

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

PATRICK JOHNSTON,  
Appellant

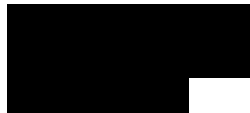
v.

G2-06-107

CITY OF EVERETT,  
Respondent

Appellant's Attorney:

*Pro Se*  
Patrick Johnston



Respondent's Attorney:

Marc J. Miller, Esq.  
Assistant City Solicitor  
Everett City Hall  
484 Broadway  
Everett, MA 02149-3694  
617-394-2230

Commissioner:

Donald R. Marquis

DECISION ON RESPONDENT'S MOTION TO DISMISS

*Procedural Background*

Pursuant to G.L. c. 31, §2 (b), the Appellant, Patrick Johnston, (hereafter "Appellant" or "Johnston") appealed the decision of the City of Everett (hereafter "the City" or "Appointing Authority") claiming that he was bypassed for promotion to the rank of Sergeant in the Everett Police Department and requesting he be promoted to such rank with back pay. On December 19, 2006, the City submitted a Motion to Dismiss to which the Appellant did not reply. A pre-hearing conference was held at the offices of the Civil Service Commission on November 20, 2006.

### *Factual Background*

The Appellant is an officer in the Everett Police Department (“the Department”). On or about March 9, 2006, the Department received a certification list with four names of officers eligible for appointment to the position of full-time Police Sergeant. The Appellant’s name appeared third on the certified eligible list, tied with one other candidate. On or about March 13, 2006, the first two candidates on the list were appointed, as was the candidate whose score was the same as Appellant’s score. The City forwarded a request to HRD to hire the three-above referenced individuals. As the City chose those candidates that were ranked first, second and tied for third, they offered no bypass reasons. HRD approved the appointments. On May 12, 2006, the Appellant filed a bypass appeal with the Commission.

### *Respondent’s Argument for Dismissal*

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.

The Appellant argues that this *is* a bypass situation. Specifically, he contends that he was bypassed for Sergeant because the City has no written policy on the selection of a “person in a tie”. He also maintains that he was aggrieved because there were four openings for Sergeant yet the City only appointed three candidates from a certified

eligible list that expired two weeks after the appointments. Further, the Appellant contends that the City did not receive HRD's permission to promote only three of the requested four officers eligible for promotion to Sergeant. Finally, the Appellant argues that he was never interviewed or told why he was not promoted.

Documentation shows that the Appellant and another candidate with the same score on the civil service examination were tied candidates whose civil service examination scores ranked them below two higher scoring candidates. Evidence in the form of a March 30, 2006 letter from the City's Personnel Department to the Human Resources Division ("HRD") stated that the City had amended the selections for the certification from four to three and that it was unable to appoint four Sergeants because of the budget constraints within the City.

As the Department 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.

Further, the Appellant’s claim that he was not informed as to the reason why he was not promoted is not a violation of civil service law. When the Appointing Authority selects between candidates whose scores are tied, it need not submit a statement of reasons to HRD, as there is no bypass. Similarly, the Appellant’s contention that the City did not receive HRD’s permission to promote only three of the requested four officers eligible for promotion is also not meritorious. There is no civil service law requiring that an Appointing Authority must promote all candidates on a certified eligible list before the list expires. In addition, the City stated that it lacked sufficient funds to promote a further officer.

*Conclusion*

The Commission does not have jurisdiction to hear this bypass appeal as there was no bypass. Rather, the evidence demonstrated that the Appellant and the individual appointed to a Sergeant position were tied candidates on the civil service list. Choosing from among tied candidates does not constitute a bypass that can be appealed to the Commission.

The Respondent's Motion to Dismiss is allowed and the Appellant's appeal filed under Docket G2-06-107 is hereby *dismissed*.

Civil Service Commission

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Donald R. Marquis  
Commissioner

By vote of the Civil Service Commission (Bowman, Taylor, Guerin and Marquis, Commissioners) on May 3, 2007.

A True copy. Attest:

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Commissioner

A motion for reconsideration may be filed by either party within ten days of the receipt of a Commission order or decision. A motion for reconsideration shall be deemed a motion for rehearing in accordance with MGL c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 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:

Patrick Johnston  
Marc J. Miller, Esq.