

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

GARY A. SMYTH,
Appellant

v.

G2-12-203

CITY OF QUINCY,
Respondent

Appearance for Appellant:

Betsy Ehrenberg, Esq.
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Boston, MA 02108

Appearance for Respondent:

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City of Quincy
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Commissioner:

Christopher C. Bowman

RULING ON CROSS-MOTIONS FOR SUMMARY DECISION

On September 22, 2011, the Civil Service Commission (Commission), acting on a bypass appeal filed by Quincy Deputy Fire Chief Gary Smyth, issued a decision vacating the appointment of Joseph Barron as the permanent Fire Chief in the City of Quincy (City).

The Commission's 2011 decision ordered the City to conduct a new selection process for Fire Chief, setting various conditions for the new process intended to ensure a fair and impartial review of the candidates, including, but not limited to, the use of an outside review panel to vet the candidates.

In response to the Commission's 2011 decision, the City contracted with a company by the name of Facets Consulting (Facets) from Phoenix, AZ to vet the two candidates (Barron and Smyth). A

review panel established by Facets ultimately recommended the appointment of Joseph Barron as Fire Chief. The Mayor accepted the panel's recommendation.

On November 8, 2012, Deputy Chief Smyth filed a second bypass appeal with the Commission, contesting the promotional appointment of Chief Barron. A pre-hearing conference was held at the offices of the Commission on November 27, 2012 and was attended by Deputy Chief Smyth and counsel for the City.

A digitally-recorded status conference was held at Quincy City Hall on February 25, 2013 which was attended by Mr. Smyth and counsel for both parties. Sworn testimony was provided by:

- Kevin Roche, principal of Facets;
- Charles Hood, San Antonio, Texas¹ Fire Chief and member of interview panel;
- Kathryn Hobin, Purchasing Agent, City of Quincy.

Prior to the status conference, the City and Facets produced several hundred pages of documents including the hand-written notes of some interview panelists, inter and intra email communication related to the selection process, contractual information and other responsive documents. I completed a cursory review of these documents prior to the status conference and have since completed a thorough review of each document submitted.

By agreement, the parties filed cross-motions for summary decision, each arguing that the undisputed facts here warrant a decision in their favor.

In summary, the City argues that the undisputed facts show that they complied with all of the conditions contained in the Commission's 2011 decision to the fullest extent possible. Further, the City argues that a fair and impartial selection process was conducted in which the Mayor accepted the recommendation of a qualified outside review panel to appoint Joseph Barron as Fire Chief.

¹ San Antonio is the seventh most populous city in the United States of America and the second most populous city in the state of Texas, with a population of 1.3 million. [Wikipedia](#)

Mr. Smyth argues that the undisputed facts show that the City failed to meet all of the conditions of the Commission's 2011 decision. Further, Mr. Smyth argues that the selection process was not independent and fair-minded.

Legal Standard for Summary Judgment

The Standard Adjudicatory Rules of Practice and Procedure, 801 Code Mass. Regulations §§ 1.00 (formal rules) apply to adjudications before the Commission.

When a party is of the opinion there is no genuine issue of fact relating to all or part of a claim or defense and he is entitled to prevail as a matter of law, the Party may move, with or without supporting affidavits, for summary decision on the claim or defense. 801 CMR 1.01(7)(h).

In order to properly address the motions, the Commission must first determine if all of the material facts have been established. Boston Fire Dep't v. Civ. Serv. Comm'n, Suff. Sup. Ct. 2012-1752-A (2012) citing Augat, Inc. v. Liberty Mutual Ins.Co., 410 Mass. 117, 120 (1991), and cases cited. The Commission "...should not consider the credibility of the witnesses or the weight of the evidence, nor should the [Commission] make findings of fact." Riley v. Presnell, 409 Mass. 239, 244 (1991) citing Attorney Gen. v. Bailey, 386 Mass. 367, 370 (1982).

Analysis

Here, the question of whether the City complied with the conditions of the 2011 Commission Decision, whether the resulting process was fair and impartial and, ultimately, whether the City's decision met the traditional "reasonable justification" standard required of all bypass decisions, are all material facts that are in dispute. Moreover, resolving these factual disputes would require, in part, credibility assessments of certain individuals, including, but not limited to, the principal of Facets Consulting and Charles Hood, the San Antonio, Texas Fire Chief who served as one of the panelists. Thus, I am unable to dispose of this case via summary decision.

I am mindful, however, that both parties are seeking an expedited resolution to this fairly unique appeal absent the need for protracted and costly litigation.² To that end, but without making any conclusions prior to the final disposition of this matter, I offer the following observations regarding the evidence submitted and arguments made thus far in the proceeding.

Mr. Smyth argues that if it is shown that the City failed to meet any one of the conditions contained in the Commission's 2011 decision, his appeal must be allowed and relief granted. He is mistaken. While this appeal involves some rather unique circumstances, that does not change the well-established legal standards by which such an appeal is decided by the Commission.

The Commission, after reviewing *all* of the relevant evidence, must determine whether there was *reasonable justification* for the action taken by the appointing authority in the circumstances found by the commission to have existed when the City made its decision. Watertown v. Arria, 16 Mass.App.Ct. 331, 332 (1983). See Commissioners of Civil Service v. Municipal Ct. of Boston, 369 Mass. 84, 86 (1975); and Leominster v. Stratton, 58 Mass.App.Ct. 726, 727-728 (2003). "It is not for the Commission to assume the role of super appointing agency, and to revise those employment determinations with which the Commission may disagree." Town of Burlington, 60 Mass. App. Ct. 914, 915 (2004). Inherent in our decision-making process is our duty to guard against political considerations, favoritism, and bias in governmental hiring and promotion.

With these standards in mind, failure to comply with the letter of any one of the conditions of the 2011 Decision, if shown, would be given the weight it is due, but would not necessarily require an adverse ruling against the City.

While further evidentiary proceedings may ultimately show otherwise, I also offer the following preliminary observations in regard to the substantive issue of whether the evidence and testimony submitted thus far sheds any light on whether the City complied with those conditions. In general, those conditions were established to provide a framework to ensure a fair and impartial review process. Mr.

² Mr. Smyth has already incurred legal costs associated with this appeal by obtaining very able legal counsel and the City has borne the costs of travel-related costs of out-of-state witnesses Roche and Hood.

Smyth appears to be overreaching in arguing that the City could not veer from the specific conditions if circumstances warranted it. For example, Mr. Smyth argues that since Facets had no experience in the review and selection of senior public sector personnel *in Massachusetts*, they violated the first condition of the 2011 decision, warranting an adverse finding against the City. The Commission's review of that condition would not end there. Rather, the Commission would consider and weigh the City's argument and evidence thereof that selecting an out-of-state vendor was meant to ensure greater objectivity.

Similarly, Mr. Smyth argues that since he was only provided with a description of the assessment process two days prior to the interview, the City failed to meet the condition requiring that he receive such information "reasonably in advance." Absent evidence that the selected candidate (Chief Barron) was provided with notice far in advance of Mr. Smyth, this argument would likely fail.

The same general principles apply in regard to how the Commission would evaluate compliance with the remainder of the stated conditions.

Viewed more broadly however, Mr. Smyth has raised issues and concerns that could potentially result in inferences calling into question facts related to certain parts of this most recent selection process. Based on the initial documents and testimony reviewed thus far, it appears that the assessment process was neither public nor was it recorded. Further questions were raised regarding the initial written report and recommendation that apparently was forwarded to the City, at best, only ninety (90) minutes after the final interview of Mr. Smyth was completed.

Notwithstanding these questions, however, the Commission, as part of further evidentiary proceeding, would consider and give the proper weight to the testimony already provided by the interview panelists, including Chief Hood, the Fire Chief from San Antonio, Texas. His testimony could potentially stand as a bulwark against allegations that the final decision was not made in accordance with basic merit principles.

Conclusion

For the reasons stated above, the cross-motions for summary decision are denied. Mr. Smyth shall have thirty (30) days to inform the Commission whether he intends to pursue his appeal further, thus warranting the scheduling of a full evidentiary hearing.

Civil Service Commission

Christopher C. Bowman
Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Ittleman, Marquis, McDowell, and Stein, Commissioners) on October 31, 2013.

A true record. Attest:

Commissioner

Notice:
Betsy Ehrenberg, Esq. (for Appellant)
James Timmins, Esq. (for Respondent)
John Marra, Esq. (HRD)