

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

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

SHAWN A. MACKIE,
Appellant

v.

G1-12-336

CITY OF LAWRENCE,
Respondent

Appearance for Appellant:

Pro Se
Shawn A. Mackie

Appearance for Respondent:

Scott C. Merrill, Esq.
Foley Hoag LLP
Seaport West
155 Seaport Boulevard
Boston, MA 02210-2600

Commissioner:

Christopher C. Bowman

ORDER OF DISMISSAL

On December 11, 2012, the Appellant, Shawn A. Mackie (Mr. Mackie), filed an appeal with the Civil Service Commission (Commission), contesting his non-selection to the position of firefighter in the City of Lawrence (City).

On January 18, 2013, a pre-hearing conference was held at the offices of the Commission, which was attended by Mr. Mackie, counsel for the City and Lawrence Fire Chief Jack Bergeron (Chief Bergeron).

Based on the statements of the parties and the documents submitted, I find the following:

1. In April 2010, Mr. Mackie took the civil service examination for firefighter and scored a 99. Mr. Mackie is a disabled veteran and, as such, receives the statutory veterans' preference under the civil service law.
2. The state's Human Resources Division (HRD) placed Mr. Mackie's name on an eligible list of candidates for firefighter in the City that would eventually expire on November 30, 2012.

3. At some point prior to August 22, 2012, the City requested a certification of names from HRD to fill four (4) or five (5) firefighter vacancies.
4. On August 22, 2012, HRD issued Certification No. 20123029 to the City. Mr. Mackie's name appeared 5th among those willing to accept appointment.
5. A background investigation was completed of Mr. Mackie and, at the request of the City, he took and passed a medical examination, a physical abilities test and a drug screening.
6. Chief Bergeron made a recommendation to the City's Appointing Authority, Mayor William Lantigua, to appoint Mr. Mackie and four others to the position of firefighter.¹
7. Mayor Lantigua told Chief Bergeron that he did not want to appoint the recommended candidates because four (4) of the five (5) candidates were not Lawrence residents.
8. Although residents receive a preference over non-residents under the civil service law, there is no requirement under the civil service law that a candidate for appointment be a resident of the City or Town where he/she is seeking appointment at the time of appointment. Individuals who are appointed are required, within nine (9) months, to move within ten (10) miles of the city or town's border. G.L. c. 31, § 58.
9. As a result of Mayor Lantigua's above-referenced decision, no further candidates (including Mr. Mackie) were selected from the eligible list that expired on November 30, 2012.
10. Chief Bergeron notified Mr. Mackie that he was not being selected for appointment. This appeal followed.
11. On January 25, 2013, Mayor Lantigua, requested a Certification from HRD to fill seven (7) vacant firefighter positions. Such Certification would be created using the names from a newly-established eligible list (as opposed to the eligible list that expired on November 30, 2012.) HRD has not issued the requested Certification and has asked the City to provide them with a copy of the Commission's decision regarding the instant appeal in addition to copies of letters rescinding any prior conditional offers of employment . (See FN1)

¹ Although Chief Bergeron indicated in a November 19, 2012 email to HRD that conditional offers of employment were made to the five (5) candidates, he stated at the pre-hearing conference that candidates did not receive a formal conditional offer of employment. Since Chief Bergeron is not authorized to appoint firefighter and since there is no evidence that Mayor Lantigua made such an offer, I have concluded that no valid conditional offer of employment was ever made to Mr. Mackie or the other candidates. While this raises some serious issue regarding why these candidates were required to undergo a medical screening, drug screening and physical abilities test, those issues are not relevant to the instant appeal.

Analysis

An Appointing Authority is required to provide unsuccessful candidates with non-selection reasons, and the candidate has the right to appeal that decision to the Commission, if the Appointing Authority appoints someone ranked lower than him (“bypasses” him) on the Certification from which the appointments were made. G.L. c. 31, § 27 and PAR.08.

Here, the City chose not to appoint any individuals from the Certification upon which Mr. Mackie’s name appeared. Thus, there was no bypass and the City was not required to provide Mr. Mackie with non-selection reasons, which would have triggered a right of appeal to the Commission.

Rather, the City chose not to make any appointments at the time and is now seeking a Certification of names to make appointments from a newly-established eligible list. “The system the Legislature created, in which eligibility lists expire and are replaced by new lists, involves the risk that positions might become available immediately after the expiration of an old list – or immediately before the establishment of a new list ... Moreover, individuals do not have a vested right in their particular positions on the eligibility list once it is established.” Callanan & others v. Personnel Administrator for the Commonwealth, 400 Mass. 597 (1987).

Since Mr. Mackie was not bypassed and the City was not obligated to make appointments from the eligible list that expired on November 30, 2012, Mr. Mackie’s appeal must be dismissed. I do so, however, with some deep reservations regarding equity and good conscience.

Mr. Mackie (and others), appear to have gone through a rigorous review process and earned the recommendation of the City’s trusted Fire Chief, who has decades of firefighter experience. The sole reason that none of the five (5) candidates were selected for appointment appears to be an arbitrary decision by the City’s Mayor that he’d prefer to appoint Lawrence residents. Had this been a bypass appeal, the Commission would have rejected that non-selection reason in short order and considered vacating any related Mayoral appointments.

While this appeal must be dismissed based on jurisdictional reasons, the Commission reserves the option of investigating, on its own initiative, or at the request of others, *any* alleged irregularities that may arise in the upcoming hiring process for firefighters. As such, the City is reminded of its responsibility to conduct a fair and impartial review process and preserve all documents (i.e. – rating sheets, interview panel notes, etc.) related to that process.

Mr. Mackie’s appeal under Docket No. G1-12-336 is hereby ***dismissed***.

Civil Service Commission

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis and Stein, Commissioners [McDowell – Absent]) on February 21, 2013.

A true record. Attest:

Commissioner

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.

Notice:

Shawn Mackie (Appellant)

Scott C. Merrill, Esq. (for Respondent)

John Marra, Esq. (HRD)