

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

**One Ashburton Place – Room 503
Boston, MA 02108
(617) 727-2293**

SUZANNE TRASAVAGE,
Appellant

v.
TOWN OF BARNSTABLE,
Respondent

CASE NO. G1-16-093

Appearance for Appellant:

Mitchell J. Notis, Esq.
32 Kent Street
Brookline MA 02445

Appearance for Respondent:

T. David Houghton, Esq.
1st Assistant Town Attorney
Town of Barnstable
367 Main Street
Hyannis, Massachusetts 02601

Commissioner:

Paul M. Stein

CORRECTED (See Page 5) DECISION ON RESPONDENT’S MOTION TO DISMISS

The Appellant, Suzanne Trasavage, appeals to the Civil Service Commission (Commission), pursuant to G.L.c.31,§2(b), to contest her non-selection for appointment to the position of police officer with the Respondent, the Town of Barnstable, and her “PAR.09 removal” from the eligible list. A pre-hearing conference was held at the UMass School of Law in Dartmouth on June 10, 2016 and a full hearing is scheduled for December 16, 2016. On August 30, 2016, the Respondent moved to dismiss that part of the Appellant’s appeal which claims that she has been bypassed, on the grounds that no person ranked below her on the Certification has been appointed. The Appellant opposes the motion.

FINDINGS OF FACT

Based on the submissions of the parties, I find the following material facts are not disputed:

1. The Appellant, Suzanne Trasavage, took and passed the civil service examination for municipal police officer (scoring a 93) administered on April 25, 2015 by the Massachusetts Human Resources Division (HRD). Her name was placed on the eligible list of candidates for police officer established by HRD on November 1, 2015. (*Stipulated Facts; Administrative Notice [HRD Letter on File]*)

2. On or about November 13, 2015, HRD issued Certification #03397 to Barnstable for appointment of 10 police officers. Ms. Trasavage's name appeared on the Certification in 20th place. (*Stipulated Facts; Administrative Notice [HRD Letter on File]*)

3. By letter dated February 8, 2016, for a variety of reasons stated in the letter, Barnstable Police Chief Paul MacDonald wrote to HRD to request that Ms. Trasavage "be removed from certification list 2015-03397 per PAR.09(2). (*Claim of Appeal; Barnstable Reply*)

4. By letter dated February 16, 2016, Chief MacDonald informed Ms. Trasavage: "As a result of information discovered during your background investigation you are no longer being considered for employment as a police officer with the Barnstable Police Department. A letter requesting your removal from certification list 2015-03397 has been forwarded to Civil Service. If you have any questions . . . please contact Lieutenant Jean Challies" (*Administrative Notice [Letter on File]*)

5. By letter dated March 28, 2014, HRD informed Ms. Trasavage that it had received Barnstable's February 8, 2016 letter and that the reasons stated in the letter were acceptable for removal under Personnel Administration Rule 09 (PAR.09). HRD's letter enclosed a copy of the

February 8, 2016 letter and informed Ms. Trasavage that she had the right to appeal HRD's determination to the Commission. (*Claim of Appeal*)

6. A total of twenty-one (21) candidates listed on Certification #03397 signed the Certification as willing to accept appointment, all but one of whom were ranked above Ms. Trasavage. Of these candidates, eighteen (18) candidates, including Ms. Trasavage and the one lower-ranked candidate, were selected for a background investigation and formal oral board interview. (*Barnstable Motion [Challies Aff't]*)

7. Upon completion of the background investigation and oral board interviews, Barnstable made conditional offers of employment to ten (10) candidates, including nine candidates ranked above Ms. Trasavage and the one lower-ranked candidate, to be effective April 11, 2016. (*Barnstable Motion [Challies Aff't]*)

8. A conditional offer is not an "appointment" to the position of police officer. The offers were subject to the candidates' successfully passing the medical examination, a Physical Abilities Test (PAT), a psychological evaluation and completion of the Municipal Police Training Committee Plymouth Academy (the "Academy"). (*Barnstable Motion [HRD E-mails to Commission attached]and Challies Aff't]*)

9. The ten selected candidates took the PAT on February 19, 2016. All candidates passed, except the lower-ranked candidate. The lower-ranked candidate re-took the PAT on March 3, 2016 and, again, failed. Accordingly, the conditional offer to the lower-ranked candidate was rescinded, that candidate did not attend the Academy and was not appointed to the position of a Barnstable Police Officer. (*Barnstable's Motion [Challies Aff't]; Appellant's Opposition, Trasavage Aff't]*)

10. A document procured by Ms. Trasavage from the Academy lists the names of the student officers who attended the 62nd Recruit Officer's Class at the Academy which began April 11, 2016 and graduated September 23, 2016. The student officers included the nine (9) Barnstable Police Department candidates who had been granted conditional offers [excluding the lower-ranked candidate] and a tenth student officer whose initials are M.H., who is also listed as a recruit from the Barnstable Police Department. (*Appellant's Opposition, Trasavage Aff't*)

11. M.H.'s name does not appear on Certification #03397. He is not a Barnstable Police Officer. (*Barnstable's Motion [Challies Aff't]; Barnstable Reply [MacDonald Aff't]*)

12. Upon inquiry, Eileen Goodick, the Academy Director, delivered a letter to Chief MacDonald, which he forwarded to the Commission, stating that Student Officer M.H. was a recruit selected by the Bourne Police Department. His name was listed on the Academy roster as a Barnstable Police Department recruit in error. (*Barnstable Reply [MacDonald Aff't]*)

13. On May 12, 2016, Ms. Trasavage appealed to the Commission. (*Claim of Appeal*)

Applicable Legal Standard

A motion to dismiss an appeal before the Commission, in whole or in part, may be filed pursuant to 801 C.M.R. 1.01(7)(h). These motions are decided under the well-recognized standards for summary disposition as a matter of law, i.e., "viewing the evidence in the light most favorable to the non-moving party", the undisputed material facts affirmatively demonstrate that the non-moving party has "no reasonable expectation" of prevailing on at least one "essential element of the case". . See, e.g., Milliken & Co., v. Duro Textiles LLC, 451 Mass. 547, 550 n.6, (2008); Maimonides School v. Coles, 71 Mass.App.Ct. 240, 249 (2008); Lydon v. Massachusetts Parole Board, 18 MCSR 216 (2005)

Analysis

In the context of civil service hiring and promotions, a “bypass” refers to a decision by an appointing authority (here, the Town of Barnstable) to “make an original or promotional appointment” of one or more candidate(s) other than the highest-ranking available candidate(s), as determined by the candidate’s place on a “certification” which reflects his or her performance (score) on the applicable civil service examination. G.L.c.31,§27,¶2. See, e.g., Malloch v. Town of Hanover, 472 Mass. 783, 784 (2015); Police Department of Boston v. Kavaleski, 463 Mass. 680, 682 n.3 (2012); City of Cambridge v. Civil Service Comm’n., 43 Mass.App.Ct. 300, 301-302, rev.den., 426 Mass. 1102 (1997). Pursuant to G.L. c. 31, § 27, the appointing authority must submit a written statement of reasons for the bypass and no “appointment of a person whose name was not highest shall be effective” without such statement of reasons for bypassing the higher ranked candidate(s). See Bielawski v. Personnel Adm’r of Div. of Personnel Admin., 422 Mass. 459, 460 (1996); MacHenry v. Civil Serv. Comm’n, 40 Mass.App.Ct. 632, 635–636, rev.den., 423 Mass. 1106 (1997).

Here, the undisputed facts, when viewed in a light most favorable to the Appellant, establish that no person has been appointed as a Barnstable Police Officer from Certification #03397 who ranked ~~above~~ **below** Ms. Trasavage within the meaning of G.L.c.31,§27,¶2. The only lower-ranked candidate who was considered for appointment had her conditional offer rescinded after twice failing the PAT. A conditional offer is not an appointment. Thus, Ms. Trasavage was not bypassed by any of the nine candidates who were appointed from Certification #03397, all of whom ranked above her on that Certification.

As to the student officer M.H., the evidence presented by the Appellant shows that that his name was listed on the Academy roster as a Barnstable student officer. That evidence, however,

must be considered with the percipient testimony from the Academy Director and Chief MacDonald that M.H. is not a Barnstable Police Officer but was sent to the Academy by Bourne, This evidence, together with the undisputed evidence that M.H.'s name does not appear on any Certification issued to Barnstable and that Barnstable has never appointed M.H. as a police officer, is sufficient to lead me to conclude that the Appellant has provided "no reasonable expectation" that she can establish her non-selection was a bypass on account of M.H.

In sum, for the reasons stated herein, the Commission lacks jurisdiction to hear the portion of this appeal which claims that the Appellant has been bypassed. Therefore, Barnstable's Motion to Dismiss is hereby **granted** and the bypass portion of the appeal of the Appellant, Suzanne Trasavage, is **dismissed**. The appeal will proceed to a full hearing limited solely to the question of the justification for PAR.09 removal of the Appellant which prevents Ms. Trasavage's name from appearing on future certifications generated during the life of the current eligible list.

Civil Service Commission

/s/Paul M. Stein

Paul M. Stein, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman [absent], Stein and Tivnan, Commissioners) on September 29, 2016.

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. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice:

Mitchell J. Notis, Esq. (for Appellant)

T. David Houghton, Esq. (for Respondent)

Patrick Butler, Esq. (HRD)