

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

JOSEPH DeSIMONE,
Appellant

v.

G2-10-328

CITY OF CAMBRIDGE,
Respondent

Appellant's Attorney:

Pro Se
Joseph DeSimone

Respondent's Attorney:

Philip Collins, Esq.
Collins, Loughran & Peloquin, P.C.
320 Norwood Avenue
Norwood, MA 02062

Commissioner:

Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION UNDER G.L. c. 31, § 2(a)

On November 24, 2010, the Appellant, Joseph DeSimone (Appellant), filed a bypass appeal with the Civil Service Commission (Commission) contesting his non-selection for promotional appointment to the position of Police Lieutenant by the City of Cambridge (City).

On December 9, 2010, the City filed a Motion to Dismiss the Appellant's appeal arguing that the Appellant had not been bypassed as none of the candidates selected were ranked below him on the Certification.

On December 21, 2010, a pre-hearing conference was held at the offices of the Commission at which time the Appellant submitted a reply to the City's Motion to Dismiss. I heard oral argument from both parties. Based on the oral argument of the parties, it was apparent that the Appellant was asking the Commission to exercise its broad authority under G.L. c. 31, § 2(a) to conduct an investigation of the promotional process. I allowed him thirty (30) days to file a request to amend his appeal requesting an investigation along with a brief supporting why such investigation should be initiated. The Appellant submitted his motion to amend his appeal and supporting brief to the Commission on January 20, 2011 and the City submitted a reply on March 9, 2011. The briefs by both parties were voluminous. Subsequent to these submissions, both parties submitted various correspondence and procedural motions to the Commission.

Based on the submissions of the parties and the statements at the pre-hearing conference, the following facts appear to be undisputed:

1. The Appellant is employed as a Sergeant in the City of Cambridge's Police Department.
2. In 2007, the Appellant took and passed a promotional examination for Police Lieutenant. He received a score of 88.
3. On March 30, 2008, the state's Human Resources Division (HRD) established an eligible list of candidates for Police Lieutenant.
4. In September 2010, the City sought to fill four (4) Police Lieutenant vacancies.
5. The Appellant's name was tied for fourth with two (2) other individuals on the Certification created by the City.
6. The City subsequently promoted the three (3) candidates ranked above the Appellant.

7. As a tie-breaking method for the fourth position, the City Manager conducted interviews with the three tied candidates.
8. What occurred at that the Appellant's interview with the City Manager is in dispute.
9. The Appellant alleges in his brief that the City Manager told him that members of the Cambridge Police Department had informed him that DeSimone was angry and disgruntled and that he (the City Manager) could not be impartial regarding the selection process.
10. In an affidavit submitted as part of the City's reply, the City Manager unequivocally denies making the above-referenced statements to the Appellant. The City Manager states that he was surprised and disappointed by the Appellant's behavior during the interview and he showed himself to have "poor self control, little capacity for self-reflection ... impulsive, reckless and eager to attack the performance and motivation of others ...".
11. The City Manager selected one of the other tied candidates for promotion.
12. In his brief to the Commission, the Appellant alleges that the selection of the fourth candidate was predetermined and that years of personal bias against him made it impossible for him to be fairly considered for promotion.

Conclusion

Years of Commission decisions have well-established that when a civil service exam results in a tie-score, and the Appointing Authority promotes some but not all of the tied candidates, no "bypass" has occurred. This is the same conclusion that Judge Young finally reached in Cotter in the District Court's decision on the merits. See Cotter v. City

of Boston, 193 F. Supp.2d 62, 323 (D. Mass. 2002), rev'd other grounds, 323 F.3d 160 (1st Cir.), cert.den., 540 U.S. 825 (2003).

The policy and practice within civil service that selection from amongst tied candidates is not considered a bypass has also been recognized by the Massachusetts Superior Court. In Thompson v. Civil Service Commission, No. 95-5742, Middlesex Superior Court (1996), the Superior Court affirmed the Commission's dismissal of a bypass appeal where the plaintiff's "allegations of 'bypass' were incorrect since no individual selected received a score lower than his." The Superior Court noted that "[i]f a person selected has a lower score than an individual not selected then the person 'bypassed' must receive a statement of reasons for the bypass." Id. The Court found that the plaintiff in Thompson had not been bypassed because the individuals who had been appointed all had the same or higher scores. Id. Thus, he was not an "aggrieved person" within G.L. c. 31. Id.

Here, as in Thompson, the Appellant has not been bypassed and the Commission has no jurisdiction to hear his appeal under Section 2 (b).

As referenced above, I provided the Appellant with the opportunity to seek to amend his appeal and request an investigation under Section 2(a). I have carefully reviewed all of the documents submitted to the Commission by both parties.

Based on that review, I conclude that there is insufficient information to warrant a Commission investigation under Section 2(a). The statute ... confer[s] significant discretion upon the Civil Service Commission in terms of what response and to what extent, if at all, an investigation is appropriate. BPPA et al v. Civ. Serv. Comm'n and City of Boston, No. SUCV2006-4617, Suffolk Super. Court (2008).

The documents submitted, *including those penned by the Appellant himself*, paint the picture of an eyebrow-raising interview in which the Appellant opted to air years worth of grievances against the Cambridge Police Department and former Police Commissioners, as opposed to articulating valid reasons for his own promotion. Further, the Appellant appears to have reached some fairly over-the-top conclusions about relatively benign conversations and documents in which he was either referenced and/or was a recipient.

The Commission does not hesitate to act when there is sufficient evidence to show that political or personal bias may have potentially infected a selection process. This is not one of those cases. The Appellant's bypass appeal under Docket No. G2-10-328 is *dismissed* and his request for investigation is denied.¹

Civil Service Commission

Christopher C. Bowman, Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on June 16, 2011.

A true record. Attest:

Commissioner

Either party may file a motion for reconsideration within ten days of the receipt of this 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)

¹ The request by fellow Police Sergeant Joseph Keough to intervene is denied.

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:

Joseph DeSimone (Appellant)

Philip Collins, Esq. (for Appointing Authority)