COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION

SUFFOLK, ss.

EDWARD WELCH, Appellant	)	
v.	)	G1-04-283
TOWN OF WINCHESTER, Respondent	)	ON THE PARTIES' MOTIONS FOR SUMMARY DECISION

DECISION

Pursuant to G.L. c. 31, § 2(b), the Appellant, Edward Welch (hereafter "Appellant"), filed this appeal with the Civil Service Commission (hereafter "Commission") on June 14, 2004, claiming that the Respondent, Town of Winchester (hereafter "Town") as Appointing Authority, lacked reasonable justification to request an Emergency Medical Technician (EMT)-Paramedic selective certification for appointments to the position of firefighter for the Winchester Fire Department (hereafter "Department"). The Appellant asserts that the result of the Town's requisition of the selective certification prohibited him from eligibility for appointment in June 2001. Further, the Appellant contends that the Town's subsequent adoption of c. 31, § 58A in January 2002, imposed age restrictions for hiring that permanently prevented him from being appointed as a firefighter. The Appellant argues that these actions prejudiced his right to compete for a firefighter position through no fault of his own and that he is entitled to relief from the Commission pursuant to St. 1976, c. 534 § 1, as amended by St. 1993, c. 310 (hereafter "Chapter 310"). The appeal was timely filed. A full hearing of this matter was scheduled

for October 27, 2006.[1] The parties agreed at this hearing to have the case decided on cross motions for summary decision and a stipulation of facts pursuant to the Standard Adjudicatory Rules of Practice and Procedure 801 CMR 1.01 7(h). Both parties submitted a Motion for Summary Decision, as well as thirty-nine (39) stipulated facts, as instructed.

Stipulation of Facts

1. The Appellant is a resident of the Town.
2. The Town is an Appointing Authority within the meaning of G.L. c. 31.
3. Employees of the Department are appointed pursuant to the provisions of G.L. c. 31.
4. All firefighters, lieutenants and captains employed by the Department are represented by Local 1564, International Association of Fire Fighters, AFL-CIO (hereafter "Union") for purposes of collective bargaining.
5. The Appellant sat for his entrance examination for a civil service firefighter position on April 29, 2000.
6. On the date of the entrance examination, the Appellant had already reached his thirty-second birthday.
7. The Appellant scored a 100 on the April 2000 examination and was the highest ranked candidate on the list for firefighter candidates residing in the Town, with no candidates appearing tied with him.
8. The civil service list from the April 2000 examination became effective in or around February 2001.

[1] John J. Guerin, Jr., a Commissioner at the time of the full hearing, served as the hearing officer. His term on the Commission has since expired. Subsequent to leaving the Commission, however, Mr. Guerin was authorized to draft this decision.

9. The Town did not hire any firefighters between July 1, 1999 and June 2001.
10. The appellant has never appeared on list of applicants provided to the Town by the Human Resources Division (hereafter "HRD").
11. At all relevant times, the Appellant was certified as an EMT-Basic but not as an EMT-Paramedic. The appellant sought and paid for his own EMT training.
12. During and prior to the year 2000, the Town, through the Department, operated an emergency ambulance service that provided Basic Life Support (BLS) services. Advanced Life Support (ALS) services were provided by a private vendor.
13. By providing ALS services through the Department, the Town anticipated achieving three identifiable benefits. First, the Town anticipated providing better patient care to the residents. Second, the Town anticipated better response time to ALS emergencies. Third, the Town expected the provision of ALS service to generate revenue for the Department and the Town.
14. To provide ALS service, a firefighter must be EMT-Paramedic certified.
15. On or about April 29, 2001, the Commonwealth of Massachusetts licensed the Town to upgrade the Department ambulance service to ALS-level service, effective July 24, 2002. As a condition of licensure as an ALS provider, the Department of Health required the Town to employ a minimum of eight (8) EMT-Paramedic certified firefighters. At the time, the Town anticipated a total complement of twelve (12) EMT-Paramedic certified firefighters to cover for vacations, sick time and training periods. In or about 2004, HRD increased the maximum number of Paramedic-firefighters the Town could request through a selective certification to twenty (20) per ALS vehicle.

16. At the time of its licensure in 2001, the Town employed only one EMT-Paramedic certified firefighter. Moreover, the Town did not intend to increase its overall firefighter complement. Rather, the Town planned to replace departing firefighters with EMT-Paramedic certified firefighters to achieve the complement necessary to provide ALS-level service. The Town has consistently adhered to this plan.
17. In September 2001, the Winchester Town Manager and Board of Selectmen appointed a citizens committee to make recommendations on the Department providing ALS service. In February 2002, the Town's ALS Committee unanimously recommended that the Department provide Paramedic level services, including a change in Department staffing to provide additional Paramedics.
18. On or about June 30, 2000, the Town Manager, the Town's authorized Appointing Authority, notified the HRD that it had initiated the process of upgrading its ambulance service from BLS to ALS, and requested an EMT-Paramedic Selective Certification for pending firefighter requisitions. The Appellant does not challenge the Town's decision to upgrade its ambulance service from BLS to ALS.
19. The Town was not required to, and indeed did not, notify any firefighter candidates of its decision to upgrade from BLS to ALS.
20. On or about March 6, 2001, the Town received an EMT-Paramedic Selective Certification from the HRD – Certification Number 210218.

21. On or about June 1, 2001, the Department hired three (3) Firefighter/EMT-Paramedics pursuant to HRD Certification 210218. None of the hired candidates had a veteran preference or any other hiring preference.
22. Since June 2002, when it initiated the process of upgrading to ALS-level service, the Town has not submitted requisitions for any non-EMT-Paramedic certified firefighters. Since June 2001, the Town has hired twenty-two (22) EMT-Paramedics.
23. Had the Town sought to hire firefighters without EMT-Paramedic certificates or firefighters with EMT-Basic certificates, the Appellant would have been reached for consideration as the highest-scoring applicant on the certification list.
24. Because the Appellant was not certified as an EMT-Paramedic in June 2001, he was not notified about the hiring process for certification 210218. At that time, the Town was not required to, and indeed did not, notify firefighter candidates without EMT-Paramedic certifications that it was hiring EMT-Paramedics.
25. In or about May 2000, the Town began negotiating with the Union for a successor collective bargaining agreement (hereafter "CBA") for the period July 1, 2000 through June 30, 2003.
26. Anticipating the upgrade of the Department ambulance to ALS service, the Town proposed terms and conditions of employment related to the upgrade to ALS services.
27. Although the Union did not oppose the ultimate upgrade to ALS service in the Department, the Union demanded to bargain over the terms and conditions of employment related to the implementation of ALS service.

28. The Town and the Union negotiated continuously for a new CBA, including the terms and conditions of employment related to ALS service, until approximately March 2004.

29. Facing binding arbitration pursuant to Chapter 1078 of the Acts of 1973, as amended by Chapter 589 of the Acts of 1987, in or about March 2004, the Town and the Union entered into a memorandum of agreement for a CBA for the period July 1, 2000 through June 30, 2003. The memorandum of agreement did not contain terms and conditions of employment relating to the implementation of ALS service. However, the Town and the Union simultaneously entered into a separate agreement to immediately commence negotiations for a CBA effective July 1, 2003, including terms and conditions of employment related to ALS service. The parties' agreement contained a schedule pursuant to which an overall agreement would be reached or the entire matter, including the terms and conditions of employment related to ALS service, would be submitted to binding arbitration.

30. The parties again commenced negotiations, but again did not reach agreement.

31. In late summer/early fall of 2004, the EMT-Paramedic certified firefighters who had been hired by the Town were planning to take employment elsewhere because of their frustration with the delay of implementation of ALS service in the Town.

32. Confronted with what it believed to be an emergency situation – the loss of its existing EMT-Paramedic certified firefighters – the Town notified the Union of its intent to implement ALS service, effective December 20, 2004, absent

agreement with the Union and prior to binding arbitration contemplated in its earlier agreement with the Union.

33. Subsequently, the Town and the Union participated in binding arbitration over the terms of the July 1, 2003 through June 30, 2006 CBA, including terms and conditions of employment related to the implementation of ALS service.
34. On or about February 28, 2005, Arbitrator Marc Greenbaum issued a binding award covering the terms and conditions of the July 1, 2003 through June 30, 2006 CBA, including terms and conditions of employment related to ALS service.
35. The Department has continuously provided ALS service since December 20, 2004.
36. At the time of the April 2000 entrance examination, the Town had not yet adopted G.L. c. 31, § 58A and therefore considered for hire candidates who were older than 32 years of age at the time of the examination.
37. On or about May 7, 2001, the Town accepted § 58A, which became effective upon notification to the HRD on January 2, 2002. The Appellant does not challenge the Town's acceptance of § 58A.
38. The Town was not required to, and indeed did not, notify any firefighter candidates of its having accepted the terms of § 58 A.
39. On or about January 11, 2002, the HRD notified the affected firefighter candidates that the Town had adopted the terms of § 58A on January 7, 2002. As of that date, the Appellant was no longer eligible for appointment to any firefighter or EMT position in the Department.

Respondent's Grounds for Summary Decision

The Town argues that the Appellant is not entitled to Chapter 310 relief by this Commission for two reasons. The first is that the Appellant never appeared on a certification list provided to the Town by the HRD. Chapter 310 provides the following:

> "If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect his rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights."

Because the Appellant never appeared on a certification list, he was not bypassed for a position by the Town, thus, the Town contends that the Appellant cannot show that his rights were prejudiced and that he is entitled to relief within the meaning of Chapter 310.

The second reason is that the decision by the Town to upgrade the Department to ALS-level service was reasonably justified, made in good faith and was not arbitrary, capricious or motivated by political influence. The Town asserts that its move to hire EMT-Paramedic certified firefighters in anticipation of the ALS upgrade and its adoption of the age restrictions on original appointments to these positions, pursuant to c. 31, § 58A, were valid policy decisions and not a pretext to specifically exclude the Appellant from employment by the Town.

Appellant's Grounds for Summary Decision

The Appellant argues that the Town decided to request an EMT-Paramedic Selective Certification from the HRD for pending firefighter requisitions before the Board of Selectmen had decided to fund the upgrade in the Department to ALS-level service and before the Union agreed to such a change in working conditions. Therefore, the Town

Manager's request for the EMT-Paramedic Selective Certification was premature and, due to the Appellant's lack of paramedic training at that time, the Appellant's name was not placed on the Selective Certification received by the Town in March 2001. As a result, the Appellant was not among those candidates hired from the list in June 2001.

While the Appellant admits that he could have rectified that situation by simply seeking out paramedic training and thus getting his name on a future paramedic certification list, he contends that another decision by the Town made sure that the Town Manager's premature request not only prevented him from being hired in June 2001 but, from ever being hired. Specifically, the Town's adoption of the § 58A age restrictions made it impossible for the Town to ever hire the Appellant for future openings in the Department

The Appellant concedes that these facts take the case outside the bounds of the normal bypass procedures, making this an unusual case for the Commission. However, the Appellant asserts that his omission from the March 6, 2001 certification list occurred "through no fault of his own" and also that, since the omission was a result of the Town's premature decision to request an EMT-Paramedic Selective Certification, his right to compete for a firefighter position was prejudiced.

Conclusion

The Civil Service Commission grants wide latitude for the discretion of the Appointing Authority in selecting candidates of skill and integrity for hire or promotion. Callanan v. Personnel Administrator for the Commonwealth, 400 Mass. 597, 601 (1987). An Appointing Authority's decision to make a selective certification request is a "selective decision" that deserves this degree of discretion. Sands v. Medford Fire

Department, 12 MCSR 71 (1999). Bracket v. MBTA, 10 MCSR 289 (1997). In a bypass appeal, the CSC must consider whether, based on a preponderance of the evidence before it, the Appointing Authority sustained its burden of proving there was "reasonable justification" for the bypass. City of Cambridge v. Civil Service Commission, 43 Mass. App. Ct. 300, 303 (1997). It is well settled that reasonable justification requires that the Appointing Authority's actions be based on adequate reasons supported by credible evidence, when weighed by an unprejudiced mind guided by common sense and correct rules of law. Selectmen of Wakefield v. Judge of First Dist. Ct. of E. Middlesex, 262 Mass. 477, 482 (1928). Commissioners of Civil Service v. Municipal Ct. of the City of Boston, 359 Mass. 214 (1971).

In determining whether the Appointing Authority had reasonable justification to take the action of bypassing the Appellant, the Commission must consider the fundamental purpose of the Civil Service System which is "to protect against overtones of political control, objectives unrelated to merit standards and assure neutrally applied public policy." If the Commission finds that there are "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy", then it should intervene. Otherwise, the Commission cannot substitute its judgment for the judgment of the Appointing Authority. City of Cambridge at 304.

A "preponderance of the evidence test requires the Commission to determine whether, on the basis of the evidence before it, the Appointing Authority has established that the reasons assigned for the bypass of an Appellant were more probably than not sound and sufficient." Mayor of Revere v. Civil Service Commission, 31 Mass. App. Ct. 315 (1991). All candidates must be adequately and fairly considered. The Commission will

not uphold the bypass of an Appellant where it finds that "the reasons offered by the appointing authority were untrue, apply equally to the higher ranking, bypassed candidate, are incapable of substantiation, or are a pretext for other impermissible reasons." Borelli v. MBTA, 1 MCSR 6 (1988).

The Town had reasonable justification for requesting EMT-Paramedic Selective Certifications for firefighter positions beginning in June 2000. The Town made a valid and reasonable decision to upgrade its Department to ALS-level service to provide better patient care for its residents and to generate revenue for its Department and itself. The Appellant did not challenge the reasonableness of the Town's decision in this regard.

Before the town could begin to provide the upgraded ALS service, it was required by the Department of Health to employ a threshold number of EMT-Paramedic certified firefighters. In June 2000, the Town employed only one EMT-Paramedic certified firefighter. The Town had a right to anticipate the upgrade to ALS-level service, despite ongoing Union negotiations and/or recommendations on how specifically to implement the upgrade from any boards or committees, and made a reasonable decision to gradually replace departing firefighters with EMT-Paramedic certified firefighters. The Town made this decision to avoid increasing the overall firefighter complement, which would have required additional funding, or laying off existing firefighters and replacing them with EMT-Paramedic certified firefighters. Because the gradual nature of the process would take time, the Town initiated the process immediately so as not to unduly delay the public safety and financial benefits of the service to its residents.

The Town had a reasonable justification, then, for beginning to request EMT-Paramedic Selective Certifications for firefighter positions in June 2000 and the requests

were appropriately approved by the HRD. Therefore, there is no basis for the Commission to find that this decision was unjustified or "premature." Absent any "overtones of political control or objectives unrelated to merit standards or neutrally applied public policy", the Commission cannot substitute its judgment for the Town's in the exercise of this valid policy decision.

The relevant part of § 58A states as follows:

> "Notwithstanding the provisions of any general or special law to the contrary, in any city, town or district that accepts this section, no person shall be eligible to have his name certified for original appointment to the position of firefighter or police officer if such person has reached his thirty-second birthday on the date of the entrance examination."

As of May 7, 2001, the Appellant had already reached his thirty-second birthday. Therefore, the Appellant could not, and cannot, be "certified for original appointment to the position of firefighter" in the Town. On this point, the Appellant provided no evidence or argument that the Town specifically targeted him for exclusion from the hiring process by adopting the provisions of § 58A. Any given civil service eligibility list is fluid and is subject to change with each certification over the life of that list. Special hiring preferences, selective certifications and, indeed, even Chapter 310 relief granted to others can coalesce to alter one's list placement, regardless of one's grade score from the qualifying examination. Such is the unfortunate fate of the Appellant, here.

There was nothing improper about the way the Town pursued the upgrade of the Department to ALS-level service. The Appellant admitted that none of the decisions related to the implementation of the service were specifically designed to prevent his hiring. The Town has sustained its burden of proving that it had reasonable justification to take the personnel actions and make the policy decisions that it made. The Appellant's

rights were not prejudiced as a result and he is not entitled to equitable relief in accordance with the provisions of Chapter 310.

For all the reasons stated herein, the Respondent's Motion for Summary Decision is allowed and the Appellant's Motion for Summary Decision is denied. Therefore, the appeal on Docket No. G1-04-283 is hereby ***dismissed.***

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John J. Guerin, Jr.
Hearing Officer

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, Stein, Taylor and Marquis, Commissioners) on July 17, 2008.

A true record. Attest:

_____
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:
Alfred Gordon, Esq.
Robert Morsilli, Esq.
John Marra, Esq.