16 states that in connection with civil service appointments, it is for the administrator to determine the criteria appropriate for this purpose. This explicit provision guides this Court in its required deference to the agency's specialized knowledge, technical competence, experience, and any discretionary authority conferred on it by statute. *Iodice v. Architectural Access Board*, 424 Mass. 370, 375-376 (1997), citing G.L.c. 30A, § 14(7); *Arnone v. Comm'r of the Dept. of Social Services*, 43 Mass. App. Ct. 33, 34 (1997).

The plaintiff demands relief based on Ch. 310 of the Acts of 1993 which provides that: "If the rights of any person acquired under the provisions 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, notwithstanding the failure of any such person to comply with any requirement of said chapter

thirty-one or any such rule as a condition precedent to the restoration or protection of such rights". [Emphasis added]. The plaintiff argues that it is through no fault of his own that the Administrator has failed to schedule civil service examinations and that he is entitled to the benefit of this curative statute which gives the Civil Service Commission discretionary authority to appoint him to permanent status. The plaintiff makes the argument that the failure to act under Ch. 310 in this case is arbitrary and capricious and discusses "the plight of the provisional" employee, subject to the arbitrary whims of the appointing authority. The concern is that decisions then become susceptible to personal and political influences. This is a compelling argument and, certainly, were Mr. Hester before this court having taken and passed the suggested second examination and yet still had not been elevated to permanent status, this judge's eyebrows would be raised. That is not the circumstance presented, however. Based on the limitations on the scope of Superior Court review of administrative agency decision-making, denial of the plaintiff's appeal is required.

The plaintiff's Motion for Judgment on the Pleadings is **DENIED**, the defendants' Cross-Motion for Judgment on the Pleadings is **ALLOWED** and the decision of the Civil Service Commission is **AFFIRMED**.

Carol S. Ball
Justice of the Superior Court

Dated: 8/6/09