

**COMMONWEALTH OF MASSACHUSETTS**

**CIVIL SERVICE COMMISSION**

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

FRANCISCO MALDONADO., JR.,  
*Appellant*

v.

G2-23-155

LOWELL POLICE DEPARTMENT,  
*Respondent*

Appearance for Appellant:

James Gilden, Esq.  
173 North Main Street  
Sharon, MA 02067

Appearance for Respondent:

Thomas G. Wood, Esq.  
City of Lowell Law Department  
City Hall, 375 Merrimack Street, 3<sup>rd</sup> Floor  
Lowell, MA 01852-5909

Commissioner:

Christopher C. Bowman

**SUMMARY OF COMMISSION ORDER**

The Appellant, a Lowell Police Sergeant, filed an appeal contesting the decision of the Lowell Police Department to bypass him for promotional appointment to Police Lieutenant. Since the Appellant has also filed a discrimination complaint with the Massachusetts Commission Against Discrimination regarding the same issue, the Civil Service Commission is dismissing this appeal until the MCAD has issued a final decision on the Appellant's complaint.

**ORDER OF DISMISSAL WITH FUTURE EFFECTIVE DATE**

***Procedural Background***

On August 18, 2023, the Appellant, Francisco Maldonado (Appellant), a police sergeant in the Lowell Police Department (Department), filed an appeal with the Civil Service

Commission (Commission), contesting the decision of the Department to bypass him for promotional appointment to the position of Lowell Police Lieutenant.

On September 26, 2023, I held a remote pre-hearing conference, which was attended by the Appellant, his counsel, and counsel for the Department. As part of the pre-hearing conference, the parties stipulated certain facts and provided an overview of their arguments regarding jurisdictional issues and whether there was reasonable justification for the promotional bypass.

***Undisputed Facts***

1. On August 11, 1996, the Appellant, a Hispanic male, was appointed as a police officer by the Department.
2. On July 15, 2018, the Appellant was promoted to Lowell Police Sergeant.
3. On December 11, 2020, the state's Human Resources Division (HRD) notified the Appellant that he received a passing score on Lowell's 2020 Police Lieutenant Sole Assessment Center.
4. On January 1, 2021, HRD established the eligible list for Lowell Police Lieutenant. On January 1, 2023, the eligible list was extended.
5. On August 15, 2023, the Department notified the Appellant that he was being bypassed for appointment for police lieutenant by a candidate ranked lower than him on the certification created from the eligible list.
6. The Appellant filed a timely appeal with the Commission.

### ***MCAD Filings***

On April 15, 2022, the Appellant filed an employment discrimination complaint with the Massachusetts Commission Against Discrimination (MCAD), alleging that the Department failed to appoint him to various specialty positions based on his race. The Department filed a Position Statement with MCAD rebutting the allegation. No investigative conference has been held at MCAD regarding this matter. On August 31, 2023, after the Appellant was bypassed for promotion to police lieutenant, he filed a subsequent employment discrimination complaint with MCAD, writing in part, “I believe I am being retaliated against by [the Department] for my previous complaint I filed against [the Department] in April 2022, and otherwise discriminated against based on my race ...”. As of the date of the pre-hearing before the Civil Service Commission, the City had yet to file a position statement regarding the Appellant’s most recent complaint and no investigative conference had been scheduled.

### ***Position of Parties***

At the pre-hearing conference, the Department argued that the Commission should defer any action on this matter at least until the MCAD complaint is resolved. The Appellant argued that deferring any action on this appeal until the MCAD complaint is resolved would result in an undue delay regarding whether there was reasonable justification to bypass the Appellant for promotion.

Should the appeal go forward at the Commission, the Department argued that the evidence would show that the Appellant’s disciplinary history, including alleged sick leave abuse, justified the Department’s decision to bypass him for promotional appointment. The Appellant argued that the evidence would show that there was no reasonable justification for the bypass and that the record would show that the Appellant, who sold back hundreds of hours of

sick time, still has 500 hours of sick time available to him. Further, the Appellant argues that the promoted candidate was alleged to have engaged in far more serious misconduct (which the Department argues was not sustained). More broadly, the Appellant argues that the Department's decision here was part of a pattern of selecting white candidates over him, including prior promotions in which white candidates tied with the Appellant were promoted.

### ***Analysis***

The MCAD complaint should be adjudicated first. It is undisputed that the Appellant has a complaint *pending* at MCAD, the agency statutorily charged with determining whether the Lowell Police Department violated state and federal anti-discrimination laws, including through its decision not to promote the Appellant to Police Lieutenant. It is prudent to allow MCAD to rule on the Appellant's discrimination claim(s) prior to proceeding with a full hearing before the Civil Service Commission.<sup>1</sup>

For that reason, the Appellant's appeal before the Civil Service Commission should be *dismissed nisi*, to become effective twenty-one days after MCAD issues a decision regarding the Appellant's complaint.<sup>2</sup> Upon the issuance of MCAD's final decision, the Commission will consider a Motion to Revoke this Order of Dismissal Nisi, to be filed no later than twenty days

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<sup>1</sup> Abstention is the judicially recognized vehicle for according appropriate deference to the respective competence of parallel court systems. *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964). Here it seems appropriate for the Commission to invoke a form of this doctrine to the end "that decision of the [civil service law] question be deferred until the potentially controlling [Chapter 151B] issue is authoritatively put to rest . . . ." *Id.* at 416, n.7 (citation omitted).

<sup>2</sup> The Commission recommends that the Appellant inform MCAD what his Chapter 31 claims are, so that Chapter 151B may be construed in light of those claims. See *England, supra*, 375 U.S. at 420. Today's disposition, although styled a *dismissal nisi*, should be understood as permitting this Commission to "retain[] jurisdiction to take such steps as may be necessary for the just disposition of the [Appellant's Chapter 31 claims] should anything prevent a prompt [MCAD] determination." See *id.* at 413 (citation omitted).

after the issuance of MCAD's final decision. In the absence of a Motion to Revoke within this time period, the dismissal of this appeal shall become final for purposes of G.L. c. 31, § 44, twenty-one days after the issuance of MCAD's final decision regarding the Appellant's G.L. c. 151B claim(s). Should the Appellant seek to revoke this dismissal at that time, the Commission will weigh MCAD's decision appropriately while conducting further proceedings on the Appellant's bypass appeal, guided in part by the Supreme Judicial Court's framework outlined in *Town of Brookline v. Alston*, 487 Mass. 278 (2021).

### ***Conclusion***

The Appellant's MCAD complaint should be adjudicated prior to any full evidentiary hearing, if necessary, before the Civil Service Commission. For that reason, the Appellant's appeal before the Civil Service Commission is *dismissed nisi*, to become effective twenty-one days after the issuance of a final decision by MCAD regarding the Appellant's complaint. Upon the issuance of a final decision by MCAD, the Civil Service Commission will consider a Motion to Revoke this Order of Dismissal Nisi, to be filed no later than twenty days after the issuance of a final MCAD decision. No additional filing fee would be required. In the absence of a Motion to Revoke within this time period, the dismissal of this appeal shall become final for purposes of G.L. c. 31, § 44, exactly twenty-one days after the issuance of the final MCAD decision regarding the Appellant's complaint.

Civil Service Commission

/s/ Christopher Bowman  
Christopher C. Bowman  
Chair

By vote of the Civil Service Commission (Bowman, Chair; Dooley, McConney, Stein and Tivnan, Commissioners) on October 19, 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 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:

James Gilden, Esq. (for Appellant)

Thomas G. Wood, Esq. (for Respondent)