

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place – Room 503
Boston, MA 02108
(617) 727-2293

ALFONSO LEONE,
Appellant

v.

Case No. B1-13-267

HUMAN RESOURCES DIVISION,
Respondent

Appearance for Appellant:

Pro Se

Appearance for Respondent:

Andrew Levrault, Esq.
Human Resources Division
One Ashburton Place, Room 211
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman, Esq.¹

DECISION ON HUMAN RESOURCES DIVISION’S MOTION TO DISMISS

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Alfonso Leone (“Appellant” or “Mr. Leone”) filed a timely appeal with the Civil Service Commission (“Commission”) on December 4, 2013 against the state’s Human Resources Division (“HRD,” “Respondent,” or “Appointing Authority”), contesting HRD’s decision to deny him disabled veteran status on the 2013 Police Officer eligible list.

A pre-hearing conference was held on January 14, 2014 at the offices of the Commission. On or about February 4, 2014, HRD filed a Motion to Dismiss with the Commission. Mr. Leone submitted an Opposition to HRD’s Motion to Dismiss on or about February 7, 2014. A motion hearing was subsequently held on February 26, 2014 at the offices of the Commission. The hearing was digitally recorded; the parties were provided with copies

¹ The Commission acknowledges the assistance of Beverly J. Carey, Esq., in the drafting of this decision.

of the recording and the Commission retained a copy of the recording.² For the reasons stated herein, HRD's Motion to Dismiss is allowed.

FINDINGS OF FACT

Based on the Motion, the Opposition, the documents produced by the parties, the arguments made at the hearing on the Motion, and taking administrative notice of all matters filed in the case and pertinent statutes, case law, regulations and policies, and reasonable inferences from the evidence, I make the following findings of fact:

1. Mr. Leone was a member of the Army National Guard beginning approximately October 20, 1993.³ His National Guard service obligation was one (1) weekend a month and two (2) weeks per year. (Administrative Notice; Testimony of Mr. Leone)
2. Mr. Leone's DD-214 Certificate of Release or Discharge from Active Duty Form lists his separation date as March 4, 1994. His Net Active Service is four (4) months and fifteen (15) days. The Type of Separation is "release from active duty training." His Character of Service is "honorable." (HRD's Motion, Attachment 1) Both Mr. Leone's DD-214 and his subsequent Separation Notice (NGB Form 22) show that his service during the four (4) months was to attend a sixteen (16) week military police training course. (HRD's Motion; Opposition to Motion to Dismiss, Attachment)
3. While in the National Guard in 1995, Mr. Leone served fifteen (15) days in Panama. At the time of his hearing before the Commission, Mr. Leone was awaiting U.S.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion.

³ Mr. Leone testified that he was in the National Guard until 2000. A certificate from the National Guard appears to corroborate that he had seven (7) years of service with the National Guard. (Ex. 1) Yet, this document does not specify how much of his service, if any, was non-training related active duty. The Commission acknowledges Mr. Leone's testimony regarding the difficulty he has had obtaining additional documentation from the Army that may reflect any additional service time. However, even if such documentation were provided, it would only alter the outcome if the documents demonstrate that he had active duty beyond training.

government documentation that would indicate the dates and nature of his service in Panama. (Testimony of Mr. Leone)

4. On July 15, 2011 the U.S. Department of Veterans Affairs in Boston received an original disability claim submitted by the Appellant. (HRD's Motion to Dismiss, Attachment 2)
5. On or about November 26, 2011, the Department of Veterans Affairs determined that Mr. Leone was a veteran of the Gulf War Era based on his service in the Army National Guard from October 20, 1993 to March 4, 1994 and that, with regard to his disability claim, a "service connection for tinnitus, bilateral is granted with an evaluation of 10 percent effective July 15, 2011." (HRD's Motion to Dismiss, Attachment 2)
6. Mr. Leone took and passed the 2013 Police Officer examination, administered on June 15, 2013. (Administrative Notice)
7. The eligible list based on this examination was established on November 1, 2013 and expires on October 31, 2015. (Administrative Notice)
8. Mr. Leone's status on this eligible list is "Civilian/Non-veteran." (Administrative Notice)
9. On or about October 15, 2013, Mr. Leone requested, via email, that HRD change his veteran status from Civilian/Non-Veteran to "Disabled Veteran." (HRD's Motion, Attachment 3)
10. Mr. Leone submitted a DD-214 Certificate of Release or Discharge from Active Duty Form, along with two letters from the Department of Veteran's Affairs Regional Office in Boston. (HRD's Motion, Attachment 2)
11. By email dated November 8, 2013, HRD denied Mr. Leone's request to change his status. HRD denied Mr. Leone's request to change his status because, according to the

records submitted to HRD, Mr. Leone was only in active duty for training and, therefore, did not meet the statutory requirements to be afforded veteran status, in accordance with G.L. c. 31, § 1. (HRD's Motion, Attachment 3)

DISCUSSION

Legal Standard for Motion to Dismiss

In accordance with 801 CMR 1.01(7)(g)(3), the Commission may at any time, on its own motion or that of a Party, dismiss an appeal for lack of jurisdiction to decide the matter or for failure of the Appellant to state a claim upon which relief can be granted. 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 undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case.” See, e.g., Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 550 (2008); Maimonides Sch. v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Mass. Parole Bd., 18 MCSR 216 (2005).

Applicable Civil Service Law

The fundamental purpose of the civil service system is to guard against political considerations, favoritism, and bias in governmental hiring and promotion. The commission is charged with ensuring that the system operates on “[b]asic merit principles.” Massachusetts Assn. of Minority Law Enforcement Officers v. Abban, 434 Mass. at 259, citing Cambridge v. Civil Serv. Comm’n, 43 Mass.App.Ct. at 304. “Basic merit principles” means, among other things, “assuring fair treatment of all applicants and employees in all aspects of personnel administration” and protecting employees from “arbitrary and capricious actions.” G.L. c. 31, § 1. Personnel decisions that are marked by political influences or objectives unrelated to merit

standards or neutrally applied public policy represent appropriate occasions for the Civil Service Commission to act. Cambridge at 304.

Pursuant to G.L. c. 31, § 2(b), the Commission has the authority to “hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator. . . .” Furthermore, G.L. c. 31, § 2(b) states, in pertinent part: “No decision of the administrator involving the application of standards established by law or rule to a fact situation shall be reversed by the commission except upon a finding that such decision was not based upon a preponderance of evidence in the record.”

In order to qualify as a “disabled veteran” under G.L. c. 31, § 1, one must first satisfy the definition of “veteran” in this section. Pursuant to G.L. c. 31, § 1, a “veteran” is, in pertinent part, any person who “comes within the definition of a veteran appearing in the forty-third clause of section seven of chapter four. . . .” In addition, G.L. c. 31, § 1 explicitly states that “[a] *veteran shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.*” (Emphasis added).

The term “veteran” is defined in G.L. c. 4, § 7, cl. 43rd, as follows (in pertinent part):

“Veteran” shall mean (1) any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States, or on full time national guard duty under Titles 10 or 32 of the United States Code or under sections 38, 40 and 41 of chapter 33 for not less than 90 days active service, at least 1 day of which was for wartime service; provided, however, that any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 90 days of active service; (2) a member of the American Merchant Marine who served in armed conflict between December 7, 1941 and December 31, 1946, and who has received honorable discharges from the United States Coast Guard, Army, or Navy; (3) any person (a) whose last discharge from active service was under honorable conditions, and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than 180 days active

service; provided, however, that any person who so served and was awarded a service-connected disability or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 180 days of active service.

In addition, a “Persian Gulf veteran” is defined as “any person who performed such wartime service during the period commencing August second, nineteen hundred and ninety and ending on a date to be determined by presidential proclamation or executive order and concurrent resolution of the Congress of the United States.” G.L. c. 4, § 7, cl.

43rd. According to G.L. c. 31, § 1, a “disabled veteran” is:

[A]ny veteran, as defined in this section, who (1) has a continuing service-incurred disability of not less than ten per cent based on wartime service for which he is receiving or entitled to receive compensation from the veterans administration or, provided that such disability is a permanent physical disability, for which he has been retired from any branch of the armed forces and is receiving or is entitled to receive a retirement allowance, or (2) has a continuing service-incurred disability based on wartime service for which he is receiving or entitled to receive a statutory award from the veterans administration.

(Id.)

The Respondent’s Argument

HRD argues that Mr. Leone does not meet the criteria set forth by G.L. c. 31, § 1 and G.L. c. 4, § 7, cl. 43rd in order to be considered a veteran. While Mr. Leone submitted documentation of honorable service with the National Guard, this was for training purposes and, therefore, is expressly excluded from the definition of veteran in G.L. c. 31, § 1. HRD contends that if Mr. Leone is not a veteran, he cannot be considered a disabled veteran.

The Appellant’s Argument

Mr. Leone argues that he meets the criteria for disabled veteran because he has at least one (1) day of wartime service during the Gulf War and he received an honorable discharge. Specifically, Mr. Leone avers that he was deployed for active duty in Panama in 1995 for fifteen (15) days. He also submits that he is exempt from the ninety (90) day active-service

requirement under G.L. c. 4, § 7, cl. 43rd due to the service connected disability he sustained. In addition, Mr. Leone states that he is considered to be a disabled veteran by the Department of Veterans Affairs and that the Commonwealth affords him the veteran's real estate tax abatement. Furthermore, the Appellant argues that under Hesse v. Dept. of the Army, 2007 MSPB 43, Docket No. AT-3443-05-0936-I-1 (2007)(a decision of the U.S. Merit Systems Protection Board), he meets the definition of disabled veteran.

Analysis

HRD has established by a preponderance of the evidence that it had reasonable justification to deny Mr. Leone disabled veteran status on the 2013 Police Officer eligible list. While Mr. Leone may be considered a disabled veteran by the Department of Veterans Affairs for purposes of receiving veterans benefits, for civil service purposes, G.L. c. 31, § 1 and G.L. c. 4, § 7, cl. 43rd set forth the requirements for veterans and disabled veterans.

General Law c. 31, § 1 expressly excludes active duty for training in the National Guard from the definition of veteran for civil service purposes. The DD-214 Form submitted to HRD by Mr. Leone only reflects his active duty for training purposes. In addition, the letter to Mr. Leone from the Department of Veterans Affairs only references his service with the National Guard from October 20, 1993 to March 4, 1994. While Mr. Leone has a document from the National Guard stating that he has seven (7) years of service, this form does not specify how much of that service, if any, was non-training active duty. (Ex. 1) As a result, with the only proof of active duty being for training in the National Guard, Mr. Leone is excluded from the definition of veteran under G.L. c. 31, § 1. Without first meeting the criteria of veteran, under G.L. c. 31, § 1, one cannot qualify as a disabled veteran under the statute.

Mr. Leone's reliance on Hesse is misplaced. Hesse is not a court decision but a decision issued by the United States Merit Systems Protection Board. The case involves application of a

federal statute requiring that certain security guard positions be filled by candidates who qualify for veterans preference. This decision relies on the fact that, unlike the definition of “veteran” under federal law, the definition of “disabled veteran” does not specifically exclude active duty for training.⁴ In addition, it is not clear whether the Appellant in Hesse was in the Army or a member of the National Guard. Furthermore, the definition of veteran relied on in Hesse applies to the purposes of 38 USC and 5 USC only. The Commission notes that these differences create an anomaly that the veteran status of a member of the Massachusetts National Guard Army may be treated differently under federal and Massachusetts law. Any effort to reconcile these differences is for the Legislature, not the Commission, to address.

While Mr. Leone avers that he also performed fifteen (15) days of wartime service in Panama in 1995, and presumably other National Guard training, unfortunately, there is no documentation to support this claim or explain where or how he was injured. Absent documents showing that Mr. Leone had active duty wartime service as defined by Massachusetts law, Mr. Leone cannot be granted either veteran or disabled veteran status.

At the hearing before the Commission, HRD noted that Mr. Leone may support additional documentation regarding his military service to HRD at any time. However, in order to change his status on the current eligible list, such supporting documents should be submitted to HRD prior to the expiration of the eligible list, on October 31, 2015. While the Commission is concerned by the difficulty Mr. Leone has had in attempting to obtain his military records, without this documentation of his service, HRD cannot reassess Mr. Leone’s status.

⁴ See 5 USC §§ 2108(1), (2)(“disabled veteran”); 38 USC § 101(21)(“active duty”); 38 USC § 101(24)(“active military service” includes a period of active duty for training during which a service member is injured in line of duty).

Conclusion

For the foregoing reasons, the Respondent's Motion to Dismiss is hereby *allowed*, in accordance with 801 CMR 1.01(7)(g)(3), and the Appellant's appeal under Docket Number B1-13-267, pursuant to G.L. c. 31, § 2(b), is hereby *denied*.

Civil Service Commission
/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq.
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on July 9, 2015.

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 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:
Alfonso Leone (Appellant)
Andrew Levrault, Esq. (for the Respondent)
John Marra, General Counsel (HRD)