

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

STEPHEN HURLEY
& LEONARD FORD,
Appellants

G2-05-93: HURLEY
G2-05-94: FORD

v.

CITY OF MELROSE,
Respondent

Appellants' Attorney:

Robert S. Mantell, Esq.
Rodgers, Powers & Schwartz LLP
18 Tremont Street: Suite 500
Boston, MA 02108
(617) 367-7200
rmantell@theemploymentlawyers.com

Respondent's Attorney:

Mark Ventola, Esq.
Sheehan, Phinney, Bass & Green
260 Franklin Street: 19th Floor
Boston, MA 02110
mventola@sheehan.com

Participant Michael Lynch's Attorney:

James W. Simpson, Jr., Esq.
Merrick, Louison & Costello LLP
67 Batterymarch Street
Boston, MA 02110
(617) 439-0305
jsimpson@merricklc.com

Participant David Dwyer's Attorney:

Pro Se
David Dwyer
18 Crestwood Circle
Lynn, MA 01905

Commissioner:

Christopher C. Bowman

DECISION

Procedural History

The Appellants, Stephen Hurley and Leonard Ford (hereafter “Hurley”, “Ford” or “Appellants”) and the Respondent, the City of Melrose (hereafter “Appointing Authority”, or “City”) filed a joint “Petition for 310 Relief” (pursuant to the powers of the Commission under Chapter 310 of the Acts of 1993) with the Commission on March 14, 2005 asking that the names of the Appellants be placed at the top of the next requested list for the position of sergeant in the Melrose Police Department.

A pre-hearing conference was conducted at the offices of the Civil Service Commission on April 21, 2005 at which time the parties reviewed the reasons for their request for “310 Relief”, including a then-recently issued decision issued by the Massachusetts Commission Against Discrimination involving the Appellants and the City of Melrose. The Commissioner who conducted the pre-hearing opted to schedule the matter for a full hearing. A full hearing was scheduled for December 19, 2006. Just prior to the hearing, the Commission received a “Motion to Intervene” by Melrose Police Officer Michael Lynch, who is currently ranked first on the existing promotional list for sergeant. Lynch, who is represented by counsel, appeared at the hearing, along with David Dwyer, who is currently ranked second on the existing promotional list for sergeant. (Dwyer is not represented by counsel and he submitted a letter opposing the above-referenced 310 Relief, which was entered by this Commissioner as a Motion to Intervene.)

As a preliminary matter, the parties were heard on the Motion(s) to Intervene at the outset of the full hearing. After hearing oral argument, the Motion(s) to Intervene were

denied, but Michael Lynch and David Dwyer were given “participant” status pursuant to Standard Adjudicatory Rules 801 CMR 1.01 (7)(d). Permission to participate “shall be limited to the right to argue orally at the close of a hearing and to file an amicus brief, but shall not necessarily make the Person allowed to participate a Party in interest who may be aggrieved by any result of the proceeding.” Id.

Factual Background

(Many of the facts are derived from the 1999 Arbitration decision and award by Sharon Ellis)

As the factual issues are not in dispute, witness testimony was not required at the full hearing and this Commissioner heard oral arguments from the parties and the participants. In July and August 1998, three vacancies for the position of sergeant arose in the City of Melrose due to retirements and one promotion to lieutenant. Appellants Hurley and Ford, initially had been in positions 4 and 5 on a certified civil service eligibility list which was set to expire on October 1, 1998. Both officers had taken the promotional exam on October 21, 1995 and it was certified on February 9, 1996. By August 1998, they had moved up to positions 1 and 2 on the 1996 list due to promotions of officers ahead of them on the list.

In February of 1998, former Lieutenant Richard Smith became the acting Chief of Police for the City of Melrose. He announced at three roll calls on his first day as Chief that the City would participate in the October 1998 promotional sergeants’ civil service examination. The announcement provided a window of eight months for officers to study for the exam. When the apparent vacancies for the two sergeant positions arose in July 1998 after the retirement of sergeants, Chief Smith called the Appellants into his office and informed them that he did not intend to make any promotions at that time, but, instead would wait for the establishment of a new list after the October 1998 exam.

Appellant Hurley did not take the October 1998 exam while Ford took the exam, but did not receive a passing score. Officer Hurley sent a letter to his union president requesting that a grievance be initiated. A grievance was initiated by the Union on behalf of Ford and Hurley regarding the Chief's decision to not use the existing list to make promotions to sergeant. The matter eventually proceeded to arbitration and a decision was issued by Arbitrator Sharon Henderson Ellis on June 29, 1999.

As part of the "Introduction" in the above-referenced arbitration decision, the arbitrator stated in part, "The essence of this arbitration is whether the City of Melrose Police Department violated the contractual "maintenance of benefits" provision when it failed to make promotions to the rank of Sergeant from the Civil Service eligibility list in existence during the Summer of 1998 when three sergeants' vacancies became available." (See AAA Case No. 1139-1915-98 (1999)). The arbitrator, in deciding to deny the grievance, cited Callanan v. Personnel Administrator, 400 Mass. 597 (1987) which states in relevant part,

"The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that positions might become available immediately after the expiration of an old list – or immediately before the establishment of a new list. The over-all pattern of the statute does not justify expectations that certain positions will become available during the period of a single list. Moreover, individuals do not have a vested right in their particular positions on the eligibility list once it is established."

Since the expiration of the 1996 exam, the City has participated in four (4) promotional exams for sergeant in 1998, 2000, 2002 and 2004. During that time period, 9 officers have been promoted to sergeant. The Appellants did not participate in the 2000, 2002 or 2004 exams.

Subsequent to their unsuccessful arbitration decision, the Appellants filed an appeal with the Massachusetts Commission Against Discrimination (MCAD). In a decision dated January 14, 2005, the MCAD ruled that the prior police chief's decision not to promote Appellants Hurley and Ford was based on unlawful age discrimination. As a result, the MCAD ordered that the City of Melrose pay Officer Ford \$42,645.60 in lost wages and pay Officer Hurley \$35,993.72 in lost wages. Further, the City was ordered to pay Ford and Hurley \$50,000 each in damages for emotional distress. The lost wages ordered by MCAD were calculated for the years between 1998 and 2002. On page 22 of the MCAD decision, the hearing officer stated in part, "I decline to extend the lost pay differential beyond the fall of 2002 because Complainants had adequate notice of the 2000 exam and could have taken it had they chosen to do so. During the fall of 2002, the results of the 2000 Sergeant's exam were certified to the City of Melrose and two Patrol Officers were promoted off the eligibility list. These promotions are an appropriate point at which to terminate a back pay award." Hurley and Ford and MCAD v. City of Melrose, Police Department, 98 BEM 3304/3305 (2005).

Joint Request for 310 Relief

Subsequent to the above-referenced MCAD decision, Appellants Hurley and Ford and the City of Melrose filed a joint request for "310 Relief" with the Civil Service Commission stating in part, "All parties now wish to resolve this matter in an expedited fashion. The parties have agreed to a settlement in principle in which Messrs. Hurley and Ford have agreed to accept a significantly reduced amount of damages in return for being promptly promoted to such sergeant positions. In order to effectuate this settlement...all parties are jointly requesting the Civil Service Commission, acting pursuant to its powers

set forth in Chapter 310 of the Acts of 1993, to order that Mr. Hurley and Mr. Ford's name be placed at the top of the civil service list for sergeant in the Melrose Police Department so that they may be considered for the next appointment to such positions.” (March 10, 2005 Petition for Chapter 310 Relief)

Question of Jurisdiction

As a threshold matter, the Commission must address the question of whether it has jurisdiction to hear these appeals in light of a previous arbitration decision. Participant Lynch argues that the Commission has no jurisdiction to hear these appeals as the issue was previously decided by an arbitrator.

Chapter 150E, section 8 provides in part that:

"Where binding arbitration is provided under the terms of a collective bargaining agreement as a means of resolving grievances concerning job abolition, demotion, promotion, layoff, recall or appointment and where an employee elects such binding arbitration as the method of resolution under said collective bargaining agreement, such binding arbitration shall be the exclusive procedure for resolving any such grievance, notwithstanding any contrary provision of chapter thirty-one."

While the City and the Appellants acknowledge the existence of the arbitrator's decision, they argue that the Commission still has jurisdiction to hear these appeals as the issue before the arbitrator was solely contractual in nature and involved general management rights of the City. In their post-hearing brief, the City and the Appellants argue that "the issue of suitability of these officers for promotion, and thus whether they were 'bypassed' is not something that was addressed in the arbitration." The Commission disagrees. By concluding that management had no obligation to hire off an existing civil service list and was free to wait until the issuance of a new list, the arbitrator's decision makes it clear that there was no bypass in this case. The City and the Appellants further argue that the instant matter is distinguishable from the issue decided

by the arbitrator as the arbitration decision did not involve age discrimination. Further, the Appellants and the City argue that the Collective Bargaining Agreement between the parties does not explicitly provide for arbitration as a means of resolving disputes over promotions, thus making G.L. c. 150E § 8 (referenced above) moot.

The Commission would need additional information, including the full text of the Collective Bargaining Agreement in effect at the time, in order to render a judgment on this issue. However, given the limited information in the record, Participant Lynch appears to have a strong case that the Commission does not have jurisdiction to hear this matter.

Arguments Regarding the Applicability of Chapter 310 of the Acts of 1993

Assuming arguendo that the Commission does have jurisdiction to hear these appeals, “310 Relief” is still not warranted.

St. 1993, c. 310 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 their own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration of such rights.”

It is well-established that the Commission, pursuant to its powers under Chapter 310 of the Acts of 1993, can order the placement of an individual’s name at the top of an existing or future civil service list as a remedy. This remedy is most commonly ordered by the Commission when a job applicant for a civil service position is unjustly “bypassed” by another applicant ranked lower on a civil service list, either for an original

or promotional appointment. In the instant case, the Appellants were not bypassed. Rather, even though two (2) vacancies for the position of sergeant existed in Melrose in 1998, and the Appellants were the top two candidates on the existing civil service list, the City chose to leave those positions vacant and fill them by using the next civil service list. That issue was grieved by the Appellants and subsequently decided by an arbitrator. As referenced above, the arbitrator, citing Callanan, effectively ruled that the City's decision did not constitute a bypass and the grievance was denied.

The Appellants in this case subsequently filed a successful appeal with the MCAD which ruled that the City's decision not to promote Appellants Hurley and Ford was based on unlawful age discrimination. The 2005 MCAD decision awarded back pay and punitive damages to the Appellants. It is this subsequent MCAD decision which forms the basis of joint request for "310 Relief" filed by the City and the Appellants.

As part of their joint memorandum to the Civil Service Commission, the Appellants and the City argue that, in light of the MCAD decision, "310 Relief" is "necessary and consistent with the goal of civil service law, and anti-discrimination law, to prohibit and fully remedy age discrimination." The Appellants and the City cite a previous Commission decision, Barrows v. Boston Police Department, 9 MCSR 30 (1996) to support their argument. In Barrows, the Commission decision states in part, "the parties seek relief in order to effectuate a settlement agreement following an MCAD probable cause finding. The Appellant had asserted that he was improperly rejected for employment by the Appointing Authority without a demonstration that undue hardship prevented it from reasonably accommodating his disability."

On this issue, Participant Michael Lynch disagrees and argues that the Commission's 310 equitable relief powers should not be extended to effectuate a settlement agreement between the City and the Appellants. Participant Lynch argues that the City, which has appealed the 2005 MCAD decision, is simply trying to "save a few dollars" by effectuating a settlement agreement that hinges on the Commission ordering the placement of the Appellants' name on the existing sergeant list so they can be promoted by the City. Moreover, Participant Lynch argues that even the MCAD, in its order, declined to extend its damage award beyond the 2000 exam because the Appellants had adequate notice of the 2000 exam and could have taken it had they chosen to do so.

On this pivotal issue, the Commission concurs with Participant Lynch. The parties are not before the Commission seeking to implement an MCAD decision which found that the City engaged in unlawful age discrimination. Rather, as a means of settling the City's pending appeal of that MCAD decision, the parties are proposing an alternative remedy that is more financially palatable to the Town. In their post-hearing brief, the City and the Appellants argue that, "the MCAD found the presence of age discrimination, thus triggering the Commission's jurisdiction to remedy a violation of basic merit principles." (emphasis added) That argument ignores the fact that the MCAD already ordered a remedy, including back pay. As part of that back pay award, the MCAD put an explicit end date on the period of time for which back pay was being awarded, noting that the Appellants had every opportunity to take subsequent civil service exams.

Moreover, the Commission is not swayed that the relief being sought is consistent with basic merit principles. While paper and pencil examinations are not always a fail-safe way to ensure the hiring and promotion of the best candidates, they are the primary

means of ensuring a qualified group of candidates in those cities and towns that voluntarily chose to remain subject to the civil service law in Massachusetts, including the City of Melrose. In this case, the Appellants have not taken and passed a civil service examination for the position of sergeant in over a decade. During that period of time, dozens of individuals, including the Participants, have studied for and taken up to four intervening promotional examinations for the position of lieutenant. As a result of their preparation, the Participants scored sufficiently high to currently occupy the two top positions on the existing promotional list for lieutenant. Pro Se Participant David Dwyer, who is currently second on the promotional list, states in his letter to the Commission, “It would seem to me that the type of backroom deal presented here to promote these officers so many years down the line goes against the foundation of what the Civil Service Commission was created for.” His blunt words strike a chord with the Commission.

Conclusion

The relief being sought by the Appellants and the City, rather than promoting basic merit principles, is more likely to subvert them. As such, the Commission concludes that relief pursuant to Chapter 310 of the Acts of 1993 is not warranted in this particular case.

For the above reasons, the Appellants’ appeals under Docket Nos. G2-05-93 and G2-05-94 are hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman, Commissioner

By vote of the Civil Service Commission (Golblatt, Chairman, Bowman, Guerin and Marquis, Commissioners [Taylor – Absent]) on January 18, 2007.

A true record. Attest:

Commissioner

A motion for reconsideration may be filed by either Party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with M.G.L. c. 30A § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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.

Notice:

Robert S. Mantell, Esq.

Mark J. Ventola, Esq.

James Simpson, Esq.

David Dwyer

John Marra, Esq. (HRD)