

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MICHAEL SCHIFONE,
Appellant

v.

G1-14-127

TOWN OF STOUGHTON,
Respondent

Appearance for Appellant:

Pro se

Appearance for Respondent:

Timothy Zessin, Esq.
Kopelman and Paige, P.C.
101 Arch Street, 12th Floor
Boston, MA 02110

Appearance for HRD:

Patrick Butler, Esq.
Labor Counsel
Human Resources Division
One Ashburton Place, Rm 301
Boston, MA 02108

Commissioner:

Cynthia A. Ittleman, Esq.

DECISION

On June 5, 2014, Mr. Michael Schifone (“Mr. Schifone” or “Appellant”) filed this bypass appeal at the Civil Service Commission (“Commission”), pursuant to G.L. c. 31, §2(b,) against the Town of Stoughton (“Town”), alleging that the Town erroneously bypassed him when he applied for the position of firefighter although he was subsequently hired effective January 1989. A prehearing conference was held in this matter on July 15, 2014, which was attended by Mr. Schifone (pro se), counsel for the Town, and counsel for the state Human Resources Division (“HRD”).

Shortly after the prehearing conference, the Commission issued a Procedural Order (“Order”) which instructed, among other things, that HRD was to produce any information related to the Appellant including Certifications issued to the Town for firefighter between 1986 and 1989. The Order provided that the Town shall produce any information related to the Appellant’s non-selection/appointment and, jointly with HRD, identify the names of anyone appointed between 1987 and 1989 that would be adversely impacted by a decision to grant the

Appellant retroactive civil service seniority. The Order also indicated that anyone who would be adversely impacted should be forwarded a copy of the Order. The Town forwarded the Order to Mr. Ledin and Mr. Chipman on July 30, 2014, informing them that they could participate in the proceedings and that a status conference would be held on September 16, 2014 in this regard.

A status conference was held on September 16, 2014 that was attended by the Appellant and attorneys for the Town and HRD. HRD and the Town submitted documents related to the Order at the status conference. As neither Mr. Ledin nor Mr. Chipman attended the status conference, I informed the parties that Mr. Ledin and Mr. Chipman could submit written statements by the following day indicating any concerns they may have about this appeal but I received none. At the status conference, I also asked the Town to submit a written explanation by the appropriate Town official of the process for making out of grade assignments, about which the Appellant had concerns that he alleged related to his date of appointment. The Town responded accordingly. The Town's September 18, 2014 email message also stated that Firefighter McBrayer may be effected if Mr. Schifone's appeal is granted. I asked the Town to ask Mr. McBrayer if he will submit an email statement but I received none.

FACTS

Based on the information produced by the parties and the reasonable inferences therefrom, and all matters filed in this case, of which I hereby take administrative notice, a preponderance of the evidence establishes the following:

1. In or about 1985, Mr. Schifone took and passed the firefighter examination. He applied for the position of firefighter in the Town and was interviewed therefor in 1985. His current rank is Firefighter. HRD cannot recreate the Certification from which Mr. Schifone was considered in 1985 in view of the passage of time. Citing the difficulty in producing documents from this time period, HRD also notes that the examination date on one page of the documents it produced is inaccurate. (Town Email and Attachments, August 12, 2014, including eight (8) documents provided by HRD at the end of the Town's attachments ("Email and Attachments"); Administrative Notice) Without this Certification, we do not know, for example, whose names were on it, in what order their names appeared, and the number of vacancies the Town was authorized to fill. (Administrative Notice)
2. By letter dated August 13, 1986, Goddard Occupational Health Services advised Mr. Schifone that the results of his recent evaluation were being forwarded to the Town. (Email and Attachments) This is the date that the Appellant states on his Appeal Form that he was notified that he had been bypassed. (Administrative Notice)
3. Mr. Schifone was not hired to be a firefighter in 1986 and he filed an appeal at the Commission. On November 5, 1986, the Commission issued a decision that states in full, "The Civil Service Commission voted on November 5, 1986 to accept appellant as eligible based on blood pressure readings taken by C.J. Corey, M.D., Goddard Hospital." (Email and Attachments) The Commission decision did not provide retroactive seniority for Mr. Schifone. (Administrative Notice)

4. On behalf of Mr. Schifone, on December 8, 1986, an attorney wrote to Stoughton Town Manager Philip Farrington stating that the blood pressure test conducted on Mr. Schifone was inadequate, that the Town denied Mr. Schifone's application based on the blood pressure test, that he had a subsequent blood pressure test with appropriate results, that he appealed to the Commission, which ruled in his favor, and that the Mr. Schifone should be "reinstated to the first-place position on the eligible list or, if action has already been taken to fill the position, that [Mr. Schifone] be appointed to that position or to another position as firefighter created specifically for him. ..." (Email and Attachments) The attorney's letter addressed the immediate issue of appointment of the Appellant and did not request retroactive seniority for Mr. Schifone. (Administrative Notice)
5. On October 27, 1986, HRD issued Certification 86-2800 authorizing the Town to hire one (1) firefighter. The Town hired one (1) person from this Certification: Mr. McBrayer, whose employment began June 3, 1987. (Email and Attachments) Mr. McBrayer's current rank is Firefighter. Mr. Schifone's name was not on Certification 86-2800. (Administrative Notice)
6. In 1986, HRD also issued Certification 86-2801 authorizing the Town to hire four (4) firefighters. The Town selected (4) candidates from this Certification, including Donald Chipman, whose employment began July 26, 1987, and Jeffrey Ledin, whose employment began August 23, 1987. (Email and Attachments) Mr. Chipman's and Mr. Ledin are currently ranked as Firefighters. It is unknown if Mr. Schifone's name was on this Certification because the parties did not produce it. (Administrative Notice)
7. By letter dated December 9, 1986, HRD (then the Department of Personnel Administration, or "DPA") told the Town in full, "Please be advised that the Civil Service Commission has voted to place the name of Michael C. Schifone at the top of the eligible list for Firefighter, Town of Stoughton, in accordance with his ethnic classification in compliance with NAACP v. Beecher, for one certification. This decision will be implemented shortly." (Email and Attachments) The Commission is not aware of a Commission decision that ordered Mr. Schifone's name be put at the top of a Certification.¹ There is no indication whether either HRD or the Town took the proposed action. Mr. Schifone is not a minority candidate affected by the court ruling in NAACP v. Beecher and the Town is not a consent decree community pursuant to NAACP v. Beecher. (Administrative Notice)
8. HRD issued Certification 88-0282 on February 11, 1988 authorizing the Town to hire two (2) firefighters. Mr. Schifone's name appeared second on the Certification but he was the first person on the Certification to sign his name, indicating his willingness to accept appointment. (Email and Attachments)
9. On April 21, 1988, HRD wrote to the Town stating that the eligible list from which the Certification had been issued to the Town on February 11, 1988 had expired, the

¹ Commission files from the 1980s relating to Mr. Schifone are no longer available pursuant to appropriate record retention and disposal provisions.

Certification had been cancelled, and the Town was to return various related forms to HRD. (Id.)

10. On April 28, 1988, the Town wrote to the Bureau of Local Government Services (within HRD at the time), returning therewith materials related to the February 11, 1988 Certification, and stating that the Town had made no appointments from this Certification. (Id.)
11. On or about May 10, 1988, HRD issued Certification 88-1191 authorizing the Town to hire two (2) firefighters. Mr. Schifone's name appeared second on the list and he was the second person to sign the list. (Id.)
12. On September 22, 1988, the Town Manager sent a memorandum to the Town Fire Department, apparently attaching Certification 88-1191, and asking the Fire Chief and Acting Deputy to interview six (6) candidates from the Certification. There were no vacancies at that time but the Town anticipated vacancies within the next few months. (Id.)
13. By letter dated December 27, 1988 from the Town to Mr. Schifone, the Town appointed Mr. Schifone to the position of firefighter effective January 8, 1989. (Id.)
14. Firefighters Schifone, Ledin, Chipman and McBrayer are on a list to be considered for assignments out-of-grade, for which they are paid at a higher rate than their actual rank. The Town Fire Chief "generally agreed with the assertion that order on Department's the [sic] out-of-grade list is based on civil service seniority" and that the parties' collective bargaining agreement does not explicitly address this matter. (Administrative Notice; Town's September 18, 2014 Email)
15. Mr. Schifone filed the instant appeal on June 5, 2014. (Administrative Notice)

DISCUSSION

Applicable Law

Pursuant to G.L. c. 31, 2(b), the Commission has the power to, "... hear and decide appeals by a person aggrieved by any decision, action, or failure to act" by HRD. Under G.L. c. 31, § 27, "[i]f an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, ... the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement or reasons has been received by the administrator" Id.

Following the ruling in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007), the Massachusetts Supreme Judicial Court held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the

speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. See Iannacchino v. Ford Motor Co., 451 Mass. 623, 636 (2008). At the Commission, the Standard Adjudicatory Rules of Practice and Procedure (hereinafter “Rules”) govern administrative adjudication. 801 CMR 1.01, *et seq*; see Commission vote of September 2, 1999 adopting the Rules but also providing, “The Commission notes that provisions of M.G.L. c. 31 take precedent over conflicting rules.” Commission vote of September 2, 1999.

The Rules indicate that, “The Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted or because of the pendency of a prior, related action in any tribunal that should first be decided.” 801 CMR 1.01(7)(g)(3). The Rules further provide that, “Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or Agency rule. ...” 801 CMR 1.01(6)(b). Pursuant thereto, and pursuant to the Commission’s powers and duties under G.L. c. 31, § 2, the Commission established a bypass statute of limitations effective October 1, 2000 as none appears in this regard in G.L. Chapter 31. The Commission’s statute of limitations provides that appeal of an appointing authority’s decision to bypass a candidate for employment must be filed at the Commission within sixty days of the candidate’s receipt of the appointing authority’s bypass notice.

Since December 6, 1993, the Commission has been authorized to grant relief, “[i]f the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights.” St. 1993, Chapter 310. Chapter 310 was preceded by St. 1976, Chapter 534, which similarly authorized the issuance of relief to appropriate persons.

Analysis

Based on the applicable law cited above, I dismiss this appeal since the alleged bypass that is the subject of this appeal occurred, if at all, many years ago, long after the sixty (60) day statute of limitations and, therefore, the Appellant’s factual allegations do not raise a right to relief above the speculative level, even if I assume that the allegations are true. In addition to its advanced age, this appeal suffers from a paucity of factually accurate information.

The Appellant was hired effective January of 1989. Alleging that he was bypassed for appointment to the position of firefighter from 1985 until his appointment effective 1989, the Appellant now seeks retroactive seniority. The Commission asked the parties to produce documents related to the Town’s consideration of the Appellant during the applicable time period. The findings herein are based on the documents produced by the parties. As the findings of fact herein indicate, a limited amount of information was produced and some of it is inaccurate. The Appellant was considered for appointment to the position of firefighter in 1985 but his medical evaluation apparently indicated that his reported blood pressure was at an unacceptable level. In 1986, the Appellant appealed to the Commission regarding the Town’s decision not to hire him based on his medical evaluation. The Commission decision ruled simply

that, based on further blood pressure testing, the Appellant was “eligible” to be hired. The decision did not grant the Appellant retroactive seniority. Moreover, at or about that time, the Appellant was represented by counsel, who wrote to the Town stating that the Appellant should be appointed forthwith. The attorney’s letter did not request retroactive seniority for the Appellant. Shortly thereafter, HRD wrote to the Town, stating that the Commission had voted to put the Appellant’s name at the top of the list in compliance with NAACP v Beecher and that the decision would be “implemented shortly.” However, there is no evidence that the Commission decision ordered that the Appellant’s name be placed at the top of a list, the Appellant is not a minority, and the Town is not a consent decree community under NAACP v. Beecher. In addition, there is no indication whether and when the Appellant’s name was placed at the top of a list.

The Appellant’s name did not appear at the top of Certification 86-2800, or anywhere else on the Certification, from which the Town hired one (1) firefighter. The only information we have regarding Certification 86-2801 is that the Town hired four (4) firefighters from it; we do not know the names of anyone else on that Certification and whether the Appellant’s name was on it at all, let alone in first place. There is no indication that HRD issued a Certification to the Town in 1987. The Appellant’s name next appeared on Certification 88-0282 but the Town did not hire anyone from it. The next Certification, 88-1191, is the one from which the Appellant was hired. At the least, it is unlikely that it took twenty-five years for the Appellant to become aware that Mr. Ledin, Mr. Chipman and Mr. McBrayer were hired before him in error and to file an appeal regarding his civil service seniority. The limited information concerning these Certifications does not establish that there was a bypass, even if the appeal was timely filed.

Asked at the status conference why he did not file this appeal until 2014 if the events that allegedly occurred took place in the 1980s, Mr. Schifone offered different explanations. On one hand, Mr. Schifone stated that pertinent information was only recently disclosed although the information that has been produced does not support his claim. On the other hand, Mr. Schifone also stated that he has regularly checked his personnel file and inquired about his status. He also alleged that, at some point in time, one or two former selectmen made statements to him supporting his allegation that he was wrongly bypassed in the 1980s but he provided no names and/or dates in support of the allegations.

At the status conference, I read aloud to Mr. Schifone the following excerpt from a typical Commission order for retroactive seniority when the Commission concludes that a candidate has been bypassed, “This retroactive civil service seniority date is not intended to provide [the candidate] with any additional pay or benefits including creditable service toward retirement.” *See, e.g. St. Amand v Department of Correction*, Docket No. G1-13-193. In view of the limitations on the relief in this text, I asked Mr. Schifone the reason for this appeal. Mr. Schifone explained that he has three (3) years left before he retires, that his retirement allowance is based on the average of the three highest years of his salaries, that he and a couple of other firefighters are occasionally assigned to work (and, therefore, get paid) out of grade based on their seniority in rank, that the other firefighters receiving out of grade assignments were hired shortly before he was, that he would get more out of grade assignments (and his salary would

increase²) if his seniority date was earlier than the other firefighters' in rank, and that the other firefighters in rank would not mind if his seniority date was revised to precede theirs for this purpose. The Commission sought but did not receive comments from the other firefighters in rank with Mr. Schifone, either for or against Mr. Schifone's appeal. Nonetheless, since the evidence does not support his claim and Mr. Schifone seeks a retroactive seniority date for the purpose of increasing his pay or benefits, Chapter 310 relief is unavailable to him even if his appeal was timely.

Conclusion

Based on the foregoing facts and conclusions of law, this appeal is hereby dismissed.

Civil Service Commission

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on October 2, 2014.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten (10) 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 (30) 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.

Notice:

Michael Schifone (Appellant)

Timothy Zessin, Esq. (for Appointing Authority)

Patrick Butler, Esq. (for HRD)

² Mr. Schifone estimated that his annual salary would be raised by a couple of thousand dollars if his appeal was granted.

