

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

CRAIG BURTON,
Appellant

v.

G1-07-207

CITY OF LYNN,
Respondent

Appellant's Attorney:

Pro Se
Craig Burton

Respondent's Attorney:

David F. Grunebaum, Esq.
Tobin, Sullivan, Fay & Grunebaum
60 William Street
Wellesley, MA 02481

Commissioner:

Donald R. Marquis

ORDER OF DISMISSAL

Procedural Background

Pursuant to G.L. c. 31, §2 (b), the Appellant, Craig Burton, (hereafter "Appellant" or "Burton") appealed the decision of the City of Lynn (hereafter "the City" or "Appointing Authority") claiming that he was bypassed for original appointment to the position of police officer in the Lynn Police Department. A pre-hearing conference was held at the offices of the Civil Service Commission on November 14, 2007.

Factual Background

On or about December 28, 2006, the Lynn Police Department (hereafter "Department") received a certification list with the names of officers eligible for

appointment as a full-time police officer. It is undisputed that the last appointment from this certification was made from a tie group containing the Appellant's name. No applicant lower on the eligibility list than the Appellant was appointed from this certification.

Conclusion

HRD Personnel Administration Rules ("PAR"), issued pursuant to G.L. c. 31, §§ 3(d) and 5, define a bypass as "the selection of a person or persons whose name or names ... appear lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification." PAR.02. Respondent argues that the Commission must dismiss the Appellant's appeal as the case does not concern a bypass situation. Rather, Respondent maintains that the Appellant was tied with the candidate listed fourth on the list and that a tie is not a bypass.

Prior Commission decisions have well established that selection from a group of tied candidates is not a bypass. Baptista v. Department of Public Welfare, 6 MCSR 21 (1993). In Kallas v. Franklin School Department, 11 MCSR 73 (1996), the Commission held that "[i]t is well settled civil service law that a tie score on a certification list is not a bypass for civil service appeals...". Although in Cotter v. City of Boston, 73 F. Supp.2d 62, 66t (1999), the U.S. District Court held that "any selection among equally-scoring candidates...is a 'bypass' because all of their names appear highest," the Court also stated in a footnote that that "it must be remembered that the Court is here ruling on a motion to dismiss... The litigants' motion papers do not present, and the Court's independent research has not uncovered, any long-standing tie-breaking administrative procedure of either the Division or the Boston Police Department that comports with the

civil service law. Should either defendant come forward with such an administrative procedure, support the description with admissible evidence, and demonstrate that the procedure was followed in this case, the Court necessarily will give such administrative procedure appropriate deference.” Id. As of the filing of the Appellant’s appeal in the instant matter (2006), the Commission is also not aware of any such accepted tie-breaking method that would alter the result here.

The Commission does not have jurisdiction to hear this bypass appeal as there was no bypass. Rather, the evidence demonstrated that only candidates ranked higher and other candidates that were tied with the Appellant were selected. Choosing from among tied candidates does not constitute a bypass that can be appealed to the Commission.

For this reason, the Appellant’s appeal filed under Docket G1-07-207 is hereby *dismissed*.

Civil Service Commission

Donald R. Marquis
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on November 15, 2007.

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)(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 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:

Craig Burton (Appellant)

David F. Grunebaum, Esq. (for Appointing Authority)

Patrick Mulroney, Esq. (HRD)