

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

TYLER LOPES,
Appellant

v.

G2-23-049

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Pro Se
Tyler Lopes

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 appeal of the Appellant as he is unable to show that he was bypassed for promotional appointment or that he is otherwise an aggrieved person who should be granted relief.

ORDER OF DISMISSAL

On April 5, 2023, the Appellant, Tyler Lopes (Appellant), filed a promotional bypass appeal with the Civil Service Commission (Commission), contesting what he argues was a decision by the Department of Correction (DOC) to bypass him for promotional appointment to Correctional Program Officer C (CPO C).

On May 9, 2023, I held a remote pre-hearing conference which was attended by the Appellant and counsel for DOC. The following is undisputed:

- a. On June 15, 2020, the state's Human Resources Division (HRD) established the eligible list for CPO C.
- b. DOC subsequently created Certification No. 08968, on which the Appellant was ranked eighth among those willing to accept appointment.
- c. Fifteen candidates were promoted, including eight ranked below the Appellant.

DOC argues that the Appellant was not bypassed because there were no vacancies at the sites that the Appellant had listed on his "site selection form." The parties agree that DOC creates civil service certifications based both on the eligible list *and* information from a site selection form that all candidates are asked to complete. For example, if a vacancy for CPO C exists at the MCI Concord facility, and the first ranked candidate on the eligible list does not indicate a preference for MCI Concord on the site selection form, that candidate will not be considered for appointment for that vacancy and the appointment of a candidate ranked lower on the overall eligible list would not constitute a bypass.

The parties also agree that, consistent with the applicable collective bargaining agreement, certain select DOC employees may be designated by the DOC Commissioner to work at the Office of Inspectional Services (OIS), which does not require their name to appear on a site selection form. This "designation", however, does not permit DOC to *promote* a DOC employee from one civil service position to another outside of the civil service law. For example, if a CPO A/B is currently working at MCI Concord, DOC can designate that employee to work at OIS *as a CPO A/B*, without regard to that person's placement on any eligible list or certification. DOC *cannot*, however, designate that same CPO A/B from MCI Concord to work at OIS *as a CPO C*. That would be a *civil service* promotion, which must conform to all civil service law and rules, including choosing from eligible candidates in rank order from a Certification.

Based on additional information provided by DOC, it appears that the incumbent CPO A/B who was ranked below the Appellant and selected for promotion as a CPO C at MCI Concord, never actually began serving as a CPO C at MCI Concord. Rather, while serving continuously at OIS, the CPO A/B was promoted to CPO C.

Motion for Summary Decision Standard

When there is no genuine issue of fact relating to all or part of a claim or defense and a party is entitled to prevail as a matter of law, summary decision is appropriate. 801 CMR 1.01(7)(h). Summary decisions are decided under the well-recognized standards for summary disposition as a matter of law: “viewing the evidence in the light most favorable to the non-moving party,” the substantial and credible evidence established 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., 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) (finding that factual issues bearing on plaintiff’s standing required denial of motion to dismiss).

Analysis

DOC’s practice of designating incumbent employees to serve at OIS, without requisition of a certification, is permitted by the CBA and is not inconsistent with the civil service law and rules. It is analogous to a Police Chief designating an incumbent civil service police officer to

serve as a detective or a court prosecutor. A police chief cannot, however, promote a police officer to sergeant without complying with the civil service law, which requires selecting from certified candidates in rank order, with bypass appeal rights afforded to non-selected candidates if a lower ranked certified candidate is promoted.

DOC argues that the OIS CPO A/B “was rightfully promoted into the vacant CPO C position at *MCI Concord* pursuant to the civil service list” and *then* designated or assigned to work at OIS. This ignores the undisputed fact that the CPO A/B never began working as a CPO C at MCI Concord, as required by Section 9(4) of the Personnel Administration Rules (PAR.09(4)) which states that: “No person shall be regard as appointed to a full-time position within the requirements of these rules unless [s]he accepts the position and is actually employed within thirty days . . .”.

The Appellant effectively argues that this potential systemic violation makes him an aggrieved person. For this reason, he asks that he be promoted to CPO C at his current work location at MCI-Norfolk. The problem with this request is that there is no evidence to show that, had DOC followed the proper procedures here, the Appellant would have been promoted to CPO C at MCI Norfolk. In fact, although the apparent misstep by DOC may have potentially harmed at least one candidate, there is no evidence to show that the Appellant is the potentially aggrieved person. Because the Appellant has no reasonable expectation of showing that he is an aggrieved person, his appeal must be dismissed.

That leaves the issue of whether the Commission should conduct a more formal review (*i.e.*, an investigation) of the process that DOC used here to promote a CPO A/B to CPO C. The Commission conducts such investigations sparingly. Based on the facts of this individual case, I do not recommend initiating an investigation, in part because the end result to cure this misstep

could, conceivably, require the promoted candidate to actually serve in the promoted position at MCI-Concord before being designated to serve at OIS. I believe a more appropriate action here is to advise DOC that, going forward, it should use particular caution not to rely on provisions in the CBA regarding designations to certain functional positions to circumvent the civil service law. I trust that DOC will adjust its practices accordingly.¹

Conclusion

For all of the above reasons, the Appellant’s appeal under Docket No. G2-23-049 is hereby ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on July 13, 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 to:
Tyler Lopes (Appellant)
Eamonn Sullivan, Esq. (for Respondent)

¹ To ensure clarity, the use of “one-day appointments” at a particular institution would not be an acceptable alternative here.