COMMONWEALTH OF MASSACHUSETTS

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

SCOTT D. DOLE,
Appellant

v. E-22-018

TOWN OF READING,
Respondent

Appearance for Appellant: *Pro Se*
Scott D. Dole

Appearance for Respondent: James M. Pender, Esq.
Morgan, Brown & Joy, LLP
200 State Street; 11th Floor
Boston, MA 02109

Commissioner: Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

On February 8, 2022, the Appellant, Scott D. Dole, filed a non-bypass equity appeal with the Civil Service Commission (Commission), contesting his non-selection for promotion to Fire Lieutenant in the Town of Reading (Town)'s Fire Department. On March 22, 2022, I held a remote pre-hearing conference which was attended by the Appellant, counsel for the Town, the Town's Fire Chief and the Town's Assistant Fire Chief. At the pre-hearing conference, the parties stipulated to the following:

A. The Appellant is a firefighter in the Reading Fire Department.

B. On November 21, 2020, the Appellant took the promotional examination for fire lieutenant and received a score of 88.

C. On March 1, 2021, the state's Human Resources Division (HRD) established an eligible list

for Reading fire lieutenant and forwarded it to the Town.

D. In January 2022, a vacancy became open in the Reading Fire Department.

E. At the time, the Appellant was tied with two other individuals for first on the above-referenced eligible list.

F. Another candidate tied with the Appellant was promoted to fire lieutenant.

G. The Appellant was not bypassed for appointment, but, rather, non-selected from a group of tied candidates on the eligible list.

At the pre-hearing conference, the Appellant did not dispute that he was not bypassed for appointment, but, rather, argued that the Commission should review whether the promotional process was consistent with basic merit principles under Chapter 31. Both at the pre-hearing conference and in his pre-hearing memorandum, the Appellant argued that the interview process was too subjective. At the pre-hearing conference, the Appellant reported that, prior to the interview, the Assistant Fire Chief purportedly stated words to the effect, "the Chief is going to promote who he wants anyway." I informed the Appellant that, even when viewing the facts most favorable to him, and accepting all of his statements as true, this matter did not appear to rise to the level of triggering an investigation by the Commission under Section 2(a).

For all of the above reasons, and because the Appellant opted not to withdraw his appeal, I provided the Town with 30 days to file a motion to dismiss and the Appellant with 30 days thereafter to file an opposition. The Town submitted a motion to dismiss and the Appellant did not submit an opposition.

Summary Decision Standard

When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the party may move, with

or without supporting affidavits, for summary decision on the claim or defense. 801 CMR 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law—i.e., "viewing the evidence in the light most favorable to the non-moving party", the substantial and credible evidence established that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case", and has not rebutted this evidence by "plausibly suggesting" the existence of "specific facts" to raise "above the speculative level" the existence of a material factual dispute requiring an evidentiary hearing. See, e.g., Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). Accord Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6 (2008); Maimonides School v. Coles, 71 Mass. App. Ct. 240, 249 (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss).

Applicable Civil Service Law

Section 2(b) of G.L. c. 31 authorizes appeals to the Commission by persons aggrieved by certain actions or inactions by the state's Human Resources Division (HRD) or, in certain cases, by appointing authorities to whom HRD has delegated its authority, and which actions have abridged their rights under civil service laws. The statute provides:

> *No person shall be deemed to be aggrieved . . . unless such person has made specific allegations* in writing that a decision, action, or failure to act on the part of the administrator [HRD] 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*. Id. (*emphasis added*)

Chapter 310 of the Acts of 1993 prescribes the discretionary authority granted to the Commission to remediate a violation of civil service law:

> *If the rights of any person* acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder *have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights* notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights. (*emphasis added*)

The fundamental mission of Massachusetts civil service law is to enforce "basic merit principles" described in Chapter 31, which command, among other things, "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" and "assuring that all employees are protected against coercion for political purposes, and are protected from arbitrary and capricious actions." G.L. c. 31, § 1. A mechanism for ensuring adherence to basic merit principles in hiring and promotion is the process of conducting regular competitive qualifying examinations, open to all qualified applicants, and establishing current eligible lists of successful applicants from which civil service appointments are to be made based on the requisition by an appointing authority of a "certification" which ranks the candidates according to their scores on the qualifying examination, along with certain statutory credits and preferences. G.L. c. 31, §§ 6 through 11, 16 through 27. In general, each position must be filled by selecting one of the top three most highly ranked candidates who indicate they are willing to accept the appointment, which is known as the "2n+1" formula. G.L. c. 31, § 27; PAR.09.

In order to deviate from the rank order of preferred hiring, and appoint a person "other than the qualified person whose name appears highest", an appointing authority must provide written reasons – positive or negative, or both – consistent with basic merit principles, to affirmatively

justify bypassing a lower ranked candidate in favor of a more highly ranked one. G.L. c. 31, §§ 1 and 27; PAR.08. A person who is bypassed may appeal that decision under G.L. c. 31, § 2(b) for a de novo review by the Commission to determine whether the bypass decision was based on a "reasonably thorough review" of the background and qualifications of the candidates' fitness to perform the duties of the position and was "reasonably justified". Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 688 (2012), citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006). and cases cited; Beverly v. Civil Service Comm'n 78 Mass. App. Ct. 182 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

Bypass

The Commission has consistently construed the plain meaning of the language in G.L. c. 31, § 27 to infer that selection from a group of tied candidates is not a bypass of a person whose "name appears highest", for which an appeal may be taken as of right to the Commission. See, e.g., Edson v. Town of Reading, 21 MCSR 453 (2008), *aff'd sub nom.*, Edson v. Civil Service Comm'n, Middlesex Sup.Ct. No. 2008CV3418 (2009) ("When two applicants are tied on the exam and the Appointing Authority selects one, the other was not bypassed"); Bartolomei v. City of Holyoke, 21 MCSR 94 (2008) ("choosing from a group of tied candidate does not constitute a bypass"); Coughlin v. Plymouth Police Dep't, 19 MCSR 434 (2006) ("Commission . . . continues to believe that selection among a group of tied candidates is *not* a bypass under civil service law"); Kallas v. Franklin School Dep't, 11 MCSR 73 (1996) ("It is well settled civil service law that a tie score on a certification . . is not a bypass for civil service appeals"). See also Cotter v. City of Boston, 193 F.Supp.2d 323, 354 (D.Mass. 2002), *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 tied candidates, no actionable 'bypass' has taken place in the parlance of the Civil Service Commission.")

Here, the record shows that the Town did not appoint any candidate ranked below the Appellant on the certification. Rather, after conducting interviews, the Town promoted another candidate tied with the Appellant to fire lieutenant. Thus, for the reasons explained above, as a matter of law, the Town correctly asserts that the Appellant's non-selection is not a bypass and the Town is not required to provide written reasons for his non-selection over others in the tie group and he does not have a statutory right of appeal to the Commission for a de novo review of the "reasonable justification" for the reasons for selecting other candidates in the ties group.

Section 2(a) Investigation

The Appellant did not specifically request that the Commission exercise its independent discretion to open an investigation into his non-selection, but, as noted above, the Commission has the authority to do so. Section 2(a) grants the Commission broad discretion upon receipt of an allegation of a violation of Chapter 31's provisions to decide whether and to what extent an investigation might be appropriate. See, e.g., Dennehy v. Civil Service Comm'n, Suffolk Superior Court C.A. No. 2013-00540 (2014) ("The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion.") See also Erickson v. Civil Service Comm'n, Suffolk Superior Court C.A. No. 2013-00639 (2014); Boston Police Patrolmen's Association et al v. Civil Service Comm'n, Suffolk Superior Court C.A. No. 2006-4617 (2007). The Commission's exercise of its power to investigate is not subject to the general rules for judicial review of administrative agency decisions under G.L. c. 30A, but can be challenged solely for an "abuse of discretion". See

Erickson v. Civil Service Comm'n, Suffolk Superior Court C.A. No. 2013-00639 (2014), citing Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321-22 (1991).

The Commission exercises its discretion to conduct an investigation only "sparingly" and, typically, only when there is clear and convincing evidence of either systemic violations of Chapter 31 or an entrenched political or personal bias that can be rectified through the Commission's affirmative remedial intervention into the hiring process. See, e.g., Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011) (declining to investigate alleged age discrimination and favoritism in provisional promotions, but admonishing agency that "certain actions . . . should not be repeated on a going forward basis"). Compare with In Re: 2010/2011 Review and Selection of Firefighters in the City of Springfield, 24 MCSR 627 (2011) (investigation into hiring spearheaded by Deputy Fire Chief which resulted in his son's appointment and required reconsideration of numerous candidates through a new hiring cycle conducted by outsiders not connected with the Springfield Fire Department); In Re: 2011 Review and Selection of Permanent Intermittent Police Officers By the Town of Oxford, CSC No. 1-11-280 (2011) (investigation of alleged nepotism in hiring Selectman's relatives required reconsideration of all 19 candidates through an new independent process); Dumont v. City of Methuen, 22 MCSR 391 (2009), findings and orders after investigation, CSC No. I-09-290 (2011) (rescinding hiring process and reconsideration of all candidates after Police Chief had participated in selection of her niece).

Here, unlike other cases the Commission has investigated, this record lacks the kind of credible evidence to imply that the selection of another candidate was tainted by clearly unlawful bias or favoritism by the appointing authority. Rather, the Appellant alleges that the interview process was too subjective and he interpreted comments made to him by the Deputy Fire Chief as suggesting that the decision was potentially pre-determined. While those issues may be

appropriate for further review as part of a bypass appeal, they do not, standing alone, justify the initiation of an investigation by the Commission when no bypass has occurred.

Conclusion

For all of the above reasons, the Appellant's non-bypass equity appeal filed pursuant to G.L. c. 31, § 2(b) is ***dismissed*** and the Commission opts not to initiate an investigation under Section 2(a).

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Stein and Tivnan, Commissioners) on June 2, 2022.

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 to:
Scott D. Dole (Appellant)
James Pender, Esq. (for Respondent)