

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

CIVIL SERVICE COMMISSION

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

WILLIAM BIANCO,
Appellant

v.

Docket No. G2-04-132

NEWTON FIRE DEPARTMENT,
Respondent

Appellant's Representative:

F. Robert Houlihan, Esq.
Heavey, Houlihan, Kraft & Cardinal
229 Harvard Street
Brookline, MA 02446
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Respondent's Representative:

Donnalyn B. Lynch Kahn, Esq.
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Commissioner:

Donald Marquis

DECISION ON RESPONDENT'S MOTION TO DISMISS

Procedural Background

Pursuant to G.L. c. 31, §2 (b), the Appellant, William Bianco, (hereafter "Appellant" or "Bianco") appealed the decision of the Newton Fire Department (hereafter "the Department" or "Appointing Authority") claiming that he was bypassed for appointment to a permanent full-time Fire Captain position and requesting that he receive such appointment with seniority back to the date of the bypass. On June 25, 2004, the

Appellant submitted a Motion to Serve Requests of Production of Documents, which motion the Commission allowed. On July 12, 2004, the Department submitted a Motion to Dismiss that was followed four days later by the Appellant's opposition to the motion. On March 22, 2005, the Appellant filed a Motion to Amend his appeal and to request that the Commission conduct an investigation pursuant to G.L. c. 31, §2(a) as to the circumstances surrounding the selection. A pre-hearing conference was held at the offices of the Civil Service Commission on March 24, 2005. On April 21, 2005, the Department filed an Opposition to Appellant's Motion to Amend.

Factual Background

On November 20, 2003, a civil service list was issued for the position of temporary Fire Captain. The list contained the following names and civil service examination scores: Appellant-85; ██████-85; and ██████-82. On December 1, 2003, the Appellant was selected for the temporary position of Fire Captain. His selection was approved by the Commonwealth's Human Resources Division ("HRD"). On January 15, 2004, the Department requested a civil service list to fill a vacancy for one permanent full-time Fire Captain position. The list was issued on January 28, 2004, and consisted of the following names and scores: ██████-85; ██████-82; and ██████-75. The Chief of the Department alerted HRD to the omission of the Appellant's name and on January 29, 2004, a letter was issued from HRD stating that the Appellant was added to the list and that his name should be placed above ██████'s name. The letter did not contain Appellant's examination score.

On February 2, 2004, the Department selected ██████ for the permanent full-time Fire Captain position, and on February 13, 2004, HRD approved this selection. On March

29, 2004, the Appellant appealed his non-selection. On July 12, 2004, HRD wrote to the Chief of the Department to clarify the order of names on the certification list for the permanent full-time Fire Captain position. The letter noted that HRD had not provided the Chief the mark that the Appellant received in the January 29, 2004 letter, and stated that he and ██████ had both received an 85%, were tied in first place on the list, and that the Appellant's name was placed before ██████'s because HRD lists tie scores alphabetically by the candidates' last names. On January 3, 2005, the Chief of the Department submitted a statement of reasons for its selection of ██████ to the Civil Service Commission.

Respondent's Grounds for Dismissal

HRD Personnel Administration Rules ("PAR"), issued pursuant to G.L. c.3 1, §§ 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. Respondent asks the Commission to dismiss the Appellant's appeal as the case does not concern a bypass situation. Rather, Respondent maintains that Appellant was tied with Yerardi and that a tie is not a bypass.

The Appellant argues that this *is* a bypass situation. The Appellant contends that as the Department was not informed of his examination score when HRD ordered that his name be placed on the list above ██████'s name, it is not certain whether the Department properly evaluated the two candidates. The Appellant also asserts that the Department should have requested that HRD consider the fact that the Appellant had, at the time of the certification's preparation, served as Acting Captain for two months and should have

been given credit for his time served in that position. He maintains that a correct disclosure by HRD on January 24, 2004 of his score, together with a credit for service as an Acting Captain, “would have put him in the first position, by himself, ahead of Mr. [REDACTED].”

The Appellant’s arguments do not have merit. The evidence shows that in January 2004 the Department was aware that Appellant and [REDACTED] had tie scores; this information was known by the Department since November 20, 2003 when the list was issued for position of temporary Fire Captain. When another list was issued two months later in January 2004, the scores did not change as there was no new civil service examination or new certification list between November 2003 and January 2004. In fact, it was the Chief of the Department who contacted HRD in late January 2004 to correct the omission of the Appellant’s name from the certification list.

Evidence in the form of the July 12, 2004 letter from HRD to the Chief of the Department indicates that [REDACTED] and Bianco received the same mark on the civil service examination of 85%, were tied in first place on the January 2004 civil service list, and that Yerardi’s name was placed second because HRD lists tie scores alphabetically by the candidates’ last names. This documentation shows that Appellant and [REDACTED] were tied candidates. As the Department contends, and as prior Commission decisions have well established, selection from a group of tied candidates is not a bypass. Baptista v. Department of Public Welfare, 6 MCSR 21 (1993); Kallas v. Franklin School Department, 11 MCSR 73 (1996).

Moreover, there is no legal authority to support Appellant's assertion that he is entitled to a higher position on the list due to a credit for time in service as temporary Fire Captain.

When the Appointing Authority selects between candidates whose scores are tied, it need not submit a statement of reasons to Human Resources, as they need not approve the selection. However, on January 3, 2005, the Appointing Authority submitted the reasons for ██████'s selection to the Commission. The Chief of the Department wrote that after the three candidates for the Captain position were interviewed, the selection committee recommended ██████ for the position based on his years of experience in the building trades, excellent interview and seniority in the Department.

Conclusion

The evidence demonstrates that the Appellant and the individual appointed to the permanent Fire Captain position were tied candidates on the civil service list. Choosing from among tied candidates does not constitute a bypass that can be appealed to the Commission.

Respondent's Motion to Dismiss is allowed and the Appellant's appeal filed under Docket G2-04-132 is hereby *dismissed*

Civil Service Commission

Donald Marquis, Commissioner

By vote of the Civil Service Commission (Bowman, Guerin and Marquis, Commissioners [Taylor – Absent]) on April 5, 2007.

A True copy. 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 MGL c. 30A s. 14(1) for the purpose of tolling the time of appeal.

Pursuant to MGL c. 31 s. 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under MGL c. 30A s. 14 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 to:

F. Robert Houlihan, Esq.
Donnalyn B. Lynch Kahn, Esq.