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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 2007-3350-C

SCOTT PETERSEN

v.

DEPARTMENT OF CORRECTION and
MASSACHUSETTS CIVIL SERVICE COMMISSION

MEMORANDUM OF DECISION AND ORDER ON
PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

Plaintiff Scott Petersen ("Petersen") brought this action, pursuant to G. L. c. 30A, §14, to challenge the decision of the Civil Service Commission ("the Commission") dismissing his complaint against the Department of Correction ("DOC") for allegedly bypassing him for a promotion. Following a hearing and a review of the record, Petersen's motion for judgment on the pleadings is denied.

BACKGROUND

Petersen is a correction officer employed by the DOC. On September 12, 1999, he was promoted to the rank of Correction Officer II ("COII"). However, his seniority date as a COII officer was pushed back to March 29, 1998, after Petersen established that the DOC bypassed him for promotion when it failed to interview him for the COII position despite his high score on the COII examination.

On June 26, 2005, the DOC made promotions to Correction Officer III

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COII"). Petersen received a score of 86 percent on the COII exam, making him the fifth with the third best score among candidates. Some of the candidates with the same rank and score as Petersen were promoted, but he was not. The DOC then looked at the candidates' COII "time in grade," that is, the actual amount of time the candidates had spent in the COII position. On July 28, 2005, Petersen appealed the DOC's decision, arguing that the DOC ought to have considered his "time in grade" as beginning on March 29, 1998, instead of September 12, 1999. The Commission dismissed his appeal. In doing so, the Commissioner ruled that no bypass occurs when one candidate is chosen over another with the same rank and score. The Commissioner did not make a finding as to whether the DOC applied the wrong start date for Petersen's COII time in grade. This appeal followed.

DISCUSSION

A court may set aside an administrative agency's final decision only where the court determines a petitioner's substantial rights have been prejudiced because the decision was based upon error of law, was unsupported by substantial evidence, or was arbitrary or capricious or an abuse of discretion. G. L. c. 30A, § 14(7); *Connolly v. Suffolk County Sheriff's Dept.*, 62 Mass. App. Ct. 187, 192-193 (2004). The court must defer to the fact-finding function of the administrative body where there is substantial evidence to support its findings and there is no other error of law.

Whelock College v. Massachusetts Comm'n. Against Discrimination, 371 Mass. 130, 133

$\Pi_1 = \{ \langle \sigma, \tau \rangle \in \Sigma \times \Sigma \mid \sigma \leq \tau \}$. Let $\mathcal{D} = \langle \Pi_1, \leq \Pi_1 \rangle$ be the distributive lattice

Pursuant to the Civil Service statute, G. L. c. 31, the administrator "shall make and amend rules which shall regulate the recruitment, selection, training and employment of persons for civil service positions. . . . Such rules shall include provisions for. . . [p]romotional appointments, on the basis of merit as determined by examination, performance evaluation, seniority of service or any other combination of factors which fairly test the applicant's ability to perform the duties of the position as determined by the administrator." G. L. c. 31, § 3(e). The administrator must maintain certified lists of candidates eligible for appointment or promotion. G. L. c. 31, § 25. Candidates are ranked on this list according to their examination scores.

G. L. c. 31, §27 provides, "[i]f an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file

with the administrator's written statement of his reasons for appointing the person whose name was not on the list. PAR.02. The Commission has consistently applied this rule to dismiss appeals by persons who claimed they were passed over for appointment or promotion in favor of other candidates with the same rank and score. See *Zielinski v. City of Everett, Human Resources Dir.*, 20 MCSR 257 (2007); *Kallas v. Franklin Sch. Dept.*, 11 MCSR 73 (1998); *Fasano v. City of Quincy*, 17 MCSR 80 (2004).

There is no dispute that the persons promoted in Petersen's stead held the same rank as him, and achieved the same score on the COIII examination. The only issue Petersen has raised is whether the DOC used the wrong date to determine his seniority for the purposes of breaking the tie between himself and the other candidates.

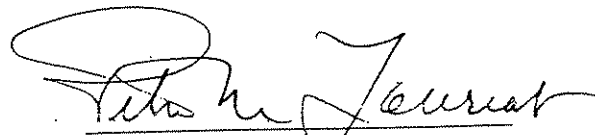
The Commission failed to address this argument, but its consideration would not have affected the outcome of the case.¹

¹ The failure may be due to the confusing manner in which Petersen asserted his argument. It is unclear whether he is alleging that a bypass occurs whenever someone with less seniority and the same test score is promoted first, or whether his argument is limited to challenging the DOC's use of time in

"We ordinarily accord an agency's interpretation of its own regulations considerable deference unless arbitrary, unreasonable, or inconsistent with the plain terms of the regulations themselves." *Rashid v. Commissioner of Corr.*, 446 Mass. 463, 476 (2006). "So long as the agency's interpretation of its regulations and statutory mandate is rational, and adhered to consistently, it should be respected." *Id.* Here, the DOC has a stated policy of using candidates' "time in grade" to break ties when multiple candidates have the same score on their examinations. It is not unreasonable to consider one's actual time spent in a particular rank as an indicator of merit for promotional purposes, and Petersen has not alleged that it was applied inconsistently in this case. Therefore, the DOC did not violate Petersen's rights when it considered his "time in grade" rather than his Civil Service seniority date in order to break the tie between him and other candidates with the same rank and score.

ORDER

For the foregoing reasons, the Plaintiff's Motion for Judgment on the Pleadings is DENIED. The decision of the Civil Service Commission in this action is affirmed.


Peter M. Lauriat
Justice of the Superior Court

Dated: January 16, 2009

grade rather than civil service seniority date for the purpose of breaking ties.

No tie score
to all
Petersen
(md)
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