

Paiva, et al. v. Massachusetts Civil Service Commission, et al.¹
Norfolk Superior Court No. 1982-CV-01309

**Memorandum and Order on Cross-Motions for Judgment on the Pleadings (Nos. 36, 36.3);
 Plaintiffs' Motion to Amend (No. 36.4); Plaintiffs' Motion to Strike (No. 36.6)
 and Plaintiffs' Motion for Reconsideration (No. 36.8)**

Plaintiff Victor Paiva ("Paiva"), an employee of the Department of Correction ("DOC"), and plaintiff Scott Finkle ("Finkle"), a recent retiree of the DOC, filed this action asserting defects in the administration of a promotional exam for the position of Captain in 2017. On December 3, 2021, this Court (Cannone, J.) ruled in favor of the defendants on each of plaintiff's challenges to the exam save one: the replacement of one component of the exam which had used objective criteria for measuring a candidate's education and experience ("E&E"), with an oral component that was scored subjectively. Finding that this new means of awarding points for E&E conflicted with G.L. c. 31, § 22, the Court granted the plaintiffs' Motion for Judgment on the Pleadings as to that issue, and remanded the matter to the Civil Service Commission ("Commission") to fashion a remedy for the violation.

The plaintiffs are now back before the Court, challenging the remedy fashioned by the Commission. The parties have filed Cross-Motions for Judgment on the Pleadings pursuant to Superior Court Standing Order 1-96), and the plaintiffs have filed several additional motions.

After hearing, and careful review of all motion materials and pertinent parts of the Administrative Record, the plaintiffs' Motion for Judgment on the Pleadings is DENIED and the Commission's Cross-Motion for Judgment on the Pleadings is ALLOWED; the plaintiffs' Motion to Amend the Complaint, Motion to Strike, and Motion for Reconsideration are DENIED.

1. Cross-Motions for Judgment on the Pleadings

In reviewing the plaintiffs' challenge to the Commission's decision on remand, this Court "accord[s] due deference and weight not only to the commission's experience, technical competence, and specialized knowledge, but also to the discretionary authority conferred upon it." School Comm. of Brockton v. Civil Serv. Comm'n., 43 Mass. App. Ct. 486, 490 (1997) (quoting G. L. c. 30A, § 14(7)). Where, as here, remedial action by the Commission is at issue, the Commission's discretion is "particularly broad." Thomas v. Civil Serv. Commn., 48 Mass. App. Ct. 446, 451 (2000) (internal quotations omitted). Such action may be overturned only if the Commission's action was arbitrary and capricious. Id. "A decision is arbitrary and capricious when it lacks any rational explanation that reasonable persons might support." Cambridge v. Civil Serv. Commn., 43 Mass. App. Ct. 300, 303 (1997).

Significant to evaluation of the Commission's remedy is the following: another promotional exam for Captain was administered in 2021, wherein the exam-givers dispensed with the oral component that was part of the 2017 exam, and reinstated a written E&E

¹ Massachusetts Human Resources Division and Massachusetts Department of Correction.

component measured by objective criteria. Of the 53 officers who took the 2017 exam, seven also took the 2021 exam, including Paiva and Finkle, who were Lieutenants at the time.

After this matter was remanded, the Commission used the E&E information submitted by the plaintiffs in connection with the 2021 exam to calculate what their scores would have been in 2017, had the E&E component been administered properly then. The Commission calculated that Paiva's score would have increased to 74, and Finkle's to 73. The Commission then looked at when officers who had scored these numbers in 2017 were promoted to Captain,² and determined that, with the new scores, Paiva would have been promoted to Captain on July 22, 2018, and Finkle would have been promoted on January 5, 2020.

Based on the above, the Commission concluded that Paiva and Finkle should have appeared on the 2017 eligibility list for Captain, and were harmed by their exclusion from it. Analogizing the situation to that of a wrongful bypass, the Commission ordered as a remedy that Paiva be placed at the top of all future eligibility lists for a Captain's position until he received a promotion. The Commission further ordered that Paiva receive a stipend, equal to the difference between Captain's pay and Lieutenant's pay for the period between July 22, 2018 and the date of his eventual promotion. Paiva was promoted to Captain in August, 2022, and received a stipend of some \$34,000.

Finkle retired in September, 2021, before this matter was remanded to the Commission, and as such was not placed on future eligibility lists. The Commission awarded him a stipend equal to the difference between Captain's pay and Lieutenant's pay for the period from January 5, 2020 to the date of his retirement, which was some \$10,000.

The Commission's determination that this remedy adequately redresses the harm incurred by the plaintiffs due to the error in the 2017 exam is not arbitrary and capricious. The Commission's analogizing of the circumstances here to a wrongful bypass is rational, and the plaintiffs have presented no evidence refuting the Commission's position that the remedy for wrongful bypass is, absent extraordinary circumstances, placement on future eligibility lists. Here, the Commission went further than the ordinary remedy for wrongful bypass, awarding the plaintiffs lost back pay in the form of stipends.

Nonetheless, plaintiffs contend that the remedy is insufficient, and seek to have the Commission appoint them Captains retroactively to the dates the Commission found they would have been promoted with the recalculated E&E scores. Plaintiffs assert that failure to give them retroactive appointments has caused them to lose seniority; delayed their progress toward "Step 5" base pay (in Paiva's case); and reduced their pension benefits (in Finkle's case).³ The plaintiffs also seek a retroactive award for "other pay" they might have earned as Captains during the interim period, such as shift differential pay, shift commander pay, and overtime.

² All but two officers who scored over 70 on the 2017 exam were eventually promoted to Captain.

³ Plaintiffs report that the Retirement Board has informed them that the stipend is not counted as regular wages for purpose of calculating their retirement benefits, and argue that a retroactive promotion would provide retroactive "wages" that would be included in the calculation.

The Commission proffered several, well-supported reasons why the extraordinary remedy of retroactive appointment is unwarranted, including that: civil servants have no right to a promotion, even if they are eligible for one, see e.g. Brackett v. Civil Service Comm'n, 447 Mass. 233, 253 (2006), and cases cited (“[t]he civil service system does not guarantee an applicant a promotion); retroactive appointment by the Commission would interfere with the prerogative of appointing authorities to make promotional decisions; authority to issue retroactive relief is typically limited to cases where discipline has been wrongfully imposed, see G.L. c. 31, § 43; and its rational determination that this case does not present the type of “extraordinary circumstances” that warrant an order of retroactive appointment.

Further, the Commission correctly noted that an award of “other” types of compensation such as shift differentials and overtime is not required when a civil servant is restored to a position from which he was wrongfully separated, because such compensation is speculative. Boston Police Dep’t v. Jones, 98 Mass.App.Ct. 762, 765-66 (2020).

The plaintiffs do not try to refute these contentions by the Commission, and make no showing that the circumstances here are so “extraordinary” that retroactive relief is warranted. Instead, the plaintiffs offer their own grounds for overturning the Commission’s remand decision, each of which is unavailing.

First, they argue that they only recently learned that the defendants have no documentation of their E&E scores from 2017. The Court fails to understand how this contention makes sense. As discussed, the 2017 exam did not include a written E&E component; the absence of a written E&E component was the very basis of the plaintiffs’ successful challenge to the exam. As a result, the plaintiffs were not asked to, and did not provide, E&E documentation in 2017. They could not possibly have been unaware of this fact.

Plaintiffs further claim that their E&E information was scored differently in 2021 from how it would have been scored in 2017. Since, again, the E&E was not scored on an objective basis in 2017, this contention is speculative.

Plaintiffs also argue that the Commission should recalculate the scores of *all* officers who took the 2017 exam using objective E&E criteria, reconstruct the 2017 eligibility list, and potentially vacate promotions that have already occurred. This proposed solution is implausible. Moreover, all of the five other officers whose E&E scores were recalculated wound up with higher scores than the plaintiffs. Given this, there is reason to believe that a recalculation of all officers’ scores would be to the detriment, rather than the benefit, of the plaintiffs.

Finally, the plaintiffs’ comparison to another corrections officer whom they allege was retroactively appointed without even taking a civil service exam is inapposite. The officer at issue had been provisionally appointed a Captain pursuant to a DOC practice that occurred for some 25 years, until the Commission in 2015 ordered DOC to give a Captain’s exam and make all officers who had served as provisional Captains before that time permanent, with tenure. The circumstances of that case are so different from those here as to be irrelevant.

Accordingly, the plaintiffs have failed to show that the Commission's decision in fashioning a remedy for the 2017 exam violation is arbitrary and capricious, and the decision is therefore affirmed.

2. Motion to Amend; Motion to Strike; Motion to Reconsider

The Motion to Amend the Complaint is denied because, first, there is no context for amending the Complaint, as plaintiff's claims have already been decided and the case is here only on a challenge to the Commission's fashioning of a remedy with respect to the claim decided in plaintiffs' favor. Moreover, the Motion does not seek to amend the allegations or claims in the Complaint, but, rather, seeks only to submit additional records, which is not a basis for a Motion to Amend.

The Motion to Strike seeks to strike from the record the checks the Commission issued plaintiffs for the stipends that were awarded, which plaintiffs apparently have not deposited. That the Commission awarded the stipends is a fact, and cannot be stricken from the record. Moreover, the issuance (and deposit) of the checks in no way impedes the plaintiffs from arguing that the Commission's remedy was insufficient, as they have done. Therefore, there is no basis for a Motion to Strike.

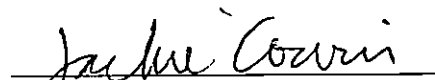
Plaintiffs' Motion for Reconsideration is based on some of the same arguments they raise in their Motion for Judgment on the Pleadings, which have been addressed above. These arguments present no sound basis for reconsidering the Court's thorough, well-reasoned decision on the parties' original Cross-Motions for Judgment on the Pleadings.

ORDER

Accordingly, it is hereby ORDERED that:

1. The plaintiffs' Motion for Judgment on the Pleadings is DENIED and the Commission's Cross-Motion for Judgment on the Pleadings is ALLOWED;
2. The plaintiffs' Motion to Amend the Complaint, Motion to Strike, and Motion for Reconsideration are DENIED.

Date: 6/29/23


Jackie Cowin
Justice of the Superior Court