COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

NANCY J. DALRYMPLE,
Appellant

v.

G2-05-338

TOWN OF WINTHROP,
Respondent

Appellant's Attorney:

Pro Se
Nancy J. Dalrymple
P.O. Box 543
Winthrop, MA 02152

Respondent's Attorney:

Howard L. Greenspan, Esq.
200 Broadway, Suite 304
Lynnfield, MA 01940
(781) 598-4545

Commissioner:

Donald R. Marquis

DECISION ON RESPONDENT'S MOTION TO DISMISS

Background

Pursuant to the provisions of G.L. c. 31, § 2(b), the Appellant, Nancy Dalrymple, (hereafter "Dalrymple" or Appellant") appealed the decision of the Respondent, the Town of Winthrop (hereafter "Appointing Authority", or "Town"), bypassing her for promotional appointment to the position of full time police sergeant. A pre-hearing was held on August 28, 2006 at the offices of the Civil Service Commission. The Commission subsequently received a Motion to Dismiss from the Town on September 14, 2006 and the pro se Appellant submitted a response to the Commission on September 28, 2006.

The Town sought from HRD a certification list for candidates passing the promotional examination to fill 2 full-time police sergeant positions with the Winthrop Police Department. HRD issued to Winthrop certification list number 230360. (See Certification No. 230360) The names of the individuals on the certification list appear in order of their respective scores, from highest to lowest. Where individuals received the same score, their names are placed in alphabetical order within the score subset. The Appellant's name appeared second on the certification list number 230360 tied with one other applicant, Stephen Rogers. The Town assembled a four-member panel and interviewed both of the tied candidates in question. Based on the panel's recommendation, the Town selected Stephen Rogers. The Appointing Authority argues that since the two candidates in question were tied, there is no bypass and, therefore, the Appellant's bypass appeal to the Commission must be dismissed.

Choosing from among tied candidates

G.L. c. 31, § 27 states that "if an appointing authority makes an original or promotional appointment form a certification of any qualified person other than the qualified person other than the qualified person who name appears highest, and the person whose name is highest is willing to accept such appointment, the appointing authority shall immediately file with [HRD] a written statement of his reasons for appointing the person whose name was not highest.

HRD Personnel Administration Rules ("PAR"), which were issued pursuant to G.L. c. 31, §§ 3(d) and 5, define a bypass as "the selection of a person or persons whose 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." PAR.02

Prior Commission decisions have well-established that selection from a group of tied candidates is not a bypass, including Baptista v. Department of Public Welfare, 6 MCSR 21 (1993), where the Commission stated, "It is axiomatic that a selection from among a group of tied candidates is not a "bypass" over which the Commission has jurisdiction". In McGonagle v. Massachusetts Parole Board, 14 MCSR 154 (2001), the Commission found that where the Appellant received the same score as two of the appointed individuals and a higher score than a third appointed individual, "[t]he Appointing Authority need only provide its written statement to [HRD] as to its reasons for appointing [the third individual] over the Appellant" since the Appellant's score was the same as the other two. Similar decisions by the Commission include Kallas v. Franklin School Department, 11 MCSR 73 (1996), where the Commission held that "[i]t is well settled civil service law that a tie score on a certification list is not a bypass for civil service appeals…"; Roberts v. Lynn Fire Department, 10 MCSR 133 (1997), where the Commission stated that an appellant will succeed in the typical bypass appeal if he can "demonstrate that the reasons offered by the Appointing Authority for favoring *lower ranking candidates* were untrue, apply equally to himself, are incapable of substantiation, or are a pretext for other, impermissible reasons."

In her response, the Appellant cites Cotter v. City of Boston, 73 F. Supp.2d 62, 66 (1999), in which the U.S. District Court held that "any selection among equally-scoring candidates is…a 'bypass' because all of their names 'appear highest'" However, the Court also states in a footnote that "it must be remembered that the Court is here ruling on a motion to dismiss… The litigants' motion papers do not present, and the Court's independent research has not uncovered, any long-standing tie-breaking administrative

procedure of either the Division or the Boston Police Department that comports with the civil service law. Should either defendant come forward with such an administrative procedure, support the description with admissible evidence, and demonstrate that the procedure was followed in this case, the Court necessarily will give such administrative procedure appropriate deference". As of the filing of the Appellant's appeal in the instant matter (2005), the Commission is also not aware of any such accepted tie-breaking method and continues to believe that selection among a group of tied candidates is not a bypass under civil service law.

In the instant case, the Appointing Authority sought to break the tie between the Appellant and Mr. Rogers by assembling an interview panel that consisted of a sergeant and lieutenant from the Winthrop Police Department as well as a sergeant from the MBTA and a sergeant from the Revere Police Department. The panel required the candidates to answer written questions and make an oral presentation to the panel. Based on the written questions and oral presentation, the two candidates were scored by the panel, with Mr. Rogers scoring significantly higher than the Appellant. Hence, Mr. Rogers was recommended for the promotional appointment to sergeant over the Appellant. According to Winthrop Police Chief David Goldstein, who has been Police Chief since 2004, he assembled this panel "to insure fairness" after talking to an employee that was apparently employed in the Civil Service Unit of the State's Human Resource Division (HRD) who told him that, in the case of a tie, "the Appointing Authority had discretion to make the appointment". (See Affidavit of Chief David Goldstein)

The Appellant, in her written response, takes great exception to this tie-breaking method, arguing that it is contrary to the Town's past-practice of breaking ties by choosing from tied candidates via alphabetical order or by seniority. (The Appellant states that she has 24 years of experience and Rogers had been an officer for less than half that time.) Further, the Appellant argues that Rogers was given a leg up in the interview process as a result of the Town's "grooming" of Rogers, who previously served in an "acting" Sergeant position and was sent to supervisory training and given the opportunity to become proficient in giving Power Point presentations.

More substantively, the Appellant alludes to her longstanding complaint of gender discrimination, which she first filed against the Town in 1989 followed by another complaint of the same nature in 1992. According to the Appellant, "both complaints were adjudicated before the SJC in 2001 in my favor. The Town of Winthrop was found to have discriminated and retaliated against me." A review of this case indicates that former Winthrop Police Chief Angelo LaMonica was sued by the Appellant both in his official capacity and individually. (See Dalrymple v. Town of Winthrop & another, 50 Mass. App. Ct. 611 (2000)). The promotion which is the subject of this appeal was overseen by current Winthrop Police Chief David Goldstein, who was appointed as Chief in 2004, four years after the final disposition of the gender discrimination suit referenced above.

Further, the Appellant alleges that she was first on a *prior* promotional list for the position of sergeant and the Appointing Authority failed to appoint anyone off that list before it expired, denying her the opportunity to be selected (assuming the Town would

have chosen not to bypass her and select a lower ranked candidate on the civil service promotional list)

Timeliness of Appeal

The Civil Service Commission adopted a sixty-day statute of limitations for bypass appeals in 2000, requiring Appellants to file their bypass appeal within sixty days of receiving notification of the bypass.

In its Motion to Dismiss, the Appointing Authority argues that the Appeal is not timely as Mr. Rogers was appointed as Sergeant on September 27, 2004 and the Appellant's bypass appeal form was not received by the Commission until October 5, 2005, over one year after the appointment in question. The Appellant argues that her appeal can not be considered untimely as she never received a bypass notice from the Town after the promotion of Mr. Rogers (since they did not consider choosing among tied candidates a bypass). According to the Appellant, it was not until the summer of 2005 that she received information from the town regarding the oral exam as the basis for promoting Mr. Rogers. Again according to the Appellant, she received this information as a result of a MCAD complaint she filed on April 28, 2005 for which an investigative conference was held at MCAD in July 2005.

Conclusion

Despite the eyebrow-raising allegations proffered by the Appellant, the Commission does not have jurisdiction to hear this bypass appeal as <u>there was no bypass</u>. The Appellant was <u>not</u> ranked higher on a civil service list than the individual who was promoted to sergeant. Rather, the Appellant and the individual promoted were <u>tied</u> and the Commission has well-established that choosing from among tied candidates does not

constitute a bypass that can be appealed to the Commission. Moreover, the Town, under the leadership of a new Police Chief, developed a mechanism to address the tie, involving law enforcement professionals from other jurisdictions.

It appears that the allegations raised by the Appellant can be more appropriately adjudicated in another forum and that the Appellant is indeed availing herself of that opportunity.

For this reason, the Appellant's appeal under Civil Service Commission Docket No. G2-05-338 is hereby ***dismissed.***

Civil Service Commission

_____
Donald R. Marquis, Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Guerin, Marquis and Taylor, Commissioners) on November 9, 2006.

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:
Nancy J. Dalrymple
Howard L. Greenspan, Esq.
Kerry Bonner, Esq.