COMMONWEALTH OF MASSACHUSETTS

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

LUC A. EYMA,
Appellant

v. E-21-069

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant: *Pro Se*
Luc Eyma

Appearance for Respondent: Joseph Santoro
Department of Correction
50 Maple Street
Milford, MA 01757

Commissioner: Christopher C. Bowman

SUMMARY OF DECISION

The Commission denied the Appellant's non-bypass equity appeal after determining that he had no reasonable expectation of showing that DOC's decision not to issue a third certification from the prior eligible list, upon which he appeared at or near the top, was meant to prevent the Appellant from being promoted to Correction Officer III (CO III).

DECISION

On March 27, 2021, the Appellant, Luc A. Eyma (Appellant), a Correction Officer II (CO II) at the Department of Correction (DOC), filed a non-bypass equity appeal with the Civil Service Commission (Commission), regarding the expiration of an eligible list for Correction Officer III (CO III). On May 11, 2021, I held a remote pre-hearing conference which was attended by the Appellant and a DOC representative.

Subsequent to the pre-hearing conference, I issued a Procedural Order asking both parties to provide the Commission with additional information. As part of those responses, DOC submitted an affidavit from a Personnel Analyst III indicating that there are no documents related to whether or not DOC would create a third certification from an eligible list established in 2018. Based on the information provided, including the statements made at the pre-hearing conference, the following, unless otherwise noted, does not appear to be in dispute:

1. In 1999, the Appellant was appointed by DOC as a Correction Officer I (CO I).
2. In 2012, the Appellant was promoted to CO II (Sergeant).
3. On May 19, 2018, the Appellant took the promotional examination for CO III (Lieutenant) and received a score of 84.
4. On August 15, 2018, the eligible list for CO III was established.
5. On July 21, 2019, DOC made 18 promotional appointments to CO III from Certification No. 06382.
6. On December 8, 2019, DOC made 6 promotional appointments to CO III from Certification No. 06703.
7. Two of the candidates promoted from Certification No. 06703 were tied with the Appellant on the certification, but were promoted based on their departmental seniority, the tie-breaking

method used by DOC. The Appellant and five other candidates with less departmental seniority than the promoted candidates were not promoted from Certification No. 06703.

8. DOC made no further promotional appointments from the CO III eligible list that was established on August 15th.
9. In regard to the prior eligible list, established on or around 2014, DOC also only created two certifications to fill vacancies.
10. On November 7, 2020, the Appellant took a promotional examination for CO III and received a failing score of 69. (According to the Appellant, this was the first time that the examination was given online. The Appellant reported that he found certain aspects of the online examination frustrating, including the challenges associated with skipping a question and returning to it later.)
11. On February 1, 2021, a new eligible list for CO III was established and the prior eligible list expired. The Appellant's name was at or near the top of the prior eligible list, tied with five others, when it expired. His name does not appear on the new eligible list.

Parties' Arguments

As part of his appeal, the Appellant argued that DOC traditionally creates three certifications from the CO III eligible list and that DOC's decision not to create a third certification and conduct a third round of promotions may have been a result of personal animus or bias against him, potentially based on claims that the Appellant[1] has filed against DOC with the

[1] The Appellant's MCAD claim is based, in part, on the fact that he is Black and over the age of 40.

Massachusetts Commission Against Discrimination (MCAD), including one complaint that was pending at the time of this appeal.

DOC argued that the decision to only create two certifications and conduct two promotional cycles was strictly related to operational issues, including budgeting issues. Subsequent to the pre-hearing, DOC provided information showing that, in regard to the prior eligible list, established in or around 2014, only two certifications were used as part of two hiring cycles, similar to what occurred in regard to the 2018 eligible list which is the subject of this appeal. DOC specifically noted that, in May 2020, DOC closed the Massachusetts Substance and Abuse Center (MASAC) in Plymouth, resulting in the relocation of many lieutenants (CO IIIs), decreasing any potential need for a third promotional cycle from the 2018 eligible list.

Summary Decision Standard

When there is no genuine issue of fact relating to all or part of a claim or defense and a party is entitled to prevail as a matter of law, summary decision is appropriate. 801 CMR 1.01(7)(h). The Commission relies on 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, 635-636, (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).

Analysis

As a preliminary matter, I asked DOC to provide the Commission with any documents related to its decision not to create a third certification from the 2018 eligible list, to which DOC indicated that no such documents existed. To ensure clarity, I then provided DOC with the expansive definition of the term "document" and asked that a diligent search be conducted to search for any such documents. In response, a DOC Personnel Analyst III submitted a sworn affidavit affirming that a search was conducted and no responsive documents were found.

The Appellant has no reasonable expectation of prevailing in his appeal for the reasons discussed below.

First, DOC's decision not to promote the Appellant from Certification No. 06703, the second and final certification created from the 2018 eligible list, was not a bypass. It is undisputed that no candidate ranked below the Appellant was promoted, but, rather, two candidates tied with the Appellant were promoted based on their departmental seniority, the well-established tie-breaking method used by DOC.

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.").

Second, the Appellant has not presented any evidence, nor does there appear to be any, that DOC traditionally creates three (as opposed to two) certifications from an eligible list prior to its expiration. The unrefuted evidence presented by DOC actually shows that, in regard to the eligible list immediately preceding the 2018 eligible list, DOC only used two, not three, certifications.

Third, the Appellant's argument that personal animus against him by certain unnamed individuals at DOC was the reason that a third certification was not created is, at best, speculative and the Appellant does not point to any existing or potential evidence that would support this argument. Rather, it is undisputed that, at or around the time that the Appellant argues that a third certification should have been created, many lieutenants were being transferred out of MASAC, reducing the need for a third certification.

The Commission rarely intervenes in matters involving the expiration / creation of eligible lists as "dying on the vine" is a normal part of the civil service appointment and promotional process, except in rare cases such as Cutillo and Kelley v. City of Malden (evidence showed that the decision to literally tear up a certification was due to the personal animus of the Police Chief

against one of the Appellants). Here, the Appellant has not pointed to any evidence that he would present to the Commission to show similar circumstances existed here. In short, the Appellant's failure to be promoted is the result of the normal process of an eligible list expiring, plus the Appellant's failure to pass the subsequent qualifying examination to be placed on the next eligible list from which promotions were to be made.

Conclusion

For all of the above reasons, the Appellant's appeal under Docket No. E-21-068 is hereby ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman
Christopher Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners) on August 11, 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:
Luc A. Eyma (Appellant)
Joseph Santoro (for Respondent)