

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**  
One Ashburton Place: Room 503  
Boston, MA 02108  
(617) 979-1900

MATTHEW J. BUSCH,  
*Appellant*

v.

E-20-134

TOWN OF WHITMAN,  
*Respondent*

Appearance for Appellant:

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Appearance for Respondent:

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Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT'S MOTION TO DISMISS**

On August 31, 2020, the Appellant, Matthew J. Busch (Appellant), a firefighter in the Town of Whitman (Town)'s Fire Department (WFD), filed a non-bypass equity appeal with the Civil Service Commission (Commission), alleging that he had been aggrieved by a decision of the Town to rescind his promotional appointment to Fire Lieutenant.

On September 29, 2020, I held a remote pre-hearing conference via Webex videoconference which was attended by the Appellant, counsel for the Town and the Town's Fire Chief. As part of the pre-hearing conference, the Town argued that the Appellant was not aggrieved as, according to the Town: a) The Appellant was not actually promoted but, rather, given a future effective date for a promotional appointment that was rescinded prior to the

promotional appointment becoming effective; and b) the Town's decision to ultimately appoint the first candidate on the certification did not result in a bypass of the Appellant, who was ranked third on the certification.

The Town's decision to rescind the appointment, or offer, was the result of a settlement agreement between the Town and the two candidates who were tied for first on the certification, both of whom filed bypass appeals with the Commission which were effectively withdrawn after the settlement agreement between the parties was reached.

As part of the September 29<sup>th</sup> pre-hearing conference, I discussed the possibility of a resolution that would forego the need for this matter to be litigated before the Commission, which took into consideration the possibility of one or two additional vacancies that could arise in the position of lieutenant in the Town's Fire Department prior to the expiration of the current eligible list. A status conference was scheduled for October 27, 2020 to receive an update on those discussions and the procedural next steps of this appeal.

Prior to the status conference on October 27<sup>th</sup>, the Town submitted a Motion to Dismiss the Appellant's appeal. On October 27<sup>th</sup>, I held a remote status conference via Webex videoconference which was attended by the Appellant, his newly-obtained counsel, counsel for the Town, the Town's Fire Chief and the Town Administrator. As part of the status conference, counsel for the Town outlined why a resolution under the possible framework discussed at the pre-hearing conference was, in the Town's opinion, not feasible. Thus, the Town filed the above-referenced Motion to Dismiss. The Appellant subsequently filed an opposition to the Town's motion, to which the Town submitted a rebuttal.

On December 9, 2020, I held a remote motion hearing which was attended by the Appellant, his counsel, counsel for the Town, the Town's Fire Chief, the former Town

Administrator and the Interim Town Administrator. Solely for the purposes of reaching a decision on the Town's motion here, I find the following facts to be undisputed or, if disputed, viewed in the light most favorable to the Appellant:

1. The Appellant is a firefighter for the Town's Fire Department. There are three (3) fire lieutenant positions in the Department.
2. In November 2018, the Appellant took and passed the promotional examination for fire lieutenant.
3. Based on the November 2018 promotional examination, an eligible list for Whitman fire lieutenant was established on March 1, 2019. Two other Whitman firefighters, Thomas Ford and Bryan Smith, were tied for first on the eligible list. The Appellant was ranked third, following Ford and Smith.
4. Firefighter Smith serves as an officer with the local firefighter's union and serves as a member of the bargaining committee that negotiates the union's collective bargaining agreement with the Town.
5. The Appellant has more seniority than Ford or Smith.
6. Looking to fill a retirement of a fire lieutenant scheduled to occur on August 29, 2020<sup>1</sup>, the Town created Certification No. 06350 on June 10, 2020. Consistent with the eligible list, the certification contained three (3) names: Ford and Smith (tied for first) and the Appellant (third).
7. The Town utilized an interview panel to assess the top three candidates, which included standard questions, a tactical fire problem, an employee counseling scenario and a public relations scenario. The interview format was similar to interviews conducted for prior

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<sup>1</sup> The incumbent's retirement date was subsequently changed to August 31, 2020.

promotions since at least 2008 or 2009, including fire lieutenant.

8. The interview panel ranked the three candidates' performance in each area as well as overall performance. The Appellant was ranked first overall of the three candidates.
9. In a notification dated June 16, 2020, which was signed by the Town's Fire Chief and the Appellant, the Fire Chief notified HRD that the Appellant was being promoted to the position of permanent fire lieutenant with an "appt. effective date" of "8/29/20".
10. In a 2 ½-page letter dated June 16, 2020, the Town's Fire Chief, who is the civil service appointing authority, notified Ford and Smith of the reasons for bypassing them for promotional appointment.
11. As part of the 2 ½-page letter, the Fire Chief wrote in part that:

"At the conclusion of the interviews [which were approximately 30-45 minutes], the members of the interview panel independently evaluated the overall performance of each candidate and all ranked Firefighter Busch as the top candidate with an overall score of 85.6 points, followed by Firefighter Ford, with an overall score of 73.4 points, and then Firefighter Smith, with an overall score of 68.4 points."

...

"Based upon Firefighter Busch's greater actual firefighter experience, his education and training, as well as his interview performance, I have concluded that Firefighter Busch is the better qualified candidate for promotion to Fire Lieutenant."
12. In a series of emails between the Town's Fire Chief and HRD between June 30<sup>th</sup> and July 1<sup>st</sup>, 2020, the Chief worked with HRD to correct an administrative error which showed the Appellant's promotion as "temporary" instead of "permanent". As part of one of those email exchanges, the Fire Chief wrote: "... he was never temporary I appointed last week (sic) it is effective August 29, maybe they thought it was temporary until that date?"
13. On June 22<sup>nd</sup> and June 24<sup>th</sup>, 2020, Ford and Smith filed bypass appeals with the Commission. Pre-hearing conferences were scheduled to be held on July 21, 2020.
14. On July 13, 2020, counsel for the Town emailed the Commission, stating:

“This office represents the Town of Whitman in the above-referenced matter that is scheduled for a pre-hearing conference on July 21, 2020 at 11:30 A.M. The Parties are in the process of discussing a resolution of [these appeals]. We are respectfully requesting that the pre-hearing conference be postponed to allow us the time to finalize the settlement terms. Counsel for the appellant has assented.”

15. The Commission responded to the above-referenced email by inquiring:

“Will the likely settlement be asking the Commission to take any action (i.e. – 310 relief) or would the likely settlement result in the appeal(s) being withdrawn?”

Counsel for Ford and Smith responded by stating: “The latter.”

16. On July 16, 2020, the Commission dismissed the appeals of Ford and Smith with a future effective date of September 18, 2020, only to be re-opened if either party sought reconsideration on or before that date. No such reconsideration was sought and the dismissal became effective on September 18<sup>th</sup>.

17. Ford and Smith, through their counsel, argued to the Town Administrator and the Board of Selectmen that the Fire Chief had impermissibly used a de facto assessment center which they argued requires a delegation agreement and bargaining with the union beforehand. The Town was informed that Ford and Smith would pursue this argument to the Civil Service Commission and the union would pursue the same argument as part of an unfair labor practice complaint.

18. An executive session was convened to discuss this matter which was attended by former Town Administrator Frank Lynam, the Fire Chief and members of the Board of Selectmen. The Board of Selectmen is not the appointing authority for appointments and promotions below the rank of Fire Chief in the Town’s fire department.

19. During that executive session, the Board of Selectmen and the Town Administrator, primarily for reasons related to litigation avoidance, agreed to a settlement agreement with Ford, Smith and the local union that would rescind the promotional appointment of the

Appellant and promote Firefighter Ford instead, effective August 31, 2020. The Town's Fire Chief, who is the appointing authority for promotional appointments to fire lieutenant, argued that the 30-45 minute interviews did not constitute a de facto assessment center.

20. The Fire Chief never told the Board of Selectmen or the Town Administrator that he was in favor of the settlement agreement, but indicated that he would "accept it" in part because he did not believe his position would be supported by the Town's legal counsel in litigation.

21. The Fire Chief subsequently signed the settlement agreement, which was also signed by the Chair of the Board of Selectmen, the Town Administrator, Ford, Smith and the president of the local firefighters' union.

22. On August 3, 2020, the Fire Chief forwarded an email to HRD stating:

"Please see the attached documents regarding Requisition #06350. The Town of Whitman reached a settlement agreement with the two members who appealed the bypass. Matthew Busch (sic) promotion to Fire Lieutenant is hereby rescinded and Thomas Ford is promoted to the position of Fire Lieutenant per the settlement agreement. I have updated NEO GOV."

23. On August 4, 2020, HRD responded, writing: "Received and Authorized."

24. Between June 16, 2020 and August 31, 2020, the Appellant and other firefighters, pursuant to provisions in the collective bargaining agreement, filled in for fire lieutenants on vacation or other leave based on seniority, for which they received additional compensation.

25. On August 31, 2020, the Appellant filed the instant non-bypass equity appeal with the Commission.

#### *Legal Standard for Summary Disposition*

An appeal may be disposed of on summary disposition 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).

*Applicable Civil Service Law*

Section 1 of G.L. c. 31 defines basic merit principles as:

“(a) 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; (b) providing of equitable and adequate compensation for all employees; (c) providing of training and development for employees, as needed, to assure the advancement and high quality performance of such employees; (d) retaining of employees on the basis of adequacy of their performance, correcting inadequate performance, and separating employees whose inadequate performance cannot be corrected; (e) assuring fair treatment of all applicants and employees in all aspects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion and with proper regard for privacy, basic rights outlined in this chapter and constitutional rights as citizens, and; (f) assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions.”

Section 2(b) of G.L. c. 31 provides that:

“No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator 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.”

Section 2(c) of G.L. c. 31 further states that “all references [in Section 2(b)] to the administrator shall be taken to mean the local appointing authority or its designated representative” and, thus, this Appellant must show here, *inter alia*, that Whitman’s Fire Chief violated some provision of Chapter 31 or the state Personnel Administration Rules.

Section 14(3) of the Personnel Administration Rules (PARs) states:

“No permanent employee shall be regarded as promoted within the requirements of these rules unless he is actually employed in the position to which he is promoted within thirty days from the date of receipt of notice by the administrator of promotion. If, however,

his promotion is approved by the administrator while he is serving temporarily in a position of the same or higher grade, he may continue to serve in such position as authorized by the administrator, and his permanent promotion shall not be affected by such temporary employment in a different grade notwithstanding the fact that he is not actually employed in the position to which he has been promoted during said thirty days.”

### *Analysis*

The issues raised here are strikingly similar to those addressed by the Commission in Harrington v. City of Pittsfield, 27 MCSR 524 (2014). The City of Pittsfield, after granting a conditional offer of employment to Harrington for original appointment as a firefighter, rescinded that offer after receiving advice from legal counsel that the City was unlikely to prevail before the Civil Service Commission if the two higher-ranked candidates filed bypass appeals with the Commission. On a motion filed by the City, the Commission, although expressing concern about the sequence of events, dismissed the Appellant’s appeal.

Here, as in Harrington, it is undisputed that the Appellant was not bypassed for promotional appointment as no candidate ranked below him was promoted to the position of fire lieutenant.<sup>2</sup> Rather, the Town rescinded the Appellant’s promotion prior to him assuming the position of fire lieutenant in favor of a higher ranked candidate. The Appellant argues that, at the time of the rescission, he had already been promoted to and was serving in the position of fire lieutenant. The undisputed facts show otherwise. The documentation submitted to HRD, signed by both the Fire Chief and the Appellant on June 20, 2020, clearly states that the effective date of the promotional appointment was to be August 29, 2020. The undisputed facts also show that the Appellant never assumed the position of permanent fire lieutenant. Rather, between June

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<sup>2</sup> No actionable bypass occurs when the final promotional examination score of an individual purporting to be aggrieved is tied with, or lower than, the individual actually promoted. *See, e.g., Cotter v. City of Boston*, 193 F. Supp. 2d 323, 354 (D. Mass. 2002), *aff'd in part, rev'd in part*, 323 F.3d 160 (1st Cir. 2003).



20<sup>th</sup> and August 29<sup>th</sup>, he and other firefighters continued the longstanding CBA-controlled practice of filling in for lieutenants on vacation and other short-term leave (i.e. – personal days) based on seniority.

Since the Appellant never served in the position of permanent fire lieutenant, a position which did not become vacant until the incumbent’s planned retirement on August 29<sup>th</sup>, he could not have been considered to have been promoted under Section 14(3) of the Personnel Administration Rules (PARs) which states in relevant part that: “No permanent employee shall be regarded as promoted within the requirements of these rules unless he is actually employed in the position to which he is promoted within thirty days from the date of receipt of notice by the administrator of promotion ...”. (emphasis added)

That turns to the issue of whether the Town is required to provide the Commission with justification for its decision to rescind its decision to promote the Appellant in favor a higher-ranked candidate and, if so, whether the Town’s decision here was contrary to basic merit principles. Although this appeal was filed under G.L. c. 31, § 2(b), I have considered that question under both Section 2(b) as well as Section 2(a) which grants the Commission broad discretionary authority to conduct investigations, upon request by, among others, an aggrieved person or on its own initiative.

I am troubled by what occurred here. In short, the Town’s Select Board and Town Manager effectively overrode the decision of the civil service appointing authority (the Fire Chief) regarding who was the most qualified person to serve as fire lieutenant based primarily on a decision (by the Board and the Town Administrator) to avoid litigation by the local union, one of whose officer’s would stand to benefit by the rescission.

I listened carefully to the Fire Chief's testimony before the Commission. He strongly opposed making a promotional appointment based primarily on reasons related to litigation avoidance and he conveyed those concerns directly to the Select Board and the former Town Administrator. Ultimately, however, the Fire Chief agreed to sign the settlement agreement (and rescind the Appellant's promotional appointment) knowing that his position was not supported by legal counsel, which was effectively confirmed by the former Town Administrator who testified that the Fire Chief doesn't decide matters related to litigation. In sum, the Town's Select Board and Town Administrator effectively usurped the Fire Chief's authority under the civil service law to make a promotional appointment to fire lieutenant.

This case is a perfect example of being careful what you wish for. By trying to avoid the possibility of litigation, at best remote and unlikely of success, Whitman set itself up for actual litigation that exposed its dubious approach to micro-managing civil service appointments to the fire service. Next time, hopefully, the Select Board and Town Administrator will respect the judgment vested in its Fire Chief as civil service law intended.

The end result here, however, is that one of two candidates tied for first on the certification for fire lieutenant received the promotional appointment and there has been no allegation that the candidate promoted does not have the sufficient knowledge, skills and abilities to serve effectively as fire lieutenant. Put another way, the Appellant is arguing that the Commission should deem him an aggrieved person because a qualified candidate ranked above him on the certification was promoted over him.

Notwithstanding the troubling sequence of events referenced above, the undisputed facts here, including that the Appellant was never promoted to fire lieutenant, and that the Fire Chief ultimately appointed a qualified person ranked above the Appellant, the Appellant cannot show

that he is an aggrieved person under Section 2(b) nor would it be appropriate for the Commission to exercise its discretionary authority under Section 2(a) to initiate an investigation.

*Conclusion*

For above reasons, the Town's Motion to Dismiss is allowed and the Appellant's appeal under Docket No. E-20-134 is *dismissed*.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Ittleman, Stein and Tivnan, Commissioners) on June 17, 2021.

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:

Ashly W. Eikelberg, Esq. (for Appellant)  
Michelle A. McNulty, Esq. (for Respondent)