

MCAD ruling supports black Worcester officers passed over for promotion



Pat Yancey of Worcester, president of the Worcester chapter of the NAACP, with her husband George. "I feel they need to settle this with these officers and put behind us this unfortunate history," Mrs. Yancey said. T&G Staff/Rick Cinclair

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WORCESTER – Nearly four years after the city appealed its ruling, the Massachusetts Commission Against Discrimination has affirmed its decision ordering the Police Department to pay hefty settlements to two black officers it concluded were unfairly passed over for promotions in the 1990s.

The ruling upholds a scathing 2011 review that found the department guilty of intentionally discriminating against minority officers and suggested that, had city officials not given “incomplete and inaccurate” testimony, the officers may have been given their sergeant’s badges a decade before.

Whether the city will accept the ruling and put an end to a 20-year legal battle remains to be seen.

“This is a benchmark in our history,” Patricia Yancey, president of the Worcester chapter of the NAACP, said Wednesday. “If (City Manager Edward M. Augustus Jr.) is really committed to this, I feel they need to settle this with these officers and put behind us this unfortunate history.”

The ruling – which a lawyer for the officers said could have implications statewide – dates back to cases filed by two officers in 1994. The case has been going on for so long that one of the officers, Andrew Harris, has already retired, while the other, Spencer Tatum, is nearing the end of his career.

The men, who were hired in 1980 and 1987, respectively, filed suits in 1994 alleging they were passed over for sergeant promotions because of a racially biased system.

Their lawsuits spawned a convoluted legal battle that has stretched more than 20 years. A procedural history laid out in the 2011 ruling shows that the men fell victim to errors of law, procedural errors and, quite possibly, deception from the city in their quest for resolution.

After the men filed their cases in 1994, the MCAD investigated the complaint and found probable cause in both cases. When mediation failed, the case was brought to its first hearing seven years later, in 2001.

The city uses state civil service exams to promote officers. The officers are promoted in the order of their scores.

The city argued the system isn't discriminatory because everybody takes the same test. The officers argued that, since no minority officers had ever scored high enough to warrant a promotion, the test was effectively discriminatory.

A hearing officer initially found for the city. The men appealed the ruling to the full three-member MCAD commission, however, according to the 2011 documents, their appeal was not properly handled.

In a series of "unusual" events, the officers case was adversely affected by multiple court mistakes. In one instance, MCAD only had two members and they deadlocked, leading to a de facto defeat and requiring another appeal.

Another appeal was somehow heard by the wrong body.

“For reasons that are unclear, and arguably without proper jurisdiction,” the Superior Court ended up reviewing one of the appeals, the commission wrote in 2011, finding against the officers.

“As a result of this unusual procedural history, the full commission has been denied an opportunity to properly review the hearing officer’s decision on the (original) claim,” it wrote.

That means the appeal the officers filed in 2001 wasn’t properly heard until 10 years later.

In addition to mistakes in procedure, the MCAD in 2011 found that the city failed to disclose information that could have changed the original outcome of the case.

According to the ruling, the city’s original evidence was “undermined by incomplete and inaccurate testimony by the city’s witnesses” – former Chief Edward P. Gardella and two former city human resources administrators.

During the proceedings, the city’s argument was that its practices were not discriminatory because it always gave the job to the applicants with the highest scores. It further argued that if it gave a so-called “affirmative action” promotion to a lower scoring minority officer, morale would suffer among white officers and the union might file a lawsuit.

But in the ruling, the commission pointed out that during its research it discovered the city had already made an “affirmative action” promotion in 1983 when it promoted black officer Loman Rutherford Sr. to the rank of sergeant.

The commission sharply criticized the city for not disclosing that fact, noting that doing so would have likely undercut the city’s arguments. In the case of Mr. Rutherford, the union never challenged the promotion.

The commission went so far to say that had the hearing officer known about Mr. Rutherford’s promotion at the time of the hearing, “it would have affected the credibility of the testimony of the city’s various witnesses and the outcome of the case.”

Reached Thursday, Mr. Gardella said he did not believe the hearing officer had specifically asked whether the department had made a prior “affirmative action” promotion. He said he does not believe the promotion was a secret or that mentioning it would have made a big difference.

“If we’ve done it before, that shows we’re not averse to promoting (minorities),” he said, and therefore not discriminatory.

Although Mr. Gardella said he believes Mr. Tatum and Mr. Harris to be standup officers, he fundamentally disagrees that use of the city's practices were discriminatory.

“A discriminatory practice would be not promoting (minority) guys at the top of the list,” he argued.

But the commission pointed out that the city would have been within the law to use a different state statute – called “PAR.10” – that allows cities to promote minority officers with lower scores.

It noted the city had actually been compelled to do so in 1988 after signing a binding agreement with MCAD to that end.

The city was supposed to use “PAR.10” to promote minority officers from 1988 to 1991. Over that time span, 10 white officers were the only officers promoted.

“(This violation) demonstrates a pattern and practice of discrimination by the appointing authority against its minority officers who took and passed the promotional examination for sergeants from (at least) 1988 through (at least) 2000 and a disservice to the city’s significant minority population,” the MCAD wrote.

Ms. Yancey said the slow churn toward resolution has been difficult on both officers.

Mr. Harris testified in court that he faced retaliation from co-workers, including interference with his radio communications that had the potential to endanger his life. He also testified about derogatory statements written on his paycheck, and that although he complained, no action was taken.

Mr. Tatum testified that not being promoted led to a depression that ultimately contributed to the dissolution of his marriage.

The court ordered the men be given \$25,000 each for emotional distress and sergeant’s backpay to 1994, including 12 percent compounded interest.

Harold L. Lichten, the officers' lawyer, said the result is that each man stands to be owed on the order of \$1 million should the city not appeal the ruling.

Ms. Yancey said she can't understand why the city wouldn't have settled the case in 2011, noting the nature of the findings.

Ms. Yancey and Mr. Lichten strongly urged the city to settle the case.

"If the city of Worcester's goal is to get more qualified police officers in supervisory ranks, why defend an antiquated system?" Mr. Lichten asked.

Mr. Lichten said the city's sole reliance on the state civil service exam is outdated and, as now determined by the MCAD, discriminatory. He called the ruling the first such ruling he is aware of in Massachusetts.

In another case in U.S. District Court which the two officers are also involved in, a judge ruled that use of civil service exams in Massachusetts by police departments does not constitute discrimination. That case is currently under appeal.

Mr. Lichten said regardless of the outcome of that case, many police departments are moving away from traditional, one-dimensional civil service exams. Boston recently created its own test, he said, as have departments in most other states.

The court in 2011 cited Boston as a city that Worcester should have emulated in the 1990s, noting that in 1996, 17 percent of the BPD's sergeants were black.

"In stark contrast, in 1996 the WPD had no minority officers serving in the rank of sergeant despite ample opportunity to use Par.10 for affirmative action purposes."

The Worcester Police Department does not currently use "Par.10." Ms. Yancey said when she recently asked City Manager Augustus and Mayor Joseph M. Petty why that was, she received no response.

Mr. Petty did not respond to a request for an interview Thursday. Mr. Augustus was on vacation, as is the city's top lawyer, David M. Moore.

Asked whether he thought the city would settle the case, Mr. Harris, who retired more than a year ago, laughed into his phone.

"I know the city, I know the chief, I know all of them," he said. "They'll never admit to any of it being wrong.

"They're not going to settle this," he said. "This is going to the wire – and I'm going down to the wire with them."

Mr. Harris emphasized his respect for the rank-and-file members of the department.

"I've always thought we were the best department in the county, and I love this city," he said. "But things have to change."

The number of minority officers overall has risen in recent years, with the department reporting a 37 percent increase this year over 2013 in the number of minority men who took the exam to become a police officer.

But Ms. Yancey noted that of the 86 ranked officers on the force, only five are black or Hispanic.

In response to a series of questions about the diversity of the police force that also requested comment on the MCAD decision, Police Chief Gary J. Gemme issued the following statement:

“The Worcester Police Department is committed to continuing our efforts to further diversify all positions in the department. We believe that the best way to achieve this objective is to increase the number of applicants from communities of color that can be hired, trained, and ultimately promoted.”

Ms. Yancey said the city needs to settle the lawsuit, acknowledge wrongdoing in the past and allow Mr. Tatum to get the promotion MCAD said he’s deserved for 21 years.

“ I’ll never forget the look in his eyes as he was giving this to me, and what this meant to him,” Ms. Yancey said, holding up a well-worn, coffee-stained version of the 2011 ruling she said the officer took with him everywhere.

“This is a benchmark action that needs to be done right now.”

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