

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

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

MICHAEL A. NIGRO,
Appellant

v.

G2-15-47

CITY OF EVERETT
and
HUMAN RESOURCES DIVISION,
Respondents

Appearance for Appellant:

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Boston, MA 02108

Appearance for City of Everett:

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Appearance for Human Resources Division:

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Commissioner:

Cynthia A. Ittleman

**DECISIONS ON APPELLANT'S MOTIONS FOR SUMMARY DECISION
AND TO JOIN A NECESSARY PARTY AND
REQUEST FOR INVESTIGATION AND
MOTION OF HUMAN RESOURCES DIVISION
FOR SUMMARY DECISION**

Michael A. Nigro (Mr. Nigro or Appellant) filed the instant appeal at the Civil Service Commission (Commission) on March 3, 2015 under G.L. c. 31, §2(b) asserting that the City of Everett (City) had bypassed him for promotion from Captain to Deputy Chief of the Everett Fire

Department (EFD) and that the state's Human Resources Division (HRD) failed to approve the City's bypass. The Commission held a prehearing conference in this case on March 24, 2015.

On March 27, 2015, the Appellant filed a Motion for Summary Decision and a Request for Investigation. On March 30, 2015, the Appellant filed a Motion to Join a Necessary Party, Captain Carli, who was selected by the Appointing Authority¹ and had the same exam score as the Appellant. By letter dated April 17, 2015, the Appointing Authority filed an Opposition to the Appellant's Motion for Summary Decision (Opposition), including affidavits from EFD Chief Butler and Mayor DeMaria. On May 11, 2015, HRD filed a Motion for Summary Decision (HRD's Motion) asserting that 1) the Appellant was not bypassed when the appointing authority selected another candidate with the same exam score and 2) it had delegated its authority to the Appointing Authority to receive reasons for bypassing a candidate where appropriate. On May 20, 2015, the Appellant filed a Supplement to his Motion for Summary Decision (Appellant's Supplement); on the same day, the Appointing Authority filed a Response to Appellant's Supplement. I held a hearing² on the parties' motions and submissions on June 1, 2015 at the Commission. This hearing was digitally recorded and the parties received a CD of the proceeding.³ At the hearing, I requested that the Appellant and the Appointing Authority produce additional information, which they submitted thereafter. The parties submitted comments on the post-hearing submissions by email.

¹ It appears that Mr. Carli was subsequently appointed provisionally to Chief of the EFD.

² The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with Chapter 31, or any Commission rules, taking precedence.

³ If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

FINDINGS OF FACT

Based on the submissions of the parties, including all documents, affidavits, memoranda, stipulations, exhibits and the non-privileged portions of the parties' email comments on the matters filed in the case prior to, and after the hearing, I find the following material facts are not in dispute:

1. At all pertinent times, the Appellant was a Captain in the EFD.
2. The Appellant took and passed the March 24, 2012 promotional exam for the position of Deputy Fire Chief of the EFD.
3. On August 15, 2012, HRD established an eligible list of four (4) candidates for the position of Deputy Chief and sent it to the EFD. The first person on the list had the highest score. The other three (3) candidates, including the Appellant and Captain Carli, were tied at a lower score than the candidate ranked first.
4. Captain Carli knows Mayor DeMaria and made donations to the Mayor's campaign fund.
5. At first, EFD Chief Butler believed that he would only be able to promote one (1) candidate to the position of Deputy Chief and he promoted the candidate with the highest score.
6. Thereafter, Chief Butler learned that he would be able to promote one (1) additional person to the position of Deputy Chief.
7. In or about January 2015, the City conducted interviews of the three (3) tied Deputy Chief candidates. The interviews were conducted by EFD Chief Butler and Melissa Rodriquez, Administrative Assistant and Chief of Staff to Mayor DeMaria⁴. Mayor DeMaria observed the interviews but did not pose questions to the candidates.

⁴ The City's Director of Human Resources position was vacant at the time and, thus, the Director was not able to participate in the interviews.

8. After the interviews, Mayor DeMaria relied upon the recommendation of Chief Butler to determine which one (1) of the three (3) tied candidates would be promoted to Deputy Chief based on which of them had the most to offer in terms of their education and experience and based on the future needs of the EFD.
9. In making his recommendation to Mayor DeMaria, Chief Butler relied on the following information about the three (3) tied candidates:

Anthony Carli

15 years of service on EFD
7 years assigned to Fire Prevention Division
7 years of experience in Public Fire Education
5 years of experience as a Fire Investigator
5 years assigned to City of Everett Code Enforcement Task Force
5 years assigned to various Urban Area Security Initiative committees
Certified Fire Officer I, II
Completed Massachusetts fire Academy Chief Fire Officer Management Training Program

Appellant

31 years of service on EFD
10 years of experience as Department Training Officer
10 years of experience in Emergency Management Functions
Certified Fire Officer I

Third tied candidate

15 years of service at EFD
Several years of experience in outside employment with large building projects
Certified Fire Officer I

10. Chief Butler recommended that Mayor DeMaria appoint Mr. Carli to the position of Deputy Chief as follows:

“With construction of the new Wynn Resort in Everett imminent, a substantial amount of my time and the Deputy Chief assigned to Fire Prevention’s time will have to be directed to working on and with this project leaving little time to devote to other areas we are involved in such as (sic)

The City of Everett Code Enforcement Task Force
The Urban Area Security Initiative
Emergency Management

Other Fire Prevention Activities

Public Fire Education

Fire Investigations, (sic)

Proposed new Fire Station Building Projects

Day to day operation of the department. (sic)

It is expected that the Deputy Chief assigned to Administration will assume some responsibility in many of these areas.

I advised the mayor that in light of the expected duties to be performed that are, in my opinion, based on ongoing initiatives within the Administrative Division, that all three candidates had something to bring to the table along with some of the same certifications (sic) and training but, that based on my knowledge of the individuals involved, in my professional opinion Captain Anthony Carli had the most to offer in terms of education and experience (sic) ...”

(Affidavit of Chief Butler)

11. Mayor DeMaria appointed Captain to the second Deputy Chief position.

12. By letter dated January 15, 2015, Mayor DeMaria informed the Appellant:

“I regret to inform you at this time you have not been selected for a promotion to the position of Deputy Chief in the Everett Fire Department.

I hope that you will continue to study and take promotional examinations for the City of Everett Fire Department.

I appreciate your service to the Fire Department and respect the job that you do everyday (sic).”

13. The Appellant filed the instant appeal on March 3, 2015.

14. The Appellant’s union, International Association of Fire Fighters Local Union 143

(Union), filed unfair labor practice charges against the City at the state’s Department of Labor Relations (DLR) regarding the Deputy Chief hiring process and interviews, which charges the City denied. The DLR issued a complaint against the City but the parties in the DLR matter settled and the union withdrew the charges in 2016.⁵

15. In 2009, HRD delegated to civil service municipalities the responsibility, in part, to notify candidates whom they have bypassed, provide the reasons therefor, and inform bypassed

⁵ The status of the DLR matter was provided by DLR by phone on the date of this decision.

candidates of their right to appeal their bypass to the Commission. The municipalities no longer need to send the reasons for bypass to HRD, as they did for bypassed candidates prior to delegation.

Standard of Review

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 CMR 1.01(7)(g) and 801 CMR1.01(7)(h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is “no reasonable expectation” that a party can prevail on at least one “essential element of the case”. *See, e.g., Milliken & Co., v. Duro Textiles LLC*, 451 Mass. 547, 550, fn.6, (2008); *Maimonides School v. Coles*, 71 Mass.App.Ct. 240, 249 (2008); *Lydon v. Massachusetts Parole Board*, 18 MCSR 216 (2005).

Applicable Civil Service Law

G.L. c. 31, s. 2(b) authorizes appeals to the Commission by persons aggrieved by certain actions or inactions by the Massachusetts Human Resources Division (HRD) or, in certain cases by appointing authorities to whom HRD has delegated its authority, and which actions have abridged their rights under civil service laws. It states, in part,

No person shall be deemed to be aggrieved ... unless such person has made specific allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person’s rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person’s employment status.”

Id.

The Commission has the same powers and duties with respect to persons aggrieved by the action, or failure to act, by municipalities through G.L. c. 31, § 2(c), and via delegation from HRD to the municipality under G.L. c. 31, § 5(e).

This appeal asserts that the Appellant was bypassed for promotional appointment to the position of Deputy Fire Chief in Everett. This process is governed by G.L. c. 31, s. 27, which provides, in part:

“ ... If an appointing authority makes an original or promotional appointment from a certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with the administrator a written statement of his reasons for appointing the person whose name was not highest. Such an appointment of a person whose name was not highest shall be effective only when such statement of reasons has been received by the administrator. The administrator shall make such statement available for public inspection at the office of the department.”
Id.

The Personnel Administrator may delegate to municipal appointing authorities “its administrative function to receive statements of reasons supporting bypass promotions” as “practicable” pursuant to G.L. c. 31, s. 5(1). Malloch v. Town of Hanover & others, 472 Mass. 783, 785 (2015). *See also* Sherman v. Town of Randolph & others, 472 Mass. 802, 804 (2015)(decided the same day as Malloch).

Under its authority in G.L. c. 31, ss. 3(d) and 5, HRD established the Personnel Administrator Rules (PAR). Section 8.02(4) of the PAR provides,

Upon determining that any candidate on a certification is to be bypassed, as defined in Personnel Administration Rule .02, an appointing authority shall, immediately upon making such determination, send to the Personnel Administrator, in writing, a full and complete statement of the reason or reasons for bypassing a person or persons more highly ranked, or of the reason or reasons for selecting another person or persons, lower in score or preference category. Such statement shall indicate all positive reasons for selection and/or negative reasons for bypass on which the appointing authority intends to rely or might, in the future, rely, to justify the bypass or selection of a candidate or candidates. No reasons that are known or reasonably discoverable by the appointing authority, and which have not been disclosed to the Personnel Administrator, shall later be admissible as reasons for selection or bypass in any proceeding before the Personnel Administrator or the Civil Service Commission. **A selection made from among candidates with the same score will be considered a tie and not a bypass.** The certification process will not proceed, and no appointments or promotions will be approved, unless and until the Personnel Administrator approves reasons for selection or bypass.

Id. (emphasis added)

Section 2(a) of G.L. c. 31 provides that the Commission is authorized, *inter alia*,

“[t]o conduct investigations at its discretion or 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.”

Id.

Under this statutory provision, the Commission has broad discretion to decide when and how to conduct an investigation. *See, e.g.,* Dennehy v. Civil Service Comm’n., Suffolk Superior Court, C.A. No. 2013-00540 (2014)(“The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion.”). *See also* Erickson v. Civil Service Comm’n., Suffolk Superior Court, C.A. No. 2013-00639 (2014); Boston Police Patrolmen’s Association, et al v. Civil Service Comm’n., Suffolk Superior Court, C.A. No. 2006-4617 (2007). “The Commission exercises its discretion to conduct an investigation only ‘sparingly’ and, typically, when there is clear and convincing evidence of an irreparable political or personal bias that can be rectified only the Commission’s affirmative remedial intervention into the hiring process.” Damas v. Boston Police Department, 29 MCSR 550, 554 (2016)(citations omitted). *See, e.g.* In Re: 2010/2011 Review and Selection of firefighters in the City of Springfield, 24 MCSR 627 (2011)(investigation of hiring led by Deputy Fire Chief that resulted in his son’s appointment, required reconsideration of many candidates in a new hiring cycle to be conducted by outsiders); and In Re: 2011 Review and Selection of Permanent Intermittent Police Officers By the town of Oxford, CSC No. I-11-280 (2011)(investigation of alleged nepotism in hiring Selectmen’s relatives required reconsideration of all 19 candidates in an independent process).

Analysis

The Appellant alleges that he was wrongly bypassed for promotion to Deputy Fire Chief because the Respondent failed to provide HRD or the Appellant the reasons he was bypassed; HRD was not permitted to delegate to the Respondent the receipt of reasons for his bypass; the City should have broken the tie by seniority as it had in the past but it did not this time⁶; and the City did not select the appointed candidate because of his personal relationship with the Mayor, who is the Appointing Authority, and because he donated to the Mayor's campaign fund.

The City and HRD aver that the Appellant was not bypassed since his score was tied with the successful candidate and that even if he was bypassed, the City was not obliged to send bypass reasons to HRD because HRD delegated that authority to the Respondent. The City further avers that the Mayor selected the successful candidate based on the Fire Chief's suggestion, after interviews were held, and not because of personal bias in favor of the selected candidate.

The undisputed material facts established in this case affirmatively indicate that there is "no reasonable expectation" that the Appellant can prevail on at least one "essential element of the case". 801 CMR 1.01(7)(g) and 801 CMR1.01(7)(h).

While G.L. c. 31, s. 27 addresses the bypass process, it makes no provision for tied candidates. PAR 8.02(4) specifically states that when a candidate is selected from a tie group, those not selected from the tie group are not bypassed. As noted recently in Damas v. Boston Police Department, 29 MCSR 550 (2016), the Commission has consistently construed G.L. c. 31, s. 27 to mean that selection from a group of tied candidates is not a bypass of a person whose

⁶ The Appellant argued that promotional appointments were based on seniority. The City argued that such appointments were made according to civil service examinations but that the assignments of promotional appointees were made according to seniority. The parties also indicated that previously, the EFD employment decisions were made by a three (3)-member Fire Commission. Thus, it is unclear whether the City had an established tie-breaking practice, whether it is relevant or not.

“name appears highest” on the certification, for which an appeal may be filed with the Commission. *See, e.g., Johnston v. City of Everett*, 20 MCSR 295 (2007); *Edson v. Town of Reading*, 21 MCSR 453 (2008), *aff’d sub nom, Edson v. Civil Service Comm’n.*, Middlesex Sup.Ct. No. 2008CV3418 (2009)(“when two applicants are tied on the exam and the Appointing Authority selects one, the other was not bypassed”); *Bartolomei v. City of Holyoke*, 21 MCSR 94 (2008)(“choosing from a group of tied candidates does not constitute a bypass”); *Coughlin v. Plymouth Police Dep’t.*, 19 MCSR 434 (2006)(selection among a group of tied candidates is *not* a bypass); *Kallas v. Franklin School Dep’t.*, 11 MCSR 73 (1996)(“it is well settled civil service law that a tie score on a certification ... is not a bypass for civil service appeals”). *See also Cotter v. City of Boston*, 193 F.Supp.2d 323, 354 (D.Mass.2002), *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 tied candidates, no actionable ‘bypass’ has taken place”). Since there is no dispute that the Appellant was tied with the candidate who was selected, the Appellant was not bypassed. Even if he had been bypassed, the Respondent was not obliged to send notice of reasons for the bypass to HRD because HRD had delegated its authority in this regard to the Respondent, which the Supreme Judicial Court has found that HRD was permitted to do. *See Malloch* and *Sherman*, *supra*.

The Appellant also complains that he was aggrieved because although he may not have been bypassed, the City used interviews as the tie-breaking method to select the final candidate and the interviews were tainted by favoritism. The Commission has not found that it has jurisdiction to address claims alleging inappropriate tie-breaking under G.L. c. 31, s. 2(b). Indeed, there is nothing in civil service law that requires an appointing authority to provide reasons for choosing one tied candidate over someone in the same tie group. Thus, as the

Commission noted in Damas v. Boston Police Department, 29 MCSR 550 (2016), “ ... non-selection of tied candidates is still not a bypass and scrutiny of a tiebreaking process cannot be converted into one.” Id. at 553.

The Appellant has also requested that the Commission conduct an investigation regarding his non-selection. The Commission has broad discretion to initiate and conduct investigations. An investigation is unwarranted here for a number of reasons. First, the Commission has already found that Captain Carli knows the Mayor and that Captain Carli donated to the Mayor’s campaign. However, neither knowing a candidate nor making campaign donations compels a finding that an investigation is warranted. Secondly, the Commission also found here that the Mayor relied on the advice of the Fire Chief in making a decision about whom to appoint to the second Deputy Chief position. In addition to participating in the interviews, the Fire Chief regularly worked with the three (3) candidates. Therefore, Fire Chief Butler’s recommendation to the Mayor was based not only on the candidates’ interviews but also on his first-hand knowledge of the candidates and their performance in various situations. Chief Butler articulated a number of details concerning each of the three (3) tied candidates which led him to his decision to recommend Captain Carli for promotion to Deputy Chief. If the three (3) candidates were not tied, the Appointing Authority could have arguably established reasonable justification for “bypassing” the Appellant based on the more diverse and varied background of Captain Carli and the number of additional responsibilities he has assumed, compared to experience of the Appellant. Moreover, the Chief indicated that he made his recommendation in view of the challenges to the Fire Department that he anticipated with the construction of the Wynn Resort Casino in Everett. Therefore, the Mayor properly relied on the Chief’s recommendation in deciding whom to promote of the three (3) tied candidates. Thirdly, the Appellant’s union filed

an unfair labor practice complaint against the City at the state Department of Labor Relations concerning the Deputy Chief promotion process involved here. The Civil Service Commission has no jurisdiction over collective bargaining issues and investigating the City of Everett's conduct in these regards would unnecessarily duplicate the efforts of the Department of Labor Relations and would be a waste of valuable resources. For these reasons, and pursuant to the Commission's considerable discretion in this regard, an investigation is unwarranted in this case.

Conclusion

For all of the above stated reasons, the Appellant's Motion for Summary Decision is *denied*, the Appellant's Motion for Investigation is *denied*, the Appellant's Motion to Join Necessary Party is *moot* and HRD's Motion for Summary Decision is *allowed* such that the appeal of Mr. Nigro, under Docket G2-15-47, is *dismissed*.

Civil Service Commission

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

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Tivnan, and Stein) on April 27, 2017.

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:

Galen Gilbert, Esq. (for Appellant)
Albert Mason, Esq. (for the City)
Michael Downey, Esq. (for HRD)
John Marra, Esq. (HRD)