COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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RONALD BALDASSARI,
KRISTEN O'NEILL,
GIANCARLO PENI,
ANTHONY COGLIANDRO,
Appellants,

v.

CITY OF REVERE,
Respondent

CASE NOS: G1-11-312 (Baldassari)
G1-11-330 (O'Neill)
G1-11-331 (Peni)
G1-11-332 (Cogliandro)

Appellants' Attorneys:

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Commissioner:

Paul M. Stein

DECISION ON MOTION TO DISMISS

The Appellants brought these appeals alleging that the City of Revere (Revere) bypassed them for appointment to positions as police officers with the Revere Police Department (RPD) when it returned an August 2011 Certification issued by the Massachusetts Human Resources Division (HRD) without making any appointments and requesting a new Certification, issued in November 2011, on which none of the Appellants' names appeared, and from which three candidates eventually were hired. Revere filed a Motion to Dismiss the appeals for lack of jurisdiction which the Appellants' opposed. On February 13, 2012, the Commission held a hearing on the

motion and, on February 15 and 22, 2012, received additional submissions from Revere (Post Hearing Exhs. 6, & 10) and the Appellants (Post Hearing Exh. 9)

FINDINGS OF FACT

Giving appropriate weight to the documents submitted by the parties, the argument of counsel and the inferences reasonably drawn from the evidence, I find the following facts to be undisputed:

1. The Appellants, Ronald Baldassari, Kristen O'Neill, Giancarlo Peni and Anthony Cogliandro, are residents of Revere who took and passed the 2009 civil service examination for Police Officer administered by HRD. (*Hearing Exhs. 1 through 4*)

2. The Appellants' names were placed on the 2010 eligible list for Police Officer established March 16, 2010. According to law, the eligibility of candidates on the 2010 eligible list lasts for two years, until March 16, 2012. (*Hearing Exh. 4)*

3. By law, a civil service eligible list remains effective until a new eligible list is established from the results of a subsequent examination, which, as a general rule, cannot be a period more than two years. (*Administrative Notice [G.L.c.31,§25]*)

4. HRD administered a new civil service examination for Police Officer in April 2011. None of the Appellants took the 2011 examination. (*Representation at Hearing*)

5. On August 15, 2011, following Revere's request for a certification of candidates for appointment as Revere Police Officers, HRD issued Certification No. 202144 consisting of the first eleven (11) names on the eligible list for Police Officer. The Appellant's names do not appear on this certification. (*Hearing Exh. 4*)

6. On August 30, 2011, following a request for additional names, HRD issued a supplement to Certification No. 20144 containing an additional twenty-one (21) names.

The Appellants names appeared on that certification (below 11 more highly ranked candidates), as follows: (a) Kristen O'Neill, tied for second, in a group of 5 candidates with the same score: (b) Ronald Baldasarri and Giancarlo Peni, tie for third, in a group of 9 candidates with the same score; and (c) Anthony Cogliandro, tied for fourth in a group of 5 candidates with the same score. (*Hearing Exh. 4*)

7. Each of the Appellants signed Certification No. 202144 indicating they were willing to accept the appointment and received and returned to the RPD the packet of material required to process their applications. (*Hearing Exhs. 1 through 4*)

8. According to Kristin O'Neil, the RPD began a background investigation on her about September 16, 2011, and she met, along with four other candidates, with RPD Sergeant Pisano to begin processing her application packet. She states that, on September 28, 2011, she was informed that the RPD had almost finished her background check, save for one reference that was expected that day. (*Hearing Exhs. 1, 2 & 3*)

9. The other Appellants did not provide any details indicating how far in the application process they went. According to Revere, it had only begun processing the first "half dozen" applicants at the top of the supplemental list, which is consistent with the inference from the statement referred to above from Kristin O'Neill that she and the four other members of her tie group began formal processing on September 20, 2011. (*Hearing Exhs. 1, 2 & 3*)

10. On September 21, 2011, HRD announced the results of the 2011 civil service examination and the establishment of a new eligible list, effective on or about November 2011. With the establishment of a new eligible list: (a) the names on the 2010 eligible list would be merged with the names on the 2011 list; (b) candidates who took both tests

would be placed on the list for two years (until November 1, 2013) according to their scores on the 2011 test; (c) candidates who did not take the 2011 test (i.e., the Appellants) would be placed on the list according to their 2009 test scores until their two year eligibility expired on March 16, 2012; and (d) candidates who took both tests but failed the 2011 test would have their names removed effective November 1, 2011. (*Hearing Exh. 4; Post Hearing Exh. 6*)

11. HRD's September 21, 2011 announcement also stated:

> "*Appointments made from the current eligible list will only be valid if the names of applicants selected for employment are received . . .or postmarked on or before October 31, 2011*. . . . Appointees from a Police Officer Certification must pass a medical examination and a Physical Abilities Test (PAT) before their appointments can be finalized. Please ensure that the names of the individuals tendered a conditional offer of employment have been submitted to HRD by the deadline.
>
> *After the issuance of this memorandum, Appointing Authorities wishing to make selections must submit a requisition and will be required to wait for the merged list on November 1, 2011*."

(*Hearing Exh. 4*) (*emphasis added*)

12. On September 29, 2011, the Mayor of Revere, then Thomas Ambrosino, who is the appointing authority for the RPD, returned Certification No. 202144 to HRD stating: "The City has decided not to hire any personnel from this Certification." (*Hearing Exh. 4; Post-Hearing Exh. 10*)

13. According to Mayor Ambrosino, the decision to return Certification No. 202144 without making any appointments was the result of deliberations among his office, RPD Police Chief Reardon and representatives at HRD. The factors that contributed to the decision included: (a) of the initial group of candidates who had been fully vetted only two had passed the initial review process; (b) Revere doubted its ability to make the October 31, 2011 deadline to complete all further processing; and (c) Revere preferred to

start afresh with the top-ranked candidates on the new eligible list. (*Hearing Exhs. 1 & 4; Post-Hearing Exh. 6*)

14. There is no evidence that, as of September 29, 2011, any of the Appellants had been interviewed, had received conditional offers of employment, or had been scheduled for medical, psychological or physical abilities screening. (*Hearing Exhs. 1 through 4*)

15. The Appellants proffered several newspaper accounts in which a city councilor criticized Revere's decision, and Revere Police Chief Reardon, because the councilor thought that Revere sorely needed additional police officers on the streets and the delay was inexplicable and "hurt the people on the old list". The newspaper accounts also contained statements attributed to an "anonymous" source as well as a statements by Mayor Ambrosino and one attributed to RPD Police Chief, saying he would be asking for a "minority list" as justification to defer the hiring process until after November 1, 2011. While there was no direct corroboration for most of these statements, for purposes of the motion, I credit that the city councilor, Mayor Ambrosino and Chief Reardon probably made most of the statements substantially attributed to them. I cannot credit any statements by anonymous sources. (*Hearing Exhs. 8 & 9*)

16. On November 15, 2011, following Revere's requests, HRD issued Certification No. 202380 containing the top twenty-four (24) names on the newly-issued, merged eligible list for Police Officer. Although several of the names on Certification No. 202380 were carried over from the prior list, none of the Appellants' names appeared on the Certification. (*Post Hearing Exhibit 6*)

17. Among the names that were carried over from the prior eligible list are two non-veterans who had appeared on the prior certification (No. 202144) and whose eligibility

dates on the new certification (No. 202380) had changed from 3/16/2012 to 11/1/2013. This evidences that these individuals, unlike the Appellants, did take and pass the 2011 examination and placed within the first two tie groups of non-veterans, which was high enough to fall within the twelve (12) "2n+1" group of candidates who signed the November 15, 2011 Certification as willing to accept appointment. (*Hearing Exh. 1; Post-Hearing Exh. 6*)

18. On January 19, 2012, newly installed Revere Mayor Daniel Rizzo appointed three individuals from Certification No. 202380 to the position of Police Officer, all of whom were new names that had not appeared on the August 30, 2011 Certification. No. 202144. The three successful candidates included a veteran and two candidates in the same tie group which also included the two candidates mentioned above who had also appeared in that tie group, ahead of all appellants, on Certification No. 20144. (*Post-Hearing Exh. 10*)

19. The inference is drawn that none of the Appellants' scored high enough on the 2009 exam to place within the first twenty-four (24) most highly ranked candidates who took and passed the most recent 2011 exam. (*Hearing Exh 1; Post Hearing Exh. 6*)

20. Even if Revere had proceeded to hire more than three officers in January 2012, and even if no additional names of successful candidates who took and passed the 2011 examination were merged into to the list above the Appellants, there would have more than a dozen other candidates who would have appeared above or tied with one or more of the Appellants and within the "2n+1" group from which Revere could have chosen to appoint additional officers. (*Hearing Exh.1; Post Hearing Exh. 6*)

CONCLUSION

Summary

The Appellants' appeals must be dismissed because they fail to establish any basis upon which the Commission could find them aggrieved by a violation of their rights under civil service law. As a general rule, an appointing authority may decide, in the exercise of its sound discretion, to postpone or discontinue a hiring process for budgetary or other reasons. The Appellants have not raised above the speculative level any suggestion that Revere's decision, here, was not made for the rational reasons they articulate – a lack of time to appropriately vet the candidates in the face of a one month deadline established by HRD and preference to hire from the most currently available list. The Appellants knew their standing on the eligible list was likely to change after the addition of new names of successful candidates who took the most recent 2011 exam (that none of the Appellants took). The Appellants also knew that their eligibility would expire totally in March 2012. While Revere's decision to stop the September 2011 hiring process as abruptly as it did is a clearly understandable disappointment for the Appellants, their own decision not to take the 2011 examination also substantially and materially contributed to the dilemma that they now face. The Commission is not inclined to grant equitable relief to candidates who aspire to civil service appointments only to see their eligibility "die on the vine" because they failed to pursue the basic obligation to take subsequent civil service examinations that would have kept their eligibility alive. Finally, the Appellants, individually and as a group, were part of a larger group of tied candidates, and they never had any assurance that, even if the hiring process had not been postponed, any of them would actually have been appointed as Revere police officers.

Applicable Legal Standard

The Commission may, on motion or upon its own initiative dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary disposition of an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.00(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 substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Relevant Civil Service Law

G.L.c.31, §2(b) authorizes appeals to the Commission by persons aggrieved by certain actions or inactions by the Massachusetts Human Resources Division (HRD) or, in certain cases by appointing authorities to whom HRD has delegated its authority, and which actions have abridged their rights under civil service law s. The statute provides:

> *No person shall be deemed to be aggrieved . . . unless such person has made specific allegations* in writing that a decision, action, or failure to act on the part

> of the administrator [HRD] was in violation of this chapter, the rules or basic merit principles promulgated thereunder *and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status*. Id. (*emphasis added*)

Chapter 310 of the Acts of 1993 prescribes the discretionary authority granted to the Commission to remediate a violation of civil service law:

> *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. (*emphasis added*)

The engine for Massachusetts civil service law is found in the "basic merit principles" described in Chapter 31, which command, among other things, "recruiting, selecting and advancing of employees on the basis of their relative ability, knowledge and skills including open consideration of qualified applicants for initial appointment" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L.c.31, §1. The most important mechanism for ensuring adherence to basic merit principles in hiring and promotion is the process of conducting regular competitive examinations, open to all qualified applicants, and establishing current eligible lists of successful applicants from which civil service appointments are to be made based on the requisition by an appointing authority of a "certification" which ranks the candidates by competitive written examination scores along with certain statutory credits and preferences. G.L.c. 31, §§6 through 11, 16 through 27. In general, each position must be filled by selecting one of the top three most highly ranked candidates who indicate they are willing to accept the appointment, which is known as the "2n+1" formula. G.l.c.31,§27; PAR.09.

In order to deviate from the rank order of preferred hiring, an appointing authority must prove specific reasons – positive or negative, or both – consistent with basic merit principles, to affirmatively justify bypassing a lower ranked candidate in favor of a more highly ranked one. G.L.c.31,§1,§27; PAR.08. Selection of one of a group of tied candidates, i.e, those with the same score is not considered selection of a "lower ranked" candidate and is not considered a bypass. See, e.g., DeSimone v. City of Cambridge, 24 MCSR 297 (2011), citing Cotter v. City of Boston, 193 F. Supp.2d 62, 323 (D.Mass. 2002), *rev'd other grounds*, 323 F.3d 160 (1st Cir), *cert.den.*, 540 U.S. 825 (2003); Breton v. City of New Bedford, 21 MCSR 127 (2008); Bartalomi v. City of Holyoke, 21 MCSR 94 (2008); Dalrymple v. Town of Winthrop, 19 MCSR 379 (2006) A person who is bypassed is entitled under G.L.c.31,§2(a) to appeal that decision for a review by the Commission to determine whether the bypass decision was "reasonably justified". See, e.g., Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist.Ct., 262 Mass. 477, 482 (1928); Mayor of Revere v. Civil Serv. Comm'n, 31 Mass.App.Ct. 315, 321n.11, 326(1991).

Placement on a civil service list, however, is a limited preference to be considered for appointment during the life of the list, rather than a right to be hired. As stated in Callanan v. Personnel Administrator, supra, absent proof of deliberate or malicious purpose:

> *"[W]e think the Legislature did not intend . . . to confer a right on those whose names appear on eligibility lists for positions . . . in the civil service system to postpone the expiration of their lists until all positions which might have become available during the term of their list are filled from their list.* The plaintiffs' claims are inconsistent with the over-all scheme of the civil service system in two important respects: the limited nature of the rights conferred on persons who pass the examinations, and the broad discretion that rests in the administrator [HRD].

> *The civil service system confers only limited rights to those on eligibility lists. . . . The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that positions might become available immediately after the expiration of an old list—or immediately before the establishment of a new list. The over-all pattern of the statute does not justify expectations that certain positions will become available during the period of a single list. Moreover, individuals do not have a vested right in their particular positions on the eligibility list once it is established.* . . . [HRD] may revise the list by placing ahead of [an applicant's] name the names of disabled veterans who had failed to claim, until after the list was established, the preference accorded them, [citation] In addition, the statute does not specify when examinations should be administered, leaving the timing of an examination to the sound discretion of the administrator. [citations] . . . .
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> *Finally, we note that* the administrator is given a measure of discretion over the expiration of a list [and] . . *the provisions* . . . *also reflect the preference for the establishment of new lists*."

Callanan v. Personnel Administrator, 400 Mass. 597, 600-601 (1987) (*emphasis added*) See also Stuart v. Roache, 951 F.2d 446 (1st Cir. 1991) (An "expectation of selection based on his position on a civil service list does not rise to the level of a property list entitled to constitutional protection.")

An appointing authority is granted considerable latitude in making decisions as a prerogative of sound management control over staffing levels, assignments and duties as to which, in the absence of arbitrary or capricious behavior, the Commission will not generally intrude. See Mayor of Lawrence v. Kennedy, 57 Mass.App.Ct.904, 906 (2003); City of Boston v. Boston Police Superior Officers Federation, 52 Mass.App.Ct. 296, 299-301 (2001); Somerville v. Somerville Mun. Employees Ass'n, 20 Mass.App.Ct. 594, 597, rev.den., 395 Mass. 1102 (1985); Gillespie et al v. Boston Police Dep't, 24 MCSR 170 (2011); O'Toole v. Newton Fire Dep't, 22 MCSR 563 (2009); Mandracchia v. City of Everett, 21 MCSR 307 (2008); Burke et al v. Human Resources Div. 21 MCSR 177 (2008); Catterall v. City of New Bedford, 20 MCSR 196 (2007); Lizotte v. City of New Bedford, 12 MCSR 40 (1999)

With limited exceptions, the life of an eligible list is limited to a period of two years, after which it is must be replaced by a new eligible list based on a more recent examination. G.L.c.31, §25. While examinations are customarily given every two years, it is not uncommon for an examination for a particular position to be given more frequently. In such cases, the names of candidates who took and passed the most recent examination are "merged" into the existing eligible list with the names of the candidates from the prior examination, according to their rank order until the expiration of the eligibility of the candidates who took only the penultimate examination, at which time those latter candidates' names drop off the list. G.L.c.31,§25.

> "[T]he statute contemplates a new eligibility list being created during the active life of an older list, and directs that the two lists are to be merged. G.L. c. 31, § 25. In the statutory scheme, the most recent examination results for an individual are used to determine ranking on the merged eligibility list. *Id. Applicants are able to protect their interests in remaining eligible by taking the later examinations."*

Callanan v. Personnel Administrator, 400 Mass. 597, 600-601 (1987) (*emphasis added*) See also Awad v. HRD, --- MCSR --- (2012) and cases cited (Commission denied request for equitable relief to revive expired eligibility on a merged list after failure to register for next available examination); Regan v. City of Salem & HRD, 24 MCSR 490 (2011) (same); Monk v. City of Salem & HRD, 24 MCSR 481 (2011) (same); Kochansky v. City of Salem & HRD, 24 MCSR 472 (2011) (same) Fontaine v. HRD, 24 MCSR 469 (2011) (same); Bourgeois v. HRD, 24 MCSR 466 (2011) (same); Delaney v. HRD, 24 MCSR 110 (2011) (same); Caccamo v. HRD, 24 MCSR 100 (2011) (same).

Applying these principles to the undisputed material facts of this case, the Commission finds no basis upon which it would be warranted, in the exercise of its discretion, to grant equitable relief to the Appellants.

First, the facts presented to the Commission disclose no reasonable basis upon which to conclude that Revere's decision to stop the hiring process for new RPD officers at the end of September was anything other than a considered judgment that the process could not be completed before October 31, 2011, a deadline set by HRD, not Revere. One of the Appellants alleges her background investigation was nearly complete, but the status of the other Appellants' applications seems less far along. There are many steps in the hiring process, which include extensive background investigations and interviews of the applicants, before a decision can be made as to which candidates deserve to be offered employment as a RPD police officer, with authority to carry a badge and a gun, and all the power that entails. Moreover, the Appellants fell within larger tie groups of candidates. Even if one or more of the Appellants' could have been processed to completion, a fair selection process required that all candidates in their respective tie groups be vetted before final choices were made. Thus, when considering how daunting the deadline that Revere faced, the larger group of candidates, not just the four Appellants, needs to be considered. The Commission will not second-guess Revere's concern that it could not take the chance that it would be able to complete the lengthy vetting process of all interested candidates with the necessary deliberation required and within the deadline established by HRD.

Second, there is no dispute that Revere made the deliberate choice to stop the process and await the new merged list that became effective on November 1, 2011. On the facts presented, however, there is no reason to believe that decision was motivated by an intent to prejudice any of the Appellants or, in fact, that it did prejudice them. The decision-maker who decided to postpone the hiring process was not the decision maker at the time

the hiring was eventually completed in January 2012. The Appellants were not removed from the November 2011 eligible list. The main reason they did not show up on the new certification was because they had not taken the most recent exam and other candidates (including veterans) who did take that test had earned a superior place on the merged list based on the new exam results. The Commission has no reasonable basis to conclude that any of the three candidates eventually appointed were selected for reasons other than merit, or that the Appellants were sidetracked for political or ulterior reasons.

The suggestion that newspaper reports attributed different reason for discontinuing the hiring process from those asserted by Revere to the Commission are not convincing evidence of ulterior motive. The rationale presented by Revere for its decision – a tight deadline and a preference for a newer list -- makes common sense and comports with basic merit principles. The Commission finds no indication that it was not the real reason.

Fourth, even if one or more of the Appellants had been reached for consideration, either in 2011 or 2012, it would be speculative that any of them would have received one of the three offers of employment and been appointed, or if not appointed, that their non-selection would have granted them a right to file a bypass appeal. In this regard, the Commission notes that the topt-ranked Appellant was in a tie-group of three candidates who had not yet been ruled out, that all of the other Appellants were in even larger tie groups with even lower scores, and that Revere eventually only hired three candidates.

Fifth, when Revere eventually did hire, one of the hired candidates was a veteran whose statutory preference would have placed him above all of the Appellants on any certification, and the other two candidates selected from the November certification both came from the top scoring non-veteran tie group. Thus, Revere eventually hired

candidates with statutory preferences and test scores on the most recent exam that, necessarily, surpassed the ranking of any of the Appellants. Weighing the result here, which clearly comports with the preference for hiring the most highly ranked candidates from the most current eligible list, against the Appellants' choices not to take the most recent examination, the Commission finds that this case does not warrant the exercise of its discretion to grant extraordinary equitable relief that could displace other deserving candidates on the current eligible list who did take the most recent qualifying competitive examination and who have legitimately earned their places ranked ahead of the Appellants.

In sum, for the reasons stated above, Revere's Motion to Dismiss is granted and the appeals of the Appellants are hereby ***dismissed***.

Paul M. Stein

Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Marquis, McDowell & Stein, Commissioners) on March 8, 2012.

A True Record. Attest:

Commissioner

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 the 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 a Civil Service Commission's final decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

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Notice to:
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