

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

DANIEL OTERO,
Appellant

v.

G2-14-301

CITY OF LOWELL,
Respondent

Appearance for Appellant:

Gary G. Nolan, Esq.
Noland Perroni Harrington, LLP
133 Merrimack Street
Lowell, MA 01852

Appearance for Respondent:

Kenneth Rossetti, Esq.
Rachel M. Brown, Esq.
City of Lowell Law Department
375 Merrimack Street, 3rd Floor
Lowell, MA 01852

Commissioner:

Cynthia A. Ittleman

DECISION ON REMAND

By decision dated October 27, 2016 in this matter, the Civil Service Commission (Commission) denied the appeal of Mr. Daniel Otero (Appellant), in which the Appellant contested the decision of the City of Lowell (Respondent) to bypass him for promotion to Sergeant. The Appellant appealed the Commission's decision.¹ Daniel Otero v. City of Lowell and Civil Service Commission, Suffolk Superior Court No. 1681CV03429. On March 18, 2019, the Court (Wilkins, J.) vacated the Commission's decision, finding that G.L. c. 31, s. 27 and

¹ At or about the same time as the instant appeal, Mr. Otero (Appellant) appealed the decision of the City of Lowell to suspend the Appellant for five (5) days for conduct unbecoming an officer. The Commission denied the Appellant's disciplinary appeal. (Otero v Lowell, 29 MCSR 512 (2016)) The Appellant appealed the Commission's decision and the Court (Wilkins, J.) affirmed the Commission's decision. Otero v Civil Service Commission, Suffolk Superior Court No. 16-3751-D) The five (5)-day suspension was one of the reasons the Respondent bypassed the Appellant for promotion.

Personnel Administrator Rule (PAR).08(4) require an appointing authority to “immediately” notify the state’s Human Resource Division (HRD) in writing of the reasons for bypassing a candidate upon its determination to bypass a candidate and that the Respondent did not timely prepare such a writing until the prehearing conference was held at the Commission in response to the Appellant’s appeal. Having failed to prepare such writing in a timely manner, the Court further found, the bases for bypass provided by the Respondent were not admissible at the Commission, necessitating vacating of the Commission’s decision. The Court went on to address the substantial evidence issue in the case to avoid remanding the matter to the Commission in that regard, stating,

... the court’s alternative holding is that, if the belated letter in fact represents the real reasons for the bypass, then substantial evidence exists to support those reasons and the bypass itself.

The proper remedy in this situation is apparent (though ultimately for the Commission to decide): to require the City to place Otero’s name first on the next certification for list for promotion to Sergeant. This remedy grants Otero the protections afforded by statute and regulation for any promotional decision, while avoiding injury to innocent third parties ... It is the alternative remedy proposed by the City to the Commission ... It is a remedy requested by Otero at the hearing in this court. It preserves the City’s authority over promotions and is even consistent with the testimony that the City may consider Otero for future promotional opportunities. Overall, placing Otero’s name at the top of the next list of eligible candidates for promotion best implemented the statute and regulation, with the least detriment to all the parties. ... (Id. at 14)(citations and footnote omitted)

In response to the Court’s remand, the Commission conducted a status conference on June 24, 2019 to hear the parties’ comments on the Court’s ruling and their suggested remedies. At the status conference, the parties acknowledged the Commission’s discretion in preparing remedies and the parties were afforded the opportunity to submit their brief recommended remedies in writing by July 17, 2019. On July 17, I received the parties’ written recommendations for a remedy. While both parties agree with the Court that the appropriate

remedy here would be to place the Appellant's name at the top of the next certification, their agreement ends there.

The Appellant avers that in addition to having his name placed at the top of the next certification, if and when he is promoted, the Commission should order a retroactive civil service seniority date. The Respondent, citing Bergeron v Town of Falmouth and Human Resources Division, 29 MCSR 546 (2016), argues that retroactive dates only apply in successful bypass appeals involving original appointments, not promotions.

The Commission noted in Bergeron, *supra*, that retroactive seniority is no longer afforded in successful promotional bypass appeals. Specifically, the Commission noted therein,

[a] promotional bypass appeal is different from an appeal from the bypass of an original appointment. The Commission does order that a candidate for original appointment to a civil service position who was unlawfully bypassed, if later appointed, be given a retroactive civil service appointment date equal to the same appointment date the candidate would have received had that candidate not been bypassed, because the civil service seniority rights (for purposes of 7 layoffs, etc.) turns on an employee's initial appointment date. In the case of a promotional appointment, however, there is no corresponding statutory relevance to the effective date of the promotion for civil service law purposes, as distinguished from the rights, if any, under other laws, such as shift bidding or vacation time prescribed by a collective bargaining agreement). *See, e.g., Town of Dedham v. Dedham Police Ass'n*, 46 Mass.App.Ct. 418 (1999), *rev.den.*, 429 Mass. 1109 (1999). *See also Sarmiento v. Town of Carver*, 28 MCSR 249 (2015); Schifone v. Town of Stoughton, 27 MCWR 543 (2013) (retroactive appointment date does not provide right to retroactive pay or benefits); and Michel v. City of Waltham, 24 MCSR 452 (2011)(retroactive seniority date applies to civil service rights only and does not affect credible service for retirement purposes)
(Id.)(citation omitted)²

Although the Appellant cites the Commission's decision in Smith v. Town of Billerica, 31 MCSR 400 (2018), to assert that retroactive seniority (for civil service purposes only) may be

² In Bergeron, the Commission further noted that it previously understood that, "the 'date of promotion' would be relevant to computing the time required to serve in a position for purposes of defining eligibility to sit for the next higher title's promotional examination, but that potential was subsequently eliminated by the paradigm established by the judicial decision in Weinberg v. Civil Service Comm'n, 72 Mass.App.Ct. 535, *rev.den.*, 452 Mass. 1110 (2008). *See generally, Dickenson et al v. Human Resources Div.*, 24 MCSR 200 (2011)(date name appears on a certification is now what measures time required to be eligible to sit for promotional exam)." Bergeron v Town of Falmouth and Human Resource Division, 29 MCSR 546 (2016).

ordered in successful promotional bypass cases, his reliance is misplaced. While the Commission mentioned retroactive seniority in Smith, the Commission did not order such relief for Mr. Smith. .

Conclusion

Based on the foregoing, pursuant to the Commission's powers of relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, the state Human Resources Division, or the City in its delegated capacity, is ordered to place the name of Daniel Otero at the top of the next certification for the position of police sergeant in the Lowell Police Department.

Civil Service Commission
/s/Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Stein and Tivnan, Commissioners [Ittleman-Absent]) on August 1, 2019.

Either party may file a motion for reconsideration within ten days of the receipt of the Commission's 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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:

Gary Nolan, Esq. (for Appellant)
Rachel Brown, Esq. (for Respondent)
Michael Downey, Esq. (for HRD)
Michele Heffernan, Esq. (HRD)