COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. SUCV2012-2882 A

COMMONWEALTH OF MASSACHUSETTS HUMAN RESOURCE DIVISION

V.

MASSACHUSETTS CIVIL SERVICE COMMISSION and

KEVIN SHEA

MEMORANDUM OF DECISION ON PETITIONER'S MOTION FOR STAY

This litigation turns upon the interpretation of a statute which defines a person who may qualify as a military "veteran" for purposes of eligibility lists for civil service employment in the Commonwealth. The respondent, Kevin Shea, is seeking to be named as a police officer or firefighter in one of the Commonwealth's subdivisions which are charged with selecting such employees from prepared civil service lists. Shea is seeking to be qualified as a disabled veteran which would provide enhancement of his position on the eligibility list from which one of those municipalities might select one of those employees for hire. The petitioner, Human Resources Division of the Commonwealth (HRD) had ruled that he did not qualify for that designation. Shea appealed, and a divided panel of the respondent Civil Service Commission (CSC) reversed that ruling.

HRD has filed a petition pursuant to G.L. c. 30A which seeks judicial review of the CSC' s ruling in Shea's case. Pending the resolution of its appeal, HRD has filed a motion

which seeks to stay the enforcement of the CSC ruling in Shea's favor.[1] Shea filed an opposition to the request for stay, and the parties were heard on October 17, 2012.

Factual Background and the Governing Statute

Shea entered the Army in 2003. His time in military service was of limited duration. 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 Malden and Medford and in the town of Winchester.

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;**

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[1] HRD had initially requested CSC to stay its ruling, however, that request was denied.

> **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 for purposes of the statute as wartime service.

Legal Standard

Cast under the heading of a request for stay, HRD's application is seeking the exercise of the court's equitable authority to grant relief in the nature of a preliminary injunction to prevent the enforcement of the CSC's ruling benefitting Shea until HRD's appeal of that ruling can be heard in this court.

The question of the issuance of a preliminary injunction begins with the familiar three-step analysis set forth in *Packaging Industries, Inc. v. Cheney*, 380 Mass. 609, 616-617 (1980). First, the judge must determine the likelihood of ultimate success on the merits on the part of the party seeking the grant of pre-trial injunctive relief. *Id.*, at 616. Second, the judge must examine whether failure to issue the injunction would cause the moving party "to suffer a loss of rights that cannot be vindicated should it prevail after a full hearing on the merits." Finally, the judge must balance this risk against any similar risk which granting the injunction would create for the opposing party. *Id.* "What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits. Only when the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue," *Id.*

An additional consideration, however, is present when the contest is not simply one

between two private parties, but where one of the parties to the lawsuit is a public entity. In such cases, the Supreme Judicial Court has ruled that "before issuing a preliminary injunction, a judge is required to determine that the requested order promotes the public interest, or, alternatively, that the equitable relief will not adversely affect the public interest." *Commonwealth v. Mass. CRINC*, 393 Mass. 79, 89 (1984) See also *Hull Municipal Lighting Plant v. Mass. Municipal Wholesale Electric Co.*, 399 Mass. 640, 649 (1987).

Ruling

1. Likelihood of Success

Critical to the determination of HRD's motion is its likelihood of ultimate success in its appeal of CSC's ruling as to Shea's status. The determination which this court ultimately will be required to make will be governed by the standard of review of administrative agency decision pursuant to G. L. c. 30A. The scope of review available to a petitioner in HRD's position is somewhat limited, as the reviewing court may only set aside that decision if it determines that it was based upon error of law or if it was unsupported by substantial evidence. *Dube v. Contributory Retirement Appeal Board*, 50 Mass. App. Ct. 21, 23 (2000). In the process of its review, a court must give due weight to the experience, technical competence and specialized knowledge of the agency, and it should defer to the agency on questions of fact and reasonable inferences drawn from the record. *Cobble v. Commissioner of the Dept. of Social Services*, 430 Mass. 385, 390 (1999), citing *Flint v. Commissioner of Public Welfare*, 412 Mas. 416, 420 (1981).

HRD's likelihood of success, therefore, hinges upon its ability to demonstrate that CSC's ruling was erroneous as a matter of law or that it was not supported by substantial evidence. The

latter of those two is, in truth, not relevant to the court's analysis, as there is no real dispute as to the facts underlying Shea's claim of entitlement to disabled veteran status; it is simply a question of whether the CSC was correct in its application of the statute to the undisputed facts of his case. In connection with this determination, HRD argues that the deference which a reviewing court normally would accord the administrative body's technical subject matter expertise should not enter in the circumstances of this dispute, since the correctness or error of the CSC's decision turns simply upon the interpretation of a provision of the wording of a provision of the General Laws and not upon some regulation or other matter more appropriately consigned to the agency's judgement based upon its expertise.[2]

The court agrees with HRD that the consideration of deference to administrative agency competence is not so sharply present where the sole issue for resolution is the interpretation to be given an enactment by the legislature made part of the General Laws. In its own undertaking of examination of the statute at issue, the court believes that the interpretation advanced by HRD--one with which two of the five members of the CSC also subscribed--is likely correct. The court agrees with CSC that interpretation of the statute cannot be clarified by simple resort to its "plain meaning." The manner in which the "provided however" clause is to be harmonized with the

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[2] At argument, the court inquired of each party if it was aware of any case law which has dealt with this issue of distinction between deference accorded an agency's interpretation of its own regulations as opposed to discernment of how a legislative enactment is to be construed; neither party was able to cite any such precedent. But see *Cleary v. Cardullo's, Inc.*, 347 Mass. 337, 344 (1964) ("significance may be given to a consistent long continued administrative application of an ambiguous statute . . . especially if the interpretation is contemporaneous with the enactment."). Irrespective of that observation in *Cleary*, however, it remains a guiding principle of c. 30A review that "an erroneous interpretation of a statute by an administrative agency is not entitled to deference." *Herrick v. Essex Regional Retirement Board*, 77 Mass. 645, 648 (2010), quoting *Woods v. Executive Office of Communities and Development*, 411 Mass. 599, 606 (1992).

preceding portion of subsection Forty-Three is essentially ambiguous. It turns upon whether that clause is intended to modify only portion (b) of the statute which addresses duration of service, or whether it is intended to be of a broader application. It is this latter approach that CSC and Shea adopt, arguing that the clause sets up a separate category of eligible veterans who need not have satisfied either end of the two preceding qualifiers, namely the (a) section referencing nature of discharge and the (b) related to duration in service.

The CSC acknowledges the established principle of statutory construction that a modifying clause be confined to the last antecedent unless there is something in the subject matter or dominant purpose which mandates a different interpretation. See *Moulton v. Brookline Rent Control Board*, 385 Mass. 228, 230-231 (1982), citing *Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 133 (1949). "According to [this rule] of construction, a proviso or an exception is also presumed to be confined to the last antecedent." *Id.*, at 231, quoting *Young's Court v. Outdoor Advertising Board*, 4 Mass. App. Ct. 130, 133 (1976). See also 2A Singer and Singer, *Sutherland Statutory Construction*, § 47:26 (7th ed. 2007) discussing the principle of *reddendo singula singulis*. Application of that doctrine here would benefit HRD's construction of the statute.

In disputing HRD's position, CSC in its majority decision lays greatest stress upon the language employed in the clause which references three specific categories of persons--those who have been awarded service-connected disability, those awarded a Purple Heart, and those who had deceased in service, the latter category in circumstances other than dishonorable. That language which CSC stresses in its ruling states that such person "shall be deemed a veteran . . . " CSC argues that this language is determinative of the animating principle behind the provision.

intending that persons who fit into one of those three categories qualify as a "veteran," effectively overriding the otherwise applicable requirements of both (a) and (b).

The difficulty with the CSC's conclusion is that it considers that cited language, "shall be deemed a veteran," in isolation without reference to the concluding portion of that sentence. That portion provides that such person may be deemed a veteran "notwithstanding his failure to complete 90 days." This portion of the sentence appears to anchor the relevant clause more solidly into the immediately antecedent provision, that which had mandated the ninety day service minimum. Had the legislature intended to have created a whole new category on the other side of the semi-colon, one untethered from the requirements set forth in both (a) and (b), it presumably would simply have inserted parallel language which referenced that it was also notwithstanding that the serviceman's discharge had not been under honorable conditions. By failing to have referenced in that additional proviso following (b) that it related to the requirements both of the status of discharge as well as to the 90 days of service rule, the implication follows of legislative intent that it apply to modify the requirements of (b) only in the case of the enumerated classes of servicepersons.[3]

The CSC has cited for support of its interpretation of the statute the ruling in *Bednarik v. Catania Hospitality Group, Inc.*, 78 Mass. App. Ct. 806, 813 (2011), which involved a provision of c. 152A governing employee wages and tips. In that case, the Court ruled that a clause which immediately followed two subjects connected by an "and" without punctuation, modified them

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[3] It is true as CSC in its ruling points out that status of discharge is referred to in the clause, albeit for only one of the three categories, those who die in service. There may be reason, however, why this would need listing in that sole of the three categories, considering that it would not be directly germane to the other two categories of servicemen who, contrariwise, would have survived and would have had a "last discharge" as referenced in (a).

both, and it determined that the defendants' attempt to invoke the "last antecedent rule" to limit the operation of the modifier to only the second of those two objects was misplaced. In reaching this result, the Court was adopting what was a plainly more commonsensical reading of the provisions of the law and one which grammatically made sense within its context. The purpose of the provision was to ensure that a patron was made aware that a house or administrative fee was not a part of a tip, and interpreting the statute to require such action only where the employer had made a "written description" but not a "designation" of the purpose of that fee would be at odds with that purpose.

In addition, the *Bednarik* Court in noting the limitation of the last antecedent rule cited as support the language of the United States Supreme Court decision in *Porto Rico Ry. Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920). In that ruling the Court had observed "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." The *Bednarik* Court had no difficulty applying this rule to the statute at issue, finding the two subjects preceding the modifying clause constituted, in effect, "a single antecedent clause." *Bednarik*, 78 Mass. App. Ct. at 813.

The statute at issue in this case presents a marked contrast. First, the two antecedent provisions here are demarcated as separate provisions designated separately as "(a)" and "(b)," presumably connoting separate requirements for eligibility for veteran status. Secondly, the circumstance presented here is inapposite to that referenced by Justice Brandeis in the Supreme Court case referenced in *Bednarik*; as already mentioned, the words used in the following clause here are not contextually so applicable to the first antecedent provision (a) as to the closer second

provision (b).

While the issue of the interpretation of this problematically worded statute is not free from doubt, it appears for the foregoing reasons that HRD's view is more consistent with principles of statutory interpretation and with a harmonious reading of all of the portions of subsection Forty-third.

2. Irreparability of Harm and the Public Interest

Shea argues that allowance of HRD's application for stay will work a grave hardship upon him in preventing him from ascending the lists for possible governmental employment by virtue of favored status as a disabled veteran. He argues that the delay while HRD's c. 30A appeal is resolved will serve to compound the harm he already has experienced from the denial of disabled veteran's status dating to the time since he had first requested and been denied that status by HRD.

The counter to Shea's argument on irreparability is its mirror-image. In order that Shea ascend the list by virtue of enhanced status means that another candidate falls behind him. His harm, therefore, cannot to be viewed in isolation, since positioning of applicants on the eligible list represents a zero-sum, as another or others whose names also appear as eligible on that list would fall concomitantly with Shea's risen status. It is true that if Shea ultimately succeeds in securing disabled-veteran status, he could potentially have been harmed through entry of a stay if he had failed to secure a position he might otherwise have gotten had that status been so listed at the time of hire prior to resolution of the appeal. On the other hand, if Shea ultimately is ruled not to be entitled to that status, he may be in position to have unwarrantedly received a position, in the process occasioning harm to another applicant who would otherwise have been taken in

preference. In either case, the resolution of the appeal would not properly restore the *status quo ante*, with the employment decision having been made and the rights of the respective employer and employee having been fixed at that juncture.[4]

As the HRD argues, consideration of the public interest required in such disputes involving decision-making by governmental entities who are parties must be taken into account in the analysis related to irreparable harm. Two of the entities involved in this dispute, HRD and CSC, are charged with ensuring the fair and equitable administration of public hiring. The public interest obviously is strong in seeing that this activity is performed in conformity with the accurate interpretation of the governing statute. Here a decision which is erroneous would serve to thwart the public interest through causing the vesting of rights in employment which might not be amenable to correction or reversal. The public interest, therefore, requires that the determination of the qualification for disabled veteran status under the statute's language be carried out as correctly as possible.

Consideration of the public interest does not alter the court's view that issuance of the stay is appropriate.

Order

The HRD's application for stay is **Allowed**. In consideration of the potential for harm to

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[4] At argument, HRD contended that any harm to Shea from the impact of the stay should he and CSC ultimately prevail could be redressed by having his seniority rights in service adjusted to the earlier date of initial recognition of disabled veteran status. This, however, would not serve to rectify a situation in which he had failed to have been selected for an employment position he could have secured had he been accorded that at that status earlier time. This factor, of course, again cuts equally in the opposite direction in that it would not permit redress to the harm done to a competitor for such position who lost out in preference to Shea in the absence of a stay should Shea ultimately be ruled not to have been entitled to disabled veteran status.

the defendant Shea, the Court directs that he may apply for an expedited schedule for submission and hearing on the parties' motions under Mass. Rule of Civ. P.12c to the end of promoting the hastened resolution of the merits of this case.

Date: November 6, 2012

Thomas A. Connors
Justice of the Superior Court

Notice Sent
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