COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

One Ashburton Place – Room 503
Boston, MA 02108
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KENNY ETIENNE
Appellant,
v.
CITY OF CHELSEA,
Respondent.

CASE NO. G1-12-154

Appearance for the Appellant:

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Appearance for the Respondent:

Amy Lindquist, Esq.
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Appearance for HRD:

Elizabeth Whitcher, Esq.
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Commissioner:

Paul M. Stein

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Kenny Etienne, acting pursuant to G.L.c.31, §2(b), appealed to the Civil Service Commission (Commission) from his non-selection by the City of Chelsea ("Chelsea") for appointment to the civil service position of permanent full-time police officer with the Chelsea Police Department (CPD). Chelsea filed a Motion to Dismiss the appeal on the grounds that the Appellant had not been bypassed and, therefore, the Commission lacked jurisdiction over the appeal. The Commission heard testimony and oral argument on the motions on July 2, 2012 from the parties and the Massachusetts Human Resources Division (HRD). The Commission marked the documents received at the hearing as Exhibits 1 through 6 and documents subsequently received from HRD on July 3, 2012 as P.H.Exh.7 and from HRD on July 10, 2012 as P.H.Exh. 8.

Findings of Fact

Giving appropriate weight to the documents submitted by the parties, the testimony of the Appellant and CPD Sgt. David Flibotte, the argument of counsel and the inferences reasonably drawn from the evidence, I find the material facts stated below to be undisputed.

1. The Appellant, Kenney Etienne, is a resident of Chelsea, Massachusetts. He is a military veteran who served with the U.S. Navy and was honorably discharged in June 2009. He is a member of an ethnic minority class (African American). (*Exhs. 1,2 & 4)*

2. Mr. Etienne took and passed the civil service examination for the entry level position of municipal police officer in 2009 and received a score of 96. (*Stipulated Fact; Exh. 2*)

3. Chelsea is a so-called "Consent Decree municipality", in which entry level police officer (and firefighter) civil service appointments are subject to the provisions of consent decrees entered by the federal court in the cases of NAACP v. Beecher and Castro v Beecher (the Consent Decree), intended to remediate past practices that had discriminated against ethnic minority candidates in hiring for those positions. (*Exhs. 1, 2 & 4*)

4. Mr. Etienne's name appeared on two certifications that were issued to Chelsea from the eligible list established in March 2010 based on the 2009 examination. (*Stipulated Facts; Exhs. 1, 2 & 7*)

5. At the time these certifications were issued, the terms of the Consent Decree required that HRD follow a modified procedure when issuing certifications to a Consent Decree municipality, such as Chelsea. Under this procedure, although the ordinary "2n+1" formula[2] is applied, applicants's names are certified in a ratio stipulated by the Consent Decree so that the name of

[2] Pursuant to the Personnel Administration Rules (PAR), civil service appointments must be made from among a defined group of candidates appearing at the top of the eligible lists ranking them according to their civil service scores. This group from which candidates may be considered consists of two times the number of positions to be filled, plus one, or "2n+1". PAR.09. If the last name in the group is tied with others, the entire tied group may be considered. Id.

one Black or Hispanic minority applicant (identified by the letter "C") is certified first, followed by the names of three non-minority applicants (identified by the letter "D"). Within each group, the customary statutory priorities specified by civil service law (veterans, residence, etc.) control the applicant's rank. (*Exhs 1 &. 5*)

6. The HRD guidelines prescribe, as to "Insufficient Applicants Responding", that:

> ". . .Appointing Authorities are advised that in order to comply with the provisions of the Castro v. Beecher Consent Decree, particular attention must be paid to the number of minority applicants willing to accept on the certification. **There must be enough active minority candidates to be considered for existing vacancies on the basis of one minority in the first place and thereafter a minority in every fourth place on the certification.** In very rare circumstances the Appointing Authority may encounter insufficient non-minority candidates willing to accept. If this is the case a copy of the signed certification should be returned with a request for additional minority names."
>
> "The Appointing Authority must replace the name of any "**C** "candidate who fails to respond **or who declines the position** with the name of the next "**C**" candidate who is willing to accept, so that the 1 to 3 ratio of selection consideration is maintained. All "**C**" candidates who are willing to accept must be moved up into "**C**" slots as outlined above."
>
> "In the event that an insufficient number of "**C**" applicants respond for existing vacancies, Appointing Authorities should send a written request for the certification of additional minority names from the Human Resources Division. Every effort will be made to expedite additional name certifications to reduce any delay in the process, but Appointing Authorities are advised that appointments made without following this procedure or without giving consideration to minority candidates according to the ratio format cannot be approved."

(*Exh. 5*) (**emphasis** in original) (**emphasis** added)

7. HRD guidelines also prescribe, as to "Applicant Marks":

> "The current provisions of the relevant consent decrees preclude printing of applicants' marks on entry level public safety certifications. Applicants within a tie group are identified by the printed words "Tie" and "Tie End" to the right of these names. Please note that the scores are limited to the ethnic group identified in the certification, that isk "**C**" candidates are tied only with other "**C**" candidates and "**D**" candidates with other candidates from that group. Tie score applicants are listed alphabetically within their preference groups."

(*Exh. 5*)

8. As to "Making the Selection", HRD guidelines state:

> "If one applicant within a tie group is reachable under the provisions of PAR.09 [the 2n+1 formula], any applicant with that score and certified within that tie group may also be reached. . . . **All** applicants willing to accept appointment should be listed . . .in the order in which they appeared on the certification **(or in accordance with the ratio provisions of Castro v Beecher if it has been necessary to move "C" candidates higher on the certification).**"

(*Exh. 5*) (**emphasis** in original)

9. As to "By-pass and Removal", HRD guidelines state:

> "The provisions of the Castro v. Beecher Consent Decree require the Appointing Authority to **notify any applicant who has indicated willingness to accept but was not appointed of the basis for his or her non-selection and of applicable appeal rights.**

(*Exh. 5*) (**emphasis** in original)

10. On March 29, 2011, Mr. Etienne withdrew his name from consideration for hire from the first certification on which he had appeared, Certification 203778. The circumstances leading to his withdrawal were due to "something in his record that was dismissed long ago." His rank on that certification is not known. (*P.H.Exh. 7; Testimony of Appellant & Sgt. Flibotte*)

11. On November 25, 2011, HRD issued Certification 202550 to Chelsea containing four names for appointment of one permanent full time police officer – one minority candidate in the first position and three non-minority candidates. The minority candidate, Jose Flores, and one non-minority candidate, did not sign the certification as willing to accept. (*Ex 6; Testimony of Sgt. Flibotte*)

12. On December 14, 2011, HRD issued a supplement to Certification 202550 containing six additional names. Mr. Etienne's name appeared on Certification 202550 tied in the first position with Marvin Pena, both veterans and minority candidates, along with four non-minority candidates, all of whom signed as willing to accept the appointment. (*Exh 1*)

13. Chelsea was uncertain how to treat the two tied minority candidates – Messrs. Etienne and Pena. On December 20, 2011, CPD Sgt. Flibotte called HRD and spoke to Nuwanda Evans, an employee in the HRD Civil Service Unit. Ms .Evans told Sgt. Flibotte:

> "[I]ndviduals within a tie group are considered interchangeable within the tie and equal to the position. On the current Chelsea Police Officer Certification, either Kenny Etienne or Marvin Pena can be listed in the first slot since they are tied for the position"

Ms. Evans confirmed this information by e-mail the next day. (*Testimony of Sgt. Flibotte; Affidavit of Nuwanda Evans; Exh. 1*)

14. Based on the information received from Ms. Evans, Chelsea deemed Mr. Pena as the minority candidate listed in the first position for purposes of the Consent Decree and moved Mr. Etienne down to the next minority position, i.e. fifth position on the certification. (*Affidavit of Nuwanda Evans;Testimony of Sgt. Flibotte; Exh. 1*)

15. As it turned out, Mr. Pena was unable to provide the necessary references to complete his application and he was eliminated from consideration for appointment. (*P.H. Exh.8; Testimony of Sgt. Filbotte*)

16. Chelsea did not give any consideration to Mr. Etienne for appointment and did not request any additional minority names in place of Mr. Pena. Instead, Chelsea appointed one of the two non-minority candidates, who had signed the original Certification list of six names. (*Exh. 1 [Letter from Nuwanda Evans]; Testimony of Appellant & Sgt. Flibotte)*

17. Mr. Etienne received no notice of, or reason for his non-selection. (*Testimony of Appellant & Sgt. Flibotte*)

18. This appeal duly ensued. (*Claim of Appeal)*

Summary of Conclusion

This appeal presents an issue of first impression that requires the Commission to interpret how the requirements of civil service law and rules concerning tie scores apply in the context of the requirements imposed by the federal court's Consent Decree in Castro v. Beecher, which is designed to enhance the employment opportunities of minority candidates for appointment as municipal police officers. The Commission has consistently ruled that, when candidates appear on a civil service eligible list with tie scores, the appointment of one or the other candidate is not considered a "bypass" within the meaning of civil service law, because the non-selected candidate is not ranked higher than the selected candidate, which is the statutory definition of a bypass under G.L.c.31,27. The issue presented here, however, is not about the rights of two tied minority candidates. Rather, Mr. Etienne claims that, according to HRD's guidelines construing the requirements of the Castro v. Beecher Consent Decree, upon the removal of Mr. Pena from consideration, Mr. Etienne was entitled to be moved up into consideration as a minority candidate in Mr. Pena's place, ahead of any non-minority candidate, and, therefore, hiring the non-minority candidate without even considering him amounts to a classic bypass that violates traditional civil service law and rules.. The Commission agrees and orders Chelsea and HRD to place Mr. Etienne at the top of all current and future certifications for appointment as a Chelsea police officer until he is appointed or bypassed.

Applicable Legal Standard

The Commission may, either on motion or upon its own initiative, dismiss an appeal at any time for lack of jurisdiction or for failure to state a claim upon which relief can be granted. 801 CMR 7.00(7)(g)(3). A motion for summary decision of an appeal before the Commission, in whole or in part, is in order pursuant to 801 C.M.R. 1.00(7)(h) when "there is no genuine issue of

fact relating to all or part of a claim or defense" and the moving party is "entitled to prevail as a matter of law."

These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., after 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 evidentiary hearing. See, e.g., Pease v. Department of Revenue, 22 MCSR 754 (2009); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005). cf. Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550n.6, 887 N.E.2d 244, 250 (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249, 881 N.E.2d 778, 786-87 (2008). See also Iannacchino v. Ford Motor Company, 451 Mass. 623, 635-36, 888 N.E.2d 879, 889-90 (2008) (discussing standard for deciding motions to dismiss); cf. R.J.A. v. K.A.V., 406 Mass. 698, 550 N.E.2d 376 (1990) (factual issues bearing on plaintiff's standing required denial of motion to dismiss)

Although the matter came before the Commission as a motion to dismiss, the Commission received evidence from both parties and, based on the undisputed facts, the matter is ripe for summary decision as a matter of law.

Relevant Civil Service Law

This appeal involves the alleged bypass of the Appellant for original appointment to a permanent civil service position which is controlled by G.L.c.31, Section 27:

> "If an appointing authority makes an original or promotional appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the

appointing authority shall immediately file . . . a written statement of his reasons for appointing the person whose name was not highest."

An applicant for appointment aggrieved by his or her non-selection in violation of Section 27 is entitled to appeal to the Commission pursuant to G.L.c.31, 2(b). 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 Commission has consistently decided that, when two applicants have the same score and one of them is chosen over the other, no bypass has occurred and the non-selected candidate does not have standing to appeal the non-selection to the Commission. See, e.g., DeSimone v. City of Cambridge, 24 MCSR 297 (2011); O'Neill v. Department of Correction, 23 MCSR 440 (2010); Bianco v. Newton Fire Dep't, 20 MCSR 241 (2007); Keegan v. City of Quincy, 19 MCSR 440 (2006); Coughlin v Plymouth Police Dep't, 19 MCSR 434 (2006); Dalrymple v. Town of Winthrop, 19 MCSR 379 (2006)

When considering the merits of a bypass decision, the task of the Commission to determine that there was "reasonable justification" for the decision to bypass the candidate "upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind, guided by common sense and by correct rules of law. " E.g., Brackett v. Civil Service Comm'n,

447 Mass. 233, 543 (2006) and cases cited. "[T]he commission's primary concern is to ensure that the appointing authority's action comports with 'basic merit principles,' as defined in G.L.c.31,§1." 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). The protection of candidates from discriminatory treatment, including but not limited to, racial discrimination, is one of the basic tenets of basic merit principles. G.L.c.31,§1 ("Basic merit principles" shall mean . . .(e) assuring fair treatment of all applicants and employees in all respects of personnel administration without regard to political affiliation, race, color, age, national origin, sex, marital status, handicap, or religion . . .")

Castro v. Beecher

The litigation that produced the Castro v. Beecher Consent Decree began in 1970 with a challenge by black and Hispanic applicants who alleged that the hiring and recruitment practices for police officers discriminated against them in violation of their federal constitutional rights. The lawsuit ultimately resulted in a finding that the civil service examinations that police officers were required to take "were discriminatory against minorities which did not share the prevailing white culture." The Consent Decree, which went through several iterations to reach its final form, was intended to remediate this past discrimination by requiring changes to the civil service examination and creating a priority pool of minority candidates who were to be hired according to a prescribed range of ratios until certain target parity was achieved. See generally Deleo v. City of Boston, 2004 WL 5740819 (D. Mass.) (Saris, USDJ) (containing a synopsis of the litigation from Castro v. Beecher, 334 F.Supp. 930 (D.Mass.1971) (Wyzanski,USDJ) [Castro I] through Castro v. Beecher, 522 F.Supp. 873 (D.Mass.1981) (Caffrey,USDJ) [Castro V]). This system is intended to "facilitate the appointment . . . of one minority policeman for each white policeman" that a

municipality hired. Castro V, 522 F. Supp. at 875. As municipalities achieved the target parity, they became eligible to be released from the terms of the decree. See Deleo v. City of Boston, 2004 WL 5740819 (finding the City of Boston had achieved parity in 2003)

Analysis

The narrow issue that requires the Commission's decision here is Mr. Etienne's claim that his civil service rights have been violated, as a matter of law, by Chelsea's failure to have moved him up to the first minority hire slot on the 2011 certification upon the removal of Mr. Pena from consideration. If that should have been done, Mr. Etienne would have been afforded the opportunity to have been appointed or, if not appointed, would clearly have been entitled to file a bypass appeal. In either case, his civil service rights would be violated as a matter of law. In order to arrive at a conclusion about this question of law, the Commission need not address the factual issues as to whether Chelsea properly selected Mr. Pena over Mr. Etienne for initial placement into the top minority slot when the first minority candidate failed to sign willing to accept, or whether Chelsea would have had reasonable justification to have bypassed Mr. Etienne on the merits had he been considered and bypassed. Only if the answer to the initial legal question were in the negative would the Commission need to face those factual issues either of which, would, in turn, require a further evidentiary hearing.

Chelsea seems to suggest that the issue requires interpretation of the requirements of the Castro v. Beecher Consent Decree that is exclusively a matter for a federal court, not the Commission, to decide, citing Rodrigues v. City of Brockton, 77 Mass.App.Ct. 1106 (2010) (Rule 1:28). While the Consent Decree is a federal court order, this point misses the mark. The issue to be decided here is which candidates on a civil service list are entitled to be placed in the preferred position of a minority candidate ahead of non-minority candidates under the paradigm of the

Consent Decree. The ordering of candidates on a civil service list is appropriately a matter of civil service law over which the Commission has express statutory authority and technical expertise. See generally, G.L.c.31, §2 through §5. See also, Bracket v. Civil Service Comm'n, 447 Mass. 233 (2006). See also Lopez v. Commonwealth, 588 F.3d 69, 75-76 (1st Cir. 2010). Indeed, the fact that Chelsea inquired of HRD, not the federal court, as to how it should handle the tie between Mr. Pena and Mr. Etienne, and relied on that advice, infers that Chelsea understood that HRD (and the Commission as the threshold arbiter of HRD's rulemaking powers) encompassed the authority to make a determination of such an issue. Id.

As a matter of civil service law, merely because candidates on a civil service list with the same score are "interchangeable" does not necessarily compel the conclusion reached by Chelsea and HRD that Mr. Etienne need not have been inserted into the first minority slot after Mr. Pena was eliminated from consideration. Nor is the dispute between the parties as to whether Mr. Pena was "actually employed" within the meaning of Personnel Administration Rules PAR 9.3 and PAR 9.4 controlling here. It is undisputed that Mr. Pena was removed from consideration without even having received a conditional offer because he was unable to supply certain references that were an essential component to the application.

The present question more closely resembles the situation that arises in deciding which candidates on a civil service certification are entitled to *consideration* for appointment, within the meaning of the 2n+1 rule, than it fits the question of when a non-selected candidate has been bypassed in favor of a lower ranked candidate. Civil service rules have generally been construed to mean that candidates who are tied are treated as equal for purposes of placement on a civil service list. Thus, as the HRD guidelines provided to Consent Decree Communities note, the Personnel Administration Rules prescribe that if the number of candidates required to meet the

2n+1 formula ends in a group of candidates who are tied, ALL of the candidates in that tie group are considered within the 2n+1 formula to be *considered* for appointment. (Exh. 5 at p. 8) Similarly, if a candidate who initially signs willing to accept subsequently withdraws from consideration, that candidate is no longer considered "willing to accept" and is removed from the 2n+1 group, which would allow the *consideration* of another candidate lower on the list, or if the list is exhausted, to invoke the authority to make a "provisional" appointment from what had then become a "short list" with less than the required 2n+1 names. See Colon v. City of Lowell, CSC No. G1-13-140, 26 MCSR --- (2013) (withdrawn candidate not bypassed); Smyth v. City of Quincy, 221 MCSR 235 (2009) (candidate offered osition but declined, left less than 2n+1 candidates "willing to accept", thus creating a "short list")

The Commission need not decide whether or not Chelsea properly selected Mr. Pena over Mr. Etienne as the candidate to be placed initially into the preferred minority position. Even assuming that choice was initially permissible, once Mr. Pena failed to complete the application process, he was no longer a person "willing to accept". Thus, his withdrawal from consideration created a vacancy in that preferred position under established civil service law and rules and, thus, this should have triggered a requirement that Chelsea fill that vacant slot in the preferred position with the name of the next candidate on the list qualified for that preferred minority position, namely, Mr. Etienne in this case.

Although not necessary to this decision, this construction of civil service law is entirely consistent with the terms and intent of the Castro v. Beecher Consent Decree to "facilitate" hiring a qualified minority candidate before any non-minority candidates were hired. The terms of the Consent Decree, as HRD has implemented it in many other respects, expressly provides for "moving up" even lower-ranked minority candidates when the higher-ranked minority candidates

are dropped from consideration, including a candidate who "declines the position". It seems a logical corollary to infer that if one of two tied minority candidates in the preferred position is eliminated from consideration, then the other tied minority candidate must be considered and, if qualified, should be appointed before any non-minority candidate is appointed. Indeed, this interpretation tends to facilitate the implementation of the Consent Decree and ensure that the municipality reaches the necessary parity sooner, rather than later, which is the ultimate goal of the process. This interpretation does not detract in any way from the ability of an appointing authority to bypass any minority candidate it deems unqualified, but it does mean that such a candidate would have to be provided reasons for such bypass which, in turn, could be appealed to the Commission.

In sum, since Mr. Etienne was neither considered for appointment in the preferred minority slot nor provided any reasons for his non-selection, he has established that, as a matter of law, his civil service rights have been violated through no fault of his own. Thus, he is entitled to equitable relief from the Commission so that he receives at least one such consideration in the future as remediation for this violation. Nothing in this Decision is meant to preclude Chelsea from bypassing Mr. Etienne for reasons, if any, that are consistent with civil service law and rules in any future consideration of his application for appointment.

Relief to be Granted

Accordingly, for the reasons stated above, the Respondent's Motion to Dismiss is DENIED The appeal of the Appellant, Kenny Etienne, is ***allowed***. Pursuant to the Commission's powers of relief inherent in Chapter 534 of the Acts of 1976 as amended by Chapter 310 of the Acts of

1993, it is hereby by ORDERED: The Massachusetts Human Resources Division and the City of Chelsea, in its delegated capacity, shall:

1. Place the name of the Appellant, Kenny Etienne, at the top any current or future certifications used for appointment to the position of Police Officer in the City of Chelsea, until such time as he is appointed or bypassed.
2. If the Appellant is selected for appointment as a Police Officer, he shall be granted a retroactive seniority date in that position with the same date as any candidate appointed from Certification #202550 (on which the Appellant's name appeared and should have been considered in the preferred minority position).
3. This retroactive seniority date is not intended to provide the Appellant with any additional or retroactive compensation or benefits, including without limitation, credible service toward retirement.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell & Stein, Commissioners) on October 31, 2013

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:
Edward G. Seabury, Esq. (for Appellant)
Amy Lindquist, Esq. (for Respondent)
John Mzrra, Esq. (HRD)