

COMMONWEALTH OF MASSACHUSETTS

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

RE: Request for Investigation against the City of Somerville by Petitioner Michael Kiely regarding the police promotional process

Tracking Number: I-18-018

Appearance for Petitioner:

James Simpson, Esq.
100 Concord Street, Suite 3b
Framingham, MA 01702

Appearance for City of Somerville:

Darren R. Klein, Esq.
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Commissioner:

Christopher C. Bowman

RESPONSE TO REQUEST FOR INVESTIGATION

On February 9, 2018, the Petitioner, Michael Kiely (Petitioner), pursuant to G.L. c. 31, § 2(a), filed a request for the Civil Service Commission (Commission) to investigate the police promotional process used by the City of Somerville (City). Specifically, the Petitioner, who, at the time was a sergeant in the City's Police Department, argued that, after having been selected for promotion by the Chief of Police, vetted by the City's Human Resources Division and with the full support of the Mayor, he was denied confirmation by the City's Board Of Aldermen who, midstream, "decided to alter the confirmation process solely for the purpose of denying the Petitioner's promotional prospects."

On April 10, 2018, I held a show cause conference, which was attended by the Petitioner, his counsel, and counsel for the City's Board of Aldermen, to determine whether there was good cause for the Commission to initiate an investigation. I heard oral arguments from counsel for the Petitioner and the City and set a briefing schedule. Both the Petitioner and the City subsequently submitted briefs, with the Petitioner arguing why the Commission should initiate an investigation and the City arguing why such action by the Commission was not warranted. The City, in a 20-page brief, argued that there was "... no evidence that any violation of civil service law and/or rules ha[d] occurred resulting in the prejudice of the civil service rights of Sergeant Kiely."

The Petitioner subsequently filed a separate bypass appeal with the Commission which was assigned to Commissioner Cynthia Ittleman for full hearing. The Commission effectively held any response to the *request for investigation* in abeyance until the conclusion of the *bypass* proceedings. Commissioner Ittleman conducted multiple days of hearing and the parties submitted proposed decisions, but no Commission decision has been issued in the bypass appeal. As a result of the recent retirement of Commissioner Ittleman, prior to the issuance of a decision, both the bypass appeal and the request for investigation have been reassigned to me. I re-reviewed the record regarding the request for investigation and then reviewed the record in the bypass appeal. During this review, the Commission became aware that Sgt. Kiely has now retired from the Somerville Police Department.¹

¹ In 2020, the Commission made inquiries to ascertain whether the parties, given the retirement of Sgt. Kiely, would prefer to resolve this matter absent a ruling by the Commission. Neither party was interested.

Legal Standard for 2(a) Investigation

Section 2(a) grants the Commission broad discretion upon receipt of an allegation of a violation of Chapter 31's provisions to decide whether and to what extent an investigation might be appropriate. See, e.g., Dennehy v. Civil Service Comm'n, Suffolk Superior Court C.A. No. 2013-00540 (2014) ("The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion.") See also Erickson v. Civil Service Comm'n, Suffolk Superior Court C.A. No. 2013-00639 (2014); Boston Police Patrolmen's Association et al v. Civil Service Comm'n, Suffolk Superior Court C.A. No. 2006-4617 (2007). The Commission's exercise of its power to investigate is not subject to the general rules for judicial review of administrative agency decisions under G.L. c. 30A, but can be challenged solely for an "abuse of discretion". See Erickson v. Civil Service Comm'n, Suffolk Superior Court C.A. No. 2013-00639 (2014), citing Mayor of Revere v. Civil Service Comm'n, 31 Mass. App. Ct. 315, 321-22 (1991).

The Commission exercises its discretion to conduct an investigation only "sparingly" and, typically, only when there is clear and convincing evidence of systemic violations of Chapter 31 or an entrenched political or personal bias that can be rectified through the Commission's affirmative remedial intervention into the hiring process. Compare e.g., Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011) (declining to investigate alleged age discrimination and favoritism in provisional promotions, but admonishing agency that "certain actions . . . should not be repeated on a going forward basis") and Perry v. Dep't of Mental Health, 28 MCSR 243 (2015) (despite drop in candidate's ranking from first to fourth place after reposting of position following management concern over initial interview process, Commission declined to proceed with investigation after ascertaining absence of evidence of personal or

political bias) with In Re: 2010/2011 Review and Selection of Firefighters in the City of Springfield, 24 MCSR 627 (2011) (investigation into hiring spearheaded by Deputy Fire Chief which resulted in his son's appointment and required reconsideration of numerous candidates through a new hiring cycle conducted by outsiders not connected with the Springfield Fire Department); In Re: 2011 Review and Selection of Permanent Intermittent Police Officers By the Town of Oxford, CSC No. 1-11-280 (2011) (investigation of alleged nepotism in hiring Selectman's relatives required reconsideration of all 19 candidates through an new independent process); and Dumont v. City of Methuen, 22 MCSR 391 (2009), findings and orders after investigation, CSC No. I-09-290 (2011) (rescinding hiring process and reconsideration of all candidates after Police Chief had participated in selection of her niece).

Legal Standard for 2(b) Bypass Appeal

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

*No person shall be deemed to be aggrieved . . . unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator [HRD] was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status. Id. (*emphasis added*)*

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

If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights notwithstanding the failure of any person to comply with any requirement of

said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights. (*emphasis added*)

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

In order to deviate from the rank order of preferred hiring, and appoint a person “other than the qualified person whose name appears highest”, an appointing authority must provide written reasons – positive or negative, or both – consistent with basic merit principles, to affirmatively justify bypassing a lower ranked candidate in favor of a more highly ranked one. G.L. c. 31, §§ 1 and 27; PAR.08. A person who is bypassed may appeal that decision under G.L. c. 31, § 2(b) for a de novo review by the Commission to determine whether the bypass decision was based on a “reasonably thorough review” of the background and qualifications of the candidates’ fitness to perform the duties of the position and was “reasonably justified”. Police Dep’t of Boston v.

Kavaleski, 463 Mass. 680, 688 (2012), citing Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 259 (2001); Brackett v. Civil Service Comm'n, 447 Mass. 233, 543 (2006). and cases cited; Beverly v. Civil Service Comm'n 78 Mass. App. Ct. 182 (2010); Leominster v. Stratton, 58 Mass. App. Ct. 726, 727-28 (2003).

Analysis

Based on a careful review of the record regarding the *request for investigation*, I have concluded that an investigation by the Commission is not warranted. My review of the record in the *bypass appeal* has not changed my conclusion. Here, unlike other cases the Commission has investigated, this record lacks the kind of credible evidence to imply that the Board's decision was tainted by clearly unlawful bias or favoritism. Rather, the record shows that the Board of Aldermen at a minimum had sufficient evidence before it, including two prior discipline matters, one of which was heard and upheld by the Commission, to question whether the promotion of Sgt. Kiely to lieutenant was in the public's best interest. That one Board member not on the Confirmation Committee attended a committee meeting and later stated that, based on what he absorbed from that meeting about Sgt. Kiely's disciplinary record and review of documents, he urged denial of a promotion, is not adequate evidence of impermissible bias. And whether the Chair of the Confirmation Committee treated Sgt. Kiely fairly in all respects is an issue preserved for adjudication in the bypass appeal—but, again, Petitioner has not adduced sufficient evidence of *personal* or *political* bias to warrant further investigation. For this reason, and in light of the high standard required to initiate an investigation under Section 2(a), I recommend that the Commission deny the Petitioner's request for investigation.

While this response disposes solely of the Petitioner's request for an investigation, I have, as referenced above, reviewed the record in the bypass appeal and I did so with the standard

related to Section 2(b) bypass appeals in mind. While the City primarily relies on two instances of prior misconduct, one of which resulted in the issuance of a so-called *Brady* letter by the District Attorney's Office, Kiely argues that the discipline is stale and that his intervening record of professional and educational achievement did not provide the Board of Aldermen with reasonable justification to bypass the Appellant for appointment.² Regardless of whether the Commission rules in favor of the City or the Appellant in that bypass appeal, the record does *not* support granting more than the traditional relief (i.e. – placement at the top of the next certification to ensure reconsideration for promotional appointment in the future) should he prevail, arguably making that pending promotional bypass appeal moot. Put simply, it does not appear to be in either party's best interest, including the Appellant's, for the Commission to issue a decision on the merits regarding the bypass appeal. For that reason, the Commission will hold the issuance of a bypass decision in abeyance for thirty days, giving the Appellant the opportunity to decide if he wishes to withdraw his bypass appeal with the Commission.

Conclusion

The Appellant's request for investigation is ***denied***.

By vote of the Civil Service Commission (Bowman, Chair; Stein and Tivnan, Commissioners)
on June 30, 2022.

Notice to:
James Simpson, Esq. (for Appellant)
Darren R. Klein, Esq. (for Respondent)

² The parties spent considerable time on dueling legal arguments related to whether a bypass actually occurred here (the City says it did not) and whether the Board of Aldermen had the legal authority to effectively rescind the Mayor's conditional offer of employment (Kiely says they do not). Neither of these arguments is persuasive. The City's Charter makes the Mayor's promotional decisions subject to Board of Aldermen approval, which is not inconsistent with the civil service law. Since candidates ranked below the Appellant were promoted, he was indeed bypassed as defined by the civil service law and rules.)

Courtesy Copy:
Tim Zessin, Esq. (for City in bypass appeal)