

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

KENNETH BRETON,
Appellant

v.

G1-06-20

CITY OF NEW BEDFORD,
Respondent

Appellant's Attorney:

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Respondent's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

Procedural Background

Pursuant to G.L. c. 31, § 2 (b), the Appellant, Kenneth Breton, (hereafter "Appellant" or "Breton") filed a bypass appeal with the Civil Service Commission, claiming he was bypassed for original appointment by the City of New Bedford (hereafter "City" or "Appointing Authority") to the position of police officer in the New Bedford Police Department.

A pre-hearing conference was conducted at the Commission on February 22, 2006. Subsequent to the pre-hearing, the Appointing Authority filed a Motion to Dismiss the Appellant's appeal and the Appellant filed an Answer.

Factual Background

On October 18, 2005, the City forwarded the names of nineteen (19) candidates to be selected as police officer to the state's Human Resources Division (HRD). The candidates were selected from civil service Certification No. 250131, which was issued to the City by HRD on February 16, 2005 and March 10, 2005. The names of all candidates selected for appointment to the position of police officer by the Appointing Authority appeared on the civil service list in higher positions than the Appellant's name.

Prior to the conclusion of the selection process, the City forwarded the reasons for not selecting individual candidates at the time it was determined that the individual applicant would not be selected by the City. The letters indicating reasons for not selecting the candidate were sent to HRD on an ongoing basis throughout the qualification process. As the City was not aware how far down the civil service list it would go in selecting candidates until the conclusion of the hiring process, it could not be determined at the time whether the non-selection constituted a bypass. Nevertheless, HRD reviewed the reasons for non-selection of each candidate and informed each candidate in writing if the reasons for non-selection were accepted by HRD.

In regard to the Appellant, the reason for his non-selection was that he was deemed "not qualified" after a psychological screening conducted by the City.

Appointing Authority's Argument in Favor of Motion to Dismiss

The City argues that the Commission has no jurisdiction to hear the instant bypass appeal as there was no bypass since all of the selected candidates were higher on the civil service certification issued by HRD than the Appellant.

Appellant's Argument in Opposition to Motion to Dismiss

The Appellant, in his Answer to the Motion to Dismiss, argues that a candidate who is bypassed due to failure of a psychological examination may appeal to the Civil Service Commission and that the Appointing Authority “unreasonably decided that the Appellant was not qualified psychologically”. Further, the Appellant argues that the City initially planned to fill twenty-two (22) police officer positions, but only forwarded nineteen (19) names to HRD, of which one of the names directly preceded that of the Appellant.

Moreover, the Appellant argues that, even if those hired by the City *were* higher on the certification list than him, he still has a basis for an appeal, as a conditional offer of employment was extended to him.

Conclusion

G.L. c. 31, § 27 states in relevant part:

“If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest.”

Section 2 of the state's Personnel Administration Rules (PAR.02) defines a bypass as:

“the selection of a person or persons whose name or names, by reason of score, merit preference status, court decree, decision on appeal from a court or administrative agency, or legislative mandate appear lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification.

There was no bypass regarding the instant action. Rather, the evidence demonstrates that all of the candidates selected for appointment by the City as police officer from the certification in question were listed higher on this list than the Appellant. While HRD erred when it notified the Appellant that he could his appeal his non-selection to the Civil Service Commission, this error does not change the fact that no bypass occurred in regard to the Appellant and, thus, he has no right of appeal to the Commission regarding the instant action.

For all of the above reasons, the Appointing Authority's Motion to Dismiss is allowed and the Appellant's appeal filed under Docket G1-06-20 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis and Taylor, Commissioners [Henderson – Absent]) on March 13, 2008.

A True copy. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of a Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(I), 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 shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice to:
Stephen C. Pfaff, Esq. (for Appellant)
Jane Medeiros Friedman, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)