COMMONWEALTH OF MASSACHUSETTS

CIVIL SERVICE COMMISSION
100 Cambridge Street, Suite 200
Boston, MA 02114
(617) 979-1900

MICHAEL LYNCH,
Appellant

v. G2-23-008

TOWN OF ARLINGTON,
Respondent

Appearance for Appellant: Michael D. Brier, Esq.
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Appearance for Respondent: Nicholas J. Dominello, Esq.
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Commissioner: Christopher C. Bowman[1]

DECISION ON RESPONDENT'S MOTION TO DISMISS

Background

On January 26, 2023, Michael Lynch (Appellant) filed an appeal with the Civil Service Commission (Commission), contesting his non-selection for the position of Parks Supervisor in the Town of Arlington (Town). The Appellant is a permanent, tenured civil service employee in the position of Working Foreman, which is a labor service position in the Town's Department of

[1] The Commission acknowledges the assistance of Law Fellow Courtney Timmins in drafting this decision.

Public Works. The position of Parks Supervisor is an official service position in the Town's Department of Public Works.

This is the Appellant's second appeal to the Commission regarding his non-selection for Parks Supervisor in Arlington. The Commission dismissed his prior appeal in a decision issued May 7, 2020, concluding that the Town complied with the civil service law when it selected another candidate for provisional promotion to Parks Supervisor. See *Lynch v. Arlington*, 33 MCSR 199 (2020) *(Lynch I*). The Appellant appealed the Commission's decision in Superior Court, but the court dismissed the appeal for noncompliance with procedural requirements.

In August 2022, there was another vacancy for Parks Supervisor in Arlington. The Appellant applied again, but the Town selected a different candidate. The Appellant timely filed the instant appeal. On February 14, 2023, I held a remote pre-hearing conference attended by the Appellant, his counsel, Town representatives, and Town counsel.

During the pre-hearing conference, the Town maintained that when the Parks Supervisor vacancy arose in August 2022, the Town posted the position as a provisional appointment open to external as well as internal candidates (as opposed to the provisional promotion that occurred in *Lynch I*). The Town conducted a three-stage selection process that included interviews and written exercises, all of which were evaluated and scored. The Appellant ranked fourth out of the final candidates. Based on the final scores and evaluations, the Town selected Kevin Naughton for provisional appointment to Parks Supervisor in the Department of Public Works. Mr. Naughton was an internal applicant from the same departmental unit; before his appointment to Parks Supervisor, Mr. Naughton worked as a Mason in the Department of Public Works. The Appellant subsequently filed a grievance regarding his non-selection, and his union filed a

demand for arbitration under the applicable collective bargaining agreement. The Town is contesting the demand for arbitration on both procedural and substantive grounds.

Pursuant to a Procedural order issued on February 24, 2023, the Town then filed a motion to dismiss, the Appellant filed an opposition in response, and the Town submitted a reply to the Appellant's opposition.

Respondent's Motion to Dismiss

In its motion to dismiss, the Town argued that the appeal must be dismissed because it involves a provisional appointment, and the Commission has previously held that non-selection to a provisional appointment is not appealable to the Commission. The Town also submitted an affidavit from its Human Resources Director denying that she ever stated that the Appellant was never going to get the promotion. She also denied any bias or retaliatory motive based on the Appellant's prior challenge to his non-selection for promotion in 2019, noting that the selected candidate also brought legal proceedings against the Town in 2021 over his non-selection for promotion to a different position.

Appellant's Opposition

The Appellant presented three arguments in opposition to the Town's motion to dismiss:

I. The provisional appointment was defective under G.L. c. 31, § 12 because the Town did not obtain approval from HRD.

II. The provisional appointment was improper because provisional appointments cannot be made from within the same departmental unit.

III. The Town should not reject the Appellant's claim of bias on the basis of an affidavit.

Along with his opposition, the Appellant submitted an affidavit from the vice president of the Appellant's union, alleging that the Human Resources Director told him she had not read the

Appellant's recommendations because she never intended to give the Appellant the job. The Appellant also submitted an affidavit from a former union president alleging that the Human Resources Director "told [him] in substance that she could not give a $72,000/year job to someone with penmanship as bad as Mr. Lynch's."

Motion for Summary Decision Standard

A party before the Commission may file a motion for summary decision pursuant to 801 CMR 1.01(7)(h), which provides:

> 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.

Such motions are decided under the well-recognized standard for summary disposition as a matter of law: whether, "viewing the evidence in the light most favorable to the nonmoving party," the substantial and credible evidence establishes that the nonmoving 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.*, *Burns v. North Attleborough*, 32 MCSR 149, 151 (2019); *Green v. Brockton*, 28 MCSR 39, 40 (2015); *Ralph v. Civ. Serv. Comm'n*, 100 Mass. App. Ct. 199, 203 (2021), quoting *Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 846-48 (2005) ("A summary decision . . . is appropriate whenever 'there was no issue of material fact for which a hearing was required.'"); *see also Iannacchino v. Ford Motor Company*, 451 Mass. 623, 635-36 (2008) (discussing standard of review for motions to dismiss); *Milliken & Co. v. Duro Textiles LLC*, 451 Mass. 547, 550 n.6 (2008).

Analysis: Provisional Appointments and Commission Jurisdiction

Although the position of Parks Supervisor falls under the civil service system, an examination for this position has not been administered in decades. As a result, municipalities must fill vacancies for Parks Supervisor, and almost all other non-public safety positions in the civil service system, through provisional appointments (G.L. c. 31, §§ 12-14) or provisional promotions (*id.* at § 15). A provisional appointment is open to anyone who "meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties." *Id.* at § 13. A provisional promotion, on the other hand, is restricted to "a civil service employee in one title next to the higher title in the same departmental unit." Id. at § 15.

The evidence shows that the City filled this position as a provisional appointment in accordance with G.L. c. 31, § 12. As such, the Appellant's non-selection does not constitute a bypass and the Commission does not have jurisdiction to hear this appeal under G.L. c. 31, § 2(b). *See Keough v. Boston*, 31 MCSR 110, 111 2018). Further, the Town complied with the civil service law and rules regarding provisional appointments.

First, the Commission has previously rejected the argument that an appointing authority must obtain HRD's approval for a provisional appointment or promotion to be valid. In *Lynch I*, the Commission stated that HRD's approval is merely "ministerial" and the lack of such approval does not render a provisional appointment or promotion defective. The Commission explained:

> HRD, since 2009, has delegated the vast amount of decision-making authority regarding permanent appointments and promotions to cities and towns. Under that delegation, for example, cities and towns are no longer required to submit bypass reasons to HRD for approval regarding permanent appointments and promotions. Further, as referenced above, the vast majority of non-public safety civil service

> appointments and promotions have been done provisionally across Massachusetts for decades with no objection from HRD. In this context, the approval referenced here in regard to provisional promotions, even if not explicitly listed in the delegation agreements, has truly become a ministerial function.

Lynch I, 33 MCSR at 201. Thus, the lack of authorization from HRD does not invalidate this provisional appointment.

Next, a provisional appointment made from within the same departmental unit is proper so long as the vacancy was open to both internal and external candidates, which this was. A provisional appointment is open to anyone who "meets the proposed requirements for appointment to the position and possesses the knowledge, skills and abilities necessary to perform such duties." *See* G.L. c. 31, § 13. Nothing in the statutory language suggests that only external candidates may be selected for provisional appointments. *See id.* at §§ 12-13. The Appellant misconstrues *Kelleher v. Personnel Administrator* in arguing otherwise. *Kelleher* merely states that Section 12 governs and permits "provisional appointments of persons from outside the departmental unit," which are not permitted under Section 15 governing provisional promotions. *See* 421 Mass. 382, 386 (1995). Section 12 expands the pool of persons who can be provisionally appointed, in contrast to the limited internal candidates who can be provisionally promoted under Section 15.

It would be nonsensical for an appointment to become defective solely because an internal candidate was ultimately selected from a mixed pool of applicants, and that is not what the Legislature or the courts intended. The Commission has previously stated:

> Absent a clear judicial directive to the contrary, the Commission will not abrogate its recent decisions that allow appointing authorities sound discretion to post a vacancy as either a promotional or original provisional appointment, unless the evidence suggests that an appointing authority is using the Section 12 provisional "appointment" process as a subterfuge for selection of a specific candidate who

> would not be eligible for provisional "promotion" over other equally qualified choices.

Medeiros, et al. v. Dep't of Mental Retardation, 22 MCSR 276, 282 (2009). There is no evidence of such "subterfuge" in this case. The Town properly considered both internal and external candidates, and presented sound reasoning for its decision to select an internal candidate who ranked second overall but had relevant experience with the Town's Department of Public Works. *See Malloy Aff.* ¶¶ 3-4, 11; *Resp. Ex. A-B.* The Town complied with basic merit principles, and the extensive documentation underlying the selection process refutes the Appellant's suggestion that it was slanted against him. *See Medeiros*, 22 MCSR at 283. Based on these facts, the provisional appointment was valid.

In sum, the Commission must dismiss this appeal because (1) the Commission lacks jurisdiction over a non-selection for provisional appointment; and (2) the evidence, viewed in the light most favorable to the Appellant, establishes that the Appellant has no reasonable expectation of prevailing in this appeal.

Analysis: Request for Investigation

The Appellant also argues that the Commission should exercise its authority under Section 2(a) of the civil service law to initiate an investigation. After carefully reviewing all of the submissions from both parties, I conclude that an investigation is not warranted at this time. The selection process included four evaluation panelists (with a fifth panelist added in the final stage), three rounds of interviews and two mock exercises, and objective scoring methods—interviews were scored independently, without consulting other panelists, and mock exercises

were scored blindly.[2] The objectivity of the selection process is further supported by the contents of the score sheets and handwritten notes from each panelist.

The evaluation panel interviewed seven applicants in the first stage of the selection process. The panel asked the same ten questions to each applicant, and each panelist rated the responses without consulting any other panelists. Based on the total scores, the Appellant ranked third after his first interview. The top four applicants (the Appellant, Mr. Naughton, and two external candidates) moved to the next stage of the selection process.

The Town's Human Resources Director detailed the second stage of the selection process as follows:

> The second stage had three components: (1) an interview of each applicant utilizing the same set of thirteen questions for each, and a scoring process similar to that used for the first stage; (2) a written exercise in which each applicant was required to respond in writing to the same set of written questions; and (3) an excel spreadsheet exercise in which each applicant was asked to create a spreadsheet addressing the same set of issues. Regarding component (2), all the panelists were asked to rate the written answers without knowing the author. Regarding component (3), the spreadsheets were assessed by two panelists, consisting of myself and DPW Director Rademacher. This was because the excel exercise was largely a matter of formulas and formatting and in the interests of moving the process along expeditiously it was decided that this rating could be done by two panelists. Like the process for rating component (2), neither panelist knew the identity of the four authors. All ratings were then provided to me. The result was that Lynch was ranked third in the interviews, fourth on the written exercise, and second on the excel exercise.
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> As described above, the excel exercise and the written exercise were both scored blindly.

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[2] The Appellant argued that "the scores themselves were largely a product of subjective interviews," but I struggle to understand how the Town, or any other employer, is supposed to fill a job opening without conducting interviews. The final scores were based on two blindly assessed exercises in addition to three interviews, and the interviews themselves were conducted in the most objective manner possible—each candidate received the same questions, and the responses were scored individually by panelists without consulting one another.

All four applicants then moved to a third stage, for which the Deputy Town Manager for Operations joined the evaluation panel. As stated by the Town: This stage presented each applicant with the same hypothetical inspection report by a consultant regarding playground safety and each applicant was interviewed by being asked the same set of questions, using a scoring process similar to that used for the prior stage. Based on the total scores after the third stage, the Appellant ranked fourth out of the four candidates.

The extensive documentary evidence indicates that the review process was objective. After totaling up a number of scores gathered from three rounds of interviews and two mock exercises, three other applicants ranked above the Appellant. After weighing the pros and cons of each applicant, the Town ultimately selected Mr. Naughton, an internal candidate who ranked second overall but performed well throughout the process and had valuable experience working for the Town's Department of Public Works. Mr. Naughton brought legal proceedings against the Town in 2021, which further undermines the Appellant's claims of bias and retaliation stemming from his legal challenge against the Town in 2019. Based on all of these facts, I find that an investigation is not warranted at this time. The selection process was not influenced by bias or retaliatory motives. It is worth noting that the Appellant does not appear to be without recourse should he wish to pursue this issue, as a request for arbitration has been filed on his behalf, raising the same issues.

Conclusion

For the above reasons, the appeal of Michael Lynch, Docket No. G2-23-008, is hereby ***dismissed***.

Civil Service Commission

/s/ Christopher Bowman
Christopher C. Bowman
Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, Stein and Tivnan, Commissioners [McConney, Absent]) on July 27, 2023.

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 their 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:
Michael D. Brier, Esq. (for Appellant)
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