

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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JAMES VERDERICO, JR. &
STEPHANIE O’SULLIVAN,
Appellants

v.

G1-07-337 (VERDERICO)
G1-07-338 (O’SULLIVAN)

BOSTON POLICE DEPARTMENT &
HUMAN RESOURCES DIVISION,
Respondents

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Commissioner:

Christopher C. Bowman

DECISION ON APPELLANTS’ MOTION FOR 310 RELIEF

Procedural Background

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellants, James Verderico and Stephanie O’Sullivan (hereafter “Appellants”) filed an appeal in which they asked the Civil Service Commission (hereafter “Commission”) to exercise its equitable powers

pursuant to Chapter 310 of the Acts of 1993 (hereafter “310 Relief”) and: 1) place the Appellants’ names at the top of the next police officer certification list which the Human Resources Division (hereafter “HRD”) sends to the Boston Police Department (hereafter “BPD” or “Appointing Authority”); and 2) if appointed, adjust the Appellants’ civil service seniority date to June 25, 2007.

A pre-hearing conference was conducted by the Commission on November 28, 2007 followed by a status conference on December 18, 2007. Since there are no material factual disputes, the parties agreed to brief the relevant legal issues and place the dispute before the Commission. HRD and BPD submitted their briefs to the Commission on March 5, 2008 and the Appellants submitted their brief on March 6, 2008.

Factual Background

1. Chapter 31 of the Massachusetts General Laws, which sets forth the rights and duties of those within the Commonwealth's civil service system, charges HRD with administering, enforcing and regulating the civil service system in accordance with civil service law & Personnel Administration Rules (“PARs”).
2. Under this authority, HRD conducts civil service examinations for purposes of establishing eligible lists and issuing certifications for appointment to appointing authorities governed by civil service law.
3. Chapter 31 § 25 provides the Personnel Administrator (“HRD”) discretion over the creation, maintenance, expiration and revocation of an eligible list and consequently the issuance of certifications for appointment that are established from the eligible list.

4. An individual's eligibility, by law, is effective for a minimum of two years. It may be effective longer should HRD be temporarily enjoined by a court order from certifying names from an eligible list, in which case eligibility of persons on such list shall be extended for a period equal to the duration of such order. M.G.L. c. 31, § 25.
5. An eligible list contains the names of those who have passed the examination and have been ranked according to statutory preferences and examination marks and is established in accordance with time frames determined by HRD.
6. Open competitive examinations for public safety positions are typically held every two years.
7. When an appointing authority has a vacancy to fill, it must file a requisition with HRD for a certification stating, among other things, the position and the number of vacancies it wishes to fill.
8. Section 8 of the state's Personnel Administration Rules (PAR.08) provides that appointing authorities are given a minimum of twelve weeks in which to make and notify HRD of appointments from the names certified. According to HRD, appointing authorities may request an extension of time in which to complete the appointment process.
9. When the certification is issued, HRD mails applicants a civil service card instructing each applicant to appear in person at the appointing authority to sign the certification "willing to accept appointment." According to HRD, applicants typically are given eight business days from the issue date of the certification to sign the list.

10. After the signing deadline, the appointing authority may begin to conduct all steps of the employment process to determine whether applicants may be given a conditional offer of employment.
11. These steps include, but are not limited to the following: obtain, complete, and return all employment applications; hold all orientation sessions; schedule and conduct interviews; and complete extensive background and CORI screenings, as well as schedule the medical examination and the Physical Abilities Test (PAT).
12. Chapter 242 of the Acts of 2000, amended M.G.L. c. 31, § 58A by inserting the following: “[n]otwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination. Any veteran shall be allowed to exceed the maximum age provision of this section by the number of years served on active military duty, but in no case shall said candidate for appointment be credited more than four years of active military duty.” The City of Boston adopted Section 58A effective November 8, 2000. (emphasis added)
13. On April 30, 2005, an open competitive examination was held for the position of police officer. The eligible list from the April 2005 examination was established on November 1, 2005 and revoked on October 31, 2007.

14. James Verderico took and passed the April 2005 open competitive examination for police officer. Mr. Verderico was thirty-six (36) years old at the time of the examination.
15. Mr. Verderico is employed as a Harvard University police officer. He previously worked as a detective in the New York City police department. He moved back to Boston so that his son could attend Boston schools.
16. Stephanie O'Sullivan also took and passed the April 2005 open competitive examination for police officer. Ms. O'Sullivan was thirty-three (33) years old at the time of the examination.
17. Ms. O'Sullivan is a criminal investigator with the Suffolk County District Attorney's Office. She hold a masters degree in criminal justice and was a five-time member of the national hockey team and alternate on the 1998 U.S. Olympic hockey team.
18. On December 13, 2007, HRD received a requisition from the Boston Police Department for a certification from the open competitive eligible list to appoint seventy (70) police officers.
19. On January 17, 2007, HRD issued certification number 270048 containing the names of individuals eligible for consideration.
20. According to the Appellants, HRD and BPD had exhausted the list of city residents when it issued certification number 270048 and, therefore, this certification, contained the names of non-resident candidates.
21. Pursuant to G.L. c. 31, § 58A, HRD was prohibited from certifying the names of all individuals who were over the age of thirty-two (32) at the time of the April 2005 examination to the Boston Police Department on certification number 270048.

22. Therefore, the names of Mr. Verderico and Ms. O’Sullivan did not appear on certification number 270048.
23. Approximately four months after HRD issued certification 270048, on April 12, 2007, the Boston Police Department notified HRD of the names of all candidates who received conditional offers of employment from certification 270048.
24. Approximately one month later, on May 18, 2007, the Legislature enacted Chapter 43 of the Acts of 2007, extending the maximum age requirement for police officers for the City of Boston to age forty (40). Chapter 43 of the Acts of 2007 states, “[n]otwithstanding section 58A of chapter 31 of the General Laws or any other general or special law to the contrary, no person shall be eligible to have his name certified for original appointment to the position of police officer in the city of Boston if such person has reached his fortieth birthday on the date of the entrance examination. This act shall take effect upon its passage. Approved May 18, 2007.”
25. The next day, May 19, 2007, the Appellants took and passed the 2007 civil service examination for the position of police officer. Ms. O’Sullivan scored in the high 80’s and Mr. Verderico scored in the low 90’s.
26. Ms. O’Sullivan helped spur the above-referenced law change by organizing a meeting with the Boston City Council on April 9, 2007. As a result of that meeting, the Boston City Council began the process of urging the Massachusetts legislature to amend section 58A of chapter 31 of the general laws.
27. On or around May 18, 2007, HRD placed the names of those affected by Chapter 43 of the Acts of 2007 on the 2005 Boston eligible list for police officer pursuant to Chapter 43 of the Acts of 2007.

28. HRD did not amend certification number 270048, previously issued in January 2007, to include Mr. Verderico or Ms. O'Sullivan's (Appellants) name, or the names of similarly situated individuals.
29. According to HRD, approximately one hundred individuals (including the two appellants) were between the ages of thirty-two (32) and forty (40) as of the April 30, 2005 open competitive examination for police officer; were not certified to Certification number 270048 issued to the Boston Police Department on January 17, 2007; were affected by Chapter 43 of the Acts of 2007, effective May 18, 2007; and would have been reached for consideration if their names had been placed on Certification number 270048.
30. According to the Appellants, only 60 of the above-referenced individuals were city residents and, out of the 60 residents, only 16 took the 2007 exam.
31. On June 25, 2007, the Boston Police Department appointed candidates from certification number 270048. This is the same day officers started the police academy.
32. In July 2007, BPD sought to hire an additional 55 police officers via lateral transfers from other police departments in Massachusetts, pursuant to G.L. c. 31, § 35.
33. The 2005 police officer eligible list expired on October 31, 2007.
34. The 2007 eligible list, compiled from the May 19, 2007 open competitive examination for police officer, was established on November 1, 2007.
35. As referenced above, the Appellants took and passed the 2007 examination. Given their scores and the high number of individuals that took the 2007 examination, it is unlikely that the Appellants will be among those reached for consideration for the

position of police officer in the City of Boston during the two-year period that the 2007 eligibility list will be in effect.

Arguments Regarding the Intent of Chapter 43 of the Acts of 2007

The Appellants argue that HRD violated the clear mandate of Chapter 43 of the Acts of 2007. Specifically, the Appellants argue that, upon passage on May 18, 2007, HRD should have reviewed the names on its 2005 eligibility list to see which applicants were between the age of 32 and 40 and added their names to the outstanding certification that was issued to the Boston Police Department in January 2007.

In support of this argument, the Appellants point to a December 12, 2007 letter sent to the Commission from Boston City Council President Maureen Feeney and Councilor Stephen Murphy, Chair of the Committee on Public Safety. This letter states in relevant part, “As soon as Chapter 43 passed, the Police Department should have requisitioned, and HRD should have certified to the Department a new list of previously aged-out candidates – especially those who, like Stephanie O’Sullivan and James Verderico, were city residents and who scored high on the 2005 exam. Regrettably, neither the agency nor the Department ever responded to the Chapter 43 legislation...Accordingly, we respectfully request that you grant them Chapter 310 relief for the current 2007 exam.”

The Boston Police Department, which is the Appointing Authority in this case, argues that, at the time Chapter 43 was enacted on May 18, 2007, conditional offers of employment had already been sent out in April 2007. By June 25, 2007, applicants who were eligible and passed screening requirements had begun police academy training. According to the BPD, if the Department would have added the Appellants and 100 other

similarly situated individuals to the list, the hiring process would have been delayed and may have impacted those who received conditional offers.

Moreover, HRD argues that the clear intent of Chapter 43 was to raise the age of eligible applicants to be considered for appointment as a police officer in the City of Boston from 32 to 40 and that the Appellants, both under the age of 40, now appear on the 2007 eligible list. According to HRD, if the Legislature had intended that the names of all individuals who were between the ages of 32 and 40 be placed on existing certifications as well as future certifications for consideration as a police officer in the City of Boston, it would have so stated.

Arguments regarding whether the Appellants are persons aggrieved

The Commission has the authority “to hear and decide appeals by a person aggrieved by any decision, action or failure to act by the administrator...” G.L. c. 31 § 2(b). A person is defined as aggrieved when “such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied or prejudiced in such a manner as to cause actual harm to the person's employment status.” Id. HRD and the BPD argue that the Appellants are not persons aggrieved as they received the benefit expressly provided by the Legislature through the clear language of Chapter 43. According to HRD, Chapter 43 did not instruct that the names of those between the age of thirty-two and forty at the time of the examination to be placed on an existing certification. The Appellants, according to HRD, received the benefit that the Legislature clearly provided them; their names appear on the current eligible list and they have the

opportunity to be certified for consideration for appointment from the current eligible list. As such, HRD argues that the Appellants are not persons aggrieved under the law.

Chapter 310 of the Acts of 1993 allows the Commission to provide relief only if the individual has been prejudiced through no fault of his own. According to the Appellants, the Appellants were prejudiced by HRD's failure to certify their names to the Boston Police Department after May 18th, when Chapter 43 became law. Again according to the Appellants, if HRD had added their names to the certification list previously issued to the Boston Police Department in January 2007, they could have been considered for employment based on their scores from the 2005 civil service exam. Instead, according to the Appellants, they must now wait and hope that their names will be reached off the 2007 list before it expires.

Appropriateness of relief being sought

The Appellants argue that the relief being sought is limited in scope and falls within the Commission's jurisdiction because its discretionary power to take action for remedial reasons under Chapter 310 is very broad, citing Certain Boston Municipal Police Officers and Sergeants v. City of Boston, G-06-113 (2006).

Further, the Appellants argue that, contrary to HRD's argument that there are 100 "similarly situated" individuals, there are actually only 16 individuals who are similarly situated to the Appellants. According to the Appellants, of the 100 applicants from the 2005 exam who were between the ages of 32 and 40 who were not certified on the list HRD sent to the BPD in January 2007, only 60 of those names were city residents and many of those 60 did not take the 2007 exam.

Finally, the Appellants cite various public policy reasons for granting the relief requested.

Conclusion

Several hundred individuals are ranked higher than the Appellants on the current civil service eligibility list that will be used to fill vacancies within the Boston Police Department over the next two years. These rankings were established based on the scores of individuals, including the Appellants, who took the 2007 civil service exam for the position of police officer, and other factors, including statutory preferences granted to veterans. It appears that neither of the Appellants is ranked high enough on the current eligibility list to be reached for consideration in the current hiring cycle. As part of the instant appeal, the Appellants are asking the Commission, pursuant to Chapter 310 of the Acts of 1993, to place them at the top of the current eligibility list.

The Appellants argue that such relief is warranted as, according to them, they were prejudiced through no fault of their own during the most-recently concluded hiring cycle, which was based on an eligibility list generated from the 2005 civil service exam.

In 2005, the Appellants both took and passed the civil service exam for the position of police officer. At the time they took the 2005 civil service exam, however, HRD was statutorily prohibited from adding anyone to the eligibility list if they were older than age 32 at the time of the exam. It is undisputed that both of the Appellants were over age 32 at the time of the 2005 civil service exam.

Over the next two years, the Boston Police Department requisitioned several certifications from HRD to hire new police officers. Upon each request for a certification, HRD issued a certification to the BPD using the eligibility list in place at the

time the certification was requested. In January 2007, the BPD requested a certification for the purpose of hiring 70 police officers. HRD, using the eligibility list in place at the time, prepared and issued a certification to the BPD. Neither James Verderico or Stephanie O'Sullivan, the Appellants in the instant matter, were included on this certification, or previous certifications, as their names were not included on the eligibility list at the time due to the fact that both of the Appellant were over age 32 at the time of the 2005 exam.

On May 18, 2007, one day prior to the 2007 civil service exam for police officer, the Legislature passed Chapter 43 of the Acts of 2007, which stated,

[n]otwithstanding section 58A of chapter 31 of the General Laws or any other general or special law to the contrary, no person shall be eligible to have his name certified for original appointment to the position of police officer in the city of Boston if such person has reached his fortieth birthday on the date of the entrance examination. This act shall take effect upon its passage. (emphasis added)

As of May 18, 2007, Chapter 43 effectively raised the age level of applicants who could be certified for consideration as a police officer in the City of Boston from thirty-two to forty.

The Appellants argue that the new law provided them the right to be certified to, and considered from, a certification issued prior to the passage of Chapter 43. Since HRD did not take this action, the Appellants argue that they were prejudiced through no fault of their own thus warranting the relief being sought in their instant appeal. The Commission concludes that such relief is not appropriate or warranted for the reasons discussed below.

The Appellants are not aggrieved persons and were not prejudiced as they have received the benefits intended by Chapter 43 of the Acts of 2007. The clear intent of the

legislation, enacted one day prior to the 2007 civil service exam for the position of police officer, was to raise the age of eligible applicants to be considered for appointment as a police officer in the City of Boston from thirty-two to forty. The Appellants, both under the age of forty, now appear on the 2007 eligible list as a result of the passage of Chapter 43.

The Commission agrees with HRD that, if the Legislature had intended that the names of all individuals who were between the ages of thirty-two and forty be placed on certification lists already issued, it would have so stated. The Legislature was quite capable of stating that Chapter 43 shall be applied to outstanding certifications. The Legislature, however, did not state this. Therefore, this Commission may “not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design.” Commonwealth v. Callahan, 440 Mass. 436, 443, 799 N.E.2d 113 (2003), quoting Commonwealth v. McLeod, 437 Mass. 286, 294, 771 N.E.2d 142 (2002), and cases cited.

Further, any attempt by HRD, upon passage of Chapter 43 in May 2007, to retroactively update the certification issued to the BPD in January 2007, would have been arbitrary and capricious. At the time Chapter 43 was enacted by the Legislature on May 18, 2007, the BPD had already screened and offered conditional offers of employment to those applicants that were chosen from the certification list in question. By June 25, 2007, applicants who were eligible and passed screening requirements began their first day of training in the local police academy. Had HRD retroactively updated the January 2007 certification, the ongoing hiring process would have been undoubtedly delayed and

negatively impacted those individuals who had already received conditional offers of employment.

The Appellants' reference to lateral transfers that were requested by the BPD and approved by HRD after the passage of Chapter 43 is somewhat of a red herring. G.L. c. 31, § 35 grants permanent civil service employees, including police officers from different departments, the right to seek a transfer from one civil service position to another. These transfers are made at the discretion of the Appointing Authority, with the approval of HRD, and can be made regardless of whether there is an active eligibility list upon which a certification could be issued by HRD. Chapter 43 made no change to this section of the statute pertaining to lateral transfers and the BPD's actions in this regard were consistent with applicable civil service law.

Finally, the Appellants argue that the Commission should grant the relief being sought for public policy reasons, specifically citing correspondence sent to the Commission from the Boston Police Patrolmens' Association and the President of the Boston City Council, expressing their support for putting the Appellants at the top of the current eligibility list. While the Commission agrees that the two Appellants appear to be exemplary candidates, the Commission respectfully does not agree that they should be placed at the top of the current eligibility list, ahead of others who scored higher on the 2007 exam and/or received a statutory veteran preference.

First, there are 100 applicants similarly situated to the Appellants. The Appellants' argument that the Commission should not consider non-residents and/or those applicants who did not re-take the test in 2007 among the 100 similarly situated individuals is off the mark. It is undisputed that by January 2007, non-residents had already become

reachable off the 2005 list. Further, had those 2005 test takers between age 32 and 40 known that simply taking and passing the 2007 civil service exam would make them eligible to be placed at the top of the eligibility list, they may very well have decided to take the 2007 exam, as the Appellants did. In regard to the instant appeal, therefore, they must be considered similarly situated individuals. Therefore, any relief granted by the Commission, including placing the names of the Appellants at the top of the current eligibility list, would also have to be granted to the 100 similarly situated individuals. Even after considering that a percentage of these 100 applicants would fail all or part of the screening process, the relief being sought would prevent or delay dozens of other applicants currently ranked higher than the Appellants from becoming Boston police officers. Given the facts in this particular case, this would be fundamentally unfair and inconsistent with the tenets of basic merit principles.

For all of the above reasons, the Appellants' request for relief under Docket Nos. G1-07-337 and G1-07-338 is denied and the appeals are hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on March 27, 2008.

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.

Notice:

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