

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

CIVIL SERVICE COMMISSION
One Ashburton Place: Room 503
Boston, MA 02108

GIOVANNI MORASCA,
Appellant

v.

G1-18-168

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

Appellant, *pro se*

Appearance for Respondent:

Joseph Santoro
Labor Relations Advisor
Department of Correction
P.O. Box 946
Industries Drive
Norfolk, MA 02056

Commissioner:

Cynthia A. Ittleman, Esq.

DECISION ON RESPONDENT’S MOTION TO DISMISS

On September 1, 2018, the Appellant, Giovanni Morasca (Mr. Morasca or Appellant), pursuant to G.L. c. 31, s. 2(b), filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Department of Correction (the Department or Respondent) to bypass him for appointment to the position of Correction Officer. A pre-hearing conference was held on November 6, 2018 at the Commission’s offices in Boston. At the pre-hearing conference, the Department stated that although it had sent the Appellant a bypass letter, the Department erred in sending it because the Appellant had not been bypassed since the Department did not hire anyone ranked below the Appellant on the pertinent Certification. I ordered the Respondent to produce the pertinent Certification, indicating which candidates had

been selected. On November 7, 2018, the Respondent filed Certification 05164 and a Motion to Dismiss (the Motion). Also on November 7, 2018, I informed the Appellant that he may submit an opposition to the Motion by November 21, 2018 and that his opposition may take the form of a letter or a memorandum, that it need not be in the form of a legal pleading. The Appellant did not file a response to the Motion.

FINDINGS OF FACT:

1. As part of the November 6, 2018 pre-hearing conference, the parties agreed that: a) Mr. Morasca took and passed the written portion of the examination for Correction Officer on March 19, 2016; and b) Mr. Morasca's name appeared on Certification No. 05164 tied in the 73rd ranking and that no candidates ranked below the Appellant were selected. (Stipulation)
2. On November 7, 2018, the Respondent submitted Certification 05164 with formal notations indicating that no one ranked below the Appellant was selected and that one (1) person was selected who was tied with the Respondent at the 73rd rank. (Administrative Notice)

Legal Standard for Motion to Dismiss

In accordance with 801 CMR 1.01(7)(g)(3), the Commission may at any time, on its own motion or that of a Party, dismiss an appeal for lack of jurisdiction to decide the matter or for failure of the Appellant to state a claim upon which relief can be granted. Such 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 undisputed material facts affirmatively demonstrate that the non-moving party has “no reasonable expectation” of prevailing on at least one “essential element of the case.” See, e.g., Milliken &

Co. v. Duro Textiles LLC, 451 Mass. 547, 550 (2008); Maimonides Sch. v. Coles, 71 Mass. App. Ct. 240, 249 (2008); Lydon v. Mass. Parole Bd., 18 MCSR 216 (2005).

Applicable Civil Service Law

The Commission has long held that the appointment of a candidate among those with the same rank on a Certification is not a bypass. See Edson v. Reading, 21 MCSR 453 (2008), *aff'd*, Edson v Civil Service Comm'n., Middlesex Superior Court No. 08-CV3418); Bartolomei v. Holyoke, 21 MCSR 94 (2008); Coughlin v. Plymouth, 19 MCSR 434 (2006); Kallas v. Franklin School Dep't., 11 MCSR 73 (1998); and Servello v. Dep't. of Correction, 28 MCSR 252 (2015). See also, Thompson v. Civil Service Comm'n., Suffolk Superior Court, No. MICV1995-5742 (1996)(concluding that selection among tied candidates does not present a bypass); Massachusetts Ass'n. of Minority Law Enforcement Officers v. Abban, 434 Mass. 256, 261 (2001)(“In deciding bypass appeals, the commission must determine whether the appointing authority has complied with the requirements of Massachusetts civil service law for selecting lower scoring candidates over higher scoring candidates ...”); Cotter v. Boston, 193 F.Supp. 2d 323, 354 (D. Mass. 2002)(citing HRD Guide), *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 candidates, no actionable ‘bypass’ has taken place in the parlance of ... civil service ...”).

Analysis/Conclusion

The parties stipulated at the prehearing conference that no one ranked below the Appellant on Certification 05164 was selected for employment at the Department of Correction. On November 7, 2018, the Respondent produced Certification 05164. This Certification indicates, as the parties also agreed at the pre-hearing conference, that the Appellant's name was

ranked 73rd thereon. The parties further agreed at the pre-hearing conference, and the Certification affirmed, that no one ranked below the Appellant was hired. The Certification also shows that a number of candidates were tied in the 73rd ranking and that one (1) of the other candidates who were tied for 73rd was hired.

When a candidate is bypassed by a candidate ranked lower on the pertinent Certification, the bypassed candidate has a right to appeal such bypass at the Commission. However, it is well established that a candidate who was not bypassed by a candidate ranked lower on a certification does not have the right to appeal. Viewing the evidence in the light most favorable to the Appellant, the undisputed material facts show that there is no one ranked below the Appellant on Certification 05164 who was hired by the Respondent. One (1) candidate who was in the Appellant's tie group and also ranked 73rd was hired but since that candidate had the same score as the Appellant, that candidate did not bypass the Appellant. As a result, there is no reasonable expectation that the Appellant will prevail on at least one essential element of the case.

For the aforementioned reasons, the Respondent's Motion is granted and the Appellant's appeal, docketed as G1-18-168, is hereby *dismissed*.

Civil Service Commission

/s/ Cynthia A. Ittleman
Cynthia A. Ittleman
Commissioner

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on December 6, 2018.

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:

Giovanni Morasca (Appellant)

Joseph Santoro (for Respondent)

John Marra, Esq. (HRD)