

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

STEVEN LIPKA,
Appellant

v.

G2-04-186

DEPARTMENT OF CORRECTION,
Respondent

Appellant's Attorney:

Harold P. Naughton, Jr., Esq.
200 High Street
PO Box 128
Clinton, MA 01510

Respondent's Attorney:

Richard Greene, Deputy Director
Division of Human Resources
Department of Correction
P.O. Box 946
Norfolk, MA 02056

Commissioner:

John J. Guerin, Jr.

DECISION ON RESPONDENT'S MOTION TO DISMISS

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Steven Lipka (hereafter "Lipka" or "Appellant") appealed the decision of the Respondent, the Department of Correction (hereafter "Respondent" or "the Department"), in bypassing him for selection to a Correction Program Officer (CPO) III position. The appeal was timely filed. A pre-hearing conference was conducted at the offices of the Civil Service

Commission (hereafter "Commission") on February 11, 2005. The Department filed a Motion to Dismiss the appeal on September 15, 2005.

Factual Background

The Appellant became an employee of the Department on or about July 1, 1986 and was promoted to a permanent CPO II on or about July 1, 1997. By announcement 6358, in or about the summer of 2000, the Massachusetts Human Resources Division (HRD) announced that it had scheduled a "Departmental Promotional Examination" for the position of CPO III. On November 18, 2000, the Appellant took this examination and received a passing grade of 73. Following the examination, the Appellant was not appointed to a CPO III position and did not receive a bypass letter.

Respondent's Grounds for Dismissal

The Department contends that, as there were no selections made below the Appellant's score of 73, the Appellant's appeal should be dismissed. The Department asserts that the last score used in the selection of candidates was a 76. The Appellant argues that his name would have been reached on the list for CPO III if certain employees that the Appellant alleges were ineligible for promotion were not selected. He alleges that the Appointing Authority failed to adhere to G.L. c. 31, § 8 in promoting provisional status CPO IIs to permanent status CPO IIIs who were not employed in the lower title for three years.

The term "bypass" is defined by the Personnel Administration Rules (PAR) as, "the selection of a person or persons whose name or names, by reason of score . . . appear

lower on a certification than a person or persons who are not appointed and whose names appear higher on said certification." (PAR .02). Here, the Department's appointments were of candidates with scores of 82 or higher while the Appellant's score was a 73; as he fell below the lowest score of selections made; therefore, the Respondent did not bypass him.

The issue in this case is identical to that decided in Palmer, et al. v. Department of Correction, Commission Docket Nos. G2-03-438, G2-03-456, G2-03-460, G2-03-441, G2-03-444 (2005). The instant appeal stems from the same examination, certification list and promotional process as were the subject of the appeals in Palmer, et al.. In that case, the Commission held that the Appellants' placement on a Civil Service certification list was equal to or lower than the placement of the candidates selected for appointment to CPO III and, therefore, no bypass occurred. The Appellants in that matter, as the Appellant here, argued that significant questions of law and fact existed as to whether individuals whom the Respondent appointed to the position of CPO III met the statutory criteria to have received such appointments and as to whether the Respondent followed the appropriate procedures in making the disputed appointments. Specifically, the Appellants asserted that as permanent employees they were unlawfully bypassed by a number of provisional individuals for appointment to CPO III. However, the Commission found that the Respondent conducted a thorough review of the individuals on the certification list before making the final appointments and was satisfied with the Respondent's procedures. The Commission concluded that no significant questions of law or fact existed as to the eligibility of the individuals selected for appointment or as to the procedures used to result in their appointment.

The Commission's reasoning in Palmer et al. is applicable to the present case. In Palmer et al., the Department made thirty-four (34) appointments of candidates with scores of 82 or higher while the Appellants' scores were the following: Palmer, 73; Fionda, 79; Gallagher, 81; and Cutler, 78; and fell below the lowest score of selections made. Therefore, the Respondent did not bypass them. The Appellant in the instant matter scored 73.

It has been well established by prior decisions of the Commission that appointment of one applicant over another does not constitute a bypass if the appointed applicant's score was equal to or greater than the appealing applicant's score. See Fasano v. City of Quincy, 17 MCSR 79 (2004). Kallas v. Franklin School Department, 11 MCSR 73 (1998), Thompson v. Civil Service Commission, 9 MCSR 48 (1996). The Appointing Authority is only required to produce a justified explanation as to an appointment when selecting a candidate other than the candidate whose name appears higher on the eligibility list. G.L. c. 31, § 27. Thus, the Department was justified in selecting candidates with higher scores than the Appellants without providing an explanation, as a statutorily defined bypass did not occur.

As in Palmer et al., the Appellant in the instant case was legitimately placed lower on the promotional certification list than those candidates who were selected and, consequently, he was not bypassed and cannot be deemed an aggrieved person. As such, the Appellant has failed to state a claim upon which relief may be granted.

Based on the reasons stated herein, the Respondent's Motion for Summary Decision is allowed and the appeal under Docket G2-04-186 is hereby *dismissed*.

Civil Service Commission

John J. Guerin, Jr.
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Taylor, Guerin, Marquis and Henderson, Commissioners) on July 12, 2007.

A true record. Attest:

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 G.L. c. 30A, § 14(1) for the purpose of tolling the time for appeal.

Any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under section 14 of chapter 30A 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:

Harold P. Naughton, Jr., Esq.

Richard Greene, HR, DOC

John Marra, Esq.

