COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street – Suite 200
Boston, MA 02114
617-979-1900

MATTHEW BOTELHO,
Appellant,
v.
TOWN OF FAIRHAVEN,
Respondent

G2-23-193

Appearance for Appellant: Joseph G. Donnellan, Esq .
Rogal & Donnellan, P.C.
100 River Ridge Drive – Suite 203
Norwood, MA 02062

Appearance for Respondent: Richard F. Massina, Esq.
Clifford & Kenny, LLP
31 Schoosett Street – Unit 405
Pembroke, MA 02359

Commissioner: Paul M. Stein

Summary of Decision

The Commission dismissed the bypass appeal brought by a candidate for Fairhaven Police Chief as premature when the present Police Chief was not expected to vacate the position until August 2024 and no appointment of a successor had been made; with the decision to become effective on August 10, 2024, so that the Appellant could reopen the appeal if he claimed that Fairhaven failed to proceed to select a new Police Chief in compliance with civil service law by that date.

DECISION AND ORDER OF DISMISSAL NISI EFFECTIVE AUGUST 10, 2024

On October 3, 2023, the Appellant, Matthew Botelho, filed this appeal with the Civil Service Commission (Commission), asserting that he had been unlawfully bypassed by the Town of Fairhaven (Fairhaven) for promotional appointment to the civil service position of Police Chief of the Fairhaven Police Department (FPD). [1] The Commission held a pre-hearing conference on

[1] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR 1.01 (formal rules), apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

November 7, 2023, at which time Fairhaven filed a Motion to Dismiss on the grounds that all positions in the FPD (and the Fairhaven Fire Department [FFD]) had been removed from civil service law and the process for selection of a new Police Chief was no longer within the purview of the Commission's jurisdiction. On November 14, 2023, Fairhaven amended its Motion to Dismiss and the Appellant filed an Opposition on November 24, 2023. On December 4, 2023, and confirmed on January 5, 2024, the Human Resources Division (HRD) informed the Commission and the parties that, after review of the documentation provided to it, HRD took the position that Fairhaven had not followed the lawfully required procedure to remove FPD and FFD personnel from civil service and that HRD considered the FPD Police Chief (along with all other FPD and FFD personnel) to be still "in Civil Service." Fairhaven disputed HRD's position and, by Procedural Order dated February 7, 2024, the appeal was scheduled for an evidentiary hearing.[2]

I held a full hearing of the appeal on March 22, 2024 as scheduled, at the University of Massachusetts School of Law in Dartmouth. The hearing was digitally recorded and a copy of the digital recording was provided to the parties.[3] I received 14 exhibits in evidence (*App.Exhs.1 through 7 and Resp.Exhs.1 through 7*). Counsel for the parties made statements on the record which, in relevant part, included admissions/stipulations of undisputed facts. Neither party called any witnesses. On April 16, 2024, I received Proposed Decisions from each party.

[2] The Commission has a related request for investigation pending concerning the status of the FPD, the FFD and the FPD Police Chief's position. Re: Appointment and Promotions in the Fairhaven Fire and Police Departments, CSC Tracking No. I-23-251.

[3] If there is a judicial appeal of the Commission's decision in this matter, the plaintiff in the judicial appeal shall supply the court with a transcript of this hearing to the extent that they wish to challenge the decision as unsupported by substantial evidence, arbitrary or capricious, or an abuse of discretion. In such cases, the Commission's digital recording shall be used to create the written transcript.

UNDISPUTED FACTS

Based on the submission of the parties, the following facts are not disputed:

1. The Town of Fairhaven (Fairhaven) is a municipal corporation organized under the laws of the Commonwealth and located within Bristol County, MA. (*Administrative Notice*)

2. Pursuant to a ballot vote in 1938, Fairhaven adopted Chapter 116 of the Acts of 1938, which "authorized the placing of the office of chief of police in the town of Fairhaven under the civil service laws." (*Resp.Exh.2*)

3. The Fairhaven Town Administrator is the appointing authority for the position of FPD Police Chief. (*Undisputed Fact; Respondent's Proposed Decision*)

4. The Appellant, Matthew Botelho, is a sworn police officer with twenty years of tenured service with the FPD. He holds the civil service title and rank of Police Sergeant, and currently serves in the functional position of FPD Administrative Sergeant, responsible to supervise daily operations of the FPD, including personnel, discipline, training, and scheduling. (*App.Exh.1*)

5. The Appellant's current assignments also include Marine Unit Supervisor, Taser Control Manager, Taser Supervisor, BolaWrap Supervisor, Simulation Supervisor, Drone Unit Supervisor and Commander, SEMLEC Drone Unit. (*App.Exh.1*)

The 2023 Selection Process for Police Chief

6. In January 2023, the Fairhaven Town Administrator, on behalf of the FPD, entered into a Delegation Agreement with the Massachusetts Human Resources Division (HRD) for a Sole Assessment Center, to be used as the sole basis for scoring and ranking candidates on an eligible list for FPD Police Chief. (*App.Exh.5*)

7. Pursuant to the Delegation Agreement, a panel of experts (seven current or retired police Massachusetts police chiefs) selected by a consultant engaged by Fairhaven conducted an

assessment center examination on June 10, 2023. The assessment center consisted of five exercises (Meeting with Local Officials, Community Meeting, Employee Harassment, Staff Meeting, and Panel Questions) designed to test the Knowledge, Skills, Abilities and Personal Traits deemed appropriate to the position of FPD Police Chief. (*App.Exh.6*)

8. Six candidates participated in the assessment center examination. The Appellant received the highest score (89.20) as well as the highest score in four of the five individual exercises. (*App.Exh.6*)

9. Based on his assessment center score, the Appellant's name appeared first on the FPD Police Chief eligible list issued by HRD on August 1, 2023. (*Administrative Notice [Fairhaven Promotional Lists, mass.gov/hrd]; HRD Letter to Commission dated November 2, 2023*)

10. After the Police Chief eligible list was issued, on or about August 22, 2023, the Fairhaven Town Administrator decided to make an independent assessment of the six candidates who had completed the assessment center by conducting an (unrecorded) interview with each candidate at which the Fairhaven HR Director was also present. (*Undisputed Fact [Appellant's Proposed Decision; Respondent's Proposed Decision]*; *App.Exh.7*)

11. On or about September 13, 2023, the Fairhaven Town Administrator informed a candidate other than the Appellant that she had selected him to succeed the current Police Chief and informed the Fairhaven Select Board to that same effect on September 18, 2023. (*Undisputed Fact [Appellant's Pre-Hearing Memo; Respondent's Pre-Hearing Memo; Respondent's Proposed Decision]*)

12. On or about September 15, 2023, the Fairhaven Town Administrator verbally informed the Appellant that he would not be chosen to become the next Police Chief. (*Undisputed Fact*

[Appellant's Pre-Hearing Memo; Respondent's Pre-Hearing Memo; Respondent's Proposed Decision])

13. The selected candidate's name appears tied for third place on the current Police Chief eligible list. The selected candidate has been the subject of discipline in 2020 and his name appears in the Peace Officer Standards Training (POST) Commission Disciplinary Records Database (*App.Exh.3*)

14. The Fairhaven Town Administrator took no action to document the decision to select a candidate other than the Appellant to become the next Police Chief, or provide the Appellant with the reasons for her decision or a written notice of his right to appeal to the Commission. (*Claim of Appeal; Appellant's Pre-Hearing Memo; Respondent's Pre-Hearing Memo*)

15. The Fairhaven Town Administrator's actions were based on the understanding that, at the time of the decision, Fairhaven had taken the necessary steps to remove the position of Police Chief (as well as all other Fairhaven police and fire service personnel) from the civil service system, and that the process for selecting a new Police Chief did not have to comply with the requirements of civil service law. (*Resp.Exhs.1 through 6; Respondent's Pre-Hearing Memo; Respondent's Motion to Dismiss*)

16. On December 4, 2023, and confirmed on January 5, 2024, HRD informed the Commission and the parties that, after review of the documentation provided to it, HRD took the position that Fairhaven had not followed the lawfully required procedure to remove its police and fire service personnel from civil service and that, in particular, HRD considered that the FPD and the position of FPD Police Chief was still "in Civil Service." (*Email exchanges between HRD and the Commission dated December 4-5, 2023, December 28, 2023, and January 5, 2024*)

17. Fairhaven now agrees with HRD[4] and the Appellant that it did not follow the required procedures to remove the position of FPD Police Chief from the civil service system and that, at present, the position of Police Chief remains a civil service position subject to all of the requirements concerning promotional appointments, among other things, prescribed by Chapter 31 of the General Laws. (*Stipulated Facts on record of March 22, 2024 Commission hearing; Respondent's Proposed Decision*)

18. Fairhaven also now agrees that, so long as the position of FPD Police Chief continues to remain in civil service, any vacancy in that position must be filled from the current FPD Police Chief eligible list in accordance with civil service law and rules. (*Stipulated Facts on record of March 22, 2024 Commission hearing; Respondent's Proposed Decision*)

19. The incumbent Police Chief intends to retire on or about August 10, 2024. (*Stipulated Facts on record of March 22, 2024 Commission hearing; Respondent's Proposed Decision*)

20. Fairhaven has begun to take the actions they believe are necessary to lawfully remove the position of Police Chief from the civil service system (as well rectify, if necessary, the process to remove all other police and fire service personnel from the civil service system). (*Stipulated Facts at March 22, 2024 Commission hearing; Administrative Notice [Letter to AGO dated 4/42024 filed in CSC Tracking No. I-23-251]*)

21. At this time, the precise process that Fairhaven must follow to remove the Police Chief from the civil service system remains unclear. At a minimum, the process will require an affirmative town vote on properly framed ballot question(s) at the biannual town election on

[4] To ensure clarity, while the Town agrees that a town-wide ballot question is required to remove the position of Police Chief from civil service, it disagrees with HRD's conclusion that a Special Act of the Legislature is required to remove the position of Fairhaven Police Chief from civil service.

November 5, 2024. It may also require other steps, including approval of a special act of the General Court, either before or after the vote. (*Stipulated Facts at March 22, 2024 Commission hearing; Respondent's Proposed Decision; Administrative Notice [Letter to AGO dated 4/42024 filed in CSC Tracking No. I-23-251]; Respondent's Proposed Decision*)[5]

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 1.01(7)(g)(3). A motion before the Commission, in whole or in part, via summary decision may be filed pursuant to 801 C.M.R. 1.01(7)(h). An appeal may be decided on summary disposition only when, "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". See, e.g., Milliken & Co. v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). See also Mangino v. HRD, 27 MCSR 34 (2014) and cases cited ("The notion underlying the summary decision process in administrative proceedings parallels the civil practice under Mass. R. Civ. P. 56, namely, when no genuine issues of material fact exist, the agency is not required to conduct a meaningless hearing."); Morehouse v. Weymouth Fire Dept, 26 MCSR 176 (2013) ("a party may

[5] The reason for the uncertainty arises because of the somewhat unusually complicated circumstances by which Fairhaven originally authorized the Police Chief and other fire and police service positions to opt into the civil service system, which leave some ambiguity as to how it must proceed to remove those positions from civil service. The substance of the issues are set forth in the Letter to the Attorney General, a copy of which is filed with the Commission in Tracking No. I-23-251, but are not relevant to the Commission's Decision in this appeal concerning the course of action to be taken so long as the Police Chief's position remains in civil service. (*See Resp.Exhs.1 through 6; Respondent's Proposed Decision*)

move for summary decision when . . . there is no genuine issue of fact relating to his or her claim or defense and the party is entitled to prevail as a matter of law.")

ANALYSIS

The parties do not dispute that Fairhaven's Town Administrator had expressed an intention to promote a candidate other than the Appellant to succeed the current FPD Police Chief at some time in the future and that, to date, no promotion has been made. The incumbent Police Chief remains in the position and is expected to continue to serve until he retires on or about August 10, 2024. Thus, at the time the Appellant filed this appeal, and at present, no vacancy has existed in the position of FPD Police Chief, and no promotion of any candidate has been made to succeed the incumbent Police Chief. Accordingly, as a matter of law, as a bypass appeal, the Appellant's appeal is premature and subject to dismissal at this time.

However, both parties now agree that at the time of the September 2023 process used by Fairhaven to select as successor to the incumbent Police Chief upon his expected retirement in August 2024, and at present, the position of FPD Police Chief has been and continues to be a civil service position subject to civil service law and rules. The parties also agree that, unless and until all steps have been completed so that the position is no longer subject to civil service law and rules, any vacancy in the position through the retirement of the incumbent Police Chief or otherwise must be filled by a promotion from the active eligible list pursuant to civil service law and rules.

The parties also agree that the September 2023 selection process that was intended to pick the next FPD Police Chief did not conform to civil service law and rules in that it ignored the requirement that, in order to select a candidate to be the next FPD Police Chief other than the Appellant, whose name appeared first on the active civil service eligible list, Fairhaven was obligated to provide written notice to the Appellant explaining to him specific reasons that

establish a "reasonable justification" to bypass him in favor of the selection of another candidate and afford the Appellant a timely opportunity for de novo review of the decision by the Commission. The prior process also was problematic in that it appeared to rely almost exclusively on subjective interview performance or other undisclosed personal preferences over the more objective assessment center examination performance of the candidates.

In the interest of ensuring that the rights of tenured civil service personnel are protected to the full extent provided by civil service law and that their rights are not infringed by further erroneous and unlawful actions or delay, a roadmap for the future process required to fill the expected vacancy in the civil service position of FPD Police Chief will facilitate that objective. At a minimum, the process must provide a viable and timely means for the Appellant to contest any future actions that allegedly infringe his civil service rights, including, but not limited to, appealing any future bypass for the position.

Accordingly, if the position of FPD Police Chief does indeed become vacant as expected, on or about August 10, 2024 or any other time while the position is still a civil service position, Fairhaven must comply with all civil service law and rules in place in order to fill that vacancy. That includes creating a certification from the existing eligible list for FPD Police Chief, complying with the statutory 2N+1 formula related to promotional appointments, and notifying bypassed candidates, in any, of their right to appeal that bypass to the Commission.

Also, Fairhaven should bear notice that, under the facts presented here, the Commission construes civil service law to require that, upon the anticipated retirement of the incumbent Police Chief, so long as the position remains in civil service, his replacement cannot be filled on an "emergency" or "temporary" basis and must be selected through a permanent promotion from the current FPD eligible list. See G.L. c. 31, § 8 (temporary promotional appointment may be made to

"fill a temporary vacancy in a permanent position if the administrator [HRD] is satisfied that such vacancy is likely to become permanent within a reasonable period of time"); G.L. c. 31, § 31 (an emergency appointment "shall be made only when the circumstances requiring it could not have been foreseen . . ."). Should Fairhaven decide to fill the position on an acting, emergency, or temporary basis, or on a permanent basis with any person other than the Appellant, and the Appellant disputes that action, the Appellant will be allowed to move to reopen this appeal immediately for an expedited adjudication of the dispute, including, without limitation, such equitable relief as may be necessary to protect the Appellant's civil service rights.

Finally, so long as the position of FPD Police Chief remains in civil service, the Commission expects that the process to replace the incumbent Police Chief will give due consideration to the results of the 2023 Sole Assessment Center. See, e.g., Peary v. Department of Correction, 34 MCSR 431 (2022); Blanchette v. City of Methuen, 34 MCSR 431 (2021); Connor v. Andover Police Dept., 30 MCSR 439 (2017); Dale v. Town of Wilmington, 28 MCSR 466 (2015), *aff'd sub nom*. Town of Wilmington v. Civil Service Comm'n, Suffolk Sup. Ct. C.A. 2015CV2963 (2016).

CONCLUSION

For the reasons stated above, Appellant's appeal under Case No. G2-23-193 is ***dismissed nisi***, to become effective on August 10, 2024.

Fairhaven shall use its best good faith efforts to conduct a fair and transparent process, consistent with this Decision and civil service law and rules, to select a candidate for permanent promotion from the current civil service eligible list to assume the position of FPD Police Chief in anticipation of the retirement of the incumbent on or about August 10, 2024; the process shall be conducted in such a manner that, if a candidate other than the Appellant is selected, the Appellant

shall be provided detailed reasons for the bypass and afforded the right to an expedited bypass appeal to the Commission under civil service law and rules.

Should the Appellant not be selected as the next FPD Police Chief and/or allege that Fairhaven is not in good faith compliance with the requirements of this Decision at any time on or before August 10, 2024, the Commission will consider a Motion to Revoke this Order of Dismissal Nisi and reopen the appeal for such expedited proceedings or investigation as may be necessary and appropriate. No additional filing fee would be required. In the absence of a Motion to Revoke within this time period, the dismissal of this appeal shall become final for purposes of G.L. c. 31, § 44, on August 10, 2024.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Markey, McConney and Stein, Commissioners) on May 2, 2024.

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 this order or 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 this Commission order or decision.

Under the provisions of G.L c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:
Joseph G. Donnellan, Esq. (Appellant)
Richard F. Massina, Esq. (for Respondent)
Ashley Logan, Esq. (HRD)