

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

MICHAEL A. LOMBARDOZZI,
Appellant

v.

E-14-38

TOWN OF LEICESTER &
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

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Appearance for Intervenor Matthew T. Brady:

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Appearance for Intervenor James Murphy:

Pro Se
James Murphy

Appearance for Intervenors Michael Kemp:
Matthew Gardner, James Conway &
Charles Larson:

No Appearance Filed

Commissioner:

Christopher C. Bowman

INTERIM DECISION

Procedural History

On February 4, 2014, Michael Lombardozzi, the Appellant (Mr. Lombardozzi), a permanent intermittent police officer in the Town of Leicester (Town), filed an appeal with the Civil Service Commission (Commission), contesting his rank on the Town's "roster" of permanent *intermittent* police officers. For reasons discussed in detail below, an individual's rank on this roster is important because it may determine if and/or when an individual is eligible for appointment as a permanent *full-time* police officer in the Town's Police Department (Department).

A pre-hearing conference was held on March 11, 2014 and a status conference was held on March 18, 2014. Given that appointments for permanent full-time police officer are currently pending in Leicester, I issued two (2) Procedural Orders and set an expedited briefing schedule. I joined the state's Human Resources Division (HRD) as a party and all individuals who may be affected by these proceedings were joined as Intervenors. Only Matthew Brady (Mr. Brady) and James Murphy (Mr. Murphy) filed appearances. As outlined in the second Procedural Order, I opted to bifurcate the two (2) substantive issues raised by Mr. Lombardozzi in his appeal to the Commission. This decision is limited to "whether or not the names of Mr. Lombardozzi, Mr. Gardner, Mr. Larson, Mr. Brady and Mr. Conway were placed in the correct order (after the first and second ranked candidates from a prior eligible list) on the permanent intermittent roster created as a result of a Form 14 which was submitted to HRD on 3/26/09." ("Issue 1") Since there was a possibility that Issue I would be dispositive of the instant appeal, I instructed the parties to limit their briefs to this issue only, with the Appellant reserving his right to have "Issue 2" adjudicated at a later date. Issue 2 involves whether "after abolishing the permanent intermittent roster, laying off all individuals on that roster, and then reinstating the roster at a

later date, whether the Town (and HRD) complied with the provisions related to the protections afforded to disabled veterans under G.L. c. 31, § 26.” Briefs were submitted by Mr.

Lombardozzi, the Town, HRD and Mr. Brady regarding Issue 1.

Background

1. The Town employs permanent *intermittent* police officers. As such, the original appointment of permanent, *full-time* police officers is governed by G.L. c. 31, § 60 which states in relevant part:

“In any city or town having an intermittent police ... force to which the civil service law and rules are applicable, original appointments to the lowest title in the regular police force ... shall be made from among the permanent members of such intermittent ... police ... force ... whose names are certified by the administrator [HRD] to the appointing authority. Names of such members shall be listed on the certification in the order of their civil service appointments ...”
(emphasis added)

2. In or around 2007, the following Leicester residents were among those who took and passed the civil service examination for police officer:

- Michael Lombardozzi;
- Michael Gardner;
- Charles Larson;
- Matthew Brady; and James Conway.

3. Based on their score and veteran status, HRD placed the names of these individuals on an eligible list of candidates. Of these five (5) individuals, Mr. Lombardozzi, a disabled veteran, was ranked first; Mr. Gardner, a veteran, was ranked second; Mr. Larson, a non-veteran was ranked third; and Mr. Brady and Mr. Conway, both of whom are also non-veterans, were tied for fourth.

4. In or about late 2007, the Town began the process of hiring five (5) permanent intermittent police officers, by requesting a certification of names from HRD.
5. On January 10, 2008, HRD, using the above-referenced eligible list, forwarded Certification No. 280022 to the Town, from which the Town could select five (5) of the first eleven (11) highest on the Certification who were willing to accept appointment.
6. The names of these five (5) individuals appeared on Certification No. 280022 in the same order as they appeared on the eligible list:
 - Lombardozzi;
 - Gardner;
 - Larson;
 - Brady / Conway.
7. All five (5) individuals signed the Certification as willing to accept appointment as permanent intermittent police officers.
8. All five (5) individuals submitted employment applications to the Town between February 5th and February 13th, 2008.
9. On May 19, 2008, the Town's Board of Selectmen voted to conditionally appoint these five (5) individuals as permanent intermittent police officers. The candidates, as listed on the form completed by the Board of Selectmen, were ranked in the same order as they appeared on the eligible list and Certification No. 280022:
 - Lombardozzi;
 - Gardner;
 - Larson;
 - Brady / Conway.

10. On or about May 22, 2008, the Town's Police Chief sent separate letters to each of the individuals conditionally appointed by the Board of Selectmen on May 19, 2008. In his letters, the Police Chief indicated that the Board of Selectmen had appointed them as intermittent police officers contingent upon successful *completion of*:

- a) a physical examination;
- b) a psychological examination;
- c) *the reserve intermittent police academy*;
- d) *a Physical Abilities Test (PAT)*; and
- e) a background investigation.

(emphasis added)

11. At the time these letters were sent on May 22, 2008, Mr. Gardner and Mr. Brady had already completed the reserve intermittent police academy (a condition of appointment). Mr. Gardner had completed the reserve intermittent police academy on December 20, 2007 and Mr. Gardner had completed the reserve intermittent police academy on December 20, 2004. Mr. Larson and Mr. Conway had *not* completed or enrolled in the reserve intermittent police academy as of May 22, 2008. Although Mr. Lombardozzi had enrolled in the academy when he received the conditional offer of employment, he did not complete this academy until July 29, 2008.

12. On June 6, 2008, the Police Chief sent Mr. Lombardozzi (who was enrolled in the reserve police academy) and Mr. Brady (who had already completed the reserve academy) providing them with more details about scheduling and completing a physical and psychological examination, informing them that, upon completion of these examinations, the Department would "set up" the PAT. Mr. Gardner was not sent this letter as he was on active military

duty. Mr. Conway and Mr. Larson were not sent this letter as they had not enrolled in or completed the reserve police academy.

13. Mr. Lombardozzi completed the physical examination on June 12, 2008 and the psychological examination on June 13, 2008. Mr. Brady completed the physical examination on June 10, 2008 and the psychological examination on June 13, 2008.
14. On or about June 12, 2008, Mr. Lombardozzi and Mr. Brady each completed their respective copies of the “Medical Verification Form – Authorizing Release of Information,” which form accompanied the physical examination form.
15. In addition, Mr. Lombardozzi and Mr. Brady both completed their respective copies of HRD’s Medical Verification Form. The physician signed his portion of Mr. Brady’s form on June 12, 2008 and signed Mr. Lombardozzi’s form on June 16, 2008.
16. The Town did not schedule the PAT for Mr. Lombardozzi and Mr. Brady until they returned their completed Medical Verification Forms. The Town received Mr. Brady’s completed Medical Verification Form on or about June 12, 2008. The Town received Mr. Lombardozzi’s form four days later, on or about June 16, 2008.
17. Upon receiving Mr. Brady’s form, the Town scheduled him for a PAT on June 16, 2008.
18. Upon receiving Mr. Lombardozzi’s form, the Town scheduled him for a PAT on June 30, 2008.
19. Mr. Gardner, who returned from his military deployment in August 2008, completed his physical examination on August 27, 2008 and the PAT on September 11, 2008. As previously referenced, Mr. Gardner had already completed the reserve police academy in 2004.

20. Mr. Larson completed the reserve academy on December 20, 2008, the physical examination on January 19, 2009; and the PAT on March 19, 2009.
21. Mr. Conway completed the reserve academy on December 20, 2008, the physical examination on January 16, 2009 and the PAT on February 19, 2009.
22. On or about March 26, 2009, the Town submitted an Authorization of Employment Form – Form 14 for Certification No. 280022 to HRD. The Town initially listed the “employment dates” for each of the five (5) individuals as follows:
- Michael Lombardozzi: 6/19/08
 - Matthew Brady: 6/19/08
 - Michael Gardner: 9/11/08
 - James Conway: 2/19/09
 - Charles Larson: 3/19/09
23. When two or more candidates whose names are to be placed on a reserve roster have the same employment date, their names should be placed in the same order as they appeared on the underlying Certification. (See Ragucci v. Saugus, 21 MCSR 667 (2008)) Applied here, the same appointment date of Mr. Lombardozzi and Mr. Brady would result in Mr. Lombardozzi’s name being ranked above that of Mr. Brady, consistent with their rank on the underlying Certification.
24. HRD subsequently informed the Town that Mr. Lombardozzi’s employment date could not be any earlier than 6/30/08, the date he completed the PAT. (See G.L. c. 31, § 61A). In response, the Town changed Mr. Lombardozzi’s employment date to June 30, 2008, the date he completed the PAT. Thus, there was no longer a roster “tie” which, under Ragucci, would require adherence to the underlying Certification. Rather, Mr. Brady now had an

employment date earlier than Mr. Lombardozzi. As previously noted, another condition of employment was completion of the reserve police academy, which Mr. Lombardozzi did not complete until July 29, 2008.

25. Also because of HRD's directive, the Town set the employment date of Mr. Gardner, who was unable to take the PAT until September 11, 2008 *because he was on active military duty*, to September 11, 2008.

26. Applying the new employment dates would effectively re-order the candidates on the roster as follows:

- Matthew Brady: 6/19/08
- Michael Lombardozzi: 6/30/08
- Michael Gardner: 9/11/08
- James Conway: 2/19/09
- Charles Larson: 3/19/09

27. Chapter 11 of the Acts of 1947 states:

“If a person, whose name was at the time of his entrance into military or naval service on an eligible list, received a permanent appointment and is given a seniority date later than that of another person who received a permanent appointment from such list but stood lower thereon, the director, upon application for such change, may establish as his seniority date the seniority date of such other person.”

28. Applied here, Chapter 11 of the Acts of 1947 would allow Mr. Gardner, who was on active military duty at the time of these reserve appointments, to seek an appointment date the same as Mr. Brady (6/19/08), which would create a tie between Mr. Gardner and Mr. Brady.

Again applying Ragucci, that tie would require reliance on the underlying Certification to determine the order in which the names should appear on the reserve roster, thus placing the name of Mr. Gardner above that of Mr. Brady.

29. The Town is now in the process of appointing two (2) permanent, full-time police officers.

Consistent with G.L. c. 31, § 60, the Town must utilize its reserve roster in making such appointments and comply with the statutory “2n + 1” formula.

30. On March 14, 2014, “Roster Certification” No. 01666 was created to facilitate these appointments. Roster Certification No. 01666 includes the names of two (2) reserve officers whose names were already on the Reserve Roster from a prior hiring cycle, Michael Kemp and James Murphy.

31. Roster Certification No. 01666, consistent with the above-referenced appointment dates, contained the names of the following individuals in the rank order noted:

- Michael Kemp: 10/15/96 DID NOT SIGN CERT
- **James Murphy:** **2/8/07** **SIGNED CERT**
- **Matthew Brady:** **6/19/08** **SIGNED CERT**
- **Michael Lombardozzi:** **6/30/08** **SIGNED CERT**
- Michael Gardner: 9/11/08 DID NOT SIGN CERT
- **James Conway:** **2/19/09** **SIGNED CERT**
- **Charles Larson:** **3/19/09** **SIGNED CERT**

32. Consistent with the statutory “2n + 1” formula, all five (5) candidates who signed Roster Certification No. 01666 as willing to accept employment are eligible for consideration. However, the Town would need to provide “sound and sufficient” reasons for not selecting (“bypassing”) Mr. Murphy and Mr. Brady, the two (2) highest ranked candidates on the Certification. Based on the statements of the parties during these proceedings, I infer that the Town’s intent is to appoint whomever, among those who signed the Certification as willing

to accept appointment, is ranked first and second on the Certification. Here, those two (2) individuals would be James Murphy and Matthew Brady – and not Mr. Lombardozzi.

The Appellant (Mr. Lombardozzi) 's argument

Mr. Lombardozzi argues that the decision to place his name second on the reserve roster among the five (5) candidates appointed from Certification No. 280022 was contrary to the intent of G.L. c. 31, § 26, which provides disabled veterans with a preference in the appointment process. Further, Mr. Lombardozzi argues that the actions taken here were inconsistent with prior Commission decisions, including Ragucci and LeGrice v. Avon and Dep't of Personnel Administration, 8 MCSR 77 (1995).

Specifically, Mr. Lombardozzi argues that assigning appointment dates based on the random date that the PAT was completed: is arbitrary; and defeats the intent of the merit system by ignoring the rank order in which the candidates appeared on the underlying Certification, based on their test scores and other statutory preferences, including the preferences granted to disabled veterans and veterans.

Intervenor (Mr Brady) 's argument

Mr. Brady argues that his appointment date, and his position relative to others on the Reserve Roster, was earned, is not arbitrary, and is not inconsistent with prior Commission decisions. Further, Mr. Brady argues that the Commission should not exercise equitable relief given Mr. Lombardozzi's years-long delay in filing his appeal with the Commission.

Specifically, Mr. Brady argues that his June 19, 2008 appointment date is justified given that, by June 19, 2008, he had successfully completed all five (5) of the pre-conditions to appointment, including not only successful completion of the PAT, but also successful completion of the reserve police academy. According to Mr. Brady, the fact that his appointment

date coincides with his PAT date flows merely from the fact that that he had already successfully completed the reserve police academy. In other words, Mr. Brady argues that, but for his aggressive pursuit of the necessary merit-based pre-condition of his appointment imposed by the Town (the reserve police academy) in 2007, many months prior to the intermittent appointment, he would not have been awarded an appointment date of June 19, 2008. Mr. Lombardozzi, in contrast, was actually granted an appointment date that preceded his completion of the reserve police academy on July 29, 2008.

HRD's Argument

Citing G.L. c. 31, § 61A and other civil service law and rules, HRD maintains that a candidate's appointment date cannot precede his/her completion of the PAT. While noting that an Appointing Authority is free to grant an appointment date that is later than the PAT completion date, it takes no position on what, if any relief should be ordered here.

Town's Argument

The Town argues that all of its actions here have been guided by directives from HRD and states that its only interest is in complying with all relevant civil service law and rules. The Town cautions, however, that any decision by the Commission to re-order the names of the candidates here could cause confusion and uncertainty across all civil service communities that utilize reserve rosters.

Analysis

I concur that, assigning appointment dates to reserve candidates, based solely on the random date that he/she is assigned to take the PAT, would be arbitrary and capricious, particularly given the undisputed facts presented here. It is undisputed that both Mr. Lombardozzi and Mr. Brady each acted with urgency and responded quickly to the Town's requests in regard to completing

the PAT. Each of them scheduled their medical appointment as directed and each of them took the PAT on the date assigned by the Town. Here, it appears that nothing more than the logistics of scheduling dictated the date upon which the PAT was completed. Had this been the sole criteria upon which the appointment date was determined, Mr. Lombardozzi's argument that he was aggrieved would have merit. However, completion of the PAT was *not* the only factor that determined the assignment of appointment dates here.

As stated by Mr. Brady, it is undisputed that the Town established five (5) pre-conditions for employment as a reserve officer, including completion of the reserve police academy. As of June 19, 2008, Mr. Brady had met this condition; Mr. Lombardozzi had not. That starkly distinguishes this case from the facts in LeGrice. In LeGrice, the Commission concluded that: "they [Avon] do appear to have violated basic merit principles, since there is no evidence – and indeed no claim – that merit played any role in assigning 'seniority' dates to ... the candidates." Further, the Commission stated in LeGrice that: "We conclude that the practice of staggering technical appointment dates for candidates selected as part of a group, *without discernible justification*, violates basic merit principles, since it inappropriately alters the order in which intermittents may be considered for advancement to permanent, full-time status." (*emphasis added*)

Here, there was discernible justification for the appointment dates: completion of the reserve police academy. Satisfying that pre-condition is directly related to the job of a reserve police officer; and is a sound and sufficient reason for assigning appointment dates that is consistent with basic merit principles.

This case is also distinguishable from Ragucci – in two ways. First, Ragucci addressed the issue of what should happen when candidates appointed to a reserve roster had the same

appointment date. Here, the Town ultimately assigned Mr. Lombardozzi and Mr. Brady different appointments dates that did not violate any civil service law or rules. Second, in Ragucci, the Appointing Authority used the reserve roster for the sole purpose of subsequently appointing candidates to permanent, full-time police officers. That is not the case here. In Leicester, the Town actively utilizes reserve police officers. Thus, what Mr. Lombardozzi is suggesting here, is that Mr. Brady's employment with the Town as a reserve police officer should have been delayed until Mr. Lombardozzi completed the reserve police academy. There is nothing in the civil service law or rules that requires that and, frankly, such a scenario would appear to be inconsistent with basic merit principles and devoid of any sound reasoning. For the same reasons, the Town was justified regarding the assignment of appointment dates for Mr. Larson and Mr. Conway.

Finally, Mr. Lombardozzi raises the more global issue of whether his statutory preference as a disabled veteran has been diluted or eliminated. For many of the same reasons referenced above, I do not believe it has. G.L. c. 31, § 26 requires that the names of disabled veterans be placed ahead of veterans and that veterans be placed above non-veterans on the eligible list. That is precisely what occurred here. Mr. Lombardozzi, pursuant to his designation as a disabled veteran, was placed at the top of the eligible list from which Certification No. 280022 was generated. As such, his name appeared first on that Certification, above those of veterans and non-veterans. This preference provided Mr. Lombardozzi with significant value, guaranteeing his placement within the statutory "2n + 1" formula *and* ensuring that the appointment of any individual other than him would constitute a bypass, requiring the Town to provide sound and sufficient reasons for his non-selection, which Mr. Lombardozzi could appeal to the Commission. That statutory preference, however, does not prevent a Town from establishing

reasonable pre-conditions on employment, such as completion of the reserve police academy, and establishing appointment dates based on the completion of those reasonable, substantive and merit-based conditions.

For all of these reasons, I have concluded that Mr. Lombardozzi is not an aggrieved person based on a review of all matters discussed as part of “Issue 1”.

However, Mr. Gardner, one of the intervenors, may be entitled to relief via HRD. Pursuant to Chapter 11 of the Acts of 1947, Mr. Gardner, who was on active military duty at the time of the appointments, may petition HRD to establish his appointment date the same as Mr. Brady, June 19, 2008. If such request is made by Mr. Gardner and granted by HRD, Mr. Gardner’s appointment date would be tied with Mr. Brady and, consistent with Ragucci, the name of Mr. Gardner would appear above the name of Mr. Brady, with Mr. Lombardozzi ranked below both of these individuals.

“Issue 2”

As stated previously, I bifurcated “Issue 1” and “Issue 2” as the resolution of Issue 1 could be dispositive of all matters. Since I have concluded that Mr. Lombardozzi is not aggrieved and not entitled to relief based on the matters in “Issue 1”, he reserves the right to argue why he is aggrieved and/or whether relief is warranted under “Issue 2”. Specifically, Mr. Lombardozzi argues that, when the Town, subsequent to the reserve appointments, but prior to requesting a Certification for permanent, full-time officers, laid off and then reinstated all reserve officers, it (following the directive of HRD) failed to comply with the requirement of Section 26 that requires “[a] disabled veteran ... [to] be retained in employment in preference to all other persons, including veterans.” In short, Mr. Lombardozzi argues that, upon reinstatement, his name, should have been placed above all other reserve officers, including Mr. Kemp and Mr.

Murphy. While I am cognizant of the time-sensitive nature of this appeal, given the pending full-time appointments, the parties must be given the opportunity to submit briefs regarding issue 2 prior to a full disposition of this appeal. For this reason, all parties and intervenors are hereby granted ten (10) days from the receipt of this interim decision to submit briefs regarding the merits of the Appellant's appeal under "Issue 2". Further, consistent with 801 CMR. 101 (7(I), the parties and intervenors also have ten (10) days from receipt of this decision to file a motion for reconsideration regarding this interim decision. Said motion may address the applicability of Chapter 11 of the Acts of 1947 and the conclusions reached herein regarding said Special Act, a matter that was not previously briefed by the parties. .

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on May 1, 2014.

A true record. Attest:

Commissioner

Notice:

Andrew Levrault, Esq. (for HRD)
David P. Cortese, Esq. (for Appellant Lombardozzi)
Sheilah F. McCarthy, Esq. (for Intervenor Brady)
Corey F. Higgins, Esq. (for Town)
James Murphy
Michael Kemp
Michael Gardner
James Conway
Charles Larson