

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

DAVID MONTROND,
Appellant

v.

**CITY OF BROCKTON and the
MASSACHUSETTS HUMAN
RESOURCES DIVISION,**
Respondent

G1-18-184

Appearance for Appellant:

David Montrond, *Pro Se*

Appearance for City of Brockton:

Karen A. Fischer, Esq.
City Hall – 45 School Street
Brockton, MA 02301

Appearance for HRD:

Melissa A. Thomson, Esq.
Labor Counsel – Human Resources Division
100 Cambridge Street – Suite 600
Boston, MA 02114

Commissioner:

Paul M. Stein

DECISION ON PENDING DISPOSITIVE MOTIONS

The Appellant, David Montrond, a Police Officer with the Brockton Police Department (BPD)), acting pursuant to G.L.c.31,§2(b),¹ filed this appeal with the Civil Service Commission (Commission) against the City of Brockton (Brockton), following a determination of the Massachusetts Human Resources Division (HRD) that he was not eligible to take the 2018 promotional examination for Police Sergeant. A pre-hearing conference was held at the Commission’s Boston office on October 12, 2018, attended by the Appellant and Brockton. At the conference, Brockton filed a Pre-Hearing Conference Memorandum, which the Commission

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with and conflicting provisions of G.L.c.31 and/or Commission rules, taking precedence.

deemed a Motion to Dismiss and HRD made an informational submission.² At the Commission's request, Brockton and HRD provided additional documentation evidencing Brockton's hiring process for Police Officers from 2008 through 2018 as well as additional information regarding Officer Montrond's civil service status during that period. (*See CSC E-mails dated 10/12/2018 & 11/14/2018; Brockton E-Mails dated 10/12/2018 & 10/15/2018; CSC Procedural Order dated 11/2/2018; HRD Emails dated 10/11/2018 & 11/15/2018*);

On January 2, 2019, the Commission received the "Respondent HRD's Motion for Summary Decision". Neither Brockton nor HRD requested oral argument. Officer Montrond opposed Brockton's Motion to Dismiss and requested an "official hearing" of his appeal, which I deem a request for oral argument. He submitted no written rebuttal to the substance of the Respondents' motions. (*See Procedural Order dated 11/2/2018, para.H; Appellant's E-mail dated 12/7/2018*).

After reviewing Brockton's "Motion to Dismiss", the "Respondent HRD's Motion for Summary Disposition" and all the other submissions of the parties, I conclude that the undisputed facts in the record and well-established law demonstrate: (1) HRD correctly decided: that Officer Montrond was not eligible to take the 2018 BPD Police Sergeant's Promotional Examination because he had not "actually served" as a BPD officer for three years, which is a statutory requirement, prescribed by G.L.c.31,§59, to take such a promotional examination and (2) the Commission lacks jurisdiction, both as a matter of timeliness and on the merits, to grant Officer Montrond relief. (i.e., the right to take a make-up examination prior to completing three years of actual service with the BPD). As the parties' written submissions are sufficient and oral argument requested by Officer Montrond would not further inform the Commission on the relevant facts and the law; per Procedural Order, para. H, oral argument is not necessary.

² Officer Montrond filed his appeal as a "bypass" appeal, naming Brockton as the Respondent. Based on the facts that emerged at the pre-hearing conference, HRD was added by the Commission as an additional Respondent. (*See Claim of Appeal; CSC Procedural Order dated November 2, 2018*)

FINDINGS OF FACT

I find the following facts are not in dispute:

1. The Appellant, David Montrond is a tenured civil service employee who was appointed to the position of permanent, full-time Police Officer with the BPD, effective August 1, 2016.

2. Officer Montrond's appointment was one of nine appointments made from civil service certification #3255, issued to Brockton by HRD on January 12, 2016, with names taken from the eligible list of candidates who took and passed the 2015 Municipal Police Officer examination.

3. Officer Montrond is a non-veteran who claims fluency in Spanish, Cape Verdean and Portuguese.

4. From August 2006 through April 2015, Officer Montrond was employed by the Brockton Public Schools as a school police officer/school resource officer.

5. The Brockton Public Schools is a separate department within the City of Brockton and is not part of the BPD. The position of School Police Officer is not a classified civil service job title.

6. Brockton is a city with a population of more than 50,000.

7. At all relevant times, the BPD was subject to the so-called "Beecher Consent Decree", providing for special treatment of minority black and Hispanic candidates ("C" candidates) over non-minority candidates ("D" candidates) for original appointment to the BPD.³

³ The "Beecher Consent Decree" is a federal court order originally entered in 1975 in the case of Castro v. Beecher, (D. Mass.) that required certain Massachusetts cities and towns to remediate past discriminatory hiring of police and fire officers by replacing the system of hiring according to rank ordering of candidates' test score with a system of "seeding" minority candidates on eligible lists, to guarantee that, in communities such as Brockton, at least one out of every four candidates considered for appointment would be a minority. Over time, as communities reached a satisfactory level of minority hiring, the federal court released them from the obligations of the decree, but Brockton remains subject to the decree. It should also be noted that, from time to time, the decree was modified by the federal court to make adjustments designed to correct for situations that had arisen which tended to disadvantage, rather than promote, minority hiring as well as to rectify unintended consequences that unduly suppressed opportunities for non-minority candidates. For the reasons explained below, it is not necessary to this Decision to address the specific details of the original decree or the modifications made to it.

8. Prior to March 13, 2013, Officer Montrond had self-identified as a Black African American. On that date, he updated his civil service profile on file with HRD and, among other things, changes his ethnic status from “Black or African American” to “Choose not to identify.”

9. Prior to the hiring cycle in which Officer Montrond was appointed from Certification #3255, Brockton made original appointments to the position of permanent, full-time police officers from six other certifications, copies of which were provided by Brockton, including two on which Officer Montrond’s name appeared, as follows:

- Certification #280016 – 01/10/2008 - Eight Permanent Full-Time Police Officers. 2n+1 = 17, which reached the fourth “C: candidate tie group (overall positions 17-38 on list) and the sixth “D” candidate tie group (overall positions 10-18 on the list). The “C” candidates hired from Certification #280016 were the second, thirteenth and nineteenth (overall positions 2, 17 & 25 on the list, in the third “C” tie group) candidates who signed willing to accept. Mr. Montrond is listed as a minority candidate and his name appears in the fifth “C” tie group (overall position 206 on the list).
- Certification #90756 – 10/02/2009 (additional names added 10/27/2009) -Five Permanent Full-Time Police Officers. 2n+1 = 11. Original certification was Re-employment List (non-residents). Additional names were 97 “C” and “D” Brockton residents, all Veterans. Only “C” candidate hired was Veteran on Reemployment List.
- Requisition #281 – 10/04/2012 - Eleven Permanent Full-Time Officers. 2n+1 = 23. 15 “C” and 36 “D” candidates signed willing to accept appointment. Mr. Montrond’s name did not appear on this Certification. The one Non-Veteran minority candidate hired from this list, who was the 6th ranked “C” candidate (out of 15) who signed willing to accept.
- Requisition #2062 – 9/06/2014 - Five Permanent Full-Time Police Officers. 2n+1 = 11. All 4 “C” candidates and all 8 “D” candidates who were willing to accept were disabled veterans or veterans (including one “C” candidate and one “D” candidate deployed overseas). Non-veteran candidates were not reached.
- Requisition #2063 – 9/09/2014 -Special Certification for 2 Permanent Full-time Bilingual Police Officers proficient in Haitain Creole.
- Requisition #2064 – 9/10/2014 - Special Certification for 2 Permanent Full Time Bilingual Police Officers proficient in Cape Verdean Creole. 2n+1 = 5. Mr. Montrond was one of five candidates in the fourth tie group (overall positions 9-13 on the list) who signed willing to accept. The two candidates hired were ranked above that tie group (in 4th and 6th overall position on the list, respectively).

10. On or about July 31, 2018, Officer Montrond submitted an application to HRD to sit for the promotional examination for the title of Police Sergeant to be administered by HRD on September 15, 2018.

11. Based on the Employment Verification Form submitted by Officer Montrond, HRD determined that he would not have been employed with the BPD for three years at the date of the examination. HRD also verified with Brockton that Officer Montrond's name did not appear as one of the officers certified by the BPD Chief of Police as eligible to take the Sergeant's Examination. HRD concluded that Officer Montrond was not eligible to sit for the examination and refunded his examination fee.

STANDARD OF REVIEW

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7) (h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is "no reasonable expectation" that a party can prevail on at least one "essential element of the case". See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

APPLICABLE CIVIL SERVICE LAW

Promotional examinations in the municipal police service are governed by G.L.c.31,§59, which was added to the civil service law by St.1978, c.393, and amended by St.1989, c.174. G.L.c.31, §59,¶2, provides:

"An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees in the next lower title in such force, except that if the number of such employees, or the number of applicants eligible for the examination is less than four, the examination shall be opened to permanent employees in the next lower titles in succession in such force until either four such eligible employees have applied for examination or until the examination is open to all permanent employees in lower

titles in such force; provided, however, that no such examination shall be open to any person who has not been employed in such force for at least one year after certification in the lower title or titles to which the examination is open; and provided, further, that no such examination for the first title above the lowest title in the police or fire force of a city or town with a population in excess of fifty thousand shall be open to any person who has not been employed in such force in such lowest title for at least three years after certification. (emphasis added)

The Massachusetts appellate courts and this Commission have construed G.L.c.31,§59,¶2 to establish a “two-prong” test for eligibility to sit for a public safety promotional examination: (1) the candidate is serving in the “next lower title” on the date of the promotional examination; and (2) the candidate has been “employed in the force” [meaning in the same police or fire department, but not necessarily in the “next lower title”] for one year prior to the date of the examination (or three years in communities over 50,000 population) after the candidate’s name was first “certified” for appointment in the “next lower title.” See Weinburgh v. Civil Service Comm’n, 72 Mass.App.Ct. 535, rev.den., 452 Mass. 1110 (2008); City of Lawrence v. Civil Service Comm’n, 66 Mass.App.Ct. 309 (2006); Nicholas v. Human Resources Div., 29 MCSR 358 (2016); O’Donoghue v. Human Resources Div., 27 MCSR 485 (2014); McNamara v. Human Resources Div., 27 MCSR 402 (2014); Daniels v. Human Resources Div., 26 MCSR 9 (2013); Bettencourt v. Massachusetts Human Resources Div., 24 MCSR 522 (2011); Dickinson v. Human Resources Div., 24 MCSR 200 (2011); Minor v. City of Chicopee, 9 MCSR (1966)

ANALYSIS

Officer Montrond met the first prong of the eligibility requirement for taking a promotional examination – he was serving as a BPD Police Officer in the “next lowest title” on September 15, 2018, the date of the BPD Police Sergeant’s Examination. Officer Montrond did not meet the second prong – he became “employed” as a BPD Police Officer on the date he was appointed, August 1, 2016, nearly eleven months short of the three years of service on the date of the

examination as required by statute (Brockton's population exceeds 50,000) to sit for that examination. Thus, HRD's decision to deny Officer Montrond's application to take the September 15, 2018 Sergeant's Examination was mandated by civil service law.

Officer Montrond makes two arguments in support of his contention that he was entitled to take the 2018 Sergeant's examination: (1) HRD should have counted his prior service as a school police officer for the Brockton Public Schools toward the three-year statutory requirement; and (2) because of the Beecher Consent Decree, he had been wrongfully denied appointment to the BPD in hiring(s) made prior to 2016 and, had he not been wrongfully denied such earlier appointment, he would have surpassed the three-year threshold by the time of the 2018 examination. Neither argument prevails.

As to the first argument, the relevant facts are beyond dispute and G.L.c.31,§59 is unambiguous – a candidate must have accrued at least three years of actual service “in the force” for which he seeks promotion. The statute, along with the appellate court precedent that have construed the statute, make clear that Officer Montrond's prior service as a Brockton School Police Officer – a non-civil service position with a different appointing authority – is not service “in the force” within the meaning of the law. HRD is bound to apply the civil service law as written. Officer Montrond's claim to count his employment with the Brockton Public Schools was properly rejected by HRD.

As to the second argument, Chapter 310 of the Acts of 1993 does authorize the Commission to exercise limited discretion to grant equitable relief when it concludes that a person's “civil service rights” have been violated through “no fault” of his or her own. That authority, however, does not authorize the Commission to grant the relief Officer Montrond requests here.

First, the Commission's authority does not extend to overriding judicial decisions, such as the Beecher Consent Decree. If Officer Montrond believes that the Beecher Consent Decree has been applied unfairly and inequitably to prejudice his consideration for appointment under the decree, that is not a matter of civil service law, but an issue for the court that entered the decree to address. Neither HRD nor the Commission may intrude on the authority of the federal courts or order a municipality to take action that would be inconsistent with the obligations established by the federal courts as they were in effect from time to time.⁴ Thus, insofar as Officer Montrond complains that he has been adversely impacted by the way the Beecher Consent Decree has been applied or enforced, the Commission is not the proper forum to address that complaint.

Second, insofar as Officer Montrond contends that he was wrongfully denied an appointment to the BPD in some earlier hiring cycle, HRD correctly asserts that such a claim is, in effect, a belated attempt to assert a "bypass" appeal years after the alleged bypass occurred. Such a belated appeal is barred by civil service law and rules, which prescribe a 60-day period within which a candidate must appeal to the Commission after notice of an "action or inaction" that resulted in an unlawful bypass, a jurisdictional matter that the Commission has strictly enforced. See, e.g., Lane v. Newburyport Police Dep't, 28 MCSR 587 (2015), citing Pugsley v. City of Boston, 24 MCSR 544 (2011); Gagnon v. Boston Fire Dep't, 28 MCSR 179 (2015); Costa v. City of Brockton, 28 MCSR 87 (2015)

Third, the undisputed facts disprove Officer Montrond's hypothesis that he would have been hired by the BPD in an earlier hiring cycle. In fact, he was never in a position to be hired prior to his 2016 appointment, no matter how he was treated, or might have been treated, under the Beecher Consent Decree.

⁴ The federal court may find that Officer Montrond's Beecher Consent Decree standing is further complicated by the fact that he changed his ethnic status in 2013.

In the 2008 hiring (#280016), Officer Montrond was nearly 200 places below the “2n+1” range, in no position, wither as a “C” candidate (as he then was listed) or a “D” candidate. In the 2009 hiring (#90756) and 2014 regular hiring (#2062), only “C” and “D” candidates with veteran’s preference were considered. As a non-veteran, Mr. Montrond would not have been reached for consideration. The same principle applies to the 2012 hiring (#281), where the lowest ranked minority candidate reached and hired was close to the top of the list, while Mr. Montrond’s name did not make it on that list (of 50 names) at all. .As to the two 2014 “Special” Certifications (#2063 and #2064), Mr. Montrond did not claim proficiency in Haitian Creole and was not eligible for consideration under that certification. Under the certification for proficient Cape Verdean speakers, while he was eligible and his name did appear on the list, the two selected candidates ranked ahead of him. These same facts also refute Officer Montrond’s belated claim that he may have been unlawfully “bypassed” in any prior hiring cycle by a lower ranked selected candidate, which he was not.

In sum, Officer Montrond’s claim to sit for a Sergeant’s promotional exam without having actually served as a BPD Police Officer for at least three years is without merit. The law and facts of the case undisputedly show that he is not entitled to relief from this Commission.

CONCLUSION

Accordingly, for the reasons stated, Brockton’s Motion to Dismiss and HRD’s Motion for Summary Disposition are **allowed**. The appeal of the Appellant, David Montrond, under Docket No. B2-14-266 is **dismissed**.

Civil Service Commission
/s/ Paul M. Stein
Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on February 14, 2019.

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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's 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:

David Montrond (Appellant)

Karen A. Fischer, Esq. (for Respondent, City of Brockton)

Melissa A. Thomson, Esq. (for Respondent, HRD)