COMMONWEALTH OF MASSACHUSETTS

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

MICHAEL LUCIANO,
Appellant

v. E-21-176

BOSTON FIRE DEPARTMENT,
Respondent

Appearance for Appellant: *Pro Se*
Michael Luciano

Appearance for Respondent: Robert J. Boyle, Jr., Esq.
City of Boston
Office of Labor Relations
Boston City Hall, Room 624
Boston, MA 02201

Commissioner: Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

On September 21, 2021, the Appellant, Michael Luciano (Appellant), filed a non-bypass equity appeal with the Civil Service Commission (Commission), contesting the decision of the Boston Fire Department (BFD) to not select him for original appointment as a firefighter. On November 2, 2021, I held a remote pre-hearing conference which was attended by the Appellant, co-counsel for the BFD and the BFD's Human Resources Director. The parties stipulated to the following:

A. On December 21, 2018, the Appellant took a (military) make-up examination for Boston firefighter and received a score of 98.

B. The Appellant's name was added to the eligible list for Boston firefighter, which was established on December 1, 2018. The Appellant qualified for preference as a disabled veteran.

C. On August 24, 2020, the state's Human Resources Division (HRD) issued Certification No. 07316 to the BFD.

D. The Appellant was tied for 8th on the certification among those willing to accept employment.

E. No candidate ranked below 8th on the certification was appointed as a firefighter.

F. When presented with a tie, the BFD uses a lottery to determine the order in which candidates are considered.

G. Candidates with a lower lottery number, but still tied for 8th on the Certification, were appointed by the BFD.

Notwithstanding that no bypass occurred here, I asked the BFD for the reason for the non-selection of the Appellant. According to the BFD, the Appellant was not selected based on a determination that he was unable to show that he qualified for the Boston residency preference, without which he would not have been within the 2N+1 formula of candidates eligible for appointment.

Both parties agreed that, based on the Appellant's active military duty and discharge date of January 25, 2019, he was eligible, based on HRD policies, to qualify for Boston residency preference if he began residing continuously in Boston on or before April 25, 2019, 90 days from his date of discharge. According to the Appellant, whose father is employed by the BFD, he was aware of the 4/25/19 cutoff date and moved in with the sister (or sister-in-law) of a Boston firefighter in West Roxbury on April 2, 2019 and has resided in Boston continuously ever since.

Prior to determining whether the Commission should consider and act on a motion to dismiss the Appellant's appeal, I ordered the parties, via a Procedural Order dated November 10, 2021, to produce the following information within 30 days to determine whether HRD's policy regarding residency preference for certain active-duty military personnel was applied properly here:

BFD: All records and other information that the Appellant provided to the BFD in attempt to show that he began residing in Boston continuously starting on or before April 25, 2019.

APPELLANT: All records and other information to show that he began residing in Boston continuously starting on or before April 25, 2019, noting which records he previously provided to the BFD as part of the background investigation.

In response to the above order, the BFD provided the Appellant's entire background investigation. The Appellant did not respond to the Commission's order. After reviewing the entire background investigation, it was clear that the BFD was aware of HRD's policy that allows certain active military duty candidates with an alternative means to establish residency preference and that the BFD was relying on the accurate date – April 25, 2019 – upon which the Appellant would have been required to establish residency in Boston. The record appeared to show that after a (very) thorough review, including a review of credit union reports showing where the Appellant made purchases, the BFD concluded that the Appellant did *not* reside in Boston on or before April 25, 2019.

Had the Appellant been bypassed for appointment, which he was not, those findings by the BFD could be challenged by the Appellant as part of a bypass appeal to the Commission. After reviewing the information provided by the BFD, and having received no information from the

Appellant, there was no basis for the Commission at that time, on its own initiative, to open an investigation under G.L. c. 31, § 2(a), which is typically only done sparingly when the Commission sees evidence of an egregious violation of basic merit principles.

For all of the above reasons, I issued a second procedural order dated January 9, 2022, summarizing the above, and provided the Appellant with 10 days to notify the Commission if he wished to withdraw his appeal. If he did not, the BFD was provided with 10 days thereafter to file a motion to dismiss and the Appellant would have 10 days thereafter to file a reply. The Appellant did not reply to the Commission's second procedural order within 10 days. On January 21, 2022, the BFD filed a motion to dismiss the Appellant's appeal.

On February 9, 2022, the Appellant submitted a letter to the Commission stating in part that: a) he had not received the "January 19" order from the Commission; and 2) the owners of his apartment "will go under oath that I was living there prior to [the] test." Also between February 9, 2022 and April 18, 2022, the Commission received ex parte communication from the Appellant's parents, which the Commission forwarded to the BFD.

Summary Decision Standard

When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he or she is entitled to prevail as a matter of law, the party may move, with or without supporting affidavits, for summary decision on the claim or defense. 801 CMR 1.01(7)(h). These motions are decided under 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, 635-36 (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).

Applicable Civil Service Law

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).

Bypass

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.")

Here, the record shows that the BFD did not appoint any candidate ranked below the Appellant on the certification. Rather, after conducting a lottery, the BFD considered a subset of candidates tied for 8th on the certification, including the Appellant. After determining that the Appellant had

not met the criteria for the residency preference, the BFD opted not to appoint the Appellant, but, as referenced above, did not appoint any candidate ranked below the Appellant on the certification. Thus, for the reasons explained above, as a matter of law, the BFD correctly asserts that the Appellant's non-selection is not a bypass and the BFD is not required to provide written reasons for his non-selection over others in the tie group and he does not have a statutory right of appeal to the Commission for a de novo review of the "reasonable justification" for the reasons for selecting other candidates in the ties group.

Section 2(a) Investigation

The Appellant did not specifically request that the Commission exercise its independent discretion to open an investigation into his non-selection, but, as noted above, the Commission has the authority to do so. 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 an entrenched political or personal bias that can be rectified through the Commission's affirmative remedial intervention into the hiring process. See, 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"). Compare 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); 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).

Here, unlike other cases the Commission has investigated, this record lacks the kind of credible evidence to imply that the selection of certain candidates over others was tainted by clearly unlawful bias or favoritism by the appointing authority. Rather, as previously referenced, and as supported by the comprehensive investigation submitted to the Commission, the BFD's decision to not select the Appellant was based on its conclusion that he failed to meet the criteria for the residency preference, without which the Appellant would not have been ranked high enough on the eligible list to be considered for appointment. Even if the BFD were mistaken regarding the

evidence of the Appellant's non-residency in Boston, the sheer absence of indicia of favoritism or bias coupled with the fact that no one who scored lower than the Appellant was appointed in this hiring round means that there is no justification for Commission intervention.

Conclusion

For all of the above reasons, the Appellant's non-bypass equity appeal filed pursuant to G.L. c. 31, § 2(b) is ***dismissed*** and the Commission opts not to initiate an investigation under Section 2(a).

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By a vote of the Civil Service Commission (Bowman, Chair; Camuso, Stein and Tivnan, Commissioners) on May 20, 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:
Michael Luciano (Appellant)
Robert J. Boyle, Jr., Esq (for Respondent)