COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

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

BARRY R. THORNTON,

Appellant

v.

CASE NO: E-11-288

TOWN OF ANDOVER and
HUMAN RESOURCES DIVISION,

Respondent

Appearance for Appellant:	William D. Cox, Jr., Esq. 145 South Main Street Bradford, MA 01835
Appearance for Town of Andover:	Joshua R. Colman, Esq. Collins, Loughran & Peloquin, P.C. 320 Norwood Park South Norwood, MA 02062
Appearance for HRD:	Andrew Levrault, Esq. Labor Counsel, Human Resources Division One Ashburton Place, Rm 211 Boston, MA 02108
Commissioner:	Paul M. Stein

DECISION

The Appellant, Barry R. Thornton, appealed to the Civil Service Commission (Commission) pursuant to G.L.c.31,§2(b), to protest his non-selection for appointment to the position of firefighter with the Town of Andover Fire Department (AFD). Since the gravamen of the appeal involved the AFD's use of a selective certification from the eligible list of candidates who were qualified as Emergency Medical Technicians (EMTs), which had been approved by the Massachusetts Human Resources Division (HRD) pursuant to Personnel Administration Rule PAR.08(6), HRD was also added as a party.

The Commission held two days of evidentiary hearings on March 20, 2011 and April 11, 2011, which were stenographically recorded.[1] Forty exhibits were received in evidence along with a Stipulation of the Parties. HRD called two witnesses (Deputy Director Regina Caggiano and Amy Lynch, Senior HR Advisor); the AFD called two witnesses (HR Director Candice Hall and AFD Fire Chief Michael Mansfield); the Appellant called one witness, AFD Lt. Barry S. Thornton.

The proceedings were suspended to permit the parties to determine whether the Appellant would be offered employment with the AFD through a newly requested certification for firefighter and the matter could be dismissed as moot. During that interval, HRD reported that it had learned that the Appellant, who had been listed on the eligible list as an Andover resident, in fact, was not an Andover resident, which the Appellant does not dispute. It is also undisputed that Andover gives preference in hiring to Andover residents, as permitted by law, so that the Appellant's place on the original eligible list was erroneous. When his non-residency is taken into account, the Appellant's place on the eligible list puts him below the names of the candidates who were hired by the AFD from the selective certification. Accordingly, the Appellant was not bypassed within the meaning of G.L.c.31,§27 and he lacks standing to appeal his non-selection. (*See HRD's letter to the Commission dated June 22, 2012 and attachments; AFD's Letter to the Commission dated June 28, 2012*) Thus, the Commission is not obliged to address the merits of the Appellant's appeal, as the parties now agree it must be dismissed for lack of jurisdiction.

The Appellant, however, presses his concern that AFD's recurring requests for a selective certification of EMT-qualified candidates only in hiring firefighters, and HRD's approval of

[1] For reasons explained, the evidentiary hearing was suspended and the Commission has not received a copy of the stenographic transcript.

those requests is not justified under applicable civil service law and rules. Although the Appellant acknowledges his own lack of standing, he requests that the Commission initiate an investigation of the matter, pursuant to its inherent authority under G.Lc.31, §2(a) to remedy a continuing violation of civil service law. (*See Appellant's Letter to the Commission dated June 29, 2012; Appellant's Proposed Decision received by the Commission on September 10, 2012*) HRD and the AFD oppose this request. (*See AFD Letter to the Commission dated October 3, 2012; HRD's Letter to the Commission dated October 5, 2012*)

G.L.c.31, Section 2(a) provides:

> "In addition to its other powers and duties, the commission shall have the following powers and duties: (a) To conduct investigations at its discretion or upon the written request of the governor, the executive council, the general court or either of its branches, the administrator, an aggrieved person, or by ten persons registered to vote in the commonwealth."

The Commission has considerable discretion in whether, and if so, in what manner, and to what extent, it may elect to conduct any investigation of matters concerning civil service law and rules. See, e.g., Whitehouse v. Town of Wareham, 25 MCSR 438 (2012); Richards v. Department of Transitional Assistance, 24 MCSR 315 (2011); Guimont v. City of New Bedford, 23 MCSR 134 (2010). See also O'Neill v. City of Lowell, 21 MCSR 683 (2008), aff'd sub nom O'Neill v. Civil Service Comm'n, MICV2009-00391 (Sup.Ct. 2009) (Chernoff, J.) ("The statute gives the Commission the power to initiate an investigation upon request . . . but does not require it to do so.") aff'd, 78 Mass.App.Ct. 1127 (2011); "Memorandum and Decision" in Boston Patrolmen's Association v. Massachusetts Civil Service Comm'n, Suffolk C.A. SUCV2006-4617; SUCV2007-1220 (Mass.Sup.Ct. December 18, 2007) (Brassard, J.), *affirming*, Commission's Response to Petition for Investigation Filed By Boston Police Patrolman's Ass'n, CSC Docket No. I-07-34 (2007) ("The plaintiffs here also urge that their request to seek an investigation was improperly denied. Judgment should enter for the defendants on this issue . . . . [W]hile the statute certainly does not require that a petition for investigation need only be made by an aggrieved person, the statute, in my

view, can only be fairly read to confer significant discretion upon the Civil Service Commission in terms of what response and to what extent, if at all, an investigation is appropriate.")

After careful review, the Commission concludes that the present circumstances do not warrant the initiation of an investigation into the AFD's use or HRD's approval of a selective certification for AFD Firefighters limited to EMT-qualified candidates.

Candidates for original civil service appointments are considered in the order of their place on a "Certification" issued to the appointing authority by HRD, which is generated from the current "eligible list" established by ranking candidates according to their scores on the competitive qualifying examination, along with certain statutory preferences such as veterans' status, and points for education and experience. As a general rule, in order to deviate from this paradigm, an appointing authority must show specific reasons – either positive or negative, or both, consistent with basic merit principles, that affirmatively justify picking a lower ranked candidate. G.L.c. 31, §§1, 6,16, 25 through 27.

Pursuant to its rule making authority (which is subject to Commission approval), HRD duly promulgated "Personnel Administration Rules" (PARs), which provide, in relevant part:

PAR.08 Civil Service Requisition and Certification

(1) *Whenever an appointing authority shall make requisition to fill a position, the Personnel Administrator [HRD] shall, if a suitable eligible list exists, certify the names standing highest on such list in order of their place on such list, except as otherwise provided by law or civil service rule*. Insofar as possible sufficient names shall be certified to enable such appointing authority to make appointments from among the number specified in PAR.09 [which sets forth the so-called 2N+1 rule]

. . .

(4) If a requisition is made calling for persons having special qualifications in addition to the general qualifications tested by an examination, the administrator may issue a selective certification of the names of such persons from the appropriate eligible list[2]

[2] A "selective" certification of candidates with "special qualifications" under PAR.08(4), is distinguished from the different PAR.10 "special certification" based on "race, color national origin or sex" used to address past practices of discrimination against those protected classes. The request involved here was a PAR.08(4) "selective certification" and the PAR.10 rule for a "special certification" is not directly applicable. cf, Brackett v. Civil Service Comm'n, 447 Mass. 233 (2006) (affirming validity of PAR.10 to remediate prior discrimination against women and minorities in hiring MBTA police officers)

The use of a special certification to permit municipal fire departments to require candidates for the position of firefighter to hold an EMT license has been a long standing HRD policy. The policy was subject to a comprehensive review and update in 2001. The most recent form used to request an EMT selective certification is dated 3/2010. (*Hearing Exhs. 3, 15 through 21; Testimony of Regina Caggiano & Amy Lynch*)

No serious question can be raised that, in general, the use of an EMT-qualified selective certification serves an important need. Many municipalities are required to employ EMT-qualified individuals because state law requires the municipalities to serve as the provider of Emergency Medical Services (EMS) in the community, and the municipal fire department is often assigned responsibility to perform this service. Thus, the employees of many municipal fire services perform double duty, staffing both fire suppression apparatus as well as emergency medical response units (ambulances). Also, fire apparatus do function as "first responder" to many medical emergencies, and the skill set of an EMT (while not actually performing in that capacity), would appear to be a valuable asset for any firefighter to have.

HRD standards prescribe the general rule that, to assure adequate round-the-clock staffing, each ambulance needs an EMT-qualified force of 20 persons to be available for assignment. The AFD staffs two ambulances, so that would authorize up to 40 EMT-qualified personnel on the fire force. The 20:1 ratio was developed by HRD through the review process described above, which included input from fire services across the Commonwealth as well as other interested parties. (*See Exhs. 15 through 21; Testimony of Regina Caggiano & Amy Lynch*) No legitimate question has been raised about the technical validity of the 20:1 ratio as the appropriate benchmark. The Appellant does not appear to be seeking a Commission investigation into such a technical matter and there is no good cause shown to do so.

The gist of the Appellant's complaint here seems to be that HRD received misinformation from the AFD about the existing strength of its EMT-qualified force and, had correct information been supplied, or had HRD been more diligent in its review of the AFD request, the special certification request would not have passed muster under HRD's then established review standards. To a lesser degree, the Appellant claims that the form used by HRD for requesting a selective EMT certification is poorly crafted and enables the use of the sort of "fuzzy math" that resulted in the AFD's selective certification to be approved.

Although the Appellant's concerns are understandable, they do not justify the Commission's intervention at this time. Even if the Commission were to agree that the AFD's prior requests for selective certification were not properly documented, the Commission would not be inclined to take action that would undo that hiring process or put the employment status of current AFD Firefighters in jeopardy, and, perhaps, introduce uncertainty about the use of EMT selective certifications throughout the civil service community. As to AFD's future EMT certifications, the propriety of those requests would depend on the staffing levels in the AFD at that time, which remains largely unknown at this time. Moreover, as HRD points out, the 20:1 ratio is a policy, not a regulatory requirement, and is subject to change in the future. The sort of hypothetical inquiry is not warranted at this time.

Similarly, although the Appellant's contention that HRD's forms introduce some ambiguities, absent showing that someone's civil service rights have been abridged, the Commission is not in a position to conduct a "best practices" evaluation of HRD's selective certification information gathering process. There is no indication that the concerns expressed by the Appellant here are more than an isolated issue unique to Andover or that HRD's practices are

believed to adversely affect fire service employment opportunities by other civil service communities throughout the Commonwealth,

Should any person actually become aggrieved in the future by his or her non-selection in favor of a lower ranked candidate, the Commission is available to make due inquiry and provide appropriate relief in such a case.

Accordingly, for the reasons stated, the "bypass" appeal of the Appellant, Barry R. Thornton is ***dismissed for want of jurisdiction***. The Appellant's request to the Commission to open an investigation into the practices of the AFD and HRD regarding requests for future EMT selective certifications is ***denied.***

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman [Absent]; Ittleman, Marquis, McDowell & Stein, Commissioners) on May 16, 2013.

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)(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 does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of a Civil Service Commission's final decision.

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:
William D. Cox, Jr., Esq. (for Appellant)
Joshua R. Coleman, Esq. (for Respondent)
Andrew Levrault, Esq. (for HRD)