

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

JASON HARRINGTON,
Appellant

G1-14-101

v.

CITY OF PITTSFIELD,
Respondent

Appearance for Appellant:

Jeremia A. Pollard, Esq.
Hannon Lerner, P.C.
184 Main Street: P.O. Box 697
Lee, MA 01238

Appearance for Respondent:

Kathleen Degnan, Esq.
City of Pittsfield
Office of the City Solicitor
70 Allen Street
Pittsfield, MA 01201

Commissioner:

Christopher C. Bowman

**DECISION ON MOTION TO DISMISS AND RESPONSE TO REQUEST FOR
INVESTIGATION**

Procedural History of the Instant Appeal

On April 28, 2014, the Appellant, Jason Harrington (Mr. Harrington), filed an appeal with the Civil Service Commission, contesting what he argues was the decision of the City of Pittsfield (City) to rescind his conditional offer to appoint him as a firefighter.

On May 28, 2014, a pre-hearing conference was held at the Springfield State Building in Springfield, MA, which was attended by Mr. Harrington, his counsel and counsel for the City.

Prior to the pre-hearing conference, the City submitted a Motion to Dismiss Mr. Harrington's appeal, arguing that no bypass occurred, as the candidate ultimately appointed was ranked above

Mr. Harrington on Certification No. 01169.

Mr. Harrington argued that, even if there was no bypass, the circumstances surrounding the decision to rescind his conditional of employment warrant an investigation under G.L. c. 31, s. 2(a).

On June 19, 2014, Mr. Harrington submitted a reply to the Motion to Dismiss and a request for investigation under Section 2(a). The City filed a reply on June 20, 2014 and a digitally-recorded hearing was held on July 9th at the Springfield State Building.

Background

Unless noted otherwise, the following facts are undisputed:

1. On April 28, 2012, Mr. Harrington took the civil service examination for firefighter and received a score of 100.
2. On September 1, 2012, the state's Human Resources Division (HRD) placed Mr. Harrington's name on an eligible list of candidates for Pittsfield firefighter. As a non-veteran, his name appeared below those of veterans.
3. On August 5, 2013, the City requested a certification from HRD in order to appoint three (3) permanent full-time firefighters.
4. On August 23, 2013, HRD sent Certification No. 01169 to the City. Mr. Harrington's name appeared fifth among those candidates willing to accept appointment, putting him within the statutory "2N + 1" formula of candidates that could be considered for appointment.
5. After undergoing a background investigation and two (2) interviews, the City's Fire Chief called Mr. Harrington and told him that he would be recommending Mr. Harrington for appointment to the City's Mayor, who serves as the Appointing Authority.

6. At some point, Mr. Harrington had a brief meeting with the Mayor who told Mr. Harrington that he would be putting his name before the City Council for appointment¹.
7. Although the parties did not stipulate to the when this occurred, it is undisputed that Mr. Harrington was required to undergo medical, psychological and physical ability testing.
8. Since a Massachusetts employer “must make a conditional job offer before requiring a medical examination” (See MCAD Guidelines at V(B)), I have inferred that Mr. Harrington did indeed, at some point, receive a conditional offer of employment from the City.
9. In order to appoint Mr. Harrington, who was ranked fifth among those candidates willing to accept appointment on Certification No. 01169, the City would be required to “bypass²” two other candidates whose name appeared above Mr. Harrington on the Certification.
10. At some point after the Mayor spoke with Mr. Harrington, the Mayor consulted with the City Solicitor about the process for bypassing the two (2) candidates ranked above Mr. Harrington.
11. The City Solicitor subsequently informed the Mayor that, in her opinion, there were not sufficient reasons to bypass the two (2) candidates ranked above Mr. Harrington. After consulting with another City attorney and receiving the same opinion, the Mayor decided not to appoint Mr. Harrington and, instead, appoint only those candidates ranked above Mr. Harrington.
12. On February 14, 2014, Mr. Harrington was contacted by the Fire Chief and told that he would not be appointed as a firefighter.

¹ Although the Mayor is the appointing authority for civil service purposes, the City represented that a local Charter provision requires City Council assent. Absent evidence to the contrary, I have accepted this representation.

² A “bypass” occurs when “the selection of a person or persons who 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.” Personnel Administration Rules, Section 2. (PAR.02)

13. On April 28, 2014, Mr. Harrington filed the instant appeal with the Commission, approximately sixty-eight (68) days after being notified by the Fire Chief of the Mayor's decision not to appoint him.

14. Pursuant to a rule adopted by the Commission on October 1, 2000, individuals bypassed for appointment must file a bypass appeal with the Commission within sixty (60) days of receiving notice of the reasons for bypass.

The Parties' Positions

The City argues that since nobody ranked below Mr. Harrington was appointed from Certification No. 01169, there was no bypass, and, therefore, the Commission has no jurisdiction to hear his bypass appeal. Even if a bypass did occur, the City argues that the Mr. Harrington's bypass appeal was untimely as it was not filed within sixty (60) days of learning of his non-selection.

In regard to Mr. Harrington's request for the Commission to initiate an investigation, the City argues that there is no evidence or suggestion that Mr. Harrington's non-selection was the result of any personal or political bias and, thus, an investigation would not be warranted.

Mr. Harrington argues that a bypass *did* occur when he was granted a conditional offer of employment. Specifically, he argues that two *other* candidates who were ranked above him were bypassed when he (Mr. Harrington) was given a conditional offer of employment. According to Mr. Harrington, the City was not permitted to reconsider that bypass decision after the issuance of the conditional offer of employment. Alternatively, he argues that the Commission should review those (initial) reasons for bypass and determine whether the City's reconsideration was consistent with basic merit principles.

Even if Commission lacks jurisdiction to review this matter as a bypass under G.L. c. 31, § 2(b), Mr. Harrington argues that the matters warrant investigation by the Commission under Section 2(a).

The Legal Standard for Consideration of a Motion to Dismiss

After the ruling in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007), the Massachusetts Supreme Judicial Court held that an adjudicator cannot grant a motion to dismiss if the non-moving party's factual allegations are enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the appeal are true, even if doubtful in fact. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008). At the Commission, the Standard Adjudicatory Rules of Practice and Procedure (hereinafter "Rules") govern administrative adjudication. 801 CMR 1.01, *et seq.* However, Commission policy provides that when such rules conflict with G.L. c. 31, the latter shall prevail; there appears to be no such conflict here. The Rules indicate that the Commission may dismiss an appeal for lack of jurisdiction or in the event the appeal fails to state a claim upon which relief can be granted. 801 CMR 1.01(7)(g)(3).

Analysis

Even under the assumption that the allegations of Mr. Harrington are true, he was not bypassed for appointment. It is undisputed that he was ranked fifth on Certification No. 01169 and that no candidate ranked below him was appointed as a permanent full-time firefighter. Thus, the Commission has no jurisdiction to hear his bypass appeal.

In regard to whether the Commission, based on the allegations presented, should initiate an investigation under Section 2(a), the statute confers significant discretion upon the Commission in terms of what response and to what extent, if at all, an investigation is appropriate. See

Boston Police Patrolmen's Association et al v. Civ. Serv. Comm'n, No. 2006-4617, Suffolk Superior Court (2007). (See also Dennehy v. Civ. Serv. Comm'n, No. 2013-00540, Suffolk Superior Court (2014) (“The statutory grant of authority imparts wide latitude to the Commission as to how it shall conduct any investigation, and implicitly, as to its decision to bring any investigation to a conclusion.”))

While I am concerned by the sequence of events that occurred here, including, but not limited to, the rescission of what appears to have been a conditional offer of employment for non-medical reasons³, there is no evidence or indication that the City's decision here was the result of personal or political bias against Mr. Harrington. In fact, it is undisputed that both the Fire Chief and the Mayor were impressed with Mr. Harrington as a candidate and want(ed) to appoint him. Rather, relying on an assessment by counsel that there were not sound and sufficient reasons to bypass candidates ranked above Mr. Harrington, the City ultimately opted not to appoint him to the position of firefighter. This does not warrant a further investigation by the Commission.

Conclusion

For these reasons, Mr. Harrington's appeal under Docket No. G1-14-101 is hereby *dismissed* and his request for investigation is denied.

Civil Service Commission

/s/Christopher C. Bowman
Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman and McDowell, Commissioner [Stein – Absent]) on September 18, 2014.

³ It is not within the Commission's jurisdiction to rule on allegations that fall squarely under the jurisdiction of MCAD under G.L. c. 151B.

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 this order or 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 this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision.

Notice:

Jeremia A. Pollard, Esq. (for Appellant)

Kathleen E. Degnan, Esq. (for Respondent)

Mark Detwiler, Esq. (HRD)