

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

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

JOSEPH DEPINA,
Appellant
v.

Case No.: G1-18-213

**BOSTON FIRE
DEPARTMENT,**
Respondent

ORDER OF DISMISSAL

On November 7, 2018, the Appellant, Joseph Depina (Mr. Depina), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection by the Boston Fire Department (BFD) for original appointment as a firefighter.

On December 11, 2018, I held a pre-hearing conference which was attended by Mr. Depina and counsel for the BFD.

As part of the pre-hearing conference, relying on documentation provided by the BFD and the state's Human Resources Division (HRD), the parties agreed that Mr. Depina's name appeared on Certification No. 04922 and that he was tied in the 19th rank with other candidates, some of whom were appointed. Importantly, no candidate ranked below 19th was appointed from this Certification.

The Commission has long held that the appointment of a candidate among those with the same rank on a Certification is not a bypass. See Edson v. Reading, 21 MCSR 453 (2008) (upheld by Superior Court; Edson v. Civil Service Comm'n, Middlesex Sup. Ct. No. 08-CV3418 (2009); Bartolomei v. Holyoke, 21 MCSR 94 (2008); Coughlin v. Plymouth, 19 MCSR 434 (2006); Kallas v. Franklin School Dep't, 11 MCSR 73 (1998); Servello v. Dep't of Correction, 28 MCSR 252 (2015); See also Thompson v. Civil Service Comm'n, Suffolk Superior Ct. No. MICV 1995-5742 (1996) (concluding that selection among tied candidates does not present a bypass); Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 261 (2001) ("In deciding bypass appeals, the commission must determine whether the appointing authority has complied with the requirements of Massachusetts civil service law for selecting lower scoring candidates over higher scoring candidates); Cotter v. Boston, 193 F. Supp. 2d 323, 354 (D. Mass. 2002) (citing HRD's guide), *rev'd in part on other grounds*, 323 F.3d 160 (1St Cir. 2003) ("when a civil service exam results in a tie -score, and the appointing authority ... promotes some but not all of the candidates, no actionable `bypass ' has taken place in the parlance of... civil service")

Since no candidate ranked below Mr. Depina was appointed to the position of firefighter, there was no bypass. Further, Mr. Depina's appeal was not received by the Commission within sixty (60) days of being notified of his non-selection, which is beyond the 60-day deadline for filing such appeals. For these reasons, Mr. Depina's appeal under Docket No. G1-18-213 is hereby *dismissed*.¹

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 20, 2018.

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)(1), 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:

Joseph Depina (Appellant)
Louis Scapicchio, Esq. (for Respondent)

¹ At the conclusion of the pre-hearing conference, Mr. Depina stated that he wanted to withdraw his appeal and signed a voluntary withdrawal form. He subsequently contacted the Commission and stated that he wanted to rescind the withdrawal.