

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

MARC SAVAGE,
Appellant / Petitioner

E-18-141
I-19-039

v.

SPRINGFIELD FIRE DEPARTMENT,
Respondent

Appearance for Appellant:

Pro Se
Marc Savage

Appearance for Respondent:

Talia Gee, Esq.
City of Springfield
36 Court Street, Room 5
Springfield, MA 01103

Commissioner:

Christopher C. Bowman

**DECISION &
RESPONSE TO REQUEST FOR INVESTIGATION**

1. On August 2, 2018, the Appellant, Marc A. Savage (Captain Savage), a Captain in the Springfield Fire Department (SFD), filed a non-bypass equity appeal with the Civil Service Commission (Commission). Attached was a three (3)-page letter outlining the basis of his appeal.
2. On September 12, 2018, I held a pre-hearing conference at the Springfield State Building in Springfield, MA which was attended by Captain Savage, counsel for the SFD, the SFD Deputy Fire Chief and a human resources representative from the SFD. Counsel for the state's Human Resources Division (HRD) participated via phone.
3. Based on the information presented at the pre-hearing, I determined that: a) Captain Savage was ranked third on an eligible list for District Fire Chief; b) prior to the expiration of that list, the SFD promoted the second ranked candidate to District Fire Chief; c) the newly-promoted District Fire Chief will serve in the functional capacity of Director of Training, a position the new incumbent, until recently, held for many years in an "acting capacity" while he was in the title of Fire Captain.

4. In his appeal, Captain Savage argued that the selected candidate was ineligible to sit for the promotional examination for District Fire Chief because, according to Captain Savage, he was no longer a civil service employee (Fire Captain) when he served as the “Acting Director of Training.” Captain Savage is mistaken. I am not aware of any law, rule or prior Commission or judicial decision that supports his argument. Just as, for example, a police officer does not lose his/her civil service status as a police officer (sergeant, etc.) when he/she is designated as a detective, a Fire Captain serving as the Director of Training does not lose his civil service status.
5. The remainder of Captain Savage’s appeal centered around his argument that the decision to promote the second-ranked candidate on the eligible list was pre-determined and that the review process was not fair and impartial. Specifically, Captain Savage pointed to the fact that two (2) of the interview panelists were named in litigation that he initiated contesting the City’s alleged non-enforcement of local residency requirements.
6. Had Captain Savage been ranked first on the eligible list and subsequent Certification, his non-selection would have constituted a promotional bypass and the above-referenced argument related to fairness, impartiality, etc. would be part of the bypass appeal proceedings. Since Captain Savage was ranked third, the selection of the second-ranked candidate did not constitute a bypass, for which appeals are heard by the Commission under Section 2(b) of Chapter 31.
7. The Commission, does, however, maintain the discretion to initiate investigations under G.L. c. 31, s. 2(a). That discretion is exercised sparingly and is typically exercised in circumstances in which the Petitioner has shown a high likelihood that the Commission would find evidence of personal or political bias in a decision-making process.
8. For all of the above reasons, I ordered the following:
 - I. Captain Savage had thirty (30) days to submit a request for investigation with the Commission, detailing the reasons why the Commission should initiate an investigation under Section 2(a).
 - II. The SFD had thirty (30) days thereafter to file a reply.
 - III. The SFD had thirty (30) days to submit a motion to dismiss the Appellant’s appeal, as initially filed under Section 2(b).
 - IV. Captain Savage had thirty (30) days thereafter to file a reply.
9. The Commission subsequently received: a request for investigation from Captain Savage; a reply from the SFD; a Motion to Dismiss by the SFD; and a reply from Captain Savage.

Analysis

For decades, the Commission has concluded that a candidate may, pursuant to G.L. c. 31, §2(b), contest his/her non-selection for appointment or promotion to a civil service position *if the appointing authority selects someone ranked below that candidate on the civil service Certification.*

In fact, the Commission has long held that the appointment of a candidate among those with the *same rank* on a Certification is not a bypass that can be appealed under Section 2(b). See Edson v. Reading, 21 MCSR 453 (2008) (upheld by Superior Court; Edson v. Civil Service Comm'n, Middlesex Sup. Ct. No. 08-CV3418 (2009); Bartolomei v. Holyoke, 21 MCSR 94 (2008); Coughlin v. Plymouth, 19 MCSR 434 (2006); Kallas v. Franklin School Dep't, 11 MCSR 73 (1998); Servello v. Dep't of Correction, 28 MCSR 252 (2015); See also Thompson v. Civil Service Comm'n, Suffolk Superior Ct. No. MICV 1995-5742 (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's 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").

Here, Captain Savage was not ranked higher nor tied with the selected candidate. Rather, the SFD promoted a candidate who was ranked *above* Captain Savage on the Certification. Thus, no bypass occurred for which Captain Savage can appeal to the Commission.

For these reasons, Captain Savage's appeal filed under G.L. c. 31, § 2(b) is *dismissed*.

As referenced above, however, the Commission has the option to exercise its discretion to initiate an investigation under G.L. c. 31, § 2(a), even when no bypass occurs. 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 Erickson v. Civ. Serv. Comm'n & others, No. 2013-00639-D, Suffolk Superior Court (2014). The Commission exercises this discretion, however, "sparingly". See Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011).

After careful review and consideration of the entire record in this matter, including the submissions of the Petitioner and the City, the Commission has concluded that an investigation is not warranted at this time and has opted not to exercise its discretion to initiate such an investigation under G.L. c. 31, § 2(a).

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 28, 2019.

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:

Marc Savage (Appellant / Petitioner)

Talia Gee, Esq. (for Respondent)