

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

ANDY HERNANDEZ,
Appellant
v.

G1-15-222

CITY OF LAWRENCE,
Respondent

Appearance for Appellant:

Pro se
Andy Hernandez

Appearance for Respondent:

Scott C. Merrill, Esq.
Foley Hoag LLP
155 Seaport Boulevard
Boston, MA 02210

Commissioner:

Cynthia A. Ittleman, Esq.

RULING ON MOTION TO DISMISS

On November 25, 2015, Andy Hernandez (“Appellant”), filed this bypass appeal under G.L. c. 31, s.2(b) with the Civil Service Commission (“Commission”), claiming that the City of Lawrence (“City”) did not have reasonable justification to bypass him for the position of police officer with the City’s Police Department (“LPD”). The Commission held a prehearing conference on December 15, 2015 by telephone since the Appellant has resided in Florida since approximately 2005. The prehearing conference was attended by the Appellant and counsel for the Respondent. As is the Commission’s practice involving bypass appeals, prior to the prehearing conference, the Commission requested of the state’s Human Resources Division (“HRD”) that it provide documentation relating to the bypass that the Appellant appeals here.

HRD responded, providing certain documentation, which the Commission forwarded to the parties prior to the prehearing conference.

At the prehearing conference, it became apparent that additional information was needed from HRD. The Commission requested and HRD provided additional information. The City is a consent decree community which, pursuant to a federal court decree, is required to provide certain consideration to minority candidates for original appointment to law enforcement positions and to obtain HRD's approval prior to bypassing candidates.

On January 7, 2016, I received the additional information that the Commission requested of HRD and sent it to the parties stating, "... Unless I receive information from either party by 5pm on Wednesday, January 13, 2016 indicating that the information provided by Attorney Butler [at HRD] is incorrect, this appeal will be subject to dismissal." On January 7th, I received an email message from the Appellant opposing dismissal of the appeal. Also on January 7th, the Commission informed the City that any response to the Appellant's statement was due by January 13th. On January 13th, the City filed a Motion to Dismiss. On January 14, 2016, the Appellant requested additional time in which to retain an attorney. The Appellant was granted an extension of time, until January 21st, to retain an attorney and provide further comment. On January 20th, the Appellant sent an email message stating that he was still looking for an attorney and asked, if he did not retain an attorney, would he be able to take another police officer exam and, if bypassed, appeal and seek relief putting his name at the top of the certification for employment. The Commission informed Mr. Hernandez (and the City) that someone who takes an exam and is bypassed may file a bypass appeal at the Commission within sixty days of the notice of bypass, the Commission decides whether the appeal is denied or allowed and, if

allowed, what relief is due. The Commission has received no further communication from the Appellant.

FINDINGS OF FACT

The following is undisputed, unless otherwise noted:

1. The Appellant, a former resident of Lawrence, has resided in Florida since approximately 2005.
2. The Appellant last took and passed a civil service exam for police officer on May 8, 1999, over seventeen (17) years ago. He applied for employment at the LPD, the City bypassed him and he filed an appeal docketed at the Commission as G-00-2482.
3. The Commission granted the Appellant relief under St.1993, c. 310 in June of 2000, ordering that the Appellant's name be placed at the top of the next Certification for police officer in Lawrence.
4. The Appellant's name was indeed placed at the top of the next Certification, ensuring an additional consideration for appointment.
5. The Appellant was thereafter bypassed again by the City and he filed another appeal docketed at the Commission as G-00-4220.
6. The Commission denied the Appellant's second bypass appeal, docketed as G-00-4220 in 2001.
7. The Appellant filed an appeal docketed at the Commission as G-02-721 in 2002. The Commission denied the Appellant's appeal docketed as G-02-721 in 2003 as moot since the appeal was the same as the appeal docketed as G-00-4220, which was denied in 2001.
8. Due to a clerical error at HRD, the Appellant's name continued to be erroneously placed on six (6) subsequent certifications issued to the LPD since 2001.

9. A review of HRD records indicates that the Appellant has not taken the exam for police officer since May 8, 1999.
10. As the Appellant's name appeared on the most recent Certification, the City once again considered him for appointment, unaware of the clerical error. He was not appointed.
11. On November 25, 2015, the Appellant filed the instant appeal.

DISCUSSION

Standard of Review

An appeal before the Commission may be adjudicated summarily, in whole or in part, pursuant to 801 C.M.R. 1.01(7)(g) and 801 C.M.R.1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., “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) 11.

Applicable Civil Service Law

G.L. c. 31, s. 16 authorizes the HRD (under the Personnel Administrator) to conduct examinations for employment, providing HRD considerable discretion in that regard. Under section 25 of Chapter 31, HRD creates a list of candidates who have passed a civil service exam. Eligibility lists generated after a civil service exam remain in effect for not more than two (2) years unless,

“ ... (1) such eligibility is extended by law because such persons are in the military or naval service; (2) the administrator is 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; or (3) no new list is

established, in which case eligibility of all persons on such list shall be extended until a new list is established for the same position for which the original list was established; provided, however, that the administrator may revoke the eligibility of the entire list or of any persons on such list subsequent to said two-year period if he shall determine that the effective maintenance of the merit system so requires such revocation and, provided further, that a written notice and explanation for said revocation is sent to the clerks of the senate and house of representatives. ...”

(Id.)

Also under section 25, HRD generates a Certification of candidates from the eligible list from which appointing authorities may hire. Id. Pursuant to Personnel Administrator Rules (“PAR”).08, a Certification becomes void, “ ... within twelve weeks of any certification of names to the appointing authority by the Administrator from any eligible list established as the result of an open competitive public safety examination. ...”

In situations where the Commission grants a bypass appeal or the parties to an appeal submit a joint request for relief in an appropriate case, the Commission may grant relief pursuant to St. 1993, c. 310, which provides, in pertinent part,

“ ... Section 1. If 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.”

(Id.)(emphasis added)

The relief provided by the Commission on such appropriate occasions places the successful appellant’s name at the top of the current or next Certification established under the existing eligibility list, in order to afford the appellant with an additional consideration by the appointing authority; it does not require that the appointing authority hire the appellant. Where appropriate, relief may be retroactive for civil service seniority purposes only. *See, e.g. Couture v. Chicopee*, Docket No. G2-15-151 (Nov. 12, 2015); Sousa v. East Longmeadow, Docket No. G2-15-87

(October 29, 2015); and Gannon v. Boston Police Department, Docket No. G1-12-329 (Oct. 29, 2015).

Analysis

Having viewed 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”. The Appellant last took a civil service exam for police officer in 1999 when he resided in Lawrence. He applied for a police officer position at the LPD but was bypassed. He appealed this bypass, docketed as G-00-2482 at the Commission, and was granted relief pursuant to St.1993, c. 310 in June 2000. Since he filed another appeal at the Commission, docketed as G-00-4220, it appears he was bypassed again but he was denied relief in that matter. He filed yet a third appeal, docketed as G-02-2002, which was denied as moot since it pertained to the same bypass as the one for which he had filed the appeal docketed as G-00-4220. In or around 2005, the Appellant moved to Florida. He last took a civil service police officer exam in 1999 and has not taken any of the six civil service exams for police officers administered since 1999. Eligibility lists expire, by law, two years after they are established. There is no indication that the eligibility list HRD created from the results of the 1999 exam was extended one year, let alone fifteen (15) years to the present, or that any of the exemptions under G.L. c. 31, s. 25 are applicable. It is only by a clerical error, as HRD reports, that the Appellant’s name continued to appear on eligible lists for police officer exams given after 1999. But for this error, the Appellant was not eligible to be considered by appointment. Therefore, the Commission has no jurisdiction to hear the instant appeal as there was no bypass.

Conclusion

For the reasons stated herein, the Respondent's Motion to Dismiss is ***allowed*** and the Appellant's appeal, docketed as G1-15-222, is hereby ***dismissed***. HRD is hereby ordered to correct the clerical error it acknowledges so that the Appellant's name does not appear on an eligible list for an exam he has not taken.

Civil Service Commission

Cynthia A. Ittleman

Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein, and Tivnan, Commissioners) on February 4, 2016.

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:

Andy Hernandez (Appellant)
Scott C. Merrill, Esq. (for Appointing Authority)
Patrick Butler, Esq. (for HRD)
John Marra, Esq. (HRD)