

COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 979-1900

MICHAEL WOODFORD,
Appellant

v.

G2-21-053

CITY OF EVERETT,
Respondent

Appearance for Appellant:

Joseph Sulman, Esq.
391 Totten Pond Road, Suite 402
Waltham, MA 02451

Appearance for Respondent:

Albert Mason, Esq.
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Southampton, MA 01073

Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT’S MOTION FOR SUMMARY DECISION

On March 6, 2021, the Appellant, Michael Woodford (Appellant), filed a bypass appeal with the Civil Service Commission (Commission), arguing that he was bypassed for promotional appointment to police lieutenant by the City of Everett (City) and that the City failed to provide him with a notice of bypass and/or bypass reasons.

On April 8, 2021, the City filed a “Response” with the Commission arguing that the Appellant was not “bypassed” for appointment because the Appellant was not serving in the next lower title of sergeant at the time of the promotion.

On April 13, 2021, I held a remote pre-hearing conference which was attended by the Appellant, his counsel, counsel for the City and the City’s Police Chief. As part of the pre-hearing conference, the parties stipulated to a limited set of facts including:

- A. On September 19, 2019, the Appellant, while serving in the position of police sergeant, took the promotional examination for police lieutenant and received a score of 81.
- B. On December 17, 2019, the state's Human Resources Division (HRD) established an eligible list for police lieutenant. The Appellant was ranked 2nd.
- C. Since the establishment of the December 17, 2019 eligible list, there have been at least two (2) requisitions from the eligible list regarding promotional appointments.
- D. As part of the first requisition, the candidate ranked first on the eligible list was promoted.
- E. The Appellant's name now appears first on the eligible list.
- F. As part of the most recent promotional process, the City promoted three (3) additional candidates to police lieutenant.
- G. The Appellant, as part of the most recent promotional process, was not notified of the vacancies and was not given the opportunity to indicate his willingness to accept the promotional appointment if selected.
- H. On or about October 30, 2019, after the Appellant took the police lieutenant examination, but before the eligible list was established, the Appellant and the City signed a "memorandum of agreement" related to alleged discipline in which the Appellant agreed to serve a two-week suspension; and be demoted to the position of police officer.

The City argued that, upon being demoted to police officer on October 30, 2019, the Appellant was no longer eligible for promotion to police lieutenant. The Appellant argued that nothing in the agreement stated that the Appellant was or is ineligible for promotion; that the Appellant remained on the eligible list (ranked 1st) for police lieutenant; and that the City was required to consider him for promotion and, if they chose not to promote the Appellant, provide him with reasons for bypass, which they did not do.

Further, the Appellant argued that the City would not have reasonable justification to bypass him based on his recent discipline because one of the candidates promoted has a “Brady letter” in his file which, according to the Appellant, is at least comparable to the recent discipline agreed to by the Appellant. In regard to the “Brady letter”, the Police Chief stated that there was no allegation of untruthfulness involved and, according to the Chief, there was, in the Chief’s opinion, no justification for the letter and/or any evidence that the officer engaged in misconduct.

I identified three issues for the parties to address via briefs:

- I. Should the Appellant’s name have been placed on the eligible list for police lieutenant established on December 17, 2019 when he was no longer in the next lower title of police sergeant?
- II. If the Appellant’s name should have remained on the eligible list, was the City required to consider the Appellant for promotional appointment to lieutenant after he was demoted to police officer?
- III. Even if the City was required to consider him, can the City now use his discipline / demotion to justify his non-selection?

Briefs were received by both parties.

Legal Standard for Summary Disposition

An appeal may be disposed of on summary disposition when, “viewing the evidence in the light most favorable to the non-moving party”, the undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005).

Applicable Civil Service Law

Section 1 of G.L. c. 31 defines basic merit principles as:

“(a) recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.”

Section 2(b) of G.L. c. 31 provides that:

“No person shall be deemed to be aggrieved under the provisions of this section unless 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.”

Section 2(c) of G.L. c. 31 further states that “all references [in Section 2(b)] to the administrator shall be taken to mean the local appointing authority or its designated representative”.

Analysis

Underlying this matter is the undisputed fact that the Appellant, while serving as a sergeant, did not perform his duties as a supervisor when he failed to personally conduct or direct his subordinates to conduct an investigation of an off-duty Everett police lieutenant who was involved in a motor vehicle accident [during the Appellant's shift as supervisor] in which the

lieutenant was suspected of trying to leave the scene of an accident in which “multiple officers and [the lieutenant] acknowledged that alcohol most likely played a role in the crash.”

The Appellant’s poor performance (and poor judgment) occurred in March 2019, approximately six months prior to then-Sergeant Woodford sitting for the lieutenant promotional examination, which, based on the law as applied here, required that the Appellant be serving in the next lower title (of sergeant) at the time of the examination (on September 19, 2019). Approximately six weeks after the examination, the Appellant, based on his poor performance as a sergeant in March 2019, agreed to be demoted to the position of police officer. The Appellant’s name was then added to the eligible list for police lieutenant in December 2019.

Importantly, the Appellant himself, by agreeing to the demotion (and a short-term suspension), acknowledged that he failed to perform one of the more critical duties expected of him as a supervisor – ensuring that a member of the Everett Police Department, when involved in alleged off-duty misconduct, does not receive any special treatment. The Commission has consistently held that such behavior is detrimental to the public interest. In Leeman and Pagliuca v. City of Haverhill, 26 MCSR 327 (2013), the Commission upheld the suspension of a police lieutenant and police officer who failed to conduct a proper investigation of a retired State Trooper involved in an off-duty motor vehicle crash in which the retired Trooper was suspected of being intoxicated. In Phillips v. City of Methuen, 28 MCSR 345 (2015), the Commission reversed the bypass of a candidate for original appointment to the Methuen Police Department where he was scored *poorly* for answering a hypothetical question regarding the discretionary arrest of family members for DUI indicating that *he would treat them no differently than other members of the public*.

Upon the Appellant’s name being added to the eligible list in December 2019, the City

would have been justified in asking the state's Human Resources Division (HRD), under Section 09 (2) of the Personnel Administration Rules (PAR.09 (2)), to remove the Appellant's name from the police lieutenant eligible list, as, based on his very recent admitted poor performance and related demotion to police officer, considering the Appellant for promotion to lieutenant would be detrimental to the public interest – and contrary to basic merit principles (and commonsense). The City did not make any such request to HRD. Rather, believing that the Appellant was now ineligible for promotion to lieutenant based on his demotion to police officer, the City simply did not consider the Appellant for promotion to lieutenant, despite the fact that his name was ranked first on the eligible list at the time of the most recent promotional cycle to fill two lieutenant vacancies.

Having failed to take the necessary steps to have the Appellant's name removed from the eligible list, the City's non-selection of the Appellant constitutes a bypass and the City was required to provide the Appellant with sound and sufficient reasons for the bypass, which the City failed to do. Based on these undisputed facts, the Appellant is an aggrieved person and his appeal is hereby *allowed*.

That leaves the issue of the appropriate relief to be awarded to the Appellant based on the rather unique circumstances presented here. Typically, the relief awarded to a candidate bypassed for promotional appointment is for the Appellant's name to be placed at the top of any current or future certifications for promotional appointment (to lieutenant in this case) until such time as the Appellant has been promoted or bypassed. In practical terms, this relief ensures that a candidate will receive one additional consideration for appointment, regardless of when the next vacancy in that title occurs. Thus, even if the underlying eligible list expires before there is a vacancy, the Appellant's name will still appear first on the certification generated from the next

eligible list, even if the Appellant chooses not to take the next promotional examination. Put another way, the relief, depending on the timing of the next vacancy, may allow the person receiving relief to forego the need to study and prepare for the next promotional examination.

The Appeals Court has ruled that the "remedy to be accorded a plaintiff [in a civil service commission matter] is a matter within the commission's discretion and will rarely be overturned." Mulhern v. Civil Service Commission, 57 Mass. App. Ct. 920, 920 (2003). See also, Hester v. Civil Service Commission, 78 Mass. App. Ct. 1109 (2010) (unpublished).

Here, based on the rather unique circumstances involved, including the Appellant's admitted poor performance and related demotion to police officer, the Commission, pursuant to its authority under Chapter 310 of the Acts of 1993, hereby orders the following:

1. The Appellant's name shall remain on the current eligible list for police lieutenant until such time as the eligible list has expired.
2. In the event that the City fills a vacancy for police lieutenant prior to the expiration of the current eligible list, the Appellant shall be considered for promotional appointment. Should he not be selected for promotional appointment, the City shall provide him with reasons for his non-selection which may be appealed to the Commission.
3. The Appellant shall not be entitled to any relief after the expiration of the current eligible list.

SO ORDERED.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on September 23, 2021.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Joseph Sulman, Esq. (for Appellant)
Albert Mason, Esq. (for Respondent)
Melinda Willis, Esq. (HRD)
Regina Caggiano (HRD)