

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

Juan Cosme,
Appellant

G1-08-153

v.

City of Somerville,
Respondent

DECISION ON RESPONDENT'S MOTION TO DISMISS

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Juan Cosme (hereinafter "Cosme" or "Appellant") seeks review of the Personnel Administrator's decision to accept the reasons of the City of Somerville, (hereinafter "appointing authority" or "City") bypassing him for original appointment to the position of Firefighter. A full hearing was held on September 16, 2008 at the offices of the Civil Service Commission (hereinafter "Commission"). One (1) tape was made of the hearing and is retained by the Commission.

At the full hearing, the appointing authority filed a Motion to Dismiss on the grounds that it did not make an appointment from the certification, No. 280286, on which the Appellant appeared, and therefore no bypass for appointment occurred. On or about September 24, 2008 the Appellant filed an Opposition to the Motion to Dismiss.

FINDINGS OF FACT

Fifteen (15) joint exhibits and one (1) stipulation were entered into evidence at the hearing. Based on these exhibits and stipulation and the testimony of the Appellant and

Deborah A. Connolly, Human Resources Coordinator for the City, I make the following findings of fact:

1. At approximately the same time, the City made (3) requisitions to the Commonwealth's Human Resources Division (HRD) for the appointment of firefighters. One requisition was for a "regular" certified eligibility list. Another requisition was for a "special" certification of candidates proficient in Spanish. The last requisition was for a "special" certification of candidates proficient in Haitian. (Testimony of Connolly, Exhibits 9 & 10)
2. The Appellant's name appeared at the top of the "special" certification for the Appointment of five (5) from candidates proficient in Spanish, Certification # 280286. The Appellant signed the certified list as willing to accept appointment (Testimony of Connolly, Exhibits 9 & 10)
3. The Appellant's name also appeared on the "regular" reserve firefighter Certification #280460. (Testimony of Connolly, Exhibit 2)
4. The Mayor of Somerville is the appointing authority. The Mayor sent the Appellant a letter dated May 30, 2008 stating that the City intended to bypass him for appointment from the special Spanish Certification #280286. The letter did not state the specific reasons for this intended bypass. (Testimony of Connolly, Exhibits 1)
5. It was learned that the reason for the intended bypass of the Appellant was his positive test result for some level of marijuana by a hair-sample test taken by the city's medical testing vendor, Concentra. The Hair test sample was collected on May 16, 2008 and the results reported on May 24, 2008. The hair sample had been taken as part of the pre-employment medical examination. The hair sample, analysis testing

had been completed by Psychomedics Corporation of Culver City California.

(Testimony of Connolly, Exhibits 13, 14)

6. Orientation was held simultaneously for the eligible candidates from all three certifications. The Appellant attended the orientation, held on June 26, 2008, since he was also on the regular certification #280460. (Testimony of Connolly, Appellant, Exhibit 2)
7. Due to funding-budgetary issues and the inadequacies with the special Spanish Certification # 280286, the City decided not to make any appointments from that Certification. The City notified each of the candidates, including the Appellant and HRD that it intended not to make any appointments from that Certification.
(Testimony of Connolly, Exhibits 3, 4, 5)
8. By letter, on July 25, 2008, HRD notified the City that it had accepted its notice of closing the selection process related to special Spanish Certification #280286. This letter officially cancelled the Certification. (Testimony of Connolly, Exhibits 6 & 7)
9. The Appellant was notified by the City by letter dated August 18, 2008 that Certification # 280286 had been closed by the City and cancelled by HRD.
(Testimony of Connolly, Exhibits 5, 6 & 7)
10. No appointments were made by the City for firefighter from the special Spanish Certification # 280286. Therefore no bypass of any candidate for appointment has been made. (Testimony, Stipulation and Exhibits)

CONCLUSION

The Respondent City of Somerville (“the City”) pursuant to 8.01 C.M.R. 1.01 (7)(g), submitted this Motion to Dismiss the appeal of Appellant, Juan Cosme, on the grounds that: The Civil Service Commission (“the Commission”) lacks jurisdiction to hear this matter since the Appellant has failed to state a claim on which relief can be granted. The Commission agrees with the City’s claim.

The Appellant’s appeal is founded on a claimed violation of G.L.c. 31, § 2(b), an unjustified bypass for an original appointment as a firefighter. The term “*Bypass*,” refers to “the selection of a person or persons whose name or names, by reason of [exam] score ... appear lower on a certification than a person or persons ... whose names appear higher on said certification.” See Cotter v. City of Boston, 73 F.Supp.2d 62, 66 n.9 (Mass. 1999). Where an employer does not select the highest named individual on an exam generated eligibility list, the Commission has authority under § 2(b) to hear an appeal of HRD’s acceptance of the employer’s statement of reasons for bypass, pursuant to § 27.

Whereas here, the City, in the proper exercise of its administrative prerogative, decided to close the selection process and cancel the special Spanish Certification without making any appointments for firefighter, from that Certification. Since no selections were made, no bypass occurred, Sections 27 and 2(b) are not triggered. See Goldblatt v Corporation Counsel of Boston & Others, 360 Mass 660, 666 (1971). The Appellant did not have a property interest in an appointment despite appearing at the top of the certified eligibility list or his expectations built over years of preparation and desire. See Bielawski v. Personnel Administrator (DPA), 422 Mass. 459, (1996)

G.L. c. 31, § 2(b) also states in relevant part that; “No person shall be deemed to be aggrieved under the provisions of this section unless such person has made specific

allegations in writing that a decision, action, or failure to act on the part of the administrator was in violation of this chapter, the rules or basic merit principles promulgated thereunder and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

The Commission finds that the Appellant has filed a timely appeal pursuant to G.L.c. 31, § 2(b) and it therefore has jurisdiction to hear or address this matter. However, the Commission maintains that after a hearing, the appeal must be dismissed on the merits, based on the facts as found.

In the present case the City clearly did not make any selection from the certification at issue and therefore no bypass for appointment could have occurred. The City has the established right to refrain from selecting any candidate(s) and requesting a closing or cancellation of the certification. The Appellant has failed to make the required showing under this section. The Appellant must make written allegations "...and said allegations shall show that such person's rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to the person's employment status."

On these findings of facts and circumstances, the Appellant failed to show that his rights were abridged, denied, or prejudiced in such a manner as to cause actual harm to her employment status. Therefore, he is not an aggrieved person, he lacks standing and therefore the Commission lacks jurisdiction to determine this appeal, under G.L.c. 31, § 2(b)

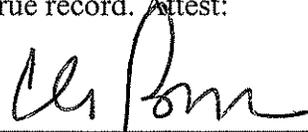
For the above reasons, the Respondent's Motion to Dismiss for Failure to State a Claim upon which relief could be granted is allowed. The Appellant's appeal, Docket Number G1-08-153 is hereby *dismissed*.

Civil Service Commission,

Daniel M. Henderson
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman, Henderson, Marquis, Taylor and Stein, Commissioners) on October 2, 2008.

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 M.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:

Matthew J. Buckley, Atty. City of Somerville

Stephen M. Roberts, Atty.

John Marra, Atty. HRD