

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

RYAN COSTA,
Appellant
v.

Docket No.: G1-14-238

CITY OF BROCKTON,
Respondent

Appearance for Appellant:

Galen Gilbert, Esq.
294 Washington Street, Suite 351
Boston, MA 02108

Appearance for Respondent:

Katherine Feodoroff, Esq.
City of Brockton
45 School Street
Brockton, MA 02301

Commissioner:

Cynthia Ittleman¹

DECISION ON RESPONDENT'S MOTION TO DISMISS

On October 15, 2014, Ryan Costa ("Appellant"), pursuant to G.L. c. 31, § 2(b), filed this appeal with the Civil Service Commission ("Commission"), regarding the decision of the City of Brockton ("Respondent") to bypass him for appointment to the position of permanent, full-time firefighter. A prehearing conference was held at the offices of the Commission on November 18, 2014, at which time both parties filed prehearing memoranda, the Respondent filed a Motion to Dismiss ("Motion"), and the Commission provided copies of information provided by the state Human Resources Division ("HRD") to the parties. On November 25, 2014, the Appellant filed an

¹ The Commission acknowledges the assistance of Law Clerk Craig E. Reeder in the drafting of this decision.

Objection to Motion to Dismiss (“Opposition”). The Commission conducted a hearing on the Motion on January 7, 2015.² The hearing was digitally recorded and both parties were sent a CD of the recorded hearing. For the reasons stated herein, the Motion is granted and the appeal is denied.

FINDINGS OF FACT

Based on the Motion (with exhibits) and the Appellant’s Opposition thereto (without exhibits) and taking administrative notice of all matters filed in the case and pertinent statutes, regulations and policies, and caselaw (including, without limitation, the Commission’s ruling in Ryan Costa v. Brockton, Docket No. G1-12-62 (“prior Costa decision”) and considering reasonable inferences from the evidence; a preponderance of the evidence establishes the following findings of fact:

1. The Appellant took the civil service examination for the position of firefighter on April 28, 2012. The Respondent and HRD have an agreement whereby HRD delegates hiring responsibilities to the Respondent upon HRD’s issuance of a Certification after a firefighter examination. The Respondent requested a Certification from HRD to fill twelve (12) firefighter positions from the 2012 examination. To this end, HRD issued Certification No. 01080 to the Respondent on September 27, 2013. The Appellant was tied with two other candidates ranked 14th on the Certification and fell within the 2N(the number of candidates to be appointed)+1 formula required by Personnel Administrator rule (“PAR”).09.

² The Appellant failed to appear at the hearing. When asked the reason for his failure to appear, counsel stated that he informed his client that he need not appear. I advised counsel that his statement was incorrect. As indicated in notices to the parties of scheduled matters, if a party fails to appear, future proceedings shall be cancelled and an Order to Show Cause shall issue. Only upon receipt of good cause in writing accepted by the Commission (not including conflicting schedules) shall further proceedings be scheduled and the matter may be subject to dismissal.

The Respondent hired twelve (12) firefighters, six (6) of whom were ranked lower than the Appellant. In (Prehearing Conference Stipulation (“Stipulation”); HRD letter dated November 14, 2014 provided to parties at prehearing conference (“HRD Letter”); Administrative Notice)

2. By letter signed by Mayor Balzotti and dated December 18, 2013, the Respondent notified the Appellant in full as follows:

Enclosed please find a copy of a letter from me as the appointing authority for the City of Brockton Fire Department stating the selection reasons associated with the candidates (sic) appointment below your name from certification number 01080 for the position of Firefighter. In addition a correspondence stating the reasons associated with your non-selection has been included.

You have a right to appeal this determination by filing your appeal, in writing, within sixty calendar days of receipt of this notice; (sic) with the Civil Service Commission, One Ashburton Place, room 503, Boston, MA 02108. You can visit the Commission’s website at www.amss.gov/csc to download an appeal form and receive information regarding filing fees. Please file a copy of this correspondence and all enclosures with your appeal to the Commission.
(Motion, exhibit B)

3. The letter enclosed with the letter referenced in Fact #2 was also signed by Mayor Balzotti and dated December 18, 2013. The enclosed letter states, in full:

As a result of the Brockton Fire Department background investigation and oral interview process, you have been found unsuitable for a Public Safety Position in the Brockton Fire Department for the following reasons:

1. You failed to provide proper and sufficient residency documentation at the time of the interview for the relevant timeframe.
2. Residency documentation submitted by you for the first few months of the relevant timeframe had been previously ruled as insufficient by the Civil Service Commission, and residency documentation provided for time period immediately following was equally insufficient pursuant to the Human Resources Division *Residency Preference Claim & Employment Selection Location Worksheet*, which provides that ‘Your residence ... is the place where you actually lived and intended as your permanent home. A temporary living place, such as ... a relative’s or friend’s house or apartment, etc (sic) is not a residence.’

Documentation provided by you indicated that during the relevant timeframe you lived with friends and then at an aunt's.

3. During the hiring process, the Department was made aware that on October 29, 2013, you were dismissed from the Municipal Police Training Academy for untruthfulness, and you were subsequently terminated from your position as Student Police Officer with the City of Brockton on November 1, 2013.

For these reasons, the City finds you to be an unsuitable candidate for a Public safety position; therefore we are notifying you that your name has been bypassed for the position of firefighter for the City of Brockton.

Id.

4. Fire Chief Richard Francis wrote a letter dated December 12, 2013 to Mayor Balzotti, which is nearly identical to the Mayor's letter quoted in Fact #3.³ The only differences were that the Mayor's letter referred directly to the Appellant ("you"), rather than as "Mr. Costa" and the Fire Chief's letter to the Mayor added, "We request Mr. Costa's name be bypassed at this time. As a result of the previously stated reasons, we find that Candidate Costa is unsuitable for a public safety position and therefore has been removed from the selection process." (December 12, 2013 Letter from Chief Francis to Mayor Balzotti (Chief Francis' Letter))

5. On October 15, 2014, the Appellant filed the instant bypass appeal.

(Administrative Notice)

DISCUSSION

Legal Standard for Consideration of a Motion to Dismiss

After the ruling in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007), the Massachusetts Supreme Judicial Court held that an adjudicator cannot grant a motion to

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dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). At the Commission, the Standard Adjudicatory Rules of Practice and Procedure (hereinafter "Rules") govern administrative adjudication. 801 CMR 1.01, *et seq.* However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Statute of Limitations

The time for appeal to the Commission from most actions, including, for example, disciplinary appeals, is set by statute and all other appeals for which a specific statutory time or rule is not prescribed must be filed within a thirty (30) day period from the notice of the action that gives rise to the appeal. *See, e.g.*, G.L. c. 31, §41; 801 CMR 1.01(6)(b) (adopted by the Commission, Sept. 2, 1999) (providing, "Any Person with the right to initiate an Adjudicatory Proceeding may file a notice of claim for an Adjudicatory Proceeding with the Agency within the time prescribed by statute or *Agency rule*. In the absence of a prescribed time, the notice of claim must be filed within 30 days from the date that the Agency notice of action is sent to a Party."(emphasis added))

G.L. c. 31 does not provide a statute of limitations for bypass appeals filed pursuant to G.L. c. 31, s. 2(b). However, section 2 of Chapter 31 explicitly vests the Commission with broad discretion in such matters. Specifically, it states,

2. In addition to its other powers and duties, the commission shall have the following powers and duties: ...

(g) To adopt such rules of procedure as necessary for the conduct of its proceedings.

Id.

Pursuant to this authority, the Commission has established a sixty(60)-day period within which a person who claims to be aggrieved by an appointing authority's decision to bypass the employee for appointment or promotion in favor of another candidate must file his or her appeal with the Commission for review pursuant to G.L. c. 31. (Commission Rule effective October 1, 2000) This sixty(60)-day window commences upon the employee's receipt of notice that makes the employee aware of his or her non-selection and right of appeal to the Commission.

The Parties' Arguments

The Respondent avers that the Appellant's appeal is untimely since he was bypassed on December 18, 2013 but did not file an appeal at the Commission until October 15, 2014. Specifically, the statute of limitations adopted by the Commission requires that such appeals shall be filed within sixty(60)-days of receipt of notice that makes the employee aware of his or her non-selection and right of appeal to the Commission and the Appellant did not appeal the bypass until nearly ten (10) months after he was so made aware, the appeal is untimely.

Further, the Respondent argues that *res judicata* bars the Appellant from relitigating whether he is entitled to a Brockton residence preference for having resided there at the appropriate time and whether the Appellant failed to complete the Background Investigation Form completely and accurately since the Commission ruled in the prior Costa decision that those were adequate reasons for bypassing the Appellant

after the 2010 firefighter exam.⁴ In any event, the Respondent asserts that it had reasonable justification to bypass the Appellant for the foregoing two reasons as well as its determination that the Appellant was discharged from the police academy for untruthfulness.

The Appellant avers that his appeal is timely since there is no applicable statute of limitations for filing a bypass appeal in G.L. c. 31. Further, he asserts that the Commission's sixty(60)-day statute of limitations lacks authority. In addition, the Appellant states that under G.L. c. 31, s. 27⁵, HRD must approve the reasons for bypassing a candidate, which HRD did not do in this case, and HRD cannot delegate to a city or town the review its own bypass decisions. Further still, the Appellant states, since HRD has not yet approved of the Respondent's bypass reasons, his appeal cannot be untimely. Lastly, the Appellant disputes that *res judicata* is applicable here. Rather, he states, a candidate can appeal to the Commission each time he is bypassed and each such appeal should be considered on its own merits, de novo, even if the appointing authority provides similar bypass reasons in each of the different appeals.

⁴ At the hearing, the Respondent noted that its brief referred to an inaccurate address.

⁵ "Section 27. Except as provided otherwise by section fifteen, if the administrator certifies from an eligible list the names of three persons who are qualified for and willing to accept appointment, the appointing authority, pursuant to the civil service law and rules, may appoint only from among such persons. If such eligible list contains the names of fewer than three such persons, the appointing authority may appoint from among those persons or may request authorization to make a provisional appointment pursuant to sections twelve, thirteen and fourteen.

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. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department."

Analysis

The Appellant's factual allegations are not enough to raise a right to relief above the speculative level, even assuming that they are true. The reason therefor is that the appeal is untimely. The bypass statute of limitations, established in the absence of a statutory one in G.L. C. 31, is sixty (60) days. As noted, above, G.L. c. 31, s. 2 invests the Commission with broad discretion in certain matters. Section 2(g) explicitly authorizes the Commission to "adopt such rules of procedure as necessary for the conduct of its proceedings". *Id.* The Commission enacted the sixty(60)-day statute of limitations for bypass appeals in the year 2000.⁶ Absent a statute of limitations, there would be no finality to appointing authorities' hiring processes as a practical matter and related evidence may be increasingly limited and/or of decreasing reliability the further in time the appeal is filed from the actions about which the appellant complains. Here, there is no dispute that the Appellant was informed by letter dated December 18, 2013 that the Respondent had bypassed him. There is also no dispute that the Appellant did not file the instant appeal at the Commission until October 15, 2014, approximately ten (10) months after the letter was sent to him, or eight months after the statute of limitations. As a result, the Appellant's allegations do not raise a right to relief above the speculative level. In view of the untimeliness of the appeal, the Commission need not address the remaining issues raised by the parties.⁷

⁶ The sixty(60)-day statute of limitations adopted by the Commission is twice as long as that provided in the Standard Rules of Adjudicatory Practice and Procedure (801 CMR 1.01(6)(b)).

⁷ The Commission has ruled that if there is a question concerning HRD's interpretation of G.L. c. 31, s. 27, regarding its authority to delegate approval of bypass determinations to appointing authorities, which would affect hundreds of appointments, that is a matter better left to the courts. See Malloch v. Town of Hanover (G2-12-278) and Sherman v. Town of Randolph (G2-10-192), which were both appealed to

Conclusion

For the reasons stated herein, the Motion is granted and the appeal filed under Docket No. G1-14-103 is hereby *dismissed*.

Civil Service Commission

/s/ Cynthia A. Ittleman

Cynthia A. Ittleman, Esq., Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell and Stein, Commissioners) on January 22, 2015.

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 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.

Notice to:

Galen Gilbert, Esq. (for Appellant)

Katherine Feodoroff, Esq. (for Respondent)

John Marra, General Counsel (HRD)

Superior Court where the courts reached opposing results. See Malloch v. Town of Hanover, SUCV2013-01169-G (Feb. 28, 2014) and Sherman v. Town of Randolph, SUCV2012-01912 (July 29, 2013). The cases were appealed to the Supreme Judicial Court, where oral argument was heard on January 5, 2015, and decisions are pending. Malloch v. Town of Hanover, SJC No. 11713; Sherman v. Town of Randolph, SJC No. 11711.