

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

JUAN ROSARIO,  
Appellant

v.

G2-07-301

CITY OF SPRINGFIELD,  
Respondent

Appellant's Attorney:

*Pro Se*  
Juan A. Rosario

Respondent's Attorney:

William G. Cullinan, Esq.  
City of Springfield  
Law Department  
36 Court Street  
Springfield, MA 01103

Commissioner:

Donald R. Marquis

DECISION ON RESPONDENT'S MOTION TO DISMISS

*Procedural Background*

Pursuant to G.L. c. 31, §2 (b), the Appellant, Juan Rosario, (hereafter "Appellant" or "Rosario") appealed the decision of the City of Springfield (hereafter "the City" or "Appointing Authority") claiming that he was bypassed for promotion to the rank of Sergeant in the Springfield Police Department. A pre-hearing conference was held at the offices of the Civil Service Commission on October 25, 2007 at which time the City and the state's Human Resources Division filed Motions to Dismiss the Appellant's appeal to which the Appellant did not respond.

### *Factual Background*

The Appellant is an officer in the Springfield Police Department (“the Department”). On or about September 8, 2005, the Department received a certification list with three names of officers eligible for appointment for 2 positions as a full-time police sergeant. It is undisputed that the Appellant was tied for second on the civil service list in question. The candidate ranked first and another candidate that was tied with the Appellant for the second ranking were promoted to the 2 sergeant positions.

### *Conclusion*

HRD Personnel Administration Rules (“PAR”), issued pursuant to G.L. c. 31, §§ 3(d) and 5, define a bypass as “the selection of a person or persons whose name or names ...appear lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification.” PAR.02. Respondent argues that the Commission must dismiss the Appellant’s appeal as the case does not concern a bypass situation. Rather, Respondent maintains that the Appellant was tied with the candidate listed fourth on the list and that a tie is not a bypass.

As HRD contends and as prior Commission decisions have well established, selection from a group of tied candidates is not a bypass. Baptista v. Department of Public Welfare, 6 MCSR 21 (1993). In Kallas v. Franklin School Department, 11 MCSR 73 (1996), the Commission held that “[i]t is well settled civil service law that a tie score on a certification list is not a bypass for civil service appeals...”. Although in Cotter v. City of Boston, 73 F. Supp.2d 62, 66t (1999), the U.S. District Court held that “any selection among equally-scoring candidates...is a ‘bypass’ because all of their names appear highest,” the Court also stated in a footnote that that “it must be remembered that the

Court is here ruling on a motion to dismiss... The litigants' motion papers do not present, and the Court's independent research has not uncovered, any long-standing tie-breaking administrative procedure of either the Division or the Boston Police Department that comports with the civil service law. Should either defendant come forward with such an administrative procedure, support the description with admissible evidence, and demonstrate that the procedure was followed in this case, the Court necessarily will give such administrative procedure appropriate deference." Id. As of the filing of the Appellant's appeal in the instant matter (2006), the Commission is also not aware of any such accepted tie-breaking method that would alter the result here.

The Commission does not have jurisdiction to hear this bypass appeal as there was no bypass. Rather, the evidence demonstrated that 1 candidate ranked higher and another candidate that was tied with the Appellant for second on the civil service list were selected. Choosing from among tied candidates does not constitute a bypass that can be appealed to the Commission.

The Respondents' Motions to Dismiss are allowed and the Appellant's appeal filed under Docket G2-07-301 is hereby *dismissed*.

Civil Service Commission

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Donald R. Marquis  
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Henderson, Marquis and Taylor, Commissioners) on November 15, 2007.

A True copy. Attest:

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Commissioner

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:

Juan Rosario (Appellant)

William G. Cullinan, Esq. (for Appointing Authority)

Michelle M. Heffernan, Esq. (for HRD)