

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

Decision mailed: 7/30/10
Civil Service Commission CB

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

TED O'NEILL,
Appellant

v.

**DEPARTMENT OF
CORRECTION,**
Respondent

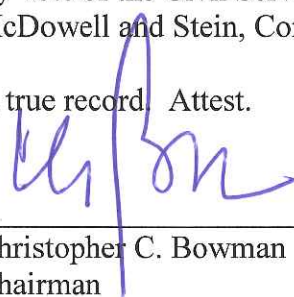
Case No.: G1-09-321

DECISION

After careful review and consideration, the Civil Service Commission voted at an executive session on July 29, 2010 to acknowledge receipt of the report of the Administrative Law Magistrate dated June 11, 2010. The Commission voted to adopt the ruling on the Motion to Dismiss and the recommended decision of the Magistrate therein. A copy of the Magistrate's report is enclosed herewith. The Appellant's appeal is hereby *denied*.

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on July 29, 2010.

A true record. Attest.



Christopher C. Bowman
Chairman

Either party may file a motion for reconsideration within ten days of the receipt of a 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 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:
Ted O'Neill (*pro se*)
Jeffrey S. Bolger (for the Appointing Authority)
Richard C. Heidlage, Esq. (DALA)



THE COMMONWEALTH OF MASSACHUSETTS

DIVISION OF ADMINISTRATIVE LAW APPEALS

98 NORTH WASHINGTON STREET, 4TH FLOOR

BOSTON, MA 02114

RICHARD C. HEIDLAGE
CHIEF ADMINISTRATIVE MAGISTRATE

TEL: 617-727-7060
FAX: 617-727-7248

June 11, 2010

Christopher C. Bowman, Chairman
Civil Service Commission
One Ashburton Place, Room 503
Boston, MA 02108

Re: Ted O'Neill v. Department of Correction
DALA Docket No. CS-10-309
CSC Docket No. G1-09-321

Dear Chairman Bowman:

Enclosed please find the Recommended Decision that is being issued today. The parties are advised that, pursuant to 801 CMR 1.01(11)(c)(1), they have thirty days to file written objections to the decision with the Civil Service Commission. The written objections may be accompanied by supporting briefs.

Sincerely,

Richard C. Heidlage
Acting Chief Administrative Magistrate

RCH/mbf

Enclosure

cc: Ted O'Neill
Jeffrey S. Bolger

RECEIVED
2010 JUN 17 A 1:50
COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Division of Administrative Law Appeals

Ted O'Neill,
Petitioner

v.

Docket No. G1-09-321
DALA No. CS-10-309

Department of Correction,
Respondent

Appearance for Petitioner:

Ted O'Neill
[REDACTED]
[REDACTED]

Appearance for Respondent:

Jeffrey S. Bolger
Director of Employee Relations
Department of Correction, Division of Human Resources
Route 1A, Industries Drive,
Norfolk, MA 02056

Administrative Magistrate:

Kenneth J. Forton, Esq.

SUMMARY OF RECOMMENDED DECISION

A custodian seeking promotion within the Department of Corrections did not have standing to challenge the Department's denial of his promotion because he was not a person aggrieved under G.L. c. 31, § 2(b). The Department was not required to explain why it promoted another candidate with the same civil service score as Petitioner because promoting a tied applicant is not a bypass pursuant to § 2(b) and Personnel Administration Rule .02.

RECOMMENDED DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Ted O'Neill, appeals the decision of the Respondent, Department of Correction (DOC), to bypass him for a promotion to the position of Industrial Instructor III. The appeal was timely filed. On August 27, 2009, the Department filed a motion to dismiss. A hearing on the motion was held on October 5, 2009 at the office of the Division of Administrative Law Appeals, 98 North Washington Street, Boston.

RULING ON MOTION TO DISMISS

The Civil Service Commission has the authority "to hear and decide appeals by a person aggrieved by any decision, action, or failure to act by the administrator." G.L. c. 31, § 2(b). A person is aggrieved when "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.*

Mr. O'Neill asserts that the Department bypassed him for promotion by instead promoting a candidate with an inferior record, which he believes is in violation of the Civil Service Act. The Personnel Administration Rules (PAR) define the term "bypass" as "the selection of a person or persons whose name or names, by reason of score . . . appear lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification." PAR.02. Based on prior decisions of the Civil Service Commission, no bypass occurs where two applicants have the same exam score and one of the applicants is chosen over the other. *See, e.g., Houle v. Dep't of*

Corr., 17 MCSR 72, 72-73 (2004); *Ortega v. Dep't of Corr.*, 6 MCSR 216, 216-18 (1993).

In May of 2008, Mr. O'Neill applied for a promotion to the title of Industrial Instructor III. As part of the application process, Mr. O'Neill filled out a Site Selection Form that listed the location of all Industrial Instructor III vacancies and directed applicants to indicate locations at which they would be willing to work. The Site Selection Form also clearly indicated that applicants would not be considered for a promotion at sites not selected. Out of a possible nine locations, Mr. O'Neill indicated he would be willing to work at five.

In addition to filling out a Site Selection Form, applicants took an appropriate civil service exam. In compliance with Massachusetts civil service law, the DOC ranked the applicants by the order of the scores they received on the civil service exam. G.L. c. 31, § 25. The applicants selected for a promotion at all nine available sites received the following scores: 83, 77, 76, 73, 73, 72, 71, 70, 69, and 62. The applicants selected for a promotion at the five sites where Mr. O'Neill was willing to work received scores of 73, 73, 72, 71, and 70. Mr. O'Neill scored a 70 on the civil service exam.

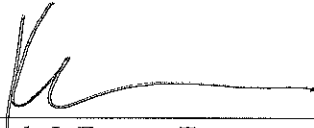
Only scores of candidates that were promoted at sites where Mr. O'Neill was willing to work are relevant in this case since he was never in contention for promotion at the other sites. As such, his score of 70 is tied for the lowest score of those applicants selected for a promotion. When a civil service exam results in a tie-score and the appointing authority promotes some but not all of the candidates, no actionable bypass has occurred. *See Cotter v. City of Boston*, 193 F. Supp. 2d 323, 354 (D. Mass. 2002). As no bypass occurred, under G.L. c. 31, § 27, the Department did not need to justify its

decision. Notwithstanding this provision, the Department defended its decision to promote Mr. Ryan over Mr. O'Neill based on seniority.

As Mr. O'Neill was denied a promotion without any violation of G.L. c. 31, § 2(b), he cannot be deemed an aggrieved person and, therefore, lacks standing to bring this appeal. For these reasons, Mr. O'Neill has failed to state a claim upon which relief may be granted, in accordance with 801 CMR 1.01, § 7(g). Thus, the Department's motion to dismiss is granted.

SO ORDERED.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kenneth J. Forton, Esq.
Administrative Magistrate

DATED: **JUN 11 2010**