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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

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SUPERIOR COURT DEPARTMENT

CIVIL ACTION NO. SUCV2012-2882 A

COMMONWEALTH OF MASS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF
MASSACHUSETTS HUMAN
RESOURCE DIVISION,

Plaintiff/Petitioner

V.

MASSACHUSETTS CIVIL SERVICE

COMMISSION and KEVIN SHEA,

Defendant/Respondent

MEMORANDUM OF DECISION ON MOTION FOR
JUDGEMENT ON THE PLEADINGS

Respondent Kevin Shea is an individual who has sought employment as a police officer or firefighter with municipalities in the Commonwealth under the civil service system. In connection with this pursuit, he has sought to be qualified as a disabled military veteran which would render him advantaged for civil service purposes in determination of who might be appointed to one of the positions which he seeks.

The petitioner, Human Resources Division of the Commonwealth (HRD) had ruled that Shea did not qualify for the designation of disabled veteran under Massachusetts statutory law upon which definition that term is based. Shea appealed that determination to the respondent Civil Service Commission (CSC). A divided panel of that board ruled in Shea's favor, reversing the decision of the HRD. HRD has filed this appeal of the CSC ruling pursuant to G. L. c. 30A. In addition, HRD filed a motion seeking a stay of enforcement of the CSC ruling, and all parties were heard on that application on October 17, 2012. This court by its written decision dated

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November 6, 2012 granted HRD's request for injunctive relief operating as a stay of enforcement of CSC's ruling. In this decision, the court determined that HRD had established likelihood of success on the merits in its contention that its interpretation of the statute at issue, c. 4 § 7, Forty-third, was correct as applied to Shea's case and that the CSC's contrary interpretation was not. This court also determined that the respondent's assertion that the question of risk of irreparable harm and promotion of public interest weighed in Shea's favor were the stay granted, due to his not benefitting from disabled veteran's status in his applications for civil service employment, effectively was counter-balanced by the harm to applicants in competition with Shea for those positions were the CSC's decision enforced prior to judicial review of HRD's petition.

As part of its ruling, this court also directed an expedited scheduling of the parties' requests for judgement on the pleadings so as to hasten resolution of the case on its merits. The parties have now filed submissions, with HRD moving for judgement on the pleadings under Mass. R. Civ. P. 12(c), to which the respondents have filed an opposition. The parties have waived further argument on the merits of the case, relying upon the arguments heard by this court in connection with HRD's application for injunctive relief.¹

Factual Background and the Governing Statute

Shea entered the Army in 2003. His time in military service was of limited duration.

¹ The legal issue to be determined is identical to that upon which the court ruled in its November 6 decision, the court having determined that HRD enjoyed likelihood of success on its petition seeking to overturn the CSC ruling. Further, the court has reviewed the parties' submissions and has not been made aware of any argument that the law governing the statutory interpretation issue central to the case has been affected in any way by any appellate or other judicial determination since the parties' argument in October and the court's November 6 ruling. Also, given this congruency, the "Factual Background and Governing Statute" portion which follows is taken verbatim, with one modification, from the court's prior ruling.

When he incurred an injury to his ankle which aggravated a preexisting condition, he was discharged, after having served a total of fifty-six days. At the time of discharge, the Army listed the character of Shea's service as "uncharacterized" on his Certificate of Release or Discharge. In 2007, Shea succeeded in securing from the Department of Veterans Affairs a ten percent service-connected disability from his date of discharge, enhanced to a twenty percent disability for the period from June of the year of the award.

Shea had taken and has passed the examinations for the positions of police officer and firefighter in the Commonwealth, both in 2010. As of the date of his appeal to the CSC, Shea's name has been placed on the eligibility list for hiring for both positions in the cities of Somerville and Medford and in the town of Winchester.²

In seeking to be designated as a disabled veteran for purposes of civil service employment, Shea claims eligibility pursuant to a portion of the governing statute which defines the term "veteran" for purpose of preference in employment selection. That provision, which is the centrality of the litigant's dispute here, defines the term as follows:

"Veteran shall mean (1) any person, (a) whose last discharge or release from his wartime service as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States . . . for not less than 90 days active service, at least 1 day of which was for wartime service; provided, however, than [sic] any person who so served in wartime and was awarded a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete 90 days of service. G. L. C. 4 § 7. Forty-third.

The parties appear not to dispute that Shea's service occurred at a period of time regarded

² The original CSC ruling erroneously had listed the city of Malden rather than Somerville, but had been amended subsequently upon joint motion of the parties.

for purposes of the statute as wartime service.

Legal Standard

The standard of review which governs appeals of a decision of an administrative agency under c. 30A requires that it be set aside if based upon error of law or if unsupported by substantial evidence. *Dube v. Contributory Retirement Appeal Board*, 50 Mass. App. Ct. 21, 23 (2000). The term “substantial evidence” is defined in the statute as “such evidence as a reasonable mind might accept as adequate to support a conclusion.” C. 30A § 1(6).

In undertaking its review, the court is limited to the administrative record, c. 30A §14(7), and the party appealing from the agency decision bears the burden of establishing the invalidity of the decision. *Merisme v. Board of Appeal on Motor Vehicle Liability Policies and Bonds*, 27 Mass. App. Ct. 470, 474 (1983). Further, a reviewing court is not permitted to substitute its own judgement for that of the agency. *Southern Worcester County Vocational Regional High School District v. Alcoholic Beverages Control Commission*, 386 Mass. 414, 420-21 (1984). A court may not displace an agency’s choice between two fairly conflicting views, even though the court would justifiably have made a different choice were it deciding the matter *de novo*. *Zoning Board of Appeals of Wellesley v. Housing Appeals Commission*, 385 Mass. 651, 657 (1982).

In general, a reviewing court grants substantial deference to the interpretation of a statute by the agency of government charged with its administration. *Gately’s Case*, 415 Mass. 397, 399 (1993). That is especially true where the statute at issue sets forth broadly a legislative policy and leaves to that agency the authority to fill in details of the articulated legislative scheme, such as through rule-making or regulation. See *Consolidated Cigar Corp. v. Dept. Of Public Health*, 372 Mass. 844, 850 (1977). See also *American Family Life Assurance Co. v. Comm. of*

Insurance, 388 Mass. 468, 473 (1983). On the other hand, the question of the interpretation to be given a statute is ultimately a question of law, subject to *de novo* judicial review, *Protective Life Ins. Co. v. Sullivan*, 425 Mass. 615, 618 (1997), citing *Raytheon Co. v. Director of Division of Emp. Security*, 364 Mass. 593, 595 (1974). See also *Commerce Ins. Co. v. Commissioner of Insurance*, 447 Mass. 478, 481 (2006) (“the duty of statutory interpretation rests in the courts.”). An administrative agency’s incorrect interpretation of a statute is not entitled to deference from the reviewing court. *Id.*, citing *Kszepka’s Case*, 408 Mass. 843, 847 (1990).

Ruling

The parties in this case have no dispute as to its basic facts. There is, therefore, no issue of whether or not the CSC’s decision in Shea’s case was based upon substantial evidence. The case turns wholly upon the correct interpretation to be given to a statute which defines a person who qualifies for the status of “veteran.” G. L. c. 4 § 7, Forty-third. That statute, it is fair to say, is not clearly written, characterized by the plain grammatically incorrect use of at least one word and by problematic punctuation. It is largely a consequence of flaws in the law’s draftsmanship that the two governmental entities involved in the lawsuit have reached differing interpretations affecting directly the determination of Shea’s status. Indeed, the determination of the defendant CSC itself was split with only three of its five members reaching the conclusion expressed in its majority decision and the other two dissenting.

In its decision on HRD’s application for a stay of that decision in the portion which dealt with its likelihood of success on the merits, this Court has addressed the substantive arguments made by the parties in support of their respective differing opinions as to how the statute should be interpreted. In its ruling, the court determined that the interpretation put forth by HRD is the

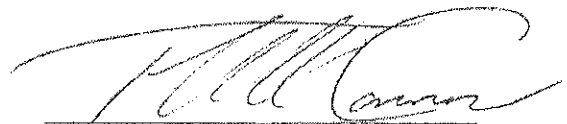
correct one, based upon principles of statutory construction and to promotion of the end of rendering a more internally harmonious reading of the various portions of the statute. See *Boston Police Patrolmen's Assn. v. Police Dept. Of Boston*, 446 Mass. 46, 50 (2006), quoting *Commonwealth v. Fall River Motor Sales, Inc.*, 409 Mass. 302, 316 (1991) ("The words of [a] statute 'should be read as a whole to produce an internal consistency.'").

CSC and Shea in their submissions do not cite any change to or amplification of law that have arisen since this court's issuance of its ruling in November, 2012, which had determined that HRD had the better argument in its interpretation of the definitional statutory provision relating to veterans. Given that, the court relies upon its reasoning as set forth fully in that November decision which treated the merits of HRD's challenge to the majority CSC determination, without setting it forth here as a reiteration. For those same reasons expressed in that earlier ruling, the court determines that the decision of the CSC on Shea's appeal of the HRD determination in seeking to qualify as a veteran under the provisions of c. 4 § 7, Forty-third was legally erroneous and that HRD is entitled to judgement on the pleadings in its petition under c. 30A.

Ruling

The motion of the plaintiff Human Resources Division of the Commonwealth for judgement on the pleadings is Allowed.

Date: March 21, 2013



Thomas A. Connors
Justice of the Superior Court

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