

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

GINA SOUSA,
Appellant

G2-08-193

v.

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Representative:

Pro Se
Gina Sousa

Human Resources Division's Representative:

Martha O'Connor, Esq.
Human Resources Division
One Ashburton Place: Room 211
Boston, MA 02108

Department of Correction's Representative:

Alexandra McInnis
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Gina Sousa (hereinafter "Sousa" or "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") contesting a determination by the Department of Correction (hereinafter "DOC" or "Appointing Authority") that she was not eligible to take the civil service promotional examination for the position of Correctional Program Officer D (CPO D).

On September 24, 2009, the Commission issued an Interim Decision on the Respondents' Motion to Dismiss. That interim decision is incorporated as part of this final decision. In the Interim Decision, the Commission provided all parties with thirty days to provide addition comments regarding whether or not the Appellant's time served as a provisional CPO C should be counted toward the requirement of CPO D test-takers to have "been employed as a CPO C for at least one year prior to the date of the [departmental promotional]" examination for CPO D."

HRD and DOC's Argument

HRD and DOC argue that provisional time does not count toward eligibility for a departmental promotional examination. According to an affidavit submitted by HRD's Assistant Director of the Civil Service Unit, for at least a decade HRD has consistently not counted provisional time spent in the next lower title toward eligibility to take a departmental promotional examination. Further, citing G.L. c. 31, §§ 9, 1, 6, 7 and 15, HRD and DOC argue that that the Appellant's time as a provisional CPO C cannot be counted toward the eligibility requirement of the CPO D examination announcement because the Appellant did not receive an original appointment or promotional appointment after certification; she was only granted a provisional promotion because no suitable certification list existed.

Appellant's Argument

The Appellant argues that provisional time does count toward eligibility for a departmental promotional examination. Specifically, the Appellant puts forth the same argument referenced in the Interim Decision, that if the principles of Weinburgh are

applied to the instant matter, she would meet the requirements to sit for the CPO D promotional examination.

Conclusion

For all the reasons cited in the Interim Decision, Weinburgh does not apply here. The plain language of the statute (in regard to promotional appointments other than police and fire) and the longstanding interpretation of HRD show that the Appellant was ineligible to sit for the departmental promotional examination for CPO D on June 2, 2007 because she was not employed *in the next lower title* after certification for at least one year preceding the date of the examination.

For these reasons, the Appellant's appeal under Docket No. G2-08-193 is hereby ***dismissed.***

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on December 10, 2009.
A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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.

Attachment: Commission's September 24, 2009 Interim Decision

Notice:

Gina Sousa (Appellant)

Alexandra McInnis (for Appointing Authority)

Martha O'Connor, Esq. (HRD)

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Commissioner:

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INTERIM DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Gina Sousa (hereinafter "Sousa" or "Appellant"), filed an appeal with the Civil Service Commission (hereinafter "Commission") contesting a determination by the Department of Correction (hereinafter "DOC" or "Appointing Authority") that she was not eligible to take the civil service promotional examination for the position of Correctional Program Officer D (CPO D).

A pre-hearing conference was conducted at the offices of the Commission on September 11, 2008. HRD did not attend due to DOC's delegated status regarding civil service matters. The presiding Commissioner informed the parties that he would seek clarification from HRD regarding their definition of the term "after certification" as it relates to an individual's eligibility to take a promotional examination. HRD subsequently asked the Commission to stay the proceedings until a final disposition was reached regarding Weinburgh v. Civil Serv. Comm'n, 72 Mass. App. Ct. 535 (2008). At the time, the Attorney General was seeking further appellate review of Weinburgh in regard to the definition of "after certification" and how that term pertained to a firefighter's (or police officer's) eligibility to take a promotional examination. HRD's motion to stay was allowed.

The Supreme Judicial Court subsequently denied the Attorney General's request for further appellate review in Weinburgh and the Commission scheduled a status conference regarding the Appellant's instant appeal for April 9, 2009.

Prior to the April 9, 2009 status conference, HRD submitted documents to the Commission, with a copy to the Appellant and DOC, arguing that the Appeals Court's decision in Weinburgh was not applicable to the instant appeal. Specifically, HRD argued that in Weinburgh, the court only examined the eligibility of police and firefighters for promotional examinations pursuant to G.L. c. 31, § 59. Since Section 59 only applies to police and firefighters, HRD argued that the decision in Weinburgh is not applicable to the instant appeal which involves the position of Correctional Program Officer. Moreover, for reasons discussed in more detail below, HRD argued that the Appellant was not eligible to sit for the promotional examination in question.

At the status conference on April 9, 2009, DOC stated that they would be filing a Motion to Dismiss the Appellant's appeal for all the reasons stated in HRD's filings. The Appellant also filed documents in response. I heard oral argument from all parties as part of the status conference on April 9, 2009.

Factual Background

On or around June 2, 2007, HRD conducted the examination for Department of Correction Correctional Program Officer D ("CPO D"). The announcement for the CPO D examination stated that "this examination is open only to current Department of Correction employees who have been employed for at least twelve months after certification in the title of Correctional Program Officer C and who do not have permanent civil service status in any title higher than Correctional Program Officer D."

According to the Appellant, she served as a provisional CPO C for over two (2) years. After the examination was given for the position of CPO C, which requires the permanent appointment of candidates, the Appellant was temporarily removed from that provisional position because she scored lower than other candidates. She was eventually promoted to the position of CPO C and, according to her written statement, was given a retroactive seniority date of May 4, 2004, based on her prior service as a provisional CPO C.

On June 2, 2007, after having served in the permanent position of CPO C for approximately 10 months and 1 day, the Appellant took the promotional civil service examination for the position of CPO D.

Appellant's Argument

Based on the Appellant's statements at the status conference as well as the written material she submitted, the Appellant argues that she should prevail in her appeal based on any one of the following three reasons:

1. Since her name appeared on the "eligible list" of candidates for the position of CPO C in the Winter of 2005 or early Spring of 2006 (as a result of taking and passing a promotional examination for CPO C), she should be considered "certified" as a CPO C when her name first appeared on the eligible list, as opposed to when she was actually appointed to the position of CPO C on July 30, 2006. Following this logic, the Appellant then argues that, according to the Weinburgh decision, she must be deemed eligible to sit for the promotional examination, because the promotional examination for CPO D took place twelve months after she was "certified" as a CPO C.
2. Even if the Commission were to determine that the Appellant was not "certified" as a CPO C at the time her name appeared on the CPO C eligible list in the Winter of 2005 or early Spring of 2006, DOC granted her a retroactive seniority date of May 4, 2004 in the position of CPO C when she was appointed on July 30, 2006, based on her prior time served as a provisional CPO C. Hence, according to the Appellant, the May 4, 2004 date should be controlling when determining her eligibility to sit for the CPO D promotional examination on July 30, 2006.
3. As referenced above, the Appellant, in addition to serving 10 months and 1 day as a permanent CPO C prior to the CPO D promotional examination, previously served approximately two (2) years as a provisional CPO C. The Appellant argues that the two years of experience as a provisional CPO C should deem her to have been

HRD and DOC's Argument

HRD argues that the Weinburgh decision is not applicable to the present matter. In Weinburgh, the court examined the eligibility of police and firefighters for promotional examinations pursuant to G.L. c. 31, § 59. Since Section 59 applies only to police and firefighters and the present appeal involves a Correctional Program officer, HRD argues that Weinburgh does not apply in the instant matter.

HRD argues that the Appellant did not meet the explicit posting requirements of this promotional examination. The posting states that “this examination is open only to current Department of Correction employees who have been employed for at least twelve months after certification in the title of Correctional Program Officer C...” According to HRD, this standard was promulgated in accordance with HRD’s discretion to establish eligibility standards pursuant to civil service law and basic merit principles under G.L. c. 31, §§ 5 and 19. Further, HRD argues that it has maintained that “after certification” as used in the CPO D announcement requires that to be eligible to take the examination, an applicant must have been employed as a CPO C for at least one year prior to the date of the examination for CPO D.

DOC concurs with HRD, arguing that the Appellant was not eligible to sit for the CPO D promotional examination because she was not appointed to the position of CPO C from a certification until July 30, 2006, less than 12 months prior to the CPO D exam.

Conclusion

The decision in Weinburgh does not apply to the instant matter. In Weinburgh, the court examined the legislative intent of G.L. c. 31, § 59, a section which applies only to the promotion of police and firefighters. Here, in regard to the promotion of Correctional Program Officers, the Commission is charged with examining HRD's intent regarding standards they developed pursuant to G.L. c. 31, §§ 5 and 19. HRD argues that, in regard to these standards, they have always maintained that “after certification”, as used in the CPO D announcement, requires that to be eligible to take the examination, an applicant must have been employed as a CPO C for at least one year prior to the date of the CPO D examination. There is no evidence to rebut HRD's contention that this has been their long-standing intent of the standards in question.

Moreover, the Section 59 language examined by the Court differs from the language contained in the standards promulgated by HRD under Sections 5 and 19. Specifically, in examining Section 59, the court considered that “the legislature chose to separate the requirement of employment in the force (no rank) from that of a year's certification in the lower rank.” Here, in regard to the HRD standards, there is no such reference to a separate requirement (of employment in the force).

Accepting this HRD interpretation, the only remaining issue for the Commission is whether or not the approximately two (2) years that the Appellant served as a provisional Correctional Program Officer C (prior to the CPO D promotional examination) should be counted toward the requirement that applicants have been “employed for at least twelve months after certification in the title of Correctional Program Officer C”.

In its filings to the Commission, HRD only references that an applicant must have “been employed as a CPO C for at least one year prior to the date of the examination for

CPO D” while the standards themselves reference being employed for at least twelve months after certification in the title of CPO C. This is an open issue that can not be resolved without all parties having the opportunity to submit further briefs and/or comments to the Commission.

For this reason, all parties are given an additional thirty (30) days to present additional comments regarding whether or not the Appellant’s time served as a provisional CPO C should be counted toward the requirement of CPO D test-takers to have “been employed as a CPO C for at least one year prior to the date of the examination for CPO D.” When submitting their comments, the parties should indicate whether or not they wish to make additional oral argument regarding this matter prior to the Commission enter a final decision.

Finally, regardless of the final outcome of this appeal, the language used in these particularly promotional examinations by HRD is ambiguous. The Commission recommends that the language be amended for clarity.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on September 24, 2009.
A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. 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.

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