2017 IL App (1st) 15478-U

FIRST DIVISION
March 20, 2017

No. 15-3478

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PATRICK SPOERRY, Plaintiff-Appellant, v. VILLAGE OF ARLINGTON HEIGHTS FIRE AND POLICE COMMISSION, Defendant-Appellee.	) Appeal from the Circuit Court of) Cook County, Chancery Division))) No. 14 CH 10776)) Honorable Peter Flynn) Judge Presiding.))

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Neither the administrative agency nor the trial court erred in rejecting the plaintiff's challenge to the promotion process that was employed when plaintiff unsuccessfully pursued a promotion to the rank of sergeant.

¶ 2 Plaintiff Patrick Spoerry is a police officer who, in 2014, sought a promotion to the rank of sergeant that he did not obtain. Plaintiff unsuccessfully appealed the non-promotion decision and then filed a complaint for administrative review in the circuit court of Cook County. The

circuit court upheld the administrative decision. Plaintiff now appeals here, and we confirm the administrative decision and affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Plaintiff Patrick Spoerry, *pro se*, is a patrolman for the Village of Arlington Heights. In 2012, he sought a promotion to the rank of sergeant. The promotion process consisted of a written examination, interviews with the Fire and Police Commission, and a department evaluation. Plaintiff passed the written examination, but scored poorly in the evaluation by his supervisors and, ultimately, ended up ranking lowest of the 11 qualifying candidates on the promotion list. Two candidates, but not plaintiff, received promotions to sergeant in the 2012 promotion round. Plaintiff appealed to the Commission arguing that the promotion process did not comply with the law or with the department's general order for promotions. The Commission rejected the appeal and plaintiff filed a complaint for administrative review in the circuit court. The trial court confirmed the administrative decision and plaintiff appealed. We affirmed, finding that the Commission complied with the Illinois Municipal Code and with its own rules. *Spoerry v. Village of Arlington Heights*, 2014 IL App (1st) 132007-U.

¶ 5 In 2014, plaintiff again sought a promotion to sergeant. Before the 2014 promotion process began, in mid-2012, the Arlington Heights Board of Fire and Police Commissioners adopted rules that include the applicable rules for promotions. The Rules require that eligible patrol officers seeking a promotion to the rank of sergeant take a written examination and pass with a score of 70 or higher. The Rules stipulate that passing the written examination earns that officer the right to be placed on a promotion list for the following two years. The Commission's Rules are silent about what further criteria should or must be considered in making promotion decisions other than to say that "[p]romotions shall be made on the basis of merit, seniority in

service, and examination."

¶ 6 In a memo dated August 21, 2013, the liaison to the Fire and Police Commission, Mary Rath, announced that the Commission would be administering the written portion of the 2014 sergeant examination on January 21, 2014. The memo indicates that the Commission anticipated that the oral interview portion of the promotion process would be conducted the following month. Rath issued another memo on January 16, 2014. In this memo, Rath laid out the comprehensive process that the Commission would utilize for the 2014 promotion round and listed the officers, including plaintiff, that had signed up for the written examination. The memo further states that the written test will be accorded 50% weight, while an interview by the Commission will be accorded 25% weight and a departmental evaluation will make up the remaining 25%. The 2014 promotion procedure, thus, used the exact same criteria as used for the 2012 promotions. See *Spoerry*, 2014 IL App (1st) 132007-U, ¶ 6.

¶ 7 Plaintiff took and passed the written examination. However, after going through the interview and department evaluation process, plaintiff again ranked last among the eligible candidates. Plaintiff appealed the resulting promotion list to the agency which rejected his appeal. He filed a complaint for administrative review thereafter. In his complaint, plaintiff asserts that the procedures employed for promotion to sergeant violate the Illinois Municipal Code, the Village of Arlington Heights Ordinances, the Arlington Heights Police Department's own internal rules and general orders, and provisions of the Village employee handbook. Plaintiff's primary objection is to the department evaluation and oral interview portions of the process which are not explicitly set forth in the codified rules, and which he claims exposes candidates to the bias of their supervisors, among other affronts.

¶ 8 The circuit court upheld the administrative decision to reject plaintiff's appeal. In its order

disposing of the matter, the circuit court stated that "[t]he board's decision is upheld for the same reasons and on the same bases as set forth by the appellate court in *Spoerry v. Village of Arlington Heights et al.*, 2014 IL App (1st) 132007-U, as considered by the court pursuant to IL. S. Ct. Rule 23(e)(1)." Plaintiff appeals.

¶ 9 ANALYSIS

¶ 10 When an administrative agency's decision involves a pure question of law, we review it *de novo. Carpetland U.S.A., Inc. v. Illinois Department of Employment Security*, 201 Ill. 2d 351, 369 (2002). When reviewing factual findings, the agency's findings and conclusions are deemed to be *prima facie* true and correct and, thus, are reviewed under the manifest weight of the evidence standard. 735 ILCS 5/3-110 (West 2012); *Goodman v. Morton Grove Police Pension Board*, 2012 IL App (1st) 111480, ¶ 24.

¶ 11 Plaintiff argues that the Arlington Heights Fire and Police Commission did not follow its own rules when it conducted the 2014 promotional process. The Illinois Municipal Code provides that the Board of Fire and Police Commissioners "by its rules, shall provide for promotion in the fire and police departments on the basis of ascertained merit and seniority in service and examination." 65 ILCS 5/10-2.1-15 (West 2012). Plaintiff also points to the Illinois Municipal Code's requirement that the Board of Fire and Police Commissioners publish and distribute rules for appointments, promotions, and removals. See 65 ILCS 5/10-2.1-5 (West 2012). Plaintiff relies on case law for the proposition that "the Department is under a legal duty to follow its own rules" (quoting *Nolan v. Hillard*, 309 Ill. App. 3d 129, 143-44 (1999)).

¶ 12 Plaintiff points out that the Fire and Police Commission Rules adopted May 7, 2012 only expressly state: (1) the requirements to be eligible to take the exam; (2) that the number of years of service will be taken into account; and (3) that a candidate must score 70% or better on a

written examination. In contrast, the 2014 promotion process plaintiff participated in was made up of a written test accorded 50% weight, along with what plaintiff objects to: an interview by the Commission accorded 25% weight and a departmental evaluation accorded 25% weight. Accordingly, plaintiff's argument goes, because the interview and department evaluation components are not contained in the promotion rules adopted and published by the Commission, they cannot be used as part of the promotional process. This argument mirrors the one plaintiff raised before and we rejected. See *Spoerry*, 2014 IL App (1st) 132007-U, ¶¶ 20, 27.

¶ 13 The trial court upheld the Commission's decision for the reasons set forth in our previous decision and noted that it considered that decision under Illinois Supreme Court Rule 23(e)(1). That Rule allows the trial court to consider non-precedential orders when there are considerations of double jeopardy, *res judicata*, collateral estoppel or law of the case. Ill. S. Ct. R. 23(e)(1). Here, we have the same parties, the same promotional process, the same challenge to that process, and a prior, final adjudication on the merits. Defendant contends that plaintiff is collaterally estopped from now claiming that the promotional process was insufficient as a matter of law. Defendant did not raise collateral estoppel as an affirmative defense or apparently at any time before including it in its response brief here. Even though a party's waiver is not a limitation on the court (*Zekman v. Direct American Marketers, Inc.*, 182 Ill. 2d 359, 368 (1998)) (and even though the trial court's ruling could be construed as based on collateral estoppel as it unobjectionably invoked Supreme Court Rule 23(e)(1)), it simply makes more sense for us to just move to the merits of plaintiff's claims.

¶ 14 We rejected plaintiff's challenge to the 2012 promotion process and we believe that our previously-expressed reasoning remains sound. Just because the Rules only discuss the written examination portion of the promotion process does not mean that additional evaluation criteria

cannot be used. The Rules say that "promotions shall be made on the basis of merit, seniority in service, and examination." The Municipal Code is in accord. A rational way to determine whether a candidate merits a promotion is to get feedback from the candidate's supervisors and conduct interviews. The department evaluators were charged with scoring the candidates on ten categories such as decision making, job knowledge, organizational commitment, and dependability. Matters such as merit and efficiency ratings for department promotions are left to the sound discretion of the Board. *Zuelke v. Board of Fire & Police Commissioners of Broadview*, 79 Ill. App. 3d 1080, 1082 (1979). By their very nature, assessments of a person's efficiency and merit must be discretionary—left to the judgment and experience of the evaluator. *Id*.

¶ 15 Plaintiff attempts to distinguish *Zuelke* on the basis that the rules evaluated in that case were more defined than those at issue in this case. Plaintiff points out that in *Zuelke*, the rules expressly provided that 10% of the promotion criteria would be based on merit and efficiency and 25% based on an oral interview (citing *Zuelke*, 79 Ill. App. 3d at 1082). But the general principles in *Zuelke* apply in this case. The board is empowered to craft a promotion process that takes into account deservedness, seniority, and testing. Department evaluations and oral interviews are rational means by which to assess whether a promotion is merited.

¶ 16 Plaintiff's proffered interpretation of the Rules eliminates the statutory and rule-based mandate that promotion decisions be made in consideration of merit. Under plaintiff's interpretation, the Commission could only consider the written examination and the points earned for service time. But neither the Rules nor the Municipal Code constrain the Commission to this extent. To the contrary, the Rules and the Municipal Code expressly allow and, in fact, require the Commission to take into account the basis of merit when making promotion

decisions. See *Peoria Police Sergeants v. City of Peoria Board of Fire & Police Commissioners*, 215 Ill. App. 3d 278, 281 (1991) (police promotions must be based on all three criteria: ascertained merit, seniority in service, and examination. A promotional process that does not consider those three distinct elements is improper). The type of process plaintiff essentially claims should have been employed was the type of process found to be improper in *Peoria Police Sergeants*, *supra*.

¶ 17 Moreover, plaintiff cannot say that the Commission inadequately advised potential candidates of the promotion process. As we stated in our previous order, even when the 2012 promotion process was taking place, the "process ha[d] been utilized by the Department and plaintiff understood the process completely." *Spoerry*, 2014 IL App (1st) 132007-U, ¶ 27. That observation is even more compelling after plaintiff went through the identical 2012 process and challenged its lawfulness. The Commission notified plaintiff and all other candidates in a January 16, 2014 memo—before the promotion process started—that the written test would be administered on a certain date and that an interview by the Commission and a departmental evaluation would follow. Plaintiff went forward with the process that applied uniformly to all candidates and there is nothing improper about the Commission taking a candidate's deservedness into consideration.

¶ 18 The evaluation process is rationally related to the Commission's legitimate and stated interest of promoting, in part, on the basis of merit. None of the statutes or case law that plaintiff relies upon prohibit the Commission from considering the candidate's job performance and abilities in order to assess whether the candidate is worthy of a promotion. Even though the Commission did not incorporate the general order into its official Rules, plaintiff knew the process and was not prejudiced by the lack of publishing nor has he demonstrated that he

suffered any prejudice from the process itself. See *Schinkel v. Board of Fire & Police Commission of Village of Algonquin*, 262 Ill. App. 3d 310, 318 (1994). Plaintiff has not established any affirmative violation of any rule. The process the Commission employed for its 2014 sergeant promotions was not unlawful. And, based on the record, the Commission's rejection of plaintiff's challenge to the promotion list was not against the manifest weight of the evidence.

¶ 19 CONCLUSION

¶ 20 Accordingly, we affirm.

¶ 21 Affirmed.