UNITED STATES DISTRICT
DISTRICT OF RHODE ISLAND

RICHARD TARLAIAN

v. C.A. No. 97-149T

THE CITY OF PROVIDENCE; VINCENT A. CIANCI, in his capacity as Mayor of the City of Providence; URBANO E. PRIGNANO, JR., in his capacity as Chief of Police of the Providence Police Department; STEPHEN T. NAPOLITANO, in his capacity as Treasurer of the City of Providence.

MEMORANDUM AND ORDER DENYING PRELIMINARY INJUNCTION

ERNEST C. TORRES, United States District Judge.

Background

Richard Tarlaian, a lieutenant in the Providence Police Department (the "Police Department"), seeks a preliminary injunction prohibiting the City of Providence (the "City") from filling a vacancy in the rank of captain until Tarlaian's grievance regarding the promotional eligibility list is resolved.

The principal issue presented is whether filling the vacancy before that time would violate Tarlaian's right to procedural and/or substantive due process under the Fourteenth Amendment to the United States Constitution.

Because I find that Tarlaian has been afforded all of the process that was due him and because I further find that the City's failure to include him on the promotional eligibility list was not arbitrary or capricious, the motion for a preliminary injunction is

denied.

Facts

The procedure for promoting Providence police officers is governed by a Collective Bargaining Agreement (the "CBA") between the City of Providence and the Fraternal Order of Police (the "Union"). The CBA requires that vacancies in the rank of captain be filled from an eligibility list consisting of the three candidates attaining the highest scores on a promotional examination. The promotional examination has five components for which points are awarded. The components are:

1. Written examination (maximum of 35 points);
2. Education points (maximum of 5 points);
3. Seniority (maximum of 5 points);
4. Service points, awarded at the Chief of Police's discretion (maximum of 5 points); and
5. Oral examination (maximum of 50 points).

A candidate's total score is arrived at by adding the points received by the candidate for each component of the examination.

The written examination consists of multiple choice questions that are prepared and graded by an independent consultant hired by the City. The number of service points awarded is a matter entirely within the discretion of the Chief of Police and the grade on the oral examination is a largely subjective determination made by a panel, the composition of which is established by the CBA.

The written examination for the eligibility list at issue in this case was given on November 9, 1996. After the grades were

announced, all candidates were invited to a review session during which the correct answers were discussed. Any candidate who disagreed with his or her score was given an opportunity to file a grievance. The City agreed that any grievances filed within seven days would receive expedited consideration and that the eligibility list would not be posted until any such grievances had been resolved through arbitration.

Tarlaian disputed the fact that his answers to questions 80 and 95 had been graded as incorrect. However, he chose not to file an expedited grievance preferring, instead, to wait until the scores on the remaining portions of the examination were disclosed.

Several weeks later, the total scores were announced and Tarlaian ranked fourth among those taking the examination. He then filed a grievance challenging the grading of his answers to questions 80 and 95. It is undisputed that if Tarlaian succeeds in his challenge with respect to either question, he should be ranked third.

Upon receipt of Tarlaian's grievance, the Police Department, acting pursuant to its established policy, forwarded the grievance to Charles Hale, the independent consultant responsible for administering the written examination. Specifically, Hale was asked to determine whether the grievance had merit and, if so, to recommend an appropriate course of action.

Hale initially determined that there was no merit to the grievance with respect to question 80 but that question 95 was vague and, therefore, recommended that it be eliminated from the

test and that the scores of all candidates be recalculated. The Police Department responded by sending Hale a copy of the "Jackvony decision," a previous ruling by an arbitrator prohibiting the elimination of questions drawn from any of the four sources enumerated in the CBA absent a showing of good cause. After reviewing Jackvony, Hale retracted his previous recommendation. He recommended, instead, that question 95 be retained and that Tarlaian's answer be considered incorrect.

When the candidates ranked first and second, later, were promoted, Tarlaian brought this action to enjoin the City from filling any additional vacancy in the rank of captain until his grievance is resolved. Specifically, Tarlaian claims that filling any such vacancy before his grievance is decided would violate his Fourteenth Amendment rights to procedural and substantive due process.

I. Preliminary Injunction Standard

One of the principal purposes of a preliminary injunction is to preserve the status quo pending ultimate resolution of the case. CMM Cable Rep. Inc. v. Ocean Coast Properties, Inc., 48 F.3d 618, 620 (1st Cir. 1995). However, a preliminary injunction is a drastic form of relief because it affects the rights of a party before that party has had an adequate opportunity to develop its case. Therefore, the standard governing issuance of preliminary injunctions is a relatively rigorous one. Stephen D. DeVito Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775, 778 (D.R.I.), aff'd per curiam, 947 F.2d 1004 (1st Cir.

1991); Bertoncini v. City of Providence, 767 F. Supp. 1194, 1197 (D.R.I. 1991). In order to satisfy that standard, the party seeking the injunction must establish:

1. that it is likely to succeed on the merits when its claim is fully litigated;

2. that it does not have an adequate remedy at law and will suffer irreparable harm if an injunction is not granted before the case is fully litigated;

3. that such harm outweighs any harm that the adverse party will suffer if the injunction is granted; and

4. that the request for an injunction will not adversely affect the public interest.

Conservation Law Found., Inc. v. Busey, 79 F.3d 1250, 1271 (1st Cir. 1996) (citing Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1009 (1st Cir. 1981)).

Discussion

I. Likelihood of Success on the Merits

The due process clause of the Fourteenth Amendment prohibits a state or a municipality from depriving any person of property without due process of law. Laborde-Garcia v. Puerto Rico Telephone Co., 993 F.2d 265, 266 (1st Cir. 1993). It requires both that fundamental procedural safeguards be provided before property rights are infringed and that the deprivation not be arbitrary or capricious. See Amsden v. Moran, 904 F.2d 748, 753-54 (1st Cir. 1990), cert. denied, 498 U.S. 1041, 111 S. Ct. 713 (1991).

A. The Procedural Due Process Claim

In order to succeed on his procedural due process claim, Tarlaian must establish:

1. that he has a Constitutionally protected property interest in being promoted to captain; and

2. that the promotion procedure adopted by the City does not satisfy Constitutional requirements (i.e., that it does not afford all of the process that is due him).

1. The Property Interest

Not all claims of entitlement rise to the level of Constitutionally protected property interests. The term "property", within the meaning of the Fourteenth Amendment, encompasses only those things to which the party asserting a property interest has "a legitimate claim of entitlement." Marrero-Garcia v. Irizarry, 33 F.3d 117, 121 (1st Cir. 1994) (quoting Board of Regents of State College v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709 (1972)). A mere "abstract need or desire" for a benefit or a "unilateral expectation" that such benefit will be conferred is insufficient. Id.

Whether an individual has a legitimate claim of entitlement is determined by reference to state law. Bishop v. Wood, 426 U.S. 341, 344, 96 S. Ct. 2074, 2077 (1976). Thus, a Constitutionally protected property interest exists if it is "recognized by state statute or a legal contract, express or implied, between the state agency and the individual." Marrero-Garcia, 33 F.3d at 121.

In this case, Tarlaian contends that he has a property interest in being promoted to captain because the CBA requires that

vacancies be filled from the three-member eligibility list and, if he prevails on his grievance, he will be the only remaining candidate on that list. The City, on the other hand, argues that Tarlaian has nothing more than a unilateral expectation of being promoted because that decision is based largely on a number of subjective criteria that are within the City's discretion to determine and because, in any event, Tarlaian is unlikely to prevail on his grievance.

It is clear that a well-founded claim to continued government employment is a Constitutionally recognized property interest that requires compliance with procedural due process requirements when such employment is terminated. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541-42, 105 S. Ct. 1487, 1493 (1985); Laborde-Garcia, 993 F.2d at 266. Those safeguards also apply in the case of demotions. See DelSignore v. DiCenzo, 767 F. Supp. 423, 426-28 (D.R.I. 1991) (treating demotion as the equivalent of termination). The nature of the procedure required to pass due process muster depends upon the circumstances. See Mathews v. Eldridge, 424 U.S. 319, 334-35, 96 S. Ct. 893, 902-03 (1976); Reardon v. United States, 947 F.2d 1509, 1517-18 (1st Cir. 1991); Amsden, 904 F.2d at 753.

Counsel have not cited any cases addressing the applicability of procedural due process guarantees in the context of promotion. However, there is no logical reason for treating a promotion to which an employee has a legitimate claim of entitlement any differently from a continuation of employment to which the employee

has a similar claim. Thus, Tarlaian's interest in being promoted to captain qualifies as a property interest if he has a legitimate claim of entitlement to the promotion.

In arguing that Tarlaian has no entitlement to be promoted because the decision to promote is discretionary, the City fails to consider the facts of this case. It is true that an employee does not have a property interest in being promoted when the appointing authority has discretion to consider subjective factors as well as objective test scores in making a decision. Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir.), cert. denied, 449 U.S. 893, 101 S. Ct. 256 (1980). However, in this case, all of the subjective factors have been quantified. Tarlaian has been graded on all components of the examination. His score can no longer be affected by anything other than the resolution of his grievance. If he is successful, he will be the only one eligible for promotion to captain and, therefore, would have a Constitutionally protected property interest.

The fact that Tarlaian's entitlement to promotion no longer is dependent upon any subjective determination by the appointing authority makes this case readily distinguishable from Burns where a property interest in promotion was found lacking on the ground that the police chief had not yet exercised his discretion to award points for subjective factors. See id. Here, Tarlaian's claim of entitlement turns solely on the objective criterion of whether his answers to two test questions were correct. See, e.g., Charles v. Baesler, 910 F.2d 1349, 1352 (6th Cir. 1990) (relevant statutes and ordinances confer right to be promoted to major); Schwartz v.

Thompson, 497 F.2d 430, 433 (2nd Cir. 1974) ("promotion would become virtually a matter of right . . . where it was solely a function of seniority or tied to other objective criteria"); Drogan v. Ward, 675 F. Supp. 832, 835 (S.D.N.Y. 1987) (civil service statute and regulations bestow property interest in promotion to those who successfully complete examination).

The more difficult hurdle for Tarlaian to clear in establishing a property interest is the requirement that he demonstrate a likelihood of succeeding on his grievance. Tarlaian has presented little evidence to support his contention that questions 80 and/or 95 should be stricken or, alternatively, that the answers he gave should be deemed correct. Instead, he relies on the initial recommendation by Hale that question 95 be eliminated and urges the Court to infer that the City pressured Hale into retracting that recommendation.

However, the evidence does not warrant such an inference. The only communication that it reveals between the Police Department and Hale after his initial recommendation is a telephone call from Sergeant Searles who stated that she was forwarding a copy of the Jackvony decision dealing with the circumstances under which examination questions could be eliminated and a later telephone call from Captain Ryan making it clear that the Police Department was not suggesting what he should do, but only that he should review the Jackvony decision and make his decision in a manner consistent with it. Hale, himself, testified that he did that.

2. Due Process

Even assuming arguendo that Tarlaian has demonstrated a sufficient likelihood of success on his grievance to establish a Constitutionally protected property interest, the procedure employed has afforded him sufficient safeguards to satisfy the requirements of due process. The method for making promotions is governed by the CBA negotiated between the City and the Union, of which Tarlaian is a member. It contains numerous procedural safeguards including specification of the subjects covered by the written examination, the employment of an independent consultant to prepare and grade the examination, review sessions at which applicants had an opportunity to dispute their scores and a grievance procedure through which dissatisfied applicants could obtain impartial adjudication of their objections. Indeed, although Tarlaian disagrees with the score that he received on the written examination, he does not challenge the manner in which it was administered. Rather, he asserts that due process requires that no further captains' vacancies be filled until his grievance is resolved.

The fatal flaw in Tarlaian's argument is that the procedure utilized did afford Tarlaian the opportunity to prevent vacancies from being filled until his grievance was decided. As already noted, Tarlaian could have filed an expedited grievance within seven days after the review session, in which case the vacancy in question could not have been filled until the grievance was resolved. However, Tarlaian chose not to do so. Instead, he opted to wait until scores on the remaining portions of the examination

were released. There may have been sound tactical reasons for that decision. Tarlaian may have been reluctant to "rock the boat" before the subjective portions of the test were graded. On the other hand, his dissatisfaction with questions 80 and 95 may not have arisen until after he learned his scores on the other portions of the test and may have been precipitated either by a belief that those scores were tailored to prevent him from making the eligibility list or, simply by the realization that challenging the questions was the only way he could enhance his ranking. However, regardless of his motivation, the fact remains that the expedited grievance procedure afforded Tarlaian the very safeguard upon which his procedural due process claim rests. In short, it afforded Tarlaian all of the protection to which he now claims that he was due.

B. The Substantive Due Process Claim

The substantive component of the due process clause prohibits a state or local government from arbitrarily and capriciously depriving a person of a Constitutionally protected interest. Amsden, 904 F.2d at 753-54. A violation of substantive due process may occur even if the procedures employed pass Constitutional muster. Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 531 (1st Cir. 1995) (quoting Daniels v. Williams, 474 U.S. 327, 331, 106 S. Ct. 662, 665 (1986)), cert. denied, 516 U.S. 1159, 116 S. Ct. 1044 (1996).

However, since the "arbitrary and capricious" standard can be somewhat subjective, it must be applied with "caution and

restraint." Santiago de Castro v. Morales Medina, 943 F.2d 129, 130 (1st Cir. 1991) (quoting Moore v. East Cleveland, 431 U.S. 494, 502, 97 S. Ct. 1932, 1937 (1977)). In order to constitute a substantive due process violation, "some basic and fundamental principle [must be] transgressed." Amsden, 904 F.2d at 754. Moreover, "the requisite arbitrariness and caprice must be stunning, evidencing more than humdrum legal error." Id. at 754 n.5.

In order to prevail on his substantive due process claim, Tarlaian must establish:

> 1. that he has a Constitutionally protected property interest in being promoted to captain; and
>
> 2. that the City's failure to promote him would be arbitrary and capricious.

Id. at 753-54.

In this case, there is no need to determine whether Tarlaian's claim of entitlement to promotion is sufficiently "basic and fundamental" to invoke substantive due process principles because the evidence falls far short of establishing that any failure to promote him would be arbitrary and capricious.

As already noted, the written examination was prepared and graded by an independent consultant and was drawn from sources specified by the CBA. Nor does the evidence support the allegation that the consultant was improperly influenced in making his determination with respect to questions 80 and 95. Thus, there is no basis for concluding that Tarlaian's current ranking is

arbitrary or capricious.

In fact, Tarlaian has failed to present sufficient evidence to warrant even a finding that the consultant's determination was erroneous. On the contrary, Hale explained, in detail, why he rejected Tarlaian's challenge to questions 80 and 95. The reasons he gave were very plausible and, as already noted, Tarlaian presented little or no evidence to the contrary.

II. Balancing of the Harms

In addition to not demonstrating a reasonable likelihood of success on the merits, Tarlaian has failed to show that any harm that he is likely to sustain if an injunction does not issue outweighs the harm likely to be visited upon the defendants if an injunction does issue. It is true that, absent an injunction, Tarlaian almost certainly will not be promoted to the next vacancy occurring in the rank of captain. But it is not clear whether that harm will be irreparable. The City asserts that if Tarlaian prevails on his grievance, the arbitrator has authority to require the City to promote him notwithstanding limitations on the size of the eligibility list or the number of captains positions in the department, an assertion that Tarlaian disputes. Unfortunately, neither party has presented anything to substantiate these respective assertions. However, no matter what remedies may be available in arbitration, and without intending to minimize the harm that Tarlaian may suffer, it should be noted that such harm may be mitigated by the possibility that Tarlaian could be promoted at some future time if he scores among the top three candidates on

the next examination.

In any event, the harm that Tarlaian may sustain is balanced by the harm to which the City, its residents and Lieutenant Kells, the officer currently ranked third, will be subjected if a preliminary injunction is issued. The City has an interest in filling captains' vacancies in a timely fashion in order to insure proper supervision within the Police Department. Obviously, proper supervision also is important in providing for the safety of City residents. To some degree, such supervision could be provided by designating a lieutenant to temporarily perform the duties of a captain but the evidence indicates that the authority of a higher rank would enable a captain to perform them more effectively.

The adverse impact that issuance of an injunction will have on Kells is more difficult to evaluate. Clearly, it will prevent him from being promoted until Tarlaian's grievance is resolved even though he, presently, is the only eligible candidate. Whether that harm is temporary or longer term will depend on the outcome of Tarlaian's grievance. If Tarlaian prevails, Kells will not be promoted unless he ranks high enough on a future examination to make a new eligibility list. That would not be cause for concern if Kells was a party to the arbitration and had an opportunity to defend his current ranking. However, it appears that he is not a party and, therefore, a preliminary injunction in this case could deprive him of the identical property interest being claimed by Tarlaian.

III. <u>The Public Interest</u>

As already noted, the issuance of an injunction in this case would adversely affect the public interest in having safety services provided in the most efficient manner possible. Tarlaian correctly points out that the public also has an interest in insuring that the process for promoting police officers is fair and based on merit. However, as previously stated, he has failed to establish that the grade he received on the written examination, which is the subject of his claim, was unfair or based on considerations other than merit. Whether his overall grade on the entire examination was tainted by other considerations is not the subject either of his claim or of any evidence presented in this case.

Conclusion

Because Tarlaian has failed to establish a likelihood of success on his due process claims, because he has failed to demonstrate that the harm he will suffer if an injunction is not issued outweighs the harm that will be suffered by others if it is and because he has failed to show that the public interest militates in favor of issuing an injunction, his motion for a preliminary injunction is denied.

IT IS SO ORDERED,

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Ernest C. Torres
United States District Judge

Date: April , 1998

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