COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

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

SHAWN INGRAHAM,
Appellant

v.

G1-15-80

TOWN OF DANVERS,
Respondent

Appearance for Appellant:

David Brody, Esq.[1]
Law Office of Joseph L. Sulman, Esq.
1001 Watertown Street, Third Floor
West Newton, MA 02460

Appearance for Respondents:

Geoffrey P. Wermuth, Esq.
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Commissioner:

Cynthia A. Ittleman[2]

DECISION

On April 28, 2015, the Appellant, Shawn Ingraham (Mr. Ingraham or Appellant), pursuant to G.L. c. 31, §2(b) filed a timely appeal with the Civil Service Commission (Commission), contesting the decision of the Town of Danvers (Town or Respondent) to bypass the Appellant for original appointment to the position of permanent firefighter. A pre-hearing conference was held on June 2, 2015 at the offices of the Commission. A full hearing was

[1] Attorney Brody is no longer with the Law Office of Joseph L. Sulman, Esq. so the Commission is sending this decision to Attorney Sulman.
[2] The Commission acknowledges the assistance of Law Clerk Barbara Grzonka in the drafting of this decision.

scheduled to be held at the same location on August 12, 2015.[3] The Respondent chose not to attend the hearing to defend its decision to bypass the Appellant. At the hearing, the Appellant moved for a "directed verdict", which I have deemed to be a Motion for Summary Decision. The Commission denied the motion and the Appellant declined to go forward, averring that it is the Respondent that has the burden of proof and it failed to appear. The proceeding was digitally recorded and both parties were provided with a CD of the hearing[4]. The Appellant submitted a post-hearing brief again requesting a "directed verdict" and attached five (5) exhibits.

FINDINGS OF FACT:

Five (5) exhibits were entered into evidence by the Appellant as part of its post-hearing brief. The Appellant's exhibits are as follows:

- Exhibit 1 Copy of the facts stipulated to by the parties at the pre-hearing conference.
- Exhibit 2 Copy of the Civil Service Commission's Notice of Full Hearing.
- Exhibit 3 Joint Petition for 310 Relief
- Exhibit 4 Copy of Commissioner Ittleman' s email dated August 11, 2015 denying parties request for Joint 310 Relief and advising that the hearing scheduled for August 12, 2015 will go forward.
- Exhibit 5 Copy of Attorney Geoffrey P. Wermuth's e-mail dated August 12, 2015 advising Commissioner Ittleman that the "Town of Danvers elects not to defend the appeal and will not be appearing at today's hearing."

[3] The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§1.00, *et seq*., apply to adjudications before the Commission with Chapter 31 or any Commission rules taking precedence

[4] If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion. In such cases, this CD should be used by the plaintiff in the judicial appeal to transcribe the recording into a written transcript.

No witnesses testified because the Respondent was not present and the Appellant did not testify and brought no additional witnesses. Based on the exhibits, and taking administrative notice of all matters filed in the case, both parties' arguments at prehearing conference and the argument of Appellant's counsel at the hearing, and pertinent statutes, rules, case law, regulations, policies, and reasonable inferences there from; a preponderance of evidence establishes the following facts:

1. At the time of the Commission's prehearing conference, the Appellant was twenty-six (26) years old, lived in Danvers and was working for a plumbing company. Previously, the Appellant spent five (5) years in the Marines with tours of duty in Japan and Afghanistan. The Appellant is a disabled veteran. The Appellant's father is a Fire Lieutenant in Danvers. (Administrative Notice)
2. On April 26, 2014, Mr. Ingraham took a civil service examination for the position of firefighter. (Stipulation)
3. Mr. Ingraham received a score of 97 and received statutory preference as a disabled veteran. (Stipulation)
4. The Town of Danvers sought to hire two (2) firefighters and requested a certification from the state's Human Resources Division (HRD). (Stipulation)
5. On December 30, 2014, HRD provided the Town with Certification number 02561. Mr. Ingraham's name appeared first on the list among the candidates who signed the Certification. (Stipulation)
6. The Appellant applied for employment at the Danvers Fire Department. (Administrative Notice)

7. The Respondent requires firefighter candidates to take a pre-employment drug test for the purpose of determining if they are using illegal drugs. The Appellant took this drug test. (Administrative Notice)
8. The Respondent did not issue a conditional offer of employment to the Appellant before administering the drug test to the Appellant. (Administrative Notice)
9. On April 14, 2015, the Respondent notified the Appellant that he was bypassed and the reasons for his bypass were negative reasons related to the Appellant.[5] (Stipulation) Although the Respondent had not informed any other candidates that they were being bypassed at that time (Administrative Notice), the Appointing Authority informed the Appellant of his bypass because of pressure by the Appellant's father. (Administrative Notice)
10. The Town subsequently appointed two (2) candidates ranked lower on the Certification than the Appellant. (Stipulation)
11. On April 28, 2015, Mr. Ingraham filed the instant bypass appeal with the Commission. (Stipulation)
12. On June 2, 2015 a pre-hearing conference was held at the offices of the Commission. (Stipulation)
13. A full hearing before the Commission was scheduled for August 12, 2015. (Administrative Notice)
14. At 3:28 p.m. on August 11, 2015, the parties submitted a "Joint Motion for 310 Relief" to the Commission via e-mail and requested that the August 12, 2015 hearing be "removed from the docket." (Appellant's Ex. 3)

[5] When bypassing candidates, appointing authorities can prefer negative reasons associated with the bypassed candidates, positive reasons associated with the selected candidates, or both. Here, the parties stipulated at the prehearing conference that the reason for bypass was negative reasons associated with the Appellant.

15. The Joint Motion for 310 Relief states, in pertinent part,

> "1. Mr. Ingram filed the instant appeal with the Civil Service Commission contesting the actions of the Town of Danvers in his non-selection for original appointment to the position of fire Fighter.
> 2. Prior to making a conditional offer of employment, the Town administered pre-employment medical testing. Mr. Ingraham participated in such testing.
> 3. On or about April 14, 2015, the Town sent Mr. Ingraham a letter informing him of his non-selection ("bypass"). The Parties stipulate that Mr. Ingraham was aggrieved by his non-selection.
> 4. The Town and Mr. Ingraham agree to Chapter 310 Relief requesting that this Commission order the Human Resources Division ("HRD") to place Mr. Ingraham's name atop the eligibility list for original appointment to the position of Permanent full-time fire Fighter, so that his name appears at the top of the existing certification and/or the next certification which is requested by the Town from HRD and from which the next original appointment to the position of Permanent full-time Fire Fighter in the Town of Danvers Fire Department shall be made by the Appointing Authority, so that Mr. Ingraham shall receive at least one opportunity for consideration."
> (Appellant's Ex. 3)

16. Upon completion of a hearing in another case after 5:00 p.m. on August 11, 2015, I emailed the parties questions regarding their 310 Relief request. (Administrative Notice)

17. At approximately 7:20 p.m. on August 11, 2015, based on the parties' responses to my Questions, I denied the Joint Motion for 310 Relief. (Appellant's Ex. 4)

18. The Appellant's name appears on the firefighter eligible list for Danvers, dated December 2016, indicating that the Appellant has taken and passed the most recent firefighter exam and that the prior list on which his name appeared is no longer in effect. The Appellant's name is first on the list after two (2) individuals who reside in Weymouth and Worcester, not Danvers. (Administrative Notice: http://www.csexam.hrd.state.ma.us/eligiblelist/eligiblelist.aspx?ListId=2&Location_Id=77&referrer=http%3a%2f%2fwww.csexam.hrd.state.ma.us%2feligiblelist%2fcommunities.aspx%3fListTypeId%3d1%26ListId%3d2&name=Firefighter+2016+Eligible+List)

Applicable Legal Standards

As noted above, the Commission applies the Standard Adjudicatory Rules of Practice and Procedure (Rules) at Commission proceedings. These Rules do not provide for motions for a "directed verdict". However, with respect to dispositive motions, 801 CMR 1.01 § 7(g)(3) of the Rules provides,

> "Dismissal for Other Good Cause. The Presiding Officer may at any time, on his own motion or that of a Party, dismiss a case for lack of jurisdiction to decide the matter, for failure of the Petitioner to state a claim upon which relief can be granted …."

An appeal before the Commission may be disposed of summarily, in whole or in part, pursuant to 801 CMR 1.01(7)(g) and (7)(h) when, as a matter of law, the undisputed material facts affirmatively demonstrate that there is no "no reasonable expectation" that a party can prevail on at least one "essential element of the case". *See, e.g.*, Milliken & Co. v. 6 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).

Applicable Civil Service and Related Law

The authority to bypass a candidate for permanent appointment or promotion to a civil service position derives from G.L. c. 31, § 27, which provides, in part,

> "If an appointing authority makes an original or promotion appointment from certification of any qualified person other than the qualified person whose name appears highest [on the certification], and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file…a written statement of his reasons for appointing the person whose name was not highest." (Id.)

St. 1993, Chapter 310 authorizes the Commission to provide relief as maybe appropriate, for example, when a candidate has been bypassed. Specifically it provides, in pertinent part,

> "Chapter 534 of the acts of 1976 is hereby amended by striking out section 1 and inserting in place thereof the following section:- Section 1. If the rights of any person acquired under the provisions of chapter thirty-one of the General Laws or under any rule

> made thereunder have been prejudiced through no fault of his own, the civil service commission may take such action as will restore or protect such rights, notwithstanding the failure of any person to comply with any requirement of said chapter thirty-one or any such rule as a condition precedent to the restoration or protection of such rights."

Not every joint request of the parties for Chapter 310 relief is granted. Beneath the request must lay a foundation indicating that the Appellant has been aggrieved, through no fault of his or her own. In Geary v. Salem Police Department, Docket No. G-01-364 (2006), the Commission confirmed that,

> "The Commission's authority to grant relief pursuant to Chapter 310 of the Acts of 1993 was not meant to be granted routinely, but rather, sparingly, in those circumstances where there is sufficient evidence showing it is warranted. Absent a full explanation by the Appointing Authority as to why the … reasons for the bypass … are no longer relevant…such relief [sought via a joint request by the parties without a full hearing is [not] warranted."
> Id.

In addition, "[w]hile the Commission strongly encourages parties to mutually resolve disputes and conserve their resources (and those of the Commission), agreements asking the Commission to grant extraordinary relief under Chapter 310 of the Acts of 1993 are not automatically granted. Rather, given the potential harm to other candidates if the relief is granted, the Commission carefully reviews whether such relief is warranted." Ingham v. Natick Police Department, Docket No. G2-14-249.

Under the Americans with Disabilities Act, a pre-employment drug test for the use of illegal substances is not a medical exam. 42 U.S.C. 12101 *et seq*. Specifically, Section 12114(d)(1) of the ADA states, in part, that "[f]or the purposes of this subchapter, a test to determine the illegal use of drugs shall not be considered a medical examination. Id. (emphasis added). Similarly, the Massachusetts Commission's Against Discrimination (MCAD) Guidelines (Guidelines), which interpret the Massachusetts anti-discrimination statute, G.L. c. 151(B), addresses pre-employment inquiries. Administrative Notice:

http://www.mass.gov/mcad/resources/employers-businesses/emp-guidelines-handicap-gen.html#Pre-employment Inquiries Drug/alcohol. The Guidelines provide that, "[a]n employer must make a conditional job offer before requiring a medical examination (and/or making inquiries). A conditional job offer is an offer of employment to a job applicant which is contingent upon the satisfactory results of a medical examination (and/or inquiry)." Id. at § V. A. (emphasis added). However, § IV. D. of the Guidelines provides,

> With regard to the current use of legal drugs, such questions are likely to elicit information about a disability and are prohibited. For example, asking an applicant to list all currently prescribed drugs may reveal that s/he is using AZT or insulin, indicating that the applicant may be disabled. An exception would exist if the employer has administered a test for the current use of illegal drugs and an applicant tests positive. In that case, the employer may ask about the use of legal drugs in order to seek an explanation for the positive test result.
> Id. (emphasis added).

Analysis

Pursuant to 801 CMR 1.01 (7)(g)(3), I dismiss this appeal because the Appellant has failed to state a claim upon which relief may be granted and that he is not entitled to judgment as a matter of law. The parties' "Joint Petition for 310 Relief" states that the Respondent bypassed the Appellant after administering "pre-employment medical testing" and that the Appellant "participated in such testing" Appellant's Ex. 3. However, federal and state law in this regard is clear: it is lawful to conduct a pre-employment drug test for the purpose of determining whether an employment candidate uses illegal drugs prior to the issuance of a conditional offer of employment. Referring to this test as a "medical test" is inaccurate. At the Commission's pre-hearing conference, both parties referred to the test that the Appellant had taken as a drug test that detects illegal drug use, which the Commission cannot ignore. As such, pre-employment testing to detect the use of illegal drugs is permitted by law without a conditional offer of employment, the Appellant's claim is untenable. Even if the Appellant had stated a claim upon

which relief may be granted, the appeal would be dismissed as partially moot. The relief provided in a successful bypass appeal is to place the name of an appellant at the top of the current or future list for consideration. As noted above, the Appellant's name appears on the list issued by HRD in December, 2016, indicating that the Appellant has taken and passed the most recent firefighter examination. The Appellant is ranked third on the 2016 list but he is effectively ranked first because the two (2) candidates above him on the list are not Danvers residents as requested by Danvers.

Conclusion

Accordingly, for the above stated reasons, Mr. Ingraham's appeal, filed under Docket No.G1-15-80, is hereby ***dismissed.***

Civil Service Commission

/s/Cynthia A. Ittleman
Cynthia A. Ittleman, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on February 16, 2017.

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:
Law Office of Joseph L. Sulman (for Appellant)
Geoffrey P. Wermuth, Esq. (for Respondent)
John Marra (for HRD)