COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

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

SHAWN COUGHLIN,
Appellant

v.

G2-05-244

PLYMOUTH POLICE
DEPARTMENT,
Respondent

Appellant's Attorney:

Susan F. Horwitz, Esq.
Sandulli Grace, PC
One State Street: Suite 200
Boston, MA 02109
(617) 523-2500

Respondent's Attorney:

Lorna M. Hebert, Esq.
Murphy, Hesse, Toomey &
Lehane LLP
300 Crown Colony Drive
P.O. Box 9126
Quincy, MA 02269-9126
(617) 479-5000

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, Shawn P. Coughlin, (hereafter "Coughlin" or Appellant") appealed the decision of the Personnel Administrator (hereafter "HRD") accepting the reasons of the Respondent, the Town of Winthrop (hereafter "Appointing Authority", or "Town"), bypassing him for promotional appointment to the position of full time police sergeant. A pre-hearing was held on

October 19, 2005 at the offices of the Civil Service Commission. The Commission previously received a Motion to Dismiss from the Town on August 1, 2005 and a separate Motion to Dismiss from HRD on the day of the pre-hearing. The Appellant submitted a response to the Commission on September 9, 2005 and a corrected response on the day of the pre-hearing, October 19, 2005.

The Town sought from HRD a certification list for candidates passing the promotional examination to fill 1 full-time police sergeant position with the Plymouth Police Department. HRD issued to Plymouth certification list number 250386. (See Certification No. 250386) 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 250386 tied with one other applicant, Martin Mason. 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 from a certification of any qualified person other than the qualified person whose 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 his 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". Id. 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.

Conclusion

The Commission does not have jurisdiction to hear this bypass appeal as there was no bypass. The Appellant was not ranked higher on a civil service list than the individual who was promoted to sergeant. Rather, the Appellant and the individual promoted were tied and the Commission has well-established that choosing from among tied candidates does not constitute a bypass that can be appealed to the Commission

For this reason, the Appellant's appeal under Civil Service Commission Docket No. G2-05-244 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 December 14, 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:
Susan F. Horwitz, Esq.
Lorna M. Herbert, Esq.
Patrick Mulroney, Esq.