

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

VICTOR PAIVA,
Appellant

G2-14-276

v.

DEPARTMENT OF CORRECTION,
Respondent

Appearance for Appellant:

David Brody, Esq.
Law Offices of Joseph Sulman
1001 Watertown Street, Third Floor
West Newton, MA 02465

Appearance for Respondent:

Earl Wilson, Esq.
Department of Correction
P.O. Box 946: Industries Drive
Norfolk, MA 02056

Commissioner:

Christopher C. Bowman

**DECISION ON RESPONDENT’S MOTION TO DISMISS &
RESPONSE TO APPELLANT’S REQUEST FOR INVESTIGATION**

On November 20, 2014, the Appellant, Victor Paiva (Mr. Paiva), filed a promotional bypass appeal with the Civil Service Commission (Commission), contesting his non-selection by the Department of Correction (DOC) to the position of Captain.

On December 16, 2014, I held a pre-hearing conference at the offices of the Commission, which was attended by Mr. Paiva, his counsel and a representative for DOC. At the pre-hearing, the parties did not dispute that there is no active eligible list for the position of Captain at DOC or that the individual who received the provisional promotion was a permanent civil service employee in the next lower title of Lieutenant.

As such, DOC met the requirements of G.L. c. 31, § 15, which allows for the provisional promotion “of a civil service employee in one title to the next higher title in the same departmental unit ... if there is no suitable eligible list ...”.

Further, since there is no eligible list in place for Captain, and the promotion cannot be made as a permanent promotion after certification without an active eligible list, there is no “bypass” for Mr. Paiva to appeal under G.L. c. 31, § 2(b) and/or the applicable provisions of the Personnel Administration Rules (PARs). For this reason, DOC submitted a Motion to Dismiss the appeal.

Notwithstanding the above, I reminded the parties that, under rare circumstances, the Commission can exercise its authority to initiate an investigation under G.L. c. 31, § 2(a). Although he had not requested such an investigation, I gave Mr. Paiva the opportunity to submit a brief explaining why the Commission should initiate such an investigation as part of his opposition to DOC’s Motion to Dismiss. Mr. Paiva submitted his opposition and brief to the Commission on February 12, 2015.

As part of Mr. Paiva’s brief, he argues that the Commission should investigate why DOC has failed to ask the state’s Human Resources Division (HRD) to administer an examination for Captain since this title (or the predecessor title) was created thirty-four (34) years ago.

The Commission regularly addresses “bypass” appeals, when an Appointing Authority appoints an individual whose name appears lower on a Certification and the non-selected candidate files an appeal with the Commission (See G.L. c. 31, § 2(b) and PAR.01 & PAR.07-09). In those cases where a candidate is “bypassed”, the Appointing Authority is required to provide sound and sufficient reasons for the bypass and, upon receiving an appeal, the Commission determines whether the Appointing Authority had reasonable justification for the bypass.

Here, as referenced above, there was no bypass and, as such, there is no requirement under the civil service law or rules for an Appointing Authority to provide non-selected candidates with non-selection reasons when making a provisional promotion that involves the promotion of a civil service employee from the next lower title. Non-selected candidates for provisional promotions usually, however, may appeal their non-selection through the grievance process outlined in the applicable collective bargaining agreement.

The Commission, however, maintains the discretion to initiate investigations under G.L. c. 31, § 2(a). This statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See Boston Police Patrolmen’s Association et al v. Civ. Serv. Comm’n, No. 2006-4617, Suffolk Superior Court (2007). (See also Dennehy v. Civ. Serv. Comm’n, No. 2013-00540, Suffolk Superior Court (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.”) & Erickson v. Civ. Serv. Comm’n & others, No. 2013-00639-D, Suffolk Superior Court (2014).

In a ruling issued by the Commission on May 28, 2015 (See Request by Jon Mograss & others to investigate the failure to administer civil service examinations for the public safety position of Captain at the Massachusetts Department of Correction, CSC Tracking No. I-14-3014

(2015)), the Commission voted to open an investigation to address the same matter that is the subject of Mr. Paiva's request. Since this matter is now the subject of an ongoing investigation in the Mogross et al petition, there is no need to initiate a separate investigation regarding the same matter.

Since DOC provisionally promoted a permanent civil service employee serving in the next lower title and no bypass occurred, Mr. Paiva's Section 2(b) appeal under Docket No. G2-14-276 is hereby *dismissed*. Since the matter related to why DOC and/or HRD have not administered civil service examinations for the position of Captain is now being investigated under a separate Petition, Mr. Paiva's request for an investigation under Section 2(a) is denied.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, McDowell, and Stein, Commissioners) on June 11, 2015.

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.

Notice:

David Brody, Esq. (for Appellant / Petitioner)

Earl Wilson, Esq. (for Respondent)

John Marra, Esq. (HRD)