

STATE OF MICHIGAN
COURT OF APPEALS

JAMES J. LAMBERT,

Plaintiff-Appellee,

v

POLICE & FIRE CIVIL SERVICE
COMMISSION, TOWNSHIP OF SHELBY and
JAMES H. VAN HEVEL,

Defendants-Appellants.

UNPUBLISHED

July 26, 1996

No. 177378

LC No. 94-002771

Before: White, P.J., and Fitzgerald and E.M. Thomas, *JJ.

PER CURIAM.

Defendants appeal an order of superintending control requiring that plaintiff be permitted to take a promotional examination. We reverse.

Plaintiff has been a uniform sergeant with the Shelby Township Police Department (the department) since January 20, 1993. Defendant Police & Fire Civil Service Commission (the commission) is an administrative agency having the authority to operate the civil service system for the hiring and promotion of members of the department. Defendant James H. Van Hevel is the Shelby Township Supervisor and is responsible for initiating promotions in the department.

On January 20, 1994, the commission gave written notice that it was establishing an eligibility list for department members seeking promotion to the rank of lieutenant. The announcement stated that applications would be accepted through June 1, 1994 from those members who met the eligibility requirements, and that the written portion of the examination would be held on July 11, 1994. The eligibility list then in place would expire on June 10, 1994. At the time, there was no vacant lieutenant position, nor was a vacancy anticipated.

* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff had not completed two years of service in the rank of sergeant as of June 1, 1994, but was to complete his two years on January 19, 1995. On February 2, 1994, plaintiff wrote the commission requesting that the examination be postponed until after January 20, 1995, when plaintiff would meet the required two years in grade and be eligible to take the examination.¹ Plaintiff appeared before the commission on March 9, 1994. The commission meeting minutes reflect substantial discussion of plaintiff's request, followed by a motion to request a legal opinion from the township attorney addressing two issues: "1) setting a precedent by approving Sergeant Lambert's request; and 2) what ramifications would result from granting the request." The motion passed, and plaintiff's request was tabled until the April commission meeting.

At the commission meeting on April 13, 1994, the township's attorney provided commission members with a copy of his opinion and the most current version of Act 78. He opined, in short, that should the commission approve plaintiff's request to postpone the examination, it would be in violation of both the collective bargaining agreement, article 8, § 8.9, and Act 78, and that the process would be subject to legal attack. He noted that § 8.9 of the collective bargaining agreement requires that eligibility lists be "continually maintained," and that Act 78 requires that the examination process begin within six months of the deadline for acceptance of applications. MCL 38.512(1); MSA 5.3362(1).² After discussion, the commission voted to deny plaintiff's request to postpone the scheduled examination, and offered its condolences to plaintiff.

Plaintiff filed a complaint for superintending control and equitable and injunctive relief on May 16, 1994, which alleged that there were no vacancies in the lieutenant rank and none were anticipated or scheduled; that there were eight sergeants, seven of whom were eligible to take the promotional examination as of June 1, 1994, and of these seven, six were promoted from the same eligibility list as plaintiff. The complaint further alleged that plaintiff would not have completed the two years in grade as of June 1, 1994, and that defendant, by seeking to create an eligibility list at the present time and prior to the current list expiring, was "effectively precluding and excluding the Plaintiff from being eligible to take the promotional examination and is singling out the Plaintiff for this exclusion and effectively prohibiting him from future promotional consideration." The complaint alleged that the commission had the discretion to delay the examination process for good cause, and that good cause existed to delay the promotional examination until after January 19, 1995, so that plaintiff would be eligible to participate. Plaintiff alleged that the commission refused to grant his request, that he had exhausted his administrative remedies when he appealed to the commission to reconsider its decision, that the commission's refusal to delay the examination process was arbitrary and capricious, and that there was no adequate remedy other than superintending control. Plaintiff also sought a temporary restraining order prohibiting defendants from initiating the examination process until plaintiff was afforded a hearing, and requested that the court determine whether good cause existed to delay or cancel the examination, and that plaintiff then be granted an injunctive order such that any cut-off date for applications would include plaintiff, and that the court exercise superintending control and reverse the commission's decision.

Defendants moved to dismiss plaintiff's request for superintending control, arguing that superintending control was inappropriate because plaintiff failed to allege and would be unable to

establish that defendants had a clear legal duty to delay the promotional examination, and because there was another adequate remedy through exhaustion of the administrative process. Defendants argued that plaintiff was required by the collective bargaining agreement to file a grievance but failed to do so, that he failed to exhaust administrative remedies, that the Michigan Public Employment Relations Act (“PERA”) barred his complaint, that the action should be dismissed for plaintiff’s failure to join the township and seven police sergeants who were eligible to take the promotional examinations, and that Van Hevel was not the appointing authority.

At a hearing on June 6, 1994, the court stated it had no briefs on the issue,³ and adjourned the matter until July 5, 1994. Plaintiff filed a brief in support of motion for equitable relief and in opposition to defendants’ motion to dismiss, in which he argued that he should be allowed to take the promotional examination on July 11, 1994, and have the test results sealed until the court holds an evidentiary hearing and makes a final ruling on the issues raised in plaintiff’s complaint. Plaintiff further argued that he had exhausted his administrative remedies by requesting a delay from the commission, which was denied, that the commission had statutory authority to delay the examination for up to six months from the closing date for the acceptance of applications, or longer for good cause, and argued that neither the collective bargaining agreement nor PERA barred his complaint. Plaintiff argued that he was the only officer of fourteen who would not be eligible to take a promotional examination.

In a written opinion and order dated July 7, 1994, the circuit court issued an order of superintending control requiring the commission to permit plaintiff to take the lieutenant’s promotional examination on July 11, 1994. Although not asserted by either party, the circuit court based its decision on the conclusion that the statute did not require that a candidate for promotion meet the eligibility requirements at the time of the examination. The court stated:

[T]he parties have mistakenly equated the preliminary requirements of taking the promotional examination with the requirements for seeking a promotion. The plain language of MCL 38.512(2); MSA 5.3363(2) only requires that promotions be filled from among those persons who have completed two years in the next lower rank; it does not require that an applicant seeking to take the promotional examination have completed two years in the next lower rank. Therefore, the two-year in-grade eligibility condition is only a requirement for filling a vacancy; it is not a requirement for taking the promotional examination. To find otherwise would lead to the absurd result of having a person one day short of the two-year in-grade period on the date of the promotional examination being deprived of the opportunity of promotion for two years even though he/she would be eligible for promotion when a vacancy occurred.

The court further determined that plaintiff’s failure to exhaust his administrative remedies did not preclude an order of superintending control under the circumstances of the case.

Defendants argue that the circuit court erred in its interpretation of Act 78, MCL 38.501 et seq.; MSA 5.3351 et seq., when it concluded that the two-year in-grade eligibility condition is only a requirement for filling a vacancy, and not for taking the promotional examination. We agree.

Promotions of full-time municipal police officers are governed by statute, MCL 38.501 et seq.; MSA 5.3351 et seq. Each municipality is required to establish a civil service commission, which is charged with enforcement of the provisions of the act establishing the municipal police and firefighters civil service. MCL 38.501; MSA 5.3351; MCL 38.509; MSA 5.3359. All persons applying for an examination conducted by the commission must submit an application:

The civil service commission in each city, village, or municipality shall require persons applying for admission to any examination provided for under this act or under the rules and regulations of the commission to file in its office, within a reasonable time before the proposed examination, a formal application in which the applicant shall state under oath or affirmation all of the following:

- (a) Full name, residence, and post-office address.
- (b) United States citizenship.
- (c) Attainment of the age of majority.
- (d) Health and physical capacity for the position for which the applicant is applying.
- (e) Each residence and business or place of employment for not less than the 3 previous years. The commission shall establish educational requirements, but the requirements shall not call for less than an eighth grade education. After acceptance by the civil service commission, the applicant shall be governed as to residence by the city or village charter.
- (f) Other information as may reasonably and legally be requested regarding the applicant's qualifications and fitness for the position for which the applicant is applying. [MCL 38.510(1); MSA 5.3360.]

The procedure by which a civil service commission is to fill a vacancy above the rank of police officer is set forth in the statute:

Vacancies in positions in the fire and police departments above the rank of fire fighter or police officer **shall be competitive and shall be filled by promotions from among persons holding positions in the next lower rank in the departments who have completed 2 years in that rank and who have at least 5 years in the department.** If there are more vacancies than there are persons with 5 years in the department, the commission may lower the requirements to 3 years in the department. **If no person or persons have completed 2 years in the next lower rank, the commission may hold examinations among persons in such rank as to all intent and purposes as though 2 years of service had been completed by those persons.** Promotions

shall be based upon the superior qualifications of the persons promoted as shown by his or her previous service and experience. [MCL 38.512(2); MSA 5.3362(2). Emphasis added.]

The circuit court concluded that plaintiff was entitled to take the promotional examination because the two years in grade requirement of MCL 38.512(2); MSA 5.3362(2) applies only to eligibility for, and at the date of, an actual promotion, rather than the promotional examination.⁴ The statute, however, specifically states “If no person or persons have completed 2 years in the next lower rank, the commission may hold examinations among persons in such rank as to all intent and purposes as though 2 years of service had been completed by those persons.” MCL 38.512(2); MSA 5.3362(2) (emphasis added). This language indicates that the Legislature intended that applicants complete two years in rank before taking a promotional examination.

We have found no case otherwise interpreting the statutory language. In *Woloszyk v Clinton Twp*, 214 Mich App 291; 542 NW2d 363 (1995), the plaintiff brought suit under MCL 38.512(2); MSA 5.3362(2), to compel his promotion to sergeant. The plaintiff was the only person who applied to take the examination after it was announced; two other eligible officers did not apply. The commission delayed the examination date and opened the examination to six other candidates of the same rank as plaintiff “who did not meet the statutory requirements of time in grade or time served with the department.” *Id.* at 293. This Court affirmed the trial court’s decision that “competitive” as used in the act, MCL 38.507, MSA 5.3357, contemplates that two or more candidates would be involved. *Id.* at 294-295. In arriving at its determination, this Court stated:

Section 12(2) of the fire and police civil service act provided that promotion by competitive examination was available to officers who had held the next lower rank to the position to be filled for a period of two years and who had five years’ service with the department.

* * *

Section 12(2) provides that if no other persons are eligible, a commission can open the examination to persons of the next lower rank as though the two-year service requirement for time in grade had been completed or waived. [*Id.* at 293-294.]

In *Killingsworth v Police and Fire Dep’t Civil Service Comm of the City of Saginaw*, 12 Mich App 340; 162 NW2d 826 (1968), the plaintiff became eligible for promotion on June 30, 1966, shortly before the scheduled July 27, 1966 examination date. The plaintiff applied to take the examination immediately upon becoming eligible. The commission ruled that since the plaintiff was not eligible on August 13, 1965, the date of expiration of the last eligibility list, he could not take the examination. *Id.* at 344-345. This Court determined that since the commission was not required by law to maintain continuous lists, and did not, in fact, maintain continuous lists, it could not use a policy of continuous lists as a basis to deny the plaintiff’s application. The Court held that “in fairness and in law

[the commission] could not use the date of August 15, 1965, . . . as an eligible date for the examination here, under the facts of this case. Plaintiff did have the required time in the department and in grade before the examination here was given.” *Id.* at 349. The court thus determined that the plaintiff was eligible to take the examination.

In an opinion addressing whether a municipality could set requirements for an examination, the Attorney General stated that under Section 12(b) of Act 78, the predecessor of MCL 38.512(2); MSA 5.3362(2), “The eligibility requirements of the applicant to take the test or examination are prescribed by the statute as years in rank and in departmental service.” 2 OAG 1958, No. 3,305, p 284 (October 21, 1958).

Thus *Wolosyk*, *Killingsworth*, and the Attorney General opinion all focus on eligibility for the examination, not the promotion.

We conclude that the circuit court erred in construing Act 78 to provide that plaintiff was eligible to take the July 11 examination even though he did not have two years in grade at the rank of sergeant at the time of the examination.

II

Plaintiff’s counter-statement of the issues raises two issues in addition to responding to defendants’ argument that the trial court erred in construing the statute: 1) “Did the . . . commission have authority to delay the testing process in order to equitably allow the plaintiff to test for promotional purposes [and 2)] Did the collective bargaining agreement . . . require a promotional eligibility list to be maintained.” The circuit court did not reach these issues. There is no question that the commission had the authority to delay the examination as requested by plaintiff. It is a separate question whether the commission had a clear legal duty to do so, or whether its denial of the postponement was arbitrary and capricious.

The plain language of Act 78 makes discretionary the commission’s decision to delay or cancel the examination process:

The examination process shall begin within 6 months after the closing date for the acceptance of applications. However, the commission may delay or cancel the examination process for good cause. [MCL 38.512(1); MSA 5.3362(1).]

The examination scheduled for July 11, 1994, was within the mandated six months after the closing date for acceptance of applications. The commission denied plaintiff’s request after discussion and consideration of the issue, and the receipt of a legal opinion from counsel recommending denial of plaintiff’s request on the basis that granting the request would violate both Act 78 and the collective bargaining agreement.

There is nothing to suggest the commission's decision was either arbitrary or capricious. Plaintiff would not have become eligible within the six months following the closing date for accepting applications; the June 1 and July 11 dates were not arbitrary in light of the expiring eligibility list; and, although no vacancy existed at the time, unexpected vacancies are a possibility. Moreover, the commission's action in denying plaintiff's request for postponement of the examination is expressly authorized by MCL 38.510(2); MSA 5.3360:

... The commission may refuse to examine an applicant or, after examination, to certify as eligible, an applicant who is found to lack any of the established preliminary requirements for the examination or position of employment for which the applicant applied ...

Plaintiff further asserts that the collective bargaining agreement did not require a continuous list, that no such list was maintained in practice, and that the union has never grieved the failure to maintain such lists. We need not address the question whether the commission was required to maintain such a list. It was permitted to so. Moreover, unlike in *Killingsworth*, where the desire to maintain a continuous list was used as a reason to impose an eligibility date that preceded the examination announcement, the application deadline and the examination date, and operated to exclude an eligible candidate, and where the examination was already scheduled to be held nearly a full year after the expiration of the prior eligibility list, here the desire to establish a new list was consistent with a collective bargaining agreement, if not mandated by it, and was given as a reason for declining to postpone an already scheduled examination for an additional six months so that someone who was not yet eligible could become eligible.

We reverse, and order that summary disposition be entered in defendants' favor.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Edward M. Thomas

¹ Plaintiff's letter stated:

Honorable Commission Members,

I would like the opportunity to speak to the members of the Civil Service Commission at the February meeting in regards to postponing the promotional examination for the position of Police Lieutenant. I would appreciate the opportunity to speak on this issue before it is decided upon by the Commission.

I would like the Commission members to consider postponing the examination until after January 20, 1995 at which time I will be eligible to take the examination. At this time there are no vacancies that need to be filled and to my knowledge none coming in the near future and no harm would be done by postponing the examination for six months.

Thank you for your consideration in regards to this matter.

² Counsel for the township did opine that under *Killingsworth, infra*, if a department member became eligible to take a promotional examination between the application cut-off date and the date of the test, he or she should be allowed to test. This situation does not apply to plaintiff.

³ Defendants brief was filed that day, June 6, 1994.

⁴ Taking the circuit court's determination to its logical conclusion would mean that any employee could sit for any scheduled examination regardless of eligibility, and would later become eligible for a promotion if a vacancy opened at a time when the employee met all eligibility requirements.