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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2008-4718-C

PAUL JOSEPH, STANLEY DEMESMIN,
WILLIAM BRADLEY, DENNIS WHITE,
WILLIAM WOODLEY and GAYLE CRAVEN

v.

notice sent
1/14/10
G.G.
G.LAW.
I.J.A.
D.A.G. (mm)

CIVIL SERVICE COMMISSION

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

Paul Joseph, Stanley Demesmin, William Bradley, Dennis White, William Woodley, and Gayle Craven (collectively the "plaintiffs"), brought this action against the defendant, Civil Service Commission ("Commission"), seeking judicial review, pursuant to G.L. c. 31, § 44, of a Commission decision dismissing their appeal.[1] The plaintiffs are police officers with the City of Boston, Massachusetts. Their present appeal pertains to a promotional examination that the Commission administered in 2002. The plaintiffs have now moved, pursuant to Mass.R.Civ.P. 12(c), for entry of a judgment on the pleadings in their favor. The Commission has filed a written opposition to the plaintiffs' motion. For the following reasons, the Plaintiffs' Motion for Judgment on the Pleadings is denied and the Commission's decision dated September 26, 2008 is affirmed.

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[1] Review under G.L. c. 31, § 44, is governed by the provisions of G.L. c. 30A, § 14.

BACKGROUND

The facts as revealed by the administrative record are as follows. The plaintiffs are sergeants in the Boston Police Department. Paul Joseph, Stanley Demesmin, William Bradley, Dennis White, and William Woodley are African-American males. Gayle Craven is a female police sergeant.

In 2002, each of the plaintiffs took a promotional examination for the position of lieutenant in the Boston Police Department. The Commission administered this promotional exam. Following the exam, six out of the one hundred seventy-eight candidates who had taken it complained to the Human Resources Division ("the HRD") because the videotaped oral section of the exam included questions on Rule 200, a Boston Police Department Rule regarding critical incident management.[2] Previously, a Boston Police Department memorandum informed the candidates that the written knowledge component of the exam would not cover Rule 200. The plaintiffs were not among the original six complainants because their union, the Boston Police Superior Officers Federation ("Union"), purportedly advised them not to challenge the fairness of the exam at that time because the union "had enough names to make the appeal effective . . . [and] more names would slow down the process," and if the union prevailed, "everyone would benefit." As discussed below,

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[2] Rule 200 covers the police department's rules and regulations for response to and management of critical incidents, such as setting up a perimeter, hostage situations, being a first responder, and calling other emergency response agencies.

everyone did not.

Subsequently, the HRD found that the examination was fair despite the inclusion of the Rule 200 questions. Over the next six years, the parties attempted, unsuccessfully, to reach a settlement agreement. Within the six-year time period, twenty-five of the original 2002 test-takers were promoted to the position of lieutenant based on the results of the 2002 exam, and an additional fourteen test-takers were promoted to lieutenant based on the result of scores on another promotional exam administered in 2005.

After conducting hearings over several days regarding the Union's appeal from the HRD decision, the Commission issued a decision on February 4, 2008 in which it concluded that the examination was unfair insofar as it included questions regarding Rule 200. The Commission noted that the inclusion of the Rule 200 questions resulted in an unfair advantage for some candidates because their performance on the Rule 200 questions would be based on experience from prior work assignments and not based on preparation for the exam. The Commission, however, limited its relief to the original individual police officers who actually filed examination appeals before the Commission pursuant to G.L. c. 31, § 2(b). These individuals were entitled to have their examinations rescored and "[i]f, based upon this rescoring, an Appellant would have received a score that equals or is greater than the score of anyone who was promoted based upon that 2002 examination, then such Appellant, if not yet

promoted, shall be granted Chapter 310 relief . . . and have his or her name placed at the top of the current promotional list until such time as his or her name has been reached for consideration for a vacant position." Administrative Record at 32. Following this decision, the Commission received a number of motions and other correspondence from the individuals who were excluded from relief under its February 4, 2008 decision.[3]

On June 12, 2008, the Commission issued a ten-page decision on a motion for reconsideration by certain appellants, and for clarification of its prior decision, to address the issue of whether the candidates who had not filed an appeal should receive the same relief as those who had filed appeals and and who had been granted relief under the February 4, 2008 decision. The Commission denied the request to expand relief to individuals beyond those who actually filed individual appeals with the Commission in a timely manner. The Commission edited its February 4, 2008 order, but again, it refused to expand relief to other individuals, including the plaintiffs, who did not actually file appeals.

The plaintiffs sent HRD a letter dated July 7, 2008 requesting that all of the remaining candidates' exams from the 2002 promotional examination be rescored in the same manner as those of the appellants who had been granted relief under the

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[3] Some of these individuals were police officers who were at or near the top of the promotional list and would be impacted by any names placed ahead of them.

Commission's February 4, 2008 and June 12, 2008 decisions. In this letter, the plaintiffs noted that:

> It is fundamentally unfair, and therefore a violation of Basic Merit Principles, to give the remedy of throwing out an unfair question to some and not to others.
>
> This request also concerns affirmative action, and the policies of the state in fostering racial integration in the Boston Police Department command staff. There are currently only two African-American Police Captains, both nearing retirement. My male clients are all African-American Police Sergeants; their later promotion to Lieutenant would help insure [sic] their future promotion to command ranks. I understand there is a shortage of Police Lieutenants in Boston and that my clients [sic] rank on the certification would be greatly enhanced if this 310 request for scoring parity were allowed. Furthermore, there are no uniformed women lieutenants in the Boston Police Department. [footnote 3 omitted] Of captains, the only three women are all to retire soon. The position of Ms. Craven would be greatly enhanced if this 310 request for scoring were allowed.

Administrative Record at 18. The HRD did not respond to the plaintiffs' request. On September 10, 2008, the plaintiffs appealed the alleged inaction of the HRD to the Commission, and attached a copy of their July 7, 2008 letter to their appeal.

On September 26, 2008, the Commission, *sua sponte*, dismissed the plaintiffs' appeal. The Commission explained:

> Pursuant to 801 CMR 1.01 (7) (g) (3), the presiding officer may at any time, on his own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendancy of a prior, related action in any tribunal that should first be decided.
>
> The instant appeals should be dismissed for the following reasons. First, the Appellants have alleged that HRD failed to act by not granting them relief pursuant to Chapter 310 of the Acts of 1993. Chapter 310, however, only

> allows the Civil Service Commission to restore or protect the rights of an aggrieved person under Chapter 31[0].
>
> Moreover, the issue of whether the Appellants in the instant appeal should be granted the relief being sought (whether it be from HRD or the Commission) has already been addressed through prior Commission decisions, referenced above, and attached to this Order of Dismissal.

Administrative Record at 50-51 (emphasis in original). Essentially, the Commission determined that it lacked jurisdiction to hear the plaintiffs' untimely appeal and the plaintiffs therefore failed to state a claim upon which relief could be granted. On October 23, 2008, the plaintiffs filed their present appeal of the Commission's September 26, 2008 decision in the Superior Court.

DISCUSSION

General Laws c. 31, § 44 provides that "[a]ny party aggrieved by a final order or decision of the commission following a hearing pursuant to any section of this chapter or chapter thirty-one A may institute proceedings for judicial review in the superior court within thirty days after receipt of such order or decision." "Any proceedings in the superior court shall, insofar as applicable, be governed by the provisions of section fourteen of chapter thirty A." *Id.*

Pursuant to G.L. c. 30A, § 14(7), this court may affirm the decision of the agency, remand the matter for further proceedings before the agency, set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been

prejudiced because the agency decision is based upon an error of law, unsupported by substantial evidence, unwarranted by facts found by the court on the record as submitted, or is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. G.L. c. 30A, § 14(7). "The court shall give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." See *id.* See also *Flemings v. Contributory Retirement Appeal Bd.*, 431 Mass. 374, 375 (2000) (recognizing that great deference is given to decisions of administrative agencies and court should not supplant its own judgment where an agency's statutory interpretation is reasonable). The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1989). The reviewing court may not substitute its judgment for that of the agency. *Southern Worcester County Regional Vocational School Dist. v. Labor Relations Comm'n*, 386 Mass. 414, 420-421 (1982). A court may not dispute an administrative agency's choice between two conflicting views, even though the court would justifiably have made a different choice had the matter come before it de novo. *Zoning Board of Appeals of Wellesley v. Housing Appeals Comm.*, 385 Mass. 651, 657 (1982).

This court must consider the entire administrative record and affirm the Commission's decision unless that decision is not supported by substantial evidence

or is based on an error of law. See *Langlitz v. Board of Reg. of Chiropractors*, 396 Mass. 374, 379 (1985). Substantial evidence means such evidence as a reasonable mind might accept as adequate to support a conclusion after taking into consideration the entire record. G.L. c. 30A, §§ 1(6), 14(7).

The plaintiffs contend that it is not fair to hold them to the results of the previous Commission decisions because they were not actually parties to the earlier cases. They assert that the Commission cannot make decisions curtailing the rights of persons who were never before it, but they do not cite any Massachusetts appellate caselaw in support of this proposition. The plaintiffs also maintain that "[d]ecision making at the Commission will be improved if they open up their hearing to racial and gender groups not heard in the prior hearings." The Commission contends that it correctly dismissed the plaintiffs' appeal as untimely, and that it properly exercised its discretion to deny relief.

Upon review of the administrative record and after hearing, the plaintiffs' motion for judgment on the pleadings must be denied, and the Commission's September 26, 2008 decision must be affirmed. The Commission properly dismissed the plaintiffs' appeal because it was untimely and not presented within seven days after the date of the 2002 promotional examination. See G.L. c. 31, § 22 (noting that "[a]n applicant may request the administrator to conduct a review of whether an examination taken by such applicant was a fair test of the applicant's fitness actually

to perform the primary or dominant duties of the position for which the examination was held, provided that such request shall be filed with the administrator no later than seven days after the date of such examination"). Apparently upon advice from the Union, the plaintiffs admittedly never filed an immediate appeal of the 2002 promotional examination with HRD.[4] Accordingly, the Commission did not have jurisdiction to hear the plaintiffs' appeal in 2008, and it properly dismissed the plaintiffs' untimely appeal in its September 26, 2008 decision. See G.L. c. 31, § 24 (stating that "[t]he commission *shall* refuse to accept any petition for appeal unless the request for appeal, which was the basis for such petition, was filed in the required time and form and unless a decision on such request for review has been rendered by the administrator [in this case, HRD]") (emphasis added).

Even if the Commission had the authority to ignore the statutory time limits set forth in G.L. c. 31, § 22 and § 24, the Commission properly exercised its discretion under St. 1993, c. 310 in denying relief in this case. Nor was the Commission's decision arbitrary and capricious. See *City of Cambridge v. Civil Service Comm'n*, 43 Mass. App. Ct. 300, 303 (1997) (noting a decision is arbitrary and capricious "when it lacks any rational explanation that reasonable persons might support"). Chapter 310 of the Acts and Resolves of 1993 states that:

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[4] If the Union's advice was erroneous, the plaintiffs may have a claim against the Union. That determination is, however, beyond the scope of this appeal.

> 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 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).

In this case, the plaintiffs were appealing the fairness of an examination that they took approximately six-years earlier. During that six-year time period, the Commission administered another promotional examination (in 2005), and approximately forty of the original 2002 test-takers were eventually promoted to the position of lieutenant. Had the Commission decided to grant relief to the plaintiffs, this decision would have likely impacted promotions to lieutenant in the Boston Police Department for a significant period of time. Therefore, the Commission properly exercised its discretion and denied the plaintiffs' present appeal.

The plaintiffs have apparently attempted to inject issues associated with race, gender, and affirmative action into their appeal to the Commission and into their present appeal to this court. This appeal, however, has nothing to do with these issues. Rather, the question is whether the 2002 promotional examination was unfair because the videotaped oral section of the exam included questions on Rule 200, and whether the Commission properly dismissed the plaintiffs' 2008 appeal. Furthermore, the plaintiffs have not identified any policy or law that would require the Commission to consider race, gender, and affirmative action in its decision to

deny relief to the plaintiffs in the circumstances of this case.

In sum, the plaintiffs have not demonstrated that the Commission's September 26, 2008 decision to dismiss the plaintiffs' appeal was based upon an error of law, unsupported by substantial evidence, or is arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. See *Merisme v. Board of Appeals on Motor Vehicle Liab. Policies and Bonds*, 27 Mass. App. Ct. at 474. Accordingly, the Plaintiffs' Motion for Judgment on the Pleadings must be denied, and the Commission's September 26, 2008 decision must be affirmed.

ORDER

For the foregoing reasons, the Plaintiffs' Motion for Judgment on the Pleadings is **DENIED** and the Civil Service Commission's decision dated September 26, 2008 is **AFFIRMED**. The Plaintiffs' Complaint is **DISMISSED**.

Peter M. Lauriat
Justice of the Superior Court

Dated: January 13, 2010