

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION

One Ashburton Place: Room 503
Boston, MA 02108

JOSEPH J. McMAHON,
Appellant

v.

G1-09-323

TOWN OF BROOKLINE,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON RESPONDENT'S MOTION TO DISMISS

The Appellant, Joseph J. McMahon (hereinafter "Appellant"), pursuant to G.L. c. 31, § 2(b), filed an appeal with the Civil Service Commission (hereinafter "Commission") on July 30, 2009, contesting the decision of the Town of Brookline (hereinafter "Appointing Authority" or "Town") to bypass him for original appointment to the position of firefighter. The Town filed a Motion to Dismiss the Appellant's appeal on August 12, 2009 and the Appellant filed an opposition to this motion on August 18, 2009. A pre-hearing conference was held at the offices of the Commission on August 25, 2009 and a status conference was held on October 27, 2009 at which time both parties provided oral

argument. The parties provided additional information and correspondence to the Commission through January 29, 2010 and the record was closed as of this date.

Although this appeal relates to the Appellant's bypass as a Brookline *firefighter*, there are various references to his prior bypass as a Brookline *police officer*. A chronology of events is as follows.

CHRONOLOGY OF EVENTS

- On March 31, 2003, the Town of Brookline notified the state's Human Resources Division (hereinafter "HRD") that it was bypassing the Appellant for original appointment as a police officer. The letter divided the reasons for bypassing the Appellant into three categories: residency, work history and responses to hypotheticals during his interview. HRD approved the Town's reasons for bypass.
- On October 16, 2003, the Appellant filed a bypass appeal with the Commission, contesting this police officer bypass and HRD's decision to accept the reasons proffered by the Town.
- While the Appellant's "police officer bypass appeal" was pending with the Commission, he subsequently sought appointment as a firefighter in the Town of Brookline.
- On March 14, 2006, the Town notified HRD that it was bypassing the Appellant for original appointment as a firefighter. The letter divided the reasons for bypassing the Appellant into three categories; residency, work history and "response to questions". In regard to the last category, the bypass letter stated, "During the course of Mr. McMahon's panel interview, he became openly agitated and exhibited aggressive tendencies while answering several of the panel's questions."
- On July 10, 2006, apparently in response to a request from HRD, the Town provided HRD with additional information regarding the decision to bypass the Appellant for the position of firefighter.
- On August 21, 2006, HRD sent a 5-paragraph letter to the Appellant. Paragraph 1 stated: "This letter is in response to your fax requested dated August 1, 2006, and your office visit of August 17, 2006, concerning the current status on the Brookline Fire Fighter appointments...". Paragraph 3 stated: "As we discussed, generally bypass and or selection reasons are not release (sic) from the file until all information has been reviewed and accepted. Due to your apprehension on the amount of time that the Town of Brookline has used to submit the requested information, the Human Resources Division (HRD) will provide you with the accepted bypass information for your bypass from the Brookline Fire Department, at this time." Paragraph 4 stated:

You have the right to appeal this determination by filing your appeal, in writing within sixty calendar days of the receipt of this notice, with the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108 or visit their website at www.state.ma.us/csc. Please file a copy of this correspondence and all enclosures with your appeal to the Commission.”

- On October 11, 2006, HRD sent another letter to the Appellant which stated in its entirety: “This is a follow up to my letter to you dated August 21, 2006. As stated in my letter, enclosed are the approved selection reasons submitted on Kevin Mahoney, Joseph Ward III, Sean Guilfooy, Arthur Johnson and Joseph Mandra as Brookline Fire Fighters. This information will complete the file in regard to your non-selection from the above certification. As stated prior, you may appeal the information within sixty calendar days of the receipt of this notice to the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108 or visit their website at www.state.ma.us/csc. Please file a copy of this correspondence and all enclosures with your appeal to the Commission.
- On January 11, 2007, the Commission issued a decision on the Appellant’s 2003 bypass appeal related to his non-selection as a police officer. The appeal was heard by a magistrate at the Division of Administrative Law Appeals. The Commission adopted the findings and conclusions of the magistrate and dismissed the Appellant’s appeal. Although the magistrate found that the reasons the Town offered in the letter to HRD about the Appellant’s residency and work history were not supported, she concluded that the Town’s third reason, related to the Appellant’s answers to hypothetical questions, was supported by a preponderance of the evidence, and thus justified their decision to bypass the Appellant as a police officer.
- On July 30, 2009, the Appellant filed a bypass appeal with the Commission regarding his 2006 non-selection as a firefighter. As part of his appeal, the Appellant attached a letter addressed to HRD which stated in part: “I was allegedly by-pass (sic) ... for not satisfying the **residency requirement** and having an unstable work history. I was later exonerated of these claims during my by-pass appeal ... with the Brookline Police Department. In my letter dated December 3, 2008 to Chief of Operations Michael J. O’Reilly / Brookline Fire Department, I uncovered some troubling information. Detective Paul Cullinane requested a meeting to go over my Firefighter application. During this meeting, Detective Cullinane brought to my attention that during 2005 / 2006 the Town of Brookline hired a Firefighter applicant who did not live in the Town. It was Chief Moran’s nephew or son-in-law. (**Arthur C. Johnson**).”(emphasis in original)¹

¹ Detective Cullinane submitted a sworn affidavit to the Commission disputing the Appellant’s version of events. In his affidavit, Cullinane states, “In early October 2008, or so, I telephoned Mr. McMahon and asked him to report to the Public Safety Building to review his application, which I had found to be incomplete. On or around the next day, he visited the Police Department to review his employment application. At that time, Mr. McMahon told me (I did not tell him) that the Brookline Fire Department hired Robert Moran’s son-in-law, Arthur C. Johnson, who was not a resident of Brookline. I believe I had heard at some point (how I had hear it I can no longer remember) that Robert Moran’s son-in-law was on the job and quit, and I may have told Mr. McMahon that I heard that much (I did not know this person’s

- On August 12, 2009, the Town filed a Motion to Dismiss the Appellant's bypass arguing that it was not timely. The Appellant filed an opposition.

TOWN'S ARGUMENT IN FAVOR OF MOTION TO DISMISS

The Town argues that the Appellant's appeal is not timely as it fails to meet the Commission's sixty (60)-day statute of limitations regarding bypass appeals. The Town argues that the Appellant's instant bypass appeal was filed almost three (3) years after the Appellant was notified that HRD was accepting the Town's reasons for bypassing him. Even if the Commission were to "toll" the appeal filing deadline until the time that the Appellant claims he first became aware that a non-resident was allegedly appointed as a Brookline firefighter in the same hiring cycle, the Town argues that the appeal would still be untimely as the Appellant became aware of this information in December 2008, several months before the instant appeal was filed with the Commission.

While maintaining that it is not relevant to the instant motion regarding timeliness, the Town notes that the Chief of the Department during the relevant time period was not Robert Moran (whom Mr. McMahon claims is related to by marriage to Mr. Johnson) but John Green. According to the Town, Chief Green was Chief from approximately July 1, 2004 through June 30, 2007. Further, the Board of Selectmen is the Appointing Authority for the Fire Department and Chief Green would have been the individual to have made any hiring recommendations to the Board.² Finally, while not acknowledging any wrongdoing, the Town notes that Arthur Johnson, contrary to assertions by the

information). I told Mr. McMahon that if he had a complaint about the selection process at the Fire Department he should take it up with the Fire Department or with the Civil Service Commission, and that he and I should stick to the task at hand, which was completing his background check.")

² According to records produced by the Town, Mr. Moran was: Deputy Chief from November 27, 2000 through April 16, 2006; Chief of Operations from April 17, 2006 through June 30, 2007; Acting Chief from July 1, 2007 to September 16, 2007; and Chief of Operations from September 17, 2007 until he retired on June 30, 2008.

Appellant, was hired just once from Mid-August through Mid-September 2006 at which time he resigned.

APPELLANT’S ARGUMENT IN OPPOSITION TO MOTION TO DISMISS

The Appellant argues that he did not receive “confirmation” that Arthur Johnson had been appointed as a firefighter in 2006 until he received a copy of a 2006 fire department general order in “early-June 2009”. The Appellant, citing Patsos v. First Albany Corp., 433 Mass. 323, 328 (2001), argues that the Commission’s statute of limitations should be tolled and that he should have 60 days from this confirmation to file a bypass appeal with the Commission, making his July 30, 2009 bypass appeal timely.

More broadly, the Appellant argues that the Commission has an obligation to investigate allegations of bias regarding the selection of civil service employees.

CONCLUSION

The Commission, by administrative rule, has established a 60-day period for taking an appeal from the approval by HRD of a bypass under G.L. c. 31, § 2(b). Here, it is undisputed that on both August 21, 2006 and October 11, 2006, HRD sent the Appellant written correspondence stating that they were accepting the reasons offered by the Town regarding his non-selection as a fire fighter. In both letters, it stated: “You have the right to appeal this determination by filing your appeal, in writing within sixty calendar days of the receipt of this notice, with the Civil Service Commission, One Ashburton Place, Room 503, Boston, MA 02108 or visit their website at www.state.ma.us/csc. Please file a copy of this correspondence and all enclosures with your appeal to the Commission.” Two of the reasons for bypass (residency and prior employment history) were also used as reasons for bypassing the Appellant for the position of police officer three years

earlier. The third reason related to the Appellant's performance before an interview panel assembled by the Town's Fire Department.

The Appellant has not offered any explanation regarding why he failed to file a bypass appeal within sixty days of being notified of his bypass by HRD in 2006. He does not dispute that he received the HRD correspondence advising him of his appeal rights. Having filed an appeal with the Commission three years earlier regarding his bypass for the position of police officer, he was not unfamiliar with the appeal filing process. In fact, the Appellant visited the offices of HRD regarding this selection process and successfully obtained an unusual preliminary letter from them regarding the reasons offered by the Town to justify his bypass.

Rather, the Appellant argues that the deadline for filing his appeal should be tolled because of a recent discovery that the Town had allegedly hired a non-resident as a firefighter during the 2006 hiring cycle that was related to a senior official in the Town's Fire Department.

The Appellant's argument fails. First, it is not plausible that the Appellant failed to file a timely bypass appeal in 2006 simply because he was not aware that the Town allegedly hired a non-resident in the same hiring cycle. In 2003, when the Town used the same reason to bypass him as a police officer, the Appellant filed an appeal and vigorously contested the Town's claim that he did not meet the residency requirement. Here, he has failed to show why he didn't file an appeal to contest the issue when the Fire Department used the same reason for bypass. Further, the Town's decision to bypass him as a fire fighter was not limited to the residency issue, but also referenced his

employment history and his performance before an interview panel assembled by the Fire Department.

The Appellant also argues that he first learned about the Town allegedly hiring a non-resident as a fire fighter in 2006 as part of an interview with a Brookline police detective in October 2008. Even if the Commission were to accept this statement, which is vigorously contested by the police detective, as true, it does not justify the Appellant's request to toll the period of time in which to file an appeal. First, the Appellant's bypass appeal was not filed until several months after he allegedly "discovered" this information. It would be unreasonable to then grant the Appellant several additional months to "confirm" the alleged information before filing an appeal with the Commission. However, as stated above, the Town's decision to bypass the Appellant relied on two additional reasons, including his employment history and his performance before an interview panel assembled by the Fire Department.

Finally, the Appellant argues that the Commission, regardless of the statute of limitations regarding bypass appeals, is obligated to investigate allegations of wrongdoing regarding a civil service hiring process.

G.L.c.31, Section 2(a) provides:

"In addition to its other powers and duties, the commission shall have the following powers and duties: (a) To conduct investigations at its discretion on upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth."

The Commission construes the statute to grant it considerable discretion in whether, and if so, in what manner, and to what extent, it may elect to conduct any investigation of matters concerning civil service law and rules. See "Memorandum

and Decision” in Boston Patrolmen’s Association v. Massachusetts Civil Service Commission, Suffolk C.A. SUCV2006-4617; SUCV2007-1220 (Mass.Sup.Ct. December 18, 2007) (Brassard, J.), *affirming*, Commission’s Response to Petition for Investigation Filed By Boston Police Patrolman’s Association, CSC Docket No. I-07-34 (2007) (“The plaintiffs here also urge that their request to seek an investigation was improperly denied. Judgment should enter for the defendants on this issue [W]hile the statute certainly does not require that a petition for investigation need only be made by an aggrieved person, the statute, in my view, can only be fairly read to confer significant discretion upon the Civil Service Commission in terms of what response and to what extent, if at all, an investigation is appropriate.”); cf. Boston Police Superior Officers Federation v. Civil Service Commission, 35 Mass.App.Ct. 688,693-94, 624 N.E.2d 617, 620-21 (1993) (construing Commission’s discretion and authority to conduct a de novo hearing on a “fair test” appeal)

When warranted, the Commission has exercised its authority to conduct investigations under Section 2(a). See Review and Selection of Reserve Police and Firefighters in the City of Methuen, CSC Case Nos. I-09-290 and I-09-423).

Here, the Commission is not persuaded, on the evidence presented, that formally initiating an investigation of the 2006 hiring process regarding firefighters in the Town of Brookline would be a fruitful or appropriate use of the limited resources available to the Commission.

For all of the above reasons, the Appointing Authority's Motion to Dismiss is allowed and the Appellants' appeal under Docket No. G1-09-323 is hereby *dismissed*.

Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Stein and Taylor, Commissioners [Marquis – Absent]) on March 11, 2010.

A true Copy. Attest:

Commissioner
Civil Service Commission

Either party may file a motion for reconsideration within ten days of the receipt of this 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 the decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration shall be deemed a motion for rehearing in accordance with G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

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.

Notice to:
Daniel W. Rice, Esq. (for Appellant)
Patricia Correa, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)