

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

JAMES BARTOLOEMI,
Appellant

v.

G2-07-386

CITY OF HOLYOKE,
Respondent

Appellant's Attorney:

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Commissioner:

Christopher C. Bowman

DECISION ON APPOINTING AUTHORITY'S MOTION TO DISMISS

Procedural Background

Pursuant to G.L. c. 31, §2 (b), the Appellant, James Bartolomei, (hereafter "Appellant" or "Bartolomei") appealed the decision of the City of Holyoke (hereafter "City" or "Appointing Authority") claiming that he was bypassed for promotional appointment to the position of sergeant in the Holyoke Police Department. A pre-hearing conference was held via teleconference on December 20, 2007. Prior to the pre-hearing conference, the City filed a Motion to Dismiss the Appellant's appeal and the Appellant filed an answer with the Commission. Subsequent to the pre-hearing conference, a

motion hearing was conducted by the Commission at the Springfield State Office Building on January 23, 2008. Both parties presented oral argument, four exhibits were entered into the record and testimony was taken from Holyoke Mayor Michael J. Sullivan and Holyoke Police Chief Anthony Scott.

Factual Background

The Appellant is a police officer in the Holyoke Police Department (“the Department”). On or about September 19, 2007, the Department received a certification list from the state’s Human Resources Division (HRD) to fill one (1) vacancy for the position of permanent full-time police sergeant in the City of Holyoke. The Appellant and one other candidate, Laurence Cournoyer, were tied for first, with a rank of 78. (Exhibit 4) The name of the Appellant, James Bartolomei, was listed above that of Cournoyer, as HRD lists names alphabetically whenever one or more candidates are tied with the same ranking.

Both the Appellant and Laurence Cournoyer had been interviewed by Holyoke Mayor Michael Sullivan, Police Chief Anthony Scott and the City Solicitor earlier in 2007 as part of a prior hiring cycle to fill another vacancy for the position of full-time police sergeant. (Testimony of Mayor Sullivan and Chief Scott)

Upon receiving the above-referenced certification, Mayor Sullivan sought Chief Scott’s recommendation as to whom should be promoted to the position of sergeant -- Cournoyer or the Appellant. According to Mayor Sullivan, Chief Scott recommended Mr. Cournoyer for the promotion, based on Mr. Cournoyer’s job performance and his community involvement. Mayor Sullivan testified that, in selecting Mr. Cournoyer, he

also considered that Mr. Cournoyer was a resident of Holyoke and the Appellant was not.
(Testimony of Mayor Sullivan)

Chief Scott, who has served as Holyoke's police chief for seven (7) years, testified before the Commission that he recommended Mr. Cournoyer to Mayor Sullivan based on the fact that Mr. Cournoyer "always gave 110%" and that he always volunteered his time on department-sponsored initiatives including a "National Night Out" event in which Mr. Cournoyer volunteered to be a D.J. (Testimony of Chief Scott)

Appointing Authority's Argument in Favor of Motion to Dismiss

The City argues that the Commission has no jurisdiction to hear the instant bypass appeal as there was no bypass since the Appellant and the selected candidate had a tie score on the civil service list used to make the promotion in question. The City, citing prior Commission decisions, argues that it is well settled civil service law that a tie score on a certification list is not a bypass for civil service appeals.

Appellant's Argument in Opposition to Motion to Dismiss

The Appellant argues that a bypass did occur as the City, for political reasons, did not follow a long-standing procedure of selecting candidates off a civil service list in the case of a tie. Specifically, the Appellant argues that the City's long-standing procedure when candidates are tied on a civil service list is to select the candidates based on alphabetical order.

Conclusion

As the City 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.

In the instant appeal before the Commission, the Appellant argues that the City does have a long-standing tie-breaking administrative procedure – to choose tied candidates in alphabetical order.

Mayor Sullivan, who is the Appointing Authority in the instant appeal, offered credible testimony before the Commission that no such tie-breaking method exists in regard to promotional appointments in the Holyoke Police Department. Specifically, Mayor Sullivan testified that this promotional appointment was the first time in his seven-year tenure as Mayor that two candidates for promotional appointment were tied on a civil service list and there was only one vacancy. Faced with this circumstance for the first time in his tenure, Mayor Sullivan testified that he sought the recommendation of the Police Chief and also considered as a factor that one of the tied candidates was a

resident of Holyoke and the other (the Appellant) was not. Police Chief Scott, who along with the Mayor and the City Solicitor had previously interviewed both of the candidates, testified that he based his recommendation to choose Cournoyer on the fact that Cournoyer “always gave 110%” and had strong community involvement, including his willingness to volunteer for Department-sponsored events.

In support of his argument that the City has previously chosen tied candidates on a civil service list in alphabetical order, the Appellant cited a prior circumstance in which the City purportedly used this method in regard to the original appointment of a permanent reserve police officer position in 2002. (Exhibit 3) Even if such a tie-breaking method was used in that circumstance, I find the original appointment of a permanent reserve police officer distinguishable from the instant action in which the City was making a promotional appointment to the position of Sergeant.

Second, the Appellant cites published statements from Mayor Sullivan regarding his policy of “going right down the list” when selecting candidates from a civil service list. During his testimony before the Commission, Mayor Sullivan confirmed that it is indeed his policy to base appointments and promotions based on a candidate’s rank on a civil service list. However, as referenced above, the instant action is the first time in his tenure that Mayor Sullivan was forced to select between two tied candidates for a promotional appointment.

Finally, the Appellant cites an affidavit from Sergeant Matthew Moriarty. In his affidavit, Moriarty states that he was advised by Mayor Sullivan that the Mayor “follows the civil service list in the order it has been made.” Moriarty’s affidavit goes on to state, “That order is primarily made by the score of the individual or in the case of my tie it is

in alphabetical order. When Officer Hart and I were promoted Officer hart was given the first promotion and I the following promotion.” (Exhibit 2)

Based on the plain language of Moriarty’s affidavit, it is clear that both of the tied candidates were selected for a promotional appointment, thus distinguishing it from the instant action. In regard to Moriarty’s reference to another candidate receiving the “first promotion” based on alphabetical order, I conclude that it has no bearing on the instant appeal. Specifically, based on the testimony of Mayor Sullivan, Chief Scott and oral argument during the motion hearing, it appears that the “first promotion” relates to who signs an appointment book in the City Clerk’s office first. Both Mayor Sullivan and Police Chief Scott offered credible testimony that they have no role in deciding the order in which selected candidates sign this appointment book. Moreover, there was no evidence presented to show that the signing of this appointment book has any impact on the candidate’s civil service seniority date.

There was no bypass regarding the instant action. Rather, the evidence demonstrated that the Appellant and the individual promoted to a sergeant position were tied candidates on the civil service list. Choosing from among tied candidates does not constitute a bypass. Further, there is no evidence of any long-standing tie-breaking administrative procedure of the City of Holyoke and/or that such a long-standing tie-breaking method was not followed based on reasons unrelated to basic merit principles.

Therefore, the Appointing Authority's Motion to Dismiss is allowed and the Appellant's appeal filed under Docket G2-07-386 is hereby *dismissed*.

Civil Service Commission

Christopher C. Bowman
Chairman

By a 4 -1 vote of the Civil Service Commission (Bowman, Chairman - YES; Guerin, Commissioner – YES; Henderson, Commissioner – NO; Taylor, Commissioner – YES; and Marquis, Commissioner - NO) on February 14, 2008.

A True copy. 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:

Daniel J. Szostkiewicz, Esq. (for Appellant)
Meghan B. Sullivan, Esq. (for Appointing Authority)
John Marra, Esq. (HRD)