

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

HERBERT STACY,
Appellant,

v.

G1-09-359

CITY OF METHUEN,
Respondent

Appellant's Attorney:

Thomas J. Gleason, Esq.
Gleason Law Offices
163 Merrimack Street
Haverhill, MA 01830

Respondent's Attorney:

Peter J. McQuillan, Esq.
Office of the City Solicitor
City of Methuen
41 Pleasant Street: Room 311
Methuen, MA 01844

Commissioner:

Christopher C. Bowman

DECISION

On September 11, 2009, the Appellant, Herbert Stacy ("Appellant" or "Stacy") filed this appeal pursuant to the provisions of G. L. c. 31, § 2(b) claiming that he had been bypassed numerous times by the City of Methuen ("City" or "Appointing Authority" or "Methuen") between 2002 and 2006 and that the City, each time, failed to file a statement of reasons for bypass pursuant to G.L. c. 31, § 27. A hearing was conducted at the offices of the Commission over two (2) days on June 24, 2010 and September 29, 2010. The hearing was digitally recorded. Both parties submitted post-hearing briefs.

FINDINGS OF FACTS:

Based upon the documents entered into evidence (Exhibits 1 through 19) and the testimony of the Appellant, Colleen McCarthy, Director of Human Resources for the City of Methuen and Officer Kevin Dzioba of the Methuen Police Department, I find the following:

1. The City of Methuen is a municipal corporation established under the laws of the Commonwealth of Massachusetts with a usual place of business at 41 Pleasant Street, Methuen, Massachusetts 01844.
2. The Mayor of the City of Methuen, Massachusetts is the appointing authority for the purpose of civil service law.
3. On April 28, 2001, the Appellant took and passed a civil service examination for the position of police officer. I infer that he was over the age of 32 at the time of the examination.
4. The authority for a city or town to establish a permanent reserve or intermittent police force is designed to provide appointing authorities with a roster of authorized civil service employees who can be called at short notice to work on an as-needed basis, performing essentially as substitutes for full-time employees who may be out ill or on vacation, and to provide extra personnel in emergency or special situations on a short-term basis. The terms “intermittent” and “reserve” force are essentially interchangeable when applied to towns; cities are restricted in the size of a “reserve” force but not an “intermittent force”. (“A Certification Handbook: Entry Level Police Officer and Firefighter Appointments For Permanent Intermittent and Reserve Service Subject to Civil Service” [HRD Intermittent Handbook], Section V; see also Ragucci v. Saugus, 21 MCSR 667 (2008))

5. Prior to making an intermittent appointment, an appointing authority must requisition a certification from state's Human Resources Division (HRD) for the number of permanent intermittent vacancies that are to be filled. Upon receipt of such a requisition, HRD issues a Certification to the appointing authority from the eligible list for the entry level position of Firefighter or Police Officer, as applicable. The appointing authority then proceeds to appoint candidates in accordance with civil service law and rules in the same manner as any original civil service appointment. (HRD Intermittent Handbook, Section V and Ragucci at p.2)
6. On December 6, 2001, HRD issued Certification # 211348 to the City for the purpose of appointing 11 permanent reserve police officers. The Appellant's name did not appear on that Certification , presumably because he exceeded the maximum age requirement at the time.
(Exhibit 18)
7. On February 21, 2002 the State Legislature approved Chapter 42 of the Acts of 2002 exempting the Appellant from the age requirements of sections 58, 61A and 61B of Chapter 31 of the General Laws to become a police officer in the City of Methuen. (Exhibit 4)
8. On March 22, 2002, HRD notified the City that the name of the Appellant should be added to Certification # 211348 after the name of Joseph A. DiPietro and Patrick M. Johnson putting the Appellant's name in the tenth position. (Exhibit 5)
9. Thus, the names of candidates as they appeared on Certification No. 211348 were:

Todd Silverio
Francesco Falorni
Carlos Camacho
Dean Drouin
Justin Law
James Panas
Michael DiPietro
Joseph Rynne

Joseph DiPietro
Herbert Stacy
Patrick Johnson
Jason Marcoux
Thomas Richardson
Chris Gagnon
Christopher Gallant
Aline Judge
Jason Lenotte
Kevin Abraham
Jeffrey Brouck
Michael Henrick
Jeffrey Anselmi
Matthew Ferraro
Keith Frost
Timothy Getchell
Terri Ludwig
Shawn Tardif
Patrick Waldron
James Deroche

(Exhibit 5)

10. On November 21, 2002, the City selected thirteen (13) candidates from Certification # 211348 including the Appellant for the position of permanent reserve police officer. (Exhibit 7)
11. Once candidates have been selected for appointment, the appointing authority returns the signed Certification with the standard Authorization of Employment Form 14 for approval by HRD. (HRD Intermittent Handbook, Section V)
12. Because of the special significance of the order in which names are placed on the Form 14 submitted at the time intermittent officers are appointed, HRD provides the following instructions about preparing such forms: "Appointing Authorities are asked to take particular notice of MGL Chapter 31, Section 60, which specifies that intermittent . . . officers must be placed and maintained on the roster and certified for full-time employment in the order in which they were appointed. It is the Appointing Authority's responsibility to insure that the effective dates of employment and the order in which employees are listed on the

Authorization of Employment Form follow this requirement, so that certifications issued from the roster list will list names in appropriate order.” (HRD Intermittent Handbook, Section V, VIII)

13. After HRD approves the intermittent appointments, the names of the appointees in that particular community are placed on a standing list called a “roster”. The names are placed on the roster “in order of the date of appointment shown” on the Authorization of Employment Form 14. (HRD Intermittent Handbook, Section V)
14. The thirteen (13) names contained on the Authorization of Employment Form 14 (Exhibit 19) resulting from Certification No. 211348 (Exhibit 18) all share the same date of employment of January 13, 2003. The 13 names were listed on the Form 14 in the following order:

Todd Silverio
Justin Law
Joseph Rynne
Thomas Richardson
Christopher Gallant
Aline Judge
Jason Lenotte
Kevin Abraham
Jeffrey Brouck
Timothy Getchell
Keith Frost
Terri Ludwig
Herbert Stacy

(Exhibit 19)

15. With the exception of Herbert Stacy, the names on the Form 14 appear in the same rank order in which they appeared on the underlying Certification. If Mr. Stacy’s name did appear in the same order as the Certification, his name would have been placed between Joseph Rynne and Thomas Richardson.

16. After HRD approves the reserve appointments, the names of the appointees in that particular community are placed on a standing list called a “roster”. The names are placed on the roster “in order of the date of appointment shown” on the Authorization of Employment Form 14. (HRD Intermittent Handbook, Section V)
17. Exhibit 16 is a copy of pages 3 -7 of the “roster” of Methuen Reserve Police Officers that is the subject of this appeal. It appears to be undisputed that pages 3 and 4 contain names of individuals placed on the roster as part of a previous hiring cycle (hereinafter “reserve hiring cycle 1 roster”). All of page 5 and the first name on page 6 contain the names of individuals placed on the roster as part of the same hiring cycle as the Appellant (hereinafter “reserve hiring cycle 2 roster”). The remainder of names on page 6 and all the names on page 7 contain the names of individuals placed on the roster as part of a subsequent hiring cycle (hereinafter “reserve hiring cycle 3 roster”).
18. When a community with a reserve force has full-time vacancies in that force to be filled, those vacancies must be filled, ahead of any other eligible candidates, from a Roster Certification requisitioned by the appointing authority from HRD. HRD compiles the Roster Certification from the roster of permanent reserve officers. Candidates must be listed on that certification “by date and order of their appointment as reflected in the records” provided to HRD by the appointing authority. Candidates with the “same date of appointment are listed in the exact order in which their names appeared on the Authorization of Employment Form 14 provided by the Appointing Authority at the time they were appointed.” (The only exception to this rule pertains to communities subject to Consent Decrees covering certain minority candidates which the parties do not assert is applicable to Saugus.) (HRD Intermittent Handbook, Section VIII)

19. On January 31, 2003 reserve officer Thomas E. Richardson (whose name appeared on reserve hiring cycle 2) was appointed as a full time police officer in the City of Methuen. According to the City, Richardson was a lateral transfer from another police department having received a permanent waiver from the Massachusetts Police Training Council. (Exhibit 10)
20. In June 2003, three candidates from reserve hiring cycle 1 roster (May, Bergeron and Tarness) and three from reserve hiring cycle 2 roster (Law, Rynne and Gallant) were appointed as permanent full time police officers.
21. According to the Appellant, Law, Rynne, and Gallant were not appointed in the correct order. The Appellant argues that he should have been positioned in front of Gallant on the roster --- and that his non-selection in June 2003 constituted a bypass under G.L. c. 31, § 27.
22. In 2004, the one (1) remaining candidate on reserve hiring cycle 1 roster (LaScola) together with five (5) candidates from reserve hiring cycle 2 roster (Lennotte, Abraham, Brouk, Getchell and Frost) were appointed as permanent full-time police officers.
23. For the same reasons referenced above, the Appellant argues that he should have been appointed before all of the candidates referenced above and, if not, provided with bypass reasons and the right to appeal such bypass to the Commission.
24. On June 23, 2006, one (1) of the two (2) remaining candidates on reserve hiring cycle 2 (Ludwig) was appointed as a full-time police officer and assigned badge number 121. The Appellant was the other candidate whose name appeared on reserve hiring cycle 2 roster.

25. Also on June 23, 2006, the City appointed nine (9) other individuals as permanent full-time police officers, all of whom were from reserve hiring cycle 3 roster.

26. On November 16, 2006, the Appellant was appointed as a permanent full-time police officer.

27. The Appellant testified that the decision to not select him earlier was directly related to personal animus against him by then-Mayor Sharon Pollard.

Appellant's Argument

First, the Appellant argues that the Form 14 submitted to HRD listed individuals in the wrong order. He argues that the Form 14 submitted in 2003 should have listed the names in the same order as the underlying Certification, which was based on a rank order using each individual's score, veteran status, etc. Instead of last, the Appellant argues that he should have been inserted after Rynne but ahead of Richardson, Gallant and all others listed below Gallant.

Had this been the case, the Appellant's name would have appeared on the "roster" of reserve police officers in that same order (i.e. – ahead of Richardson, Gallant and all other names below them on the underlying Certification).

Second, the Appellant argues that, had the roster been assembled in the correct rank order, he should have been selected before Richardson, Gallant and all other individuals below them on the roster. If his name had been in the correct order and the City chose not to select him, the Appellant argues that this would have constituted a bypass that he should have been able to appeal.

For these reasons, the Appellant asks the Commission to grant him a retroactive civil service seniority date the same as Richardson, January 13, 2003.

Appointing Authority's Argument

The City argues that it doesn't matter where the Appellant's name was placed on the Form 14 or the roster. Since all of the individuals from roster hiring cycle 2 had the same reserve appointment date, they should all be considered tied when the City chooses which individuals to select as permanent full-time police officers.

Further, the City argues that, even if the Appellant is correct, his appeal is untimely as it comes several years after the appointments in question.

Conclusion

The Appellant took and passed an examination for police officer in Methuen. Since he apparently exceeded the age restriction, HRD did not initially place his name on the eligible list of candidates. The City subsequently requested a Certification of names to consider candidates for the position of reserve police officer. During this time, a Special Act of the Legislature allowed the Appellant to be considered for appointment, notwithstanding his age. HRD notified the City to insert the Appellant's name on the Certification in rank order consistent with his examination score, which they did. When the City returned the Authorization for Employment (Form 14) to HRD, the selected candidates for reserve police officer appeared in the same order as the Certification, with the exception of the Appellant, whose name appeared last. Based on this Form 14, HRD established a roster of reserve police officers that the City would need to use when appointing permanent full-time police officers. When appointing such permanent full-time police officers, it appears that the City, having already vetted these individuals when they were appointing reserves, appointed individuals in the order in which their names appeared on the roster. The only exception to this rank-order appointment process was one hiring cycle where Methuen appointed an individual (Hunter) whose name appeared below that of the Appellant.

The Appellant argues that his name was placed in the wrong order on the Form 14 and that this erroneous placement resulted in him not be appointed as a permanent full-time police officer at an earlier date. Further, the Appellant argues that if his name was in the correct order and Methuen chose not to select him, they should have given him non-selection reasons as his non-selection constituted a bypass that he had a right to appeal, citing the Commission's 2008 decision in Ragucci.

The City argues that the order of the candidates on the Form 14 and roster is irrelevant since they should all be considered tied since they had the same reserve appointment date.

Was the Appellant's name placed on the Form 14 and the Roster in the wrong place?

Yes. With the exception of the Appellant, the City listed the names on the Form 14 in the exact order that they appeared on the Certification. The roster was then created in the same order of the Form 14. If Mr. Stacy's name did appear in the same order as the Certification, his name would have been placed between Joseph Rynne and Thomas Richardson, as opposed to last.

Are all of the candidates on the Form 14 (and roster) with the same reserve appointment date considered tied, regardless of the order in which they are listed?

No. The Commission, in a 2008 decision in Ragucci, penned by Commission Stein, addressed this issue squarely stating:

“ ... the conundrum is whether the creation of an intermittent [or reserve] public safety roster pursuant to Section 60 is meant to level the playing field and erase all preferences and merit-based distinctions among intermittent appointees that are ordinarily relevant to an original public safety appointment, or whether, when previously appointed intermittent officers come up for appointment to a full-time position, their original relative ranking on the qualifying examination and their original statutory preference are intended to remain a legitimate, distinguishing factor in the selection process ... The Commission decides ... that the weight of analysis and the prior decisions of the Commission lead to the conclusion that Section 60 meant to instruct an appointing authority to incorporate, to the extent possible, merit-based distinctions and statutory preferences among

candidates within an intermittent [or reserve] roster rather than to mandate that they disappear entirely.”

Applied here, the Appellant’s name should not have been considered tied with all other candidates based on the same reserve appointment date. Rather, the Appellant’s rank on the reserve roster should have mirrored his rank on the Certification, placing him between Joseph Rynne and Thomas Richardson.

Did the Appellant’s non-selection constitute a bypass?

Yes. In June 2003, the City appointed an individual from the roster (Gallant) whose name would have been lower on the roster if the City had placed the Appellant’s name correctly on the Form 14. (I accept the Town’s assertion that Richardson was not appointed from the roster but, rather, was appointed by a lateral transfer in January 2003). When the City appointed Gallant as a permanent full-time police officer in June 2003, they should have notified the Appellant that he was being bypassed, the reasons for such bypass, and the right to file an appeal with the Commission.

Can the Appellant contest his “bypass” six years after it occurred?

No. The Appellant testified that, at the time of his non-selection, he suspected that it was related to a purported personal animus against him by then-Mayor Sharon Pollard. Although the Appellant did not receive non-selection reasons (as the City believed he was tied and no bypass occurred), nothing prevented him from filing an appeal with the Commission and/or requesting an investigation regarding his suspicion that the appointments were being made for reasons unrelated to basic merit principles. For whatever reason, he chose to wait until several years after his non-selection (as well as his subsequent appointment) to file an appeal with the Commission. Part of the reason for filing the appeal at this time was clearly related to the possibility of layoffs, which would occur according to individuals’ civil service seniority dates.

It would be unfair to the City and the other individuals who could be adversely affected by a change in seniority dates to now litigate a matter that the Appellant could have litigated several years ago. Further, as noted in Ragucci, HRD and most cities and towns have interpreted Section 60 to say that all individuals on the roster with the same appointment date are tied. It appears that the Commission's decision in Ragucci was the first definitive decision clearly establishing that this is not the case.

Is any relief warranted?

Yes. It is undisputed that on June 23, 2006, the City appointed an individual (Hunter) from the reserve hiring cycle 3 roster. Even if the City believed that all of the candidates on the reserve hiring cycle 2 roster, with the same reserve appointment date, were tied, they can make no such argument regarding Mr. Hunter, whose reserve appointment date occurred *after* the Appellant. Thus, the Appellant's civil service seniority date should be changed to June 23, 2006. Further, any argument by the City that they were justified in bypassing the Appellant in June 2006 would ring hollow to this Commissioner as they subsequently appointed the Appellant to a full-time position a few months later.

For this reason, the Appellant's appeal is *allowed in part* and the Commission, pursuant to its authority under Chapter 310 of the Acts of 1993, hereby directs HRD or the City of Methuen in its delegated capacity, to adjust the Appellant's civil service seniority date to June 23, 2006.

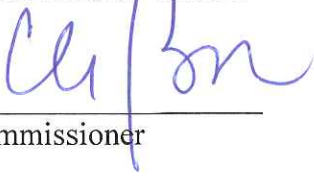
Civil Service Commission



Christopher C. Bowman
Chairman

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell and Stein, Commissioners) on July 14, 2011.

A true record. Attest:



Commissioner

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)(1), 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:

Thomas J. Gleason, Esq. (for Appellant)

Peter J. McQuillan, Esq. (for Appointing Authority)

COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

CASE NO. G1-09-359

HERBERT STACY,
Appellant,

Vs.

CITY OF METHUEN,
Respondent

ALLOWED/DENIED

Christopher C. Boyman, Chairman

Date: 8/15/11
Civil Service Commission

ASSENTED MOTION TO AMEND DECISION

NOW COMES the appellant in the above-entitled matter and hereby moves the Commission to amend its Decision rendered on July 14, 2011.

As reason therefore, counsel for the appellant states as follows:

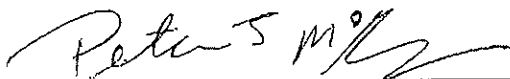
1. At various places in the Decision the Commission refers to appointments made by the City on June 23, 2006 (Par. 25) and the appointment of an individual (Hunter) on the same date (Pg. 12).
2. The parties agree that June 23, 2006 is an incorrect date, both for the appointments referenced to and the appointment of Hunter.
3. The parties agree that the correct date is January 13, 2006.
4. Correcting this date would also have the effect of adjusting the appellant's Civil Service seniority date to January 13, 2006 (Pg. 12).

WHEREFORE, the appellant prays that the within Assented Motion be allowed and for such other and further relief as the Court deems appropriate.

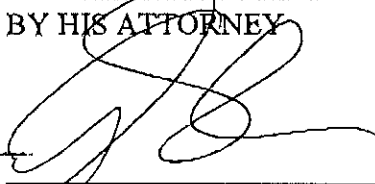
Dated: August 12, 2011

ASSENTED TO:

RESPECTFULLY SUBMITTED
FOR THE APPELLANT
BY HIS ATTORNEY



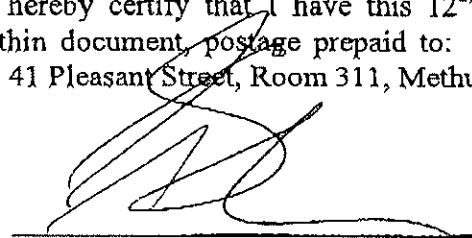
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BBO# 547134

CERTIFICATE OF SERVICE

I, Thomas J. Gleason, Esquire do hereby certify that I have this 12th day of August, 2011 forwarded a copy of the within document, postage prepaid to: Peter J. McQuillan, Esquire, City Solicitor's Office, 41 Pleasant Street, Room 311, Methuen, MA 01844.



Thomas J. Gleason, Esquire