

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

RAMON ALVARADO,
Appellant

v.

CASE NO: E-09-61

**CITY OF NEW BEDFORD and
HUMAN RESOURCES DIVISION,**
Respondents

Appellant Pro Se:

Ramon Alvarado
[REDACTED]

City of New Bedford Attorney:

Jane Medeiros Friedman, Esq.
First Assistant City Solicitor
City of New Bedford Law Department
133 William Street
New Bedford, MA 02740

HRD Attorney:

Tsuyoshi Fukuda, Esq.
Labor Counsel
Human Resources Division
One Ashburton Place
Boston, MA 02108

Commissioner:

Paul M. Stein

DECISION ON MOTIONS FOR SUMMARY DECISION

The Appellant, Ramon Alvarado, acting pursuant to G.L.c.31, § 2(b) duly appealed to the Civil Service Commission (Commission) for equitable relief to adjust his civil service seniority date as a police officer with the City of New Bedford Police Department (NBPD). NBPD and HRD filed Motions for Summary Disposition on May 15, 2009 and May 18, 2009 respectively, asserting that for various reasons the Appellant failed to state a claim that would entitle him to receive a retroactive seniority date. The Appellant did not respond to either motion.

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties and the inferences reasonably drawn from the evidence, I find the following material facts to be undisputed:

1. The Appellant, Ramon Alvarado, took and passed the 1997 entry level civil service examination for the position of Municipal Police Officer and his name was duly placed on the eligible list. (*Claim of Appeal; NBPD Motion, Exhibits B, D & E*)

2. On or about September 3, 1997, Mr. Alvarado began a three-year tour of active duty with the United States Army, and was separated from active duty on or about September 2, 2000. (*Claim of Appeal; NBPD Motion, Exhibit B*)

3. While Mr. Alvarado was serving on active duty in the Army, the NBPD requested and received two certifications (Nos. 980102 dated February 26, 2008 and No. 980108 dated November 6, 2008) for the appointment of NBPD Police Officers. Mr. Alvarado's name appeared on both these certifications. (*NBPD Motion, Exhibits D & E*)

4. Mr. Alvarado did not respond to the notices sent to him to appear and sign the certifications that he was "willing to accept" appointment as required by civil service law and rules. (*Claim of Appeal; NBPD Motion, Exhibits D & E*)

5. On September 13, 1998, the NBPD hired 14 candidates for the position of Police Officer from Certification No. 980102, including five candidates who had served as NBPD police cadets and, therefore, qualified for a hiring preference pursuant to Chapter 639 of the Acts of 1979, and nine candidates whose names appeared higher on the certification than Mr. Alvarado. (*NBPD Motion, Exhibits C, D & E*)

6. On May 2, 1999, the NBPD hired 13 candidates for the position of Police Officer from Certification No. 980108, including candidates who had served as NBPD police cadets and, therefore, qualified for a hiring preference pursuant to Chapter 639 of the Acts of 1979, ten candidates whose names appeared higher on the certification than Mr. Alvarado and two candidates whose names appeared lower than Mr. Avarado. (*NBPD Motion, Exhibits C, D & E*)

7. There is no documentation to indicate what notices, if any, had been sent to Mr. Alvarado concerning the hiring of police officers from either 1998 certification, or where those notice were sent, or what, if any, notice had been given to NBPD that Mr. Alvarado was then serving on active duty at the time. (*Claim of Appeal; NBPD Motion*)

8. After separating from active duty, Mr. Alvarado went to the NBPD and inquired about his status as a candidate for NBPD police officer. He says he was informed that he had been bypassed in 1998 because he did not sign the list stating he was interested in the job. He says he was told to take the next civil service examination. (*Claim of Appeal*)

9. Mr. Alvarado did take and pass the next entry level Municipal Police Officer civil service examination and was hired by the NBPD on January 12, 2003, which is his current effective civil service seniority date. (*Claim of Appeal; NBPD Motion Exhibit A*)

10. Sometime in 2006, Officer Alvarado says he came to learn through his military sources that he should not have been bypassed and that the NBPD was obliged to offer him a job if anyone had been hired below him on the certification. (*Claim of Appeal*)

11. On February 24, 2009, Officer Alvarado filed this appeal for equitable relief seeking to adjust his seniority date to the date NBPD hired officers from certifications on which his name had appeared while he was on active duty. (*Claim of Appeal*)

Applicable Standard on Dispositive Motion

The party moving for summary disposition of an appeal before the Commission pursuant to 801 C.M.R. 7.00(7)(g)(3) or (h) is entitled to dismissal as a matter of law under the well-recognized standards for summary disposition, i.e., when “viewing the evidence in the light most favorable to the non-moving party” (here, Officer Alvarado) the moving party (here NBPD) has proffered substantial and credible evidence that Mr. Alvarado, has “no reasonable expectation” of prevailing on at least one “essential element of the case”, and Officer Alvarado has not produced sufficient “specific facts” to rebut this conclusion. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008)

Specifically, this motion to dismiss must be allowed unless Officer Alvarado raises “above the speculative level” sufficient facts “plausibly suggesting” that his present seniority date is erroneous and that the error was due to a mistaken interpretation of civil service law and rules and not through any “fault of his own.” See generally Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss. cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff’s standing required denial of motion to dismiss)

The Appellant’s Claim for Equitable Relief

As a general rule, the seniority date of a tenured civil service employee is computed from the date on which the employee began permanent employment in the departmental unit. G.L.c.31,§33,¶1. Accordingly, absent some other exception or special circumstances, Officer Alvarado’s current seniority date of January 12, 2003 is correct.

In some circumstances, a candidate who was qualified for appointment to a civil service position but unable to accept the position due to his or her current active military duty status has been hired with a retroactive seniority date. The cases in which that has occurred, however, differ in important respects to the present case. In McGrath v. Boston Police Dep't, 19 MCSR 316 (2006), the Commission granted equitable relief to award the appellant a retroactive seniority date because, after the appellant had signed the certification as “willing to accept”, he became unable to complete the appointment process before he was involuntarily recalled to active military duty. In King v. Medford Fire Dep't, 19 MCSR 317 (2006), the appellant’s wife (and power of attorney) signed the certification on his behalf. When he returned from active duty, the appellant was considered for appointment but “bypassed” in favor of the son of the Fire Chief. The Commission ordered the Appellant’s name placed on the top of the eligibility list for future appointments.

In McClain v. Somerville, 424 F.Supp.2d 329 (2006), the City of Somerville was found to have violated the appellant’s rights under the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §4301 et seq., which provides, in part:

“A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.”

Id., 38 U.S.C. §43119(a). In the McClain case, the appellant made his interest in the position “known” to the appointing authority, who selected him for appointment but declined to hire him after learning he would not be released from active duty until late October 2001 and could not attend the police academy beginning earlier in that month.

The present case is not a bypass case, as the Appellant did not sign either of the two 1998 certifications “willing to accept” and, therefore, was not a person whom the appointing authority was required to consider within the “2n+1” formula. See G.L.c.31, §§25, 27; PAR.09.¹ This is also not a case in which the appointing authority took action that impeded a candidate’s rights because of his or her military status. The undisputed facts show that NBPD had no knowledge of the Appellant’s military status and there is no evidence that the Appellant took any steps to notify the NBPD of that status until several years later. Moreover, by his own acknowledgement, Officer Alvarado has known, at least since 2006, of the circumstances that he now presents to the Commission as the basis for his request for equitable relief.

HRD’s motion makes the additional point that the delay in pursuing a remedy here has prejudiced HRD and NBPD. The Commission finds this point well-taken. There can be facts and circumstances that would justify holding an appointing authority accountable for failing to take proper measures to preserve potential employment rights of those serving in the military. Here, however, given the passage of so many years, proving those facts, e.g., what NBPD knew of the Appellant’s status, what notices were sent to him, where they were sent, and what anonymous members of the NBPD may have told him going back to the year 2000, all do seem burdensome, if not impossible. Officer Alvarado has impressed the Commission as a skilled professional who surely is a credit to the NPBD. However, the unfortunate delay in pursuing a claim must be considered a factor that weighs against granting the equitable relief requested.

¹ As to Certification No. 980102 (2/26/1998), since no candidate was hired whose name appeared lower than the Appellant’s, even if the Appellant has signed “willing to accept”, he would not have been able to challenge his non-selection from that certification. See G.L.c.31, §§2(b), 27; PAR.02 (definition of bypass)

Accordingly, for the reasons stated, the appeal of the Appellant, Ramon Alvarado, is hereby *dismissed*.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein and Taylor, Commissioners) on. September 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. 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 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 to:

Ramon Alvarado, Pro Se. (Appellant)

Jane Medeiros Friedman, Esq. (for Appointing Authority)

Tsuyoshi Fukuda, Esq. (HRD)