COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

THOMAS LAVELLE,
Appellant

v.

DEPARTMENT OF CORRECTION,
Respondent

G2-22-129

Appearance for Appellant: *Pro Se*
Thomas Lavelle

Appearance for Respondent: Eamonn M. Sullivan, Esq.
Department of Correction
Division of Human Resources
50 Maple Street, 1st Floor
Milford, MA 01757

Commissioner: Christopher C. Bowman

SUMMARY OF DECISION

The Commission dismissed the Appellant's promotional bypass appeal as no bypass occurred. Rather, the Appellant was not selected by DOC for a provisional appointment to the position of Recreation Officer II.

DECISION ON RESPONDENT'S MOTION TO DISMISS

On September 27, 2022, the Appellant, Thomas Lavelle (Appellant), filed an appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (DOC) to not select him for the position of Recreation Officer II (RO II). On October 18, 2022, I held a remote pre-hearing conference which was attended by the Appellant and counsel for DOC. DOC subsequently filed a motion to dismiss the Appellant's appeal and the

Appellant did not file an opposition. For the reasons stated below, the motion is allowed and the Appellant's appeal is dismissed.

Most of the facts are not in dispute here. The Appellant is a long-serving permanent, tenured Recreation Officer I (RO I) at DOC. On June 17, 2022, DOC posted notice of four vacant RO II positions to be filled via provisional appointment. Interviews were conducted and the Appellant was ranked 5th among the interviewed candidates. On August 4, 2022, the Appellant was notified that he was not selected for RO II. DOC argues that, since no bypass occurred here, the Commission lacks jurisdiction to hear his appeal. At the pre-hearing, the Appellant argued that the eligible list for RO II, for which he took an examination, was still in place. Subsequent to the pre-hearing, I provided both parties with a notification from the state's Human Resources Division (HRD) dated July 25, 1997, effectively revoking almost all non-public safety eligible lists in Massachusetts, which includes the Recreation Officer series. There is no dispute that there has been no civil service examination for this series since that time and, hence, no further eligible lists have been established from which to make permanent appointments or promotions. Thus, DOC is required to fill vacancies in the Recreation Officer series through provisional appointments or promotions.

Motion to Dismiss and Summary Decision Standards

The Standard Rules of Adjudicatory Practice and Procedure (Formal Rules), codified at 801 Mass. Code Regs. 1.01, establish (in subsection 7(g)) that "[t]he Presiding Officer may at any time, on his or her 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 pendency of a prior, related action in any tribunal that should first be decided."

Additionally, when a Respondent before the Commission is of the opinion there is no

genuine issue of disputed material fact relating to the Appellant's claim, no viable ground of appeal, and the Respondent is entitled to prevail as a matter of law, this party may move, with or without supporting affidavits, either to dismiss the entire appeal or for summary decision on a particular claim. 801 CMR 1.01(7)(h). Such motions are decided under the well-recognized standards for summary disposition as a matter of law—i.e., "viewing the evidence in the light most favorable to the non-moving party," the substantial and credible evidence establishes that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case," and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring an evidentiary hearing. *See, e.g., Nigro v. City of Everett,* 30 MCSR 277 (2017); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005). *Accord Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008); *Maimonides School v. Coles*, 71 Mass. App. Ct. 240, 249 (2008). *See also Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss). *Cf. R.J.A. v. K.A.V.*, 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss).

Analysis

The vast majority of non-public safety civil service positions in the official service in Massachusetts have been filled provisionally for well over two decades. These provisional appointments and promotions have been used as there have been no "eligible lists" from which a certification of names can be made for permanent appointments or promotions. The underlying issue is the Personnel Administrator's (HRD) inability to administer civil service examinations that are used to establish these applicable eligible lists. This is not a new issue – for the Commission,

HRD, the Legislature, the courts or the various other interested parties including Appointing Authorities, employees or public employee unions.

In a series of decisions, the Commission has addressed the statutory requirements when making such provisional appointments or promotions. *See Kasprzak v. Department of Revenue*, 18 MCSR 68 (2005), *on reconsideration*, 19 MCSR 34 (2006), *on further reconsideration*, 20 MCSR 628 (2007); *Glazer v. Department of Revenue*, 21 MCSR 51 (2007); *Asiaf v. Department of Conservation and Recreation*, 21 MCSR 23 (2008); *Pollock and Medeiros v. Department of Mental Retardation*, 22 MCSR 276 (2009); *Pease v. Department of Revenue*, 22 MCSR 284 (2009) & 22 MCSR 754 (2009); *Poe v. Department of Revenue*, 22 MCSR 287 (2009); *Garfunkel v. Department of Revenue*, 22 MCSR 291 (2009); *Foster v. Department of Transitional Assistance*, 23 MCSR 528 (2010); *Heath v. Department of Transitional Assistance*, 23 MCSR 548 (2010).

In summary, these recent decisions provide the following framework when making provisional appointments and promotions:

- Section 15 of G.L. c. 31, concerning provisional promotions, permits a provisional promotion of a permanent civil service employee from the next lower title within the departmental unit of an agency, with the approval of the Personnel Administrator (HRD) if (a) there is no suitable eligible list; or (b) the list contains fewer than three names (a short list); or (c) the list consists of persons seeking an original appointment and the appointing authority requests that the position be filled by a departmental promotion (or by conducting a departmental promotional examination). In addition, the agency may make a provisional promotion skipping one or more grades in the departmental unit, provided that there is no qualified candidate in the next lower title and "sound and sufficient" reasons are submitted and approved by the administrator for making such an appointment.

- Under Section 15 of Chapter 31, only a "civil service employee" with permanency may be provisionally promoted, and once such employee is so promoted, she may be further provisionally promoted for "sound and sufficient reasons" to another higher title for which she may subsequently be qualified, provided there are no qualified permanent civil service employees in the next lower title.
- Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as a provisional appointment (as opposed to a provisional promotion), unless the evidence suggests that an appointing authority is using the Section 12 provisional "appointment" process as a subterfuge for selection of provisional employee candidates who would not be eligible for provisional "promotion" over other equally qualified permanent employee candidates.
- When making provisional appointments to a title which is not the lowest title in the series, the Appointing Authority, under Section 12, is free to consider candidates other than permanent civil service employees, including external candidates and/or internal candidates in the next lower title who, through no fault of their own, have been unable to obtain permanency since there have been no examinations since they were hired.

Applied to the instant appeal, DOC has not violated any civil service law or rule regarding provisional appointments. DOC posted the RO II vacancy as a provisional appointment and, as such, was not required to appoint candidates with civil service permanency. They were permitted to consider both external candidates as well as internal candidates

Ultimately, DOC provisionally appointed four internal candidates to the position of RO II. For the reasons cited above, this is not a violation of those sections of the civil service law

related to provisional appointments and, further, does not constitute a "bypass" of the Appellant, which could typically be appealed under G.L. c. 31, § 2(b).

Although no bypass occurred here, the Commission always maintains authority under G.L. c. 31, § 2(a) to conduct investigations, including when allegations are made that an appointment process was not consistent with basic merit principles. This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. *See Boston Police Patrolmen's Association et al. v. Civil Service Comm'n*, No. 2006-4617 (Suff. Sup. Ct., December 18, 2007). *See also Erickson v. Civil Service Comm'n & others*, No. 2013-00639-D (Suff. Sup. Ct., November 3, 2014). There has no evidence presented here to suggest that DOC's non-selection of the Appellant was the product of any impermissible factors such as personal or political bias.

Conclusion

For all the reasons stated above, the Appellant's appeal under Docket No. G2-22-129 is ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chairman; Dooley, McConney, Stein and Tivnan) on March 9, 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 his / her 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:
Thomas Lavelle (Appellant)
Eamonn Sullivan, Esq. (for Respondent)