

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

RICHARD FAIRBANKS,
Appellant

v.

Docket No.: G1-15-175

TOWN OF OXFORD,
Respondent

Appearance for Appellant:

James Triplett, Esq.
Triplett & Fleming
25 Camp Hill Drive
Oxford, MA 01540

Appearance for Respondent:

Marc L. Terry, Esq.
Mirick, O’Connell, DeMallie &
Lougee, LLP
1800 West Park Drive
Westborough, MA 01581

Commissioner:

Cynthia A. Ittleman

**DECISION ON RESPONDENT’S MOTION TO DISMISS
AND APPELLANT’S MOTION TO STAY APPOINTMENT**

Mr. Richard Fairbanks (Appellant) filed the instant appeal on September 9, 2015 at the Civil Service Commission (Commission) pursuant to G.L. c. 31, § 2(b) alleging that the Town of Oxford (Respondent) wrongly bypassed him for appointment to the Permanent, Full-time position of patrol officer.¹

¹ Also pending at the Commission is the Appellant’s disciplinary appeal, docketed D1-16-162, for which a full hearing is scheduled on January 31, 2017. In that case, the Appellant alleges that the Respondent wrongfully terminated his employment as a Permanent *Intermittent* Police Officer in 2016. The Respondent alleges that the Appellant resigned from his *Intermittent* position and withdrew from his April 2016 appointment as a *Full-time* Police Officer, both of which the Appellant strenuously denies and are not determinative in the instant case.

The Appellant previously applied unsuccessfully for employment as a Permanent *Intermittent* Police Officer at the Oxford Police Department and filed appeals in those regards and was granted relief. See Fairbanks v. Oxford, G1-11-360 (2012) and Fairbanks v. Oxford, G-01-1483 (2005). The Commission also conducted an Investigation about the selection of Permanent Intermittent Police Officers by the Respondent, Investigation No. I-11-280 (2011), in

The Appellant filed a Motion to Stay Certification of Appointment of Joseph Conlon (Motion to Stay) pending this appeal. The Respondent filed a Motion to Dismiss and Opposition to Motion to Stay (Motion to Dismiss), asserting that it did not bypass the Appellant because he was tied with the candidate who was appointed and appointment on that basis does not constitute a bypass. The Appellant filed an Opposition to the Motion to Dismiss and Support for Motion to Stay (Opposition to Motion to Dismiss). The Respondent filed a Reply to the Opposition to the Motion to Dismiss (Reply). At the request of the Commission, the parties thereafter submitted Supplemental Memoranda regarding the legal issue of a tie in similar circumstances in view of the Commission's decision in Ragucci v. Town of Saugus, G1-10-200 (2012). The Respondent filed a Second Motion to Dismiss, alleging that the appeal was moot because the Appellant had withdrawn from consideration and resigned from his position as a Permanent *Intermittent* Police Officer for the Respondent. The Appellant filed an Opposition to the Second Motion to Dismiss. Reply to the Appellant's opposition to the Motion to Dismiss. The Commission conducted a hearing on November 13, 2015 on the parties' motions and responses and these matters were taken under advisement.² The hearing was digitally recorded and copies of the recording were sent to the parties.³

The instant bypass appeal was reviewed at a prehearing conference on the discipline case on November 29, 2016, given that the matters appear to be related. The parties were encouraged to resolve both the bypass and the discipline matter and were advised that if the bypass case was

which the Commission found that two (2) members of the Respondent Board of Selectmen tainted the process for appointing Intermittent Police Officers and ordered the Respondent to take a number of actions regarding the police officer hiring process prior to making additional appointments.

² The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq.*, apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence. At the request of the parties, the hearing was conducted by phone.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

not resolved shortly, the Commission would issue rulings on the motions pending in the bypass appeal. A hearing was scheduled for the discipline case.

Subsequently, the Respondent requested a delay in the issuance of rulings on the bypass case motions so that he could discuss both cases with his client and possibly reach a resolution with the Appellant. A delay was granted, indicating that the deadline for resolving both cases by December 14, 2016. I received no response from the parties by December 14, 2016 or by the date of this decision.

I take administrative notice of all matters filed in this appeal, as well as in the discipline appeal filed by the Appellant, docketed D1-16-162.

FINDINGS OF FACT

Based on the submissions of the parties and the state's Human Resources Division (HRD), including all motions, responses thereto, documents, the Appellant's affidavit, the parties' prehearing conference stipulation and arguments at the motion hearing, and email messages regarding this case, I find that the following material facts are not in dispute:

1. The Appellant is approximately forty-seven (47) years old and resides in Rochdale, Massachusetts. The Appellant took and passed the Police Officer examination in 2011 and applied for the position of *Permanent Intermittent* Police Officer in Oxford. The Appellant's name appeared first on certifications 01129 and 01130, from which he was appointed as a *Permanent Intermittent* Police Officer in November, 2013. (Information provided by HRD September 24, 2015 and copied to parties September 29, 2015, Appellant's Affidavit, Motion for Stay, Opposition to Motion to Dismiss)
2. In or about April, 2014, the Respondent sought to hire one Permanent *Full-time* Police Officer, which it would hire from a "Roster Certification" of Permanent *Intermittent*

Police Officers, which included the Appellant. This roster was signed by the five (5) Permanent *Intermittent* Police Officers, including the Appellant. The Respondent scheduled interviews for the available Permanent *Full-time* Police Officer position for the Appellant and fellow *Intermittent* Officers Raymond and Ausmus. Officer Raymond had been appointed as a Permanent *Intermittent* Officer in October 2013 and the others (including Appellant) had been appointed as Permanent *Intermittent* Officers on November 27, 2013. At a Board of Selectmen's (BOS) meeting on April 22, 2014, the BOS interviewed three (3) of the selected *Intermittent* Officers for ten (10) minutes each for One (1) Permanent *Full-time* position. In regard to their interview performance, the BOS gave Officer Raymond a rating of 546, the Appellant a rating of 461 and Officer Ausmus a rating of 489. The BOS appointed Officer Raymond to the available Permanent *Full-time* Police Officer position. (Opposition to Motion to Dismiss and Support of Motion to Stay (Exs. 5 and 5A))

3. In August 2014, the Respondent issued Roster Certification 02227, seeking to hire appoint another *Full-time* Police Officer from among the remaining four (4) *Intermittent* Police Officers: the Appellant was listed first, Officer Ausmus appeared second, Officer Conlon was third and Officer Gray was fourth. The Appellant was not appointed a *Full-time* Police Officer from this Roster Certification. (Opposition to Motion to Dismiss and Support of Motion to Stay (Ex. 6))
4. In January 2015, the Respondent issued Roster Certification 0260R, seeking to appoint another *Full-time* Police Officer from among three (3) *Intermittent* Police Officers: the Appellant was listed first, Officer Conlon was second on the Roster Certification, and Officer Gray was third. The Appellant was not appointed a *Full-time* Police Officer from

this Roster Certification. (Opposition to Motion to Dismiss and Support of Motion to Stay (Ex. 7))

5. In July 2015, the Respondent issued Roster Certification 03105R, seeking to appoint another *Full-time* Police Officer from among two (2) *Intermittent* Police Officers: the Appellant was listed first and Officer Conlon was second. (Opposition to Motion to Dismiss and Support of Motion to Stay (Ex. 8))
6. By memorandum dated August 26, 2015, Police Chief Michael Hassett wrote to the BOS and Town Manager, Brian Palaia, providing information about the two (2) candidates on the July 2015 Roster Certification and endorsing the Appellant for appointment. (Opposition to Motion to Dismiss and Support of Motion to Stay (Ex. 9))
7. By letter dated September 10, 2015, the BOS Chairman, Dennis Lamarche, wrote to the Appellant, in full,

Thank you for your interest in the full-time Police Officer position. We were fortunate to have excellent candidates for this opening. The decision was a difficult one and, as you know, we have completed our review and selection process.

Although we were very impressed with your abilities and accomplishments, we have filled the position with another candidate. Your interest in the Town of Oxford is very much appreciated and we appreciate your assistant as a Permanent Intermittent Police Officer in our community.

(Opposition to Motion to Dismiss and Support of Motion to Stay (Ex. 11))

8. The Respondent did not send the Appellant a bypass letter indicating the reasons he was not appointed to the position of *Full-time* Police Officer and advising of his right to appeal the bypass to the Commission. (Email message from Respondent's counsel, November 30, 2016)⁴

⁴ The Respondent gave the Appellant a conditional officer of employment for the *Full-time* Police Officer position in or about April 2016, requiring the Appellant to take and pass a Physical Abilities Test (PAT) and attend a police

Standard of Review

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 CMR 1.01(7)(g) and (7)(h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is no “no reasonable expectation” that a party can prevail on at least one “essential element of the case”. *See, e.g., Milliken & Co. v. 6 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).

Applicable Law

Massachusetts General Laws Chapter 31, section 27 addresses the bypass of candidates for employment providing, in part,

If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department.

(Id.)

In relation to bypasses, the Personnel Administrator Rules (PAR), section .08, adds,

(4) Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all positive reasons for selection and/or negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later

academy for additional training but the Appellant sustained an injury from a part-time job at another municipality’s Public Works Department, which delayed the Appellant’s ability to take the PAT. (Opposition to Second Motion to Dismiss) The Respondent alleges that the Appellant declined the conditional offer and resigned; the Appellant vigorously denies these allegations. The April 2016 matter is not the subject of the instant appeal.

be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. A selection made from among candidates with the same score will be considered a tie and not a bypass. The certification process will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass. ...

(5) The Personnel Administrator shall, within fifteen days of receiving reasons for selection or bypass, review the reasons submitted and inform the appointing authority of approval or disapproval of the reasons for selection or bypass. The appointing authority shall be granted a hearing, as necessary, with the Personnel Administrator, or the Administrator's designee, during the fifteen-day review period to explain, clarify or justify reasons for selection or bypass. If the Personnel Administrator disapproves any reason or reasons for selection or bypass, he shall immediately notify the appointing authority, with clear and specific reasons for the rejection. If the Personnel Administrator accepts the reasons, he shall forthwith notify the appointing authority and the bypassed candidate or candidates, who may then appeal the decision to the Civil Service Commission pursuant to M.G.L. Chapter 31, §2(b).

(Id.)⁵

When the Commission finds that an appointing authority has failed to establish by a preponderance of the evidence that it had reasonable justification for bypassing an appellant, the Commission may grant the appeal and order that the appellant's name shall be placed at the top of the existing or future certification for further consideration by the appointing authority.

As noted above, PAR.08(4) provides that, in the appointment of permanent full-time personnel, "[a] selection made from among candidates with the same score will be considered a tie and not a bypass. (Id.) However, G.L. c. 31, § 60, relating to intermittent police or fire forces, provides, in part,

In any city or town having an intermittent or reserve police or fire force to which the civil service law and rules are applicable, original appointments to the lowest title in the regular police or fire force shall be made from among the permanent members of such intermittent or reserve police or fire force, as the case may be, whose names are certified by the administrator to the appointing authority. Names of such members shall be listed on the certification in the order of their civil service appointments to such intermittent or reserve police or fire force, or, if such order is not ascertainable, in the order provided by

⁵ Since the Personnel Administrator delegated much of the police appointment process to municipalities in 2009, the municipality is obliged to inform a bypassed candidate accordingly.

the appointing authority at the time of their appointments to such intermittent or reserve police or fire force ...

No person who has passed his fiftieth birthday shall be appointed pursuant to this section to the regular police or fire force. A member of an intermittent or reserve police or fire force who, after being duly certified on three occasions, refuses employment on a permanent basis in the regular police or fire force shall not be eligible for further certification for appointment thereto and, notwithstanding the provisions of sections forty-one, forty-three and forty-four or any other law, shall cease to be a member of such intermittent or reserve police or fire force ...

(Id.)

Further, the HRD Certification Handbook for Entry Level Police Officer and Firefighter

Appointments for Permanent Intermittent and Reserve Service Subject to Civil Service provides, in part,

...Appointing Authorities are asked to take particular notice of MGL Chapter 31, Section 60, which specifies that intermittent and reserve officers must be placed and maintained on the roster and certified for full-time employment in the order in which they were appointed. It is the Appointing Authority's responsibility to insure that the effective dates of employment and the order in which employees are listed on the Authorization of Employment Form follows this requirement, so that certifications issued from the roster list will list names in appropriate order. ...

(Id. at section V)(**emphasis in original**)⁶

In 2008, the Commission expounded upon these provisions in Ragucci v. Town of Saugus, 18 MCSR 167 (2008). Specifically, the Commission determined, in part,

... the weight of analysis and the prior decisions of the Commission lead to the conclusion that Section 60 meant to instruct an appointing authority to incorporate, to the extent possible, merit-based distinctions and statutory preferences among candidates within an intermittent roster rather than to mandate that they disappear entirely. Every appointment of either permanent “intermittent” or “full time” firefighters derives from an eligible list compiled from the group of candidates who passed the same qualifying examination and made the cut as the first “2n+1” that put them on the certification to the municipality seeking to hire them, either as full-time or intermittent officers, as the case may be. When making a “full time” appointment directly from such a certification, it is clear that an appointing authority must file with HRD and HRD must approve a written statement of “sound and sufficient” reasons “in accordance with basic merit principles” before a person listed lower on the certification may be appointed over a person listed

⁶ Under the 2009 delegation by HRD to civil service municipalities of certain of these duties, the responsibility for creating and maintaining appropriate rosters rests with the municipalities.

higher, and the non-selected person who is higher on the list has a well-established right of appeal to the Commission to contest the justification proffered for the “bypass” of the more highly ranked candidate. G.L.c.31,§27, G.L.c.31§2(b).

(Id. and cases cited)⁷

Analysis

The Appellant avers that the Respondent wrongfully bypassed him for appointment to the position of full-time permanent Police Officer. The Respondent argues that the Appellant was not bypassed because he was tied with other Permanent *Intermittent* Police Officers like the Appellant who were appointed to their *Intermittent* positions on the same date.

The undisputed material facts affirmatively demonstrate that there is no reasonable expectation that the Respondent can prevail on at least one essential element of the case. The Appellant’s name appeared first on the certification from which he was appointed to the position of Permanent *Intermittent* Police Officer in 2013. Consistent with Ragucci, that was the appropriate ranking, given that he was ranked first on the certification that was used to make the appointments to the Permanent *Intermittent* Officer position. Instead of appointing the Appellant to the position of full-time permanent Police Officer when the position became available, the Respondent appointed a Permanent *Intermittent* Police Officer who ranked below the Appellant on the certification from which they were appointed *Intermittent* Police Officers. The Respondent acknowledges that it did not send the Appellant notice of the bypass, asserting that it believed that the Appellant was not bypassed because he and the selected officer were tied, having been appointed to the position of Permanent *Intermittent* Police Officer on the same date. However, the law in this matter is established and clear. To prevent the disappearance of the statutory and merit-based determinations, rosters for appointment of Permanent *Intermittent*

⁷ Again, in 2009 HRD delegated a number of its functions in this regard to civil service municipalities. As a result, it is the municipality’s responsibility to ensure that lists are created and maintained appropriately.

Police Officers to the position of *full-time* Police Officers are required to maintain the status of the candidates as they appeared in the certification from which the *Intermittent* Police Officers were appointed.

Conclusion

For the reasons stated above, the Respondent's Motion to Dismiss and Second Motion to Dismiss, and the Appellant's Motion to Stay are **denied** and the bypass appeal of the Appellant, Richard Fairbanks, docketed as G1-15-75, is hereby **granted** and, pursuant to the powers of relief inherent in Chapter 534 of the Acts of 1976, as amended by Chapter 310 of the Acts of 1993, the Commission orders the Human Resources Division, or the Town of Oxford in its delegated capacity, to take the following actions:

Place the name of Richard Fairbanks at the top of future certifications for the position of permanent full-time Police Officer in the Town of Oxford until he is appointed or bypassed.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein, and Tivnan, Commissioners) on February 2, 2017.

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:
James Triplett, Esq. (for Appellant)
Marc L. Terry, Esq. (for Respondent)
John Marra, Esq. (HRD)