COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION
One Ashburton Place - Room 503
Boston, MA 02108
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DANA DUPUIS,
Appellant
v.

TOWN OF BOURNE,
Respondent

NORMAN SYLVESTER,
Intervenor

Docket No.: G2-15-74

Appearance for Appellant:	Betsy Ehrenberg, Esq. Pyle Rome Ehrenberg PC 2 Liberty Square, 10th Floor Boston MA 02109
Appearance for Respondent:	Robert S. Troy, Esq. Troy Wall Associates 99 Old Kings Highway Sandwich MA 02563
Appearance for Intervenor:	John M. Collins, Esq. 15 Lighthouse Road Aquinnah, MA 02535
Commissioner:	Paul M. Stein

DECISION ON RESPONDENT/INTERVENOR'S JOINT MOTION FOR SUMMARY DECISION

The Appellant, Dana Dupuis, acting pursuant to G.L.c.31,§2(b), appeals to the Civil Service Commission (Commission) to contest the decision of the Respondent, Town of Bourne (Bourne), acting pursuant to delegation from the Massachusetts Human Resources Division (HRD), to decline to appoint him to the civil service position of Fire Chief with the Bourne Fire Department (BFD). Following the pre-hearing conference held on June 12, 2015 and pursuant to procedural orders issued thereafter, the successful candidate, and current Bourne Fire Chief Norman Sylvester, was permitted to intervene. On October 22, 2015, Bourne and Chief Sylvester filed a

"Joint Motion for Summary Decision", seeking to have the appeal dismissed for lack of jurisdiction, claiming that the Appellant had been erroneously granted a statutory veteran's preference which placed him at the top of the eligible list and, without the statutory preference, the Appellant did not rank above Chief Sylvester so that no bypass occurred. The Appellant opposed the motion as did HRD. A hearing on the Joint Motion for Summary Decision was held on October 27, 2015. For the reasons set forth below, the Joint Motion for Summary Decision is allowed and the Appellant's appeal is dismissed for lack of jurisdiction.

STATEMENT OF UNDISPUTED FACTS

Based on the parties' submissions and argument of counsel, I find that, viewing the evidence most favorably to the Appellant, the following relevant facts are not in material dispute:

1. The Appellant, Dana Dupuis, is a tenured civil service employee of the BFD. He became a permanent firefighter in 1997, after serving more than six years as a call firefighter. He was promoted to the rank of acting Lieutenant in 2013 and became Acting Deputy Chief in January 2014. (*Appellant's Pre-Hearing Memorandum & Exh. E*)

2. Deputy Dupuis served as a member of the United States Air Force from 1984 until 1990 and from 1990 to 2007 as a member of the Massachusetts Air National Guard. He retired in 2007 after 22 years of honorable service, having achieved the rank of Technical Sergeant (E-6). (*Appellant's Pre-Hearing Memorandum, Exh. E*)

3. For reasons he did not explain, when Deputy Dupuis initially was appointed as a Bourne firefighter, he did not claim a veteran's preference and was hired from an eligible list on which his name appeared in rank order with other non-veterans. (*Appellant's Opposition {Dupuis Aff't]*)

4. The Intervenor, Norman Sylvester, prior to his appointment as Bourne Fire Chief, served

as a Lieutenant with the Hyannis Fire Department, which is a "non-civil service" fire service, meaning that the fire service employees are not appointed pursuant to, and are not subject to, the requirements of Massachusetts Civil Service Law, G.L.c.31. He does not have any record of military service. (*Appellant's Opposition*)

5. In June 2014, in anticipation of the retirement of then BPD Fire Chief Greene, Bourne initiated a request to HRD to "do an Assessment Center for a Fire Chief and Deputy Fire Chief", which sought approval for the following:

- Open competitive statewide Massachusetts only
- Interview candidates then grade them and pick the best 7 to 10 candidates for the assessment
- Require at least 5 years as a lieutenant with education.

(HRD Motion [Ward Aff't]; Administrative Notice [Req. No. 02020]; *Appellant's Opposition, Attch. 1A*)

6. Although Bourne's specific request was not approved, Bourne and HRD entered into a "Delegation Agreement", pursuant to which HRD delegated to the Bourne Human Resources Department and to a consultant approved by HRD, the responsibility "to develop, construct, validate, administer and score a Fire Chief assessment center. With the exception of additional points as required by statute or rule, including credit for employment or experience in the Fire Chief title, this delegated process will be used as the **sole basis** for scoring and ranking candidates on an eligible list." (**emphasis** in original). The Delegation Agreement provided, among other things, that Bourne and/or the consultant would perform the following tasks:

> "Development of the departmental promotional examination announcement to be used to solicit applications. . . . HRD will, upon request, provide sample language for the announcement, consistent with statutory requirements, regarding eligibility for the selection process, Employment/Experience examination component, and statutory preferences. . . ."
>
> "Reviews permitted pursuant to Section 22 of Chapter 31 of the MGL shall be the responsibility of the consultant. The Town of Bourne and/or the consultant shall be

responsible for issuing notice to all candidates of the rights afforded to them under this Section of the MGL."

"The Town of Bourne and/or consultant shall be responsible for issuing notice to all candidates of the Employment/Experience examination component, including instructions on how to claim credits."

"The consultant shall calculate any additional credits required by statute GL Chapter 31 §59, as well as issue score notices to individual candidates which shall include the date(s) of examination, examination title, passing point, candidate score, and any additional credits required by statute."

"Upon establishment of an eligible list, stemming from assessment center exercises and any additional points required by statute, such list will be forwarded to HRD."

(*HRD Motion, Exh. 1; Appellant's Pre-Hearing Memorandum, Exh "A"*)

7. Bourne subsequently retained a consultant to implement the assessment center process.

(*Undisputed Facts; HRD Motion [Ward Aff't"]*)

8. Bourne duly prepared and posted an "Examination Posting" for the "Open Competitive Examination for Fire Chief" which contained, among other things, the following information to candidates:

"**ELIGIBILITY**. Applicants must have at least five years of full-time, or equivalent part-time experience in a governmental or private fire department or fire services, in a managerial, supervisory or administrative capacity (defined as that which requires the direction of a segment of a department's operation and includes the estimation of resources required to accomplish objectives and the development and recommendation of policies, work methods, and procedures within the framework of broader policies established by higher level officials, or an equivalent combination of such experience and the substitutions below [of a Bachelor's Degree or Master's Degree or higher"

. . .

"**VETERANS PREFERENCE**: Applicants **MUST** first pass the examination. Veterans who qualify for preference pursuant to M.G.L. Chapter 4, Section &, Clause 43 will receive placement preference on the eligible list. Disabled Veterans place above Veterans on the list. If you are claiming Veteran's Preference, and if your eligibility for Veteran's Preference has not been approved previously by HRD, you must submit a copy of your DD Form 214 . . . at the examination site. More information . . . is available on the Civil Service website (www.mass.gov/civilservice) in the *Veteran & Active Duty Military Applicant Information* section.[1]

(*Appellant's Opposition, Attch 1B; HRD Motion, Exh. 2*)

[1] I take administrative notice of the information contained in the referenced HRD website regarding veteran's preference.

9. The Assessment Center examination was conducted on October 28, 2014. Deputy Dupuis, Norman Sylvester, and five other candidates took the examination. On November 4, 2014, the consultant computed the candidates' assessment center scores, before statutory or education/ experience credits, and reported these scores to HRD, as follows:

84% Jeffrey Medeiros
79% Norman Sylvester
77% Dana Dupuis
77% Joseph Feeney
76% John Grasso
76% David Pelonzi
74% Daniel Braley

(*Appellant's Opposition, Attch. 2A & 2B: HRD Motion, Exh. 3*)[2]

10. On November 18, 2014, HRD informed the consultant that HRD had recalculated the scores to add two preference points to Deputy Dupuis's score for veteran's status, and two "25 year service" preference points to Jeffrey Mederios's score and Joseph Feeney's score for 25 years of service. HRD informed the consultant that John Grasso's request for the 25-year service credit was denied, as were Experience/Education points claimed by Norman Sylvester and John Grasso. Based on HRD's recalculations, the candidates scores were adjusted as follows:

86% Jeffrey Medeiros
79% Norman Sylvester
79% Dana Dupuis
79% Joseph Feeney
76% John Grasso
76% David Pelonzi
74% Daniel Branley

HRD also informed the consultant that "since this was an Open Competitive exam, veterans have absolute preference. Since Dana Dupuis is a veteran he moves to #1 on the list. All other candidates will be listed in order of their scores." (*Appellant's Opposition Attch. 2C; HRD Motion [Ward Aff't], Exh. 3*)

[2] The consultant's scoring spreadsheets provided to the Commission only list the names of Deputy Dupuis and Norman Sylvester, but the identity of the other candidates and their associated scores are readily inferred.

11. On December 4, 2014, the consultant established the following eligible list and forwarded the list to Bourne and HRD, and sent letters to the candidates to inform them of their final scores, as HRD had instructed, as follows:

FIRE CHIEF ELIGIBLE LIST

1	Dana Dupuis
2	Jeffrey Medeiros
3(tie)	Joseph Feeney
3(tie)	Norman Sylvester
4(tie)	John Grasso
4(tie)	David Pelonzi
5	Daniel Braley

(*HRD Motion [Ward Afft],Exhs. 3 through 5; Appellant's Pre-Hearing Memorandum, Exh. "C"*)

12. MMA's letter to Deputy Dupuis stated: "Your score includes Promotional Preference points for Veteran's Status." It did not indicate that he also had been awarded the "absolute" statutory veteran's preference. (*HRD Motion [Ward Aff't], Exh.5*)

13. On December 12, 2014, HRD informed MMA and Bourne that HRD had erroneously awarded two (2) preference points for veteran's status to Deputy Dupuis and for 25-year service to Messrs. Medeiros and Feeney. In addition, HRD added 0.18 "E&E" points to Mr. Feeney's score, but that small adjustment did not change his rounded final score. This produced the following corrected scores:

84%	Jeffrey Medeiros
79%	Norman Sylvester
77%	Joseph Feeney
77%	Dana Dupuis (vet-move to top of eligible list)
76%	John Grasso
76%	David Pelonzi
74%	Daniel Branley

HRD noted that: "Dana Dupuis is still at the top of the eligible list due to the policy of the open competitive exam." (*HRD Motion [Ward Aff't]; Appellant's Opposition, Attch. 4*)

14. Based on the corrected scores, HRD sent the following revised eligible list to Bourne:

1. Dana Dupuis
2. Jeffrey Medeiros
3. Norman Sylvester
4. Joseph Feeney
5. David Pelonzi
5. John Grasso
6. Daniel Braley

(*HRD Motion [Ward Aff't]; Appellant's Opposition, Attch. 4*)

15. Upon receipt of the final eligible list, Bourne conducted oral interviews of the top three candidates on the list, using a five-member interview panel consisting of two outside Fire Chiefs[3], the Bourne Police Chief, Town Administrator and Bourne Human Resources Director. (*HRD Motion, Exh. 7; Appellant's Opposition Attch. 5*)

16. By letters dated February 12, 2015, Bourne Town Administrator Guerino informed Deputy Dupuis that he had been bypassed for appointment as the Bourne Fire Chief for the reasons set forth in Administrator Guerino's letter. (*Appellant's Opposition, Attch. 5; HRD Motion, Exh. 7*)

17. The Bourne Board of Selectmen (BOS) approved the appointment of Chief Sylvester on February 17, 2015. (*Appellant's Opposition*)

18. On February 26, 2015, Administrator Guerino submitted a "Notification of Employment" to HRD, as the Appointing Authority, showing the appointment of Chief Sylvester effective February 28, 2015. (*HRD Motion, Exh. 6*) [4]

19. Deputy Dupuis timely filed this appeal on February 19, 2015. (*Claim of Appeal; HRD Motion, Exh. 8*)

[3] I note that one of the "outside" panel members was the Fire Chief in Centerville MA, the villlage in which Mr. Sylvester lived (but did not work).

[4] The Town Administrator's letter preceded Bourne BOS approval and stated the reasons for the bypass as "my decision" based on "my concerns". This would be consistent with his status as an Appointing Authority, but, if, as the parties seem to assume, the BOS is the BFD's Appointing Authority, the language in the bypass letter would be problematic. This potential procedural issue, although noteworthy, does not change the Commission's decision here.

SUMMARY OF CONCLUSION

G.L.c.31,§26 promotes employment of veterans (and others enumerated in the statute) by granting so-called "absolute" preference intended to facilitate entry into public service through exceptions to the rule for consideration for employment based strictly on performance on competitive examinations. These special statutory exceptions do not continue through career advancement by veterans once they have gained civil service status. Rather than the "absolute" preference, a veteran employed in a civil service position who thereafter takes and passes a competitive examinations for advancement to another civil service position, by civil service rule, only is entitled to have two points added to that exam score. Even after adding two more "employed veteran" preference points to his assessment center score, the Appellant is, at best, tied with Mr. Sylvester on a properly established eligible list. By hiring a candidate tied but not ranked "below" him, Bourne did not bypass the Appellant. He lacks standing to appeal his non-selection to the Commission. The appeal must be dismissed for lack of jurisdiction.

STANDARD OF REVIEW

A motion for summary decision to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 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 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)

ANALYSIS

Applicable Civil Service Law and Rules

G.L.c.31, §1 (definitions) provides, in pertinent part:

> "Basic merit principles", shall mean: (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; . . . (c) providing of training and development for employees . . . to assure the advancement and high quality performance of such employees; . . . .
>
> "Civil service appointment", an original or a promotional appointment . . .
>
> "Civil service employee", a person holding a civil service appointment . . . .
>
> "Eligible list", a list established . . . pursuant to the civil service law and rules, of persons who have passed an examination . . . . or any other list . . . from which certifications are made . . . to fill positions in the official service."
>
> "Original appointment", an appointment pursuant to section six . . . .
>
> "Permanent employee", a person who is employed in a civil service position (1) following an original appointment . . .; or (2) following a promotional appointment. . . .
>
> "Promotional appointment", an appointment pursuant to section seven . . .
>
> "Provisional employee", a person who is employed in a civil service position, pursuant to and in accordance with sections twelve, thirteen and fourteen.

G.L.c.31, §3 prescribes that HRD shall make and file rules in accordance with Chapter 30A, to include provisions, among other things;

> "(c) Open competitive and other examinations to test the . . .fitness of applicants. . . ."
>
> "(e) Promotional appointments, on the basis of merit as determined by examination, performance evaluation, seniority of service or any combination of factors which fairly test the applicant's fitness . . ."
>
> "(f) Preferences to veterans in original and promotional appointments."

G.L.c.31, §6 provides, among other things::

> "Each appointment to a civil service position shall be made by an original appointment pursuant to the provisions of this section or by a promotional appointment pursuant to the provisions of section seven . . . ."
>
> "Each such original appointment . . . shall be made after certification from an eligible list established as a result of a competitive examination for which civil service employees and non-civil service employees were eligible to apply.. . ."
>
> "An appointing authority desiring to make an original appointment . . .shall submit a requisition to . . . certify from the eligible list sufficient names of persons for consideration . . . pursuant to section twenty-five and the personnel administration

rules. If no suitable eligible list exists . . . the appointing authority may make a provisional appointment . . . ."

"An appointing authority may requisition to fill any position by original appointment pursuant to this section, or where a promotional appointment may be made . . . it may requisition to fill a position by promotional appointment pursuant to section seven."

G.L.c.31, §7 provides:

"Each promotional appointment . . . shall be made pursuant to section eight [providing a special procedure for promotion of civil service employees from one title to the next higher title] or after certification from an eligible list established as a result of . . . (a) a departmental promotional examination pursuant to section nine, (b) an alternate departmental promotional examination pursuant to section ten or (c) a competitive promotional examination pursuant to section eleven, provided that promotional appointments in such police and fire forces . . . shall be made pursuant to section fifty-nine . . . ."

G.L.c.31, §11 provides:

"An appointing authority may make a promotional appointment on the basis of a competitive promotional examination . . . which shall be open to all . . . civil service employees in titles determined by the administrator to be eligible titles."

G.L.c.31, §25 provides, in part:

"[HRD] shall establish . . . eligible lists of persons who have passed each examination for appointment . . . arranged on each such list, subject to the provisions of section twenty-six, where applicable, in the order of their marks on the examination based upon which the list is established."

G.L.c.31, §26 provides:

"The names of persons who pass examinations for original appointment to any position in the official service shall be shall be placed on eligible lists in the following order: (1) disabled veterans, in the order of their respective standings; (2) veterans in the order of their respective standings; (3) widows or widowed mothers of veterans who were killed in action or died from a service connected disability . . . (4) all others, in the order of their respective standing."

. . .

"An appointing authority shall appoint a veteran in making a provisional appointment under section twelve unless such appointing authority shall have . . . determined that none of such veterans is qualified or is willing to accept the appointment."

. . .

"A disabled veteran shall be retained in employment in preference to all other persons, including veterans"

G.L.c.31, §59 provides:

> "Original and promotional appointments in police and fire forces . . . within the official service, including appointments to the position of chief or similar position where the civil service law and rules are applicable to such position, shall be made only after competitive examination . . . ."
>
> "An examination for a promotional appointment to any title in a police or fire force shall be open only to permanent employees . . . in the next lower titles in succession in such force until either four such eligible employees have applied . . . ."
>
> . . .
>
> "An eligible list established as a result of any examination shall not be used for an original or promotional appointment to any position in a police or fire force unless the announcement . . . identified such position as one to be filled from such list. Notwithstanding the provisions of any law or rule to the contrary, a member of a regular police force or fire force who has served as such for twenty-five years and who passes an examination for promotional appointment in such force shall have preference in promotion equal to that provided to veterans under the civil service rules."

The Personnel Administration Rules (PARs) promulgated by HRD pursuant to G.L.c.31, §3, include the following relevant provisions:

> **"PAR.02 DEFINITIONS"**
>
> "Examination, any instrument or process which . . . measures the fitness of applicants to perform the duties of a position. Types of examinations . . . include:
>
> (a) Competitive promotional examination, any competitive examination which is open, pursuant to M.G.L.c31, §11, to certain civil service employees of the Commonwealth . . . .
> (e) Open competitive examination, any examination for an original appointment which is open to all members of the public . . . ."
>
> "Merit preference status, a status afforded preference in civil service appointment pursuant to M.G.L.c..31, for example section 26:
>
> a. sons or daughters of certain deceased firefighters or police officers as to public safety positions,
> b. disabled veterans,
> c. blind persons following disabled veterans in appointments of typists . . .
> d. veterans,
> e. widows or widowed mothers of veterans . . . .
> f. [on request by] a city or town . . . for original appointment to the police or fire force of [residents] ahead of [non-residents] . . . '
> g. police or fire personnel with twenty-five years service."
>
> "Promotion, a change in employment from one title to a higher title in the same series . . . "

"PAR.14 CIVIL SERVICE PROMOTION"

"(1) The examination process approved by [HRD] for establishment of a promotional eligible list of ranked candidates may consist of a written examination, an oral examination, a practical test, a graded performance evaluation, or a graded schedule of seniority of service. A combination of the foregoing or other graded components through a ranking process to determine merit may be proposed by the appointing authority and approved by [HRD]. . . .Nothing in this rule shall be deemed to limit the authority of [HRD] to determine the weight and scope of examinations . . . ."

"(2) In competitive examinations for promotion to any position in the classified official service, [HRD] shall add two points to the general average mark obtained by any veteran . . . providing such veteran has first obtained a passing mark in such examination. A veteran who has also obtained twenty-five years of service shall not receive an additional two points to the general average mark."

Discussion

This appeal requires the Commission to answer the following question of law: Was the Appellant lawfully ranked first on the eligible list for Bourne Fire Chief, above Norman Sylvester, because the Appellant is a veteran entitled to an "absolute" statutory preference set forth in G.L.c.31, §26 for any "original" appointment after an "open competitive examination" (so that the selection of the lower-ranked Norman Sylvester was a bypass), or does the "absolute" preference not apply when appointment to Bourne Fire Chief is clearly a "promotion" from the Appellant's current civil service position (in which case, the Appellant is tied with Norman Sylvester on the eligible list and there would be no bypass). Only if Deputy Dupuis has been bypassed for appointment does the Commission take jurisdiction to review the "reasonable justification" for his non-selection. See, e.g., 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); Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971), *citing* Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). [5]

[5] The rule is well-established that selection of one of two or more candidates tied with the same score is not a bypass. E.g.,, Vetiac v. Boston Police Dep't, 27 MCSR 382 (2014); see G.L.c.31, §27; PAR.02;

Statutory provisions for preference of veterans in Massachusetts civil service employment is as old as the civil service law itself. See St. 1884, c. 320, §14 (Sixth) (Commission shall make rules "giving preference in *appointments to office and promotions in office* (other qualifications being equal)" to honorably discharged army and navy war veterans) (*emphasis added*). See also, St. 1896, c.517 (special preference for "appointment to or employment in any position in the public service" to veterans of the "war of the rebellion" [Civil War]); St. 1895, c. 501, §1 (Sixth) (preference in "appointment to office and promotion in office"), §2 ("Veterans who have made application for employment in the public service . . .shall be preferred for certification and appointment in preference to all other applicants not veterans"), §3 (war veterans "shall be appointed in preference to other persons"); St.1887, c.437 (Civil War veterans "may be preferred for appointment to office or employment in the service of the Commonwealth, or the cities thereof without having passed any examination") But see Brown v. Russell, 166 Mass. 14 (1896) and reaffirmed in Commissioner of the Metropolitan Dist. Comm.., 348 Mass. 184, 192-93 (19XX) (holding unconstitutional the "absolute" preference in hiring veterans without examination); Corliss v. Civil Service Commr's, 242 Mass. 63 (1922) (abrogating "absolute" preference for veterans in civil service rules)

The current version of the veteran's preference has its origin in Chapter 463 of the Acts of 1922, which rewrote then Section 23 of Chapter 31, to provide:

> "The names of veterans who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the order of their respective standing above the names of all other applicants, except that veterans who are disabled and who present a certificate . . . that their disability is not such as to prevent the efficient performance of the duties of the position to which they are eligible and . . . such disability was received in line of duty. . in time of war . . . shall be placed ahead of all other veterans on such eligible lists in the order of their respective standing. . . . A disabled veteran shall be appointed and employed in preference to all other persons, including veterans."

The core language of former G.L.c.31, §23 remained substantially unchanged through the 1978 omnibus recodification of Chapter 31, at which time it found its way into new Section 26, which rewrote and replaced then former Section 23 with what is substantially the current version of the statutory preference. See St. 1978, c.393, §11.

One significant prior revision, however, had been made in 1971, at which time the language of the last sentence was rewritten to read as it does today, with the words in italics stricken and the underlined words added: "A disabled veteran shall be [*appointed and employed*] *retained in employment* in preference to all other persons, including veterans." St. 1971, c. 1051, §1. This amendment became relevant when, in 1972, the SJC held the prior version of this last sentence unconstitutional and ordered the appointment of "assistant commissioner for children's services to be made from the eligible list "without regard" to the preference for disabled veterans in that sentence. Of significance to the present appeal, in passing on this question, Justice Braucher noted that the "facts before us . . . dramatically highlight the adverse impact of the 'absolute preference' on the efficient operation of the public service. The question here is not one of adding one more fireman to a fire department, but of appointing one of the commissioner's principal assistants . . . ." Hutchinson v. Director of Civil Service, 361 Mass. 480, 489 (1972).

The weight of authority has consistently held that the "absolute" veteran's preference is something of a misnomer. Apart from the grave constitutional issues that a pure "absolute" preference presents, the preference must be construed so as to make the civil service law and rules an effectual piece of legislation in harmony with common sense and sound reason. See, e.g., Younie v. Doyle, 306 Mass. 567, 571 (1940) (disabled veterans preference did not change the right to terminate an employee without cause prior to the completion of his/her probationary period).

In particular, both before and after the 1978 recodification, the required statutory preference granted to veterans was understood only to facilitate entry of veterans into the civil service, but not their advancement once they have been employed. In Opinion of the Justices, 324 Mass. 736 (1949), in response to questions from the Commission, the SJC opined on the constitutionality of proposed civil service rules that would authorize adding two points to the scores of veterans who have passed a "competitive examinations for promotion to any [civil service] position. . ." as to which "a very large number of veterans . . . protested that the proposed rule did not give the "full preference' which they cite is the intent of the law." Id. The Opinion of the Justices held that the Commission could properly adopt different rules for veteran's preference in promotions from those applicable by statute to an initial appointment because "Section 23 [which then contained the statutory veteran's preference] applies only to entry into the service and does not extend to promotion within it. . . . "Preference to veterans must be a reality. It cannot be made illusory or a mere gesture. But preferences of two points added to the general average mark on any reasonable examination scale . . . would give to veterans a substantial advantage over others. That is all that §3, cl. 1(g) can fairly be construed to require. There is no requirement that the rules of the commission shall carry the preference in promotion as far as §23 carries the preference in original appointments, or to the extreme limit of constitutionality". Id. 324 Mass. at 244n1, 245, citing MacCarthy v.Director of Civil Service, 391 Mass. 124 (1946).[6]

In MacCarthy, the SJC had rejected the claim of a disabled veteran to an absolute preference for promotion over other candidates for the position of Superintendent in the MDC. The Court's opinion stated: "[T]he respondents contend that in the civil service law the word 'appointment' is used to denote only the original entry into the classified civil service, and does not apply to a

[6] The rule prescribing that two points are added to the scores of veterans who take and pass a competitive examination for promotional appointment is now codified as PAR.14(2)

promotion within that service. That contention seems to us well founded. . . . In 1900 Attorney General Hosea M. Knowlton rendered an opinion that 'it was the intention of the Legislature to use the word "appointment" as applicable only to the original selection of persons for office, and to distinguish between such original selection and the promotion of persons already appointed to office. . . .' The contrast between 'appointment' and "promotion' in the civil service law existed long before the class of 'disabled veterans' was created by St. 1922, c. 463. When by that statute that class was given a superior preference as to 'appointment', that preference did not extend to a promotion." Id., 319 Mass. at 126-127.

Most recently, in a case involving the provisions of G.L.c.31, §26 applicable to the preference for veterans in a "provisional" promotion, the Appeals Court reaffirmed the principles of statutory construction that demonstrated the legislative intent behind the veteran's preference was limited to facilitating hiring but not advancement:

> "The plaintiff argues that G.L.c.31, §26 . . . does not limit the veterans' preference to original entry into the civil service system. He argues that §12, to which §26 refers is not limited to original entry appointments, and that, therefore, §26 cannot be so limited. . . . We do not agree with the plaintiff's construction of the statute."
>
> ". . . .[T]he well-known maxim, expression unius est exclusion alterius, the expression of one thing is the exclusion of another, applies. . . . This construction is consistent with a policy that prefers veterans in hiring, but does not favor them once they have obtained civil service employment."

Aquino v. Civil Service Comm'n, 34 Mass.App.Ct. 538, 540-41 (1993).

The Commission recently embraced the principle enunciated in this appellate case law, namely, that the veteran's preference was meant to apply to facilitate original entry into civil service but not advancement. Palluccio v. Department of Revenue, 28 MCSR 118 (2015) (current employee seeking provisional "appointment" to a higher title)

In sum, although the verbiage has evolved with the refinement of the civil service law over time, the origin and history of the veteran's preference consistently reflects a legislative

intent that focused on the preference for veterans in the original selection for employment in civil service positions and, while permitting such preference for veterans already employed, deferred to duly promulgated administrative rules as to the scope and form of such preference. The history makes a compelling record that supports the conclusion that civil service law and rules are not meant to apply the so-called "absolute" statutory preference for hiring veterans to the Appellant's situation here, which, as in Hutchinson, is "not one of adding one more fireman to a fire department, but of appointing [the Fire Chief]." While the same "absolute" preference might have been extended to such a situation by administrative rule, PAR.14(2) did not do so. Therefore, the Appellant has no "absolute" veteran's preference to be promoted to the position of Bourne Fire Chief. Although the Appellant would seem to be entitled to the "two point" administrative preference allowed by PAR.14(2), a question that the Commission need not expressly decide, adding two points to his score on the competitive examination would put him tied with Mr. Sylvester, the chosen candidate, so that no bypass occurred.

I have carefully considered the points made by the Appellant and HRD that argue for a different result. Those arguments are not without some force, but none are persuasive.

First, the Appellant and HRD point to language in G.L.c.31, Section 26 providing the preference to all veterans "who pass examinations for ***original*** appointment to any position in the official service." (***emphasis added***) HRD argues that, pursuant to civil service law and rules, an "original" appointment is distinguished from a "promotional" appointment, and is one made from a "open" competitive examination, such as administered here, "for which civil service employees and non-civil service employees were eligible to apply." See G.L.c.31, §§3, 6, 7, 11; PAR.02. This construction of the law, however, is not what the Commission and the weight of judicial precedent has placed on these provisions. The distinctions between

"original" and "promotional" appointments were the product of the 1978 recodification of Chapter 31. See, e.g., G.L.c..31 (Ter..Ed). As explained above, prior to that recodification, former Section 23 was clearly construed as meant only to secure entry of veterans into the civil service and it is well-settled that the purpose of the recodification was to "rearrange c.31 'topically, as well as sequentially,' or otherwise put, to make "technical" rather than "substantive": amendments to c.31. . . . the rule of statutory construction applicable to recodification suggests that . . . . verbal changes in the revision of a statute do not alter its meaning, and are construed as a continuation of the previous law. [citations]." Board of Selectmen of No. Attleborough v. Civil Service Comm'n, 16 Mass.App.Ct. 388, 391-92 (1983). Thus, it is not appropriate to read into the insertion of the word "original" in the recodification of the preference, or the reformulation of the terminology for describing the form of competitive examinations as "open", "original" and "promotional", any intention to change the substantive nature of the veteran's preference and expand it to include persons who already hold a civil service position and, in fact, are seeking advancement to a higher title, which is something the law, prior to 1978, clearly did not contemplate. To read the law in that fashion would exalt form over substance. [7]

Second, the Appellant and HRD suggest that the Commission's prior decisions and case law focused on "provisional" appointments and promotions (which are "temporary"

[7] The Commission leaves for another day any determination whether any person who takes an "open" competitive examination for department chief, which requires experience in a lower title, and whose experience comes from service in a non-civil service community, comes within the intent of the preference for "entry" into a civil service position. Especially when it comes to public safety positions, there is some reason to conclude that, when considering the civil service law in its entirely, both historically and under current statutes, it was never contemplated that an appointing authority would be required to give Section 26 "entry" preference to an applicant for chief of department, and it would not be appropriate to construe the statute to create such an absurd result. . cf. Joseph v. Administrator of Division of Personnel Administration, 11 Mass.App.Ct. 943 (1983) (rejecting application of "entry" level age requirement to open competitive exam for Police Chief). See also, Donahue v. City of Boston, 304 F.3d 110, 120 (1st Cir. 2002) (unclear whether or not appointment of police officer who applied for a position with BPD should be considered an "original" appointment because he already worked in another community)

appointments not made from "eligible lists" after an examination) and the rationale expressed in those decisions does not carry over to appointments made through competitive examinations. It is true that "provisional" appointments and permanent appointments are covered by different paragraphs of Section 26, but the principle expressed in the precedent does not turn on the difference in the nature of the appointment. See, e.g. Aquino v. Civil Service Comm'n, 34 Mass.App.Ct. 538, 540-41 (1993); Palluccio v. Department of Revenue, 28 MCSR 118 (2015)

Third, the Appellant cites the rescript opinion of the Appeals Court in Joseph v. Administrator of Division of Personnel Administration, 11 Mass.App.Ct. 943 (1981) and the case of Goncalves v. City of Boston, 66 Mass.App.Ct. 180 (2006) for the proposition that the distinction between an "open" competitive and a "promotional" competitive examination is recognized in civil service law and an examination must be one or the other; it cannot be "open" for some and "promotional" for others. In Joseph, a veteran challenged his non-selection for appointment as Norwell's Police Chief after passing the "open" competitive examination, claiming he was unlawfully disqualified because he failed to meet the physical standards for an "original appointment" (which would not be applicable to a "promotional" appointment) and because the other candidates were past the age limit for appointment. In affirming dismissal of the appeal, the Appeals Court held that "towns, whose police force is within the official service, may select either open competitive or promotional procedures. Departmental practice has been in accord with this interpretation and various non-entry level public safety positions have been filled by original appointment . . . in which disabled veterans . . . are given the highest preference." Id. Reliance on Joseph is not warranted, however, in view of the fact that the decision rests on construction of the language in the 1978

recodification and fails to address the greater weight of authority that preceded the recodification as well as the subsequent case law, such as Aquino, which takes a different view. Indeed, considerable doubt is cast on the existence of any established administrative policy applicable here by the multiple changes that HRD made in the treatment of preferences in this case. Moreover, there is nothing expressly inconsistent about the opinions in Joseph and Goncalves that distinguish the difference in form of "open" and "promotional" competitive examinations under the current version of civil service law and rules, with the principle that the application of substantive provisions of civil service law, such as veterans' preferences, must follow the well-established intent behind the substantive provision, without regard to how the form of the examination is characterized, and the preference might well be intended to apply differently to differently-situated applicants taking the same examination. See also, Donahue v. City of Boston, 304 F.3d 110, 120 (1st Cir. 2002)

Accordingly, for the reasons stated, the Joint Motion for Summary Disposition is ALLOWED. The appeal of the Appellant, Dana Dupuis, is ***dismissed for lack of jurisdiction***.

Civil Service Commission.

/s/ Paul M. Stein
Paul M. Stein
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman, Camuso, Ittleman, Stein & Tivnan, Commissioners) on December 10, 2015.

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 sent to:

Betsy Ehrenberg, Esq. (for Appellant)
Robert S. Troy, Esq (for Respondent)
John M. Collins, Esq.(for Intervenor)
Michael Downey, Esq. (HRD)