

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION

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

SCOTT McCABE,
Appellant

v.

E-19-158

CITY OF LAWRENCE &
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

Andrew J. Gambaccini, Esq.
Reardon, Joyce & Akerson, P.C.
4 Lancaster Terrace
Worcester, MA 01609

Appearance for City of Lawrence:

Wendy Chu, Esq.
Valerio Dominello & Hillman, LLC
One University Avenue
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Appearance for Human Resources Division:

Melissa Thomson, Esq.
Human Resources Division
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Boston, MA 02114

Commissioner:

Cynthia A. Ittleman

DECISION ON CITY OF LAWRENCE'S MOTION TO DISMISS

On July 30, 2019, pursuant to G.L. c. 31, §§ 2(a) and 2(b), the Appellant, Scott McCabe (Appellant), a full-time police officer in the City of Lawrence (City)'s Police Department (LPD), filed a non-bypass equity appeal or, in the alternative, a request for investigation, with the Civil Service Commission (Commission), seeking a retroactive adjustment in his civil service seniority date *from* November 17, 2014 *to* September 9, 2001 or October 28, 2003. On August 12, 2019, I

held a pre-hearing conference at the Mercier Community Center in Lowell. The City subsequently filed a Motion to Dismiss and the Appellant filed an opposition. On November 22, 2019, I held a motion hearing at the same location. For the reasons stated below, the City's Motion to Dismiss is allowed; the Appellant's non-bypass equity appeal is dismissed; and his request for investigation is denied.

It is undisputed that the City bypassed the Appellant for appointment for the position of full-time police officer in 2000. In 2000, the City notified HRD of the reasons for bypass and, after review, HRD notified the Appellant that: a) HRD had approved the City's reasons for bypass and b) the Appellant may appeal this determination to the Commission. The Appellant subsequently filed a timely bypass appeal with the Commission; attended a pre-hearing conference; and participated in a full hearing before the Commission. In short, the Appellant was aware of the process for contesting a bypass; exercised his right to file an appeal with the Commission; and actively participated in the entire appeal process regarding the bypass.

On October 24, 2002, the Commission allowed the Appellant's 2000 bypass appeal and ordered the following relief:

“Pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, the Commission directs the Personnel Administrator [HRD] to place McCabe's name at the top of the current eligibility list, or, if necessary, revive his eligibility and place him at the top of the next requested certification, so that McCabe will be considered for the next appointment as a police officer with the City's Police Department.”

(McCabe v. Lawrence, 15MCSR 70 (2002))

Based on the plain reading and the intent of that order, the Appellant was to be given one additional opportunity for reconsideration for appointment as a Lawrence police officer. Further, by placing his name at the top of the next Certification, a non-selection by the City would constitute a bypass that could be appealed to the Commission.

Accepting, as true, the sworn affidavit of the Appellant, he became aware, sometime “in late 2002” that the City was appointing police officers and he (the Appellant through counsel) inquired with the City as to why the Appellant had not been considered for appointment. Assuming all facts in the light most favorable to the Appellant, the appointment of any candidates in “late 2002” would have constituted a bypass of the Appellant if the Appellant’s name should have been at the top of the Certification used during that hiring cycle. Importantly, the Appellant, despite being aware that candidates had been appointed from that 2002 Certification, did not file a bypass or any other type of appeal with the Commission in 2002.

Moving forward, it is undisputed that the Appellant’s name, consistent with the Commission’s 2002 order, did appear at the top of a subsequent Certification issued to the City on September 15, 2004. The Appellant acknowledges that he did sign the Certification as willing to accept appointment. The documentary evidence shows that: the City notified HRD of the proposed reasons for bypass; HRD approved the reasons; and HRD notified the Appellant of their approval along with the Appellant’s right to file an appeal with the Commission. Again, however, accepting the Appellant’s affidavit as true, he did not receive the HRD notification. The Appellant was, however, aware that other candidates, who must have been ranked below him, were appointed. Despite being well versed with the avenue for filing an appeal with the Commission, the Appellant did not do so. The Appellant seeks to justify his failure to file an appeal with the Commission by stating that his attorney at the time purportedly told him his only right of appeal was to Superior Court, which the Appellant did not pursue.

What occurred next is perplexing. Notwithstanding the fact that the Appellant’s name had indeed appeared at the top of at least one Certification issued to Lawrence, from which he was considered for appointment; and notwithstanding the fact that the last time the Appellant took a

civil service examination for police officer was in 2003, the Appellant's name appeared at the top of certifications for police officer issued to Lawrence for an additional ten years. Ultimately, the Appellant was appointed as a full-time police officer by the City in 2014. Despite the open question of whether the Appellant's name should have appeared on any Certifications issued to Lawrence after 2004, the Appellant, who was appointed from a Certification in 2014, now seeks a retroactive civil service seniority date back to 2003. In his affidavit, the Appellant states in part that he seeks such relief: "... to help avoid layoff risk in the future and simply because of the principle of the matter, which is very important to me." Such relief is not warranted for the reasons discussed below.

Even when the facts are viewed most favorably to the Appellant, he knew, *for years*, that candidates ranked below him on Certifications were being appointed by the Lawrence Police Department. He was intimately familiar with the process of filing an appeal with the Commission and he chose not to do so. He acknowledges that he consulted with his attorney, who suggested filing action in Superior Court, which the Appellant chose not to do. The Commission has squarely addressed this issue in the past. In Pugsley v. City of Boston, et al, 24 MCSR 544, 547 (2011), the Commission stated that:

"... embraces the principle that a party coming before the Commission to seek equitable relief ... must exercise reasonable diligence in pursuit of that relief. Accordingly, where a person has had actual notice – whether in writing or not – of an action or inaction by HRD or an appointing authority that the person reasonably knew or show have known was a violation of civil service law or rules, that person cannot sit on those rights indefinitely. Thus, it is a fair requirement that once such a person discovers that he or she has been harmed by an action or inaction of HRD, he had an obligation to promptly file a claim of appeal, or lose the right to press it."¹

¹ I carefully reviewed the decisions cited by the Appellant regarding instances in which the Commission has exercised its discretion to grant retroactive civil service seniority dates. They are either not on point, inapposite or not persuasive in the context of the undisputed facts of the instant appeal.

See also Mulligan v. Boston Police Department, 28 MCSR 57 (2015) (Commission denied appeal filed years after Appellant was purportedly bypassed for appointment although not receiving a written notice at the time.)

Further, the Appellant's appeal rests largely on speculation and assumption, including the assumption that, had the Appellant contested his bypass in 2003 or 2004, the Commission would have allowed his appeal and ordered a retroactive civil service seniority date, something the Commission chose *not* to do in 2002.

Finally, any request for investigation regarding this matter would need to address whether the Appellant's name should have appeared on any Certification after 2004, including the 2014 Certification from which the Appellant was appointed. Put another way, such an investigation is more likely to harm, rather than help, the Appellant.

For all of above reasons, the Appellant's appeal under Docket No. E-19-158 is hereby ***dismissed*** and his request for investigation is ***denied***.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on May 6, 2021.

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)(1), 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:

Andrew Gambaccini, Esq. (for Appellant)

Wendy Chu, Esq. (for Respondent)

Melissa Thomson, Esq. (for HRD)