

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

STEPHENS P. LIMA,

Appellant

G1-19-258

v.

CITY OF NEW BEDFORD,

Respondent

Appearance for Appellant:

Matthew A. Viana, Esq.
Beauregard, Burke & Franco
32 William Street
New Bedford, MA 02740

Appearance for Respondent:

Elizabeth Treadup Pio, Esq.
Associate City Solicitor
New Bedford City Hall
133 William Street
New Bedford, MA 02745

Commissioner:

Paul M. Stein

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Stephens Lima, acting pursuant to Mass. G.L.c.31, §2(b), brought this appeal to the Civil Service Commission (Commission), contesting his non-selection by the City of New Bedford (New Bedford) for appointment to the civil service position of Firefighter with the New Bedford Fire Department (NBFD).¹ New Bedford filed a Motion to Dismiss the appeal on the grounds that it was untimely, which the Appellant opposed. A pre-hearing conference and motion hearing was held on January 24, 2020 at the UMass School of Law in Dartmouth. For the reasons explained below, I conclude that Motion to Dismiss should be granted and the appeal be dismissed.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

FINDINGS OF FACT

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

1. On March 28, 2018, the Appellant, Stephens P. Lima, took and passed the written civil service examination for Firefighter administered by the Massachusetts Human Resources Division (HRD) and his name was placed on the eligible list for Firefighter established by HRD on or about December 1, 2018.

2. On March 18, 2019, and as amended on March 24, 2019, HRD issued Certification No. 066166 authorizing New Bedford to appoint up to ten (10) Firefighters.

3. Mr. Lima's name appeared in a tie group in the 6th position on Certification No. 06166.

4. New Bedford eventually appointed seven (7) candidates from Certification No. 06166, including six ranked below Mr. Lima on the certification.

5. On September 17, 2019, Nbfd Administrative Coordinator Amy Poitras mailed a letter from Acting Nbfd Fire Chief Paul Coderre to Mr. Lima, via certified mail return receipt, to the address listed by Mr. Lima in his Nbfd employment application. The letter informed Mr. Lima that he had been bypassed and, in compliance with civil service law, informed him of the reasons for the bypass and advised him of his right to appeal the bypass decision to the Commission.

6. Mr. Lima never received Chief Coderre's September 17, 2019 letter. On or about October 10, 2019, the letter was returned, unopened, to the Nbfd by the US Postal Service with the notation: "RETURN TO SENDER UNCLAIMED UNABLE TO FORWARD."

7. Meanwhile, on October 9, 2019, Mr. Lima contacted the Nbfd to inquire about the status of his application and spoke to Ms. Poitras. She informed him that a letter had been sent to him on September 17, 2019. On that same day, Ms. Poitras sent Mr. Lima an e-mail stating:

“Attached are scanned copies of the contents of the envelope that was mailed certified mail on 09/17/19” to Mr. Lima. She included the tracking number and stated: “If you’d like when I receive the envelope “Return to Sender” I can give you a call to stop by the station and pick it up.”

8. Mr. Lima acknowledges that he received Ms. Poitras’s 10/9/19 email and read it that same day. He did not open the attachment containing the bypass letter.

9. On October 10, 2019, Mr. Lima emailed Ms. Poitras to request that she call him once the original September 17, 2018 letter was returned.

10. On October 15, 2019, Ms. Poitras left a voice message for Mr. Lima and emailed him indicating that the envelope containing the original September 17, 2019 letter had been received and that he could pick it up at the station.

11. On October 15, 2019, Mr. Lima went to the Nbfd station to retrieve the letter but learned that Ms. Poitras had left for the day. He never returned to pick up the letter.

12. At some point on October 15, 2019, however, Mr. Lima opened the attachment to the email sent to him by Ms. Poitras on October 9, 2019 and reviewed its contents, and became aware of his bypass and right of appeal.

13. By letter to the Commission postmarked December 11, 2019, Mr. Lima filed this appeal.

STANDARD OF REVIEW

The Commission may dispose of an appeal summarily, as a matter of law, pursuant to 801 C.M.R. 1.01(7) when undisputed facts affirmatively demonstrate “no reasonable expectation” that a party can prevail on at least one “essential element of the case”. See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 fn.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

APPLICABLE CIVIL SERVICE LAW

The Commission has established, by rule, a 60-day period within which a candidate must appeal to the Commission after notice of an “action or inaction” that resulted in an unlawful bypass is a jurisdictional matter that the Commission has strictly enforced. See, e.g., Lane v. Newburyport Police Dep’t, 28 MCSR 587 (2015), citing Pugsley v. City of Boston, 24 MCSR 544 (2011); Gagnon v. Boston Fire Dep’t, 28 MCSR 179 (2015). The sixty-day window commences upon “receipt of notice that makes the [applicant] aware of his or her non-selection and right of appeal to the Commission.” Costa v. City of Brockton, 28 MCSR 87 (2015).

The Commission is open to giving Mr. Lima the benefit of the doubt that he did not receive notice of any attempted delivery of the Nbfd’s September 17, 2019 letter, despite the fact that the 2019 letter was properly addressed, and in the regular course of business it could be expected that the USPS delivered notice to him that it was holding a certified letter for him to pick up. There is no doubt, however, that on October 9, 2019, Mr. Lima received an email from the Nbfd that contained an attachment with the complete contents of the September 17, 2019 letter and that the text of that email expressly identified the attachment as including the “contents of the envelope that was mailed certified mail on 09/17/19”. At that point, the Nbfd had taken all steps necessary to make Mr. Lima aware of the Nbfd’s bypass decision. Although Mr. Lima apparently chose not to open the attachment until October 15, 2019, that does not change the fact that he was placed on notice of the bypass decision upon receiving that email, any more than he would be excused if he had picked up the September 17, 2019 letter at some earlier date but never opened it until October 15, 2019.

As Mr. Lima’s appeal was filed outside the sixty-day mandatory window, it is untimely and the Commission lacks jurisdiction to hear his appeal.

CONCLUSION

Accordingly, for the reasons stated, New Bedford's Motions to Dismiss is ALLOWED and the appeal of the Appellant, Stephens P. Lima, under Docket No. G1-19-258 is *dismissed*.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Camuso [absent], Ittleman, Stein & Tivnan, Commissioners) on February 13, 2020.

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 a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's 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:

Matthew A. Viana, Esq. (for Appellant)

Elizabeth Treadup Pio, Esq. (for Respondent)